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

TAMMY NUTALL-PRITCHARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 16-0455-II
	)	
THE TENNESSEE BOARD OF COSMETOLOGY AND BARBER EXAMINERS, *et. al.*	)	
	)	
Defendants.	)	

AMENDED MEMORANDUM OF LAW AND FACTS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Ms. Pritchard, by and through counsel, respectfully submits the following amended memorandum of law and facts in support thereof in support of her amended motion for preliminary injunction. *See* LCv. R. 26.04(b).

Dated: August 26, 2016

Respectfully submitted,

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INTRODUCTION

Occupational licensure is literally permission from the government to work. According to a 2015 report by the White House, since 1950 the percentage of Americans who need a license to work has grown from five (5) percent to closer to twenty-nine percent (29%), even as the economy increasingly becomes service oriented. The White House, *Occupational Licensing: A Framework for Policymakers* 3, 17 (2015) (hereinafter "W.H. Report").[1] These laws are worse than nuisances. By imposing onerous requirements, "[a]t some point, extremely burdensome licensing requirements have the practical effect of excluding most or all potential entrants and should be treated as strict legal barriers to entry." Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing,* 39 Harv. J.L.& Publ. Pol'y 209, 211 n. 3 (Winter, 2016).

Unnecessary licensure laws are good for no one. According to the White House, the effect is to reduce employment in licensed fields by driving up the price of goods and services. Worse, it discourages and even prevents workers from entering more lucrative fields, especially lower-income workers who can ill-afford to bear the cost of tuitions and lost wages associated with attending a school in advance of obtaining a license. Instead, they tend to enter less well-paid fields, which, in turn, depresses those wages by glutting the field. W.H. Report, p. 12. While undoubtedly licensure laws can be important to

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[1] The report can be viewed here: https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.
[2] The report can be viewed here: http://mercatus.org/sites/default/files/Timmons-OpticianLicensing.pdf.
[3] The next highest state is Washington where wages are $10.92 an hour. This report was

protect the public in certain fields (i.e. doctor, dentist), all too often states, including Tennessee, impose requirements that are, in actuality, a "naked attempt to raise a fortress protecting the monopoly rents that [the law's beneficiaries] extract from consumers." *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002). *See* Larkin, 39 Harv. J.L. & Publ. Pol'y at 211 ("Licensing requirement have become vehicles for cronyism at the public's expense."). This is precisely the case with Tennessee's shampoo licensing law, as we shall soon see.

The temptation to rig otherwise free markets is, unfortunately, as old as free market theory itself. No less than Adam Smith described licensing as a way to "limit the number of apprentices per master, thus ensuring higher earnings for persons in these occupations." Edward Timmons and Anna Mills, *Bringing the Effects of Occupational Licensing into Focus*, Mercatus Center, p. 4, n. 5 (Feb. 2015) (quoting Adam Smith, *Wealth of Nations* (New York: Modern Library Edition, 1994 [1776])).[2] It remains true that professional and industry associations "often have economic interest to restrain competition" that presents a threat. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988).

In a nation founded on nothing so much as economic opportunity, it is not surprising that the Founders considered career to be of utmost import. James Madison, the principal author of the Bill of Rights, affirmed:

[2] The report can be viewed here: http://mercatus.org/sites/default/files/Timmons-OpticianLicensing.pdf.

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions and monopolies deny to part of its citizens the free use of their faculties, and *free choice of their occupations*, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly called.

James Madison, *Property* (Mar. 29, 1792) (emphasis added) (reprinted in *50 Core American Documents* (Christopher Burkett ed., Ashcroft Press, 2015)). Likewise, Thomas Jefferson, in his first inaugural address described a government, which "shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvements, and shall not take from the mouth of labor the bread it has earned." Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) (reprinted in *50 Core American Documents*, p. 113). To the Founders, the right to pursue a career was "indispensible to political freedom…. The Framers would not understand why courts should treat property rights as '"poor relations,' subordinate to what we today refer to as 'liberty' interests." Larkin, 39 Harv. L.J & Pub. Pol'y at 329. Fortunately, this is not so true in Tennessee courts.

Safety concerns did not prompt the law. In laboring to demonstrate that shampooers have harmed consumers, the Board only mustered two examples. Worse still, neither involved either shampoo*ing* or shampoo*ers*, involving instead cosmetology (coloring hair) and a scabies outbreak at a school. The examples are, in other words, off-point and totally inadequate to demonstrate a legitimate safety concern worthy of the infringement on Ms. Pritchard's constitutionally protected right to pursue a calling. Thus, even at

this early stage, this Court is in a position to declare the law unconstitutional and permanently enjoin its enforcement.

Tennessee's shampoo law has had the intended effect. The law has "less to do with fencing out incompetents than with fencing in incumbents." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 104 (Tex. 2015) (striking down Texas law requiring a license for eyebrow threaders) (Willett. D., concurring). According to publicly available labor statistics, the hourly mean wages for shampooers in Tennessee are *the highest in the nation* at over $15 an hour. U.S. Dep't. of Labor, Occupational Employment Statistics, Occupational Employment and Wages, 39-5093 Shampooers (May, 2015).[3]

Although other circuits disagree, in the Sixth Circuit, economic favoritism is *not* a legitimate purpose, even under deferential federal rational basis review, much less under the Tennessee Constitution. *See Craigmiles*, 312 F.3d at 229. Thus, when the Board reflexively embraced economic favoritism as a legitimate justification, Memorandum of the Defendants in Support of Motion to Dismiss, p. 24 (quoting *Sensational Smiles LLC, v. Mullen*, 793 F.3d 281, 287 (2d Cir. 2015)), it had the facts right but the law wrong. Now, with the Board's actual evidence, or lack thereof, of a threat to consumers, this Court can readily affirm that requiring a license to shampoo is an unconstitutional violation of economic freedom.

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[3] The next highest state is Washington where wages are $10.92 an hour. This report was viewed online here:
http://www.bls.gov/oes/current/oes395093.htm.

This case is about more than Ms. Pritchard. Shampoo licenses are oft cited to by critics of occupational licensure. *See, e.g., Patel*, 469 S.W.3d 104 n. 71 (Willett, D., concurring); Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, Wall St. J. (Feb. 7, 2011).[4] Shedding a light on a law that has, to date, primarily burdened those without great political access, this case has rightly attracted the opprobrium and outrage of the nation. *See e.g.*, Glenn Reynolds, *America's Unregulated Shampooer Menace*, USAToday ("[P]rotectionist law that interfere with people's right to earn a living are a major drag on the economy and a major barrier for poor and working-class people trying to do better….Shampooers of the world, arise!");[5] Nick Sibilla, *Shampooing Hair Without A License Could Mean Jail Time in Tennessee*, Forbes (May 15, 2016) ("Fortunately, the state's regulations may be swept away.").[6]

It is time to wash away the grit. Doing so vindicates the fundamental right of Tennesseans to pursue an honest and harmless calling.

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[4] Viewed online here:
http://www.wsj.com/articles/SB10001424052748703445904576118030935929752.
[5] Viewed online here:
http://www.usatoday.com/story/opinion/2016/05/09/occupational-licensing-shampooer-regulation-tennessee-right-earn-living-act-column/84134102/.
[6] Viewed online here:
http://www.forbes.com/sites/instituteforjustice/2016/05/05/shampooing-hair-without-a-license-could-mean-jail-time-in-tennessee/#5791e17b7f2b.

STATEMENT OF FACTS

The following facts are not at issue and are sufficient for the Court to determine that Ms. Pritchard is likely to prevail.

1. *Tennessee's cosmetology law.*

Tennessee regulates cosmetology, barbering, and related fields through the Tennessee Cosmetology Act ("the Act") of 1986. *See* Tenn. Code Ann. § 62-4-101, *et. seq.* (LexisNexis 2016). "Shampooing" was not part of the act in its original form. When the Act was substantively amended in 1996 with 1996 Tenn. Pub. Acts. 897, "shampooing" was added separately. 1996 Tenn. ALS 897, 1996 Tenn. Pub. Ch. 897, 1995 Tenn. HB 745, enacted May 8, 1996 (LexisNexis).

As currently structured, the Act contains a definitions section. Tenn. Code Ann. § 62-4-102 (LexisNexis 2016). The Act contains a qualifications section. Tenn. Code Ann. § 62-4-110 (LexisNexis 2016). The Act also contains a licensure section. Tenn. Code Ann. § 62-4-108 (LexisNexis 2016).

The definitions and qualifications sections, but not the licensure section, separately address the various fields governed by the Act: cosmetology, aesthetics, manicuring, natural hair styling, and, finally, shampooing. The qualifications section lists education hour requirements in descending order: 1,500 hours for a cosmetologist, 750 hours for an aesthetician, 600 hours for a manicurist, and 300 hours for a natural hair stylist or a shampooer. *See* Tenn. Code Ann. § 62-4-110 (LexisNexis 2016).

The licensure section, in contrast, states that a person must get a license to practice cosmetology, manicuring, or aesthetics. Tenn. Code Ann. § 62-4-108 (LexisNexis 2016).

To obtain a license to shampoo, a person must obtain not less than 300 hours in "*the practice and theory of shampooing* at a school of cosmetology." Tenn. Code Ann. § 62-4-110(e)(2) (LexisNexis 2016) (emphasis added). Further, the Board is authorized to set the curriculum for a school of cosmetology by rules and regulations. *See* Tenn. Code Ann. § 62-4-120(k) (LexisNexis 2016).

2. ***Tennessee's shampoo regulatory regime.***

The rules and regulations contain the educational requirements for a shampoo license. The 300 hours are apportioned with 100 hours of general, 50 hours of chemical, and 150 physical training. TENN. COMP. R. & REGS. R. 0440-01.03(d). The regulations compel the study of subjects like shampooing theory, rinsing material from the hair, or answering the phone. TENN. COMP. R. & REGS. R. 0440-01.03(d)(1), (3). They also compel the study of subjects like chemistry and composition of shampoo, OSHA requirements, and shop management. TENN. COMP. R. & REGS. R. 0440-01.03(d)(2), (3).

An applicant must also, in addition to completing the required coursework, pass two (2) examinations and pay a fee to the state. TENN.

COMP. R. & REGS. R. 0440-01-.09, 0440-01.13(d)(2)(e). One examination is on "theory." The other examination is "practical."

The two examinations are not administered by the Board. The Board has contracted with an outside vendor, PSI Services, LLC, ("PSI") to develop and administer the examinations. Answer, p. 6, para. 43. The Board is not able to produce a copy of the exams, frustrating any ability to scrutinize the nature of the examination questions. Answer, p. 6, para. 44. PSI's candidate information bulletin reveals some details.[7] A candidate must, Answer, p. 7, para. 46:

a. Bring a blood spill kit and demonstrate responding to a blood spill incident.
b. Drape a model using a clean towel or cape.
c. Brush the hair of a model using one-inch subsections until entire hair has been brushed.

The Board deems it unlawful to shampoo hair without a license, ostensibly in violation of the Act. Answer, p. 7, para. 47. A violation of the Act is a crime punishable by incarceration of up to six (6) months in prison and/or a $500 criminal fine. Tenn. Code Ann. §§ 40-35-111(e)(2), 62-4-129. The Board may also assess civil penalties of up to $1,000 per day for each unlicensed act of shampooing, as well as the cost of investigation and prosecution (including fees, transcripts, court reporters, travel, lodging and

[7] PSI's candidate information is publicly posted here: https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=140&bulletinurl=.pdf

"all investigator time"), the hearing, and license suspension or revocation. *See* Tenn. Code Ann. § 62-4-127 (LexisNexis 2015), Tenn. Code Ann. §§ 56-1-308(a), 311(a) (LexisNexis 2015), TENN. COMP. R. & REGS. R. 0440-01.03(d).

3. ***The harm to Ms. Pritchard.***

Ms. Pritchard is a former natural hair braider who has extensive experience hair styling, both as a hobby and profession. Hair braiding lifted her and her family out of poverty until the State of Tennessee effectively crushed that business due to a separate licensure requirement. She struggled financially before finding her footing. She currently works in a local Memphis school as a resource officer. Ex. A. Affidavit of Tammy Nutall-Pritchard, Aug. 11, 2016.

Ms. Pritchard still knows many people involved in cosmetology, including one friend who operates a beauty salon. She would like to work part time for her friend. Doing so would materially advance her financial well-being, and permit her to return to a field she loved but was forced to abandon. But she cannot do so unless she obtains a license, a license the Board told her she needed to get even if she was under the supervision of her friend and was not involved with shop management. *Id.*

In sum, it is not in dispute that the Board required Ms. Pritchard to obtain a license to wash hair. Nor is it in dispute what it would take to get that license. This sets up the present conflict. We now have a sense as to

what actual evidence undergirds the Board's fear of unlicensed shampooing. As a matter of law, there is not a constitutional reason to burden the exercise of Ms. Pritchard's fundamental right to pursue a career, as explained below.

SUMMARY OF ARGUMENT

The right to pursue a living is protected under both the federal and state constitutions. The Fourteenth Amendment requires the law to be rationally related to a legitimate interest. The Tennessee Constitution provides even more robust protection Thus, this Court should ask if the statue's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest.

Ms. Pritchard is substantially likely to prevail. The Board presented only two (2) examples of harms allegedly posed by shampooing, and both have nothing to do with shampooing or unlicensed shampooers. The legislative history likewise reflects concern over doling out political favors, but not safety.

Even if safety was a concern, the educational curriculum and testing are not rationally related. The requisite 300 hours is absurdly long to acquire safety training for this basic chore. Most of the study and testing have nothing to with safety and are obvious busy work.

Requiring a license of a common and ordinary trade like shampooing makes it a monopoly with no legitimate relation to public, health, safety and well-being. Finally, the Board lacks the authority to require a license based on the plain language of the statute.

ARGUMENT

Tenn. R. Civ. P. 65.01 provides trial courts with authorization to provide injunctive relief by issuing a preliminary, temporary injunction. A trial court should issue an injunction when:

> it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Gentry v. McCain, 329 S.W.3d 786, 792-93 (Tenn. Ct. App. 2010) (quotation omitted).

The standard for issuance of the injunction is guided by a familiar, four-part test:

> The most common description of the standard for preliminary injunction in federal and state courts is a four-factor test: (1) the threat of irreparable harm to the plaintiff if the injunction is not granted; (2) the balance between this harm and the injury granting the injunction would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.

Id. at 793 (quotations omitted). The Court need not consider each of these factors if fewer factors are "dispositive." *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003) (citations omitted). These factors are measured on a "sliding scale … which takes into account the intensity of each [factor] in a given calculus." *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975) (citation omitted).

Based on the admissions made by the Board to date, it is apparent that Ms. Pritchard is likely to demonstrate: 1) there is not a legitimate reason to require a license to wash hair because there is no safety concern; 2) even if there was a legitimate safety concern, the Board's requirements are not rationally related to that concern; 3) the effect of the shampoo law and licensure regime as a whole are so unreasonably burdensome as to become oppressive in relation to the underlying governmental interest; 4) the licensure regime is monopolistic and designed to deliver economic favors to existing market participants; and, 5) the Board lacked jurisdiction to require Ms. Pritchard to obtain a license because the licensure statute does not state a requirement to obtain a license to shampoo hair.

She faces ongoing irreparable harm. Time and again, the courts have held that constitutional rights are so important that any infringement is grounds for an injunction. Ms. Pritchard also faces the loss of income she needs to better her family's life, something she cannot recoup through monetary damages. There is no harm in permitting her to shampoo, and the public interest never lies in the enforcement of an unconstitutional act.

I. MS. PRITCHARD IS LIKELY TO SHOW THAT TENNESEE'S SHAMPOO LICENSURE LAW AND REGULATORY REGIME IS UNCONSTITUTIONAL.

A. The license requirement and regime violate Ms. Pritchard's economic liberty under both the U.S. and Tennessee constitutions.

The right to earn a living is protected by the Fourteenth Amendment, and the "Law of the Land" Clause of the Tennessee Constitution. Fourteenth Amendment review is guided under the deferential "rational basis" test, which asks whether the challenged law is rationally related to a legitimate governmental interest. Tennessee's protections are more robust. The "Law of the Land" Clause was squarely concerned with property rights protection and the pursuit of a calling. Tennessee jurisprudence accords great significance to this right. Review under the Tennessee Constitution is more searching. This Court should also ask whether the statue's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest, fully cognizant of the actual purposes of this protectionist law, and harm to workers.

Shampooing licenses violate either test. The licensure law is not rationally related to protect consumer safety. Moreover, even if safety was a legitimate concern, the educational requirement and testing have little if anything to do with safety, and are both absurdly out of proportion, and thus, not rationally related. Rather, Tennessee's shampooing regulatory regime is about enriching existing market participants, as demonstrated by the

legislative history and the fact that there is insufficient evidence of a harm posed by shampooing to warrant licensure.

1. *The Fourteenth Amendment's protection of economic liberty.*

For Fourteenth Amendment purposes, the question under rational basis is whether the challenged law bears a rational relation to a legitimate state interest.[8] *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 (E.D. Ky. 2014). Economic measures carry a strong presumption of validity; a person wishing to invalidate a statute under rational basis must negative every conceivable basis. *Id.* The guiding case is *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

In *Craigmiles*, the Sixth Circuit used a rational basis test that was deferential, but fact-bound. The State of Tennessee required a funeral director's license to sell caskets. 312 F.3d at 222-23. Notably, because the law did not impact a fundamental right, the Court employed the rational basis test. *Id.* at 223-24. The Court analyzed the State's proffered public health and safety justification, rejecting them as bogus. *Id.* at 225-26. The Sixth Circuit recognized that under rational basis, the Supreme Court is leery of a legislature's circuitous path to a legitimate end when a direct path is available. *Id.* at 227. There must be a plausible connection between the government's connection and any possible justification for the law. This the

[8] While Equal Protection and Substantive Due Process are distinct rights, courts often consider them as one "because they present the same issue." *Bruner*, 997 F. Supp. 2d at 697, n. 8.

State could not do in *Craigmiles*, leaving only one illegitimate justification for the law. The Court wrote, "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." 312 F.3d at 229.

Licensure laws are subject to meaningful court scrutiny. Courts increasingly do exactly that. In this, Tennessee was perhaps ahead of the game. As early as *Wilkerson v. Johnson*, the Sixth Circuit gave generous protection to economic liberty after the State refused to award a barber shop license. 699 F.2d 325, 328 (6th Cir. 1983) (collecting cases--freedom to pursue a career "qualifies as a liberty interest which may not be arbitrarily denied by the State."). Silly licensure laws are falling with greater frequency under the Fourteenth Amendment. *See, e.g., Waugh v. Nevada State Board of Cosmetology*, 36 F. Supp. 3d 991, 1022 (D. Nev. 2014) (requiring makeup artists to attend cosmetology school when most of the curriculum has nothing to do with sanitation is irrational); *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 894 (W.D. Tex. 2015) (forcing African hair-braider teacher to meet barber school regulations is irrational).

Not only are courts able to engage in a meaningful, fact-bound inquiry under Fourteenth Amendment, courts are increasingly striking laws that are transparent protectionism.

2. *The Law of the Land's protection of economic liberty.*

Protection of economic liberty is stronger under Art. I, § 8 of the Tennessee Constitution. It provides that "no man shall be … disseized of his

freehold, liberties or privileges … or in any manner destroyed by his life, liberty or property, but by judgment of his peers or the law of the land." By its plain text, the Law of the Land Clause is distinct from the Fourteenth Amendment. Unlike the Fourteenth Amendment, which was aimed at making full citizens out of newly freed slaves, the historical context of this clause demonstrates that its drafters were primarily concerned with property rights.

The Law of the Land Clause has been in the Tennessee Constitution since its first iteration in 1796, but its roots are much deeper. Its origins lay in the "per legam" clause found in Chapter 29 of the Magna Carta. *State ex. rel. Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn. 1980). The Magna Carta itself was primarily about protection of property rights. Larkin, 39 Harv. J.L. & Pub. Pol'y at 259-260. "Lord Coke wrote that Magna Carta (now 800 years old) and English common law safeguarded the right of 'any man to use any trade thereby to maintain himself and his family." *Patel*, 469 S.W.3d at 116 (Willett, D., concurring). Tennessee jurisprudence then appropriately reflects an abiding concern for both the protection of property and the means to acquire it.

From early on, consistent with the statements of Madison and Jefferson and its constitutional roots in the Magna Carta, the Tennessee Supreme Court affirmed the importance of pursing one's calling:

> The "liberty" contemplated in each provision means not only the right of freedom from servitude, imprisonment, or physical

> restraint, *but also the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade, or profession*, to make all proper contracts in relation thereto, and to enjoy the legitimate fruits thereof.

Harbison v. Knoxville Iron Co., 53 S.W. 955, 957 (Tenn. 1899) (emphasis added).

So important is the right to work that the Tennessee Supreme Court has described it as (and in contradistinction to *Craigmiles,* 312 F.3d at 223-24) a "fundamental one, protected from unreasonable interference …." *Livesay v. Tennessee Bd. of Exam'rs in Watchmaking,* 322 S.W.2d 209, 213 (Tenn. 1959) (quotation and citation omitted). In *Livesay*, the Court found unconstitutional an unnecessary license requirement on an "old and 'innocuous occupation,'" in that case, the making of watches. *Id.* Because this requirement did not "promote the general welfare or protect the public morals, health or safety, or have any real tendency to those ends," it violated the Tennessee Constitution. *Id.* The right to engage in a chosen profession without unreasonable governmental interference is both a "liberty and property interest." *State v. AAA Aaron's Action Agency Bail Bonds, Inc.,* 993 S.W.2d 81, 85 (Tenn. Crim. App. 1998) (citing cases).

The importance of this right does not only have a constitutional basis but a statutory one as well. In passing the recent "Right to Earn a Living Act" this last session, the General Assembly affirmed "the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive

government interference is a fundamental civil right." 2016 Pub. Acts 1053, SB2469, enacted Apr. 28, 2016. As a fundamental civil right, Ms. Pritchard's career should not be lightly taken from her.

To be sure, there are times when courts have approved of licensure laws. *See Ford Motor Co. v. Pace*, 335 S.W.2d 360, 362 (Tenn. 1960) (regulation of automobile industry is appropriate because of complexity and the "many, many accidents and deaths."); *Tennessee Bd. of Dispensing Opticians v. Eyear Corp.,* 400 S.W.2d 734, 743 (Tenn. 1966) (regulation of opticians "as are necessary for the eyes including the adaptation, preparation, and dispensing of glasses, special lenses, etc." is for public health). Those are cases where the public safety concerns are much more manifest. If one is to view the Tennessee precedents on a scale, with watchmaking on one end, where no regulation is permissible, and medicine is on the other, with automobile regulation and regulation of opticians near that end, then the question, soon to be taken up, is where on the scale is shampooing.

If the different text and historical contexts of Tennessee's constitutional protections are to mean anything, if the recent legislative findings in the Right to Earn a Living Act are to mean anything, and if the right is truly to be deemed "fundamental" as a matter unique to state law, *see Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 11 (Tenn. 2000) ("fundamental rights receive special protection under both federal and state

constitutions"), then it must mean this Court's review is more searching than it would be under the Fourteenth Amendment.

3. *The significance of Tennessee's greater protection.*

The *Patel* decision, the Texas eyebrow-threading case mentioned above, is a model. In *Patel*, the Texas Supreme Court analyzed the question under their Law of the Land Clause, concluding that it provided greater protection than the Fourteenth Amendment. 469 S.W.3d at 86-87. Courts should ask in addition to whether the statue is rationally related to a legitimate governmental interest, "whether the statue's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." *Id.* at 87.

Additionally, in concurrence, Justice Willett offered several principles to guide decision-making in this realm. First, the law should be tested "based on real-world facts and without helping the government invent after-the-fact rationalizations." *Patel*, 469 S.W.3d at 112 (Willett, D., concurring). Second, as with other rights, courts should not "condone government's dreamed-up justifications (or dream up post hoc justifications themselves) for interfering with citizens' constitutional guarantees." *Id.* at 116. Third, the courts need not ignore the reason why increasing numbers of people need a license to work: economic rent-seeking. Special-interest factions "crave the exclusive, state-protected right to pursue their careers." *Id.* at 118.

This Court should incorporate *Patel*. The Texas Law of the Land provision is similar to Tennessee's. Textually, it is much closer to Tennessee's Law of the Land Clause than it is than the Fourteenth Amendment. A more searching form of review naturally progresses out of longstanding Tennessee case law (*Harbison/Livesay*) that recognizes the importance of pursuing a calling. It matters if a statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest. This should be a searching inquiry where the Court meaningfully reviews the proffered justifications, and the Court should not be blind to the political realities of the licensing law's origins.

Ms. Pritchard respectfully maintains that the Tennessee Constitution likewise demands that these questions be asked. The Board cannot offer a satisfactory reply to either them, or pass ordinary rational basis review.

4. *The shampoo license requirement and educational and testing regime violate Ms. Pritchard's right to earn a living.*

There is not a legitimate safety concern present here because there is not an evidence-based safety concern posed by shampooing. Even if there were, 300 hours of training and testing that is mostly unrelated to safety are not rationally related. The legislative history likewise reflects that there was no evidence of harm, nor were the statute's enactors concerned about safety. The only harm that concerned legislators had to do with the political ramifications of not passing a bill that cosmetologists wanted. Finally, what is *required* out of shampooing students is so wildly out of balance with what

is *needed* to ensure safety as to be unconstitutional under the law of the land clause.

a) *The Board's records show that shampooing does not present a public safety concern.*

The discovery conducted to date demonstrates shampooing presents no public health concern. When asked to admit that the Board was unaware of a consumer complaint alleging that a person has medical care or contracted a disease from getting shampooed, the Board produced two purported examples. Ex. B, Defendants' Response to Plaintiff's Request for Admission and Production of Documents, p. 3. Frankly, this should end the inquiry.

The sheer paucity of even allegations demonstrates that there is no harm posed by shampooing. Given how many instances of shampooing occurs daily throughout the state, it is astonishing that there are not more if this is indeed a harmful activity. This stands in sharp contrast to what one would expect to find if the safety concerns of shampooing were as "obvious," and "self -evident" as advertised. Memorandum in Support of Motion to Dismiss, pp. 25-26. If files overflow with consumer complaints from poorly administered shampoos, then these paltry two examples are weak representatives, to say the least.

Really it is quite intuitive. After all, shampooing involves *soap and water*, the basic ingredients of sterilization in the first place. In other words, a shampooer cleans the only part of his or her body that comes into contact with the customer by the very nature of the act. Everyone washes hair safely.

It is among the most mundane of daily chores. Children manage it at an early age. Returning to the proffered examples, they crumble further still when put to scrutiny.

They involve neither shampooing nor an unlicensed shampooer. In one instance in 2002, a hairdresser applying hair color injured a person's scalp, and the customer sought medical treatment Ex. C, Discovery Items, TN_0001. Using *color* makes this service cosmetology, not *shampooing*, by definition. Tenn. Code Ann. § 62-4-102(a)(3)(A) (LexisNexis 2016) (Cosmetology means, among other things, "*coloring* or similar work on the hair of any person by any means). Shampooing simply means brushing, combing, shampooing, rinsing, or conditioning. Tenn. Code Ann. § 62-4-102(a)(21) (LexisNexis 2016). Coloring is not included. This is not an example of shampooing.

Still more, (although it is not perfectly clear from the one document provided by the Board), the reference to a "hairdresser" makes it seem that this was not a shampooer, but rather a cosmetologist. And as there is no mention in the citation of an infraction for being unlicensed, it furthermore appears that the cosmetologist was *licensed*. A licensed cosmetologist who provided a service fourteen (14) years ago that a shampooer could not legally provide is anything but evidence of the harm that can be posed by unlicensed shampooing, let alone an excuse to license a whole field.

The other example is worse. Here, the Board learned of an outbreak of scabies at a cosmetology school in Clarksville in 2015 when it was closed by the health department. Ex. B, Defendants' Response to Plaintiff's Request for Admission and Production of Documents, p. 3. What this has to do with shampooing is a mystery. The Board says the cause was head lice. There is no mention of the role shampooing played. The explanation that the issue "was quickly resolved because both the students and the instructors knew how to identify abnormalities in the scalp and hair particles," *id.*, is not illuminating. A shampooer's job involves applying shampoo and water. If it is in any way her responsibility, Ms. Pritchard or any other shampooer can do as the school did and find the appropriate persons to address head lice. The point is that an incompetent shampooer did not cause this.

Furthermore, this is not something Tennessee's licensure regime would address. The discovery attachments indicate that the best way to prevent scabies is abstinence and mutual monogamy. Ex. C, Discovery Items, TN_0004. This is not part of the shampoo curriculum. Stated bluntly, the need to identify and treat scabies is not something a shampooer needs to know in order to protect public safety.

Even if this scabies outbreak at the Clarksville school had any relation whatsoever to shampooing or a shampooer, it would hardly justify the State's licensure regime, which, after all, requires a person attend a *school*, evidently one of the few recorded places where a person can be harmed. Schools, like

shops themselves, have sanitation standards they must obey. Tenn. Code Ann. § 62-4-125 (LexisNexis 2016). There is an entire regulatory regime regarding sanitation. This is not at issue. It places responsibility for the sanitation of an establishment on the manager. TENN. COMP. R. & REGS. R. 0440-02.03. Given the Board's logic in its proffered example, the State might just as well require a license to work at a fast food restaurant because the owner failed to meet safety standards.

b) The legislative history demonstrates that the law was about protectionism, not safety.

The General Assembly was not concerned with safety when it amended the Act to, among other things, add shampooing. There does not appear to have been any studies or surveys about the harms presented by shampooing, or even a discussed concern.[9] There does not appear to be any evidence of a public safety concern adduced. There only appears to be discussion of a study was brought up on April 11, 1995 at the House Health & Human Resource Committee, but the concern was the cost the changes would have on the industry.[10] Ex. D, Recorder notes, House Health & Human Resources Committee, Apr. 11, 1995. Safety concerns over shampooing were not an especial concern of the legislature.

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[9] In contrast, doubling the educational hours for manicurists was at least argued to protect clients at the Senate Commerce Committee on March 7, 1995.

[10] Legislative archives for this time are kept in cassette form making it difficult to identify the speaker. Exhibit D are the official notes from the recorder. The markings in the citations to the legislative history are where Ex. D indicates the comments begin. Counsel notes that this timing did not match the timing on his recorder, and he will add a footnote denoting his counter.

Suppressing competition was. It should not be forgotten that the Board's first instinct was to argue that economic favoritism was a legitimate reason for this law. Memorandum in Support of Motion to Dismiss, p. 24 (quoting *Sensational Smiles LLC, v. Mullen*, 793 F.3d 281, 287 (2d Cir. 2015)). The Board had to go out of circuit to find the *Sensational Smiles* case, a notorious defense of economic favoritism, missing *Craigmiles* along the way. This represented a choice. And that choice was to defend economic rent-seeking because that is what the shampoo law is.

This history of the bill shows it was about maximizing profits for practitioners by controlling the market, not protecting the public. In 1995, the bill amending the Act to, among other things, define shampooing and insert it into the Act was first proposed. At a house committee on March 21, 1995, a Board representative answered questions about the bill. She stated that work done "for pay, free, or otherwise by any person" would not be allowed under the bill, and its intended purpose was "intended to decrease unlicensed practice of cosmetology in the home." Meryl Smith, House Health & Human Resource Committee, Mar. 21, 1995, (943).[11]

Representative Kerr then expressed a concern about barring family members from fixing each other's hair. After the Board representative assured him (without explanation) that was permissible, she told Representative Kerr (again, without explanation) that a next-door neighbor

[11] Undersigned counsel notes that this timing did not match the timing on his recorder, which had her comments beginning at (560).

was forbidden. Representative Kerr, House Health & Human Resource Committee, Mar. 21, 1995 (1126).[12] To follow up, Representative Herron returned to this topic:

> Q- Could you explain, following up on Representative's Kerr's question if your own language, including "for free," does that mean that, that uh, my next door neighbor can't cut my little boy's hair, legally? Is that, is that, what you are telling me?
>
> A- Well, we're trying to eliminate [sic] some of the kitchen work that's done.
>
> Q- Well, so we-, … so we're all clear. If, if, those of us who have children, if our next door neighbor, wants to out to out of a kindness to us, to cut our children's hair, they can't legally do that after your bill becomes law, correct?
>
> A. Excuse me just a moment.

Representative Herron, House Health & Human Resource Committee, Apr. 11, 1995 (1178).[13] The proceedings were then interrupted by an overload of questions and the meeting was postponed, but the intentions to control the field had been openly placed on the table.

When the committee met on April 11, 1995 to return to the questions about the bill, Representative Cantrell called this a "horrible bill." Specifically referencing Section 9 of the bill, which added shampooing to the definitional section of the Act, he stated that it was "quite clear if you're gonna shampoo somebody's hair what you got to do." He proceeded to say: "we kind of heard that if grandma down the road shampoos a neighbors'

[12] Undersigned counsel has this at approximately (640).
[13] Undersigned counsel has this at approximately (645).

head, *the cosmetologists aren't gonna like that*." Representative Cantrell, House Health & Human Resource Committee, Apr. 11, 1995, (689) (emphasis added).[14][15] Representative Deberry agreed that this was a "horrible bill" and that it was "another way" to make owners of schools rich. After pointing out that getting a cosmetology license costs $5,000, she then described it as "absurd" that a degree from the University of Tennessee cost the same or less. Representative Deberry, House Health & Human Resource Committee, Apr. 11, 1995 (736).[16]

This committee closed by sending it to committee, but not before the mask dropped completely. The bill's sponsor, Representative Turner spoke for it to oppose sending the bill to a committee. She closed the debate ominously, darkly advising legislators to talk to cosmetology schools and shops in their district looking for professionals trying to get "the best education for the dollar," warning "'this dog will bite you, big time, because these people are very influential in their districts and they know everybody and everybody's family and who's kin to who in the third generation." Representative Turner, House Health & Human Resource Committee, Apr. 11, 1995, (861).[17] The bill returned in amended form next year ultimately becoming law.

The legislative record paints an ugly portrait of naked rent-seeking, and it was no secret. When rights are at stake, this Court has a vital role in

[14] Rep. Cantrell was concerned about the effect Section 9 would have on barbers. Nonetheless, it reflects the influence of cosmetologists.
[15] Undersigned counsel has this at approximately (370).
[16] Undersigned counsel has this at approximately (400).
[17] Undersigned counsel has this at approximately (504).

the constitutional order. The comments when this law was debated should strike this Court "with 'the force of a five-week-old, unrefrigerated dead fish.'" *Craigmiles*, 312 F.3d at 225 (quoting *United States v. Searan*, 259 F.3d 434, 447 (6th Cir. 2001)). This is not, to use the shopworn phrase, "second-guessing the wisdom of the legislature." This is what courts are supposed to do. Judicial deference does not mean that "property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more." *Patel*, 469 S.W.3d at 104-05 (Willett, D., concurring).

c) The educational and testing regimes are not rationally related to safety, even if that was a legitimate concern.

Even if safety concerns were actually legitimately behind the law, the way Tennessee furthers that interest with the educational and testing regime is not rationally related to it. Three hundred (300) hours are an absurdly and unnecessarily long period of schooling to learn basic sanitation.

What a shampooer needs to know about safety is shown by the practical exam. It requires using hand sanitizer, wiping the counter, and throwing away waste. [18] PSI Candidate Information Bulletin, p. 9. This is the most that is needed to ensure safety, it hardly needs to be taught, and certainly not for 300 hours.

Consider hair wrapping, another field regulated by the Act at that involves analogous levels of human contact as shampooing (it just lacks the

[18] No one has a copy of the exam. This is based on the PSI candidate information bulletin.: https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=140&bulletinurl=.pdf

soap and water).[19] It requires no license whatsoever. *See* Tenn. Code Ann. § 62-4-109(a)(6) (LexisNexis 2016). A hair wrapper needs only sixteen (16) hours of training, with only eight (8) hours of sanitation training. *Id.* After that, the wrapper is free to work, required only to notify customers they are not licensed. There is no rational reason to require a shampooer to pay for nearly *twenty times* as much schooling.

A shampooer's training is grossly out of proportion with any safety concern. Only an unspecified portion of the 100 general hours of the 300 hours overall has anything to do with sanitation. TENN. COMP. R. & REGS. R. 0440-01.03(d). When less than one-third of the training pertains to sanitation, it is evident the regime is not about protecting public safety. As in *Craigmiles*, this Court should be leery of a "legislature's circuitous path to legitimate ends when a direct path is available." 412 F.3d at 227. It is evidence of the real motive for the law.

The other subjects are things that have nothing to do with sanitation at all. They have to do with shop management. TENN. COMP. R. & REGS. R. 0440-01.03(d)(3). Ms. Pritchard does not want to manage a shop. She should not need to know how to order product, or take inventory. Or the subjects include things no one needs to learn. TENN. COMP. R. & REGS. R. 0440-01.03(d)(2). OSHA and EPA regulations are not factors in Ms. Pritchard's life, or the practice of shampooing. The subjects also require knowledge of things

[19] Hair wrapping is defined as the wrapping of manufactured materials around hair without cutting, coloring, chemically treating, etc., using hair extensions or other services. Tenn. Code. Ann. § 62-4-102(a)(7) (LexisNexis 2016).

everyone already knows. Ms. Pritchard knows how to rinse foreign materials from hair, and how to answer a phone. TENN. COMP. R. & REGS. R. 0440-01.03(d)(3). It is doubtful schooling can help her get any better at either. It is certain that these matters have nothing to do with public safety. This is obviously busy work because there is simply not 300 hours worth of safety related shampoo knowledge.

The testing is equally irrational. There are two exams: theory and practical. Answer, p. 6, para. 40-42. Cleaning up a blood spill at least seems related to safety. It just has nothing to do with anything a shampooer is likely to encounter. But they are tested on it. PSI Candidate Bulletin, p. 9. This makes no sense, but it makes as much sense as everything else. Less than *half* of the questions on the theory exam are safety related. PSI Candidate Bulletin, p. 6. The other subjects are not. Mastery of draping a client with a cloth or brushing hair in one-inch segments are actual, advertised test subjects for the practical portion. Answer, p. 7, para. 46. The "safety" components of the practical portion were mentioned above. Again, this is so ludicrously out of whack with any safety concern that this Court should be unafraid to name the law for what it is.

d) The licensure law and licensure regime are unconstitutional.

This violates the Fourteenth Amendment. There is no actual evidence of a harm that needed regulating. The legislature was not even concerned with consumer safety when it undertook to regulate shampooing. Rather,

lawmakers were interested in awarding economic advantages to politically connected groups. They even said so themselves, on the record. This is not a valid interest, even under the Fourteenth Amendment. This Court should therefore enter a preliminary and permanent injunction on Count Four of the Complaint.

This is only truer under Tennessee's Law of the Land Clause. This Court is only more able to suss out what the shampoo law is all about. Furthermore, this Court is able to vindicate a right that in Tennessee has rightly been deemed "fundamental." So, even it was true that the law was rationally related to a safety interest, the effect of the shampoo law and licensure regime as a whole are so unreasonably burdensome as to become oppressive in relation to the underlying governmental interest. This Court should therefore enter a preliminary and permanent injunction on Count Two of the Complaint.

B. The Board and its practices violate Tennessee's anti-monopolies clause.

Tennesseans have a right to be protected from monopolies. This right is protected by Article I, Section 22 of the Tennessee Constitution. It provides that monopolies are contrary to the genius of a free state. The Board violates anti-monopolies provision in two ways: a) the Board itself is inherently anti-competitive; and b) the current licensure regime wholly excludes new competitors from entering the field. The Board vested with authority over the profession is packed with competitors in the field of

cosmetology/barbering. By statute, the board must contain fourteen (14) members. All but two (2) *must* be market participants. *See* Tenn. Code Ann. § 62-4-103(b) (LexisNexis 2016).

1. *The licensure regime creates a monopoly.*

A monopoly is defined as an exclusive right, granted to a few, of something that was before a common right. *Watauga v. Johnson City*, 589 S.W.2d 901, 904 (Tenn. 1979). According to the North Carolina Supreme Court, the "ordinary trades" are available to all as a common right, and as such, unnecessary licensure requirements can violate its anti-monopolies clause. *State v. Harris*, 6 S.E.2d 854, 864 (N.C. 1939). Because the board in question was packed with market participants, they were taking unconstitutional, anti-competitive action. *Id.* Tennessee's identical anti-monopolies clause is found in its Declaration of Rights, which itself is based on North Carolina's. *In re Estate of Trigg*, 368 S.W.3d 483, 491 (Tenn. 2012). *See* Lewis L. Laska, *The Tennessee State Constitution,* p. 5 (1990).

Lest it be thought that licensure regimes cannot create a monopoly, the case of Dr. Bonham, a well-known anti-monopolies case under English common law (at least at one time), presents a corrective. *See* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585, 600, 602-604 (2009) (describing Dr. Bonham's case). He was imprisoned for unlicensed practice of medicine. The court found for him, finding he could

be imprisoned for malpractice, but not unlicensed practice. *Id.* at 602-03. Renown English jurist Sir Edward Coke characterized licensing authority as:

> a monopoly that violated the freedom of English subjects to practice lawful trades and professions without interference by the crown. This argument reflected the general seventeenth-century understanding that grants of royal monopolies over so-called "ordinary trades or callings" violate the common law.

Id. at 604. In the early seventeenth century, "these royal monopolies were completely out of control, subjecting large numbers of people to fines and imprisonment merely for pursuing common trades or businesses." *Id.* at 605.

Things have come full circle. The shampooing of hair was among the most common and simple of vocations before it came under the regulatory arm of the state. The Board threatens the unlicensed with severe fines and violating the Act can result in even imprisonment. Shampooing was available *to* all Tennesseans prior to the enactment of the law in 1996. Now it is not available *at* all, unless a person acquires the license. This is a state-sponsored monopoly as that term would have been understood at the time the anti-monopolies provision was authored and inserted into the Constitution.

2. *The monopoly fails to satisfy the legitimate relation test.*

Monopolies are permissible "in so far as such monopoly has a reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people." *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335, 337 (Tenn. 1948). "[I]t is the duty of the Court to determine whether the

monopoly does have any legitimate relation with the declared public purpose of the act." *Id.* This inquiry is focused on purpose of the monopoly itself; the power to regulate does not imply the power to grant a monopoly. *Id.* Furthermore, the Court must ask whether the rationale proffered in support of the challenged monopoly truly were the actual goal. "The courts decide … whether that is really the end had in view." *Id.* (citation and quotation omitted).

The shampoo license fails this test. This actual goal of the law was not safety. It was to satisfy a constituency. Furthermore, for the reasons explained above, there is no health or safety concern involved in unregulated shampooing. Morals and well-being are not in the discussion. The shampoo law fails to satisfy the legitimate relation test. This Court should grant relief on Claim Two of the Complaint.

C. The Board has no jurisdiction because the legislature has never made the shampoo license mandatory.

The Act created a shampoo license but it did not make it mandatory. Tenn. Code Ann. § 62-4-102 is the definitions section. It defines cosmetology, aesthetics, manicuring, natural hair styling, and shampooing separately. Tenn. Code Ann. § 62-4-110 sets forth the qualifications to obtain a license. Again, it likewise categorizes them all separately. Tenn. Code Ann. § 62-4-108. Here, the law states that a person must get a license to practice cosmetology, manicuring, or aesthetics. Unlike the rest of the Act,

shampooing is not included. By the plain reading of the Act, shampooing is not a required license.

The Board argues that because "cosmetology" encompasses "shampooing" and because cosmetology does require a license, it has effectively made shampooing require a license. This does not make any sense. If shampooing is a subset of cosmetology and cosmetology requires a license, then a person needs a *cosmetology* license, not a shampooing license. Essentially, the Board is trying to re-write the statute to insert shampooing in a section where it is not but where it would need to be to grant the Board the authority it claims it has.

Nor does this correspond with how the licensure section otherwise works. Cosmetology also includes "aesthetics" and "manicuring." Tenn. Code Ann. §§ 62-4-102(a)(3)(C), (D), (E), (F) (LexisNexis 2016). Yet the licensure section specifies that a person needs a license to practice "cosmetology, manicuring, aesthetics." Tenn. Code Ann. § 62-4-108 (LexisNexis 2016). Those terms were specified even though they are subsets of cosmetology, indicating that the Boards' theory is invalid. In fact, in the bill that added shampooing to the Act in the first place, Section 108 was amended to specifically add manicuring. 1996 Tenn. ALS 897, 1996 Tenn. Pub. Acts 897, 1996 Tenn. Pub. Ch. 897, 1995 Tenn. HB 745, enacted May 8, 1996 (LexisNexis). Shampooing was not added to this section. Just because a field is a subset of cosmetology, it does not mean that requiring it for cosmetology

effectively imposed the license. In those other cases, the license requirement was explicitly included in Section 108.

This held true in the 2016 legislative session when the legislature added natural hair styling but not shampooing to the licensure section. *See* 2016 Tenn. Pub. Acts 991, § 7, SB 2374 (enacted Apr. 21, 2016). Natural hair styling is now part of Section 108, even though it too is encompassed in the definition of "cosmetology." This omission is especially meaningful because the bill otherwise addressed shampooing, now explicitly including it and hair braiding under the definition of "cosmetology." *See* 2016 Tenn. Pub. Acts 991, § 6, SB 2374 (enacted Apr. 21, 2016)

If the legislature added shampooing to the licensure section folding it under the umbrella of cosmetology, it stands in marked contrast to how it has required a license for manicuring, aesthetics, and natural hair styling, all of which are specified. This is an unnatural interpretation, not supported by text or the larger history of the Act.

II. MS. PRITCHARD WILL SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION.

A finding that the ban on washing hair violates Ms. Pritchard's constitutional rights constitutes irreparable harm, and typically resolves the entire four-factor test. *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). "It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. District of Columbia*,

571 F.3d 1304, 1312 (D.C. Cir. 2009) (quotation and citation omitted). Constitutional rights cannot be repaired by monetary damages. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511-12 (6th Cir. 1992).

III. AN INJUNCTION IS IN THE PUBLIC INTEREST.

The public interest is served by the protection of liberty. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995)). Conversely, the government has no "interest in enforcing an unconstitutional statute." *United States v. U.S. Coin & currency,* 401 U.S. 715, 728 (1971) (Brennan, J., concurring).

There is no way to know how many other people like Ms. Pritchard have opted out of a job because they were cowed by this licensure requirement. An injunction would help those who might not have the resources to fight such an unjust law.

IV. THE BALANCE OF EQUITIES TIPS IN FAVOR OF THE INJUNCTION.

Nobody would suffer harm by the issuance of an injunction. The lack of any consumer complaints regarding harm from shampooing is evidence of that. There simply is no harm to balance.

V. THIS COURT SHOULD NOT ORDER AN INJUNCTION BOND.

In the event that this Court issues a preliminary but not a permanent injunction, under Tenn. R. Civ. P. 65.05, the applicant for an injunction must provide a bond for the payment of costs and damages as may be incurred or

suffered by any person who would have been wrongfully enjoined. The bond is an issue for the court to determine. *See Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (courts "possess discretion over whether to require the posting of security.").

A bond is unnecessary and, in fact, does not make sense. The bond is to be set in the amount of "costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined." Tenn. R. Civ. P. 65.05(1) (2015). There are no costs and damages that could result here. The parties are not suing each other over money. Indeed, even Ms. Pritchard is not asking for any compensatory damages. This case only seeks declaratory and injunctive relief so there will be no financial loss, let alone one that could not ultimately be reclaimed.

VI. CONCLUSION.

For the foregoing reasons, Ms. Pritchard respectfully requests that the Court grant the instant motion.

Dated: August 26, 2016

Respectfully submitted,

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BRADEN H. BOUCEK
B.P.R. No. 021399

[redacted]