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

ELIAS ZARATE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 18-534-II**
	)	
THE TENNESSEE BOARD OF COSMETOLOGY AND BARBER EXAMINERS; ROXANA GUMUCIO, et al.	)	
	)	
Defendants.	)	

**PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
Tenn. R. Civ. P. 56.04; Local Rule § 26.04(d)-(e)**

Plaintiff Elias Zarate respectfully opposes the Board's motion for summary judgment. This Court should deny the Board's motion for three (3) reasons. First, the Board has failed to support its motion with any material facts. Second, the Board misunderstands Tennessee rational basis review, which requires meaningful judicial review. The Board does not even try to explain how holding barbers to a higher educational standard than cosmetologists promotes any governmental interest. Third, the Board ignores material facts which preclude judgment as a matter of law.

I. Introduction.

The Board commits an overarching error on the first page. The Board is correct that courts have "'nothing to do with questions of policy,'" (Defs.' Mot. Summ. J. ("Bd. Mot.") 1 (quoting *Estrin v. Moss*, 430 S.W.2d 345, 350 (1968))), but that does not mean courts blindly defer to legislative determinations. As the Supreme Court recently held, "the Court's police-power precedents *require*[] an examination of the actual purpose *and effect* of a challenged law." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2473 (2019) (emphasis added) (quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)). Not "'every statute enacted ostensibly for the promotion of the public health, the public morals, or the public safety' is 'to be accepted as a legitimate exertion of the police powers of the State.'" *Id.* at 2473 (emphasis added) (citing *Mugler*, 123 U.S. at 661); *see Craigmiles v. Giles*, 312 F.3d 220, 224, 227 (6th Cir. 2002) (Tennessee license failed to promote any public interest). The Court would hardly be acting as a "super-legislature," (Defs.' Mem. Supp. Mot. Summ. J. ("Bd. Mem.")), by exercising its constitutionally mandated duty to evaluate whether a challenged law "has any real tendency to carry into effect the purposes designed." *State ex rel. Loser v. Nat'l Optical Stores Co.*, 225 S.W.2d 263, 269 (Tenn. 1949).

II. The Board's Motion is Not Supported by Its Statement of Facts.

In Tennessee, a party moving for summary judgment must support the motion with a "statement of the material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R.

Civ. P. 56.03. The standard for granting summary judgment, which the Board does not provide in its brief, requires—"[s]ubject to the moving party's compliance with Rule 56.03"—that the moving party "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. "[W]hen the moving party does not bear the burden of proof at trial," as here, the party seeking summary judgment bears an initial burden of production that it may satisfy "either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence . . . is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015). The Board cannot obtain summary judgment based on "conclusory assertion[s]"; rather, the Board must "support its motion with 'a separate concise statement of material facts as to which [the Board] contends there is no genuine issue for trial.'" *Id.* (quoting Tenn. R. Civ. P. 56.03). Each fact must be "supported by a specific citation to the record." *Rye*, 477 S.W.3d at 265 (quoting Tenn. R. Civ. P. 56.03). Plaintiff can defeat the Board's motion for summary judgment by "demonstrat[ing] the existence of specific facts in the record which could lead a rational trier of fact to find in [Plaintiff's] favor." *Id.*[1]

[1] It is true that Plaintiff bears the burden of proof in this case. Bd. Mem. 7. In opposing the Board's motion, however, Plaintiff need only show "*the existence* of specific facts in the record which *could* lead [the Court] to find in [Plaintiffs'] favor." *Rye*, 477 S.W.3d at 265 (emphases added).

The facts the Board designates as material and undisputed have no bearing on the rationality of the Academic Achievement Requirement. Plaintiff does not dispute those facts. *See* Defs.' Statement Undisputed Facts ("SUMF"); *accord* Pl.s' Resp. Defs.' Statement Undisputed Facts ("Pl.'s SUMF"). It is true that Plaintiff underwent an administrative action for cutting hair without a license. SUMF ¶¶ 1–12. It is not material, but Plaintiff agrees that it happened. Plaintiff is not challenging the final order, and Plaintiff has paid off all of those administrative fines. Pl.'s SUMF ¶ 37. None of these facts are inconsistent with those designated in the Plaintiff's own Rule 56.03 statement. *Cf.* Pl.'s SUMF. And none have anything to do with whether the public health and safety have been rationally served by requiring barbers, but not other professions, to graduate high school before practicing.

Rather than tie its facts to its legal argument, the Board references attachments to its motion and memorandum, which consist of stray print-outs taken from the internet, and a supplemental declaration and report of its purported expert. These are not referenced in the Rule 56.03 statement of facts as required. Because they are not, Plaintiff lacks the ability to "demonstrate[] that the fact is disputed," or inadmissible. Tenn. R. Civ. P. 56.03. Even if that failure to designate is excused, the responses and testimony do not concern the need to classify barbers separately from cosmetologists, or any other profession; thus, they are immaterial to 2/3 of Plaintiff's claims. In sum, the Board

cannot and does not cite record evidence that helps it meet its summary judgment burden regarding Plaintiff's claims.

The Board's motion should be denied as deficient.

III. The Board Misunderstands the Tennessee Rational Basis Test.

Section III.A demonstrates that, contrary to the Board's position, (Bd. Mem. 22), the Tennessee Constitution is not in lockstep with federal rational basis review. Section III.B shows that the Board fails to understand that the facts matter under Tennessee rational basis review. Section III.C establishes that even the federal rational basis standard does not bar judicial inquiry into the validity of an occupational licensing restriction.

A. The Tennessee Constitution is Not in Lockstep with Federal Rational Basis Jurisprudence.

The Board wrongly argues that the state and federal constitutions provide identical levels of protection. Bd. Mem. 6-7, 10, 18, 22-23. Indeed, the Board squarely argues that state and federal protections under due process and equal protection are "synonymous." *Id.* at 22 (quoting *Hughes v. Bd. of Probation and Parole*, 514 S.W.3d 707, 715 (Tenn. 2017)). The Tennessee Supreme Court has foreclosed this argument. In *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d. 1 (Tenn. 2000), the Court stated that its statements about synonymy are "not dispositive" of the degree of constitutional protection provided by the Tennessee Constitution. *Id.* at 14 (citation and quotation marks omitted). "Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal

standards." *Id.* at 15 (quoting *State v. Black*, 815 S.W.2d 166, 193 (Tenn. 1991) (Reid, C.J., concurring in part and dissenting in part)).

Tennessee courts employ a meaningfully different standard as a result. Legislative classifications must have a "real and substantial basis" rooted in the governmental interest the classification was designed to promote. *See State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994); *Metro. Gov't of Nashville & Davidson Cty. v. Shacklett*, 554 S.W.2d 601, 608 (Tenn. 1977); *Logan's Supermarkets, Inc. v. Atkins*, 304 S.W.2d 628, 632 (Tenn. 1957); *State v. Greeson*, 124 S.W.2d 253, 256, 258 (Tenn. 1938); *In re T.M.G.*, 283 S.W.3d 318, 325 (Tenn. Ct. App. 2008); *State v. Whitehead*, 43 S.W.3d 921, 927 (Tenn. Crim. App. 2000); *Smith v. State*, 6 S.W.3d 512, 519 (Tenn. Crim. App. 1999); *Worley v. Dep't of Children's Servs.*, No. 03A01-9708-JV-00366, 1998 Tenn. App. LEXIS 103, at *1 (Tenn. Ct. App. Feb. 10, 1998); *Templeton v. Metro. Gov't of Nashville & Davidson Cty.*, 650 S.W.2d 743, 756–58 (Tenn. Ct. App. 1983); *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 733, 776 (Tenn. 1910). Even as it insists federal and state standards are the same, the Board avoids the "real and substantial" standard, which is evidence of the difference. This standard has long been used by courts in the economic context, when governments "exclude certain persons from engaging in [a] business while allowing others to do so." *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956) (citing *State v. Harris*, 6 S.E.2d 854 (N.C. 1940)).

When considering the related Law of the Land question, the question is whether the measure has "any real tendency to carry into effect the purposes designed—that is, the protection of the public safety, the public health, or the public morals—and whether that is really the end had in view." *Spencer-Sturla Co. v. City of Memphis*, 290 S.W. 608, 612–13 (Tenn. 1926) (quoting *Motlow v. State*, 145 S.W. 177, 188 (Tenn. 1911)); *see also State v. Smith*, 6 S.W.3d 512, 519 (Tenn. 1999) (enactment must bear a real and substantial relationship to the public's health, safety, morals or general welfare); *State v. Greeson*, 124 S.W.2d 253, 258 (Tenn. 1938) (Tennessee barber regulation must have a "real or substantial relation to the public, health, safety, or welfare.") (emphasis added). Tennessee courts embrace a meaningful standard as part of rational basis review. *Spencer-Sturla*, 290 S.W. at 612–13.

The Board is wrong that the Tennessee Constitution is in lockstep with the federal rational basis jurisprudence. Tennessee courts require meaningful consideration of the government's classifications and interests.

B. Facts and Evidence Matter in the Tennessee Rational Basis Analysis.

The facts matter. The Board argues to the contrary when it asserts that this Court is limited to only asking "whether the law is reasonably related to proper legislative interests." Bd. Mem. 22 (quoting *Riggs v. Burson*, 941 S.W.2d 44, 52 (Tenn. 1997)). The touchstone of rational basis review is reasonableness, and "'[r]easonableness' varies with the facts in each case." *Tester*, 879 S.W.2d at 829. Courts are not

relegated to rubber stamping legislative determinations. The determination of reasonableness *is* a "judicial function." *Spencer-Sturla*, 290 S.W. at 612; *see also Campbell v. McIntyre*, 52 S.W.2d 162, 164 (Tenn. 1931) ("[I]t cannot be denied that a sound judicial discretion is essential" to the question of whether a licensing provision is rationally related to a "public interest."); *see Pack v. S. Bell Tel. & Tel. Co.*, 387 S.W.2d 789, 793 (Tenn. 1965) (A court's role is to determine whether the legislation is so unconnected to its purpose as to constitute a "manifest abuse" of discretion.). While it is beyond the power of a court to determine whether a regulation is "wise or a foolish policy," the courts do determine whether an act "has any real tendency to carry into effect the purposes designed, that is, the protection of the public safety, the public health, or the public morals." *Mobile Home City v. Hamilton Cty.*, 552 S.W.2d 86, 87 (Tenn. Ct. App. 1976) (quoting *Motlow v. State*, 145 S.W. 177, 188 (Tenn. 1911)). When the government conceives of a justification that "ignores the evidence in th[e] record," Tennessee courts have the power to say so, no matter what federal courts may say. *See, e.g.*, *Tester*, 879 S.W.2d at 829–30.

That is why Tennessee courts routinely engage the facts even when they uphold licensing restrictions. *See e.g., Estrin*, 430 S.W.2d at 350 (pest control license involved "the application of highly toxic poisons to private residential as well as commercial buildings"); *Rivergate Wine & Liquors, Inc. v. Goodlettesville*, 647 S.W.2d 631, 634 (Tenn. 1983) ("the record establishes a rational basis for the ordinance"); *Chapdelaine v. Tenn. State Bd. of Exam'rs for Land Surveyors*, 541

S.W.2d 786, 787–88 (Tenn. 1976) (plaintiff "failed to carry the burden of proof" establishing that land surveying fell outside the state's police powers); *Kree Inst. of Electrolysis, Inc. v. Bd. of Electrolysis Exam'rs*, 549 S.W.2d 158, 159 (Tenn. 1977) (evidence showed that electrolysis "requires insertion of a needle into the human skin …").

The Tennessee cases the Board relies on when articulating a rational basis standard undermine its case for total deference. As pointed out above, the Board cites *Estrin*, 430 S.W.2d at 350, to argue that this Court must defer to legislative classifications. Bd. Mot. 1. And yet *Estrin* itself held that the "reasonableness of any particular classification depends upon the particular facts of the case." *Estrin*, 430 S.W.2d at 349. The *Small Schools* case that the Board cites, (Bd. Mem. 22), found the state's school funding formula violated Tennessee's guarantee of equal protection precisely because there was not an evidentiary basis for the differentiations made by the school funding formula. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). The Board also cites *Lynch v. City of Jellico*, (Bd. Mem. 22), where the Court upheld a method for determining permanent partial disability under Workers' Compensation. 205 S.W.3d 384, 391 (Tenn. 2006). The Court merely relied on prior precedent, (*see id*. at 396 (citing *Brown v. Campbell Cty. Bd. of Educ.*, 915 S.W.2d 407 (Tenn. 1995))), and that relied on the *Tenn. Small School Systems* and *Tester* standard requiring "reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification." *Tester*,

879 S.W.2d at 829. The *Hughes* case, cited by the Board, (Bd. Mem. 22), upheld a prohibition on acceptance of filings from inmates who have outstanding fees because of the abundant evidence of the costs of frivolous inmate litigation. *Hughes v. Bd. of Probation and Parole*, 514 S.W.3d 707, 721–24 (Tenn. 2017).[2] Likewise, *Gallaher v. Elam*, 104 S.W.3d 455, 462 (Tenn. 2003), found a rational basis for the state's child support guidelines because "both policy and fact justify the classification at issue." None of these cases require willful blindness out of the courts.

The most that can be said for the Board is that "specific evidence is not necessary to show the relationship between the statute and its purpose," but *only* if such a relationship is plainly conceivable. Bd. Mem. 22, (quoting *Riggs v. Burson*, 941 S.W.2d 44, 52 (Tenn. 1997)). Section IV.A will show that not so much as a conceivable explanation exists for imposing different standards on barbers than cosmetologists. Bd. Mem. 11–12. *Riggs* does not otherwise apply for the simple reason that the *Riggs* plaintiffs failed to state a valid claim. Plaintiff has stated a valid claim. *See* Order Denying Mot. Dismiss (Oct. 31, 2018). In *Riggs*, by contrast, the Tennessee Supreme Court dismissed an ill-stated challenge to a state statute banning heliports within nine miles of a national park. 941 S.W.2d at 54. *Riggs*'s contribution to Tennessee case law was its holding that "*legal conclusions* set forth in a complaint are not required to be taken as true." *Id.* at 47–48 (emphasis added).

[2] *Dep't of Correction v. Pressley*, 528 S.W.3d 506 (Tenn. 2017), cited by the Board, (Bd. Mem. 22), is not a rational basis case.

Because the *Riggs* plaintiffs failed to state anything beyond "legal conclusions," (*id.* at 48), the *Riggs* Court wrote that "specific evidence is not necessary" in order to presume a rational basis. *Id.* at 52. *Riggs* does not preordain the rejection of well-stated claims such as Plaintiff's, and *Riggs* does not hold that evidence rebutting the presumption of a rational basis may be summarily disregarded. Tennessee case law is to the contrary.

Tester and *Small School Systems* show that specific evidence is permissible—and useful—to contradict the government's hypothetical justifications for a challenged law.

C. The Federal Rational Basis Standard Does Not Demand Total Judicial Deference.

Despite the presumption of validity that federal courts attach under rational basis review, it "is not a rubber stamp of all legislative action. …" *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000). The Board cites *Am. Exp. Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685 (6th Cir. 2011). Bd. Mem. 10. However, in that case the Sixth Circuit explained that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional *unless in light of the facts made known or generally assumed* it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *Am. Exp. Travel*, 641 F.3d at 689 (quoting *United States v. Carolene Prods. Co.,* 304 U.S. 144, 152 (1938)) (emphasis added). Under the Board's own authority, the government does not get to rest on implausible justifications.

The guiding case for evaluating a Tennessee license under rational basis scrutiny is *Craigmiles*, 312 F.3d at 220. In *Craigmiles*, the Sixth Circuit used a rational basis test to strike down a Tennessee law that required a funeral director's license to sell caskets. *Id.* at 222–23. The Sixth Circuit analyzed the State's proffered public health and safety justifications, rejecting them as bogus. *Id.* at 225–26. Because the State could not actually articulate a convincing safety rationale, the Sixth Circuit found that the law had only one justification: protectionism. This was an illegitimate governmental purpose: "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Id.* at 229. This outcome cannot be squared with a result in which the government's interests are unknown and beyond scrutiny.

Similarly, in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 534 (1985), the Supreme Court ruled an ordinance that required special permitting for individuals with mental disabilities, but not other facilities like fraternity houses or hospitals, was not reasonable because "the record" did not show any rational reason for believing that the individuals in the home posed a special threat to "the city's legitimate interests," which again, were identified. 473 U.S. at 448. The defendants' proffered rationales purporting to support its actions, all of which the Court rejected, were based on the factual evidence. *Id.* at 449–50. Federal courts are not a fact-free zone either.

The Board's burden of production at summary judgment is to "affirmatively negate[] an essential element" of Plaintiff's claims or else

show that Plaintiff has insufficient evidence to establish those claims. *Rye*, 477 S.W.3d at 264. The Board cannot meet that burden by insisting that it gets complete deference and that facts and evidence do not matter.

IV. The Board is Not Entitled to Judgment as a Matter of Law.

Even if Section II or III are not sufficient to defeat the Board's motion, the record precludes summary judgment for the Board on any of the three (3) claims. Section IV.A shows that the Board's motion fails as to his equal privileges and immunities claim. Section IV.B, shows why the Board's motion fails under the Law of the Land claim. Section IV.C shows why the Board's motion fails under the Fourteenth Amendment.

A. The Board is Not Entitled to Summary Judgment on Plaintiff's Equal Privileges and Immunities Claim (Claim Two).

Plaintiff's second cause of action is the most straightforward way to grant summary judgment. The Board does not try to show how its interests are advanced by treating barbers differently from cosmetologists.

Tennessee courts recognize the right to earn a livelihood, *see Livesay v. Tenn. Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959); to acquire and enjoy property, *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 474 (Tenn. 2012); and to participate in activities "of the utmost personal and intimate concern." *Sundquist*, 38 S.W.3d at

10–11 (right to earn a livelihood).[3] In order to prevail at summary judgment, the Board must affirmatively negate an element of Plaintiff's claim or else show that Plaintiff has insufficient evidence that the state's differential treatment of barbers, as compared to cosmetologists, to say nothing of elected officials or EMRs, who have the state's blessing to work, is irrational. *See, e.g.*, *Tester*, 879 S.W.2d at 828.

The Tennessee rational basis test for such classifications is as follows:

> *There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification. . . . [A]ll classification must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law.*

Id. (emphasis added by court) (quoting *Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. at 775–76). The "substantial differences" which make barbers different from cosmetologists and other professions must "form the basis of the classification" and "be germane to the purpose of the law." *Id*.

As explained below in Section IV.B.1, the Board's justifications fail on their face. The classification of barbers promotes no interest, as the

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[3] Each of these Tennessee cases refer to those rights as "fundamental." The Board is thus incorrect in asserting that no "fundamental" right is at issue here. *Cf.* Bd. Mem. 9, 18. The Academic Achievement Requirement lacks any rational basis in the public health, safety, morals, or general welfare and thus, the Court need not adopt heightened scrutiny.

Board implicitly acknowledges. Section IV.B.2 identifies specific facts in the record which establish that the Board's differential treatment of barbers is irrational and actually undermines its public purpose.

1. The Characteristics of Barbering Are Not Substantially Germane to Any Legitimate Interest.

In support of its summary judgment motion, the Board only raises three (3) justifications. They are: ensuring professional competency (Bd. Mem. 11); promoting the goal of education in Tennessee (*id*. at 12–13); and the need to read at a level sufficient to understand texts relevant to barbering. *Id.* at 13–17.[4] One of the three (3)—professional competency—should be stricken because the Board did not include it in its interrogatory response where it identified the public interests, as directed by this Court: *"the State ... cannot, as it asserts, wait until filing its summary judgment and 'spring' those reasons on Zarate."* Order Granting Pl.'s Mot. to Compel, 6 (May 3, 2019). Regardless, the Board's justifications fail on their face for three (3) reasons.

First, justifications that can be broadly applied to any profession are invalid governmental purposes. This principle invalidates professional competency and incentivizing education. In *Livesay*, the Tennessee Supreme Court rejected the idea that ensuring professional competency was a valid *public* justification. 322 S.W.2d at 213 (Incompetence "does not directly affect the public, but affects only the parties thereto."). A justification that would allow the Legislature to

[4] The Board's memo does not mention math skills, one of its original reasons. Pl.'s SUMF ¶ 241. It has therefore waived this justification.

"regulate every conceivable business" would render the constitutionally recognized right to earn a living meaningless. *Id.* Competency and incentivizing education are goals so broad as to make the state's power to regulate a profession a "delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint." *Id.* They are illegitimate goals as a matter of well-established law.

Second, the Board's interests, even if valid, are statewide goals and are not furthered by singling out barbers. Bd. Mem. 20–21. Nothing about barbering is "unique and distinguishable from the same legislative problem as it presents itself" in any other profession. *Whitehead*, 43 S.W.3d at 926-27 (quotation omitted). Ensuring professional competency and promoting the goal of education can be said of *any* profession and *any* level of education. There is simply nothing "germane" about barbering that promotes any of these interests. *See Tester*, 879 S.W.2d at 829 (quotation omitted). What makes *barbers* "substantially different," (*see id.*), from other professions such that it promotes these interests to require barbers obtain a *high school* degree? The executive director, Gumucio, conceded that there was nothing about barbering that specifically incentivized the completion of education. Pl.'s SUMF ¶ 247 (acknowledging "nothing different" about barbering that would not "be there for many professions"), 248 ("It would" promote the goal of education to require a high school degree before holding any job). Legislative classifications need not be drawn with "mathematical nicety" to survive rational basis, but this classification is "wholly without any rational basis." *U.S. Dep't of Agric.*

v. Moreno, 430 U.S. 528, 538 (1973) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

The only slight difference between barbers and cosmetologists is the ability to shave with a straight razor. *Compare* Tenn. Code Ann. § 62-3-105 (barbering) *with* Tenn. Code Ann. § 62-4-106 (cosmetology, to include shaving with a safety razor); Pl.'s SUMF ¶¶ 60–61, 231 ("very little" difference between professions), 198 ("increasingly similar"), 225 ("very, very limited distinction"). Thus, the Boards were merged, with the goal of harmonizing the standards for licensure. *Id.* ¶¶ 200–01, 204–06, 216. This lone difference is hardly "substantial," *see Tester*, 879 S.W.2d at 829, and plainly not germane to any of the interests asserted by the Board.

The Board offers **no** justification for why cosmetologists should be treated differently. Bd. Mem. 20. Rather, it just points to the fact that the legislature has classified cosmetologists differently as if that was conclusive. The General Assembly's determinations are "not conclusive upon the courts." *Chapdelaine*, 541 S.W.2d at 787. The Board says there *is* a legislative classification, but has not "*disclose[d] the propriety and necessity of the classification*." *Tester*, 879 S.W.3d at 829 (emphasis preserved). The simple existence of a separate statutory regime, (Bd. Mem. 20), is not a "substantial" basis for differentiating between barbers and cosmetologists, *Tester*, 879 S.W.3d at 829, when defendants themselves recognize that "except for some minor verbiage … both sets of laws have said the same thing." Pl.'s SUMF ¶ 230. As this Court has already found, the Board must at least show "*some* good and valid

reason" for the classification. Order 5 (April 17, 2020) (quoting *Tester*, 879 S.W.2d at 829) (emphasis added). Rational basis is deferential, but if some kind of a rationale is not evident, then "it follows that [the Court's] plain duty" is to invalidate the challenged law. *Livesay*, 322 S.W.2d at 213.

This Court is not required to accept an irrational classification, just because this case does not "implicate a fundamental right." Bd. Mem. 9; *see Whitehead*, 43 S.W.3d at 928 ("The state does not suggest a rational basis for the classification."). Rational basis, even under federal caselaw, is "not "toothless."' *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 (citing *Mathew v. Lucas*, 427 U.S. 495, 510 (1967)). This Court is not obligated to accept a classification that the Board cannot defend. As Judge Trauger recently ruled in *Thomas v. Haslam*, 303 F. Supp. 3d 585, 616 (M.D. Tenn. 2018), "[n]othing about the case law, however, suggests that the Constitution's tolerance for legislative or administrative self-sabotage is limitless." (citing cases). To contend that a legislative classification is valid because the legislature made the classification is a defense of arbitrary classifications.

In dismissing comparisons to EMRs and elected officials, the Board misunderstands what makes classes similarly situated. Bd. Mem. 19. Classes are alike depending on the interests asserted. *See Tester*, 879 S.W.3d at 829 (Classifications must "*disclose the propriety and necessity of the classification*.") (emphasis preserved). For instance, in *Greeson*, the Tennessee Supreme Court considered a regulation that set closing hours for barber shops. The point of comparison was with any

"other businesses" that did not have closing hours, irrespective of whether the business involved services similar to cutting hair and shaving. 124 S.W.2d at 259 (holding regulation was "discriminatory" because it "leaves unregulated as to hours of closing various other businesses") (quotations omitted). An apple is famously unlike an orange. If the government tried to stop fruit blight by halting importation of apples, but not oranges, there would need to be some difference between the two species that was relevant to that goal. That one is red and the other orange is a superficial difference.

When it comes to the goals of ensuring professional competency, incentivizing education, or understanding laws and regulations, EMRs and elected officials are similarly situated. Barbers cut hair but EMRs provide emergency medical care. Tenn. Comp. R. & Regs. 1200-12-01-.16; Gum. Dep. Ex. 28 at 10. Both can potentially harm the persons they serve. The risk is far greater with an EMR,[5] (*see* Tenn. Comp. R. & Regs. 1200-12-01-.16(2)(b)(1)(i)), but that makes it irrational to think that it furthers the goal of safety by requiring barbers complete high school when EMRs complete no level of formal schooling?[6] Pl.'s SUMF ¶ 237. However much requiring barbers finish high school incentivizes education, requiring the same out of far more visible elected officials would provide a greater incentive. However much barbers need to understand the laws and rules governing their

[5] Available at: https://www.tn.gov/content/dam/tn/health/healthprofboards/ems/PH-3677.pdf.
[6] Available at: https://www.tn.gov/content/dam/tn/health/events/Initial%20Certification%20for%20Emergency%20Medical%20Responder.pdf.

profession, it is only more critical that the persons writing and enforcing those laws understand them.[7] When considered in light of the interests being asserted, barbers, EMRs, and elected officials are an apples-to-apples(-to-apples) comparison.

It is not "reasonable to infer" that the legislature chose to classify barbers differently from cosmetologists because it wanted to address "some aspects" of "an ongoing concern about educational attainment in Tennessee by adding barbering to the many professions that already require a high school diploma." Bd. Mem. 20–21. Two years after the legislature *upped* the educational standard for barbers from 10th grade to high school, (Pl.'s SUMF ¶¶ 195–208), the legislature *dropped* the educational standard for cosmetologists. *See* 2017 Tenn. Pub. Acts 226 (enacted as Tenn. Code Ann. § 62-4-110); Bd. Mem. 19 n. 10. The inference the Board wishes the Court to draw is decidedly unreasonable. The new standard for cosmetology illustrates what the Academic Achievement Requirement was meant to do—according to its senate sponsor, it was supposed to ease licensing restrictions. Pl.'s SUMF ¶¶ 199, 216; *see also* "Right to Earn a Living Act," Tenn. Pub. Ch. 1053 (2016)[8] (finding regulations of entry into professions have "had

[7] Nor is it relevant that the state imposes a similar educational standard in other fields. Bd. Mem. 13 n. 7, 19. The absence of constitutional infraction in one respect is not justification for unconstitutional inequity.

[8] Available at: https://publications.tnsosfiles.com/acts/109/pub/pc1053.pdf.

the effect of arbitrarily limiting entry and reducing competition") (enacted as Tenn. Code Ann. § 4-5-501, *et seq*.).

Third, text complexity is not a valid basis to classify barbers as different from cosmetologists or elected officials. This justification rests entirely on the Board's expert, (Bd. Mem. 13-17), who should be excluded.[9] *See* Pl.'s Mot. *In Limine*. Wrenn's testimony has no bearing on the equal privileges analysis because she never assessed cosmetology texts until Plaintiff made her. Wrenn Dep. 100:14-16, 178:3-14. Thus, she failed to create a dispute in fact. *See Bassett v. Snyder*, 59 F. Supp. 3d 837, 853 (E.D. Mich. 2014) (expert in rational basis case who failed to conduct a comparison is insufficient basis to grant summary judgment for defendant; "Rank speculation will not suffice."). If it is important to ensure that barbers can read at a sufficient level to be able to understand the rules and laws, it is only more important that the persons who write and enforce those rules and laws understand them.

For these three (3) reasons, the Court does not even need to resort to the factual record to ascertain that no rational basis exists to classify barbers separately. Plaintiff will now turn to the factual record to show specific facts that operate to deny the Board's motion.

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[9] In the Board's motion, they ask that Wrenn be allowed a third try at Lexile analysis "to address certain concerns raised during [Plaintiff's] deposition." Bd. Mem. 16. Those concerns were that she did not follow the instructions on how to properly use Lexile. She still failed on her third try, as will be shown in the next Section. She should be excluded.

2. The Evidence Shows That There is No Real and Substantial Difference Between Barbers and Cosmetologists and Other Professionals.

The evidentiary record shows that cosmetologists, EMRs, and elected officials pose equal or greater concerns to all public interests.

When it comes to incentivizing education, the Board's goals are not advanced by demanding barbers alone complete high school. Students in Tennessee are not required to graduate high school in the first place. Bd. Mem. 11. *C.f., Canale v. Steveson*, 458 S.W.2d 797, 800 (Tenn. 1970) ("If legislature had in fact intended to prohibit fortune-telling statewide, then it would have tried to do just that."). Gumucio agreed that requiring cosmetologists, (Pl.'s SUMF ¶ 249; Gum. Dep. 141:18–19 ("I believe the goal of education is there for both.")), elected officials, (*id.* ¶ 250; Gum. Dep. 142:8 ("It would promote the goal of education.")); and EMRs, (Gum. Dep. 144:2 ("It would.")), to meet the high school requirement would also promote that goal. When state senators lack an educational requirement, requiring barbers serve this goal is irrational. Pl.'s SUMF ¶¶ 217, 219–220. It is obvious, as Gumucio readily admitted, that conditioning any job on completion of high school would meet this goal. Gum. Dep. 144:10 ("It would."). She also accepted that requiring college out of anyone wishing to work in the state would promote this goal. Pl.'s SUMF ¶ 248. The facts demonstrate that the classification of barbers is not germane to this goal of promoting education.[10]

[10] Practitioner competency obviously applies equally to any profession.

Text complexity also fails as a justification under the factual record. The Board's proof is Wrenn, and Wrenn found *more* instances where cosmetology texts produced higher scores than analogous barber texts. Wrenn Dep. Ex. 1. More generally, cosmetologists also have a set of laws and rules that they must follow, which the Board enforces. Pl.'s SUMF. ¶¶ 181, 182, 183. If anything, there's good reason to demand more out of cosmetologists. Most of the sanitation infractions implicating public health and safety are related to nail care, a practice more typically performed by cosmetologists. *Id.* ¶¶ 58, 150, 151, 152, 153. There are far more cosmetologists (appx. 44,000) than barbers (appx. 5,000) in the state. *Id.* ¶¶ 47, 50. The Board argues that cosmetologists have "entirely different statutory regimes," (Bd. Mem. 20), but it does not suggest that the cosmetology regime is materially less difficult to understand. Board members acknowledge that they are not. Pl.'s SUMF ¶¶ 230–31. The Board does not draft either set of regulations to be more difficult to understand. *Id.* ¶ 128. Even if barber texts were more difficult to understand than cosmetologists, cosmetologists can oversee barbers in dual license shops and will need to ensure the compliance of barbers. Tenn. Code Ann. §§ 62-4-118(d), 119(3); Pl.'s SUMF ¶¶ 172–75. Therefore, the need to understand even *barbering* rules is present for cosmetologists. The evidence establishes no basis for treating barbers to a higher educational standard.

From a health and safety standpoint, the laws and rules are indistinguishable. Pl.'s SUMF ¶ 194 ("bottom lines" on sanitation are the same). Cosmetologists have the same number of overall hours:

1,500. Even when a blood spill incident occurs and public safety is paramount, the cosmetology and barbering procedures are identical. Pl.'s SUMF ¶ 57.

The lone difference between the professions—shaving with a straight razor, (*id*. ¶ 225)—fails to "disclose the propriety," *Tester*, 879 S.W.2d at 829, of requiring barbers obtain an additional two (2) years of high school. A student wouldn't be required to learn a thing about straight razors with additional high school. Pl.'s SUMF ¶ 80. Under current law, a cosmetologist can practice barbering with an additional 300 hours of training, not by graduating high school. Tenn. Code Ann. § 62-3-110(b)(3)(B). The Department and Board fully endorsed allowing cosmetologists to use a straight razor in 2018, with *no* required training. Pl.'s SUMF ¶¶ 226, 227. If danger to the public from straight razor shaves is the underlying concern, then the question turns back to EMRs, who can use a defibrillator to restart the heart of a pulseless, non-breathing patient. Tenn. Comp. R. & Regs. 1200-12-01-.16(2)(b)(1)(i). Safe practice is not a justification for classifying barbers to this level of education.

Plaintiff has directed this Court to evidence and basic logic that are sufficient to establish that no real or substantial basis exists to treat barbers to this educational standard.

B. The Board is Not Entitled to Summary Judgment on Plaintiff's Law of the Land Claim (Claim One).

The Board's justifications for how the Academic Achievement Requirement supposedly advances some public goal misunderstands the

standard in Tennessee. Bd. Mem. 11-17. Justifications only satisfy the Tennessee standard if they have a "real tendency" to further public safety, health, or morals. *Livesay*, 322 S.W.2d at 213; *Bd. of Dispensing Opticians v. Eyear Corp.*, 400 S.W.2d 734, 742 (Tenn. 1966); *State ex. rel Loser*, 225 S.W.2d 263, 269 (Tenn. 1949); *Spencer-Sturla Co.*, 290 S.W. at 612-13; *see also Smith*, 6 S.W.3d at 519 (requiring "real or substantial" relation to a public interest); *Greeson*, 124 S.W.2d at 190 (same). The record demonstrates that the Board's justifications fail.

At the outset, the Board's competency and incentivization justifications are illegitimate ones for the reasons explained previously. The Court must ask whether the goal is actually economic protectionism, or enrichment of private parties. *See Spencer-Sturla Co.*, 290 S.W. at 613 (Courts must ask whether "the end had in view" is for "the public generally, as distinguished from those of a particular class."); *Gentry v. Memphis Fed'n of Musicians*, 151 S.W.2d 1081, 1082 (Tenn. 1940) (invalidating a law "attempted for the declared purpose and the sole purpose of profit to another group of citizens"); *Bean v. Bredesen*, No. M2003-01665-COA-R3-CV, 2005 Tenn. App. LEXIS 267 at *19 (Tenn. Ct. App. May 2, 2005); *see also Craigmiles*, 312 F.3d at 22. If the Academic Achievement Requirement does little but suppress competition, the Court can deduce that it is actually "very well tailored" to provide benefits to discrete interest groups like existing licensees. *See Craigmiles*, 312 F.3d at 228.

Competency-The public is already protected from incomptent barbers by a "a rigid statutory scheme." *See Bd. of Comm'rs of Roane*

Cty. v. Parker, 88 S.W.3d 916, 922–24 (Tenn. Ct. App. 2002). A rigorous licensing process awaits would-be barbers. Students must complete 1,500 hours of classwork and two examinations before they can begin to practice. Pl.'s SUMF ¶¶ 64, 65; *see* Tenn. Code Ann. § 62-3-110(b)(A). If a barber student cannot read at the necessary level, then they will not become a barber. That has proven true. The Board is institutionally unaware of even a single injury caused by non-compliance with the Academic Achievement Requirement. Pl.'s SUMF ¶ 157.

Requiring future barbers to also complete two (2) more years of high school has no "real tendency," *Livesay*, 322 S.W.2d at 213, to make better barbers. Board members themselves acknowledge they didn't learn anything about barbering in high school. Pl.'s SUMF ¶ 80. Even the House Sponsor of the bill that became the Academic Achievement Requirement, Antonio Parkinson, later acknowledged that it "[d]oesn't take a high school diploma to be a barber or cosmetologist if you go through cosmetology or barber training." *Id.* ¶ 213.[11] The Academic Achievement Requirement is so lacking in justification that the Board grasps for far-flung justifications disavowed by the sponsor of the very law it defends.

If barber skills were lacking, then forcing future barbers to graduate high school is the sort of "circuitous path to legitimate ends when a direct path is available" that rightly makes courts "suspicious." *See Craigmiles,* 312 F.3d at 227 (citing *Cleburne*, 472 U.S. at 432). The

[11] Plaintiff erroneously referred to him as Representative "Parker" in Pl.'s SUMF ¶ 213.

Academic Achievement Requirement did not affect existing licensees, (Pl.'s SUMF ¶ 246), who would have been the source of any actual problem. If there were any anxiety that rising barbers were lacking the necessary barbering skills—a concern appearing nowhere in the legislative record—the "General Assembly had several direct means of achieving that end." *Craigmiles*, 312 F.3d at 228. For instance: i) increasing the 1,500-hour requirement; ii) rejiggering the mandated curriculum for barber schools; and, iii) requiring additional training of practitioners. Raising educational standards for only future barbers looks suspiciously like it 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) (Willett, D. concurring).

Incentivize education-This goal makes no sense at the outset since Tennesseans are not required to attend high school through 12th grade. Bd. Mem. 11. If the state wanted to incentivize completion of high school, it should have made a statewide law. *See Canale*, 458 S.W.2d at 800 (irrational to advance a statewide goal by a regulation limited based on population). To require barbers to graduate high school as a way of achieving this goal is unconstitutionally "arbitrary," *Smith*, 6 S.W.3d at 519, "unreasonable, oppressive [and] discriminatory." *Rivergate Wine & Liquors, Inc.*, 647 S.W.2d at 634. This logic has no end: Why not require college or a postgraduate degree? Why not require a high school degree to walk dogs? There is no "reasonable or natural relation" between requiring barbers to graduate high school and

incentivizing education. *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978).

Acknowledging that this rationale is so weak as to be described as "marginal," (Bd. Mem. 13), the Board nonetheless insists that even marginal rationales satisfy the rational basis test. *Id*. Again, it fails to appreciate the relevant Tennessee standard in two (2) important respects. First, due process in Tennessee requires that a challenged law have a "real tendency" to further the goal. *See Livesay*, 322 S.W.2d at 213; *see Smith*, 6 S.W.3d at 519. A "marginal" tendency falls well short. Second, Tennessee requires consideration of whether the benefits are irrationally out of balance with the burdens. *State ex rel. McCormick v. Burson*, 894 S.W.2d 739, 745 (Tenn. Ct. App. 1994) (*"*In determining whether a substantive due process right has been violated, we must balance the 'liberty of the individual' and 'the demands of organized society.'"). Under its own Law of the Land Clause, the Texas Supreme Court asked whether "the statue's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." *Patel*, 469 S.W.3d at 86–87. At some point, it falls upon the courts to "to determine whether the legislation is so unconnected to its purpose as to constitute a manifest abuse of discretion." *Pack*, 387 S.W.2d at 793. Given that the benefit of this law is, at most, "marginal," (Bd. Mem. 13), it too is out of balance with the burden it places on Elias.

Making it harder for Tennesseans to get better jobs is a decidedly irrational approach to helping Tennesseans get better jobs. The

Academic Achievement Requirement is what stands between Plaintiff and a good job. It is "either counterproductive or irrationally overinclusive." *See Thomas*, 303 F. Supp. 3d at 616 (quoting *LaFleur*, 414 U.S. at 653 (1974) (Powell, J., concurring in the result)). Easing licensing restrictions is, per state policy, "the surest means for economic mobility" to protect the freedom to earn an honest living. Tenn. Pub. Ch. 1053 (2016) (enacted as Tenn. Code Ann. § 4-5-501, *et seq*.). This was, after all, the intent of the legislature when enacting the Academic Achievement Requirement. *See* Pl.'s SUMF ¶ 216 (Sen. Bell: goal was "to make it as easy as possible for citizens to become licensed barbers or licensed cosmetologists"). Targeting a class particularly vulnerable to unemployment is the most irrational version of this irrational approach. *Id*. ¶ 219 (Sen. Bell: "[T]here are very limited opportunities for them to work. [Barbering] is one of the things that they would be able to do."). Approximately 28% of Tennessee workers are licensed or certified.[12] Gum. Dep. Ex. 24 at 47. 87.3% of Tennessee workers without a high school degree are neither licensed or certified. *Id*. The Board could not have devised a more irrational justification.

The Board seems oblivious that the evidence it offers hurts its cause. Bd. Mot. Ex. A & B. It culls internet sources finding that higher educational levels correlate with higher wages. It should be obvious that, if the state requires a high school diploma to have access to good jobs, those with high school diplomas will have more access to good jobs.

[12] Available at: https://ij.org/report/at-what-cost. And as the Board recognizes, many Tennessee licenses already required high school graduation. *See* Bd. Mem. 13 n. 7.

This is a problem of the state's own making. It is anything but a rational justification for making the problem worse.

Licensing restrictions have well known negative effects on wages as documented in government, and other studies. The White House and Department of Labor were specific about the negative economic effects occupational licensing restrictions had on wages and the economy. Gum. Dep. Ex. 19 at 4–5 ("[B]y making it harder to enter a profession, licensing can also reduce employment opportunities and lower wages for excluded workers, and increase costs for consumers."), 8 ("licensing restrictions cost millions of jobs nationwide….") 13-14, 62-63, Ex. 20 at 5-6; *see* FTC STAFF, POLICY PERSPECTIVES: OPTIONS TO ENHANCE OCCUPATIONAL LICENSE PORTABILITY iv (Sept. 2018).[13] A recent study found that Tennessee was the most heavily regulated state in the cosmetology/barbering field and that Tennesseans would enjoy 9.331% job growth in those fields if they merely reduced their restrictions to mirror Hawaii's.[14] Gum. Dep. Ex. 22 at 8.

The Board knows that raising barriers to entry in this field is an irrational way to promote job growth. In 2019, the state removed the practice of hair braiding from the practice of cosmetology or natural hair styling. Pl.'s SUMF ¶ 51. This yielded immediate economic benefits. There are already more hair braiders than licensed natural

[13] Available at: https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license_portability_policy_paper_0.pdf/.
[14] Available at: http://www.will-law.org/wp-content/uploads/2017/10/final.pdf.

hair stylists, even though natural hair stylists were able to start getting licensed in 1999. *Id*.

The Academic Achievement Requirement unquestionably boosts wages for those who already hold the barber license because the state is artificially restricting competition. Gum. Dep. Ex. 19 at 8 ("[L]icensing may raise wages for those who are successful in gaining entry to a licensed occupation, but they raise prices for consumers and limit opportunity for other workers in terms of both wages and employment."). This is, however, evidence of "the more obvious *illegitimate* purpose to which licensure provision is very well tailored." *See Craigmiles*, 312 F.3d at 228 (emphasis added).

Text complexity-Promoting an understanding of barber rules and laws is only legitimate if the rules and laws themselves serve another legitimate interest. Otherwise enforcement of any interest, no matter how illegitimate, would always pass the rational basis test. Wrenn admitted that she paid no attention to the underlying question of whether the texts she analyzed served any actual health and safety purpose. Wrenn Dep. 134:17-135:11; 137:1-9, 22-23.

The Board's mission is to protect public health and safety. The Board's interest lies in ensuring that licensees *comply* with the rules designed to protect the public, not that they *read* rules at any particular level. If the state is making it harder for licensees to comply, then it would only be further evidence of the irrationality of the state's licensing scheme.

The Board is an ally when it comes to compliance, undercutting its asserted interest in text complexity. It assists practitioners in safely doing their jobs. Pl.'s SUMF ¶ 131. The Board tries to draft rules that are easily understood. *Id.* ¶ 129. When licensees have trouble understanding, the Board makes itself available to assist. *Id.* ¶ 131. The Board's website FAQs rephrased one of the few pieces of text where Wrenn originally measured higher scores in a barbering law than an analogous cosmetology law. *Id.* ¶¶ 134, 135. Using simpler language resulted in a substantially lower Lexile score. Wrenn Dep. Ex. 22. The Board offers examinations in foreign languages; it doesn't demand foreign language speakers learn to read at a high school level. Pl.'s SUMF ¶ 132. When individual practitioners have infractions, the Board disciplines them, and assists them. *Id.* ¶ 140. It has never sent them back to high school for additional learning. *Id.* ¶ 141. Reading the rules as they are written is not something that the licensees actually do.

Wrenn's analyses consistently failed to support a high school graduate level of readership. She arbitrarily chose narrow slices of text to measure out of all of the barbering rules, laws and a 944-page textbook, despite MetaMetrics admonition that a person "*must type at least 20 percent* from various sections of the book to get a semi-accurate measure." Wrenn Dep. Ex. 5 at 15 (emphasis added). Wrenn originally only found something approaching alignment—whatever that term means—in 3 or 4 instances out of 19, depending on what benchmark is used for "high school graduate." Pl.'s Mem. Supp. Summ. J. 47–48.

On her third try, Wrenn's scores got worse for the Board. Bd. Mem. 16–17; Bd. Mot. Ex. A.3. For starters, the fact that she needed a third try (and wound up changing the scores of nearly every one of her previous measurements) underscores her unreliability. Bd. Mot. Ex. A.3. Compounding matters, the Board's memo relates a different score than Wrenn's exhibit in one of the few instances where the score correlates to high school graduate. *Compare* Bd. Mem. 16 (scoring TCA 62-3-109 (item 1) at 1410-1600L) *with* Bd. Mot. Ex.A.3 (scoring it at 1210-1400L). Wrenn lacked any objective criterion whatsoever by which to evaluate grade levels and text complexity. Pl.'s Mem. Supp. Mot. *In Limine* 8-15. With her third pass, she still failed to identify a neutral benchmark for high school graduate Lexile level anywhere in her declaration. Bd. Mot. Ex. A. The Board uses 1400 and 1440L, (Bd. Mem. 15, 17), however Wrenn admitted that she had "not looked at the average Lexile measure of a high school graduate." Wrenn Dep. 157:19-21. When squarely asked if 1,400 was the benchmark, she refused to endorse it. *Id.* at 156:19-157:2 (generally explaining what reader measure is based on and then stating "I do not feel comfortable commenting on an individual's reader level based on that.").

In the end, Wrenn's third scores still failed to meet the Board's benchmark for high school graduate. Of the 24 texts she measured for her third try, five (5) are well above 1400L, starting at 1610L and up,[15]

[15] The scores well above that range include: Rules of the Barber Board 0200-01-.06(5) at 1610-1800L; Rules of the Barber Board 0200-01-.06(8)(b) at 1810L & Above; Rules of the Barber Board 0200-03-.04 at 1610-1800L; Rules of the Barber Board 0200-03-.05(2)(a)

and seven (7) are well below, topping out at 1200L,[16] (Bd. Mem. 16-17; Bd. Mot. Ex. A.3), which, per MetaMetrics' grade bands, corresponds to seventh grade. Bd. Mot. Ex. A.1 Fig. 2 at 9. Remarkably, even though Wrenn self-selected which texts to measure, *half* of her measurements–12 of 24–fell entirely outside high school graduate level. Of the other half, 11 also fell *entirely within* the 1085-1400L range for 10th grade.[17] Exactly *one* score fell above the 10th grade band and below 1600L.[18] Bd. Mot. Ex. A.3. By anyone's assessment, Wrenn failed to justify a high school graduate standard.

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at 1610-1800L; and EPA Excerpt: Registered Disinfectants at 1610-1800L. Bd. Mot. Ex. A.3.

[16] Those scores include: Tenn. Code Ann. § 62-3-118 at 1010-1200L; Rules of the Barber Board 0200-01-.11(1)(a)(1) at 1010-1200L Milady's 1993 Introduction and Bacteriology at 1010-1200L; Milady's 2011 Bacteriology at 1010-1200L; Milady's 2011 Galvanic Current at 1010-1200L; Blood Spill Procedures at 810-1000L; and EPA Excerpt: Registered Sterilizers at 1010-1200L. *Id.*

[17] Those scores are: Tenn. Code Ann. § 62-3-109(a)-(c)(1)(B) at 1210-1400L; Tenn. Code Ann. § 62-3-121 at 1210-1400L; Tenn. Code Ann. § 62-3-129(c)(1)-(3) at 1210-1400L; Tenn. Code Ann. § 62-3-132 at 1210-1400L; Rules of the Barber Board 0200-01-.05 at 1410-1600L; Milady's 1993 Introduction at 1210-1400L; Milady's 2011 Preface at 1210-1400L; Milady's 1993 Introduction and Color Theory at 1210-1400L; Milady's 2011 Introduction and Color Theory at 1210-1400L; Milady's 1993 Faradic Current at 1210-1400L; Milady's 2011 Faradic Current at 1210-1400L; and PSI Services LLC Master Barber Examination Bulletin at 1210-1400L. Bd. Mot. Ex. A.3.

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

Even as the Board describes it, Wrenn only found 7 of the 24 measurements (items 1, 6-8, 10-11, 18) "above the highest end of the 10th grade range." Bd. Mem. 17. This is nowhere near a preponderance, and the Board is including 5 items that begin at least 200 points higher than the 1400L range that would correlate with high school graduate level. *Id.* at 16-17 (items 7, 8, 10, 11, 18 measure 16010L and up). One (item 1) is at 10th grade level (1210-1400L), (Bd. Mem. Ex. A.3), not 14010-1600L as the Board mistakenly relates in its memo. Bd. Mem. 16. This brings us back to exactly one measurement roughly correlating to high school. Wrenn's unreliable Lexile measurements do not support the Board's justification.

Last, even with a Mulligan, Wrenn is still unable to properly use Lexile. As previously explained, Wrenn failed to follow MetaMetrics' instructions when she drafted her report. *See* Pl.'s Mot. *In Limine*. The purpose of her third try was to properly follow the instructions, something an "expert" would have done initially. Knowing Plaintiff's objections in advance, Wrenn still failed to follow instructions. She says she converted the text format and got around the word count limit, (Bd. Mot. Ex. A ¶¶ 12-13), but offered no explanation for how she input texts of 1,000 words when she could not at her deposition. Wrenn Dep. 108:6-109:2. She did not correctly edit the text as directed by MetaMetrics. *See* Wrenn Dep. Ex. 3 (Text Preparation Guide) 8-9.[19] Every one of Wrenn's measurements (Bd. Mot. Ex. A.3), still

[19] Available at: https://metametrics.my.salesforce.com/sfc/p/#460000000niE/a/4o000000g4XH/91WD0GzRMl6hmd8IJlWzeDgIKgPYi8fE7vOZh_0S9zM.

erroneously includes title headings and page numbers. *Id*. at 8. The only items roughly correlating with 1440L (items 1 and 6) have obvious formatting errors in addition to the title and page numbers that plague all of Wrenn's third measurements. Both include subheading numbers. Bd. Mot. Ex. 3 at TCA 62-3-109 (item 1); Barber Rule 0200-01-.05 (item 6). Those should have been deleted. Wrenn Dep, Ex. 3 at 8. Item 1—Wrenn's very first attempt—deletes the quotation marks surrounding "designated manager" and "manager" and replaces those with question marks (?Designated manager?, ?Manager?). Bd. Mot. Ex. 3 at TCA 62-3-109 (item 1). At that point, she was no longer measuring the Code's actual text. MetaMetrics furthermore instructs users to remove sentences with "unconventional" punctuation. Wrenn Dep, Ex. 3 at 8. Wrenn is unable to follow the instructions made available for any member of the public. And if most of Wrenn's flawed measurements do not align with high school graduate level, they fail to suggest that high school graduation is a rational standard.

For the foregoing reasons, the Board is not entitled to summary judgment on Plaintiff's substantive due process claim.

C. The Board's Justifications Flunk the Federal Rational Basis Standard.

Again, the federal rational basis test is "deferential, but not 'toothless.'" *Bruner*, 997 F. Supp. 2d at 698 (citing *Mathew v. Lucas*, 427 U.S. 495, 510 (1967). Just as the plaintiff was able to show in *Craigmiles*, no plausible connection exists between any possible justification and a requirement that barbers complete high school. The

Board cannot muster an explanation for why cosmetologists need no education, but barbers need high school. Barbers already face a rigorous process of licensure. If they were insufficiently prepared, then the most direct thing to do would have been to require more hours beyond the 1,500 already mandated by the state, or to adjust the apportionment of hours in the curriculum at barber school. Board members themselves acknowledge they didn't learn anything about barbering or using the straight razor in high school. Pl.'s SUMF ¶ 80. Moreover, the fact that the Academic Achievement Requirement does not actually prevent barbers from practicing so long as they *already had a license* when it was enacted, (*id*. ¶ 246), 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)).

Plaintiff acknowledges that the privileges and immunities claim has been foreclosed under existing precedent. *See Craigmiles*, 312 F.2d at 229. He wishes to preserve the claim for the record.

V. CONCLUSION

The Board's motion is unsupported by any material undisputed facts, misunderstands Tennessee's rational basis test, and fails to show it is entitled to judgment as a matter of law on any claims. For these reasons, Plaintiff asks the Court to DENY the Board's motion for summary judgment.

DATED: June 22, 2020.

Respectfully submitted,

s/ B.H. Boucek
BRADEN H. BOUCEK

[redacted]