

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

ELIAS ZARATE,

Plaintiff,

v.

No. 18-534-II

THE TENNESSEE BOARD  
OF COSMETOLOGY AND BARBER  
EXAMINERS; ROXANA GUMUCIO, in her  
her official capacity as executive director of the  
Tennessee Board of Cosmetology; RON R.  
GILLIHAN II, KELLY BARGER, NINA  
COPPINGER, JUDY MCALLISTER,  
PATRICIA J. RICHMOND, MONA  
SAPPENFIELD, FRANK GAMBUZZA,  
AMY TANKSLEY, ANITA CHARLTON,  
YVETTE GRANGER, JIMMY BOYD,  
BRENDA GRAHAM, and REBECCA  
RUSSELL, in their official capacities  
as members of the Board.

Defendants.

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MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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The defendants have moved this Court for summary judgment pursuant to Tenn. R. Civ. P. 56 as to all issues in this case. The undisputed facts and law supporting this motion are set out below.

In our constitutional system, legislatures have considerable latitude in drawing distinctions and establishing standards for participating in public commerce. That latitude and discretion extend to determining the level of academic achievement appropriate to licensure as a master

barber. The plaintiff's challenge to the requirement established by the General Assembly should be rejected and the statute's constitutionality upheld.

## **BACKGROUND**

### **I. MR. ZARATE'S PURSUIT OF BARBERING AS A CAREER.**

According to the complaint, Elias Zarate wishes to become a licensed master barber in Tennessee. Complaint at ¶ 12. Without a proper certificate of registration, it is unlawful to practice barbering in this State. *See* Tenn. Code Ann. § 62-3-107. The eligibility requirements for a certificate include having "received a high school diploma or, in lieu of a high school diploma, ... a GED® or HiSET® diploma" (hereafter, the "academic achievement requirement") along with being at least 17 years old and completing the 1,500 hours of course work required at a registered barber school. Tenn. Code Ann. § 62-3-110(b). By his own admission, Mr. Zarate has not met this "academic achievement requirement." *See* Complaint at ¶ 141.

Despite not possessing a barbering certificate, Mr. Zarate worked as a barber in a licensed shop for some time before filing this suit, displaying a "bogus license" to accomplish this.<sup>1</sup> Complaint at ¶ 55. In January 2017, an inspector from the Board inspected the shop at which Mr. Zarate worked and cited him for providing barber services without a license. Complaint at ¶¶ 56-57. After this inspection, Assistant General Counsel Allison Renfro, on behalf of the Tennessee Department of Commerce & Insurance, filed a "Notice of Hearing and Charges" dated April 19, 2017, that notified Mr. Zarate of charges brought against him before the Board regarding violations of the Tennessee Barber Laws, Tenn. Code Ann. §§ 62-3-101, *et seq.* *See* Declaration of Hosam

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<sup>1</sup> The exact time is unclear because Mr. Zarate refused to answer a question about it on the grounds that, by virtue of the Fifth Amendment of the United States Constitution, he could not be compelled to give incriminating evidence against himself. *See* Plaintiff's Response to Defendants' First Set of Discovery Requests, Interrogatory No. 5.

William ("William Decl.") at ¶ 5 and Exh. I. That notice was sent to Mr. Zarate under cover of a letter from Ms. Renfro on the same date. *See id.*; *see also* Complaint at ¶ 58.

The Notice of Hearing and Charges describes Mr. Zarate's conduct and accuses him of violating Tenn. Code Ann. § 62-3-107 ("[n]o person shall practice or attempt to practice barbering in this state . . . without a valid certificate of registration issued pursuant to this chapter by the state board of cosmetology and barber examiners."). The notice asserts that Mr. Zarate's violation of this statute subjected him to "administrative discipline including, but not limited to[,] revocation of, suspension or *refusal to issue* or renew a master barber license for" Mr. Zarate as well as the assessment of civil penalties and investigatory costs. *See* William Decl. at Exh. I (emphasis added). The notice further advised Mr. Zarate that "the Board or its duly authorized representative will hear proof on whether to suspend, revoke or refuse to renew Respondent's license and/or whether to impose other lawful disciplinary action on Respondent, including civil penalties and all costs authorized by law." *See id.*

Mr. Zarate's contested case hearing was held before administrative law judge Elizabeth D. Cambron on June 12, 2017, after which Judge Cambron issued an "Initial Order" on August 22, 2017. *See* William Decl. at ¶ 7, Exh. III; *see also* Complaint at ¶ 67. The order made the following findings of fact:

- Mr. Zarate did not hold a valid license at any time relevant to the contested case proceeding;
- On January 18, 2017, a Regulatory Boards Field Representative ("inspector") visited a barber shop called Revolution Salon, located at 109 S. Front Street, Memphis, Tennessee 38103, to conduct an inspection of the premises, and to determine whether the shop was operating in compliance with applicable law;
- During this inspection, the inspector observed Mr. Zarate cutting a client's hair in the shop;

- Mr. Zarate had posted what appeared to be a valid master barber license: it displayed “his name, a license number, an expiration date, and the Department of Commerce and Insurance seal.”
- But when the inspector performed a search of the Board’s license database, the license posted for Mr. Zarate did not come up in the search.
- Mr. Zarate “told the inspector that [he] had never been to barber school.”
- Mr. Zarate “obtained the license from a source other than the Board . . . , but would not name the source.”
- Mr. Zarate “knew a barber shop was unlikely to hire him if he did not have a license” and Revolution Salon “asked to see a license before hiring him.”

*See* William Decl. at Exh. III, pp. 1-2.

Judge Cambron thus concluded, as a matter of law, that Mr. Zarate’s conduct violated Tenn. Code Ann. § 62-3-107, prohibiting the practice of barbering without a valid certificate of registration issued by the Board. *See* William Decl. at Exh. III, pp. 2-3. The judge also found Mr. Zarate’s conduct to implicate Tenn. Code Ann. § 62-3-121, which provides that “[t]he board may either refuse to issue or renew or may suspend or revoke any certificate of registration for any one (1) or combination of the following causes: . . . (6) Immoral or unprofessional conduct.” *See* William Decl. at Exh. III, p. 3.

In September 2017,<sup>2</sup> Mr. Zarate formally petitioned for a reconsideration of the Initial Order under Tenn. Code Ann. § 4-5-317.<sup>3</sup> *See* William Decl. at ¶ 8 and Exh. IV; *see also* Complaint at ¶ 68. That petition was denied by an “Order Denying Petition for Reconsideration of Initial Order” entered on September 25, 2017. *See* William Decl. at ¶ 9 at Exh. V. In addition, Mr. Zarate

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<sup>2</sup> The complaint alleges that this was done on September 5, 2017, and the Department of Commerce & Insurance’s records show that the petition was filed on September 6. The difference is immaterial. A petition for reconsideration must be filed with 15 days of the initial order under Tenn. Code Ann. § 4-5-317(a); that deadline in this instance was September 6, 2017. Petitions are deemed denied within twenty days after receipt under Tenn. Code Ann. § 4-5-317(c), and the denial notice was issued 20 days after the later of the two dates.

<sup>3</sup> “[A] petition for reconsideration, stating the specific grounds upon which relief is requested,” may be filed within 15 days of the entry of an initial or final order. Tenn. Code Ann. § 4-5-317(a).

was provided with a "Notice of Denial of the Petition for Reconsideration of the Initial Order" issued on September 25, 2017. *See* William Decl. at ¶ 9 at Exh. VI. This notice also advised Mr. Zarate that the Initial Order would become a final order unless either party filed a written appeal with the Administrative Procedures Division or the agency filed a written notice of review with the same division, in either case no later than October 10, 2017.

Under Tenn. Code Ann. § 4-5-315(b), a petitioner must file a petition for appeal from an initial order within 15 days of the entry of the initial order. That period is "tolled by the submission of a timely petition for reconsideration of the initial order pursuant to § 4-5-317, and a new fifteen-day period shall start to run upon disposition of the petition for reconsideration." Tenn. Code Ann. § 4-5-315(b). Mr. Zarate did not file a written appeal with the Administrative Procedures Division before October 10, 2017, or otherwise. *See* William Decl. at ¶ 10. Nor did the agency file a written notice for review. *See id.* at ¶ 11. Because there was no appeal from the Initial Order, it became a final order by operation of law on October 10, 2017. Mr. Zarate then had 60 days from that date to file a petition for judicial review under Tenn. Code Ann. § 4-5-322(b)(1)(A). That period expired on December 9, 2017, without Mr. Zarate ever filing a petition for review of the agency's decision. That decision is thus now final and unappealable.

Instead of appealing that decision, Mr. Zarate chose to come directly to this Court by filing a declaratory judgment action under Tenn. Code Ann. § 29-14-101, *et seq.*, *see* Complaint at ¶ 8, to challenge the constitutionality of the academic achievement requirement. Defendants moved to dismiss the suit for lack of justiciability because Mr. Zarate had not proceeded under the declaratory judgment provisions of Tennessee's Uniform Administrative Procedures Act, but this Court denied that motion on the grounds that Mr. Zarate was making a facial challenge to the

statute and was thus not required to exhaust his available administrative remedies. *See* "Memorandum and Order," October 31, 2018.

### **LAW AND ARGUMENT**

The complaint generally challenges the General Assembly's authority to require licensed barbers to have obtained a high school diploma, GED, or HiSET diploma (*see* Tenn. Code Ann. § 62-3-110). It seeks relief under three numbered claims:

- Claim 1 – that the educational requirement abridges Mr. Zarate's "right to earn an honest living," purportedly guaranteed by Article I, Section 8 of the Tennessee Constitution. *See* Complaint at ¶¶ 152-163;
- Claim 2 – that the educational requirement violates Mr. Zarate's right to equal treatment under the law secured by Article I, Section 8, and Article XI, Section 8, of the Tennessee Constitution. *See* Complaint at ¶¶ 164-174;
- Claim 3 – that the educational requirement violates Mr. Zarate's rights to due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution, as well as its protection of the privileges and immunities of citizens. *See* Complaint at ¶¶ 175-182;

The protections relied on by the plaintiff for Claims 1 and 2 duplicate those afforded by substantive due process and equal protection under the United States Constitution, and all of the claims are reviewed under a rational basis standard.

Under the broad deference afforded by this standard of review, the academic achievement requirement is well within the Tennessee General Assembly's broad authority to legislate the public policy of this State.

#### **I. MR. ZARATE BEARS THE BURDEN OF NEGATING EVERY CONCEIVABLE JUSTIFICATION FOR THE CHALLENGED STATUTE.**

This suit "makes a facial challenge to the constitutionality of Tenn. Code Ann. § 62-3-110(b)(2)'s requirement" of a particular level of academic attainment. "Memorandum and Order," Oct. 31, 2018 (denying Defendants' motion to dismiss). A facial challenge is an assertion that "no set of circumstances exist[s] under which the Act would be valid." *City of Memphis v. Hargett*,

414 S.W.3d 88, 103 (Tenn. 2013) (quoting *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993)).

In analyzing constitutional challenges, courts “start with a strong presumption that acts passed by the legislature are constitutional.” *State v. Decosimo*, 555 S.W.3d 494, 506 (Tenn. 2018) (quoting *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006)). Accordingly, every presumption is indulged, and every doubt resolved, in favor of the statute's constitutionality. *Id.* (citing *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003)). The challenger to a statute's constitutionality bears “a heavy burden of overcoming that presumption,” and the “burden of proof and persuasion rests with him.” *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001). *See Gallaher v. Elam*, 104 S.W.3d 455, 459-60 (Tenn. 2003) (quoting *West v. Tenn. Hous. Dev. Agency*, 512 S.W.2d 275, 279 (Tenn. 1974)) (“[T]he party attacking the constitutionality of a statute ‘must bear a heavy burden in establishing some constitutional infirmity of the Act in question.’”).

“This presumption applies with even greater force when, as here, the facial constitutional validity of a statute is challenged.” *Decosimo*, 555 S.W.3d at 506. A facial challenge is “the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid.” *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993).

In order to prevail in this suit, Mr. Zarate must negate not only the justifications proffered by Defendants in defense of the statute, but any set of circumstances that the Court may conceive under which the statute would satisfy the requirements of the United States and Tennessee constitutions.

## **II. THE ACADEMIC ACHIEVEMENT REQUIREMENT SATISFIES THE FOURTEENTH AMENDMENT.**

Barbers interact with the public at large both physically and commercially. Out of a concern for the health, safety, and welfare of Tennesseans who seek barbering services, the General Assembly has established a licensure requirement to practice barbering. *See* Tenn. Code Ann. § 62-3-107. The requirements for obtaining this certification are set out at Tenn. Code Ann. § 62-3-110(b) and include an age minimum (17), certain levels of profession-specific schooling, and the academic achievement requirement at issue in this suit. Together, these precautions are designed to ensure that Tennesseans may be assured that barbers in this State offer their services to the public with a certain level of personal competence and capability. This sort of policymaking is at the heart of the legislative prerogative and well within the General Assembly's authority under both the United States and Tennessee Constitutions.

### **1. Substantive Due Process Analysis Under the Rational Basis Standard.**

Mr. Zarate alleges that the academic achievement requirement violates the Fourteenth Amendment's guarantee of due process of law. *See* Complaint at ¶ 176. Because this is a facial—rather than as-applied—challenge and because there is no allegation that the legislative enactment of the academic achievement requirement was in any way procedurally deficient, the basis must be substantive due process.

Substantive due process, unlike procedural due process, “bars oppressive government action regardless of the fairness of the procedures used to implement the action.” Substantive due process has been used to protect rights such as the right to marry, have children, and make child-rearing decisions. “Substantive due process claims may be divided into two categories: (1) deprivations of a particular constitutional guarantee and (2) actions by the government which are ‘arbitrary[ ] or conscience[ ]shocking in a constitutional sense.’”

*In re: Walwyn*, 531 S.W.3d 131, 138-39 (Tenn. 2017) (internal citations omitted).

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

The academic achievement requirement at issue in this case is a legislative policy intended to protect the safety and welfare of the public through the regulation of professional conduct, which does not implicate any fundamental right under the United States Constitution. Indeed, Mr. Zarate has not alleged that the academic achievement requirement implicates a fundamental right or creates a suspect classification, and there is no authority that it does so under the Fourteenth Amendment. Rational basis is thus the appropriate standard of review.

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

Additionally, under the rational basis test, the government “has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and may be based on rational speculation unsupported by evidence or empirical data.” *Liberty Coins*, 748 F.3d at 694 (quoting *TriHealth, Inc. v. Bd. of Comm’rs*, 430 F.3d 783, 790 (6th Cir. 2005)) (internal quotation marks omitted); *see also U.S. Railroad Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (explaining that under rational-basis review, it is “constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.” (internal quotation marks omitted)); *Am. Express Travel Related Servs. Co.*,

641 F.3d at 690 (stating that “if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny”) (citation omitted).

## **2. The Academic Achievement Requirement Survives Plaintiff's Due Process Challenge Because It Has a Rational Basis.**

Tennessee law requires that every child between the ages of six and seventeen attend a public or private school, *see* Tenn. Code Ann. § 49-6-3001(c)(1), and the “State of Tennessee recognizes the inherent value of education and encourages its support” in its very constitution. Tenn. Const. Art. XI, § 12. “The value of education to each person and to society in general is immeasurably great.” *Tennessee Small School Sys. v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993).

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing [them] for later professional training, and in helping [them] to adjust normally to [their] environment.

*Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

Compulsory education can thus be understood as a means of ensuring that the general citizenry is trustworthy, competent, and responsible, which dovetails with the constitutionally-permissible use of State regulatory power to use occupational-licensing systems to “shield[ ] the public against the untrustworthy, the incompetent, or the irresponsible.” *Liberty Coins*, 748 F.3d at 692 (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)). While Tennessee's compulsory education laws do not require high school graduation, it is plain that all of the benefits described above are best realized if students complete the secondary education program as designed, which they ordinarily would accomplish by the end of their seventeenth year.

More particularly, the General Assembly could rationally have speculated that an increase in the State's level of high school graduation<sup>4</sup> would result in citizens earning more in income immediately and over the course of their lives. It could have taken note of the information provided by the Bureau of Labor Statistics at <https://www.bls.gov/careeroutlook/2016/data-on-display/education-matters.htm>.<sup>5</sup> These statistics compiled by the federal government for 2015 demonstrate that those possessing high school diploma had higher average weekly earnings by 37.5% (increasing from \$493 to \$678 per week). They also experienced a lower unemployment rate (falling from 8.0% to 5.4%).

This increase in earning power has a multiplicative benefit for the State as a whole, as illustrated by the brochure "The Graduation Effect: Every Student's Potential to Impact a Community" produced by the Alliance for Excellent Education. *See* Exhibit "B," attached.<sup>6</sup> An increase in the Tennessee population's overall earning power would expand and boost the economy by increasing the money those citizens spend in Tennessee. It would thus also increase Tennessee's sales and business tax revenue, both of which are measured by sales, boosting State revenues and funding additional State services. And those multiplicative benefits are not created solely by barbering. Students who are incentivized to graduate from high school by the prospect of a barbering career will have more professional opportunities available whether they pursue barbering or change their mind at some point in their future.

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<sup>4</sup> Throughout this brief, Defendants may refer to "high school graduation" or "graduating high school" in the context of meeting this requirement. This terminology is a stylistic choice that should be understood to include the high school equivalents that also meet the statutory requirement.

<sup>5</sup> Retrieved on May 27, 2020. A screen capture is attached as Exhibit "A."

<sup>6</sup> This document was retrieved from <http://impact.all4ed.org/US-GradEffect-Infographic.pdf> on May 28, 2020.

The incentive to graduate from high school created by conditioning access to the barbering profession on graduation may be marginal, but it *is* an incentive. Regardless of the precise number of people who would have graduated from high school without the academic achievement requirement, the number who will do so under that requirement is necessarily higher because the range of professional callings available after graduating is now that much greater, just as is the case with a variety of other professions that require a high school degree in Tennessee.<sup>7</sup> Each of these requirements pushes Tennessee students toward the goal of high school graduation, especially collectively.

The rational basis of the academic achievement requirement is also demonstrated by the complexity of the information that certified barbers must know and command in order to successfully pursue a license and comply with statutory and regulatory requirements. Defendants retained Casey-Haugner Wrenn, Assistant Commissioner with the Tennessee Department of Education, to review the licensure requirements for certified barbers and provide expert testimony on the reasonableness of the academic achievement requirement.

Ms. Wrenn concluded that the academic achievement requirement was “not ‘arbitrary’ but rather can be justified by looking at literacy comprehension requirements” necessary for mastering the barbering “licensing requirements (such as curriculum and testing)” as well as the statutes and regulations governing the profession. *See* Expert Report at 2.<sup>8</sup> She explained that a high school

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<sup>7</sup> Examples include funeral directors (*see* Tenn. Code Ann. § 62-5-305(a)(5)), embalmers (*see* Tenn. Code Ann. § 62-5-307(a)(5)), home inspectors (*see* Tenn. Code Ann. § 62-6-305(2)), affiliate real estate brokers (*see* Tenn. Code Ann. § 62-13-303(a)(2)), real estate instructors (*see* Tenn. Code Ann. § 62-13-324(a)(2)), land surveyors (*see* Tenn. Code Ann. § 62-18-109(a)(5)), principal auctioneers (*see* Tenn. Code Ann. § 62-19-111(c)(3)), real estate appraisers (*see* Tenn. Code Ann. § 62-39-303(1)), pedorthists (*see* Tenn. Code Ann. § 63-3-202(a)(2)(B)(i)), registered nurses (*see* Tenn. Code Ann. § 63-7-104(2)), nursing home administrators (*see* Tenn. Code Ann. § 63-16-104(a)(3)), and electrologists (*see* Tenn. Code Ann. § 63-26-111(3)).

<sup>8</sup> Ms. Wrenn's “Expert Witness Report” is attached as Exhibit “1” to her affidavit, which is Exhibit “A” to Defendants' motion for summary judgment.

diploma or equivalent could rationally be considered a “proxy” for measuring the linguistic skills necessary for obtaining and maintaining a master barber certification because “it is one of the most easily accessible, economical, and nationally benchmarked measures of academic skill and competency available to individuals.” Expert Report at 2-3.

More specifically, Ms. Wrenn opined that the academic achievement requirement “would effectively discern between individuals who have a high likelihood of comprehending a specific text.” She further reasoned that “[t]his discernment is appropriate to differentiate between applicants who would be qualified to not only obtain the license but also fully comply with governing regulations while practicing and those who may be able to complete specific tasks with fidelity but not be able to fully comprehend or comply with governing laws in perpetuity.” Expert Report at 4. This, in particular, highlights the reasonableness of the requirement when applied to someone like Mr. Zarate, who claims to be a fully capable barber regardless of his lack of formal training and a high school degree. Even if that were true, it would not necessarily be the case that Mr. Zarate or someone else in his position would have the capability to properly maintain his license and practice barbering in accord with the health and safety requirements periodically adjusted and amended by the General Assembly and the Board.

To determine the reasonableness of using a high school degree as a proxy for linguistic capability, Ms. Wrenn relied on the Lexile Framework and Text Measures, “a well-known, research-based methodology for determining text complexity and a person’s reading comprehension ability.” Expert Report at 6. Relying on the Lexile Framework’s own website, Ms. Wrenn explains that “[e]ducators use Lexile measures to match students with text . . . The Lexile scale is like a thermometer from below 0L for beginner readers to above 2000L . . . When a Lexile text measure

matches a Lexile reader measure, this is called a 'targeted' reading experience. The reader will likely have some challenge with the text, but not enough to get frustrated." Expert Report at 7.

"When the state is considering an appropriate demonstration of competence to ensure future comprehension of all rules and regulations, one could use . . . the Lexile framework, as a proxy to understand a person's needed comprehension." Expert Report at 8. Ms. Wrenn was able to "estimate the typical Lexile Reader Measures demonstrated by students in different grade levels based on historical research. Expert Report at 8; see Expert Report at 9, Fig. 2. The typical range for a student in 11th and 12th grades is 1130L to 1440L. For 10th grade, the range is 1085L to 1400L. Of course, a successful high school graduate would be on the higher end of the 11th and 12th grade range, "well above 1400L." Expert Report at 8.

In her analysis, Ms. Wrenn examined a selection of relevant texts, including text from a standard barbering textbook (Milady's *Standard Textbook of Professional Barber-Styling*), the Master Barber Examination Candidate Information Bulletin prepared for master barber candidates by PSI Services LLC (the third-party administrator of Tennessee's examination), selections from the barbering statutes and regulations, as well as certain federal regulations from the Environmental Protection Agency and Food and Drug Administration that are referenced by the Tennessee regulations. *See* Expert Report at 9-10. She produced a series of Lexile measures that indicated that these sources—all of which are relevant and necessary for an aspiring or licensed barber to comprehend—are more aligned with a high school graduate than a 10th grade student so that "[a] student who had successfully completed high school would have a much higher likelihood of comprehending more of the information in the textbook." Expert Report at 10.

Ms. Wrenn's initial Lexile analysis is described in her report and more fully described in response to Plaintiff's Interrogatory No. 25. *See* Notice of Filing, Item No. 3. After her deposition

by Plaintiff's counsel, Ms. Wrenn performed the measurements again to address certain concerns raised during that examination. Those results are more fully stated in Ms. Wrenn's affidavit, *see* Affidavit at ¶¶ 12-15, and Exhibit 3, but are summarized in the table below.

<b>Item</b>	<b>Text</b>	<b>Lexile Score</b>
1	Tenn. Code Ann. § 62-3-109(a) through (c)(1)(B)	1410 – 1600
2	Tenn. Code Ann. § 62-3-118	1010 – 1200
3	Tenn. Code Ann. § 62-3-121	1210 – 1400
4	Tenn. Code Ann. § 62-3-129 (c)(1) through (3)	1210 – 1400
5	Tenn. Code Ann. § 62-3-132	1210 – 1400
6	Rules of the Barber Board <sup>9</sup> 0200-01-.05	1410 – 1600
7	Rules of the Barber Board 0200-01-.06 (5)	1610 – 1800
8	Rules of the Barber Board 0200-01-.06 (8)(b)	1810 and above
9	Rules of the Barber Board 0200-01-.11 (1)(a)(1)	1010 – 1200
10	Rules of the Barber Board 0200-03-.04	1610 – 1800
11	Rules of the Barber Board 0200-03-.05 (2)(a)	1610 – 1800
12	Milady's Introduction	1210 – 1400
13	Milady's Introduction and Bacteriology	1010 – 1200
14	Milady's Introduction and Color Theory	1210 – 1400
15	Milady's Faradic Current	1210 – 1400
16	PSI Services LLC Master Barber Examination Bulletin	1210 – 1400
17	Blood Spill Procedures	810 – 1000
18	EPA Excerpt: Registered Disinfectants	1610 – 1800
19	EPA Excerpt: Registered Sterilizers	1010 – 1200

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<sup>9</sup> Tenn. Comp. R. & Regs.

Of the items analyzed by Ms. Wrenn, the scores of seven of the nineteen (Items 1, 6 to 8, 10, 11, and 18) are entirely above the highest end of the 10th grade range. Another seven (Items 3 to 5, 12, and 14 to 16) have an upper limit of 1400L, the same as for 10th grade, but the lower limit, 1200L, is considerably higher than the lower limit for 10th grade readers. Four items (Items 2, 9, 13, 19) have upper limits of 1200L, which is still considerably higher than the lower limit for 10th grade. Only Item 17 is entirely within the range for the 10th grade.

By contrast, the upper end of the 11th and 12th grade range covers the upper limit of twelve of the seventeen items (all but Items 1, 6 to 8, 10, 11, and 18), and when we consider that a high school graduate would be at the higher end of that range—the upper limit of which is 1440L—those graduates will likely have a strong command of all twelve of those items and be within the range of two more (Items 1 and 6).

Based on this analysis, the General Assembly could reasonably conclude that a high school diploma provides more assurance, as a proxy, that master barbers and aspiring barbers will be able to successfully and safely maintain those licenses and comply with the evolving regulatory framework on an ongoing basis.

In its wisdom as the policy-making body for the State, to regulate the practice of barbering the General Assembly has enacted Tenn. Code Ann. § 62-3-101, *et seq.*, a set of statutes that define the practice and govern it through requirements imposed on barbers, shops, and schools. It also created the Board of Cosmetology and Barber Examiners to administer those statutes, vesting in it the power to promulgate rules, which add further detail to the educational, safety, and practical standards for the profession. Using a high school education as a convenient proxy for a level of linguistic capability necessary to understand and comply with this regulatory regime is entirely

rational. The academic achievement requirement thus has a rational basis and should be sustained against Mr. Zarate's substantive due process challenge.

Mr. Zarate disagrees with the wisdom of the academic achievement requirement, but even if he had the better of the argument, sub-optimal policy choices do not create constitutional grounds to invalidate statutes and regulations. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Justice Holmes dissented from the *Lochner* Court's invalidation of a state law because "[i]t is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical, as" the one under review. *Id.* History has long since vindicated Justice Holmes. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

#### **B. The Academic Achievement Requirement Poses No Equal Protection Concerns.**

Mr. Zarate alleges that the academic achievement requirement also violates his right to equal protection of the law under the Fourteenth Amendment. See Complaint at ¶ 176. "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011). Again, there is no allegation that barbering is a fundamental right or that the academic achievement requirement subjects Mr. Zarate to a suspect classification. The plaintiff's only avenue to relief through the Equal Protection Clause is thus to establish disparate treatment as to similarly-situated persons without a rational basis.

Mr. Zarate argues that allowing cosmetologists to become licensed with a 10th grade education while barbers must complete high school violates the “guaranty of equal treatment.” Complaint at ¶ 166.<sup>10</sup> He also points to a handful of other professions or positions that do not require a high school diploma, including emergency medical responders (“EMRs”) (Complaint at ¶ 168) and elected officials such as the governor, senators, and representatives (Complaint at ¶ 170).

Cosmetologists are at least regulated by the same board as barbers, but the comparison to EMRs is obvious cherry-picking. Defendants have identified eleven different professions—in addition to master barbers—for which a high school education is required for licensure. The question becomes whether it is the General Assembly—the policy-making body of the State of Tennessee—that will decide on the licensure requirements for professions, or the courts on a case-by-case *ad hoc* basis. If a court can invalidate, on constitutional grounds, a licensure requirement for barbers because it has not been applied to a completely unrelated profession like emergency medical services, then it is acting as little more than a super-legislature in second-guessing the policy choices of the people’s representatives.

The comparison to elected officials is even more attenuated. The role of elected officials in a constitutional democracy does not resemble, in any way, the role of professionals who hold themselves out to the public as competent and safe purveyors of services. The governor doubtless holds more influence and authority than any individual barber or EMR or land surveyor, as well as any attorney who is required to hold an advanced degree before sitting for the bar exam. By Mr. Zarate’s logic, the requirement of a law degree is unconstitutional because we do not require a

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<sup>10</sup> In fact, there currently is not an educational requirement for cosmetologists. *See* Tenn. Code Ann. § 62-4-110.

similar level of education for the governor. Following this reasoning would tear down every licensure requirement in the State.

But even cosmetologists are not similarly situated with barbers. The two professions are governed by entirely different statutory regimes—Tenn. Code Ann. §§ 62-3-101, *et seq.* for barbers, Tenn. Code Ann. §§ 62-4-101, *et seq.* for cosmetologists—and entirely separate sets of rules—Tenn. Comp. R. & Regs. Chapter 200 (for barbers) and Tenn. Comp. R. & Regs. Chapter 440 (for cosmetologists)—a legacy of the time when the professions were governed by entirely separate boards. *See* 2014 Pub. Laws Ch. 964 (consolidating the two boards). It is the General Assembly that defines the scope of the professions of barbering and cosmetology for purposes of Tennessee law. It is the General Assembly that decides how to regulate these professions and whether to entrust this process to one board or two.

However similar the professions of barbering and cosmetology may seem to Mr. Zarate, “[p]erfection in statutory classifications is neither possible nor constitutionally required. *Harmon v. Angus R. Jessup Associates, Inc.*, 619 S.W.2d 522, 524 n.2 (Tenn. 1981) (citing *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976)). And “[t]he equal protection clause does not require a state legislature to choose between dealing with all aspects of a problem or not dealing with it at all.” *Id.* (citing *Dandridge v. Williams*, 397 U.S. 471 (1970)). It is reasonable to infer that the Tennessee General Assembly saw an opportunity to address an ongoing concern about educational attainment in Tennessee by adding barbering to the many professions that already require a high school diploma. As explained above, doing so clearly increases the overall incentive for Tennesseans to finish high school. But the Equal Protection Clause does not require the General Assembly to simultaneously impose such a requirement upon every profession for which it might

rationally be justified. Instead, it can choose to deal only with *some* aspects of the problem at a given time.

Invalidating the General Assembly's choice to impose separate licensure requirements on barbering and cosmetology is tantamount to invalidating the larger choice to distinguish between barbering and cosmetology as professions entirely. Nothing in the Equal Protection Clause or the United States Constitution requires this Court to so thoroughly invade the policy-making province of the legislature.

**C. The Complaint Does Not Establish A Privileges and Immunities Claim.**

The third basis on which Mr. Zarate relies for his federal constitutional challenge is the Privileges and Immunities Clause of the Fourteenth Amendment. *See* Complaint at ¶ 176. But nothing in the complaint actually supports a claim under this clause.

Under the Privileges and Immunities Clause, “[t]he Citizens of each State [are] entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const., Art. IV, § 2, cl. 1. While the clause does protect “the right of citizens to ‘ply their trade, practice their occupation, or pursue a common calling,’” *McBurney v. Young*, 569 U.S. 221, 227 (2013), this is only in the context of one state’s protectionism against citizens of other states. “[T]he Court has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens.” *McBurney*, 569 U.S. at 227. Because Mr. Zarate does not allege that the challenged action was made in order to provide a competitive economic advantage for Tennessee citizens against out-of-state citizens, the Privileges and Immunities claim fails. *See generally Merrifield v. Lockyer*, 547 F.3d 978, 983-84 (9th Cir. 2008) (holding that the right to pursue one’s chosen profession does not fall within the purview of the Privileges and Immunities Clause).

**III. THE ANALYSIS UNDER THE TENNESSEE CONSTITUTION IS THE SAME AS UNDER THE FEDERAL CONSTITUTION.**

Mr. Zarate also makes claims under the Tennessee Constitution, including Article I, § 8, and Article XI, § 8 (respecting equal treatment) and under the “Law of the Land Clause” in Article I, § 8. Tennessee courts have long held that these provisions largely parallel the Due Process and Equal Protection clauses of the United States Constitution discussed above.

“Both the United States and Tennessee Constitutions protect the right to due process of law” in the former’s Fourteenth Amendment and the latter’s “Law of the Land” Clause (Article I, section 8), respectively. *Hughes v. Bd. of Probation and Parole*, 514 S.W.3d 707, 715 (Tenn. 2017). Article I, section 8, of the Tennessee Constitution (the “law of the land clause”) “is ‘synonymous’ with the Due Process Clause of the Fourteenth Amendment.” *Id.* (emphasis added); *see also Dep’t of Correction v. Pressley*, 528 S.W.3d 506, 513 (Tenn. 2017) (noting that “Tennessee’s ‘law of the land clause,’ provides identical due process protections” to those secured by the Fourteenth Amendment); *Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006) (stating that the law of the land clause is “synonymous with the due process provisions of the federal constitution”). The Tennessee Supreme Court has also “concluded that Article I, section 8 and Article XI, section 8 of the Tennessee Constitution provide “essentially the same protection” as the Equal Protection Clause of the United States Constitution.” *Hughes*, 514 S.W.3d at 715 (quoting *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993)).

Tennessee courts have also deployed the same formulation of the rational basis standard of review. “[U]nder the rational basis test, specific evidence is not necessary to show the relationship between the statute and its purpose. Rather,” courts ask “only whether the law is reasonably related to proper legislative interests.” *Riggs v. Burson*, 941 S.W.2d 44, 52 (Tenn. 1997). *See also Hughes*, 514 S.W.3d at 715 (applying rational basis analysis to any equal protection claim that neither

“operates to the peculiar disadvantage of a suspect class” or “interferes with the exercise of a fundamental right”). “When applying the rational basis test, [the Tennessee Supreme Court has] observed that state legislatures have the initial discretion to determine what is ‘different’ and what is ‘the same’ and that they are given considerable latitude in making those determinations.” *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003).

Because the due process and equal protection guarantees of the United States and Tennessee Constitutions are largely synonymous, with no exception applicable to the case before this Court, the analysis is the same—the academic achievement requirement is supported by a rational basis and should be upheld against Mr. Zarate’s constitutional challenge.

**CONCLUSION**

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

Respectfully submitted,

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