No. 12-0657

In the Supreme Court of Texas

ASHISH PATEL, ANVERALI SATANI, NAZIRA MOMIN,
MINAZ CHAMADIA, and VIJAY LAKSHMI YOGI,

Petitioners / Cross-Respondents,

v.

TEXAS DEPARTMENT OF LICENSING AND REGULATION, ET AL.,

Respondents / Cross-Petitioners.

On Petition for Review from the
Third Court of Appeals at Austin, Texas
No. 03-11-00057-CV

PETITIONERS' BRIEF ON THE MERITS

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Minaz Chamadia
Vijay Lakshmi Yogi

Respondents / Cross-Petitioners / Defendants

Texas Department of Licensing and Regulation; William H. Kuntz, Jr., in his official capacity as executive director of the Department; Texas Commission of Licensing and Regulation; and the members of the Commission in their official capacities:

Mike Arismendez
Lewis Benavides**
Frank Denton**
LuAnn Roberts Morgan
Fred N. Moses
Lilian Norman-Keeney**
Catherine Rodewald**
Ravi Shah**
Deborah Yurco

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* Tahereh Rokhti was a party to the trial court's final judgment and, for this reason, she is listed here. *See* Tex. R. App. P. 55.2(a). However, this Court later granted Ms. Rokhti's request to sever her appeal and voluntarily dismiss her claims against the Respondents.

** Former Commission members Lewis Benavides, Frank Denton, and Lilian Norman-Keeney were parties to the trial court's judgment in their official capacities, but they have all since left the Commission. Ravi Shah and Catherine Rodewald have replaced them, while one position remains vacant. Mr. Shah and Ms. Rodewald are therefore automatically substituted as parties in their official capacities, as will be any Commissioner appointed to fill the current vacancy. *See* Tex. R. App. P. 7.2(a).

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In the Third Court of Appeals
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STATEMENT OF THE CASE

Nature of the Case:	Action for declaratory and injunctive relief based on Article I, § 19 of the Texas Constitution.
Trial Court:	The Honorable Gisela D. Triana-Doyal, 200th Civil District Court, Travis County.
Trial Court: Disposition	The state's plea to the jurisdiction was denied, the Petitioners' motion for summary judgment was denied, and the state's motion for summary judgment was granted.
Court of Appeals:	The parties cross-appealed to the Third District Court of Appeals. Petitioners sought reversal of the denial of their motion for summary judgment; the state sought reversal of the denial of its plea to the jurisdiction. The Appellants and Cross-Appellees were Ashish Patel, Anverali Satani, Nazira Momin, Tahereh Rokhti, Minaz Chamadia, and Vijay Lakshmi Yogi. The Appellees and Cross-Appellants were the Texas Department and Texas Commission of Licensing and Regulation, William H. Kuntz, Jr., in his official capacity as executive director of the Department, and the members of the Commission in their official capacities—namely, Frank Denton, Mike Arismendez, Lewis Benavides, LuAnn Roberts Morgan, Fred N. Moses, Lilian Norman-Keeney, and Deborah Yurco.
Court of Appeals Disposition:	The court of appeals affirmed the denial of the state's plea to the jurisdiction and affirmed summary judgment for the state in an opinion authored by Justice Melissa Goodwin (joined by Justices Puryear and Henson). *Patel v. Tex. Dep't of Licensing & Regulation*, No. 03-11-00057-CV, 2012 Tex. App. LEXIS 6187 (Tex. App. July 25, 2012, pet. filed) (mem. op.). *See* Appendix 1.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Texas Government Code § 22.001(a)(6) because this case presents important constitutional issues likely to recur in future cases. In addition, this Court has jurisdiction because the court of appeals held differently from a prior decision of other courts of appeals on a material question of law. *See* Tex. Gov't Code § 22.001(a)(2).

ISSUES PRESENTED

1. What test governs substantive due process challenges to economic regulations brought under Article I, § 19 of the Texas Constitution—the real and substantial test, a rational basis test that considers evidence, or a rational basis test that does not consider evidence?

2. If the real and substantial test controls, does the record show a real and substantial connection between the state's eyebrow threading regulations and public health and safety and, if so, are those regulations unduly burdensome?

3. If the rational basis test controls, does it require courts to weigh evidence and, if so, does the record show any rational relationship between the state's eyebrow threading regulations and the state's legitimate public safety objectives?

TO THE HONORABLE SUPREME COURT OF TEXAS:

This case asks the Court to decide what test governs substantive due process challenges to economic regulations brought under Article I, § 19 of the Texas Constitution and whether facts matter in the inquiry at all. The lower courts apply a variety of tests, which fall into three principal lines of authority: (1) those applying the "real and substantial test"; (2) those applying the "Texas rational basis test," which takes account of evidence; and (3) those applying the "no-evidence rational basis test," which takes no account of evidence. This Court has twice recognized this split of authority and twice declined to decide which test governs.

The Court should adopt the real and substantial test. This test asks whether an economic regulation has a *real* and *substantial* connection to a legitimate governmental objective and, if so, whether the regulation is unduly burdensome in light of that objective. The rational basis test, by contrast, asks whether a given regulation is merely *rationally* related to a legitimate governmental objective—a more permissive standard that, over time, has led some Texas courts to disregard all evidence of government overreach in favor of blanket deference to the political branches.

As demonstrated below, this Court's precedents, Texas's unique history and values, and precedents from other jurisdictions all support the

adoption of the real and substantial test. In the 18 years since this Court reserved the question, however, the lower courts have drifted between the three available tests—sometimes applying meaningful judicial review and other times applying knee-jerk deference to the government. Today, our courts need to be more engaged—not less engaged—in protecting the constitutional rights of Texans against state regulatory overreach. Because facts matter in state constitutional adjudication, the Court should grant the petition for review and hold that the real and substantial test controls.

STATEMENT OF FACTS

The Petitioners are three eyebrow threaders and two eyebrow-threading entrepreneurs. Threading—as it is commonly called—is a South Asian method of hair removal that uses a single strand of cotton thread to remove unwanted facial hair. *See* Parts I & II *below*. This appeal arises from the Petitioners' state constitutional challenge to a recent change in state policy, the effect of which is to require eyebrow threaders to obtain hundreds of hours of training in conventional, Western-style cosmetology techniques that threaders do not use. *See* Part III *below*.

While the opinion of the court of appeals correctly states the general nature of this case, it fails to address a number of undisputed facts critical to its outcome. First, the parties agree that no one is required to learn

eyebrow threading to obtain a cosmetology license. *See* Part IV *below*. Second, the parties agree that no one must prove they know how to thread to obtain a cosmetology license. *See* Part V *below*. Finally, the parties agree that all of the Petitioners in this case work in, or own, licensed salons, which must comply with the state's many health and safety standards for cosmetology businesses and their employees. *See* Part VI *below*.

The court of appeals also failed to appreciate the significance of a key factual dispute—specifically, how much sanitation training threaders need to keep the public safe. Medical testimony offered by the Petitioners shows threading is a safe procedure that requires, at most, basic sanitation training that takes one hour to complete. The state, however, maintains that threaders need 750 hours of conventional cosmetology training in order to learn basic sanitary practices like washing your hands and keeping your work area clean. *See* Part VII *below*. The court of appeals specifically acknowledged this factual dispute, but failed to recognize that the dispute should have, at minimum, led to the reversal of the trial court's grant of summary judgment to the state.

I. The technique of eyebrow threading

Eyebrow threading is an ancient and all-natural hair removal technique practiced widely in South Asia. CR[1] at 177, 181, 185, 193, 501. Threaders—as practitioners are commonly called—tightly wind a single strand of cotton thread, form a loop with their fingers, and then quickly brush the thread along their customer's face, trapping unwanted hair in the loop and instantly removing the hair from its follicle. CR at 186, 188, 501-02. The technique is illustrated in the record with pictures, a diagram, and a link to an online demonstration. CR at 177, 188, 585 (citing http://www.youtube.com/watch?v=EIeHYNt-rl4).

Eyebrow threading is unlike conventional Western cosmetology because it does not involve chemicals, dyes, or sharp objects. *See* CR at 193-96, 523-24. Instead of hot wax, tweezers, scissors, and lasers, threaders use only a single strand of cotton thread, which is never reused, making the method simpler, safer, and cheaper than conventional Western methods of hair removal.[2] *See* CR at 177, 181, 521-25.

[1] Petitioners use "CR" to refer to the trial court's single-volume Clerk's Record.

[2] Some threaders use scissors to clip larger hairs as an incidental part of the threading process. *See* CR at 405, 525. Petitioners have never argued that they have a constitutional right to use scissors—or any other reusable tool—without a cosmetology license.

II. Petitioners' jobs and businesses are threatened by new state-licensing requirements for eyebrow threading.

Petitioners Nazira Momin, Minaz Chamadia, and Vijay Yogi are eyebrow threaders who work for Justringz—a threading salon with locations in San Antonio and Irving. CR at 206-07, 212-16. Each is an expert eyebrow threader—Ms. Momin has been threading for 20 years, Ms. Chamadia for 10 years, and Ms. Yogi for 8 years. CR at 207, 213, 216. None has a state cosmetology license. *Id*. Petitioner Anverali Satani owns two licensed threading salons in Austin and, with Petitioner Ashish Patel, he is attempting to expand his business to San Antonio, Houston, Flour Bluff, Corpus Christi, and Boerne. CR at 198-200, 202-04, 1486, 1489. (Petitioners are collectively called the "Threaders" below.)

After years of inaction, the Texas Department of Licensing and Regulation ("TDLR") abruptly deemed threading to be the practice of cosmetology in early 2008, *see* CR at 244, 264, 283, thus making it illegal to practice threading without a cosmetology license. Tex. Occ. Code § 1602.251(a). As a result, unlicensed threaders risk fines of up to $5,000 every day they go to work. Tex. Occ. Code § 51.302(a); CR at 285.

In 2009, TDLR cited Ms. Momin and Ms. Yogi. CR at 50-52, 64-66. Both women received notices imposing $2,000 fines (and threatening them with daily fines of up to $5,000) based on allegations they were practicing

cosmetology without licenses.[3] *Id.* Ms. Chamadia fears enforcement against her, too, because she works at the Justringz location where Ms. Momin and Ms. Yogi were cited, and she was present when TDLR investigated that location for employing unlicensed threaders. CR at 212-13.

It is also illegal to employ a person without a cosmetology license, so business owners face the same penalties as unlicensed threaders if they allow them to work in their salons. Tex. Occ. Code §§ 51.302(a); 1602.403(c)(1); CR at 285. Indeed, Mr. Satani received two warnings because he employs unlicensed threaders. CR at 47-49; 202-04. He and Mr. Patel have made every effort to comply with the new law: They have attempted to hire licensed cosmetologists, but licensees have no training or skill in threading; they have also offered to pay unlicensed (but competent) threaders to pursue cosmetology licenses, but threaders have uniformly declined their offers. CR at 198-204.

[3] At the time Ms. Momin and Ms. Yogi were cited, it was unclear whether threading was even "cosmetology" as it is defined in state law; but this uncertainty was resolved when, in 2011, the Legislature amended the cosmetology laws to include—and thus regulate—compensated hair removal using "tweezing techniques." *See* S.B. 1170 (82nd Leg., R.S.), Sec. 12, codified at Tex. Occ. Code § 1602.002(a)(9). TDLR has since defined "tweezing techniques" as any type of temporary hair removal using thread. 16 Tex. Admin. Code § 83.10(28).

III. The burdens of obtaining a cosmetology license

Threaders are understandably reluctant to pursue licensing. Obtaining a cosmetology license requires either 750 or 1,500 hours of instruction in a state-licensed beauty school, depending on whether the would-be cosmetologist pursues the state's facialist specialty license or its general operator license. Tex. Occ. Code §§ 1602.254(b)(3), .257(b)(3); CR at 297. Cosmetologists who take the easier 750-hour route through the facialist program must devote 225 hours to learning masking and other facial treatments, 75 hours to makeup, 50 hours to chemistry, 75 hours to "electricity, machines, and related equipment," 15 hours to aroma therapy, 10 hours to nutrition, and 10 hours to "color psychology," among other topics. 16 Tex. Admin. Code § 83.120(b). TDLR does not require a single minute of threading training. *See* Part IV *below*.

Cosmetology school is also expensive—a legislative report shows it costs between $7,000 and $22,000 to attend beauty school for the nine to 16 months it takes to complete the required coursework. CR 305-10.[4]

[4] This document—a report of the Texas House Committee on Government Reform—was excluded from evidence by the trial court based on authentication and hearsay objections. CR at 3091; 3516. The document is nevertheless a self-authenticating government report of which this Court may take judicial notice. Tex. R. Evid. 201; 803(8), 901(b)(7), & 902(5). Regardless of whether the Court relies on the precise figures in the report, however, the record contains other evidence that cosmetology school is expensive and time consuming. *See* CR at 1973 (TDLR's witness says that the 750-hour curriculum costs $9,000 on average); Tex. Occ. Code § 1602.451(a)(5) (requiring minimum of nine months for 1,500-hour curriculum).

Would-be cosmetologists also must take the state's practical and written examinations at a cost of $133, excluding the cost of preparation. *See* 16 Tex. Admin. Code §§ 83.20(a)(6), .21(c), (e); CR at 328-29, 800-01. These examinations are administered only in English, Spanish, and Vietnamese, CR at 330, 802, presenting unique challenges for South Asian immigrants. To maintain a license, successful examinees must pay $53 biannually and take continuing education courses. 16 Tex. Admin. Code §§ 83.20(a), .25(e), .26(a)-(b), .31(a), .80(a)-(b).

IV. It is undisputed that threading technique is not part of the cosmetology curriculum.

Everyone agrees that threading training is not required to obtain either a facialist or general cosmetology operator license. TDLR is responsible for reviewing and approving all beauty-school curricula, Tex. Occ. Code §§ 1602.354, .453(b)-(c), and schools have to submit their lesson plans to TDLR. CR at 353-54. But the agency admits that it has no curriculum guidelines for threading and that it does not require beauty schools to teach threading technique. CR at 236, 278, 786, 1695. At most, five schools—one percent of the state's total 389 beauty schools—teach threading voluntarily. CR at 292, 377-400, 405-07, 415-17, 425-26, 433-34, 1664-65. Only one of these five (a school in Lubbock) devotes more than a few hours to threading. CR at 143-44 (summarizing the schools' classes).

V. It is undisputed that threading technique is not tested on the licensing examinations.

In line with this lack of instruction, the state's practical and written examinations do not require any knowledge of threading. Both tests are administered and scored by a third-party testing firm. CR at 328-30 (general operator guidelines); CR at 800-01 (facialist testing guidelines). The firm's testing guidelines show that both practical examinations do not require any ability to thread, although they specifically test conventional techniques that *are* taught in beauty school—including tweezing, waxing, depilatories, and cutting, curling and relaxing hair. CR at 335-40, 809-11.

In the trial court, TDLR suggested that a recent change to the facialist guidelines allows (but does not require) examinees to use thread, rather than metal tweezers, to demonstrate their ability to tweeze. RR (MSJ)[5] at 81:7-82:17. But examinees also must hold a customer's skin taut while tweezing, CR at 810, which is impossible for threaders because they need both of their hands to thread. *See* Part I *above*. At best, threading is an *optional* method of showing you know how to tweeze; but no one is *required* to show she can thread. And no such option exists for the general operator test, *see* CR at 335-40, although TDLR allows anyone with a general operator license to perform threading all the same. CR at 297.

[5] Petitioners use "RR (MSJ)" to refer to the Reporter's Record from the December 9, 2010 hearing on the parties' cross-motions for summary judgment.

The written examinations also do not test threading technique.[6] *See* CR at 334-35, 806; *see also* CR at 576-79 (TDLR's witness acknowledges that threading is not tested on the written examination). Moreover, the written examinations are scored in a way that allows candidates to pass (with room to spare) even if they answer every general sanitation question incorrectly. *See* CR at 334, 806.

VI. It is undisputed that all of the Petitioners work in (or own) licensed salons.

Of course, the state licenses salons, as well as individuals. Tex. Occ. Code § 1602.305. Salons are required to comply with all of TDLR's health and safety regulations. 16 Tex. Admin. Code § 83.71(b). Those regulations address all of the commonsense sanitation practices that threaders must observe to keep the public safe. For example, salon employees must "wash their hands with soap and water, or use a liquid hand sanitizer, prior to performing any services on a client." 16 Tex. Admin. Code § 83.105. They must keep their work areas clean and dispose of non-reusable items, including thread, after each use. *Id.* Salons are subject to inspections that ensure compliance. Tex. Occ. Code § 1603.104.

[6] Because the written examination is a proprietary document belonging to TDLR's contractor, its specific contents are subject to a trial court order that prevents Petitioners from discussing the examination in any detail in this publicly available brief. *See* CR at 491-97. However, the parties' sealed briefing on the exam questions, and the examination questions themselves, are included in the record. *See* CR at 3518-19.

It has never been in dispute that all of the Threaders in this case work in (or own) licensed salons.[7] CR at 74, 202-08, 212-16, 1486, 1489, 1544. And the Threaders have never questioned the constitutionality of the state's salon regulations—they only challenge the individual-licensing laws as applied to eyebrow threading. CR at 125-26.

VII. The only dispute is over how much sanitation training threaders need to keep the public safe.

Petitioners' expert, Dr. Seema Patel, specifically addressed the issue of how much sanitation training threaders need to keep the public safe, and she concluded that threaders need one hour of training to master three simple practices: wash your hands, use new thread, and keep your work area clean. CR at 506, 508, 521. Each of these commonsense practices is separately required by the salon-licensing laws and enforced by inspections. *See* Part VI *above*.

Dr. Patel is a public-health-trained physician who runs a medical spa providing threading services alongside other forms of temporary hair removal. CR at 499-501, 507-09, 527-28. While TDLR admits that it has not researched eyebrow threading, CR at 240-43, and offers no expert testimony of its own, Dr. Patel's report addresses all of the available

[7] The one exception is Mr. Patel, whose claims are based on his efforts to open salons, not on his operation of existing salons. CR at 198-200. But his business partner, Anverali Satani, operates licensed salons. CR at 1486, 1489.

medical literature on eyebrow threading, as well as her own empirical analysis of the technique's safety in a commercial setting. CR at 499-526. Based on this investigation and her personal experience teaching sanitation, Dr. Patel concludes that threading is a safe procedure—much more so than conventional cosmetology practices—and that its sanitary practice in a salon does not require conventional cosmetology training. CR at 505-06, 523-26. Indeed, Dr. Patel spends just one hour teaching basic sanitation to the threaders she employs. CR at 508.

Although the record shows that one hour of sanitation training would guarantee public safety, the Threaders conceded below (and concede here) that 40 hours of the 750-hour facialist curriculum are at least arguably relevant because they address general sanitation, safety, and first aid. 16 Tex. Admin. Code § 83.120(b). TDLR argued below that its sanitation training actually amounts to 430 hours. *See* CR at 785. In addition to the 40 hours of general sanitation training that the Threaders agree is relevant, TDLR tacks on 225 hours devoted to facial treatments, cleansing, and masking, 90 hours devoted to anatomy and physiology, 50 hours devoted to cosmetology laws and rules, and 25 hours devoted to hair removal generally.[8] *Id.*

[8] At oral argument in the court of appeals, TDLR conceded that, by its own reckoning, at least 57% of the 750-hour program is altogether irrelevant to threading.

SUMMARY OF THE ARGUMENT

This Court has twice declined to decide what line of authority governs economic regulations challenged under the substantive due process protections of the Texas Constitution. The Due Course of Law Clause in Article I, § 19 has been variously interpreted to require that regulations have a "real and substantial" connection to the public good, that regulations be "rationally related" to the public good in a way that can be proven with evidence, and that regulations be "rationally related" to the public good without reference to any evidence. Confusion about the test has led to inconsistent rulings about the scope of the government's regulatory power and about what evidence of irrationality is required to overcome that power if, in fact, any evidence can.

This case presents a unique opportunity to settle the issue. The court of appeals held that TDLR's threading regulations pass constitutional muster under any available test. At the same time, the court of appeals acknowledged key factual disputes between the parties, and then declined to resolve them. These key facts could tip the constitutional balance in favor of the Threaders if this Court holds that their claims are controlled either by Texas's line of real and substantial cases or by the line applying the rational basis test in a way that takes account of evidence.

This Court should take this opportunity to adopt the real and substantial test. First, this test would ensure that lower courts weigh the purpose and effect of an economic regulation based on evidence, not speculation. Second, Texas's unique traditions and values counsel in favor of a more rigorous standard of review for economic regulations than the one applied under federal law. Third, other states use the real and substantial test, and precedents from those states show how the test helps courts to draw principled lines between public power and individual liberty. Finally, assuming that the Court adopts this test, the Threaders should prevail because TDLR's regulations have no real or substantial connection to the public good and because they are unduly burdensome.

In the alternative, the Court should explicitly hold that Texas applies the rational basis test in a way that takes evidence seriously. The Threaders should have won under this standard, as well. At a minimum, TDLR was not entitled to summary judgment in light of the court of appeals' recognition that a material factual issue remains—namely, how much sanitation training threaders need to keep the public safe.

In all events, this Court should explicitly reject the no-evidence rational basis test. Adopting that test would be disruptive—the Court would have to reject the reasoning of both its line of real and substantial cases and

the many Texas rational basis cases that have taken evidence seriously. Because this Court has never held that evidence is meaningless in constitutional litigation, the Court should now clearly repudiate those lower court opinions that have used no-evidence rational basis review.

For these reasons, the Court should grant the petition for review, reverse the decision of the court of appeals, and render judgment for the Threaders. In the alternative, the Court should remand for reconsideration under the correct legal standard and, if necessary, trial.

ARGUMENT

I. This Court has twice declined to decide whether the real and substantial test or the rational basis test governs substantive due process challenges.

This Court has twice declined to decide what test governs challenges to economic regulations brought under the Texas Constitution's Due Course of Law Clause. *See Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 525 (Tex. 1995); *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 263 & n.5 (Tex. 1994).

In *Trinity River*, this Court first noted that Texas cases have "not been consistent in articulating a standard of review under the due course clause." 889 S.W.2d at 263. The Court cited two lines of cases—one that applied a more probing standard of review, and one that applied federal

rational basis analysis. *Id.* at 263 n.5 (collecting cases). Because the law at issue in that case—a ten-year statute of limitations for defects in structural architecture or engineering—passed constitutional muster under either line of cases, the Court upheld the law without deciding which test was correct. *Id.* at 260, 263.

The question came up again in *Garcia*. In that case, the en banc Fourth Court had struck down various provisions of the Workers' Compensation Act because the court believed they violated the open courts, equal protection, and substantive due process guarantees of the Texas Constitution. *Tex. Workers' Comp. Comm'n v. Garcia*, 862 S.W.2d 61, 66, 80-103 (Tex. App.—San Antonio 1993) (en banc), *rev'd*, 893 S.W.2d 504 (Tex. 1995). Evaluating the plaintiffs' substantive due process claim, the Fourth Court specifically declined to apply the federal rational basis test. *Id.* at 74-75. In its place, the court applied a three-part test distilled from Texas case law, under which:

> (1) The object of the law must be within the scope of the legislature's police power; (2) the means used must be appropriate and reasonably necessary to accomplish that object; and (3) the law must not operate in an arbitrary or unjust manner, or be unduly harsh in proportion to the end sought.

Id. at 75 (citing *Thompson v. Calvert*, 489 S.W.2d 95, 99 (Tex. 1972); *State v. Richards*, 301 S.W.2d 597, 602 (Tex. 1957); *Wylie v. Hays*, 263 S.W. 563,

565 (Tex. 1924)). The Fourth Court weighed the testimony of competing expert witnesses and, using this three-part test, struck down the challenged provisions of the Workers' Compensation Act because they appeared to subvert the Act's purpose of protecting injured workers.

This Court reversed. *Garcia*, 893 S.W.2d at 525-26. The Court agreed that Texas courts have "attempted to articulate our own independent due course standard" for substantive due process claims, which has sometimes been "characterized as more rigorous than the federal standard." *Id.* at 525 (collecting cases). But the Court again declined to decide which test controls because the evidence showed that the Act passed muster under both the federal standard and the "more rigorous" Texas standard. *Id.* Like the Fourth Court, this Court nevertheless weighed the evidence carefully; it simply disagreed with the lower court that the evidence warranted striking down the Act. *See id.* at 525-26.

II. Texas courts are deeply confused about which test governs.

As this Court recognized in *Garcia* and *Trinity River*, Texas cases do not make clear which test governs substantive due process challenges brought under the state constitution. Some courts apply what has been called "real and substantial" review, although their method of applying it has been slightly different from case to case. Other courts apply a version

of the federal rational basis test that takes account of evidence to determine the reasonableness of government regulations. Still other courts apply a version of the rational basis test that takes no account of evidence at all and relies, instead, on judicial speculation. This has led to inconsistent rulings on the scope of the economic-liberty right under the Texas Constitution.[9]

A. Some courts use the "real and substantial test" and look for evidence of a real problem and a reasonable government response.

Texas's real and substantial cases take account of both the purpose and real-world effect of a regulation. For example, in *State v. Richards*, this Court upheld the innocent-owner provisions of the civil asset forfeiture statute against a substantive due process challenge. 301 S.W.2d 597, 603 (Tex. 1957). Echoing the first prong of the court of appeals' test in *Garcia*, *see* p. 16 *above*, this Court observed that "[t]he line where the police power of the state encounters the barrier of substantive due process is not susceptible to exact definition," and recognized, "[a]s a general rule the power is commensurate with, but does not exceed, the duty to provide for the real needs of the people." 301 S.W.2d at 602. Because the purpose of

[9] Economic liberty—that is, the right to earn an honest living free from unreasonable governmental interference—has been recognized and enforced in Texas for more than 65 years. *Marsh USA, Inc. v. Cook*, 354 S.W.3d 764, 785 & nn.26-28 (Tex. 2011) (Willett, J., concurring); *see also Hawks v. Yancey*, 265 S.W. 233, 238-39 (Tex. Civ. App.—Dallas 1924, no writ) (collecting still earlier cases). TDLR has acknowledged (as it must) that economic liberty is a protected right, *see* CR at 1704, so the only question in this case is how courts should decide whether that right is violated.

the statute was to stop the illegal movement of narcotics, the Court held that it "clearly falls within the orbit of the police power." *Id.*

The Court in *Richards* went on to consider the effect of the statute. Echoing the Fourth Court's second and third prongs in *Garcia*, *see* p. 16 *above*, the Court considered whether an innocent owner's forfeiture of her vehicle was an undue burden on the owner's property rights (as one aspect of substantive due process). 301 S.W.2d at 602. The Court acknowledged that seizure of an innocent person's vehicle produced a "harsh result" but believed that this result was essential to keep drug traffickers from enlisting third-parties to hold title to vehicles that then could be used in illegal enterprises with impunity. *Id.* The Court in *Richards* took account of both the purpose and the effect of the statute and, finding a real purpose for the law and a substantial connection between its purpose and its effect in the real world, upheld the law.[10]

A version of this test has been applied by the Third Court, Fourteenth Court, Austin and Eastland Courts of Civil Appeals, and the Fifth Circuit. *See Aladdin's Castle, Inc. v. City of Mesquite,* 713 F.2d 137, 138 n.2 (5th Cir. 1983) (applying Texas law); *Satterfield v. Crown Cork & Seal Co.*, 268

[10] Petitioners' argument is only that the Court applied the correct test—the real and substantial test—in *Richards*. Plaintiffs do not argue that *Richards* reached the correct result under that test. Indeed, the law firm representing the Petitioners in this case is representing the petitioner in another case asking the Court to reconsider the result reached in *Richards*. *See El-Ali v. State*, No. 13-0006.

S.W.3d 190, 215 (Tex. App.—Austin 2008, no pet.); *Tex. State Bd. of Pharmacy v. Gibson's Disc. Ctr., Inc.*, 541 S.W.2d 884, 887-89 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774, 779 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Humble Oil & Ref. Co. v. City of Georgetown*, 428 S.W.2d 405, 407-08 (Tex. Civ. App.—Austin 1968, no writ); *City of Coleman v. Rhone*, 222 S.W.2d 646, 649 (Tex. Civ. App.—Eastland 1949, writ ref'd).

For example, in *Humble Oil*, the Austin Court of Civil Appeals reviewed a municipal ordinance requiring fuel trucks with a capacity of more than 1,400 gallons to stop outside Georgetown's city limits and transfer their cargo to smaller fuel trucks above ground. 428 S.W.2d at 407-08. Believing there must be a "real and substantial connection between the provisions of a police regulation and its purpose[,]" the court looked for actual evidence that the regulations were "reasonably calculated to promote the public safety." *Id.* at 413. Using this test, the court found the ordinance unconstitutional based on evidence that transferring fuel above ground was more dangerous than using underground storage tanks. *Id.* at 407-14. In other words, the stated purpose of the law—fuel safety—

was at odds with the evidence about its effect in the real world and, for this reason, the law violated the Texas Constitution.

More recently, in *Satterfield*, the Third Court applied a two-step analysis to determine the purpose and effect of a tort-reform measure aimed at capping corporations' liability for asbestos claims. Relying on Texas's line of real and substantial cases, the Third Court held: (1) the government's means of regulation must bear a real and substantial connection to the government's stated regulatory objective; and (2) the effect of the regulation must not be unduly harsh in proportion to the regulatory objective. 268 S.W.3d at 215. Using this test, the Third Court struck down the statute because it imposed an unduly harsh burden on litigants with pending asbestos claims. *Id.* at 219-20. This Court later struck down the same law without discussing the line of real and substantial cases. *See Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 145-46 (Tex. 2010) (establishing three-factor test unique to retroactivity claims under Article I, § 16).

Although they apply slightly different articulations of the test, *Richards*, *Humble Oil*, and *Satterfield* illustrate the distinguishing characteristic of Texas's real and substantial case law: Courts carefully

weigh evidence concerning, first, the government's purpose for a law and, second, the law's real-world impact on individual liberty.

B. Other courts use the "Texas rational basis test" and look for evidence that the government has acted reasonably.

When Texas cases apply the federal rational basis test to state-law claims, they often weigh evidence—including expert testimony—to determine the purpose and effect of a law. *See, e.g.*, *City of San Antonio v. TPLP Office Park Props., Ltd.*, 218 S.W.3d 60, 65-66 (Tex. 2007) (per curiam) (upholding closure of an office park entryway because expert testimony showed concrete harms to the surrounding community from unreasonable traffic); *Garcia*, 893 S.W.2d at 525-26 (weighing expert testimony for and against use of American Medical Association guidelines in determining state workers' compensation claims); *Limon v. State*, 947 S.W.2d 620, 627-29 (Tex. App.—Austin 1997, no writ) (upholding bond requirement for alcohol sellers in business less than three years because evidence showed most problems occurred in the first years of operation); *Martin v. Wholesome Dairy, Inc.*, 437 S.W.2d 586, 590-600 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) (upholding ban on milk filled with non-milk additives because expert testimony showed it was less nutritious than regular milk and sold deceptively as regular milk).

The "Texas rational basis test" applied in these cases is deferential to the government, for sure, but evidence of a connection (or disconnect) between a law's purpose and its effect nevertheless matters to the outcome, just as it does under the real and substantial cases. *See generally HL Farm Corp. v. Self*, 877 S.W.2d 288, 293-94 (Tex. 1994) (Doggett, J., dissenting) (discussing the role evidence has played in "Texas rational basis" cases and comparing federal cases).

Two federal courts have applied this type of evidence-based rational basis review to strike down cosmetology-licensing regimes challenged under the Fourteenth Amendment's economic-liberty protections. *See Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214-16 (D. Utah 2012) (holding state hair-braiding license unconstitutional because the required curriculum barely addressed hair braiding); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1118-19 (S.D. Cal. 1999) (same). *See* pp. 53-56 *below*. Thus, the rational basis test, while deferential, is often applied by Texas courts (and federal courts) in a way that takes evidence seriously.

C. Still other courts use the "no-evidence rational basis test" and refuse to look at evidence.

Under the no-evidence version of the rational basis test, however, economic regulations pass constitutional muster if they have any conceivable justification—whether offered by the government or invented

by the Court—and evidence seldom matters. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-15 (1993); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955). Texas cases have, at times, applied this no-evidence version of the rational basis test to state substantive due process claims. *See Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 625, 632-33 (Tex. 1996) (disregarding trial court's findings of fact and holding as a matter of law that Edwards Aquifer Act furthered public interest of managing water resources); *Garcia v. Kubosh*, 377 S.W.3d 89, at 98-100 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (upholding $15 state fee on bail bonds as a matter of law and holding factual development unnecessary); *Lens Express v. Ewald*, 907 S.W.2d 64, 68-70 (Tex. App.—Austin 1995, no writ) (disregarding expert testimony about the negative effects of requiring contact-lens dispensers to retain physical copies of prescriptions and upholding the requirement as a matter of law); *Tex. Optometry Bd. v. Lee Vision Ctr., Inc.*, 515 S.W.2d 380, 385-86 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.) (upholding law prohibiting opticians, but not optometrists, from advertising their prices without a permit because federal courts had upheld similar restrictions); *see also Chandler v. Jorge A. Gutierrez, P.C.*, 906 S.W.2d 195, 202 (Tex.

App.—Austin 1995, writ denied) (recognizing real and substantial test but applying no-evidence review).

This line of cases applying a no-evidence version of the rational basis test exists alongside—without overruling—the line of cases applying real and substantial review and the line of cases applying rational basis review that nevertheless weigh evidence. Many evidence-based opinions also have a tendency to include anti-evidence dicta that has deepened courts' confusion about the correct standard. *See, e.g.*, *Garcia*, 893 S.W.2d at 520, 525-26 (noting facts play a "limited role" in constitutional review, but weighing expert testimony on both sides to reach a decision).

The tension between the three lines of cases is starkly illustrated by comparing this Court's opinions in *Garcia* (an evidence-based case) and *Barshop* (a no-evidence case), which were decided only 17 months apart. In *Garcia*, this Court carefully reviewed the expert testimony on both sides and relied on it in the decision. 893 S.W.2d at 525-26. In *Barshop*, the Court read *Garcia* as holding that evidence plays almost no role in constitutional adjudication. 925 S.W.2d at 625 (citing *Garcia*, 893 S.W.2d at 520) (observing that if a law "is constitutional under any possible state of facts, we should presume that such facts exist without making a separate investigation of the facts or attempting to decide whether the Legislature

has reached a correct conclusion with respect to the facts."). In fact, *Garcia* reserved the question of whether a "more rigorous" standard of review applies (*see* Part I *above*) and then applied Texas's evidence-based test (*see* Part II-B *above*). 893 S.W.2d at 525-26. The Court's analysis in *Barshop*, however, suggests—without explicitly holding—that lower courts can and should disregard all evidence in constitutional cases and, indeed, that is what some lower courts have done. *See, e.g.*, *Kubosh*, 377 S.W.3d at 99-100 (citing *Barshop* and dismissing case without opportunity for factual development).

The resulting confusion has led some courts to rely on all three tests, but then apply no-evidence review. For example, in *Patterson v. City of Bellmead*, the Tenth Court upheld a city ordinance requiring anyone keeping more than four cats and dogs on their property to pay a $300 kennel fee. No. 10-12-00357-CV, 2013 Tex. App. LEXIS 3136, at *1-2, *27 (Tex. App.—Waco Mar. 21, 2013, pet. denied) (mem. op.). The plaintiffs challenged the law based on the Fourteenth Amendment's equal-protection guarantee, *id.* at *1-2, *14, but the Tenth Court decided the case on substantive due process principles. *Id.* at *27. The court said it would rely on both the real and substantial test applied in *Satterfield* and the

evidence-based test applied in *Garcia* and *TPLP Office Park*. *Id.* at *18-20; *see* Subparts A & B *above*.

But the analysis that the *Patterson* court actually applied can only be squared with no-evidence review. Indeed, the court affirmed a trial court order blocking the plaintiffs from conducting discovery—including a request that the city identify its asserted rational basis for the law. *Id.* at *9-15. The court nevertheless affirmed summary judgment for the city because the city *asserted* the law was rational and many cases have held that cities have the power to regulate how people keep animals. *Id.* at *21-27. At the same time, the *Patterson* court disregarded evidence suggesting the law was irrational—namely, plaintiffs' affidavits suggesting that the kennel fee decreased animal adoptions, increased shelter deaths, and did nothing to stop animal hoarding (hoarders just had to pay $300). *See id.* at *24-25. On this record—the city's *assertion* of rationality and the plaintiffs' countervailing *evidence*—the *Patterson* court ruled as a matter of law. *Id.* at *27.

Just as in *Patterson*, the court of appeals in this case attempted to apply all three of the available tests at once. *See* Appendix 1 at 27-30 (discussing *Richards* and *Satterfield* [real and substantial test], *Garcia* [evidence-based rational basis test], and *Williamson v. Lee Optical* [no-

evidence rational basis test]). But, as in *Patterson*, the court of appeals went on to affirm summary judgment for the government in a way that can only be squared with no-evidence review.

III. The outcome of this case depends on which test governs.

The court of appeals believed there was "conflicting evidence" about the extent to which beauty schools teach threading and the extent to which threading is tested on the cosmetology examinations. Appendix 1 at 24-25. While both sides agree that training in threading technique is not required and that no one has to demonstrate her ability to thread on the state's licensing examinations, *see* pp. 8-10 *above*, the parties do continue to dispute, as a factual matter, how much sanitation training threaders need to keep the public safe. *See* pp. 11-12 *above*.

The Threaders presented expert testimony that just one hour of sanitation training is necessary to master three basic practices—frequent hand washing, disposal of used thread, and sterilization of the work area. *See* pp. 11-12 *above*. TDLR (without any expert support of its own) pointed to the broad language of its administrative rules and argued that at least 430 hours of the 750-hour facialist curriculum are necessary for sanitary threading. The court of appeals did not resolve this factual dispute, however, because it believed that the precise amount of sanitation training

is "not controlling" where sanitation forms *some* part of the curriculum.[11] Appendix 1 at 35. Thus, the court of appeals held, as a matter of law, that under "any articulation" of the test, the Threaders can be constitutionally required to spend $9,000 and nine months or more in school to learn to wash their hands, use new thread, and clean their work areas. *See id.* at 29-30 (quoting *Garcia*, 893 S.W.2d at 525).

The court of appeals was incorrect. Evidence of a disconnect between the state's regulatory objectives and its regulatory means matters very much under the line of Texas cases applying real and substantial review and the line of cases applying evidence-based rational basis review, while it matters little (or not at all) under the line of cases applying the no-evidence standard. The outcome of this case thus turns on the correct legal standard.

A. The real and substantial test is the correct standard and the Petitioners prevail under it.

The Court should hold that the real and substantial test controls state substantive due process challenges to economic regulations. When this test has been applied, it has helped Texas courts determine whether a law is calculated to achieve something meaningful or is, instead, an unreasonable

[11] The court of appeals suggested that it considered all of the evidence in the light most favorable to the Threaders, Appendix 1 at 26 (citing *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002)), but based on its understanding of the constitutional standard, simply ruled in favor of TDLR as a matter of law. *See id.* at 29.

burden on an individual's economic liberty that achieves little or nothing for the public. *See* Part III-A-1 *below*.

Texas's unique history and values support the adoption of the real and substantial test. *See* Part III-A-2 *below*. Moreover, 20 state high courts also apply this test, and these precedents demonstrate how real and substantial review aids courts in identifying constitutionally problematic legislation. *See* Part III-A-3 *below*. Finally, the Threaders would prevail if this Court adopts the real and substantial test. *See* Part III-A-4 *below*.

1. Texas cases applying the real and substantial test have struck the right balance between individual liberty and government power.

Texas's real and substantial cases show courts doing what courts are designed to do: engaging in the facts and arguments on both sides and reaching a considered constitutional judgment.

The real and substantial test was most recently applied in *Satterfield*, where the Third Court used the test to strike down a tort-reform measure aimed at capping the liability of successor corporations for asbestos claims pending against companies they had purchased. 268 S.W.3d 190 (Tex. App.—Austin 2008, no pet.). The doomed statute applied retroactively, in violation of Article I, § 16 of the Texas Constitution, because it extinguished pending claims. *Id.* at 199; *accord Robinson*, 335 S.W.3d at 128, 147-50.

The trial court in *Satterfield* granted Crown Cork's motion for summary judgment, absolving it of further liability because its total damages had already exceeded the statutory cap. 268 S.W.3d at 199. The plaintiff appealed and Crown Cork defended the statute's constitutionality by arguing it was within the Legislature's police power to protect "innocent successor corporations" from bankruptcies that could affect thousands of workers and the state's broader economy. *Id.* at 214.

On appeal, the Third Court gave the law the customary presumption of constitutionality, *id.* at 201, but noted that the utterance of "public health and safety" cannot, by itself, shield government action from judicial review. *Id.* at 215, 219. Government regulations, the Court said, require a "real and substantial" relationship between a law and the public interest. *Id.*

The Third Court noted that Texas courts have performed this "real and substantial" inquiry in a number of ways, relying on cases—like this case—that address state constitutional challenges to economic regulations. *Id.* at 217 (citing *Martin*, 437 S.W.2d at 591-92; *Johnny Frank's*, 480 S.W.2d at 775). Under these cases, (1) the government's means of regulation must bear a real and substantial connection to the government's stated regulatory objective; and (2) the effect of the regulation must not be

unduly harsh in proportion to the regulatory objective. *Satterfield*, 268 S.W.3d at 215-16; *see also* Part II-A *above*.

The tort-reform law in *Satterfield* failed this test for two reasons: First, it benefitted only a small subset of the public—successor corporations with asbestos liabilities—not the public at large. 268 S.W.3d at 219. Second, the means the Legislature chose for achieving its objective—extinguishing pending claims—was simply unfair to litigants. *Id.* at 219-20.

Satterfield therefore marked a departure from earlier Third Court precedents that used the no-evidence rational basis test for substantive due process and police power challenges brought under the state constitution. *See Rylander v. B&A Mktg. Co.*, 997 S.W.2d 326, 333 & n.7 (Tex. App.—Austin 1999, no pet.); *Lens Express*, 907 S.W.2d at 68-70; *Marble Falls Indep. Sch. Dist. v. Shell*, No. 03-02-00693-CV, 2003 Tex. App. LEXIS 2845, at *9-10 & n.3 (Tex. App.—Austin Apr. 3, 2003, no pet.) (mem. op.). That departure proved temporary, however, when the Third Court decided this case by conflating all of the available standards. *See* Appendix 1 at 27-30; *cf. Hebert v. Hopkins*, 395 S.W.3d 884, 898 (Tex. App.–Austin 2013, no pet.) (assuming federal test will control "unless and until a party demonstrates otherwise").

Earlier, in *Humble Oil*, the Austin Court of Civil Appeals also rejected the government's mere utterance of health and safety objectives—the very real danger of a fuel truck accident and resulting fire—and analyzed the real-world workings of the city's regulations, which required large trucks to stop outside of city limits and offload their fuel into smaller trucks for delivery to retailers in the city. 428 S.W.2d at 407-12. The *Humble Oil* court held that the required "real and substantial" connection between regulatory objectives and public safety was missing because the danger of accidents and fires was only increased by requiring more fuel trucks and more transfers of fuel before delivery. *Id.* at 413-14.

The real and substantial test has helped courts reach well-reasoned judgments for the government, as well. For example, in *City of Houston v. Johnny Frank's Auto Parts Co.*, the Fourteenth Court upheld an ordinance under real and substantial review. 480 S.W.2d 774 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). The law required tow truck companies to do two things: drain wrecked cars of all flammable liquids and build fences to keep wrecked cars out of reach of the public. *Id.* at 775. The court reviewed the testimony at trial and agreed the evidence supported the city's findings (and the obvious truth) that wrecked vehicles present a serious risk of fire if they contain flammable material and a

serious risk of injury if they are accessible to the public. *Id.* at 778-79. The court nevertheless went on to consider the burdens that the law imposed on tow companies. *Id.* at 779. The court weighed testimony that tow companies would pay thousands of dollars to comply with the law and that one company believed it would be forced out of business. *Id.* Notwithstanding these private burdens, however, the court upheld the law because there was also testimony showing that the law meaningfully addressed the risk of fire and injury. *Id.*

And in *City of Coleman v. Rhone*, the Eastland Court of Civil Appeals upheld the constitutionality of parking restrictions associated with a new fire lane using a two-step analysis similar to the one used in *Satterfield*—asking whether the fire lane was (1) "appropriate and reasonably necessary under all the circumstances to accomplish a purpose within the scope of the police power"; and (2) "reasonable in the sense of not being arbitrary and unjust." 222 S.W.2d 646, 649 (Tex. Civ. App.—Eastland 1949, writ ref'd). The court first held that the trial court erred by submitting the constitutionality of the restrictions to a jury. *Id.* at 650. But the court reviewed the entire record for itself and, based on testimony that parked cars were hindering fire trucks from responding to emergencies, upheld the law. *Id.* at 648, 651. *Johnny Frank's* and *Rhone* were both easy wins for

the government, but even so the courts looked at the evidence and the purpose and effect of the laws.

The common thread among all of the real and substantial cases is that courts make an engaged constitutional judgment based on the factual record before them—carefully balancing the government's reasons, the burdens on individual liberty, potential harm to the public, and the connection (if any) between the government's reasons and the public's real needs. Sometimes the plaintiff wins—as in *Satterfield* and *Humble Oil*—and sometimes the government wins—as in *Johnny Frank's* and *Rhone*. What distinguishes these cases from rational basis cases, however, is that the courts weighed evidence of both the purpose and the real-world effect of the law, not just arguments for and against its rationality.

2. The real and substantial test better reflects Texas's tradition of individual liberty and entrepreneurship.

This case would not mark the first occasion the Court has read the Texas Constitution's Bill of Rights as protecting civil liberties to a greater extent than do the federal courts. *See Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992) (holding that Article I, § 8 protects free expression to a greater extent than does the First Amendment); *In the Interest of J.W.T.*, 872 S.W.2d 189, 197-98 & n.23 (Tex. 1994) (suggesting that Article I, § 19

protects putative fathers' right to paternity testing to a greater extent than does the Fourteenth Amendment); *LeCroy v. Hanlon*, 713 S.W.2d 335, 338-41 (Tex. 1986) (holding that Article I, § 13 protects access to courts independently of Fourteenth Amendment analysis). In each of these cases, the Court based its decision on the text of the state constitution, Texans' famously independent nature, and the "independent vitality" of the Texas Bill of Rights.

As the Court noted in *Davenport*, "[j]ust as our history is distinctive in its insistence that our constitution is of independent force, so is the very letter of that fundamental document." 834 S.W.2d at 17. Indeed, the preamble to the Bill of Rights declares that each provision's purpose, including the due process protections of Article I, § 19, is to protect individual liberty.[12] Significantly, two separate constitutional provisions guarantee due process of law—Article I, §§ 13, 19. And the U.S. Supreme Court has recognized that the wording of Article I, § 19 may provide more protection than does the Fourteenth Amendment. *City of Mesquite v.*

[12] "That the general, great and essential principles of liberty and free government may be recognized and established, we declare . . . [n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. Art. I, § 19 & preamble.

Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982).[13] All of this shows that the drafters of the state constitution intended to protect individual liberty more than the framers of the U.S. Constitution. *See LeCroy*, 713 S.W.2d at 339 (noting the wording of Article I, § 13 "indicates the high value the drafters and ratifiers placed on the right of access to the courts"); Arvel Ponton III, *Sources of Liberty in the Texas Bills of Rights*, 20 St. Mary's L.J. 93, 112 (1988) (noting the origins of Article I, § 19 in the Texas Constitution predated the ratification of the Fourteenth Amendment); James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 St. Mary's L.J. 399, 424-25 (1993) (noting the state constitution "is much more detailed than the federal version").

Countless authors have pointed to Texans' fierce sense of independence from the federal government. *See, e.g.*, T.R. Fehrenbach, *Lone Star: A History of Texas and the Texans* 714-15 (1985) (discussing Texans' independent streak vis-à-vis the federal government); Mark E. Nackman, *A Nation Within a Nation: The Rise of Texas Nationalism* 131 (1975) ("Even in modern times, the spirit of independence remains and

[13] In procedural due process cases, however, this Court has determined that the textual similarity between Article I, § 19 and the Fourteenth Amendment counsels against independent state constitutional analysis. *City of Sherman v. Henry*, 928 S.W.2d 464, 472-73 & n.5 (Tex. 1996) (citing *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); *Mellinger v. City of Houston*, 3 S.W. 249, 252-53 (Tex. 1887)). These cases do not resolve the separate, and uncertain, question of whether the text of Section 19 warrants independent analysis for substantive due process purposes.

something of the Texas nation is perpetuated."); James R. Soukup et al., *Party and Factional Division in Texas* 67 (1964) ("Brief status as an independent Republic, participation in the Confederacy, and the traumatic experience of Reconstruction have all contributed to the development of a states' rights orientation [in Texas].").

This independence has led Texans to resist many forms of unreasonable governmental interference, from whatever source. *See* Fehrenbach, at 714 ("The pressures out of Washington to regulate and control the individual's use of private property, whether his acres or his factories, offended Texans."); William R. Hogan, *Rampant Individualism in the Republic of Texas*, 44 Sw. Hist. Q. 454, 454 (1941) (explaining that "for more than a century pronounced individualism has marked Texas as a region apart, even in the West.").

Historically, Texans have also placed special value on individual freedom in the economic sphere. *See, e.g.*, Larry Secrest, *Texas Entrepreneurship: An Analysis* 10 (1973) ("The cultural values and general social climate of Texas have served to encourage entrepreneurial activity."); Fehrenbach, at 708 ("The Texan ethic and Texan society . . . rewarded enterprise."); William R. Hogan, *The Texas Republic: A Social and Economic History* 298 (1946) ("Stamina, individualism, 'go-ahead'

initiative, pride in everything Texan—these were and still are, in varying degrees, among the ingredients of the Texas spirit."); Oran Roberts, *A Description of Texas: Its Advantages and Resources with Some Account of Their Development, Past, Present and Future* 133 (1881) ("[S]imple independence by one's own labor is and should be regarded as the honorable position of the Texan citizen, to which any good man may easily attain, an honorable road to fortune lies open to anyone whose ambition leads in that direction . . . .").

Because the Texas Constitution has long been recognized "to possess independent vitality, separate and apart from the guarantees provided by the United States Constitution," *City of Sherman v. Henry*, 928 S.W.2d 464, 473 (Tex. 1996), the Court should adopt the real and substantial test and reject the federal rational basis test. The real and substantial test better reflects Texans' spirit of independence from the federal government and better values Texas's traditions of individualism and entrepreneurship. By following its real and substantial line of cases, this Court will better protect the "independent vitality" of the Texas Constitution, and the people that it protects. *See Robinson*, 335 S.W.3d at 163-65 (Willett, J., concurring) (discussing the Court's vital role in enforcing the Texas Bill of Rights by placing meaningful limits on government power).

3. Other states use the real and substantial test.

Even states with less of an independent tradition than Texas have used the real and substantial test, rather than the federal rational basis test. Twenty state high courts have used real and substantial review to determine whether an economic regulation violated substantive due process rights or exceeded the scope of the police power under their state constitutions.[14]

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[14] *See Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 946-48 & n.7 (Pa. 2004) (upholding auctioneer regulations designed to prevent fraud); *Omya, Inc. v. Town of Middlebury*, 758 A.2d 777, 780 (Vt. 2000) (upholding commercial traffic limits that reduced congestion, pollution, and property damage); *Peppies Courtesy Cab Co. v. City of Kenosha*, 475 N.W.2d 156, 158-59 (Wis. 1991) (striking down taxicab dress code because it lacked a substantial relation to improving city's public image); *Katz v. S.D. State Bd. of Med. & Osteopathic Exam'rs*, 432 N.W.2d 274, 278-79 & n.6 (S.D. 1988) (upholding medical-practice regulations designed to prevent malpractice and fraud); *Louis Finocchiaro, Inc. v. Neb. Liquor Control Comm'n*, 351 N.W.2d 701, 704-06 (Neb. 1984) (striking down liquor wholesale price controls because they lacked any substantial relationship to public welfare); *Myrick v. Bd. of Pierce Cnty. Comm'rs*, 677 P.2d 140, 143 (Wash. 1984) (striking down most provisions of massage parlor regulations); *Red River Constr. Co. v. City of Norman*, 624 P.2d 1064, 1067 (Okla. 1981) (striking down municipal ordinance prohibiting sand trucks from using certain streets because the ordinance actually increased traffic and the risk of accidents); *Rockdale Cnty. v. Mitchell's Used Auto Parts, Inc.*, 254 S.E.2d 846, 847 (Ga. 1979) (reversing lower court ruling that zoning requirements were facially unconstitutional, but remanding to allow the plaintiff to show that the requirements had no real and substantial relationship to public health and safety); *In re Florida Bar*, 349 So. 2d 630, 634-35 (Fla. 1977) (per curiam) (rejecting maximum contingency-fee schedule that failed to meaningfully address problem of excessive fees); *McAvoy v. H. B. Sherman Co.*, 258 N.W.2d 414, 422, 427-29 (Mich. 1977) (upholding law requiring employers to pay 70% of workers' compensation award while appeal of the award was pending); *Dep't for Natural Res. & Envtl. Prot. v. No. 8 Ltd. of Va.*, 528 S.W.2d 684, 686-87 (Ky. 1975) (striking down law that conditioned the grant of strip-mining permits on obtaining the surface owner's consent because it was ineffective as an environmental-protection measure); *Hand v. H & R Block, Inc.*, 528 S.W.2d 916, 923 (Ark. 1975) (striking down minimum price for franchise agreements because it bore no relation to public health and safety); *Leetham v. McGinn*, 524 P.2d 323, 325 (Utah 1974) (striking down law restricting cosmetologists [*cont. next page*]

These cases reveal how the real and substantial test helps courts determine whether a law is calculated to achieve something meaningful for the public or is, instead, an unreasonable limitation on economic liberty. For example, in *Peppies Courtesy Cab Company v. City of Kenosha*, the Wisconsin Supreme Court applied the real and substantial test and struck down a city's dress code and grooming standards for taxicab drivers. 475 N.W.2d 156, 158-59 (Wis. 1991). The city argued that strict appearance standards were needed to attract business and tourism, and supported its argument with evidence that some taxicab drivers looked like they had "crawled out of bed," wore torn-up shoes, fishnet shirts, and filthy tube tops. *Id.* at 157.

The *Peppies* court accepted that promoting business and tourism is a legitimate governmental interest, but it nevertheless struck down the law because the city's evidence did nothing to show that driver appearance

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to women's hair); *Md. State Bd. of Barber Exam'rs v. Kuhn*, 312 A.2d 216, 224-25 (Md. 1973) (same); *People ex rel. Orcutt v. Instantwhip Denver, Inc.*, 490 P.2d 940, 943-45 (Colo. 1971) (striking down ban on so-called "filled milk" products because the ban bore no relationship to protecting public safety or preventing fraud); *Brennan v. Ill. Racing Bd.*, 247 N.E.2d 881, 882-84 (Ill. 1969) (striking down regulation that conditioned a horse trainer's license on his horses' drug-testing results); *Coffee-Rich, Inc. v. Comm'r of Pub. Health*, 204 N.E.2d 281, 286-89 (Mass. 1965) (striking down law banning the sale of imitation coffee cream because the law did not prevent fraud or market confusion); *Zale-Las Vegas, Inc. v. Bulova Watch Co., Inc.*, 396 P.2d 683, 691-93 (Nev. 1964) (striking down law that bound third-parties to non-compete provisions in private contracts because the law did not promote competition); *Berry v. Koehler*, 369 P.2d 1010, 1014-15 (Idaho 1961) (upholding regulation of dental prosthetics as licensed dentistry because licensure meaningfully protected the public); *Christian v. La Forge*, 242 P.2d 797, 804 (Or. 1952) (striking down fixed barbering prices because they only benefited barbers, not the public).

negatively impacted the city's image with outsiders. *Id.* at 159. That is, because the city argued taxicab drivers were hurting business and tourism, the city needed at least some evidence that their appearance was hurting business and tourism, not just evidence that some taxicab drivers were messy. *Id.* The Wisconsin Supreme Court tested the city's arguments against the evidence precisely because the court applied real and substantial review, rather than no-evidence rational basis review. *See id.* at 158-59. Under no-evidence review, the *Peppies* case would have come out the opposite way, because the court would have been bound to accept the city's claims at face value.

Similarly, in *Red River Construction Company v. City of Norman*, the Oklahoma Supreme Court applied real and substantial review to strike down a city ordinance that certainly would have survived no-evidence rational basis review. 624 P.2d 1064, 1067 (Okla. 1981). The city banned large sand trucks from using a particular street in order to address complaints about the number of vehicles going to and from a mining operation. *Id.* at 1065. The city argued that its large-truck ban was needed to protect the health, safety, and welfare of residents living along the street—indisputably a legitimate government interest—but the record did not support the city's arguments. *Id.* at 1067. Instead, the evidence showed

that the large-truck ban would only lead to more frequent trips using smaller trucks, thus *increasing* vehicular traffic along the road. *Id.* Because the evidence was out of joint with the city's objectives, the Oklahoma Supreme Court struck down the law.

By contrast, in *Omya, Inc. v. Town of Middlebury*, the Vermont Supreme Court considered a law similar to the one at issue in *Red River*, but reached the opposite conclusion. 758 A.2d 777, 780-81 (Vt. 2000). In *Omya*, a quarry owner challenged a land-use permit that restricted the number of trips its vehicles could take through a town to 115 per day. *Id.* at 779. Unlike in *Red River*, the government in *Omya* offered evidence that its trip limitations were necessary to protect public welfare—including findings from the Vermont Environmental Board that trucks were disturbing guests at local inns, making sidewalk conversation difficult, generating dust and dirt that was marring historic buildings, and emitting fumes that were harming residents' health. *Id.* at 780. In *Omya*, unlike in *Red River*, the law limited the total number of trucks, not just large trucks, so people could not just use more small trucks and defeat the law's purpose. In *Omya*, the government's well-supported findings were thus sufficient to demonstrate a real and substantial connection to a legitimate public purpose. *Id.*

The real and substantial test was applied in both *Red River* and *Omya*, but produced different results because, in *Red River*, the government did not offer any real evidence of a substantial connection to the public interest, whereas in *Omya* it did. But under the no-evidence rational basis standard, the outcome of both cases likely would have been the same—victory for the government—because, under that standard, evidence does not matter.

Unique among the states, the Massachusetts high court applies the real and substantial test when a constitutional case presents a close question, but it applies the rational basis test when a law's relationship to the public good is "evident." *See Mass. Fed'n of Teachers v. Bd. of Educ.*, 767 N.E.2d 549, 563 n.14 (Mass. 2002) (upholding license-renewal test for public school mathematics teachers). Only the Alabama Supreme Court appears to have rejected the real and substantial test, *see Alabama Power Co. v. Citizens of Ala.*, 740 So. 2d 371, 380-81 (Ala. 1999), but, even so, Alabama sometimes applies a heightened standard of review in state-constitutional challenges to economic regulations. *See, e.g.*, *State v. Lupo*, 984 So. 2d 395, 400, 406-07 (Ala. 2007) (applying "reasonableness" standard to strike down licensing of interior designers).

Thus, the real and substantial test reflects a nationwide tug-of-war between meaningful judicial review of economic regulations on the one hand and the no-evidence version of the rational basis test on the other. *See generally* Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 Am. U. L. Rev. 457, 513-40 (2005) (identifying 301 cases since 1940 in which state high courts have struck down economic regulations based on substantive due process). When other state high courts have applied the real and substantial test, they have (like Texas courts) carefully balanced the government's reasons for regulating, the burdens on individual liberty, and the connection (if any) between the government's reasons and the public's real needs.

4. If the Court adopts the real and substantial test, the Petitioners should prevail.

Texas's real and substantial test asks whether an economic regulation has a *real* and *substantial* connection to a legitimate governmental objective and, if so, whether the regulation is unduly burdensome in light of that objective. *See* Parts I & III-A-1 *above*. Assuming the Court adopts this test, the Threaders demonstrate below that they should have prevailed under it.

a. The state's threading regulations have no real or substantial connection to the state's objective of safe eyebrow threading.

TDLR's regulation of eyebrow threading is a solution in search of a problem, and a poor solution at that. Unlike the government in *Richards* and *Johnny Frank's*—both real and substantial cases that the government won—TDLR offers no evidence of a real problem that it is trying to solve. *See Richards*, 301 S.W.2d at 602; *Johnny Frank's*, 480 S.W.2d at 778-79. Unlike the government in *Humble Oil*—a real and substantial case the government lost—TDLR offers no expert testimony. *See* 428 S.W.2d at 408-14.

In this case, TDLR agrees that threading technique (the regulated activity) is not a required part of the cosmetology curriculum. *See* pp. 8-10 *above*. Instead, TDLR requires full cosmetology licensure to guarantee a certain minimum amount of sanitation training. *See* pp. 11-12 *above*. Sanitation is surely a legitimate and even salutary goal. But TDLR offers no evidence even suggesting that proper sanitation requires licensing both salons and the people who work there, *see* pp. 10-11 *above*, nor any evidence suggesting that proper sanitation requires a training program

that, by TDLR's own reckoning, requires 750 hours of training to guarantee, at most, 430 hours of sanitation instruction.[15] *See* p. 12 *above*.

The truth is that TDLR knew nothing about threading and, when it discovered it, simply tossed threading in with the existing conventional cosmetology program for the agency's own convenience. *See* p. 6 n.3 *above*. Indeed, TDLR admits it has never studied threading. *See* p. 11 *above*.

The Threaders' expert witness, meanwhile, submitted a report addressing all of the available medical literature on eyebrow threading, as well as her own empirical analysis of the technique's safety. *See* pp. 11-12 *above*. Based on her investigation and extensive professional experience with beauty procedures generally, and with eyebrow threading specifically, Dr. Patel concludes that threading is safe and, from a medical perspective, requires nothing more than basic sanitation training. *Id*. If the government's obvious interest in the safe transport of fuel could not, in *Humble Oil*, override the equally obvious disconnect of requiring more fuel trucks to make more fuel transfers, then TDLR's threading regulations also must fail constitutional review because there is no meaningful connection between the state's sanitation goal and its actual regulations.

[15] The Threaders' evidence shows that at most 40 hours of the 750-hour facialist curriculum are devoted to arguably relevant sanitation training—making the program 95% irrelevant to safe threading. *See* pp. 11-12 *above*.

It is important to remember that TDLR does not require instruction in threading technique, *see* pp. 8-10 *above*, so there is no assurance that licensed cosmetologists know the first thing about it. The result is that state-licensed cosmetologists enjoy an exclusive privilege to perform threading for compensation, but the public has absolutely no guarantee that licensed cosmetologists know what they are doing. This policy is at once pointless and deeply misleading to consumers. Like the restrictions in *Humble Oil*, TDLR's threading regulations only mislead the public into a false sense of security. Just as many small fuel trucks are more dangerous than a few large fuel trucks, many licensed cosmetologists who do not know how to perform threading are more dangerous to the public than unlicensed threaders, working in licensed salons, who *do* know how to perform it.

Thus, the record includes hard evidence, in the Threaders' favor, that unlicensed threading is no threat to the public. In TDLR's favor, the record includes no hard evidence, only the mere assumption that threading should require conventional cosmetology training. As against supposition, hard evidence must prevail. *See Humble Oil*, 428 S.W.2d at 408-14; *Garcia*, 893 S.W.2d at 520 ("in most instances, an appellate court must focus on the

entire record to determine whether the Legislature has exceeded constitutional limitations") (citation omitted).

This kind of regulation without reasons fails the first prong of the real and substantial test because it is not based on any bona fide health and safety concerns and, even if it were, it is not sensibly calculated to answer those concerns.

b. The effect of the threading regulations is unduly harsh in proportion to the state's objective.

In all events, TDLR's threading regulations place a disproportionate burden on the Threaders as compared to the public benefits (if any) of licensing eyebrow threading as conventional cosmetology. TDLR's threading regulations therefore fail the second prong of the real and substantial test, as well, because they impose an undue burden. *See* Parts I & III-A-1 *above*.

TDLR's position in this case ultimately must rest on the contention that the general sanitation training provided in Texas beauty schools justifies requiring eyebrow threaders to undergo 750 hours of cosmetology instruction and two examinations. *See* RR (MSJ) at 67:7-19 (arguing sanitation training is the crux of TDLR's concern). Even if the Court accepts that TDLR's threading regulations are reasonably aimed at the

constitutionally legitimate purpose of sanitation, however, there remains an unconstitutional disconnect between the public's health and safety and TDLR's actual rules.

Sanitation is important, of course, but it is unbelievable that sanitation takes 750 hours to learn. By comparison, the Texas Department of State Health Services requires emergency medical technicians and paramedics to attend a 140-hour basic course followed by 624 hours of on-the-job training, 25 Tex. Admin. Code § 157.32(c)(4)(B), and the Texas Commission on Law Enforcement requires first-time peace officers to undergo just 643 hours of training, only 16 hours of which is devoted to emergency medical assistance.[16]

Yet, TDLR says it takes 750 hours of training to guarantee basic sanitation knowledge when, by its own reckoning, 430 hours of its training program are devoted to sanitation and 320 hours are devoted to other topics that everyone agrees are irrelevant. *See* p. 12 *above*. The result is that the state will certify someone to intervene in a life-threatening emergency with just 14 more hours of training than the state requires for basic sanitation in a salon. In the case of a police officer, the state believes

[16] Texas Commission on Law Enforcement, Officer Standards and Education, Basic Peace Officer Course, Table of Contents, "643-Hour Basic Peace Officer Course," available at, http://www.tcleose.state.tx.us/content/training_instructor_resources.cfm (last visited Sept. 12, 2013); *see also* 37 Tex. Admin. Code § 221.3 (listing requirements for advanced peace-officer training).

it takes 700 *fewer* hours to learn emergency medical assistance than it does to learn to wash your hands and clean up after salon customers.

Moreover, the government knows how to draw sensible rules for niche cosmetology practices comparable to eyebrow threading. For example, hair braiders—who, like eyebrow threaders, practice a traditional, all-natural beauty procedure that does not involve chemicals or reusable instruments—are only required to undergo a 35-hour health and safety training, not the state's full cosmetology training program. *See* 16 Tex. Admin. Code § 83.120(b). This 35-hour training is similar to the arguably relevant 40 hours of sanitation training that TDLR requires for all state-licensed facialists. In this case, however, TDLR has tacked on an unnecessarily burdensome 710 extra hours.

The real and substantial test does not allow the government to be so dismissive of the Threaders' economic liberty, nor so cavalier with its credentialing of public practitioners. TDLR's threading regulations therefore fail both prongs of the real and substantial test.

B. If the real and substantial test does not control, the Texas rational basis test does.

When Texas Courts apply the rational basis test, more often than not they carefully weigh evidence—including expert testimony—on both sides of the case. *See, e.g.*, *City of San Antonio v. TPLP Office Park Props.*, 218

S.W.3d 60, 65-66 (Tex. 2007) (per curiam) (upholding closure of an office park driveway where 2,300 vehicles used the driveway daily and engineers testified that the increased traffic decreased residents' quality of life); *Whitworth v. Bynum*, 699 S.W.2d 194, 196-97 (Tex. 1985) (striking down law prohibiting recovery for injuries suffered in a family member's car under Article I, § 3 while refusing to assume the law's rationality). These are not the actions of a court blindly applying the no-evidence version of the rational basis test, which accepts any conceivable basis for regulation without reference to evidence. *See, e.g.*, *Lens Express*, 907 S.W.2d at 69.

The reviewing of real evidence—not just the government's *post hoc* rationalizations for a law—is a common feature of Texas's evidence-based rational basis cases and its real and substantial cases. *Compare Martin*, 437 S.W.2d at 592-600 *with Humble Oil*, 428 S.W.2d at 408-14. The real and substantial test remains the better test, however, because it articulates a clearer standard of review and better focuses courts on their duty to take state constitutional claims seriously. But, even if the Court chooses not to adopt the real and substantial test, the Court should nevertheless review the entire record and make an engaged constitutional judgment in this case because Texas constitutional cases, like all cases, turn on the application of law to fact.

1. Under the Texas rational basis test, the Petitioners should prevail.

Even assuming the rational basis test is the correct legal standard (and it is not), the lower courts misapplied it to the facts of this case. Even under federal rational basis precedents, minimum rationality means that regulations must be designed to accomplish, not undermine, their objectives. This is doubly true under Texas's rational basis cases. *See* Part II-B *above*. TDLR's regulation of eyebrow threading, even if it is aimed at something obviously legitimate—like sanitation—nevertheless fails constitutional review because TDLR in no way confines itself to reasonable sanitation requirements and may, in fact, undermine the quality of threading services by giving consumers a false sense of security in the ability of state-licensed cosmetologists to perform threading.

On the same grounds, two federal courts have struck down irrational cosmetology-licensing programs using the federal rational basis test. *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214-16 (D. Utah 2012); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1105-08 (S.D. Cal. 1999).

In *Cornwell*, the U.S. District Court for the Southern District of California held the application of cosmetology laws and administrative rules to the practice of hair braiding violated equal protection and substantive due process. 80 F. Supp. 2d at 1118-19. Like threading, hair

braiding is a traditional and specialized practice that is not represented in conventional Western cosmetology training. *See Cornwell v. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1263-64 (S.D. Cal. 1997) (denying government's motion to dismiss). Like threading, braiding is a form of all-natural hair care that does not use any chemicals or reusable objects. *See id.* at 1264. And like threading in Texas, hair braiding was not taught or tested in California's beauty schools. *Cornwell*, 80 F. Supp. 2d at 1111-12, 1116-17 (granting motion for summary judgment).

Several hair braiders challenged the constitutionality of the requirement that they obtain conventional cosmetology licenses. *Id.* at 1102. The defendant board, like TDLR in this case, argued that its regulations were justified by the state's interest in public health and safety. *Id.* at 1106. Yet the board required just 65 hours of its 1,600-hour curriculum—about four percent—to be devoted to general health and safety, and licensed beauty schools voluntarily devoted about six percent of their curricular hours to safety topics. *Id.* at 1103 n.6, 1111. As a part of this 65-hour health and safety training, braiders would learn disinfection and sanitation, bacteriology, anatomy and physiology, and the proper handling of hazardous substances. *Id.* at 1103 n.6, 1109.

Weighing the government's health and safety objectives against the methods employed to meet those objectives, the *Cornwell* court recognized that, "[t]here must be some congruity between the means employed and the stated end[.]" *Id.* at 1106. The court found this relationship lacking and offered an analogy to illustrate its conclusion:

> Even if Cornwell were defined to be a cosmetologist, the licensing regimen would be irrational as applied to her because of her limited range of activities. This irrationality can be illustrated by analogy. Assume the range of every possible hair care act to involve tasks A through Z. From the Court's perspective, Cornwell's activities would cover tasks A, B, and some of C. The State's cosmetology program mandates instruction in tasks B through Z. The overlap areas are B and part of C. This minimal overlap is not sufficient to force Cornwell to attend a cosmetology school in order to be exposed to D through Z, when she only needs B and a portion of C. In sum, the Court finds that the [California Barbering and Cosmetology] Act as implemented through regulations is irrational[.]

Cornwell, 80 F. Supp. 2d at 1108.

Last year, in *Clayton*, the U.S. District Court for the District of Utah followed *Cornwell* and held Utah's hair-braiding license unconstitutional because the required cosmetology curriculum barely addressed hair braiding. 885 F. Supp. 2d at 1214-16.

Here, as in *Cornwell* and *Clayton*, the government is irrationally applying conventional cosmetology laws and rules to a specialized practice, without bothering to require the teaching or testing of that practice. Like

the board in *Cornwell*, TDLR wants threaders, who only perform practice "A," to undergo training in practices "B" through "Z," when, at best, a minor portion of that instruction—perhaps "B" and part of "C"—is even remotely relevant to threading. Here, as in both *Cornwell* and *Clayton*, the Threaders do not challenge the government's power to regulate cosmetology; rather, they challenge an agency's senseless application of conventional cosmetology rules to a niche practice—not for the benefit of the public, but for the convenience of the agency. Here, as in *Cornwell* and *Clayton*, the government's one-size-fits-all approach to licensing is irrational and, therefore, unconstitutional under the rational basis test.

The Texas rational basis test applied in cases like *TPLP Office Park*, *Whitworth*, and *Martin* takes evidence of irrationality at least as (if not more) seriously than does the federal rational basis test applied in *Clayton* and *Cornwell*. *See* Part II-B *above*. If the Court elects to follow the rational basis test, therefore, it should follow *Cornwell* and *Clayton* and hold that the government's concern for sanitation and safety is entirely undermined by the evidence showing how TDLR actually regulates threading.

C. The no-evidence rational basis test is not the real rational basis test.

As shown above, the Court should take this opportunity to choose between the real and substantial test and those Texas rational basis cases that take evidence seriously. No matter the outcome of that decision, however, the Court should clearly repudiate the handful of Texas rational basis cases that have held evidence of irrationality does not matter. *See* Part II-C *above*. These cases have misunderstood the rational basis test. The real rational basis test—the one applied by federal courts and by a long line of Texas cases—takes evidence seriously.

The Fifth Circuit recently demonstrated how federal courts weigh the evidence and investigate the real-world effect of a law when they apply the federal rational basis test. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226-27 (5th Cir. 2013), *petition for cert. filed* (Jul. 17, 2013) (No. 13-91). In *St. Joseph Abbey*, Louisiana had criminalized the sale of caskets by anyone except state-licensed funeral directors. *Id.* at 218. A monastery of monks wanted to sell their handmade caskets to the public, but could not because they were not licensed. *Id.* at 217-19. The Fifth Circuit struck down the law. *Id.* at 227.

The court first noted that rational-basis analysis "does not proceed with abstraction for hypothesized ends" and that "a hypothetical rationale,

even *post hoc*, cannot be fantasy." *Id.* at 223. It then reviewed the state's two justifications—consumer protection and public health and safety—and compared those justifications to the evidence at trial about what the law actually accomplished. *Id.* at 224-27. The court concluded that the casket-licensing law was an irrational regulation that did nothing to protect the public and merely drove up consumer prices. *Id.* at 219-20, 224, 226-27. Given the absence of any legitimate justification for the law, the Fifth Circuit recognized the obvious: The restriction on who could sell a casket was simply a form of economic protection for the funeral industry, not a law with any public benefits. *Id.* at 226-27.

As the Fifth Circuit recognized, the federal rational basis test is a deferential form of review, but this does not mean that it requires courts to accept rationales that are contrary to the regulatory system set up by the legislature. *Id.* at 223, 226-27. Here, as in *St. Joseph Abbey*, the Court need not (and should not) accept the government's talismanic invocation of "health and safety" when TDLR's threading regulations do nothing in the real world to advance public safety.

And rational-basis victories like *St. Joseph Abbey* are not anomalous. For example, plaintiffs have prevailed in 21 rational basis cases in the U.S.

Supreme Court since 1970.[17] During that same time, plaintiffs have prevailed in 24 rational basis cases in federal courts within the Fifth Circuit.[18]

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[17] *See United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *id.* at 2706 (Scalia, J., dissenting) (noting Court relied on rational basis review); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995); *Quinn v. Millsap*, 491 U.S. 95, 109 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 345-46 (1989); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24-27 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 64 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159, 159 (1977) (per curiam); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 538 (1973); *James v. Strange*, 407 U.S. 128, 141-42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 78-79 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 195-96 (1971); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *Turner v. Fouche*, 396 U.S. 346, 362-64 (1970).

[18] *See St. Joseph Abbey*, 712 F.3d at 226-27; *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 746 (5th Cir. 2008); *Simi Inv. Co. Inc v. Harris Cnty.*, 236 F.3d 240, 253 (5th Cir. 2000); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981); *Doe v. Plyler*, 628 F.2d 448, 461 (5th Cir. 1980); *Harper v. Lindsay*, 616 F.2d 849, 855 (5th Cir. 1980); *Thompson v. Gallagher*, 489 F.2d 443, 449 (5th Cir. 1973); *Newman Marchive P'ship v. Hightower*, 735 F. Supp. 2d 483, 487-90 (W.D. La. 2010); *Houston Balloons & Promotions, LLC v. City of Houston*, No. H-06-3961, 2009 U.S. Dist. LEXIS 53693, at *16-18 (S.D. Tex. June 24, 2009); *Creekmore v. Attorney Gen. of Tex.*, 341 F. Supp. 2d 648, 668 (E.D. Tex. 2004); *Esperanza Peace & Justice Ctr. v. San Antonio*, 316 F. Supp. 2d 433, 467-69 (W.D. Tex. 2001); *Casket Royale v. Mississippi*, 124 F. Supp. 2d 434, 440 (S.D. Miss. 2000); *Warner v. St. Bernard Parish Sch. Bd.*, 99 F. Supp. 2d 748, 752 (E.D. La. 2000); *Fred C. v. Tex. Health & Human Servs. Comm'n*, 988 F. Supp. 1032, 1036 (W.D. Tex. 1997); *La. Seafood Mgmt. Council, Inc. v. Foster*, 917 F. Supp. 439, 446 (E.D. La. 1996); *White v. State Farm Mut. Auto. Ins. Co.*, 907 F. Supp. 1012, 1018-19 (E.D. Tex. 1995); *Hunt v. City of Longview*, 932 F. Supp. 828, 840-41 (E.D. Tex. 1995); *Santos v. City of Houston*, 852 F. Supp. 601, 607-09 (S.D. Tex. 1994); *McDonald v. Bd. of Miss. Levee Comm'rs*, 646 F. Supp. 449, 471-73 (N.D. Miss. 1986); *Margaret S. v. Treen*, 597 F. Supp. 636, 675-76 (E.D. La. 1984); *Margaret S. v. Edwards*, 488 F. Supp. 181, 211 (E.D. La. 1980); *Doe v. Plyler*, 458 F. Supp. 569, 585-86 (E.D. Tex. 1978); *Walters v. Edwards*, 396 F. Supp. 808, 819-20 (E.D. La. 1975); *Linda R.S. v. Richard D.*, 335 F. Supp. 804, 812 (N.D. Tex. 1971).

None of these outcomes makes any sense if rational basis review is as the government portrayed it below: a charade in which judges exercise no judgment, give knee-jerk deference to the legislative and executive branches, and simply act as a rubber stamp. *See* CR at 1704; RR (MSJ) at 91:10-18. On the contrary, even federal rational basis review has real teeth.

In any case, the federal constitution only sets the floor for individual rights; the Texas Constitution establishes the ceiling. *LeCroy*, 713 S.W.2d at 338 & n.3; *Whitworth*, 699 S.W.2d at 196-97; *see generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). The Fourteenth Amendment already protects Texans (as residents of the Fifth Circuit) from state regulations that fail the rational basis test because they cannot be squared with evidence and meaningful judicial review. *See St. Joseph Abbey*, 712 F.3d at 223, 226-27. It would be a hollow act, therefore, for this Court to hold that Article I, § 19 is governed by a no-evidence version of the rational basis test that provides *less* protection than the Fourteenth Amendment provides. In other words, if this Court were to adopt the no-evidence rational basis test, the Texas Constitution would not be the ceiling for individual rights; it would be lower than the floor set by the Fourteenth Amendment; the Texas Constitution would be the basement. Under no-evidence review, state

constitutional challenges to economic regulations would be a dead letter, while precisely the same claims could be brought under the Fourteenth Amendment. This kind of inverted federalism would be inconsistent with this Court's long-standing enforcement of the state-law right to economic liberty. *See* p. 18 n.9 *above*.

The no-evidence standard is also inconsistent with those Texas cases that have applied the "more rigorous" standard of review recognized in *Garcia*. *See* Part I *above*. Accordingly, if the Court adopts the no-evidence standard, it will be rejecting all of Texas's real and substantial cases and its many evidence-based rational basis cases.

1. Under the no-evidence rational basis test, the Petitioners—and every constitutional plaintiff—would lose before reaching the merits.

The Threaders acknowledge that they could not prevail in this case under the no-evidence line of rational basis cases, but neither could anyone else. Defeat is certain under the no-evidence standard because nothing a plaintiff says or does can defeat the government's speculation or, indeed, the courts' speculation on behalf of the government.

The state's position in this case is not rooted in the real rational basis test. It is rooted in a caricature of the rational basis test in which the state always wins. Embracing this caricature would not only doom every

constitutional plaintiff that brings an economic-liberty claim in Texas, it would also send a dangerous signal to the state that its economic regulations are altogether beyond the scope of judicial review.

In fact, TDLR's cross-petition in this case demonstrates the far-reaching implications of the state's position. Although TDLR prevailed on the merits below, its cross-petition asks this Court to reverse on jurisdictional grounds. *See* State's Cross-Pet. for Review at 5-14. The state's theory is essentially this: Constitutional cases can and should be removed from the summary judgment process altogether and decided on pleas to the jurisdiction—based on nothing more than a court's sense of the "viability" of the plaintiff's claims. *See id*. The Court should reject that position for all the reasons discussed in the Threaders' response to TDLR's cross-petition. But if the Court were to adopt the no-evidence constitutional standard, there really would be nothing to prevent constitutional cases from being routinely dismissed at the outset of litigation based on one judge's impression that the plaintiff stood little chance of winning, regardless of the evidence. Some judges would act to protect state constitutional rights, and allow cases to proceed; other judges would supplant their judgment for the facts and dismiss cases at the outset. While this regime would be convenient for the government, it would lead to

scattershot rulings in the court of appeals and sow disarray about when (and how) a person's state constitutional rights can be litigated.

IV. Now is the time to decide which test governs.

Now is also the time to resolve the question of which of the three available tests applies. While the split of authority between *Richards* (real and substantial), *Garcia* (rational basis with evidence), and *Barshop* (no-evidence rational basis test) remained mostly dormant for the decade after the question was reserved in *Garcia*, confusion has resurfaced in the last five years in cases like *TPLP Office Park* (rational basis with evidence), *Satterfield* (real and substantial), and, most recently, *Kubosh* and *Patterson* (no-evidence test). *See* Part II *above*. Moreover, the Third Court's refusal to recognize which test controls this case conflicts with—without overruling—the Third Court's 2008 opinion in *Satterfield*, which held that the real and substantial test controls.

Given the Third Court's special role in resolving challenges to state laws and agency regulations, it is particularly important that the internal inconsistencies in the Third Court's jurisprudence be swiftly resolved. *Compare Satterfield*, 268 S.W.3d at 215-16 (applying real and substantial review) *and Limon*, 947 S.W.2d at 627-29 (applying evidence-based

rational basis review) *with Lens Express*, 907 S.W.2d at 68-70 (applying no-evidence review) *and Rylander*, 997 S.W.2d at 333-34 (same).

Over time, this uncertainty about the legal standard governing state economic regulations can be expected to lead to an ever-more confusing patchwork of standards across—and within—the other court of appeals districts. This will allow some courts to devalue the economic freedom of Texans in favor of government regulation, other courts to properly enforce the right to engage in business free from unreasonable regulations, and still other courts to pick and choose the cases in which they will enforce constitutional rights. Litigants will not—and currently do not—know which standard will govern in a particular case.

PRAYER

Petitioners ask the Court to grant their petition for review, reverse the judgment of the court of appeals, and render judgment in their favor or, in the alternative, remand to the trial court for reconsideration under the correct legal standard.

RESPECTFULLY SUBMITTED this 13th day of September 2013,

INSTITUTE FOR JUSTICE

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CERTIFICATE OF COMPLIANCE

This brief contains 14,986 words, excluding the portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that on September 13, 2013, I caused a true and correct copy of the foregoing Petitioners' Brief on the Merits to be sent to the following counsel by United States certified mail, return receipt requested:

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TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-11-00057-CV

Appellants, Ashish Patel, Anverali Satani, Nazira Momin, Tahereh Rokhti, Minaz Chamadia, and Vijay Lakshmi Yogi // Cross Appellants, Texas Department of Licensing and Regulation; William H. Kuntz, Jr., in his official capacity, et. al.

v.

Appellees, Texas Department of Licensing and Regulation; William H. Kuntz, Jr., in his official capacity, et al. // Cross Appellees, Ashish Patel, Anverali Satani, Nazira Momin, Tahereh Rokhti, Minaz Chamadia, and Vijay Lakshmi Yogi

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT NO. D-1-GN-09-004118, HONORABLE GISELA D. TRIANA-DOYAL, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

These cross-appeals concern the constitutionality of cosmetology statutes and administrative rules as they apply to eyebrow threading. *See* Tex. Occ. Code Ann. §§ 1601.002, 1601.251, 1602.002, 1602.251, 1602.403 (West 2004 & Supp. 2011); 16 Tex. Admin. Code §§ 83.1–83.120 (2011) (Tex. Dep't of Licensing and Regulation, Cosmetologists). Appellants Ashish Patel, Anverali Satani, Nazira Momin, Tahereh Rokhti, Minaz Chamadia, and Vijay Lakshmi Yogi, who are in the business of eyebrow threading, urge that eyebrow threading regulations

unreasonably interfere with their constitutional right to economic liberty under article I, section 19 of the Texas Constitution. *See id.*; Tex. Const. art. I, § 19.[1]

Facing competing motions for summary judgment, the district court granted summary judgment in favor of appellees the Texas Department of Licensing and Regulation (the Department), the Department's executive director, the Texas Commission on Licensing and Regulation (the Commission), and the Commission's members. On appeal, appellants contend that the district court erred in its summary judgment rulings and that it abused its discretion by admitting portions of an affidavit. The state defendants cross appeal, challenging the denial of their plea to the jurisdiction and motion to strike expert testimony. For the reasons that follow, we affirm the district court's judgment.

BACKGROUND

Eyebrow threading is a facial hair removal technique using a single strand of cotton thread.[2] Appellants Patel and Satani have ownership interests in eyebrow threading businesses, and

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[1] Article I, section 19 of the Texas Constitution provides that:

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the land.

Tex. Const. art. I, § 19.

[2] *See generally Kuntz v. Khan*, No. 03-10-00160-CV, 2011 Tex. App. LEXIS 446, at *3 (Tex. App.—Austin Jan. 21, 2011, no pet.) (mem. op.) (describing practice of eyebrow threading as "a method of shaping eyebrows by using a piece of 100-percent cotton thread to pull individual hair follicles out of the skin's pores").

the remaining appellants are individuals who are or were employed as eyebrow threaders. None of the appellants has a state cosmetology license.

The Department is the state agency charged with regulating cosmetology. Tex. Occ. Code Ann. §§ 51.051, 1602.001–.002, 1603.001–.002 (West 2004 & Supp. 2011). The Commission governs the Department and is statutorily authorized to appoint the Department's executive director, oversee the director's administration, formulate policy, and adopt administrative rules. *Id.* §§ 51.051, 51.101, 51.201, 1603.101 (West 2004 & Supp. 2011). The Department's executive director is responsible for administering the Department's programs. *Id.* § 51.103(a)(2) (West 2004).

The Department initiated administrative actions against appellants Momin, Rokhti, and Yogi, seeking to impose penalties against them for practicing eyebrow threading without a license.[3] *See id*. §§ 51.301–.302 (West 2004) (Executive Director or Commission authorized to impose administrative penalty per alleged violation per day), § 1602.251(a) (West Supp. 2011) ("A person may not perform or attempt to perform a practice of cosmetology unless the person holds a license or certificate to perform that practice."). The Department also investigated complaints against an eyebrow threading business owned by Satani concerning the employment of unlicensed eyebrow threaders, but no notice of alleged violation has been issued against the business.[4] *See id*. § 1602.403 (West Supp. 2011) (person holding beauty shop or speciality license may not employ unlicensed operator or specialist).

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[3] The administrative actions against Momin, Rokhti, and Yogi remain pending. The Departments's prosecution of these actions was stayed by agreement of the parties to this litigation, without prejudice to any party.

[4] Prosecution of the complaints against Satani's business were also stayed by agreement of the parties to this litigation, without prejudice to any party.

Appellants thereafter brought this suit in December 2009, seeking declaratory and injunctive relief pursuant to the Uniform Declaratory Judgements Act (UDJA). *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001–.011 (West 2008). In their pleadings, appellants alleged that "[w]ithout any changes in state law or administrative rules, Defendants have abruptly taken the position that threading is the practice of cosmetology, requiring government-issued licenses for both threading business owners and their employees."

Appellants, however, did not seek a declaration that the practice of eyebrow threading was outside the statutory definition of cosmetology. *See* Tex. Occ. Code Ann. § 1602.002 (West Supp. 2011) (definition of cosmetology).[5] Rather, they contended that the challenged cosmetology statutes and rules were unreasonable as applied to eyebrow threading and violated their constitutional right "to earn an honest living in the occupation of one's choice free from unreasonable governmental interference," that the state defendants do not have an "important, legitimate, or rational reason for applying Texas' cosmetology laws and rules to the commercial practice of eyebrow threading," that "[t]he state's police power does not extend to the regulation of harmless commercial practices such as eyebrow threading," and that the state defendants are "presently and unconstitutionally requiring or attempting to require Plaintiffs to obtain licenses that are not reasonably related to their chosen occupation."

[5] The legislature amended the definition of cosmetology after this Court's decision in *Kuntz*. *See* Act of June 17, 2011, 82d Leg., R.S., ch. 1241, § 12, 2011 Tex. Gen. Laws 1241 (current version at Tex. Occ. Code Ann. § 1602.002 (West Supp. 2011)); *Kuntz,* 2011 Tex. App. LEXIS 446, at *21-24 (discussing whether eyebrow threading falls within statutory definition of cosmetology prior to 2011 amendment).

As to their pleaded claims for relief, appellants sought declaratory judgment that the state defendants "violate the privileges and immunities guarantee of the Texas Constitution by unreasonably interfering with Plaintiffs' right to pursue eyebrow threading" and "violate the due process guarantee of the Texas Constitution by unreasonably interfering with Plaintiffs' right to pursue eyebrow threading." They also sought "a permanent injunction barring Defendants from enforcing Texas' cosmetology laws—specifically Sections 1601.002, 1601.251, 1602.002, 1602.251, and 1602.403 of the Texas Occupations Code and Title 16, Sections 83.1 through 83.120 of the Texas Administrative Code—against Plaintiffs based on the commercial practice of eyebrow threading."[6]

Appellants filed a motion for summary judgment in October 2010. Appellants sought summary judgment on the ground that the state defendants' application of cosmetology laws and rules to the commercial practice of eyebrow threading was unconstitutional "because it places senseless burdens on eyebrow threaders and threading businesses without any actual benefit to public health and safety." They urged that the state defendants could not "constitutionally regulate the commercial practice of eyebrow threading as conventional cosmetology unless they can establish a real and substantial relationship between their regulations and the public's health and safety" and that

[6] *See* Tex. Occ. Code Ann. §§ 1601.002 (West Supp. 2011) ("barbering" defined), 1601.251, (West 2004) (certificate, license or permit required to perform act of barbering); 1602.002 (West Supp. 2011) ("cosmetology" defined), 1602.251 (West Supp. 2011) (license or certificate required to perform "practice of cosmetology"), 1602.403 (West Supp. 2011) (employment of license or certificate holder); 16 Tex. Admin. Code §§ 83.1–83.120 (2011) (Tex. Dep't of Licensing and Regulation, Cosmetologists). Although appellants' pleadings include provisions addressing "barbering," they have not made specific arguments concerning the regulation of barbering, focusing their challenge on cosmetology regulations. We, therefore, do the same.

the state defendants could not meet this standard. Their arguments included that "state cosmetology licensing [was] not necessary for safe eyebrow threading," that the state defendants "credentialing program [was] doing nothing to promote public health or competent threading in Texas," and that the statutes and rules were "grossly out of proportion to any legitimate health and safety objections the government may have."

Appellants attached evidence to support their motion, including affidavits of appellants, discovery responses by the state defendants, deposition excerpts, and an affidavit by their expert with attachments. Appellants presented evidence to support their positions that eyebrow threading is safe, that the beauty schools do not teach eyebrow threading, and that eyebrow threading is not tested as a condition of licensure. The evidence included costs to attend a state-licensed beauty school and to take the examinations and the required number of hours of instruction and curriculum. *See* Tex. Occ. Code Ann. §§ 1602.251, .254, .257 (West Supp. 2011) (license and certificate requirements for individuals); 16 Tex. Admin. Code §§ 83.20–.21 (individual license and examination requirements).

Around the same time, the state defendants filed a plea to the jurisdiction and motion for summary judgment, as well as a motion to strike appellants' expert testimony. In their plea and motion for summary judgment, the state defendants challenged appellants' standing and contended that appellants' claims were barred by sovereign immunity. As to the merits of appellants' claims, the state defendants argued, among other grounds, that the uncontested facts showed that appellants failed as a matter of law to articulate a privileges and immunities violation different from their substantive due process claim or to show that Texas cosmetology laws and implementing rules

deprived appellants of any substantive due process right or interest protected by article I, section 19 of the Texas Constitution. *See* Tex. Const. art. I, § 19. The State defendants attached evidence to support their plea and motion, including discovery responses by appellants and affidavits and deposition excerpts with attachments.

After a hearing, the district court denied the state defendants' plea to the jurisdiction and motion to strike expert testimony but granted their motion for summary judgment and denied appellants' motion for summary judgment. The district court thereafter signed a final judgment. These cross appeals followed.

ANALYSIS

State Defendants' Plea to the Jurisdiction

We begin with the threshold jurisdictional issues raised by the state defendants on cross appeal. In their first three issues, the state defendants challenge the district court's denial of their plea to the jurisdiction.[7] They contend that appellants' UDJA suit is barred by sovereign immunity, urging that appellants failed to allege a viable ultra vires claim against the state officials and that there is no waiver of immunity to allow such claims directly against state entities. They also raise standing and ripeness challenges to appellants' claims.

[7] In their fourth issue, the state defendants challenge the district court's denial of their motion to strike expert testimony. Because we affirm the district court's summary judgment in favor of the state defendants, we need not address this issue. *See* Tex. R. App. P. 44.1, 47.1.

A) Standard of Review

We review a plea questioning the trial court's subject matter jurisdiction de novo. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We focus first on the plaintiff's petition to determine whether the facts that were pled affirmatively demonstrate that subject matter jurisdiction exists. *Id.* at 226. We construe the pleadings liberally in favor of the plaintiff. *Id*. If a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. *Id*. at 227; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). The court's "ultimate inquiry is whether the plaintiff's pleaded and un-negated facts, taken as true and liberally construed with an eye to the pleader's intent, would affirmatively demonstrate a claim or claims within the trial court's jurisdiction." *Brantley v. Texas Youth Comm'n,* No. 03-10-00019-CV, 2011 Tex. App. LEXIS 8220, at *34–38 (Tex. App.—Austin Oct. 12, 2011, no pet.) (mem. op.) (citing *Miranda*, 133 S.W.3d at 226; *Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 513, 516 n.8 (Tex. App.—Austin 2010, no pet.)).

B) Sovereign Immunity

The state defendants challenge the district court's jurisdiction to consider appellants' UDJA claims based upon sovereign immunity. "Sovereign immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction." *Miranda*, 133 S.W.3d at 225–26 (citing *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999)). To proceed in a suit against state entities and officials, a plaintiff must establish a waiver of immunity, *see Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003); *Jones*, 8 S.W.3d at 638,

or that sovereign immunity is inapplicable. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex. 2009) (sovereign immunity does not prohibit "suits to require state officials to comply with statutory or constitutional provisions"); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) ("[S]uits for equitable remedies for violation of constitutional rights are not prohibited.").

(i) Claims against the Department and the Commission

As part of their first issue, the state defendants urge that appellants' claims are in substance ultra vires claims and, therefore, that there is no waiver of immunity to allow such claims directly against the Department and the Commission. *See Texas Dep't of Ins. v. Reconveyance*, 306 S.W.3d 256, 258–59 (Tex. 2010) (deeming allegations and requested declaration, in substance, ultra vires claims and dismissing claims against department); *Heinrich*, 284 S.W.3d at 372–73 (explaining that suits seeking to restrain official conduct that is ultra vires of an agency's statutory or constitutional powers "cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity" because "'acts of officials which are not lawfully authorized are not acts of the State'" (citation omitted)). Appellants dispute that their claims are ultra vires claims and argue that they are properly asserted against the Department and the Commission, as well as against the Executive Director and the Commission members.

Sovereign immunity generally does not bar suit against a governmental entity that challenges the constitutionality of a statute and seeks injunctive relief. *See Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994)) (holding that sovereign immunity did not bar UDJA suit against state agency that challenged statute itself and sought injunctive relief); *see also* Tex.

Const. art. I, § 29 ("[W]e declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void."); *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007) (per curiam) ("'Suits for injunctive relief' may be maintained against governmental entities to remedy violations of the Texas Constitution." (citation omitted)); *City of Arlington v. Randall*, 301 S.W.3d 896, 906 (Tex. App.—Fort Worth 2009, pet. denied) ("Although no implied private right of action exists for money damages against governmental entities for violations of the Texas Constitution, a suit seeking an equitable remedy for violations of constitutional rights may be maintained against governmental entities." (citing *Bouillion*, 896 S.W.2d at 147)); *Texas Dep't of State Health Servs. v. Holmes*, 294 S.W.3d 328, 336 (Tex. App.—Austin 2009, pet. denied) ("Sovereign immunity does not shield a governmental entity from a suit for equitable relief for a violation of constitutional rights." (citing *Bouillion*, 896 S.W.2d at 149)).[8]

Further, although the UDJA does not establish subject matter jurisdiction, *see Texas Dept. of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011) (stating that "the UDJA does not enlarge the trial court's jurisdiction but is 'merely a procedural device for deciding cases already within a court's jurisdiction'" (citation omitted)), the UDJA "expressly provides that persons may

[8] *Cf. Brantley v. Texas Youth Comm'n,* No. 03-10-00019-CV, 2011 Tex. App. LEXIS 8220, at *34–38 (Tex. App.—Austin Oct. 12, 2011, no pet.) (mem. op.) (in context of ultra vires claims, citing *Heinrich* to support conclusion that "any claim for equitable relief from a constitutional violation would . . . be barred by sovereign immunity" to the extent asserted against state agency); *Texas State Bd. of Public Accountancy v. Bass*, No. 03-09-00251-CV, 2011 Tex. App. LEXIS 294, *9–10, 25–26 (Tex. App.—Austin Jan. 14, 2011, no pet.) (mem. op.) (questioning holding in *City of Elsa* in light of *Heinrich* but recognizing that governmental entities not immune from suits challenging validity of statutes or ordinances).

challenge . . . statutes, and that governmental entities must be joined or notified." *Texas Lottery Comm'n v. First State Bank*, 325 S.W.3d 628, 634 (Tex. 2010) (quoting *Leeper*, 893 S.W.2d at 446); *see also* Tex. Civ. Prac. & Rem. Code Ann. §§ 37.004(a), .006.[9]

Among appellants' claims in their pleadings, they challenge the constitutionality of specific cosmetology statutes themselves as applied to the practice of eyebrow threading. *See Leeper*, 893 S.W.2d at 446; *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995) ("as applied" challenge to statute is challenge "under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances"). This claim does not require an interpretation of the challenged statutes that eyebrow threading falls outside the scope of those statutes. *See Texas Dept. of Licensing and Regulation v. Roosters MGC, LLC*, No. 03-09-00253-CV, 2010 Tex. App. LEXIS 4392, at *8–11 (Tex. App.—Austin June 10, 2010, no pet.) (mem. op.) (state agency immune from claims seeking declarations regarding proper interpretation of statute and that services at issue outside scope of statute). Appellants also seek a permanent injunction against the state defendants barring them from enforcing the challenged statutes against appellants for the commercial practice of eyebrow threading. Given their claim challenging specific statutes themselves and their requested injunctive relief, we conclude that the district court did not err in

[9] Similarly, section 2001.038 of the government code permits suits against state agencies for declaratory relief concerning the validity or applicability of their rules. *See* Tex. Gov't Code Ann. § 2001.038(a), (c) (West 2008) ("The state agency must be made a party to the action."); *Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth.*, 96 S.W.3d 519, 529 (Tex. App.—Austin 2002, pet. denied) (section 2001.038 authorizes courts to determine whether "a rule is *valid* and/or *applicable*") (citation omitted, emphasis in original). Appellants, however, amended their pleadings to delete section 2001.038 of the government code as a basis for the district court's jurisdiction.

denying the state defendants' plea to the jurisdiction as to the state entities. *See Texas Lottery Comm'n*, 325 S.W.3d at 635; *City of Elsa*, 226 S.W.3d at 392.

(ii) Claims against the Executive Director and the Members of the Commission

The state defendants also urge in their first issue that appellants failed to allege a "viable" ultra vires claim against the state officials. *See Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11 (Tex. 2011) (citation omitted) (state actors retain immunity from claims unless the plaintiff has "pleaded a viable claim"). The state defendants characterize the substance of appellants' claims as ultra vires claims but assert that appellants "failed to identify any ultra vires acts."[10] *See Reconveyance*, 306 S.W.3d at 258–59. Their argument focuses on the merits of appellants' constitutional claims: whether the claims, assuming that they are ultra vires, are "viable." *See Andrade*, 345 S.W.3d at 11.

Although the district court ultimately denied the state defendants' plea to the jurisdiction, the court considered the evidence presented by both sides and determined the merits of competing motions for summary judgment at the same time it considered the state defendants' plea. In this context, we cannot conclude that the court erred by denying the state defendants' plea to the

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[10] For example, the state defendants argue in their brief:

> [T]he thrust of [appellants'] suit is that the State Officials acted outside their constitutional authority by applying the cosmetology laws to the practice of eyebrow threading. Accordingly, although [appellants] do not themselves invoke the "ultra vires" doctrine explicitly, they in fact assert a [sic] *ultra vires* claims falling squarely within the Supreme Court's holdings in *Heinrich* and *Reconveyance*. (Emphasis in original.)

jurisdiction and determining the merits of appellants' constitutional claims against the state officials by summary judgment. *See Roosters MGC, LLC*, 2010 Tex. App. LEXIS 4392, at *7–8 (citing *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002)) ("In deciding a plea to the jurisdiction, a court may not weigh the claims' merit beyond the extent necessary to determine jurisdiction, but must consider only the plaintiffs' pleadings and the evidence pertinent to the jurisdictional inquiry."); *see also Holmes*, 294 S.W.3d at 335 (holding that trial court did not err in denying plea to the jurisdiction and deferring its determination of alleged constitutional violation "until the case could be more fully developed"). We overrule the state defendants' first issue on cross appeal.

C) Standing and Ripeness

In their second and third issues, the state defendants contend that the district court erred in denying the state defendants' plea to the jurisdiction based upon lack of standing and ripeness. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000) (standing and ripeness component parts of subject matter jurisdiction). They contend that Patel and Satani lack standing because they have no injury traceable to the regulation of eyebrow threading that would be redressable by a favorable ruling and that the claims of Patel, Satani, and Chamadia are not ripe. They also contend that the claims of Momin, Yogi, and Rokhti are subject to the redundant remedies doctrine.

(*i*) *Standing*

"[S]tanding focuses on the issue of *who* may bring an action." *Id.* at 851 (citing *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626–27 (Tex.

1996)) (emphasis in original). "The general test for standing in Texas requires that there (a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (citation omitted). Because appellants seek only declaratory and injunctive relief and they seek the same relief, "only one plaintiff with standing is required." *See Andrade*, 345 S.W.3d at 6 (citing *Barshop*, 925 S.W.2d at 627).

On appeal, the state defendants do not challenge appellant Chamadia's standing to assert appellants' claims for injunctive and declaratory relief, and they did not present evidence to negate her pleaded facts supporting standing. Further, the determination of the declarations sought here resolves appellants' constitutional challenge to the regulation of eyebrow threading. *See Texas Assoc. of Bus.*, 852 S.W.2d at 446. Based upon the pleadings and un-negated facts taken as true, we conclude that Chamadia has established standing. *Id.*; *see also Webb v. Voga*, 316 S.W.3d 809, 812 (Tex. App.—Dallas 2010, no pet.) ("Standing is generally a question of law determined from the pleadings."). Because we conclude that Chamadia has standing, we need not review the standing of Patel and Satani to assert the same claims for declaratory and injunctive relief. *See Andrade*, 345 S.W.3d at 6.

(ii) Ripeness

Similar to standing, ripeness "emphasizes the need for a concrete injury for a justiciable claim to be presented" but it "focuses on *when* that action may be brought." *Gibson*, 22 S.W.3d at 851 (citation omitted) (emphasis in original). In assessing ripeness, "a court is required 'to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of

withholding court consideration.'" *Perry v. Del Rio*, 66 S.W.3d 239, 250 (Tex. 2001) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). "Hardship is shown when a statute 'requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance.'" *Mitz v. Texas State Bd. of Veterinary Med. Exam'rs*, 278 S.W.3d 17, 26 (Tex. App.—Austin 2008, pet. dism'd) (quoting *Abbott Labs*, 387 U.S. at 153).

The state defendants contend that the claims of Patel, Satani, and Chamadia are not ripe because there have been no enforcement actions against them and they have suffered no injury from the challenged regulations. The pleadings and un-negated facts, however, taken as true show that Chamadia, Patel, and Satani are subject to a continuing threat of civil and criminal liability for the practice of eyebrow threading without a license, as well as administrative penalties and sanctions. *See* Tex. Occ. Code Ann. §§ 51.301– .302 (administrative penalty) (West 2004), 51.352–.353 (West Supp. 2011) (civil penalty and administrative sanctions), 1602.554 (West 2004) (unlicensed practice of cosmetology criminal misdemeanor); *Perry*, 66 S.W.3d at 250; *Mitz*, 278 S.W.3d at 25–26 (holding constitutional claim ripe for review, considering "continuing threat of civil and criminal liability against the practitioners and the direct effect the Act had on their ongoing business enterprise").

As with Chamadia's pleadings concerning her interest in the controversy, Patel and Satani pleaded, and the un-negated facts taken as true show, that they both have interests in eyebrow threading businesses and that the departments' actions threaten them with "punishing administrative fines, civil penalties, and criminal penalties." Further, appellants challenge the constitutionality of statutes, a challenge that is "is unquestionably an issue fit for judicial review." *Mitz*, 278 S.W.3d

at 23 (citation omitted). Given appellants' pleadings and the un-negated facts taken as true, Chamadia, Patel, and Satani have shown hardship without judicial consideration and that their issues are fit for judicial review. *See Perry*, 66 S.W.3d at 250; *Mitz*, 278 S.W.3d at 26. We conclude then that their claims are ripe.

(iii) Redundant Remedies

Under the redundant remedies doctrine, when a statute provides an avenue for attacking a final agency order, a UDJA action generally will not lie to provide a redundant remedy. *See Strayhorn v. Raytheon E-Sys., Inc.*, 101 S.W.3d 558, 572 (Tex. App.—Austin 2003, pet. denied); *Kuntz v. Khan*, No. 03-10-00160-CV, 2011 Tex. App. LEXIS 446, at *11 (Tex. App.—Austin Jan. 21, 2011, no pet.) (mem. op.). The state defendants contend that the claims of Momin, Yogi, and Rokhti are barred by this doctrine because all of the substantive relief that appellants seek through their UDJA suit could be brought through the administrative process. *See* Tex. Gov't Code Ann. § 2001.174(2)(A)-(B) (West 2008).

Although administrative actions subject to judicial review are pending against Momin, Yogi, and Rokhti, there is no administrative action pending against Chamadia, and we have concluded that she has standing to assert appellants' claims for declaratory and injunctive relief. *See Andrade*, 345 S.W.3d at 6. As we concluded previously as to the standing of Patel and Satani, we need not review the standing of Momin, Yogi, and Rokhti to assert the same claims asserted by Chamadia for declaratory and injunctive relief. *See id.* Further, Momin, Yogi, and Rokhti remain subject to civil and criminal liability, in addition to administrative penalties and sanctions. *See, e.g.*, *Mitz*, 278 S.W.3d at 26 (case ripe for judicial review although administrative proceedings pending

because "continuing threat of civil and criminal liability" established hardship without judicial consideration). Given their continuing exposure to civil and criminal liability and Chamadia's standing to assert appellants' claims, we conclude that the redundant remedies doctrine does not bar the other individual appellants' claims. *See id.*

Having found standing and that the challenged claims are ripe for judicial review, we overrule the state defendants' second and third issues on cross appeal and turn to appellants' issues.

Appellants' Issues on Appeal

Appellants raise four issues challenging the district court's summary judgment rulings. They contend in their first two issues that (i) the district court erred because it should have applied the "real and substantial" test that governs judicial review of state economic regulations and not the federal "rational basis" test, (ii) the record does not show a substantial relationship between the government's eyebrow threading regulations and the public health and safety, and (iii) the regulations are unduly burdensome. Appellants contend in their third issue that, even if the federal "rational basis" test controls, the record does not show any rational relationship between the eyebrow threading regulations and legitimate public safety objectives. In their final issue, they contend that the district court abused its discretion by admitting portions of an affidavit.

A) Standards of Review

We review a trial court's decision to grant or deny summary judgment de novo. *Texas Mun. Power Agency v. Public Util. Comm'n of Tex*., 253 S.W.3d 184, 192 (Tex. 2007); *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins.*

Co. v. Knott, 128 S.W.3d 211, 215 (Tex. 2003). To prevail on a traditional motion for summary judgment, the movant must show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). We take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Dorsett*, 164 S.W.3d at 661. When the parties file competing motions for summary judgment, and one is granted and one is denied, we review the record, consider all questions presented, and render the decision the trial court should have rendered. *Id.* When the trial court does not specify the grounds for its summary judgment, as is the case here, the appellate court must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Knott*, 128 S.W.3d at 216.

B) Appellants' Constitutional Challenge to Cosmetology Statutes and Rules as applied to Eyebrow Threading

In their first issue, appellants contend that the standard for reviewing their constitutional challenges brought under article I, section 19 of the Texas Constitution is the "real and substantial" test for challenges to economic regulations.[11] In the context of determining whether a statute is a proper exercise of police power, this Court has stated the test as whether "the statute in

[11] Although appellants pleaded separate causes of action based upon substantive due process and the privileges and immunities clause in article I, section 19 of the Texas Constitution, appellants do not make separate arguments in their briefing, and the substance of their claims was the same—that the regulations violated their right to earn an honest living in the occupation of one's choice free from unreasonable governmental interference. We, therefore, do not address the privileges and immunities clause separately but consider it as part of their substantive due process, economic liberty challenge.

question bears a real and substantial relation to the public health, safety, morals, or general welfare *of the public*." *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190, 216 (Tex. App.—Austin 2008, no pet.) (emphasis in original). A statute is a proper exercise of police power if it is "appropriate and reasonably necessary to accomplish a purpose within the scope of the police power" and it is "reasonable and not arbitrary or unjust in the manner it seeks to accomplish the goal of the statute or so unduly harsh that it is out of proportion to the end sought to be accomplished." *Id.* at 215 (citation omitted).

The state defendants counter that the proper standard is federal "rational basis" review, the standard that applies to federal due process challenges. *See Garcia*, 893 S.W.2d at 525 (rational basis test discussed); *see also City of San Antonio v. TPLP Office Park Prop.*, 218 S.W.3d 60, 65–66 (Tex. 2007) (applying "rational basis" review to substantive due process challenge to city action and ordinance); *University of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (explaining that "due course" provision in Texas Constitution lacks "meaningful distinction" from federal "due process"); *Liberty Mut. Ins. Co. v. Texas Dep't of Ins.*, 187 S.W.3d 808, 827 (Tex. App.—Austin 2006, pet. denied) (applying federal rational basis review to substantive due process challenges); *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 68–69 (Tex. App.—Austin 1995, no writ) (same). "Under federal due process, a law that does not affect fundamental rights or interests—such as the economic legislation at issue here—is valid if it merely

bears a rational relationship to a legitimate state interest." *See Garcia*, 893 S.W.2d at525 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)).[12]

In *Garcia*, the Texas Supreme Court "recognized that 'Texas courts have not been consistent in articulating the standard of review under the due course clause.'" *Id.* (citation omitted). The court noted that Texas courts "have sometimes indicated that section 19 provides an identical guarantee to its federal due process counterpart" and, "[o]n other occasions, . . . our Court has attempted to articulate our own independent due course standard . . . which some courts have characterized as more rigorous than the federal standard." *Id.*; *see Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 263 & n.5 (Tex. 1994) (noting that Texas courts not consistent in articulating standard of review under due course clause). Because appellants' issues raise substantive due process as well as arguing that the eyebrow threading regulations are not a proper exercise of the state's police power, we consider their arguments under both standards.

[12] To bring a substantive due process claim, an individual also must establish a protected interest. *Liberty Mut. Ins. Co. v. Texas Dep't of Ins*., 187 S.W.3d 808, 827 (Tex. App.—Austin 2006, pet. denied). For purposes of their motion for summary judgment, the state defendants assume that the appellants had a protected, but not fundamental, liberty interest. *See Rylander v. B & A Mktg. Co.*, 997 S.W.2d 326, 333–34 (Tex. App.—Austin 1999, no pet.) (applying rational basis review where fundamental liberty interest not at stake); *Garay v. State*, 940 S.W.2d 211, 218 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (applying rational basis review to substantive due process claim concerning right to seek and obtain employment); *see also Martin v. Memorial Hosp. at Gulfport*, 130 F.3d 1143, 1148–50 (5th Cir. 1997) (recognizing the right to earn living in the "common occupations of the community" as a protected, but not fundamental, liberty interest and applying rational basis review to substantive due process challenge).

(i) Appellants' Arguments

Appellants contend that the cosmetology statutes and rules as applied to eyebrow threading do not pass the real and substantial test because they have no real or substantial connection to stated objectives such as sanitation and health and safety. They argue that the "constitutionally required real and substantial connection is lacking because the government has no evidence that eyebrow threading is dangerous and, even if it did, there is no meaningful connection between the practice of eyebrow threading and the [Department]'s conventional cosmetology regulations." They also argue that the effect of the regulation is unduly harsh in proportion to the stated objections.

Appellants alternatively contend that even if the district court correctly applied the federal "rational basis" test, that it misapplied the test because "there is an irrational disconnect between legitimate concerns for the public's safety and requiring eyebrow threaders to undergo several hundred hours of irrelevant training simply to guarantee perhaps a few dozen hours of sanitation training." They argue that: (i) the regulations "may, in fact, undermine safety by giving consumers a false sense of security in the ability of state-licensed cosmetologists to perform threading," and (ii) the state's cosmetology training program has nothing to do with eyebrow threading and, therefore, that "there is no sense in requiring them to endure it."

Appellants further argue that we must consider and weigh the evidence and that the evidence supports their position that the statutes and rules should be struck down. They point to evidence that they contend supports findings that: (i) eyebrow threading does not require conventional cosmetology training, (ii) it is "safe and requires, at most, minimal sanitation training," (iii) Texas does not require beauty schools to teach eyebrow threading, (iv) a limited number

of schools voluntarily teach threading, and (v) Texas does not test threading as a condition of licensure.[13]

The requirements for obtaining and then maintaining a cosmetology license include completing 1500 hours—or 750 hours for a facialist—in a licensed beauty school, passing written and practical examinations, paying biannual fees, and taking continuing education courses. *See* Tex. Occ. Code Ann. §§ 1602.254–.258 (eligibility for licenses), 1603.252–.257 (examination requirements), 1602.351 (minimum curriculum for schools), 1602.451 (West Supp. 2011) (duties of holder of beauty school license); 16 Tex. Admin. Code §§ 83.20(a) (license requirements), 83.25(e) (continuing education), 83.26(a)–(b) (renewal), 83.31(a) (term), 83.80(a)–(b) (fees), 83.120 (curriculum).

Appellants urge that the general sanitation training taught in beauty schools does not justify requiring eyebrow threaders to undergo 750 or 1500 hours of instruction and two examinations. The facial curriculum requires 40 hours out of the 750 hours required for "sanitation, safety, and first aid." *See* 16 Tex. Admin. Code § 83.120. The facial curriculum additionally includes: 225 hours for "facial treatment, cleansing, masking, therapy," 90 hours for "anatomy and

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[13] The evidence included the Department's discovery responses in which it named schools that provided instruction on the practice of eyebrow threading. Appellants provided affidavits from individuals from some of those schools. Some of the individuals testified that their school did not teach eyebrow threading. Appellants' evidence also included excerpts from cosmetology textbooks addressing eyebrow threading and their expert's testimony. Appellants characterize the references in the textbooks as "cursory," and urge that their expert's testimony shows that eyebrow threading is safe and should not require a cosmetology license. Their expert, who was a physician and operated a medical spa, testified concerning existing medical literature and data from hair removal treatments at her medical spa, including eyebrow threading, waxing, and laser hair removal. There had only been one complication from threading at her medical spa. Her opinion was that the practice of threading only required "a basic sanitation course."

physiology," 75 hours for "electricity, machines, and related equipment," 75 hours for "Makeup," 50 hours for "orientation, rules and laws," 50 hours for "Chemistry," 50 hours for "care of client," 35 hours for "management," 25 hours for "superfluous hair removal," 15 hours for "aroma therapy," 10 hours for "Nutrition," and 10 hours for "color psychology." *See id.* Appellants urge that the training that the Department has imposed "comes with at least 710 hours of unnecessary instruction" and that the "threading regulations place a disproportionate burden on Appellants as compared to the public benefits (if any) of licensing eyebrow threaders as conventional cosmetologists."

(ii) The State Defendants' Contrary Arguments

On the contrary, the state defendants contend that rational basis review applies to appellants' economic liberty claims brought under the Texas Constitution and that, in any event, the challenged regulations survive under either rational basis or real and substantial review. The state defendants' position is that the practice of eyebrow threading requires, at a minimum, a license for a facialist, and that the application of the licensing requirements for a facialist to eyebrow threading, as well as the other challenged cosmetology regulations, bears a rational relationship to the legitimate state purpose of protecting public health and safety. *See* Tex. Admin. Code §§ 83.10(9) (definition of facialist), 82.120(b) (facial curriculum).[14] They also contend that there is a real and substantial connection between the eyebrow threading regulations and the legitimate concern for public health, safety, and sanitation. They argue that Texas regulates eyebrow threading because cosmetology

[14] After September 1, 2011, a license for a facialist is referred to as an esthetician speciality license. *See* Tex. Occ. Code. Ann. § 1602.257 (West Supp. 2011) (amendments effective Sept. 1, 2011).

procedures and techniques—including eyebrow threading—performed on the public implicate the transmission of communicable diseases unless safe and sanitary practices are followed and that a primary basis for regulating cosmetology services—including eyebrow threading—is due to the risk of contamination and spread of disease inherent in providing such services to the public.

The state defendants focus on sections of the cosmetology statutes and rules that specifically address public health, safety, and sanitation concerns. *See, e.g.*, Tex. Occ. Code Ann. §§ 1603.102 (West Supp. 2011) (Commission required to "establish sanitation rules to prevent the spread of an infectious or contagious disease"), 1603.352 (West Supp. 2011) (imposing sterilization requirements for certain cosmetology services), 1602.406 (West 2004) (practice of cosmetology forbidden by any licensed person who knows they are suffering from infectious or contagious disease), 1603.455 (West Supp. 2011) (Department authorized to issue emergency orders "to protect the public health and safety"); *see generally* 16 Tex. Admin. Code §§ 83.100–.111; *see id.* §§ 83.100 (health and safety definitions), 83.102 (general health and safety standards), 83.104 (health and safety standards for facial services), 83.111 (health and safety standards related to blood and bodily fluids).

The state defendants also dispute appellants' characterization of the testing and teaching of eyebrow threading by Texas beauty schools and in the textbooks. They presented conflicting evidence concerning the cost and extent that beauty schools teach and test threading and health, safety, and sanitation and the topics covered by the licensing examinations. The evidence included excerpts from textbooks, actual test questions from the licensing examinations, candidate information bulletins that advise candidates of the subjects covered on the examinations, and an

affidavit by Marinela LaFleur, a program specialist in the education and examination division from the Department. The excerpts from the textbooks cover, among other topics, hair removal including threading, disorders and diseases, sanitation, bacteria, viruses, infection control, and first aid. The subject areas covered by the test questions and the candidate information bulletin include sanitation and safety concerns, as well as hair removal.[15]

In her affidavit, LaFleur testified concerning the facial curriculum and the topics covered on the licensing examinations in relevant part:

> The facial curriculum, which requires 25 hours of instruction in superfluous hair removal, does not specify the types of hair removal that beauty schools must teach. Schools may elect to teach waxing, threading or other hair removal techniques in response to student demand. . . .
>
> With regard to the current facialist exam in particular, 24 percent of the written exam (22 questions out of 90) directly addresses sanitation, disinfection, and safety. In addition, these matters are also addressed as part of the client consultation and analysis component (e.g. human physiology, anatomy, and disorders), which constitutes 12 percent (11 questions) of the exam. Hair removal, including eyebrow threading as a form of tweezing, comprises another 11 percent (10 questions) of the exam. A candidate's eyebrow threading technique and hands-on compliance with the related sanitation requirements are tested during all three phases of the practical examination—pre-service, during service, and post-service. During each of these phases, the applicant is assigned points for successfully performing eyebrow threading technique and/or adhering to all of the safety criteria that are part of each phase of a proper eyebrow tweezing.

She also listed textbooks that are currently used in beauty schools "which represent accepted Cosmetology standards."

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[15] The district court admitted the test questions under seal.

The state defendants also rely upon appellants' expert to support their position that the challenged regulations meet either test. In the report that was attached to her affidavit, appellants' expert listed diseases that can be spread through the threading process and articles reflecting medical risks of threading and the need for sanitation to minimize the risks. She stated in part:

> The sanitation risk of any form of hair removal technique, including eyebrow threading, could result in viral and superficial bacterial infections. . . .
>
> The complications mentioned can occur with waxing or tweezing since the listed complications are due to the "trauma" of the procedure rather than just threading. It is the act of having the skin abraded that causes the complication of redness, swelling, itching, inflammation of the hair follicles, discoloration, and the superficial bacterial and viral infections. Thus, all forms of avulsive (pulling) like hair removal can have these complications. . . .

Her report also listed specific forms of bacteria and viruses that are contagious and that can be spread during the threading process.

(iii) Analysis of Appellants' Constitutional Challenge

Because the district court granted summary judgment in favor of the state defendants, the issue on appeal is whether the state defendants established that they were entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Grant,* 73 S.W.3d at 215. We, therefore, consider the evidence in the light most favorable to appellants. We also presume, however, that the challenged regulations are constitutional, and appellants, as the parties challenging the constitutionality of the regulations, bear the burden to demonstrate that the regulations fail to satisfy constitutional

requirements. *Satterfield*, 268 S.W.3d at 201 (citing *Enron Corp. v. Spring Indep. Sch. Dist*., 922 S.W.2d 931, 934 (Tex. 1996) and *Vinson v. Burgess*, 773 S.W.2d 263, 266 (Tex. 1989)).

Appellants presented evidence that eyebrow threading is safe but whether it generally is safe is not determinative here. Appellants do not dispute that a primary purpose of the cosmetology regulations is to protect public health, safety, and sanitation. They also do not dispute that eyebrow threading is subject to regulation as a cosmetology service.[16] Because the challenged regulations address an occupation and are related to public health and safety, they are squarely within the scope of the state's police power. *See Satterfield,* 268 S.W.3d at 217 (regulation of occupations and professions and regulations concerning public health and safety within the scope and proper exercise of police power); *see also Texas State Bd. of Barber Exam'rs v. Beaumont Barber College, Inc.*, 454 S.W.2d 729, 731 (Tex. 1970) (regulation of barber trade necessary to public health and proper exercise of police power).

The Texas Supreme Court has explained the courts' role when reviewing statutes that are within the scope of the police power:

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[16] For example, appellants state in their brief:

> Appellant acknowledge that the government can constitutionally regulate the basic sanitation aspects of eyebrow threading, but they vigorously challenge the notion that they can do so using *this* regulatory regime.

They compare eyebrow threaders to hair braiders who are required to complete 35 hours of training and are eligible for a speciality certificate. *See* Tex. Occ. Code Ann. § 1602.258 (West Supp. 2011) (requisites for speciality certificate eligibility determined by Department); 16 Tex. Admin. Code §§ 83.20(b) (requirements for hair braiding speciality certificate), 83.120(b) (hair braiding curriculum).

> A large discretion is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. If there is room for a fair difference of opinion as to the necessity and reasonableness of a legislative enactment on a subject which lies within the domain of the police power, the courts will not hold it void.

State v. Richards, 301 S.W.2d 597, 602 (Tex. 1957). In *Richards*, the supreme court found that the innocent-owner provision of a civil asset forfeiture statute as applied to the property rights of the innocent owner was within the scope of the state's police power and upheld it against a state substantive due process challenge. *See id.* at 602–03; *cf. Satterfield*, 268 S.W.3d at 220 (holding that statute that limited asbestos-related liabilities of certain successor corporations not within police power).

Similarly, in the context of a challenge to state regulation of visual care and related licensing requirements, the United States Supreme Court found that the challenged statutes that subjected opticians to the regulatory system at issue did not violate the constitution. *Williamson*, 348 U.S. at 491 ("We cannot say that the regulation has no rational relation to that objective [professional treatment of human eye] and therefore is beyond constitutional bounds."). In reaching its holding, the court observed:

> The [challenged state] law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial

> conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

Id. at 487–88 (citation omitted); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1974) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.").[17]

Applying these directives for reviewing regulations that are within the scope of the police power here, we conclude that, under either the real and substantial test or rational basis review, the state defendants established that they were entitled to summary judgment as a matter of law. *See Texas State Bd. of Barber Exam'rs*, 454 S.W.2d at 732 (citation omitted) ("The necessity or reasonableness of particular regulations imposed under the police power is a matter addressed to the legislative department whose determination in the exercise of a sound discretion is conclusive upon the courts. Legislative enactments will not be held unconstitutional and invalid unless it is absolutely necessary to so hold."). Viewing the evidence in the light most favorable to appellants, the evidence at most established that there is "room for a fair difference of opinion as to the necessity and reasonableness" of the challenged regulations. *See Richards*, 301 S.W.2d at 602; *see also FM Prop. Operating Co. v. City of Austin*, 93 F.3d 167, 175 (5th Cir. 1996) (where the question of

[17] *See* Anthony B. Sanders, *The "New Judicial Federalism" before its time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 Am. U. L. Rev. 457, 475, 478 (2005) (noting that United States Supreme Court has not invalidated an economic regulation on economic substantive due process grounds since 1937 and that "by the 1980s only a handful of states invalidated economic regulations on substantive due process grounds, and then, only on occasion").

whether there is a rational relationship between policy and legitimate objective is "debatable," no substantive due process violation).

In *Garcia*, the supreme court found that under "any articulation," the statute at issue was "sufficiently rational and reasonable to meet constitutional due course requirements." *See* 893 S.W.2d at 525; *see also Trinity River Auth.*, 889 S.W.2d at 263 (noting standard of review under due course clause not consistently articulated and holding that "under any cognizable test" statute at issue "passes constitutional muster"). Similarly, on the record before us, we conclude that the challenged regulations are "sufficiently rational and reasonable to meet constitutional due course requirements." *See id.*

(iv) Craigmiles and Cornwell

As part of their third issue, appellants rely on two federal court decisions to support their position that, even under the rational basis test, the regulatory licensing scheme as applied to eyebrow threading violates their substantive due process rights. *See Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999). We find both cases distinguishable.

In *Craigmiles*, the plaintiffs challenged an amendment to a statute that precluded the selling of caskets without a "funeral director" license from the state. 312 F.3d at 222. In that case, the evidence showed that licensed funeral directors sold the caskets at prices substantially over total costs. *Id.* at 224. Applying rational basis review, the Sixth Circuit held that the amendment violated both the due process and equal protection clauses of the Fourteenth Amendment, "[f]inding no rational relationship to any of the articulated purposes of the state" and that the amendment was

"nothing more than an attempt to prevent economic competition." *Id*. at 225, 228; *see also* U.S. Const. amend. XIV, § 1. Given the "pretextual nature of the state's offered explanations," the court invalidated the "naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers." 312 F.3d at 229. Here, in contrast with the challenged amendment in *Craigmiles*, there was no evidence to support a finding that the purpose of the regulation of the practices of cosmetology, including eyebrow threading, was economic protection or to prevent economic competition.

In *Cornwell*, the plaintiffs brought substantive due process and equal protection claims challenging California cosmetology regulations as applied to African hair braiding. 80 F. Supp. 2d at 1102–03. The plaintiffs' equal protection claim was "grounded on the reasoning that 'sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.'" *Id.* (citation omitted). Plaintiffs also alleged that the "current cosmetology regulatory regime has the intent and effect of establishing and maintaining a cartel for cosmetology services in California." *Id*. at 1113, 1117–18. Facing motions for summary judgment and applying rational basis review, the California district court granted summary judgment for one of the plaintiffs and denied it as to the other plaintiffs. The court concluded as to the successful plaintiff, who only "locks" hair, that "her activities were of such a distinguishable nature" that she could not be reasonably classified as "a cosmetologist as it is defined and regulated presently" and that, even if she were defined as a cosmetologist, "the licensing regime would be irrational as applied to her because of her limited range of activities." *Id*. at 1107–08. The court noted that the successful

plaintiff's task was limited to the "physical manipulation of hair without the use of hazardous chemicals." *Id*. at 1118.

The factors considered by the court to reach its finding that the regulations were not rational as applied to the successful plaintiff included the mandated curriculum of 1600 hours, the exposure of hair braiders to hazardous chemicals that they do not use in their trade, and the lack of hair braiding teaching in the mandated curriculum. Although appellants make analogous arguments here concerning the curriculum and licensing requirements, they did not seek a declaration that eyebrow threading fell outside the definition of cosmetology, they did not bring an equal protection claim, and they did not allege monopoly or other improper reasons behind the challenged regulations. We further cannot conclude that hair braiding and eyebrow threading fall within the same type of cosmetology services. *See* Tex. Occ. Code Ann. § 1602.258 (West Supp. 2011) (requisites for speciality certificate eligibility determined by Department); 16 Tex. Admin. Code §§ 83.20(b) (requirements for hair braiding speciality certificate), 83.120(b) (hair braiding curriculum different from other cosmetology services).

(v) Conclusion

Because we conclude that the state defendants established as a matter of law that the challenged cosmetology statutes and rules as applied to the practice of eyebrow threading do not violate appellants' economic liberties under article I, section 19 of the Texas Constitution, we conclude that the district court did not err in granting summary judgment in favor of the state defendants. We overrule appellants' first, second, and third issues.

C) Challenge to Admission of Portion of LaFleur's Affidavit

In their final issue, appellants contend that the district court abused its discretion by admitting portions of the affidavit of Marinela LaFleur concerning the number of hours of training taught at licensed beauty schools devoted to general sanitation. *See In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005) (per curiam) (standard of review of a trial court's decision to admit or exclude evidence is abuse of discretion). Appellants objected to this portion of her testimony as conclusory. *See, e.g.*, *HIS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 803 (Tex. 2004) (conclusory statements in expert affidavit "insufficient to create a question of fact to defeat summary judgment").

A trial court abuses its discretion if it acts arbitrarily or unreasonably or without reference to any guiding rules and principles. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam) (citing *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241–42 (Tex. 1985)). Additionally, to be entitled to reversal due to the erroneous admission of evidence, an appellant must show that the error probably resulted in an improper judgment. Tex. R. App. P. 44.1; *State v. Central Expressway Sign Assocs*., 302 S.W.3d 866, 870 (Tex. 2009). In conducting a harm analysis, we review the entire record and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted. *Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007); *In re C.R.*, 263 S.W.3d 368, 370 (Tex. App.—Dallas 2008, no pet.).

In her affidavit, LaFleur testified that she was employed by the Department as a program specialist in the education and examination division, that she had been in that position for

four years, that she was "familiar with and [had] knowledge of the curriculum for the cosmetology operator and facialist license examination and the Candidate Information Bulletins (CIBs) that TDLR publishes for the benefit of licensure candidates," and that she was "a licensed cosmetology operator and a licensed cosmetology instructor."

Appellants objected to the following paragraph in LaFleur's affidavit on the ground that it was improper conclusory testimony that 430 hours are devoted to general sanitation training:

> The curriculum required to be taught in licensed beauty schools is listed in 16 TAC § 83.120(a) (operator curriculum - 1500 hours) and § 83.120(b) (facial curriculum -750 hours). The curriculum covers extensive sanitation requirements found under the following topics and hours: facial treatment, cleansing, masking, therapy (225 hours), anatomy and physiology (90 hours), orientation, rules and law (50 hours), sanitation, safety and first aid (40 hours), superfluous hair removal (25 hours). Sanitation in the practice of cosmetology services is a serious public health and safety concern, and therefore it is covered as a component of teaching virtually every cosmetology technique.

Appellants point to the curriculum guidelines for the facial curriculum in the rules that set 40 hours for "sanitation, safety, and first aid," *see* Tex. Admin. Code § 83.120(b), to argue that LaFleur failed to provide a "means of testing her proposition that sanitation training is sprinkled across 430 hours of the cosmetology curriculum."

We cannot conclude that the district court abused its discretion by overruling appellants' objection and admitting this paragraph. See *Bowie Mem'l Hosp.*, 79 S.W.3d at 52. The topics and hours as attested to by LaFleur track the topics and hours set forth in the rules for the facial curriculum. Further, appellants have failed to show that the judgment turned on the admission of this paragraph. *See* Tex. R. App. P. 44.1; *Central Expressway Sign Assocs*., 302 S.W.3d at 870.

The evidence was extensive concerning the curriculum covered by beauty schools in Texas, and the record makes clear that sanitation was part of the curriculum. The actual number of hours devoted to sanitation is not controlling here. We overrule appellants' fourth issue.

CONCLUSION

For these reasons, we affirm the district court's judgment.

_____

Melissa Goodwin, Justice

Before Justices Puryear, Henson and Goodwin

Affirmed

Filed: July 25, 2012

TINA PATTERSON AND LARRY PATTERSON, Appellants v. CITY OF BELLMEAD, Appellee

No. 10-12-00357-CV

COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO

2013 Tex. App. LEXIS 3136

March 21, 2013, Opinion Delivered
March 21, 2013, Filed

SUBSEQUENT HISTORY: Petition for review denied by *Patterson v. City of Bellmead, 2013 Tex. LEXIS 549 (Tex., July 26, 2013)*

PRIOR HISTORY: [*1]

From the 74th District Court, McLennan County, Texas. Trial Court No. 2011-1826-3.

DISPOSITION: Affirmed.

COUNSEL: For Appellant/Relator: Steven W. Thornton, Westerburg & Thornton, PC, Dallas, TX.

For Appellees/Respondents: Dillon Meek, Haley & Olson, PC, Waco, TX.

JUDGES: Before Chief Justice Gray, Justice Davis, and Justice Scoggins.

OPINION BY: AL SCOGGINS

OPINION

MEMORANDUM OPINION

In this appeal, appellants, Tina and Larry Patterson, complain about a summary judgment granted in favor of appellee, the City of Bellmead (the "City"). In two issues, the Pattersons contend that: (1) the city ordinance involved in this case--Section 3-40 of the City's Municipal Code--is unconstitutional; and (2) the trial court abused its discretion in denying their motion to compel and granting the City's motion to quash. We affirm.

I. BACKGROUND

On March 15, 2011, the City gave the Pattersons notice that they were in violation of Section 3-40 of the City's Municipal Code. As noted by Victor Pena, the City's manager, "Section 3-40 regulates the number of dogs and cats that could be kept on any one premise within the City." In fact, Section 3-40 provides that:

> The maximum number of dogs and cats which may be kept on any one premise shall be four (4). Any person or persons who keeps more than a combined total of four (4) dogs or cats on any one premise shall be deemed to be maintaining a kennel and shall be [*2] assessed a kennel fee of three hundred dollars ($300.00) per year.

In their second amended petition for declaratory relief, the Pattersons asserted that they "started a small hobby of training and handling show-quality dogs"

beginning in 1973.[1] To prepare the dogs for various shows, the Pattersons admitted that they "have often maintained multiple dogs and cats, as well as several other types of animals on the Property."[2] In any event, the Pattersons emphasized that they "have always operated this endeavor as a hobby rather than a business in order to retain an amateur status."

1 In their appellate brief, the Pattersons state that they began training and handling show-quality dogs in 1982, not 1973.

2 In addition to the dogs on the 2.521-acre property, Tina Patterson acknowledged that when she moved on to the property in 1983, she brought "three horses, sixteen dogs[,] and two cats with her .... The number of horses later grew to 25." In her affidavit, Tina stated that "the number of dogs varied over the coming years from 6 to 30."

In an affidavit, Pena explained that he met with the Pattersons shortly after they received the City's notice. Pena recalled that he reviewed different options [*3] with the Pattersons, including applying for and obtaining a permit. If the Pattersons obtained a Patterson v. City of Bellmead Page 2 permit, they would no longer be in violation of Section 3-40. The Pattersons "asked for a few days to become compliant with the ordinance," which Pena believed was acceptable. But rather than obtaining the permit or achieving compliance with Section 3-40, the Pattersons filed this action, seeking a declaration that Section 3-40 is unconstitutional.

During the discovery phase of this case, the Pattersons attempted to depose a City representative. The Pattersons also propounded interrogatories and requested certain documents from the City regarding, among other things, prior enforcement of Section 3-40. The City objected to the Pattersons' discovery requests and also filed a motion to quash the deposition of the City representative. The Pattersons responded to the City's objection by filing a motion to compel, which was later denied by the trial court. In addition, the trial court granted the City's motion to quash.

Thereafter, the City filed a traditional summary-judgment motion, arguing that Section 3-40 is constitutional because the ordinance is not arbitrary [*4] or unreasonable and it does not violate the *Equal Protection Clause of the Fourteenth Amendment of the United States Constitution*. See *U.S. CONST. amend. XIV*. The Pattersons filed a response to the City's summary-judgment motion, attaching the affidavits of Tina and Yvette Garza, the President of Lost Paws Rescue of Texas.

After a hearing on May 30, 2012, the trial court granted the City's summary-judgment motion. The trial court ordered that the Pattersons take nothing by their lawsuit. The Pattersons filed a motion for new trial, which was overruled by operation of law. See *TEX. R. CIV. P. 329b(c)*. This appeal followed.

II. STANDARD OF REVIEW

The purpose of a declaratory-judgment action is to establish the existing rights, status, or other legal relationships between the parties. *City of El Paso v. Heinrich, 284 S.W.3d 366, 370 (Tex. 2009)*; *see TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b)* (West 2008). Suits for declaratory judgment are intended to determine the rights of parties when a controversy has arisen, but before any wrong has been committed. *See Armstrong v. Hixon, 206 S.W.3d 175, 179 (Tex. App.--Corpus Christi 2006, pet. denied)*; *Montemayor v. City of San Antonio Fire Dep't, 985 S.W.2d 549, 551 (Tex. App.--San Antonio 1998, pet. denied)*.

Declaratory [*5] judgments are reviewed under the same standards as other judgments and decrees. *See TEX. CIV. PRAC. & REM. CODE ANN. § 37.010* (West 2008); *Hawkins v. El Paso First Health Plans, Inc., 214 S.W.3d 709, 719 (Tex. App.--Austin 2007, pet. denied)*. We look to the procedure used to resolve the issue at trial to determine the standard of review on appeal. *See Hawkins, 214 S.W.3d at 719*; *Armstrong, 206 S.W.3d at 179*; *see also City of Galveston v. Tex. Gen. Land Office, 196 S.W.3d 218, 221 (Tex. App.--Houston [1st Dist.] 2006, pet. denied)*. Because the trial court determined the declaratory judgment through summary judgment proceedings, we review the propriety of the trial court's declarations under the same standards that we apply to summary judgments. *See City of Galveston, 196 S.W.3d at 221*; *City of Austin v. Garza, 124 S.W.3d 867, 871 (Tex. App.--Austin 2003, no pet.)*; *Lidawi v. Progressive County Mut. Ins. Co., 112 S.W.3d 725, 730 (Tex. App.--Houston [14th Dist.] 2003, no pet.)*.

The function of a summary judgment is to eliminate patently unmeritorious claims and untenable defenses, not to deprive litigants of the right to a trial by jury. *Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 228 (Tex. 2004)*. [*6] We review a trial court's decision

to grant or deny a summary judgment de novo. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex., 253 S.W.3d 184, 192 (Tex. 2007)*; *Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661 (Tex. 2005)*. To prevail on a traditional motion for summary judgment, the movant must show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *TEX. R. CIV. P. 166a(c)*; *Sw. Elec. Power Co. v. Grant, 73 S.W.3d 211, 215 (Tex. 2002)*. We take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Dorsett, 164 S.W.3d at 661*.

III. THE MOTIONS TO COMPEL AND QUASH

In their second issue, the Pattersons argue that the trial court abused its discretion by denying their motion to compel and granting the City's motion to quash. Specifically, the Pattersons allege that the trial court's rulings ostensibly prohibited them from engaging in the discovery process, which restricted their ability to meet their burden of proving that Section 3-40 is unconstitutional.

A. Applicable Law

We review a trial court's actions denying discovery for an abuse of [*7] discretion. *Ford Motor Co. v. Castillo, 279 S.W.3d 656, 661 (Tex. 2009)*. A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id*.

The Texas Supreme Court has stated that "'the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed.'" *In re Colonial Pipeline Co., 968 S.W.2d 938, 941 (Tex. 1998)* (orig. proceeding) (quoting *Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984)* (orig. proceeding)); *see In re Alford Chevrolet-Geo, 997 S.W.2d 173, 180 (Tex. 1999)* (orig. proceeding). Our procedural rules define the scope of discovery to include any unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, as long as the information sought is "reasonably calculated to lead to the discovery of admissible evidence." *TEX. R. CIV. P. 192.3(a)*; *In re CSX Corp., 124 S.W.3d 149, 152 (Tex. 2003)* (orig. proceeding) (per curiam); *see Eli Lilly & Co. v. Marshall, 850 S.W.2d 155, 160 (Tex. 1993)*. Information is relevant if it tends to make the existence of a fact that is [*8] of consequence to the determination of the action more or less probable than it would be without the information. *TEX. R. EVID. 401*. The phrase "relevant to the subject matter" is to be "'liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial.'" *Castillo, 279 S.W.3d at 664* (quoting *Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 553 (Tex. 1990))*.

Although the scope of discovery is broad, discovery requests must nevertheless show a "reasonable expectation of obtaining information that will aid the dispute's resolution." *In re CSX Corp., 124 S.W.3d at 152*; *see In re Am. Optical Corp., 988 S.W.2d 711, 713 (Tex. 1998)* (orig. proceeding). Thus, discovery requests must be "reasonably tailored" to include only relevant matters. *In re CSX Corp., 124 S.W.3d at 152*; *see In re Am. Optical Corp., 988 S.W.2d at 713*. Therefore, the preemptive denial of discovery is proper if there exists no possible relevant, discoverable testimony, facts, or material which would support or lead to evidence that would support a claim or defense. *Castillo, 279 S.W.3d at 664*. The scope of discovery is also limited by the legitimate interests of the opposing party [*9] to avoid overly broad requests, harassment, or disclosure of privileged information. *McIlhany, 798 S.W.2d at 553*.

The party objecting to discovery bears the burden to present any and all evidence necessary to support its objections. *See TEX. R. CIV. P. 193.4(a), 199.6*; *In re CSX Corp., 124 S.W.3d 149*; *see also In re Am. Power Conversion Corp., No. 04-12-00140-CV, 2012 Tex. App. LEXIS 9369, at *10 (Tex. App.--San Antonio Nov. 14, 2012, orig. proceeding)* (mem. op.).

B. Discussion

In the present case, the Pattersons sought information from the City regarding, among other things,

> 1. Each and every governmental interest to which the City claims Section 3-40 is related. Also, the Pattersons requested that the City detail how it contends Section 3-40 meets, satisfies, relates, or has any connection to the particular governmental interest. In doing so, the Pattersons also requested that the City state and describe upon what information, study, empirical data, or other evidence upon which these contentions are based.

2. The number and/or identity of the individual(s) and/or entity(ies) that the City has charged with a violation of Section 3-40 of the Municipal Code of the City of Bellmead from the [*10] time of the provisions' enactment until present[3]

3 At least two Ohio courts have stated that:

> The conscious exercise of some selectivity in enforcement is not, in itself, a violation of the United States Constitution. In order for selective enforcement to reach the level of unconstitutional discrimination, the discriminations must be "intentional or purposeful." To prove selective prosecution, a claimant bears the heavy burden of establishing, at least prima facie: (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, *and* (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. The burden on a person claiming selective enforcement to show intentional or purposeful discrimination is a heavy one, and will not be presumed.

Zageris v. Whitehall, 72 Ohio App. 3d 178, 594 N.E.2d 129, 135 (Ohio Ct. App. 1991) (citing *State v. Flynt, 63 Ohio St. 2d 132, 407 N.E.2d 15, 15, 17-18 (Ohio 1980))* (emphasis added). [*11] Here, the Pattersons neither pleaded nor proved invidious discrimination or selective prosecution based on bad faith; therefore, we fail to see how information regarding the City's prior enforcement of Section 3-40 is relevant in this matter.

In any event, a review of the Pattersons' pleadings shows that they assert a facial challenge to Section 3-40, advancing both substantive due process and equal protection violations. In this appeal, we must determine whether the challenged provision of the ordinance goes beyond the legitimate bounds of the City to enact it. It is axiomatic that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1955)*. Further, courts have noted that:

> "while this standard is often difficult for the movant to meet--given the complexities of constitutional litigation--it is not insuperable . . . . If a complaint alleges that a state regulation, on its face, is inconsistent with a specific provision of the United States Constitution, that complaint [*12] will be dismissed where a thoughtful reading of the regulation convinces the district court that the regulation is plainly within the bounds of the Constitution."

Chicago Bd. of Realtors v. Chicago, 673 F. Supp. 224, 228 (N.D. Ill. 1986), aff'd, 819 F. 2d 732 (7th Cir. 1987) (quoting *Gaines v. Lane, 790 F.2d 1299, 1303 (7th Cir. 1986))*. The *Chicago Board of Realtors* Court further explained:

> The reason for this rule is apparent; a facial challenge to the constitutionality of legislative action may depend solely upon a reading of the challenged provision and whether it meets the test appropriate to the specific constitutional provision under which it is challenged. This sort of facial challenge admits of no room for proof of any facts in support of the challenge. Such questions are pure questions of law, and as was held in Gaines may be answered on the pleadings.

Id.

As noted above, the Pattersons assert a facial challenge to the constitutionality of Section 3-40--a challenge that is a pure question of law and does not permit the introduction of facts to support the Pattersons' assertions. *Id.; see Gaines, 790 F.2d at 1303*. In addition, as we conclude below, reasonable minds may differ as [*13] to whether Section 3-40 has a substantial relationship to public health, safety, morals, or general welfare; thus, the ordinance must stand as a valid exercise of the City's police power and the Pattersons' discovery requests are irrelevant to this matter. *See Quick v. City of Austin, 7 S.W.3d 109, 117 (Tex. 1998)* ("The party attacking the ordinance bears the 'extraordinary burden' to establish 'that no conclusive or even controversial or issuable fact or condition existed' that would authorize the passage of the ordinance. We consider all the circumstances and determine, as a substantive matter, if reasonable minds could differ as to whether the ordinance has a substantial relationship to the protection of the general health, safety, or welfare of the public. If the evidence reveals a fact issue in this respect, the ordinance must be upheld." (internal citations omitted)); *see also Gaines, 790 F.2d at 1304* ("In short, a regulation which generally advances a legitimate governmental interest of sufficient importance is not invalid simply because the government does not demonstrate that each and every application of that regulation necessarily furthers that interest.").

Furthermore, to [*14] the extent that the Pattersons sought a declaration of unconstitutionality under the *Equal Protection Clause of the Fourteenth Amendment of the United States Constitution*, we note that the Pattersons' equal-protection argument focuses on a comparison of Section 3-40's treatment of dog and cat owners with owners of other animals. In particular, the Pattersons argue that Section 3-40 unfairly restricts dog and cat ownership but does not impose ownership limitations for other animals. Clearly, the Pattersons' equal-protection argument does not involve a charge of invidious discrimination based on immutable characteristics, such as race or sex. *See U.S. CONST. amend. XIV*; *Hatten v. Rains, 854 F.2d 687, 690 (5th Cir. 1988)*; *see also Employers Ins. of Wausau v. Horton, 797 S.W.2d 677, 681 (Tex. App.--Texarkana 1990, no writ)* ("In general, the guarantee of equal protection is not a source of substantive rights or liberties but a right to be free from invidious discrimination in statutory classifications."). And the record does not suggest that the discovery sought by the Pattersons likely will lead to evidence of invidious discrimination addressed by the *Equal Protection Clause*.

Accordingly, [*15] we cannot say that the Pattersons have adequately demonstrated that the trial court abused its discretion in limiting discovery in this matter. *See Castillo, 279 S.W.3d at 661*. We overrule the Pattersons' second issue.

IV. CONSTITUTIONALITY OF SECTION 3-40

In their first issue, the Pattersons contend that Section 3-40 is unconstitutional because the ordinance does not have a rational relationship to any governmental function. The Pattersons also assert that the ordinance violates the *Equal Protection Clause of the Fourteenth Amendment of the United States Constitution* because it treats dog and cat owners differently than others who are similarly situated.

A. Applicable Law

A municipal ordinance is presumed to be valid, and the burden of showing its invalidity rests on the party attacking it. *See Safe Water Found. of Tex. v. City of Houston, 661 S.W.2d 190, 192 (Tex. App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.)*; *City of Waxahachie v. Watkins, 154 Tex. 206, 212, 275 S.W.2d 477, 480 (1955)* ("Since it is an exercise of the legislative power of the City's Council, the ordinance must be presumed to be valid."); *see also Espronceda v. City of San Antonio, No. 04-02-00561-CV, 2003 Tex. App. LEXIS 4334, at *3 (Tex. App.--San Antonio May 22, 2003, pet. denied*) (mem. op.) [*16] . If reasonable minds may differ as to whether a particular ordinance has a substantial relationship to the public health, safety, morals, or general welfare, no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the City's police power. *Quick, 7 S.W.3d at 117*. When suit is filed attacking an ordinance passed under a municipality's police powers, "the party attacking the ordinance bears an 'extraordinary burden' to show 'that no conclusive or even controversial or issuable fact or condition existed' which would authorize the municipality's passage of the ordinance." *City of Brookside Vill. v. Comeau, 633 S.W.2d 790, 792-93 (Tex. 1982)* (citing *Thompson v. City of Palestine, 510 S.W.2d 579, 581 (Tex. 1974)*). The question of whether one challenging an ordinance can meet this burden of proof is a question of law properly answered in summary-judgment proceedings. *Hunt v. City of San Antonio, 462 S.W.2d 536, 539 (Tex. 1971)*.

If possible, we must interpret a statute in a manner that renders it constitutional.[4] *FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 873 (Tex. 2000)*; *Quick, 7 S.W.3d at 115* [*17] ("In analyzing the constitutionality of a statute, we should, if possible, interpret the statute in a manner that avoids constitutional infirmity."). Under *section 54.001(a) of the Texas Local Government Code*, the governing body of a municipality may use its police power to enforce any ordinance of the municipality. *TEX. LOC. GOV'T CODE ANN. § 54.001(a)* (West 2008). However, the exercise of police power by a City must accord with substantive due process principles--that is, it cannot be arbitrary and unreasonable. *See City of San Antonio v. TPLP Office Park Props., 218 S.W.3d 60, 65 (Tex. 2007)* (citing *Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 938 (Tex. 1998))*.

> 4 In determining the constitutionality of a statute or ordinance, criminal case law is substantially similar to its civil counterpart. In particular, in *Skillern v. State*, the Austin Court of Appeals noted the following:
>
> > In determining a statute's constitutionality, we must begin with a presumption of the statute's validity. *Faulk v. State, 608 S.W.2d 625, 630 (Tex. Crim. App. 1980)*; *Ely v. State, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979)*; *Wilson [v. State], 825 S.W.2d [155] at 158 [(Tex. App.--Dallas 1992, pet. ref'd)]*. We presume [*18] that the legislature did not act unreasonably or arbitrarily in enacting the statute and that it had due regard for constitutional requirements. *Ex parte Granviel, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978)*; *Mohammad v. State, 814 S.W.2d 137, 140 (Tex. App.--Houston [14th Dist.] 1991), aff'd, 830 S.W.2d 953 (Tex. Crim. App. 1992)*. It is appellant's burden to show that the statute is unconstitutional. *Granviel, 561 S.W.2d at 511*; *Robinson v. Hill, 507 S.W.2d 521, 524 (Tex. 1974)*. Every reasonable intendment and presumption is made in favor of the constitutionality and validity of the statute until the contrary is clearly shown. Before a legislative act will be set aside, it must clearly appear that its validity cannot be supported by any reasonable intendment or allowable presumption. *Granviel, 561 S.W.2d at 511*. Constitutional issues will not be decided upon a broader basis than the record requires. *State v. Garcia, 823 S.W.2d 793 (Tex. App.--San Antonio 1992, pet. ref'd)*. *890 S.W.2d 849, 860 (Tex. App.--Austin 1994, no pet.)*.

The United States Supreme Court has stated that a City's action with regard to property regulation will survive a substantive due process challenge if it could have [*19] rationally been decided that the measure might achieve the objective. *Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 n.3, 107 S. Ct. 3141, 3147-48, 97 L. Ed. 2d 677 (1987)*. The City argues that the proper standard in this case is federal "rational basis" review--the standard that applies to federal due process challenges. *See Garcia, 893 S.W.2d at 525*; *see also TPLP Office Park Props., 218 S.W.3d at 65-66* (applying "rational basis" review to a substantive due process challenge to city action and ordinance). "Under federal due process, a law that does not affect fundamental rights or interests . . . is valid if it merely bears a rational relationship to a legitimate state interest." *Garcia, 893 S.W.2d at 525* (citing *Williamson v. Lee Optical Co., 348 U.S. 483, 491, 75 S. Ct. 461, 466, 99 L. Ed. 563 (1955))*. Or, in other words, "[u]nder the rational relationship standard, the City's decisions must be upheld if evidence in the record shows it to be at least fairly debatable that the decisions were rationally related to a legitimate governmental interest." *TPLP Office Park Props., 218 S.W.3d at 65* (citing *Mayhew, 964 S.W.2d at 938*).

In the context of determining whether a statute or ordinance [*20] is a proper exercise of police power, Texas courts have stated the test as whether "the statute in question bears a real and substantial relation to the public health, safety, morals, or general welfare of the public." *Satterfield v. Crown Cork & Seal Co., 268 S.W.3d 190, 216 (Tex. App.--Austin 2008, no pet.)*; *see*

Lamar Corp. v. City of Longview, 270 S.W.3d 609, 615 (Tex. App.--Texarkana 2008, no pet.) (citing *City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984)*; *Hunt, 462 S.W.2d at 539*); *see also Grothues v. City of Helotes, 928 S.W.2d 725, 729 n.6 (Tex. App.--San Antonio 1996, no writ)* (noting that the police power is a grant of authority from the people to their government agents for the protection of the health, safety, comfort, and welfare of the public). A statute is a proper exercise of police power if it is "appropriate and reasonably necessary to accomplish a purpose within the scope of the police power" and it is "reasonable and not arbitrary or unjust in the manner it seeks to accomplish the goal of the statute or so unduly harsh that it is out of proportion to the end sought to be accomplished." *Satterfield, 268 S.W.3d at 215* (citation omitted).

The [*21] trial court resolves disputed fact issues, but the ultimate question of whether an action or ordinance regulating property violates due process is a question of law. *TPLP Office Park Props., 218 S.W.3d at 65* (citing *Mayhew, 964 S.W.2d at 932*).

B. Discussion

In its traditional motion for summary judgment, the City asserted that Section 3-40 is constitutional because it "is rationally related to a legitimate government interest in the safety, welfare and general enjoyment of both animals and citizens of the City of Bellmead." In addition, the City cited numerous cases from around the country holding that ordinances, including those regulating the ownership, possession, and control of dogs, are a proper exercise of a municipality's police power if they are designed to secure the safety, health, and welfare of the public. *See Ex parte Naylor, 249 S.W.2d 607, 611, 157 Tex. Crim. 355 (Tex. Crim. App. 1952)* ("It is the policy of the courts to uphold regulations intended to protect the public health, unless it is plain that they have no real relation to the object for which ostensibly they were enacted, and prima facie they are reasonable."); *Leibowitz v. City of Mineola, 660 F. Supp. 2d 775, 783-84 (E. D. Tex. 2009)* [*22] (noting that dogs are recognized as property in Texas and that "[o]rdinances, including those regulating the ownership, possession, and control of dogs, are a proper exercise of a municipality's police power if they are designed to secure the safety, health and welfare of the public") (citing *Vargas v. City of San Antonio, 650 S.W.2d 177, 179 (Tex. App.--San Antonio 1983, writ dism'd w.o.j.)*; *Hargrove v. City of Rotan, 553 S.W.2d 246, 247 (Tex. Civ. App.--Eastland 1977, no writ)*); *see also Sentell v. New Orleans & Carrollton R.R. Co., 166 U.S. 698, 704, 17 S. Ct. 693, 695-96, 41 L. Ed. 1169 (1897)* ("Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the State and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens. That a State, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen."); *Koorn v. Lacey Twp., 78 Fed. Appx. 199, 202-03 (3d Cir. 2003)*[5] *Zageris v. City of Whitehall, 72 Ohio App. 3d 178, 594 N.E.2d 129, 134-35 (Ohio Ct. App. 1991)* [*23] (upholding, as constitutional, a city ordinance limiting the number of dogs allowed to be kept in a single family dwelling).[6]

5 In *Koorn v. Lacey Township*, the Third Circuit Court of Appeals noted that:

> There is no fundamental right to keep more than a certain number of dogs in a dwelling unit, so the District Court properly applied rational-basis scrutiny to evaluate the Ordinance's constitutionality. Thus, to satisfy the rational-basis test, the Ordinance need only be rationally related to any legitimate government purpose. The Ordinance need not be narrowly tailored to achieving that legitimate end.
>
> Protecting residents' health and safety is a legitimate interest of municipal government. Large concentrations of dogs can be dangerous and unsanitary. As a result, a municipality may rationally conclude that limiting the number of dogs in any given dwelling will protect the health and safety of its residents. The Township does not need to prove that the number of dogs they chose to allow was any more or less rational than any other number,

> distinguish between large and small dogs, address other pets such as cats, or impose sanitation standards, as the Koorns allege.

78 Fed. Appx. 199, 202-03 (3d Cir. 2003); [*24] *see Stern v. Halligan, 158 F.3d 729, 731 (3d Cir. 1998)* ("Protecting the health, safety, and general welfare of township inhabitants . . . is plainly in the public interest.").

6 In *Zageris*, the Ohio Court of Appeals stated that:

> In order to overcome the presumption of validity that the Whitehall ordinance enjoys, and in order to prove that it is unreasonable and arbitrary, the contesting party must demonstrate a clear and palpable abuse of the legislating body's police power. When dealing with municipal ordinances, the municipalities are presumed to be familiar with local conditions and know the needs of the community, and, therefore, a court will not substitute its judgment for legislative discretion absent a clear and palpable abuse of power.

594 N.E.2d at 134.

In response to the City's assertions and case law, the Pattersons relied heavily on Tina and Garza's affidavits. Garza, who has experience "dealing with the City of Carrollton, Texas regarding its pet limit law" and who has worked for sixteen years for animal-rescue organizations, stated that Section 3-40 is not rationally related to a legitimate governmental interest. Garza further opined that issues concerning hoarding, noise [*25] and odor complaints, injury to humans or property by animals, and abuse of animals are unrelated to pet-limit laws. Instead, pet-limit laws lead to increased costs to the municipality, decreased animal adoptions, and increased animal deaths in municipal shelters, according to Garza.

On the other hand, Tina detailed her ownership and use of the property and described how Section 3-40 impaired her use of the property. Tina also noted that she has had numerous interactions with City Animal Control Officers and that one officer stated that: "The dogs were beautiful" and "The animals looked to be in great condition." Tina also averred that no one has ever complained about the number of animals staying on the property and that she is not aware of anyone being accused by the City of violating Section 3-40.

Nevertheless, after reviewing Section 3-40 and the record in this case, we believe that the ordinance arises out of the City's police power because it was designed to secure the safety, health, and welfare of the public. *See Whitfield v. City of Paris, 84 Tex. 431, 432-33, 19 S.W. 566, 567 (1892)* (concluding that an ordinance providing for the destruction of dogs was a proper exercise of [*26] the police power of the municipality because it was designed to secure the safety, health, and welfare of the public); *Beville v. City of Longview, 131 S.W.2d 313, 314 (Tex. Civ. App.--Texarkana 1939, writ dism'd)* (considering an ordinance designed to restrain and prohibit mules and other livestock from roaming at large within city limits and noting that this ordinance was a valid exercise of the city's police power, enacted in the interest and welfare of the public at large); *Smith v. Arnold, 251 S.W. 315, 315-16 (Tex. Civ. App.--Beaumont 1923, no writ)* (considering the liability of a municipality for the negligence of its poundmasters in carrying out a municipal ordinance regulating, restraining, and prohibiting certain animals from running at large and impounding them and noting that "[s]uch ordinances arise out of the police power conferred upon cities and towns and are enacted for the public good"); *see also Koorn, 78 Fed. Appx. at 202-03*; *Stern v. Halligan, 158 F.3d 729, 731 (3d Cir. 1998)*. In fact, we agree with the conclusion made in *Koorn* that: "Protecting residents' health and safety is a legitimate interest of municipal government. Large concentrations of dogs can be dangerous [*27] and unsanitary. As a result, a municipality may rationally conclude that limiting the number of dogs in any given dwelling will protect the health and safety of its residents." *78 Fed. Appx. at 203*.

Furthermore, the Pattersons' reliance on the affidavits of Tina and Garza demonstrates that reasonable minds may differ as to whether Section 3-40 has a substantial relationship to public health, safety, morals, or general welfare. *See Quick, 7 S.W.3d at 117*; *see also Gaines, 790 F.2d at 1304*. Therefore, based on the foregoing, the ordinance does not violate substantive due

process and, thus, must stand as a valid exercise of the City's police power. *See TPLP Office Park Props., 218 S.W.3d at 65*; *Mayhew, 964 S.W.2d at 938*; *Satterfield, 268 S.W.3d at 215*.

The Pattersons also argue that Section 3-40 violates the *Equal Protection Clause* and that the City is estopped from employing the presumption of constitutionality. The *Equal Protection Clause of the Fourteenth Amendment*, as applied to the states, guards against invidious discrimination. *See U.S. CONST. amend. XIV*; *see also Hatten, 854 F.2d at 690*. This amendment invalidates classifications that disadvantage a particular group or deprive a [*28] certain class of people their fundamental rights. *Hatten, 854 F.2d at 690*. "Classifications which impermissibly interfere with the exercise of a fundamental right or operate to the peculiar advantage of a suspect class are subjected to strict judicial scrutiny, meaning that they must constitute the least restrictive means to achieve a compelling state interest." *Id*. (citing *Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312, 96 S. Ct. 2562, 2566, 49 L .Ed. 2d 520 (1976)*). Classifications that disadvantage a quasi-suspect class are subject to intermediate scrutiny, and "must bear a significant relationship to an important state end." *Id*. All other classifications must only bear a rational relationship to a legitimate legislative end. *Id*.

The Pattersons have provided no support for the proposition that dog and cat ownership is a fundamental right or that as dog and cat owners, they are part of a suspect or quasi-suspect class subjected to invidious discrimination. In fact, the *Koorn* Court noted that "[t]here is no fundamental right to keep more than a certain number of dogs in a dwelling unit." *78 Fed. Appx. at 202*. Therefore, we must apply the rational basis test to evaluate the Pattersons' [*29] equal-protection claim. *Id*. And because we have concluded that Section 3-40 is rationally related to a legitimate governmental interest, protecting the health and safety of the City's residents, we therefore reject the Pattersons' equal protection claim.

With respect to the Pattersons' estoppel contention, we note that the City exercised its governmental powers when enacting Section 3-40. *See TEX. LOC. GOV'T CODE ANN. § 54.001(a)*. Moreover, Texas courts have held that estoppel does not apply against a governmental unit exercising its governmental functions. *See City of Hutchins v. Prasifka, 450 S.W.2d 829, 835 (Tex. 1970)*; *Clear Lake City Water Auth. v. Winograd, 695 S.W.2d 632, 640 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.)*; *Capitol Rod & Gun Club v. Lower Colorado River Auth., 622 S.W.2d 887, 896 (Tex. App.--Austin 1981, writ ref'd n.r.e.)*. As such, we also reject the Pattersons' estoppel argument.

Because we have concluded that Section 3-40 of the City's Municipal Code is constitutional, we cannot say that the trial court erred in granting the City's traditional motion for summary judgment. *See Tex. Mun. Power Agency, 253 S.W.3d at 192*; *see also Dorsett, 164 S.W.3d at 661*. [*30] Accordingly, we overrule the Pattersons' first issue.

V. CONCLUSION

Having overruled both of the Pattersons' issues on appeal, we affirm the judgment of the trial court.

AL SCOGGINS

Justice

Before Chief Justice Gray,

Justice Davis, and

Justice Scoggins

Affirmed

Opinion delivered and filed March 21, 2013

Marble Falls Independent School District, Appellant v. Eddie Shell, on behalf of his minor children, Morgan Shell and Alex Shell, Appellee & In re Marble Falls Independent School District

NO. 03-02-00652-CV, NO. 03-02-00693-CV

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

2003 Tex. App. LEXIS 2845

April 3, 2003, Filed

SUBSEQUENT HISTORY: [*1] Released for Publication May 27, 2003.

PRIOR HISTORY: FROM THE DISTRICT COURT OF BURNET COUNTY, 33RD JUDICIAL DISTRICT. NO. 21904, HONORABLE V. MURRAY JORDAN, JUDGE PRESIDING.

DISPOSITION: Judgment reversed; temporary injunction dissolved; writ of mandamus dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee father filed a petition for a temporary restraining order, temporary injunction, permanent injunction, and damages against appellant school district seeking to enjoin the district from enforcing its drug-testing policy. The 33rd District Court, Burnet County (Texas), granted the temporary injunction. The district filed a petition for writ of mandamus and an interlocutory appeal.

OVERVIEW: The district enacted a drug and alcohol testing program for all students participating in extracurricular activities. The father's children were students in the district, and they participated in extracurricular activities, but they were also Jewish and drank wine as a part of their religion. The trial court granted the temporary injunction before affording the district an opportunity to present its defense. The appellate court found that the trial court abused its discretion in granting a temporary injunction, as the father failed to establish a probable right to recover in that the district's drug-testing policy did not violate: (1) *Tex. Const. art. I, § 6*, as it applied to every junior high and high school student participating in extracurricular activities and it was facially neutral with respect to religion; (2) *Tex. Const. art. I, § 19*, as there was no fundamental right to participate in extracurricular activities, and the drug-testing policy bore a rational relationship to a legitimate state interest; and (3) *Tex. Const. art. I, § 9*, as a student had a limited privacy interest in a public school setting, and the intrusion was not unreasonable.

OUTCOME: The district court's judgment was reversed, the temporary injunction was dissolved, judgment was rendered in favor of the school district, and the petition for writ of mandamus was dismissed as moot.

COUNSEL: Mr. David P. Hansen-Marbal Falls, Ms. Jacqueline M. Harrison, Mr. Leonard J. Schwartz, Schwartz & Eichelbaum, P.C., Austin, TX.

For Appellee: Mr. Eddie G. Shell, Shell & Associates, Burnet, TX.

Mr. Dennis J. Eichelbaum-Marble Falls, Schwartz &

Eichelbaum, P.C., Frisco, TX.

JUDGES: Before Justices Kidd, Patterson and Puryear.

OPINION BY: Mack Kidd

OPINION

ORIGINAL PROCEEDING FROM BURNET COUNTY

MEMORANDUM OPINION

Marble Falls Independent School District (Marble Falls), as both relator and appellant, filed a petition for writ of mandamus and an interlocutory appeal challenging the trial court's grant of a temporary injunction in favor of appellee and real party in interest, Eddie Shell, on behalf of his minor children, Morgan Shell and Alex Shell ("Shell"). *See Tex. Gov't Code Ann. § 22.221(b)* (West Supp. 2003); *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(4)* (West Supp. 2003). Shell challenged the Marble Falls mandatory extracurricular activity drug-testing policy as a violation of the Texas Constitution's guarantees of religious freedom, privacy, and due process. *See Tex. Const. art. I, §§ 6, 9, 19*. Because the trial court granted a temporary injunction before affording Marble Falls an opportunity to present its defense, Marble Falls petitioned for writ of [*2] mandamus. Marble Falls also brought an interlocutory appeal, asserting that Shell failed to satisfy the requisite burden of proof. *See Tex. R. App. P. 28.1*. Because Shell failed to prove a probable right to recover, we will reverse the trial court's decision and dissolve the temporary injunction.

BACKGROUND AND PROCEDURE

In August 2002, Marble Falls passed a policy for the 2002-2003 school year requiring the drug testing of all junior high and high school students who participate in extracurricular activities. The policy lists a number of substances for which students can be tested, including alcohol, barbiturates, cocaine, and steroids. Every junior high and high school student participating in extracurricular activities is to be tested twice a year and will be subject to additional random testing. An independent testing laboratory is to analyze a urine, hair, or saliva sample submitted by each student. If a sample tests positive, the student will be suspended from participation in extracurricular activities. The length of the suspension--varying from three weeks to permanent suspension--will depend on the number of times a student has tested positive.

Shell, [*3] believing that the Marble Falls drug policy violated his children's rights, filed an original petition for a temporary restraining order, temporary injunction, permanent injunction, and damages. Shell sought to enjoin Marble Falls from enforcing its drug-testing policy with respect to Alex and Morgan Shell, both of whom are students in the Marble Falls Independent School District. Shell argues that the Marble Falls drug policy, which allows for the testing of alcohol consumption, violates his children's religious freedom, privacy rights, and *due process rights* under the Texas Constitution because his children consume wine during religious observances of their Jewish faith. *See Tex. Const. art. I, §§ 6, 9, 19*. According to Shell, the policy would, in effect, make his children's participation in religious observances a ground for disallowing their participation in extracurricular activities at school.

At the temporary injunction hearing, before Marble Falls cross-examined Shell's second witness, the parties agreed to bifurcate the witness's testimony in order to accommodate each party's out-of-town expert witness. Shell then called his expert. During cross-examination of Shell's [*4] expert by Marble Falls, the trial court judge stated he was going to grant the temporary injunction.

In its petition for writ of mandamus, Marble Falls argues that the trial court abused its discretion when it: (1) failed to allow Marble Falls an opportunity to cross-examine Shell's witnesses; (2) issued a temporary injunction before Shell rested his case; and (3) issued a temporary injunction prior to affording Marble Falls the opportunity to present its case-in-chief. Shell responds that the temporary injunction was properly granted because: (1) there was a viable cause of action based upon a threat of imminent and irreparable injury whereby a probable right to recover could be had; and (2) Marble Falls was allowed proper development of its case.

In this interlocutory appeal, Marble Falls argues that the trial court erred in granting the temporary injunction because: (1) the trial court abused its discretion in failing to afford Marble Falls the opportunity to call witnesses, submit evidence, and cross-examine all of Shell's witnesses; and (2) Shell failed to demonstrate either a probable right to recover or a probable injury.

DISCUSSION

Standard of Review

[*5] A temporary injunction serves to preserve the status quo between the parties pending a trial on the merits. *Walling v. Metcalfe, 863 S.W.2d 56, 58, 37 Tex. Sup. Ct. J. 18 (Tex. 1993)*; *Synergy Center, Ltd. v. Lone Star Franchising, Inc., 63 S.W.3d 561, 564 (Tex. App.--Austin 2001, no pet.)*. In an appeal from an order granting or denying a request for a temporary injunction, appellate review is confined to the validity of the order that grants or denies the injunctive relief. *Synergy Center, Ltd., 63 S.W.3d at 564*; *Center for Econ. Justice v. American Ins. Ass'n, 39 S.W.3d 337, 343 (Tex. App.--Austin 2001, no pet.)*. The decision to grant or deny the injunction lies within the sound discretion of the trial court, and we will not reverse that decision absent a clear abuse of discretion. *Synergy Center, Ltd., 63 S.W.3d at 564*. When considering the propriety of a temporary injunction, this Court may neither substitute its judgment for that of the trial court nor consider the merits of the lawsuit. *Synergy Center, Ltd., 63 S.W.3d at 564*. Abuse of discretion exists when the court misapplies the law to established [*6] facts or when it concludes that the applicant has demonstrated a probable injury or a probable right to recover and the conclusion is not reasonably supported by evidence. *Reagan Nat'l Advert. v. Vanderhoof Family Trust, 82 S.W.3d 366, 370 (Tex. App.--Austin 2002, no pet.)*. If the claimant cannot present a valid legal theory, based on the claimant's allegations, to support a probable right to recover, a temporary injunction will be improper. *See Tenet Health Ltd. v. Zamora, 13 S.W.3d 464, 472 (Tex. App.--Corpus Christi 2000, pet. dism'd w.o.j.)*.

1. Probable Right to Recover

To establish the right to the issuance of a temporary injunction, the applicant must show a probable right to recover at final trial and probable injury in the interim; the applicant is not required to establish that he or she will finally prevail in the litigation. *Transport Co. of Tex. v. Robertson Transports, Inc., 152 Tex. 551, 261 S.W.2d 549, 552 (Tex. 1953)*; *Amalgamated Acme Affiliates, Inc. v. Morton, 33 S.W.3d 387, 392 (Tex. App.--Austin 2000, no pet.)*. Shell's original petition includes claims brought under the Texas Constitution [*7] for violation of religious freedom, due process, and privacy rights. We will address each claim in turn.

A. Religious Freedom

Shell argues that the Marble Falls drug policy violates Alex and Morgan Shell's freedom of worship under the Texas Constitution. *Tex. Const. art. I, § 6.* [1] The Shell children, as part of their Jewish faith, occasionally consume alcohol. Because alcohol is a drug eligible for testing under the Marble Falls drug-testing policy, Shell claims that his children could be punished--by way of suspension from participation in extracurricular activities--due to their religious belief and practice.

> 1 *Article I, Section 6 of the Texas Constitution* states:
>
> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.
>
> *Tex. Const. art. I, § 6*.

[*8] Shell has presented no authority for the proposition that the Texas Constitution affords greater protection of religion than does the *First Amendment to the United States Constitution*. Absent such a showing, we may assume, without deciding, that the state and federal free exercise guarantees are coextensive with respect to Shell's particular claims. *See Tilton v. Marshall, 925 S.W.2d 672, 677 n.6, 39 Tex. Sup. Ct. J. 985 (Tex. 1996)*.

The United States Supreme Court has held that the right of free exercise of religion does not relieve an individual of the obligation to comply with a neutral law of general applicability on the ground that the law proscribes, or requires, conduct that is contrary to the individual's religious practice, so long as the law does not violate other constitutional provisions. *Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879, 108 L.*

Ed. 2d 876, 110 S. Ct. 1595 (1990). Interpreting *Smith*, Texas courts have stated that religious freedoms are not implicated by neutral laws governing activities the government has the right to regulate merely because some religious groups may be disproportionately affected. *Ramos v. State, 934 S.W.2d 358, 367 (Tex. Crim. App. 1996)*; [*9] *Mauldin v. Texas State Bd. of Plumbing Exam'rs, 94 S.W.3d 867, 872 (Tex. App.--Austin 2002, no pet.)*.

The Marble Falls drug policy applies to every junior high and high school student participating in extracurricular activities. Although some religious groups or practices *could* be affected disproportionately, the policy is generally applicable and facially neutral with respect to religion. Therefore, under the standard articulated in *Smith*, we hold that the Marble Falls drug policy does not constitute a violation of religious freedom under the Texas Constitution. *See Smith, 494 U.S. at 879*; *Ramos, 934 S.W.2d at 367*; *Mauldin, 94 S.W.3d at 872*. However, we must still determine whether the Marble Falls drug policy fails a rational relationship analysis or violates other constitutionally protected rights.

B. Due Process

Shell argues that the Marble Falls policy violates his children's due process rights under *Article I, Section 19 of The Texas Constitution.* [2] Under both the *federal* and *Texas due process clauses*, [3] a law that does not affect fundamental rights or interests is valid [*10] if it bears a rational relationship to a legitimate state interest. *See Williamson v. Lee Optical Co., 348 U.S. 483, 491, 99 L. Ed. 563, 75 S. Ct. 461 (1955)*; *Texas Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 525 (Tex. 1995)*.

2 *Article I, Section 19 of the Texas Constitution* states:

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.
>
> *Tex. Const. art. I, § 19*.

3 Texas courts have not been consistent in articulating a standard of review under the Texas due course clause. *Texas Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 525 (Tex. 1995)*. Texas courts have sometimes indicated that *section 19* provides an identical guarantee to its *federal due process* counterpart. *See Mellinger v. City of Houston, 68 Tex. 37, 3 S.W. 249, 252-53 (Tex. 1887)*; *Lindsay v. Papageorgiou, 751 S.W.2d 544, 550 (Tex. App.--Houston [1st Dist.] 1988, writ denied)*. On other occasions, however, the Texas Supreme Court has attempted to articulate its own independent due process standard. *E.g., Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140-41, 20 Tex. Sup. Ct. J. 308 (Tex. 1977)*; *Thompson v. Calvert, 489 S.W.2d 95, 99, 16 Tex. Sup. Ct. J. 140 (Tex. 1972)*; *State v. Richards, 157 Tex. 166, 301 S.W.2d 597, 602 (Tex. 1957)*. Some Texas courts have characterized the approach in these cases as more rigorous than the federal standard. *E.g., Yorko v. State, 681 S.W.2d 633, 636 (Tex. App.--Houston [14th Dist.] 1984), aff'd, 690 S.W.2d 260 (Tex. Crim. App. 1985)*. In the end, however, a law that does not affect fundamental rights or interests is valid if it bears a rational relationship to a legitimate state interest. *See Garcia, 893 S.W.2d at 525*.

[*11] The Texas Supreme Court has repeatedly held that participation in extracurricular activities is not a fundamental right. *In re University Interscholastic League, 20 S.W.3d 690, 692, 43 Tex. Sup. Ct. J. 788 (Tex. 2000)* (right to participate in extracurricular activities not a fundamental right); *Eanes Indep. Sch. Dist. v. Logue, 712 S.W.2d 741, 742, 29 Tex. Sup. Ct. J. 550 (Tex. 1986)* (due process strictures do not apply because right to play baseball not fundamental right); *Spring Branch Indep. Sch. Dist. v. Stamos, 695 S.W.2d 556, 560, 28 Tex. Sup. Ct. J. 554 (Tex. 1985)* (student's right to participate in extracurricular activities *per se* does not rise to level of fundamental right under Texas Constitution). Because participation in extracurricular activities is not a fundamental right, the Marble Falls drug policy is valid if it bears a rational relationship to a legitimate state interest.

The United States Supreme Court dealt with a similar drug-testing policy in *Board of Education v. Earls, 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002)*. Like the Marble Falls drug policy, the policy in *Earls* required all middle school and high school students to consent to drug testing [*12] in order to participate in any extracurricular activity. *Earls, 536 U.S. at *___, 122 S. Ct. at 2562*. The court found that the school district had a legitimate interest in protecting the safety and

health of its students, *Education, 536 U.S. at *___, 122 S. Ct. at 2569*, and that the need to prevent and deter the substantial harm of childhood drug use provided the necessary immediacy for a school testing policy, even when there was no demonstration of a drug abuse problem. *Education, 536 U.S. at *___, 122 S. Ct. at 2567-68*. The court found that testing students who participate in extracurricular activities was a reasonably effective means of addressing the school district's legitimate concerns in preventing, deterring, and detecting drug use. *Education, 536 U.S. at *___, 122 S. Ct. at 2569*.

The Marble Falls drug policy is substantially similar to the policy in *Earls.* The three objectives listed in the Marble Falls policy are: (1) to provide a deterrent to drug use for students who participate in extracurricular activities; (2) to provide a drug education program for those students who test positive or are at risk for drug use; and [*13] (3) to ensure the health and safety of students who participate in extracurricular activities. Because the Marble Falls policy allows the student to submit a urine, hair, or saliva sample, it might even be characterized as less intrusive than the policy in *Earls*, which mandated that all students provide a urine sample. *See Education, 536 U.S. at *___, 122 S. Ct. at 2566*. The Marble Falls policy also provides for confidentiality of test results and allows only the student, the student's parent or guardian, the sponsor of the extracurricular activity, the campus principal, and the drug program administrator to know the test results. Furthermore, under the policy, all test results are to be destroyed when the student no longer has extracurricular eligibility. Not only are the stated objectives of the Marble Falls policy legitimate, but the drug-testing program, as described in the policy, is rationally related to achieving the stated objectives. We therefore conclude that Shell has failed to present sufficient evidence that the Marble Falls policy violates the due process provisions of either the Texas or United States Constitutions.

C. Violation of Right to [*14] ***Privacy***

Shell specifically alleges that the Marble Falls drug policy violates his children's privacy rights by subjecting them to an unlawful search and seizure under the Texas Constitution. *Tex. Const. art. I, § 9.* [4] As with his claim of violation of religious freedom, Shell has presented no authority for the proposition that *Article I, Section 9 of the Texas Constitution* affords greater protection than does the *Fourth Amendment to the U.S. Constitution*. *See Ramos v. State, 934 S.W.2d 358, 362 n.5 (Tex. Crim. App. 1996)* (burden on appellant to demonstrate that *Texas Constitution Article I, Section 9* offers greater protection than U.S. Constitution). Accordingly, our analysis is consistent with an analysis of the protections afforded under the *Fourth Amendment to the U.S. Constitution*--which is substantially similar to *Article I, Section 9 of the Texas Constitution--as* well as consistent with the Texas Supreme Court's interpretation of the general right to privacy under the Texas Constitution.

4 *Article I, Section 9 of the Texas Constitution* states:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Tex. Const. art. I, § 9. This language is substantially the same as that found in the *Fourth Amendment to the U.S. Constitution*, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

[*15] Shell generally alleges that the Marble Falls drug policy violates his children's right to privacy as granted by the Texas Constitution. The Texas Supreme Court has held that, while the Texas Constitution contains no express guarantee of a right to privacy, it contains several provisions similar to those in the United States Constitution that have been recognized as implicitly creating protected "zones of privacy." *Texas State Employees Union v. Texas Dept. of Mental Health and Mental Retardation, 746 S.W.2d 203, 205, 31 Tex. Sup. Ct. J. 33 (Tex. 1987)* (construing *Tex. Const., art. I, §§ 6, 8, 9, 10, 25*). Each of the cited provisions gives rise to a concomitant zone of privacy. *Texas State Employees*

Union, 746 S.W.2d at 205 (citing *Griswold v. Connecticut, 381 U.S. 479, 484, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965)).* The Texas Constitution protects personal privacy from unreasonable intrusion, and this right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means. *Id.*

We can dispose [*16] of Shell's specific claim under *Article I, Section 9 of the Texas Constitution* and his general privacy rights claim through the same analysis. The United States Supreme Court, in *Board of Education v. Earls, 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002),* addressed the issue of students' privacy interests in school:

A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. . . . Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.

Education, 536 U.S. at 825, 122 S. Ct. at 2565 (citations omitted). The drug policy in *Earls* required students to submit a urine sample. Given the "minimally intrusive nature of the sample collection and the limited uses to which the test results [would be] put," the Supreme Court concluded that any invasion of students' privacy was not significant, especially since students who voluntarily choose to participate in extracurricular activities have a limited expectation of privacy. *Education, 536 U.S. at *___, 122 S. Ct. at 2566-67* [*17] (citing *Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 657-58, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995)*). Furthermore, the United States Supreme Court declined to impose a requirement of individualized suspicion on schools desiring to implement drug policies. *Education, 536 U.S. at *834, 122 S. Ct. at 2568*. The court also reiterated that reasonableness under the *Fourth Amendment* does not require employing the least intrusive means, because "the logic of such elaborate less-restrictive alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Education, 536 U.S. at *834, 122 S. Ct. at 2569* (citations omitted).

We have already held that the Marble Falls drug policy is rationally related to a legitimate state interest. Because the Marble Falls policy allows for submission of a urine, hair, or saliva sample, limits the purposes for which test results will be used, and protects the confidentiality of results, we hold that the policy is only minimally intrusive on students' already reduced expectations of privacy. Therefore, it does not constitute an unreasonable intrusion on the right to [*18] personal privacy. Accordingly, we hold that Shell has failed to present sufficient evidence that the Marble Falls policy violates either the Texas or United States Constitutions.

CONCLUSION

Because Shell's allegations are legally insufficient to support his claim of constitutional infirmities, Shell has failed to establish a probable right to recover. Therefore, it was an abuse of discretion for the trial court to grant the temporary injunction. Thus, we reverse the judgment of the district court and dissolve the temporary injunction. Having rendered judgment in favor of Marble Falls, we dismiss the petition for writ of mandamus as moot.

Mack Kidd, Justice

HOUSTON BALLOONS & PROMOTIONS, LLC., Plaintiff, versus THE CITY OF HOUSTON, Defendant.

CIVIL ACTION NO. H-06-3961

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

2009 U.S. Dist. LEXIS 53693

June 24, 2009, Decided
June 24, 2009, Filed

PRIOR HISTORY: *Houston Balloons & Promotions, LLC v. City of Houston, 589 F. Supp. 2d 834, 2008 U.S. Dist. LEXIS 107346 (S.D. Tex., 2008)*

COUNSEL: [*1] For Houston Balloons & Promotions, LLC, Purtee & Associates Ltd, Plaintiffs: Paul S Francis, LEAD ATTORNEY, Amelia Gayle Berg, Baker & Hostetler, Houston, TX; James E Phillips, Baker Hostetler LLP, Houston, TX.

For The City of Houston, Defendant: John M. Helms, LEAD ATTORNEY, City of Houston, Legal Dept., Houston, TX.

JUDGES: VANESSA D. GILMORE, UNITED STATES DISTRICT JUDGE.

OPINION BY: VANESSA D. GILMORE

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 10 and June 11, 2009, a bench trial was held in the above-styled case. Having considered the evidence in this case and the applicable law, the Court enters the following findings of fact and conclusions of law. Any finding of fact that is more appropriately characterized as a conclusion of law shall be so construed.

I. Findings of Fact

Plaintiff Houston Balloons & Promotions, LLC is a Texas limited liability company with its principal place of business in Spring, Harris County, Texas. Plaintiff Purtee & Associates, Ltd. is a Texas limited liability partnership, also with its principal place of business in Spring, Harris County, Texas. Houston Balloons & Promotions, LLC is the general partner of Purtee & Associates, Ltd. At all times material to this case, Houston [*2] Balloons & Promotions, LLC and Purtee & Associates, Ltd. together owned and operated the business known as Houston Balloons and Promotions ("Houston Balloons" or "Plaintiffs"). Houston Balloons leases, erects and maintains standard and customized inflatable balloons to its customers in and around the City of Houston, Texas ("City") for the purpose of advertising and promoting their businesses. Jim Purtee ("Purtee") is the President and principal owner of Houston Balloons.

Defendant, the City of Houston, Texas ("City" or "Defendant") is a municipality duly formed and operating under the laws of the State of Texas. In 1980, the City enacted the Houston Sign Code, City of Houston Building Code, Chapter 46, Houston Code of Ordinances ("Sign Code"), which applies to all "signs" as that term is

defined in the Sign Code. Section 4602 of the Sign Code defines the term "sign" as follows:

> SIGN shall mean any outdoor display, design, pictorial or other representation that shall be so construed, placed, attached, painted, erected, fastened, or manufactured in any manner whatsoever so that the same shall be used for advertising.

Section 4604 of the Sign Code establishes a City Sign Administration, [*3] headed by a Sign Administrator, to administer and enforce the Sign Code and all other City laws related to signs. The Sign Administration's duties include issuing permits as required by Section 4605 of the Sign Code, making inspections, and taking appropriate action to enforce the Sign Code in instances of noncompliance. The Sign Administration has a staff of inspectors who investigate possible violations of the Sign Code and related laws. Sign Administration inspectors issue written warning notices of violations ("NOVs"), which require the removal of signs that violate the law. Sign Administration inspectors also issue citations and fines for failing to honor the warning notices. Susan Luycx ("Luycx") is the City's Sign Administrator, and she served in this role during the time period relevant to this suit.

In 1993, the City added Section 28-37 to the City Code by Ordinance No. 93-906. Section 28-37, which was not included in the Sign Code, set forth the City's laws regarding attention-getting devices ("AGDs"). HOUSTON, TEX. CODE, ch. 28, art. I, § 28-37 (2005). The ordinance included the following preamble provisions:

> WHEREAS, the City Council of the City of Houston finds that such [*4] attention-getting devices pose substantial problems of traffic safety and visual aesthetics similar to and, in many instances, more serious than, conventional commercial advertising signs; and WHEREAS, the City Council of the City of Houston finds that the proliferation such attention-getting devices within the City adversely affects the aesthetic environment, safety and quality of life of the citizens of the City of Houston; . . .

Section 28-37 provided the definition for an AGD as follows:

> Attention-getting devices shall mean devices erected, placed or maintained so as to attract attention to any commercial business, or any goods, products or services available on the premises of the commercial business, which shall include but, not be limited to, the following: banners; cut-out figures; discs, festooning; inflatable objects, including balloons; non-governmental flags; pennants; propellers; steam-or smoke-producing devices; streamers; whirligigs; blinking, rotating, moving, chasing, flashing, glaring, strobe, scintillating, search, flood or spot lights; or similar devices; any of which are located or employed in connection with the conduct of a commercial business.

Inflatable advertising [*5] devices, such as those leased by Houston Balloons, were AGDs within the definition of Section 28-37. Section 28-37(b) also provided that "[i]t shall be unlawful for any person to place, erect, maintain, or display any attention-getting devices on any private or public property within the city . . ." for more than forty-four days in any one calendar year.

AGDs are not "signs" as defined in the Sign Code; however, if an AGD displays a certain type of message on it, it may be subject to the provisions of the Sign Code. Section 28-37(a) stated in part:

> Provided, further, that any device otherwise defined as an attention-getting device which contains or displays any written message, business name, pictorial representation, logo, corporate symbol, silhouette, or other visual representation identifying or advertising a particular business, good, service or merchandise sold or available for sale on the premises where the device is erected, displayed or maintained shall be a "sign" as that term is defined in Section 4602 of the Houston Sign Code and shall be subject to the provisions of that Code, rather than this section.

Up until the time of the filing of Plaintiffs' suit, the City interpreted [*6] Section 28-37(a) to mean that any written message on an AGD that advertised a particular business, good, service or merchandise was a *non-generic* message. Any written message that did not identify or advertise a particular business, good, service or merchandise sold or available on the premises where the AGD was located was a *generic* message. Under this interpretation, the City prohibited AGDs with *non-generic* messages, but allowed identical AGDs with *generic* messages or no messages.

The City Sign Administration published a brochure ("Brochure") for use by persons desiring to display AGDs. The Brochure included information about the City's regulations concerning AGDs and the form to register an AGD. It described permitted attention-getting devices as including "Banners (Non-advertising in nature, such as "Grand Opening," "Sales" or "Specials")." The Brochure further stated that "Attention-Getting Devices cannot include advertising copy" and explains that "Attention-Getting Devices cannot include any written message, business name, logo, corporate symbol, silhouette or other visual representation identifying or advertising a particular business, good, service or merchandise sold or available [*7] for sale on the premises."

Section 28-37 (e) required anyone displaying an AGD on his, her or its premises to register the AGD with the Sign Administration. Failure to register an AGD was a misdemeanor punishable by a fine of not less than $ 150.00 and not more than $ 200.00 for each violation. Under Section 28-37, each day an AGD was displayed without registration was a separate violation.

According to Luycx, the City had not allocated any funds for the regulation of AGDs and the enforcement of Section 28-37. As a result, the regulations were enforced only when citizens filed complaints about particular AGDs. Sign Administration inspectors were instructed not to issue an NOV or a fine with respect to an AGD unless a citizen complained about it. If no complaint was filed with respect to an illegal AGD, the City did not investigate it. Therefore, a number of businesses, including auto dealers, were allowed to continue displaying illegal AGDs without encountering any enforcement action. Luycx also testified that the provision of Section 28-37(b) that specified a time limit on the number of days that an AGD could be displayed was not uniformly enforced.

The relevant time period for this [*8] case is from December 13, 2004 to December 13, 2006. Plaintiffs filed their Original Complaint on December 13, 2006, and the City thereafter abandoned its regulation of AGDs. On November 23, 2008, the City effectively repealed Section 28-37 and promulgated City of Houston Ordinance No. 2008-992, which will take effect on January 1, 2010 and will effectively ban all AGDs. Ordinance No. 2008-992 is not at issue in this suit.

Houston Balloons has not utilized AGDs to display their own messages or promote their own business. Houston Balloons leased inflatables to customers, and erected and maintained them on behalf of their customers. On occasion, Houston Balloons would register inflatables leased to customers with the Sign Administration. Houston Balloons did this on behalf of its customers, but was under no obligation to do so. The registrations were made in the name of the customer leasing and displaying the AGD.

In some instances, Houston Balloons and/or its customers were able to register AGDs with *non-generic* messages with the Sign Administration, and later received NOVs and tickets from the Sign Administration for violating Section 28-37. In other instances, Houston Balloons attempted [*9] to register an AGD on behalf of a customer, but was told by the Sign Administration that the registration would not be allowed because of the AGD's *non-generic* content. Houston Balloons then asked that a sign permit be issued for the AGD under the Sign Code, and was told that no permit under the Sign Code would be issued.

Houston Balloons was directly subject to enforcement of the City's regulations of AGDs. On September 28, 2006, Houston Balloons received an NOV from the Sign Administration for an inflatable it was installing for a customer. On other occasions, Purtee was told by Sign Administration inspectors to halt the installation of inflatables balloons with *non-generic* messages at specific locations.

The City also issued NOVs and fines to customers of Houston Balloons. This enforcement caused the cancellation of a number of Houston Balloons' existing lease contracts. The regulations also had a chilling effect on new leases of inflatables because potential customers

feared receiving NOVs and fines. Therefore, the City's regulations prevented Houston Balloons from leasing inflatables, causing it to lose profits. Houston Balloons presented evidence that it sustained lost profits [*10] during the relevant time of at least $ 927,841.00, accounting for a reasonable profit margin of 80%. Houston Balloons also incurred attorney's fees in prosecuting its claims in this case of $ 244,279, and costs and expenses in the amount of $ 16,479.

II. Conclusions of Law

A. Standing

The doctrine of standing determines "whether a litigant is entitled to have a federal court resolve his grievance." *Kowalski v. Tesmer, 543 U.S. 125, 128, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004)*. The inquiry into standing contains two distinct strands, which are analyzed as dual threshold matters:

> (1) Article III standing, which enforces the Constitution's case-or-controversy requirement; and
>
> (2) prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction.

Id.; Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11-12, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) (internal citations omitted).

Article III, § 2 of the United States Constitution extends the judicial power of the United States solely to cases and controversies. *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*. Article III standing requires three elements: (1) the plaintiff must have suffered an actual "injury in fact"; (2) there must be a causal [*11] connection between the injury and the complained-of conduct; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*.

Here, both Plaintiffs and Defendant agree, and the evidence demonstrates, that Plaintiffs have Article III standing to bring the instant claims. First, Plaintiffs have established that they suffered "injury in fact" as a result of the City's regulation of AGDs, including inflatable balloons. Pursuant to the City's regulations, the City rejected Houston Balloons' applications for sign permits, filed on behalf of Houston Balloons' customers, where the inflatable balloons bore *non-generic* messages. The City also imposed NOVs and fines on Houston Balloons and its customers who leased and displayed inflatables with *non-generic* messages. On occasion, Houston Balloons was instructed by Sign Administration inspectors to halt the installation of inflatable balloons with *non-generic* messages at specific locations. Houston Balloons' customers subsequently cancelled their orders and contracts with Houston Balloons and halted leasing inflatable balloons. As a result, the demand for Houston Balloons' [*12] products declined and Houston Balloons suffered economic harm. This economic harm constitutes injury in fact. *Craig v. Boren, 429 U.S. 190, 194, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)* (direct economic injuries meet Article III's "injury in fact" requirement). Additionally, the Court finds that Plaintiffs' economic losses are a direct result of the City's regulation of AGDs. Therefore, Plaintiffs meet the first and second elements of Article III standing. Finally, if this Court were to find in Houston Balloons' favor, Houston Balloons would be compensated for past financial losses it suffered as a result of the City's regulations in the form of compensatory damages. Therefore, an outcome in Plaintiffs' favor would redress past economic injuries. Accordingly, Plaintiffs have established Article III standing.

Even when a plaintiff has met the barrier of Article III standing, prudential limitations to standing may apply. According to the principal of prudential standing, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Powers v. Ohio, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)*; *Ward v. Santa Fe Indep. Sch. Dist., 393 F.3d 599, 606 (5th Cir. 2004)* [*13] (*citing Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*). In limited exceptions, a plaintiff may bring an action on behalf of third parties as long as the plaintiff demonstrates "some hindrance to the third party's ability to protect his or her own interests." *Powers, 499 U.S. at 411*. Further, prudential standing demands that a "plaintiff's complaint falls within the zone of interests protected by the law involved." *Elk Grove Unified, 542 U.S. at 12* (*citing Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)*). The inquiry is "whether the constitutional or statutory provision on which the claim rests properly

can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth, 422 U.S. at 500* (plaintiffs bringing suit on behalf of third parties lacked prudential standing because plaintiffs were not subject to the ordinance at issue).

In the Court's December 9, 2008 Order addressing Plaintiffs' *First Amendment* claim, the Court found that Plaintiff was subject to the prudential limitations of standing. (Instrument No. 50). The City's regulation of AGDs dictated the type of speech that could be displayed on an AGD. The City's regulations did not limit Houston Balloons' [*14] own speech, but rather the speech of Houston Balloons' customers. As such, Houston Balloons did not have standing in its own right to bring a *First Amendment* challenge to the City's regulation of AGDs. Additionally, Houston Balloons was not entitled to assert the rights of its third party customers under the overbreadth doctrine, because the overbreadth doctrine does not apply to commercial speech. *Bd. of Trs. v. Fox, 492 U.S. 469, 483, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)*.

Here, the Court addresses Houston Balloons' equal protection and due process claims against the City for its regulation of AGDs. The Court finds that Houston Balloons has standing in its own right to bring these claims and is not subject to the prudential limitations of standing. First, Section 28-37 defines AGDs as "devices erected, placed or maintained so as to attract attention to any commercial business, or any goods, products or services available on the premises of the commercial business . . . [such as] inflatable objects, including balloons . . . ." Section 28-37(b) states that "[i]t shall be unlawful for any person to place, erect, maintain, or display any attention-getting devices on any private or public property within the city . . [*15] . ." Houston Balloons was in the very business of leasing, erecting, installing, and maintaining inflatable objects on behalf of its customers. By the plain language of the regulation, Section 28-37(b) regulated Plaintiffs' ability to conduct its business of erecting and maintaining inflatables.

Further, Houston Balloons was directly subject to enforcement action under the regulations. On September 28, 2006, Houston Balloons received an NOV, which prevented it from installing an inflatable for a customer. On other occasions, Sign Administration inspectors told Houston Balloons to halt the installation of inflatables. These enforcement actions demonstrate that the Sign Administration's application of Section 28-37 interfered with Plaintiffs' ability to conduct its business. Accordingly, the City's regulations impacted Plaintiffs' own legal rights and interests. Houston Balloons has standing in its own right to bring the instant equal protection and due process claims.

The City concedes that Houston Balloons has standing to bring its equal protection and due process claims, but argues that it only has standing to assert the legal rights and interests of third parties. Because the Court [*16] finds that Houston Balloons has prudential standing to bring the instant claims in its own right, the Court need not address the City's argument regarding third-party standing.

B. Equal Protection

The *Equal Protection Clause of the Fourteenth Amendment* requires that all persons similarly situated be treated alike. *Rolf v. City of San Antonio, 77 F.3d 823, 828 (5th Cir. 1996)*. The *Equal Protection Clause* applies only "if the challenged governmental action classifies or distinguishes between two or more relevant groups." *Id*. (quoting *Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), cert. denied, 511 U.S. 1127, 114 S. Ct. 2134, 128 L. Ed. 2d 864 (1994))*. "Where . . . the classification created by the regulatory scheme neither trammels fundamental rights or interests nor burdens an inherently suspect class, equal protection analysis requires that the classification be rationally related to a legitimate state interest." *Cornerstone Christian Schs v. Univ. Interscholastic League, 563 F.3d 127, 139 (5th Cir. 2009)* (citing *Walsh v. Louisiana High School Athletic Asso., 616 F.2d 152, 160 (5th Cir. 1980)*. Under rational-basis scrutiny, the regulation is "accorded a strong presumption of validity" and "must be upheld against equal [*17] protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id*. (citing *Heller v. Doe, 509 U.S. 312, 319-320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993))*.

Here, the City prohibited AGDs with *non-generic* messages, while allowing *generic* messages or no messages on identical AGDs. This classification neither involves a fundamental right or interest nor burdens an inherently suspect classification. Therefore, the City's regulation of AGDs is subject to rational-basis scrutiny. The City stated that its goals in regulating AGDs were traffic safety and visual aesthetics. However, the City has provided no evidence demonstrating that its classification

between AGDs with *non-generic* messages and AGDs with *generic* messages promoted safety or aesthetics. Luycx, the City's Sign Administrator, was unable to explain how the City's regulations improved safety and aesthetics. Additionally, the Court finds no reasonably conceivable state of facts by which this classification promoted safety or aesthetics. Although the City's regulations are accorded a strong presumption of validity, the Court finds that there is no rational relationship between the regulations at [*18] issue and the City's stated goals. Accordingly, the City's regulation of AGDs violated Plaintiffs' Constitutional right of equal protection to erect and maintain inflatables with *non-generic* messages.

C. Due Process

The *Due Process Clause of the Fourteenth Amendment* requires that the language of a legislative or administrative enactment "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Ford Motor Co. v. Texas DOT, 106 F. Supp. 2d 905, 910 (W.D. Tex. 2000)* (citing *Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972))*. The *Due Process Clause* proscribes laws so vague that persons "of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Women's Med. Ctr. v. Bell, 248 F.3d 411, 421 (5th Cir. 2001)* (citing *Smith v. Goguen, 415 U.S. 566, 572, n.8, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974))*. A law is unconstitutionally vague if it is so indefinite that it allows arbitrary and discriminatory enforcement. *Id*. (citing *Grayned, 408 U.S. at 108-109*). The Fifth Circuit has held that a law or regulation violates the *Due Process Clause* if it "is inherently standardless, enforceable only on the exercise of [*19] an unlimited, and hence arbitrary, discretion vested in the state." *Id*. (citing *Margaret S. v. Edwards, 794 F.2d 994, 999 (5th Cir. 1986))*. "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)* (citing *Grayned, 408 U.S. at 108-109*).

Here, the City's regulations with respect to AGDs did not indicate to whom they applied. The plain language of Section 28-37 failed to indicate whether it applied to those who used AGDs to advertise their businesses, those who owned the land on which the AGDs were displayed, those who provided AGDs, or those who erected and maintained AGDs. Houston Balloons is in the business of leasing, erecting and maintaining AGDs to their customers. The City maintains that the regulations did not apply to Houston Balloons. Rather, the City argues that the regulations applied only to those who were using AGDs to advertise their business, such as the customers of Houston Balloons, because these advertisers were required to register their AGDs with the Sign Administration and were subject to enforcement action. However, Houston [*20] Balloons has provided uncontroverted evidence that it was also subject to enforcement action by the Sign Administration. Houston Balloons received at least one NOV and was told by Sign Administration inspectors on more than one occasion to halt installation of AGDs. This inconsistency demonstrates that the Sign Administration itself was unclear as to whom the regulations applied. The Court finds that the City's regulations were unlawfully vague because they failed to provide sufficient notice regarding to whom they applied and they lacked "explicit standards for those who apply them." *Hoffman Estates, 455 U.S. at 498*.

The City's regulations also failed to provide standards for enforcement by the Sign Administration. The language of the Sign Code and Section 28-37 did not specify how the Sign Administration was to enforce the regulations. Luycx testified that enforcement was conducted on an *ad hoc* basis -- only when a citizen complained about a particular AGD -- because the Sign Administration lacked funding to uniformly enforce the regulations. Consequently, the regulations were enforced against certain AGDs with *non-generic* messages, such as Plaintiffs' inflatables, but they were not [*21] enforced against other similarly illegal AGDs with *non-generic* messages, such as light pole standards used by auto dealers. The City also did not uniformly enforce Section 28-37's limitations on the number of days that an AGD could be displayed during a given year. In some instances, AGDs were continuously displayed for several years. The Court finds that the City's regulations were unlawfully vague because they lacked uniform enforcement standards and were arbitrarily and inconsistently enforced by the Sign Administration.

Accordingly, the City's regulation of AGDs violated Plaintiffs' Constitutional right of due process.

D. Damages

Pursuant to *42 U.S.C. § 1983*, Houston Balloons is entitled to recover compensatory damages from the City for the financial losses it suffered as a result of the City's unconstitutional regulation of AGDs. The City's regulation of AGDs during the relevant time directly caused Houston Balloons financial losses of at least $ 927,841.00. Accordingly, Houston Balloons is entitled to compensatory damages of $ 927,841.00.

The City effectively repealed Section 28-37 on November 23, 2008, and the regulations at issue in this case are no longer in effect. Accordingly, [*22] Houston Balloons is not entitled to a declaratory judgment or injunctive relief.

Pursuant to *42 U.S.C. § 1988*, Plaintiffs are entitled to recover their attorneys' fees in the amount of $ 170,850, which reflects a reduction of Plaintiffs' total attorneys' fees by twenty-five percent for an incomplete victory. Plaintiffs are also entitled to recover costs and expenses in the amount of $ 16,479. Plaintiffs are entitled to recover post judgment interest in the amount of 0.5% per annum, compounded annually, from the date of judgment herein until paid. In an event of an appeal to the Fifth Circuit, the Court awards additional attorneys' fees of $ 25,000.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 24th day of June, 2009, at Houston, Texas.

/s/ Vanessa D. Gilmore

VANESSA D. GILMORE

UNITED STATES DISTRICT JUDGE