

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COURTNEY HAVEMAN AND
AMANDA SPILLANE,

Petitioners,

v.

BUREAU OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS,
STATE BOARD OF COSMETOLOGY OF
THE COMMONWEALTH OF
PENNSYLVANIA,

Respondent.

No. 765 MD 2018

PETITIONERS' APPLICATION FOR SUMMARY RELIEF

Andrew Ward*
New York Bar No. 5364393
Dan Alban*
Virginia Bar No. 72688
Erica Smith*
New York Bar No. 4963377
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321
ahward@ij.org; dalban@ij.org

William N. Clark
Attorney No. 69739
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Telephone: (215) 665-4101
Facsimile: (215) 665-2013
wclark@cozen.com

*Admitted pro hac vice

Counsel for Petitioners

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INTRODUCTION

This application for summary relief challenges Pennsylvania’s requirement that applicants for limited cosmetology licenses have “good moral character.” Petitioners, Courtney Haveman and Amanda Spillane, are two women who want to become estheticians—cosmetologists who focus on skincare. Courtney and Amanda have criminal records from when they were younger and struggling with substance abuse, but they have turned their lives around. They have been sober and successful for years. They graduated from beauty school and had job offers from salons. Amanda even went through a humiliating hearing to prove to Respondent, the State Board of Cosmetology, that she is a good person. But under the good-character requirement, the Board rejected them anyway. They were not virtuous enough to be cosmetologists, even though their criminal histories have nothing to do with cosmetology. And this is typical. Under the good-character requirement, the Board routinely scrutinizes applicants because of irrelevant criminal convictions.

That is unconstitutional. Article I, Section 1, of the Pennsylvania Constitution guarantees applicants like Courtney and Amanda the right to pursue their chosen occupation free from irrational laws. And good character has nothing to do with cosmetology. The requirement’s scope is bizarre: cosmetology applicants need good character, but barbers, other salon workers, and even practicing cosmetologists do not. The Board applies the requirement arbitrarily. And on top of all that, the Board

already has enough authority to protect the public through its power to police behavior that *is* related to cosmetology.

As this Court stated last year, “[t]he Board was not created to replicate the work of those engaged in criminal law enforcement.” *Bentley v. State Bd. of Cosmetology*, 179 A.3d 1196, 1203 n.8 (Pa. Cmwlth. 2018). The Court should reiterate that principle today, recognize the good-character requirement as irrational, and enjoin the Board from enforcing it.

STATEMENT OF UNDISPUTED FACTS

Pennsylvania’s Beauty Culture Law establishes three kinds of limited cosmetology licenses: for estheticians, nail technicians, and natural hair braiders. 63 P.S. § 511. Like full cosmetology licenses, all three require applicants to have “good moral character.” *Id.* §§ 510(a), 511(a).¹ The Board uses this requirement to scrutinize and reject applicants like Petitioners, Courtney Haveman and Amanda Spillane.

Amanda

A. Amanda’s recovery and interest in esthetics

Amanda Spillane is a Philadelphia-area woman who turned a troubled past into a productive present. Verified Pet. ¶¶ 44–50. While in high school, she began to

¹ This brief discusses some Board rulings about applicants for full cosmetology licenses. The Chair of the Board admitted that good character means the same thing for full and limited licenses. Chair Depo. (Ex. 1) at 64:19–65:7 (“Q: I’m asking if there’s any reason why—if someone could have good character for purposes of one law, but not good character for purposes of the other? A: No.”).

self-medicate to cope with anxiety and depression, and that behavior devolved into drug addiction. *Id.* ¶ 46. Between 2005 and 2011, she pleaded guilty to crimes including drug possession, driving while under the influence, and thefts and burglaries, which she committed to pay for the drugs that fed her addiction. *Id.* ¶ 47. Ultimately, she served two years in prison. *Id.* ¶ 48.

After serving her sentence, Amanda was remorseful about her wasted youth and determined to do better. *Id.* ¶¶ 50, 55. For years, she arrived at McDonald's at 4:45 a.m. to work the morning shift. *Id.* ¶ 51. Her manager there evaluated her as outstanding. *Id.* She later worked as a waitress. *Id.* Amanda is now eight-years sober, managing her mental health, and connected with her family. *Id.* ¶¶ 52, 53, 55. Her criminal record is clean since her release from prison. *See id.* ¶ 69.

Because food service does not pay well, Amanda found herself relying on food stamps. *Id.* ¶ 72. She decided to pursue a trade, and she chose esthetics because she finds skincare calming. *Id.* ¶ 57. So, in 2014, while working full-time, Amanda completed a yearlong program at a beauty school. *Id.* ¶ 58. It cost more than \$6,000. *Id.* She even received a job offer at a salon. *Id.* ¶ 59. She had no idea that her past could come back to make all this effort a waste. *Id.* ¶ 61.

B. The Board rejects Amanda after a humiliating ordeal.

In November 2014, Amanda applied for an esthetician's license. *Id.* ¶ 62. The Board provisionally denied her. *Id.* ¶ 63. According to the Board, Amanda's convictions suggested that she did not have good character. *Id.* ¶ 64. And the only way

to appeal was by presenting her case in an administrative hearing in Harrisburg. *Id.* ¶ 66. Amanda could not afford a lawyer, so she had to represent herself. *Id.* She gathered pages of evidence and had friends, family, and even her beauty school write reference letters. *Id.* ¶ 68. Then, in the summer of 2015, she and her parents drove more than 100 miles for the hearing. *Id.* ¶ 113. Amanda had worked so hard to turn her life around, and now here was a chance to start the career she wanted.

It was a disaster. Amanda was humiliated for hours as the government dissected her life in front of her parents. *Id.* ¶¶ 67, 113. She and her father both cried. *Id.* ¶ 67. The hearing examiner was disappointed that Amanda did not provide documents on topics ranging from “compliance with her criminal parole” to her “spiritual rehabilitation.” *Id.* ¶ 69. Ultimately, he recommended that the Board deny Amanda’s application. *Id.* It is unclear from his proposed order what would have sufficed to “negate the record of poor moral character [that Amanda had] developed” in her youth, but her “ability to maintain employment, complete esthetician training, and” live a crime-free life was not enough. *Id.* The Board adopted the examiner’s recommendation in November 2015. *Id.* ¶ 70. The experience was time-consuming, invasive, and degrading, and it prevented Amanda from starting her chosen career. *Id.* ¶¶ 109, 113, 118.

Courtney

A. Courtney's recovery and interest in esthetics

Courtney Haveman has a similar story. Today Courtney devotes her life in the Philadelphia suburbs to raising her toddler. *Id.* ¶¶ 7, 12. Six years ago, however, she was a different person. *Id.* ¶¶ 13, 15. When Courtney was in high school, she began drinking too much. *Id.* ¶ 14. That addiction led to several misdemeanor convictions arising from a few drunken episodes. *Id.* ¶ 15. One involved driving while intoxicated, another involved possession of paraphernalia for smoking marijuana, and the last, in 2013, involved drunkenly resisting arrest at a casino. *Id.* ¶ 16.

After this last incident, Courtney realized alcohol was destroying her life. *Id.* ¶ 17. She stuck with AA and has been sober ever since. *Id.* ¶¶ 17–18. She has not committed any more crimes. Courtney Depo. (Ex. 2) 15:6. She met the man who would become her husband, got married, and then, in 2017, gave birth to their son. *Id.* ¶ 20.

Like Amanda, Courtney wants to be an esthetician. The work would let her help support her son while satisfying her longstanding interests in skincare and helping women look their best. *Id.* ¶¶ 22, 104. So, in 2016, she completed a six-month, \$6,000 course at the same beauty school Amanda had gone to. *Id.* ¶ 23; *see also id.* ¶ 58. A salon offered her a job. *Id.* ¶ 25. She was excited to get her license. *Id.* ¶ 24.

B. The Board rejects Courtney.

Instead, she got an unpleasant surprise. In March 2016, Courtney received a letter informing her that her application required certified copies of “ALL” documents related to her convictions, including certified copies of “the Criminal Complaint, Affidavit of Probable Cause, Information or Indictment and any Verdict or Plea documents.” *Id.* ¶ 28; Pearson Vue Ltr. (Ex. 3). Courtney paid for and submitted certified records. V. Pet. ¶ 29.

Still, that July, the Board preliminarily rejected Courtney. *Id.* ¶ 31. Her convictions, from three to five years earlier, suggested she lacked “sufficient good moral character.” *Id.* Courtney did not request a hearing because she was overwhelmed by the idea of proving her character to the government and she did not have the money for a lawyer. *Id.* ¶¶ 33–36. The Board’s denial became final. *Id.* ¶ 37. Courtney did write a letter asking the Board to reconsider—

Becoming an esthetician has always been a dream of mine. Over the past several years I have worked extremely hard to overcome my past and not allow it to be a burden to me. I have learned from my mistakes ...

—but the Board never responded. *Id.* ¶¶ 39–40; Courtney Ltr. to Bd. (Ex. 4). Like Amanda, Courtney found applying for a license invasive and degrading. V. Pet. ¶ 118.

The Application Process

For applicants with the wrong kind of past, that is how the process works. First, a would-be cosmetologist spends hundreds of hours and thousands of dollars on beauty school. Only then does she have the chance to see whether her character

passes muster. *See* 63 P.S. § 511(b); Bd. Depo. (Ex. 5) 44:3–46:12 (confirming that the Board will not review an application unless the applicant has completed 250 hours of schooling in esthetics or braiding or 150 hours in nail technology).

After sufficient schooling, a would-be cosmetologist applies to the Board to take the licensure examination. Dep’t of State Pamphlet (Ex. 6) 2. As part of the application, an applicant with a criminal record must submit a background check for each state in which the applicant has lived during the five prior years. *Id.*; Bd. Depo. (Ex. 5) 60:6–20, 61:14–19. These cost \$22 for a Pennsylvania background check; the Board does not know the cost for other states. Bd. Depo. (Ex. 5) 61:2–13.

Next, an outside testing agency reviews the application for completeness. If an applicant with a criminal history fails to submit sufficient documentation, the application is deficient, and the Board will not process it further. *Id.* at 50:23–51:5, 79:20–80:2, 82:6–24. If the application is complete, “Board Counsel reviews the criminal background check for offenses that may be grounds for the provisional denial of a license.” Dep’t of State Pamphlet (Ex. 6) 2 (footnote omitted). In some cases, the Board then provisionally denies the applicant.² Dep’t of State Pamphlet (Ex. 6) 2. Next comes the option of a hearing. *Id.* If, like Courtney, the applicant does

² Although the Board did not produce precise numbers, it avers that between October 2014 and May 2018, 47 applicants were provisionally denied under the Beauty Culture Act, for lack of character or otherwise. Interrogatory Response 5 (Ex. 7).

not undergo a hearing, the denial becomes final. Otherwise, as with Amanda, the application proceeds to a hearing examiner. *Id.* at 2, 4.

Hearings are not pleasant. They are held only in Harrisburg, which can mean burdensome travel for applicants. Bd. Depo. (Ex. 5) 98:11–22; V. Pet. ¶ 113. Once there, applicants, most of whom do not have college degrees, Chair Depo. (Ex. 1) 76:15–17, must provide testimony or other evidence, such as employment records or references, to prove their character. Dep’t of State Pamphlet (Ex. 6) 3–4. The examiner then judges them under a test with at least eight factors:

- “• The seriousness of the crime(s)
- The date of the crime(s)
- The age of the person at the time of commission of the crime(s)
- The age(s) of the victim(s) of the crime (if applicable)
- The circumstances, if known, surrounding the commission of the crime(s)
- The relationship between the criminal conduct and the applicant’s prospective duties as a licensee
- The prison, jail, probation, parole, rehabilitation and employment records of the applicant since the commission of the crime(s)
- Any affidavits or other written documents, including character references provided on the applicant’s behalf.”

Id. at 3 (emphasis removed). Sometimes applicants are cross-examined by a Prosecuting Attorney for the Commonwealth. *See, e.g.*, Nov. 17, 2017 decision (Ex. 8) App’x at 2.

As the Chair of the Cosmetology Board conceded, the invasiveness of these hearings can be “[d]ifficult.” Chair Depo. (Ex. 1) 27:1–8. The Board’s mission to ensure good salon experiences often draws out intensely personal testimony. For example, one applicant, undergoing a character hearing because of a prostitution conviction, explained that she had been a victim of sex trafficking:

3. In late April or early May 2013, a man ... contacted Applicant through Facebook, and she met him in a motel where he restrained her and threatened her with bodily harm if she left. (*Hearing Transcript, pages 14 to 17.*)

4. [The man] posted Applicant’s photo and information on the internet and offered Applicant for prostitution. (*Hearing Transcript, pages 17 to 20.*)

5. Applicant’s participation in prostitution was involuntary and coerced. (*Hearing Transcript, pages 14 to 20.*)

Jan. 18, 2017 decision (Ex. 9) App’x at 3. Another applicant testified that she was seeing a therapist to help her cope after an abortion. Jan. 23, 2017 decision (Ex. 10) App’x at 14. Another testified about delivering her stillborn daughter, her grief and diagnoses of postpartum depression and post-traumatic stress disorder, and the dozen medications her psychiatrist prescribed in response, which made her feel “like a zombie.” Sept. 22, 2016 decision (Ex. 11) App’x at 2. Yet another testified about attempting suicide due to an abusive relationship:

The emotional abuse included name calling; “Jake” repeatedly told her she was “worthless;” she should kill herself because she wasn’t anything of a mother; she wasn’t anything of a person; she was a piece of “crap;” she is “fat;” look how ugly she is; no one could ever possibly love her. (N.T. [notes of testimony] 15–16)

Mar. 9, 2016 decision (Ex. 12) App’x at 5–7.

When all the testimony about fitness to work in a salon is over, the examiner drafts a proposed order about the applicant’s character. Dep’t of State Pamphlet (Ex. 6) 4. If the applicant disagrees with it, the applicant has thirty days to submit an up-to-fifty-page brief to the Board, which may hold oral argument. *See* 1 Pa. Code §§ 35.211–12, 35.214.

Finally, the Board decides whether the applicant has good enough character to be a cosmetologist. Dep’t of State Pamphlet (Ex. 6) 4. The whole process can easily take a year. Bd. Depo. (Ex. 5) 107:5–15 (“Q: I’m asking about the duration of the review of criminal history from the time all the records are submitted to a decision saying you can take the exam ... Could it take a year? A: It could take a year, absolutely.”).

The Current Lawsuit

Even after enduring that process, however, Courtney and Amanda want to become estheticians. V. Pet. ¶ 104. Courtney needs to earn more because she is now a single mother supporting a toddler, Courtney Depo. (Ex. 2) 39:24–40:10, and Amanda, who is now pregnant, wants to be able to support her first child, Amanda Depo. (Ex. 13) 18:4–8. Since applying, both have even worked other jobs in salons. Courtney Depo. (Ex. 2) 15:17–16:6; Amanda Depo. (Ex. 13) 11:18–23, 18:9–16. But they do not want to again undergo a burdensome process that the Board is still enforcing—let alone risk another denial. V. Pet. ¶¶ 117–19; Chair Depo. (Ex. 1)

103:17–21 (“Q: For now though, the Board enforces the good moral character requirement, correct? A: We take it into consideration, yes. Q: And you’re still doing that today? A: Yes.”). So Courtney and Amanda sued in this Court. They are seeking (1) a declaratory judgment that the requirement is facially unconstitutional and (2) an injunction prohibiting the Board from implementing it. V. Pet. ¶¶ 121–45.

This Court has already overruled the Board’s preliminary procedural objections. *See* Mem. Op. (Dec. 9, 2019). Now, Courtney and Amanda seek summary relief.³

ARGUMENT

In the following argument, Petitioners show that the good-character requirement is facially unconstitutional.

In Part I, they present the legal standards for assessing facial challenges and substantive due process claims. Then, in Part II, they present four reasons that the good-character requirement violates their substantive due process right to engage in a common occupation of life. Finally, in Part III, Petitioners show that the requirement violates their right to equal protection.

³ As the Court recognized when it overruled the Board’s preliminary objections, Courtney and Amanda “are **not** challenging their initial license denials or seeking damages based on those denials. They are seeking relief only prospectively, based on the unconstitutional burden the good moral character requirement is imposing on them now.” Mem. Op. 22–23 (quoting V. Pet. ¶ 122). In other words, this suit is not about their past applications. It’s about their next applications.

I. LEGAL STANDARD

“At any time after the filing of a petition for review in an ... original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.” Pa. R.A.P. 1532(b). Here, Petitioners are bringing a facial substantive due process claim like the one in *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015) (en banc), which provides the relevant legal standards.

A law is facially unconstitutional if “its invalid applications are so real and substantial that they outweigh the statute’s plainly legitimate sweep.” *Id.* (quoting *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1223 n.37 (Pa. 2009)). And, as a matter of substantive due process, an application of a law is invalid when it is irrational:

A law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.

Id. at 519 (quoting *Gambone v. Com.*, 101 A.2d 634, 637 (Pa. 1954)) (emphasis in *Peake*).

In other words, “Article 1, Section 1 guarantees ... an individual’s right to engage in any of the common occupations of life.” *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 20 (Pa. Cmwlth. 2012) (en banc). “[T]he legislature can curtail the right to engage in a chosen occupation for an important reason, but it may not do so in a way that is overly broad.” *Peake*, 132 A.3d at 519.

II. THE GOOD-CHARACTER REQUIREMENT VIOLATES SUBSTANTIVE DUE PROCESS

Under that test, the good-character requirement fails. The cosmetology laws of which the requirement is part “have but one purpose, and that is the protection of patrons of ... beauty shops.” *Bd. of License & Inspection Review v. Weber*, 147 A.2d 326, 328 (Pa. 1959); *see also* Interrogatory Response 1 (Ex. 7) (the Board identifying the “promot[ion of] public health and safety” through licensure as “all government purposes and interests that ... are advanced by the good-character requirement” (footnote omitted)).

The good-character requirement lacks a “real and substantial relation” to that purpose. This is so for at least three reasons. First, both discovery and case law prove that good character has nothing to do with protecting beauty-shop patrons. Second, the requirement irrationally discriminates between similarly situated people. If protecting beauty patrons does not demand good character of barbers, other salon workers, or already-licensed cosmetologists, then it is unnecessary for cosmetology applicants. Third, the Board applies the requirement arbitrarily. By definition, arbitrary laws do not advance state interests.

Besides being unrelated to protecting patrons, the requirement is also “unreasonable, unduly oppressive [and] patently beyond the necessities of the case.” *Peake*, 132 A.3d at 519 (quoting *Gambone*, 101 A.2d at 637). That’s because the Board already has separate authority to withhold licenses for misbehavior that *is* related to

cosmetology. As a result, the good-character requirement necessarily adds only authority *unrelated* to cosmetology.

A. Cosmetology does not present unique risks of crime.

Petitioners begin with the most obvious reason that the requirement is unconstitutional: its invalid applications—the situations in which good character lacks “a real and substantial relation” to cosmetology—outweighs its legitimate sweep. For the Board, good character bars only applicants with convictions for crimes of moral turpitude.⁴ That kind of immaculate record might make sense for fiduciaries such as lawyers (who have unique opportunities to exploit their clients), just as it might make sense to bar embezzlers from accounting. But a cosmetology applicant’s convictions for crimes of moral turpitude simply do not endanger beauty patrons.

This is not just common sense; the undisputed discovery proves it. The Board *admits* that it has no evidence that the good-character requirement protects salon customers. Interrogatory Response 3 (Ex. 7) (Board responding to a request for evidence that the requirement serves a purpose by stating that it “cannot identify any scientific studies, interviews or testimony”). The Board cannot identify any crimes that are inherently relevant to cosmetology, and it cannot say if it has ever used the

⁴ See *Gombach v. Bureau of Com’ns, Elections & Legislation*, 692 A.2d 1127, 1130 (Pa. Cmwlth. 1997) (defining “good moral character” “in terms of a person lacking ‘moral turpitude’”); Interrogatory Response 6 (Ex. 7) (Board responding “No.” to the interrogatory, “In determining whether someone has committed acts of moral turpitude, do you consider acts besides those that resulted in criminal convictions?”).

good-character requirement to deny a license because of a crime that puts beauty patrons at risk. *Id.* Responses 4, 5. The Board Chair, when asked “Do you think that there’s anything about cosmetology that offers specific risks of certain kinds of crime?” admitted, simply, “No.” Chair Depo. (Ex. 1) 74:17–75:1. Indeed, the Board’s own decisions often assert that the only crimes related to cosmetology are those “committed in the course of practicing the profession.” *E.g.*, March 30, 2017 decision (Ex. 14) App’x at 24 n.14. There are even cosmetology classes in prison. *See Abruzzese v. State Bd. of Cosmetology*, 185 A.3d 446, 452 (Pa. Cmwlth. 2018). A law this untethered from its purported aim cannot satisfy the “real and substantial” test.⁵

Case law only underscores that disconnect. Many crimes are crimes of moral turpitude (as turpitude is “anything done knowingly contrary to justice, honesty or good morals,” *Gombach*, 692 A.2d at 1130), but courts have repeatedly held that various crimes are unrelated to the safe practice of beauty services. Just last year, this Court took for granted that none of forgery, drug dealing, aggravated assault, escape, or fleeing police is inherently related to cosmetology. *See Bentley*, 179 A.3d at 1198,

⁵ The administration itself believes that good-character requirements may be “unnecessary barriers.” Bureau of Professional and Occupational Affairs, *Review of State Professional and Occupational Licensure Board Requirements and Processes 2* (June 11, 2018), available at <https://www.dos.pa.gov/ProfessionalLicensing/Documents/EO2017-03-Executive-Report-Occupational-Licensing.pdf>. In the real world, laws like the good-character requirement harm the public by restricting lawful employment and thus encouraging recidivism. *See* Stephen Slivinski, *Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform*, Policy Report No. 2016-01, Center for the Study of Economic Liberty, Arizona State University (Nov. 7, 2016) (concluding that heavier licensing burdens correlate with increasing recidivism), available at <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf>.

1203 n.8 (explaining that the Board needs more than convictions for these crimes to impose a sanction related to cosmetology); *Abruzzese*, 185 A.3d at 448–49, 453–54 (vacating Board discipline because Board had not introduced evidence that an esthetician with a felony drug-dealing conviction was a risk to patrons). The Court has similarly held that neither sexual abuse nor drug dealing is inherently related to barbering. *See King v. State Bd. of Barber Exam'rs*, 195 A.3d 315, 329–30 (Pa. Cmwlth. 2018) (en banc); *Fulton v. State Bd. of Barber Exam'rs*, 169 A.3d 718, 726 (Pa. Cmwlth. 2017); *Kirkpatrick v. State Bd. of Barber Exam'rs*, 117A.3d 1286, 1287, 1294 (Pa. Cmwlth. 2015). And, almost fifty years ago, the Supreme Court explained that old crimes can be irrelevant:

We are also mindful that [a blanket ban on anyone who has been convicted of a crime of moral turpitude] runs afoul of the deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders. This State in recent years has been unalterably committed to rehabilitation of those persons who have been convicted of criminal offenses. To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.

Sec'y of Revenue v. John's Vending Corp., 309 A.2d 358, 362 (Pa. 1973); *see also Ake v. State Bd. of Accountancy*, 974 A.2d 514, 520 (Pa. Cmwlth. 2009). So case law recognizes that criminal history is not relevant to the safe practice of cosmetology.

That is because the risks of allowing people with criminal records to work in cosmetology—if there are risks—“would be equally present in other commercial

establishments, such as corner grocery or convenience stores, that are not subject to professional licensure requirements.” *King*, 195 A.3d at 330 (quoting *Fulton*, 169 A.3d at 726). In fact, that’s just what the Chair of the Board conceded, that there is nothing unique about cosmetology to justify character reviews:

Q: What about good character is relevant to the practice of cosmetology?

A: Serving the public. It’s a major part of their job, is dealing with the public, serving the public, communicating with the public, as well as their overall success.

...

Q: Do you think it’s important that grocery store baggers have good character?

A: Yes.

Q: Do you think it’s important that grocery store cashiers have good character?

A: Yes.

Q: Is there any job where it wouldn’t be important to have good character?

A: No.

Chair Depo. (Ex. 1) 72:6–73:20. This Court, however, has already rejected that draconian thinking, *see King*, 195 A.3d at 330, which would justify excluding people with criminal records from any job at all, even after the criminal justice system finds them fit to re-enter society.

In short, the case law establishes that crimes of moral turpitude are unrelated to the safe practice of cosmetology. Coupled with the Board's complete lack of evidence, that means that the good-character requirement's invalid applications outweigh its legitimate sweep.

B. Even within the beauty industry, the good-character requirement irrationally discriminates.

If requiring good character of cosmetology applicants bore a "real and substantial" relation to protecting salon patrons, one would expect the Legislature to require good character of people in similar positions. But it does not do that. Barbers, other salon employees, and even practicing cosmetologists may work regardless of character.

This kind of irrational distinction proved a law unconstitutional in *Peake*. There, the difference came down to a grandfathering clause. People with certain criminal convictions were barred from working in elder care, but not if they had worked a year in elder care by a certain date. 132 A.3d at 512, 521. That was enough for this Court, sitting en banc, to find the law unconstitutional on its face:

[A] lifetime employment ban ... for anyone convicted of an enumerated offense at any time, with a grandfather clause for employees with identical convictions employed for one year at a facility as of July 1, 1998, does not bear a real and substantial relation to the stated goal of protecting older adults

Id.

The good-character requirement has a similarly strange scope.

1. *Barbering*

First, good character is not required of barbers. *See King*, 195 A.3d at 326.

Barbers and cosmetologists, however, do parallel, and sometimes even identical, work. Barbers and estheticians both care for the face, and barbers and braiders both work with hair.⁶ The fields are so similar that the laws governing cosmetology need an exception for barbers. 63 P.S. § 523. Sometimes barbers and cosmetologists work in the same salon. *See* 63 P.S. § 515.2; Bd. Depo. (Ex. 5) 139:2–4 (“Q: Are there salons where both cosmetologists and barbers practice? A: I do believe there are, yes.”). Yet, despite these similarities, cosmetology applicants need good character and barber applicants do not. Even if they have identical criminal records, even if they will perform similar services, even if they will stand one salon chair apart, the law requires good character of only the cosmetology applicants, who will use tweezers, and not the barber applicants, who will use straight razors. That is irrational. *See Peake*, 132 A.3d at 521; *see also Md. State Bd. of Barber Exam’rs v. Kuhn*, 312 A.2d 216, 224 (Md. 1973) (holding that a haircutting restriction on cosmetologists but not barbers bore no “real and substantial relation” to the public welfare).

⁶ *Compare* 63 P.S. § 552.1 (defining barbering as “[t]o shave or trim the beard; to cut, shape, trim or blend the hair with the proper tools or instruments designed for this purpose; to shape the eyebrows, to give facial and scalp massaging, facial and scalp treatment, with any preparations made for this purpose, ... [and, among other things,] to dye, color or bleach the hair”) *with id.* at § 507 (defining esthetics as the “the practice of massaging the face, applying cosmetic preparations, antiseptics, tonics, lotions or creams to the face, removing superfluous hair by tweezers, depilatories or waxes and the dyeing of eyelashes and eyebrows”); *see also Weber*, 147 A.2d at 328 (characterizing the Barber License Law and the Beauty Culture Law as “twins”).

2. *Unlicensed salon workers*

Similarly, good character is not required for other, unlicensed workers in salons. This proves that, beyond the practice of cosmetology, these businesses are not somehow posing unique risks to patrons.

For example, if theft were a particular problem in salons, patrons would be just as vulnerable to a shampooist (who could steal from a purse while washing hair) as an esthetician (who could do the same during a facial). But shampooists, who are not licensed at all, need not undergo character exams, while estheticians must. *See* 49 Pa. Code § 7.97(b). Courtney's own situation shows how irrational this is. She works as a shampooist in a salon right now. Courtney Depo. (Ex. 2) 15:17–16:6. How could that salon be any less safe if she were an esthetician, working with skin instead of hair? There is likewise no character requirement for salon cashiers. That is why, despite her convictions for theft and burglary, Amanda could work as a salon cashier between waitressing jobs. Amanda Depo. (Ex. 13) 11:18–23, 18:9–16. She just cannot do the job that she spent hundreds of hours training to do.

Or take a case from the Board's decisions. One applicant was provisionally denied because, when she was around sixteen and then again when she was eighteen, she had sexual relationships with two high schoolers (which was a crime because she supervised them as an assistant soccer coach and because, the second time, she was a legal adult.) Mar. 13, 2018 decision (Ex. 15) App'x at 3–4 (describing conduct); *see also id.* at App'x at 5, 10 (giving age at commission); *id.* at App'x at 12–13 (defining

crimes). This applicant waited fifteen months for her application to be approved, *id.* at 1, App’x at 3; sat through a hearing, which her boss attended, that examined her sexual history, mental health, and medical prescriptions, *id.* at App’x at 3–4; and still got probation for four years, *id.* at 1. Yet the applicant was doing makeup professionally in a salon the entire time.⁷ *Id.* at App’x at 5. So—as the Board Chair admits—all that character review prevented zero risk to salon customers, who were patronizing the applicant and her salon regardless. Chair Depo. (Ex. 1) 98:19–24 (“Q: ... when she was in the salon for a year and presumably would keep working in the salon, is there a way that denying this license would protect salon customers? A: Denying it? Not necessarily.”).

It is no surprise, then, that the Board cannot explain this irrationality. Petitioners asked if any difference between licensed and unlicensed salon employees justifies the character distinction. All the Board could identify is that the Legislature has chosen to regulate one but not the other. Interrogatory Response 9 (Ex. 7). That sort of distinction—justified by nothing except statutory categories—is the definition of an irrational law.

3. *Licensed cosmetologists*

The irrational distinctions do not stop there. To be precise, good character is not even required of practicing cosmetologists. Rather, it is required of only

⁷ The Board’s order does not suggest that this work constituted unlicensed practice or was otherwise improper. *Id.*

cosmetology applicants. Once they become practicing cosmetologists, those same people cannot be punished for crimes of moral turpitude, unless those crimes are somehow related to cosmetology.

This, however, is the same flaw as in *Peake*. There, working elder-caretakers could continue to work no matter their criminal histories. But new applicants with those same histories were barred. 132 A.3d at 521. Here, someone with the wrong criminal history cannot become a cosmetologist. But a practicing cosmetologist can commit the same crimes and keep practicing.

One of these irrational distinctions might well be enough to prove the good-character requirement invalid under *Peake*. Here there are three. And they are not the requirement's only flaws.

C. The Board's decisions are arbitrary.

Another is the requirement's imprecision, which leads the Board to apply it arbitrarily. Yet "[t]he touchstone of due process is protection of the individual against arbitrary action of the government." *Peake*, 132 A.3d at 518 (quoting *Nixon v. Com.*, 839 A.2d 277, 287 (Pa. 2003)); *see also Johnson*, 59 A.3d at 20 ("The substantive protections of due process are meant to protect citizens from arbitrary and irrational actions of the government.").⁸

⁸ To be clear, the point is not that the requirement is void for vagueness. Rather, it is that the inherent subjectivity of judging character leads to outcomes that are arbitrary, so the requirement to do so is irrational, in violation of substantive due process. That said, the Court has suggested that

The term “good moral character” is, at best, fuzzy. The Supreme Court of the United States recognized long ago that

the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice

Konigsberg v. State Bar of Cal., 353 U.S. 252, 263 (1957) (footnote omitted). The Bureau of Professional and Occupational Affairs itself agrees that “the requirement to demonstrate ‘good moral character’ is loosely defined.” *Review of State Professional and Occupational Licensure Board Requirements and Processes* (see n.5 *supra*) 2. And the Board Chair admitted that “good character” means different things to different people:

A: As far as good character, it’s somebody who has—you know, they’re in good standing, do no wrong, wants to do what’s right. I mean, everybody has a different opinion of what it could mean, what it does mean.

Q: What did you mean by that last part, that everybody has a different opinion about what it could mean?

A: Well, depending on you—it could be your religion, it could be your race, a lot of different things as to what it would mean to you. Many things are written down and stated as in black and white, but as I read it, you read it, anybody else could read it, we all interpret things as we want to see them.

standardless laws like the good-character requirement may violate the non-delegation doctrine. *See Abruzzese*, 185 A.3d at 453 n.7.

Chair Depo. (Ex. 1) 59:1–14. This murkiness is only worsened by the Board’s (non-exhaustive) eight-factor test. So many factors with so little guidance invite arbitrary decision-making. *See, e.g., Itel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 79–80 (1993) (Scalia, J., concurring) (criticizing multi-factor and balancing tests as “vague and open-ended”); *Menard, Inc. v. Comm’r*, 560 F.3d 620, 622–23 (7th Cir. 2009) (Posner, J.) (“Multifactor tests with no weight assigned to any factor are bad enough from the standpoint of providing an objective basis for a judicial decision.”).

That might not matter if the Board had some special insight into character—but it doesn’t. Although the Chair of the Board believes that Board members are good judges of character, her reasoning—“All of them are from the industry. A lot of them have, you know, dealt with situations in their life.”—is less than airtight. Chair Depo. (Ex. 1) 52:2–8. Neither the Chair nor (to her knowledge) any of the other Board members has any particular training in psychology, criminology, or moral philosophy. *Id.* at 57:19–58:13.

Over and over, this lack of institutional competence manifests in the Board’s decisions. To start, compare the decision to reject Amanda with the decision to approve a different applicant four months later. Both women shared convictions for theft, drug possession, and driving while intoxicated. *Compare* Amanda decision (Ex. 16) App’x at 1–2 *with* Mar. 10, 2016 decision (Ex. 17) Attach. at 3–5. Both then turned their lives around. Yet the same rehabilitation in both women led the Board to opposite conclusions:

<i>Amanda</i>	<i>March 10, 2016 applicant</i>
<p>Applicant contends that her convictions are not truly indicative of her current moral character as evidenced by having worked at McDonalds for approximately two years, having completed Beauty Culture school while continuing to work, by having contributed to charities, and by having refrained from drug use and further criminal behavior since being released from prison. However, Applicant has offered little, if any, demonstrative evidence that she has rehabilitated her moral character since her release from prison.</p> <p>Ex. 16 App'x at 22.</p>	<p>She has been abstinent for more than three years and has had no further arrests or prosecutions. She has developed stable and healthy personal relationships, including the prospect of becoming a mother. Applicant has a supportive family network. And at considerable financial cost Applicant enrolled in a program of education in cosmetology and demonstrated the persistence and drive to successfully complete her education.</p> <p>For these reasons, Applicant has satisfied her burden of proving her good moral character at present and that she satisfies the statutory requirements for eligibility for the cosmetology examination.</p> <p>Ex. 17 Attach. at 15–16.</p>

Even the Chair of the Board conceded that outcomes like these were inconsistent.

Chair Depo. (Ex. 1) 89:24–92:12.

These sorts of arbitrary outcomes pervade the Board's character reviews. The sex-trafficking victim with a prostitution conviction mentioned earlier? Another woman whose misconduct "involved permitting her son's friends to use alcohol in her home"? These women both went through hearings that treated them the same as an applicant convicted of murder for smothering a baby. All three received the same

judgment: good character and an unrestricted license. *Compare* Jan. 18, 2017 decision (Ex. 9) 1, App'x at 3 *and* Mar. 13, 2018 decision (Ex. 18) Final Order & Attach. at 3 *with* July 10, 2019 decision (Ex. 19) 1, App'x at 6. Yet the Board gave a year's probation to a woman whose only crime was stealing \$400 six years earlier. May 5, 2016 decision (Ex. 20) 1, App'x at 4. The make-up artist who had committed statutory sex crimes as a teenager? Despite working in a salon anyway, she received four years' probation—the same as a woman who, at 28, had murdered her ten-month-old son. *Compare* Mar. 13, 2018 decision (Ex. 15) 1, App'x at 3–5, 10 *with* Nov. 17, 2017 decision (Ex. 8) 1, App'x at 3. Pressed to explain these inconsistencies, the Board Chair admitted that this is just how judging character works:

Q: You agree, I assume—let me know if not—that murdering a 10 month old is worse than a statutory sex crime between teenagers, right?

A: Um, that's a tough one to say yes or no to.

Q: Why is that?

A: Because they're both criminal crimes and how you look at them, because of the age or anything along those lines, should not be a determining factor in our business. There again, you are employed and working with the public so, you know, what one might see as a huge fault could be different in somebody else's eyes. There again, that's where we have to look at all facts and documents that support our decision or that will support our decision.

Q: Do you think people who commit crimes at 28 are any less responsible than people who commit crimes around 19, just based on age?

A: There again, I can't answer that one.

Q: So to sum up then, correct me if I'm wrong, I think you said you can't say whether people are more or less responsible for a crime based on age, and you also can't say whether crimes are worse or better based on the nature of the crime; is that right?

A: In some cases, yes.

Chair Depo. (Ex. 1) 88:22–89:22.

This cannot be the law. Even ignoring that character is unrelated to cosmetology, even ignoring the requirement's irrational exceptions, the Constitution prevents the government from imposing a requirement that means radically different things to different people, that the enforcing agency has no competence to implement, and that produces results this bizarre.

D. Because of the Board's other powers, the good-character requirement adds only illegitimate authority.

Finally, even if the Board were denying applicants for relevant reasons, it would not need the good-character requirement to do so. The requirement is thus “unnecessary” in the sense of *Peake*. 132 A.3d at 519.

That is because, under Section 519 of the Beauty Culture Law, the Board has separate authority “to refuse ... licenses ... for ... dishonest or unethical practices” related to cosmetology. 63 P.S. § 519(a); *see also Bentley*, 179 A.3d at 1202. The same is also true under the general Criminal History Records Information Act. *See Fulton*, 169 A.3d at 726 (discussing 18 Pa. C.S.A. § 9124). So, between these two laws, the Board has ample authority to reject an applicant for any misbehavior relevant to cosmetology. This argument, too, is not theoretical; the Chair of the Board admitted

that the character requirement does not even make a difference to protecting salon customers:

Q: What would be different if there were no good moral character requirement, given your powers under section 519?

A: That, I couldn't answer at this time, being that it is still there and we have to take it into consideration.

Q: But you don't know what difference it would make?

A: At this time, no.

Chair Depo. (Ex. 1) 103:8–16. This exemplifies an “unnecessary” law. *See Peake*, 132 A.3d at 519. It does not matter to the Board's mission of protecting salon customers, but it matters very much to the applicants whose licenses depend on it.

Pennsylvania courts have rejected occupational restrictions based on much less. Last year, this Court held en banc that it was an abuse of discretion for the Board of Barber Examiners to revoke a license because of a felony sex crime. The Court reasoned that “the General Assembly has enacted other statutes that are specifically aimed at addressing the Board's concerns” about safety, such as standards for parole, sex-offender-registration laws, and child-protection laws. *King*, 195 A.3d at 327–29. Similarly, the Pennsylvania Supreme Court has repeatedly found substantive due process violations when other, less-restrictive laws were enough to achieve the government interest. For example, in one case a town banned private gas wells but not public ones. The Supreme Court struck down the ban because private wells could be governed by regulations that were safe enough for public wells. *Mahony v. Twp. of*

Hampton, 651 A.2d 525, 527–28 (Pa. 1994) (“This reasonable condition would be far less drastic and intrusive than total prohibition.”). The Supreme Court has similarly struck down a ban on advertising drug prices as “patently beyond the necessities of the case” when the problems the law purportedly addressed were already “attacked in a more direct fashion” by other laws regulating the industry. *State Bd. of Pharmacy v. Pastor*, 272 A.2d 487, 492–94 (Pa. 1971); *see also Gambone*, 101 A.2d at 637 (finding advertising law purportedly aimed at restricting fraud unconstitutional in part because fraud already criminalized).

In sum, then, the Board already has the authority to reject applicants for misconduct that is related to cosmetology, so much so that its Chair could not identify any further benefit to reviewing character. It is irrational for a licensing requirement to be all cost and no benefit.

III. THE GOOD-CHARACTER REQUIREMENT VIOLATES THE RIGHT TO EQUAL PROTECTION

The good-character requirement also facially violates the right to equal protection. Under Pennsylvania’s equal-protection principles, a classification distinguishing similarly situated people “must rest upon some ground of difference which justifies the classification and has a fair and substantial relationship to the object of the legislation.” *Curtis v. Kline*, 666 A.2d 265, 268 (Pa. 1995). Here, as discussed in Section II.B, the good-character requirement irrationally distinguishes cosmetology applicants from at least three similarly situated groups: barbers, other

salon employees, and practicing cosmetologists. *See Kubn*, 312 A.2d at 222–24 (finding equal-protection violation when law irrationally distinguished cosmetologists and barbers). And, as discussed throughout, the requirement needlessly discriminates against people with criminal histories. *See, e.g., Barletta v. Rilling*, 973 F. Supp. 2d 132, 140 (D. Conn. 2013) (finding equal-protection violation where licensing law excluded all felons). The requirement is thus unconstitutional as a violation of equal protection. *See Wings Field Pres. Assocs. v. Dep’t of Transp.*, 776 A.2d 311, 319–21 (Pa. Cmwlth. 2001).

CONCLUSION

This case is about people who want to tweeze eyebrows, do nails, and braid hair. Weighing their sins does nothing to protect the public. It just makes it harder for them to get back on their feet and take the first steps toward a better life. The Pennsylvania Constitution is not that unforgiving.

This Court should grant summary relief to Petitioners, declare that the good-character requirement is unconstitutional on its face, and enjoin the Board from enforcing it.

December 20, 2019

/s/ Andrew Ward*

*Admitted *pro hac vice*

Respectfully submitted,

/s/ William N. Clark

Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that this Petitioners' Application for Summary Relief, Affidavit of Andrew Ward in Support of Petitioners' Application for Summary Relief, and Exhibits 1–20 comply with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellee and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: December 20, 2019

/s/ William N. Clark
William N. Clark
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limitation of Pa. R.A.P. 2135 because it contains 7,688 words, including footnotes, based on the word count of the word processing system used to prepare it.

Dated: December 20, 2019

/s/ William N. Clark

William N. Clark

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, William N. Clark, hereby certify that I am this 20th day of December, 2019, serving a copy of the foregoing Petitioners' Application for Summary Relief, Affidavit of Andrew Ward in Support of Petitioners' Application for Summary Relief, and Exhibits 1–20 upon the persons listed below via the electronic filing system:

Cynthia Kaye Montgomery
2601 North Third Street, PO Box 2649
Harrisburg, PA 17105-2649

Kenneth Lawson Joel
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17120

Mary Abbegael Giunta
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17111

Shana Mary Walter
30 Scarlet Oak Drive
Etters, PA 17319

Thomas Paul Howell
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101

Timothy Eugene Gates
Department of State, Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120

/s/ William N. Clark
William N. Clark
Counsel for Petitioners