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COMMENTARY

*ELP: Entirely Legal Protectionism: A Discussion on One Example of
Arizona’s Problematic Occupational Licensing Requirements*

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“Well, that doesn’t seem fair...”

Without fail, that is what I hear after telling people about Arizona’s licensing requirements for a massage therapist applicant. In addition to the education, character, and skill requirements common among licensing requirements in many professions, the State has included an English Language Proficiency (“ELP”) requirement for any massage therapist applicant that doesn’t identify as a native English speaker.¹ The State justified this extra requirement as “a health and safety measure to ensure that a massage therapist is able to make an evaluation of a client and communicate in English with the client or other health care practitioners and with a 911 operator in the case of an emergency.”²

On its face, that seems uncontroversial—reasonable, even.

But here’s the kicker: the Arizona State Board of Massage Therapy requires a score of twenty-five in each of the ELP test categories— reading, writing, speaking, and listening—for a total score of 100.³ The required passing score is higher than the mean and median scores for test-takers with graduate degrees (ninety-one) and native English speakers (ninety-five).⁴ The minimum passing score is even higher than the minimum proficiency score required for admittance into Arizona State University’s PhD program (eighty!).⁵

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¹ A.R.S. § 32-4222(E), ARIZ. ADMIN. CODE § R4-15-201(C) (2004).

² 20 Ariz. Admin. Reg. 2246 (Aug. 2014) (Notice of Final Rulemaking).

³ ARIZ. ADMIN. CODE § R4-15-201(C) (2004).

⁴ EDUC. TESTING SERV., TEST AND SCORE DATA SUMMARY 2021 19 (2022) <https://www.ets.org/content/dam/ets-org/pdfs/toefl/toefl-ibt-test-score-data-summary-2021.pdf> (averaging ninety-one and ninety-five consecutively).

⁵ *English Proficiency for International Graduation Students*, ARIZ. STATE UNIV., <https://admission.asu.edu/international/graduate/english-proficiency> (last visited Nov. 3, 2022) (“Score of at least 80...”).

Well, that doesn't seem fair.

One avenue available to those who have been impacted by unfair licensing requirements like this is through the substantive due process protections enshrined in Arizona's State Constitution.

Article II, Section 4 states “[n]o person shall be deprived of life, liberty, or property without due process of law.”⁶ This clause protects two distinct forms of “due process,” procedural, and substantive.⁷ Substantive due process stands for the guarantee “that the state is without right to deprive a person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond...necessity... [it is] an arbitrary exercise of governmental powers.”⁸

Substantive due process has been used to overturn or invalidate governmental action in many different contexts, including for occupational licensing. In *Stewart*, the Court invalidated sections of a city ordinance establishing requirements for applicants attempting to become “supervising electricians.”⁹ The Court’s role was to ensure that the regulations were “reasonable and not monopolistic or oppressive.”¹⁰ The Court took issue with the requirements that applicants had to be at least twenty-five years old and must have had six years of experience as a “journeyman” electrician.¹¹ In questioning the rationality of the minimum age requirement, the Court wrote that “[m]ost of the professions and businesses welcome into their ranks those members of society who have arrived at legal age...” and “[the] learned professions of the law and medicine place no such age limit upon those applying for admission to them.”¹² Likewise, when evaluating the reasonableness of the journeyman experience requirement, the Court stated “[s]ix years’ experience as a master electrician conceivably would do as much to qualify the applicant.”¹³ In both instances, the Court assessed the requirements with a common-sense approach and found both lacking for the same reason: they were “oppressive, arbitrary, and monopolistic, and not in the interests of safety to property or life.”¹⁴

Here the State uses its police powers as a justification for its occupational licensing also, but it's hard to argue that requiring a PhD level of proficiency for only non-native English-speaking applicants is anything but “so far beyond necessary.”¹⁵ What's more, Arizona is the only state with such a regulation for massage therapists, and massage therapy is one of the few professions in Arizona with an ELP requirement. Even mental health care providers and physicians do not need to satisfy an ELP requirement. As in *Stewart*, “If

⁶ ARIZ. CONST. art. II, § 4.

⁷ *Id.*

⁸ *Valley Nat'l Bank of Phoenix v. Glover*, 62 Ariz. 538, 553 (1945).

⁹ *City of Tucson v. Stewart*, 45 Ariz. 36, 60 (1935).

¹⁰ *Id.* at 46.

¹¹ *Id.* at 47.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 48.

¹⁵ *Glover*, *supra* note 8, at 298-99.

these learned professions” don’t require language proficiency exams to protect their patients, there is no rational reason that a massage therapist would.¹⁶

When discussing substantive due process, *Arizona Downs* is often mentioned as the nail in the coffin. In *Arizona Downs*, the Arizona Supreme Court held that statutes that affect “non-fundamental” rights will be reviewed under a rational basis test.¹⁷ While *Arizona Downs* does align Arizona law with the rational basis test used at the federal level, it does so by ignoring a long line of precedential cases without explanation.¹⁸ Further, *Arizona Downs* dealt with the right to enter the regulated industry of horse racing.¹⁹ Occupational licensing instead affects a different right—the right to earn an honest living. *Glover* and *Stewart* looked into occupational licensing specifically. Arizona’s massage therapist regulations, while related to the state’s police powers like any other occupational licensing requirement, fail the second step of the *Glover* test because they are so far beyond what is necessary to protect the public’s health and safety that they constitute an arbitrary use of the state’s power.

Be on the lookout, because unfair licensing demands like Arizona’s ELP requirements for massage therapists could be lurking anywhere, even hidden inside otherwise reasonable regulations. If you come across such a requirement, consider whether it is extreme enough to be a possible substantive due process violation.

¹⁶ See *Stewart*, *supra* note 9, at 47.

¹⁷ *Ariz. Downs v. Ariz. Horsemen’s Found.*, 130 Ariz. 550, 555 (1981) (“[T]he statute will be upheld if it has any conceivable rational basis to further a legitimate governmental interest.”)

¹⁸ *Id.*

¹⁹ *Id.*