In the District Court
of
Shawnee County, Kansas

Bryn Green,	Civil Action No. 2023-CV-300030
Plaintiff,	Plaintiff's Opposition to Defendants' Motion to Dismiss; Certificate of Service.
v.	Oral Argument Requested
Kansas State Board of Cosmetology, *et al.*,	Division Three (Hon. Teresa L. Watson)
Defendants.	

Plaintiff's Opposition to Defendants' Motion to Dismiss

This case involves sugaring—a safe and effective temporary hair removal technique that uses sugar, lemon juice, and water—and on the other hand, the Defendants' unreasonable, irrational, arbitrary, oppressive, improperly tailored, and protectionist licensing requirements.

Bryn Green is a 33-year-old mother in Hays, Kansas. To help support her family, she wants to perform sugaring—and only sugaring. Even though Ms. Green has *already* successfully completed a sugaring class, she is legally prohibited from performing sugaring for money unless she obtains a government issued license. To obtain that license, Ms. Green would have to complete either 1,500 or 1,000 hours of instruction in a cosmetology or esthetician school, respectively—that has virtually nothing to do with sugaring. It's estimated that *less than* 1% of either curriculum is specific to sugaring. Making matters worse, this schooling is prohibitively expensive. Cosmetology and esthetician schools can cost as much as $19,000 and $16,000, respectively.

But that's not all. After finishing school, Ms. Green would be forced to take two examinations that have virtually nothing to do with sugaring either—and because the tests are *written only*, she would *never* be tested on her actual ability to perform sugaring safely, effectively, or competently.

There is no esthetician school in Hays, only a cosmetology school. That means Ms. Green would be forced to spend tens of thousands of dollars and almost a year of her life learning irrelevant things and taking irrelevant examinations that don't test for competency in sugaring, for something that is *already* safe, that doesn't require any schooling to learn, and that she already knows how to do, just so she could use a completely safe, all-natural paste to remove unwanted hair.

The government's occupational licensing regime is unreasonable, irrational, arbitrary, oppressive, protectionist, and not appropriately tailored to fit the practice of sugaring. It is, therefore, unconstitutional.

Ms. Green has plainly stated claims under the Kansas Constitution Bill of Rights Sections 1, 2, 18, and 20. The government's K.S.A. § 60-212(b)(6) motion should be denied.

Facts

Sugaing is a safe and effective temporary hair removal technique that uses sugar, lemon juice, and water, to safely remove unwanted hair. (First Amended Petition ("FAP") ¶ 2, 28.) The beauty practice is an all-natural, non-invasive, safe, temporary hair removal technique dating back at least to ancient Egypt. (FAP ¶¶ 27, 30-32, 139(a).) In Kansas, performing sugaring for money requires a license (FAP ¶¶ 46-49, 52-53), but if it's done for free, it's unregulated (FAP ¶¶ 48-49, 52-53).

Ms. Green is a 33-year-old mother in Hays, Kansas. (FAP ¶¶ 2, 118.) She wants to perform sugaring to help support her family. (FAP ¶¶ 2, 124.) Sugaring would also allow her to spend more time with her son, because she could set her own schedule. (FAP ¶¶ 122-124.) That's particularly important because in Hays, like many other places in Kansas, affordable daycare options are lacking. (FAP ¶ 124.) Ms. Green doesn't want to offer any other type of esthetics or cosmetology services. (FAP ¶ 125.)

Even though Ms. Green has already successfully completed a sugaring class (FAP ¶ 126), she can't legally offer sugaring services. Sugaring without a license is a misdemeanor. (FAP ¶ 46.) Ms. Green isn't licensed. (FAP ¶¶ 2, 11.)

Sugaring doesn't require extensive schooling, coursework, or instruction to be able to perform it safely or competently. (FAP ¶ 43.) It involves little more than applying, at body-temperature, a paste made of sugar, lemon juice, and water to the skin—by hand—and then removing the paste. (FAP ¶¶ 28, 35.) Each customer is serviced using fresh, sanitary sugar paste. (FAP ¶ 34.) The sugaring paste has natural antiseptic properties. (FAP ¶ 38).

Sugaring isn't like other beauty practices. It's not at all like waxing, for example. (FAP ¶¶ 35-37, 39-41.) Unlike waxing, sugaring presents no risk of burning (FAP ¶ 35); and because the paste does not adhere to the skin, there is no risk of removing a customer's skin, either. (FAP ¶ 37.) There is nothing inherently dangerous about sugaring. (FAP ¶ 42.) The sugaring paste is water soluble—unlike wax—so any misapplied paste can simply be washed off. (FAP ¶¶ 39-41.) Because sugaring is safe, it can be applied to the same areas more than once without creating a risk of undue trauma to the skin (FAP ¶37); and can even be applied skin with varicose veins, spider veins, psoriasis, and eczema. (FAP ¶ 36.)

Because sugaring is safe, sugarers only need to know how to wash their hands—and that doesn't require any schooling at all. (FAP ¶ 44, 65.)

Nonetheless, a license is still required. Obtaining that license requires successfully completing 1,500 or 1,000 hours of instruction in a cosmetology or esthetician school approved by the Board of Cosmetology.[1] (FAP ¶¶ 3, 54, 58, 72.) Because there's no esthetician school in Hays, (FAP ¶¶ 57, 80, 131, 133), Ms. Green would have to attend the cosmetology school there. (FAP ¶¶

[1] By comparison, becoming an emergency medical technician requires successful completion of a Kansas Board of Emergency Medical Services approved course. Fort Hays State's program is 7 credit hours, or approximately 93.33 clock hours. (FAP ¶ 71.)

6, 57, 80, 131, 133.) That school is a full-time, 11-month program that costs $18,200. (FAP ¶¶ 131, 136.)

Nearly every minute of cosmetology school is spent on matters not specific to sugaring, and a significant portion of the time is spent on topics a sugarer will never use under any circumstances. (FAP ¶ 60.)

Of the mandatory 1,500 hours of instruction, only 2.27 hours—that is, .002% of the cosmetology curriculum—is specifically related to sugaring; conversely, 99.998% of the curriculum is devoted to matters not related to sugaring. (FAP ¶¶ 60-62.) That assumes sugaring is being taught for the full 2.27 hours—which is highly unlikely. (FAP ¶ 62.) The cosmetology curriculum requires no hands-on practical training in sugaring. (FAP ¶ 66; Ex. A.)

A cosmetology textbook that forms a basis for schools' curricula, *Milady Standard: Cosmetology,* (13th ed. 2016), devotes only three *paragraphs*—out of 1,129 *pages*—to the technique. (FAP ¶ 63.) One of these is only one sentence long. (Id.) The textbook does not instruct students on how to perform sugaring—it instead tells students to learn about sugaring "at trade shows and seminars, as well as through videos." (Id.); *id.* at 747. Three pages are devoted to hand washing, the only thing needed to safely practice sugaring. (FAP ¶ 65); *Id. at* 92-93; 104.

By comparison, the textbook spends five pages on "Resume Development," *Milady Standard: Cosmetology* at 1036-1040; fourteen pages on "Life Skills," *id.* at 22-35; four pages instructing students on their personal image, grooming, and fashion, *id.* at 38-41; approximately 175 pages on "Nail Care," *id.* at 846-1021; approximately 35 pages on "Scalp care, Shampooing, Conditioning," *id.* at 320-355; and approximately 169 pages on "Haircutting" and "Hairstyling." *Id.* at 356-525. (FAP ¶ 64.)

The licensing regime does not require cosmetology instructors to be able to competently perform sugaring before becoming an instructor. (FAP ¶¶ 81-86; Ex. D.) It does not even require instructors to have performed sugaring at all. (Id.) Becoming an instructor requires instruction on teaching skills, not sugaring skills. (Id.)

After completing cosmetology school, aspiring sugarers must take licensing examinations developed and administered by the Board. (FAP ¶ 87.) The cosmetology examination consists of two, two-hour written tests: a 125-question multiple-choice practical examination, and a 120-question multiple-choice theory examination. (FAP ¶ 91; Ex. E.) Both exams are administered by computer. (FAP ¶ 91.)

The practical examination doesn't test competency in sugaring. (FAP ¶ 94; Ex. E.) It doesn't contain a single sugaring-specific question either. (Id.) Based upon the percentages, it's highly unlikely the theoretical exam contains sugaring-specific questions during any particular examination period—and it is practically certain that during at least some examination periods, no questions relating to sugaring appear on the exam at all. (FAP ¶ 92-93.)

Argument

Standard of Review

A KSA § 60-212(b)(6) dismissal is a "drastic" and "final action" "akin to entering default judgment," which is "not favored in law." *Boydston v. Bd. of Regents for State of Kan.*, 242 Kan. 94, 101 (1987). Motions to dismiss are viewed with "judicial skepticism," *Nungesser v. Bryant*, 283 Kan. 550, 559 (2007), and granting them is "seldom warranted," *Fams. Against Corp. Takeover v. Mitchell*, 268 Kan. 803, 809 (2000).

"Any doubt should" therefore "be resolved in favor of action which allows the case to be decided on its merits," *Boydston*, 242 Kan. at 101; and not just on the "theory espoused" by a plaintiff, "but on any possible theory the court can divine." *Nungesser*, 283 Kan. at 559.

District courts must assume the factual allegations are true, resolve doubts and inferences in the plaintiff's favor, and view the petition in the most plaintiff-favorable light. *Id.*; *Noel v. Pizza Hut, Inc.*, 15 Kan. App. 2d 225, 231, 235 (1991).

Rather than dismissing a case under 212(b)(6), courts should—under the "rule of liberal construction" and "liberal interpretation of the pleadings required by our rules of notice

pleading"—permit "discovery to fill in any gaps" in the petition. *Montoy v. State,* 275 Kan. 145, 148-9 (2003); *Mitchell*, 286 Kan. at 809.

If a petition gives fair notice of the claims and grounds—as judged against KSA § 60-208, which only requires a short and plain statement—the 212(b)(6) motion should be denied. *Id.* at 809; *Montoy* 275 Kan. at 148; *see also Noel,* 15 Kan. App. 2d at 231-32; *Oller v. Kincheloe's, Inc.*, 235 Kan. 440, 447 (1984).

I. Ms. Green has stated a claim under Section 1 of the Kansas Constitution's Bill of Rights.

Ms. Green alleges the licensing regime involving sugaring is arbitrary, unreasonable, oppressive, protectionist, irrational, and not appropriately tailored to the practice of sugaring—and therefore unconstitutional under Section 1 of the Kansas Constitution's Bill of Rights. (FAP ¶¶ 1, 7, 23, 141, 144, 145, 172).

More specifically, Ms. Green properly alleges the licensing regime irrationally and unconstitutionally requires her to spend tens of thousands of dollars[2] and almost a year of her life[3] at state-approved schools that—for all practical purposes—*don't teach sugaring,* and that forces her to take irrelevant examinations that don't even test whether someone can practically perform sugaring,[4] for something that is already safe, that doesn't require any schooling to learn, and that she already knows how to do, just so she can use a completely safe, all-natural paste to remove unwanted hair.[5]

Ms. Green supports her allegations with ample factual support, drawing from the government's curricula, its own textbooks, and its own examination requirements. She has plainly stated a Section 1 claim. The government's motion should be denied.

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[2] (FAP ¶¶ 4, 69, 79, 131, 136).
[3] (FAP ¶¶ 3, 56, 58, 61, 62, 67, 72, 75, 78, 141(h)).
[4] (FAP ¶¶ 5, 6, 85, 87, 88, 91, 92, 93, 94, 95, 96, 97, 98, 141(e, f, i, j)).
[5] (FAP ¶¶ 30-44, 139(a-d), 141(g-k)).

A. The government's motion to dismiss improperly conflates merits standards with pleading standards.

The government spends nearly all of its briefing arguing the *merits* of Ms. Green's claims—that in its view, the licensing regime survives the application of the rational basis test. *E.g.,* Gov't motion at 5, 6, 7, 8, 12-13, 14-17. It repeatedly cites cases decided on the merits after a fully developed factual record. *E.g.*, Gov't motion at 5, citing *Miami Cnty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 292 (2011) (decided after trial); Gov't motion at 6, citing *Blue v. McBride*, 252 Kan 894, 897 (1993) (same).

But the standard of proof applied at the *merits* stage—strict scrutiny, intermediate scrutiny, or rational basis—is irrelevant at the *pleadings* stage. Ms. Green doesn't need to prove anything right now. *Kucharski-Berger v. Hill's Pet Nutrition, Inc.*, 60 Kan. App. 2d 510, 531 (2021). She only needs to "sufficiently apprise[]" the government "of the facts upon which she claims to be entitled to relief," *id*. at 521—and that's an incredibly low standard.

The government's attempt to apply a merits-level standard of proof at the 212(b)(6) stage is improper because it "conflate[s]" the standard applied at "summary judgment with the standard of review required for pleadings under our liberal notice pleading scheme." *Id*. at 520. "The court and parties can address the *merits* of the allegations at later stages of the litigation." *Id*. at 531 (emphasis added).

As shown next, Ms. Green has indeed put the government on notice of what she has alleged, what her legal theories are, and the facts that support both her allegations and her theories. That alone is reason enough to reject the government's motion to dismiss.

B. Ms. Green has sufficiently alleged the licensing regime is arbitrary, unreasonable, oppressive, protectionist, irrational, and not appropriately tailored to the practice of sugaring—and therefore unconstitutional.

Ms. Green's Section 1 claim—and the factual support for it—is closely analogous to the six beauty regimes that were declared unconstitutional *on the merits* in recent years.

In *Cornwell v. Hamilton*, after reviewing a cosmetology regime's curricula, textbooks, and licensing examinations, the court found the licensing requirement unconstitutionally "irrational

and certainly unreasonable" because it required aspiring hair braiders to spend thousands of dollars and thousands of hours to obtain a cosmetology license where the curriculum is "just over six percent" relevant and where the licensing examinations were only eleven percent relevant. 80 F. Supp. 2d 1101, 1110-11, 1116 (S.D. Cal. 1999). The court likened the licensing regime to "require[ing] would-be lawyers and architects to take course work and pass a licensing exam in cosmetology," which is irrational and unconstitutional. 80 F. Supp. 2d at 1106.

In *Clayton v. Steinagel*, another cosmetology case, the court reviewed the curricula, textbooks, and licensing examinations, and found that "[m]ost of the cosmetology curriculum" was "irrelevant," and that "[e]ven the relevant parts [were] at best, minimally relevant;" consequently, requiring a cosmetology license was "wholly irrational" and unconstitutional. 885 F. Supp. 2d 1212, 1215–16 (D. Utah 2012). The "right to earn a living," it observed, was the "very essence of the personal freedom and opportunity that the Constitution was designed to protect." *Id.* (cleaned up).

In *Waugh v. Nev. State Bd. of Cosmetology*, too the court reviewed the facts of Nevada's beauty licensing regime and declared it, unconstitutional because there was no sufficient justification for requiring people to learn a "laundry list of subjects" that were "wholly unrelated" to the would-be practitioner. 36 F. Supp. 3d 991, 1022 (D. Nev. 2014), vacated and remanded after Nevada legislature passed legislation changing cosmetology regime, No. 14-16674, 2016 WL 8844242 (9th Cir. Jan. 27, 2016). Likewise, in *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 894 (W. D. Tex. 2015), the court again reviewed the facts and declared the beauty licensing regime unconstitutionally irrational. And in *Thiam v. Bureau of Pro. & Occupational Affs.*, the court reviewed the facts of a beauty regime and held the regime was "unreasonable" and "unduly oppressive," and therefore, unconstitutional under Pennsylvania's Constitution. 302 A.3d 1271, 2023 WL 4715186, *12 (Pa. Commw. Ct. 2023) (unpublished)

In a case remarkably similar to this one, *Patel v. Texas Dep't of Licensing & Regul.*, the Texas Supreme Court reviewed the facts of the beauty licensing regime—including the cost of the beauty

schools, their curricula, their textbooks, and the licensure examinations—and declared it unconstitutionally irrational under the Texas Constitution. 469 S.W.3d 69 (Tex. 2015). There, plaintiffs had to complete only 750 hours of schooling—half as much as Kansas' 1,500 hours—to practice a temporary hair removal technique called threading. Yet the required training was so irrelevant to the practice of threading that the court found it irrational to impose that requirement, even though it composed as much as 58% of the required 750 hours. *Id.* at 88-90. This lack of a relationship between the mandatory hours and the practice, "combined with the fact that threader trainees have to pay for the training and at the same time lose the opportunity to make money actively practicing their trade" was "not just unreasonable or harsh, but it is so oppressive that it violate[d]" the Texas Constitution. *Id.* at 90. As then-Justice Willet put it, it's "irrational" to force people to spend "thousands of dollars" learning irrelevant things. *Id.* at 110 (Willett, J., concurring).

These cases show that Ms. Green has pleaded sufficient facts supporting her legal theory that Kansas' licensing requirements for sugaring—just like the six cases above—is arbitrary, unreasonable, oppressive, protectionist, irrational, and not appropriately tailored to the practice of sugaring.

These facts include (among others):

- Sugaring is all-natural, non-invasive, sanitary, and safe. (FAP ¶ 139(a).) There is nothing inherently dangerous about sugaring either. (FAP ¶ 42.)

- Sugaring doesn't require extensive schooling, coursework, or instruction to perform it safely or competently. (FAP ¶ 43.)

- Sugarers don't need extensive schooling, coursework, or instruction to learn basic hygiene or to know how to wash their hands. (FAP ¶ 44.)

- Application of the sugaring paste doesn't involve the use of heat, chemicals, or sharp objects. (FAP ¶ 139(b)). The sugaring paste has natural antiseptic properties, which inhibit bacterial growth. (FAP ¶ 139(c).) Sugaring is so safe, it can be done on areas of the skin with varicose veins, spider veins, psoriasis, and eczema. (FAP ¶ 139(d)).

- Because the sugaring paste is applied at body temperature, sugaring is not like waxing, and there is no risk of burning. (FAP ¶ 35.)

- The cosmetology and esthetician curricula have essentially nothing to do with sugaring. (FAP ¶ 141(a).) Cosmetology and esthetician schools spend essentially all of their instruction time on subjects that sugarers will *never* use (FAP ¶ 141(b)); and spend essentially none of their time on subjects that sugarers will use (FAP ¶ 141(c)).

- Of the mandatory 1,500 hours of instruction, .002% of the cosmetology curriculum is estimated to be sugaring specific (FAP ¶¶ 60-62); conversely, 99.998% of the curriculum is devoted to non-sugaring-specific information. (FAP ¶¶ 60-62). That assumes sugaring is being taught for the full 2.27 hours—which is highly unlikely. (FAP ¶¶ 62).

- The cosmetology curriculum doesn't require any hands-on practical training in sugaring either. (FAP ¶ 66; Exhibit A).

- Cosmetology instructors are not required to have any hands-on experience providing sugaring services, or even know how to properly provide sugaring services. To become licensed instructors, would-be teachers complete courses and take examinations on teaching methodology. (FAP ¶¶ 81-86; Exhibit D.)

- The cosmetology and esthetician textbooks devote almost none of their space to teaching sugaring. (FAP, ¶ 141(d).) A Board-approved textbook that forms a basis for schools' curricula, *Milady Standard: Cosmetology,* (13th ed. 2016), devotes only three *paragraphs* of the 1129 *pages* to the technique, one of which is only one sentence long. Rather than teaching cosmetology students how to provide sugaring services, the book advises students to learn about sugaring "at trade shows and seminars, as well as through videos." *Id.* at 747. (FAP ¶ 63). By comparison, the textbook spends five pages on "Resume Development," *Milady Standard: Cosmetology* at 1036-1040; fourteen pages on "Life Skills," *id.* at 22-35; four pages instructing students on their personal image, grooming, and fashion, *id.* at 38-41; approximately 175 pages on "Nail Care," *id.* at 846-1021; approximately 35 pages on "Scalp care, Shampooing, Conditioning," *id.* at 320-355; and approximately 169 pages on "Haircutting" and "Hairstyling," *id.* at 356-525. (FAP ¶ 64). The book devotes three pages to the importance and proper method of washing hands, which is the only thing needed to safely practice sugaring. *Milady Standard: Cosmetology* at 92-93, 104. (FAP ¶ 65.)

- The cosmetology and esthetician theory examinations essentially do not cover sugaring-specific matters, (FAP ¶ 141(e)), and do not test sugaring skills at all. (FAP ¶¶ 141(e), (f).)

- Sugaring is safe, so there is no evidence that the regime protects the public's health, safety, or welfare, and no facts that warrant requiring aspiring sugarers who only want to perform sugaring to take 1,500 or 1,000 hours of schooling, or to take these Board-approved cosmetology or esthetician examinations. (FAP ¶ 141(g)-(i).)

- The licensing regime involving sugaring is grossly disproportionate to any interest advanced by the government. (FAP ¶ 141(l).)

- The licensing requirements lack a rational connection with an applicant's fitness or capacity to engage in sugaring. (FAP ¶ 141(m).)

- The licensing regime does not provide less restrictive alternatives to satisfy the regime's ostensible purpose. (FAP ¶ 141(n).)

- The licensing regime involving sugaring, as described throughout this lawsuit, is evidence of protectionism—specifically, the requirement exists not to protect the general public, but to prevent legitimate economic competition for the benefit of those entities already holding cosmetology or esthetician licenses, at the expense of both Ms. Green, and Kansas consumers, who are consequently less able to obtain sugaring services. (*See* FAP ¶ 141(o)).

- There is no basis for believing that providing sugaring services *for money* is any more of a threat to the public health, safety, or welfare, than is sugaring for *no* money; the fact that the licensing requirement applies solely in the former, but not in the latter, is arbitrary, irrational, and lacks any connection to a legitimate government interest. (FAP ¶ 139(g), (h).)

Based upon these facts—which must be taken as true—Ms. Green has sufficiently stated a claim that the regime is unconstitutional under Section 1 of the Kansas Constitution's Bill of Rights. There is no constitutionally sufficient reason to compel aspiring sugarers to learn a "laundry list of subjects that are" "wholly unrelated" to sugaring, *see Waugh*, 36 F. Supp. 3d at 1022; or to spend "thousands of dollars" learning irrelevant things, *Patel,* 469 S.W.3d at 110 (Willett, J., concurring); or to take "irrelevant" licensing examinations, *Cornwell*, 80 F. Supp. 2d at 1115-7; *Clayton*, 885 F. Supp. 2d at 1215.[6]

[6] All of this is true for both the cosmetology and esthetician regimes. However, because the government doesn't make any distinction between the two, Govt's brief at 2 n.1, Ms. Green focuses on the cosmetology regime.

Tellingly, the government ignores the six cases above—and *never* addresses Ms. Green's allegations involving the irrelevant schooling, curricula, and examinations. Instead, the government repeatedly misrepresents Ms. Green's claims—arguing the case is about the "right to perform procedures on other peoples' bodies," or the "right to become a sugarer on" Ms. Green's "own terms," or a "right to cosmetic procedures." Gov't memo at 11, 13, 12 (cleaned up). These misstatements are unserious and demonstrate the weakness of its motion.[7]

Ms. Green doesn't "seek a special 'out' or preferential treatment;" instead, she seeks "rationality when trying to pursue a livelihood." *Cornwell,* 80 F. Supp. 2d at 1118.

At a minimum Ms. Green has sufficiently alleged the licensing requirements for sugaring are arbitrary and irrational—in that they are insufficiently related to the occupation in question. *See, e.g.*, *Patel,* 469 S.W.3d at 110 (Willett, J., concurring); *Schware v. Board of Examiners*, 353 U.S. 232, 239 (1957); *Hainline v. Bond*, 250 Kan. 217, 222 (1992); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

Further, Ms. Green has sufficiently alleged facts "refuting the law's ostensible public-interest rationale,"[8] that the regime lacks "less restrictive alternatives to satisfy the law's ostensible purpose,"[9] that the regime "harm[s] competition and consumers,"[10] and that the regime is "protectionis[t]."[11] *Cent. Kansas Med. Ctr. v. Hatesohl*, 308 Kan. 992, 1024 (2018) (Stegall, J., concurring) (cleaned up).

The government's argument that "*any risk,*" Gov't memo at 15 (emphasis added), justifies an irrational, oppressive, improperly tailored, and protectionist licensing regime is disproven by

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[7] The government improperly introduces its *own* facts and contradicts the facts alleged by Plaintiff no less than 20 times as well. Gov't. memo at 2, 3, 4, 7, 8, 16, 17. Because this is a 212(b)(6) motion, they should be disregarded. If the court considers converting the government's motion to one for summary judgment, Ms. Green requests additional briefing and leave to conduct discovery.

[8] (FAP ¶¶ 27-44, 139, 141).

[9] (FAP ¶¶ 3, 58, 72, 99, 141(n)).

[10] (FAP ¶¶ 112, 113, 116, 117, 121, 131-137, 141(o), 146-149).

[11] (FAP ¶¶ 1, 2, 5, 6, 7, 11, 23, 32-43, 48-49, 53, 65, 76, 84, 99, 139, 141, 143, 169, 185, 187, 199, 212, 225, 227-228).

the six beauty licensing cases above, and by common sense.[12] *Cf. Young v. Hector*, 740 So. 2d 1153, 1164 (Fla. 3rd Dist. Ct. App. 1998), *on reh'g* (July 14, 1999) (Judges "not required to shed their common sense and life's experiences"). Everything in life has *some* risk; the government's argument would justify imposing whatever prerequisites the government wanted, no matter how burdensome, on even the most innocuous practices. Besides, a version of that argument was, again, rejected in the six cases above.[13]

In the end, Ms. Green has properly alleged that forcing her to spend more than $18,000 and a nearly a year of her life learning irrelevant things and taking irrelevant exams for something *that is already safe,* and *something she already knows how to do*—and *that she could do legally without a license if she does it for free*—"is not just unreasonable or harsh, but so oppressive that it violates" the Kansas Constitution. *See Patel*, 469 S.W.3d at 90. Ms. Green has adequately pleaded enough facts to support her claim. The motion to dismiss should therefore be denied.

C. Even *if* merits standards *did* apply at the pleadings stage, strict scrutiny applies.

Levels of scrutiny don't apply at the 212(b)(6) stage. But even if they did, the proper standard would be strict scrutiny.

1. The right to earn an honest living, free from unreasonable government restrictions is a fundamental and inalienable natural right.

Section 1 of the Kansas Constitution's Bill of Rights is a "natural rights" clause that sets forth "rights that are broader than and distinct from those in the Fourteenth Amendment" to the

[12] Equally flimsy is the government's argument—unsupported by any caselaw—that Ms. Green is somehow required to "demonstrate that she (and all other potential 'sugarers') will always comply" with government standards in order to state a claim. Gov't memo at 16. Whether someone complies with licensing requirements isn't at all the same thing as whether the licensing requirements are unconstitutional.

[13] The government's administrative burden argument, Gov't memo at 17, doesn't justify forcing Ms. Green to spend tens of thousands of dollars taking irrelevant courses, learning irrelevant things, and taking irrelevant examinations either. "The Constitution recognizes higher values than speed and efficiency." *Vlandis v. Kline*, 412 U.S. 441, 451 (1973) (cleaned up). Besides, the burdens would be less, not more, and the government already doesn't have a uniform system. Braiding and threading are exempted. (FAP ¶¶ 50-51.)

United States Constitution. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 622 (2019). It's like other Lockean natural rights guarantees in other state constitutions, applies to an enormous variety of topics and is "nonexhaustive." *Id.* at 624, 631-32.

"The theory of natural rights traces its lineage from the writings of John Locke through the Declaration of Independence, written by Thomas Jefferson, and the Virginia Declaration of Rights of 1776, written by George Mason." *State v. Carr*, 314 Kan. 615, 635 (2022), *cert. denied*, 143 S. Ct. 581 (2023) (cleaned up).

Therefore, determining the "scope" and "contours" of the "natural rights guaranteed" by Section 1 requires an examination of the historical record, including the "writings of John Locke and William Blackstone, given their historic significance in the development of American constitutional frameworks and jurisprudence." *Id*. at 629.

2. The right to earn an honest living: tracing its lineage from Magna Carta to the Wyandotte Convention.

The right to earn a living has been protected at common law as far back as the Magna Carta. *See* Timothy Sandefur, *The Right to Earn a Living* 17-29 (2010); William S. McKechie, *Magna Carta: A Commentary on the Great Charter of King John* 287-91, 289 & n.1 (2d ed. 1914). English courts protected this right beginning in at least the 1600s. *See., e.g.*, *Allen v. Tooley*, 80 Eng. Rep. 1055, 1055 (K.B. 1614) (the common law protects the right of "any man to use any trade thereby to maintain himself and his family"); *The Ipswich Tailors' Case*, 77 Eng. Rep. 1218, 1219 (K.B. 1615) (At "the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil."). That included striking down licensing requirements. *Case of the Bricklayers*, 81. Eng. Rep. 871 (K.B. 1624); *see further* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 989–1008 (2013) (citing cases).

In his 1628 *Institutes of the Laws of England*, Sir Edward Coke recognized that laws which prohibited individuals from working in a common trade are "against the liberty, and freedom of

the subject, that before did, or lawfully might have used that trade, and consequently against this great charter." 2 E. Coke, Institutes * 47 (spelling modernized). He went on: "No man ought to be put from his livelihood without answer." *Id*. Summarizing Coke's doctrine a century and a half later, Blackstone explained that "[a]t common law every man might use what trade he pleased." 1 W. Blackstone, *Commentaries* *427. In other words, people have a legal right to put their skills to use providing for themselves and their families, without unreasonable interference from others—or from the government.

This was not a mere legal tradition. John Locke held that economic liberty is a natural, fundamental human right. He wrote that everyone "has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his." John Locke, *Two Treatises of Government* § 27 at 287-88 (Peter Laslett, student ed. 1988).

That principle, that "'every Man has a Property in his own Person,'" *Hodes*, 309 Kan. at 640, means that a person has a right to her knowledge and skills to earn an honest living free from unreasonable interference by others, or by the government. Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 221 (2003).

By the 1720s, "liberty" was well understood to include the right to "labour for [one's] own pleasure and profit." John Trenchard & Thomas Gordon, 2 *Cato's Letters: Or, Essays on Liberty, Civil and Religious, and Other Important Subjects, Letter #62* at 248 (1724).

In 1776, Adam Smith declared that "[t]he property which every man in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands, and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbor is a plain violation of this most sacred property." 1 Adam Smith, *Wealth of Nations* 151 (1776).

But America's founding fathers said the same years earlier. In 1768, Benjamin Franklin explained that a principal cause of the upset in the American colonies was the British government's violation of Americans' economic freedom. British trade restrictions barred colonists from making and selling hats made from furs trapped in North America or making retail goods from iron mined in America; instead, raw materials were legally required to be shipped to Britain to be made into retail goods there and returned to America. Americans objected to these rules because "[t]here cannot be a stronger natural right than that of a man's making the best profit he can of the natural produce of his lands." *Causes of the American Discontents before 1768, in Benjamin Franklin: Writings* 613 (Lemay ed., 1987). Thomas Jefferson likewise objected that these laws were "an instance of despotism," because they violated "the rights of free commerce." *A Summary View of the Rights of British America* (1774) *in Thomas Jefferson: Writings* 108-09 (Peterson, ed, 1984). Jefferson also wrote that "[e]veryone has a *natural right* to choose for his pursuit such one of them as he thinks most likely to furnish him subsistence." Thomas Jefferson, *Thoughts on Lotteries, in* 17 *The Writings of Thomas Jefferson* 449 (Bergh, ed., 1907) (emphasis added).[14] James Madison, too, wrote that when government imposes "arbitrary restrictions, exemptions, and monopolies"—that includes licensing laws—it denies "part of its citizens the free use of their faculties and free choice of their occupations." *Property* (1792), *in James Madison: Writings* 516 (Rakove, ed., 1999).

Simply put, the right to earn a living free from unreasonable government interference was a staple of American common law lawyers before, during, and after the American Revolution.

America's Founders also understood the right to earn an honest living to be a natural right—one courts would enforce. *See* David N. Mayer, *Liberty of Contract: Rediscovering a Lost Constitutional Right* 14 (2011); Lemke & Macdonald, *supra* at 84-85.

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[14] Jefferson believed the "first principle of association" was "the guarantee to every one a free exercise of his industry, and the fruits acquired by it." 13 Bergh, ed., *Writings* at 466. At his first inauguration, he described good government as "leav[ing individuals] to regulate their own pursuits of industry and improvement" and "not tak[ing] from the mouth of labor the bread it has earned." *Jefferson: Writings, supra* at 494.

By 1776, when the Declaration of Independence was written—the model for Kansas Bill of Rights Sec. 1, *Hodes*, 309 Kan. at 626—the phrase, 'life, liberty, and the pursuit of happiness' was well understood as "intended to refer, among other things, to the individual's right to pursue a trade and thereby improve [her] position in life." Sandefur, *supra* at 24; *see also* Chester James Antieau, *Natural Rights and the Founding Fathers: The Virginians*, 17 Wash. & Lee L. Rev. 43, 64 (1960). In other words, the phrase "pursuit of happiness" was understood to include a right to economic liberty—or "right to pursue a calling," James W. Ely, Jr., "*To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. Pa. J. Const. L. 917, 929 (2006).

In the run-up to the Civil War, the issue of the individual's inalienable, natural, fundamental right to earn a living became even more pressing. Abraham Lincoln told an audience in 1859—the same year as the Wyandotte Convention—that he endorsed the principle of "*free labor*—the just and generous, and prosperous system, which opens the way for all—gives hope to all, and energy, and progress, and improvement of condition to all." Speech at the Wisconsin Agricultural Society, 3 *Collected Works of Abraham Lincoln* 479 (Basler ed., 1953). Frederick Douglass was even more explicit: "What is freedom?" he asked—and answered: "It is the right to choose one's employment. Certainly, it means that, if it means anything." *Great Speeches by Frederick Douglass* 52 (New York: Dover 2013).

The bottom line is simple: the natural rights concept in general, and the fact that among these rights is the specific right to earn an honest living, was fixed, firm, and defined by the time the Wyandotte Convention convened in 1859.

At that convention, Samuel Kingman proposed the language that became Section 1 because he "wished the purely American feeling to appear in this first section. These terms were already in the hearts of the people; they had become traditional. The declaration of independence and declaration of rights formed a part of the political creed from which no man could extricate himself." Kansas Constitutional Convention: A Reprint of the Proceedings and Debates of the

Convention Which Framed the Constitution of Kansas at Wyandotte in July, 1859. (Kansas State Printing Plant, Topeka 1920) at 679-79.

Other Kansas founders understood the right to earn an honest living to be a natural right too. *See, e.g.,* Richard Cordley, *The Lessons of Our History,* The Herald of Freedom (Dec. 3, 1859) ("every man has an inalienable right to the undisturbed possession and use of himself and all his faculties. The right of individual self-possession and self-use are the only basis of free government, and any government that fully guarantees these, whatever its form, is a free government."); Solon Thatcher, *The Republican,* Western Home Journal (Aug. 4, 1859) (the natural rights expressed in the Declaration of independence are "the foundation stones upon which the whole structure of Liberty rests;" the "rights of the people are jealously cared for" in the Kansas Constitution, which "is radiant with the sunlight of Liberty.")

The historical record shows that there can be no reasonable debate: among the fundamental and inalienable natural rights that the Kansas Constitution's natural rights clause protects is the right to earn an honest living, free from unreasonable government interference.

3. The right to earn an honest living is objectively and deeply rooted in history and tradition, implicit in the concept of ordered liberty, and long protected by American courts.

The right to earn an honest living "is objectively, deeply rooted in this Nation's history and tradition." *Patel*, 469 S.W.3d at 93 (Willett, J., concurring) (cleaned up). In fact, in *Dent v. West Virginia*, 129 U.S. 114 (1889), the first U.S. Supreme Court case to consider the constitutionality of a state occupational licensing law, the Court called this right "a distinguishing feature of our republican institutions." *Id.* at 121. It held that licensing can be a constitutional means of protecting public safety—but only if the requirements for obtaining the license "are appropriate to the calling or profession." *Id.* at 122. "[W]hen they have no relation to such calling or profession," the Court

said, they "deprive one of his right to pursue a lawful vocation," and are thus unconstitutional. *Id.*[15]

And in 1904, the Kansas Supreme Court expressly held that the right to earn a living is "as completely within the protection of the Constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will." *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 69 Kan. 297, 299 (1904). Many other state and federal courts have also recognized and protect the right, including by the concept of "the pursuit of happiness." *See, e.g., Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 539 (Cal. 1971) ("The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness."); *Van Zandt v. McKee*, 202 F.2d 490, 491 (5th Cir. 1953) ("The right to life, liberty, and the pursuit of happiness, includes the right to work and earn an honest living"); *Livesay v. Tennessee Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959) (right to earn a living is "fundamental"); *State v. Harris*, 6 S.E.2d 854, 863 (N.C. 1940) ("Among [the unyielding constitutional rights] the right to earn a living must be regarded as inalienable. Conceding this, a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life by the erection of educational and moral standards of fitness is legal grotesquery.") *Truax v. Raich*, 239 U.S. 33, 41, (1915) ("the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."); *Harbison v. Knoxville Iron Co.*, 53 S.W. 955, 957 (Tenn. 1899) (liberty includes the right "to pursue any lawful calling, vocation, trade, or profession").

[15] That case involved the Fourteenth Amendment, which this case does not; nevertheless, it is instructive—as is the fact that Congressman John Bingham—one of the framers of the Fourteenth Amendment—argued that "Liberty, our own American constitutional liberty, is the right . . . to work an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil." Cong. Globe, 42nd Cong., 1st Sess. App. 86 (1871).

4. The licensing regime is presumed unconstitutional.

Because the right to earn an honest living free from unreasonable government interference is a fundamental and inalienable natural right under Section 1, strict scrutiny applies. *Hodes*, 309 Kan. at 669. That, in turn, means the licensing requirements are *presumptively unconstitutional*. *Id.* at 669.[16] The government bears the burden of proving the regime is narrowly tailored to serve a compelling interest—"one that is not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests." *Id.* at 663 (cleaned up). Yet in its motion, the government gets it entirely backwards and tries reversing the burden of proof, relying on outdated, pre-*Hodes* caselaw to argue that the plaintiff bears the burden. Gov't memo at 5. That is wrong. *Hodes* makes clear that "strict scrutiny applies when a fundamental right is implicated." 309 Kan at 663 (cleaned up). Under strict scrutiny, this case certainly survives a motion to dismiss.

D. Alternatively, intermediate scrutiny applies.

Even if strict scrutiny doesn't apply, intermediate scrutiny should. Will Clark, *Intermediate Scrutiny as a Solution to Economic Protectionism in Occupational Licensing*, 60 St. Louis U. L.J. 345 (2016); Alexandra L. Klein, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes,* 73 Wash. & Lee L. Rev. 411 (2016); Marshall Stula, *Occupational Licensing Laws: Threading the Needle Between Consumer Protecting and the Constitutional Right to Earn a Living* (Jan. 3, 2022).[17]

These scholars reason that such scrutiny is best adapted to balance between the government's need to regulate and the risk that licensing laws will be used by politically influential private interest groups to exclude legitimate economic competition. *See, e.g.,* Clark, *supra*, at 361

[16] *See also id*. at 674 ("Presuming that any state action alleged to infringe" on fundamental and inalienable natural right is constitutional "dilutes the protections established by our Constitution.")

[17] Available at https://kansaslawreview.ku.edu/forum/occupational-licensing-laws-threading-the-needle-between-consumer-protection-and-the-constitutional-right-to-earn-a-living/

("courts examining protectionist licensing laws have expressed their disapproval of using rational basis review as a rubber-stamp. To prevent the proliferation of different types of poorly defined rational basis review, [intermediate scrutiny would] provide an easy-to-apply standard that allows courts to address unfair licensing laws."); *see also* Klein, *supra*, at 457-59 (licensure laws also both affect both individuals seeking the right to practice and consumers who are harmed by the lack of market competition.")

Because Ms. Green has sufficiently alleged the licensing regime is irrational, arbitrary, irrational, oppressive, and protectionist, the government's licensing regime doesn't pass intermediate scrutiny either; and again, that means the government's motion to dismiss should be denied.

E. Even if the rational basis test applies, Ms. Green has stated a Section 1 claim.

The government premises its entire argument on the flawed assumption that rational basis applies at the 212(b)(6) stage. It doesn't. But even if it did, the government gets the test wrong. First, it relies on a *federal* version of the rational basis test, which differs from the Kansas test. In Kansas, the facts of a case matter. Second, the government views the rational basis test as a set of magic words that entitle the government to dismiss an adequately pleaded petition at the pleading stage, without factfinding. That's not what the rational basis test *is*, and that's not what the rational basis test *does*.

1. The facts matter—Kansas courts don't rubber-stamp government action.

In Kansas courts, facts matter. Constitutional cases are decided *after* discovery, not at the 212(b)(6) stage. Kansas courts do not blindly rubber-stamp government action, even where the government asserts the police powers doctrine, like it does here.

For example, *Delight Wholesale Co. v. City of Overland Park*, 203 Kan. 99 (1969), involved an ordinance prohibiting the selling of vegetables, fruits, and ice cream. The government defended the ordinance on police power grounds. Yet the court engaged in a factual inquiry and declared the ordinance unconstitutional. "The acknowledged purpose of the ordinance is to protect the safety

of children who gather about the vehicle in the street. *What are the facts*?" *Id*. at 103 (emphasis added). "We must apply the general rules *to the facts* and circumstances as they exist in this state and as they exist in the streets of our residential areas. The *facts* as they exist in a more heavily populated state might well justify a different conclusion than would be reached here." *Id*. at 104 (emphasis added).

Likewise, in *Paola v. Wentz*, 79 Kan. 148, 153 (1908), the Supreme Court held that city officials could not remove a tree from a street so they could put a sidewalk in a place not authorized by law. "When the city is called upon to answer in court why it is about to destroy a tree," said the court, "and offers a reason that proves untenable, [the city] cannot then, while refusing to disclose any further purpose, take the benefit of a presumption of rightful conduct." *Id*.

And of course, the government's police powers are subject to the requirement of reasonableness, a factual inquiry. *Perry*, 69 Kan. at 299 ("[T]he Legislature has no power to impair or limit the reasonable and lawful exercise of a right, guarantied by the Constitution, under the guise of a police regulation."); *Strehlow v. Kansas State Bd. of Agr.*, 232 Kan. 589 (1983) (court refuses to uphold Kansas' filled dairy product law on police powers grounds); *Delight Wholesale Co. v. City of Prairie Vill.*, 208 Kan. 246 (1971) (striking down city ban on selling goods from vehicles between seven a.m. and nine p.m. because it has the effect of prohibiting an ice cream truck business after a trial); *Gilbert v. Mathews*, 186 Kan. 672, 686 (1960) (striking down a public auction law because it was "designed to be so oppressive and unreasonable that it prohibit[ed] the conduct of such lawful business"); *City of Junction City v. Mevis*, 226 Kan. 526, Syl. ¶ 1 (1979) (affirming the dismissal of conviction for firearm possession under overbroad ordinance that criminalized innocent conduct because a "city cannot enact unreasonable and oppressive legislation under the guise of the police power").

In *City of Baxter Springs v. Bryant*, 226 Kan. 383, 391 (1979), the court invalidated a statute on the grounds that a "legislative body cannot, under the guise of the police power, enact unequal,

unreasonable, and oppressive legislation," and openly questioned blind deference to the police power doctrine.

Kansas courts have similarly refused to blindly defer to state boards, including the Board of Cosmetology. *State v. Gillen*, 126 Kan. 368 (1928) (court denied State's request to enjoin Emma Gillen from practicing cosmetology without first passing the Board's examination); *State v. Cavender*, 131 Kan. 577 (1930) (denying Board of Cosmetology's request to enjoin a licensed barber from giving permanent waves to hair without a cosmetology license); *see also Keith v. State Barber Bd.*, 112 Kan. 834 (1923) (rejecting board's argument that performing services similar to barbering means a person is engaged in the barbering occupation).

All of that is to say, in Kansas, the facts of a case *matter*. The government is wrong in suggesting otherwise.

2. Federal law doesn't apply, but even if it did, the government misstates the federal test.

The case isn't brought under federal law. Ms. Green seeks relief from the government's irrational licensing regime *solely* under the Kansas Constitution. She hasn't sought *any* relief under the Fourteenth Amendment.

Because the Kansas Constitution *separately* and *independently* protects the right to earn an honest living—even *if* rational basis applies—the government's reflexive reliance on the *obsolete federal* version of the rational basis test is erroneous. Gov't memo at 15 ("Plaintiff must negate every conceivable reason the legislature might have had for passing the law"); Id. at 6, 9 (relying on *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993)).

Kansas' version of the test isn't the same as the *federal* one. In *Gannon v. State*, 305 Kan. 850, 883 (2017), for example, the Court explicitly "reject[ed]" the federal standard "of virtually conclusive deference to the legislature's enactment[s]." Like several other states, Kansas' version applies a more realistic and factually oriented test which "demand[s] actual *rationality,* scrutinizing the law's actual *basis,* and applying an actual *test*." *Patel*, 469 S.W.3d at 98 (Willett, J. concurring)

(emphasis in original); *see Ladd v. Real Est. Comm'n*, 659 Pa. 165, 186 (2020) ("rational basis test under Pennsylvania law is less deferential to the legislature than its federal counterpart"). *See also Cent. Kansas Med. Ctr. v. Hatesohl*, 308 Kan. 992, 1024 (2018) (Stegall, J., concurring) (rational basis test isn't toothless and may overcome based on evidence); *Bryant*, 226 Kan. at 391 (in a rational basis case, court focused on actual facts, not mere assertions by government).

Kansas' version of the test is less deferential to the government than the federal version, but even the federal version is not the rubber stamp the government says it is. While it's true that *Beach Commc'ns, Inc.*, 508 U.S. at 318, said facts are irrelevant in rational basis cases, the Court repudiated that position three years later in *Romer v. Evans*, 517 U.S. 620 (1996), and said facts *do* matter: "[E]ven in [rational basis cases], we insist on knowing the relation between the classification adopted and the object to be attained." *Id.* at 632–33.

What's more, the federal rational basis test is only a *rebuttable factual presumption*. *See Borden's Farm Prod. Co. v. Baldwin*, 293 U.S. 194, 209-210 (1934) (federal rational basis test is a presumption of fact that can be rebutted "by a resort to common knowledge or other matters which may be judicially noticed, or to *other legitimate proof*." (emphasis added)). The federal test "is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack." *Id.* That is why federal courts have repeatedly rejected motions to dismiss in rational basis cases on the grounds the plaintiffs have a right to introduce evidence to prove up their allegations. *See, e.g., Dias v. City & Cty. of Denver,* 567 F.3d 1169 (10th Cir. 2009)*; Bruner v. Zawacki*, No. CIV.A. 3:12-57-DCR, 2013 WL 684177, at *4 (E.D. Ky. Feb. 25, 2013); *Munie v. Koster*, No. 4:10CV01096 AGF, 2011 WL 839608, at *3 (E.D. Mo. Mar. 7, 2011); *Slaughter v. Dobbs*, 579 F. Supp. 3d 842, 848 (S.D. Miss. 2022).

But in any event, this case involves state law, not federal law, and the 212(b)(6) standard governs, not the federal rational basis standard.[18] That means this Court should **deny** a dismissal "on any possible theory [it] can divine." *Nungesser*, 283. Kan. at 559. Therefore, the government's argument that "there need not even be evidence" supporting its position, and that courts can "hypothesize a reasonable, lawful basis" for a dismissal, Gov't memo at 6, is flatly untrue.

Under the government's misinformed view, a plaintiff could never win a rational basis case. *See* Gov't memo at 15-17. But that's wrong. *See, e.g., Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (finding licensing requirement for coffin-makers unconstitutional—after holding a full trial); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (licensing requirement for pest control workers unconstitutional); *Meadows v. Odom*, 360 F.Supp.2d 811 (M.D. La. 2005); *Gilbert v. Mathews*, 186 Kan. 672 (1960) (holding Kansas' New Goods Public Auction Law unconstitutional under outdated "negative every conceivable basis" test). In fact, the United States Supreme Court has struck down at least twenty laws under the rational basis test since the 1970s.[19] Even federal rational basis "is not a rubber stamp." *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000).

The government's preferred version of the rational basis test simply does not apply to this case. Even under rational basis, the facts matter.

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[18] For the same reasons, the government's repeated references to *McBride*, 252 Kan. 894, are misplaced. Gov't memo at 5, 6, 8, 14, 15. The Kansas Supreme Court decided *McBride* under federal law, not state law. *See* 252 Kan at 921 ("S.B. 486 is not violative of the Fourteenth Amendment"); *id*. at 924 (refusing to apply the Kansas Constitution). But even if *McBride* were decided under Section 1, its analysis pre-dates *Hodes* and is no longer viable.

[19] *E.g., Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 614-15 (2000); *Village 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 (1995); *Quinn v. Millsap*, 491 U.S. 95, 108 (1989); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985); *Hooper v.Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24-25 (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 (1977); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *James v. Strange*, 407 U.S. 128, 141-42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970).

3. Ms. Green has sufficiently alleged a Section 1 claim and the factual support for it. The government's 212(b)(6) motion should be denied.

Although rational basis cases are *sometimes* difficult, *this* one should not be. *This* cosmetology regime is just as onerous, if not worse than, the cosmetology regimes declared unconstitutional in *Cornwell*, *Clayton*, *Waugh*, *Brantley*, *Thiam*, and *Patel*. In each of those cases, courts applied rational basis at the *merits* stage and declared their respective licensing regimes unconstitutional. Since those plaintiffs won on the merits there, Ms. Green easily survives the government's 212(b)(6) motion here. She has alleged ample facts supporting her Section 1 claim, using the government's own government-approved textbooks, its own curricula, and its own examination requirements.

The government's only stated interest—other than administrative convenience, a non-starter[20]—is the public's safety. On that point, it tries to make the argument that sugaring is somehow like waxing, and therefore, it can theoretically cause burns. That concern is nonexistent and completely unsupportable. There is no risk of burning. (FAP ¶ 35; Petition ¶ 35.) The paste is applied at body-temperature. (FAP ¶ 35; Pet. ¶ 35) The government's *own* textbook says there's no risk of burning. *Milady Standard Esthetics: Advanced*, 2nd Edition (2013) at 569; (FAP ¶ 35; Pet. ¶ 35.) Sugaring isn't waxing. (FAP ¶¶ 35-37, 39-41; Pet. ¶¶ 35-37, 39-41.) Nor is it anything like waxing. (Id.) That the Board of Cosmetology doesn't appreciate the difference between waxing and sugaring is perhaps understandable though—for all practical purposes, it's not being taught in their schools, (FAP ¶¶ 3, 59-67, 73-77, 132, 141(a-d)), or part of their curriculum, (FAP ¶¶ 59-62, 73-75, 77, 141(a)), or being tested, (FAP ¶¶ 91-98, 141(e-f)).

Even *if* there were legitimate safety concerns—and there aren't[21]—*this* regime doesn't satisfy its supposed public safety rationale at all, let alone rationally. Sugaring isn't tested or taught

[20] Footnote 13 at page 13.

[21] The government obliquely references—without any support, and contrary to the FAP—that cosmetologically procedures could cause irritation, breakout, bruising, cuts, and bodily fluid contamination. The Board of Cosmetology, again, doesn't understand what sugaring *is* or how it's *done*. (FAP ¶¶ 29-44,

for all practical purposes. Instead of protecting public health, the regime *undermines* public health and safety. *Cornwell*, 80 F. Supp. 2d at 1112 (finding time spent on irrelevant training, rather than relevant training, undermines public health).

Further, requiring Ms. Green to spend more than $18,000 (FAP ¶¶ 4, 69, 131, 136), and almost a year of her life, (FAP ¶ 136), taking classes that—for all practical purposes—don't teach her sugaring (FAP ¶¶ 3, 59-67, 73-77, 132, 141(a-d)), and then requiring her to take irrelevant licensing examinations that don't even test whether she can practically perform sugaring (FAP ¶¶ 91-98, 141(e-f)), for a temporary hair removal technique that is *already* safe (FAP ¶¶ 1, 2, 6, 30-42, 139, 141), that doesn't require *any* schooling to learn, (FAP ¶¶ 43, 44), and *that she already knows how to do*, (FAP ¶ 126) is "grossly disproportionate to *any* interest advanced by the government," (FAP ¶¶ 141(l)) (emphasis added), doesn't have "*any* rational connection" to the practice, (FAP ¶¶ 141(m)) (emphasis added), and is "protection[ist]," (FAP ¶ 141(o))—an illegitimate and unconstitutional government interest.

At bottom, the government knows Ms. Green's Section 1 theory and the factual grounds for it. To the extent there are any gaps in Ms. Green's lawsuit, rather than dismissing it—a drastic and disfavored action, *Boydston*, 242 Kan. at 101—this Court should, under the "rule of liberal construction" and "liberal interpretation of the pleadings required by our rules of notice pleading," permit "discovery to fill in [those] gaps." *Montoy*, 275 Kan. at 148, 149; *Fams.*, 268 Kan. at 809. The government's 212(b)(6) motion should therefore be denied.

II. Ms. Green has stated a claim under Section 18 of the Kansas Constitution's Bill of Rights.

Section 18 of the Kansas Constitution's Bill of Rights provides that "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Previously, Kansas courts considered Sections 1 and 2 as the

138-141.) Besides, it's improper to introduce facts—*especially* incorrect ones like these—at this stage. They should be disregarded.

due process equivalent for more than 100 years. *Hodes*, 309 Kan. at 635. Oftentimes courts applied variations of Fourteenth Amendment tests to claims under Sections 1 and 2 without differentiation. *See e.g., Leiker v. Employment Sec. Bd. of Review*, 8 Kan. App. 2d 379, 387 (1983).

It is clear, however, that Section 18 is Kansas' due process of law clause. *Hodes*, 309 Kan. at 627; *Creecy v. Kansas Dep't of Revenue*, 310 Kan. 454, 462 (2019).[22]

Hodes did not explain how Section 1's decoupling from the Fourteenth Amendment affects claims now brought under Section 18, Kansas' due process clause. But Kansas courts have applied two different "due process" tests: a "reasonableness" test, and the "real and substantial relation test."

The "reasonableness" test requires a "case-by-case" examination and "balancing" of the nature of the individual interest infringed, the degree of the infringement, the importance of government's interest, whether the government's actions could be "more carefully tailored" and whether there were "alternative means of achieving [the government's] goal." *Darling v. Kansas Water Office*, 245 Kan. 45, 51-52 (1989).

In the occupational licensing context, this test has meant that the government cannot impose unreasonable restrictions and qualifications that exclude persons of skill. *State ex rel. Beck v. Gleason*, 148 Kan. 1, supplemented, 148 Kan. 459 (1938); *State ex rel. Beck v. Cooper*, 147 Kan. 710 (1938); *State v. Wilcox*, 64 Kan. 789 (1902); *Hainline v. Bond*, 250 Kan. 217, 222 (1992) (licensing requirements unconstitutional because they did not "have a rational connection with the applicant's fitness or capacity to practice") (citation omitted).

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[22] The government's argument that Section 18 only protects "procedural rights," Gov't memo at 18, or that it only applies to claims for damages, Gov't memo at 18, because it uses the words "person, reputation, or property"—and doesn't contain the word "liberty"—is not just confused, it's unsupported by any case or theory. *Creecy*, 310 Kan. at 462 (explaining Section 18 protects substantive and procedural due process). Moreover, "[p]roperty" includes "life, liberty, and estate." Locke, *Two Treatises, supra,* § 87 at 323; *see also* Madison, *Property, supra* at 516 (stating that the "free use of their faculties, and free choice of their occupations" is a form of property).

The "real and substantial relation" test asks "whether the legislative means selected has a real and substantial relation to the objective sought." *Ernest v. Faler*, 237 Kan. 125, 129 (1985); *see also Peterson v. Garvey Elevators, Inc.*, 252 Kan. 976, 981 (1993) ("When a statute is attacked as violative of due process, the test is whether the legislative means selected has a real and substantial relation to the objective sought.") (cleaned up); *Cott v. Peppermint Twist Mgmt. Co.*, 253 Kan. 452, 484 (1993); *Bryant*, 226 Kan. at 395 ("The section has no real and substantial relationship to the moral, sanitary or health conditions of the licensed premises.").

The "real and substantial relation" test relies on "human judgment, natural justice, and common sense. Whether or not a restriction is reasonable may depend on many factors, no single factor being ordinarily decisive" and examines the "total situation." *Ernest*, 237 Kan. at 130-131. This means "the legislature cannot use a cannon to kill a cockroach." *Id.* at 130. In other words, a "legislative body cannot, under guise of the police power, enact unequal, unreasonable, and oppressive legislation[.]" *Bryant*, 226 Kan. at 391; *Capital Gas & Electric Co. v. Boynton*, 137 Kan. 717, 728, 730 (1933) (law did not promote the public welfare, and was "unreasonable, arbitrary, unjust, and oppressive.") (cleaned up).

Under the facts, which must be taken as true, Ms. Green has sufficiently alleged the regime violates each and every test under Section 18. The government's motion should therefore be denied.

III. Ms. Green has stated an Equal Protection Claim.

The government argues that Ms. Green hasn't sufficiently alleged an equal protection claim because, it says, "rational basis" applies. Gov't memo at 14. For the reasons above, that's wrong.

Ms. Green has put the government on notice of her factual allegations and legal claims. There is "no evidence, or sufficient justification, for treating sugarers differently based solely on whether sugaring involves a commercial transaction." (FAP, ¶ 183). In other words, it is an irrational and arbitrary distinction that violates equal protection principles to treat sugarers who

do it for money differently than those who do it for free, because nothing about the exchange of money makes sugaring dangerous to the public health, safety, or welfare, or that makes it safe enough to practice without a license where money is *not* exchanged. The government never addresses this unequal treatment in its motion.

Moreover, because sugaring is safe, there is no evidence or sufficient justification for treating sugaring *the same* as dangerous occupations (FAP, ¶ 184), or treating sugarers differently from those engaged in similarly safe activities (FAP, ¶ 185). *Cornwell*, 80 F. Supp. 2d at 1103 ("sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.") (cleaned up). But again, the government never addresses that unequal treatment in its 212(b)(6) motion.

For these reasons, the motion to dismiss Ms. Green's equal protection claims should also be denied.

IV. Ms. Green has stated a claim under Section 20 of the Kansas Constitution's Bill of Rights.

Section 20 is patterned after the Ninth and Tenth Amendments. *See generally* Anthony B. Sanders, *Baby Ninth Amendments: How Americans Embraced Unenumerated Rights and Why It Matters* (2023). Thirty-five states have an unenumerated rights provision similar to Section 20. *Id.* at 149-59. The general understanding is that these provisions "protect individual rights." *Id.* at 42 (cleaned up). Section 20 therefore "authoriz[es] the enforcement of a Lockean vision of 'rights first – government second.'" Randy Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom*, 10 Harv. J.L. & Pub. Pol'y 101, 103, 111 (1987).

Nonetheless, the government moves to dismiss Ms. Green's Section 20 claim on two grounds, neither of which are persuasive: first, Section 20 only applies to procedural rights, Gov't memo at 18-9; and second, it doesn't "create substantive rights," Gov't memo at 19.

For its procedural-rights-only argument, the government appears to rely exclusively on *Manning v. Davis*, 166 Kan. 278 (1948). Gov't memo at 19. But *Manning* was a Fourteenth

Amendment case, not a Section 20 case—and it had nothing to do with procedural versus substantive rights.

The government's second argument—that Section 20 doesn't create substantive rights—entirely misses the point. Ms. Green has never argued that Section 20 *creates* a substantive right to earn a living. Instead, she argues that the right predates the Kansas Constitution and has been retained by the citizens of Kansas. The Kansas Supreme Court acknowledges that Section 20 "protect[s] vital rights," after all, *Rivera v. Schwab*, 315 Kan. 877, 891 (2022), and as shown next, that includes rights which might be alienable, but are nonetheless retained, under Lockean principles.

The Lockean commitment to natural rights at the Wyandotte convention is clearly seen in Sections 1 and 20 of the Bill of Rights. Steven Calabresi, *et al*., *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in A Modern-Day Consensus of the States?*, 94 Notre Dame L. Rev. 49, 133 (2018). The language of these two Lockean natural rights provisions must be considered together. Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771, 789 (2021) (state constitutions "should be interpreted in their overall context").

In short, Section 20, like Section 1, protects Lockean natural rights. *See Venard v. Cross*, 8 Kan. 248 (1871) (takings challenge to government land regulation under Section 20); *Williams v. City of Wichita*; 190 Kan. 317 (1962) (same); *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 225 (1944) (forcible removal of individuals from their home violated unenumerated rights clause similar to Section 20).

Alternatively, Section 20 may be read as a rule of construction placing limits on the police power of the state. It says, "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people." Given its text, Section 20 doesn't permit unenumerated rights to be treated worse than enumerated rights. It certainly doesn't authorize the legislature to enact oppressive, irrational, protectionist, and arbitrary licensing regimes like this one, under the police powers doctrine. At a minimum,

Section 20 requires courts reviewing *all* restrictions on an individual's liberty to find "actual *rationality*, scrutinizing the law's actual *basis*, and applying an actual *test*." *Hodes*, 309 Kan. at 766 (Stegall, J., dissenting) (emphasis in original) (cleaned up). Conversely, courts should not "apply the presumption of constitutionality" to Section 20 claims, like this one. *See Matter of A.B.*, 313 Kan. 135, 148, (2021) (Stegall, J. concurring).

At this stage, because a claim must not be dismissed if there is "any possible theory the court can divine" that supports it, the government's motion to dismiss the Section 20 claim should be denied.

Conclusion

Ms. Green has sufficiently alleged that the licensing regime violates Kansas Constitution Bill of Rights Sections 1, 2, 18, and 20. She has put the government on notice of the claims, her legal theories, and the factual bases for them—and that is all that's required at this stage of the proceedings. This Court should deny the government's 212(b)(6) motion.[23] Ms. Green requests oral argument pursuant to Local Rule 3.202(c).

Dated: February 23, 2024.

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[23] If the court is inclined to grant the government's motion, Ms. Green requests the opportunity to move for leave to amend; or in the alternative, dismissal without prejudice so Ms. Green can re-file.

Certificate of Service

The undersigned certifies that on February 23, 2024, the above document(s) were filed using the electronic filing system, which will send notification of such filing to all participants, including to: Abhishek Kambli, Jesse A. Burris, and Erin B. Gaide.

/s/ Sam MacRoberts
Samuel G. MacRoberts