

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

BRYN GREEN,

Plaintiff,

vs.

**KANSAS STATE BOARD OF
COSMETOLOGY, ET AL.,**

Defendants,

**Civil Action No. SN-2023-CV-
300030
Division No. 3**

Pursuant to K.S.A. Chapter 60

DEFENDANTS REPLY TO PETITIONER’S RESPONSE TO MOTION TO DISMISS

Petitioner seeks have the court invalidate a law with which she disagrees instead of going to the proper branch of government—the Legislature. She invents a right to “earn an honest living” located somewhere in the Kansas Constitution. The long and short of it is, though, that even if all Petitioner’s facts are taken as true, she has no right to relief because she has not shown she has a fundamental, constitutional right to “earn an honest living” by “sugaring” for pay under the Kansas Constitution in the first place. The court should dismiss the petition.

I. Petitioner fails to invoke a recognized right under the Kansas Constitution

Petitioner has the burden of showing the right to “earn an honest living” by “sugaring” is a fundamental right enshrined in the Kansas constitution and that it has been infringed. *Hodes & Nausser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 669, 440 P.3d 461, 496 (2019). The former is a purely legal question, decided by the text of the constitution. *Hodes & Nausser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 623, 440 P.3d 461, 471 (2019); *Bailey v. Howard*, 272 P.3d 1287 (Kan. Ct. App. 2012). While courts may engage in factfinding after the Plaintiff invokes a *recognized* right,

the first question is whether the right is recognized at all. If it is not, courts have and may dismiss the petition for failing to state a claim. *See generally, e.g., Fowler v. Stitt*, 676 F. Supp. 3d 1094 (N.D. Okla. 2023).

As Petitioner acknowledges, she brings her claim “*solely* under the Kansas Constitution. She hasn’t sought *any* relief under the Fourteenth Amendment.” Resp. at 23 (emphases in original). She therefore must show that she has a fundamental, constitutional right to “earn an honest living” by “sugaring” under the Kansas Constitution. As discussed in the Motion to Dismiss, *see* Def. Mot. at 10–14, Petitioner has failed to do so. Neither the text nor history of Section 1 contain such a right. That should end the question.

Petitioner counters by recounting the history of her so-called right to “earn an honest living.” Resp. at 14–18. Her discussion is almost entirely focused on federal common law and the drafters of the federal constitution, which may be informative but does not speak to what the drafters of the Kansas Constitution intended.¹

Petitioner’s analysis of the Kansas Constitution is limited to three quotes from three people. Resp. at 17–18. Two of these—Richard Cordley and Solon Thatcher—were not delegates at the Wyandotte Convention and have limited relevance when determining the intent of the delegates who drafted the constitution. *Davis v. City of Leawood*, 257 Kan. 512, 527, 893 P.2d 233, 244 (1995) (considering a non-legislator’s post-hoc statement not instructive as to the meaning of a statute). The other quote was made by a single delegate and is not representative of the intent of all delegates. *Id.* (finding persuasive another court’s holding that “one legislator’s understanding of the meaning reflects only his or her personal view and is not indicative of legislative intent

¹ Kansas courts may look to the federal constitution and history to aid in interpreting the Kansas Constitution, but the focus must be on what the drafters of the Kansas Constitution intended. *See Hodes*, 309 Kan. at 623, 440 P.3d at 471 (discussing whether *Kansans* chose to protect certain rights).

because there is no evidence or assurance that other legislators shared this opinion.”). As that quote does not even address the right to “earn an honest living” at all, it cannot be taken to mean the drafters as a whole intended to create a fundamental, constitutional right to “earn an honest living” to be implied in the language of Sections 1, 2, 18, or 20.

Nor has the Kansas Supreme Court recognized this right. In fact, Kansas courts have repeatedly upheld occupational licensing regimens against similar challenges. *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 615, 576 P.2d 221, 226 (1978) (collecting cases). *Coffeyville Vitrified Brick & Tile Co. v. Perry*, cited by Petitioner for the proposition that the right to “earn an honest 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,” Resp. at 19 (quoting 9 Kan. 297, 76 P. 848 (1904)), does not change anything. *Coffeyville* concerned unions the right to contract under the federal constitution. The opinion expressly noted, “Before approaching a discussion of the question let us exclude any notion that the act in question is a police regulation. It will be observed that it does not affect the public welfare, health, safety, or morals of the community, or prevent the commission of any offense or other manifest evil.” *Coffeyville*, 76 P. at 848. It therefore has nothing to say about whether there is a right to “earn an honest living” under the Kansas Constitution that may be interfered with by a licensing requirement.

Petitioner next takes sentences from cases in other jurisdictions (state,² federal,³ or both) that discuss the right to earn a living and argues that, after *Hodes*, the Kansas Constitution must

² *Patel v. Texas Dep’t of Licensing & Regul.*, 469 S.W.3d 69 (Tex. 2015); *Sail’er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971); *Livesay v. Tenn. Bd. of Examiners in Watchmaking*, 204 Tenn. 500, 504 S.W.2d 209 (1959); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 53 S.W. 955 (1899), *aff’d*, 183 U.S. 13 (1901).

³ *Sail’er Inn*, 5 Cal. 3d 1, 485 P.2d 529 (1971); *Zandt v. McKee*, 202 F.2d 490 (5th Cir. 1953); *Truax v. Raich*, 239 U.S. 33 (1915); *Harbison*, 103 Tenn. 421, 53 S.W. 955.

protect an even broader right. Resp. at 12–13. However, just because other jurisdictions arguably recognize such a right (Petitioner has not shown that they do), that does not mean the Kansas Constitution does. *Hodes* is limited to the specific issue involved in the case (abortion), and one statement that the Kansas Constitution generally protects broader rights than the federal constitution does not mean the Kansas Constitution automatically protects any conceivable right just because the federal constitution arguably protects that alleged right to some degree. *See State v. Phipps*, 63 Kan. App. 2d 698, 719, 539 P.3d 227, 241 (2023) (Schroeder, J., dissenting in part); Temporary Injunction Order, *State of Kan. ex rel. Kobach v. Harper, et al.*, No. SN-2023-CV-422, at 22–23 (Dist. Ct. Shawnee Cnty. Mar. 11, 2024). That would be a stretch indeed.

At most, these cases are persuasive authority and they are not all that persuasive in this case. None recognized a brand-new right to “earn an honest living” cut from whole cloth. Many discuss the right to contract (the right to form a private agreement between parties) or union rights, not the right to engage in any given occupation without having to obtain a license. *Van Zandt v. McKee*, 202 F.2d 490, 491 (5th Cir. 1953); *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 53 S.W. 955, 957 (1899), *aff’d*, 183 U.S. 13 (1901). In fact, many reaffirm the state’s police power to impose regulations and restrictions or require licenses “for the safety, health, morals, comfort and general well-being of its people.” *Livesay v. Tennessee Bd. of Examiners in Watchmaking*, 204 Tenn. 500, 504, 322 S.W.2d 209, 211 (1959); *see also Sail’er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 20, 485 P.2d 529, 542 (1971); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 860 (1940).

Plaintiff must show that the plain text of the Kansas Constitution supports the fundamental right she asserts. Failing that, she must show the Kansas drafters intended to enshrine the right to “earn an honest living” in the state constitution. She has not.

II. Petitioner cannot negate every conceivable reason the State may have for requiring a license

Should the court find there is no fundamental, constitutional right to earn an honest living by “sugaring,” it should dismiss the petition for failing to state a claim. Should the Court find (or assume) there is a constitutional right to earn an honest living, it should find rational basis review applies. *See, e.g., Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (applying rational basis review to a licensing statute). As discussed in the Motion to Dismiss, the State has many reasons for requiring licenses, Def. Mot. at 14–17, and Petitioner has the “obligation to negative every conceivable basis” for the Legislature’s decision. *Downtown Bar and Grill v. State*, 294 Kan. 188, 198 273 P.3d 709 (2012) (emphasis omitted). She has not and cannot do so, and so the petition should be dismissed.

III. Section 18 does not create an independent right

Petitioner’s argument relating to Section 18, Resp. at 28–29, is clearly contradicted by caselaw. *Schmeck v. City of Shawnee*, 231 Kan. 588, 594, 647 P.2d 1263, 1267 (1982) (“This section [] does not create rights of action; it means only that ‘for such wrongs that are recognized by the law of the land,’ the courts of this state shall be open and afford a remedy.”). The cases she cites involve claims brought under both Sections 1 and 18—if they involve Section 18 at all—and none hold that Section 18 provides any right or cause of action not already contained in Section 1.

IV. Petitioner has not stated an equal protection claim.

Equal protection claims are likewise justiciable at a motion to dismiss if the plaintiff is not similarly situated to another group. *Baker v. Blue Valley Sch. Bd.*, 543 P.3d 1179 (Kan. Ct. App. 2024) (“[E]ven accepting their facts as true, we do not find they were similarly situated with non-exceptional students.”). “To be similarly situate the individuals must be prima facie identical in all relevant respects or directly comparable in all material respects; although this is not a precise formula, it is nonetheless clear that similarly situated individuals must be very similar indeed.” *Id.* (internal quotation marks omitted) (quoting *Ebonie S. ex rel. Mary S. v. Pueblo School Dist. 60*,

819 F. Supp. 2d 1179, 1189 (D. Colo. 2011)). A conclusory statement that a plaintiff is “similarly situated to others does not suffice to state a claim. *Id.*

Petitioner now compares herself to people who “sugar” for free rather than for pay. These groups are not “identical in all relevant respects or directly comparable in all material respects” because one is engaged in commerce and one is not. Nearly all licensing statutes distinguish between people who hold out to the public their services for pay and those who do the same thing for free for their family and friends. The State’s exercise of its power to regulate commerce does not create an equal protection issue.

V. Petitioner has not stated Section 20 claim

Finally, Petitioner argues she has stated a claim under Section 20. As discussed in the Motion to Dismiss, Mot at 19–20, Kansas courts have not come close to recognizing that this section creates a new substantive right to “earn an honest living” such as by “sugaring.” While the State cannot take property without consent of the owner, *see Venard v. Cross*, 8 Kan. 248, 252 (1871), it may impose restrictions and regulations on businesses without violating Section 20, *Manning v. Davis*, 166 Kan. 278, 281, 201 P.2d 113, 115 (1948).

CONCLUSION

The first step in a lawsuit is to invoke a recognized right and show that it has been violated. The right Petitioner claims, the right to “earn an honest living” by “sugaring” for pay, has not been recognized by Kansas courts and is not found in the text or history of the Kansas Constitution. Her petition should therefore be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2024, the above document was filed with the Clerk of the Court electronically and notice was sent to all counsel via the court's e-filing system.

/s/ Erin B. Gaide
Attorney for Defendants