IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

BRYN GREEN, *Plaintiff*, vs. **KANSAS STATE BOARD OF COSMETOLOGY, DAVID YOCUM**, in his official capacity as Chairperson of the Kansas **State Board of Cosmetology, NICHOLE HINES, CHRISTINE "TINA" BURGARDT, KELLY ROBBINS, DAVE TUCKER, ASHLEY RANGEL, KIMBERLEY MANCUSO, MARY BLUBAUGH**, in their official capacities as members of the Kansas State Board of Cosmetology, **BENJAMIN FOSTER,** in his official capacity as Executive Director of the Kansas State Board of Cosmetology, and **STATE OF KANSAS** *Defendants*,	**Civil Action No. SN-2023-CV-300030** **Division No. 3**

Pursuant to K.S.A. Chapter 60

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiff, Bryn Green, challenges Kansas's cosmetology-licensing framework as it relates to the provision of a specific service (sugaring). Her claims should be dismissed because (1) Kansas regulates all cosmetologists regardless of the specific services they choose to provide, and Plaintiff is not similarly situated to those who

provide non-cosmetology services; (2) the Kansas Constitution does not protect the due-process/liberty rights Plaintiff claims, and recognizing them now would require reversal of decades of Kansas Supreme Court precedent; (3) the licensing statutes and regulations are rationally related to a state interest; and (4) Sections 18 and 20 of the Kansas Bill of Rights protect procedural rights and do not create new substantive rights.

Therefore, Defendants respectfully request the Court dismiss this lawsuit, because Plaintiff has not stated a claim under Kansas law.

STATEMENT OF FACTS

Kansas regulates cosmetologists and estheticians.[1] K.S.A. 65-1901–12. State law requires every cosmologist to obtain a license. If a person meets specified qualifications, the person is granted a cosmetology license upon application to the Board of Cosmetology (KBOC). All new applicants must have completed the necessary hours of training at a licensed school and pass a written examination. *Id.* 65-1905(a). KBOC has the power to license schools and to adopt rules and regulations for the exam. *Id.*

Kansas has defined "cosmetology" by statute. "Cosmetology" includes any form of temporary hair removal, unless specifically exempted. *Id.* 65-1901(d).

[1] Estheticians practice a limited version of cosmetology. K.S.A. 65-1901(f). The petition does not rely on a difference between estheticians and cosmetologists. *See* Pet. ¶ 4 (discussing both together). So, unless otherwise stated, they are treated the same for the purposes of this memorandum.

"Sugaring" is a temporary hair removal technique under the statute. Pet. ¶ 52. Sugaring involves heating a paste of sugar, lemon juice, and water and applying it to a person's skin. *Id.* ¶ 28. When the paste cools, it is peeled off and unwanted hair is pulled out along with it (similar to waxing, another common cosmetological technique, *accord* K.A.R. 28-24-7). Pet. ¶ 27. The sugar paste may be applied to the arms, legs, face, and any other area of the body with hair. Plaintiff claims that, if done correctly, sugaring is safe. *Id.* ¶ 32. Even so, sugaring may cause skin irritation or breakouts. *Id.* ¶ 38. Those who perform sugaring should use a fresh paste on each customer and dispose of the paste following use. K.A.R. 28-24-7; Pet. ¶ 34. Those who offer sugaring services are cosmetologists and are required to be licensed. K.S.A. 65-1901(d); Pet. ¶ 52.

State statute exempts "threading" (temporarily removing hair from the eyebrows by pulling a hair from its follicles with threads) and hair braiding without dyes, heat, or chemicals from the definition of "cosmetology." *Id.* 65-1901(d)(2). A person who practices these services, and only these services, does not require a license. *Id.* 65-1901(d)(2), 60-1928.

KBOC may inspect the facilities of cosmetology license-holders for cleanliness and sanitation. K.A.R. 69-13-2. Sanitation standards are set by the Secretary of Health and Environment and enforced by KBOC. K.S.A. 65-1,148(b). Cleanliness and sanitation requirements include proper handwashing, disposal of single-use items, and cleaning and disinfecting of equipment and facilities. *See* K.A.R. 28-24-

1–14. The State also regulates the sugar paste used for "sugaring." *Id.* 28-24-7. This includes requiring the paste to be maintained at the proper temperature, prohibiting cosmetologists from leaving the paste standing, and requiring single-use applicators be disposed of. *Id.*

Plaintiff does not hold a cosmetology license, and therefore may not lawfully provide sugaring services for compensation. Pet. ¶ 11. But she claims that if she had a license (or were exempted from the licensing requirement) she would provide such services. *Id.* She challenges the cosmetology licensing statutes and policies under (1) the Equal Protection provisions of Sections 1 and 2 of the Kansas Bill of Rights, and (2) an alleged "right to earn an honest living" she places somewhere in Section 1, the Due Process provision of Section 18, or the unenumerated rights provision of Section 20 of the Bill of Rights.

ARGUMENT

Plaintiff has failed to state a claim upon which relief can be granted, and the Court should therefore dismiss her claim. When considering a motion to dismiss under K.S.A. 60-212(b)(6), the Court must accept the well-pleaded facts in the petition and inferences reasonably drawn from them "in the light most favorable to [the] plaintiff" and ask whether those representations and inferences would warrant relief for the plaintiff. *Bonin v. Vannaman*, 261 Kan. 199, 204, 929 P.2d 754, 761 (1996). "However, th[e] court is not required to accept conclusory allegations argued by the plaintiff regarding the legal effect of the presumed facts if the allegations do

not reasonably follow from the facts." *Id.* (citations omitted).

"Kansas statutes are presumed constitutional, and all doubts must be resolved in favor of their validity." *In re Weisgerber*, 285 Kan. 98, 102, 169 P.3d 321, 326 (2007). "The burden of proof is on the party challenging the constitutionality of the statute." *Blue v. McBride*, 252 Kan. 894, 915, 850 P.2d 852, 869 (1993) (citation omitted).

I. The Kansas Licensing Scheme Does Not Violate the Equal Protection Guarantees of the Kansas Constitution

Plaintiff argues the cosmetology-licensing statutes violate her equal-protection rights under Section 2[2] of the Kansas Constitution's Bill of Rights. Kansas courts treat the state's equal-protection guarantee as coextensive with the federal one. *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168, 180 (2022) (quotation omitted); *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005).

Equal protection guarantees that "arguably indistinguishable" classes of people will not be treated differently. *Barrett ex rel. Barrett v. Unified Sch. Dist. No. 259*, 272 Kan. 250, 256, 32 P.3d 1156, 1161 (2001) (internal quotes omitted). If the classification does not involve suspect classes or encroach upon a fundamental right, the law is subject to rational basis review. *Id.*

[2] The petition also cites Section 1. Pet. ¶ 181. But "it is clear that the textual grounding of equal protection guarantees contained in the Kansas Constitution Bill of Rights is firmly rooted in the language of section 2," not Section 1. *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168, 180 (2022).

Professions are not suspect classes. *See generally McBride*, 252 Kan. at 916, 850 P.2d at 869 (suspect classes are those that differentiate people by race, sex or gender, ethnicity, religion, legitimacy, or nationality). If a suspect class is not implicated, the law is subject only to rational-basis review, and the court only considers whether the classification "rests on grounds wholly irrelevant to the achievement of the State's objective." *Chiles v. State*, 254 Kan. 888, 895, 869 P.2d 707, 713 (1994); *McBride*, 252 Kan. at 916, 850 P.2d at 869 ("For legislative classification in economic regulation to be violative of the equal protection clause of the Fourteenth Amendment, the classification must amount to an invidious discrimination."). To satisfy rational-basis review, there need not even be evidence that legislature actually relied on such basis in making the distinction. It is enough that the Court can hypothesize a reasonable, lawful basis for the challenged distinction. *FCC v. Beach Comms., Inc.*, 508 U.S. 307, 315 (1993).

Plaintiff has identified a variety of classes she believes are implicated by the law. She identifies her own class as "sugarers"—*i.e.*, those who practice sugaring and only sugaring. Pet. ¶ 186. She has also identified a class of cosmetologists and estheticians who provide different services. *Id.* ¶ 188. There is also a class of "those whose pursuits are inherently dangerous." *Id.* ¶ 187. Finally, there is a class of "threaders" and "hair braiders". *Id.* ¶ 189. But the statute does not cut the baloney quite so thin. In reality, the Court should compare two classes: Cosmetologists (including "sugarers") and Non-Cosmetologists (including "threaders" and "hair

braiders"). These are the only two classes created by the statute.

But regardless of the classes of professions the court does consider, rational basis review applies. And, in applying such review, it is plain that the licensing statute is reasonable—and, therefore, constitutional.

Starting with the statutory categories: Cosmetologists are not similarly situated to Non-Cosmetologists. Cosmetology includes cutting and styling hair, waxing and removing hair, giving facials, removing hair, and doing manicures and pedicures. K.S.A. 60-1901(d)(1). These services include the use of heat, chemicals, scissors, razors, and electricity. *Id.* Some cosmetological procedures, including sugaring, involve waxes, pastes, and other things that are heated before being applied to the body, causing the potential for burns if done incorrectly. Non-conmetological services like threading and hair braiding do not pose such a risk. K.S.A. 65-1901(d)(2), (*l*). Nor does either such service involve a paste that KBOC has determined should not be left sitting out and should be disposed of after one use. Some cosmetological procedures require the use of sharp objects and pose a risk of cuts; neither threading or hair braiding uses sharp objects. Some cosmetological procedures, including sugaring, can be performed on all areas of the body, including intimate areas; threading and hair braiding are limited to the face, head, and neck.[3] Cosmetologists (including those who sugar) consequently have a

[3] In fact, the legislature specifically amended SB 348 (2022) (the bill which exempted "threading" from the definition of "cosmetology") to ensure that threading could not be practiced on all areas of the body. *See* Proposed amendment to SB 348,

higher risk of coming into contact with bodily fluids or passing their own fluids to their clients. Threaders and hair braiders do not. All of these are distinctions on which the legislature could have rationally relied in choosing to require cosmetologists, including "sugarers," to obtain a full cosmetology license, but not hair braiders or eyebrow threaders.

To the extent the Court considers Plaintiff's "as-applied"/"class of one" equal protection challenge, the argument that "sugarers" are not similarly situated to "cosmetologists" and therefore should not be treated the same fairs no better for these same reasons. As with other cosmetological procedures, sugaring involves heat, the possibility of infection and irritation, risk of body fluid cross-contamination, and intimate areas of the body. Threading and hair braiding do not. As with other cosmetological procedures, the materials used in sugaring must be created, maintained, and disposed of properly to ensure a sanitary environment. Those used in threading and hair braiding do not. She has not, therefore, shown she is subject to "invidious discrimination." *McBride*, 252 Kan. at 916, 850 P.2d at 869.

Ultimately, the legislature can choose to define cosmetology to include some acts or professions and exclude others. "Defining the class of persons subject to a regulatory requirement . . . 'inevitably requires that some persons who have an

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as amended by SCW, https://www.kslegislature.org/li_2022/b2021_22/committees/ctte_h_hhs_1/misc_documents/download_testimony/ct.te_h_hhs_1_20220307_26_testimony.html

almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" *Beach Comms.*, 508 U.S. at 315–16 (quoting *R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). "The legislature is not required to draw a perfect line and can always later refine the one it has drawn if circumstances warrant it." *Guardian Title Co. v. Bell*, 248 Kan. 146, 156, 805 P.2d 33, 40 (1991). Indeed, the legislature exempted threading and hair braiding from the definition of cosmetology after a deliberative process that specifically considered whether those services needed to be licensed.[4] These were not arbitrary, unconsidered distinctions. If Plaintiff wants sugaring to be exempted as well, her remedy can be found in the legislature, not the courts.

For these reasons, Plaintiff has failed to state a plausible Equal Protection claim. That portion of her suit must be dismissed.

II. Kansas's Cosmetology Licensing Statutes Do Not Violate a Fundamental Right under Sections 1 or 2

a. Plaintiff has not identified a fundamental right

[4] "Threading" was exempted from the definition of "cosmetology" by S.B. 348 (2022). The Senate Committee on Public Health and Welfare and House Committee on Health and Human Services held hearings before recommending adoption of the Bill. *See* Kansas Legislature, 2021–2022 Legislative Session, SB 348, https://www.kslegislature.org/li_2022/b2021_22/measures/sb348/ (last accessed Jan. 17, 2024). Hair braiding was exempted by S.B. 513 (2000), and was likewise reviewed and recommended by committees. *See* Kansas House Journal, 2000 Reg. Sess. No. 50.

Plaintiff also claims the cosmetology statutes and policies violate her "right to earn an honest living, to conduct business free from unreasonable governmental interference, and to be free from arbitrary, unreasonable, oppressive, protectionist, or irrational government restrictions," allegedly in violation of sections 1, 2, 18 and 20 of the Kansas Constitution's Bill of Rights. Pet. ¶¶ 169, 199, 211.

Section 1 states, "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." It does not expressly protect the right to earn a living, and so such a right (if it exists) would need to be located among these "natural rights," *see Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 644, 440 P.3d 461, 483 (2019). Plaintiff is correct that Kansas protects a broader scope of rights than the Federal Constitution, but as with the Federal Constitution, these rights must be rooted in history and tradition. *See id.* at 623, 440 P.3d at 471. They cannot be created out of whole cloth.

For historical proof of the right she asserts, Plaintiff quotes Kansas founders Richard Cordley ("[E]very 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 free government.") and Solon Thatcher ("[T]he natural rights expressed in the Declaration of Independence are 'the foundation stones upon which the whole structure of Liberty rests' [and] 'the rights of the people are jealously care for' in the Kansas Constitution, which 'is

radiant with the sunlight of Liberty.'"). Pet. ¶ 168. She argues these statements indicate the Constitution was intended to protect "the right to earn an honest living." *Id.* ¶ 167.

There are several problems with Plaintiff's argument. First, she distorts *Hodes & Nauser, MDs, P.A. v. Schmidt* and takes parts out of context. The *Hodes* Court considered whether Section 1 protects the right to bodily integrity and personal autonomy. 309 Kan. at 645, 440 P.3d at 483. The Court held pregnant women have a right to bodily integrity and with it, the right to abort their children. *Id.* at 646, 440 P.3d at 484. The right to bodily integrity is held by the person whose body is affected by the regulation. *See id.* The abortion restrictions were enjoined because they arguably prevented women from exercising their rights. *See id.* at 680–82, 440 P.3d at 502–04. Plaintiff's argument is that *she* has the right to earn a living and so *she* has a right to perform procedures on *other peoples'* bodies. There is a world of difference between the right to control one's own body and the "right" to hold a profession free from government regulation. The State may step in and impose restrictions on rights when someone else is at risk of harm. *See id.* at 662, 440 P.3d at 492 (discussing John Locke's view that "some regulation of natural rights as essential to civil society because there is no privilege to violate the rights of others").[5] So, neither a right to bodily integrity nor a right to personal autonomy

[5] Even rights that are explicitly found in constitutions (rather than squirreled away in the general term "liberty" or unremunerated rights provisions) are subject to reasonable restrictions to protect the rights of others. For example, the State may

recognized by *Hodes* supports Plaintiff's desired result.

Even if Plaintiff's argument was that *other people* have a right to be "sugared" and these statues and regulations interfered with that right (Defendants do not understand this to be her argument), *Hodes* would still not require the court to hold them unconstitutional.[6] While *Hodes* did recognize a right to bodily integrity and personal autonomy, it did not say the government cannot enact reasonable regulations around the exercise of these rights. Indeed, the Court explicitly noted that "[t]he debates about the wording of section 1 at the Wyandotte Convention suggest the framers did not intend to prohibit all government encroachment of natural rights." *Id.* at 661, 440 P.3d at 492 "Nor did [John] Locke himself view inalienable rights as being totally outside the purview of regulation in an organized society." *Id.* at 661–62, 440 P.3d at 492.

Furthermore, neither the Cordley nor Thatcher statements Plaintiff quotes above establishes that those founders understood the right to earn a living (or have a cosmetic procedure done) to be the right to do so *entirely free from government regulation*, especially where the profession poses some risk of harm to others.

Second, assuming there is a right to earn a living, the State is not violating it

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limit speech that threatens another without violating the First Amendment, *see generally Counterman v. Colorado*, 600 U.S. 66 (2023), or impose some restrictions on the right to bear arms without violating the Second Amendment, *see generally District of Columbia v. Heller*, 554 U.S. 570 (2008).

[6] Kansas has not recognized a fundamental right to cosmetic procedures, and other courts have held there is none. *See, e.g.*, *Cole v. Clarke*, No. A-01-799, 2003 WL 21278477, at *5 (Neb. Ct. App. June 3, 2003).

by regulating a profession. Kansas courts often consider the "right to earn a living" in the context of non-compete and confidentiality agreements between private parties. *See, e.g.*, *Puritan-Bennett Corp. v. Richter*, 235 Kan. 251, 679 P.2d 206 (1984). In these cases, the agreements are struck down or narrowed if they would act as a *complete bar* to the profession. *Id.* at 257, 679 P.2d at 211. The courts have rejected arguments similar to Plaintiff's, where the complained-of act was a State regulation and not a total bar. *See Bongers v. Madrigal*, 1 Kan. App. 2d 198, 200, 563 P.2d 515, 517 (1977). Here, the State is not preventing Plaintiff from earning a living as a "sugerer"; it is simply regulating cosmetology for the health and safety of its citizens.

Plaintiff—and anyone else who wants to engage in "sugaring"—is free to do so within the rules the State has set. But Plaintiff has no right to become a "sugarer," on her own terms. It is well established in Kansas that the State may impose restrictions on businesses. *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 614–15, 576 P.2d 221, 226 (1978) ("[S]tates possess an inherent power to regulate certain businesses and professions for the good of society."). The State may enact regulations that are related to any conceivable state interest. *Mueller*, 271 Kan. at 903, 27 P.3d at 889. The State may also require people to obtain licenses to practice a particular profession and may set the requirements for those licenses. *Schneider*, 223 Kan. at 615, 576 P.2d at 226. There is no right to "earn an honest living" free from government regulation. To hold otherwise would require reversal of decades of

caselaw.

Plaintiff's argument, therefore, turns completely on the words "arbitrary, unreasonable, oppressive, protectionist, [and] irrational." Pet. ¶ 169. These, however, are legal conclusions. The court need not assume a statute is "arbitrary," "unreasonable," "oppressive," "protectionist," and/or "irrational" just because Plaintiff says it is. In fact, such assertions should be disregarded unless supported by facts. *Vannaman*, 261 Kan. at 204, 929 P.2d at 761. As discussed below, Plaintiff has not pled and cannot plead facts to support them.

What Plaintiff's facts demonstrate is that she cannot charge members of the public to remove their hair via sugaring without first obtaining a cosmetology license. That is all.

For these reasons, Plaintiff's complaint fails to invoke a fundamental right under Sections 1 or 2.

b. Kansas's cosmetology licensing statutes and policies are rationally related to a State interest

Plaintiff has not shown she is a member of a suspect class or that Kansas's cosmetology licensing statutes and policies encroach on a fundamental right. Therefore, as with most economic and social regulations, the law is subject to rational-basis review. *McBride*, 252 Kan. at 915–16, 850 P.2d at 869 ("An economic regulation challenged on substantive due process grounds will not be overturned as long as there is an evil at hand for correction and it might be thought that the

particular legislative measure was a rational way to correct it."). Under this standard, Plaintiff must negate every conceivable reason the legislature might have had for passing the law. *Miami Cnty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 316, 255 P.3d 1186, 1208 (2011); *Mueller*, 271 Kan. at 903, 27 P.3d at 889. "[I]t is not enough to 'simply point out that a statute might not be rationally related to the state objectives sought under one set of facts.'" *Id.* (brackets omitted) (quoting *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 851, 942 P.2d 591 (1997)). "Insofar as the objective is concerned, a statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it." *Mueller*, 271 Kan. at 903, 27 P.3d at 889 (2001) (quotation omitted); *see also McBride*, 252 Kan. at 916, 850 P.2d at 869 ("The due process clause does not prohibit states from anticipating and addressing problems which have yet to manifest themselves as long as the problem is at least rationally conceivable."). The petition has not shown the law is unjustifiable.

Plaintiff argues that the licensing requirement is arbitrary or irrational because, as she represents, sugaring is safe. However, Plaintiff has not pled (and cannot plead) facts indicating that sugaring is completely without risk, and the court should not assume it is. Without such facts, Plaintiff loses. Because any risk justifies the legislature's judgment that regulation is necessary. And it is the legislature that, in our system of government, gets to make that call.

The State has an obvious interest in protecting members of the public who

receive cosmetology services. Ensuring that those who charge for these services are properly trained in safe procedure, hygiene, and first aid protects members of the public and cosmetologists from potentially serious injuries or infections. Sugaring involves heating a sugar paste and applying to the body, including potentially sensitive parts of the body, to remove hair. K.A.R. 28-24-7; Pet. ¶ 40. If the paste is heated too much or not allowed to cool, it can cause burns. In addition to burns, sugaring can cause skin irritation and bruising. Pet. ¶ 38. The State has an interest in ensuring people who heat sugar and pour it on other people to remove body hair know how to do it properly, know what to do if something goes wrong, and are keeping a clean, hygienic space.

A license is also more than a statement that a cosmetologist has taken some classes. A license-holder must comply with ongoing regulations, including inspections for safety and cleanliness. License-holders face penalties for non-compliance with safety and cleanliness standards. As the petition acknowledges, "sugarers" must know and follow hygiene and cleaning standards, must properly cool the heated paste before applying it to the skin, and must properly dispose of the paste after use. *See* Pet. ¶¶ 33, 34, 44. Plaintiff does not and cannot demonstrate that she (and all other potential "sugarers") will always comply with these sanitary standards.[7] She does not and cannot demonstrate that she (and all other potential "sugarers") know how to treat burns or other basic first aid. Nor can she

[7] And the petition does not claim these sanitary standards are unnecessary.

demonstrate that she (and all other potential "sugarers") will always properly prepare, store, and discard the paste. Periodic inspections (and the potential penalties attached) help ensure these basic health and sanitary standards are complied with and protect the public.[8]

So, the State has an interest requiring cosmetologists (including those who sugar) to obtain licenses and to be subject to ongoing regulations. The State also has an interest in creating and maintaining a uniform regulatory system for all cosmetologists or estheticians. A system where each person was allowed to choose which licenses to obtain (and therefore which classes they were required to take and which fees they were required to pay) based on which individual services they wanted to provide could (and very likely would) create additional administrative burdens for the State. The legislature could have decided that a uniform system would be more efficient and a better use of State resources.

Plaintiff's petition does not and cannot address any of these concerns, and she has therefore not negated every conceivable State interest. She has not and cannot show that the licensing statutes and regulations are unreasonable. And, consequently, she has failed to state a claim.

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[8] While the State could, of course, have an inspection regime that does not necessarily rely on licensing, it would be considerably more difficult to enforce. How would the State know that sugaring or other cosmetological activities are even performed at a particular location? Administrative convenience can be a rational basis supporting a law's constitutionality. 16B C.J.S. *Constitutional Law* § 1279 (2023) (citation omitted).

III. Sections 18 and 20 Protect Procedural Rights; They do not Create New Substantive Rights

Plaintiff has not stated a claim under Sections 1 or 2, and so her claims under Sections 18 and 20 must also fail.

Section 18 provides "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."[9] The Kansas Supreme Court has interpreted this to be a procedural right. Section 18 "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." *Schmeck v. City of Shawnee*, 231 Kan. 588, 594, 647 P.2d 1263, 1267 (1982) (internal quotation marks omitted). Section 18 protects access to the courts to assert claims. *Noel v. Menninger Found.*, 175 Kan. 751, 763–64, 267 P.2d 1263, 1267 (1982). It does not create any substantive rights. *OMI Holdings, Inc. v. Howell*, 864 F. Supp. 1046, 1050 (D. Kan. 1994), *aff'd*, 107 F.3d 21 (10th Cir. 1997); *Schmeck*, 231 Kan. at 594, 647 P.2d at 1267. If Plaintiff has failed to state a claim under another constitutional provision, "Section 18 . . . cannot be used to create one." *OMI*, 864 F. Supp. at 1050.[10]

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[9] Plaintiff has not alleged an injury to her person, reputation, or property, nor is she seeking damages for any such injury. Section 18 is therefore inapplicable.

[10] Courts have found that the due process provisions in the Fifth and Fourteenth Amendments of the Federal Constitution protect substantive as well as procedural rights. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 52 Kan. App. 2d 274, 283, 368 P.3d 667, 672 (2016), *aff'd*, 309 Kan. 610, 440 P.3d 461 (2019). These substantive due process rights are "squarely tied" to the word "liberty" in the Fourteenth

Likewise, Section 20 does not create substantive rights. Section 20 provides: "This enumeration of rights [in the Bill 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." The Court considered the effect of this section on state liquor prohibitions in *Manning v. Davis*, 166 Kan. 278, 201 P.2d 113 (1948). There, the Court observed political power rests with the people. *Manning*, 166 Kan. at 281, 201 P.2d at 115. Political power includes the ability to "pass legislation for the general welfare of the people" and to "exercise . . . police power." *Id.* Ordinarily, "the people exercise [these] powers through the legislature." *Id.* Section 20 does not, therefore, prevent the legislature from passing laws for the general welfare, including laws regulating cosmetology. Nor does it protect the right to practice cosmetology (or any other profession) free from government regulation.

Of course, the people, acting through the legislature, could not pass laws that infringe on constitutional rights. *See Williams v. City of Wichita*, 190 Kan. 317, 340, 374 P.2d 578, 595 (1962). But Plaintiff has not shown that the cosmetology licensing statutes violate her rights under Sections 1 or 2 and has not identified any other potential constitutional right. Therefore, she has not shown that the licensing statutes and regulations are in excess of legislative power in violation of Section 20.

Amendment ("...nor shall any State deprive any person of life, liberty, or property, without due process of law"). *Id.* at 285, 368 P.3d at 674. Section 18 does not contain the word "liberty," and therefore cannot be used to create substantive rights this way.

Finally, to the extent Plaintiff tries to locate this right in the catch-all unenumerated rights clause of Section 20, her argument also fails. As courts in other jurisdictions have noted,[11] unenumerated rights provisions "ensure[] only those rights deemed fundamental by history and tradition." *Filan v. Martin*, 38 Wash. App. 91, 97, 684 P.2d 769, 773 (1984). As discussed above, Plaintiff has failed to locate her asserted right in Kansas's history and tradition. Courts have also found unenumerated rights provisions, such as the Ninth Amendment, do not create rights themselves; they simply ensure that rights that were not expressed by the constitution will not later be denied because they were not expressed. *Charles v. Brown*, 495 F. Supp. 862, 863 (N.D. Ala. 1980). These rights must still "be found in the penumbras of the first eight amendments or in the liberty concept of the Fourteenth Amendment." *Id.* And, as discussed, Plaintiff has failed to state a liberty or other substantive due process basis for her asserted right. Nor has she located it in the "penumbra" of any other constitutional provision.

For these reasons, Plaintiff's complaint fails to invoke a fundamental right under Sections 18 or 20.

CONCLUSION

For these reasons, the court should dismiss the complaint under K.S.A. 60-212(b)(6).

[11] Nothing in the petition suggests a Kansas court would hold differently when deciding a claim under Section 20.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of January, 2024, the above document was filed with the Clerk of the Court via facsimile at (785) 251-4917, with a copy to all counsel of record via email.

/s/ Erin B. Gaide
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