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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: SN-2023-CV-300030
PII COMPLIANT

IN THE DISTRICT COURT
SHAWNEE COUNTY, KANSAS

Bryn Green, Plaintiff, v. Kansas State Board of Cosmetology, *et al.*, Defendants.	Case No. 2023-cv-300030 Division Three (Hon. Teresa L. Watson)

DEFENDANTS' RESPONSE
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff, Bryn Green, wants to earn an income by practicing sugaring hair removal. Under Kansas law, that would make her either a cosmetologist or an esthetician. Cosmetologists and estheticians have to receive an appropriate education, pass an examination, and obtain and maintain a license which subjects them to the disciplinary jurisdiction of Defendants, the Board of Cosmetology, as well as to regular health and sanitation inspections.

Plaintiff believes that sugaring is always safe, no matter what, so there is no reason for her to have a license or to work out of a licensed establishment subject to regular inspections. And since she does not want to perform any cosmetology service except sugaring, she thinks it would be unnecessary and irrational to have to be educated as a cosmetologist. She also thinks the schools are too expensive and far away. On those bases, she has alleged that the state laws, regulations, and policies which require her to go to school, pass a test, and get and keep a cosmetology license violate her fundamental right to earn an unregulated living, deprive her of the equal protection of the law, deprive her of due process of law and violate her unenumerated right to work without government interference.

These claims have no support in the Constitution and are without merit. No one has a fundamental right, or any other kind of right, to totally unregulated employment free from rational regulation. And there is no equal protection violation in treating one cosmetologist who wants to perform sugaring the same as any other cosmetologist who wants to perform one or more cosmetology techniques. Nor is

there any due process violation, as Plaintiff has not been denied a license or punished for working without one. Regardless of how Plaintiff frames her challenge to the law's command that she have a license to practice sugaring, the Court, following longstanding precedent, should uphold the law if it has any conceivable rational basis. Since the laws are rational, they should survive.

Though the undisputed facts described in Plaintiff's motion for summary judgment do not establish that sugaring is quite as safe as Plaintiff believes it is, the remaining undisputed facts provide a sufficient basis on which the Court can resolve the outstanding legal issues, deny Plaintiff's motion for summary judgment and rule in favor of Defendants' pending cross-motion for summary judgment.

RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

Defendants offer the following response to Plaintiff's statement of facts, in separately numbered paragraphs which correspond to Plaintiff's summary judgment brief:

1. Uncontroverted.
2. Uncontroverted.
3. Uncontroverted.
4. Uncontroverted.
5. Uncontroverted for purposes of this motion.
6. Uncontroverted for purposes of this motion.
7. Uncontroverted.
8. Uncontroverted.
9. Uncontroverted.
10. Uncontroverted.
11. Uncontroverted.

12. Uncontroverted.
13. Uncontroverted.
14. Uncontroverted.
15. Uncontroverted for purposes of this motion.
16. Uncontroverted.
17. Uncontroverted.
18. Uncontroverted.
19. Uncontroverted.
20. Uncontroverted.
21. Uncontroverted.
22. Uncontroverted.
23. Controverted. The factual and legal conclusion that "Sugaring paste is hygienic" is not supported by the quoted texts. It does not follow from the fact that sugaring paste is not able to support bacteria breeding that it cannot be contaminated in a manner that would render it unhygienic. Alternatively, this is an opinion or a legal conclusion that does not require a response.
24. Uncontroverted.
25. Uncontroverted.
26. Uncontroverted.
27. Uncontroverted.
28. Uncontroverted.
29. Controverted. This statement is contradicted by Plaintiff's own sources. While some sugaring textbooks say there is "no risk of burning or tearing the skin, not all agree. *See* Stip. Ex. 3, p. 25 (noting Spatula-Applied Sugaring Pros include "*Reduced* risk of burning;" Cons include "Risk of burning if the sugar paste is not tested for appropriate safe-to-use temperature prior to the application."). *See also* Plaint. MSJ, SOUF, No. 81 ("The paste can be warmed by hand, or in a digital sugar warmer").
30. Uncontroverted for purposes of this motion.

31. Uncontroverted.
32. Uncontroverted.
33. Uncontroverted.
34. Uncontroverted.
35. Controverted. The statement that hair "is removed in the direction of growth" is contradicted by the quoted material in Stip. Ex. 5 at 19, which states that "sugar paste is generally and preferably applied against the hair growth and removed in the direction of hair growth." The statement is also unsupported in that its passive grammatical construction does not explain who is removing the hair, or what prevents that unknown person from removing it opposite to the direction of growth.
36. Uncontroverted.
37. Uncontroverted.
38. Uncontroverted.
39. Uncontroverted.
40. Uncontroverted.
41. Controverted. The risk of burning depends on competent performance of the sugarer, and cannot be stated as a fact. *See* response No. 29.
42. Controverted. Defendants have moved for exclusion of Dr. Patel's expert report, which, if granted, would remove the authority for this statement of fact.
43. Controverted. Defendants have moved for exclusion of Dr. Patel's expert report, which, if granted, would remove the authority for this statement of fact. Additionally, this is a statement of opinion or a legal conclusion which does not require a response.
44. Controverted. The statement that sugaring is safe is an opinion or a legal conclusion which does not require a response.
45. Controverted. The statement is a legal conclusion which does not require a response. Additionally, it is supported only by Dr. Patel's report, which should be excluded. *See* Response to No. 42.

46. Controverted. This statement is supported only by Dr. Patel's report, which should be excluded. *See* Response to No. 42.
47. Controverted. This is an opinion or legal conclusion which does not require a response. Additionally, it is supported only by Dr. Patel's report, which should be excluded. *See* Response to No. 42.
48. Uncontroverted for purposes of this motion.
49. Controverted. This is an opinion or a legal conclusion which does not require a response. Additionally, it is supported only by Dr. Patel's report, which should be excluded. *See* Response to No. 42.
50. Controverted. Defendants have moved for exclusion of Dr. Patel's expert report, which, if granted, would remove the authority for this statement of fact.
51. Uncontroverted.
52. Uncontroverted.
53. Uncontroverted.
54. Uncontroverted.
55. Uncontroverted.
56. Uncontroverted.
57. Uncontroverted, to the extent it accurately states Dr. Patel's testimony.
58. Uncontroverted, to the extent it accurately states Dr. Patel's testimony.
59. Controverted. This statement is supported only by Dr. Patel's report, which should be excluded. *See* Response to No. 42. Further, it is contradicted by Ms. Hines' expert testimony. Hines Expert Report, p. 1, 4.
60. Uncontroverted.
61. Uncontroverted.
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64. Uncontroverted for purposes of this motion.
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81. Uncontroverted.

82. Uncontroverted.

83. Uncontroverted, to the extent that the statement represents Ms. Green's intentions as to how she would practice sugaring, if authorized.

84. Uncontroverted.

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101. Uncontroverted.

102. Uncontroverted.

103. Uncontroverted.

104. Uncontroverted.

105. Controverted. Ms. Green's declaration makes a conclusory statement that the cost of attending Hays Academy is prohibitively expensive, without providing any personal financial details to justify that statement. Further, "prohibitively expensive" is undefined. Alternatively, this statement represents an opinion or legal conclusion which does not require a response.

106. Uncontroverted for purposes of this motion.

107. Uncontroverted.

108. Uncontroverted.

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118. Uncontroverted for purposes of this motion.

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122. Uncontroverted.

123. Controverted. This statement is an opinion or a legal conclusion which does not require a response.

124. Uncontroverted.

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134. Uncontroverted.

135. Controverted. This statement is an opinion or a legal conclusion which does not require a response.

136. Uncontroverted.

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146. Uncontroverted.

147. Uncontroverted.

148. Controverted. Ms. Green's declaration makes a conclusory statement about a reasonable commuting distance. That conclusion is an opinion, not a fact, which does not require a response.

149. Uncontroverted.

150. Uncontroverted.

151. Uncontroverted.

152. Uncontroverted.

153. Controverted. Ms. Green's declaration makes a conclusory statement that the cost of attending Hays Academy is prohibitively expensive, without providing any personal financial details to justify that statement. Further, "prohibitively expensive" is undefined. Alternatively, this statement represents an opinion or legal conclusion which does not require a response.

154. Uncontroverted.

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164. Uncontroverted.

165. Uncontroverted.

166. Controverted. Ms. Green's declaration makes a conclusory statement that commuting is not viable. "Viable" generally means "capable of working." *Viable*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/viable. Ms. Green has not provided any factual support for her conclusion that she is not capable of

working a commute of any particular distance. Alternatively, this is an opinion or a legal conclusion that does not require a response.

167. Uncontroverted.

168. Uncontroverted.

169. Uncontroverted.

170. Uncontroverted.

171. Controverted. Ms. Green's declaration makes a conclusory statement that the cost of attending Bellus Academy is prohibitively expensive, without providing any personal financial details to justify that statement. Further, "prohibitively expensive" is undefined. Alternatively, this is an opinion or a legal conclusion that does not require a response.

172. Uncontroverted.

173. Uncontroverted.

174. Uncontroverted.

175. Uncontroverted.

176. Uncontroverted.

177. Uncontroverted.

178. Controverted. Ms. Hines did not testify that an individual who attended cosmetology or esthetics school and passed their licensure tests, but had not received hands-on training in sugaring, "and that's all they've done," would not be qualified to perform sugaring. She testified that they would not necessarily be qualified, a statement which leaves open the possibility that an individual will be qualified. *JSOF* ¶ cxliv; Pl. Ex. D, Hines Depo. 220:4—221:20. *See* Pl. MSJ, SOUF No. 162.

179. Uncontroverted.

180. Uncontroverted.

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216. Uncontroverted.

217. Uncontroverted.

218. Controverted. Ms. Hines did not testify that an individual who attended cosmetology or esthetics school and passed their licensure tests, but had not received hands-on training in sugaring, would not be qualified to perform sugaring. She testified that they would not necessarily be qualified, a statement which leaves open the possibility that an individual will be qualified. *JSOF* ¶ cxliv; Pl. Ex. D, Hines Depo. 220:4—221:20. *See* Pl. MSJ, SOUF No. 162.

219. Uncontroverted.

220. Uncontroverted for purposes of this motion.

221. Uncontroverted.

222. Uncontroverted.

223. Controverted. This statement is an opinion or a legal conclusion which does not require a response.

224. Controverted. This statement is an opinion or a legal conclusion which does not require a response.

225. Controverted. This statement is an opinion or a legal conclusion which does not require a response.

226. Controverted. This statement is an opinion or a legal conclusion which does not require a response.

227. Controverted. This statement is an opinion or a legal conclusion which does not require a response.

228. Uncontroverted.

229. Uncontroverted.

230. Uncontroverted for purposes of this motion.

231. Uncontroverted for purposes of this motion.

232. Uncontroverted for purposes of this motion.

233. Uncontroverted for purposes of this motion.

234. Uncontroverted for purposes of this motion.

235. Controverted. This statement is an opinion or a legal conclusion which does not require a response.

236. Uncontroverted.

237. Uncontroverted.

238. Uncontroverted.

239. Uncontroverted.

240. Uncontroverted.

241. Uncontroverted.

242. Uncontroverted.

243. Uncontroverted.

244. Uncontroverted.

245. Uncontroverted.

246. Uncontroverted.

247. Controverted. The Board representative was asked about the opinion of the Board as to whether sugaring presents a risk of burning. 112:5-7. A witness testifying on behalf of an organization pursuant to K.S.A. 60-230(b)(6) is qualified to testify to "information known or reasonably available to the organization." To the extent an organization is capable of holding any opinion, testimony about opinions is beyond the scope of 230(b)(6) testimony.

248. Uncontroverted for purposes of this motion.

249. Uncontroverted for purposes of this motion.

250. Uncontroverted for purposes of this motion.

251. Controverted. The Board representative was asked a question concerning health risks of sugaring. 128: 24-25,129:1-12. A witness testifying on behalf of an organization pursuant to K.S.A. 60-230(b)(6) is qualified to testify to "information known or reasonably available to the

organization." The witness is not authorized or qualified to give expert testimony as to the health risks of any procedure. *See also* 154:1-17.

252. Uncontroverted for purposes of this motion.

253. Uncontroverted.

254. Uncontroverted.

255. Uncontroverted.

256. Uncontroverted.

257. Uncontroverted.

258. Uncontroverted.

259. Uncontroverted.

260. Uncontroverted.

261. Controverted. The Board representative was asked: "Is the completion of 1,500 hours of instruction in cosmetology school necessary for the protection of public health when it comes to sugaring?" 146:19-22. A witness testifying on behalf of an organization pursuant to K.S.A. 60-230(b)(6) is qualified to testify to "information known or reasonably available to the organization." The question asked for an opinion or legal conclusion which is outside the scope of 230(b)(6) witness testimony.

262. Uncontroverted for purposes of this motion.

263. Controverted. A witness testifying on behalf of an organization pursuant to K.S.A. 60-230(b)(6) is qualified to testify to "information known or reasonably available to the organization." The witness was asked for an opinion or legal conclusion which is outside the scope of 230(b)(6) witness testimony.

264. Uncontroverted for purposes of this motion.

265. Uncontroverted, to the extent that the statement of facts in paragraph 265 accurately summarizes Dr. Patel's expert report.

266. Uncontroverted, to the extent that paragraph 266 accurately gives Dr. Patel's opinion.

267. Uncontroverted.

268. Uncontroverted.

269. Uncontroverted.

270. Uncontroverted.

271. Uncontroverted.

272. Uncontroverted for purposes of this motion.

273. Uncontroverted.

ARGUMENT

Plaintiff argues that her right to engage in commercial sugaring without meeting the licensing requirements in state law is fundamental under Section 1 of the Kansas Bill of Rights. She also argues that the licensing requirements violate her right to the equal protection of law under Section 2. And she asserts that the substantive due process and unenumerated rights allegedly protected by Sections 18 and 20 shield her from any licensing requirements as she practices unregulated sugaring. These arguments are not supported by the undisputed facts, not supported in law, and should be rejected.

A. The unqualified right to earn a living is not a fundamental right

Plaintiff alleges a violation of her natural rights under Section 1 of the Kansas Bill of Rights. And she asks the Court to apply strict scrutiny of the Kansas cosmetology licensing requirements. The Court should reject this argument and refuse to apply strict scrutiny.

Section 1 protects fundamental rights, which can include those "natural rights rooted in Kansas history and tradition." *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 644 (2019). A fundamental right is one expressly or implicitly guaranteed by the Constitution. The Supreme Court has recognized various implied

rights, including that of personal autonomy (*id.* at 667), voting, privacy, marriage, and travel, (*see Farely v. Engelken*, 241 Kan. 663, 670 (1987)), and the right to a parental relationship with a child (*see In the Interest of K.W.D. and E.L.D.*, 321 Kan. 100, 109 (2025)). But no court has held that earning income in an unregulated profession is a fundamental right.

Plaintiff asks this Court to recognize a new right, largely on the basis of the broad natural rights discussion in *Hodes*. But, contra Plaintiff, natural rights are not equivalent to fundamental rights in Kansas law. The Supreme Court recognized in *Hodes* that "the strict scrutiny test best protects those natural rights that we today hold to be fundamental"—it did not declare that every natural right is fundamental. 309 Kan. at 669. *See also id.* at 663 ("the natural right of personal autonomy is fundamental and thus requires applying strict scrutiny."). Of the natural rights, the Supreme Court has held only that the right to personal and bodily autonomy is a fundamental right. *See id.* at 667 (observing that, before *Hodes*, "there are no Kansas cases applying strict scrutiny to natural rights."). It does not follow that any right that can be characterized as a natural right is also a fundamental right under the Kansas Constitution.

There is no evidence that the right to practice unlicensed commercial sugaring is a fundamental right, deeply rooted in the history and tradition of Kansas citizens. In fact, Plaintiff cannot show that anyone has ever practiced commercial sugaring in this state without a license, let alone establish a tradition.

To the contrary, Kansas has required cosmetology licenses for professional hair removal, including sugaring, since 1927. *See* L. 1927, ch. 245, § 1.

Plaintiff cites *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 69 Kan. 297, 299, 76 P. 848, 849 (1904), for the proposition that the Kansas Supreme Court has endorsed an individual's "right to work where and for whom he will." Pl. MSJ at 46-47. But that case is inapposite: the court overturned a state law that prohibited terminating employees for belonging to a labor union; it held that the law at issue was not a police regulation and "does not affect the public welfare, health, safety, or morals of the community." *Coffeyville*, 69 Kan. at 848. Rather, the case concerned the freedom of contract. *See id.* at 849 ("Any act of the Legislature that would undertake to impose on an employer the obligation of keeping one in his service whom, for any reason, he does not desire, would be a denial of his constitutional right to make and terminate contracts and to acquire and hold property."). Not only did the *Coffeyville* court not make any specific statement about the fundamental right to earn a living, its holding on the freedom to contract has been superseded by Supreme Court rulings on labor law, the commerce clause, and civil rights. *See e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). It does not prove the existence of a fundamental right to unregulated sugaring.

When considering the history and tradition of unregulated economic activity, the Court should look to cases that are directly on point. For example, in *Dent v.*

West Virginia, 129 U.S. 114, 121 (1889), the Supreme Court held that "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition." The court was explicit that "such restrictions" encompassed the usual exercise of state police powers, which is why it upheld the challenged licensing regime. Because the Supreme Court in 1889 endorsed the use of police power to establish reasonable restrictions on the alleged right to earn a living, it is worth quoting at length:

> The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different states, *from time immemorial*, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. *The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity*.

Id. at 122 (emphasis added). *Dent* could not have endorsed the reasonable restrictions of a licensing regime if unregulated economic activity were a fundamental right.

In sum, *Dent* severely undermines Plaintiff's claim that unregulated economic activity is a fundamental right, deeply rooted in history and tradition. To the contrary, states in 1889 were known to have, "from time immemorial," the authority to regulate professions to protect the public against incompetence and fraud, to require a minimum education and skill in a profession, and to examine

applicants to assure that minimum standards of education, competence, and character were met. These are precisely the bases for today's regulation of cosmetology and esthetics.

Moreover, Plaintiff fails to establish that an unqualified right to work is a natural right in the first place. While she quotes extensively from a variety of eighteenth and nineteenth century political philosophers and politicians in support of her argument that the right to work is a natural right, not one of those theorists speaks directly to the issue in this case—i.e. to the specific limitations the government may place on economic activity through the exercise of its police power. While it is arguable that a general right to work is a natural right, not even the natural rights theorists define the right to work such that it would include totally unregulated employment in any field. Her argument is therefore fundamentally flawed.

Most of the cited natural rights theorists are not talking about the right to earn a living free from professional licensing requirements; they speak instead of "liberty," (the framers of the Kansas Constitution), international free trade (Franklin, Jefferson), a general right to work based on a classical liberal theory of property (Locke, Smith), or even freedom from slavery (Lincoln, Douglass).

When the theorists mention earning a living through labor or a trade, they may use the language of natural rights, but they do not use it in the sense that it is legally cognizable as a fundamental right. Instead, they refer to a non-fundamental

right that is subject to reasonable regulation. As the court noted in *Hodes* for example:

> Nor did Locke himself view inalienable rights as being totally outside the purview of regulation in an organized society. He viewed some regulation of natural rights as essential to civil society because there is no privilege to violate the rights of others. Two Treatises, Bk. II, §§ 87, 95. But that regulation cannot be so extensive or invasive that these natural rights are surrendered completely. Two Treatises, Bk. II, § 131 (a person forgoes natural rights "only with an intention ... to preserve himself his Liberty and Property").

Hodes, 309 Kan. at 661-62. Thus, even Locke believes in *some* regulation, so long as natural rights are not "surrendered completely."

The state's licensing requirements do not require Plaintiff to completely surrender her right to earn an honest living. She already earns a living, in another field, equivalent to what she expects to earn as a sugarer (albeit with less favorable working conditions). *See* Pl. MSJ, SOUF Nos. 4, 7, 8. And she has not established that the licensing requirements cannot be met, only that she finds them costly and inconvenient. *See, e.g., id.*, No. 105. Thus, her right to earn a living has not been completely surrendered, nor even her right to earn a living by sugaring, only her right to earn a living by totally unregulated sugaring. *See Risjord* 249 Kan. 497, 502 (1991) (holding that the fundamental right to travel was not affected by a ban on riding horses on public roads because "Appellees have available to them all of the various modes of travel such as by automobile, bicycle, motorcycle, airplane, bus, train, or foot—all subject, of course, to regulation for safety."); *See also Puritan-Bennett Corp. v. Richter*, 235 Kan. 251, 257 (1984) (holding restrictions to be

unreasonable only when they "would virtually bar appellant from the practice of his profession."); *accord Bongers v. Madrigal*, 1 Kan. App. 2d 198, 200 (1977).

Plaintiff herself summarizes the natural rights theorists as understanding that "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." Pl. MSJ at 41. *See also id.* at 42 ("That principle, that 'every Man has a Property in his own Person,' 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.") (quoting Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 221 (2003); *id.* at 43 ("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.") (emphasis added). The recurrence of the term "unreasonable interference" marks the alleged natural right to earn a living as a right that is, in any case, *not fundamental*. Fundamental rights receive strict scrutiny to ensure that a compelling government interest is advanced by narrowly tailored means—they cannot be reasonably infringed. On the other hand, a natural right that cannot be infringed *unreasonably* is essentially subject to the rational basis review that is appropriate for all economic regulation. In other words, our jurisprudence already incorporates the natural rights understanding of the eighteenth and nineteenth centuries, and does so by not treating the right to earn a living as a fundamental right. This Court should follow precedent and find that the right to earn a living is not a fundamental right.

It is important here to note that if the Court were to find that the right to earn an honest living free of regulation is a fundamental right, the consequences would be profound. As the Supreme Court observed in *Hodes*, "strict scrutiny… applies when a fundamental right is implicated." *Id*. at 663. And under strict scrutiny, "once a plaintiff proves an infringement [of a fundamental right]—regardless of degree—the government's action is presumed unconstitutional." *Id*. at 669. Thus, every state law which applies in any way to restrict—*regardless of degree*—anyone's right to perform any act that might earn them an income, would be presumed unlawful and the State would have the burden of showing the infringement was narrowly tailored in pursuit of a compelling government interest. Nearly every conceivable economic regulation on the books, therefore, would be presumptively unconstitutional.

Rather than judicially creating a new, previously unrecognized fundamental right that would upend Kansas law and government, the Court should follow precedent which clearly establishes that the state may impose reasonable restrictions on businesses. *See State ex rel. Schneider v. Liggett*, 223 Kan. 610, 614-15 (1978) ("[Sltates possess an inherent power to regulate certain businesses and professions for the good of society"). Consistent with that precedent, the State may enact regulations that are related to any conceivable state interest. *State v. Mueller*, 271 Kan. 897, 903 (2001). 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.

In sum, Plaintiff has failed to prove any Section 1 violation because she cannot show that the right to practice unregulated sugaring is fundamental under the Kansas Constitution. Kansas has never recognized a fundamental right to practice an occupation entirely free from regulation, or free of occupational licensing requirements—especially health and safety regulations. The Court should therefore rule in favor of Defendants on Plaintiff's claim that the cosmetology licensing laws are unconstitutional under Section 1.

B. Plaintiff is not subject to unequal treatment under the law

To sustain an equal protection violation under Section 2 of the Kansas Bill of Rights, Plaintiff must show that she belongs to a class of individuals which is treated differently from an indistinguishable class of other individuals. *See Villa v. Health Pol'y Auth.*, 296 Kan. 315, 324 (2013). "If there is no classification or disparate treatment, there is no equal protection violation." *Id*. Kansas courts treat the state's equal-protection guarantee as coextensive with the federal one. *See Rivera v. Schwab*, 315 Kan. 877, 894 (2022) (quotation omitted); *State v. Limon*, 280 Kan. 275, 283 (2005).

At the outset, it is necessary to note that cosmetology licensing is an economic regulation which can only violate the equal protection clause if it is found to target a suspect class or to infringe on a fundamental right. *See Blue v. McBride*, 252 Kan. 894, 915 (1993) ("Courts do not substitute their social and economic beliefs for the judgment of the legislative bodies and are not concerned with the wisdom, need, or appropriateness of legislation.") (quoting *Ferguson v. Skrupa,* 372 U.S. 726,

730 (1963)). Plaintiff has not argued that cosmetology licensing targets her on the basis of gender, sex, race, or religion, or any other suspect class. And she fails to establish that she has a fundamental right to unregulated commercial activity, via Section 1 of the Kansas Bill of Rights, as discussed above. Accordingly, if there is any allegedly unequal treatment under the law, it must be analyzed under rational basis review. And, as shown below, the licensing laws are rational.

And Plaintiff is not subject to any unequal treatment under the law. She has identified two classes of people to whom she believes she is similarly situated and who receive different legal treatment. These are people who sugar for free, rather than for compensation, and people who are perform braiding and threading—as well as others who perform work that is generally "not dangerous"—without a cosmetology license. Each class is easily distinguished from the class of prospective commercial sugarers who require a cosmetology license.

First, Plaintiff is not similarly situated to anyone who offers sugaring for free. The differences between Plaintiff, who wants to provide sugaring to the public for compensation, and others who provide sugaring for free, are too profound to support an equal protection allegation. Uncompensated sugarers work with a narrowly circumscribed circle of people who are known to each other: family and friends. No one provides sugaring to the public *pro bono*—including Plaintiff—and no one from the public is interested in receiving *pro bono* hair removal services.

Compensated sugarers, unlike *pro bono* sugarers, offer their services to strangers, and, if successful, draw their clientele from a wide range of people

unrelated to the sugarer and unrelated to each other. And commercial sugarers have a financial interest in offering their services to as many people as they can, in order to increase their income and defray business expenses. This distinguishes them from the hypothetical free sugarer, for whom one would have to postulate some other, extremely unusual and unlikely motivation for seeking a large clientele. The number and variety of clients increases the risks to the public of unsafe practice, of spreading disease from one client to the next, and from criminal and dishonest behavior by the sugarer. Further, it is reasonable to assume that free sugarers have a mutual relationship with their sugarees involving a minimum of trust and affection which mitigates risks and which cannot be assumed for those who offer their services to the public for compensation.

Second, commercial sugarers are not "arguably indistinguishable" from the other class hypothesized by Plaintiff: the class of people who do things which are "not dangerous" and do not require a cosmetology license (or any other license).[1] This class of "safe activities," according to Plaintiff, includes threaders and hair braiders, who have been exempted by statute from the definition of cosmetology.

To start, Plaintiff has not sufficiently alleged that she is similarly situated to all unlicensed practitioners of "safe" activities. She has only made this allegation

[1] The Court should reject the claim that sugaring is "not dangerous," as that claim is belied by the expert testimony of both Defendants' proffered expert, Nichole Hines (*see* Def. MSJ, Add. Facts, ¶¶ 6-25) and Plaintiff's proffered expert witness, Dr. Seema Patel, who recommends a more limited, but still substantial scheme of sugaring training and regulation necessary to protect the public health. See Stip. Facts, ¶¶ cl, clii, cliii; Patel deposition trans. Def. MJS, Ex. 4, 104:12-24; 105:13-23.

with respect to braiding and threading, and has failed to establish that there are no other "safe" activities which do not require a license. That alone should doom her equal protection class comparison.

In any case, Plaintiff has invented an arbitrary distinction between "safe" and "dangerous" practices that appears nowhere in the law. Plaintiff is not required to obtain a "dangerous activity license;" she is required to obtain a cosmetology license. Cosmetologists must be licensed to practice cosmetology; activities that are not properly defined as "cosmetology" do not require a license. Since sugaring is cosmetology, it requires a license. Stip. Facts. ¶ lv; K.S.A. 65-1901(d), (f).

And that is not the only way Plaintiff fails in her attempt to similarly situate herself with unregulated practitioners of "safe" activities. For instance, it does not make sense to compare classes of individuals based on only one of the possible justifications for licensing—"safety" is not the only rational justification for the licensing requirements, as discussed below. Only a comparable unlicensed activity that shared with sugaring every conceivable justification for licensing could support the argument that sugaring is similarly situated to that unregulated activity.

Aside from any conceivable motivation for licensing, there are other important differences between sugarers and hair braiders or threaders which show they are not similarly situated. For example, hair braiders and threaders are not totally unregulated, as Plaintiff would have this Court totally deregulate her own

sugaring business.[2] K.S.A. 65-1928 includes requirements that would not apply to Plaintiff if her petition were granted, including the requirement that braiders and threaders review a brochure, produced by the Kansas Department of Health and Environment, conduct a self-test and retain the brochure and test on the premises. And K.S.A. 65-1901(l)'s definition of threading limits the practice to "the face or the front of the neck." Plaintiff's practice of sugaring would be unregulated and unlimited. Plaintiff's equal protection allegations thus depend on treating sugaring like the "safe" version of threading which is practiced on the front of the neck, not like the "dangerous" version that might be practiced on the side of the neck. This distinction is untenable. A threader who intended to practice threading on the entire body, as Plaintiff intends to practice sugaring, would be subject to the same licensing requirements as Plaintiff.[3]

For these reasons, Plaintiff cannot show any similarly situated class on which to predicate her equal protection claim. The Court should accordingly rule in favor of Defendants.

C. Sections 18 and 20 do not provide any substantive rights

Section 18 of the Kansas Bill of Rights provides "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law,

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[2] See First Am. Pet. ¶ 224 (requesting declaratory relief that cosmetology licensing for sugaring is "unconstitutional under Kansas Constitution Bill of Rights Sections 1, 2, 18 and 20") and ¶ 229 (requesting injunctive relief "enjoining Defendants… from enforcing or directing the enforcement of the [Cosmetology Act and regulations]").

[3] Braiding is traditionally performed on the hair of the head only; there is no evidence that anyone has ever performed braiding on the genital area.

and justice administered without delay." This is a procedural right, which guarantees "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 (1982) (internal quotation marks omitted). Thus, section 18 protects access to the courts to assert claims. *Noel v. Menninger Found.*, 175 Kan. 751, 763-64 (1982). It does not create new substantive rights. *Schmeck*, 231 Kan. at 594; *OMI Holdings, Inc. v. Howell*, 864 F. Supp. 1046, 1050 (D. Kan. 1994), aff'd, 107 F.3d 21 (10th Cir. 1997).

Further, to plead a due process violation, Plaintiff must allege some injury caused by state action. This is why, for example, *Hodes*, which reviewed legislative prohibitions of certain abortion procedures, found a violation of a fundamental right, but no due process violation.[4] But Plaintiff has not plead or alleged any injury, only a violation of fundamental rights and of equal protection. There is therefore no basis for any due process violation.

However, even if Plaintiff were to allege a substantive due process claim, the "reasonableness" or "real and substantial relation" test would yield no different result than rational basis review under her Sections 1 and 2 claims. This is because "the test in determining the constitutionality of a statute under due process or equal protection weighs almost identical factors." *Peterson v. Garvey Elevators, Inc.*, 252 Kan. 976, 981 (1993). Thus, "in addressing whether [a statute] violates equal

[4] In fact, the only time *Hodes* even mentions Section 18 is to explain why Section 1 provides for judicially enforceable rights, despite not having a due process clause. *See Hodes*, 309 Kan. at 627.

protection, we implicitly will have determined if the statute violates due process." *Id.*

Ultimately, however, since Plaintiff has failed to state a claim under another constitutional provision, "Section 18… cannot be used to create one." *Id*. And because Plaintiff cannot establish any independent constitutional violation, Section 18 provides no independent basis for relief. The Court should therefore reject Plaintiff's Section 18 claims.

Just like Section 18, Section 20 does not protect any substantive right on which Plaintiff can rely. Section 20 is a "savings clause" ensuring that enumerated rights do not eliminate other traditional rights. It does not create standalone substantive rights or limit the Legislature's police power to regulate professions. *Manning v. Davis*, 166 Kan. 278 (1948). To the extent Plaintiff tries to locate a right to unregulated sugaring in the unenumerated rights clause of Section 20, her argument fails. As courts in other jurisdictions have noted, unenumerated rights provisions "ensure only those rights deemed fundamental by history and tradition." *Filan v. Martin*, 38 Wash. App. 91, 97 (1984). Since unlicensed sugaring is not a right established in Kansas's history and tradition under Section 1, it is also unprotected by Section 20. Kansas courts have never held that any rights other than fundamental rights are protected under Section 20.

And, as with Plaintiff's Section 18 claim, the best she can hope for from any Section 20 claim is another round of rational basis review. Since the challenged laws have a rational basis for purposes of Section 1 and 2 (see Section E, below),

they will survive an identical review for purposes of Section 20. The Court should therefore reject Plaintiff's Section 20 claims.

D. Both strict scrutiny and intermediate scrutiny are inappropriate for evaluating the licensing requirements

Because there is no fundamental right to practice any profession free of regulation, the cosmetology and esthetics licensing requirements cannot be subjected to strict scrutiny. See Section A, above. And because there is no equal protection violation, strict scrutiny is similarly not appropriate here. See Section B, above.

Plaintiff also requests intermediate scrutiny as an alternative to strict scrutiny, but there is no precedent for applying intermediate scrutiny to an economic regulation. This Court should not be the first to do so. There is no exception for "protectionist" economic regulation, and Plaintiff cites none. In Kansas, intermediate scrutiny has been applied only in a few, limited circumstances, involving "quasi-suspect" classes like gender. *See T.N.Y. ex rel. Z.H. v. E.Y.*, 51 Kan.App.2d 956, 965 (Ct. App. 2015). Just as Plaintiff has failed to show that unlicensed commercial sugarers are a suspect class, she has failed to show, or even allege, that they are a quasi-suspect class.

In support of the application of intermediate scrutiny, Plaintiff cites a handful of law review articles which essentially advocate for the use of judicial power to overturn the decisions of state legislatures with which the authors disagree. This is not the role of the court. And it is hard to square this naked appeal to judicial power with the classical liberal philosophies Plaintiff cites elsewhere in

her argument that unregulated sugaring is a fundamental right. Intermediate scrutiny is unmerited.

E. The licensing requirements have a rational basis

Unless a law targets a suspect class or burdens a fundamental right, an "equal protection claim is examined under the rational basis test." *Logsdon v. State*, 32 Kan.App. 2d 1, 5 (Ct. App. 2002). Under the rational basis test, a law must "bear some rational relationship to a legitimate state interest." *Hodes* 309 Kan. at 663. And it "will be upheld if it is reasonably related to a legitimate State interest." *Id.* This means the law "must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals." *Id*. The "party asserting the unconstitutionality of a statute under the rational basis standard has the burden to negate every conceivable basis which might support the classification." *Mudd v. Neosho Memorial Regional Medical Center*, 275 Kan. 187, 198 (2003). Accordingly, the Court must uphold the licensing laws if there is any conceivable basis which might support them. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

1. It is rational to require that commercial sugarers be licensed cosmetologists

Contrary to Plaintiff, finding a conceivable rational basis does not require the Court "to blindly defer" to the Board. Pl. MSJ p. 53.[5] And nothing here depends on

[5] Plaintiff cites *State v. Gillen*, 126 Kan. 368 (1928), in which the Kansas Supreme Court interpreted the licensing requirement, that an applicant must have practiced cosmetology for "a period of six months continuously and prior to the taking effect" of the Cosmetology Act, such that the six-month period need not have occurred in Kansas, as the Board of Cosmetology required. *Gillen* concerned statutory interpretation, not agency deference. In any case, Defendants have not argued

any slight differences between the federal and state rational basis tests.[6] The rational basis test is clear: the Court need only find a single, conceivable rational basis—whether or not the Board has asserted it—to uphold the licensing laws under rational basis review. Cosmetology and esthetics licensing, as applied to sugaring, has several conceivable rational bases. Any one of them would be sufficient to uphold the challenged laws under rational basis review.

First, licensing is a rational means to protect public health and safety. It is undisputed that safe sugaring requires training in sanitation, first aid, and proper handling of heated substances, similar to other forms of cosmetology: Plaintiff and her proffered expert witness both assert various sanitation measures they will take or believe should be taken by sugarers. *See* Stip. Facts, ¶¶ cl, clii, cliii; Patel Depo. (Pl. Ex. Z), 104:12-24, 105:13-23. Defendants' expert believes certain other, more demanding sanitation measures are appropriate. *See* Def. MSJ, Add. Facts, ¶¶ 18-20. That the experts' respective health and sanitation programs are not identical shows only that different people may have different views on which safety measures are appropriate, all of which are rational. All agree that some health and sanitation

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anywhere that the Court should defer to any agency, including the Board of Cosmetology.

[6] Further, some of the supposed differences in the federal and state versions of the rational basis test may be overstated. For example, Plaintiff cites *Tennessee Wine and Spirits Retailers Assoc. v. Thomas*, 588 U.S. 504 (2019) as a federal rational basis case, but it is not. It is a Commerce Clause case, in which a state law discriminated against nonresidents. The Supreme Court addressed whether the law's discriminatory residency requirement was justified under the terms of section 2 of the Twenty-First Amendment, which the court had held permits regulation of the sale of alcohol when the regulation is justified by health and safety.

measures are appropriate. Accordingly, state law requires licensees to have been broadly educated in cosmetology and esthetics, including courses in health and sanitation procedures applicable to a range of techniques. *See* K.S.A. 65-1905, 1903. That education is rationally applied to cosmetology and esthetics, the profession to which sugaring indisputably belongs. Pl. MSJ, SOUF No. 113.

Further, as a complement to a program of training and education, licensing facilitates enforcement of health and sanitation regulations. Licensees are required to work in a licensed establishment, subject to regular state health and safety inspections. *See* K.S.A. 65-1906, 1907. These inspections ensure that not only are cosmetologists and estheticians aware of proper sanitation techniques, but they actually practice them too.

Second, licensing facilitates disciplinary oversight of cosmetologists and estheticians by the Board of Cosmetology. Stip. Facts ¶¶ clxiv, clxv, clxvi; Def. MSJ, Add. Facts. ¶ 23; *see also* K.S.A. 65-1909. And licensing helps to regulate the moral character of the profession, protecting the public from individuals who have engaged in criminal behavior, dishonest or deceptive behavior, and incompetent or dangerous behavior (including drug and alcohol abuse). *Id.*

Third, licensing of sugaring is rational because it facilitates uniform standards for cosmetologists, in furtherance of a legitimate state interest in administrative efficiency. The practices encompassed by cosmetology and esthetics cohere together. *See, e.g.,* Green Depo. 23:16-22 (Def. MSJ Ex. 2) (wherein Plaintiff admits that she assumed sugaring was one of the disciplines included in the

definition of cosmetology). Where one form of hair removal is practiced, other forms are likely to be practiced as well. Conceivably, the Legislature could have required independent education, training and testing requirements for every profession and every technique included in the statutory definitions of cosmetology and esthetics—and the Board already offers not only a cosmetology license, but also licenses for narrower practice areas, like esthetics and nail technology, to accommodate aspiring licensees with narrower practice interests. Instead, it made a rationally justifiable decision to provide for a narrower range of licenses.

Although Plaintiff would prefer an even narrower license (or regulatory classification) encompassing education and testing requirements for a single cosmetology technique, her preference does not make it irrational to limit the number and type of cosmetology licenses that are available. *See Guardian Title Co. v. Bell*, 248 Kan. 146, 156 (1991) ("The legislature is not required to draw a perfect line and can always later refine the one it has drawn if circumstances warrant it."). The relative simplicity of the existing licensing requirements serves both students, who might otherwise be required to obtain scores of licenses in order to practice the full range of what is currently covered by a cosmetology license, as well as the state, which may not be able to continue relying on an all-volunteer board of cosmetology to set education and testing standards for all the various techniques currently encompassed by a cosmetology license. Such a proliferation of licenses would also require funding for additional Board staff to regulate establishments, conduct inspections, and handle a higher volume of license applications and renewals,

education and training certifications, and more complex disciplinary enforcement, all with specific standards narrowly tailored to every cosmetology technique.[7] By limiting the existing regulatory classifications to a manageable number of categories, the licensing requirements serve the interest of administrative efficiency.

2. It is rational to treat sugaring differently from braiding and threading

Plaintiff alleges that it is irrational to treat sugaring differently from braiding and threading, by requiring education and licensing for the one but not the other. But there are important differences between the techniques that rationalize different licensing requirements.

Unlike braiding and threading, sugaring is practiced on the entire body, including the genital area. *See* Hines Exp. Report, p. 1. The traditional practice of sugaring therefore makes it unlike threading and braiding. Braiding and threading never involve heat, chemicals, or sharp implements. And neither is performed in any sensitive or genital area. K.S.A. 65-1901(l). So they have a lower risk of burns, irritation, and communication of diseases. And because they are not performed in the genital area, there is a lower risk to the public when services are provided by an individual with poor moral character or a criminal history. On the other hand, sugaring can involve heated substances, has disposal requirements and other

[7] And there is no reason to believe that the specification of cosmetology techniques is not subject to even more minute delineation. For example, Plaintiff insists that she intends to practice the room-temperature, hand-applied variation of sugaring, not the warm, spatula-applied variation. A regulatory classification that treated all sugaring alike would be subject to a virtually identical critique as the one Plaintiff brings against the State for treating all cosmetologists alike.

sanitary risks, and often involves working on intimate body areas. *See* Def. MSJ, Add. Facts, ¶¶ 12-15.

Moreover, the legislative history supports treating these disciplines differently. Braiding and threading were exempted from the definition of cosmetology by law. Sugaring was not. Though the legislature passed a sugaring exemption bill, SB 434, by a majority vote, that bill was vetoed by the Governor, who specifically cited her concern that deregulating sugaring, as proposed in the bill, would negatively affect public health and safety. *See* Messages from the Governor: Senate Bill 434, April 12, 2024.[8] The Court should respect the legislative judgment that has kept sugaring a licensed activity.

3. Plaintiff fails to show that sugaring does not require education or licensing

Plaintiff offers a complex set of arguments to challenge the rationality of the state's licensing requirements. She argues that the law's education requirements are too burdensome, that the school curricula and board examination neglect sugaring to the point that it is irrational to require education and testing for sugaring, and that sugaring is safe and does not require any education, sanitation inspections, or disciplinary oversight of licensees. Defendants address these arguments in turn.

A.

To start, Plaintiff alleges that the law's education requirements are irrational because they would require her to attend either a cosmetology school in Hays,

[8] Available at https://www.sos.ks.gov/publications/sessionlaws/2024/Message-04-SB-434.html.

where she lives, or an esthetician school in Manhattan, which is inconveniently far from her home. Plus, she thinks the schools are too expensive.[9] The Court should ignore these arguments in its rational basis review, as they refer to aspects of receiving an education which have no connection to the challenged laws. Defendants do not operate schools, do not direct where schools must be located, and do not set tuition fees. *See, generally,* K.S.A. 65-1903.

Moreover, Plaintiff's arguments concerning the burden of the licensing requirements—that an education would cost too much and take too much time—are specific to her and cannot be generalized. Plaintiff once spent four years earning a bachelor's degree in agricultural business, Pl. MSJ SOUF No. 2, but now intends to abandon her agricultural employment, which has no educational or training requirements whatsoever. Yet she describes an alternative course of instruction in cosmetology, which she could complete in less than one year, as oppressive, unnecessary, and prohibitively expensive. Those adjectives do not describe the burden of a cosmetology degree in general—at least not in relation to any four-year university degree; they describe the subjective burden experienced by a Plaintiff who has already received a college education, started a career in a different field, and settled her family in Hays. In other words, Plaintiff confuses the general issue

[9] Plaintiff also characterizes these burdens as "harsh" and "oppressive," which Defendants understand as synonymous with irrational (or at least subsumed into the category of irrational).

of the rationality of the state's licensing requirements with specific issue of whether or not it would be a good idea for *her* to obtain a cosmetology license.[10]

In any case, the burdens are overstated. Plaintiff can attend a school in the city she lives in. Pl. MSJ SOUF Nos. 102-105. And while student loans are available, she has not even looked into them. Green Depo., 20:3-10. In short, she can attend a school and pay for it, but she would rather not. Under rational basis review, these are not burdens that would make the law's education requirements unconstitutional. Plaintiff would like the Court to engage in a different sort of review, effectively choosing her preferred alternative education and licensing approach over the existing statutory approach. But that defeats the entire purpose of rational basis review, which is generally to defer to legislative judgments about economic regulations and avoid judicial second-guessing of the ultimate wisdom of every law enacted by the other branches of government.[11]

B.

Next, Plaintiff argues that requiring cosmetology and esthetics education courses and licensing tests for sugaring is irrational because the courses and the tests do not provide much instruction in or testing of sugaring. But that does not

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[10] To the extent that Plaintiff's specific circumstances allegedly cause the licensing laws to affect her unequally relative to others—such as, for example, in her capacity as a mother of small children or as a resident of Hays—those circumstances must be addressed in an equal protection claim. But Plaintiff has not alleged any equal protection violation on those grounds.

[11] To be clear, "wisdom" is not the Constitutional standard, rationality is. As Thurgood Marshall is known to have remarked, "The Constitution does not prohibit legislatures from enacting stupid laws." *See New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (Stevens, J., concurring).

make it irrational to require a cosmetology education and license to practice sugaring.

Sugaring is a small part of the education program because it is a small part of the field of cosmetology. And test questions, which are designed to ask a few representative questions taken from the whole curriculum in order to measure an applicant's approximate mastery of the entire curriculum, similarly reflect the curriculum. *See* Pl. MSJ, SOUF Nos. 197 and 198. The amount of time devoted to sugaring instructions, and the number of sugaring questions on the average examination, therefore rationally reflect the situation of sugaring within the practice of cosmetology. It also reflects the market for sugaring and the general interests of students at the schools who decide how much class time to devote to sugaring instead of any other hair removal technique. *See* Markeley Depo., 39:18-21; 90:8-15.

Moreover, it is undisputed that sugaring fits squarely within the definition of cosmetology. So it would be irrational to require education and testing of cosmetology, generally—which Plaintiff does not dispute is appropriate for cosmetologists—only if it is irrational to require a single cosmetology license in order to practice any particular cosmetology technique. But a line has to be drawn somewhere. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315-16 (1993) ("Defining the class of persons subject to a regulatory requirement… inevitably requires that some persons who have an 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.") (internal quotations omitted). The Court should respect the line the Legislature has drawn.

It is worth noting, too, that Plaintiff's arguments about the rationality of licensing are in tension with her argument about the burdens of licensing. She argues that the education curricula do not sufficiently address sugaring, require instruction in sugaring techniques, or provide opportunities for hands-on instruction. Yet the easiest way to remedy the alleged deficiencies in sugaring-specific instruction would be to add time and expense to the cosmetology education—in other words, to make the curriculum even more burdensome to Plaintiff, as well as less relevant to other aspiring cosmetologists who *do not* intend to practice sugaring. This tension between covering every technique in depth while also limiting the overall burden of education on students illustrates the balancing of interests that is a prerogative of the Legislature, not the Judiciary. Here, again, the Court should not second-guess the judgment of the Legislature.

C.

Finally, Plaintiff argues that sugaring is safe and does not require any education, sanitation inspections, or disciplinary oversight of licensees. Plaintiff relies on two sources of information for this claim: cosmetology student textbooks and a family physician from Ohio. Neither one can establish that it is irrational to require sugarers to receive a cosmetology education in order to practice sugaring.

Plaintiff quotes extensively from the leading cosmetology and esthetics textbooks. But these textbooks do not and cannot establish that it is irrational to

require a cosmetology license to practice sugaring. To the contrary, the textbooks—*cosmetology* textbooks intended for *cosmetology* students studying to practice professional *cosmetology*—indisputably include sugaring as a cosmetology technique and locate sugaring squarely within the practice of cosmetology. If, as Plaintiff insists repeatedly, the textbooks are "reliable sources," then the Court should rely on them for the fact that sugaring is cosmetology, not some separate profession accidentally captured in an overly-broad statutory definition.

Further, as a source of authority, the textbooks themselves are open to the same criticism that Plaintiff makes of Defendants, their laws, and their expert witness. The books lack the same medical and scholarly background, and the same direct and peer-reviewed studies of efficacy, that Plaintiff believes are fatal to the state licensing requirements. For instance, there is no evidence that the authors of the textbook were trained in medicine, public health, etc. And there is no evidence that doctors, epidemiologists, etc., were consulted in the creation of the book. Plaintiff expects the word "textbook" to automatically encompass a vast range of scientific authority which is simply not in evidence. No one has studied, peer-reviewed, or checked in any way the authority of the textbook. No one should presume, therefore, that the books carry *more* authority than the Board of Cosmetology or a qualified cosmetology expert.

So what is in evidence with respect to the textbooks? They are pedagogical tools, designed to introduce students to a broad range of techniques and principles related to cosmetology. And they are reliable for pedagogical purposes, for use by

students who are receiving a broad education in cosmetology and esthetics. Interpreting the textbooks in their pedagogical context means that the text cannot be assumed to give students more information than is appropriate for a student of cosmetology, nor can it be read piecemeal, divorced from the rest of the curriculum of which it is a component. Yet this is precisely what Plaintiff does.

To use them as Plaintiff insists would be to transform them into all-purpose, authoritative and complete reference works, containing, like an eighteenth-century encyclopedia, "all the knowledge scattered on the surface of the earth."[12] This is plainly asking too much of them.[13]

It is also inappropriate to take individual sections of the textbooks out of their context. Plaintiff cites the sugaring-specific sections of the textbooks as though

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[12] Denis Diderot, *Encyclopedia 1772 (*Marvin Perry, et. al., *Sources of the Western Tradition*, vol. II, p. 43 (Boston: Houghton Mifflin, 1987)).

[13] The textbooks agree. They literally disclaim the authority Plaintiff foists on them. For example, the Milady textbooks provide the following "Notice to the Reader:"

> Publisher does not warrant or guarantee any of the products described herein or perform any independent analysis in connection with any of the product information contained herein. Publisher does not assume, and expressly disclaims, any obligation to obtain and include information other than that provided to it by the manufacturer. The reader is expressly warned to consider and adopt all safety precautions that might be indicated by the activities described herein and to avoid all potential hazards. By following the instructions contained herein, the reader willingly assumes all risks in connection with such instructions. The publisher makes no representations or warranties of any kind, including but not limited to, the warranties of fitness for particular purpose or merchantability, nor are any such representations implied with respect to the material set forth herein, and the publisher takes no responsibility with respect to such material.

Stip. Ex. 3, 0003. (Milady 12); Stip. Ex. 5, 0003; see also Stip Ex. 7, 0003 (Pivot Point).

the rest of the curriculum is irrelevant, to prove that the rest of the curriculum is irrelevant. But that begs the question. The textbook is intended to be used as part of a complete curriculum—there is no evidence that each topic section in the book is intended to be used as a self-contained authority on any subject.

Ultimately, when understood on their own terms, the textbooks do not say quite what Plaintiff wants them to say. When the textbooks describe the technique of sugaring, they clearly describe the characteristics of the technique *when performed properly and safely*. They presume an otherwise educated and experienced sugarer. Thus, they ignore all the many health and sanitation risks that may result from improper and unsafe technique. And they ignore the variations in sugaring technique (hot and cold, hand-applied or spatula), which add additional risks.

For example, Plaintiff states that "Sugaring is hygienic because the paste is only ever used on one customer." Pl. MSJ, SOUF No. 18.b. Obviously, nothing stops an incompetent or careless sugarer from reusing the paste. The textbook's account is therefore incomplete. So too with Plaintiff's claim that sugaring is removed in the direction of the hair growth, which is less irritating than waxing. Pl. MSJ, SOUF No. 27. In truth, sugaring paste is removed in the direction the sugarer chooses, and an incompetent sugarer may not make the same choices as a competent one. Plaintiff makes the same error describing the risk of burning. *See* Pl. MSJ, SOUF No. 18.e. When warm sugaring requires heating the sugar paste, an incompetent or careless sugarer may overheat all or some portion of the paste. *Compare* Pla. MSJ,

SOUF No. 19 ("Depending on the technique, applying the sugaring paste does not require the use of heat…") *with id.* 41 ("Because of the application temperature, there is no risk of burning.") and 81 ("The paste can be warmed by hand, or in a digital sugar warmer"). These alleged benefits are the safety benefits of competent, trained sugarers, not sugaring itself. If anything, they illustrate that sugarers should receive a comprehensive education in cosmetology.

As her second source of authority for the claim that sugaring is safe, Plaintiff cites to someone who has no authority in the subject of sugaring or professional licensing or the state of Kansas: Dr. Seema Patel, family physician from Ohio and Plaintiff's proffered expert witness. As explained more fully in Defendants' motion to exclude the testimony of Dr. Patel, Dr. Patel is not an expert in sugaring, is not a licensed or trained cosmetologist, has not studied sugaring except to perform some internet searches and a limited, flawed review of mostly irrelevant literature, and does not prescribe sugaring or hair removal generally because hair removal is virtually never medically necessary. Given the serious defects in Dr. Patel's claimed expertise, Defendants ask the Court to rule on the motion to exclude her testimony prior to relying on any fact in this motion that comes from her expert report or deposition testimony.

Nonetheless, despite her criticisms of Defendants' licensing regime, it is worth noting that even Dr. Patel does not believe sugaring is safe enough to go entirely unregulated. In her expert report, she recommended that all sugarers, prior to offering sugaring services to the public, an individual should attend a course on

sugaring techniques, and a course on basic hygiene and sanitation, where they learn aseptic technique, appropriate hand washing, work place and equipment sanitation, and appropriate universal precautions. Moreover, practicing sugarists should list all sugar paste ingredients and the date the sugar paste was created, use disposable items for each client, learn who are high risk clients and how to counsel them on the risks of sugaring, including risks related to recent or current use of antibiotics, use of hormonal birth control, use of over-the-counter retinoids, such as Accutane, surgery, chemotherapy, or radiation, pregnancy, and ensure that the sugaring area has appropriate sanitation, running water, lighting and cleaning standards. *See* Stip. Facts, ¶¶ cl, clii, cliii; Patel Depo. 104:12-24, 105:13-23.

None of Dr. Patel's recommendations would magically turn into legal requirements if Plaintiff is granted summary judgement. So not only does Plaintiff's own expert belie, or at least seriously complicate, her claim that sugaring is "safe," her lengthy list of recommendations illustrates the sophisticated line-drawing that is characteristic of legislative judgment. It shows, once again, the wisdom of deferring to the Legislature.

In sum, Plaintiff fails in her attempt to show that it is irrational to require sugarers to obtain a cosmetology education. She has not met her burden of establishing that the challenged laws are unconstitutional. The Court should grant summary judgment in favor of Defendants on the claim that the challenged laws lack a rational basis.

SCOPE OF RELIEF

Plaintiff has moved the Court to declare the entire "occupational licensing regime" to be unconstitutional—including any law, regulation, or informal policy or practice. This request is far too broad, is not justified by the facts and is unsupported by Plaintiff's pleadings and arguments. The Court should ensure that any relief granted follows from its factual and legal findings. Such limited relief is, moreover, supported by the severance clause in K.S.A. 65-1910.

For example, the details of Defendants' approved curricula and testing protocols are not contained in the statute Plaintiff asks the Court to declare unconstitutional. Those details are granted in statute to the discretion of the Board of Cosmetology. *See* K.S.A. 65-1905; 65-1907 ("It shall be the duty of the board to determine the number of hours and practice work required of students in each subject of cosmetology, nail technology, esthetics and electrology taught in a licensed school"). The statutes require only that schools follow a Board-approved curriculum and that applicants be examined. *Id*. Those statutes, therefore, should only be declared unconstitutional if the Court finds that it is irrational to require a prospective sugarer to receive *any* education, or take *any* examination. Plaintiff has not argued, and the Court should not find, that there is no education and no test that could be rationally applied to prospective sugarers.

Furthermore, even if the Court were to find that it is irrational to subject sugarers to the existing education and testing requirements, it does not follow that

the other licensing requirements in the Cosmetology Act are automatically unconstitutional. These practitioner requirements include:

- obtaining a license (K.S.A. 65-1902(b)(1);
- meeting the non-educational requirements of a license-holder, including being at least 17 years of age and having a high-school education (K.S.A. 65-1905);
- working in a licensed facility (K.S.A. 65-1902(b)(11) and displaying a license (K.S.A. 65-1906);
- being subject to the Board's disciplinary authority (K.S.A. 65-1908; 65-1909).

The Court should not declare that these aspects of the "government's occupational licensing regime" are unconstitutional unless it finds that Plaintiff has sufficiently plead and provided arguments in favor of the unconstitutionality of those provisions, and unless it finds that those provisions are not severable from the provisions which have been specifically challenged. Since Plaintiff has not advanced arguments explaining why these provisions are not severable, the Court should treat severability arguments as waived and limit any holding of unconstitutionality to the specific statutory provisions, if any, which it finds violate Plaintiff's rights.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Defendants, enter judgment in favor of all Defendants on all claims, dismiss Plaintiff's petition with prejudice, and award such further relief as the Court deems appropriate.

Respectfully submitted,

/s/ James Rodriguez
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CERTIFICATE OF SERVICE

I certify that on January 23, 2025, I authorized the electronic filing of the foregoing with the Clerk of the Court using the e-flex system, which will send notifications of this filing to the e-mail addresses on the electronic mail notice list.

/s/ James Rodriguez
James Rodriguez