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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' REPLY
TO PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff has failed to overcome the presumption of constitutionality that applies to the state's cosmetology and esthetics licensing laws. The challenged laws are rational and reasonable, and easily satisfy the constitutional standard for economic regulation under rational basis review. Plaintiff's insistence that sugaring is "safe" is inaccurate, but also misses the more important point: sugaring is cosmetology. The practice of cosmetology involves risks to the public health and the state has acted rationally to mitigate that risk through its licensing regime. The education and testing requirements, which Plaintiff believes are inappropriate for sugarers, are clearly appropriate for individuals who want to become licensed cosmetologists.

Plaintiff has not demonstrated the irrationality of the licensing regime. Nor has she established that any heightened scrutiny should be applied to the challenged laws—they do not affect a fundamental right or involve any suspect classification. No matter how Plaintiff frames "the right to earn a living free from unreasonable interference"—whether as a violation of a natural right under Sections 1 and 20 of the Bill of Rights, an equal protection violation under Section 2, a substantive due process violation under Section 18—the law should stand as long as it is found to have a rational basis.

Because the undisputed facts in this case establish the rationality of the licensing regime**, s**ummary judgment should be granted to Defendants on all counts.

REPLY TO PLAINTIFF'S RESPONSE TO STATEMENT OF FACTS

Plaintiff responded with extensive objections to Defendants' Statement of Undisputed Facts.[1] To the extent a specific reply is necessary, it is indicated in the body of the argument.

Some of the facts presented by the parties remain in dispute. In general, Plaintiff disputes those of Defendants' facts which indicate that the practice of commercial sugaring entails risks to the health and safety of the public. Plaintiff maintains that sugaring—or rather, the cold, hand-applied method of sugaring that she would use exclusively—is categorically safe, without qualification. This dispute over the safety of sugaring is intertwined with the parties' dispute about the admissibility of their respective expert witnesses. But the dispute over the safety of sugaring would likely remain, whether any or all of the parties' expert witnesses are excluded.

Outside of the parties' dispute over the relative safety of sugaring, however, the parties substantially agree on the remaining facts (although they obviously disagree about how to interpret them and about the legal conclusions that should be drawn from them). Accordingly, the Court can and should grant summary judgment on all the legal issues raised in Plaintiff's complaint which can be resolved by reference to the remaining undisputed facts. If any of the issues in the parties' respective motions for summary judgment cannot be

[1] Plaintiff also responded with a list of her own undisputed facts, which apparently duplicate the facts she provided in her own Motion for Summary Judgment. Defendants' responses to those facts can be found in Defendants' Response (Jan. 23, 2026).

resolved without also resolving the disputed factual question concerning the relative safety of sugaring, the parties should proceed to trial on that narrow factual issue only.

But a trial is unnecessary. The Court can and should grant summary judgment to Defendants even in the absence of a resolution of the single disputed category of fact—the relative safety of sugaring. The public health risk of sugaring constitutes merely one of several rational bases that would establish the constitutionality of the challenged licensing laws. And summary judgment may be granted to Defendants if the Court decides that the appropriate level of scrutiny is rational basis review, and that there is another rational basis by which the licensing laws can be justified. Summary judgment in favor of Plaintiffs, however, cannot be granted as long as the safety of sugaring remains a disputed fact and the licensing laws are subject to rational basis review—unless the Court accepts that the challenged laws are irrational even if Defendants' facts concerning safety and public health were accepted.

ARGUMENT

A. Strict scrutiny is appropriate only for review of infringements of fundamental rights, and sugaring is not a fundamental right

There are no fundamental rights at issue in this case. Strict scrutiny is appropriate only for an infringement of fundamental rights. Accordingly, strict scrutiny under Section 1 has never been applied to an economic regulation or infringement of a natural right except in the abortion context under *Hodes*. *See Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 667 (2019) (observing that, before

Hodes, "there are no Kansas cases applying strict scrutiny to natural rights."). That is because the "right to work" is not a fundamental right protected by Section 1, and infringements of the right to work—of which there are many in the law—are not subjected to strict scrutiny.

The better interpretation of Plaintiff's historical record of statements from natural rights theorists is that the natural right to earn a living *free from unreasonable interference* has already been incorporated into Kansas constitutional law by subjecting economic regulations to rational basis review.[2]

Plaintiff has attempted to expand the Supreme Court's holding in *Hodes*—that the right to personal autonomy includes the right of a woman to terminate her pregnancy—to cover every activity that can be associated with natural rights. But *Hodes* is not so expansive. Following a similar discussion of the historical sources that Plaintiff includes in her brief, the Supreme Court held the following:

> At the core of the natural rights of liberty and the pursuit of happiness is the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This ability enables decision-making about issues that affect one's physical health, family formation, and family life. Each of us has the right to make self-defining and self-governing decisions *about these matters*.

[2] It's far from clear how strict scrutiny—which requires a law to be narrowly tailored in furtherance of a legitimate government interest—could even be coherently employed to analyze a right to earn a living free of *unreasonable* interference, since that right may, by its own terms, be infringed by any *reasonable* regulation. The application of strict scrutiny to that right would suggest that even an *unreasonable* interference with the right to earn a living may still be valid if it is narrowly tailored.

Hodes, 309 Kan. at 646 (emphasis added). *Hodes* is an important decision with respect to the recognition of a fundamental right to make "self-defining and self-governing decisions" about "physical health, family formation, and family life." But there is nothing in *Hodes* that indicates the court considered expanding its conception of fundamental rights to include the right to earn a living.

B. There is no substantive due process violation

Plaintiff suggests that *Hodes* opened up a new career for Section 18 as an alternative protector of substantive due process rights. That misreads *Hodes*. There, the court noted that while the U.S. Constitution's 14th Amendment protected fundamental rights and due process in the same provision—"nor shall any State deprive any person of life, liberty or property, without due process of law"—Kansas's Bill of Rights split those functions into separate sections. Section 1 protects "equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," while Section 18 provides for a "remedy by due course of law, and justice administered without delay." *Hodes* understood this separation to mean that the two sections, together, accomplish what the 14th Amendment's Due Process Clause accomplishes on its own: they protect natural rights and provide a mechanism for the judiciary to enforce them. *See Hodes*, 309 Kan. at 627-28.

Hodes, however, did not change the general rule that "if a constitutional claim is covered by a specific constitutional provision… the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of due process." *Johnson v. Kansas Department of Revenue*, 58 Kan.App.2d 431, 446

(Ct. App. 2020). No substantive due process analysis is necessary here, therefore, where the claim simply repeats Plaintiff's claim for the protection of natural rights that is the purview of Section 1.

Plaintiff's argument that there is a "real and substantial relation" test that is separate from the rational basis test is also untenable. In most cases, those tests are synonymous. *See Baxter Springs v. Bryant*, 226 Kan. 383 (1979) (a rational basis case using the term "rational" and "real and substantial relation" interchangeably). In sum, Plaintiff's Section 18 claim duplicates the Section 1 claim and calls for rational basis review.

C. A law that limits commercial sugaring to licensed cosmetologists does not violate equal protection

Requiring sugarers to be licensed cosmetologist does not subject anyone to unequal treatment under the law.[3] Sugarers are cosmetologists, and have to be licensed as such. Everyone who practices cosmetology is treated the same. Plaintiff's only response is that she is not a cosmetologist: "[c]osmetologists and estheticians engage in many beauty practices; sugarers engage in only one." Pl. Resp. at 71. But that is simply not true. The law defines cosmetology and esthetics such that any person who provides *any one* of the defined services qualifies as a cosmetologist or esthetician. *See* K.S.A. 65-1901(d) and (f). And Plaintiff has not established that other licensed cosmetologists or estheticians always, often, or ever, provide more than one beauty practice. The reality is that licensed cosmetologists and

[3] Sugarers may be estheticians or cosmetologists. For the purposes of this and Defendants' other briefing, cosmetology and esthetics may be treated as interchangeable unless otherwise noted.

estheticians *may* engage in as many or as few beauty practices as they choose; licensed cosmetologists and estheticians who practice only sugaring may as well. They are not subject to different treatment.

Plaintiff's response largely ignores the arguments Defendants make concerning the other variants of Plaintiff's equal protection claim. Defendants explained why it is rational to treat commercial sugaring differently from private and *pro bono* sugaring—they have different risks. *See* Def. Resp. at 24-25. And Plaintiff similarly ignores Defendants' arguments that it does not make sense to compare classes of dangerous and non-dangerous activities. *See* Def. MSJ at 20; Def. Resp. at 24-25. Plaintiff thus wholly fails to make out a claim under Section 2's equal protection clause. Nonetheless, even if Plaintiff can allege an equal protection violation, it should be analyzed under rational basis review because there is no suspect or even quasi-suspect classification. *See Barrett ex rel; Barrett V. Unified Sch. Dist. No. 259*, 272 Kan. 250, 256 (2000).

D. Section 20's reservation of unenumerated rights also leads to rational basis review

Plaintiff again erroneously argues that Section 20 sets up a parallel standard of review that protects unenumerated natural rights. It does not. Section 1 protects unenumerated rights too. *See Hodes*, 309 Kan. at 631 (noting the "broad wording of Kansas' section 1, with its unenumerated natural rights guarantee"); *id.* at 636 ("section 1 or similar provisions describe a wide range of judicially enforceable [unenumerated] rights."). Section 20 may be useful for interpreting Section 1, but it does not independently protect any rights.

Plaintiff mischaracterizes Defendants' response to her Section 20 claim. Defendants do not claim that the right to earn a living does not exist because it is unenumerated. Either she is claiming a right to earn a living free from any regulation—which does not exist—or else she is claiming a right to earn a living free only from unreasonable interference, which should be analyzed no differently from her identical Section 1 claim. There is no reason to think that any unenumerated right which is retained by the people under Section 20, and which is not impaired or denied by the enumeration of rights in the other sections, would not be subject to the same tiered-review analysis of a Section 1 right. Defendants agree with Plaintiff that unenumerated rights should not be treated worse than enumerated rights—if a non-fundamental enumerated right receives rational basis review, then so should a non-fundamental unenumerated right. Like Plaintiff's Section 18 claim, the best she can hope for from a Section 20 claim is rational basis review.

E. Rational basis review is appropriate; the licensing laws are rational

In her response, Plaintiff proposes four or five different standards of review. Only one makes sense. Whether the Court is analyzing Plaintiff's claim as an infringement of a non-fundamental right under Section 1, or as unequal treatment under the law without any suspect classification under Section 2, or as a substantive due process violation involving a non-fundamental right under Section 18, or as a violation of a non-fundamental, unenumerated right under Section 20, the end result is the same: if the regulation has a rational basis, it is constitutional.

Next, Plaintiff has objected to the alleged lack of evidence in the record which establishes a rational basis for the licensing regime. This objection is meritless, and shows a misunderstanding of rational basis review. Under rational basis review,

> a State ... has no obligation to produce evidence to sustain the rationality of a statutory classification… A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data… Therefore, a rational basis will be found for a classification *if any state of facts reasonably may be conceived to justify it*.

Christopher v. State ex rel. Kansas Juvenile Justice Auth., 36 Kan.App.2d 697, 709 (Kan. App. 2006) (cleaned up) (emphasis added).

1. *The licensing regime has several rational bases*

The rational basis standard is easily satisfied here. *See generally* Def. MSJ at 21-26; Def. Resp. at 31-45. Kansas cosmetologists must be educated and licensed as cosmetologists. Sugarers are cosmetologists and therefore must be educated and licensed as cosmetologists. The cosmetology education ensures that all licensees are trained in broadly applicable techniques of sanitation, blood exposure and disease control. To obtain a license, applicants are tested on their general knowledge of the cosmetology curriculum materials. Once they begin their practice, the licensing laws ensure that they perform their work in licensed and regularly inspected facilities, that they are held accountable for incompetent practice, and that their personal conduct meets the minimum standards for licensees—they may not advertise their services in a deceptive or misleading manner, they may not abuse drugs or alcohol, and they may lose their license if they commit a disqualifying felony. In theory, the Legislature could require the Board to create individualized licenses—each with its

own program of education, testing, personal qualifications, and facility standards—for every conceivable technique that falls within the umbrella of cosmetology. But implementing such a licensing regime would require substantial trade-offs relative to the existing regime, including increased costs to the state to developing and maintaining standards for, as well as enforcing, scores of different licenses, and confusion among the public and licensees as to what procedures are authorized by which licenses. The legislature made a rational choice to establish licenses for a few broad categories of commercial practices, even though those categories will sometimes be broader than the practice interests of the licensees.

Plaintiff's arguments against these rational bases are unpersuasive, and often self-contradictory.[4] Plaintiff insists, repeatedly, that sugaring is "safe." But that characterization is belied by her claim that a program of sanitary and blood spill precautions—the one that threaders and braiders are *supposed* to follow, and possibly do follow—is still necessary to protect public health. *See* Pl. Resp. p. 53. The KDHE pamphlet will not be required of sugarers if summary judgment is granted to Plaintiff. And there is no evidence that requiring threaders and braiders to read a pamphlet is effective at protecting the public health either—the requirement cannot be enforced against them, as they are unlicensed. And they

[4] Plaintiff also objects to Defendants' arguments about the rational bases of the licensing laws, which were not cited in Defendants' response to interrogatories requesting information about the government interests which the licensing laws support. *See, e.g.,* Pl. Resp. at 59. Those objections are meritless. Under rational basis review, the Court looks for a rational basis as a matter of law. A rational basis is not an affirmative defense that must be disclosed to Plaintiff.

have received no training outside of the pamphlet, so some may not be able to follow the pamphlet's instructions.

Plaintiff's proffered expert, Dr. Seema Patel, recommends an even more extensive system of training and education, which will also not be implemented if Plaintiff is granted summary judgment. *See* Stip. Facts, ¶. cl, clii, cliii; Patel depo. 104:12-24, 105:13-23. Moreover, Plaintiff herself has received some minimal training in sugaring, and plans to seek further training Stip. Facts ¶¶ xxiii, xxiv. That is a responsible choice, but if her motion for summary judgment is granted, there will be no requirement that any other sugarer in the state receive any training, and no system of enforcement in place to protect the public from incompetent sugarers.

Plaintiff claims that "this case isn't challenging the government's ability to conduct inspections." Pl. Resp. at 57. But it clearly is—her requested relief asks the Court to declare the entire licensing regime unconstitutional. That includes inspections of sugarers and their facilities. And Plaintiff cannot explain why sugarers should be inspected if "sugaring is safe" or *how* they would be inspected if they were unregulated, as Plaintiff moves this Court to make them.

Plaintiff's response to Defendants' administrative efficiency argument admits that there will be no regulation of sugaring if she wins this case: "There is no logical reason… to think less regulation makes the government's oversight harder." Pl. Resp. at 59. That may be true, but while removing sugaring from all government oversight may answer Defendants' arguments about efficiency, it contradicts

Plaintiff's other arguments that sugaring can be practiced safely with regular inspections. If the only way Plaintiff can rebut administrative efficiency as a rational basis is to assume zero government oversight of sugarers, then the safety of sugaring has to be analyzed under those conditions too—no training of any kind, no inspections, no enforcement. And Plaintiff has not made the case that sugaring is safe under those conditions.

Defendants have referred to the various ways in which the licensing requirements ensure a minimum of good moral character, for example, by prohibiting deceptive advertising practices, negligence, substance abuse, and felonious conduct. Not one of these requirements of licensees would apply to sugarers if Plaintiff is granted summary judgment. Plaintiff has responded only to the felony review component of the licensing requirements, and then only to argue that the felony review is not effective—not that it is not rational.

Finally, Plaintiff frames the Governor's veto as a separate rational basis for licensing. But that misunderstands Defendants' argument. The Governor's veto is not mentioned as a rational basis, nor especially to "immunize" the law from review. Rather, it illustrates the separation of powers concerns that underlie courts' decision to engage in rational basis review. *See Blue v. McBride*, 252 Kan. 894 ("Courts can longer sit as a 'super legislature' and throw out laws they feel may be unwise, improvident or inappropriate."); *Christopher*, 36 Kan.App.2d at 710 ("Courts may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."). By second-guessing the wisdom of every

legislative determination, the judiciary would play the role of super-legislature. The Governor's veto is merely a reminder of the separation of powers issue at play: she exercised her veto power and provided her reasoning. If the Court grants summary judgment to Plaintiff, it means that the Governor's veto was irrationally exercised.

2. *Plaintiff's cases do not support the claim that sugaring must be deregulated*

Plaintiff cites a number of cases in other states where "a beauty practice" was considered unconstitutional. The Court should not rely on those cases to determine the rational basis of Kansas's licensing requirements. The facts of those cases matter. And each of the cases relies on other facts about other "beauty practices" than sugaring. They all address either makeup artistry—*Waugh v. Nev. State Bd. of Cosmetology,* 36 F. Supp. 3d 991 (D. Nev. 2014)—threading—*Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69 (Tex. 2015)—or braiding—*Cornwell v. Hamilton,* 80 F. Supp. 2d 1101 (S.D. Cal. 1999)); *Clayton v. Steinagel,* 885 F. Supp. 2d 1212 (D. Utah 2012); *Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W. D. Tex. 2015); *Thiam v. Bureau of Pro. & Occupational Affs.*, 302 A.3d 1271, 2023 WL 4715186 (Pa. Commw. Ct. 2023)—not sugaring.

At best, these cases might support the conclusion that it is constitutionally irrational to require a cosmetology license for braiding and threading. But Kansas has already made that determination in the Legislature. Not one of the states which found cosmetology licensing for braiding or threading to be unconstitutional has made the same determination with respect to sugaring. The Court can and should analyze the rationality of the cosmetology licensing requirements on their own

terms, without reference to what other states have decided in other cases concerning other, not closely related beauty practices**.**

3. Plaintiff's protectionism arguments are wrong

Plaintiff alleges that the sugaring licensing regime is protectionist. That characterization is inaccurate, or irrelevant, for several reasons. First, protectionist regulations are not unconstitutional. Many laws are protectionist in the sense that they limit the available pool of labor (by making it more expensive) in order to improve working conditions for the employed. Minimum wage laws and collective bargaining protections are obvious examples, but other workplace regulations, like laws regulating occupational safety, family leave, workers' compensation, and civil rights also raise costs and limit employment opportunities, with the goal of ensuring decent and safe employment for employees. This is not some protectionist conspiracy, it is the essence of economic regulation.

Second, Plaintiff misrepresents the purpose of the Board to characterize it as a protectionist organization, beginning by misrepresenting the provisions of the Board's establishing statute. The Board's statutory purpose is clear: "to *regulate* the practice of the profession of cosmetology in Kansas." K.S.A. 74-2701(a) (emphasis added). K.S.A. 74-2701(a) establishes the Board and provides that the membership shall be composed of two licensed cosmetologists, one licensed tattoo artist or body piercer, one licensed operator of tanning facility, one school license-holder, and two members who "shall represent the general public." This composition ensures a representation of perspectives, including that of the public. It's not a lobbying

group, and makers and retailers of cosmetic supplies and equipment, who might directly profit from favorable Board regulation, are prohibited from serving on the Board. *Id*.

Although Plaintiff quotes Nichole Hines' belief that the Board should represent practitioners and the regulated industry (Pl. Resp. p. 44), she expressed that opinion while describing her frustration that the Board itself, as a corporate body, *disagreed* with her opinion. *See* Hine Depo. 139:15-25, 140:11-23. That quotation is not an accurate basis on which to characterize the purpose of the Board.

Finally, the allegation of protectionism does not even make sense here. Every license-holder in the state—whom Plaintiff labels a beneficiary of a protectionist scheme—faced substantially the same burdens of education, testing, licensing, and inspections that are alleged to be a bar to others. The only barrier to entry is to become qualified according to the statutes and regulations. Thousands have done so, and nothing stops anyone else who wants to join them.

F. Plaintiff's response indicates that several of her claims have been withdrawn

Plaintiff's complaint requested an injunction "prohibiting enforcement of the licensing regime at issue in this case." Pet. ¶ 161.[5] Yet now, in her response, Plaintiff asserts that she

[5] *See also id*. ¶¶ 224-227 (variously requesting declaratory judgment that "Defendants' occupational licensing regime involving sugaring, as described throughout and above, is unconstitutional").

> has not challenged sanitation or inspection requirements, or claimed that the state may not enact any regulations regarding sugaring. Plaintiff's claim is that education and testing required to obtain a license are arbitrary, unreasonable, oppressive, protectionist, irrational, and not appropriately tailored to the practice of sugaring—and therefore unconstitutional.

Pl. Resp. ¶ 21.[6] The sanitation and inspection requirements apply only to licensees, or to licensed establishments which may employ only licensees. If Plaintiff is not challenging these provisions, and is instead challenging *only* the education and testing that are required to obtain a license, then even if Plaintiff were successful, she would still be required to obtain a license and be subject to existing sanitation regulations, as well as the facilities requirements and inspections, just without graduating from cosmetology school or taking an exam.

If, however, Plaintiff does *not* intend to withdraw her challenge to the entire "licensing regime" as it is applied to sugaring, then her statements that she is not challenging the sanitation regulations, facilities requirements, regular inspections, and Board disciplinary jurisdiction are false. And those aspects of the licensing regime—which appeared to be challenged in the complaint—should be considered as rational bases which support the licensing regime.

On the other hand, if Plaintiff is challenging *only* the education and testing requirements as applied to sugaring, the Court should bear in mind that the details of the education and testing are set by Board regulation, not statute. Since Plaintiff

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[6] *See also* Pl. Resp. at 57. ("The government next suggests that requiring Ms. Green to complete 1,500 or 1,000 of irrelevant and prohibitively expensive coursework, and requiring her to pass two irrelevant licensing exams, is rational because 'licensees are required to work in a licensed establishment … subject to inspections.' … This case isn't challenging the government's ability to conduct inspections.").

has not made a facial challenge to the law's requirement that *any* education and *any* test should be required of a licensee who intends to practice only cold, hand-applied sugaring, any relief should be limited to the specific regulations and testing practices which have been challenged, rather than the statutes.

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
James Rodriguez (KS Bar #29172)
Office of Attorney General Kris W. Kobach
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Tel.: (785) 368-8197
Jay.Rodriguez@ag.ks.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on February 6, 2026, 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