UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NDIOBA NIANG and TAMEKA STIGERS, Plaintiffs, v. EMILY CARROLL, et al., Defendants.	)	Civil Case No. 4:14-cv-01100-JMB

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs Ndioba (Joba) Niang and Tameka Stigers are African-style hair braiders who wish to continue braiding hair for a living without having to needlessly spend thousands of hours and thousands of dollars to obtain an irrelevant cosmetology or barber license. Plaintiffs' constitutional claims in this case are supported by a mountain of evidence consisting largely of direct admissions by the Board, its expert witnesses, and individual Board member Defendants.[1] All three previous federal rational-basis challenges to regulating African-style hair braiders as cosmetologists or barbers—two of which were nearly identical to this case—were successful.[2] But one would never know any of that from reading Defendants' Memorandum in Support of Motion for Summary Judgment (ECF No. 48) ("Defs.' Mem.")

Rather than address adverse precedent, the Board simply ignores existing on-point case law. The Board's motion fails to cite directly applicable federal precedent and instead relies almost exclusively on broad, general discussions of the deference often given to economic regulations in U.S. Supreme Court cases. The Board's memorandum fails to mention a single federal case involving a challenge to occupational licensing, much less the three federal cases successfully challenging the application of cosmetology/barber licensing to African hair braiders identified by Plaintiffs in their Memorandum In Support of Plaintiffs' Motion for Summary Judgment ("Pls.' MSJ Mem.") at 5-6.

The Board's motion also fails to address the Board's numerous admissions and other evidence that directly contradict its legal positions. For example, the Board's entire motion relies on the Board's

[1] Unless otherwise specified, this brief will refer to Defendants collectively as "the Board."

[2] *See Brantley v. Kuntz*, 2015 U.S. Dist. LEXIS 680 at *16, *22 (W.D. Tex. 2015) (striking down application of Texas's barber school regulations to schools that exclusively teach African hair braiding); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1215-16 (D. Utah 2012) (striking down application of Utah's cosmetology licensing regime to African hair braiders); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1118-19 (S.D. Cal. 1999) (striking down application of California's cosmetology licensing regime to African hair braiders).

erroneous assumption that African-style hair braiding is not a separate occupation from cosmetology or barbering. *See* Defs.' Mem. 3-9, 14-15, 18-21. However, the Board itself has admitted that cosmetology and barbering are different occupations from African-style hair braiding. Pls.' Statement Uncontrov. Material Facts ("SUMF") (ECF No. 49-1) ¶ 56. Substantial additional uncontroverted evidence also demonstrates that African-style hair braiding is a separate and distinct occupation from cosmetology or barbering. *Id.* ¶¶ 51-66. And all three of the previous federal challenges to regulating braiders as cosmetologists/barbers found the same.

Although the Board claims that licensing African-style hair braiders as cosmetologists or barbers is justified by the Board's interest in protecting public health and safety, the Board admits that completing the cosmetology/barber licensing requirements fails to ensure that one is competent to safely perform African-style braiding. *Id.* ¶¶ 333-37, 341-46. That failure is in part because, as the Board's expert on hair braiding testified, "one does not learn [African-style hair braiding] in school." *Id.* ¶ 292. As the Board also admits, not a single hour of instruction is required to be spent on hair braiding under the mandatory cosmetology/barber curriculum, *id.* ¶¶ 188-93, 242, and ~10% or less of the time is dedicated to general topics that the Board claims are even broadly relevant to hair braiding. *See id.* ¶¶ 209-13. In addition, the Board's licensing exams either do not test, or inadequately test, hair braiding. *Id.* ¶¶ 301-05, 320-47. The Board thus acknowledges that the cosmetology/barber licensing schemes "are not designed to prepare and test one's preparation to engage in only African-style hair braiding." Defs.' Mem. 15.

Finally, the Board further errs in mistaking Plaintiffs' claim under the Privileges **or** Immunities Clause of the 14th Amendment as a claim under the Privileges **and** Immunities Clause of Article IV, Section 2. Independent of the Board's confusion, however, Plaintiffs recognize that their Privileges or Immunities claim is foreclosed by the *Slaughter-House Cases*, 83 U.S. 36 (1873), and simply wish to preserve it for appeal.

Rather than furthering any health and safety or consumer protection interests, applying Missouri's cosmetology/barber licensing requirements to African-style braiders merely creates arbitrary and onerous burdens that impede hair braiders like Joba Niang and Tameka Stigers from pursuing their right to earn a living and pursue the American dream. For these reasons, the Board's Motion for Summary Judgment should be denied and Plaintiffs' Motion for Summary Judgment should be granted.

ARGUMENT

Below, Plaintiffs identify four key reasons why the Board's Motion for Summary Judgment is unsupported by the law or the evidence. First, the Board ignores relevant precedent, including the three previous federal rational-basis cases that have struck down the application of cosmetology/barber regulations to African-style hair braiders. Second, Plaintiffs should prevail on their equal protection claim because African-style hair braiding is a separate occupation from cosmetology or barbering, and cannot rationally be licensed as though it is the same. Third, Plaintiffs should prevail on their substantive due process claim because licensing African-style hair braiders as cosmetologists or barbers is not rationally related to any legitimate state interest. Finally, Plaintiffs note that they have not filed a claim under the Privileges and Immunities Clause of Article IV, Section 2, but they do wish to preserve for appeal their claim under the Privileges or Immunities Clause of the Fourteenth Amendment.

I. The Board Fails to Cite Relevant Precedent, Including Directly On-Point Adverse Decisions, and Thus The Legal Issues It Claims Are Presented by this Case Are Actually Questions That Have Already Been Resolved.

As Plaintiffs explain below, the Board completely ignores relevant precedent, including directly on-point adverse decisions by three federal district courts that have considered very similar challenges to this case (two of which are nearly identical).[3] As a result, the Board fails to realize that the legal

[3] In addition, although the Board cites the standard for summary judgment, the Board largely treats this summary judgment motion as though it were a motion to dismiss, citing little evidence and repeatedly arguing that Plaintiffs have failed to state a claim upon which relief may be granted, as if it were a motion under Rule 12(b)(6). *See* Defs.' Mem. 18-20, 23. In fact, the Board only cites evidence a

issues it claims are presented by this case have already been answered by the federal courts. The Court should decline the Board's invitation to decide this case in such a cavalier fashion, and should instead follow the guidance provided by previous federal cases that resolved precisely these same issues.

A. The Board fails to cite directly relevant precedent on occupational licensing, including three very similar cases involving successful rational-basis challenges by African-style hair braiders to cosmetology/barber regulations.

The Board's memorandum ignores relevant (and often adverse) case law, including U.S. Supreme Court precedent and directly on-point cases from other federal district courts.

First, the Board fails to acknowledge the U.S. Supreme Court's key holding on the constitutionality of occupational licensing: "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Board of Bar Exam'rs*, 353 U.S. 232, 238-39 (1957).[4] Indeed, the occupational qualifications required by a state must have a "rational connection with the applicant's fitness or capacity to practice [his or her occupation]." *Id.* at 239; *see also Clayton*, 885 F. Supp. 2d at 1214. Moreover, as two federal district courts have found in applying this test, "[w]hile the fit between [the state's] interest and the means employed need not be perfect, it must be reasonable. 'There must be some congruity between the means employed and the stated end or the test would be a nullity.' *Clayton*, 885 F. Supp. 2d at 1214 (citing *Cornwell*, 80 F. Supp. 2d at 1118). For this

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handful of times, and only on two pages of its brief. *See* Defs.' Mem. 12-13; *see also id.* at 9, 20 (referencing testimony without citation). Although the Board prepared a Statement of Uncontroverted Material Facts (ECF No. 48-1), it never cites any of these allegedly uncontroverted facts in its memorandum. Instead, the Board repeatedly references and cites to the Complaint. Defs.' Mem. 2, 8, 18-20, 23. The Board may of course limit the scope of its motion for summary judgment in any way it pleases, but Plaintiffs want to call the Court's attention to the unusually limited and narrow basis on which the Board seeks summary judgment.

[4] The only occupational-licensing case the Board even mentions is a century-old state case that merely establishes that it is within the state's police power to regulate barbering to prevent the spread of contagious diseases. Defs.' Mem. 8 (quoting *Ex parte Lucas*, 61 S.W. 218, 221 (Mo. banc. 1901)).

reason, a state's interests in occupational licensing cannot be satisfied by treating two distinct occupations as the same because "this results in standards of qualification that have no rational connection to a person's actual profession." *Id.* (citing *Cornwell*, 80 F. Supp. 2d at 1103).

Instead, the Board incorrectly asserts that "the constitutionality of such [occupational licensing] requirements is unquestioned." Defs.' Mem. 18. But even under rational-basis review, occupational licensing regulations cannot simply be placed beyond question—particularly when they are applied to people who are practicing entirely different occupations. As Plaintiffs explained in the memorandum supporting their motion for summary judgment, see Pls.' MSJ Mem. 3-5, rational-basis review is a meaningful standard of review where courts consider actual evidence and not merely a rubber stamp of legislative or executive will, as it is sometimes portrayed. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[A] hypothetical rationale, even post hoc, cannot be fantasy, and [] the State Board's chosen means must rationally relate to the state interests it articulates.").

Second, the Board fails to note that three federal courts have considered similar rational-basis challenges to regulations of African-style hair braiders as cosmetologists or barbers, and all three struck down the challenged regulations as applied to African-style hair braiders. *See, e.g.*, *Brantley v. Kuntz*, 2015 U.S. Dist. LEXIS 680 at *16 (W.D. Tex. 2015); *Clayton*, 885 F. Supp. 2d at 1215-16; *Cornwell*, 80 F. Supp. 2d at 1118-19. Two of these cases—*Clayton* and *Cornwell*—were nearly identical to the present case, as both involved challenges by African-style hair braider plaintiffs to a state's efforts to license African-style hair braiders as cosmetologists/barbers.[5]

In *Cornwell*, the court analyzed the scope of services provided by African-style hair braider Dr. JoAnne Cornwell, who developed the Sisterlocks hair-locking system (the same system used by Tameka), compared to those services provided by cosmetologists. 80 F. Supp. 2d at 1107. Finding that

[5] In their memorandum supporting summary judgment, Plaintiffs identified the factors analyzed by the *Clayton* and *Cornwell* courts, Pls.' MSJ Mem. 6-7, and examined the evidence in the present case through that lens. *See* Pls.' MSJ Mem. 9-28.

Cornwell did not do facials, makeup, manicures, pedicures, haircuts, or hair removal, the court determined that Cornwell's activities were "minimal in scope compared to the activities of a cosmetologist" and thus were "of such a distinguishable nature, she [could not] reasonably be classified as a cosmetologist as it [was] defined and regulated." *Id.* at 1108. The court in *Clayton* reached the same conclusion in comparing African hair braiding services, similar to those provided by Joba, to Utah's licensing requirements. 885 F. Supp. 2d at 1215. The court found the cosmetology licensing regime irrational when applied to the hair braider's activities because her services were "distinct and limited when compared to cosmetologists." *Id.* She did not "use chemicals, shampoo, cut or color hair, or do facials, shaves, esthetics, or nails." *Id.* at 1215-16. The factual circumstances of the plaintiffs in these two directly on-point cases are thus nearly identical to those of Tameka and Joba in this case. *See* Pls.' MSJ Mem. 11-12, Pls.' SUMF ¶¶ 4-5, 29-30, 34-38, 74-87, 93, 100-107. The Board fails to mention either case or to distinguish those cases from the case before this Court. It also fails to mention *Brantley*, which struck down the application of laws and regulations governing barber schools to schools that only offer instruction in African-style hair braiding. 2015 U.S. Dist. LEXIS 680 at *16.

In all three cases, the courts considered the evidence presented by the African-style hair braider plaintiffs in considering whether the government's cosmetology/barber regulations bore a rational relationship to the purported state interests in protecting the public from hair braiders. *See Brantley*, 2015 U.S. Dist. LEXIS 680 at *16 ("Plaintiffs have successfully refuted every purported rational basis for the [challenged requirements] articulated by Defendants, and the Court can discern no other rational bases for the [challenged requirements] in light of the facts at hand."); *Clayton*, 885 F. Supp. 2d at 1214-16 (noting that "the facts of this particular case must be considered" and listing "[a] number of facts [that] are helpful in determining whether there is a rational relationship between the State's interest in public health and safety and the State's licensing regulations."); *Cornwell*, 80 F. Supp. 2d at 1106-18

(reviewing substantial evidence and finding it determinative in evaluating the rationality of applying the licensing regulations at issue to African hair braiders).

Thus, when the Board claims that "it is not irrational for the legislature to require that [African-style hair braiders] have such a foundation [in general hair care] before they can offer hair care services to the public for compensation," Defs.' Mem. 15, and that "the constitutionality of such requirements is unquestioned," *id.* at 18, it does so without the guidance of federal courts that have already considered this same issue and rejected the Board's position. This Court should look to the guidance provided by the Supreme Court as well as federal district courts in three other jurisdictions.

B. The legal issues identified by the Board have already been resolved by federal courts.

The Board identifies two issues presented by this case. *See* Defs.' Mem. 2. With respect to the first question, there is little dispute that Missouri has legitimate state interests in regulating "the professions relating to the styling of hair, including African Style Hair Braiding." *Id.* But this case is not about that. It is about whether it is rational for Missouri to further those interests by licensing African-style hair braiders as one of two occupations, cosmetologists or barbers, both of which are distinct from African-style hair braiders.

In its second issue presented, the Board asks whether requiring any person "engaged in hair care professions to hold a license as either a cosmetologist or barber," regardless of what his or her occupation entails, is rationally related to the state's interests. The answer to this question must be "no." Even under the rational-basis test, entire industries cannot simply be lumped together and licensed as a monolithic occupation; there must be a "rational connection with the applicant's fitness or capacity to practice" his or her actual occupation. *Schware*, 353 U.S. at 239. It would be similarly absurd to have a "financial occupation license" for everyone involved in the financial industry, from mortgage brokers to certified public accountants to investment advisors. Indeed, as three federal courts have held when considering whether these exact occupations should be treated the same, it is irrational

to "squeeze 'two professions into a single, identical mold,' by treating hair braiders—who perform a very distinct set of services—as if they were cosmetologists." *Clayton*, 885 F. Supp. 2d at 1215 (citing *Cornwell*, 80 F. Supp. 2d at 1103); *see also Brantley*, 2015 U.S. Dist. LEXIS 680 at *22. Because the occupations of cosmetology and barbering are so different from the occupation of African-style hair braiding, as explained below, and because both the mandatory education and testing for licensed cosmetologists and barbers fails to adequately prepare someone to safely perform African-style hair braiding—as the Board itself admits—it is not rational to require everyone in the "hair care professions" to obtain a license as a cosmetologist or barber.

II. African-Style Hair Braiding Is Not the Practice of Cosmetology or Barbering, and Requiring Plaintiffs to Comply With Missouri's Cosmetology/Barber Licensing Scheme Violates Equal Protection.

The Board maintains that requiring African-style hair braiders to comply with Missouri's cosmetology/barbering licensing regimes does not violate Plaintiffs' right to equal protection under the Fourteenth Amendment. Defs.' Mem. 18-21. To support its position, the Board argues that African-style hair braiding is the practice of cosmetology/barbering, and that requiring African-style hair braiders to comply with Missouri's cosmetology/barbering licensing regimes is rationally related to a legitimate government interest. Defs.' Mem. 19. But a mountain of evidence, including the Board's own admissions, directly contradicts the Board's legal position.

The Board ignores the multitude of evidence obtained during the discovery process—including admissions from the Board itself, the Board's expert witnesses, and individual Defendants—that African-style braiding is not the same as cosmetology or barbering.[6] *See* Pls.' MSJ Mem. 10-11; Pls.' SUMF ¶¶ 51-53, 55-66. The Board further ignores extensive testimony provided by the Board itself, the Board's expert witnesses, and individual Defendants that reveal the almost complete absence of any

[6] As noted *supra*, the Board also ignores the conclusions reached by the three federal courts to have addressed this issue, all of which determined that African-style hair braiding is distinct from the practices of cosmetology and barbering.

training or testing on African-style hair braiding under the cosmetology/barber licensing regimes. *See* Pls.' MSJ Mem. 12-13, 21-26; Pls.' SUMF ¶¶ 181-93, 209-20, 285-98, 301-25. In fact, this disparity prompted the Board to repeatedly endorse and vote for a separate license for African-style hair braiders containing substantially fewer training hours. *See* Pls.' MSJ Mem. 14; Pls.' SUMF ¶¶ 197-208.

Below, Plaintiffs first explain why African-style hair braiding is a distinct occupation from cosmetology and barbering with its own distinct cultural and historical roots. Next, Plaintiffs show that there is a fundamental mismatch between what is taught and tested under Missouri's cosmetology/barber licensing scheme and the occupation of African-style hair braiding. Because of this disconnect between the occupation being licensed and the actual licensing requirements, application of Missouri's cosmetology/barber licensing scheme to African-style hair braiders like Joba and Tameka violates their rights to equal protection under the law.

A. African-style hair braiding is not the practice of cosmetology or barbering, and is a distinct occupation based upon its unique historical and cultural roots.

The Board claims that African-style hair braiding is the practice of cosmetology and barbering. Defs.' Mem. 3-5. To support this assertion, the Board relies on two arguments. First, the Board claims that African-style hair braiding is by definition the practice of cosmetology or barbering according to Missouri's statutory code. *Id.* 3-4. Second, because African-style hair braiding shares some broad similarities with cosmetology and barbering, the Board claims that African-style hair braiding is only a specialty within cosmetology/barbering. *Id.* 4-5. The first argument is irrelevant, while the evidence directly contradicts the second argument.

1. It does not matter whether African-style hair braiding is included in Missouri's statutory definitions of "cosmetology" or "barbering."

The Board first argues that the statutory definitions of cosmetology/barbering conclusively determine that African-style hair braiding is included in these two occupations. *Id.* at 3-4. But this argument misses the point entirely. Plaintiffs do not bring a challenge to the statutory definitions of

cosmetology or barbering, nor to the Board's interpretation of those terms, but instead bring a constitutional challenge to the requirement that African-style hair braiders obtain a cosmetology/barber license in order to practice a separate occupation. The only question this Court must consider is whether it is rational to subject African-style hair braiders to Missouri's cosmetology/barber licensing scheme given the facts in the record about the differences between these occupations and the absence of African-style hair braiding from what is taught or tested in order to get a cosmetology/barber license, and not whether Missouri's statutory definitions (or the Board's interpretation of those statutes) are correct. As the court noted in *Cornwell*, "[e]ven if [plaintiff] were defined to be a cosmetologist, the licensing regimen would be irrational as applied to her because of her limited range of activities." 80 F. Supp. 2d at 1108. Thus, the rationality of applying the cosmetology/barber licensing scheme to African-style hair braiders does not depend on interpreting statutory definitions.

2. The uncontroverted evidence in this case conclusively demonstrates that African-style hair braiding is a distinct occupation from cosmetology and barbering.

The Board also claims that broad commonalities between African-style hair braiding and cosmetology/barbering support its claim that African-style hair braiding is not a distinct occupation. According to the Board, African-style hair braiding is "by its very nature" a form of hair care within the practice of cosmetology/barbering because each occupation purportedly involves "manipulation of hair for aesthetic effect," is performed in salons using "similar" tools, and has "health and safety consequences." Defs.' Mem. 4. At the same time, the Board maintains that barbering and cosmetology are separate occupations despite the substantial overlap between the two. Pls.' SUMF ¶¶ 314-15. Of course, once one generalizes enough, **any** two things can be defined in similar terms: milkshakes and lava, for example, are both liquid substances found at extreme temperatures that often appeal to children. The Board's gross generalizations fail to support its position that African-style hair braiding is not a distinct occupation, particularly given the record evidence that distinguishes African-style hair braiding from cosmetology and barbering, and any specialty therein. *Compare* Defs.' Mem. 3-4, 19, *with*

Pls.' MSJ Mem. 10-12, *and* Pls.' SUMF ¶¶ 51-66, 75-76, 80, 94-96, 100, 317-18. In fact, the Board's legal position that African-style hair braiding is simply a specialty within cosmetology/barbering contradicts its own admission that African-style hair braiding is a separate occupation. Pls.' SUMF ¶ 56; *see also* Pls. SUMF ¶¶ 317-18. The evidence demonstrates that African-style hair braiding is a distinct occupation because: (1) it provides a much narrower set of services than either cosmetology or barbering; (2) there is very little overlap between those who offer cosmetology/barbering services and those who offer African-style hair braiding services; (3) African-style hair braiding has a unique history and culture that dramatically departs from cosmetology/barbering and is thus mostly provided by a certain community for a certain community; and (4) it is distinct even from other forms of braiding.

i. African-style hair braiders offer a much more limited scope of service than cosmetologists or barbers, and do not use dangerous chemicals.

First, African-style hair braiders provide a scope of service that is much more limited than the wide array of services provided by barbers and cosmetologists. Pls.' MSJ Mem. 10-11; Pls.' SUMF ¶¶ 52-53, 62-64. Unlike cosmetology/barbering, African-style hair braiding is a form of natural hair care that eschews the use of chemicals focusing instead on complementing the natural texture and shape of the hair. Pls.' SUMF ¶¶ 50-52, 70. Thus, African-style hair braiders use different techniques, methods, and simple tools to provide very different services for the customer than the customer would typically receive from a cosmetologist or barber. *Id.* ¶ 64; *see, e.g.*, *id.* ¶¶ 76, 80, 96, 100.

These same differences led the *Clayton* and *Cornwell* courts to conclude that African-style hair braiding was a distinct occupation and that it would be unreasonable to treat it as though it were the same as the practices of cosmetology or barbering. *Clayton*, 885 F. Supp. 2d at 1215 ("The scope of [plaintiff's] activities are distinct and limited when compared to cosmetologists. She does not use chemicals, shampoo, cut or color hair, or do facials, shaves, esthetics, or nails."); *Cornwell*, 80 F. Supp. 2d at 1108 ("On the basis of this evidence, the Court finds that [plaintiff's African-style hair braiding] activities are minimal in scope compared to the activities of a cosmetologist. Because her activities are

of such a distinguishable nature, she cannot reasonably be classified as a cosmetologist as it is defined and regulated presently.").

ii. The minimal overlap between those who offer African-style braiding services and those who offer cosmetology/barber services demonstrates that the occupations are distinct.

Few African-style hair braiders are cosmetologists/barbers, and most cosmetologists/barbers do not provide African-style hair braiding services. Pls.' SUMF ¶¶ 57-62, 195, 292, 294-96, 298. In fact, there is minimal overlap between African-style hair braiding and the practice of cosmetology/barbering. *See, e.g.*, *id.* ¶ 59 (Board inspector testifying that of 1,200 cosmetology salons in her area, which covers 1/3 of St. Louis, only one or two also provide African-style hair braiding services); ¶ 60 (Board's cosmetology expert admits that she does not know any other licensed cosmetologists currently in practice who offer African-style hair braiding.). At the same time, most African-style hair braiders and African-style hair braiding salons exclusively offer hair-braiding services. *Id.* ¶ 62. Moreover, the types of braids offered by African-style hair braiders are not typically offered by cosmetologists or barbers. *Id.* ¶¶ 76, 96; *see also id.* ¶¶ 294, 296-97. The Board's expert witness cosmetologist even testified that she typically refers customers who want intricate braided styles to unlicensed African-style hair braiders who specialize in the type of braiding that customers want. *Id.* ¶ 61. The minimal overlap between those who provide African-style hair braiding and those who offer cosmetology/barbering services demonstrates that these occupations are distinct, reflecting their unique histories and different purposes in serving customers today.

iii. The unique history and culture of African style hair braiding, and its prevalence only in communities with African ancestry sharply differentiates it from cosmetology and barbering.

African-style hair braiding is also distinct from cosmetology and barbering because of its unique history and cultural significance, and because of the distinct community in which braiding services are popular. The basis of African-style hair braiding techniques originated centuries ago in Africa and was brought by Africans to this country, where it has endured as a distinct and popular form of hair styling

done by and for persons of African descent. *Id.* ¶¶ 51, 53, 65, 71. It uses techniques designed to complement hair that is physically unique, often described as "tightly textured" or "coily," which is most common among African-Americans or those of African descent. *Id.* ¶¶ 50, 51, 70. Indeed, African-style hair braiding is usually passed down through families from generation to generation, reflecting the unique cultural roots and history of the practice. *Id.* ¶¶ 54-55.

For these reasons, unlike cosmetology or barbering, African-style hair braiding is most popular with people of African descent, who tend to have more textured hair, and in communities predominantly of African ancestry, including African-Americans and African immigrants. *Id.* ¶¶ 65, 70. Also, unlike barbering, African-style hair braiding is not predominately performed on men. *Id.* ¶ 66.

iv. African-style hair braiding is even distinct from other forms of hair braiding, particularly basic braids that may be taught in cosmetology school.

Finally, African-style hair braiding is clearly distinct from other forms of hair braiding as the Board, Defendants' hair-braiding expert, and two Board member Defendants admit. *Id.* ¶¶ 63, 67-69. African-style hair braiding is set apart from other braiding styles because (1) it is more detailed, intricate and complex, and thus takes much more time to perform on a customer, *id.* ¶¶ 69, 77, 97, and (2) the typical customer for African-style hair braiding is typically of African descent. *Id.* ¶¶ 65, 70. The types of basic braids that may be taught in cosmetology school, such as French braids, are not the braids offered by African-style hair braiders. *Id.* ¶¶ 76, 96; *see also id.* ¶¶ 294, 296-97. African-style hair braiding is also unique in that no other form of hair braiding has numerous salons exclusively dedicated to offering those braiding services. *Id.* ¶¶ 62, 72 (Board inspector testified that she has never seen any shops in Missouri that specialize in non-African styles of braiding).

B. Requiring African-style hair braiders to comply with Missouri's cosmetology/barber licensing regime is not rational given the sharp differences between these occupations and the absence of African-style hair braiding from the required cosmetology/barber curricula and exams.

The Board makes two arguments to defend the rationality of requiring African-style hair braiders to comply with Missouri's licensing regimes. First, the Board persists in its claim that African-style hair braiding is the practice of cosmetology/barbering and thus it is rational to subject African-style hair braiders to the same licensing requirements. Defs.' Mem. 19. Second, the Board argues that requiring compliance with Missouri's licensing regimes is rational because it ensures the competence of licensed cosmetologists and barbers to provide African-style hair braiding in furtherance of the State's interest in consumer protection. Defs.' Mem. 20. In offering these defenses of Missouri's licensing regime, the Board ignores the facts of this case and fails to distinguish the two nearly identical federal court cases that reached precisely the opposite conclusion.

1. There is little or no similarity between what is taught and tested as part of the cosmetology/barber licensing scheme and the practice of African-style hair braiding.

In addition to the evidence discussed above and the Board's admission that African-style hair braiding is a distinct occupation, Pls.' SUMF ¶ 56, it is clear from Missouri's cosmetology/barber licensing regimes that African-style hair braiding is not part of either occupation. Missouri's cosmetology/barber licensing requirements are almost completely irrelevant to the practice of African-style hair braiding and are designed for wholly different occupations. *See* Pls.' MSJ Mem. 12-18.

As the Board has admitted, Missouri's licensing program was designed to train and test cosmetologists/barbers for their respective occupations, and is not designed to train or test African-style hair braiders. *See* Pls.' MSJ Mem. 12; Pls.' SUMF ¶¶ 181-87, 209-10, 306. As the Board put it: "Part of the problem is that these [cosmetology/barber] curricula are not designed to be specific to hair braiding, and they require many hours of instruction that does [sic] not particularly relate to that practice." Pls.' SUMF ¶ 182. The Board has also admitted that the mandatory cosmetology curriculum

"is not specifically germane to African Hair Braiding and does not include various aspects of African Hair Braiding." Pls.' SUMF ¶ 210. In fact, the Board admits that not a single hour of instruction on braiding is required by the mandatory cosmetology/barber curricula. Pls.' SUMF ¶¶ 188-93, 242. Moreover, the Board admits that ~10% or less of the hours in the current mandatory cosmetology/barber curricula cover general topics (such as "anatomy" or "state law") that the Board claims are generally relevant to braiders. Pls.' MSJ Mem. 2, 13, 17-18; Pls.' SUMF ¶¶ 211-15. But the Board also admits that it cannot ensure that even those 100 or so hours are spent on topics that are actually relevant to African-style hair braiding. Pls.' SUMF ¶¶ 216, 242.

Furthermore, the Board admits that the licensing exams are designed to license cosmetologists and barbers, and not to license hair braiders. *See* Pls.' MSJ Mem. 24-26; Pls.' SUMF ¶¶ 306, 333, 337, 343-46. Although the Board admits that licensing exams need to test what people do as part of their occupation in order to ensure competency and safety, Pls.' SUMF ¶¶ 305, 312-16, the Board also admits that it cannot ensure any connection between the content of Missouri's licensing exams and the practice of African-style hair braiding. *See* Pls.' MSJ Mem. 25-26; Pls.' SUMF ¶¶ 317-19. In fact, hair braiding is barely tested on the written portion of Missouri's cosmetology exam, if it is tested at all, and it is not tested on the written portion of the barber exam nor the practical portion of any cosmetology/barber exam, as the Board admits. Pls.' MSJ Mem. 25-26; Pls.' SUMF ¶¶ 146, 301-303, 320-25, 347. Because of this mismatch between the occupation of African-style hair braiding and the cosmetology/barber licensing exams, the Board admits that the cosmetology/barber exams are not adequate to qualify, certify, or license African-style hair braiders. Pls.' SUMF ¶¶ 343-46.

2. The Board's claim that the mandatory cosmetology/barber licensing regime provides an adequate foundation for African-style hair braiding is belied by the admissions of the Board and its experts.

Although the Board admits that the current licensing regimes are not tailored to African-style hair braiding, Defs.' Mem. 15, it nevertheless insists that the licensing requirements provide a necessary

basic foundation for hair care and thus ensure that consumers "are not defrauded by unqualified persons holding themselves out as able to perform services." Defs.' Mem. 20. According to the Board, requiring people who provide African-style hair braiding to obtain a cosmetology/barber license is not irrational because it protects consumers from unqualified braiders. *Id.* But the distinction between a licensed and unlicensed braider is arbitrary and negligible because *nothing* about Missouri's licensing regime ensures that a licensed cosmetologist or barber is competent to provide African-style hair braiding, as the Board itself has admitted. Pls.' MSJ Mem 15, 20, 26; Pls.' SUMF ¶¶ 333, 336-37, 341-46. Because this argument is really about whether Missouri has a legitimate government interest in licensing African-style braiders as cosmetologists/barbers, Plaintiffs address it in more detail in Part III, *infra*.

3. The total disconnect between Missouri's cosmetology/barber licensing scheme and the practice of African-style hair braiding renders it unconstitutional.

As demonstrated above, there is a total disconnect between Missouri's cosmetology/barber licensing scheme and the practice of African-style hair braiding, which violates Plaintiffs' equal protection rights. The same disparity between the licensing scheme and the profession of African-style hair braiding was considered by the court in *Cornwell*, which found that the "curricula [were] of extremely marginal relevance to Plaintiff's activities." *Cornwell*, 80 F. Supp. 2d at 1110. Moreover, the court found the uncertainty of whether a student would receive any training on African-style hair braiding compounded the burden on braiders by requiring them to use scarce time and resources "on learning irrelevant skills." *Id.* at 1112. The court refused to accept the Defendants' assertion that African-style hair braiding is taught and concluded that the mandated curriculum was not "a rational exercise of licensure to the practice of Plaintiffs' desired profession." *Id.* at 1114.

For the same reasons, African-style hair braiders are distinctly burdened by Missouri's licensing regimes. In order to lawfully practice their profession, they must comply with licensing requirements designed for different professions. If any of the training they receive is relevant, it is minimal. Pls.'

MSJ Mem. 12-13; Pls.' SUMF ¶¶ 213; 292; 294. Even the Board and its experts admit that neither the training nor the exams ensure any competence in African-style hair braiding. Pls.' SUMF ¶¶ 333-37, 341-46. Therefore, Missouri's licensing regime has "irrationally squeezed two professions into a single, identical mold," uniquely burdening Joba and Tameka, and all African-style hair braiders, by subjecting them to arbitrary and irrelevant cosmetology/barber licensing requirements that fail to further any legitimate government interest. *Clayton*, 885 F. Supp. 2d at 1215 (quoting *Cornwell*, 80 F. Supp. 2d at 1103).

III. Licensing African-Style Hair Braiders as Cosmetologists or Barbers is Not Rationally Related to a Legitimate State Interest and Thus Violates Plaintiffs' Substantive Due-Process Rights.

Licensing African-style hair braiders as cosmetologists or barbers violates Plaintiffs' substantive due-process rights because there is no rational relationship between licensing and any of the Board's purported state interests. But the cost of complying—both in terms of time and money—with the mandatory 1,000- to 1,500-hour curriculum requirements is particularly onerous, with tuition for cosmetology/barber school costing up to $21,000. Pls.' SUMF ¶ 157. These pose costly or even insurmountable barriers to entry for African-style hair braiders like Joba and Tameka, who cannot afford to stop supporting their families for a year or more while they spend thousands of hours and thousands of dollars learning cosmetology or barbering skills that they do not need and will not use in while practicing their occupation. Pls.' SUMF ¶¶ 22-23, 46-47.

Thus, as Plaintiffs explain below, requiring African-style hair to obtain a cosmetology/barber license by taking 1,500 to 1,000 hours of irrelevant classes and passing an irrelevant exam: (1) fails to ensure competence or safety in the provision of braiding services; (2) offers no notable consumer protection benefits proportionate to the total number of hours required; (3) has nothing to do with the other interests claimed by Defendants as flowing from Missouri's regulatory scheme; and (4) evidently

does not advance a legitimate state interest that the Missouri legislature takes seriously, given the statutory exemption from licensing for hair braiders at public amusement and entertainment venues.

A. Licensing African-style hair braiders as cosmetologists/barbers has no rational relationship to competently or safely providing African-style hair braiding.

As Plaintiffs exhaustively detailed in their memorandum supporting their summary judgment motion, *see* Pls.' MSJ Mem. 14-26, licensing African-style hair braiders as cosmetologists is not rationally related to the Board's claimed interests in protecting the public from incompetent braiders or unsafe braiding practices. As discussed *supra* in Part II, not a single hour of instruction on African-style hair braiding is required under Missouri's cosmetology/barber licensing regime and very little to none of the required instruction is even vaguely relevant to African-style hair braiding. In addition, with respect to the three health-and-safety topics the Board claims are of particular concern for hair-braiding (traction alopecia, CCCA, and special concerns related to braiding children's hair), Pls.' SUMF ¶¶ 237-39, the Board or its experts admit that: (1) no instruction on these topics is required by the mandatory cosmetology/barber curricula, *id.* ¶¶ 241-42; (2) these topics are either not covered in the standard cosmetology/barber textbooks (CCCA and braiding children's hair) or receive only such cursory coverage as to be inadequate (traction alopecia), *id.* ¶¶ 272-280; and (3) none of these topics are tested on the cosmetology/barber licensing exams, *id.* ¶¶ 328-32.

As a result, the Board and its experts admit that the mandatory cosmetology/barber curricula, the standard cosmetology/barber textbooks, and the mandatory cosmetology/barber licensing exams are all inadequate for ensuring competence to safely provide African-style hair braiding services. Pls.' SUMF ¶¶ 237, 268, 272-80, 328-37, 341-46. For example, the Board admits that passing the cosmetology/barber licensing exams does *not* ensure "competence in the material deemed necessary for the safe practice of hair braiding." Id. ¶ 333. The Board also admits that it exercises zero oversight over the quantity or quality of any instruction on hair braiding provided by Missouri cosmetology/barber schools and thus cannot guarantee that *any* training in African-style hair braiding,

or the three health-and-safety topics the Board claims are of particular concern for hair-braiding, is provided at any Missouri cosmetology/barber school. *Id.* ¶¶ 219-20, 241-42, 286-91.

For these reasons, the Board admits that Missouri's cosmetology/barber licensing regime "does not provide a guarantee of competence for braiders," and thus the Board "cannot assure that the public is protected from exposures to services performed by individuals lacking in competence to provide braiding." Pls.' SUMF ¶¶ 341-42. These admissions completely undercut the Board's claims of a legitimate government interest in requiring licensure to protect the public from any supposedly incompetent or unsafe braiders.

B. General consumer-protection interests do not justify 1,000 to 1,500 hours of irrelevant training and testing.

As Plaintiffs explained in their memorandum supporting their Motion for Summary Judgment, *see* Plaintiffs' Mem. 26-28, there is no rational relationship between licensing African-style hair braiders as cosmetologists or barbers and preventing consumer fraud and harm. Only 20 hours of the mandatory 1,500 or 1,000 hour curricula are devoted to general consumer protection topics—"Salesmanship and shop management," "Professional Image" and "State Law"—that are even arguably relevant to these interests. Pls.' SUMF ¶¶ 130, 140. In addition, the Board cannot guarantee how much time of the 20 hours is even spent on consumer protection issues, because it admits that it has no knowledge about what specific instruction is provided on these (or any) of the mandatory subjects. Pls.' SUMF ¶ 349. Moreover, the Candidate Information Bulletins for the NIC licensing exams used in Missouri do not indicate that any of these topics are tested—the only subject even marginally relevant is "client consultation." Pls.' SUMF ¶¶ 152-53, 304, 350. Thus, these facts "demonstrate an insufficient rational relationship between [consumer protection] and the actual regulatory scheme as applied to" African-style hair braiders. *Clayton*, 885 F. Supp. 2d at 1215.

Whatever general consumer-protection interest Missouri may have, it simply does not justify requiring people to spend 1,500 or 1,000 hours learning irrelevant information about an occupation

they do not perform. If it did, then **any person practicing any occupation in Missouri** could also be required to spend a thousand or more hours to obtain a cosmetology/barber license in order that he or she might receive just 20 hours of training in salesmanship and shop management, professional image, or state law. This does not benefit consumers. If anything, it harms them by creating massive and costly barriers to entry, which not only drive up the prices of services, but actually interferes with braiders becoming proficient in their craft. *See Cornwell*, 80 F. Supp. 2d at 1106 ("[F]orcing African hair braiders to attend cosmetology school logically impedes their ability to offer competent hairbraiding services to their customers, i.e., it leaves them untrained to perform their own craft.").

C. The other functions identified by Defendants—such as annual inspections—do not require 1,000 to 1,500 hours of irrelevant training and testing.

Defendants claim that the education and testing component is just one of three functions of cosmetology/barber licensing, and that the other two functions (inspection and "accountability through discipline," as well as a screening process for cosmetology/barber students) justify the rationality of the licensing scheme. Defs.' Mem. 11-14. But there is no reason that these other functions are dependent on the unconstitutionally irrelevant and burdensome education-and-testing requirement that Plaintiffs challenge. The education and testing components of the licensing scheme that Plaintiffs challenge cannot be justified by these entirely separate functions. Moreover, these functions would largely remain unaffected by Plaintiffs' challenge, as explained below.

1. Screening applicants for character-and-fitness issues does not justify imposing a 1,500-hour education-and-testing requirement.

Defendants claim that an application screening process protects the public from hair braiders who may have character-and-fitness issues. Defs.' Mem. 11-12. Defendants offer a generic hypothetical about how unscrupulous people might "draw the public in with the promise of hair braiding services." Defs.' Mem. 12. Of course, there is nothing about this hypothetical that is unique to hair braiding, and offering African-style hair braiding services seems a rather implausible way for the

unscrupulous to lure in the unsuspecting public. Moreover, concerns about fraud are relevant to anyone who deals with the public, which is why Missouri already has consumer fraud laws, and a civil court system, to address these issues. Meanwhile, there are no such character-and-fitness screening requirements for the vast majorities of businesses that interact with the public, and the Board offers no reason why it is of any particular importance that hair braiders be screened for character-and-fitness issues, but not other workers who offer personalized services, such as tailors or personal trainers. Finally, whatever minimal value might be added by this screening process, it is unrelated to the mandatory 1,500 or 1,000 curriculum hour and testing requirements for cosmetologists and barbers.

2. Inspections of hair-braiding salons and any resulting discipline against noncompliant establishments can continue without a 1,500 or 1,000 hour education-and-testing requirement.

With respect to the inspection and discipline functions, Defendants appear to be confused about the nature of Plaintiffs' challenge. Plaintiffs are not challenging the statutory definitions of cosmetology or barbering, nor are they challenging the Board's interpretation of those statutes. Rather, Plaintiffs are challenging the application of the irrelevant cosmetology/barber education and testing regime to African-style hair braiders because it violates the 14th Amendment. In other words, this lawsuit only challenges what Defendants' describe as the first of three functions of the licensing system: "determin[ing] initial qualification." Defs.' Mem. 11. Thus, **Plaintiffs are not challenging** the provisions of Missouri's barber and cosmetology statutes related to establishment licenses and inspections. *See* Mo. Rev. Stat. §§ 328.115, 329.045. Those provisions could remain in effect, and inspections of braiding salons could continue, even if the cosmetology/barber education and testing regime is struck down as unconstitutional. Indeed, Defendants acknowledge that Plaintiffs do not

complain about the inspection regime. Defs.' Mem 11 ("The licensing systems provides three essential functions, about only one of which the Plaintiffs complain.").[7]

As Defendants admit, the Board has jurisdiction over facilities where "services falling within the definitions of either barbering or cosmetology are being performed." Defs.' Mem. 13. The Board acknowledges that it currently interprets hair braiding as falling under the definition of both cosmetology and barbering. Defs.' Mem. 4. If successful, this lawsuit would not change the statutory definitions of barbering or cosmetology, nor would it compel the Board to reinterpret those statutes. Instead, it would merely establish that African-style hair braiders cannot be compelled to spend 1,000 or 1,500 hours taking irrelevant classes, nor be required to take irrelevant exams, in order to offer African-style hair braiding services to customers.

Similarly, Defendants claim that, in the absence of the education-and-testing regime, they would be left without the authority to discipline those who fail to correct violations found by Board inspectors. Defs.' Mem. 13-14. That claim is obviously not true as a matter of logic, nor is it true under the operation of Missouri's current licensing scheme. Board inspections are typically conducted of licensed establishments (or unlicensed establishments alleged to be providing cosmetology or barbering services), and not of individual licensed practitioners. *See* Mo. Rev. Stat. §§ 328.115, 329.045. The statutory scheme explicitly permits discipline to be brought against the holders of establishment licenses or anyone with a business that offers "cosmetology" or "barber" services (which again, are terms interpreted by the Board to include hair braiding) in a manner that violates the Board's standards for sanitation. *See* Mo. Rev. Stat. §§ 328.150, 328.160, 329.140, 329.250, 329.255. Indeed all but one of

[7] As Plaintiffs made clear in their opening memorandum in support of summary judgment, and as the Board concedes in its brief, Plaintiffs have not challenged the inspection regime. In fact, Joba's shop has been regularly inspected for over a decade and Plaintiffs even agreed to participate in an additional Board inspection as part of the discovery in this case. *See* Defs.' Mem. 12. Plaintiffs wish to make clear to the Court that their challenge is limited to the requirement that African-style hair braiders must obtain individual cosmetology or barber licenses by completing the mandatory education and testing components of the cosmetology/barber licensing regime in order to braid hair for paying customers.

the 18 cases that the Board references as examples of disciplinary proceedings being brought against unlicensed hair-braiders were actually brought against the salon establishment itself. *See* Defs.' Ex. A, 11-12. Like inspection, disciplinary proceedings against establishments that fail to correct sanitation violations could continue unchanged without the unconstitutional education-and-testing requirements for African-style hair braiders.[8]

D. The Board's Claimed State Interests Are Undercut By the Statutory Exemption for Unlicensed Hair Braiders at Public Amusement and Entertainment Venues.

The Board also fails to acknowledge a notable gap in the state's regulation of hair braiding, which undermines the Board's claimed state interests in licensing African-style hair braiders as cosmetologists. As Plaintiffs explained in their memorandum supporting their motion for summary judgment, *see* Pls.' MSJ Mem. 28-30, the Missouri legislature has exempted hair braiders from cosmetology licensure if they braid hair only at public amusement and entertainment venues. *See* Mo. Rev. Stat. § 316.265; Pls.' SUMF ¶¶ 158-59. The Board has not identified any factual justification for this exemption and the Board's President and another Defendant Board member both admit that exempting braiders at these venues from Missouri's licensing requirements is unreasonable and irrational. Pls.' SUMF ¶ 173.

This admission undercuts the claimed state interests for licensure because there is no reason why the state interests would be any less compelling outside of public amusement and entertainment venues than inside such venues. If unlicensed hair braiding presents dangers to the public at braiding salons, why should it not also do so at amusement parks? The Board's President admits that there is nothing unique about such venues that would make them any safer for hair braiding, and thus there is no reason why braiders at such venues should be treated any differently. *See* Pls.' SUMF ¶¶ 170-72.

[8] Of course, if Plaintiffs prevail in this constitutional challenge to requiring braiders to obtain a cosmetology/barber license, it would not be permissible for the Board to discipline braiders for merely braiding without a license, nor to discipline salons for having unlicensed braiders. Actual sanitation violations, however, would still be subject to enforcement and disciplinary proceedings as before.

Indeed, there is some reason to think that the government's interests in protecting the public might be greater at seasonal amusement parks and carnivals, which attract tourists and visitors, and are often more transitory and itinerant in nature than most braiding salons, which rely more heavily on repeat business and establishing a local reputation.

As a result, "the government has undercut its own rational basis for the licensing scheme by excluding [Plaintiffs] from the exemption. The exemption from the license is given to those [braiders] who are most likely to [endanger public health and safety]. Additionally, the [braiders] who are least likely to [endanger public health and safety] must remain part of the licensing scheme." *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008); *see also Brantley*, 2015 U.S. Dist. LEXIS 680 at *17-19 (noting two instances in which the proffered state interests were "fatally undermined" by statutory exemptions demonstrating that those interests were spurious).

Where the legislature's own statutory exemptions undermine the government's claimed interests, those interests cannot be regarded as rationally related to a legitimate government purpose. *Id.* at *17; *Merrifield*, 547 F. 3d at 991 ("We cannot simultaneously uphold the licensing requirement under due process based on one rationale and then uphold [Plaintiff]'s exclusion from the exemption based on a completely contradictory rationale."). The Court should thus not take at face value the state interests claimed by the Board as justifying the Missouri Legislature's regulatory scheme because they are undermined by the Legislature's own exemptions from that regulatory scheme.

IV. Defendants Erroneously Attack an Article IV, Section 2 Privileges and Immunities Claim that Plaintiffs Have Not Raised.

Defendants spend nearly two pages disputing that there is a violation of the Privileges and Immunities Clause of Article IV, Section 2. Defs.' Mem. 2, 21-23. However, Plaintiffs bring no such claim. Defendants appear to have confused Plaintiffs' Privileges **or** Immunities Claim under the Fourteenth Amendment with a Privileges **and** Immunities Claim under Article IV, Section 2 that Plaintiffs have not raised. *See* Am. Compl. ¶¶ 2, 128-31 (ECF No. 36). As Plaintiffs explain in their

memorandum supporting their summary judgment motion, Pls.' MSJ Mem. 7, Plaintiffs understand that this argument is currently foreclosed by the U.S. Supreme Court's decision in the *Slaughter-House Cases*, 83 U.S. 36 (1873), and may only be overturned by the Supreme Court. Plaintiffs thus respectfully ask the Court to note that this argument has been preserved for possible Supreme Court review.

CONCLUSION

For all of the above reasons, applying Missouri's cosmetology/barber licensing scheme to African-style hair braiders is irrational and deprives Joba and Tameka of their constitutional right to earn a living free from arbitrary and unreasonable regulations. Therefore, Plaintiffs respectfully request that this Court deny Defendants' Motion for Summary Judgment and grant Plaintiffs' Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 30th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2015, this MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and the other accompanying documents were electronically served on the below parties using the CM/ECF system of the United States District Court for the Eastern District of Missouri.

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