UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

NDOBIA NIANG, et al. Plaintiffs v. EMILY CARROLL, et al., Defendants	)	Civil Case No. 4:14-cv-01100 JMB Magistrate Judge Bodenhausen

DEFENDANTS' REPLY MEMORANDUM ON

MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

CHRIS KOSTER
Attorney General

Edwin R. Frownfelter
Assistant Attorney General
Bar No. 59477-MO
615 East 13th St., Suite 401
Kansas City, Missouri 64106
Telephone (816) 889-5019
Facsimile (816) 889-5006
edwin.frownfelter@ago.mo.gov
Attorneys for Defendants

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Defendants Emily Carroll, Jackie Crow, Joseph Nicholson, Leata Price-Land, Lori Bossert, Wayne Kindle, Christie L. Rodriguez, Leo D. Price, Sr., and Linda M. Bramblett submit the following Reply Memorandum in response to Plaintiffs' Memorandum Opposing Defendants' Motion for Summary Judgment.

Plaintiffs' Plaintiffs' Memorandum Opposing Defendants' Motion for Summary Judgment recapitulates, at length, many of the arguments already advanced in support of their Motion for Summary Judgment. Defendants will limit this Memorandum to addressing specific new points raised in

Defendants' memorandum, rather than restating their core arguments for the third time. Defendants reassert and incorporate all arguments offered in their Memorandum in Support of their Motion for Summary Judgment and their Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.

I. Defendants Acknowledge the Existence of Adverse Case Law

Defendants acknowledge the existence of three decisions cited by Plaintiffs in which courts have found in favor of African-style hair braiders under similar circumstances – *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999), *Clayton v. Steinagel,* 885 F. Supp. 2d 1212 (D. Utah 2012), and *Brantley v. Kuntz*, 2015 U.S. Dist. LEXIS 680, 2015 WL 75244 (W.D. Tex. 2015). Those cases were decided adversely to the position Defendants argue, and if this Court agrees with the point of view adopted in those cases, the Plaintiffs will prevail in this matter. One case, *Bah v. Attorney General of Tennessee,* 610 Fed.Appx. 547 (6th Cir.2015), nowhere mentioned by Plaintiffs, adopts a similar viewpoint to that expressed by the Defendants is although the facts are somewhat different as it involves a challenge to a statute that creates a "natural hair styling" license similar to that the Board has urged the Missouri legislature to adopt, invoking many of the same arguments used in this case,.

In response to these cases, Defendants note that each of the cases cited by Plaintiffs was decided by a district court with the same level of authority as this Court. A decision of a district court in another circuit, while it may have persuasive effect, is not binding on this District Court. *Mills v. City of Grand Forks*, 614 F.3d 495, 499 (8th Cir. 2010). No cases raising similar issues have been decided by this Court, the Eighth Circuit under whose authority this Court operates, or indeed any circuit court of appeals, or by the Supreme Court of the United States. Therefore, this case does not involve questions which have been definitively resolved by the federal courts as claimed in Plaintiffs' memorandum.

The courts in *Cornwell* and *Clayton* evaluated the interests of the plaintiffs against those asserted by the state and concluded in favor of the individual plaintiffs. Defendants' Motion for Summary Judgment recognizes that there is validity to Plaintiffs' claim that the educational process required for licensure does not focus on their particular practice, but sets forth societal interests that weigh against reaching the plaintiff-centric result the *Cornwell* and *Clayton* cases did.

Plaintiffs claimed in their complaint that there are no health consequences of African-style braiding because they do not use chemicals [Amended Complaint, Paragraph 25]. The evidence conclusively shows that

allegation to be false. Defendants' expert witnesses established that there are significant health and safety concerns inherent in the practice, and Defendants' inspectors testified as to conditions they observed in braiding establishments where the practitioners were not in compliance with basic health and safety requirements.

The *Cornwell* and *Clayton* courts brushed these concerns off on the path to relieving the plaintiffs in those cases of educational requirements they found burdensome. The Defendants' Motion for Summary Judgment asks this Court to give due deference to the legislature's admittedly imperfect plan to address these interests, and conduct an analysis taking into account factors the *Cornwell* and *Clayton* courts did not.

Plaintiffs argue that Defendants ignored Supreme Court authority, citing *Schware v. Board of Bar Examiners of State of New Mexico,* 353 U.S. 232 (1957). Plaintiffs cite an out-of-context quotation from *Schware*: "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).

However, this is not a point in dispute. Defendants do not deny the application of the rational relationship test; indeed, the second section of

Defendants' memorandum in support of their Motion for Summary Judgment expressly states the applicability of the test. Defendants did not cite *Schware* in their Motion for Summary Judgment memorandum because its relevance is limited to the single out-of-context quotation cited by Plaintiffs' counsel, on a point not disputed by Defendants.

The holding of the case itself bears no applicability to the facts at hand. *Schware* examined a character and fitness test by which an applicant was denied admission to the bar due to some long-ago conduct which the court found unrelated to his current fitness. The case does not dictate any result under the current fact situation. Once one agrees that the rational relationship test applies, as Defendants did early in their brief, *Schware* has no further bearing on the outcome of this case.

II. African Style Hair Braiding is a Specialty Within the Profession, not a Separate Occupation

Defendants devote eight pages of their memorandum to arguing the proposition that African-style hair braiding is a separate occupation rather than a specialty within the hair care professions. This argument largely repeats what has already been stated in the memoranda supporting and opposing the cross motions for summary judgment.

This is a core question in this litigation. Does the legislature violate the Due Process clause by requiring licensure for a general traditional profession which includes an arcane specialized subset of that profession which uses significantly different techniques and serves a distinct population?

Defendants have acknowledged that the standard barbering and cosmetology curricula do not address African-style hair braiding at any length, and the qualifying examinations test it little if at all. As Defendants stated throughout, the licensing process does not prepare one to be an African-style hair braider; it prepares one to be generally competent in the hair care professions. The law in Missouri views African-style hair braiding as a specialty within those professions, not a separate occupation.

Defendants argue that the responsibility for defining the broad outlines of licensed professions lies with the legislature, not the courts. With regard to professional licensure in particular, states have wide latitude to prescribe that certain activities can only be performed by licensed professionals, even if even if an objective assessment might suggest that those same tasks could be performed by others. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 855 (1992); *Mazurek v. Armstrong,* 520 U.S. 968, 973 (1997).

Specialties arise within many occupations that use only a small subset of the general knowledge of the profession, and develop techniques or serve population dramatically different from most practitioners of the profession.

By analogy, a person who desires to practice only immigration law might make many of the same arguments Plaintiffs make here against a requirement that she qualify for traditional legal practice and be admitted to the bar. An immigration attorney practices in different tribunals than those in which most lawyers are accustomed, applying different law, and serving, to a great extent, a culturally and linguistically different population than most lawyers see. Immigration law is not mandatory in law school curricula, and most lawyers in general practice are probably not competent to practice immigration law. A person practicing immigration law exclusively would probably have little use for much of the subject matter taught in law schools. Yet no one questions the constitutionality of requiring aspiring immigration lawyers to attend three years of law school and pass a bar examination with little or no immigration content. The fact that professionals within a field may undertake highly specialized applications of the field, applying little of the field's general knowledge and having little in common with the field's general practice, does not render the general requirement of competence and

licensure in the field irrelevant to the state's interests in protecting health and safety and value to consumers.

III. Licensing African-style hair braiders as Part of a Comprehensive Provision for the Hair Care Professions Bears a Rational Relationship to State Interests

A. It is not relevant that African-style hair braiding is not a mandatory part of the barbering/cosmetology curriculum.

Plaintiffs argue that the educational curriculum for cosmetology and barbering is irrelevant to African-style hair braiding because that specialty is not a required part of the curriculum. As Defendants argued in their summary judgment memorandum, this is true because African-style hair braiding is a specialty. A person who desires to practice only this specialty cannot expect to learn it from any school, but would need to select a school with a strong program in this area. Such schools exist in the state of Missouri [Defendants' SUMF 18].

Plaintiffs repeatedly assert that "the Board admits" certain propositions, which the Board, or the Board defendants, have not and do not admit. Counsel for plaintiffs deposed the Executive Director for fifteen hours over two days and bombarded her with argumentative, conclusory questions, with which she did not argue. As explained in the Defendants' Memorandum Opposing Plaintiffs' Motion for Summary Judgment, these are not

admissions on the part of the Board, which is not a defendant, or other defendants. The evidence Plaintiffs amassed speaks for itself, but Plaintiffs are wrong when they claim the Defendants have admitted key facts merely because the Executive Director, without Board guidance specifically addressing the issues posed, elected to provide factual responses during her deposition and not engage in argument with Plaintiffs' counsel about conclusory propositions they posed.

B. Plaintiffs wrongly contend the inspection function can continue if they are granted the relief they seek.

Plaintiffs argue at Section III(C)(2) of their Memorandum that the relief they seek will not preclude the Board from inspecting and correcting hair braiding establishments for health and safety considerations, deriding the argument as "obviously not true as a matter of logic" [Plaintiffs Memorandum, p.22].

Plaintiffs clearly misunderstand the basis of the Board's authority to inspect facilities. Section 329.025.1, RSMo, states in part:

> The board shall have power to:
> * * *
> (2) Prescribe by rule for the **inspection of barber and cosmetology establishments and schools** and appoint the necessary inspectors and examining assistants;
>
> (3) Prescribe by rule for **the inspection of**

> **establishments and schools of barbering and cosmetology as to their sanitary conditions** and to appoint the necessary inspectors and, if necessary, examining assistants; …

[emphasis added]. The only provision in Chapter 328, regarding barbering, that provides for inspections is Section 328.115.1, RSMo, which states:

> The owner of every establishment in which the occupation of barbering is practiced shall obtain a license for such establishment issued by the board before barbering is practiced therein. A new license shall be obtained for a barber establishment within forty-five days when the establishment changes ownership or location. **The state inspector shall inspect the sanitary conditions required for licensure,** established under subsection 2 of this section, for an establishment that has changed ownership or location without requiring the owner to close business or deviate in any way from the establishment's regular hours of operation.

[Emphasis added]

From these passages, it is evident that the power of the inspectors employed by the Board to review haircutting establishments is grounded on the precondition of licensure, or the performance of services that constitute barbering or cosmetology. The Board has no authority to issue licenses to anyone who does not meet the educational standards specified in the statutes, and this Court's authority does not extend to ordering the licensure of anyone who has not met those requirements. If this Court determines that hair braiders are not practicing barbering or cosmetology within the meaning

of Chapters 328 and 329, the practical effect would most likely remove them from the statutory licensing scheme and place them in a special category beyond the Board's jurisdiction. The Board's inspectors have no statutory authority to inspect unlicensed parties, other than to ascertain whether other activities which do constitute barbering or cosmetology are being performed there. Exempted from the coverage of the statute, people declaring themselves hair braiders would have no incentive to permit inspections or to comply with any corrective actions represented. Without licenses to discipline, the Board would have no leverage to compel braiders to submit to inspection or correct violations.

The Plaintiffs' claim that they do not seek exemption of braiders from inspection and enforcement of sanitation standards is disingenuous and unfounded. They may not challenge that regime, but they challenge the applicability of licensure, and without licenses to discipline, nothing could be done to enforce the standards applicable to all other hair care providers.

IV. Conclusion

The Defendants' Motion for Summary Judgment should be granted.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Edwin R. Frownfelter
Assistant Attorney General
Missouri Bar No. 59477
615 East 13th St., Suite 401
Kansas City, Missouri 64106
Telephone (816) 889-5019
Facsimile (816) 889-5006
edwin.frownfelter@ago.mo.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of November, 2015, this Reply Memorandum was electronically served on the below parties using the CM/ECF system of the United States District Court for the Eastern District of Missouri.

Dan Alban
Gregory R. Reed
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: dalban@ij.org, greed@ij.org

Jerry M. Hunter
Bryan Cave LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750
Tel: (314) 259-2772
Fax: (314) 552-8772
Email: jmhunter@bryancave.com

/s/ Edwin R. Frownfelter
Assistant Attorney General
Bar No. 59477MO
Attorneys for Defendants