UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is a simple case about a single issue: whether it is constitutional for the state to license one occupation (African-style hair braiding) as though it is one of two entirely different occupations (cosmetology or barbering). There are no disputed material facts. Defendants admit in their opposition brief that "[t]here is no dispute that neither the educational requirements nor the qualifying examinations used for licensure in the hair care professions address African-style hair braiding specifically in any detail." Defs.' Opp'n 14-15 (ECF No. 52). Defendants also admit that "it is true that much of the cosmetology or barbering curriculum is irrelevant to the needs of one who chooses only to engage in the single practice of hair braiding." Defs.' Opp'n 17-18. Defendants do not dispute over 250 material facts in Plaintiffs' Statement of Uncontroverted Material Facts (Pls.' SUMF) (ECF No. 49-2) and fail to cite any evidence in response to those that they claim to dispute, effectively conceding them. Defendants also attempt to disavow some of the testimony of the Board's Rule 30(b)(6) organizational representative, but again fail to cite any evidence rebutting her testimony.

There is also remarkably little dispute about the case law. Defendants fail to respond to the two nearly identical federal rational-basis cases (and a third similar case) presented by Plaintiffs in which African-style hair braiders successfully challenged the application of cosmetology/barber licensing to their profession based on the same equal protection and substantive due process claims that Plaintiffs raise here. In defiance of both precedent and reason, Defendants appear to believe that the U.S. Constitution imposes no limits on how a state legislature licenses occupations. But courts can and do strike down licensing schemes when they are unreasonable, such as when the licensing requirements designed for one occupation are used to license those engaged in a quite different occupation. This Court should reject Defendants' invitation to ignore directly relevant case law and a mountain of evidence, and should instead protect the constitutional rights of Plaintiffs Ndioba "Joba" Niang and Tameka Stigers to earn a living in the occupation of their choosing free from irrational regulations.

ARGUMENT

I. There Are No Disputed Material Facts.

It is clear from Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 52) and Defendants' Response to Plaintiffs' Statement of Undisputed Material Fact [sic] (ECF No. 52-1) that there are no material facts in dispute. Defendants do not even claim to dispute about 250 paragraphs of Plaintiffs' Statement of Uncontroverted Material Facts (ECF No. 49-2). With respect to the paragraphs that Defendants claim they dispute, Defendants fail to provide any citations to record evidence indicating that those facts are controverted. Defendants also cannot simply disclaim the testimony of the Board's organizational representative under Rule 30(b)(6) without offering record evidence that Defendants believe controverts her testimony.

A. Inadequacy of Defendants' Response to Plaintiffs' Statement of [Uncontroverted] Material Fact[s].

Defendants claim that "many of" the facts in Plaintiffs' Statement of Uncontroverted Material Facts "remain in dispute."[1] However, Defendants cannot merely state that they dispute facts in Plaintiffs' Statement of Uncontroverted Material Facts; they must provide citations to record evidence which they believe shows the facts are in dispute. Local Rule 7-4.01(E) ("Every memorandum in opposition shall include a statement of material facts as to which the party contends a genuine issue exists. Those matters in dispute shall be set forth with specific references to portions of the record, where available, upon which the opposing party relies."). Defendants have completely failed to do this. There are no citations to such record evidence in Defendants' Response to Plaintiffs' Statement of Undisputed Material Fact [sic]. Therefore, all statements in Plaintiffs' Statement of Uncontroverted

[1] Many of these so-called "disputes" are nonmaterial and without any basis. For example, Defendants repeatedly state: "Disputed that chemicals used in cosmetology are hazardous. No scientific evidence indicating such chemicals are harmful is on the record." Defs.' Resp. ¶¶ 24-25, 48, 90, 108, 110. But Defendants' own expert states: "Chemicals such as hair dye and straighteners can potentially damage the hair shaft and scalp thus leading to permanent hair loss." Wright Decl. at 2 (ECF No. 48-11).

Material Facts shall be deemed admitted under Local Rule 7-4.01(E): "All matters set forth in the statement of the movant shall be deemed admitted for purposes of summary judgment unless specifically controverted by the opposing party." *See, e.g.*, *Riley v. U.S. Bank*, Case No. 4:08CV00206(ERW), 2009 U.S. Dist. LEXIS 76001 (E.D. Mo. Aug. 26, 2009) at *3-*4 (noting party's failure to comply with Local Rule 7-4.01(E) and deeming admitted uncontroverted statements of fact); *Lockridge v. HBE Corp.*, 543 F. Supp. 2d 1048, 1053 (E.D. Mo. 2008) (same).

B. Inadequacy and irrelevance of Defendants' belated objections regarding the testimony of the Board's organizational representative under Rule 30(b)(6).

Defendants also attempt to revoke some of the testimony of the Board's organizational representative under Rule 30(b)(6), for a variety of reasons. There is no legal basis for Defendants' objections. The topics of the deposition questions were noticed in advance. *See* Deposition Notice, Exhibit 1. The Board determined the organizational representative who was best equipped to answer questions relevant to this lawsuit. During the deposition, Defendants' counsel failed to register these objections to the testimony to which Defendants now object.[2]

As an opinion often cited on this topic explains: "The Rule 30(b)(6) designee . . . presents the [entity's] 'position' on the topic. Moreover, the designee must not only testify about facts within the [entity's] knowledge, but also its subjective beliefs and opinions. The [entity] must provide its interpretation of documents and events." *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C.), *aff'd,* 166 F.R.D. 367 (M.D.N.C. 1996) (multiple citations omitted); *see generally* 8A Charles Alan Wright et al., Fed. Prac. & Proc. Civ. § 2103 (3d ed. 2010). It is of no matter whether the Board as a body has reached or endorsed a conclusion about particular issues testified to by the Rule 30(b)(6) designee,

[2] Defendants' counsel instead registered frivolous objections such as by objecting to questions about "the Board's understanding or the Board's knowledge" because the Board is a "collective organization." Carroll Dep. 79:15-20 (Alban Decl. Ex. 10, ECF No. 49-13). But that is precisely what an organizational representative is supposed to testify about: "The persons designated must testify about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6).

because Rule 30(b)(6) testimony concerns all "information known or reasonably available to the organization" regardless of whether the entity's governing board has voted on it. Defendants cite no authority indicating that a governing board must "approve" such testimony, and Plaintiffs are aware of none. Moreover, "some extraordinary explanation must be required before a[n entity] is allowed to retreat from binding admissions in the testimony of its Rule 30(b)(6) designee." *Estate of Thompson v. Kawasaki Heavy Indus.*, 291 F.R.D. 297, 304 (N.D. Iowa 2013). Defendants offer no such explanation.

Defendants also seem to confuse whether the testimony of the Board's organizational representative under Rule 30(b)(6) is legally binding on the Board with whether the testimony is a judicial admission. While it is true that the testimony of the Board's organizational representative is not tantamount to a judicial admission in the same manner as Defendants' Answer or responses to written discovery, the testimony is still the legally binding testimony of the Board and admissible as evidence. "A Rule 30(b)(6) deposition serves a unique function—it is the 'sworn corporate admission that is binding on the corporation.'" *Buehrle v. City of O'Fallon*, No. 4:10CV00509(AGF), 2011 U.S. Dist. LEXIS 11972, at *6 (E.D. Mo. Feb. 8, 2011) (quoting *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D. D.C. 2003)). Because Defendants have failed to offer any testimony to dispute or impeach the testimony of the Board's organizational representative, that testimony is uncontroverted.

Moreover, the admissions that Defendants contest as "legal conclusions" are usually testimony about clear-cut factual issues. For example, Defendants characterize the Board's admission that "neither cosmetologists nor barbers generally provide hair braiding services, nor African-style hair braiding services," Pls.' SUMF ¶ 59, as a "legal conclusion." Defs.' Resp. Pls.' SUMF ¶ 59 (at 22-23). Defendants have no basis to object to such testimony without providing citations to record evidence.

As a fallback position, Defendants claim that the statements of the Board's organizational representative "are not legal admissions of the Board or of any defendant other than the Executive Director." Defs.' Opp'n 2. But by acknowledging that these statements are the admissions of the

Executive Director, Defendants concede that it is record testimony of a named Defendant in this case. Thus, all such testimony is admissible against Defendants as uncontroverted testimony unless Defendants specifically dispute the Executive Director's testimony with citations to record evidence. Defendants completely fail to do so, so all of the Executive Director's testimony is uncontroverted.

II. Plaintiffs Have a Right to Earn a Living as African-Style Hair Braiders.

Defendants appear to dispute the very idea that Plaintiffs have a constitutional right to earn a living because, Defendants claim, Plaintiffs are not pursuing a "common occupation." Defs.' Opp'n 3-4. Without citation to any authority, Defendants argue that the right to earn a living only applies to the "common occupations," which excludes "niche" occupations such as African-style hair braiding. Defs.' Opp'n 4, 15.[3] This reasoning would appear to exclude from constitutional protection the right to pursue any occupation that is only practiced by a small minority even though the very purpose of the Fourteenth Amendment was to project minority rights from majoritarian impulses. Moreover, the U.S. Supreme Court has held that, "[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 Examiners of New Mexico*, 353 U.S. 232, 238-39 (1957) (emphasis added). More recently, the Court explained: "this Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment." *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (recognizing that this protection applies to the "complete prohibition of the right to engage in a calling," as opposed to a "brief interruption" such as when a search warrant is executed on a defense attorney while his client is testifying before a grand jury).

The Eighth Circuit has never recognized any exceptions from the "common occupations," nor indicated that citizens may be deprived of this right if their chosen occupation is not sufficiently

[3] Defendants guess that there are "probably less than 100" African-style hair braiders is wild speculation that is not supported by any record evidence. The Board inspectors estimated the number of braiding salons, not braiders.

popular.[4] Moreover, all three of the successful challenges to cosmetology/barber regulations brought by African-style hair braiders have explicitly recognized that African-style hair braiders (and in *Brantley*, African-style hair-braiding instructors) have a constitutional right to pursue their chosen occupations.[5]

Defendants thus invite this Court to break new ground in ruling that those who are members of occupational minorities do not enjoy "[t]he right to work for a living" that is "the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Traux v. Raich*, 239 U.S. 33, 41 (1915). This Court should decline to do so.

III. Defendants Concede that Plaintiffs Have Identified All of the State Interests.

Defendants concede that Plaintiffs have correctly identified the state interests. Defs.' Opp'n 5. As Plaintiffs demonstrated in their opening brief, licensing African-style hair braiders as cosmetologists or barbers fails to advance each of these state interests. *See* Pls.' MSJ Mem. 9-30 (ECF No. 49-1).

IV. Defendants Still Fail to Address Directly Relevant Federal Case Law Involving Challenges By African-Style Hair Braiders to Cosmetology Licensing.

Defendants continue to fail to address or respond to the directly on-point federal rational-basis cases involving challenges by African-style hair braiders to being licensed or regulated as cosmetologists/barbers, and thus effectively concede Plaintiffs' arguments. Defendants omit any mention of the nearly identical case of *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1215-16 (D. Utah 2012)

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[4] Contrary to Defendants' characterization, *Singleton v. Cecil* explicitly discusses "occupational liberty" and the difference between when someone is employed at-will by a public entity and when "the government, as a regulator, has somehow used its regulatory authority to deny a person the opportunity to pursue a chosen profession." 176 F.3d 419, 425 (8th Cir. 1999).

[5] *Brantley v. Kuntz*, No. A-13-CA-872-55, 2015 U.S. Dist. LEXIS 680, at *11, *22 (W.D. Tex. Jan. 5, 2015) ("The liberty protected by substantive due process encompasses an individual's freedom to pursue his or her chosen profession. . . . Denial of a license to practice one's profession can work a deprivation of that liberty interest, if the reasons for the denial offend due process."); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1216 (D. Utah 2012) ("to premise Jestina's right to earn a living by braiding hair on [Utah's cosmetology/barbering licensing] scheme is wholly irrational and a violation of her constitutionally protected rights"); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1105, 1118 (S.D. Cal. 1999) ("Plaintiffs . . . seek rationality when trying to pursue a livelihood").

(striking down application of Utah's cosmetology licensing regime to African hair braiders), upon which Plaintiffs rely heavily in their opening memorandum. *See* Pls.' MSJ Mem. 5-7, 9-12, 14-23, 27-28. Defendants only twice mention the other nearly identical case of *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), despite Plaintiffs' extensive discussion of the case, *see* Pls.' MSJ Mem. 5-7, 9-12, 14, 16-19, 21-24, and make no attempt to distinguish it from this case. *See* Defs.' Opp'n 8. Similarly, Defendants only twice mention the other successful federal rational-basis challenge by African-style hair braiders to cosmetology/barber regulations, *Brantley v. Kuntz*, 2015 U.S. Dist. LEXIS 680, at *16. *See* Defs.' Opp'n 8. Again, Defendants make no effort to distinguish *Brantley* and only discuss it in the limited context of whether Plaintiffs have properly brought an equal-protection claim. *See id.* Defendants also fail to address the eight factors identified by Plaintiffs that were used in *Clayton* and *Cornwell* to evaluate whether the cosmetology licensing scheme at issue was rationally related to the occupation of African-style hair braiding. *See* Pls.' MSJ Mem. 6-7, 16-24, 23, 28. By failing to discuss or dispute these cases, or the eight factors considered in *Clayton* and *Cornwell*, Defendants effectively concede the issues on which they are cited by Plaintiffs.

Defendants do cite an unpublished Sixth Circuit opinion involving African hair braiders, *Bah v. Attorney General of Tennessee*, 610 Fed. Appx. 547 (6th Cir. 2015). But unlike this case (and unlike *Clayton* and *Cornwell*), *Bah* involved a specialty braiding license, in which the majority of required hours of instruction involved specific instruction in braiding techniques. The *Bah* plaintiffs challenged a license in "natural hair styling" with only 300 hours of curriculum, and not Tennessee's 1500-hour general cosmetology license. *Id.* at 549. Those 300 hours include 180 hours of practical instruction on "[t]wisting, wrapping, weaving, extending, locking, braiding[,] and natural hair styling." *Id.* In other words, the "natural hair styling" license challenged in *Bah* is analogous to the 300-hour specialty license for braiders that the Board has endorsed, but that has not been enacted into law. Pls.' SUMF ¶¶ 202-

04. The *Bah* opinion distinguishes Tennessee's specialty braiding license from the California cosmetology license challenged in *Cornwell*, noting that *Cornwell* involved a challenge to a 1600-hour general cosmetology license and a general cosmetology exam. 610 Fed. Appx. at 552 (". . . the plaintiff in *Cornwell* was required to become a full cosmetologist to practice African hair braiding."). Thus, the 300-hour specialty hair braiding license challenged in *Bah* bears no similarity to Missouri's general 1500-hour cosmetology license, which requires **zero hours of instruction on braiding techniques**, much less any practical, hands-on training in those subjects. Pls.' SUMF ¶¶ 188-91, 193.

V. On Plaintiffs' Equal Protection Claim, Defendants Misread or Ignore the Cases Plaintiffs Cite In Support and Fail to Offer a Rebuttal to the Evidence Presented.

At issue in Plaintiffs' equal protection claim is not "whether the Equal Protection Clause requires the [Missouri] legislature to specially provide for a particular subset of a recognized profession," but rather whether it is constitutionally permissible for Defendants to "shoehorn two unlike professions," as the Board itself has recognized, "into a single identical mold." *Brantley*, 2015 U.S. Dist. LEXIS 680, at *22-25 (quoting *Clayton*, 885 F. Supp. 2d at 1214); Defs.' Opp'n 7. *See also Cornwell*, 80 F. Supp. 2d at 1107-08; Pls.' SUMF ¶¶ 56, 194-95. African-style hair braiding is not a subset of cosmetology/barbering. Pls.' MSJ Mem. Part III.A (ECF Doc. No. 49-1). There is no rational connection between a braider's fitness to practice African-style hair braiding and Missouri's cosmetology/barber licensing scheme. *See Clayton*, 885 F. Supp. 2d at 1214; *Cornwell*, 80 F. Supp. 2d at 1105 (citing *Schware*, 353 U.S. at 238-39). Requiring African-style hair braiders to comply with an irrelevant cosmetology/barber licensing scheme violates Plaintiffs' rights to equal protection.

In disregarding Plaintiffs' equal protection claim, Defendants make two significant errors. First, Defendants misread *Jenness v. Fortson* and its role in the courts' equal protection analysis in both *Cornwell* and *Clayton*. Second, Defendants fail to address the undisputed record evidence here, which clearly demonstrates that African-style hair braiding is not the same as the practice of cosmetology/barbering,

notwithstanding Missouri's statutory definitions, and that subjecting braiders to Missouri's cosmetology/barber licensing scheme is irrational.

A. Misreading *Jenness* and its application to *Cornwell* and *Clayton*, Defendants incorrectly assert that the Equal Protection Clause does not protect differently situated individuals from being irrationally treated as if they were the same.

Defendants claim that the guarantees of the Equal Protection Clause are reserved only for those individuals who are similarly situated, *see* Defs.' Opp'n 7-9, and argue that Plaintiffs "seek to manufacture a substantive right." Defs.' Opp'n 8. Courts, however, have repeatedly recognized that the Equal Protection Clause protects not only similarly situated individuals from disparate treatment, but also differently situated individuals from similar treatment. *See Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971) (citing *Williams v. Rhodes*, 393 U.S. 23 (1968)); *Clayton*, 885 F. Supp. 2d at 1214, 1216 (citing *Cornwell*, 80 F. Supp. 2d at 1103, 1107-08); *cf. Brantley*, 2015 U.S. Dist. LEXIS 680 at *22-25.

Defendants further argue that, in *Jenness*, "the Court's actual holding was the opposite of the conclusion Plaintiffs urge," and claim that the U.S. Supreme Court merely "made the observation . . . that the Equal Protection Clause does not require that differently situated people be treated exactly the same." Defs.' Opp'n 7-8. Defendants misread *Jenness* to limit the guarantees of equal protection, and thus wrongly urge this Court to disregard Plaintiffs' equal protection claim.

Jenness concerned an equal protection challenge to Georgia's two-path process for adding a candidate's name to the ballot. The Court found no equal protection violation **precisely because** differently situated individuals were **not** treated as if they were the same. *Jenness*, 403 U.S. at 441-42 ("Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes."). The *Jenness* court concluded that Georgia's two-path process was constitutional because it rationally accommodated differently situated nominees, while noting that requiring differently situated nominees to meet the same burden could have violated equal protection. *Id.* at 442 ("Sometimes the grossest discrimination can lie in treating things that are different as though they were

exactly alike, a truism well illustrated in *Williams v. Rhodes*."). *Jenness* therefore stands for the proposition that irrationally treating differently situated people similarly poses the same threat to equal protection as irrationally treating similarly situated people differently. *See id.* at 440-42.

Both *Cornwell* and *Clayton* adopted this understanding of *Jenness*. But Defendants treat *Cornwell*'s extensive rational-basis analysis of California's licensing regime as irrelevant (and conveniently fail to address *Clayton*, which also adopted the Supreme Court's approach in *Jenness*). *See* Defs.' Opp'n 8 (dismissing *Cornwell*'s "analysis of rationality"); *Cornwell*, 80 F. Supp. 2d at 1103, 1108-13, 1114-15, 1115-17 (describing the irrationality of the cosmetology curriculum requirements, textbooks, and licensing exam); *Clayton*, 885 F. Supp. 2d at 1214 ("Courts have also made it clear that a state may not 'treat[ ] persons performing different skills as if their professions were one and the same.'" (citing *Cornwell*)).

By misreading *Jenness* and ignoring *Clayton* and *Cornwell*, Defendants evidently forget that "the same [rational basis] standard applies" whether evaluating equal protection or due process claims. *Id.* at 1106 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40 (1985)). The analysis in the *Clayton* and *Cornwell* opinions is the same analysis this Court should apply here. *See Clayton*, 885 F. Supp. 2d at 1214, 1216 (analyzing plaintiff's due process and equal protection claims under the rational-basis test and finding Utah's cosmetology/barber scheme irrational); *Cornwell*, 80 F. Supp. 2d at 1103, 1119 (relying on the same analysis and reaching the same conclusion regarding California's scheme). Whether considered under equal protection or due process, the results are the same and not disputed: Missouri law forces African-style hair braiders to satisfy extensive educational requirements and take exams that have nothing to do with African-style hair braiding. That is irrational and unconstitutional.

B. African-style hair braiding is dramatically different from the practice of cosmetology or barbering, thus making Missouri's cosmetology/barber licensing scheme irrational as applied to hair braiders.

The overwhelming record evidence of this case demonstrates that the practice of African-style hair braiding is not the practice of cosmetology/barbering. *See* Pls. MSJ Mem. 9-12, 14; Pls.' SUMF

¶¶ 50-72; Pls.' Opp'n 10-13; *cf. Cornwell*, 80 F. Supp. 2d at 1108; *Clayton*, 885 F. Supp. 2d at 1215. Defendants agree that African-style hair braiding has a distinct and ancient history, provides more limited services than cosmetology/barbering, uses fewer and different tools, has a distinct client base, and is primarily performed by those who are not cosmetologists or barbers. *See* Defs.' Resp. Pls.' SUMF ¶¶ 51-55, 58-66, 69-72, 195. These factors not only distinguish African-style hair braiding from cosmetology/barbering, they also conform to the Board's understanding of what constitutes a distinct profession. *See* Pls.' SUMF ¶¶ 194-95. The similarities between African-style braiding and cosmetology/barbering suggested by Defendants are superficial, de minimis, and fail to demonstrate how African-style hair braiding is merely a subset of cosmetology/barbering. Defs.' Opp'n 10; *see Cornwell*, 80 F. Supp. 2d at 1108 (finding that plaintiff could not be reasonably classified as a cosmetologist because of her minimal scope of activities). The fact that African-style hair braiding is distinct from the practice of cosmetology/barbering is further reflected in the total mismatch between Missouri's licensing scheme and African-style hair braiding. *See* Pls.' MSJ Mem. 9-28; Pls.' SUMF ¶¶ 181-350; Pls.' Opp'n 14-20; *see also infra* Part VI.

In an attempt to side step these overwhelming facts, Defendants again rely on the statutory definitions of cosmetology/barbering, the legislature's discretion in regulating occupations, and allege a decision in favor of the Plaintiffs would jeopardize the public's well-being. Defs.' Opp'n 9-10, 12. First, Plaintiffs are not challenging the statutory definitions of cosmetology/barbering nor the Board's interpretation of those definitions; they are challenging the rationality of subjecting African-style hair braiders to Missouri's cosmetology/barber licensing scheme. *See* Pls.' Opp'n 9-10. Second, even under the rational-basis test, regulations must be rationally related to a legitimate government interest. Subjecting African-style hair braiders to Missouri's cosmetology/barber licensing requirements fails that test, as Plaintiffs previously demonstrated in excruciating detail. *See* Pls.' MSJ Mem. 12-28; Pls.' SUMF ¶¶ 181-350; Pls.' Opp'n 14-20. Finally, Plaintiffs are not challenging the salon inspection regime, so

striking down the cosmetology/barber licensing requirements will not impair the Board's ability to conduct inspections or discipline noncompliant salons. *See* Pls.' Opp'n 21-23; *see also infra* Part VI.B.

VI. On Plaintiffs' Substantive Due Process Claim, Defendants Fail to Rebut Plaintiffs' Showing that There is No Rational Relationship Between Licensing African-Style Hair Braiders as Cosmetologists or Barbers and Any Legitimate State Interest.

Licensing African-style hair braiders as cosmetologists or barbers violates Plaintiffs' substantive due process rights because it is not rationally related to any of the purported state interests. That's because, as Plaintiffs documented extensively in their opening brief and Statement of Uncontroverted Material Facts, there is very little or no relationship between the cosmetology/barber licensing scheme and the practice of African-style hair braiding. *See* Pls.' MSJ Mem. 9-28; Pls.' SUMF ¶¶ 181-350. This is undisputed; in their brief, Defendants admit, "[t]here is no dispute that neither the educational requirements nor the qualifying examinations used for licensure in the hair care professions address African-style hair braiding specifically in any detail." Defs.' Opp'n 14-15. Defendants also admit that "it is true that much of the cosmetology or barbering curriculum is irrelevant to the needs of one who chooses only to engage in the single practice of hair braiding." Defs.' Opp'n 17-18.

Remarkably, Defendants nonetheless claim that "a substantial portion of the required curriculum is devoted to teaching practitioners the skills and techniques they will need to safely and competently practice their craft." Defs.' Opp'n 16. This appears to be a feat of generic word selection; given Defendants' admissions in their brief and in discovery, Defendants must be talking about the "craft" of cosmetology or barbering rather than African-style hair braiding. But it is simply not relevant that obtaining a cosmetology/barber license may teach African-style hair braiders the skills necessary to safely and competently perform barbering or cosmetology, because those are not the services offered by African-style hair braiders. Braiders braid hair; they do not provide haircuts or cosmetology services.

In their arguments against Plaintiffs' substantive due process claim, Defendants pay lip service to the notion that occupational licensing regulations must be "reasonable" and must "reasonably

advance[]" a government interest, Defs.' Opp'n 14, but completely fail to engage on the issue of whether there actually is any rational "fit" between Missouri's cosmetology/barber licensing scheme and African-style hair braiding. Instead, Defendants attempt to distract the Court by pointing to other aspects of the Board's regulatory authority that they would prefer to defend. But Plaintiffs do not challenge the Board's authority to conduct inspections or discipline salons. Nor do Plaintiffs ask this Court to create a new license for hair braiders. Below, Plaintiffs address these points in turn.

A. There must be a rational "fit" between the licensing qualifications imposed and someone's fitness or capacity to practice that occupation.

Defendants' various statements about the legislature's broad authority to define and license occupations fail to account for the limitations imposed by the U.S. Constitution. Even in rational-basis cases, there must still be a rational connection between the occupation being licensed and the licensing requirements. Defendants seem to think this constitutional requirement is somehow superseded by how narrowly or broadly the legislature defines a given occupation or industry, however "imperfect" that may be. *See* Defs.' Opp'n 14-15, 18. Following this logic, if the legislature had defined hair braiding as part of structural engineering, then Defendants apparently believe that Plaintiffs would simply have to obtain degrees and licenses as structural engineers in order to practice African-style hair braiding. What Defendants fail to grasp is that the legislature's definition of an occupation is irrelevant; what matters is that the licensing regime imposed for any given occupation be rationally connected to the practice of that occupation. The legislature certainly does not have to create licenses for every occupation. When there is no license for a given occupation, people who practice that occupation cannot be constitutionally required to obtain a license that requires them to learn and demonstrate skills that are irrelevant to what they actually do in the day-to-day practice of earning their livelihood.

Defendants' failure to recognize this constitutional constraint on occupational licensing is demonstrated by their argument that Plaintiffs' substantive due process claim "overlooks the larger public interest in having some sort of screening process for those who would offer services to the

public." Defs.' Opp'n 14. Indeed, "some sort of screening process" is all that Defendants can offer this Court in terms of what is being advanced by requiring African-style hair braiders to comply with Missouri's cosmetology/licensing scheme. By Defendants' logic, requiring anyone, regardless of occupation, who "offer[s] services to the public" to obtain a cosmetology/barber license would be constitutional because it satisfies "the larger public interest in having some sort of screening process." This is absurd and ignores both the Supreme Court's holding in *Schware* that "any qualification must have a rational connection with the applicant's fitness or capacity to practice" his or her occupation, 353 U.S. at 239, as well as the guidance offered by lower courts that have considered nearly identical challenges brought by African-style hair braiders. *See Clayton*, 885 F. Supp. 2d at 1214 ("While the fit between this interest and the means employed need not be perfect, it must be reasonable."); *Cornwell*, 80 F. Supp. 2d 1106 ("There must be some congruity between the means employed and the stated end or the test would be a nullity."). Here, Plaintiffs have shown that there is a complete mismatch between the "means" of requiring African-style hair braiders to obtain a cosmetology/barber license, and any purported state interests. *See* Pls.' MSJ Mem. 9-28; Pls.' SUMF ¶¶ 181-350; Pls.' Opp'n 14-20.

B. Striking down the licensing requirement will not impair the Board's ability to conduct inspections or discipline noncompliant salons.

As Plaintiffs explained in their Opposition to Defendants' Motion for Summary Judgment (ECF No. 51), *see* Pls.' Opp'n 20-23 & n.7, they do not challenge the Board's authority to license establishments, conduct inspections of those establishments, or discipline those establishments. *See, e.g.,* Mo. Rev. Stat. §§ 328.115, 329.045. Plaintiffs are only challenging the requirement that an African-style hair braider must obtain an **individual license** as a cosmetologist or barber by completing the mandatory education and testing components of the cosmetology/barber licensing scheme in order to braid hair for paying customers. **Plaintiffs are not challenging salon licenses or salon inspections**. Thus, a ruling for Plaintiffs will not impair the Board's ability to conduct salon inspections or discipline noncompliant salons (although the Board could no longer discipline salons for unlicensed braiders).

C. Defendants mistake Plaintiffs' legal claims for a policy proposal to create a new braiding license.

Defendants also claim, without citation, that "Plaintiffs assert that they should not be subject to any educational regimen other than a brief course in sanitation and sterilization practices. . . .Plaintiffs assume that the AHSB [sic] practitioner comes into the art already trained and skilled . . . " Defs.' Opp'n 16. Plaintiffs are unsure what arguments Defendants are responding to, but Defendants seem to be mistaking Plaintiffs' legal claims for a policy proposal. Plaintiffs are not asking this Court to create a new licensing scheme or develop new requirements for licensing hair braiders. That is exclusively the province of the legislature. Plaintiffs merely ask this Court to strike down the application of Missouri's cosmetology/barbering licensing scheme to the distinct profession of African-style hair braiding.

VII. Plaintiffs Do Not Raise a Separate Claim Regarding Missouri's Statutory Exemption for Hair Braiders at Public Amusement or Entertainment Venues.

Defendants are mistaken about the nature of Plaintiffs' argument regarding Missouri's statutory exemption for unlicensed hair braiders at public amusement or entertainment venues. *See* Defs.' Opp'n 18-20. While Plaintiffs note that this exemption violates equal protection in a footnote, Pls.' MSJ Mem. 29 n.7, they do not raise it as an independent equal protection claim. Rather, Plaintiffs point out that this statutory exemption undermines the claimed state interests in protecting the public from unlicensed braiders because the Missouri legislature itself is willing to grant exemptions in situations where braiders are perhaps more likely to endanger public health and safety. *Id.* at 29-30. This argument thus further demonstrates the irrationality of applying Missouri's cosmetology/barber licensing scheme to African-style hair braiders, thus supporting both Plaintiffs' due process and equal protection claims.

CONCLUSION

For all of the above reasons, as well as the reasons stated in Plaintiffs' opening brief and in opposition to Defendants' motion for summary judgment, Plaintiffs respectfully request that this Court deny Defendants' Motion for Summary Judgment and grant Plaintiffs' Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 11th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of November, 2015, this REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' 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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