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.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs Ndioba (Joba) Niang and Tameka Stigers are African-style hair braiders who braid for customers at their salons in the St. Louis area. They provide only all-natural braiding services and do not use harmful chemicals, such as chemical relaxers, bleaches, or dyes. But they are required by Missouri law to obtain irrelevant licenses as cosmetologists (or barbers) in order to practice their chosen occupation. This is irrational because cosmetology and barbering are different occupations from African-style hair braiding, as Missouri's Board of Cosmetology and Barber Examiners (the "Board") admits. African-style hair braiders use specialized techniques and far less equipment to provide a very distinct, and far more limited, service. As the Board admits: "To be licensed in the State of Missouri, hair braiders are currently required to obtain a general cosmetology license and complete a 1500-hour cosmetology curriculum that is not specifically germane to African Hair Braiding and does not include various aspects of African Hair Braiding. As a result, African Hairbraiders are currently required under Missouri law to complete and pay tuition for months of training that does not relate to their occupation—African Hair braiding." Pls.' Statement Uncontrov. Material Facts ("SUMF") ¶ 210.

This case is nearly identical to two successful challenges by African-style hair braiders to state cosmetology/barber licensing in other federal districts. Like the plaintiffs in those cases, Joba and Tameka simply seek to continue braiding hair for a living without being forced to spend thousands of hours and tens of thousands of dollars to get licensed in a different occupation than they have chosen.

Missouri's cosmetology/barber licensing scheme is so irrelevant to African-style hair braiding that the Board admits that these licenses provide no guarantee of competence in hair braiding. That's because, as the Board admits, one can become a licensed cosmetologist/barber in Missouri—and thus be able to legally braid hair for pay—despite (1) receiving **no instruction on hair braiding** (let alone African-style hair braiding), and (2) **not being tested on hair braiding**. At the same time, those who actually have training and skill in African-style hair braiding cannot do so without an irrelevant license.

Missouri's licensing schemes for cosmetology and barbering require 1,500 and 1,000 hours of instruction, respectively, which can cost over $21,000. The hour requirements are so excessive that the President of the Board, who owns and teaches at a cosmetology/barber school, admits that, "[you] wouldn't come up with 1500 hours if you went through the whole entire textbook." SUMF ¶ 225. His school not only goes through the textbook three times, thus tripling the hours of "theory" instruction, but also spends 245 hours on general physical fitness, including possibly over 100 hours learning how to "stand properly," which he claims is "necessary" because barbers stand all day. SUMF ¶¶ 223-26.

In contrast, **the Board admits that not a single hour is required to be spent teaching hair braiding**, let alone African-style hair braiding. The Board's own hair-braiding expert testified that one does not learn African-style hair braiding in cosmetology school. SUMF ¶ 292. Indeed, most such schools that even teach braiding only offer cursory instruction in basic techniques such as simple plaits and French braids, but not the advanced, intricate styles that African-style braiders typically perform.

The Board further admits that the vast majority of the required cosmetology/barber curricula is not necessary to safely braid hair. It admits that ~10% or less of the total required class hours (spent on general health and safety topics) are even faintly relevant to braiding. By and large, cosmetology and barber schools and textbooks do not teach the health and safety issues the Board contends are most relevant to braiding. The required written and practical exams are almost entirely irrelevant to African-style braiders, and the Board and its expert dermatologist admit that these exams are inadequate to ensure that someone can safely braid hair. Recognizing the licensing mismatch, the Board has supported proposals that would create a separate 300-hour license specifically for hair braiders. But even that is far more instruction than the Board's own experts say is necessary to learn to safely braid.

This is why Joba and Tameka need this Court to protect their constitutional right to earn a living in their chosen occupation, a right guaranteed by the Fourteenth Amendment, so that they may continue supporting their families using their unique skills and talents as African-style hair braiders.

LEGAL STANDARDS

Below, Plaintiffs (1) lay out the legal standard for summary judgment, (2) explain the rational-basis standard of review, (3) review the factors that have been considered in two nearly identical rational-basis challenges to cosmetology/barber licensure of African-style hair braiders, and (4) explain that they seek to preserve their Privileges or Immunities claim for review.

I. Legal Standard for Summary Judgment.

Plaintiffs move this Court for summary judgment on their claims. Summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court shall view the evidence and draw inferences in a light most favorable to a non-moving party. But the nonmoving party must set forth specific facts showing that there is a genuine issue to resolve at trail. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If the evidence presented by the nonmoving party does not raise a genuine issue of material fact, summary judgment should be granted. *Id.* at 247-48. Where the nonmoving party fails to make a sufficient showing to establish the existence of an essential element to the party's case, for which they will bear the burden of proof at trial, summary judgment is required. *Celotex Corp.*, 477 U.S. at 322. The failure of proof for an essential element renders all other facts immaterial. *Id.* at 323.

II. Rational-Basis Review.

Joba and Tameka have brought claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment challenging the licensing of African-style hair braiders as cosmetologists (or barbers) as violating their right to earn a living. Plaintiffs do not allege that hair braiders are a protected class and courts do not treat the right to earn a living as fundamental; courts thus apply rational-basis review in evaluating such claims. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Lakeside Roofing Co. v. Nixon*, No. 4:10cv1761, 2012 WL 709276, at *13 (E.D. Mo. 2012).

To survive rational-basis review, government laws must be rationally related to a legitimate government interest. *See Romer*, 517 U.S. at 631-33. Courts strike down laws under this standard when they "lack[] a rational relationship to legitimate state interests." *Id.* at 632. Even when the government proffers a legitimate governmental interest to justify a law that law must be rationally related to furthering the proffered interest or it will be struck down under rational-basis review. *See, e.g.*, *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) (finding no rational relationship between Alaska program that distributed state oil money to residents in 1980 based on length of state residency since 1959 and state's purported objectives); *see also Lakeside Roofing Co.*, 2012 WL 709276, at *15 (no rational relationship between Missouri's Excessive Unemployment Law and stated goal of bolstering Missouri employment).

Plaintiffs in rational-basis cases bear the burden to negate the reasons proffered by the government for the challenged law by adducing evidence of irrationality. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) ("[T]he existence of facts supporting the legislative judgment is to be presumed . . . *unless in the light of the facts made known or generally assumed* it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.") (emphasis added). This requires rebutting each of the government's proffered purposes for the challenged laws or regulations with reference to specific factual evidence. *See, e.g., St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[t]he State Board cannot escape the pivotal inquiry of whether there is such a rational basis, one that can now be articulated and is not plainly refuted by the [Plaintiffs] on the record compiled . . ."); *Planned Parenthood of Minnesota v. Minnesota*, 612 F.2d 359, 362-63 (8th Cir. 1980) (addressing and rejecting the three justifications proffered by the government in support of a statute with reference to specific evidence in the factual record).

Rational-basis review is thus a meaningful standard of review conducted in light of actual evidence, and not a rubber stamp of government conduct, as it has sometimes been portrayed. *See, e.g.*, *St. Joseph Abbey*, 712 F.3d at 223 ("[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."). Plaintiffs prevail in rational-basis cases when they adduce evidence and provide reasoning establishing that there is no logical connection between the challenged statutory scheme and any plausible legitimate rationale.[1] Where every asserted rationale is refuted, courts strike down the challenged law.

III. Rational-Basis Review of Applying Cosmetology/Barber Regulations to African-Style Hair Braiders.

In the present case, the Court must ask whether Missouri's application of its cosmetology and barbering licensing regimes to African-style hair braiders furthers a legitimate government interest and whether there is a rational connection between that interest and the licensing requirements. The professional qualifications required by a state must have a "rational connection with the applicant's fitness or capacity." *Schware v. Board of Bar Exam'rs*, 353 U.S. 232, 239 (1957). Although there does not have to be "a perfect fit" between any legitimate governmental interest in regulating an occupation and the occupational regulation, "there must be some congruity between the means employed and the stated end." *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214 (D. Utah 2012) (quoting *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999)). The rationality of a licensing scheme is thus measured by the means-end fit of the licensing requirements with the state's purported interest.

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

[1] *See, e.g.*, *Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (ability to grasp politics not logically connected to land ownership); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989) (disparities in tax rates so enormous as to be illogical); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50 (1985) (group home being too big not logical basis for permit denial when identical homes routinely granted permits); *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985) (encouraging Vermont residents to make in-state car purchases not logical basis for tax on car that Vermont resident purchased out-of-state before becoming Vermont resident); *Zobel*, 457 U.S. at 62-63; *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam) (ability to grasp politics not logically connected to property ownership); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (stimulating the agricultural economy not logically connected to whether people in a household are related or unrelated); *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971) (if inability to pay is no basis to deny transcript to felony defendant, then inability to pay is no logical basis for denying transcript to misdemeanant); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (no rational interest in underlying property-ownership requirement for political office).

applied to African-style hair braiders. *See, e.g.*, *Brantley v. Kuntz*, 2015 U.S. Dist. LEXIS 680 at *16 (W.D. Tex. 2015) (striking down application of Texas's barber school regulations to schools that exclusively teach African hair braiding); *Clayton*, 885 F. Supp. 2d at 1215-16 (striking down application of Utah's cosmetology licensing regime to African hair braiders); *Cornwell*, 80 F. Supp. 2d at 1118-19 (striking down application of California's cosmetology licensing regime to African hair braiders). In each of the three cases, the courts considered facts presented by the plaintiffs to evaluate whether the challenged statutes or regulations bore a rational relationship to the proffered governmental interests. *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 these facts determinative in evaluating the rationality of applying the licensing regulations at issue to African hair braiders).

Clayton and *Cornwell* are the two cases that most closely resemble the present case because both were challenges to licensing African-style hair braiders as cosmetologists or barbers. *Clayton* and *Cornwell* reviewed the following factors to evaluate whether the cosmetology licensing scheme at issue was rationally related to the occupation of African-style hair braiding:

(1) The ratio of total hours required to obtain the license to the number of hours that are actually relevant to African-style hair braiding;

(2) Whether the state can guarantee that the subjects it claims are relevant to hair braiding will be given more than minimal time in any particular cosmetology/barber school;

(3) Whether the state knows which schools, if any, teach African-style hair braiding, how many hours of instruction in African-style hair braiding are offered at any such schools, and whether such instruction is mandatory or elective;

(4) The ratio of the number of pages in the standard textbooks for the cosmetology/barber curriculum that discuss braids of any kind, and particularly African-style braids;

(5) Whether the practical examination for a cosmetology/barber license is relevant to African-style hair braiding;

(6) Whether the state knows whether the written examination for a cosmetology/barber license requires any knowledge of natural or African-style hair braiding;

(7) Whether someone who is versed in the skills of African-style hair braiding may not practice them without a cosmetology/barber license, while someone with a cosmetology/barber license is not required to have any skills or experience in African-style hair braiding; and

(8) Whether African-style hair braiding was considered when the cosmetology/barber licensing scheme was created, and whether the state has investigated whether African-style hair braiding is a threat to public health or safety.

Clayton, 885 F. Supp. 2d at 1215; *Cornwell*, 80 F. Supp. 2d at 1106-18.

IV. Plaintiffs Seek to Preserve Their Privileges or Immunities Claim.

Plaintiffs also seek relief under the Privileges or Immunities Clause of the Fourteenth Amendment. Plaintiffs recognize, however, that this argument is currently foreclosed by the U.S. Supreme Court's decision in the *Slaughter-House Cases*. 83 U.S. 36 (1873). Plaintiffs acknowledge that only the Supreme Court may overturn the *Slaughter-House Cases* and reinstate the Privileges or Immunities Clause as a meaningful constitutional protection of the right to earn a living. Therefore, Plaintiffs do not waive their arguments under the Privileges or Immunities Clause and respectfully ask the Court to note that this argument has been preserved for possible Supreme Court review

ARGUMENT

Below, Plaintiffs first identify their constitutional rights at stake in this case. Next, Plaintiffs outline the government's purported interests in licensing African-style hair braiders as cosmetologists or barbers. Third, Plaintiffs show that Missouri's treatment of African-style hair braiders as though they are cosmetologists or barbers for the purposes of occupational licensing is irrational and violates equal protection. Fourth, Plaintiffs show that the licensing scheme violates their rights to substantive due process (and equal protection) because there is no rational relationship between licensing African-style

hair braiders as cosmetologists/barbers and the state's claimed interest of protecting public health and safety by ensuring competency and qualifications to provide hair braiding services. Fifth, Plaintiffs demonstrate that there is no rational relationship between licensing African-style hair braiders as cosmetologists/barbers and any consumer protection interest. Finally, Plaintiffs show that the government's purported interests are undercut by a statutory exemption for unlicensed braiders.

I. Joba and Tameka Have a Constitutional Right to Earn a Living.

Joba and Tameka have a constitutional right to earn a living as African-style hair braiders free from unreasonable regulations; indeed, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity" that the Constitution was designed to protect. *Truax v. Raich*, 239 U.S. 33, 41 (1915). It has long been recognized that the Fourteenth Amendment protects the right of individuals to pursue the occupation of their choice free from arbitrary and irrational regulations. *See, e.g.*, *Schware*, 353 U.S. at 238-39 ("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."); *see also Singleton v. Cecil*, 176 F.3d 419, 425 (8th Cir. 1999) (distinguishing when substantive due process rights are implied in the occupational context and when they are not).

II. Defendants Claim Two Categories of Governmental Interests in Licensing African-Style Hair Braiders as Cosmetologists or Barbers.

Defendants claims that the governmental interests advanced by licensing African-style hair braiders as cosmetologists or barbers are "protecting the health and safety of the public, assuring that professionals offering services to the public are competent, honest, and qualified, and preventing consumer fraud and harm, and others." SUMF ¶¶ 175-76. However, any interest in "assuring that professionals offering services to the public are competent, honest, and qualified" is not distinct from any interests in protecting public health and safety or preventing consumer fraud and harm. SUMF ¶¶ 175-79. Defendants have thus identified two overlapping categories of interests: (1) ensuring that those

who offer hair braiding services to the public are competent and qualified to do so without endangering public health and safety, and (2) preventing consumer fraud and harm. SUMF ¶ 180. To prevail, Plaintiffs must show that there is no rational relationship between licensing African-style hair braiders as cosmetologists or barbers and these two categories of claimed governmental interests.

III. Treating African-Style Hair Braiders as Cosmetologists or Barbers Is Irrational and Violates Plaintiffs' Constitutional Rights to Equal Protection.

As the three federal courts that have considered this issue have already recognized, African-style hair braiding is not the same occupation as cosmetology or barbering, and it is impermissible to "shoehorn two unlike professions 'into a single, identical mold, by treating hair braiders—who perform a very distinct set of services—as if they were [cosmetologists or barbers].'" *Brantley*, 2015 U.S. Dist. LEXIS 680 at *22-23 (quoting *Clayton*, 885 F. Supp. 2d at 1215); *Cornwell*, 80 F. Supp. 2d at 1107-08 (noting that a braider's services are "minimal in scope compared to the activities of a cosmetologist [and] of such a distinguishable nature, [that the African braider plaintiff] cannot reasonably be classified as a cosmetologist"). The Board itself also admits that hair braiding is a different occupation from both barbering and cosmetology. SUMF ¶ 56.

The guarantees of Equal Protection under the Fourteenth Amendment protect not only similarly situated individuals from disparate treatment, but also differently situated individuals from similar treatment. *See Jenness v. Fortson*, 403 U.S. 431, 442, (1971) ("sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . ."); s*ee also* Lawrence H. Tribe, *American Constitutional Law* 1438 (2d ed. 1988) ("Equality can be denied when government fails to classify, with the result that its rules or programs do not distinguish between persons who, for equal protection purposes, should be regarded as differently situated.").

In the occupational licensing context, "any qualification must have a rational connection with the applicant's fitness or capacity" to practice that occupation. *Clayton*, 885 F. Supp. at 1214 (quoting *Schware*, 353 U.S. at 239). 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.* at 1214 (citing *Cornwell*, 80 F. Supp. 2d at 1103). As in *Clayton* and *Cornwell*, Missouri's requirement that African-style hair braiders become licensed as cosmetologists or barbers in order to offer their services to customers "has irrationally squeezed two professions into a single, identical mold." *Id.* at 1215 (quoting *Cornwell*, 80 F. Supp. 2d at 1103).

Below, Plaintiffs first explain why African-style hair braiding is a distinct occupation from cosmetology or barbering. Next, Plaintiffs demonstrate that they are not cosmetologists or barbers and do not provide cosmetology/barber services. Third, Plaintiffs show that, despite the many differences between these occupations, Missouri continues to irrationally regulate African-style hair braiding as though it is the same as cosmetology or barbering. Fourth, Plaintiffs point out that the Board has proposed a separate license for hair braiders to remedy these problems.

A. African-style hair braiding is not the practice of cosmetology or barbering and is a distinct occupation.

African-style hair braiding is a separate occupation from cosmetology or barbering, as the Board itself admits. SUMF ¶ 56. Indeed, African-style hair braiding is distinct from cosmetology and barbering in many ways. First, the scope and type of services offered by African-style hair braiders is much more limited; cosmetologists and barbers provide a wide array of services—including chemical straightening of hair and chemical dyes—that are not provided by African-style hair braiders. SUMF ¶¶ 50, 52-53. As a result, few African-style hair braiders are cosmetologists or barbers. SUMF ¶¶ 57-58. Second, African-style hair braiding uses different techniques, methods, and simple tools to provide a very different service for customers than what is offered in most cosmetology salons or barber shops. SUMF ¶¶ 63-64, 67-69, 76, 96. Third, as the Board admits, African-style hair braiding has distinct geographic, cultural, historical and racial roots, with an ancient African lineage that is completely independent from European cosmetology and barbering. SUMF ¶ 51. For example, it is usually not learned in school, and is often passed down from generation to generation. SUMF ¶¶ 54-55. Fourth,

as a form of natural hair care, it is philosophically opposed to the use of potentially harmful chemicals emphasized in modern cosmetology, which appeals to customers who don't want to have their hair or scalp damaged by chemicals. SUMF ¶¶ 52-54. Fifth, it is primarily done by and for persons of African descent (and unlike barbering, not predominantly performed on men). SUMF ¶¶ 51, 65-66, 70. Sixth, African-style hair braiding occupies a unique niche in the hair-care industry, with many practitioners exclusively offering African-style hair braiding services. SUMF ¶¶ 52-54, 62, 72. In contrast, few cosmetologists or barbers offer hair braiding, much less African-style hair braiding. SUMF ¶¶ 59-61.

B. Joba and Tameka are not cosmetologists or barbers—they only provide African-style hair braiding services, and do not provide cosmetology/barber services.

Cornwell involved a challenge by Dr. JoAnne Cornwell, who developed the Sisterlocks hair-locking system used by Tameka. 80 F. Supp. 2d at 1107-08. The *Cornwell* court analyzed the scope of services provided as part of the Sisterlocks process and concluded that "Cornwell's 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." *Id.* at 1108. Here, the Sisterlocks services offered by Tameka are essentially identical to those offered by Dr. JoAnne Cornwell. SUMF ¶¶ 34-38, 93, 100-107. Joba does not practice Sisterlocks; however, her services are similarly limited to all-natural African-style hair braiding (as was true of Jestina Clayton, the plaintiff in *Clayton*). SUMF ¶¶ 74-87; 885 F. Supp. 2d at 1213.

Joba and Tameka are not cosmetologists or barbers and do not hold themselves out as cosmetologists or barbers. SUMF ¶¶ 4-5, 29-30. Like many African-style hair braiders, Joba and Tameka limit their services solely to providing African-style hair braiding. SUMF ¶¶ 62, 74, 93. Unlike cosmetologists, Joba and Tameka do not offer a wide range of different hair care services; they only offer African-style hair braiding. SUMF ¶¶ 74, 80, 93, 100. Unlike cosmetologists, Joba and Tameka do not dye hair nor use chemicals or heat to style, relax, or straighten their customers' hair. SUMF ¶¶ 80, 100. Unlike cosmetologists, Joba and Tameka do not wash their customers' hair. SUMF ¶¶ 81-

82, 101-02. Unlike cosmetologists, Joba and Tameka use simple tools and don't use many of the tools or equipment commonly used by cosmetologists or barbers. SUMF ¶¶ 83-87, 103-107.

Joba and Tameka do not typically provide the sorts of basic plaits and braids that may be taught to novices at some cosmetology/barber schools. SUMF ¶¶ 75, 94. Instead, Joba and Tameka offer unique African-style hair braiding services—including Senagelese twists, micro braids, box braids, and Sisterlocks—that cannot typically be found at cosmetology salons or barber shops. SUMF ¶¶ 74, 76, 93, 96. These styles are intricate and highly detailed, often with a large number of small braids or locs, and usually take several hours—sometimes a full day—to create. SUMF ¶¶ 77, 97.

Where, as here, there is minimal overlap between the services provided by a hair braider and the services provided by a cosmetologist or barber, it is unreasonable to consider the practice of braiding hair akin to the practice of cosmetology or barbering. *See 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 ("Even 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.").

C. Even though African-style hair braiding is a distinct occupation from either cosmetology or barbering, Missouri requires hair braiders to obtain a cosmetology/barber license in order to braid hair for customers.

The Board readily admits that it requires anyone in Missouri who wishes to braid hair for paying customers to obtain a cosmetology/barber license, and that it enforces Missouri's cosmetology/barber licensing scheme against hair braiders who fail to comply. SUMF ¶¶ 111-17. But, as the Board also admits, Missouri's cosmetology/barber licensing programs are designed to train and prepare cosmetologists and barbers for their respective occupations, and were not designed to train or prepare African-style hair braiders. SUMF ¶¶ 181-87. In the Board's own words: "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 not particularly relate to that practice." SUMF ¶ 182. The problem is thus twofold: (1) the cosmetology/barber licensing scheme is not actually designed to teach hair braiding, much less African-style hair braiding, and (2) the mandatory cosmetology/barber curriculum includes many hours of instruction that are irrelevant to hair braiders.

First, as the Board admits: "To be licensed in the State of Missouri, hair braiders are currently required to obtain a general cosmetology license and complete a 1500-hour cosmetology curriculum that is not specifically germane to African Hair Braiding and does not include various aspects of African Hair Braiding." SUMF ¶ 210. As a result, the Board admits, "one specializing in the braiding of hair would not learn all he or she needs from the standard curricula." SUMF ¶ 183. In fact, the mandatory cosmetology/barber curricula **does not require any training on braiding, much less African-style hair braiding**. SUMF ¶¶ 188-93. While the Board claims that cosmetology/barber schools may opt to spend time on hair braiding as part of the mandatory hours allocated to the "hairstyling" or "miscellaneous" subjects, the Board also cannot guarantee that *any* time spent on those subjects is actually relevant to braiding and does not monitor whether schools spend any of that time on braiding instruction, as explained further *infra* in Parts IV.B.iii and IV.C. SUMF ¶¶ 218-19, 285-91.

Second, the Board has repeatedly conceded that: "African Hairbraiders are currently required under Missouri law to complete and pay tuition for months of training that does not relate to their occupation—African Hair braiding." SUMF ¶ 210. In fact, as explained further *infra* in Part IV.A, the Board also admits that ~10% or less of the mandatory cosmetology and barber curricula—which total 1,500 hours and 1,000 hours respectively—pertains to subjects (including "anatomy" and "state law") that the Board claims are relevant to African-style hair braiding. SUMF ¶¶ 211-213. Thus, to lawfully braid hair in Missouri, an African-style hair braider must complete roughly 1400 or 900 hours of irrelevant training to become a licensed cosmetologist or barber, respectively. *See id.*; SUMF ¶ 111.

D. Recognizing the mismatch between the cosmetology/barber licensing scheme and braiding, the Board itself supports a separate license for braiders.

As a result of the mismatch between the cosmetology/barber licensing requirements and African-style hair braiding, the Board has also supported, and continues to support, establishing a separate license for hair braiders with significantly different (and lower) requirements from Missouri's cosmetology/barber licensing regime. SUMF ¶¶ 197-208. The Board admits that, in order to satisfy all of the governmental interests identified by Defendants, it seeks "to create a special category of licensure for braiders with more of what they do need and less of what they don't." SUMF ¶¶ 205-07. Notably, unlike the status quo, the Board's proposed curriculum for a "Class HB –hairbraiding" license would include mandatory instruction specifically on "hair braiding and braid styling." SUMF ¶¶ 200, 202, 204. Thus, even the Board recognizes that African-style hair braiding is a different occupation from cosmetology or barbering that should not be licensed as though it is the same occupation. SUMF ¶ 56.

For all of the above reasons, licensing African-style hair braiders as cosmetologists or barbers violates equal protection because there is no "rational connection with the applicant's fitness or capacity" to practice African-style hair braiding. *Clayton*, 885 F. Supp. at 1214 (quoting *Schware*, 353 U.S. at 239). Like California, Utah, and Texas, Missouri "has irrationally squeezed 'two professions into a single, identical mold.'" *Id.* at 1215 (quoting *Cornwell*, 80 F.Supp.2d at 1103).

IV. There is No Rational Relationship Between Missouri's Cosmetology/Barber Licensing Regime and Assuring Competence or Safety in African-Style Braiding.

Licensing African-style hair braiders as cosmetologists or barbers violates Plaintiffs' substantive due-process rights because it is not rationally related to the Board's purported interests in protecting the public from incompetent braiders or unsafe hair braiding practices. The cosmetology/barber licensing regimes were not designed for African-style hair braiding and have no requirements specific to African-style hair braiding, as the Board itself admits. *See supra* Part III.C. The Board also admits that—prior to discovery in this lawsuit—it had no knowledge of whether any Missouri cosmetology/barber schools

offered instruction in African-style hair braiding nor whether African-style hair braiding was tested on its licensing exams. SUMF ¶¶ 300-02, 328. The Board thus cannot verify or ensure that cosmetologists or barbers are taught or tested on the skills and knowledge necessary to perform African-style hair braiding. The Board further admits that Missouri's cosmetology and barber licensing regimes cannot ensure that cosmetologists or barbers "demonstrate competence in the material deemed necessary for the safe practice" of hair braiding nor do they provide any "guarantee of competence" to perform hair braiding. SUMF ¶¶ 336, 342. Thus, requiring braiders to become licensed as cosmetologists or barbers does not further any interest in ensuring that braiders are competent or qualified to safely braid hair.

At the same time, 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. SUMF ¶ 157. But the Board admits that ~10% or less of the mandatory curricula pertains to subjects it claims are relevant to African-style hair braiding. SUMF ¶ 211-13. The Board also admits that 300 hours of instruction would be sufficient to protect the public (and has supported proposals to create a separate 300-hour braiding license), while the Board's experts concluded that far less instruction is needed for to learn to safely braid hair. SUMF ¶¶ 227-35. Requiring someone to **spend 900 to 1400 hours and tens of thousands of dollars on irrelevant and unnecessary training** to learn an occupation different from the one he or she actually chooses to practice is completely pointless and irrational on its face. In short, "[Missouri's] cosmetology/barbering licensing scheme is so disconnected from the practice of African hairbraiding, much less from whatever minimal threats to public health and safety are connected to braiding, that to premise [Joba and Tameka's] right to earn a living by braiding hair on that scheme is wholly irrational and a violation of [their] constitutionally protected rights." *Clayton*, 885 F. Supp. 2d at 1215-16.

Below, Plaintiffs first show that Missouri's mandatory cosmetology/barber curricula are both largely irrelevant to African-style hair braiding and fail to require instruction on three health and safety

topics that the Board contends are particularly important for hair braiding. Next, Plaintiffs explain that the standard textbooks used by most schools are inadequate for braiding instruction and that the Board exercises no oversight over any other materials that may be used for braiding instruction. Third, Plaintiffs show that if any instruction on hair braiding is offered in Missouri cosmetology/barber schools, the Board exercises no oversight over it. Fourth, Plaintiffs demonstrate that Missouri's licensing exams fail to adequately test on hair braiding or on three health and safety topics the Board claims are particularly important for hair braiding.

A. The Board admits that Missouri's mandatory cosmetology/barber curricula are largely irrelevant and unnecessary to the practice of African-style hair braiding and fail to require instruction on particularly important health-and-safety topics.

Both the *Clayton* and *Cornwell* courts focused on the extent to which the mandatory cosmetology/barber curricula was relevant to African-style hair braiding. *See Clayton*, 885 F. Supp. 2d at 1215 ("[m]ost of the cosmetology curriculum is irrelevant to hairbraiding. Even the relevant parts are at best, minimally relevant."); *Cornwell*, 80 F. Supp. 2d 1118 (noting that the mandatory curriculum "requires hair braiders to learn too many irrelevant, and even potentially harmful, tasks."). As the *Cornwell* court noted, irrational requirements can be both unduly burdensome and counterproductive: "Because the licensing regimen requires would-be braiders to spend scarce time and resources on learning irrelevant skills, it actually impedes development of knowledge in their own craft." *Id.* at 1112.

i. The Board admits that less than ~10% of the mandatory cosmetology/barber curricula is relevant or necessary for hair braiding.

As noted *supra* in Part III.C, the Board admits that not a single hour of instruction on braiding is required by the mandatory cosmetology/barber curricula. SUMF ¶¶ 188-93, 242. The Board claims, however, that the mandatory cosmetology/barber curricula include training on general health-and-safety topics that are relevant to braiding. SUMF ¶¶ 214-15. But the Board admits that the curricula require many hours of training that are irrelevant to braiding, and "include[] a great deal of information [hair braiders] will never use." SUMF ¶ 209. Indeed, the Board President admits that even for his

cosmetology/barber students, "[you] wouldn't come up with 1500 hours if you went through the whole entire textbook." SUMF ¶ 225. His students go through the textbook three times, thereby tripling the hours he claims they spend on "theory." SUMF ¶ 226. His school also spends 245 hours on "fitness center," a general physical fitness subject that includes cardiovascular workouts, "eating healthy," health maintenance, and learning to use workout equipment. SUMF ¶ 223-24. The only component he could identify that was specific to cosmetology/barbering was that his students spend possibly over 100 hours learning how to stand properly, which he says is "necessary" because "barbers, we stand all day." *Id.*

In fact, **the Board can only identify 100 hours of subjects in the mandatory 1,500-hour cosmetology curriculum**—and 105 hours of subjects in the mandatory 1,000-hour barbering curriculum—that it claims are necessarily relevant to hair braiding. SUMF ¶¶ 211-12. The subjects that the Board identified as relevant are general health and safety (or business practices) topics, including twenty hours on "Anatomy" and ten hours on "Salesmanship and shop management." SUMF ¶¶ 214-15. Thus, the Board admits that approximately 10% or less of the mandatory curricula for cosmetology/barber licensing is relevant to African-style hair braiding. SUMF ¶ 213. Such a low ratio of relevant-to-irrelevant instruction was found insufficient to satisfy the rational-basis standard in both *Clayton* and *Cornwell*. *See Clayton*, 885 F. Supp. 2d at 1215 (up to 30% of the curriculum was alleged to be relevant); *Cornwell*, 80 F. Supp. 2d at 1109 (less than 10% of the curriculum was relevant).

Further demonstrating that much of the cosmetology and barbering curriculum is irrelevant and unnecessary for braiding, the Board admits that one could learn everything needed to safely practice braiding—and satisfy all of the stated government interests—with 300 hours of training. SUMF ¶ 222. The Board has supported a separate licensure for braiders that would require 300 hours of training rather than 1,000 or 1,500 hours. SUMF ¶ 201. However, even that overestimates the amount of time necessary to safely train braiders according to the Board's own experts. The Board's expert on hair braiding concluded that only 115 hours of health and safety instruction in the 1,500-hour mandatory

cosmetology curriculum were necessary for braiders to safely provide hair braiding services. SUMF ¶ 227.[2] One of the Board's expert dermatologists concluded that many of the hour requirements for these subjects in the mandatory cosmetology/barber curricula hour requirements were "excessive" and said far fewer hours of training—as few as 2-3 days or 25-30 hours of training—would actually be needed for braiders to learn everything except sanitation best practices.[3] SUMF ¶¶ 230-35. The Board's other expert dermatologist indicated that what braiders need to be taught about traction alopecia to safely braid children's hair could be taught in 15 minutes to attentive students, and she in fact gives such instruction in this time frame to patients at her clinic. SUMF ¶ 229.

Where a licensing regime is "so disconnected from the practice of African hairbraiding" to premise someone's right to work on that scheme is "wholly irrational" and a violation of constitutional rights. *Clayton*, 885 F. Supp. 2d at 1215-16; *see Cornwell*, 80 F. Supp. 2d at 1108.

ii. The mandatory cosmetology/barber curricula fails to require any instruction on the three health-and-safety topics that the Board claims are of special concern for hair braiding.

The Board identifies three specific health-and-safety topics that it claims are of special concern for hair braiding, SUMF ¶¶ 236-39, but it admits that they are not required to be taught as part of the mandatory cosmetology/barber curricula. SUMF ¶ 241. Thus, the Board cannot ensure that any cosmetologist or barber has received instruction on these topics. SUMF ¶ 242. Specifically, Defendants' experts allege that two hair-loss conditions known as traction alopecia and central centrifugal cicatricial alopecia (CCCA) are of special concern for African-style hair braiding, and that there are also special health considerations when providing braiding services to young children. SUMF

[2] Ms. Morris claimed that an additional 130 hours for haircutting and shaping was necessary for a braider to learn how to trim ends properly to match the shape of the face, but one of the Board's expert witness dermatologists reviewed her testimony and determined that the reasons given by Ms. Morris for inclusion of this category related only to aesthetic concerns, and not health and safety issues. SUMF ¶¶ 227-28.

[3] Missouri's mandatory cosmetology curriculum requires 30 hours of instruction on "Sanitation and sterilization," while Missouri's mandatory barber curriculum requires 20 hours of instruction on "Sterilization, Sanitation, and Safe Work Practices." SUMF ¶¶ 130, 140. Thus, there would be 45-60 total hours of training for braiders if this recommendation was combined with the hours for sanitation training in the cosmetology/barber curriculum.

¶¶ 238-39. The Board claims that obtaining a cosmetology/barber license ensures that would-be braiders are properly trained on these topics. SUMF ¶ 234. But the Board admits that **there is no requirement that any instruction on traction alopecia, CCCA, or braiding children's hair be provided** in the mandatory cosmetology/barber curricula. SUMF ¶ 240. The standard textbooks offer either no coverage or inadequate coverage of these topics, as explained *infra* in Part IV.B.ii. Thus, the Board cannot ensure that any instruction on these topics is offered under the cosmetology/barber licensing regimes, nor that cosmetologists/barbers receive any more information about these health and safety topics than anyone else. SUMF ¶ 242. Nevertheless, cosmetologists and barbers are free to braid hair despite no assurances that they have received any instruction or training about traction alopecia, CCCA, or the braiding of young children's hair. *See, e.g.*, SUMF ¶¶ 243-50, 272-80.

B. The standard textbooks used by most Missouri cosmetology/barber schools are inadequate for instruction on African-style hair braiding, and the Board exercises no oversight of any other materials used for braiding instruction.

In addition to examining the relevance of the required curricula, both the *Clayton* and *Cornwell* courts noted that the industry-standard textbooks used in cosmetology/barber schools provide scant instruction on braiding. *Clayton*, 885 F. Supp. 2d at 1215 (noting that only 38 pages of 1700 pages reference braids of any kind); *Cornwell*, 80 F. Supp. 2d at 1111, 1114-15 (finding that the Pivot Point curriculum did not save California's regulations because so few pages were devoted to braiding and instruction was provided on straight rather than coily hair). As in *Clayton* and *Cornwell*, the standard textbooks used by Missouri cosmetology/barber schools are also inadequate to provide instruction on African-style hair braiding because their discussion of braiding is cursory and riddled with errors.

i. The standard textbooks used by most Missouri schools provide only cursory, inaccurate instruction on African-style hair braiding.

The primary cosmetology and barbering textbooks used by most Missouri-licensed cosmetology and barbering schools are the Milady and Pivot Point textbooks. SUMF ¶¶ 251. The Board admits that most licensed cosmetology/barber schools use the Milady and Pivot Point textbooks as the

foundation for any instruction they offer on hair braiding, including any instruction on the health-and-safety topics the Board alleges are particular to African-style hair braiding. SUMF ¶ 252; *see also* SUMF ¶¶ 248-49. However, these textbooks provide only cursory braiding instruction, if any at all. SUMF ¶ 253. As in *Clayton*, between the two cosmetology textbooks, totaling some 1,700 pages, only 38 pages mention braids (the editions have not changed). 885 F. Supp. 2d at 1215; SUMF ¶ 254. In nearly 1,400 pages, the two barbering textbooks only spend two pages on hair braiding techniques (one does not mention braiding, the discussion in the other is "very vague"). SUMF ¶ 254 Moreover, the instruction on braiding in the Milady and Pivot Point cosmetology textbooks is riddled with errors—including in the captions for the photographs and in the step-by-step instructions. SUMF ¶ 255. They are also not particularly useful for learning African-style hair braiding because they focus on braiding styles for straight hair—and largely use illustrations showing braiding on straight or artificially straightened hair—and not the textured hair that is most commonly braided in African-style hair braiding. SUMF ¶ 256.

ii. The standard textbooks offer inadequate instruction on health-and-safety topics relevant to braiding, particularly the three topics the Board claims are of special concern for braiding.

In addition, the primary cosmetology and barbering textbooks used by most Missouri schools provide either no instruction or inadequate instruction on several health-and-safety topics that the Board's experts identified as relevant to braiding. SUMF ¶¶ 257-71. Depending on the textbook, they also omit at least two and sometimes all three of the health and safety topics the Board claims are most important for braiding. Defendants admit that CCCA and braiding children's hair are not mentioned in the Milady or Pivot Point cosmetology/barber textbooks. SUMF ¶ 272-73. Defendants also admit that traction alopecia is not mentioned in the barbering textbooks. SUMF ¶ 274. The 2010 Pivot Point and 2012 Milady cosmetology textbooks contain only a very brief, one-paragraph discussion of traction alopecia, while the 2016 edition of Milady does not even mention traction alopecia. SUMF ¶¶ 275-76. Due to the cursory information and lack of images, Defendants' dermatology experts concluded that the textbooks provide insufficient instruction on traction alopecia for hair braiders. SUMF ¶¶ 277-80.

iii. The Board exercises no oversight over any materials used for any braiding instruction that may be offered by Missouri-licensed cosmetology/barber schools.

The Board claims that it requires licensed Missouri cosmetology and barber schools to use standardized textbooks, but has very few standards for textbooks—they must merely be a current edition and not a photocopy. SUMF ¶¶ 281-83. The Board's inspectors, when conducting a school inspection, primarily inspect to see if there is a sufficient number of textbooks that are not outdated. SUMF ¶ 284. The Board makes no effort to monitor or evaluate the quality of the textbooks or any other materials nor their relevance to African-style hair braiding or any other subject. SUMF ¶¶ 285-91. In fact, the Board admits it has "never reviewed the quality" of any hair-braiding curriculum nor can it identify a single lesson plan on braiding, used by any cosmetology/barber school. SUMF ¶¶ 290-91.

Thus, as in *Clayton* and *Cornwell*, the primary textbooks used by Missouri cosmetology/barber schools fail to offer meaningful instruction in African-style hair braiding. In addition, the textbooks fail to offer instruction on the three health-and-safety topics that the Board has identified as being of particular concern with respect to braiding. Moreover, the Board exercises no oversight over the curriculum used to teach any subjects, including any instruction on braiding, and thus cannot ensure the accuracy, quality, or relevance of such instruction to African-style hair braiding. As a result, the Board "cannot guarantee that the subjects it claims are relevant to African hair braiding will be given more than minimal time in any cosmetology/barber school." *Clayton*, 885 F. Supp. 2d at 1215.

C. If Missouri cosmetology/barber schools offer any instruction on hair braiding, the Board exercises no oversight over that instruction.

Occupational licensing schemes are irrational if they cannot ensure that licensed individuals receive the necessary training or skills for their occupation. *See Clayton*, 885 F. Supp. 2d at 1215 (noting that the State does not know what schools, if any, teach African-style hair braiding or how many hours of instruction are provided); *Cornwell*, 80 F. Supp. 2d at 1112 (noting that there is no guarantee that

students who complete cosmetology school will learn necessary skills and that the current licensing regime may work against the State's goal by squandering limited time on irrelevant training).

The Board admits it has **zero oversight over the quantity or quality of any instruction on hair braiding** provided by Missouri cosmetology/barber schools. SUMF ¶¶ 219, 286-91. Thus, as in *Clayton* and *Cornwell*, the Board cannot ensure that Missouri cosmetology/barber schools provide any instruction in hair braiding, let alone African-style hair braiding. In fact, most Missouri cosmetology/barber schools offer little or no instruction in African-style hair braiding.

i. The Board does not monitor whether Missouri's licensed cosmetology/barber schools provide any instruction on hair braiding.

As in *Clayton* and *Cornwell*, the Board is unable to guarantee that any hair braiding instruction is provided by cosmetology/barber schools as part of either curricula. SUMF ¶¶ 188-193, 219. In fact, the Board does not even monitor whether cosmetology/barber schools offer any instruction on hair braiding, let alone African-style hair braiding. SUMF ¶¶ 219, 286-88. Nor does it review the quality of any braiding instruction. SUMF ¶¶ 289-91. Despite the importance of practical hands-on experience performing braiding, students are not required to receive any practical experience braiding, including on a live person with "tightly textured" hair. SUMF ¶¶ 190-92, 297. Thus, one may graduate from cosmetology/barber school without *any* training or experience in braiding. SUMF ¶ 193.

Even for the 100 or 105 hours of mandatory curriculum subjects that the Board identified as relevant to braiding, the Board cannot guarantee that all of the hours spent on those topics are relevant to braiding because what is taught under each subject is entirely up to the discretion of each school. SUMF ¶¶ 214-16, 242. Thus, just as in *Clayton*, the Board "cannot guarantee that the subjects it claims are relevant to African hair braiding will be given more than minimal time in any cosmetology/barber school, making even its estimate of 'relevant hours' speculative." 885 F. Supp. 2d at 1215.

The situation in Missouri therefore mirrors the situations in Utah and California described in *Clayton* and *Cornwell*. *See Clayton*, 885 F. Supp. 2d at 1215 ("The State does not know which schools, if

any, teach African hair braiding."); *Cornwell*, 80 F. Supp. 2d at 1112 ("[E]ven were it the case that a would-be braider might learn to braid in cosmetology school, there is no assurance that this would happen with every possibility of the reverse being true.").

ii. Although some Missouri-licensed cosmetology/barber schools may offer brief instruction in basic braiding, few Missouri schools offer instruction in African-style hair braiding.

As the Board's expert on hair braiding testified, "one does not learn [African-style hair braiding] in school." SUMF ¶ 292. Indeed, most African-style hair braiders are self-taught, learning braiding techniques from friends and family, as the Board admits. SUMF ¶ 55. The Board admits that to the extent that cosmetology/barber schools provide any braiding instruction, most of those schools only provide instruction on basic braiding techniques (such as simple plaits and French braids, often on straight hair), and not African-style hair braiding. SUMF ¶¶ 294-97. The Board estimates that less than 10 of the 93 Missouri schools teach African-style hair braiding techniques. SUMF ¶ 293. African-style hair braiding expert Pamela Ferrell conducting a phone survey sample of 16 Missouri schools and also reviewed the schools' depositions by written question; she also found that African-style hair braiding it is not commonly taught in Missouri schools. SUMF ¶ 298. She also found that only 23 of the 85 the schools claimed to teach about CCCA when specifically asked about it. SUMF ¶ 247. In addition, at least 63 schools indicated that they used the standard Milady or Pivot Point textbooks (a vast majority said exclusively) for instruction on traction alopecia and CCCA, are inadequate for instruction on these topics, as Defendant's expert dermatologist admits. SUMF ¶¶ 248-49, 272-280.

D. Missouri's licensing exams are inadequate to test hair braiders.

In both *Clayton* and *Cornwell*, the courts found that the failure of the states' respective licensing exams to meaningfully test or even include braiding as a topic underscored the irrelevance of the licensing regimes for African-style hair braiding. *See Clayton*, 885 F. Supp. 2d at 1215 (noting that the practical exam is irrelevant to African hair braiding and that the state has no idea what is included on the written exam and whether any knowledge of African hair braiding is required); *Cornwell*, 80 F. Supp.

2d at 1115-16 (noting that irrelevant subjects dramatically outweigh relevant subjects on the exam and that it is (1) unlikely that braiding is part of the exam because it is not a required component of the curricula and (2) braiding may be tested only on straight hair as indicated by the textbooks).

Similarly, in this case, because the Board outsources the exam to third parties including the National Interstate Council of State Boards of Cosmetology (the "NIC"), the Board has very little knowledge of what is tested; the Board admits it has never reviewed more than the 8-10 sample questions that the NIC provides to the public for each exam. SUMF ¶¶ 152, 153. The Board admits that hair braiding is not tested on the practical portions of either of Missouri's cosmetology or barber licensing exams nor can it be tested on the written portion of Missouri's barber licensing exam. SUMF ¶¶ 146, 303; *see* SUMF ¶¶ 153. Indeed, the Board had no idea whether anything relevant to braiding was actually tested on the written cosmetology exam until discovery in this lawsuit. SUMF ¶¶ 300-02.

i. Cosmetology and barber licensing exams are not suited to licensing African-style hair braiders.

The Board admits that the NIC cosmetology and barber exams used in Missouri are designed to license cosmetologists and barbers, respectively, and not to license hair braiders. SUMF ¶ 306. The Board also admits that the NIC has developed a separate exam that is designed for licensing hair braiders, but that Missouri does not use that exam. SUMF ¶¶ 307-08. In developing exams, the NIC places substantial emphasis on ensuring there is a "key linkage" between the content of the examinations and the day-to-day practice of an occupation, including by conducting frequent studies of practitioners, as the Board admits. SUMF ¶¶ 309-10. The Board also admits that this "key linkage" between the content of the examinations and practice on the job is what ensures the legal defensibility of the NIC examinations. SUMF ¶ 311. Also, as the Board admits, licensing exams need to test what people actually do as part of their occupation in order to ensure competency and safety in that occupation. SUMF ¶¶ 312-13. That's why the Board admits it could not ensure that "key linkage" if it licensed barbers using the cosmetology exam or vice-versa, even though there is significant overlap

between the two professions. SUMF ¶¶ 314-15; *see also* SUMF ¶ 316. The Board also admits that requiring braiders to pass either the barber or cosmetology exam presents the same problems as requiring barbers to pass the cosmetology exam (or vice-versa). SUMF ¶¶ 317-18. Thus, the Board cannot ensure this "key linkage" between the content of the exam and practice on the job when it requires hair braiders to pass the cosmetology or barber exams. SUMF ¶ 319.

ii. Hair braiding is barely tested on the written portion of the cosmetology exam, if at all.

Hair braiding is only minimally tested, if at all, on the written portion of the cosmetology licensing exam. SUMF ¶¶ 320-25, 347. On the various exam forms used by Missouri for both the cosmetology and barber licensing exams over the past ten years, a total of 13,240 questions have been asked on 124 different exams. SUMF ¶ 320. At the behest of Plaintiffs, the NIC ran a search on Missouri's licensing exams for the past ten years for key terms related to braiding, traction alopecia, and CCCA; it found only 15 questions with terms related to braiding which appeared on only 70 of the 124 exams. SUMF ¶¶ 321-22. Of those 15 questions, the Board's expert witness on hair braiding concluded that one question was not even relevant to African-style hair braiding, only one question was specific to African-style hair braiding, and only three questions tested health and safety information relevant to African-style hair braiding. SUMF ¶ 323. The Board's expert dermatologist reviewed the same questions and found that no more than six questions tested health and safety information relevant to African-style hair braiding. SUMF ¶ 324.

Therefore, according to the Board's experts, of the 13,240 questions asked on Missouri's licensing exam in the past ten years, only 14 questions were on hair braiding (just one was specific to African-style hair braiding), and between three and six of those questions tested health and safety information relevant to hair braiding. SUMF ¶¶ 324-25. None of those six questions appeared on the same exam. SUMF ¶ 325. Thus, braiding is barely tested on Missouri's licensing exams, if at all. In addition, none of the exams used in Missouri in the past ten years contained questions that mentioned

traction alopecia or CCCA. SUMF ¶ 326-30. Nor do the exams test any special concerns related to braiding children's hair. SUMF ¶ 331. Thus, as the Board admits, the very health and safety topics that the Board claims are of special concern for African-style hair braiding—which it claims justify testing braiders—have not been tested on the licensing exams in the past ten years. SUMF ¶¶ 329-33, 340.

iii. The Board admits that Missouri's cosmetology/barber licensing exams are inadequate to qualify, certify, or license someone to safely braid hair.

The Board initially defended the rationality of requiring African-style hair braiders to pass the cosmetology/barber licensing exams by claiming that "[t]he requirement of passage of examinations ensures that individuals seeking to perform services on members of the public have demonstrated competence in the material deemed necessary for safe practice." SUMF ¶ 340. However, the Board's own expert dermatologist who reviewed the relevant exam questions provided by the NIC (as explained above) concluded that the cosmetology/barber exams do not adequately test health and safety issues relevant to African-style hair braiding and that the exams are not adequate to "qualify, certify, or license African-style hair braiders." SUMF ¶¶ 343-45. The Board now admits that passing the exams does not "ensure that individuals seeking to perform services on members of the public have demonstrated competence in the material deemed necessary for safe practice" of hair braiding. SUMF ¶¶ 345-47.

For all of the above reasons, applying Missouri's cosmetology/barber licensing regime to African-style hair braiders does not bear a rational relationship to the government's purported interest in protecting public health and safety by ensuring the competence and qualifications of hair braiders.

V. There is No Rational Relationship between Licensing African-style Hair Braiders as Cosmetologists or Barbers and Preventing Consumer Fraud and Harm.

Requiring African-style hair braiders to be licensed as cosmetologists or barbers in order to allegedly "prevent[] consumer fraud and harm," SUMF ¶ 175, is irrational given the tiny fraction of time (20 hours) devoted to arguably relevant topics in the 1,500 to 1,000 hours of instruction required

by the mandatory curricula.[4] SUMF ¶¶ 130, 140. Out of 1,500 required hours of instruction, the mandatory cosmetology curriculum requires only 20 hours of instruction that are even arguably relevant to this stated interest: ten hours of instruction in "Salesmanship and shop management" and ten hours in "State law." SUMF ¶ 130. Similarly, out of 1,000 required hours of instruction, the mandatory barbering curriculum only requires 20 hours of instruction that are even arguably relevant to this stated interest: five hours of instruction in "Professional Image," five hours in "Salesmanship and Establishment Management," and ten hours in "State Law."[5] SUMF ¶ 140. The Board admits that it has no knowledge about whether there is any additional instruction provided on these topics at cosmetology/barber schools, nor what instruction is provided on these subjects on any specific topics beyond the broad categories defined in the mandatory curricula. SUMF ¶ 349. The Board does not know the content of the licensing exams beyond what is in the Candidate Information Bulletins ("CIBs") provided by the NIC, SUMF ¶¶ 152-53, but the only subject even marginally relevant to these topics that is listed on the CIBs as being tested on the licensing exams is "client consultation"—there is no testing on salesmanship, shop/establishment management, professional image, or state law.[6] SUMF ¶¶ 152-53, 304, 350. This omission is unsurprising; the Board uses the national NIC exams, which do

[4] Any other consumer-protection interests that the Board may have in ensuring that braiders are competent or that they can braid hair without endangering public health and safety have been addressed *supra*.

[5] These 20 hours of instruction on salesmanship, shop management, and state law are included in the 100 or 105 total hours of the mandatory curricula that the Board claims is relevant to braiding.

[6] Defendants also claim that a character and fitness screening process "protect[s] the public from the initial entry of individuals with character and fitness issues into licensed professions." SUMF ¶ 348. Concerns about fraud are relevant to anyone who deals with the public, but there are no such character and fitness screening requirements for the vast majorities of businesses, and Missouri already has consumer fraud laws to address these issues. Moreover, 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. The entire licensing scheme cannot be justified by such a tangential claimed interest. *See, e.g.*, *Clayton*, 885 F. Supp. 2d at 1215 (Utah's licensing scheme fails because it "is so disconnected from the practice of African hairbraiding, much less from whatever minimal threats to public health and safety are connected to braiding").

not necessarily test each of the specific subjects listed in Missouri's cosmetology/barber curricula. *See* SUMF ¶¶ 144, 307, 309-10.

The court in *Clayton* examined some of these same factors in determining that there was not a rational relationship between Utah's stated governmental interest and Utah's licensing regulations as applied to African hair braiders. Following the same analysis leads to similar results. Here, the ratio of arguably relevant hours (20 hours out of 1,500 or 1,000 total hours) is considerably smaller than the 400-600 hours that the *Clayton* defendants contended were relevant out of the 2,000 total hours of instruction required in Utah. In other respects, the Defendants are on roughly equal footing with the *Clayton* defendants—they cannot guarantee how much time of the 20 hours is even spent on consumer protection issues, do not know whether any schools provide any additional instruction on these topics, and do not know whether these topics are tested on its licensing exams. However, they should know that these topics are not listed on the CIBs and thus cannot be tested. *See* SUMF ¶¶ 152-53, 304, 350. In short, the "facts demonstrate an insufficient rational relationship between [consumer protection] and the actual regulatory scheme as applied to" African-style hair braiders. 885 F. Supp. 2d at 1215.

Protecting consumers from fraud or other harm cannot rationally justify licensing African-style hair braiders as cosmetologists or barbers given the tiny proportion of time in the mandatory curricula that is dedicated to topics that may (or may not) be relevant. If merely asserting a consumer-protection interest was sufficient to justify this level of licensing, **any occupation in Missouri** could be required to spend a thousand or more hours to obtain a cosmetology/barber license in order that workers might receive 20 hours of training in salesmanship and shop management, professional image, or state law.

VI. The Claimed Government Interests Are Undercut By the Statutory Exemption for Unlicensed Hair Braiders at Public Amusement and Entertainment Venues.

In 2014, the Missouri legislature enacted a statute, Mo. Rev. Stat. § 316.265, exempting hair braiders from cosmetology licensing at public amusement and entertainment venues. SUMF ¶¶ 158-59. Hair braiders at public amusement and entertainment venues places are thus outside the Board's

jurisdiction and need no license to braid. SUMF ¶¶ 163-65. However, as the Board's President admits, there is nothing unique about public amusement or entertainment venues that makes them a safer place to perform hair braiding than a salon, and there is no reason why an unlicensed hair braider at a public amusement or entertainment venue would be less likely to injure the public than an unlicensed braider at a salon.[7] SUMF ¶¶ 170-72. The Board admits that is unaware of any other state with an exemption for unlicensed braiders solely at public amusement and entertainment venues. SUMF ¶ 174. The Board's President and another Board Member, both Defendants, admit that exempting braiders at these venues from Missouri's licensing requirements is unreasonable and irrational. SUMF ¶ 173. In other words, they are not aware of any facts that rationally justify the exemption.

This exemption undercuts the claimed governmental interests for licensing hair braiders as cosmetologists: if unlicensed hair braiding presents concerns about health and safety, competence, or consumer protection, why should that be any different at an amusement park than at a salon? *See* SUMF ¶ 172. Moreover, the Board claims that it cannot as effectively protect the safety of the public throughout the entire state of Missouri when there are certain locations (such as these venues) in Missouri where the Board has no jurisdiction to license and regulate hair braiders. SUMF ¶¶ 165-68.

Plaintiffs do not believe that any hair braiders should be licensed as cosmetologists, but if some braiders are to be licensed and others exempted, there may be good reasons why governmental interests in consumer protection and ensuring competence might be higher at a carnival or seasonal amusement park which attracts more tourists, *see* SUMF ¶¶ 160-62, and which does not depend as much on repeat clientele and establishing a good reputation in the local community as a salon. Indeed, the exemption is part of Chapter 316 of Title 21 (Public Safety and Morals) of the Revised Statues of Missouri, which grants extra authority over "Shows, Circuses, Amusement Buildings and Festivals." Thus, as in

[7] Because there is no basis for subjecting braiders in some locations to licensing while exempting braiders in certain other locations, Missouri's cosmetology licensing scheme violates equal protection by treating similarly situated people—unlicensed hair braiders in Missouri—differently. *See, e.g., City of Cleburne*, 473 U.S. at 439.

Merrifield v. Lockyer, "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." 547 F.3d 978, 992 (9th Cir. 2008). Similarly, in *Brantley*, the court noted that the government's claimed interests were twice "fatally undermined" by statutory exemptions demonstrating that the proffered justifications were specious. 2015 U.S. Dist. LEXIS 680 at *17-19 ("If braiding students actually needed barber chairs to have adequate workspace or to maintain a clean environment, it would make no sense to exempt braiding schools from the requirement that students have their own barber chairs.").

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."). At a minimum, then, the exemption for unlicensed braiders at entertainment venues raises serious doubts about the strength or validity of the claimed governmental interests. Combined with Plaintiffs' arguments above, it is evident that licensing braiders as cosmetologists in some locations but not others advances no legitimate government interests.

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 grant Plaintiffs' motion for summary judgment.

RESPECTFULLY SUBMITTED this 30th day of September, 2015.

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