UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO.: 3:17-cv-00508

JASNA BUKVIC-BHAYANI, DAHLIA INSTITUTE OF MAKEUP ARTISTRY LLC, and JULIE GOODALL,	)
Plaintiffs,	)
v.	)
BALDWIN RAY MITCHELL, JR., WYATT JONES, JR., KRISTA ROSE, ABBY SEATS, DIANE SMITH, RENEE BYARS, in their official capacities as Members of the North Carolina Board of Cosmetic Art Examiners, and LYNDA ELLIOTT, in her official capacity as Executive Director of the North Carolina Board of Cosmetic Art Examiners,	)
Defendants.	)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff Jasna Bukvic-Bhayani has a passion for (and expertise in) makeup artistry. She is already a licensed makeup artist and successful entrepreneur, and now she wants to share what she has learned. Specifically, Plaintiff Bukvic-Bhayani wants to open a school to teach makeup artistry to others. Plaintiff Julie Goodall is an avid makeup hobbyist who wants to attend the school. Unfortunately for Plaintiffs, North Carolina's Cosmetic Art Act requires makeup schools to first obtain an esthetics-school license issued by the state's Board of Cosmetic Art Examiners before they can open. And to obtain this permission to speak, North Carolina makeup schools must agree to teach a one-size-fits-all, Board-created 600-hour curriculum and to purchase more than $10,000 in equipment. Worse still, the overwhelming majority of both the required curriculum and the required equipment are unrelated to makeup artistry.

North Carolina's burdens on Plaintiffs are unconstitutional. Teaching makeup artistry is fully protected speech. Defendants single out this speech based on its content, their regulations' purpose is to control teachers' content, and they compel teachers to say things they would not otherwise say. Therefore, these regulations are subject to strict scrutiny, which Defendants cannot possibly meet.

Since Defendants cannot survive strict (or even lesser) scrutiny, and because the other factors involved in issuing a preliminary injunction weigh in Plaintiffs' favor, Plaintiffs respectfully request that this Court enjoin enforcement of North Carolina's makeup-school-license requirement against Plaintiffs for the duration of this litigation. A preliminary injunction would enable Plaintiff Bukvic-Bhayani to open her school to students like Plaintiff Goodall before waiting for a final judgment.

STATEMENT OF FACTS

The facts are clear—Plaintiff Bukvic-Bhayani would have opened her makeup school but for the challenged regulations and their enforcement by Defendants. First, this section will address Plaintiffs' backgrounds and Plaintiff Bukvic-Bhayani's plans to open the school. Second, this section will describe the licensing requirements which prevented her from doing so. Third, this section will discuss the regulations' effects on Plaintiffs.

I. PLAINTIFFS MERELY WANT TO COMMUNICATE ABOUT MAKEUP.

Plaintiff Bukvic-Bhayani is an expert makeup artist whose passion for her craft spans decades. Nearly twenty years ago, she studied makeup artistry at a school in Sarajevo. *See* Decl. of Jasna Bukvic-Bhayani in Supp. of Pls.' Mot. for Prelim. Inj. ¶ 2, attached hereto as Exhibit "A."

After moving to America as a war refugee, Plaintiff Bukvic-Bhayani became a United States citizen and obtained North Carolina's esthetician license in order to legally earn a living as a makeup artist. *Id*. at ¶¶ 3-4. North Carolina requires people practicing "esthetics" for pay to obtain an esthetician license (unless they qualify for one of North Carolina's statutory exemptions to this requirement). N.C. Gen. Stat. § 88B-2(5), (10), (11a); *id*. § 88B-22(a). And North Carolina defines "esthetics" to include "applying makeup" as well as numerous unrelated services, including "giving facials," "performing skin care," and "removing superfluous hair . . . by use of creams, tweezers, or waxing."[1] *Id*. § 88B-2(11a). To obtain an esthetician license, one

[1] North Carolina also defines "esthetics" to include "applying eyelashes to a person, including the application of eyelash extensions, brow or lash color," "beautifying the face, neck, arms, or upper part of the human body by use of cosmetic preparations, antiseptics, tonics, lotions, or creams," "surface manipulation in relation to skin care," and "cleaning or stimulating the face, neck, ears, arms, hands, bust, torso, legs, or feet of a person by means of hands, devices, apparatus, or appliances along with the use of cosmetic preparations, antiseptics, tonics, lotions, or creams." N.C. Gen. Stat. § 88B-2(11a).

must—among other things—complete a state-created 600-hour esthetics curriculum covering all of these disparate topics at a state-licensed school. *Id*. § 88B-9.

To satisfy this requirement, Plaintiff Bukvic-Bhayani attended the Academy of Nail Technology and Esthetics. Ex. A ¶ 4. Because the state-mandated 600-hour esthetics course taught by the Academy was designed for a variety of prospective estheticians—specialists in facials, hair removal, skin care, and much else—very little of it concerned makeup artistry. *Id*. In fact, to the best of Plaintiff Bukvic-Bhayani's recollection—the course included 10 hours or less of actual makeup instruction. *Id*.

After obtaining a state license, Plaintiff Bukvic-Bhayani worked as a makeup artist in North Carolina. Today, she owns a successful Charlotte studio where she works as a makeup artist. *Id*. at ¶ 5. In fact, she has appeared on a Charlotte-based television station twice in the past two years to teach viewers lessons in makeup artistry. *Id*.

Now, Plaintiff Bukvic-Bhayani wants to open a makeup school, the Dahlia Institute of Makeup Artistry (the "Dahlia Institute"), and communicate her knowledge of makeup artistry for a fee. *Id*. at ¶ 6. At the Dahlia Institute, she plans to teach makeup artistry through lectures, written materials, and practical demonstrations. *Id*. at ¶¶ 8-9. Specifically, the Dahlia Institute would offer 200-hour and 500-hour curricula encompassing different styles of makeup, different types of makeup, different makeup-application techniques, and advanced color theory, along with specialized classes on topics like special-effects makeup. *Id*. at ¶ 6.

Plaintiff Bukvic-Bhayani wants to teach makeup artistry, and nothing else, at the Dahlia Institute. *Id*. at ¶ 10. The Dahlia Institute would not teach students any of the non-makeup skills included in North Carolina's definition of "esthetics," such as giving facials, removing superfluous hair, or performing skin care. *Id*. Accordingly, Plaintiff Bukvic-Bhayani has never

advertised the Dahlia Institute as an esthetics school or purported to offer classes that would satisfy any of North Carolina's requirements for obtaining a state-issued esthetician license. *Id*.

Rather than targeting students seeking to qualify for this license, Plaintiff Bukvic-Bhayani intends for the Dahlia Institute to teach two different types of students. First, the Dahlia Institute would provide an advanced makeup program for already-licensed estheticians. *Id*. at ¶ 11. To the best of Plaintiffs' knowledge, no programs like this currently exist in North Carolina. *Id*. As Plaintiff Bukvic-Bhayani learned when she studied at the Academy of Nail Technology and Esthetics, the only North Carolina schools teaching any makeup skills—licensed esthetics schools—do so at a rudimentary level. *Id*. Accordingly, the Dahlia Institute would fill a void in North Carolina's education market for already-licensed estheticians.

Second, Plaintiff Bukvic-Bhayani plans to teach hobbyists—unlicensed students who are interested in applying makeup as a hobby rather than for monetary compensation—at the Dahlia Institute. *Id*. Since these students do not want to apply makeup for pay, they do not need to acquire an esthetician license and have no interest in attending a 600-hour esthetics course.

For instance, makeup hobbyist Plaintiff Goodall would like to attend the Dahlia Institute. *See* Decl. of Julie Goodall in Supp. of Pls.' Mot. for Prelim. Inj. ¶ 7, attached hereto as Exhibit "B." Having known Plaintiff Bukvic-Bhayani since 2011, Plaintiff Goodall considers Plaintiff Bukvic-Bhayani to be an expert makeup artist. *Id*. at ¶¶ 2-3. To improve her makeup skills, Plaintiff Goodall wants to listen to Plaintiff Bukvic-Bhayani's makeup lessons. *Id*. at ¶ 3. Because she does not want to apply makeup for pay, Plaintiff Goodall has no interest in acquiring an esthetician license or paying for and attending a licensed esthetics school. *Id*. at ¶¶ 4-5. She just wants to learn about makeup, not facials, hair removal, skin care, or any of the other non-makeup topics defined by North Carolina as "esthetics." *Id*. at ¶ 6. Accordingly, the

Dahlia Institute is a good fit for her and North Carolina's licensed esthetics schools are not. *Id.* at ¶¶ 6-7.

II. NORTH CAROLINA IMPOSES ONEROUS REQUIREMENTS ON MAKEUP-SCHOOL SPEECH.

Unfortunately, Plaintiff Goodall cannot attend Plaintiff Bukvic-Bhayani's makeup school because North Carolina's Board of Cosmetic Art Examiners stopped her from opening one. In the fall of 2016, Plaintiff Bukvic-Bhayani announced her plans to open a makeup school over Facebook. Ex. A ¶ 12. Shortly thereafter, the Board's Chief of Enforcement—Connie Wilder—paid her a visit. *Id.* Ms. Wilder explained that the North Carolina Cosmetic Art Act prohibited Plaintiff Bukvic-Bhayani from opening her makeup school without a cosmetic-art-school license from the Board, which Plaintiff Bukvic-Bhayani does not have. *Id.* Ms. Wilder also told Plaintiff Bukvic-Bhayani that, in order to obtain this license, her school would need to satisfy the Board's curriculum and equipment requirements for schools licensed to qualify students for a Board-issued esthetician license, despite Plaintiff Bukvic-Bhayani's objections that this made no sense for the type of school she wanted to open. *Id.*

Over a series of emails, the Board reiterated this position. After Plaintiff Bukvic-Bhayani emailed the Board and asked whether she could operate a makeup school, the Board's Executive Director—Lynda Elliott—replied that she "cannot just teach makeup application." *Id.* at ¶ 13, Ex. A-1 at 1. In subsequent emails, Plaintiff Bukvic-Bhayani reiterated that her school would not be for students seeking esthetician licenses and that she just wanted to teach makeup artistry. *Id.* at ¶ 14. For instance, in one email to the Board's Enforcement Processor, Tanya Wortman, dated February 24, 2017, Plaintiff Bukvic-Bhayani asked: "Do I need my school to be licensed before I can teach makeup artistry to students who do not want to become licensed estheticians?" *Id.* at ¶ 14, Ex. A-2 at 1. On April 14, 2017, Defendant Lynda Elliott emailed Plaintiff Bukvic-

Bhayani and said: "If you are providing education to anyone that does not hold a current license with this cosmetic art board you must obtain a school license and teach the full curriculum[.]" *Id*. at ¶ 16, Ex. A-3 at 1.[2]

Defendant Elliott and the Board's employees are correct that North Carolina requires Plaintiff Bukvic-Bhayani to obtain a cosmetic-art-school license for her makeup school before opening it. The requirement that makeup schools get a Board license before teaching is mandated by statute. Under the North Carolina Cosmetic Art Act, "[n]o one may open or operate a cosmetic art school before the Board has approved a license for the school." N.C. Gen. Stat. § 88B-16(b). A "cosmetic art school" is defined as "[a]ny building or part thereof where cosmetic art is taught." *Id*. § 88B-2(6). "Cosmetic art" is defined as "[a]ll or any part or combination of cosmetology, esthetics, natural hair care, or manicuring, including the systematic manipulation with the hands or mechanical apparatus of the scalp, face, neck, shoulders, hands, and feet." *Id*. § 88B-2(5). "Esthetics" includes "applying makeup." *Id*. § 88B-2(11a). Accordingly, reading the Act as a whole, no one may open or operate a building or part thereof where applying makeup is taught unless the Board has already approved a license for the school.

The Board is not allowed to grant a license unless all of its rules have been met. *Id*. § 88B-16(b). In order to meet those rules, makeup schools must have their future speech, and

[2] Ms. Wortman and Defendant Elliott told Plaintiff Bukvic-Bhayani that she would not need a cosmetic-art-school license if she was merely teaching licensed estheticians classes counting toward their 8-hour-per-year continuing-education requirement under N.C. Gen. Stat § 88B-21(e). Ex A. ¶ 14, Ex. A-2 at 1, Ex. A-3 at 1. As a threshold matter, it not clear that this is true under the North Carolina Cosmetic Art Act (or consistent with the Board's interpretation of it). *Id*. at ¶ 15. But, even if Ms. Wortman and Defendant Elliott are correct that this safe harbor exists for continuing-education classes, the safe harbor would not encompass the Dahlia Institute. At her prospective school, Plaintiff Bukvic-Bhayani plans to offer (and teach) 200-hour and 500-hour curricula, open to both licensed students and hobbyists, rather than just teaching 8-hour classes satisfying annual continuing-education requirements. *Id*. As the Board made clear in person and over email, its position is that, without a cosmetic-art-school license, Plaintiff Bukvic-Bhayani may not teach her preferred curricula at a school open to non-licensed students. *Id*. at ¶¶ 12-14, 16.

facilities, approved by the Board. Specifically, a prospective school must submit an application to the Board with several supporting documents, including a course curriculum for each discipline to be taught (and a diagram with location of equipment placement).[3] 21 N.C. Admin. Code § 14T.0102(a), (b)(2)-(3); *id.* § 14T.0601(a). According to the Board, a failure to submit these documents will result in denial of the application.[4] Moreover, the Board is prohibited from issuing a license to a prospective school before inspecting it to ensure compliance with its regulations, including that all mandated equipment has already been installed. N.C. Gen. Stat. § 88B-16(b); 21 N.C. Admin. Code § 14T.0102(c). In short, Board licensure requires that schools satisfy the Board's curriculum and equipment requirements before being allowed to open.

The state-mandated curriculum for makeup schools has very little to do with makeup artistry. It is 600 hours long and covers all of the esthetician license's disparate components. 21 N.C. Admin. Code § 14T.0604(a). Under the Board's regulations, an esthetics curriculum must include instruction in: (1) anatomy or physiology; (2) hygiene; (3) disinfection; (4) first aid; (5) chemistry; (6) draping; (7) facial or body treatment (cleansing, manipulations, masks); (8) hair removal; (9) basic dermatology; (10) skin care machines, electricity, and apparatus; (11) aromatherapy; (12) nutrition; (13) make-up or color theory; and (14) styles and techniques of esthetics services, including facials, makeup application, performing skin care, hair removal, eyelash extensions, applying brow and lash color, business management, and professional ethics. *Id.* Additionally, the Board requires that the curriculum include practical instruction in the

[3] In fact, even after granting schools licenses, the Board polices their speech. Licensed schools are subject to reevaluation and re-inspection at any time. 21 N.C. Admin. Code § 14T.0803(b). Also, the Board requires that a school continue to adhere to a Board-approved curriculum, and develop lessons from that curriculum, after obtaining Board approval for licensure. *Id.* § 14T.0601(a).

[4] *See* N.C. Bd. of Cosmetic Art Exam'rs, *Cosmetic Art School Application*, https://www.nccosmeticarts.com/uploads/forms/New_School_Application.pdf (last visited Aug. 17, 2017).

following styles and techniques: facials manual (skin analysis, cleansing, surface manipulations, packs, and masks), facials electronic (the use of electrical modalitus, including dermal lights, and electrical apparatus for facials and skin care including galvanic and faradic), eyebrow arching, hair removal (hard wax, soft wax, and depilatories), makeup application (skin analysis, complete and corrective makeup), eyelash extensions, and brow and lash color. *Id*. § 14T.0604(b).

For each of these subjects, the Board requires "performances," which it defines as "the systematic completion of the steps for safe and effective cosmetic art services to a client." *Id*. In total, the Board requires 40 performances for facials manual, 30 performances for facials electronic, 20 performances for eyebrow arching, 30 performances for hair removal, 30 performances for makeup application, 10 performances for eyelash extensions, and 10 performances for brow and lash color. *Id*. In other words, of the 170 performances required for the Board's esthetics curriculum, there are only 30 makeup-application performances.

As these numbers show, the overwhelming majority of the material in the Board's esthetics curriculum is irrelevant to makeup artistry. Roughly five-sixths of the Board's mandatory esthetics performances do not concern makeup artistry at all.

The equipment requirements are no better. The Board requires that esthetics schools be equipped with, among other things: (1) ten stations, which each must include a facial treatment chair (or treatment table) and stool; (2) a waste container at each station; (3) a facial vaporizer; (4) a galvanic current apparatus; (5) an infra-red lamp; (6) a woods lamp; (7) a magnifying lamp; (8) a hair removal wax system; (9) a thermal wax system; (10) a suction machine; and (11) an exfoliation machine with brushes. *Id*. § 14T.0303(b).

Each of these items is unnecessary for teaching makeup artistry. Ex. A ¶ 20. Their only plausible purpose is to facilitate instruction of esthetics skills that do not involve makeup

application, such as giving facials, removing hair, or performing skin care. *Id*. Moreover, purchasing all of this equipment would cost more than $10,000. *Id*.

III. BUT FOR NORTH CAROLINA'S REGULATORY SCHEME, PLAINTIFFS WOULD HAVE TALKED ABOUT MAKEUP AND WOULD BE DOING SO IN THE FUTURE.

As a result of her meeting with Ms. Wilder and correspondence with Ms. Wortman and Ms. Elliott—along with her review of North Carolina's Cosmetic Art Act and the Board's regulations—Plaintiff Bukvic-Bhayani has not opened a makeup school. Ex. A ¶ 17. The Board's curriculum and equipment requirements are unacceptable to her. Plaintiff Bukvic-Bhayani is unwilling to spend hundreds of hours teaching non-makeup subjects, just so that she can spend some time talking about what she actually wants to talk about—makeup artistry. For the same reason, she refuses to purchase more than $10,000 in equipment for the Dahlia Institute that is unrelated to teaching makeup artistry.

Consequently, she is not seeking to obtain a cosmetic-art-school license for the Dahlia Institute. *Id*. at ¶ 18. And, this makes sense, as she wants to operate a makeup school, not a full cosmetic art school. But, without a cosmetic-art-school license, she is not permitted to open her makeup school, the Dahlia Institute, and teach willing listeners like Plaintiff Goodall at all. Indeed, a violation of the North Carolina Cosmetic Art Act constitutes a Class 3 criminal misdemeanor. N.C. Gen. Stat. § 88B-22(f). Also, the Board could fine Plaintiffs Bukvic-Bhayani and the Dahlia Institute hundreds of dollars per violation for violating the pertinent regulations. 21 N.C. Admin. Code §§ 14P.0106(c), 14P.0107(c), 14P.0111(a), 14P.0113(m).

If Plaintiff Bukvic-Bhayani and the Dahlia Institute of Makeup Artistry LLC were not subject to the North Carolina Cosmetic Art Act and the Board's regulations, she would have already opened a makeup school and would be teaching lessons there right now. Ex. A ¶¶ 17,

20. Immediately after Plaintiff Bukvic-Bhayani announced her plans to open a makeup school, six students expressed interest in enrolling. *Id*. at ¶ 12.

For example, Plaintiff Goodall would enroll at the Dahlia Institute to hear Plaintiff Bukvic-Bhayani's makeup lessons if the Board permitted them. Ex. B ¶ 7. Plaintiff Goodall has no interest in enrolling at any existing esthetics school because she does not want to pay for hundreds of hours of classes unrelated to makeup artistry. *Id*. at ¶ 6.

But, because of North Carolina's requirements, Plaintiff Bukvic-Bhayani cannot teach Plaintiff Goodall, and others like her, at the Dahlia Institute, even though Plaintiff Bukvic-Bhayani is ready to speak. In order to teach at the Dahlia Institute, Plaintiff Bukvic-Bhayani has already developed lesson plans, prepared written handouts, and purchased the necessary materials for makeup classes, including a variety of makeup products and brushes. Ex. A ¶ 21. She also identified space she could rent for a makeup school. *Id*. If Defendants were enjoined from enforcing the challenged requirements, Plaintiff Bukvic-Bhayani would, during the pendency of this litigation, teach makeup lessons at the Dahlia Institute, and Plaintiff Goodall would attend the school. *Id*. at ¶ 23; Ex. B ¶ 7. Indeed, but for the requirements challenged in this lawsuit, the Dahlia Institute would already be open. Ex. A ¶ 21.

ARGUMENT

Under the First Amendment, people are allowed to talk about makeup artistry (like almost anything else) without first getting the government's permission to do so. Yet, North Carolina will not let Plaintiffs communicate about makeup artistry before getting Defendants' permission. This permission is conditioned on Plaintiffs' agreement to follow a 600-hour esthetics curriculum and install more than $10,000 in esthetics equipment, both of which are largely unrelated to makeup artistry.

North Carolina's requirements for prospective makeup schools cannot be squared with the First Amendment. They regulate teaching, which is a form of fully-protected speech. Moreover, they are based on the subject matter of Plaintiffs' speech, cannot be justified without reference to that speech, and force unwilling speakers to teach subjects they do not want to teach. Thus, the requirements are content-based and subject to strict scrutiny. And they cannot satisfy strict (or even lesser) scrutiny—they fail to advance any government interest, let alone a compelling or substantial one, and burden far more speech than necessary. As such, North Carolina's licensing requirements on makeup schools are unconstitutional.

As the following will show, Plaintiffs satisfy the four requirements of a preliminary injunction: (1) likelihood of success on the merits; (2) irreparable harm; (3) balance of equities; and (4) benefit to the public. *WV Ass'n of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). Moreover, because there is no risk of any harm at all to Defendants, Plaintiffs respectfully request that the bond requirement of Rule 65(c) be either waived or set in a nominal amount of one dollar.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM.

North Carolina's makeup-school-licensing scheme triggers First Amendment scrutiny because it regulates teaching, which constitutes speech. Because the scheme cannot withstand First Amendment scrutiny, it is unconstitutional.

A. Because Teaching is Speech, North Carolina's Licensing Requirements for Makeup Schools Trigger First Amendment Scrutiny.

Teaching is speech, so restrictions on teaching—including North Carolina's restrictions on makeup schools—trigger First Amendment scrutiny. Both the Supreme Court and the Fourth Circuit have explained this point, and their precedents will be addressed in turn.

In *Holder v. Humanitarian Law Project*, the Supreme Court held that teaching is speech. 561 U.S. 1, 28 (2010).[5] Though the case arose in a different factual context than the case at hand, its core holding is instructive. Specifically, the Court held that prohibitions on providing "training" to designated "foreign terrorist organizations"—such as the Kurdistan Workers' Party ("PKK") and Liberation Tigers of Tamil Eelam ("LTTE")—triggered First Amendment scrutiny. *Id*. at 8-9, 27. The law at issue in *Holder* defined "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." *Id*. at 12-13. Because plaintiffs' conduct triggering coverage under this law—teaching—consisted of "communicating a message," the Supreme Court held that the law regulated "speech" and not "noncommunicative conduct." *Id*. at 28.[6]

The Fourth Circuit's precedents repeatedly confirm this point. For instance, in *Edwards v. City of Goldsboro*, the Fourth Circuit held that teaching a gun-safety course is speech. 178 F.3d 231, 245-49 (4th Cir. 1999). In *Edwards*, a police officer alleged that a police-department policy barring him from teaching a private gun-safety class in his free time violated his right to free speech. *Id*. at 237-39. This Circuit agreed, noting that his class—which consisted of "verbal as well as some written instructions accompanied by physical demonstrations"—constituted speech. *Id*. at 247.

Similarly, in *Goulart v. Meadows*, where parents challenged a restriction on their ability to use a community center for homeschooling purposes, this Circuit applied First Amendment scrutiny. 345 F.3d 239, 247-48 (4th Cir. 2003). This Circuit held that the parents' proposed

[5] *See also Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (declaring that academic freedom is "a special concern of the First Amendment"); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) ("[A]cademic teaching-freedom . . . [is within a] constitutionally protected domain."); *Sweezy v. New Hampshire*, 354 U.S. 234, 249-50 (1957) (plurality opinion) (holding that a "right to lecture" is a constitutionally-protected freedom).

[6] In *Holder*, the Supreme Court ultimately upheld the challenged prohibition on training designated foreign terrorist organizations, but applied strict scrutiny in reaching this judgment. 561 U.S. at 27-39.

uses—teaching a geography class and a fiber-arts class—involved the "transmission of knowledge or ideas by way of the spoken or written word" and was, consequently, speech.[7] *Id*. at 247.

Plaintiffs' makeup instruction is, like other types of teaching, a form of speech. To teach her makeup courses at the Dahlia Institute, Plaintiff Bukvic-Bhayani must communicate messages explaining and demonstrating her craft to students. Ex. A ¶¶ 8-9. Moreover, her speech is analogous to the teaching at issue in *Holder*, *Goulart*, and *Edwards*. Like the plaintiffs in *Holder*, she seeks to impart specific skills—the purpose of her classes is to teach students how to, among other things, highlight and contour faces, enhance complexion, use corrective makeup, and conceal flaws. *Id*. at ¶ 7. Like the plaintiffs in *Goulart*, she aims to transmit knowledge by way of spoken and written word. *Id*. at ¶ 8. And, like the plaintiff in *Edwards*, she uses verbal instructions and physical demonstrations in order to communicate messages.[8] *Id*. at ¶¶ 8-9.

Further, as in all of these cases, Plaintiffs' speech is the "conduct" triggering coverage under North Carolina's Cosmetic Art Act (and attendant regulations). Plaintiff Bukvic-Bhayani is already legally licensed to practice esthetics. *Id*. at ¶ 4. Hence, she has North Carolina's permission to put makeup on people's faces in exchange for compensation. N.C. Gen. Stat. § 88B-2(5), (10), (11a); *id*. § 88B-22(a). What North Carolina prohibits is her opening a business with the purpose of *talking* to students like Plaintiff Goodall about putting makeup on

[7] Based on the specific facts in *Goulart*, the challenged restrictions in that case survived First Amendment scrutiny, but that does not change the fact that First Amendment scrutiny was applied. 345 F.3d at 246-60.

[8] Just as a gun safety instructor's non-verbal physical demonstrations constitutes speech, so too with Plaintiff Bukvic-Bhayani practical demonstrations. The goal of this practical instruction would be to communicate messages on how to better apply makeup. Ex. A ¶ 9. It should also be noted that this Circuit has held that the use of makeup itself can be protected artistic expression. *Berger v. Battaglia*, 779 F.2d 992, 994, 997 (4th Cir. 1985).

faces. Accordingly, North Carolina's makeup-school-licensing regime regulates speech and is, thus, subject to First Amendment scrutiny.

B. North Carolina's Licensing Requirements for Makeup Schools Fail First Amendment Scrutiny.

As set forth below, North Carolina's makeup-school-licensing regime cannot withstand First Amendment scrutiny. First, strict scrutiny applies to the scheme. Second, Defendants cannot overcome strict scrutiny. Third, even if strict scrutiny did not apply, Defendants would still be unable to meet their burden.

1. *North Carolina's Licensing Requirements for Makeup Schools Are Subject to Strict Scrutiny.*

Strict scrutiny is the default setting for free speech cases, and, as forth below, it applies here. Makeup instruction does not fall within any recognized exceptions to regular First Amendment doctrine. And, as the United States Supreme Court observed in *United States v. Stevens*, courts must exercise extreme caution when recognizing any new exceptions that call for diminished scrutiny. 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative costs and benefits.").

Even if Defendants were somehow able to provide a reason why Plaintiffs' type of speech should not receive strict scrutiny, strict scrutiny would still apply regardless because the challenged restrictions are content-based. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) ("[C]ontent-based restrictions on speech . . . can stand only if they survive strict scrutiny."). As relevant here, speech restrictions can be content-based in three different ways. First, a law is deemed content-based if it, on its face, "applies to particular speech because of the topic discussed." *Id*. at 2227. In fact, a "speech regulation targeted at specific subject matter is

content-based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230. Second, even if a law appears content-neutral on its face, the law is still content-based if it cannot be justified without reference to the content of speech it regulates. *Id.* at 2227. Finally, laws compelling speakers to change the content of what they say are content-based. *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014). For the following reasons, North Carolina's makeup-school-licensing requirements trigger strict scrutiny under any of these three standards.

First, the challenged requirements—like those at issue in *Reed*—discriminate based on the topic discussed, rendering them content-based on their face. In *Reed*, the Supreme Court held that a sign code that subjected "temporary directional signs," "political signs," and "ideological signs" to different restrictions was content-based on its face because it discriminated between different topics:

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech.

135 S. Ct. at 2227. When enforcing restrictions like these, officials "examine the content of the message that is conveyed" in order to determine its legality. *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987); *see also Reed*, 135 S. Ct. at 2231 (noting that, because the challenged sign code required officials to determine whether a sign was "political" or "ideological," it was "obvious[ly]" content-based).

Just like the requirements at issue in *Reed*, the school-licensing requirement in North Carolina's Cosmetic Art Act discriminates based on topics discussed. It applies only to schools

teaching "cosmetic art," including "esthetics," which encompasses makeup artistry. N.C. Gen. Stat. § 88B-16(b); *id*. § 88B-2(5), (11a). By licensing schools that speak on some topics—but not others—North Carolina has singled out certain types of speech for special burdens. *See, e.g.*, *Cahaly v. LaRosa*, 796 F.3d 399, 405 (4th Cir. 2015) (applying *Reed* to find anti-robocall statute content-based because it "applie[d] to calls with a consumer or political message" but not those "made for any other purpose"). Here, if someone is subject to Defendants' requirements, it is due to the content of his or her speech.

Also, like in *Reed*, in the case at hand, government officials must evaluate the content of speech to determine whether it is legal. If a school taught basket weaving or modern dance, that would be legal without the Board's permission. But, under North Carolina's Cosmetic Art Act, a school may not teach makeup artistry, or any other aspect of "cosmetic art," without a Board license. To determine whether unlicensed instruction is legal, Defendants must scrutinize teachers' speech for "cosmetic art" content.

Second, Defendants cannot justify the challenged restrictions without reference to the speech they regulate. Defendants' purpose for licensing makeup-school speech is to ensure that the content of teachers' speech meets Defendants' standards. This is evident by how Defendants examine the content of schools' speech before issuing them licenses to speak. Before obtaining a license to speak, prospective schools must submit an application to Defendants and promise to adhere to their mandatory curriculum. 21 N.C. Admin. Code §§ 14T.0102(a), (b)(3); *id*. § 14T.0601(a). In fact, Defendants monitor schools' speech even after granting them licenses in order to make sure that they are speaking Defendants' preferred way and adhering to their mandatory curriculum. *Id*. §§ 14T.0601(a), 14T.0803(b).

Third, Defendants compel speech through a mandatory curriculum. As the Fourth Circuit observed in *Stuart v. Camnitz*, compelled speech is necessarily content-based. 774 F.3d at 246 ("A regulation compelling speech is by its very nature content-based, because it requires the speaker to change the content of his speech or even to say something where he would otherwise be silent."); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make *necessarily* alters the content of the speech." (emphasis added)). In *Camnitz*, the law at issue required physicians to display and describe a sonogram of a fetus during a vaginal ultrasound to women seeking abortions, even if the women averted their eyes and refused to listen. 774 F.3d at 242. The Fourth Circuit held that this law required "quintessential compelled speech" because "[i]t force[d] physicians to say things they otherwise would not say." *Id.* at 246.[9]

For the same reason, North Carolina's curriculum requirements for makeup schools are a form of content-based compelled speech. As a prerequisite to licensure, these schools must teach a 600-hour esthetics curriculum which overwhelmingly consists of topics unrelated to makeup artistry, and even purchase more than $10,000 in ancillary equipment to deliver these messages. 21 N.C. Admin. Code §§ 14T.0303(b), 14T.0604(a). And they must teach this curriculum even to students uninterested in it. The result is that Defendants have forced Plaintiffs to make an unconstitutional, content-based choice: Plaintiffs must either alter their speech or not talk at all.

Accordingly, North Carolina's makeup-school-licensing regime is content-based in three distinct ways, any one of which is sufficient to trigger strict scrutiny.

[9] It should be noted that, because *Camnitz* was written before *Reed*, the Fourth Circuit proceeded to apply intermediate scrutiny. *Camnitz*, 774 F.3d at 245-56. However, in light of the Supreme Court's subsequent holding in *Reed*, the Fourth Circuit's holding in *Camnitz* that compelled speech is inherently content-based must be viewed as requiring strict scrutiny. *Reed*, 135 S. Ct. at 2228.

2. *Defendants Cannot Satisfy Strict Scrutiny.*

Having shown that North Carolina's restrictions on Plaintiffs' speech are subject to strict scrutiny, the only remaining question is whether those restrictions survive strict scrutiny. Strict scrutiny imposes an overwhelming presumption of unconstitutionality that the government may rebut only with concrete evidence demonstrating both a compelling interest and narrow tailoring. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816-17 (2000). Speculation and conjecture are insufficient. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . ."); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) ("[W]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.") (internal citation omitted)). In light of the government's steep burden, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy*, 529 U.S. at 818. As explained below, the Board cannot satisfy either of strict scrutiny's requirements.[10]

None of the purported interests Defendants are likely to assert will be "compelling." In First Amendment cases, compelling government interests are interests of the highest order, such as preventing terrorism or preserving the integrity of the judicial system. *See, e.g.*, *Holder*, 561 U.S. at 28; *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015). This is not such a case.

In defending North Carolina's cosmetic-art-school license requirements, Defendants may assert interests in ensuring that students are prepared for the Board's esthetician license. But this

[10] "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

rationale does not apply to Plaintiffs' speech—Plaintiffs Bukvic-Bhayani and the Dahlia Institute do not seek to qualify students for Board-issued licenses, and Plaintiff Goodall is uninterested in obtaining one.

Alternatively, Defendants may try to justify the challenged restrictions by asserting interests in regulating the performance of makeup artistry. However, whatever threats North Carolina (perhaps unreasonably) believes to be caused by makeup artistry are already addressed through its esthetician-license requirement. Requiring the already-licensed Plaintiff Bukvic-Bhayani to acquire an additional license before opening her prospective school on the same subject fails to further any compelling government interests.

Indeed, Defendants' only remaining rationale for restricting Plaintiffs' speech is policing the quality of makeup speech, but this is not a legitimate government interest, let alone a "compelling" one. In the Supreme Court's extensive precedents discussing freedom of speech, it has never indicated that government may require a permit to speak in order to improve (by its own estimation) the quality of the speech in question. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 164-69 (2002) (striking down law forbidding any door-to-door advocacy without first obtaining a permit); *Thomas v. Collins*, 323 U.S. 516, 539-40 (1945) (invalidating permit requirement for union recruitment speech); *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628-32 (1980) (summarizing cases).

As a general rule, the government cannot regulate speech for the purpose of improving the quality of that speech. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 743 n.8 (2008) ("[I]t would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech."). After all, if Defendants could license makeup instruction as a means of improving its quality, then that same justification would allow the government to

impose licensing requirements on authors writing makeup books, journalists penning makeup articles, and documentarians filming makeup films. Such an approach would gut the First Amendment.

Even if one were to hypothetically assume that government had a sufficient interest in policing the quality of makeup speech, Defendants could not prove that North Carolina's requirements for prospective makeup schools are narrowly tailored to further that interest. These requirements bear little, if any, connection to makeup artistry. Roughly five-sixths of the practical instruction Defendants mandate in their 600-hour esthetics curriculum is unrelated to makeup artistry. 21 N.C. Admin. Code § 14T.0604(a) (only 30 of 170 mandatory performances concern makeup application); Ex. A ¶ 19. And the thousands of dollars in equipment that Defendants mandate Plaintiffs purchase is entirely unrelated to makeup artistry. Ex. A ¶ 20; 21 N.C. Admin. Code § 14T.0303(b). Rather than improving the quality of Plaintiffs' speech—or advancing any other government interest—in a narrowly-tailored manner, Defendants have imposed burdens so unreasonable that they have driven Plaintiffs' speech from the marketplace and prevented listeners like Plaintiff Goodall from accessing harmless information. Ex. A ¶¶ 17, 21; Ex. B ¶ 8.

Accordingly, because Defendants cannot prove that the challenged restrictions are narrowly tailored to further a compelling government interest, they cannot satisfy their burden under strict scrutiny.

3. *Even if Strict Scrutiny Did Not Apply, Defendants Would Still Lose.*

Even if strict scrutiny did not apply, Plaintiffs would still prevail on their First Amendment claim. After all, even if the challenged regulations were content-neutral restrictions

on commercial speech—and they are not[11]—the restrictions would still be subject to intermediate scrutiny. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 142-43 (1994). Under this standard, unless the government could prove that the subject being discussed is unlawful or the speech is inherently misleading—and Defendants cannot here—it must prove that: (1) its interest is substantial; (2) the restriction at issue directly and materially advances that interest; and (3) the restriction is not more extensive than necessary to serve that interest. *See id.* at 143 (citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)); *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 298 (4th Cir. 2013). Defendants would still bear the entire burden of showing that the challenged restrictions are constitutional. *See Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *see also Ibanez*, 512 U.S. at 143 (explaining that government is required to prove that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree"). Defendants cannot satisfy this burden.

Defendants fail prong one because, as discussed *supra*, their only plausible rationale for burdening Plaintiffs' speech—policing the quality of makeup speech—is not a legitimate government interest, let alone a "substantial" one. A license to speak—whether about makeup or anything else—is flatly inconsistent with the First Amendment. *See, e.g.*, *Edwards v. District of*

[11] As discussed *supra*, the challenged requirements are content-based. Moreover, Plaintiffs' speech is non-commercial. Commercial speech is usually defined as speech that "does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Plaintiffs' speech that is restricted by Defendants—instruction regarding different styles of makeup, different types of makeup, different makeup-application techniques, and advanced color theory—is not advertising. Whereas advertising merely proposes a commercial transaction, Plaintiffs' makeup instruction would—if legal—occur *after* transactions between students and the Dahlia Institute have been agreed upon.

Columbia, 755 F.3d 996, 1002 (D.C. Cir. 2014) (holding that licensing requirement for tour guides violated the First Amendment).[12]

Defendants also fail prong two. Even if one were to hypothetically assume that government had a sufficient interest in policing the quality of makeup speech, Defendants could not prove that North Carolina's requirements for prospective makeup schools "directly and materially advance" that interest. As discussed *supra*, Defendants' curriculum and equipment requirements for prospective makeup schools bear little, if any, connection to makeup artistry.

Finally, Defendants fail prong three because these requirements are unduly burdensome. North Carolina's curriculum and equipment mandates for prospective makeup schools are so onerous that they have driven the Dahlia Institute out of the marketplace, even though Plaintiff Bukvic-Bhayani wants to teach there and Plaintiff Goodall wants to learn there. Defendants bear the burden of showing why less-restrictive alternatives—*e.g.*, limiting esthetics-instruction requirements to schools designed to qualify students for esthetics licensure—are somehow insufficient. *See Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1240 (11th Cir. 2017) (holding that a restriction on skim-milk labeling violated the First Amendment where "numerous less burdensome alternatives existed" and the government was unable to show why they were insufficient). They could not possibly do so.

Because Defendants cannot satisfy their burden under any potentially-applicable level of scrutiny, Plaintiffs are likely to prevail on the merits of their First Amendment claim.

[12] Because the speech at issue in *Edwards* was—like the speech at issue in this case—non-commercial, the D.C. Circuit did not apply *Central Hudson* scrutiny in deciding the case. It did, however, hold that D.C.'s tour-guide license flunked intermediate scrutiny (without deciding whether strict scrutiny should apply). 755 F.3d at 1000. Accordingly, as the *Edwards* ruling makes clear, a license to speak is inconsistent with the First Amendment even under diminished scrutiny.

II. PLAINTIFFS SATISFY THE REMAINING ELEMENTS FOR A PRELIMINARY INJUNCTION.

The remaining three elements of the preliminary-injunction analysis are also easily met: (1) the suppression of speech is always an irreparable harm; (2) the balance of equities favors Plaintiffs because Defendants will suffer no harm, financial or otherwise, if Plaintiffs are allowed to speak during the pendency of this case; and (3) the public interest favors Plaintiffs because the public has no interest in the unconstitutional suppression of speech.

As to the irreparable-harm requirement, it is well-established in this Circuit that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus, this Circuit has held that in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is "inseparably linked" to the likelihood of success on the merits of the plaintiff's First Amendment claim. *Musgrave*, 553 F.3d at 298. Moreover, "the loss of valuable business opportunities" is also an irreparable injury. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). In this case, Plaintiffs have demonstrated that they are likely to prevail on their First Amendment claim. Also, unless Defendants are enjoined, Plaintiff Bukvic-Bhayani stands to lose valuable business opportunities at the Dahlia Institute during the pendency of this litigation. *See* Ex. A ¶ 23. Accordingly, Plaintiffs have satisfied the requirement of demonstrating irreparable harm.

Further, the balance of equities in this case tips decidedly in Plaintiffs' favor. In contrast with the irreparable harm Plaintiffs will continue to suffer if an injunction is not issued, Defendants stand to suffer no harm at all. There is no risk of financial loss to Defendants, because an injunction will not compel them to take any action or obligate any resources. More

fundamentally, Defendants have no legitimate interest in the continued enforcement of an unconstitutional law. *See Legend Night Club v. Miller*, 637 F.3d 291, 302-303 (4th Cir. 2011) ("[T]he State of Maryland is in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions."). To the extent that the state has any interest in the continued enforcement of the law, the Supreme Court has made clear that this Court must "give the benefit of any doubt to protecting rather than stifling speech." *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007); *see also id.* at 474 ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

Finally, an injunction will also serve the public interest because the public benefits from a marketplace of ideas that is "uninhibited, robust, and wide-open." *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Like Defendants, "the public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law." *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010). Thus "it is always in the public interest to protect First Amendment liberties." *Legend Night Club*, 637 F.3d at 303 (quoting *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004)).

III. THIS COURT SHOULD SET A BOND AT EITHER ZERO DOLLARS OR A NOMINAL AMOUNT OF ONE DOLLAR.

Under Federal Rule of Civil Procedure 65(c), this Court may issue a preliminary injunction only if the applicant provides a bond in an amount determined by the court. This Court, however, has the discretion to set the bond in whatever amount it deems proper, and may even set the bond at zero dollars if there is no risk of financial harm to the enjoined party. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999). In this case there is no danger that Defendants will suffer any financial damage or incur any unrecoverable costs if Plaintiffs are permitted to communicate freely during the pendency of this litigation.

Accordingly, Plaintiffs respectfully request that, if their motion for preliminary injunction is granted, this Court set the bond at either zero dollars or in the nominal amount of one dollar.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for preliminary injunction and enjoin the enforcement of North Carolina's requirement that Plaintiffs Bukvic-Bhayani and Dahlia Institute of Makeup Artistry LLC must obtain a cosmetic-art-school license from Defendants before operating a school teaching makeup to Plaintiff Goodall and other students. Plaintiffs also respectfully request that the Court waive the bond requirement under Federal Rule of Civil Procedure 65(c).

Dated this 23rd day of August, 2017.

Respectfully submitted,

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* *Pro Hac Vice Application To be Filed*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of August, 2017, a true and correct copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION** was dispatched to a third party process server for service to the following Defendants:

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