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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Last year, Defendants ordered Plaintiff Bukvic-Bhayani to cancel her school's grand opening, and they have prevented her from opening the school ever since. Defendants were enforcing the plain language of North Carolina law, whereby no one may open any type of makeup school without a government license. Indeed, the North Carolina General Assembly has expressly prohibited Defendants from granting an exception to this requirement.

Now, upon being sued, Defendants have changed their tune. According to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, Plaintiff Bukvic-Bhayani is supposedly permitted to teach what she wants, rendering the instant case unnecessary. Defendants' Memorandum is supported by the affidavit of one Defendant. Besides asserting a position Defendants are not authorized to take, the affidavit is not binding on the North Carolina Board of Cosmetic Art Examiners and cannot provide Plaintiffs with the resolution they need in order to move forward with their constitutionally protected speech.

Accordingly, judicial resolution of this case is necessary for two reasons. First, Defendants are expressly obligated to enforce North Carolina's prohibition on unlicensed makeup schools and have based their entire position on a temporary misreading of the relevant laws and regulations. Second, without a court judgment permanently binding them, Defendants can again reverse their position and threaten Plaintiffs' First Amendment rights. In other words, without a ruling from this Court in Plaintiffs' favor, Plaintiff Bukvic-Bhayani's makeup school—the Dahlia Institute—will remain closed, and the ongoing and irreparable harm to Plaintiffs' First Amendment rights will continue.

Because this Court must decide the instant case, it must reach the merits of Plaintiffs' First Amendment challenge. As Plaintiffs explained in their opening brief, North Carolina's statutory prohibition on unlicensed makeup schools violates the First Amendment: It is a

content-based restriction on teaching, which is constitutionally protected speech, and consequently triggers strict scrutiny (which it fails).

Defendants' response refuses to engage with the Supreme Court and Fourth Circuit precedent relied on by Plaintiffs. Instead, Defendants primarily (and improperly) rely on a vacated opinion from the District of Nevada. (In fact, it is a vacated opinion holding that aspects of a similar law failed to even survive rational basis review.) Regardless, under the controlling precedent in this circuit, the challenged requirements are unconstitutional, content-based restrictions on speech.

In light of this Court's jurisdiction over Plaintiffs' challenge—and Plaintiffs' likelihood of success on the merits of their First Amendment claim—Plaintiffs are entitled to a preliminary injunction barring Defendants from prohibiting unlicensed makeup instruction.

ARGUMENT

Since much of Defendants' argument is based on a misreading of the relevant statutory and regulatory provisions, Section I of this brief corrects Defendants' errors and addresses the General Assembly's express prohibition on Defendants' new position. Section II explains why an affidavit that does not bind the Board cannot preclude the need for judicial resolution. Finally, Section III addresses Defendants' flawed First Amendment argument.

I. DEFENDANTS DO NOT HAVE THE AUTHORITY TO PERMIT PLAINTIFFS' SPEECH.

Defendants' primary argument—that Plaintiffs do not need relief from this Court—is based entirely on a misreading of the North Carolina Cosmetic Art Act. Contrary to Defendants' assertions, the General Assembly has it made perfectly clear that all makeup schools are required to obtain a cosmetic-art-school license, regardless of whether the students intend to charge for their eventual services. In fact, the Board of Cosmetic Art Examiners has no discretion to grant

exemptions from North Carolina's cosmetic-art-school-license requirements. In arguing that Plaintiffs' speech is permitted in North Carolina, Defendants erroneously cite North Carolina's licensing requirements for ***practicing*** makeup artistry, but ignore North Carolina's licensing requirements for ***teaching*** makeup artistry.

This section will correct Defendants' errors in three ways. First, it will address North Carolina's prohibition on unlicensed makeup schools. Second, it will address the General Assembly's express prohibition on the Board ever deviating from the cosmetic-art-school-license requirements. Third, it will address the fact that the exemption relied upon by Defendants in their brief—which only exempts the ***performance*** of makeup artistry without compensation—includes no corresponding exemption for ***makeup schools***.

A. The North Carolina Cosmetic Art Act Prohibits Unlicensed Makeup Schools.

The North Carolina Cosmetic Art Act unambiguously prohibits unlicensed makeup instruction, including at the Dahlia Institute. Under the Act, "[n]o one may open or operate a cosmetic art school before the Board [of Cosmetic Art Examiners] 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" includes "esthetics," *id*. § 88B-2(5), which includes "applying makeup." *Id*. § 88B-2(11a). Reading the Act as a whole, no one—including Plaintiff Bukvic-Bhayani or the Dahlia Institute—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. Neither the North Carolina Cosmetic Art Act nor the North Carolina Administrative Code contains any exemptions to this requirement.

Accordingly, North Carolina law bans unlicensed makeup instruction at the Dahlia Institute ***irrespective*** of whether Defendants think it is legal.

B. The North Carolina General Assembly Has Expressly Banned the Board from Taking Its New Position.

Even if Defendants wanted to permit Plaintiffs' speech, they could not do so. On the issue of cosmetology schools in general, and makeup schools in particular, the General Assembly could not have been clearer: The Board of Cosmetic Art Examiners has no authority to deviate from the mandated requirements or to give an exemption to any type of school. In the General Assembly's words:

> ***No one*** may open or operate a cosmetic art school before the Board has approved a license for the school. The Board ***shall not*** issue a license before a cosmetic art school has been inspected and determined to be in compliance with the provisions of this Chapter ***and*** the Board's rules [which are located in Chapter 14 of Title 21 of the North Carolina Administrative Code].

N.C. Gen. Stat. § 88B-16(b) (emphasis added).

In light of this provision, the Board cannot unilaterally permit Plaintiffs' speech. Under N.C. Gen. Stat. § 88B-16(b), if either the North Carolina Cosmetic Art Act or the North Carolina Administrative Code prevents a makeup school from operating, then the Board has zero discretion to find otherwise or to grant an exemption. And, as shown in the previous subsection, the North Carolina Cosmetic Art Act prohibits Plaintiffs' makeup instruction. Hence, North Carolina bars Defendants from granting the Dahlia Institute an exemption from the state's licensing requirements for cosmetic art schools.

C. The Exemption Relied On In Defendants' Brief Is Inapplicable to Makeup Schools.

Defendants ignore North Carolina's ban on unlicensed makeup instruction and restrictions on Defendants' ability to unilaterally permit speech, instead citing an inapplicable statutory provision to argue that judicial resolution of this case is unnecessary. Specifically, much of Defendants' argument relies on the North Carolina Cosmetic Art Act's criminal penalty

section, where exemptions to the Act's licensing requirements are listed. Defs.' Mem. in Opp. to Mot. for Prelim. Inj. ("Defs.' Mem."), ECF No. 18, at 9. To be clear, Defendants are correct that the list of exemptions includes an exemption for ***practicing*** makeup artistry without seeking pay or reward. N.C. Gen. Stat. § 88B-22(a). But nowhere does the list include any exemption for ***teaching*** makeup artistry to individuals who do not want to practice makeup artistry for pay.

Indeed, N.C. Gen. Stat. § 88B-22 illustrates the problem with Defendants' argument to the contrary. The General Assembly divorced the Act's enforcement exemptions from the Act's definitions. The Act defines relevant terms like "cosmetic art" and "esthetics" to include various activities irrespective of whether compensation is sought. *See id*. § 88B-2(5) (defining "cosmetic art"); *id*. § 88B-2(11a) (defining "esthetics"). But when it separately exempted those practitioners that are not seeking compensation, the Act did not include a corresponding exemption for the schools teaching those practitioners. *See id*. § 88B-22. Sadly, the list's glaring omission of any exemption for schools did not prevent Defendants from relying on it in their brief.

In light of North Carolina's restrictions on unlicensed makeup instruction, Plaintiffs must obtain judicial resolution as to their First Amendment rights. North Carolina's General Assembly banned unlicensed makeup instruction (including at the Dahlia Institute), Defendants cannot unilaterally revise this requirement, and the exemption Defendants cites to argue otherwise is inapplicable. Accordingly, asking Defendants for a declaratory ruling, or other permission to speak, would be futile. Even if Defendants wanted to permit Plaintiffs' speech, the North Carolina Cosmetic Art Act would bar it.

II. DEFENDANTS' NON-BINDING POSITION ON THE LEGALITY OF PLAINTIFFS' UNLICENSED MAKEUP INSTRUCTION CANNOT DIVEST THIS COURT OF JURISDICTION.

Despite the provisions discussed *supra*, Defendants now contend that Plaintiffs' lawsuit is unnecessary. According to Defendants, Plaintiff Bukvic-Bhayani is supposedly already allowed to open her desired makeup school without a license for it. Defs.' Mem. at 9-10. Defendants rely on a declaration saying that Plaintiff Bukvic-Bhayani may teach already-licensed estheticians and makeup hobbyists. Decl. Lynda Elliott ("Elliott Decl."), ECF No. 17, ¶¶ 19-24.

However, even if Defendants had the authority to exempt Plaintiffs from the North Carolina Cosmetic Art Act and the Board's regulations (which they do not), Defendant Elliott's declaration would still not moot this dispute. This is the case because: (1) Defendant Elliott's declaration does not bind the Board; (2) the declaration leaves open the possibility of future enforcement against Plaintiff Bukvic-Bhayani; and (3) the declaration constitutes—at most—voluntary cessation of unconstitutional behavior, which is insufficient to divest this Court of jurisdiction. Below, Plaintiffs address each of these three deficiencies in Defendant Elliott's declaration.

First, without a judicial resolution, Defendants' position on the legality of Plaintiffs' makeup speech is not necessarily permanent. Nothing in Defendant Elliott's declaration permanently binds either the current Board of Cosmetic Art Examiners or any successors from stopping Plaintiffs' makeup instruction. Accordingly, ***even if*** Defendants could permit Plaintiffs speech through Defendant Elliott's declaration, Plaintiffs have no assurance that the Board of Cosmetic Art Examiners will continue to permit Plaintiffs' speech if they dismissed their suit.

Second, this risk is magnified by the fact that Defendant Elliott's declaration leaves the Board leeway to require that Plaintiff Bukvic-Bhayani obtain a cosmetic-art-school license.

According to the declaration, Plaintiff Bukvic-Bhayani may open a "small" school to hobbyists and continuing-education students without a cosmetic-art-school license, but not a school open to students seeking to work as professional makeup artists. *Id.* ¶¶ 23-24. Essentially, Defendants have signaled that they will—allegedly—permit Plaintiffs' unlicensed speech insofar as it conforms to the speech proposed in the four corners of their complaint. However, once a student intent on learning makeup artistry for the sake of, say, working professionally in another state walks through the doors of the Dahlia Institute, Defendant Elliott's declaration leaves the door ajar for Board enforcement.

Plaintiff Bukvic-Bhayani should not have the burden of policing what her students want to do with their makeup education. At most, she can simply tell students that her classes do not qualify them for licensure as estheticians in North Carolina. If teaching makeup without a license requires her to decipher each student's subjective intent for taking her classes, then her speech—in spite of Defendant Elliott's declaration—is still at risk without judicial relief.

Third, even if Defendant Elliott's declaration was a categorical promise to leave Plaintiff Bukvic-Bhayani and the Dahlia Institute free to teach makeup, it would—at best—constitute voluntary cessation of unconstitutional activity. Even though Plaintiff Bukvic-Bhayani already told Defendants that she is solely teaching hobbyists and already-licensed estheticians rather than seeking to qualify anyone for an esthetician license, Defendants previously stopped Plaintiff Bukvic-Bhayani from opening a makeup school without a cosmetic-art-school license. Bukvic-Bhayani Decl. ¶ 12. Defendants also repeatedly told Plaintiff Bukvic-Bhayani, both verbally and over email, that she may not teach unlicensed students—like Plaintiff Goodall—without a cosmetic-art-school license. *Id.*, Exs. A-1 & A-3.

Defendants' alleged change of heart cannot divest this court of jurisdiction. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (cautioning that post-litigation "maneuvers designed to insulate" actions from review "must be viewed with a critical eye"). "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). As the Supreme Court recently explained: "Otherwise, a defendant could engage in unlawful conduct, stop when sued [and] then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013); *see also Knox*, 132 S. Ct. at 2287 (holding that dismissal would "permit a resumption of the challenged conduct as soon as the case is dismissed").

Consequently, the Supreme Court has established a high bar for dismissing a case on Defendants' preferred grounds. The defendant "bears the formidable burden of showing that it is ***absolutely clear*** the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (emphasis added). This burden is especially high where executive cessation is—as here—not clearly legal. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 n.1 (2017) (holding that governor's announcement to change challenged policy did not moot case).

Defendants fail by a wide margin in seeking to meet this "stringent" test. *City of Mesquite*, 455 U.S. at 289, n.10. As noted above, Defendant Elliott's declaration is non-binding and leaves open the door for future enforcement. As such, it falls far short of the kind of "unconditional and irrevocable" promise necessary to terminate this lawsuit. *See Already, LLC*, 133 S. Ct. at 728.

Courts have repeatedly held that even legislative repeal of an unconstitutional practice is insufficient to show that the "behavior could not reasonably be expected to recur." *See Friends of the Earth*, 528 U.S. at 170; *see also Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993) (holding city's repeal of challenged ordinance and replacement with new ordinance that slightly changed old one was insufficient to dismiss challenge to case). If the legislative repeal of an unconstitutional practice is insufficient to dismiss a challenge to that practice, the mere announcement of a revised legal position, communicated via legal brief, is also insufficient. *See id.*; *Houchins v. KQED, Inc.*, 438 U.S. 1, 25-26 n.13 (1978) (Stevens, J., dissenting) (cautioning courts "to beware of efforts to defeat injunctive relief by protestations of [ ] reform").

In sum, Plaintiffs' lawsuit should not be dismissed by virtue of Defendants' post-litigation maneuver. Without judicial relief permanently binding them, Defendants could proceed to stop Plaintiff Bukvic-Bhayani from opening the Dahlia Institute of Makeup Artistry to Plaintiff Goodall and other students at any time. As a result, Plaintiff Bukvic-Bhayani cannot prudently open the school, and it will remain closed unless relief is granted by this Court.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR FIRST AMENDMENT CHALLENGE AND ENTITLED TO A PRELIMINARY INJUNCTION.

Since judicial resolution of this lawsuit is necessary, this Court must consider the merits of Plaintiffs' First Amendment challenge in determining whether a preliminary injunction is warranted. As set forth in detail in Plaintiffs' opening brief, Plaintiffs are likely to succeed on their First Amendment claim. *See* Pls.' Mem. in Supp. Mot. for Prelim. Inj. ("Pls.' Mem."), ECF No. 4-1, at 11-22. North Carolina's restrictions on unlicensed makeup instruction trigger First Amendment scrutiny because teaching is speech. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *Goulart v. Meadows*, 345 F.3d 239, 247-48 (4th Cir. 2003);

Edwards v. City of Goldsboro, 178 F.3d 231, 245-49 (4th Cir. 1999). These restrictions are content-based for three independent reasons—they discriminate based on topic discussed, *see Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); they cannot be justified without reference to the content of the speech they regulate, *see id.*; and they compel speakers to change the content of what they say, *see Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014). *See* Pls.' Mem. at 14-17. As a result, they are subject to strict scrutiny, *see Reed*, 135 S. Ct. at 2231, which Defendants cannot possibly meet. *See* Pls.' Mem. at 18-20. In fact, even if diminished scrutiny applied (and it does not), Defendants still could not meet their burden. *See id*. at 20-22.

In their opposition brief, Defendants do not address any of these arguments. They do not address whether makeup instruction is constitutionally protected speech or whether North Carolina's restrictions on makeup instruction are content-based. Instead, they argue that there is an occupational-licensing exception to the First Amendment. Defs.' Mem. at 2.

Defendants are wrong—there is no occupational-licensing exception to the First Amendment. As the Supreme Court has explained, federal courts do not have a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010). Instead, the appropriate inquiry is whether the given category of speech has been historically treated as unprotected the way obscenity, incitement, and fighting words have been. *Id*. at 1585-86. Teaching—whether about makeup or anything else—has not been historically unprotected. *See, e.g.*, *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

Consistent with the Supreme Court's jurisprudence, federal courts across the nation have held that occupational-licensing restrictions are subject to First Amendment scrutiny. For instance, the United States Court of Appeals for the D.C. Circuit held that the D.C. government

violated the First Amendment when it required a license to work as a tour guide. *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014). And a federal court likewise found that the Kentucky psychologist-licensing board violated the First Amendment when it attempted to end the publication of a popular advice column on the ground that the column constituted "unlicensed practice of psychology." *Rosemond v. Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015). As these decisions make clear, individuals do not lose their First Amendment rights when they engage in an occupation.

To argue otherwise, Defendants rely on bad law. In arguing that there is an occupational-speech exception to the First Amendment, Defendants lead with a vacated decision—*Waugh v. Nevada State Board of Cosmetology*, 36 F. Supp. 3d 991 (D. Nev. 2014), *vacated*, 2016 WL 8844242 (9th Cir. 2016).[1] *See* Defs.' Mem. at 10-11 (citing *Waugh*). Defendants also cite a district court's denial of a preliminary-injunction motion—*Cooksey v. Futrell*, No. 3:12-cv-336, 2012 WL 3257811 (W.D.N.C. Aug. 8, 2012). *See* Defs.' Mem. at 11 (citing *Cooksey*). But Defendants fail to note a later Fourth Circuit opinion in that very same case finding that North Carolina's Board of Dietetics and Nutrition had chilled the plaintiff's speech, establishing a First Amendment injury-in-fact. *Cooksey v. Futrell*, 721 F.3d 226, 229 (4th Cir. 2013).

Defendants' other First Amendment cases—*Accountant's Society of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988), and *Lowe v. SEC*, 472 U.S. 181 (1985)—are simply inapposite. *See* Defs.' Mem. at 11 (citing *Bowman* and *Lowe*). Neither case stands for a general occupational-licensing exception to the First Amendment. The Fourth Circuit, in *Bowman*, and former Justice Byron White, in a concurrence in *Lowe*, merely held that restrictions on speech may be subject to

[1] In citing *Waugh*, Defendants also fail to note that Nevada's application of certain cosmetology regulations to makeup schools failed to satisfy even the rational basis test. *See Waugh*, 36 F. Supp. 3d at 1019-25. Even if occupational-licensing restrictions were subject to diminished scrutiny (and they are not), the requirements challenged in this case would not, as Defendants imply, automatically be constitutional.

diminished scrutiny where the speakers in question (1) personally take on a client's affairs, (2) claim to exercise judgment on their client's behalf, and (3) base that judgment on the client's individual needs and circumstances. *See Bowman*, 860 F.2d at 604; *Lowe*, 472 U.S. at 232 (White, J., concurring).[2]

Unlike the accountants in *Bowman* and investment advisers in *Lowe*, makeup instructors like Plaintiff Bukvic-Bhayani do none of these things. They do not take on a client's affairs, substitute their own judgment for their clients' judgment, or exercise that judgment based on a client's particular needs. They do not conduct financial transactions for their clients; they just talk to them about makeup.

In summary, Defendants' response to Plaintiffs' First Amendment challenge is unavailing. Plaintiffs are likely to succeed on the merits. Moreover, as discussed at length in Plaintiffs' opening brief—*see* Pls.' Mem. at 22-25—the suppression of their speech is an irreparable harm, the balance of equities favors them, and the public interest favors them. Accordingly, Plaintiffs are entitled to a preliminary injunction.[3]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for preliminary injunction.

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[2] Moreover, these two opinions are irreconcilable with recent Supreme Court precedent. As discussed *supra*, the Supreme Court—in *United States v. Stevens*—reaffirmed that there are only a handful of historically recognized exceptions to the First Amendment for entire categories of speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. 130 S. Ct. at 1586. The Fourth Circuit, in *Bowman*, and Justice White, in *Lowe*, do not even attempt to argue that fiduciary speech is historically unprotected. In any event, since Plaintiffs' speech is not fiduciary speech, the Court need not determine whether fiduciary speech is subject to diminished scrutiny.

[3] Defendants argue that Plaintiffs' motion should be denied because Plaintiffs' lawsuit comes 16 months after Plaintiffs' first communications with North Carolina's Board of Cosmetic Art Examiners. Defs.' Mem. at 10. Plaintiffs should not be penalized for their good-faith effort to resolve this dispute through several emails before resorting to litigation. The fact that Defendants' ongoing violation of Plaintiffs' rights has lasted many months does not make Plaintiffs' claims less meritorious, their injury any less irreparable, the balance of equities any different, or the public interest any weaker. Moreover, as Defendants note, Plaintiffs commenced suit within only four months of the last email between Plaintiff Bukvic-Bhayani and the Board. *Id.* at 6. Plaintiffs needed those four months to retain counsel and move this case forward.

Dated this 16th day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2017, a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION was served upon the following counsel of record by electronic mail to:

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