App. 1

United States Court of Appeals
for the Eighth Circuit

No. 16-3968

Ndioba Niang; Tameka Stigers

Plaintiffs-Appellants

v.

Emily Carroll, in her official capacity as Executive Director of the Missouri Board of Cosmetology and Barber Examiners; Wayne Kindle, In his official capacity as a member of the Missouri Board of Cosmetology and Barber Examiners

Defendants-Appellees

Betty Leake

Defendant

Jackie Crow, In her official capacity as a member of the Missouri Board of Cosmetology and Barber Examiners; Joseph Nicholson, In his official capacity as a member of the Missouri Board of Cosmetology and Barber Examiners; Leata Price-Land, In her official capacity as a member of the Missouri Board of Cosmetology and Barber Examiners; Lori Bossert, In her official capacity as a member of the Missouri Board of Cosmetology and Barber Examiners; Linda M. Bramblett, In her official capacity as a member of the Missouri Board of Cosmetology and Barber Examiners; Leo D. Price, Sr., In his official capacity as a member

of the Missouri Board of Cosmetology and Barber Examiners; Christie L. Rodriguez, In her official capacity as a member of the Missouri Board of Cosmetology and Barber Examiners

Defendants-Appellees

Missouri African Hairbraiders and Their Customers; Pacific Legal Foundation; Public Choice Scholars; Cato Institute; Reason Foundation; Individual Rights Foundation; Senator Rand Paul; Goldwater Institute; Beacon Center of Tennessee; The Show-Me Institute

Amici on Behalf of Appellant(s)

Appeal from United States District Court for the Eastern District of Missouri – St. Louis

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Submitted: September 20, 2017
Filed: January 11, 2018

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

BENTON, Circuit Judge.

Missouri statutes require African-style hair braiders to be licensed as barbers or cosmetologists. Ndioba "Joba" Niang and Tameka Stigers challenge this

requirement under the Fourteenth Amendment. The district court[1] granted summary judgment for the State. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

African-style hair braiders are required to have a license to work for pay in Missouri. §§ **328.020, 329.030 RSMo 2016**. License candidates must (1) complete a costly and time-intensive training course – 1,000-hours for barbering and 1,500-hours for hairdressing, (2) disclose criminal, citizenship, and limited character background, and (3) pass a licensing exam. These requirements apply to those who "cut and dress the hair for the general public" or perform "arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means." §§ **328.010(1)** (barbers), **329.010(5)(a)** (cosmetologists) **RSMo 2016**. Niang and Stigers – two unlicensed, compensated, African-style braiders – believe African-style braiding is different from barbering and cosmetology with distinctive techniques not covered in either training course or the exam.

This court reviews de novo a grant of summary judgment. ***Torgerson v. City of Rochester***, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). "Where a law neither implicates a fundamental right nor involves a suspect or quasi-suspect classification, the law must only

[1] The Honorable John M. Bodenhausen, United States Magistrate Judge for the Eastern District of Missouri, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. § 636(c).

be rationally related to a legitimate government interest." ***Gallagher v. City of Clayton***, 699 F.3d 1013, 1019 (8th Cir. 2012). This review is "a paradigm of judicial restraint" where "a statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." ***FCC v. Beach Commc'ns, Inc.***, 508 U.S. 307, 313-14 (1993) (citations omitted). Courts must give "a strong presumption of validity" to state laws. ***Heller v. Doe***, 509 U.S. 312, 319 (1993) (citations omitted). Courts must be "very reluctant" to "closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." ***United States v. Windsor***, 133 S. Ct. 2675, 2717 (2013), *quoting* ***City of Cleburne v. Cleburne Living Ctr., Inc.***, 473 U.S. 432, 441-42 (1985). When a "rational basis" passes equal protection review, it "also satisfies substantive due process analysis." ***Executive Air Taxi Corp. v. City of Bismarck***, 518 F.3d 562, 569 (8th Cir. 2008).

The braiders argue that the license requirement is not rationally related to any legitimate government interest. According to the State, its interests are protecting consumers and ensuring public health and safety. The State offered evidence of health risks associated with braiding such as "hair loss, inflammation, and scalp infection." The State also presented evidence of scalp conditions that braiders must recognize as unsuitable for braiding.

The district court added two purposes: stimulating more education on African-style braiding and

incentivizing braiders to offer more comprehensive hair care. The braiders object that the district court cannot offer justifications. To the contrary, courts are "not bound to consider only the stated purpose of a legislature." ***Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City***, 742 F.3d 807, 809 (8th Cir. 2013). The braiders have the burden to negate not only the State's justification, but also "every conceivable basis which might support it." ***FCC***, 508 U.S. at 315 (internal quotations and citations omitted).

As the braiders acknowledge, the license requirement furthers legitimate government interests in health and safety. *See* ***Barsky v. Bd. of Regents of U.***, 347 U.S. 442, 449 (1954) (as "a vital part of a state's police power," it may "establish and enforce standards of conduct within its borders relative to the health of everyone there," including "the regulation of all professions concerned with health."). In the cases the braiders cite, the government did not have a legitimate interest. *See* ***Craigmiles v. Giles***, 312 F.3d 220, 224 (6th Cir. 2002) (restricting casket sales to funeral directors – "protecting a discrete interest group from economic competition" – "is not a legitimate governmental purpose"); ***St. Joseph Abbey v. Castille***, 712 F.3d 215, 222 (5th Cir. 2013) (same); ***Ranschburg v. Toan***, 709 F.2d 1207, 1211 (8th Cir. 1983) (finding "intent to discriminate is not a legitimate state interest"); ***Fowler v. United States***, 633 F.2d 1258, 1263 (8th Cir. 1980) ("no rational interest" "to summarily discharge without cause a mentally retarded worker, but not a non-retarded worker who performs the same job").

The braiders argue that the State's means do not fit its purposes. They emphasize an exception allowing unlicensed braiding "without the use of potentially harmful chemicals . . . while working in conjunction with any licensee for any public amusement or entertainment venue." *See* § **316.265 RSMo 2016**. The braiders also cite a legislative proposal by the licensing Board for a special barber/cosmetology license for braiders.

The licensing requirement is rationally related to the State's interest in public health and safety notwithstanding the licensing exception and the legislative proposal. The State is not required to "choose between attacking every aspect of a problem or not attacking the problem at all." ***United Hosp. v. Thompson***, 383 F.3d 728, 733 (8th Cir. 2004), *quoting* ***Dandridge v. Williams***, 397 U.S. 471, 487 (1970). "[E]ven when there is an imperfect fit between means and ends" courts are still compelled under rational basis review "to accept a legislature's generalizations." ***Heller***, 509 U.S. at 321. The fit need only be arguable and rational, with "some footing in the realities of the subject addressed by the legislation." ***Id.*** "The assumptions underlying these rationales may be erroneous, but the very fact that they are arguable is sufficient." ***FCC***, 508 U.S. at 320 (internal quotations and citation omitted). "It is enough that the State's action be rationally based and free from invidious discrimination." ***Dandridge***, 397 U.S. at 487. *See also* ***Schware v. Bd. of Bar Exam. of N.M.***, 353 U.S. 232, 239 (1957) (a state violates the Fourteenth Amendment when its

"action is invidiously discriminatory"). Here, the fit between the licensing requirement and the State's interest is imperfect, but not unconstitutionally so.

The braiders assert that the Missouri licensing regime is too overbroad and under-inclusive to be rationally related to the State's interest. They cite the State's concession that only about 10 percent of the required training courses is relevant to African-style braiders, and that almost all the exams do not test on braiding. To the contrary, the State "may exact a needless, wasteful requirement in many cases," which may "not be in every respect logically consistent with its aims" but still be "constitutional." ***Williamson v. Lee Optical of Okla., Inc.***, 348 U.S. 483, 487-88 (1955). "It is enough" that the State identify "an evil at hand for correction" and believe regulation "was a rational way to correct it." ***Id.*** at 488. "A State can require high standards of qualification" if it has "a rational connection with the applicant's fitness or capacity to practice." ***Schware***, 353 U.S. at 239. There may be advantages and disadvantages to a license requirement, "[b]ut it is for the legislature, not the courts, to balance" them. ***Williamson***, 348 U.S. at 487.[2]

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[2] The braiders' citations to *Peeper v. Callaway Cty. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997) are not persuasive because it is a non-economic case about restraints on First Amendment rights. *See* ***Kansas City Taxi***, 742 F.3d at 810 (acknowledging non-economic cases are not persuasive in the local economic sphere); ***Lee v. Driscoll***, 871 F.3d 581, 585 (8th Cir. 2017) (interpreting *Peeper* as addressing restrictions on the First Amendment right to associate).

Finally, the braiders argue that the statutes violate equal protection by treating different professionals – braiders and barbers/cosmetologists – similarly. The premise of this argument is wrong. The braiders define their profession as "braiding, locking, twisting, weaving, cornrowing, or otherwise physically manipulating hair without the use of chemicals that alter the hair's physical characteristics." The braiders' definition is rational, but it is not the only rational way to define professions that involve hair dressing and other similar services. And their definition falls squarely within the scope of the definitions of barbering and cosmetology that the Missouri legislature has chosen. Barbering is to "dress the hair for the general public." **§ 328.010(1) RSMo 2016**. Cosmetology is "arranging, dressing . . . or similar work upon the hair of any person." **§ 329.010(5)(a) RSMo 2016**. A legislature rationally could conclude that African-style braiding is not a different profession than barbering or cosmetology. "We see no constitutional reason why a State may not treat all who deal with [dressing hair] as members of a profession." *See* ***Williamson***, 348 U.S. at 490.[3]

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[3] The braiders rely on rulings by three district courts. Because these decisions do not appropriately defer to legislative choices, they are not persuasive. *See* ***Brantley v. Kuntz***, 98 F. Supp. 3d 884, 893 (W.D. Tex. 2015) (To "shoehorn two unlike professions 'into a single, identical mold' " violates substantive due process); ***Clayton v. Steinagel***, 885 F. Supp. 2d 1212, 1215 (D. Utah 2012) (finding a violation of equal protection where State "irrationally squeezed 'two professions into a single, identical mold' "); ***Cornwell v. Hamilton***, 80 F. Supp. 2d 1101, 1103 (S.D. Cal. 1999) (same), *questioned in part by* ***Merrifield v. Lockyer***, 547 F.3d

The Missouri statutes do not violate the Fourteenth Amendment rights of the African-style hair braiders.

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The judgment is affirmed.

978, 985 (9th Cir. 2008) (district court's reasoning in *Cornwell* "cannot survive equal protection analysis").

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NDIOBA NIANG and TAMEKA STIGERS, Plaintiffs, v. EMILY CARROLL, *in her official capacity as Executive Director of the Missouri Board of Cosmetology and Barber Examiners, and* WAYNE KINDLE, JACKIE CROW, JOSEPH NICHOLSON, LEATA PRICE-LAND, LORI BOSSERT, LINDA M. BRAMBLETT, LEO D. PRICE, SR., and CHRISTIE L. RODRIGUEZ, *in their official capacities as members of the Missouri Board of Cosmetology and Barber Examiners*, Defendants.	)	No. 4:14 CV 1100 JMB

MEMORANDUM AND ORDER[1]

(Filed Sep. 20, 2016)

Introduction

In this case, the Court must evaluate the constitutionality of a Missouri law requiring practitioners of a unique form of hair care called African Style Hair Braiding ("ASHB") to be licensed as cosmetologists or barbers. ASHB is a distinctive form of natural hair care that involves braiding, locking, twisting, weaving, or otherwise physically manipulating a person's hair without the use of artificial chemicals.[2]

Despite its differences from mainstream cosmetology or barbering, the State of Missouri nevertheless requires ASHB practitioners to become licensed in the same manner as traditional cosmetologists or barbers before they can practice their craft on the general public, for money. This means meeting the same educational, training, and testing requirements as traditional cosmetologists or barbers. The State argues that requiring licensure for these professionals serves the State's interests in promoting the public health and protecting consumers from incompetence or fraud by setting educational and testing requirements, and

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[1] This case is before the Court with the parties' consent under 28 U.S.C. § 636(c). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

[2] ASHB has cultural, historical, and racial roots in Africa, where its techniques originated many centuries ago, and were brought by Africans to this country.

through inspections, as well as the prospect of licensee discipline.

Ndioba Niang and Tameka Stigers ("Plaintiffs") argue, however, that the practice of ASHB is not like traditional cosmetology or barbering; that it has a different historical and cultural genesis; and that it uses distinctive techniques. Plaintiffs contend, therefore, that it is irrational for the State of Missouri to require them to obtain a license they consider irrelevant and do not want. Plaintiffs also argue that the educational and testing requirements do nothing to promote competence in hair braiders, and that the State can protect consumers through general business licensing and general consumer protection laws, instead of licensing. Plaintiffs allege that application of the licensing regime to them violates their rights to substantive due process and equal protection, as well as their privileges or immunities under the Fourteenth Amendment.

To vindicate their rights, Plaintiffs filed this lawsuit. Plaintiffs seek declaratory relief that their constitutional rights have been violated, and injunctive relief prohibiting the State of Missouri from enforcing its licensing regimes against them. Plaintiffs also seek attorneys' fees.

After discovery in this matter was complete, the parties filed cross-motions for summary judgment. (ECF Nos. 47 and 49) Oral argument on both motions was held on January 19, 2016. Thereafter, the Court stayed this matter until the end of the 2016 Missouri Legislative session because two bills were pending

before the Missouri Legislature that might have mooted this matter. (ECF No. 57) Those bills never passed, so the Court lifted the stay. (ECF No. 62) The matter is now ripe for decision. Based on the undisputed facts of this case, and the applicable law, Defendants are entitled to summary judgment. Therefore, the Court will **GRANT** Defendants' motion for summary judgment, and **DENY** Plaintiffs' motion for summary judgment.

I. Background

A. Factual Background

1) Plaintiffs

Plaintiffs are two individuals employed in the traditional practice of ASHB. (Plaintiffs' Statement of Uncontroverted Material Facts) ("PSOMF") (ECF No. 49-2 at ¶¶ 5, 30)[3] Plaintiffs both own and operate

[3] In its discussion of the factual background of this case, the Court will refer to either uncontroverted facts, or will construe any facts that are in genuine dispute in Plaintiffs' favor. *See Ricci v. DeStefano*, 557 U.S. 557, 586 (2009).

The Court notes at the outset that there is a dispute between the parties over whether Defendants have admitted items in Plaintiffs' Statement of Uncontroverted Material Facts ("PSOMF"). Plaintiffs argue that, in disputing many of their uncontroverted facts, Defendants "fail to provide any citations to record evidence indicating that those facts are controverted," and that "[t]herefore, all statements in Plaintiffs' Statement of Uncontroverted Material Facts shall be deemed admitted under Local Rule 7-4.01E." (ECF No. 54 at 2-3) This local rule requires that "[e]very memorandum in opposition [to a motion for summary judgment] include a statement of material facts as to which the party contends a genuine issue exists. Those matters in dispute

establishments, open to the public, for the provision of their services, for compensation. (*Id*. at ¶¶ 6, 31) Neither Plaintiff is licensed as a cosmetologist or a barber in the State of Missouri. (*Id*. at ¶¶ 4, 29)

The undisputed facts in this case demonstrate that ASHB is a unique form of natural hair care which involves braiding, locking, twisting, weaving, cornrowing, or otherwise physically manipulating a person's hair. (*Id*. at ¶ 50) ASHB is usually practiced by individuals of African or African-American descent, upon hair that is often described as "tightly textured" or "coily" hair. (*Id*.) ASHB has geographic, cultural, historical, and racial roots in Africa, where its techniques originated many centuries ago. (*Id*. at ¶ 51) Practitioners of ASHB typically do not use chemicals to artificially alter hair. (*Id*. at ¶ 52)

Although the parties disagree about the extent to which ASHB is taught or learned in professional cosmetology or barbering schools, the parties agree that practitioners usually learn to perform their craft when they are children or teens, and most are "self-taught."

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shall be set forth with specific references to portions of the record, where available, upon which the opposing party relies." It further provides that "[a]ll matters set forth in the statement of the movant shall be deemed admitted for purposes of summary judgment unless specifically controverted by the opposing party."

The Court need not resolve this issue. For one thing, many of Plaintiffs' statements of fact are actually legal argument, especially where they relate to issues such as the relevancy and sufficiency of the licensing regime. Furthermore, as noted above, the Court will construe any material facts that are genuinely disputed in Plaintiffs' favor.

(*Id*. at ¶¶ 54, 55; ECF No. 52-1 at 20) The parties also appear to agree that many practitioners of ASHB offer only hair-braiding services, as opposed to a wider array of services traditionally provided by full-service cosmetologists or barbers. (PSOMF at ¶ 62; ECF No. 52-1 at 23-24) Almost exclusively, the services offered by Plaintiffs are the intricate hair braiding that is representative of ASHB, as opposed to more traditional cosmetology or barbering services. (PSOMF at ¶ 74, 75, 93, 94)

A typical customer interaction with Plaintiff Ndioba Niang begins by Niang asking customers about their past hair braiding experience; whether they have any scalp sensitivities or scalp conditions; and whether they have had any chemical hair treatments such as coloring, hair relaxing, or perm. (*Id*. at ¶ 78) Niang then examines the customer's scalp and hair prior to performing any braiding. (*Id*. at ¶ 79) Niang does not cut or color hair, or use chemicals, heat, or chemical relaxers to style hair. (*Id*. at ¶ 80) Niang does not wash hair. (*Id*. at ¶81)

In braiding her customers' hair, Niang uses combs, brushes, hair clips, hair extensions, scissors, lighters or candles (to seal the end of artificial hair extensions). In the past, Niang used flat irons, blow dryers, or hood dryers for certain braided hair styles, but she claims she does not use those items anymore, because they are "not necessary" for ASHB services. (*Id*. at ¶¶ 83-86) Niang cleans and sanitizes the combs, brushes, and hair clips that she uses with soap and water and/or Barbicide prior to use on each customer. (*Id*. at ¶ 87)

Plaintiff Tameka Stigers provides ASHB services at an establishment in St. Louis called "Locs of Glory". (*Id*. at ¶¶ 92, 93) Specifically, she uses a locking style known as Sisterlocks.[4] (*Id*. at ¶ 93) Locs of Glory offers a range of services, including cosmetology, barbering, and esthetics, and employs licensed practitioners, but Stigers herself does not provide those services. Rather, Stigers confines her practice to providing Sisterlocks services. (*Id*. at ¶98-100)

In providing braiding services, Stigers uses a "hook tool," similar to a crochet hook, that is specifically designed for Sisterlocks. (*Id*. at ¶ 103) Stigers sanitizes the hook tool multiple times throughout the day with hand sanitizer, which is the same cleaning process used by the licensed practitioners at Locs of Glory. (*Id*. at ¶ 104) In addition, Stigers periodically uses a hair dryer to dry customers' hair. Stigers also uses thread snips to help untangle customers' hair if the hair is tangled, so that she can properly section the hair on customers' scalps for braiding. (*Id*. at ¶¶ 105, 107) Stigers also provides instructions to clients on how to maintain their Sisterlocks at home, including instructions on how to re-tighten Sisterlocks. (*Id*. at ¶ 37) Stigers does not use other equipment such as flat irons, curling irons, or hood dryers. (*Id*. at ¶ 106)

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[4] "Sisterlocks" is a proprietary ASHB technique developed by Dr. JoAnne Cornwell, the lead plaintiff in an important ASHB case discussed later in this opinion. *See Cornwell v. Hamilton*, 80 F. Supp.2d 1101 (S.D. Cal. 1999). Stigers underwent additional training in this technique in order to become a certified Sisterlocks consultant. (PSOMF at ¶ 35, 36)

Stigers admits that the services she provides are more complex than the basic plaits and simple braids that may be taught to students during the course of a traditional cosmetology or barbering education. (*Id*. at ¶ 94) Stigers does, however, sometimes provide the basic plaits and simple braid services. When she does do these simpler services, she usually performs them on children. (*Id*. at ¶ 95)

Plaintiff Niang avers that if she was sued for the unlicensed practice of cosmetology, she would be unable to keep her business open, and that if this lawsuit is unsuccessful, she will be forced to close her business. (ECF No. 49-58 at ¶ 35) Niang further avers that she is unable to afford to attend a licensed cosmetology or barbering school, and that even if she could afford it, she would be forced to be around what she considers to be "potentially hazardous chemicals," that she would not otherwise handle. (*Id*. at ¶¶ 36-38)

Plaintiff Stigers avers that if this lawsuit fails, she will be forced to spend thousands of hours and tens of thousands of dollars to attend cosmetology or barber school, or complete a 3,000 hour cosmetology or 2,000 hour barber apprenticeship in order to stay in business. Stigers states that she cannot afford this tuition, and that she might have to close her business if the licensing requirement remains. Stigers also argues that, if Missouri's licensing regime is not struck down, she will have to handle hazardous chemicals that she does not want to handle, and would not otherwise handle. (ECF No. 49-61 at ¶¶ 32-37)

2) <u>Missouri Licensing and Educational Regimes</u>

The State of Missouri licenses hair care professionals under two statutes – one relating to cosmetology, and the second relating to barbering. Section 329.010(5)(a) of the Missouri Revised Statutes defines cosmetology as performing, or offering to engage in, any of the following acts:

> arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means; or removing superfluous hair from the body of any person by means other than electricity, or any other means of arching or tinting eyebrows or tinting eyelashes. . . . [A]ny person who either with the person's hands or with mechanical or electrical apparatuses or appliances, or by the use of cosmetic preparations, antiseptics, tonics, lotions or creams engages for compensation in any one or any combination of the following: massaging, cleaning, stimulating, manipulating, exercising, beautifying or similar work upon the scalp, face, neck, arms or bust [is engaged in cosmetology].

The State of Missouri, through its Board of Cosmetology and Barber Examiners ("Board") construes this definition of cosmetology to include the practice of ASHB. (Doc No. 41 at ¶ 31) The Board argues that, "[b]y its nature, African-style hair braiding falls within the definition of 'cosmetology,' as it involves 'arranging, dressing, . . . cutting, . . . or similar work upon the hair

of any person.'" (ECF No. 48 at 3-4) Furthermore, the Board argues that "[h]air braiding is, by its very nature, a form of hair care and styling" because it "involves the manipulation of hair for aesthetic effect." (*Id*. at 4)

Because the Board considers the practice of ASHB to be cosmetology, state law requires ASHB practitioners to be licensed by the State. In particular, § 329.030 provides that it is "unlawful for any person in this state to engage in the occupation of cosmetology or to operate an establishment . . . of cosmetology, unless such person has first obtained a license." Furthermore, Missouri law provides that the practice of cosmetology without a license is a class C misdemeanor, punishable by criminal penalties and fines of $300. *See* § 329.250 RSMo.[5]

In order to become a licensed cosmetologist, an applicant must meet the requirements of § 329.050 RSMo., including passing a background check, satisfying an educational requirement, and sitting for an exam. In order to sit for the cosmetology exam, an applicant must satisfy the educational requirement in one of three ways: (1) graduate from a licensed school with no less than 1,500 hours of training or the equivalent credit hours, with the exception of public vocational technical schools in which a student shall

[5] There are a few exceptions to this prohibition. First, § 329.010(4), (5) permits the unlicensed practice of cosmetology where it is done *without compensation*. Second, as will be discussed later, there is an exemption for braiders at public amusement and entertainment venues. *See* RSMo. § 316.265.

complete no less than 1,220 hours; (2) complete a cosmetology apprenticeship under the supervision of a licensed cosmetologist of no less than 3,000 hours; or (3) graduate from a cosmetology school or apprenticeship program in another State which has substantially the same requirements as Missouri law. *See* § 329.050 RSMo.

The mandatory curriculum for licensed cosmetology schools, and the apprenticeship program includes: shampooing of all kinds, hair coloring, bleaches, rinses, hair cutting and shaping, permanent waving and relaxing, hair setting, pin curls, fingerwaves, thermal curling, combouts and hair styling techniques, scalp treatments and scalp diseases, facials, eyebrows and arches, manicuring, hand and arm massage and treatment of nails, cosmetic chemistry, salesmanship and shop management, sanitation and sterilization, anatomy, state law, and additional optional topics selected by the schools. *See* § 329.040.4 RSMo.

The cosmetology exam (like the barbering exam, discussed below) is developed by an independent third party contractor, called Professional Credential Services, Inc. ("PCS"), which administers the National Interstate Council's cosmetology and barber licensing exams. (PSOMF *Id*. at ¶ 143-44) The Board does not select or control the content of the cosmetology (or barbering) exam, other than by contracting with PCS to administer the exam. (*Id*. at ¶ 148) The exam consists of 110 questions, only 100 of which are scored. The content of the written exam is drawn from material contained in two of the main textbooks used in

cosmetology schools – the Milady textbook, and the Pivot Point textbook.[6] (*Id*. at ¶¶ 149, 154, 156)

The facts demonstrate that these two textbooks focus on traditional, mainstream cosmetology, and do not contain specific instruction on ASHB. (*Id*. at ¶¶ 252-54) In fact, less than 50 pages of the nearly 3,000 pages of the Milady and Pivot Point cosmetology (and barber) textbooks contain information about any kind of braiding. (*Id*. at 254) Even when the textbooks do discuss braiding, it is not focused on ASHB, but instead, on traditional braiding which is outside of the scope of services normally provided by Plaintiffs and other ASHB practitioners. (*Id*. at 256) Because the content of these textbooks form the basis of the licensing exams, the facts show that only a small percentage of the licensing exam focuses upon hair braiding.

As to the barbering statute, according to Missouri law, a barber is anyone who "is engaged in the capacity so as to shave the beard or cut and dress the hair for the general public." § 328.010(1) RSMo. Section 328.020, meanwhile, provides that it is "unlawful for any person to practice the occupation of a barber in this state, unless he or she shall have first obtained a license." The unlicensed practice of barbering is a class C misdemeanor. *See* § 328.160 RSMo.

In order to become a licensed Missouri barber, an applicant must complete a written and practical exam

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[6] The majority of Missouri cosmetology and barber schools use the Milady or Pivot Point textbooks. (ECF No. 49-13 at 452)

pursuant to §§ 328.070-328.080 and 20 CSR[7] 2085-5.010(10). In order to sit for the barbering exam, an applicant must: (1) study for no less than 1,000 hours in a period of not less than six months in a licensed barber school under the direct supervision of a licensed instructor; or (2) complete no less than 2,000 hours under the direct supervision of a licensed barber apprentice supervisor. *See* § 328.080 RSMo.

The mandatory curriculum for licensed barbers schools, and the apprenticeship program include: history, professional image, bacteriology, sterilization, sanitation, and safe work practices; implements, tools and equipment; properties and disorders of the skin, scalp, and hair; treatment of hair and scalp, along with facial massage and treatments, shaving, haircutting, hairstyling, mustache and beard designs, permanent waving, chemical hair relaxing and soft curl permanents, hair coloring, hairpieces, chemistry, anatomy, physiology, salesmanship, establishment management, and state law. *See* 20 CSR § 2085-12.030. The mandatory barbering curriculum does not appear to include any specific ASHB instruction, and the barbering exam has very few questions directly relevant to hair braiding.

Missouri currently licenses 97 schools of barbering and cosmetology. (Defendants' Statement of Uncontroverted Material Facts at ¶ 17) ("DSOMF") Total tuition (for all 1500 hours) at a licensed Missouri cosmetology/barber school costs between $3,800 and $21,450, with

[7] "CSR" stands for Missouri Code of State Regulations.

an average of $11,570. (ECF No. 49-47 at 1; PSOMF at ¶ 157)

3) Application of State Licensing Laws to African Style Hair Braiders

As discussed above, and as agreed by the parties in this lawsuit, the Board has determined that the practice of ASHB falls within the statutory definition of either cosmetology or barbering, and therefore, all those practicing ASHB must be licensed as cosmetologists or barbers. (PSOMF at ¶¶ 120, 133; ECF No. 35 at ¶ 31)

As a result of this determination, the Board has undertaken several enforcement actions against practitioners of ASHB in Missouri operating without a license. (ECF No. 49-4 at 12-13) *See, e.g.*, *State Board of Cosmetology and Barber Examiners v. Salimato Kouyate, d/b/a African Sisters Hair Braiding*, Case No. 09-1544 CB; and *State Board of Cosmetology and Barber Examiners v. Anani Kodjo Adzoh and Ayawa Fiadonou, d/b/a/ Pauline African Hair Braiding*, Case No. 10-1753 CB.[8] In its response to interrogatories,

[8] The hearing decisions for these cases, and several others like it, can be found online at the Missouri Board of Cosmetology and Barber Examiner's website, in the discipline section: http://pr.mo.gov/cosbar-discipline.asp (last visited on September 15, 2016). Although these hearing decisions were not entered into the record, the Court takes judicial notice of the fact that these enforcement actions occurred. *See American Prairie Const. Co. v. Hoich*, 560 F.3d 780, 798 (8th Cir. 2009) (permitting district courts to take judicial notice of facts outside the record where "the

Defendants acknowledged at least 18 enforcement actions in the ASHB context. (ECF No. 49-4 at 12-13) The punishment in these cases has usually been in the form of discipline against the license of the businesses, due to the presence of unlicensed individuals providing ASHB services. There appear to have been no criminal prosecutions brought against unlicensed practitioners.

Defendants – pursuant to their inspection regime – have presented evidence from two Board inspectors who have inspected ASHB establishments. (ECF No. 48-13 at 10-18; and ECF No. 48-14 at 7-17) In at least some instances, inspectors have found sanitation violations at ASHB establishments, including unpackaged hair left out, unclean work areas, trash and hair on the floor and general uncleanliness in the salons. (*Id*.) It appears that these enforcement actions were undertaken in response to complaints filed against these establishments.[9] (ECF No. 49-13 at 310-313)

B. Procedural History

On June 16, 2014, Plaintiffs filed a three-count complaint against Emily Carroll ("Carroll"), Executive Director of the Missouri Board of Cosmetology and Barber Examiners ("Board"), in her official capacity.

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facts are matters of common knowledge or are capable of certain verification").

[9] Some of these complaints have apparently been filed by licensed competitors of the unlicensed practitioners. (ECF No. 49-13 at 317-19) It is not clear what percentage of the complaints is filed by competitors, and what percentage is filed by customers.

(ECF No. 1) Plaintiffs also sued six Board members in their official capacities (collectively, "Defendants").[10] On April 15, 2015, Plaintiffs filed an Amended Complaint, in which they added references to the State's barbering license, because Defendants determined during the course of discovery that Plaintiffs could be regulated under the barbering regime in addition to the cosmetology licensing regime. (ECF Nos. 30, 36)

In Count I of the Amended Complaint, Plaintiffs allege that enforcement of either the cosmetology or barber licensing regime against them violates their right to substantive due process by violating their "right to earn a living." (ECF No. 36 at 28-29) Plaintiffs claim that forcing them to undergo "at least 1,500 hours of irrelevant cosmetology training or at least 1,000 hours of irrelevant barbering training" is not rationally related to any legitimate government interest. (*Id*. at 29) In Count II, Plaintiffs claim that the licensing regime deprives them equal protection of the law, in violation of the Fourteenth Amendment, arguing that "the right to equal protection protects not just similarly situated people from being treated differently, but also differently situated people from being

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[10] These six individuals were Wayne Kindle, Betty Leake, Jackie Crow, Joseph Nicholson, Leata Price-Land, and Lori Glasscock. (*See* ECF No. 1 at 1) On November 25, 2014, Defendants gave notice to the Court that Betty Leake was no longer a member of the Board, due to the expiration of her term in office. (*See* ECF No. 25 at 1) Under Fed. R. Civ. P. 25(d), Linda M. Bramblett, Leo D. Price, Sr., and Christie L. Rodriguez are substituted as parties, because they have been named to terms on the Board. (*Id*.)

treated similarly." (ECF No. 36 at 30) Plaintiffs claim that they "cannot be subject to the same regulations and licensing requirements as cosmetologists or barbers." (*Id*.) In Count III, Plaintiffs allege that the licensing regime violates the Privileges or Immunities Clause of the Fourteenth Amendment, which they claim "protects the right to earn a living in the occupation of a person's choice subject only to reasonable government regulation." (ECF No. 36 at 31)

Plaintiffs seek declaratory and injunctive relief. They want: (1) a declaratory judgment that application of the Missouri licensing regime to Plaintiffs and ASHB practitioners generally is unconstitutional;[11] (2) a permanent injunction prohibiting Defendants from enforcing the licensing regime against Plaintiffs and ASHB practitioners generally; and (3) attorneys' fees, costs, and expenses in the action, pursuant to 42 U.S.C. § 1988. (ECF No. 36 at 32-33)

On September 30, 2015, after completion of discovery, the parties filed cross-motions for summary judgment. (ECF Nos. 47, 49) Concurrent with their motions for summary judgment, the parties also filed proposed

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[11] Plaintiffs appear to intend their lawsuit as a facial challenge. (*See* ECF No. 36 at 32-33) (asking for relief vindicating the rights of African Style Hair Braiders *generally*). Plaintiffs did not bring this case as a class action under Fed. R. Civ. P. 23, however, and lack standing to assert claims or to seek relief on behalf of other ASHB businesses who are not before the Court. *See generally United States v. Raines*, 362 U.S. 17, 21-23 (1960). Therefore, the Court considers Plaintiffs' suit to be an as-applied challenge and only rules on the factual circumstances presented in this case.

statements of uncontested material facts. (ECF Nos. 48-1 and 49-2) On October 30, 2015, both parties filed briefs in opposition to the other party's motion. (ECF Nos. 51, 52) On November 11, 2015, both parties filed replies in support of their respective motions for summary judgment. (ECF Nos. 53, 54)

As discussed above, after briefing was complete, the Court ordered oral argument from the parties concerning their respective motions for summary judgment. (ECF No. 55) The Court heard oral argument on January 19, 2016.

At oral argument, the Court discussed with the parties the fact that multiple bills had been proposed in the Missouri Legislature which would have altered the licensing requirements for hair braiders in Missouri, and potentially mooted the case. The Court therefore entered an order staying the case until the end of the 2016 legislative session, or passage of one of the licensing bills. (ECF No. 57) At the end of the 2016 legislative session, however, no bill had been passed by the legislature mooting this controversy. Therefore, on May 27, 2016, the Court lifted the temporary stay in this matter, and took the matter under submission. (ECF No. 62) The matter is now fully briefed and ready for disposition.

II. Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.

Civ. P. 56(a). Under Rule 56, a party moving for summary judgment bears the burden of demonstrating that no genuine issue exists as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and a fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Once the moving party discharges this burden, the non-moving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere existence of some alleged factual dispute." *Anderson*, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials in the pleadings. *Id*. at 256. "Factual disputes that are irrelevant or unnecessary" will not preclude summary judgment. *Id*. at 248.

The Court must construe all facts and evidence in the light most favorable to the non-movant, and must refrain from making credibility determinations and weighing the evidence. *Id*. at 255. "Where parties file cross-motions for summary judgment, each summary judgment motion must be evaluated independently to determine whether a genuine issue of material fact exists and whether the movant is entitled to judgment as a matter of law." *Progressive Cas. Ins. Co. v. Morton*, 140 F. Supp.3d 856, 860 (E.D.Mo. 2015) (citations omitted).

III. Discussion

As noted above, Plaintiffs claim that application of the Missouri cosmetology and barbering statutes to them violates their Fourteenth Amendment rights to substantive due process, equal protection of the law, and their privileges or immunities. The Court will address these claims in reverse order for the sake of clarity and narrowing the issues. As an initial matter, however, the Court addresses the preliminary issue of standing, which the parties have not discussed. This inquiry is important because Plaintiffs have not yet been harmed, but instead are alleging hypothetical threats that they will be harmed in the future.

A. Standing

Although the parties do not contest that this Court has subject matter jurisdiction, the Court is under an independent obligation to assure itself that it has subject matter jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). That means the Court must inquire as to Plaintiffs' standing, and the suitability of this controversy for judicial review. *See also Bernbeck v. Gale*, ___ F.3d ___, 2016 WL 3769481 at *2 (8th Cir. July 14, 2016) (noting that even where it is not raised by the parties, standing is "'a threshold issue that [the Court is] obligated to scrutinize,' sua sponte if need be") (internal citations omitted).

This independent obligation to ensure justiciability arises because the federal courts are tribunals of limited jurisdiction. *See Kokkonen v. Guardian Life Ins.*

Co. of America, 511 U.S. 375, 377 (1994). For instance, Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." *See* U.S. Const., Art. III, § 2. The standing doctrine gives meaning to this limitation by identifying those disputes which are appropriately resolved through the judicial process. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish Article III standing, a plaintiff must show: (1) an injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *Id*. at 560-61.

There is no doubt that Plaintiffs have alleged a sufficient injury in theory: deprivation of their livelihood, fines, or even criminal conviction for the unlicensed practice of cosmetology or barbering counts as injury. *Cf. Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2343 (2014) (holding that the threat of criminal and civil enforcement of a prohibition against false statements in an election campaign is a cognizable injury in fact). But the Court must determine not merely whether the type of injury that Plaintiffs allege is sufficient, but whether – because this is a threatened *future* injury – the threatened injury is "certainly impending," or there is a "substantial risk" that the harm will occur. *See Clapper v. Amnesty International*, 133 S. Ct. 1138, 1147, 1150, n. 5 (2013). This inquiry is necessary because federal courts do not adjudicate issues of hypothetical harm that may or may not occur in the future. *See id*. at 1143 (holding that a future

injury must be "certainly impending" in order to establish Article III standing).

In this regard, "it is not necessary that the plaintiff first expose h[er]self to actual arrest or prosecution to be entitled to challenge the statute that [s]he claims deters the exercise of h[er] constitutional rights." *Babbitt v. United Farm Workers Na. Union*, 442 U.S. 289, 298 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)) (alterations in original omitted). Instead, when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, [s]he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt*, 442 U.S. at 298. (quoting *Doe v. Bolton*, 410 U.S. 719, 188 (1973)). Only "persons having no fears of state prosecution except those that are imaginary or speculative," lack standing. *Id*. In analyzing the probability of future prosecution, courts look to evidence of enforcement in the past. *Susan B. Anthony List*, 134 S. Ct. at 2345 ("We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'") (quoting *Steffel*, 415 U.S. at 459).

Here, Plaintiffs have sufficiently proved standing. It is uncontested that the prohibition on the unlicensed practice of cosmetology or barbering carries the risk of

criminal and civil penalties.[12] Although no *criminal* prosecutions appear to have been brought, Defendants have regularly engaged in civil enforcement proceedings, stripping establishments of their licenses due to the presence of unlicensed practitioners on their premises, and Plaintiffs have either an ownership interest in, or are employed by similar establishments. As discussed above, Defendants have admitted to at least eighteen enforcement actions over the last several years against hair braiders and establishments where ASHB is provided. (ECF No. 49-4 at 12-13) The past record of enforcement of Missouri's licensing requirements is sufficient to indicate that Plaintiffs face a sufficiently likely enforcement action in the future to satisfy Article III standing requirements. *Susan B. Anthony List*, 134 S. Ct. at 2345.[13]

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[12] It is also uncontested that the practice of ASHB falls within the statutory definition of cosmetology. Plaintiffs do not argue that the State incorrectly applied the statutory definition of cosmetology or barbering to ASHB; they argue instead that it is constitutionally impermissible to subject ASHB to the licensing requirements of the cosmetology and barbering statutes.

[13] Also, there is no question that the "causation" and "redressability" elements of standing are met as well: the purported injury is *caused* by enforcement of the licensing regimes, and there is sufficient *redressability* if this Court finds that the licensing regime is unconstitutional – the Court can enjoin enforcement of the regime against Plaintiffs. And finally, there is no ripeness issue in this case. Although cases of future injury usually require a ripeness inquiry, in cases like this "Article III standing and ripeness issues . . . 'boil down to the same question:' " whether the controversy is ready for judicial review. *Susan B. Anthony List*, 134 S. Ct. at 2341, n. 5. This is because the "doctrines of standing and ripeness 'originate' from the same Article III limitations." *Id*.

Therefore, because Plaintiffs have established standing, and this case is ripe for judicial disposition, the Court will now turn to the merits of the parties' motions. The Court will first dispose of Plaintiffs' Privileges or Immunities Clause claim, and then review Plaintiffs' Equal Protection Clause and Substantive Due Process Clause claims.

B. Privileges or Immunities Clause (Count III)

Plaintiffs allege that application of the licensing regime to them violates the Privileges or Immunities Clause of the Fourteenth Amendment, because it "unreasonably" restricts their "right to earn a living in the occupation of [their] choice subject only to reasonable government regulation." (ECF No. 36 at 31) Plaintiffs acknowledge, however, that this claim is foreclosed by the *Slaughter-House Cases*, 83 U.S. 36 (1872) (holding that the Privileges or Immunities Clause only protects those rights which owe their existence to the federal government, and that the right to practice a profession of one's choice is not a federal right, but is left to the state government for protection and security). (ECF No. 49-1 at 7) Plaintiffs simply wish to preserve their Privileges or Immunities Clause claims for potential Supreme Court review. (ECF No. 49-1 at 7) The Court

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(quoting *DiamlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006)). In cases such as this, there is no ripeness inquiry separate from the standing inquiry.

therefore grants summary judgment to Defendants on Count III.

C. Equal Protection Clause (Count II)

Next, the Court must decide whether Plaintiff's Equal Protection Clause argument is properly before the Court. Plaintiffs have pleaded an equal protection count, but Defendants argue that Plaintiffs are asking for an unwarranted extension of equal protection doctrine, and that Plaintiffs have – in substance – articulated only a substantive due process theory. (ECF No. 52 at 7-9) Plaintiffs respond by arguing that their equal protection claim is distinct from the due process claim. (ECF No. 54 at 8-12) Plaintiffs argue that ASHB is not the same occupation as cosmetology or barbering, and that it violates the Equal Protection Clause to regulate them as if they were traditional cosmetologists or barbers. (*Id*.) Plaintiffs claim that 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." (ECF No. 49-1 at 9) Plaintiffs conclude that, because the State of Missouri did not differentiate in licensing between traditional cosmetologists, and African Style Hair Braiders, the State has violated the Equal Protection Clause.

In support of their equal protection argument, Plaintiffs rely mainly on *Jenness v. Fortson*, 430 U.S. 431, 442 (1971), as well as decisions from two federal

district courts in other states which have agreed with Plaintiffs that the Equal Protection Clause is implicated in ASHB licensing. *See Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1103 (S.D. Cal. 1999) (holding that Plaintiff's equal protection argument was properly before that court); and *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214 (D. Utah 2012) (same).[14] Defendants, on the other hand, deny that Plaintiffs have adequately alleged an Equal Protection Clause claim. (ECF No. 52 at 5-9) Defendants argue that the idea that equal protection is violated by treating people similarly is a unique interpretation of the Equal Protection Clause, not supported by case law, and a "distraction" from the main issue in the case, which is the substantive due process claim. (*Id*. at 9)

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[14] Plaintiffs also cite *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 893 (W.D. Tex. 2015), for the proposition that it is impermissible to "shoehorn" two unlike professions into one licensing scheme. *See id*. (quoting *Clayton* and *Cornwell*). *Brantley* does not help Plaintiffs' equal protection argument. In *Brantley*, the district court held that certain requirements for barbering schools could not be applied to an African Style Hair Braider who taught ASHB in her establishment and wanted to be considered a barbering "school." The court said that the minimum requirements [to be considered a licensed barbering school] could not be applied to the plaintiff in that case because they were not "logically connecting means and ends," and instead were "shoehorn[ing] two unlike professions into a single, identical mold." This was a substantive due process holding, however. Earlier in the opinion, the court noted that it had *expressly dismissed* the equal protection claim in an earlier decision. *Id*. at 888. In that earlier decision, the same court explained that the plaintiff's "equal protection claims are not equal protection claims at all, but are merely strained attempts to reframe her due process arguments." *See Brantley v. Kuntz*, 2013 WL 6667709 at *5 (W.D. Tex. Dec. 16, 2013).

The Court agrees with Defendants. Plaintiffs are asking for an extension of equal protection doctrine that has no support in controlling case law, inverts the traditional understanding of equal protection jurisprudence, and is largely irrelevant because the rational basis inquiry under the substantive due process framework is identical to that which Plaintiffs propose under equal protection guise.

First, the Court agrees with Defendants that there is no controlling case law supporting Plaintiffs' position. Plaintiffs rely almost exclusively on one sentence of dicta at the end of *Jenness* where the Supreme Court said that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness*, 403 U.S. at 442. This statement, however, is taken out of context, and is unrepresentative of the actual holding of the case.

At issue in *Jenness* was a Georgia election law that required a nominee of a "political body" (i.e., a third party) to secure the signatures of 5% of the eligible voters for that office at the last election before their name would be printed on the official ballot. *Id.* at 433. This signature requirement did not apply to nominees of the Democratic or Republican parties, and had the effect of limiting ballot access to nominees of the major parties. Various third party candidates attacked that law, claiming that the law illegally discriminated against them by requiring them to secure the signatures of 5% of the voters before printing their names on the ballot, yet automatically printing the names of the Republican or Democratic nominees. The third parties argued

that it violated the Equal Protection Clause to treat them differently.

The Supreme Court rejected that challenge, noting that Georgia had good reason to treat third party nominees differently than the nominees of the Republican and Democratic parties, due to "obvious differences in kind between the needs and potentials" of the two established parties as opposed to newer third parties. *Id*. at 441. The Court went on to state that "Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Id*. at 441-42. Thus, it is apparent that the holding of the Supreme Court was that Georgia did not violate equal protection principles by treating groups *differently*. The Court then speculated that it was a good thing that Georgia treated the two groups differently because it would have been unfair to treat them the same. This speculation, appearing in the second-to-last paragraph of the opinion, is dicta. *Jenness* does not support Plaintiffs' argument that equal protection principles *require* people to be treated unequally if they are differently situated.

Plaintiffs dispute this reasoning by arguing that the Court in *Jenness* "found no equal protection violation **precisely because** differently situated individuals were **not** treated as if they were the same." (ECF No. 54 at 9) (emphasis in original) That is not accurate – the Supreme Court held that there were good

reasons for treating the two types of parties differently. In other words, the Supreme Court did not hold that Georgia was *constitutionally mandated* to treat the two types of parties differently – merely that it was *constitutionally permissible* to do so.

The only additional case law that Plaintiffs cite in support of their equal protection arguments comes from the other ASHB cases in two other district courts: *Clayton* and *Cornwell*. The problem, however, is that *Clayton* (the Utah case), from 2012, simply cites to *Cornwell* (the California case), from 1999, with no independent analysis as to how the Equal Protection Clause applies. *See Clayton*, 885 F. Supp. 2d at 1214 ("Review of both Plaintiff's Due Process and Equal Protection claims must be based on the rational relation test. . . . Courts have also made it clear that a state may not treat persons performing different skills as if their professions were one and the same.") (citing *Cornwell*).

The *Cornwell* court, in turn, simply cites to the *Jenness* case, for the proposition that treating two entities *equally* can violate equal protection principles. *See Cornwell*, 80 F. Supp. 2d at 1103 ("Plaintiff's Equal Protection claim is grounded on the reasoning that 'sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.'"). *Cornwell* does not critically analyze *Jenness*. As discussed above, this language from *Jenness* is dicta, and does not stand for the proposition for which Plaintiffs cite it. This Court declines to follow the *Cornwell* court's truncated reasoning.

More importantly, perhaps, the Ninth Circuit overturned the *Cornwell* court's equal protection analysis in *Merrifield v. Lockyer*, 547 F.3d 978, 985 (9th Cir. 2008). In *Merrifield*, a pest-controller who engaged in a specific type of pest control challenged the application of California's pest control license requirements. The plaintiff there engaged in "non-pesticide animal damage prevention and bird control," as opposed to most pest-controllers, who used pesticide-based practices. *Id*. at 980. The plaintiff claimed that he should be exempt from such license requirements because he did not use pesticides. The plaintiff argued that treating him the same as pesticide-based pest controllers violated his rights to equal protection, citing *Cornwell*. *Id*. at 984.

The Ninth Circuit responded by criticizing *Cornwell's* equal protection analysis in precisely the same way discussed above. It noted that in *Jenness*, "the challenged laws imposed *different* requirements on two different groups, traditional and new political parties. However, in *Cornwell*, the challenge was by an African hair stylist who challenged a *uniform* licensing scheme." *Id*. at 985 (emphasis in original). The Ninth Circuit concluded that "the reasoning of the district court in *Cornwell* . . . cannot survive equal protection analysis." *Id*.

In sum, Plaintiffs' reliance upon *Jenness, Cornwell*, and *Clayton* for the proposition that equal protection principles *require unequal treatment* in certain

situations is unsupported by any controlling or persuasive case law.[15]

Finally, even if the Court were inclined to hold that Plaintiffs had alleged a viable equal protection argument, it is unclear what such an analysis would add, because both parties agree that this Court should undertake a rational basis review. This review is the same level of scrutiny under the Due Process and Equal Protection Clauses. *See, e.g.*, *Independent Charities of America, Inc. v. State of Minn.*, 82 F.3d 791, 798 (8th Cir. 1996) (noting that "a statute which satisfies the rational basis test in an equal protection analysis also satisfies the rational basis test under substantive due process analysis"); *see also Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, Mo.*, 742 F.3d 807, 809 (8th Cir. 2013) (hereinafter "*Kansas City Taxi*") ("A rational basis that survives equal protection scrutiny also satisfies substantive due process analysis.") (quoting *Executive Air Taxi Corp. v. City of Bismark, N.D.*, 518 F.3d 562, 569 (8th Cir. 2008)).

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[15] The *Brantley* court, which is cited by Plaintiffs, characterized Plaintiffs arguments as "essentially a reverse equal protection claim." *See Brantley*, 2013 WL 6667709 at *4. This type of claim is impermissible under Fifth Circuit precedent. *See Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) ("We may conduct an equal protection inquiry *only* 'if the challenged government action classifies or distinguishes between two or more relevant groups.' ") (emphasis added). This inversion of equal protection principles is also impermissible in the Tenth Circuit. *See Powers v. Harris*, 379 F.3d 1208, 1215) (10th Cir. 2004) ("[E]qual protection only applies when the state treats two groups, or individuals, differently.").

At bottom, Plaintiffs' main concern is *not* that they are being treated *differently*, in violation of equal protection principles, but that they are suffering an unconstitutional barrier to practice their profession – this is a substantive due process claim. *See Merrifield*, 547 F.3d at 985. For the foregoing reasons, the Court holds that Plaintiffs have not proved a viable equal protection claim. The Court grants summary judgment to Defendants on Count II.

D. Substantive Due Process (Count I)

1) Rational Basis Standard of Review

The heart of Plaintiffs' lawsuit is their substantive due process claim in Count I. Plaintiffs allege that the State of Missouri has imposed unreasonable restrictions on their right to practice the profession of their choice. This is a substantive due process claim. *See Merrifield*, 547 F.3d at 985.

Substantive due process claims are evaluated under the "rational basis" test when they do not involve "suspect" classifications, such as racial or gender classifications, and where the restrictions at issue do not implicate fundamental rights. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (holding that "if a law neither burdens a fundamental right nor targets a suspect class," rational basis review applies); *see also Kansas City Taxi*, 742 F.3d at 809 (applying rational basis review to an ordinance regulating permits to drive taxi cabs). Both parties agree that this case does not involve suspect classifications, or fundamental rights, and both

parties agree that the rational basis test applies. (ECF Nos. 49-1 at 3 and 48 at 5-6) Under rational basis review, government laws must be rationally related to a legitimate government interest. *Romer*, 517 U.S. at 631.

Rational basis review has been called a "paradigm of judicial restraint." *F.C.C. v. Beach Communications*, 508 U.S. 307, 314 (1993) ("*Beach*"). A regulation survives rational basis review "if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification." *Id*. at 313 (emphasis added). Rational basis review "is not a license for courts to judge the wisdom, fairness or logic of legislative choices." *Id*. Where there are *plausible* reasons for the legislature's action, a court's inquiry "is at an end." *Id*. at 313-14. This restraint flows naturally from the structure and history of the Constitution, which "presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted *no matter how unwisely we think a political branch has acted*." *Id*. at 314 (emphasis added).

Furthermore, courts may not strike down a law under rational basis review simply because that law may not succeed in bringing about the result it seeks to accomplish, *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 50 (1966) (*abrogated on other grounds by Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 584 n. 6 (1986)), or because the problem could have been addressed in some other

way. *See Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 378 (1973). Indeed, courts may not strike down a statute even when no empirical evidence supports the assumptions underlying the legislative choice. *See Vance v. Bradley*, 440 U.S. 93, 110-11 (1979).

These limitations exist because such regulations are not "subject to courtroom fact-finding." *Beach*, 508 U.S. at 315. In other words, Plaintiffs bear the burden of discrediting "*every conceivable basis* which might support [the regulation] *whether or not the basis has a foundation in the record*." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (emphasis added). So long as the law does not burden fundamental rights or single out suspect classes, the State of Missouri is free to engage in "rational speculation unsupported by evidence." *Beach*, 508 U.S. at 315.[16] Whether the regulation is wise or not is a judgment reserved to the Missouri legislature, because our Constitution allocates policy making authority in the economic realm to elected officials, not federal judges. *Cf. National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) ("*NFIB*").

2) <u>Analysis</u>

Given the judicial deference mandated by rational basis review, the Court must uphold the licensing regime because the State has advanced at least two

[16] It is important to reiterate that the parties do *not* contend that the law singles out a suspect class, and both parties agree that rational basis review applies.

legitimate state interests, and the means chosen by the State to advance those interests (the licensing regime) are at least rationally related to those interests. The Court will take both of those points in turn.

The State argues that it is regulating in furtherance of its interests in promoting the public health and protecting consumers. (ECF No. 48 at 8-10) Both parties stipulate that these are legitimate state interests, and the Court agrees. *See Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (recognizing health and safety to be a legitimate governmental interest); *see also Turner Broadcasting System v. FCC*, 520 U.S. 180, 189-90 (1997) (finding consumer protection to be a legitimate governmental interest). Therefore, the issue is whether Plaintiffs can meet their burden to prove that there is *no conceivable set of facts* which would support the means chosen by the State to achieve these purposes. *See Beach* 508 U.S. at 313.

Plaintiffs make several arguments in an attempt to meet this burden. These boil down into two categories of argument. First, Plaintiffs argue that the practice of ASHB is safe, and does not significantly impact the State's interest in public health. Second, Plaintiffs argue that – even if there is some "minimal" connection between ASHB and the public health, or some small issue with consumer protection – the licensing regime is constitutionally infirm because it fails to promote those interests. (ECF No. 49-1 at 15) This in turn is because the licensing regime was "not designed for African-style hair braiding," and it has "no requirements specific to African-style hair braiding," along with the

fact that Missouri barber and cosmetology schools do not offer instruction in ASHB. (*Id*. at 14) Finally, Plaintiffs argue that – given how unrelated the training is to the practice of ASHB – the cost of obtaining a license is "particularly onerous," and the State could accomplish their legitimate interests in other ways, such as normal business inspection regimes, and general state consumer fraud statutes. (*Id*. at 26-27)

Defendants respond by conceding that the licensing regime at issue in this case was developed without consideration of ASHB, and that it does not specifically prepare trainees to engage in the practice of ASHB. But Defendants argue that the practice of ASHB implicates broader, traditional public health, sanitary, safety, and business practice issues, and that cosmetology and barber training teaches these broader skills. Therefore, Defendants argue that – given the deference that the Missouri legislature is due under the rational basis test – the means chosen by the State to achieve its legitimate interests are permissible.

The Court agrees with Defendants, and holds that Plaintiffs have not met their burden to demonstrate that there is no *reasonably conceivable state of facts that could provide a rational basis* for the regulation. *Beach*, 508 U.S. at 313. The record demonstrates that issues of public health and consumer protection are present, and that the licensing regime at least minimally promotes those interests. Also, the regulation could conceivably promote other legitimate state interests. Therefore, the Court must uphold the license requirement. *Id*. at 313-14.

First, it is clear that the practice of ASHB implicates traditional public health concerns. The evidence in the record shows that – even if chemicals are not used in hair arranging and dressing – ASHB presents general concerns of sanitation, the effects of prior or parallel use of chemicals, instrument sterilization, disease recognition and control, long-term scalp damage, and other health and safety concerns which are just as much involved in African-style hair braiding as in any other hair arranging and dressing technique. (*See, e.g.*, ECF No. 48-11 at 2) (Dr. Dakara Rucker Wright, M.D., discussing the fact that "hair braiding can also potentially damage hair follicles deep in the scalp and hair shaft," and noting that she "disagree[s] that because chemicals are not used in African-style braiding, there are no significant health concerns relating to such practice"); (*see also* ECF No. 48-10 at 10) (Dr. Raechele Gathers, M.D., noting that improper braiding techniques, especially when used on children, "could permanently impact the child's ability to grow future hair, and could also lead to devastating infections that can cause both physical and psychological harm"); (*see also* ECF No. 49-4 at 4) (listing scientific and legal publications discussing public health and regulatory issues surrounding hair braiding and issues of scalp health, especially in African-American clientele).

Plaintiffs respond by contesting the accuracy of these assertions that ASHB implicates serious health risks. (*See* ECF No. 49-1 at 1) (describing ASHB as "all-natural" hair care that does "not use harmful chemicals"). But it is not the proper role of this Court

to second-guess the wisdom of the State's decision to favor one form of disputed evidence over another, especially where the State does not even have an affirmative duty to submit evidence supporting its decision. *See Beach*, 508 U.S. at 315 (holding that a legislative choice may be based on rational speculation unsupported by evidence or empirical data).

A recent decision from the Court of Appeals for the Second Circuit is illustrative of this point. At issue in *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 285 (2nd Cir. 2015) *cert. denied*, 136 S. Ct. 1160 (2016), was a rule requiring that a process involved in teeth whitening – shining an LED light into a patient's mouth – be performed by a licensed dentist. Plaintiffs, who were non-dentist teeth whiteners challenging this rule, proffered expert testimony from medical doctors that there were absolutely no health risks associated with non-dentists shining LED lights into patients' mouths. Defendants, on the other hand, did not introduce *any* admissible evidence to show that there was a bona fide medical risk in allowing non-dentists to shine LED lights into a patient's mouth. But the record contained a few equivocal mentions of (non-admissible) evidence that there *might* be *some* health risks associated with shining LED lights into patients' mouths. *Id*. at 284-85. This was enough for the Second Circuit to uphold the Connecticut rule limiting teeth whitening to licensed dentists, because that court held that it is not the job of a federal court to weigh Connecticut's evaluation of disputed evidence. *Id*. at 285.

In this case, Defendants have made a much stronger showing of potential public health issues than did the State of Connecticut in *Sensational Smiles*, with the testimony of Dr. Rucker Wright and Dr. Gaethers, mentioned above. (*See* ECF Nos. 48-11 and 48-10) This evidentiary showing regarding the potential public health implications of ASHB is more than sufficient to withstand rational basis review. Again, it is not this Court's job to adjudicate the weighing of evidence. It is enough that the State has a "conceivable" basis for regulating, and indeed, the State does not even have a duty to affirmatively proffer facts in support of its legislative choice. *See Beach*, 508 U.S. at 315 (holding that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").

Furthermore, Plaintiffs and their own experts admit that hair braiders often discuss traditional cosmetology services when serving their own clients. For instance, Plaintiff's expert witness, Pam Ferrell, who is an African Style Hair Braider, admits that in her practice, she helps "clients address the damaging effects of chemical hairdressing services performed by licensed cosmetologists and/or consumers who use hydroxide relaxer home-kits to chemically straighten the naturally curly state of their hair." (ECF No. 49-53 at ¶ 15) If hair braiders are assessing their customers' past experience with traditional cosmetology services, and advising those customers on future courses of action, the State can at least "conceivably" want these

braiders educated regarding the cosmetology methods and techniques that they are discussing with customers. *See Beach* 508 U.S. at 313.

Plaintiffs here make an additional argument as well. They argue that even if ASHB does in fact implicate health and safety concerns, the licensing regime is not a rational way to deal with those issues because the licensing regime was not designed with hair braiders in mind, the cosmetology and barbering curriculum does not prepare graduates for the practice of ASHB, and the licensing exam does not insure that practitioners of ASHB are competent in that craft. This argument is unavailing.

For one thing, even if the cosmetology and barbering education and testing regime is inadequate in its stated goals of educating practitioners and protecting the public, that is not a sufficient reason for declaring that the law violates substantive due process. *See Gallagher v. City of Clayton*, 699 F.3d 1013, 1020 (8th Cir. 2012) ("Even 'if the rationale for the law seems tenuous,' the law survives rational basis review so long as 'the legislative facts on which the law is apparently based could . . . reasonably be conceived to be true by the governmental decision maker.' ") (internal citations and brackets omitted); *see also Seagram & Sons, Inc.*, 384 U.S. at 50 (holding that federal courts may not strike down a law under rational basis review simply because it may not succeed in bringing about the result it seeks to accomplish).

The plaintiffs in *Sensational Smiles* made an analogous argument. They argued that even if shining an LED light into a patient's mouth could conceivably implicate health concerns, the rule requiring that that process be done by a licensed dentist violated rational basis review because dentists are not taught about LED lights in dental school, and therefore, their educational background is not relevant at all to the purported rule. *Sensational Smiles*, 793 F.3d at 285.

The Second Circuit held that this failure to connect the educational regime of dentists to the justification for the state rule did not violate due process. That court held that the state:

> might have reasoned that if a teeth-whitening customer experienced sensitivity or burning from the light, then a dentist would be better equipped than a non-dentist to decide whether to modify or cease the use of the light, and/or to treat any oral health issues that might arise during the procedure. The [state] might also have rationally concluded that, in view of the health risks posed by LED lights, customers seeking to use them in a teeth-whitening procedure should first receive an individualized assessment of their oral health by a dentist.

Id. The court concluded that these were "rational grounds for the [state] to restrict the use of these lights to trained dentists." *Id*. This reasoning is applicable to the present case. As discussed above, Plaintiffs conduct an initial examination of customers' scalp and hair

before beginning the braiding process; the State could quite sensibly require that such braiders be trained in broader hair care topics such as disease recognition, biology, bacteriology, etc., before treating their customers.

Indeed, the case of Plaintiff Niang is instructive. A typical customer interaction with Niang involves Niang asking customers about any prior hair braiding experience, whether they have any scalp sensitivities or scalp conditions, and whether they have had any chemical hair treatments such as coloring, hair relaxing, or perm. (PSOMF at ¶ 78) Niang then conducts an examination of the customer's scalp and hair prior to performing any braiding. (*Id*. at ¶ 79) In doing these evaluations, and receiving this health information from customers, the State of Missouri could very reasonably conclude that cosmetology education is relevant.

Moreover, while the Court agrees (and Defendants concede) that much of the education and training that traditional cosmetologists and barbers undergo is not directly relevant to the narrow practice of ASHB, the educational regime includes scalp treatments and disease recognition, bacteriology, sanitation, disorders of the skin, scalp and hair, and sterilization. (PSOMF at ¶ 129, 139) This broader education is at least a rational connection between the State's interest and its chosen means of accomplishing that interest.

Moving from the educational aspect of the licensing regime to the testing portion, the fact that the

testing regime includes few questions specifically relating to hair braiding is also not dispositive. *Cf*. *Merrifield*, 547 F.3d at 988 (holding that a pest control license examination was not irrationally narrow where it focused on pesticide issues, but petitioner practiced pesticide-free pest control). This is because a "licensing statute does not fail because it is not tailored to each precise specialization within a field. 'It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislature measure was a rational way to correct it.'" *Id*. (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955)).

In sum, the various features of the Missouri cosmetology and barbering licensing regimes are at least minimally related to the State's legitimate interest in the public health, and if the State's regime is at least minimally related to the relevant interest, that satisfies the rational basis burden. *Cf*. *Heller*, 509 U.S. at 320-21 (holding that a statute survives rational basis review unless a plaintiff can discredit "every conceivable basis which might support [the regulation] whether or not the basis has a foundation in the record").

The licensing requirement is also rationally related to the State's legitimate interest in consumer protection. To give just a few examples, the licensure process helps the State to screen for a variety of issues such as criminal history, or whether an applicant has been disciplined in another state. The licensing system also provides for a system of inspections of ASHB establishments. (ECF No. 48 at 11-14; ECF No. 53 at

9-11) These are rational means of carrying out the State's interest in consumer protection because by requiring hair braiders to obtain a license, the State "creates a framework to monitor them and keep them accountable." *Merrifield*, 547 F.3d at 988.

Plaintiffs respond by arguing that this interest is not sufficient to sustain the licensing system because a relatively small percentage of the educational curriculum is dedicated to consumer protection issues, and because there are general "consumer fraud laws, and a civil court system, to address these issues." (ECF No. 51 at 20-21) Plaintiffs' arguments are unavailing. A federal court may not strike down a law under rational basis review simply because it may not succeed in bringing about the desired result, *Seagram & Sons, Inc.*, 384 U.S. at 50, or because the problem might have been addressed in some other even more efficient way. *Mourning*, 411 U.S. at 378. The State does not need to show that its chosen means will be ultimately successful, or that it has chosen the best way to accomplish its goal.[17]

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[17] Plaintiffs make a final argument that the Court would like to address: that the Missouri legislature has fatally undercut its own asserted interests in protecting the public health and consumers through a statutory exemption that exempts hair braiders at public amusement and entertainment venues from normal licensing requirements. (ECF No. 49-1 at 28-30) The Court agrees that this exemption somewhat undercuts the State's asserted interests, because the State is permitting unlicensed braiders to practice their craft on the public at entertainment and amusement venues. But this is not enough to invalidate the licensing requirement generally, because "[l]egislatures may implement

Based on the undisputed facts before the Court, the State has articulated *plausible* rationales for the State's rule requiring licensure for African Style Hair Braiders, as discussed above. In addition, the Court can conceive of other plausible reasons for the licensing regime, other than the ones propounded by the State. For instance, both parties agree that the cosmetology and barbering schools in Missouri do not concentrate on ASHB. But it is certainly conceivable that the very act of requiring hair braiders to become licensed could act as an incentive to the creation of more schools and coursework specifically focused upon ASHB. Indeed, the State could have attempted to stimulate the market for ASHB education by requiring hair braiders to become licensed. Likewise, it is uncontested in the record that Plaintiffs (and many other hair braiders) mostly provide only ASHB services as opposed to broader services. If these braiders were licensed, they would be able to provide more comprehensive hair care. It is conceivable that the State could attempt to incentivize hair braiders to offer more comprehensive services by requiring them to be licensed, thereby offering additional options for their customers.

In the end, whether it relates to the interests articulated by the State, or the conceivable interests

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their program step by step, in . . . economic areas," *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), and "States are accorded wide latitude [to make] rational distinctions [] with *substantially less than mathematical exactitude*." *Id*. (emphasis added).

discussed above, "[t]he assumptions underlying these rationales may be erroneous, but the very fact that they are arguable is sufficient, on rational-basis review, to immunize the [State's] choice from constitutional challenge." *Beach*, 508 U.S.at 320 (internal quotations and alterations omitted). For all of the reasons discussed above, Defendants are entitled to summary judgment on Count I.

As a final matter, this Court recognizes that at least two other federal district courts have ruled in favor of hair braiders who are similarly situated to Plaintiffs in this matter. *See Cornwell v. Hamilton*, 80 F. Supp.2d 1101 (S.D. Cal. 1999) (holding that application of California's cosmetology licensing regime to African hair braiders violates substantive due process and equal protection); *see also Clayton v. Steinagel*, 885 F. Supp.2d 1212 (D. Utah 2012) (holding that application of Utah's cosmetology licensing regime to African hair braiders violates substantive due process and equal protection).[18]

The Court does not find the reasoning of those decisions persuasive because those courts engaged in a hard look at the actual connection between the State's asserted interests and how each aspect of the licensing regime advanced the State's interests in concrete ways. *See, e.g.*, *Cornwell*, 80 F. Supp.2d at 1108, 1110, and 1115 (holding that California's licensing regime was

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[18] Indeed, the Court notes that Plaintiffs in this matter cited *Cornwell* and *Clayton* repeatedly throughout their briefing, relying on those cases for most of their substantive arguments.

irrational as applied to plaintiff hair braider because of her "limited range of activities," which over-lapped only minimally with the types of activities covered in the state's principle training curriculum and examination; holding that less than ten percent of the curriculum and eleven percent of the licensing exam were relevant to plaintiff's actual activities); *see also Clayton*, 885 F. Supp.2d at 1214 (following the reasoning of the *Cornwell* court, and holding that Utah's regime licensing hair braiders failed rational basis review where the state's educational curriculum and entrance exam overlapped only minimally with the plaintiff hair braider's actual activities). The *Cornwell* and *Clayton* courts viewed this marginal overlap between the actual practice of hair braiders and the training/testing requirements as constitutionally infirm due to overbreadth (by including within its reach persons – i.e. hair braiders – to whom the license was not relevant) and under inclusiveness (by failing to ensure the competency of hair braiders).

This type of stringent review of a state's asserted interests and how each aspect of the State's licensing regime promotes those interests is not consistent with Supreme Court case law which holds that those connections are "not subject to courtroom fact-finding." *See Gallagher*, 699 F.3d at 1020 (quoting *Beach*, 508 U.S. at 315). Furthermore, the *Cornwell* and *Clayton* courts did not consider whether there was "any conceivable set of facts" which could support the licensing requirements, as required under *Beach*, 508 U.S. at 313.

All of this leads the undersigned to conclude that it is not clear what standard of review the courts applied, *in fact*, in *Cornwell* and *Clayton*, but it appears to be more stringent than rational basis review in the Eighth Circuit. The undersigned is bound by the standard of review articulated by the Supreme Court and the Eighth Circuit in cases such as *Beach* and *Kansas City Taxi*. Thus, although there is no doubt a commonsense persuasive force to aspects of the *Cornwell* and *Clayton* decisions, the undersigned is convinced, and therefore concludes, that those decisions would not pass muster in the Eighth Circuit if subjected to the deferential standard of review mandated by *Beach* and *Kansas City Taxi*. The Court declines to follow the reasoning of the *Cornwell* and *Clayton* courts.

IV. Conclusion

In conclusion, this case illustrates the great deference that federal courts must show to government economic regulations under the rational basis standard. The Court agrees that Plaintiffs do not fit comfortably within the traditional definition of cosmetologists and barbers set out under state law. The Court need not consider whether this is a wise law, or whether it embodies sound policy. That is a judgment reserved to the elected representatives of the people of Missouri. *Cf. NFIB*, 132 S. Ct. at 2577; *see also Young v. Ricketts*, 825 F.3d 487, 495 (8th Cir. 2016) (dismissing due process and equal protection challenges to a licensing requirement, and noting that arguments that the licensing requirement is "too costly, too parochial, or fails to

effectively" advance the state's interests "are legislative issues," not judicial ones).

This Court holds only that Plaintiffs have failed "to negative every conceivable basis which might support [the cosmetology and barbering regulations.]" *Beach*, 508 U.S. at 315 (internal quotation marks and citations omitted). Because they have failed to do so, Plaintiffs cannot prove that Defendants violated their constitutional rights by requiring that they obtain a cosmetology or barber license in order to practice their craft professionally for the public.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment (ECF No. 49) is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (ECF No. 47) is **GRANTED**.

A separate judgment shall be entered this day.

/s/ John M. Bodenhausen
UNITED STATES MAGISTRATE JUDGE

Dated this 20th day of September, 2016

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Rev. Stat. § 316.265. Hairstyling, employees engaged in at public venues not subject to Chapter 329, when. – No employee or employer primarily engaged in the practice of combing, braiding, or curling hair without the use of potentially harmful chemicals shall be subject to the provisions of chapter 329 while working in conjunction with any licensee for any public amusement or entertainment venue as defined in this chapter.

Mo. Rev. Stat. § 328.010. Definitions. – As used in this chapter, unless the context clearly indicates otherwise, the following terms mean:

(1) **"Barber"**, any person who is engaged in the capacity so as to shave the beard or cut and dress the hair for the general public shall be construed as practicing the occupation of "barber", and the said barber

or barbers shall be required to fulfill all requirements within the meaning of this chapter;

. . . .

Mo. Rev. Stat. § 328.020. License required. – It shall be unlawful for any person to practice the occupation of a barber in this state, unless he or she shall have first obtained a license, as provided in this chapter.

Mo. Rev. Stat. § 328.080. Application for licensure, fee, examination, qualifications – approval of schools. –

1. Any person desiring to practice barbering in this state shall make application for a license to the board and shall pay the required barber examination fee.

2. The board shall examine each qualified applicant and, upon successful completion of the examination and payment of the required license fee, shall issue the applicant a license authorizing him or her to practice the occupation of barber in this state. The board shall admit an applicant to the examination, if it finds that he or she:

(1) Is seventeen years of age or older and of good moral character;

(2) Is free of contagious or infectious diseases;

(3) Has studied for at least one thousand hours in a period of not less than six months in a

properly appointed and conducted barber school under the direct supervision of a licensed instructor; or, if the applicant is an apprentice, the applicant shall have served and completed no less than two thousand hours under the direct supervision of a licensed barber apprentice supervisor;

(4) Is possessed of requisite skill in the trade of barbering to properly perform the duties thereof, including the preparation of tools, shaving, haircutting and all the duties and services incident thereto; and

(5) Has sufficient knowledge of the common diseases of the face and skin to avoid the aggravation and spread thereof in the practice of barbering.

. . . .

Mo. Rev. Stat. § 328.115. Barber establishments, licensure requirements – sanitary regulations, noncompliance, effect – renewal of license, fee – delinquent fee. –

1. The owner of every establishment in which the occupation of barbering is practiced shall obtain a license for such establishment issued by the board before barbering is practiced therein. A new license shall be obtained for a barber establishment within forty-five days when the establishment changes ownership or location. The state inspector shall inspect the sanitary conditions required for licensure, established under subsection 2 of this section, for an establishment that has changed ownership or location without

requiring the owner to close business or deviate in any way from the establishment's regular hours of operation.

2. The board shall issue a license for a establishment upon receipt of the license fee from the applicant if the board finds that the establishment complies with the sanitary regulations adopted pursuant to section 329.025. All barber establishments shall continue to comply with the sanitary regulations. Failure of a barber establishment to comply with the sanitary regulations shall be grounds for the board to file a complaint with the administrative hearing commission to revoke, suspend, or censure the establishment's license or place the establishment's license on probation.

. . . .

Mo. Rev. Stat. § 328.160. Penalty for violation of provisions of chapter. – Any person practicing the occupation of barbering without having obtained a license as provided in this chapter, or willfully employing a barber who does not hold a valid license issued by the board, managing or conducting a barber school or college without first securing a license from the board, or falsely pretending to be qualified to practice as a barber or instructor or teacher of such occupation under this chapter, or failing to keep any license required by this chapter properly displayed or for any extortion or overcharge practiced, and any barber college, firm, corporation or person operating or conducting a barber college without first having secured the license required by this chapter, or failing to comply with such

sanitary rules as the board prescribes, or for the violation of any of the provisions of this chapter, shall be deemed guilty of a class C misdemeanor. Prosecutions under this chapter shall be initiated and carried on in the same manner as other prosecutions for misdemeanors in this state.

Mo. Rev. Stat. § 329.010. Definitions. – As used in this chapter, unless the context clearly indicates otherwise, the following words and terms mean:

. . . .

(5) **"Cosmetology"** includes performing or offering to engage in any acts of the classified occupations of cosmetology for compensation, which shall include:

(a) **"Class CH – hairdresser"** includes arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means; or removing superfluous hair from the body of any person by means other than electricity, or any other means of arching or tinting eyebrows or tinting eyelashes. Class CH – hairdresser also includes any person who either with the person's hands or with mechanical or electrical apparatuses or appliances, or by the use of cosmetic preparations, antiseptics, tonics, lotions or creams engages for compensation in any one or any combination of the following: massaging, cleaning, stimulating, manipulating, exercising, beautifying or similar work upon the scalp, face, neck, arms or bust;

. . . .

Mo. Rev. Stat. § 329.030. License required. – It is unlawful for any person in this state to engage in the occupation of cosmetology or to operate an establishment or school of cosmetology, unless such person has first obtained a license as provided by this chapter.

Mo. Rev. Stat. § 329.040. Schools of cosmetology – license requirements, application, form – hours required for student cosmetologists, nail technicians and estheticians. –

. . . .

4. The subjects to be taught for the classified occupation of cosmetology shall be as follows and the hours required for each subject shall be not less than those contained in this subsection or the credit hours determined by the formula in Subpart A of Part 668 of Section 668.8 of Title 34 of the Code of Federal Regulations, as amended:

(1) Shampooing of all kinds, forty hours;

(2) Hair coloring, bleaches and rinses, one hundred thirty hours;

(3) Hair cutting and shaping, one hundred thirty hours;

(4) Permanent waving and relaxing, one hundred twenty-five hours;

(5) Hairsetting, pin curls, fingerwaves, thermal curling, two hundred twenty-five hours;

(6) Combouts and hair styling techniques, one hundred five hours;

(7) Scalp treatments and scalp diseases, thirty hours;

(8) Facials, eyebrows and arches, forty hours;

(9) Manicuring, hand and arm massage and treatment of nails, one hundred ten hours;

(10) Cosmetic chemistry, twenty-five hours;

(11) Salesmanship and shop management, ten hours;

(12) Sanitation and sterilization, thirty hours;

(13) Anatomy, twenty hours;

(14) State law, ten hours;

(15) Curriculum to be defined by school, not less than four hundred seventy hours.

. . . .

Mo. Rev. Stat. § 329.045. License of cosmetology shop required, establishment fee – display of license – change of ownership, effect of. –

1. Every establishment in which the occupation of cosmetology is practiced shall be required to obtain a license from the board. Every establishment required to be licensed shall pay to the board an establishment

fee for the first three licensed cosmetologists esthetician and/or manicurists, and/or apprentices and an additional fee for each additional licensee. The fee shall be due and payable on the renewal date and, if the fee remains unpaid thereafter, there shall be a late fee in addition to the regular establishment fee or, if a new establishment opens any time during the licensing period and does not register before opening, there shall be a delinquent fee in addition to the regular establishment fee. The license shall be kept posted in plain view within the establishment at all times.

2. A new license shall be obtained for a cosmetology establishment within forty-five days when the establishment changes ownership or location. The state inspector shall inspect the sanitary conditions required for licensure for an establishment that has changed ownership or location without requiring the owner to close business or deviate in any way from the establishment's regular hours of operation.

Mo. Rev. Stat. § 329.050. Applicants for examination or licensure – qualifications. –

1. Applicants for examination or licensure pursuant to this chapter shall possess the following qualifications:

(1) They must be persons of good moral character, have an education equivalent to the successful completion of the tenth grade and be at least seventeen years of age;

(2) If the applicants are apprentices, they shall have served and completed, as an apprentice under the supervision of a licensed cosmetologist, the time and studies required by the board which shall be no less than three thousand hours for cosmetologists . . . ;

(3) If the applicants are students, they shall have had the required time in a licensed school of no less than one thousand five hundred hours training or the credit hours determined by the formula in Subpart A of Part 668 of Section 668.8 of Title 34 of the Code of Federal Regulations, as amended, for the classification of cosmetologist, with the exception of public vocational technical schools in which a student shall complete no less than one thousand two hundred twenty hours training.. . . . and

(4) They shall have passed an examination to the satisfaction of the board.

Mo. Rev. Stat. § 329.250. Violation of law – penalty. – Any person who shall act in any capacity other than by demonstration to or before licensed cosmetologists, or maintain any business wherein a license is required pursuant to this chapter, without having such license, or any person who violates any provision of this chapter is guilty of a class C misdemeanor.

Mo. Code Regs. Ann. tit. 20, § 2085-12.030 Curriculum Prescribed for Barber Schools/Colleges

PURPOSE: This rule establishes general requirements for barber school curriculum and teaching (instructor) requirements.

(1) Missouri barber schools shall provide a minimum of one thousand (1,000) hours of training over a period of not less than six (6) months. Apprenticeship training in Missouri shall provide a minimum of two thousand (2,000) hours of training for a period not to exceed five (5) years. The subjects and the minimum hours in each are listed in Columns A and B in this section.

Subject	**Column A Minimum Hours Student**	**Column B Minimum Hours Apprentice**
(A) History	5	10
(B) Professional Image	5	10
(C) Bacteriology	5	10
(D) Sterilization, Sanitation, and Safe Work Practices	20	40
(E) Implements, Tools, and Equipment	15	30
(F) Properties and Disorders of the Skin, Scalp, and Hair	15	30
(G) Treatment of Hair and Scalp	20	40
(H) Facial Massage and Treatments	5	10
(I) Shaving	35	70
(J) Haircutting	425	850
(K) Hairstyling	325	650
(L) Mustache and Beard Design	5	10

(M)	Permanent Waving	30	60
(N)	Chemical Hair Relaxing and Soft Curl Permanents	30	60
(O)	Hair Coloring	30	60
(P)	Hairpieces	5	10
(Q)	Chemistry	5	10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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

Defendants' Response to Plaintiffs' Statement of Undisputed Material Fact

(Filed Oct. 30, 2015)

* * *

General objection

Plaintiffs claim in their Statement of Undisputed Material Fact that "the Board admits" numerous propositions based on questions posed to the Executive Director during depositions, which she did not argue with or deny.

The Executive Director does not have authorization, either in her personal capacity or as organizational representative, to admit or deny propositions on which the Board has not acted. Rule 30(b)(6) states that the organizational representative shall testify "about information known or reasonably available to the organization."

In fact the Board is not a party to the litigation, so each allegation that "the Board admits" is not binding on any of the Board defendants.

As organizational representative the Executive Director is authorized to testify about actions the Board has taken and information known or reasonably available to the organization. She is not authorized to bind the Board or the Board defendants to agree or disagree with abstract propositions in questions posed by counsel for Plaintiffs in depositions. Thus, the Board defendants reserve the right to dispute such propositions, and will note below propositions claimed by Plaintiffs as undisputed material facts when they are not supported by binding admissions of the Board.

* * *

3. Plaintiff Joba Niang is a United States citizen and resident of the city of Florissant in St. Louis County, Missouri. Niang Decl. ¶ 3.

Not disputed.

4. Joba is not a licensed Missouri cosmetologist or barber, and she does not want to become a licensed Missouri cosmetologist or barber. Niang Decl. ¶ 12.

Not disputed.

5. Joba is an African-style hair braider and advertises her services as such. Niang Decl. ¶ 14.

Not disputed.

* * *

9. Joba has braided hair professionally for more than 15 years. Niang Decl. ¶ 4.

Not disputed.

* * *

16. In 2001, Joba opened her own hair braiding business, Joba Hair Braiding, located in Florissant, Missouri, and she has continually operated Joba Hair Braiding since 2001. Niang Decl. ¶ 11.

Not disputed.

* * *

21. If this lawsuit it unsuccessful and Joba is forced to become a licensed cosmetologist (or barber) simply to perform African-style hair braiding she will be forced to close her business. Niang Decl. ¶ 35.

Not disputed.

22. Joba cannot afford to spend thousands of hours learning cosmetology or barbering skills that she does not need or use in the practice of African-style hair braiding instead of supporting her family. Niang Decl. ¶ 36.

Disputed as not factual, because ASHB services are cosmetology services.

23. Joba also cannot afford to attend a licensed cosmetology or barbering school, which can cost more than $21,000, in order to receive training in cosmetology and barbering skills. Niang Decl. ¶ 37; Defs.' Doc.

Produc. No. 47 (produced August 10, 2015) (Alban Decl. Ex. 44).

Not disputed, although many programs cost far less than the amount stated. Aspire Beauty Academy, a school in the St. Louis metropolitan area, offers a cosmetology program for tuition of $9,000. Defs.' Doc. Produc. No. 47 (produced August 10, 2015) (Alban Decl. Ex. 44).

24. If Joba undertook cosmetology/barber training, she would be forced to handle potentially hazardous chemicals during cosmetology or barbering training that she does not want to handle and would not otherwise handle as an African-style hair braider. Niang Decl. ¶ 38.

Disputed that chemicals used in cosmetology are hazardous. No scientific evidence indicating such chemicals are harmful is on the record. Plaintiff Niang has no scientific or medical training, so her unscientific and uneducated beliefs about the safety of chemicals are not evidence of record.

25. But for Missouri's cosmetology/barbering licensing requirements, Joba would not have taken unnecessary measures – such as attempting to complete the 3,000-hour cosmetology apprenticeship program or accommodating a licensed cosmetologist (and the hazardous chemicals used in cosmetology) at her braiding salon – to avoid Board enforcement against her and her business. Niang Decl. ¶ 34.

Disputed that chemicals used in cosmetology are hazardous. No scientific evidence indicating such chemicals are harmful is on the record. Plaintiff Niang has no scientific or medical training, so her unscientific and uneducated beliefs about the safety of chemicals are not evidence of record.

26. Joba is a member of a West African hair-braiding community in the St. Louis area and personally knows that several hair braiders, including personal friends of hers, were recently investigated and sued by the Board in administrative proceedings for the unlicensed practice of African-style hair braiding. Niang Decl. ¶ 26.

Not disputed.

27. Joba reasonably fears that it is only a matter of time before she is investigated and sued by the Board; if she is sued by the Board, Joba does not believe she will be able to keep her business open. Niang Decl. ¶ 27.

Not disputed. No enforcement action has been taken against Plaintiff Niang.

* * *

28. Tameka Stigers is a United States citizen and resident of the City of St. Louis, in St. Louis County, Missouri. Stigers Decl. ¶ 3.

Not disputed.

29. Tameka is not a licensed Missouri cosmetologist or barber, and she does not want to become a licensed Missouri cosmetologist or barber. Stigers Decl. ¶ 16.

Not disputed.

30. Tameka is an African-style hair braider and advertises her services as such. Stigers Decl. ¶ 16.

Not disputed.

* * *

34. In 2008 Tameka became a practitioner of Sisterlocks, a form of natural hair care and a proprietary African-style hair-braiding technique created by Dr. JoAnne Cornwell. Stigers Decl.¶ 7.

Not disputed.

* * *

39. In June 2014, Tameka opened her own storefront location, Locs of Glory, at 5860 Delmar Blvd., Suite 100, St. Louis, Missouri, 63112. Stigers Decl. ¶ 11.

Not disputed.

* * *

44. If this lawsuit is unsuccessful, Tameka will be forced to either spend thousands of hours and tens of thousands of dollars to attend cosmetology/barber school (or complete a 3,000 hour or 2,000 hour cosmetology or barber apprenticeship) to learn cosmetology/barber skills not relevant to African-style hair braiding

or cease providing African-style hair braiding for compensation at her business. Stigers Decl. ¶ 32.

Disputed and averred to the contrary that cosmetology training is relevant to AHSB, as AHSB is a style of hair dressing and therefore is a cosmetology service.

45. Locs of Glory has a strong focus on African-style hair braiding, and Tameka believes that if she stops offering African-style hair braiding services it will hurt the success of her business. Stigers Decl. ¶ 14.

Not disputed.

46. Moreover, Tameka cannot afford to spend thousands of hours learning cosmetology or barbering skills that she does not need or use in the practice of African-style hair braiding instead of advancing her business. Stigers Decl. ¶ 35.

Disputed that cosmetology services are not needed to perform ASHB, as ASHB is a style of hair dressing and therefore constitutes cosmetology under Missouri law.

47. Tameka also cannot afford to attend a licensed cosmetology or barbering school, which can cost more than $21,000, in order to receive training in cosmetology and barbering skills. Stigers Decl. ¶ 36; Defs.' Doc. Produc. No. 47 (produced August 10, 2015) (Alban Decl. Ex. 44).

Disputed that a cosmetology education costs $21,000; tuition in many programs is far less.

Aspire Beauty Academy, a school in the St. Louis metropolitan area, offers a cosmetology program for tuition of $9,000. Defs.' Doc. Produc. No. 47 (produced August 10, 2015) (Alban Decl. Ex. 44).

48. Additionally, if Tameka is forced to attend cosmetology or barbering school (or enter the cosmetology or barbering apprenticeship program) she would be forced to handle potentially hazardous chemicals during cosmetology/barbering training that she does not want to handle, would not otherwise handle as an African-style hair braider, and that are contrary to her commitment to natural hair care. Stigers Decl. ¶ 37.

Disputed that chemicals used in cosmetology are hazardous. No scientific evidence indicating such chemicals are harmful is on the record. Plaintiff Stigers has no scientific or medical training, so her unscientific and uneducated beliefs about the safety of chemicals are not evidence of record.

49. Tameka knows that other unlicensed African-style hair braiders in the St. Louis area have been investigated and sued by the Board in administrative proceedings and worries that it is only a matter of time before she is also targeted by the Board's enforcement efforts. Stigers Decl. ¶ 38.

Not disputed.

* * *

50. "African-style hair braiding" refers to braiding, locking, twisting, weaving, cornrowing, or otherwise

physically manipulating hair without the use of chemicals that alter the hair's physical characteristics. It incorporates both traditional and modern styling techniques. African-style hair braiding is a method of natural hair care. It is typically performed on hair that is physically unique, often described as "tightly textured" or "coily" hair. Ferrell Decl. ¶ 17; see also Gathers Dep. 52:21-53:2 (Alban Decl. Ex. 30) (offering a similar definition).

Not disputed.

51. African-style hair braiding is so called because it has distinct geographic, cultural, historical, and racial roots. The basis for African-style hair-braiding techniques originated many centuries ago in Africa and were brought by Africans to this country, where they have endured (and have been expanded upon) as a distinct and popular form of hair styling primarily done by and for persons of African descent. Answer Am. Compl. ¶ 20; see also Carroll Dep. 401:1-16 (Alban Decl. Ex. 10); Kindle Dep. 83:9-15 (Alban Decl. Ex. 21); Morris Dep. 97:14-23 (Alban Decl. Ex. 35); Ferrell Decl. ¶¶ 17, 18, 22, 29.

Not disputed.

52. As a form of natural hair care, African-style hair braiding eschews the use of chemicals to chemically alter the hair's state. Carroll Dep. 131:16-21 (Alban Decl. Ex. 10); Carroll Dep. Ex. 4 (Alban Decl. Ex. 11); Morris Dep. 298:17-22 (Alban Decl. Ex. 35); Wright Dep. 165:10-16, 165:20-166:1 (Alban Decl. Ex. 32); Ferrell Decl. ¶ 24; Stigers Decl. ¶ 17; see also Morris Dep.

123:22-124:7, 127:17-128:1 (Alban Decl. Ex. 35) (Defendants' expert on hair braiding testifying about the meaning of "natural hair care"); see also Answer Am. Compl. ¶ 25 (admission by failure to deny that "the use of chemicals is anathema to natural hair care"); Answer Am. Compl. ¶ 26 (admission by failure to deny that "African-style hair braiding uses no chemicals to physically change textured hair").

Not disputed.

53. The popularity of African-style hair braiding grew out of a rejection of cosmetology's emphasis on straight, European hair and health concerns about the chemicals used to relax or straighten naturally textured hair. Ferrell Decl. ¶ 25; Morris Dep. 303:12-15 (Alban Decl. Ex. 35); see also Answer Am. Compl. ¶ 24 (admissions by failure to deny that: "The concept of natural hair care is particularly meaningful for many African Americans because for decades Western culture pressured African Americans to use chemicals or heat to straighten their hair. These Western methods are still prevalent in American cosmetology schools. African-style hair braiding provides an alternative to current "corrective" measures by working with a person's natural hair texture.").

Not disputed.

54. Often, persons of African descent learn to braid textured hair as children or teens, usually by first learning to do their own hair or that of friends and relatives. Answer Am. Compl. ¶ 22.

Not disputed.

55. The Board, a Board member Defendant, and the Board's expert on hair braiding admit that African-style hair braiding techniques and skills are generally not learned in formal schooling, but are usually "self-taught" – learned from family members or friends, and passed down from generation to generation. Carroll Dep. 75:24-76:18 (Alban Decl. Ex. 10); Crow Dep. 42:1-5, 53:12-16, 54:7-55:2 (Alban Decl. Ex. 26); Morris Dep. 100:19-23, 101:12-102:4 (Alban Decl. Ex. 35); Morris Expert Report 1, ¶ 3 (Alban Decl. Ex. 37) (" . . . one does not learn [African-style hair braiding] in school, but generally learn[s] it by experience and by continuing education from various teachers, specialized classes, and self-study.").

Denied that the testimony of any of the individuals constitutes admissions by the Board as a whole (see General Objection), but the substance of the proposed finding is not disputed. Moreover, the report of the Board's expert is misinterpreted to mean almost the opposite of the expert's point. The Board's expert wrote and testified that ASHB is a specialty to build upon the foundation of an education in cosmetology, not that an education is [sic] **cosmetology is irrelevant.**

* * *

56. The Board admits that hair braiding is a different occupation from both cosmetology and barbering. Carroll Dep. 420:6-9, 421:6-10 (Alban Decl. Ex. 10).

Denied and disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection.

57. The Board and the Board's expert witness on hair braiding admit that the vast majority of people who know how to do African-style hair braiding – including those African-style braiders who perform the sort of high-end techniques that one gets paid to do – are not cosmetologists or barbers. Carroll Dep. 76:19-22 (Alban Decl. Ex. 10); Morris Dep. 91:24-92:4, 100:24-101:11, 103:21-25 (Alban Decl. Ex. 35).

Denied and disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection. Disputed in that the section of the Board's expert quoted is misinterpreted and misquoted to support a conclusion the witness was not stating. In fact, the witness testified that the basic technique people learn at home is not the kind of high-level braiding people get paid to do.

58. The Board admits that a majority of African-style hair braiders in Missouri who offer braiding services for compensation are not licensed cosmetologists or barbers. Carroll Dep. 77:3-10 (Alban Decl. Ex. 10).

Not disputed.

59. The Board admits that neither cosmetologists nor barbers generally provide hair braiding services, nor African-style hair braiding services. Carroll Dep. 446:25-447:18 (Alban Decl. Ex. 10); see also Orr

Dep. 25:11-23, 44:15-24 (Alban Decl. Ex. 28) (testifying that only one or two of the 1,200 cosmetology salons in her inspection area, which covers a third of St. Louis, also offer braiding services); Conner Dep. 21:10-12, 50:6-14 (Alban Decl. Ex. 29) (testifying that she has never seen braiding taking place in barber shops or barber schools in her four and a half years as an inspector for the Board).

Denied and disputed as stated. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection.

60. The Board's expert witness on hair braiding, a licensed cosmetologist, admits that she doesn't know any other licensed cosmetologists currently in practice who offer African-style hair braiding. Morris Dep. 328:16-329:3 (Alban Decl. Ex. 35).

Not disputed.

61. The Board's expert witness on hair braiding, a cosmetologist, admits that she rarely braids hair other than performing simple sew-ins for extensions and typically refers customers who want intricate braided styles to unlicensed African-style hair braiders who specialize in the type of braiding that customers want. Morris Dep. 332:1-335:4 (Alban Decl. Ex. 35).

Not disputed.

62. Many African-style hair braiders exclusively offer hair-braiding services and many hair braiding shops exclusively offer hair-braiding services. Carroll Dep. 77:11-17 (Alban Decl. Ex. 10); Morris Dep. 103:21-104:4

(Alban Decl. Ex. 35) ("That's all they do."); Orr Dep. 10:1-7, 23:15-24:8, 56:22-25 (Alban Decl. Ex. 28) (estimating that she has inspected 20 shops that exclusively offered braiding in her inspection area, which covers about a third of St. Louis, but admitting that there may be up to a dozen more unlicensed braiding shops that she has not inspected); see also Conner Dep. 20:2-5, 49:4-22, 53:22-54:5 (Alban Decl. Ex. 29) (noting that she has inspected shops dedicated exclusively to braiding, and estimating that there were probably up to a dozen additional unlicensed shops that exclusively offered African-style hair braiding).

Not disputed.

63. The practice of African-style hair braiding is quite distinct from other types of styling more common in the United States that are traditionally part of modern cosmetology and barbering practices. Ferrell Decl. ¶ 28; see also Answer Am. Compl. ¶ 21 (admitting that "there are some unique aspects of African-style hair braiding to other hairdressing techniques," and admitting by failure to deny that: "[t]he practice of African-style hair braiding is quite distinct from other types of styling more common in the United States").

Not disputed.

64. African-style hair braiders use different techniques, methods, and simple tools to provide very different services for the customer than they would typically receive in a cosmetology salon or barber shop. Ferrell Decl. ¶¶ 26, 28; see, e.g., Niang Decl. ¶¶ 15-18, 21-24; Stigers Decl. ¶¶ 15-27; see also Answer Am.

Compl. ¶ 27 (admission by failure to deny that " . . . African-style hair braiders rely on their experience, skills, and common or simple tools used by women to do their own hair – such as combs, picks, and hair ties").

Not disputed that techniques are different, but the stated conclusion does not follow from the alleged admission quoted.

65. Unlike barbering or cosmetology, African-style hair braiding is predominately popular in certain communities with African ancestry, including African-Americans and African immigrants. Carroll Dep. 75:3-9 (Alban Decl. Ex. 10); Crow Dep. 34:17-35:3 (Alban Decl. Ex. 26); Price-Land Dep. 39:13-15 (Alban Decl. Ex. 23); Morris Dep. 86:15-21, 87:9-14 (Alban Decl. Ex. 35); Gathers Dep. 55:6-11, 55:21-56:21 (Alban Decl. Ex. 30); Wright Dep. 194:7-16, 196:15-197:5 (Alban Decl. Ex. 32).

Not disputed that African-style braiding is predominately popular in the stated community, but disputed that this is "unlike barbering or cosmetology," as barbering and cosmetology services other than ASHB are also quite common in the same community.

* * *

74. Joba exclusively provides African-style hair braiding. Some of the braiding styles she provides include Senegalese twists, micro braids, box braids, and

advanced cornrows such as the knotless cornrow. Niang Decl. ¶ 13.

Not disputed.

75. Joba does not typically provide the basic plaits and simple braids that may be taught to students in cosmetology/barber school because those are simple braiding techniques that are normally done at home by relatives or friends, not skilled African-style hair braiders. Niang Decl. ¶ 17.

Not disputed. This contention supports the testimony of Tendai Morris, Defendants' cosmetology expert, that the kind of braiding learned at home is not the high-level braiding people like the Plaintiffs perform for compensation. [See Plaintiffs' Proposed UMF no. 57].

76. Joba's African-style hair braiding services are not typically available at cosmetology salons and barber shops. Niang Decl. ¶ 16.

Not disputed.

77. Because the African-style hair braiding services she offers are intricate and highly detailed, often with a large number of small braids or locs, her braiding services can take several hours, even an entire day, to perform. Niang Decl. ¶ 18.

Not disputed.

* * *

80. Joba does not provide any of the services typically provided by cosmetologists or barbers; she does not cut hair, color hair, use chemicals or heat to style hair, or use chemical relaxers or heat to straighten hair. Niang Decl. ¶ 13.

Not disputed.

81. Joba does not wash customers' hair. Previously, Joba would wash a customer's hair prior to braiding if it was necessary. Hair washing has always been incidental to Joba's business because most customers arrive with recently washed hair and because it is not necessary for Joba to wash already clean hair in order to provide African-style hair braiding. Niang Decl. ¶ 21.

Not disputed. The fact that the named plaintiffs claim to follow these practices is unverified, and cannot be assumed true of all persons marketing services providing ASHB.

* * *

83. In order to braid a customer's hair, Joba primarily uses combs, brushes, and hair clips. Niang Decl. ¶ 22.

Not disputed.

* * *

88. Joba exclusively provides African-style hair braiding services because of their cultural significance to her heritage and her experience with African-style hair braiding growing up. Niang Decl. ¶ 15.

Not disputed.

89. Joba has no interest in providing cosmetology or barber services. Niang Decl. ¶¶ 12-13, 32.

Disputed. The braiding services Plaintiff Niang performs constitute "dressing" or "arranging" hair, which meets the definitions of cosmetology and/or barbering under Missouri law.

90. Joba also exclusively provides African-style hair braiding services because she does not want to use the harmful chemicals typically associated with cosmetology and barbering services, such as chemicals used to color and bleach hair and chemical relaxers used to relax or straighten naturally curly or textured hair. Niang Decl. ¶ 13.

Disputed that chemicals used in cosmetology are harmful. No scientific evidence indicating such chemicals are harmful is on the record. Plaintiff Niang has no scientific or medical training, so her unscientific and uneducated beliefs about the safety of chemicals are not evidence of record.

91. Joba believes that these chemicals can be harmful to both her and her customers. Niang Decl. ¶ [13.]

Not disputed that Plaintiff Niang holds this belief, but it is disputed that her belief has any scientific validity.

* * *

93. Tameka exclusively provides African-style hair braiding services, specifically a locking style known as Sisterlocks. Stigers Decl. ¶ 15.

Not disputed.

94. Tameka does not typically provide the basic plaits and simple braids that may be taught to students in cosmetology/barber school because those are simple braiding techniques that are normally done at home by relatives or friends, not skilled African-style hair braiders. Stigers Decl. ¶ 19.

Not disputed. This allegation confirms the testimony of Plaintiff's expert Morris that the kind of hair dressing work performed by the Plaintiffs and other African-Style braiders is not the same as what most people learn at home.

95. When Tameka does perform such simple braiding services, it is usually for children, and she only charges $25. This is not a time-consuming or significant portion of her business. Stigers Decl. ¶ 20.

Not disputed.

96. The African-style hair braiding and Sisterlocks services provided at Tameka's shop are not typically available at cosmetology salons or barber shops. Stigers Decl. ¶ 21.

Disputed. While most barber shops and cosmetology salons do not offer such specialized services, the record does not contain information demonstrating the degree to which the

market for ASHB, a minute sector of the hair care profession, is served by licensed as opposed to unlicensed providers.

97. Because the Sisterlocks style she offers is intricate and highly detailed, often with many small locs, Tameka's braiding services can take hours, even an entire day, to perform. Stigers Decl.

Not disputed. ¶

* * *

100. Tameka does not provide any of the services typically provided by cosmetologists or barbers; she does not provide haircuts, color hair, use chemicals or heat to style hair, or use chemical relaxers or heat to straighten hair. Stigers Decl. ¶ 18.

Not disputed that Plaintiff Stigers does not provide these traditional services, but she does provide hair dressing services which under Missouri law do constitute barbering or cosmetology services.

101. Tameka does not wash customers' hair. If a customer arrives for his/her appointment with recently washed hair, there is no need for the hair to be washed immediately prior to braiding. Stigers Decl. ¶ 23.

Not disputed.

102. If a customer arrives for an appointment and needs his/her hair washed, one of the licensed cosmetologists or barbers at Locs of Glory will wash the customer's hair or the customer can go home to wash

their hair and return at a later time for his/her appointment. Stigers Decl. ¶ 23.

Not disputed.

* * *

103. Tameka uses a hook tool, somewhat similar to a crochet hook, designed especially for Sisterlocks in order to braid hair. Stigers Decl. ¶ 24.

Not disputed.

* * *

108. Tameka provides African-style hair braiding because it is a form of natural hair care that does not use hazardous chemicals typically used in cosmetology and barbering. Stigers Decl. ¶ 17.

Disputed that chemicals used in cosmetology are harmful. No scientific evidence indicating such chemicals are harmful is on the record. Plaintiff Stigers has no scientific or medical training, so her unscientific and uneducated beliefs about the safety of chemicals are not evidence of record.

109. Tameka has no interest in providing cosmetology or barber services. Stigers Decl. ¶ 16.

Disputed. The braiding services Plaintiff Stigers performs constitute "dressing" or "arranging" hair, which meets the definitions of cosmetology and/or barbering under Missouri law.

110. She has no interest in using the hazardous chemicals typically used by cosmetologists and barbers because she believes they are harmful to both her and her customers. Stigers Decl. ¶ 18.

Disputed that chemicals used in cosmetology are hazardous or harmful. No scientific evidence indicating such chemicals are harmful is on the record. Plaintiff Stigers has no scientific or medical training, so her unscientific and uneducated beliefs about the safety of chemicals are not evidence of record.

* * *

111. In order to lawfully provide African-style hair braiding in the state of Missouri, a person is required to comply with Missouri's cosmetology or barbering licensing regimes. Answer Am. Compl. ¶¶ 18, 31, 35, 65-67, 107, 110, 115.

Not disputed.

112. This is because the Board interprets Missouri's cosmetology and barber statutes as applying to African-style hair braiding. Answer Am. Compl. ¶¶ 31, 35, 65-67.

Not disputed.

113. The Board has brought and continues to bring enforcement actions against individuals who braid hair for compensation without obtaining a cosmetology license. Answer Am. Compl. ¶¶35, 105; Defs.' Resp. to Pls.' First Interrogs. No. 11 (Alban Decl. Ex. 1);

see also Defs.' Resp. to Pls.' Second RFA No. 13 (Alban Decl. Ex. 5); Carroll Dep. 138:12-24 (Alban Decl. Ex. 10).

Not disputed.

114. Neither Joba nor Tameka can lawfully braid hair in Missouri unless they obtain either a cosmetology or barbering license because the Board enforces the cosmetology and barbering licensing requirements against African-style hair braiders. Answer Am. Compl. ¶¶ 18, 31, 32, 35, 36, 39, 105, 107, 110, 115; Carroll Dep. 138:12-24 (Alban Decl. Ex. 10).

Not disputed.

115. Thus, every day that Joba and Tameka remain in business as unlicensed hair braiders, they risk being targeted by the Board's enforcement of the cosmetology/barbering licensing requirements on African-style hair braiders, particularly if a complaint is filed against them with the Board. Answer Am. Compl. ¶¶ 18, 105, 107, 110, 115; Carroll Dep. 138:20-24, 315:24-316:9, 330:18-22 (Alban Decl. Ex. 10).

Not disputed.

116. Complaints about unlicensed hair braiders can be filed with the Board anonymously by anyone, including a disgruntled customer, a competitor, or anyone else with bias or improper motives. Carroll Dep. 317:15-319:16, 330:18-332:13, 373:14-374:10, 375:4-12, 381:9-16 (Alban Decl. Ex. 10).

Not disputed.

117. In fact, complaints about unlicensed hair braiders have been filed with the Board by competitors or those who believe they are losing business to an unlicensed braider, such as licensed cosmetologists/ barbers. Carroll Dep. 318:4-20, 334:9-335:4, 484:3-485:23 (Alban Decl. Ex. 10); Carroll Dep. Ex. 24 (Alban Decl. Ex. 19).

Not disputed that complaints have been filed by licensees. Their motives are matters of speculation.

* * *

120. Although the statute does not mention braiding, the Board interprets the definition of cosmetology in Mo. Rev. Stat. § 329.010(5)(a), as including African-style hair braiding. Answer Am. Compl. ¶ 31.

Not disputed.

* * *

124. Mo. Rev. Stat. § 329.250 provides that the unlicensed practice of cosmetology is a class C misdemeanor punishable by criminal penalties and fines of $300 pursuant to Mo. Rev. Stat. §560.016. Answer Am. Compl. ¶ 34.

Not disputed.

* * *

125. In order to become a licensed Missouri cosmetologist, an applicant must complete a written and practical exam pursuant to Mo. Rev. Stat. § 329.100. Answer Am. Compl. ¶ 41.

Not disputed.

126. In order to sit for the exam, an applicant must: graduate from a licensed Missouri cosmetology school with no less than 1,500 hours of training or from a vocational technical school with no less than 1,220 hours of training; complete a cosmetology apprenticeship under the supervision of a licensed cosmetologist of no less than 3,000 hours; or graduate from a cosmetology school or apprenticeship program in another state which has substantially the same requirements as Missouri. Answer Am. Compl. ¶ 40.

Not disputed.

* * *

127. Mo. Rev. Stat. § 329.040(4) establishes the 1,500 hour mandatory cosmetology curriculum for licensed cosmetology schools, and Mo. Code Regs. Ann. tit. 20, § 2085-12.050 establishes the 1,220 hour mandatory cosmetology curriculum for vocational technical schools. Answer Am. Compl. ¶¶ 44, 45, 49, 50.

Not disputed.

* * *

133. Although Mo. Rev. Stat. § 328.010 does not mention braiding, and although the Board has historically interpreted braiding as "hairdressing" requiring a Class CH or CA cosmetology license, the Board now interprets the definition of barber in Mo. Rev. Stat. § 328.010(1) as including someone who performs

African-style hair braiding. Answer Am. Compl. ¶¶ 64-67.

Not disputed.

* * *

135. Mo. Rev. Stat. § 328.160 provides that the unlicensed practice of cosmetology is a class C misdemeanor punishable by criminal penalties and fines of $300 pursuant to Mo. Rev. Stat. § 560.016. Answer Am. Compl. ¶ 61.

Not disputed.

* * *

137. In order to sit for the exam, an [applicant] must: study for no less than 1,000 hours in a period of not less than six months in a licensed barber school under the direct supervision of a licensed instructor or complete no less than 2,000 hours under the direct supervision of a licensed barber apprentice supervisor. Answer Am. Compl. ¶ 69.

Not disputed.

* * *

157. The Board admits that tuition at a licensed Missouri cosmetology/barber school can cost up to $21,450 and averages $11,750 at the 24 cosmetology/barber schools for which the Board had received tuition information from 2013-2015. Defs.' Doc. Produc. No. 47 (produced on August 10, 2015) (Alban Decl. Ex. 44); see also Crow Dep. 60:6-8 (Alban Decl. Ex. 26) (Estimating tuition costs in Missouri: "It's anywhere from

10 to 17,000 [dollars], I think, some of the ones that I've seen the tuition numbers on.").

Not disputed. Tuition in the programs documented in Defs.' Doc. Produc. No. 47 ranges from $5,405 to $21,250.

* * *

170. The President of the Board, a Defendant, admits that there is nothing about public amusement or entertainment venues that makes them a safer place to perform hair braiding than anywhere else. Kindle Dep. 206:23-207:1 (Alban Decl. Ex. 21).

Not disputed.

171. The President of the Board, a Defendant, admits that there is no reason why an unlicensed hair braider who is braiding at a public amusement or entertainment venue would be less likely to injure the public than an unlicensed braider who is braiding somewhere else. Kindle Dep. 207:2-6 (Alban Decl. Ex. 21).

Not disputed.

172. A Board member Defendant admits that if braiding is potentially dangerous at a braiding salon, it's also potentially dangerous at an amusement park or other entertainment venue. Price-Land Dep. 195:18-25 (Alban Decl. Ex. 23).

Not disputed.

* * *

181. The Board admits that Missouri's cosmetology and barber licensing requirements and curricula are designed to train and prepare cosmetologists and barbers to practice cosmetology and barbering, respectively. Carroll Dep. 59:3-60:1 (Alban Decl. Ex. 10); but see Kindle Dep. 52:7-53:24 (Alban Decl. Ex. 21) (Board President, a Defendant, offers circular explanation for the basis of the curriculum and admits that he does not know why the Board has standards for the number of hours in specific categories for the cosmetology/barber curriculum).

Denied and disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection.

182. The Board admits that "[p]art 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." Carroll Dep. 212:3-12 (Alban Decl. Ex. 10); Carroll Dep. Ex. 12 (Alban Decl. Ex. 14); see also Defs.' Resp. to Pls.' RFA No. 17 ("It is true that the curricula are not designed to be specific to hair braiding.").

Not disputed.

183. The Board admits that "one specializing in the braiding of hair would not learn all he or she needs from the standard [cosmetology/barber] curricula." Defs.' Resp. to Pls.' Third RFA No. 26 (Alban Decl. Ex. 6).

Not disputed.

* * *

185. The Board does not know whether African-style hair braiding was even considered when the cosmetology or barber statues were passed, but admits that the barbering statutes were passed in approximately 1909 and that the cosmetology statutes were passed in approximately 1939. Carroll Dep. 467:20-468:6 (Alban Decl. Ex. 10).

Not disputed.

* * *

188. Defendants admit that instruction on hair braiding, much less on African-style hair braiding, is not required by Missouri's mandatory cosmetology/barber curricula. Answer Am. Compl. ¶¶82, 83; Defs.' Resp. to Pls.' First RFA No. 7 (Alban Decl. Ex. 4); Carroll Dep. 224:11-23 (Alban Decl. Ex. 10).

Not disputed.

* * *

193. Thus, someone may graduate from cosmetology/barber school in Missouri and obtain a cosmetology/barber license without receiving "any experience or any training in braiding," much less practical training on a real person. Crow Dep. 101:15-22, 104:7-23 (Alban Decl. Ex. 26).

Not disputed.

* * *

194. It is the Board's position that, in order for something to constitute a distinct profession, there must either be a significant number of people who exclusively provide a specific service for compensation or there must be a separate professional license. Carroll Dep. 83:9-22 (Alban Decl. Ex. 10); see also Carroll Dep. 59:3-10 (Alban Decl. Ex. 10).

Disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection. This is not an undisputed material fact, but a legal argument by Plaintiffs' counsel.

195. The Board admits that the vast majority of people who know how to do African-style hair braiding are not cosmetologists or barbers, that a majority of hair braiders in Missouri who provide braiding services for compensation are not licensed cosmetologists or barbers, that many braiders exclusively provide braiding services, and that braiders operate out of salons that exclusively provide braiding services. Carroll Dep. 76:19-77:16 (Alban Decl. Ex. 10).

Disputed. The Board has not voted on or endorsed this conclusion, so it is not admitted by the Board. See the General Objection. To the extent that the Organizational Representative can testify about information available to the Board, the averment seems consistent with information known to the Board although not known as an established fact.

196. The Board also admits that if hair braiding had a separate license in Missouri, hair braiding would be a distinct profession. Carroll Dep. 94:20-95:3 (Alban Decl. Ex. 10).

Disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection.

197. On several occasions, the Board itself has proposed and endorsed creating a separate license for hair braiders with significantly different (and lower) requirements from Missouri's current cosmetology/barber licensing regime. Defs.' Resp. to Pls.' Third RFA No. 19 (Alban Decl. Ex. 6); Carroll Dep. 86:24-87:3, 90:4-91:3 (Alban Decl. Ex. 10); Carroll Dep. Ex. 5 (Alban Decl. Ex. 12) (including legislative proposals from 2007, 2008, 2010, 2011, 2012 submitted by the Board to the Missouri legislature to create a separate braiding license).

Not disputed.

* * *

205. The Board has repeatedly proposed and endorsed a separate hair braiding license as part of its mission to protect the public. Carroll Dep. 92:17-93:16, 147:22-149:15 (Alban Decl. Ex. 10); see also Crow Dep. 75:23-76:3 (Alban Decl. Ex. 26); Kindle Dep. 174:20-25, 175:4-11, 175:17-20 (Alban Decl. Ex. 21).

Not disputed.

206. The Board admits that its proposals to create a separate "Class HB – hairbraiding" license with either a 300-hour or 600-hour mandatory curriculum would fulfill all of the government interests identified by the Board. Carroll Dep. 93:11-16 (Alban Decl. Ex. 10); see Defs.' Resp. to Pls.' First Interrogs. Nos. 1-2 (Alban Decl. Ex. 1); see also Kindle Dep. 209:11-14, 210:2-7 (Alban Decl. Ex. 21).

Not disputed.

207. The Board admits that the purpose of these proposals is "to create a special category of licensure for braiders with more of what they do need and less of what they don't." Carroll Dep. 221:18-222:13; Carroll Dep. Ex. 11 (Alban Decl. Ex. 13); see also Carroll Dep. 206:17-22 (Alban Decl. Ex. 10).

Not disputed.

* * *

209. The Board admits that "much of the qualifying curriculum does not relate to" the practice of hair braiding and "includes a great deal of information [hair braiders] will never use." Carroll Dep. 212:23-213:17, 219:8-220:8, 221:7-17 (Alban Decl. Ex. 10); Carroll Dep. Ex. 12 (Alban Decl. Ex. 14).

Disputed. The Board has not voted on or endorsed this conclusion, so it is not admitted by the Board. See the General Objection. To the extent that the Organizational Representative can testify about information available to the Board, the averment seems consistent with information

known to the Board although not known as an established fact.

210. The Board admits that: "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." Carroll Dep. 146:16-147:12 (Alban Decl. Ex. 10); Carroll Dep. Ex. 5 (Alban Decl. Ex. 12).

Denied and disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection. The Board has consistently denied that ASHB is a separate occupation, but has insisted that it is a style within the larger profession of hair care.

211. In fact, the Board admits that it can identify only 100 hours of subjects in the 1,500-hour mandatory cosmetology curriculum that it claims are necessarily relevant to African-style hair braiding. Carroll Dep. 103:14-24, 104:23-105:13, 461:24-463:7; 464:4-14 (Alban Decl. Ex. 10).

Denied and disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection. The Board has consistently stated that much of the curriculum

is relevant and useful to persons performing braiding.

212. The Board also admits that it can identify only 105 hours of the 1,000-hour mandatory barbering curriculum that it claims are necessarily relevant to African-style hair braiding. Carroll Dep. 106:12-108:1, 108:19-25, 111:3-9, 460:12-461:23, 464:4-14 (Alban Decl. Ex. 10).

Denied and disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection.

213. The Board thus admits that only about 10% or less of the mandatory cosmetology/barber curriculum is relevant to African-style hair braiding. Carroll Dep. 461:10-14, 461:20-23;462:24-463:7, 464:4-14 (Alban Decl. Ex. 10).

Denied and disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection.

214. The 100 hours of subjects in the mandatory cosmetology curriculum that the Board claims are relevant to African-style hair braiding are general health and safety or business practices subjects, which include twenty hours of instruction on "Anatomy," ten hours of instruction on "Salesmanship and shop management," and ten hours of instruction on "State law." Carroll Dep. 105:7-13 (Alban Decl. Ex. 10).

Denied and disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection.

215. The 105 hours of subjects in the mandatory cosmetology curriculum that the Board claims are relevant to African-style hair braiding are general health and safety or business practices subjects, which include 5 hours of instruction on "Professional Image," 15 hours of instruction on the "Implements, Tools, and Equipment" used by barbers, 5 hours of instruction on "Salesmanship and Establishment Management," and 10 hours of instruction on "State Law." Carroll Dep.106:12-16, 111:3-9 (Alban Decl. Ex. 10).

Denied and disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection.

216. Even among the 100 or 105 hours of subjects in the curriculum on general health and safety or business practices subjects that the Board claims are relevant to African-style hair braiding, the Board cannot ensure that all of the hours in each subject are spent on topics that are actually relevant to African-style hair braiding. See, e.g., Price Sr. Dep. 132:8-133:15, 145:8-146:13; 148:10-149:2 (Board member Defendant testifying that braiders need instruction in barber tools they do not use, admits that only some of the hours of the permanent waving and hair coloring subjects are about learning how to identify those treatments, while other hours are about how to

actually provide those treatments, which is something African-style hair braiders don't do).

Denied and disputed. The Board as a body has not reached or endorsed this legal conclusion. See the General Objection.

* * *

236. Defendants claim that "there are distinct health and safety issues presented by African-style braiding" and that there are "additional issues particular to braiding." Answer Am. Compl. ¶¶23-24; but see Carroll Dep. 309:13-310:8 (Alban Decl. Ex. 10) (e.g., "Q: So there really aren't any distinct or additional issues that are particular to braiding? A: I cannot think of any.").

Not disputed. The Board's pleadings and not the Executive Director's testimony state the Board's position.

* * *

238. Of particular concern to Defendants' dermatologist experts are the conditions of traction alopecia and CCCA. Gathers Expert Report, Resp. Nos. 7-10 (Alban Decl. Ex. 31); Wright Expert Report ¶¶ 10-12 (Alban Decl. Ex. 34).

Not disputed.

239. Defendants' dermatologist experts also assert that there are special considerations when braiding children's hair. Gathers Expert Report, Resp. Nos.

10-11 (Alban Decl. Ex. 31); Wright Expert Report ¶ 8 (Alban Decl. Ex. 34).

Not disputed.

* * *

241. However, Defendants admit that information about traction alopecia, CCCA, or special concerns related to braiding children's hair is not required to be taught as part of the mandatory cosmetology/barber curricula. Defs.' Resp. to Pls.' Third RFA Nos. 24, 25, 28 (Alban Decl. Ex.6).

Not disputed.

242. Defendants admit that cosmetology/barber schools have discretion to determine the particulars of their content within the hourly requirements for the mandatory curricula and thus if subjects are not specifically listed in the mandatory cosmetology/barber curricula, the Board cannot ensure that barbers or cosmetologists receive any training in these subjects. Defs.' Resp. to Pls.' First Interrogs. No. 9 (Alban Decl. Ex. 1); Carroll Dep. 225:9-17; 288:18-289:20 (Alban Decl. Ex. 10); see also, e.g., Carroll Dep. 445:3-9 (Alban Decl. Ex. 10).

Not disputed.

243. For example, a Board member Defendant who operates and teaches at a cosmetology school admitted that her instruction on hair braiding includes no instruction on CCCA and only limited instruction

traction alopecia. Crow Dep. 125:21-126:12 (Alban Decl. Ex. 26).

Not disputed.

244. In addition, a Board member Defendant, a licensed barber who owns and teaches at a barber school, repeatedly admitted that he was unfamiliar with CCCA and had "never heard of it before." Price Sr. Dep. 104:9-25, 108:16-17, 143:22-24.

Not disputed.

245. Similarly, a Board inspector and licensed cosmetologist testified that she was taught about alopecia generally in cosmetology school, but not about traction alopecia or CCCA, and that she had never heard about CCCA prior to her deposition. Conner Dep. 7:20-22, 158:15-16, 159:25-160:4 (Alban Decl. Ex. 29).

Not disputed.

* * *

250. The Board further admits that it is not aware of any instruction in any cosmetology or barbering school that is provided on any special concerns related to braiding children's hair. Carroll Dep. 446:5-13 (Alban Decl. Ex. 10).

Not disputed.

* * *

254. The Board admits that less than 50 pages of the nearly 3,000 pages of the Milady and Pivot Point

cosmetology/barber textbooks contain information about any kind of braiding technique. Carroll 466:7-15 (Alban Decl. Ex. 10); see also Ferrell Decl. ¶ 68-69 ("Between the two [cosmetology] books, totaling 1700 pages, only 38 pages mention braids.") (further noting that just two or three pages of the 675-page Milady's Standard Textbook of Professional Barbering discuss braiding and that none of the 684 pages in Milady's Standard Textbook of Professional Barber-Styling discuss braiding); see also Kindle Dep. 108:3-10 (Alban Decl. Ex. 21) (admitting that the instruction in the Milady barbering text is "very vague" and "very short").

Not disputed.

* * *

261. Defendants' expert dermatologists identified a number of general hair and scalp conditions that they say can be caused or exacerbated by improper braiding, sanitation, and hygiene. Those conditions include folliculitis, cellulitis, hair breakage/trichorrehexis nodosa, allergic reactions to over-the-counter consumer products/contact dermatitis, tinea capitis, staphylococcus aureus, scarring and keloid formation, seborrheic dermatitis, chemical alopecia, dissecting cellulitis, psoriasis, discoid lupus erthematosus, trichotillomania, acne keloidalis, and alopecia areata. Ferrell Decl. ¶¶ 89-90; Ferrell Expert Rebuttal Report to Dr. Gather's Report 3, 6, 9 (Ferrell Decl. Ex. 2); Ferrell Expert Rebuttal Report to Dr. Wright's Report 4, 6 (Ferrell Decl. Ex. 3).

Not disputed. Ferrell, who is not a physician, is not competent to rebut any aspect of the medical opinions of Gathers or Wright..

262. Many of these conditions are not taught in cosmetology/barber schools, nor tested on the exams, as indicated by their absence from the standard textbooks, as detailed below. Others are only briefly defined and insufficient information is provided, such that cosmetologists/barbers are not any better equipped to address these conditions than anyone else. Ferrell Decl. ¶ 91; Ferrell Expert Rebuttal Report to Dr. Gather's Report 3-4, 6, 9 (Ferrell Decl. Ex. 2); Ferrell Expert Rebuttal Report to Dr. Wright's Report 4, 6-8 (Ferrell Decl. Ex. 3).

Not disputed. Ferrell, who is not a physician, is not competent to rebut any aspect of the medical opinions of Gathers or Wright.

263. With the exception of traction/traumatic alopecia, information about any connection between these medical conditions and hair braiding is not part of cosmetology or barbering training, as evidenced by their absence from the cosmetology and barber textbooks (which means they also cannot be tested on the exams). Ferrell Decl. ¶ 92; Ferrell Expert Rebuttal Report to Dr. Gather's Report 3, 6 (Ferrell Decl. Ex. 2); Ferrell Expert Rebuttal Report to Dr. Wright's Report 4, 7 (Ferrell Decl. Ex. 3).

Not disputed.

264. The following conditions are completely absent from the cosmetology/barber textbooks: folliculitis, chemical alopecia, dissecting cellulitis, discoid lupus erythematosus, tricholtillomania, and acne keloidalis nuchae. Ferrell Decl. ¶ 94; Ferrell Expert Rebuttal Report to Dr. Gather's Report 9 (Ferrell Decl. Ex. 2).

Not disputed.

265. Topics such as tinea capitis, staphylococcus aureus, cellulitis, contact dermatitis, scarring/keloid formation, seborrheic dermatitis, and psoriasis are only briefly defined. Ferrell Decl. ¶ 95; Ferrell Expert Rebuttal Report to Dr. Gather's Report 2, 6, 9 (Ferrell Decl. Ex. 2); Ferrell Expert Rebuttal Report to Dr. Wright's Report 4 (Ferrell Decl. Ex. 3).

Not disputed.

266. The cosmetology and barbering textbooks provide no information or instruction about the vulnerability of children to braiding or any of these medical conditions. Ferrell Decl. ¶¶ 87-88; Ferrell Expert Rebuttal Report to Dr. Wright's Report 4, 9 (Ferrell Decl. Ex. 3); Ferrell Expert Rebuttal Report to Dr. Gather's Report 8 (Ferrell Decl. Ex. 2).

Not disputed.

267. A total of 9 pages between the Milady and Pivot Point textbooks are dedicated to bacteria and bacterial infection. This instruction consists of basic information about preventing infections such as cleaning tools between customers, washing your hands, and

declining to perform service if a customer's skin shows visible signs of abrasions or infections. Ferrell Decl. ¶ 99; Ferrell Expert Rebuttal Report to Dr. Gather's Report 2-3 (Ferrell Decl. Ex. 2).

Not disputed.

268. The current cosmetology/barber curricula and textbooks fail to comport with Dr. Gathers' and Dr. Wright's recommendations for mandatory basic training for hair braiders. Ferrell Decl. ¶100; Ferrell Expert Rebuttal Report to Dr. Wright's Report 6-9 (Ferrell Decl. Ex. 3); Ferrell Expert Rebuttal Report to Dr. Gather's Report 8, 9-12 (Ferrell Decl. Ex. 2).

Disputed as an argumentative generalization. The curricula do not cover all the points suggested by Dr. Gathers and Wright but include some.

* * *

272. Defendants stipulate that CCCA is not mentioned in the standard Milady or Pivot Point cosmetology or barbering textbooks. Wright Dep. 255:1-13 (Alban Decl. Ex. 32) (Defendants' stipulation that CCCA does not appear in either the Milady or Pivot Point cosmetology textbooks); Price Dep. 114:9-13 (Alban Decl. Ex. 27) (Defendants' stipulation that CCCA does not appear in either of the two Milady barbering textbooks); Defs.' Resp. to Pls.' Third RFA No.24 (Alban Decl. Ex. 6).

Not disputed.

273. Defendants admit that none of the Milady or Pivot Point cosmetology or barbering textbooks contains any information on special concerns for braiding children's hair. Defs.' Resp. to Pls.' Third RFA No. 28 (Alban Decl. Ex. 6); Carroll Dep. 445:19-24 (Alban Decl. Ex. 10).

Not disputed.

274. Defendants stipulate that traction alopecia is not mentioned in either of the standard Milady barbering textbooks. Price Dep. 114:9-13 (Alban Decl. Ex. 27) (Defendants' stipulation that traction alopecia does not appear in either of the two Milady barbering textbooks); Defs.' Resp. to Pls.' Third RFA No. 25 (Alban Decl. Ex. 6).

Not disputed.

275. The 2010 Pivot Point and 2012 Milady cosmetology textbooks contain only a brief, one-paragraph discussion of traction alopecia. Wright Dep. 250:8-19, 251:4-20, 252:1-16 (Alban Decl. Ex. 32); Gathers Dep. 160:21-163:3 (Alban Decl. Ex. 30) (2012 Milady cosmetology textbook), 164:6-165:3 (Pivot Point Salon Fundamentals cosmetology textbook).

Not disputed.

276. The new 2016 edition of the Milady cosmetology textbook does not even mention traction alopecia by name and contains a single sentence describing the condition. Wright Dep. 251:4-16, 253:20-254:8 (Alban Decl. Ex. 32); Ferrell Dep. 143:6-145:21 (Alban Decl. Ex. 38).

Not disputed.

* * *

280. Defendants' dermatologist experts concluded that the 2010 Pivot Point and 2012 Milady cosmetology textbooks contain insufficient instruction on traction alopecia and CCCA to teach hair braiders what they needed to know about these conditions in order to safely braid hair. Wright Dep. 253:7-254:25, 225:1-13 (Alban Decl. Ex. 32); Gathers Dep. 163:4-14, 165:8-13 (Alban Decl. Ex. 30).

Not disputed.

* * *

286. The Board admits that "the Board has no oversight over the braiding instruction, if any, provided by any of the barbering or cosmetology schools." Carroll Dep. 238:17-21 (Alban Decl. Ex. 10).

Not disputed. Schools are not required to provide braiding instruction, and there are no specific criteria for such instruction as braiding is a part of the larger hair care professions.

287. Defendants admit that the Board does not keep track of whether any cosmetology/barber school provides any instruction on African-style hair braiding. Defs.' Suppl. Resp. to Pls.' First Interrogs. No. 6 (Alban Decl. Ex. 2) ("The question of whether and to what extent the schools teach African-style braiding is within the control of each school, and is not information provided to or collected by the Board."); Carroll

Dep. 235:13-18 (Alban Decl. Ex. 10); Conner Dep.146:8-16, 147:2-7 (Alban Decl. Ex. 29); Defs.' Resp. to Pls.' Second RFA No. 12 (stating that the Board lacks knowledge to admit or deny whether any barber schools offer any instruction, or have any curriculum, specific to African-style braiding); Defs.' Resp. to Pls.' First RFPD No.6 (Alban Decl. Ex. 7) (providing no documents responsive to the request for documents supporting the contention that African-style hair braiding is taught as part of the required curriculum).

Not disputed.

288. The Board admits that "the Board doesn't have information about how many hours of instruction are offered at these schools specifically on braiding." Carroll Dep. 235:19-25 (Alban Decl. Ex. 10); see also Conner Dep. 147:2-7 (Alban Decl. Ex. 29) (stating that the Board has no way to verify any number of hours of instruction in hair braiding that may be claimed by any school).

Not disputed.

289. The Board admits that it has never inquired into any specific braiding techniques taught at cosmetology/barber schools nor the level of depth of instruction offered. Carroll Dep. 236:6-15 (Alban Decl. Ex. 10).

Not disputed.

290. The Board admits that it has never reviewed the quality, nor even confirmed the existence of, any braiding curriculum used by cosmetology or

barbering schools. Carroll Dep. 235:4-12 (Alban Decl. Ex. 10); Defs.' Suppl. Resp. to Pls.' First Interrogs. No. 6 (Alban Decl. Ex. 2); Defs.' Resp. Pls.' First RFPD No. 6 (Alban Decl. Ex. 7) (providing no documents responsive to the request for documents supporting the contention that African-style hair braiding is taught as part of the required curriculum).

Not disputed.

291. Moreover, the Board admits that "the Board can't identify a single example of a lesson plan . . . provided by a cosmetology or barbering school that lists braiding as a topic that's being taught in a course." Carroll Dep. 228:9-14 (Alban Decl. Ex. 10); see also Defs.' Resp. to Pls.' Third RFPD No. 1 (Alban Decl. Ex. 9) (providing no documents responsive to the request for sample lesson plans or course descriptions specific to African-style braiding); Defs.' Resp. to Pls.' First RFPD No. 6 (Alban Decl. Ex. 7).

Not disputed.

* * *

292. The Board's expert on hair braiding, a Missouri-licensed cosmetologist who attended cosmetology school in Missouri, admits that "one does not learn [African-style hair braiding] in school, but generally learn[s] it by experience and by continuing education from various teachers, specialized classes, and self-study." Morris Expert Report 1, ¶ 3 (Alban Decl. Ex. 37).

Not disputed.

* * *

300. Defendants admit that, prior to discovery in this case, the Board had no knowledge of whether the cosmetology/barber licensing exams contained any questions specific to hair braiding or to the specific health and safety issues the Board contends are of special concern for hair braiding. Defs.' Resp. to Pls.' First & Second RFA Nos. 1-2, 10 (Alban Decl. Exs. 4, 5); Carroll Dep. 467:7-15 (Alban Decl. Ex. 10).

Not disputed.

301. The Board admits that, as a result of discovery in this case, the Board now knows that in the past 10 years, there were only 14 or 15 questions that are even relevant to hair braiding out of over 13,000 questions asked on 124 different versions of the exams. Carroll Dep. 252:15-254:7, 467:16-19 (Alban Decl. Ex. 10); Carroll Dep. Ex. 14 (Alban Decl. Ex. 15) (NIC Resp. to Dep. by Written Questions) (Alban Decl. Ex. 40).

The Board has made no admissions of these allegations, but the results of the NIC inquiry are part of the record.

302. The Board admits that, prior to discovery in this case, the Board was not aware that questions relevant to African-style hair braiding "were lacking" on the cosmetology/barber licensing exams. Carroll Dep. 588:18-23 (Alban Decl. Ex. 10).

Not disputed.

303. The Board admits that hair braiding is not tested on the practical portions of either of Missouri's cosmetology or barbering licensing exams nor is it

listed in the NIC Candidate Information Bulletin as a topic that can be tested on the written portion of Missouri's barber licensing exam. Carroll Dep. 226:6-227:8, 241:8-17 (Alban Decl. Ex. 10); Defs.' Doc. Produc. Nos. 51, 53 (Alban Decl. Exs. 45, 47).

Not disputed.

304. The NIC Candidate Information Bulletins for the cosmetology/barber licensing exams also do not indicate that salesmanship, shop or establishment management, professional image, or state law are tested subjects. Defs.' Doc. Produc. Nos. 51, 53 (Alban Decl. Exs. 45, 47).

Not disputed.

305. The Board admits that licensing does not "provide a guarantee of competence in braiding if . . . someone can pass the exam without demonstrating any competence in braiding." Carroll Dep. 227:9-22 (Alban Decl. Ex. 10).

The examination provides assurances of competence in cosmetology and barbering as a general matter, not in every style or practice within the scope of those professions. Since braiding is a style within the larger ambit of the hair care professions, the examination process is not designed to assure competence in that particular practice. The organizational representative's testimony does not constitute an admission by the Board on any subject other than

the Board's actions and information available to the Board. See the General Objection.

* * *

313. The Board admits that licensing someone in a given profession using licensing exams for a different profession would not be a good way to determine their qualifications. Carroll Dep. 417:13-24 (Alban Decl. Ex. 10).

Disputed. The proposition is stated in argumentative questions by Plaintiff's counsel with which the organizational representative did not disagree. However, this is not an admission by the Board of the content of Plaintiffs' counsel's argumentative questions. See the General Objection.

* * *

320. On the various exam forms used by Missouri for both the cosmetology and barber licensing exams over the past ten years, 13,240 questions have been asked on 124 different exams. NIC Resp. to Dep. by Written Question Nos. 13-14 (Alban Decl. Ex. 40) (totaling the cosmetology, barber styling, barber, and hair design questions).

Not disputed.

321. At the behest of Plaintiffs, and with notice to Defendants, the NIC conducted a search of these questions using search terms designed to find questions specific to African-style hair braiding. Those

terms were: braid, lock, twist, weave, weaving, cornrow, sew, weft, traction alopecia, and central cicatricial alopecia. NIC Resp. to Dep. by Written Question No. 15 (Alban Decl. Ex. 40).

Not disputed.

322. The NIC found that cosmetology, hair design, and barber exams contained a total of 15 questions with these search terms, appearing on 70 exams. NIC Resp. to Dep. by Written Question No. 16 (Alban Decl. Ex. 40); see also NIC Resp. to Dep. by Written Question Ex. B (SEALED) (Alban Decl. Ex. 42) (containing the text of the 15 exam questions identified by the NIC and their multiple choice answers).

Not disputed.

323. Defendants' Expert Tendai Morris concluded that, of the 15 questions identified through the NIC's search, one of the questions was not even relevant to African-style braiding, only one of the questions was specific to African-style braiding, and only three questions tested information relevant to the health and safety of braiding. Morris Dep. 260:8-277:14 (SEALED Portion) (Alban Decl. Ex. 36).

Not disputed.

324. Defendants' Expert Dr. Wright concluded that no more than 6 questions tested health safety information relevant to African-style hair braiding, including the three questions that Ms. Morris identified as relevant to the health and safety of braiding. Wright

Dep. 170:5-184:23 (SEALED Portion) (Alban Decl. Ex. 33).

Not disputed.

325. None of the six questions identified by Defendants' experts as testing health and safety information relevant to African-style hair braiding appeared together on the same exam in the past ten years. See NIC Resp. to Dep. by Written Question Ex. A (SEALED) (Alban Decl. Ex. 41); Wright Dep. 170:5-184:23 (SEALED Portion) (Alban Decl. Ex. 33); Morris Dep. 260:8-277:14 (SEALED Portion) (Alban Decl. Ex. 36).

Not disputed.

* * *

326. The Board admits that information that is not in the standard Milady and Pivot Point textbooks listed in the NIC Candidate Information Bulletins for the licensing exams cannot be tested on the exams. Carroll Dep. 244:10-13; 245:9-12 (Alban Decl. Ex. 10).

Not disputed.

327. The NIC identified no exam questions in the past ten years on Missouri's cosmetology and barber licensing exams that asked about traction alopecia, CCCA, or any concerns related to braiding children's hair. NIC Resp. to Dep. by Written Question No. 18 (Alban Decl. Ex. 40); see also NIC Resp. to Dep. by Written Question Ex. B (SEALED) (Alban Decl. Ex. 42)

(containing the text of the 15 exam questions identified by the NIC and their multiple choice answers).

Not disputed.

328. The Board admits that it has no knowledge of any cosmetology/barber licensing exam question in the past ten years that relates specifically to CCCA or braiding children's hair. Defs.' Resp. to Pls.' Third RFA Nos. 22-23 (Alban Decl. Ex. 6).

Not disputed.

329. The Board admits that it is important to test hair braiders about CCCA, but that CCCA is not a topic tested on Missouri's cosmetology/barber licensing exams. Carroll Dep. 245:15-246:3 (Alban Decl. Ex. 10); see also Carroll Dep. 244:14-21 (Alban Decl. Ex. 10) (admitting that CCCA is not tested on the exams because it is not discussed in the cosmetology/barber textbooks).

Not disputed.

330. The Board further admits that the cosmetology/barber exams used in Missouri for the past 10 years do not test on traction alopecia. Carroll Dep. 450:19-23 (Alban Decl. Ex. 10); see also Carroll Dep. 246:11-247:11 (Alban Decl. Ex. 10) (admitting that the barber licensing exam cannot test on traction alopecia because traction alopecia is not discussed in the barbering textbooks).

Not disputed.

331. Similarly, the Board admits that the cosmetology/barber exams used in Missouri for the past 10 years do not test on the topic of any special concerns related to braiding children's hair. Carroll Dep. 450:13-18 (Alban Decl. Ex. 10).

Not disputed.

* * *

334. Dr. Wright concluded that the cosmetology and barbering licensing exams do not "adequately test health and safety issues relative to braiding." Wright Dep. 185:8-14 (Alban Decl. Ex. 32).

Not disputed.

335. Dr. Wright further concluded that the Missouri cosmetology and barber licensing exams were inadequate to "qualify, certify, or license braiders." Wright Dep. 185:19-23 (Alban Decl. Ex. 32) ("Q: Based on what you've just reviewed, these questions, do you think these exams would be adequate to qualify, certify, or license braiders?" A: No.").

Not disputed.

336. Given the expert witnesses' testimony, the Board admitted that if someone took one of those exams it "would not ensure that the individual has demonstrated competence in the material deemed necessary for safe practice." Carroll Dep. 263:4-9 (Alban Decl. Ex. 10) ("Q: And so if I'm accurately conveying what they said, then, in fact, those exams don't – passing those exams does not demonstrate competence in

the material deemed necessary for the safe practice of braiding; is that right? A: Right.").

Disputed. The proposition is stated in argumentative questions by Plaintiff's counsel with which the organizational representative did not disagree. However, this is not an admission by the Board of the content of Plaintiffs' counsel's argumentative questions. See the General Objection.

* * *

342. The Board also admits that Missouri's current cosmetology/barber licensing scheme "does not provide a guarantee of competence for braiders." Carroll Dep. 239:2-7 (Alban Decl. Ex. 10).

Disputed. The proposition is stated in argumentative questions by Plaintiff's counsel with which the organizational representative did not disagree. However, this is not an admission by the Board of the content of Plaintiffs' counsel's argumentative questions. See the General Objection.

343. One of the Board's expert witnesses, a dermatologist, admits that the cosmetology/barber licensing exams do not adequately test health and safety issues relative to braiding based on her review of questions specific to braiding that appeared on Missouri's cosmetology/barber exams in the past 10 years. Wright Dep. 185:8-14 (Alban Decl. Ex. 32).

Not disputed.

344. One of the Board's expert witnesses, a dermatologist, admits that the cosmetology/barber licensing exams are not adequate to qualify, certify, or license braiders based on her review of questions specific to braiding that appeared on Missouri's cosmetology/barber exams in the past 10 years. Wright Dep. 185:19-23 (Alban Decl. Ex. 32).

Not disputed.

345. The Board now admits that the cosmetology/barber exams used in Missouri for the past ten years are "not adequate to qualify, certify or license African-style hair braiders." Carroll Dep. 450:5-12 (Alban Decl. Ex. 10).

Disputed. The proposition is stated in argumentative questions by Plaintiff's counsel with which the organizational representative did not disagree. However, this is not an admission by the Board of the content of Plaintiffs' counsel's argumentative questions. See the General Objection.

346. The Board also now admits that the requirement of passage of the Missouri cosmetology or barbering examinations 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. Carroll Dep. 265: 4-12 (Alban Decl. Ex. 10); see also Carroll Dep. 266:1-5 (Alban Decl. Ex. 10).

Disputed. The proposition is stated in argumentative questions by Plaintiff's counsel with which the organizational representative did not disagree. However, this is not an admission by the Board of the content of Plaintiffs' counsel's argumentative questions. See the General Objection.

347. In addition, the Board President, a Defendant, admits that cosmetology/barber licensing exams "do not test braiding" and that "the exam doesn't test competence to perform braiding." Kindle Dep. 138:5-17, 150:5-16 (Alban Decl. Ex. 21).

Not disputed. It should be noted that on both occasions the Board President testified that the reason braiding is not tested is because "it's a style."
