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January 13, 2025

ATTORNEY GENERAL OPINION NO. 2025-1

The Honorable Renee Erickson
State Senator, 30th District
State Capitol, Room 445-S
300 SW 10th St.
Topeka, Kansas 66612

Re: State Boards, Commissions and Authorities—State Board of
Cosmetology—Kansas State Board of Cosmetology; Appointment;
Qualifications

Synopsis: As a race-based classification, the requirement that the State Board of
Cosmetology have at least one African-American member is
constitutional only if it is narrowly tailored to achieve a compelling
government interest. Cited herein: K.S.A. 74-2701.

* * *

Dear Senator Erickson:

As State Senator for the 30th District, you ask whether K.S.A. 74-2701(a)'s
requirement that one member of the State Board of Cosmetology be an African-
American is legal. Because this is a race-based classification, the requirement is
constitutional only if it is narrowly tailored to further a compelling government
interest. While we can hypothesize a few interests to support the requirement, it is
unclear whether a court would find those interests compelling and the statute
narrowly tailored to those interests.

K.S.A. 74-2701(a) creates the State Board of Cosmetology, and it provides that the Board have eight members. Relevant here, at least two members must be licensed cosmetologists and two members must represent the general public interest.¹ And “[i]f none of the licensed cosmetologist members of the [B]oard is an African-American, at least one member representing the general public interest shall be an African-American.”² Through this “Representation Requirement,” the statute effectively mandates that at least one Board member be African-American.

Because the Representation Requirement classifies Board members on the basis of race, it implicates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.³ Accordingly, the Representation Requirement must be narrowly tailored to further a compelling government interest.⁴ This is known as “strict scrutiny” review, and it is a very demanding standard.⁵

First, there must be a compelling government interest to justify the race-based classification. Only a few interests suffice, including the remediation of “specific, identified instances of past discrimination that violated the Constitution or a statute.”⁶ It is not clear why the legislature adopted the Representation Requirement. It was part of the House Substitute for Senate Bill 643, passed into

¹ K.S.A. 74-2701(a).

² *Id.* This requirement was added to the statute in 2002. See Act of May 30, 2002, ch. 187, § 16, 2002 Kan. Sess. Laws 1196, 1217.

³ The Equal Protection Clause prohibits a State from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Section 1 of the Kansas Bill of Rights provides: “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” Section 2 provides in part: “All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit.” Some older case law asserted that “Section 1 applies in cases . . . when an equal protection challenge involves individual rights.” *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005). But the Kansas Supreme Court has recently recognized that “the textual grounding of equal protection guarantees contained in the Kansas Constitution Bill of Rights is firmly rooted in the language of section 2,” whose protections are “coextensive with” the federal Equal Protection Clause. *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022), *cert. denied sub nom. Alonzo v. Schwab*, 143 S. Ct. 1055 (2023). At any rate, if the Representation Requirement were evaluated under the Kansas Constitution, the court would also apply strict scrutiny review. See *Farley v. Engelken*, 241 Kan. 663, 669–70, 740 P.2d 1058 (1987) (discussing strict scrutiny review for race-based classifications). Accordingly, if the Representation Requirement violates the United States Constitution, it likely violates the Kansas Constitution. And if the Representation Requirement violates federal law, it is unenforceable even if it does not violate state law. See U.S. Const. art. VI, cl. 2.

⁴ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 206–07 (2023).

⁵ See *id.* at 206 (calling strict scrutiny “a daunting two-step examination”); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (recognizing that strict scrutiny is a “searching standard of review” for race-based classifications); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting) (recognizing that “strict scrutiny leaves few survivors”).

⁶ *SFFA*, 600 U.S. at 207.

law in 2002, but the legislative record does not contain the rationale for its inclusion. While the legislature’s reasoning is uncertain, at least two plausible reasons exist.

The first is that the Representation Requirement safeguards against either discrimination in the licensing and investigation of African-American cosmetologists and cosmetology businesses owned by African-Americans or the seating of members on the Board itself. Because of the Board’s broad authority and long history, it is not inconceivable that it (or a predecessor entity) engaged in past discrimination against African-American stylists, businesses, or potential Board members.⁷ But there is no apparent evidence of such discrimination in the legislative record.

The second possible reason is that the Representation Requirement may make it more likely that at least one member of the Board is familiar with hairstyles that are prevalent in the African-American community. This would ensure the Board considers these hairstyles while issuing licenses, conducting investigations, and promulgating rules and guidance. It is unclear whether a court would consider either justification to be sufficiently compelling.⁸

Second, even when supported by a compelling governmental interest, the race-based classification must be narrowly tailored to that interest—*i.e.*, the classification must be “necessary[]to achieve that interest.”⁹ “[T]he most exact connection” must exist “between justification and classification.”¹⁰ Here, it is questionable whether the Representation Requirement is necessary to achieve its goals. Certainly, it ensures African-Americans have a voice on the Board, which might help prevent discrimination and potentially provide the Board with information about hairstyles that are prevalent within the African-American community. But these objectives could likely be fulfilled in a race-neutral manner. For example, K.S.A. 74-2701(a) could be amended to require that one member of the Board have experience or other relevant background in hairstyling techniques and styles that are prevalent within the African-American community. This would both provide a check against potential discrimination and provide the Board with knowledge about these hairstyles.

⁷ See generally *State ex rel. Smith v. Cavender*, 131 Kan. 577, 578–79, 292 P. 763 (1930) (recognizing broad reach of initial 1927 Cosmetology Act).

⁸ See *SFFA*, 600 U.S. at 208 (recognizing that race-based classifications require a “most extraordinary case” to be legal); *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 799 (2011) (noting the government “must specifically identify an ‘actual problem’ in need of solving” (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822–23 (2000))).

⁹ *SFFA*, 600 U.S. at 207 (internal quotes omitted).

¹⁰ *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (internal quotes omitted).

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Consequently, we cannot say with certainty that K.S.A. 74-2701(a)'s Representation Requirement is constitutional. Defending it in court against a constitutional challenge would likely be a difficult task.

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Attorney General

/s/ Adam T. Steinhilber

Adam T. Steinhilber
Assistant Solicitor General