No. 16-3968

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NDIOBA NIANG and TAMEKA STIGERS,

Appellants,

v.

EMILY CARROLL, et al.,

Appellees.

BRIEF OF AMICI CURIAE GOLDWATER INSTITUTE, BEACON CENTER OF TENNESSEE AND THE SHOW-ME INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL

On appeal from the U.S. District Court for the Eastern District of Missouri

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RULE 29(a) STATEMENT

All parties have consented in writing to the filing of this brief.

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IDENTITY AND INTEREST OF AMICI CURIAE

Goldwater Institute ("GI") is a nonpartisan public policy and research foundation dedicated to the principles of limited government, economic freedom, and individual responsibility. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs to advance, *inter alia*, economic liberty as an essential constitutional right. GI scholars have published important research regarding restrictions on this right, including, Mark Flatten, *Protection Racket: Occupational Licensing Laws And The Right to Earn A Living* (Goldwater Institute, 2016)[1]; Stephen Slivinski, *Bootstraps Tangled in Red Tape* (Goldwater Institute Policy Report No. 272, Feb. 23, 2015)[2]; TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING (2010).

The Beacon Center of Tennessee is a free market policy organization whose mission is to empower Tennesseans to freely pursue the American dream. Economic liberty is central to Beacon's mission statement, and Beacon was instrumental in passing the Tennessee Right to Earn a Living Act, which affirms that "the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference is a fundamental civil right." 2016 Tenn. Pub. Acts 1053, SB2469, enacted Apr. 28, 2016.

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[1] http://www.goldwaterinstitute.org/en/work/topics/free-enterprise/regulations/protection-racket-occupational-licensing-laws-and-/.

[2] https://goldwater-media.s3.amazonaws.com/cms_page_media/2015/4/15/OccLicensingKauffman.pdf.

The Show-Me Institute is a Missouri think tank whose mission is "advancing liberty with responsibility by promoting market solutions to Missouri public policy." The Institute engages in research, political commentary, and public outreach on various subjects including the validity of licensing requirements imposed on hair braiders in Missouri.

Amici submit this brief because they believe their public policy perspective and litigation experience will provide an additional viewpoint which will be helpful to this Court.[3]

INTRODUCTION

Economic liberty is a basic human right, essential for realizing the American dream. *See generally* SANDEFUR, *supra*, at xiii; Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and The Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983 (2013). While the government has broad authority to regulate businesses to protect the public against dishonesty, fraud, incompetence, or public health dangers, the regulations it imposes must be related to a person's "fitness or capacity to practice" the business. *Schware v. Board of Bar Exam'rs*, 353 U.S. 232, 239 (1957). Laws that lack such a relationship—that deprive a person of economic liberty without sufficient

[3] Counsel for the parties did not author this brief in whole or in part. No person or entity, other than amicus, its members and counsel made any monetary contribution to the preparation and submission of this brief.

justification—violate the Due Process Clause. *Habhab v. Hon*, 536 F.3d 963, 968 (8th Cir. 2008).

Occupational licensing laws are frequently abused—and have been in this case—to bar economic competition for *private* benefit, rather than to advance any actual public interest. *See generally* Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976). As a White House report recently observed, licensing "reduces employment in the licensed occupation and hence competition, driving up the price of goods and services for consumers. This could benefit licensed practitioners…[b]ut the wages of workers who are excluded from the occupation are reduced…." Office of Economic Policy, *Occupational Licensing: A Framework for Policymakers* 12 (July 2015).[4]

The reason this is a *constitutional* matter, not merely a policy dispute, is that one purpose of the Due Process Clause is to prevent private-interest abuse of the lawmaking power. *See* David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 584-93 (2009). The most basic principle of due process of law is that legislation must serve the *public* interest, rather than the private interests of politically powerful groups. *Weinberg v. Northern Pac. Ry. Co.*, 150 F.2d 645,

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4 https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

651 (8th Cir. 1945). While lawmakers must have discretion to establish regulatory policy in the manner they believe best calculated to benefit the public, they do not have discretion to restrict individual freedom simply to benefit a favored few, or to burden a disfavored group. *Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983). That is true even if the private benefits and burdens are disguised as benefits to the public. *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223-27 (5th Cir. 2013).

It is a common misconception—and was wrongly endorsed by the district court here—that "anything goes" under the rational basis test. In fact, while that test is deferential, it is not toothless, *Kansas City Taxi Cab Drivers Ass'n v. City of Kan. City, Mo.*, 742 F.3d 807, 810 (8th Cir. 2013), or a mere rubber stamp, which upholds anything the legislature labels as reasonable. *Toan*, 709 F.2d at 1211. The rational basis test requires a *rational* inquiry into whether the challenged statute can *realistically* be said to further some *public*-oriented purpose. The district court's effort to fashion a rationalization for the licensing requirement in this case fails to meet that standard.

What this Court said in another context is equally true here: "realism, not formalism, should be dominant; the problem must be solved in the light of commercial actuality, not in the aura of juristic semantics." *Electrical Equip. Co. v. Daniel Hamm Drayage Co.*, 217 F.2d 656, 660 (8th Cir. 1954). The District Court erred by using a mechanistic approach whereby the hard realities

of the facts on the ground are covered up by juristic formulas and purely theoretical rationalizations for the law. *Cf.* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 620–21 (1908) ("The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions. So used, they cease to be conceptions and become empty words.").

For the government to exploit its regulatory power to give monopoly benefits to politically powerful industries as against their competitors also violates the Equal Protection Clause. *Craigmiles*, 312 F.3d at 228; *Castille*, 712 F.3d at 223-27; *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1118 (S.D. Cal. 1999). The court below rejected this argument on the theory—articulated in *Merrifield v. Lockyer*, 547 F.3d 978, 984-85 (9th Cir. 2008)—that when government treats different industries as though they are the same, that cannot violate the Equal Protection Clause. *Niang v. Carroll*, No. 4:14 CV 1100 JMB, 2016 WL 5076170, at **11–12 (E.D. Mo. Sept. 20, 2016). That conclusion was in error. The inequality here lies in the fact that the law requires hair-braiders to get cosmetology licenses, but does not require truck drivers or electricians to get cosmetology licenses, even though hair-braiders, like truck drivers and electricians, are not cosmetologists.

ARGUMENT

I.
EXISTING INDUSTRIES REGULARLY USE LICENSING LAWS TO BLOCK ECONOMIC COMPETITION FOR THEIR OWN PRIVATE INTERESTS

A. Licensing Laws are Routinely Abused to Benefit Politically Powerful Insiders and To Burden Discrete and Insular Minorities

For as long as economic regulations have existed, powerful business interests have sought to exploit them to block economic competition for their own self-interest. SANDEFUR, *supra* at 18-23. The reason is simple: the power to outlaw one's own competition is worth a great deal of money to a business. A firm or an industry that invests the effort to obtain a legal restriction against competition stands to profit from that investment if the restriction enables that firm to raise its prices or stagnate on innovation and improvement. This is why occupational licensing is typically adopted at the request of existing firms, "always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers." Gellhorn, *supra* at 11.

The benefits to the companies that receive such monopoly benefits are difficult to measure, but experts estimate that licensing laws on average enable licensed businesses to charge about 15 percent more for their services than their counterparts in states where licensing barriers do not exist. Flatten, *supra* at 4.

Licensing laws are estimated to raise consumer costs between 3 and 16 percent, costing the economy more than $200 billion each year. *Id.* at 9.

The fact that such laws typically exist not to protect the public but to advance the self-interest of existing industries is demonstrated by the fact that relatively few industries—only about 30—are licensed in all states. *Id.* at 4. Most professions are licensed in only one or a few states. *Id*. Yet there is no evidence to suggest that consumers in those states without licensing are at greater risk from unscrupulous or incompetent practitioners.

For example, interior designers are required to obtain a license in only two states. *Id.* at 8. This makes sense, as it is prima facie obvious that there is no actual risk of harm to consumers from the unlicensed practice of interior decorating. Nevertheless, a trade organization called the American Society of Interior Design has invested years of effort and millions of dollars in seeking to persuade state legislatures to impose licensing laws to block competition. Dick M. Carpenter II, *Designing Cartels* (Institute for Justice, 2007).[5] When Colorado legislators were asked to adopt such a licensing law, they assigned an independent agency to research the proposal. It found no evidence that the unregulated practice of interior design in states without licensing laws had harmed consumers. *See* Colo. Dep't of Regulatory Agencies, Office of Policy & Research, *Interior Designers 2000 Sunrise Review* at 25.[6] The Washington

[5] http://ij.org/wp-content/uploads/2015/03/Interior-Design-Study.pdf.
[6] http://goo.gl/4FUvcv.

State legislature also surveyed states that regulate interior design and found no evidence that consumers were better protected in those states than in states that do not regulate that industry. Wash. Dep't of Licensing, *Sunrise Review of Interior Designers*, Dec. 2005.[7]

Only 16 states require hair-braiders to obtain cosmetology licenses. Flatten, *supra* at 12. Another 14 have a separate license specifically for hair-braiders, and the other states require no license at all. *Id.* There is no evidence that consumers in states where hair-braiding is not licensed have suffered any health consequences or greater instances of fraud. Rather, the beneficiaries of licensing restrictions on the practice of hair-braiding are established barbers and cosmetologists who are thereby able to block legitimate economic competition.

It is also evident that unlicensed hair-braiding is not a genuine threat to public safety because Missouri law allows people to braid each other's hair without a license, so long as they do so for no money, or do so at amusement parks or entertainment venues. *Niang,* 2016 WL 5076170 at *17 n.17. Were unlicensed hair-braiding in fact a threat to public safety, the statute would not include these exceptions. Also, consumers are already protected from dishonest or incompetent hair-braiders by ordinary consumer protection laws, and ordinary tort law. Licensing adds no additional protection for consumers—but does prevent competition.

[7] http://www.dol.wa.gov/about/docs/SunriseInteriorDesigners.pdf.

In 2008, Colorado published a report that, like its earlier interior design report, surveyed states that require licensure for braiding. It, again, found few instances of disciplinary actions being taken. Dep't of Regulatory Agencies, Office of Policy, Research & Regulatory Reform, 2008 Sunrise Review: *Hair Braiders/Natural Hairstylists* at 16-17.[8] Rather, it found that—as is true here—the licensing law did not actually require any significant amount of study of actual hair-braiding before a person could obtain a hair-braiding license. *Id.* at 20. Consequently, "an unlicensed person who has been providing hair braiding/natural hairstyling services for years is in violation of the law, while a licensed hairstylist can legitimately provide these services to the public without having had a single hour of training." *Id.* Such an absurd result does nothing to protect the public.

Licensing can actually harm consumers by reducing the competitive forces that can improve public safety. Flatten, *supra* at 26. And licensing can cause what economists call "the Cadillac effect": raising the requirements so high that consumers cannot afford licensed services and resort to the underground economy instead. *Id.* *See also* S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 79-80 (1987). (describing how the "Cadillac effect" harms consumers by forcing them into the

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8 http://hermes.cde.state.co.us/drupal/islandora/object/co%3A4645/datastream/OBJ/view.

underground economy and depriving them of a chance to hire competent, but not top-flight, practitioners.)

Existing industries have an incentive to define the scope of their practice expansively, so as to broaden their power to restrict competition. For example, in *North Carolina State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101 (2015), the Federal Trade Commission sued a state regulatory board which declared that teeth-whitening services qualified as the practice of dentistry and was therefore off-limits to non-dentists. The FTC noted that the complaints that triggered the agency's action were not from consumers, but from licensed dentists who objected to competition. *In the Matter of the N.C. Bd. of Dental Exam'rs*, 152 F.T.C. 640, 2011 WL 11798463 at **4, 11 (2011). It also noted that the regulatory board was made up of practicing dentists, who stood to personally gain from stifling competition. *N.C. Bd. of Dental Exam'rs v. F.T.C.*, 717 F.3d 359, 369 (4th Cir. 2013). Teeth-whitening is a perfectly safe activity that can be performed at home with an over-the-counter kit. But by defining it as within the practice of dentistry, established dentists were able to block competition for their own purposes. The Supreme Court allowed the antitrust case to proceed, warning that "[s]tate agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing." 135 S. Ct. at 1114.

The same thing is happening here, just in a different version: the Board of Cosmetology and Barber Examiners—"on which a controlling number of

decisionmakers are active market participants in the occupation the board regulates," *id.* at 1114—has interpreted the scope of practice broadly to encompass hair-braiding, despite the fact that hair-braiders do not use chemicals or cut hair. Consequently, the plaintiffs are forced to obtain a license despite the fact that practically none of the required training curriculum is relevant to the practice of hair-braiding. *Niang*, 2016 WL 5076170, at *5. There is virtually no evidence that enforcing this licensing requirement has protected or will protect consumers from any genuine public health hazard. The Board admits as much. JA1861-67, JA1849-50; ADD45-49; see also ADD43. On the contrary, there is a "more obvious illegitimate purpose to which licensure [requirement] is very well tailored," namely that it "imposes a significant barrier to competition," *Craigmiles*, 312 F.3d at 228.

B. Licensing Laws That Restrict Economic Opportunity in Ordinary Occupations Are a Significant Threat to Minority Groups

The hair-braiding trade is a prime example of the role that economic liberty—or its violation—plays in the lives of ordinary Americans. Consider the case of Debra Nutall.

In the 1990s, Nutall was a single mother of three living in a Memphis housing project and working as a nursing assistant. Flatten, *supra*, at 2. Because the job did not pay much, she decided to make extra money by offering hair-braiding services, a skill she learned from her mother. She got a business license and ran the business, first out of her home, and later out of a Memphis

storefront, paying taxes and satisfying customers with her quality work. She became so successful that others came to learn her techniques and she became highly regarded as a pioneer in the industry. *Id*. at 2-3. Her sister, Tammy Pritchard, worked in the salon with her, shampooing hair. *See* Kevin McKenzie, *Memphis Sisters Star in Think Tank's Assault on Shampoo License*, MEMPHIS COMMERCIAL APPEAL, May 2, 2016.[9]

But in 1995, Nutall began receiving threats from the Tennessee Board of Cosmetology, which claimed she was violating the law by not having a cosmetology license. Obtaining a license would have required 300 hours of classes (a year of schooling) at a cost of about $2,000—and an expensive exam testing skills Nutall never used. Flatten, *supra*, at 10. Pritchard, too, was threatened with prosecution for shampooing without a license—a crime punishable by six months in prison—despite the fact that no Tennessee school offers a shampooing curriculum. McKenzie, *supra*. (It was and remains legal in Tennessee to braid or shampoo another person's hair without a license if one is not paid for doing so.)

Hair-braiding and shampooing are, of course, not trades typically practiced by wealthy, highly-educated, politically influential individuals. Many hair-braiders are recent immigrants, some still learning English. Their hair-braiding skills may be their best chance at economic independence. *See Braider*

[9] http://archive.commercialappeal.com/business/development/Memphis-sisters-star-in-think-tanks-assault-on-shampoo-license-377866341.html.

Licensing Raises Issue of State Regulation vs. Culture, TAMPA BAY TIMES, Sept. 22, 2006[10] ("Some…worry about…immigrant braiders who came to America with very little to their name and often don't speak English, a skill they would likely need to get through certification classes. 'They came here with that craft,' said [one braider]…. 'That is their only means of getting any sort of income.'"). Restrictions on entry into this trade can "erect additional barriers to the economic independence of poor black women who have few marketable skills other than braiding." Monica C. Bell, *The Braiding Cases, Cultural Deference, And The Inadequate Protection of Black Women Consumers*, 19 YALE J.L. & FEMINISM 125, 144 (2007).

In fact, GI research shows that while the average entrepreneurship rate among the lowest-income Americans is about .38 percent, or 380 entrepreneurs per 100,000 low-income residents, that rate is far lower in states where more than 50 percent of low-income occupations are subject to licensing requirements. There, the rate is 11 percent below the national average. Slivinski, *supra* at 1, 14. States where fewer than a third of low-income occupations are subject to licensing requirements enjoy an average entrepreneurship rate 11 percent *higher* than the national average. *Id.* at 14. Even accounting for other variables such as age, unemployment, etc., "the mere

[10] http://www.sptimes.com/2006/09/22/Business/Braider_licensing_rai.shtml

presence of widespread occupational licensing can depress the low-income entrepreneurship rate." *Id.*

Nutall tried to obtain political redress. She lobbied state and federal legislators for 15 years to get a statutory exemption from the licensing requirement. But because she was a single individual with no political or economic influence, she could obtain no remedy—despite the fact that Tennessee actually suffered from a *shortage* of licensed hair-braiders and shampoo technicians, due to the excessive cost and time required to obtain a license. In fact, there are only 36 licensed shampoo technicians in Tennessee, and, not coincidentally, they have the highest average wages for shampooers nationwide. Flatten, *supra*, at 10.

Nutall was forced to close her business and move to Mississippi, which requires no license for hair-braiding. *Id.* at 32. Tennessee officials, she said, "left me out there to drown. Are [they] really looking for people to be self-sufficient? Or are [they] really looking for them to be in poverty?" *Id*.

II.
OCCUPATIONAL LICENSING LAWS ARE CONSTITUTIONAL ONLY IF THEY REALISTICALLY SERVE THE PUBLIC INTEREST

A. The Right to Earn A Living Is A Critically Important Part of Constitutionally Protected Liberty

Economic liberty is a crucial part of constitutionally-protected liberty, and "a distinguishing feature of our republican institutions." *Dent v. West Va.*, 129 U.S. 114, 121 (1889). It is an indispensable part of "the American Dream."

See LAWRENCE R. SAMUEL, THE AMERICAN DREAM: A CULTURAL HISTORY 7 (2012) ("upward mobility, the idea that one can, through dedication and with a can-do spirit, climb the ladder of success and reach a higher social and economic position…[is] the heart and soul of the American Dream.").

It is difficult to imagine an adequate definition of freedom that would not include the ability to make economic choices for oneself, including the choice to start a business or offer one's skills for money. The Supreme Court has always held that this right—to engage in "the common occupations of life"—is protected under the "liberty" and "property" provisions of the Fifth and Fourteenth Amendments. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

Economic freedom passes *every* test for being regarded as a fundamental right. It is "'objectively, "deeply rooted in this Nation's history and tradition."'" *Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012) (citation omitted). Four centuries ago, British courts regarded the right to earn a living free of restrictions that serve the private interests of politically powerful businesses, as an essential legally-protected freedom. *See* Calabresi & Leibowitz, *supra* at 989-1003; SANDEFUR, *supra* at 17-25. By the time of the American Revolution, it was well settled that "at the common law, no man could be prohibited from working in any lawful trade," *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218, 1219 (K.B. 1615), and that "at the common law, a man might use what trade he pleased." 1 W. BLACKSTONE, COMMENTARIES

*427. Licensing requirements that lacked a connection to public health and safety violated the principle of due process of law. 3 E. COKE, INSTITUTES *181 ("all grants of monopolies are against the ancient and fundamental laws of this kingdom.").

America's founders regarded economic liberty as an important part of the pursuit of happiness that government is obligated to protect. Calabresi & Leibowitz, *supra* at 1009-23; Mayer, *supra* at 577-87. James Madison, for instance, argued that "the protection of different and unequal faculties of acquiring property" is "the first object of government." THE FEDERALIST No. 10 at 58 (J. Cooke ed., 1961). If "arbitrary restrictions, exemptions, and monopolies deny to part of its citizens…[the] free choice of their occupations," the government is "not…just." James Madison, *Property* (1798) *in* JAMES MADISON: WRITINGS 516 (J. Rakove ed., 1999).

Economic freedom is also "'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.'" *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir. 2002) (citation omitted). A society where individuals lack the freedom to make their own economic choices cannot be free. In fact, one reason the American founders rebelled against the British monarchy was that it deprived them of economic opportunity by granting monopolies to politically favored groups. *See* Calabresi & Leibowitz, *supra* at 1007-08.

No society that has deprived its people of economic freedom has ever maintained any other liberty for long. *See, e.g.*, Francisco Toro, *It's Official: Venezuela is A Full-Blown Dictatorship*, WASH. POST, Oct. 21, 2015.[11] Restricting economic freedom has been a common tool by which oppressive governments have abused disfavored minorities—including in the United States. *See* SANDEFUR, *supra* at 145-47 (describing how California used licensing laws to oppress Chinese immigrants); DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS (2000) (describing how southern states used economic restrictions to oppress black Americans after the Civil War). This Court has recognized that the right to "pursu[e]…a chosen employment" is "'of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure.'" *Freeman v. Gould Special Sch. Dist. of Lincoln Cnty*, 405 F.2d 1153, 1164 (8th Cir. 1969) (citation omitted).

Economic freedom likely plays a far greater role in the lives of ordinary Americans than most of the rights courts treat as favored and "fundamental." Half of eligible voters do not vote, *see* Adam Taylor, *American Voter Turnout is Still Lower Than Most Other Wealthy Nations*, Wash. Post, Nov. 10, 2016,[12] and about two-thirds do not travel, Rafat Ali, *Travel Habits of Americans: 63%*

[11] https://www.washingtonpost.com/news/global-opinions/wp/2016/10/21/its-official-venezuela-is-a-dictatorship/?utm_term=.17d58573d9d0.
[12] https://www.washingtonpost.com/news/worldviews/wp/2016/11/10/even-in-a-historic-election-americans-dont-vote-as-much-as-those-from-other-nations/?utm_term=.1e04254509b5.

of Adult Americans Have Not Traveled Last Year, Skift.com, Sep. 2, 2014,[13] despite these rights being treated as "fundamental" under current law. But virtually every American exercises economic liberty each day, either as a consumer—by choosing where to shop and what to buy—or as a producer, by working for a living. More than half of Americans would like to start their own business someday. Donald W. Moore, *Majority of Americans Want to Start Own Business*, Gallup.com, Apr. 12, 2005.[14]

Nor is the importance of economic freedom a politically partisan viewpoint. Clinton Administration Solicitor General Walter Dellinger has observed that "both economic and non-economic liberty…are essential…. [T]he failure to protect either economic or personal liberty inevitably weakens both." *The Indivisibility of Economic Rights And Personal Liberty*, 2003-2004 CATO SUP. CT. REV. 9, 10, 18.[15] Democratic Senator Chuck Hagel has declared that "[w]ithout economic freedom, people do not have choices or independence. Every specific freedom that is noted in our Constitution and Bill of Rights would fall apart without economic freedom." Heather Vaughan, *Interview with Charles "Chuck" Hagel,* 16 GEO. PUB. POL'Y REV. 1, 4–5 (2011). Justice William Douglas even called economic liberty "the most precious liberty that

[13] https://skift.com/2014/09/02/travel-habits-of-americans-63-of-adult-americans-have-not-traveled-in-last-year/.
[14] http://www.gallup.com/poll/15832/majority-americans-want-start-own-business.aspx.
[15] https://www.cato.org/supreme-court-review/2003-2004

man possesses." *Barsky v. Board of Regents of Univ.*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

B. Even Under Rational Basis Review, Courts Are Obligated to Protect Entrepreneurs Against Abusive Licensing Restrictions

Legal protection for economic liberty is critically important for people who lack political influence and cannot hope to persuade legislatures to respect their rights. Politically powerful companies can usually exert power to obtain favorable legislation, but individual entrepreneurs, like the plaintiffs here, occupy "'a position of political powerlessness,'" and must rely on the courts fulfilling their "special role" to safeguard their rights. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (citation omitted)).

"Democratic government…respects the majority will, but our forefathers had sufficient vision to ensure that even the many must give way to certain fundamental rights of the few…. 'A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.'" *Haney v. County Bd. of Educ. of Sevier Cnty*, 410 F.2d 920, 925–26 (8th Cir. 1969) (citation omitted). *See also Murray v. Dosal*, 150 F.3d 814, 821 (8th Cir. 1998) (Heaney, J., dissenting) ("Courts have an obligation to protect minority interests when the Constitution is violated by majoritarian will.").

But people "who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined." Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation*

and Reburial, 1962 SUP. CT. REV. 34, 50. "The would-be barmaids of Michigan or the would-be plumbers of Illinois have no more chance against the entrenched influence of the established bartenders and master plumbers than the Jehovah's Witnesses had [in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)]." *Id.*

Courts have reduced judicial protection of economic liberty to the level of rational-basis review for two reasons: first, because legislatures, and not courts, should make policy determinations, *Young v. Ricketts*, 825 F.3d 487, 495 (8th Cir. 2016), and second, because it is presumed that "'improvident decisions will eventually be rectified by the democratic process,'" so that judicial intervention is unnecessary. *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 442 (8th Cir. 2007) (citation omitted).

As to the first reason, it is correct that courts should not make policy determinations. But this case does not involve a policy determination. It involves constitutionally protected rights: specifically, the right to engage in a common occupation without unreasonable government interference. *Moran*, 296 F.3d at 645. The District Court's assertion that this case involves a policy disagreement over "whether this is a wise law" was a straw man. *Niang*, 2016 WL 5076170, at *19.

As to the presumption that economic freedom can be relegated to the democratic process, this case makes plain that such a naïve notion would throw an entire class of politically powerless individuals on the mercy of a

majoritarian process they have no hope of influencing and would "sacrifice their civil rights in the name of an amiable fiction." McCloskey, *supra* at 50. This Court should not "forget[] the political impotence of the isolated job-seeker who has been fenced out of an occupation." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1374 (2d ed. 1988).

Nor should this Court use the rational basis test as a mindless formalism—a set of magic words shields legislative action from meaningful judicial scrutiny. The Supreme Court has made clear that the rational basis test is not a rubber-stamp, but only a *factual* presumption. *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934). "As such it is…rebuttable," *id.*, and where a challenged law "is predicated upon the particular economic facts of a given trade or industry…these facts are properly the subject of evidence and of findings." *Id.* at 210. *Accord, United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938); *Polk Co. v. Glover*, 305 U.S. 5, 9-10 (1938); *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405, 414 (1935).

In other words, the test does *not* justify a court in disregarding reality or indulging in "fanciful conjecture," *Borden's Farm*, 293 U.S. at 209, or "fantasy," *Castille*, 712 F.3d at 223, or "accept[ing] nonsensical explanations for regulation," *id.* at 226, or "manufactur[ing] justifications in order to save an apparently invalid statutory classification." *Schlesinger v. Ballard*, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting). As this Court observed in *Toan*, 709 F.2d at 1211, "states may have great discretion" under the rational basis test, but

"they do not have unbridled discretion. They must still explain why they chose to [adopt the rule they did]."

The District Court sought to justify its refusal to take a realistic look at the effect of the law at issue here by citing Chief Justice Roberts' admonition that courts should avoid making political judgments. *See Niang*, 2016 WL 5076170, at **13, 19. The court would have been better served to remember Chief Justice Roberts's warning that "[t]here is a difference between judicial restraint and judicial abdication." *Citizens United v. FEC*, 558 U.S. 310, 375 (2010).

Since the first Supreme Court case on the constitutionality of occupational licensing, *Dent*, 129 U.S. at 122, the Court has consistently held that licensing requirements must be "appropriate to the calling or profession, and attainable by reasonable study or application." *Id.* If they bear "no relation to such calling or profession, or are unattainable by such reasonable study and application," they "deprive one of his right to pursue a lawful vocation." *Id*. Even after the advent of the rational basis test, this is still the rule. States may impose "high standards of qualification," but those standards "must have a rational connection with the applicant's fitness or capacity to practice" the profession. *Schware*, 353 U.S. at 239.

Determining whether that link exists requires a realistic examination of the law and its consequences. In his decisive concurring opinion in *Kelo v. City of New London*, 545 U.S. 469, 491 (2005), Justice Kennedy explained that "a

court applying rational-basis review" must reject "pretextual public justifications" for a law. Where a plaintiff alleges that a law lacks a rational basis, a court "should treat the objection as a serious one" and conduct "a careful and extensive inquiry" to "see if it has merit." *Id.*

In short, under the rational basis test, government "may not under the guise of protecting the public interest, arbitrarily interfere with…or impose unreasonable restrictions upon [a] lawful calling." *Weinberg*, 150 F.2d at 651. Government may regulate businesses only to promote "the interests of the public generally, as distinguished from those of a particular class…and even when this condition may be said to exist, the means to accomplish the purpose must be reasonably necessary and not oppressive nor arbitrary." *Id.*

Rational basis is, of course, lenient, as this Court noted in *Kansas City Taxi Cab Drivers Ass'n*, 742 F.3d at 810. But it is also not "toothless." *Id.* And that case is easily distinguishable because it involved taxicabs, long classified as public utilities. Anticompetitive licensing requirements have traditionally been regarded as more justifiable in cases involving public utilities—given the heavier regulation imposed on them—than in an ordinary competitive market such as hair-braiding, where the only monopolistic tendencies are created by the law itself. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 279 (1932) (striking down licensing law that would have been constitutional if applied to a public utility, when it was applied to an ordinary competitive market, because the law "does not protect against monopoly, but

tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.").

III.
A LAW THAT UNREASONABLY TREATS DIFFERENT BUSINESSES AS THOUGH THEY ARE THE SAME CAN VIOLATE THE EQUAL PROTECTION CLAUSE

The District Court rejected the proposition that the Equal Protection Clause can be violated by unreasonably lumping two different businesses together under the same regulation. It did so on the formalistic notion that as long as the law treats two things the same, that sameness precludes a violation of the Equal Protection Clause, no matter how different those things actually are. *See Niang*, 2016 WL 5076170 at *12.

But the Equal Protection violation here does not reside in any inequality between hair-braiders and cosmetologists, who are subject to the same statute. It resides in the inequality between hair-braiders and *other non-cosmetology professions*. *These* are the similarly-situated categories. The inequality lies in the fact that while painters, dentists, obstetricians, and other non-cosmetology professions are not required to get a cosmetology license, hair-braiders are, despite the fact that hair-braiders are no more cosmetologists than are painters, dentists, or obstetricians. It is true that subjecting all Xs and all Ys to the same rule formally satisfies the demands of equality *inter se*, even if that rule is only rational with regard to Y. But the relevant inequality is that X is subject to that

rule, *while A, B, and C are not,* , even though X is similarly situated to A, B, and C, not to Y.

It would plainly be arbitrary for the government to require lawyers to be licensed as architects, *cf. Cornwell*, 80 F. Supp. 2d at 1106, and would violate Due Process of Law for that reason. But it would also violate equal treatment, not because such a requirement would treat lawyers and architects differently—it would not—but because it would treat lawyers differently than firemen, bookkeepers, and journalists, who, like lawyers, are not architects, but who are not required to get architect licenses while the lawyers are. The *Merrifield* court committed a fallacy in its discussion of *Cornwell* in looking for inequality in the wrong relationship. That fallacy is ironic in light of the *Merrifield* court's holding that a judge "cannot simultaneously uphold [a] licensing requirement…based on one rationale and then uphold [an] exclusion from the exemption based on a completely contradictory rationale." 547 F.3d at 991.

Equal treatment requires the recognition of relevant distinctions, simply because the context in which legislation operates is relevant. As the Supreme Court explained in *Carolene Products*, 304 U.S. at 153–54, "the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason *because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the*

prohibition." (Emphasis added). In other words, it can violate the principle of equality to impose a uniform rule on things that are different.

The Supreme Court has repeatedly endorsed the inequality theory that the court below called "dicta." In *Anderson v. Celebrezze*, 460 U.S. 780, 800–01 (1983), it invalidated an Ohio requirement that independent Presidential candidates satisfy an early filing deadline before running for office, even though that deadline also applied to candidates who ran as members of political parties. The Court recognized that the early filing deadline made sense for party members, because they competed in primary elections for nomination. But independent candidates do not do so. It therefore was irrational to force them into the same mold as partisan candidates. "In short, 'equal treatment' of partisan and independent candidates simply is not achieved by imposing the…deadline on both," the Court declared. "As we have written, '[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.'" *Id.* at 801 (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). *See also Buckley v. Valeo*, 424 U.S. 1, 97–98 (1976); *American Party of Tex. v. White*, 415 U.S. 767, 782 (1974).

Unequal treatment often occurs despite an apparent equality. One clear example of this phenomenon, which, appropriately enough, also involved hair-braiding, is *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6,546), which struck down a San Francisco ordinance requiring the county jail to shave the heads of male prisoners. Although the county claimed this was a

sanitation ordinance, the court found this to be "a mere pretense," *id.* at 254, and that the law was intended to penalize Chinese immigrants, who prized their long braided queues. The Chinese were targeted because white laborers did not want to compete against them economically. *See* SANDEFUR, *supra* at 145-47. And although the ordinance was written in general terms—and today would be subject to rational basis review—the court found that this did not resolve the question. "When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men," the court declared. *Id.* at 255. If judges were required to uphold any law the government claimed was a public health measure, "the most important provisions of the constitution, intended for the security of personal rights, would…often be evaded and practically annulled." *Id.*

This case may not involve *de jure* discrimination, but as *Cornwell* observed, 80 F. Supp. 2d at 1104–05, there is a racial aspect that cannot be overlooked. Licensing laws disproportionately burden low-income occupations and minority business owners. *See* Slivinski, *supra*. Black workers are 23 times less likely to have a license than are whites, Salim Furth, *Understanding The Data on Occupational Licensing* (Heritage Foundation, Sept. 28, 2016),[16] and licensing requirements disproportionately handicap minority entrepreneurs. Slivinski, *supra*. Moreover, African hair-braiding has a distinctive cultural

[16] http://www.heritage.org/research/reports/2016/09/understanding-the-data-on-occupational-licensing.

connection linked to people of African descent. JA1744, JA1754. These facts well justify one scholar's conclusion that "any regulation that imposes barriers to entry is likely to have adverse effects on outsiders who want to become insiders. One problem with licensing laws is that in our society, minorities are more likely to be outsiders than insiders." YOUNG, *supra* at 75.

CONCLUSION

The rational basis test does not strike judges with blindness and forbid them to know as judges what they know as people. *Nunan*, 12 F. Cas. at 255. Nor is it an excuse for empty formalism—for mechanically recitating legal formulas rather than genuinely examining "the realities of the subject." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

Hair-braiding is not cosmetology. It is not a plausible threat to public health, or it would be illegal to do it for free or at public fairs. The law challenged here is only a restriction on competition engineered to benefit insiders against entrepreneurs who want to exercise their "fundamental interest…in the right to engage in [one] of the common occupations of life." *Moran*, 296 F.3d at 645. It raises costs, suffocates economic opportunity, and violates the Constitution.

The judgment below should be *reversed*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of January, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ *Timothy Sandefur*
Timothy Sandefur

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(C), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. THE BRIEF CONTAINS 6,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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3. Pursuant to 8th Cir. R. 28(h)(2), the electronically filed brief , addendum, and joint appendix have been scanned for viruses and are virus free.

Dated: January 10, 2017

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