No. 17-1428

IN THE

Supreme Court of the United States

NDIOBA NIANG and TAMEKA STIGERS,

Petitioners,

v.

BRITTANY TOMBLINSON, in her official capacity as executive director of the Missouri Board of Cosmetology and Barber Examiners, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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May 14, 2018

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INTEREST OF *AMICUS CURIAE*

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing *pro bono* legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human-rights issues.

The Rutherford Institute is interested in this case because arbitrary occupational licensing regimes, like the one at issue in this case, infringe upon fundamental liberty interests, including the well-established right to earn a living in one's chosen profession.[1]

SUMMARY OF ARGUMENT

The right to earn a living free from arbitrary government interference is a fundamental right implicit in the concept of ordered liberty. The right was recognized at common law and by both the framers of the Constitution and the drafters of the Fourteenth Amendment.

Irrational occupational licensing regimes are a growing threat to that right. As recently as 1950, occupational licensing requirements affected only about

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amicus*'s intent to file this brief, and have provided their written consent.

one in twenty Americans. But they are becoming ever more prevalent in ever more fields, and now affect a full quarter of the American work force. And a growing body of empirical evidence shows that these requirements slow economic growth, hurt consumers, and have disproportionate negative effects on already disadvantaged groups.

The state regulations at issue here are an example of occupational licensing gone wrong. Under Missouri law, to practice African-style hair braiding, one must become licensed a cosmetologist or barber—either of which is an expensive, time-consuming process that has only marginal relevance to the practice of hair braiding. This requirement serves only to protect the economic interests of licensed cosmetologists and barbers at the expense of unlicensed persons who want to earn a living as hair braiders.

The Court should grant the petition to resolve a split among the courts of appeals as to the level of deference that ought to be applied in occupational licensing cases. The Fifth, Sixth, and Ninth Circuits have—correctly—applied a searching and meaningful level of review to ensure that occupational licensing regimes rationally relate to a legitimate governmental interest. By contrast, the Eighth Circuit here applied a highly deferential version of rational-basis review, all but ensuring that the cosmetology licensing requirements at issue would survive scrutiny, despite their negative impact upon African-style hair braiders. The Court should resolve this split by requiring courts to apply a searching review of the record in occupational licensing cases to ensure that the regulatory regimes are rational in fact and not just in theory.

THE WRIT SHOULD BE GRANTED

I. This case involves an issue of national importance concerning the impact of occupational licensing regimes upon the fundamental right to earn a living free from arbitrary interference.

By their nature, occupational licensing schemes restrain an individual's fundamental right to earn a living through the practice of his or her trade—a right which finds expression in the foundations of pre-colonial British common law, in the natural-law philosophies of the Founding Fathers, and in the drafting history of the Fourteenth Amendment.

A. The right to earn a living and to pursue one's occupation of choice is an essential liberty interest protected by the Fourteenth Amendment.

Few rights are so deeply rooted in American history and tradition as the right to apply one's own talent and initiative to earn an honest living free from arbitrary government interference. Indeed, this right was well known at common law for more than a century before America's founding, being most clearly articulated in the British case of *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1613). In *Allen*, Chief Justice Edward Coke held that both the Magna Carta and the common law protected the right of "any man to use any trade thereby to maintain himself and his family." *Id.* at 1055.

Chief Justice Coke expounded upon this concept in his seminal treatises, explaining that the common law found monopolies illegal precisely because they prohibited others from competing fairly and earning

a living. Edward Coke, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 181 (1644). Judge Blackstone also recognized man's fundamental right to economic liberty, affirming the general proposition that "[a]t common law every man might use what trade he pleased." 1 William Blackstone, COMMENTARIES 427.

The Founding Fathers also recognized the right to earn a living as an essential liberty. Thomas Jefferson declared that "[e]very one has a natural right to choose for his pursuit such one of them as he thinks most likely to furnish him subsistence." Thomas Jefferson, Thoughts on Lotteries, *in* 3 MEMOIR, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON 429 (Thomas Jefferson Randolph ed. 1829). According to Jefferson, the "first principle of association" was "the *guarantee* to every one of a free exercise of his industry, and the fruits acquired by it." Thomas Jefferson, To Mr. Joseph Milligan, *in* 14 WRITINGS OF THOMAS JEFFERSON 466 (Albert Ellery Burgh ed. 1905). Jefferson's convictions as to the centrality of economic liberty were memorialized in the Declaration of Independence, in which he expanded Locke's fundamental rights formulation of "Life, Liberty, and Estate" to "certain unalienable Rights," among which were "Life, Liberty, and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). As Jefferson and his contemporaries recognized, the "pursuit of Happiness" encompassed the right to labor in pursuit of a productive and self-sustaining life, secured by the

natural right to economic liberty and property—a concept synonymous with the "American Dream."[2]

Like Jefferson, James Madison also conceived of economic liberty as a natural right, professing that only an unjust government would permit "arbitrary restrictions, exemptions, and monopolies [to] deny to part of its citizens that free use of their faculties, and free choice of their occupations." James Madison, Property, *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 479 (1865); *see also* James Madison, Speech in the Virginia State Convention of 1829–'30, *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 51 (1865) ("The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right."). Madison and George Mason memorialized their conception of economic liberty as an expression of natural law in the Virginia Declaration of Rights, affirming that all men possess "certain inherent rights … namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." THE VIRGINIA DECLARATION OF RIGHTS para. 1 (1776).

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[2] *See* Adrienne Koch, JEFFERSON AND MADISON: THE GREAT COLLABORATION 79 (1950) (describing Jefferson's natural rights philosophy as "not far removed" from Locke's conception of property, which encompassed man's "natural right to work and to the fruit of his own labor," and to have "property *in his person*, in the faculties that he can employ to make the earth more productive"); Pauline Maier, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 134 (2012) ("The inherent right to pursue happiness probably also included 'the means of acquiring and possessing property….'").

Like Jefferson and Madison, the framers of the Fourteenth Amendment conceived of the right to earn a living as a fundamental right. When introducing the bill that would become the amendment, Senator Jacob Howard presented "the views and motives which influenced that Committee" when drafting the Privileges and Immunities Clause of the Fourteenth Amendment, and illustrated the point by reading from Justice Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866). In *Corfield*, Justice Washington wrote that the Privileges and Immunities Clause in Article IV protected "privileges deemed to be fundamental," including "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." 6 F. Cas. at 551–52.

Nearly every major newspaper in the country covered Senator Howard's speech as front-page news. *E.g.*, *The Reconstruction Committee's Amendment in the Senate*, N.Y. TIMES, May 25, 1866, at 2, col. 4 (calling Senator Howard's exposition "frank and satisfactory … clear and cogent"); *The Reconstruction Debate in the Senate*, CHI. TRIBUNE, May 29, 1866, at 2, col. 3 (characterizing Senator Howard's explanation as "very forcible and well put" and observing that it "commanded the close attention of the Senate"). Senator Howard's formulation was further confirmed by Representative John Bingham, the principal architect of the Privileges or Immunities Clause, who explained its original intent in protecting "the

liberty … to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil." Cong. Globe, 42d Cong., 1st Sess. app. 86 (1871).

At the time that the Fourteenth Amendment was ratified, the term "due process" had been long understood as protecting the right to earn a living free of unreasonable government interference, as an extension of the Magna Carta's "law of the land" provision, which had protected subjects from arbitrary government interference in trade. *See* Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351–53 (1868); Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 46 (2003) ("Most English and American courts accepted Coke's interpretation of … the meaning of 'law of the land' and 'due process of law,' and numerous United States federal and state judicial opinions have cited his interpretations of the Magna Carta and the common law.").

Consistent with this history, this Court has long held that the Due Process Clause offers substantial protection from government attempts to restrict an individual's "fundamental rights," defined as those "which are 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). This Court has also recognized that among the fundamental rights guaranteed by the Due Process Clause is the freedom:

> to engage in any of *the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy *those privileges long recognized at common law* as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 588 (1972) ("This Court has long maintained that 'the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure.'") (quoting *Truax v. Raich*, 239 U.S. 33, 41 (1915) (Hughes, J.)).

The Court applied this principle in *Lowe v. Securities & Exchange Commission*, 472 U.S. 181 (1985), invalidating an injunction against a group of former investment advisors who sought to publish a newsletter expressing personal investment opinions. The Court held that it was "'undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose' [subject only to rules which] 'have a rational connection with the applicant's fitness or capacity to practice' the profession." *Id.* at 228 (quoting *Dent v. West Virginia*, 129 U.S. 114, 121–22 (1889) (upholding a licensing requirement to practice medicine); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (holding that prior Communist Party affiliations and

union-related arrests were unrelated and invalid bases to exclude a person from the legal practice)).

Similarly, in *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925), this Court enjoined Oregon from enforcing a statute which, with limited exception, prohibited non-public schools from engaging in the work of teaching their students. In so doing, it upheld the teachers' rights to work at those schools and granted the school "protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property." *Id.* at 536.

And in *Connecticut v. Gabbert*, 526 U.S. 286 (1999), this Court recognized that "the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment." *Id.* at 291–92.

One of the most eloquent expressions of the right to earn a living comes from Justice Douglas's dissent in *Barsky v. Board of Regents of the University of the State of New York*, 347 U.S. 442 (1954). In *Barsky*, the Court allowed a doctor's medical license to be revoked for refusing to submit to an investigation about alleged Communist sympathies. Justice Douglas criticized the majority's willingness to defer to arbitrary occupational licensing schemes, writing:

> The right to work, I had assumed, was the most precious liberty that man possesses. *Man has indeed as much right to work as he has to live, to be free, to own property.*...

> And so the question here is not what government must give, but rather what it may not take away….
>
> If, for the same reason, New York had attempted to put Dr. Barsky to death or to put him in jail or to take his property, there would be a flagrant violation of due process. I do not understand the reasoning which holds that the State may not do these things, but may nevertheless suspend Dr. Barsky's power to practice his profession. I repeat, *it does a man little good to stay alive and free and propertied, if he cannot work*.

Id. at 472–73 (Douglas, J., dissenting) (emphasis added).

We respectfully submit that Justice Douglas has it right all along. This Court should reaffirm the fundamental right to earn a living free from government interference as expressed in *Meyer*, *Lowe*, *Pierce*, and *Gabbert*.

B. Arbitrary occupational licensing regulations slow economic growth, reduce competition, harm consumers, and have outsized effects on disadvantaged and minority populations.

Recent decades have seen a five-fold increase in occupational licensing schemes; in 1950, less than five percent of American workers needed a state li-

cense to work, while today, more than twenty-five percent of workers require a state license.[3]

Scholars across the political spectrum agree that occupational licensing regimes should be reduced because they:

- reduce competition and increase prices, costing consumers an estimated $203 billion per year[4];
- widen inequality and decrease upward mobility for low-income families[5];
- restrict employment, with an estimated loss of over 2.8 million jobs nationwide[6];
- reduce service availability[7]; and

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[3] *See* Morris Kleiner & Alan Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173 (2013).

[4] *See* Morris Kleiner, REFORMING OCCUPATIONAL LICENSING POLICIES 6 (2015), http://goo.gl/Koa7nK; *see generally* OFFICE OF ECON. POLICY, COUNCIL OF ECON. ADVISERS, & DEP'T OF LAB., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015), http://goo.gl/Q4fuhS (hereinafter "White House Rep.").

[5] *See* Will Marshall, UNLEASHING INNOVATION AND GROWTH (2016), http://goo.gl/nTRNFz; BRIAN MEEHAN, BARRIERS TO MOBILITY (2017), http://goo.gl/58biEo.

[6] *See* Morris Kleiner, REFORMING OCCUPATIONAL LICENSING POLICIES*, supra*, at 6; see *also* Morris Kleiner, LICENSING OCCUPATIONS 43–65 (2006); Morris Kleiner & Robert Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J. Law & Econ. 547 (2000); Dick M. Carpenter II, *Blooming Nonsense: Experiment Reveals Louisiana's Florist Licensing Scheme as Pointless and Anti-Competitive*, INSTITUTE FOR JUSTICE (Mar. 2010), http://goo.gl/iJLxXc/.

- generally fail to improve public health or quality.[8]

Moreover, the effects of these licensing schemes are more likely to disproportionately affect low-income workers,[9] minorities,[10] and distinct groups.[11]

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[7] *See* Daniel Smith, REFORMING OCCUPATIONAL LICENSING IN ALABAMA 4–6 (2015), http://goo.gl/BmzKtx; Morris Kleiner, LICENSING OCCUPATIONS, *supra*, at 1–15; White House Rep., *supra*, at 12.

[8] *See* Stanley Gross, PROFESSIONAL LICENSURE AND QUALITY: THE EVIDENCE (1986), http://goo.gl/QG3Tty; *see also* Morris Kleiner, *Relaxing Occupational Licensing Requirements*, 59 J. LAW & ECON. 284–87 (May 2016) (finding no loss of quality when regulations were eased to allow nurse practitioners to work more independently of physicians); White House Rep., *supra*, at 13 & n.20.

[9] *See* Steven Horowitz, BREAKING DOWN THE BARRIERS (2015), http://goo.gl/NxrQKw; Morris Kleiner & Alan Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173 (2013); White House Rep., *supra*, at 12.

[10] *See* Monica C. Bell, *The Braiding Cases, Cultural Deference, And The Inadequate Protection of Black Women Consumers*, 19 YALE J. L. & FEMINISM 125, 144 (2007) (finding that restricting entry into hair braiding can "erect additional barriers to the economic independence of poor black women who have few marketable skills other than braiding").

[11] *See* Ryan Nunn, *The Future of Occupational Licensing Reform*, THE REGULATORY REVIEW (Jan. 30, 2017), http://goo.gl/ncbsMY. ("To name a few, individuals with criminal records are sometimes barred from working, for instance, as sheet metal workers or barbers, many military veterans with relevant skills are prevented from entering licensed occupations, and entrepreneurs are foiled by an inflexible vision of how work should be organized.").

In the case of hair braiders, there is mounting evidence that "the more stringent a state's statutes concerning cosmetology licensing requirements, the higher will be the average price and the less will be the quantities consumed of those services in that state."[12]

Even in states with restrictive cosmetology licensing regimes, there is "scant" evidence to support the claim that these licensing regimes actually screened out low-quality cosmetologists.[13] Yet the risk of underqualified hair braiding is minimal to nonexistent, as customers have ready-access to information sufficient to choose a braider based on personal quality and price preferences, and the most likely outcome from hiring an underqualified braider is merely a bad hair day.[14]

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[12] A. Frank Adams, *et al.*, *Occupational Licensing in a "Competitive" Labor Market: The Case of Cosmetology*, 23 J. LAB. RES. 267, 273 (2002).

[13] Mark Klee, *How Do Professional Licensing Regulations Affect Practitioners? New Evidence*, U.S. BUREAU OF LAB. STATS., Working Paper No. 2013-30 (2013), http://goo.gl/dgdSQX.

[14] *See* Morris Kleiner, LICENSING OCCUPATIONS, *supra,* at 98 (stating that even in the barbering world, "[t]he difference between a good and bad haircut is two days").

II. Review is warranted to provide guidance on the proper application of rational-basis review in occupational licensing cases.

A. Implicit in this Court's precedents is the idea that the level of deference afforded under rational-basis review modulates with the nature and importance of the rights involved.

In some cases involving economic regulations—such as *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), and *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483 (1955)—the Court has applied a highly deferential version of rational-basis review. In other cases, however, the Court has applied "a more searching form" of review. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment); *see also* Mark Strasser, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex*, 38 PEPP. L. REV. 1021, 1030 (2011) ("It may be that the Court has implicitly decided not to recognize any new suspect or quasi-suspect classes but will instead recognize gradations within the category subjected to rational basis scrutiny."). Some observers have described such cases as applying "rational basis with bite." *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759–63 (2011); Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

For example, in *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court struck down a statutory provision that excluded a household from the food-stamp program if its members were not all related to each other. The Court

rejected the government's argument that the regulation furthered the legitimate government interest in preventing fraud in the program, finding that the regulation would exclude "not those persons who are 'likely to abuse the program' but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." *Id.* at 538.

Another example of a more searching application of rational-basis review is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), which held that a local zoning ordinance was invalid as applied because it required a special-use permit for homes for the mentally retarded but not for other multiple-dwelling facilities. In his separate opinion, Justice Marshall characterized the majority's approach as employing a "searching … or 'second order' rational-basis review," contrasting it to the more deferential approach exemplified by *Lee Optical*. *Id.* at 456–60 471–72 (Marshall, J., concurring in the judgment in part and dissenting in part).

The Court has also applied a more searching form of rational-basis review to laws that were motivated by animus toward a particular group or classified persons based upon immutable characteristics. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Underlying these cases is the recognition that rational-basis review does not mean unfettered deference, but a dynamic inquiry that can be more or less "searching" depending on the context. In cases like this one, in which a state's occupational licensing in-

terferes with an individual's fundamental right to earn a living, the Court should apply a more searching form of rational-basis review.

B. The circuit split identified in the petition is a reflection of the different approaches to rational-basis review in occupational licensing cases.

The petition contrasts the decision below with other court of appeals decisions involving occupational licensing, identifying a split of authority as to whether courts will consider evidence that the regulation has only an incidental effect to a legitimate government interest. Pet. 3, 16–21. Another way of viewing the circuit split is that some courts of appeal are applying a maximally deferential version of rational-basis review, while other courts are applying a more searching review that approaches the "rational basis with bite" review sometimes employed by this Court.

In *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), the Fifth Circuit examined a Louisiana regulation that granted funeral homes the exclusive right to sell caskets within the state. The court took a careful look at the State's proffered rationale for the law—consumer protection—"informed by the setting and history of the challenged rule." *Id.* at 223. The court of appeals rejected the rationale based on a searching examination of the record, concluding that the rationale was not supported by the structure of the regulation. *See id.* at 223–27.

Similarly, in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002)—another case involving limitations on the intrastate sale of caskets—the Sixth Circuit considered whether there was a rational relationship

between the State's licensing requirements and any legitimate governmental interest. While the State contended that the licensing requirements promoted both public health and safety and consumer protection, the Sixth Circuit scrutinized the history of the licensing regime and held that these were merely "pretextual" explanations and that the requirements were merely a "naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers." *Id.* at 229.

And in *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), the Ninth Circuit considered whether a difference in licensing requirements for pest controllers who removed "bats, raccoons, skunks, and squirrels" and those who removed "mice, rats, or pigeons" was rational. *Id.* at 988. After carefully examining the record, including the testimony of the government's expert, the court concluded that the different licensing requirements were not rational because the government's conceivably legitimate interest in differentiating between the two types of pest controllers—that pest controllers targeting certain animals were more likely to be exposed to dangerous pesticides—was contrary to the record evidence. *See id.* at 988–92. Thus, despite a conceivable health-and-safety rationale for the regulation, the Ninth Circuit held that it could not survive rational-basis review.

By contrast, in this case, the Eighth Circuit conducted only a perfunctory rational-basis review. After concluding that the licensing requirement for hair braiders could further a legitimate government interest in health and safety, Pet. App. 5, the Eighth Circuit gave maximum deference to the legislature's decision, *see* Pet. App. 6–8. The court failed to grap-

ple with the record evidence showing that although the regulation purported to advance a legitimate governmental interest, it was too poorly fit to that interest to be rational. Pet. 5, 16.

This case, thus, presents an opportunity for the Court to synthesize the diverging approaches to rational-basis review into a single framework in which the level of deference afforded to a law or regulation decreases along a continuum—and the review becomes more searching—according to the rights at stake and the nature of the classifications at issue. Thus, at one end of the spectrum would be mine-run cases involving routine economic regulations. At the other end, with a rational-basis review that begins to approach intermediate scrutiny, would be cases involving important rights or classifications involving animus or immutable characteristics. For the reasons discussed above—including the fundamental nature of the right to earn a living free of arbitrary government interference—occupational licensing regulations should be subject to this more searching form of rational-basis review.

There will, of course, be instances in which occupational licensing regimes are perfectly rational, such as licensing requirements for physicians. But in many other instances, in which a state's purported interests in enacting licensing requirements are less defined, courts should take a hard look at whether the challenged licensing regimes actually further those purported interests, or whether the licensing regimes are being enacted to protect the economic interests of one particular group at the expense of another.

CONCLUSION

The Court should grant the writ of certiorari.

Respectfully submitted,

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MAY 14, 2018