No. _____

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 Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At summary judgment, the Eighth Circuit rejected a rational-basis challenge to a regulatory scheme despite undisputed evidence that the scheme had only an incidental connection to any legitimate government interest and imposed substantial burdens unrelated to any government interest. The court upheld the application of Missouri's cosmetology/barber licensing scheme to African-style hair braiders despite uncontroverted evidence that very little of the mandated training or testing had any relevance to braiders and that braiders would have to take a thousand or more hours of admittedly irrelevant and expensive training and testing before legally practicing their craft. This ruling creates a split of reasoning with the Fifth, Sixth, and Ninth Circuits regarding whether, under rational-basis review, any incidental connection to a government interest is sufficient to sustain an entire, burdensome regulatory scheme. The ruling below also compounds a mature split between the Second and Fourth Circuits and the First, Fifth, Sixth, and Ninth Circuits regarding the weight that evidence should be given under rational-basis review.

The Questions Presented are:

1. What framework should courts apply when analyzing the constitutionality of economic regulations under the Due Process or Equal Protection Clauses of the Fourteenth Amendment?

2. Should the *Slaughter-House Cases*, 83 U.S. 36 (1873), be overturned?

PARTIES TO THE PROCEEDINGS

The Petitioners are Ndioba Niang and Tameka Stigers.

The Respondents are Brittany Tomblinson, in her official capacity as Executive Director of the Missouri Board of Cosmetology and Barber Examiners;[1] Wayne L. Kindle, in his official capacity as a member of the Missouri Board of Cosmetology and Barber Examiners; Jacklyn J. Crow, in her official capacity as a member of the Missouri Board of Cosmetology and Barber Examiners; Joseph A. 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 L. 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.

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[1] Brittany Tomblinson has replaced Emily Carroll as the Executive Director of the Missouri Board of Cosmetology and Barber Examiners ("the Board"), and thus automatically replaces Ms. Carroll as a party in accordance with Supreme Court Rule 35.3. In addition, Betty Leake is no longer on the Board and is no longer a Respondent.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 879 F.3d 870 (8th Cir. 2018). The opinion of the district court, App. 10, was not reported, but is available at 2016 WL 5076170 (E.D. Mo., Sept. 20, 2016).

JURISDICTION

The order of the court of appeals was entered on January 11, 2018. This petition is timely filed on April 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The plaintiffs below brought this action under 42 U.S.C. § 1983, alleging violations of the Fourteenth Amendment's Due Process, Equal Protection, and Privileges or Immunities Clauses, which provide:

> 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.

U.S. Const. amend. XIV, § 1.

Relevant provisions of Missouri's cosmetology and barbering statutes and regulations are reproduced in the Appendix at App. 59-69.

STATEMENT

This case is a challenge under the Fourteenth Amendment to a Missouri licensing scheme that requires African-style hair braiders to obtain either a cosmetology or barber license to perform their craft. As applied by the Missouri Board of Cosmetology and Barber Examiners ("the Board"), Missouri law requires that African-style hair braiders spend a thousand or more hours attending cosmetology or barbering school (and pay tens of thousands of dollars in tuition) and pass a cosmetology or barbering exam, even though this licensing scheme does not teach or test hair braiding and the state admits the life-changing burdens imposed by the scheme are almost entirely irrelevant to African-style hair braiding. Braiding for compensation without obtaining such a license is a criminal offense.

Petitioners challenged Missouri's licensing scheme on the grounds that the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment do not permit states to subject African-style hair braiders to costly and burdensome occupational licensing requirements that have little, if any, relevance to their profession. But the Eighth Circuit upheld the application of this time-consuming and expensive licensing requirement to braiders – despite noting that just 10 percent or less of the required training and almost none of the required exams have any relevance to braiding – holding that "the fit between the licensing requirement and the State's interest is imperfect, but not unconstitutionally so." App. 7.

In so holding, the Eighth Circuit created a split of reasoning with the Fifth, Sixth, and Ninth Circuits regarding whether, under rational-basis review, courts should consider evidence that a challenged regulatory scheme has only an incidental connection to any legitimate government interest and imposes substantial burdens unrelated to any government interest. Accordingly, the Eighth Circuit explicitly rejected the contrary holdings of three federal district courts that considered factually and legally indistinguishable challenges by African-style hair braiders to state cosmetology/barber regulatory schemes.

In addition, the Eighth Circuit's opinion further implicates a mature, but unacknowledged, circuit split on the broader issue of whether and how to weigh evidence in a rational-basis challenge. By both brushing aside evidence about the marginal fit between the

challenged regulations and any government interest, and ignoring evidence that the licensing scheme imposed major burdens unrelated to any government interest, the Eighth Circuit joined the Second and Fourth Circuits, deepening the split with the First, Fifth, Sixth, and Ninth Circuits regarding whether and how to weigh evidence in rational-basis cases.

The Eighth Circuit's ruling also decides an important question of federal law in a way that conflicts with this Court's guidance on rational-basis review in the context of professional licensing. This Court has held that professional qualifications required by a state must have a "rational connection with the applicant's fitness or capacity to practice" her occupation. *Schware v. Bd. of Bar Exam'rs of New Mexico*, 353 U.S. 232, 239 (1957). But by upholding the application of a licensing scheme that the Board itself admits is "not adequate to qualify, certify or license African-style hair braiders," App. 124, and is almost entirely irrelevant to the practice of African-style hair braiding, *see* App. 102-03, the Eighth Circuit has strayed from this guidance. The practical effect of the Eighth Circuit's ruling is to permit states to impose extremely burdensome occupational licensing requirements that are almost entirely unrelated to a given profession so long as some tiny percentage of the mandated training has an incidental connection to some government interest. This Court should not permit states to use this sort of regulatory bootstrapping to satisfy rational-basis review.

Accordingly, this Court should grant certiorari to clarify the proper application of rational-basis review

and clarify that it is not "rational" for a government to impose a highly burdensome regulatory scheme where undisputed record evidence demonstrates that only a very small proportion of that scheme even incidentally advances any government interest.

The Court should also grant certiorari to address whether the *Slaughter-House Cases*, 83 U.S. 36 (1873), should be overturned so that claims regarding the right to earn a living may be brought under the Privileges or Immunities Clause of the Fourteenth Amendment.

I. Petitioners and their African-style hair braiding services

Petitioners Ndioba Niang and Tameka Stigers are African-style hair braiders who exclusively offer all-natural hair braiding services to customers at salons in the St. Louis area. App. 71-75, 84-90. They do not cut hair, nor do they use potentially dangerous chemicals or heat treatments to straighten, dye, or bleach hair. App. 86, 89. Instead they use only simple tools such as combs, hair clips, and their fingers to provide all-natural hair braiding styles such as Sengalese twists, micro braids, and Sisterlocks. App. 83-86, 88. The braiding they offer is intricate and highly detailed and can take several hours, or even an entire day, to perform. App. 85, 89.

These specialized natural braiding services are not typically offered by cosmetologists or barbers. App. 81-85, 88. In fact, African-style hair braiding developed separately from European cosmetology and barber

practices, originating many centuries ago in Africa. App. 78. African-style hair braiding is a set of natural hair care techniques involving braiding, locking, twisting, and other physical manipulation of the hair without the use of chemicals, which is typically performed on "tightly textured" or "coily" hair, primarily by and for persons of African descent. App. 77-78. Petitioners are devoted to offering African-style hair braiding in part because of its strong cultural significance owing to its distinct geographic, historical, and racial roots. App. 76, 78, 86.

Petitioners do not wish to offer cosmetology or barber services because, as natural hair care providers, they oppose the use of potentially dangerous chemicals or heat to treat hair. App. 73, 78-79, 87, 90-91. They believe these chemicals can be harmful to themselves and their customers, and they do not want to have to handle these chemicals, as would be required during cosmetology or barber training. *Id.*

In addition, Petitioners cannot afford the time or money – a thousand or more hours of training and tens of thousands of dollars in tuition – that it would take to attend cosmetology or barber school to learn a variety of styling techniques that they would not even use as natural hair braiders, while also not learning how to braid. *See* App. 72-73, 76-77.

II. Missouri's cosmetology/barber licensing scheme and its application to African-style hair braiders

Missouri's cosmetology and barbering statutes were adopted in the early twentieth century, and the Board is unaware of whether African-style hair braiding was even considered when the statutes were passed. App. 98. Nonetheless, the Board has interpreted and enforced these statutes such that African-style hair braiders are subject to Missouri's cosmetology/barber licensing scheme. App. 91-95.

Despite this enforcement, the Board itself recognizes that African-style hair braiding is a different occupation from both cosmetology and barbering. App. 80-81, 99, 102. The Board admits that: "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." App. 102. The Board further admits that "hair braiders are currently required to obtain a general cosmetology license and complete a 1,500-hour cosmetology curriculum that is not specifically germane to African Hair Braiding and does not include various aspects of African Hair Braiding." App. 102.

The burdens of licensure are life-changing, both in terms of time and money. To obtain a Missouri cosmetology license, aspiring cosmetologists generally must take 1,500 hours of coursework at a cosmetology school and pass an exam designed specifically for cosmetology. App. 64-65, 93-94, 97. Similarly, aspiring

barbers must take 1,000 hours of coursework at a barber school and take a test designed specifically for barbering.[2] App. 60-61, 95. The cost of tuition at a Missouri cosmetology or barber school averages nearly $12,000 and can cost as much as $21,450. App. 95-96.

The Board admits that the required cosmetology and barber curricula and exams do not require any instruction or testing on hair braiding, and that graduates may obtain a cosmetology or barber license without receiving any experience or training in braiding. App. 98, 116-17, 124-25. In fact, the Board admits that it can only identify 100 hours of the 1,500-hour cosmetology curriculum or 105 hours of the 1,000-hour barbering curriculum that are even potentially "relevant" to African-style hair braiding. App. 102-03.[3]

In other words, more than 93 percent of the mandated cosmetology curriculum (1,400 hours) and about 90 percent of the mandated barbering curriculum (895 hours) is admittedly irrelevant to hair braiders. App. 102-03.

The disconnect between the mandated standards of qualification and the practice of African-style hair braiding is further demonstrated by the standard

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[2] There are slightly different requirements for students at vocational high schools and there is an option to complete an apprenticeship with double the number of required training hours. App. 94-95.

[3] These potentially "relevant" hours cover general health and safety topics, such as twenty hours on "Anatomy," and general business topics, such as ten hours on "Salesmanship and shop management" and ten hours on "State law." App. 103-04.

cosmetology and barber textbooks used in most Missouri schools. As the district court recognized, "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." App. 21 (further noting that the focus of those few pages is not on African-style hair braiding).

Because the textbooks barely discuss braiding, the exams either do not cover braiding or ask, at most, a single braiding question (out of 110). App. 116-17, 119-20. The district court explained, "[b]ecause 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." App. 21. The Eighth Circuit acknowledged that "almost all the exams do not test braiding." App. 7. Accordingly, both the Board and its expert dermatologist admitted that the cosmetology and barber exams were completely inadequate to qualify, certify, or license braiders. App. 122-24.

Because of this disconnect between the cosmetology/barber licensing scheme and African-style hair braiding, the Board has proposed and endorsed creating a separate license for hair braiders. App. 100-01. This is because, as the Board itself admits, "much of the qualifying [barber/cosmetology] curriculum does not relate to" the practice of braiding and "includes a great deal of information [braiders] will never use." App. 101.

Even the state legislature has recognized that licensing braiders as cosmetologists or barbers is not an important public health and safety concern. The only

time the Missouri General Assembly passed a law specifically about hair braiding was to *exempt* hair braiders from cosmetology licensing at public amusement or entertainment venues. *See* App. 59. Even though the Board admits that such venues are no safer than a salon, App. 96, unlicensed braiders can braid at any circus or festival under this exemption, but cannot braid at a salon.

III. Proceedings below

Petitioners filed their complaint in the Eastern District of Missouri in June 2014, raising claims under the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment.[4] At summary judgment, in response to the Board's position that its policy promoted public health and safety and consumer protection, Petitioners presented comprehensive unrebutted evidence about the disconnect between Missouri's cosmetology/barber licensing scheme and the practice of African-style hair braiding.[5]

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[4] Throughout the litigation, Petitioners have preserved their Privileges or Immunities claim while admitting the claim was foreclosed in the lower courts by this Court's precedent in the *Slaughter-House Cases*, 83 U.S. 36 (1873). *See* Br. Appellants at 13 n.3, http://ij.org/wp-content/uploads/2014/06/IJ084147.pdf; Mem. Supp. Pls.' Mot. Summ. J. at 7, http://ij.org/wp-content/uploads/2014/06/Plaintiffs-Memo-in-Support-of-MSJ-Niang-v.-Carroll.pdf.

[5] The Board failed to dispute about 250 paragraphs of Petitioners' Statement of Undisputed Material Facts, instead offering a meritless "General Objection," App. 70-71, denying that testimony of the Board's Rule 30(b)(6) witness represented the Board because the Board had not voted on her testimony. The Board also

The district court nonetheless granted summary judgment to the Board. App. 10-58. The district court found that Petitioners "do not fit comfortably within the traditional definition of cosmetologists and barbers," App. 57, and that "much of the education and training that traditional cosmetologists and barbers undergo is not directly relevant to the narrow practice of [African-style hair braiding]." App. 51. However, the district court pointed to the 100 or 105 hours of "broader education" (out of 1,500 or 1,000 total hours of required training) identified by the Board as the "rational connection" between the licensing regime and legitimate government interests. App. 51. Accordingly, the district court found that "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." App. 52.

The district court expressly rejected the reasoning of two federal district courts in nearly identical challenges by African braiders to the cosmetology/barber licensing regimes in California and Utah.[6] App. 55;

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objected to leading questions of its 30(b)(6) witness, *e.g.*, App. 118, and generally failed to cite specific evidence for the facts it "disputed," as required by the Local Rules; accordingly, all such facts "shall be deemed admitted for purposes of summary judgment." E.D. Mo. L.R. 7-4.01(E).

[6] The district court also brushed aside a third similar case, *Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W.D. Tex. 2015), involving a successful challenge by an African-style braiding instructor to

Clayton v. Steinagel, 885 F. Supp. 2d 1212 (D. Utah 2012); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999). The district court explained that it did "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." App. 55. The district court explained that the *Cornwell* and *Clayton* courts struck down the licensing regimes because of the "marginal overlap between the actual practice of hair braiders and the training/testing requirements." App. 56. The district court viewed this as an improper application of rational-basis review because "[t]his 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." *Id.* (internal quotations omitted). In sum, the district court held that if any part of a licensing scheme is incidentally relevant to a government interest, the entire licensing scheme passes rational-basis review, regardless of the regulatory burdens imposed.

Petitioners timely appealed to the Eighth Circuit, which affirmed the district court's ruling. App. 1-9. The Eighth Circuit adopted a similarly toothless version of rational-basis review, holding that Missouri "may exact a needless, wasteful requirement" so long as it can

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the requirements that her braiding school meet certain requirements designed for barbering schools. App. 35 n.14.

identify "an evil at hand for correction" and believes regulation "was a rational way to correct it." App. 7 (quoting *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-88 (1955)).

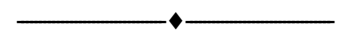
Like the district court, the Eighth Circuit also explicitly rejected the holdings of the three nearly identical challenges by African braiders to cosmetology/barber licensing schemes "[b]ecause these decisions do not appropriately defer to legislative choices." App. 8 n.3. The Eighth Circuit also explicitly distinguished this case from successful challenges to occupational licensing regulations in the Fifth and Sixth Circuits, claiming that in those cases, "the government did not have a legitimate interest." App. 5.

Although the Eighth Circuit acknowledged the Board'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," App. 7, it found that even this ever-so-slight connection between the regulatory scheme and the government interest was sufficient to satisfy rational-basis review because "[t]he fit need only be arguable and rational." App. 6. Thus, it held that "the fit between the licensing requirement and the State's interest is imperfect, but not unconstitutionally so." App. 7.

The Eighth Circuit was unconvinced that Missouri's legislature had undermined the health-and-safety justifications for braider licensing when it created a statutory exception for unlicensed braiding at public amusement and entertainment venues, noting that the

government is not required to address "every aspect of a problem." App. 6 (internal quotations omitted). In sum, the Eighth Circuit held that an almost entirely irrelevant, time-consuming, and expensive licensing scheme could be justified if *any* aspect of the scheme was minimally related to a government interest.

This petition timely followed.



REASONS FOR GRANTING THE WRIT

This case presents crucial questions which merit this Court's review about the standard of review in cases involving challenges to economic regulations. This Court should resolve whether courts engaged in rational-basis review should consider evidence demonstrating that the vast majority of a challenged regulatory scheme imposes a serious burden that does not advance any government interest. This Court should also clarify – given the deepening circuit split and the apparent disparity between *Williamson v. Lee Optical* and other rational-basis decisions by this Court – how courts should consider evidence in analyzing the relationship between challenged laws and the government interests they purport to advance either under rational-basis review or under the Privileges or Immunities Clause of the Fourteenth Amendment.

In Part I, Petitioners show that the Eighth Circuit's opinion creates a split of reasoning with the Fifth, Sixth, and Ninth Circuits regarding whether courts should consider evidence about the regulatory

mismatch and whether the burdens imposed by occupational licensing are irrationally disproportionate to any government interest advanced; in so doing, it also reached the opposite result of three nearly identical federal rational-basis challenges by African-style braiders to state cosmetology/barber regulations. Part II discusses how this case deepens a long-standing, but as-yet-unacknowledged, split among the circuit courts of appeal regarding the consideration of facts in rational-basis challenges to economic regulations. As explained in Part III, the Eighth Circuit's holding also conflicts with this Court's precedent regarding the consideration of facts in rational-basis cases. Part IV discusses how several major developments, including the massive growth in occupational licensing since the 1950s, require this Court to revisit its occupational licensing decisions. Part V addresses why the Court should overturn the *Slaughter-House Cases* and restore the Privileges or Immunities Clause as a constitutional protection for the right to pursue an economic livelihood.

I. The ruling below creates a split of reasoning with three federal circuits regarding rational-basis review of regulatory mismatch in occupational licensing cases and directly conflicts with the outcome of three nearly identical braiding cases.

This Court should grant certiorari because the opinion below creates a split of reasoning with three federal circuits about whether a merely incidental

connection to a government interest can rationally sustain a burdensome and largely irrelevant regulatory scheme. Demonstrating the practical consequences of this split in reasoning, the Eighth Circuit's opinion directly conflicts with three nearly identical federal braiding challenges, two from those circuits.

A. The ruling below creates a split of reasoning with the Fifth, Sixth, and Ninth Circuits regarding whether a merely incidental connection to a government interest is sufficient, under rational-basis review, to sustain a substantial occupational licensing burden.

The case below creates a split of reasoning with the Fifth, Sixth, and Ninth Circuits, which have rejected government claims that some incidental connection to a purported government interest is sufficient to bootstrap an entire regulatory scheme under rational-basis review in similar occupational licensing cases. Although the Eighth Circuit tried to distinguish these cases by saying they were cases in which "the government did not have a legitimate interest," App. 5, the Eighth Circuit ignored that those courts made their determinations by first reviewing the record evidence to determine whether there was a rational relationship between the challenged laws and a legitimate government interest or whether the regulatory mismatch was so severe that it could not rationally support the regulatory burden imposed.

In its opinion below, the court declined to consider whether it is rational to require hair braiders to undergo 1,400 hours of admittedly irrelevant and expensive training because it is packaged with 100 hours of general training that is potentially relevant to hair braiders, *see* App. 102-03, and upheld requiring braiders to take a 110-question licensing exam that the Board admitted was "not adequate to qualify, certify or license African-style hair braiders," App. 124, because it might have a single question about braiding. App. 116-17, 119-20. As a result, the Eighth Circuit permitted Missouri to bootstrap a very broad and almost completely irrelevant regulatory scheme based on an incidental rational connection to a government interest.

In contrast, in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), the Sixth Circuit considered record evidence about the regulatory mismatch to hold that the challenged scheme was insufficiently related to legitimate health-and-safety concerns to rationally justify the burden it imposed. *Craigmiles* was a challenge to Tennessee regulations that permitted only licensed funeral directors to sell caskets. These regulations required a person to "dedicat[e] two years and thousands of dollars to the education and training required for licensure[, which] is undoubtedly a significant barrier to entering the Tennessee casket market." *Id.* at 224-25. The court recognized the presumption of constitutionality and deference owed to the legislature. *Id.* at 223-24. Nevertheless, the court found that the plaintiffs rebutted the proffered justifications for the

regulation with record evidence about the regulatory mismatch. The state claimed the restriction was rationally related to its interest in protecting public health because "the education and training required for licensure insures that those who handle dead bodies may dispose of them safely and prevent the spread of communicable diseases," but the record evidence showed this training was irrelevant to casket retailers, who do not handle human remains or offer embalming services. *Id.* at 225. Moreover, the court rejected the State's attempt to bootstrap the entire licensing requirement based on the justification that licensure "trains directors in the best ways to treat individuals who have suffered profound loss." *Id.* at 228. While casket retailers do frequently deal with bereaved customers, the court found "this justification [was] very weak" given the totality of the scheme and was not enough to rationally justify the burdens of the scheme. *Id.* Thus, the Sixth Circuit rejected the licensing scheme as irrational despite this minimal connection between the required training and a legitimate government interest.[7]

In *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), the Ninth Circuit also considered record evidence about the regulatory mismatch to hold that the challenged scheme was not adequately related to a legitimate health-and-safety interest to rationally

[7] Indeed, having considered all the evidence and eliminated any public-health justification for the regulation, the Sixth Circuit recognized that the law was instead designed to "protect[ ] a discrete interest group [funeral directors] from economic competition," which was "not a legitimate governmental purpose." *Craigmiles*, 312 F.3d at 224.

justify the burden imposed. *Merrifield* was a challenge to a California law that required a pest-control license for those who used non-pesticide methods of controlling rats, mice, and pigeons, but exempted those who used similar methods to control other vertebrate pests. *Id*. at 981-82. Under the regulation, a person "[f]aced . . . the prospect of either punishment if he worked without a license or enduring much expense and effort to obtain the license." *Id.* at 982. The state defended the law on the grounds that pest-control workers who target rats, mice, and pigeons need to be licensed to ensure their familiarity with pesticides that they may encounter during their work. *Id*. at 987-88. The court recognized that such a law could be supported by "the government's interests in public health and safety and consumer protection." *Id.* at 986. However, the court held irrational the distinction between those whom the law exempted and those whom the law required to be licensed, because the court recognized – based on record evidence – that the exempted pest controllers were more likely than the non-exempted pest controllers to encounter dangerous pesticides. *Id*. at 991. Thus, despite some minimal connection to a legitimate public-health-and-safety interest, the Ninth Circuit rejected the regulations as irrational.[8]

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[8] As in *Craigmiles*, the Ninth Circuit, having rejected the purported health-and-safety justification for the law, instead recognized that "the record highlights that the irrational singling out . . . was designed to favor economically certain constituents at the expense of others similarly situated," an illegitimate state interest. *Merrifield*, 547 F.3d at 991 & n.15.

And in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), the Fifth Circuit struck down another regulation limiting casket sales to licensed funeral directors based on record evidence about the absence of a connection to any legitimate interest that would rationally justify imposing "significant regulatory burdens" including mandatory training and testing requirements. *Id.* at 218. These requirements included an "apprenticeship," *id.*, of at least 1,560 hours involving active assistance in at least 30 funerals, and passing a funeral-director exam. *See* La. Stat. Ann. § 37:842(5), (7). Had the Fifth Circuit reasoned like the Eighth Circuit did below, it could have concluded that these requirements provided general training and testing about the funeral industry, which is at least incidentally relevant to casket sellers, and upheld the regulations based on this minimal connection to a government interest. Instead, the Fifth Circuit noted that the evidence showed that Louisiana's training requirements were largely irrelevant to casket sellers because "[n]one of this mandatory training relates to caskets or grief counseling" and "[t]he exam does not test Louisiana law or burial practices." 712 F.3d at 218.

The Fifth Circuit also rejected Louisiana's consumer-protection rationale for restricting casket sales to funeral homes as "betrayed by the undisputed facts," because "[n]o provision mandates licensure requirements for casket retailers," and "[n]o rule addresses casket retailers or imposes requirements for the sale of caskets beyond confining intrastate sales to funeral homes." *Id.* at 223-24. This mirrors the regulatory

mismatch in this case, where Missouri offers no license specific to hair braiders and has no regulations that address hair braiding other than preventing anyone but cosmetologists and barbers from offering braiding.

In addition, the Fifth Circuit found that Louisiana's consumer-protection statute "already polices inappropriate sales tactics by all sellers of caskets." *Id.* at 225. Thus, even though Louisiana strictly limited who could sell caskets, the Fifth Circuit was unpersuaded that such a minimal connection to consumer-protection interests was sufficient to sustain the licensing scheme because none of the restrictions ensured that funeral directors would receive any training specific to casket sales and basic consumer-protection laws were far more effective at advancing those same interests.

B. The Eighth Circuit's holding directly conflicts with three factually and legally indistinguishable braiding cases which considered evidence about both regulatory mismatch and the regulatory burden.

The practical implications of this split in reasoning between the Eighth Circuit and the Fifth, Sixth, and Ninth Circuits are demonstrated by the different outcomes reached in three nearly identical federal district court decisions – including one in the Fifth Circuit and one in the Ninth Circuit – involving challenges to cosmetology/barber regulations by African-style braiders. *See Brantley*, 98 F. Supp. 3d at 894 (striking down

application of Texas's barber school regulations to school that exclusively teaches African braiding); *Clayton*, 885 F. Supp. 2d at 1215-16 (striking down application of Utah's cosmetology/barber licensing regime to African braiders); *Cornwell*, 80 F. Supp. 2d at 1118-19 (striking down application of California's cosmetology licensing regime to African braiders). Indeed, both the district court and the Eighth Circuit recognized their decisions reached precisely the opposite result of these decisions. App. 8 n.3; App. 55-56.

1. The evidence in the other federal braiding cases was nearly identical to the evidence this case.

The facts of *Cornwell* and *Clayton* were nearly identical to this case, while *Brantley* addressed a closely related issue involving the regulation of African braiding schools as barbering schools.[9]

First, just as in this case, *Cornwell* and *Clayton* both involved challenges to cosmetology/barber licensing regimes with a thousand or more required hours of training, and in each case the evidence showed that only a small percentage of those hours had any relevance to braiding. In *Cornwell*, California's cosmetology regime comprised 1,600 hours, of which 110 hours

[9] *Brantley* concerned the application of barber school regulations to a hair braiding school and relied on record evidence of differences between barbering and braiding to show the irrationality of applying regulations designed for barbering schools to braiding schools. 98 F. Supp. 3d at 892.

were "possibly relevant" to African braiders; accordingly, the court noted that "well below ten percent" of California's required cosmetology hours had any relevance to braiders. 80 F. Supp. 2d at 1109-10. Likewise, in *Clayton*, Utah conceded that "1400 to 1600 of the 2000 hours of the mandatory curriculum are irrelevant to African hairbraiding," leaving at most 400 to 600 hours of relevant training. 885 F. Supp. 2d at 1215.

Second, just like this case, the evidence in both *Cornwell* and *Clayton* showed that the cosmetology/barber textbooks contained a very low percentage of material relevant to braiding. *See id.* (only 38 pages of the 1,700 pages in the Utah cosmetology/barber textbooks mentioned braiding); *Cornwell*, 80 F. Supp. 2d at 1110 (finding that "the curricula are of extremely marginal relevance to Plaintiff's activities").

Third, just like this case, in both *Cornwell* and *Clayton*, the undisputed evidence showed that the licensing exams were either totally irrelevant to braiding or at most had a few questions relevant to braiding. In *Cornwell*, the court pointed to the evidence showing that the relevance of the written examination to braiders "appears to be minuscule" and "hairbraiding is essentially not tested on the practical [exam]." *Id.* at 1116-17. In *Clayton*, Utah admitted that the practical examination was "irrelevant to African hairbraiding" and it did not know whether its written examination tested knowledge about braiding. 885 F. Supp. 2d at 1215.

Fourth, just as in this case, each of the three other braiding cases also involved a severe burden imposed on braiders by almost completely irrelevant regulations. *See Brantley*, 98 F. Supp. 3d 884, 893 (finding that the challenged regulations make it "prohibitively difficult" to operate a braiding school); *Clayton*, 885 F. Supp. 2d at 1215-16 (burdensome licensing scheme included at least 1,400-1,600 hours of training irrelevant to braiders); *Cornwell*, 80 F. Supp. 2d at 1112-13 (noting "substantial burden" of requiring braiders to complete irrelevant training and irrationality of "requiring individuals to take a 1600-hour course in order to study a very few hours of sanitation and potential scalp disorder material").

2. The Eighth Circuit explicitly rejected the other federal braiding decisions because they considered record evidence about both the regulatory fit and the regulatory burden while conducting rational-basis review.

Despite all of these factual similarities, the Eighth Circuit viewed these opinions as unpersuasive because they "[did] not appropriately defer to legislative choices." App. 8 n.3. The district court below likewise noted that the standard of review applied by *Cornwell* and *Clayton* "appears to be more stringent than rational basis review in the Eighth Circuit." App. 57. That is because the *Cornwell, Clayton*, and *Brantley* courts actually considered the record evidence about both the awful regulatory mismatch and the substantial regulatory

burdens imposed, which were wildly disproportionate to any legitimate government interest. Having considered this evidence, all three courts rejected the government's attempt to bootstrap an entire regulatory scheme under rational-basis review because a small portion of the scheme might minimally advance a government interest.

Because applying cosmetology/barber regulations to African-style braiders only incidentally advanced any government interest while imposing burdens irrationally disproportionate to any government benefit, the *Brantley*, *Cornwell*, and *Clayton* courts declined to uphold the regulations as "rational" when applied to African-style braiders. In contrast, the Eighth Circuit refused to engage in this analysis, stopping as soon as it found any connection – however minimal – between the licensing scheme and braiding. As a result, unlike braiders in California, Utah, and Texas, braiders in Missouri can be forced to spend a thousand or more hours and an average of nearly $12,000 complying with costly and irrelevant cosmetology/barber licensing requirements.

II. The Eighth Circuit's decision exacerbates a mature, but unacknowledged, circuit split regarding whether and how to weigh record evidence in rational-basis cases.

Since at least 2002, various circuit courts of appeal have reached conflicting decisions about how to consider record evidence in rational-basis challenges to

regulations that prevent people from earning an honest living: the First, Fifth, Sixth, and Ninth Circuits give meaningful consideration to record evidence about the rational relationship in cases challenging economic regulations, while the Second and Fourth Circuits do not. By brushing aside the record evidence about the regulatory mismatch and completely ignoring the evidence that the life-changing regulatory burden was irrationally disproportionate to any government interests, the Eighth Circuit further deepened this split. This Court should step in to resolve this question and prevent continued confusion among the lower courts.

A. The First, Fifth, Sixth, and Ninth Circuits give meaningful consideration to record evidence about the rational relationship and burdens imposed in challenges to economic regulations.

The Courts of Appeal for the First, Fifth, Sixth, and Ninth Circuits have held that economic regulations are unconstitutional after considering record evidence to defeat claims of a rational relationship to a legitimate government interest in protecting health and safety. Even though each of these courts presumed the constitutionality of the challenged regulations and deferred to legislative choices, these courts still considered the evidence developed in litigation to rebut that presumption.

As discussed *supra* in Part I.A, the Fifth, Sixth, and Ninth Circuits relied on record evidence to sustain

rational-basis challenges in *St. Joseph Abbey*, *Craigmiles*, and *Merrifield*.

The First Circuit also relied on record evidence to sustain a preliminary injunction entered in a rational-basis challenge to Puerto Rico's regulatory scheme governing milk prices in *Vaquería Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464 (1st Cir. 2009). The court accepted that "Puerto Rico has a legitimate state interest in stabilizing milk production and protecting the livelihoods of dairy farmers." *Id.* at 483. But, based on the record evidence, it affirmed that "there was no rational nexus between the regulatory scheme established . . . and these goals." *Id.* Given the burden imposed by these regulations, which had driven the plaintiffs to "the verge of losing their businesses" and "the brink of insolvency," *id.* at 485, the First Circuit affirmed the entry of the preliminary injunction, *id.* at 488.

B. The Second, Fourth – and now Eighth – Circuits either refuse to consider record evidence, or brush it aside, in rational-basis cases challenging economic regulations.

The Second, Fourth, and now Eighth Circuits either refuse to consider record evidence in rational-basis challenges to economic regulations, or brush it aside. By ignoring record evidence in these cases, these courts have turned the rational-basis test into a mere rubber stamp, contrary to this Court's precedents. *See*

Mathews v. Lucas, 427 U.S. 495, 510 (1976) (rational basis, while deferential, is not "toothless").

In *Colon Health Centers of America v. Hazel*, 733 F.3d 535 (4th Cir. 2013), the Fourth Circuit refused to even allow plaintiffs an opportunity to conduct discovery to disprove the alleged rational basis of Virginia's certificate-of-need law for medical enterprises. On appeal from dismissal under Federal Rule of Civil Procedure 12(b)(6), the court ruled that plaintiffs' Dormant Commerce Clause claims turned on questions of fact and remanded for factual development. *Id.* at 544, 546. But the court ruled that facts did *not* matter in plaintiffs' due process and equal protection challenges to the same laws. The court pointed to assertions made by the State to uphold the regulations, but did not allow plaintiffs to develop facts to disprove those assertions by affirming the dismissal of those claims at the mere pleading stage. *Id.* at 547-48.

In *Sensational Smiles v. Mullen*, 793 F.3d 281 (2d Cir. 2015), the Second Circuit ignored record evidence in upholding part of a licensing scheme under which the Connecticut State Dental Commission tried to limit certain teeth-whitening procedures to licensed dentists. Non-dentist plaintiffs challenged the state's prohibition against a non-dentist shining an LED light at a customer's mouth. *Id.* at 283-84 & n.1. The court noted that injury from LEDs "cannot be absolutely excluded," citing potential danger from "high power" LEDs used for extended periods, *id.* at 284 & n.2, even though the plaintiffs used low-powered LEDs for just 20 minutes, *id.* at 283 & n.1. The court also brushed

aside evidence that dentists were not trained to use LEDs nor required to know anything about LEDs, and the fact that the state allowed consumers to "shine the LED light into their own mouths, after being instructed in its use by unlicensed teeth-whitening professionals, but prohibit[ed] those same teeth-whitening professionals from guiding or positioning the light themselves," because the Dental Commission "might" have believed that dentists were somehow "better equipped" to address any issues arising from shining LEDs into people's mouths. *Id.* at 285.

* * *

Here, Missouri admitted its burdensome licensing scheme was almost entirely irrelevant when applied to Petitioners. App. 7. But the Eighth Circuit ignored the evidence demonstrating that the irrational burdens imposed by the scheme were disproportionate to any government interest. *See* App. 5-6. In so doing, the Eighth Circuit joined this deepening circuit split about the consideration of facts in rational-basis cases. This Court should grant certiorari in this case to address the circuit split and clarify its own rulings as to whether facts – and specifically, facts about regulatory mismatch resulting in a regulatory burden disproportionate to any government interest – matter in rational-basis challenges to economic regulations.

III. The Eighth Circuit's holding conflicts with this Court's precedents both before and after *Williamson v. Lee Optical*.

The Eighth Circuit made *Williamson v. Lee Optical* the touchstone of its ruling, but in doing so ignored this Court's prior and subsequent precedent demonstrating that evidence regarding the fit between the regulatory scheme and government interests matters in rational-basis challenges to economic regulations. This precedent demonstrates that consideration of facts about the severity of a means-ends mismatch – and the resulting imposition of burdens unrelated to any government interest – is a proper part of rational-basis review.

A. This Court's rational-basis cases consider facts about the challenged scheme, including facts about the severity of the means-ends mismatch and whether the regulatory burdens imposed are disproportionate to any government benefit.

This Court's best-known early elucidation of the rational-basis test – in *Carolene Products* – makes clear that even under rational-basis review, people have the right to introduce evidence disproving the rationality of "legislation affecting ordinary commercial transactions," and to challenge regulations "by proof of facts tending to show that the statute . . . is without support in reason." *United States v. Carolene Products*, 304 U.S. 144, 152, 154 (1938). Indeed, *Carolene Products* recognized that denial of the opportunity to disprove

presumed facts in a rational-basis case "would deny due process." *Id.* at 152.

Although the Eighth Circuit apparently misread *Lee Optical* as overriding *Carolene Products* on this point, App. 7, this Court has continued to consider evidence regarding the fit between the regulatory scheme and government interests in rational-basis cases. For example, in *Schware*, decided just two years after *Lee Optical*, this Court determined that Schware's due process right to practice as an attorney had been violated because the weight of the evidentiary record did not "rationally justif[y] a finding that [he] was morally unfit to practice law." 353 U.S. at 246-47. While this Court recognized that "[a] State can require high standards of qualification" it also recognized that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239. In Schware's case, the facts showed he had used an assumed name, been repeatedly arrested, and been a member of the Communist Party. *Id*. at 240-44. But Schware introduced extensive evidence showing he was of good character and had not been in trouble for twenty years. *Id.* at 235-45. Rather than accept New Mexico's contention that this record showed enough to justify their concerns about Schware's fitness to practice law, this Court ruled that it did not raise enough concern about his present character – given Schware's own "forceful showing of good moral character" – to justify the denial. *Id.* at 246. That is, although this Court recognized a legitimate interest underlying the state's action and some evidence to support it, this Court

ruled, based on the balance of the evidence, that there was not a rational connection as applied to the specific facts of Schware's case to justify the heavy burden of depriving him of his occupation.

Similarly, in *Zobel v. Williams*, this Court applied rational-basis review to invalidate Alaska's retroactive oil-dividend distribution scheme even though the scheme marginally advanced the legitimate interest of attracting and retaining new residents. 457 U.S. 55, 57 (1982). Under the scheme, first-year Alaska residents were eligible for one share of state oil proceeds worth $50 (compared to 21 shares worth $1,050 for Alaskans in residence since 1959) plus an additional share each additional year of residence. *Id.* Thus, even though longtime residents benefitted the most, the challenged scheme provided a modest financial incentive for new residents. But this Court found that such a minimal overlap with the state's interest in encouraging settlement in Alaska was insufficient to justify the scheme under rational-basis review, and struck down the law because the benefits disproportionately went to residents who had already chosen to live in Alaska prior to the law's enactment. *Id.* at 62. *See also*, *e.g.*, *Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (although there may be some rational relationship between owning land and understanding local issues, land ownership is not necessary to understand local issues, so a land-ownership requirement for local office is irrational); *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985) (even though it advanced legitimate state interest of paying for road maintenance, under-inclusive application of Vermont car tax only to non-residents imposed a burden

disproportionate to government interest, rendering scheme irrational); *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971) (even though it advanced state interest of reducing court costs, providing trial transcripts only for felony offenses was under-inclusive and thus irrational).

If the Eighth Circuit had followed *Schware*, *Zobel*, and the other precedent cited above, it would have considered the record evidence about the extreme disconnect between the challenged regulations and African-style hair braiding, and the resulting disproportionate burden unrelated to any government interest. Then, it would have concluded that the challenged cosmetology/barber regulations were irrational and unconstitutional as applied to braiders, just as three other federal courts have ruled.

B. *Lee Optical* should be reassessed.

If the Eighth Circuit correctly read *Lee Optical* as holding that facts do not matter in rational-basis cases, that holding has been undermined and this Court should reassess *Lee Optical* as binding precedent. The "facts don't matter" approach to judging is at odds with the long-held understanding of rational-basis review articulated in cases such as *Carolene Products*. And, as noted above, this Court's decisions since *Lee Optical* demonstrate that facts do matter in rational-basis cases.[10]

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[10] It is also at odds with an originalist understanding of the Fourteenth Amendment's Due Process and Equal Protection

Because of confusion over *Lee Optical*, the lower federal courts find themselves conflicted about the extent to which they should consider record evidence in rational-basis cases. *See* Part II. This conflict has led federal courts to reach directly conflicting results in nearly identical braiding cases. *See* Part I.B. Accordingly, this Court should take this opportunity to clarify that a facts-don't-matter approach is inappropriate for adjudicating due process and equal protection challenges to economic regulations.

IV. The massive growth in occupational licensing and greater understanding of licensing burdens and regulatory capture require this Court to revisit its occupational licensing decisions.

This Court last squarely addressed the Fourteenth Amendment's restraints on state occupational licensing laws in the 1950s in the *Lee Optical* and *Schware* cases, but circumstances have changed since then and the assumptions underpinning those decisions must be revisited. First, there has been a massive growth in occupational licensing across the country since then. Second, governments and academics have come to the largely uniform conclusion that occupational licensing is less beneficial and more burdensome than previously assumed. And third, many observers – including

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Clauses, which were intended to protect the pre-existing right at common law to earn an honest living. *See generally* Timothy Sandefur, *The Right to Earn a Living* 17-25 (2010).

this Court – have recognized that state occupational licensing laws are frequently used to illegitimately harm the public for the benefit of special interests.

First, there has been a five-fold increase in occupational licensing since *Lee Optical*. In the early 1950s, less than five percent of the U.S. workforce required an occupational license. Today, however, about twenty-five percent of the workforce requires an occupational license.[11] Two-thirds of that increase came from states licensing ever more occupations, rather than from growth in traditionally-licensed occupations.[12] Moreover, "[e]mpirical work suggests that licensed professions' degree of political influence is one of the most important factors in determining whether States regulate an occupation."[13] Thus, this massive growth has happened at the demand of industry insiders rather than public demand.

Second, governments and academics have come to the largely uniform conclusion that occupational licensing is less beneficial and more burdensome than previously assumed. In 2015, the Obama administration found that "most research does not find that licensing

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[11] Dep't of the Treasury Office of Econ. Pol'y, Council of Econ. Advisers & Dep't of Labor, *Occupational Licensing: A Framework for Policymakers* 6 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (citing Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. Lab. Econ. S173, S173-S202 (2013)).

[12] *Id.* at 20.

[13] *Id.* at 22 (citations omitted).

improves quality or public health and safety."[14] Instead, it found that licensing has negative effects on consumer prices, earnings, and interstate mobility, and that these costs fall disproportionately on the poor, immigrants, those with a criminal history, and military spouses.[15]

Third, there is greater awareness – including in this Court – that state occupational licensing laws are often used to benefit private interests rather than the public. This Court recognized that private interests hijack government power for private benefit in both the majority opinion and the dissent in *North Carolina State Board of Dental Examiners v. FTC*. *Compare* 135 S. Ct. 1101, 1108 (2015) (noting that regulatory board consisting of dentists had used government power to protect dentists from competition despite absence of any evidence of consumer harm) *with id.* at 1117 (Alito, J., dissenting) ("Professional and occupational licensing requirements have often been used" to benefit industry insiders and not the public.). The Obama[16] and Trump[17] administrations, and the Federal Trade Commission,[18] have also expressed concerns about the

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[14] *Id*. at 13, 58-60.

[15] *Id.* at 14-16, 30-32, 35-40, 60-66.

[16] *Occupational Licensing*, *supra* note 11, at 52.

[17] Press Release, Dep't of Labor, U.S. Secretary of Labor Acosta Addresses Occupational Licensing Reform (July 21, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170721.

[18] FTC, Economic Liberty, https://www.ftc.gov/policy/advocacy/economic-liberty (last visited Apr. 6, 2018).

threat that state occupational licensing laws pose to those pursuing an economic livelihood.

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When the Supreme Court adopted rational-basis review for economic regulations in *Carolene Products*, it went out of its way, in famous footnote 4, to say "more searching judicial inquiry" was necessary in cases where the political process should not be trusted to "bring about repeal of undesirable legislation." 304 U.S. at 152 n.4. But today we have ample evidence that economic regulations are an example of when the political process cannot be trusted.[19] This is due, in no small measure, to lower courts reading *Lee Optical* as requiring rubber-stamp approval of economic regulations.[20]

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[19] *See generally* Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. Econ. 1089 (1991) (explaining role of interest groups in "capturing" government decision-making for their own economic advantage); George J. Stigler, *The Theory of Economic Regulation*, Bell J. Econ. & Mgmt. Sci., Spring 1971, at 3-21 (demonstrating that industries and professional associations pursue economic regulations to advance their own economic self-interest); *see also*, *e.g.*, Robin W. Roberts & James M. Kurtenbach, *State Regulation and Professional Accounting Educational Reforms: An Empirical Test of Regulatory Capture Theory*, 17 J. Acct. & Pub. Pol'y 209 (1998) (finding adoption of 150-hour accounting education requirement directly related to strength of CPA lobby); Morris M. Kleiner & Kyoung Won Park, *Battles Among Licensed Occupations: Analyzing Government Regulations on Labor Market Outcomes for Dentists and Hygienists*, NBER Working Paper No. 16560 (Nov. 2010) (analyzing effects of regulatory competition between dentists and dental hygienists).

[20] *See* Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209, 325 (2016) (explaining that highly deferential judicial review leads to "the

In light of the five-fold increase in occupational licensing and greater understanding of licensing burdens and regulatory capture since *Lee Optical* and *Schware*, this Court should revisit its prior decisions to ensure its precedents are not used to excuse unconstitutional licensing regulations.

V. This Court should overturn the *Slaughter-House Cases* and protect the right to pursue an economic livelihood as a privilege or immunity under the Fourteenth Amendment.

This Court has long recognized the right to pursue an economic livelihood as a "fundamental right" under the Privileges and Immunities Clause of Article IV, § 2. But in *Slaughter-House*, this Court refused to accord the right the same protection under the Privileges or Immunities Clause of the Fourteenth Amendment. *Slaughter-House* is inconsistent with the original understanding of the Privileges or Immunities Clause – which was meant to meaningfully protect national citizens' right to pursue an economic livelihood against encroachment by their states of residence – and should be overturned.

The right to pursue an economic livelihood has long been recognized as "fundamental" under the Privileges and Immunities Clause of Article IV, § 2. In

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unfortunate result that the Constitution affords the least protection for those individuals who are least able to protect themselves against, and are most harmed by, the very political process that charter created").

Corfield v. Coryell, Justice Washington recognized that the Privileges and Immunities Clause protected, among other "fundamental" rights, the right to "pass through, or to reside in any other state, for purposes of trade, agriculture, [or] professional pursuits." 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230). More recently, in *Supreme Court of New Hampshire v. Piper*, this Court held that practicing law was a "privilege" – indeed, a "fundamental right" – protected by the Privileges and Immunities Clause. 470 U.S. 274, 281 (1985).

Because the right to pursue an economic livelihood is a fundamental right under the Privileges and Immunities Clause, this Court requires restrictions on the right to be justified by real evidence. In *Piper*, this Court considered a residency requirement for bar membership. *Id.* at 275. This Court recognized that residency restrictions could be allowed, but whether they were allowed depended on the facts. *Id.* at 284. And in that case, this Court's analysis of the facts demonstrated that such restrictions could not be justified. *Id.* at 285-87.

Notwithstanding the recognition of the fundamental right to pursue an economic livelihood under the Privileges and Immunities Clause, this Court held in the *Slaughter-House Cases*, 83 U.S. 36 (1873), that the right to pursue an economic livelihood was not protected by the Privileges or Immunities Clause. Moreover, based on *Slaughter-House*, this Court further determined that the Privileges or Immunities Clause did not protect a woman's right to practice law, notwithstanding the fact that she possessed the

"requisite learning and character" for the occupation. *Bradwell v. Illinois*, 83 U.S. 130, 138-39 (1873).

Today, there is widespread agreement across the political spectrum that *Slaughter-House*'s "narrow" interpretation of Privileges or Immunities Clause was incorrect. *See McDonald v. City of Chi.*, 561 U.S. 742, 756-57 (2010) (collecting citations); *id.* at 806 (Thomas, J., concurring) (holding that rights "fundamental to the American scheme of ordered liberty," and "deeply rooted in this Nation's history and tradition" are "enforceable against the States" through the Privileges or Immunities Clause) (internal quotations omitted); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepperdine L. Rev. 601, 631, n.178 (2001) ("Virtually no serious modern scholar – left, right, and center – thinks that [*Slaughter-House*] is a plausible reading of the Amendment"). But only this Court can reconsider that decision.

In light of *Slaughter-House*'s incompatibility with both *Corfield v. Coryell*'s original understanding of the fundamental right to pursue an economic livelihood and *Piper*'s continuing recognition of that right as fundamental, this Court should grant review in this case to overturn *Slaughter-House*. This Court should instead determine, consistent with the original understanding of the Fourteenth Amendment, that the Privileges or Immunities Clause meaningfully protects a citizen's right to pursue an economic livelihood against abridgment by his own state, just as the Privileges and

Immunities Clause protects that same right against abridgment by other states.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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