

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

**BRIEF OF AMICI CURIAE
PUBLIC CHOICE SCHOLARS IN
SUPPORT OF THE PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

The undersigned *amici curiae* are five scholars with expertise in public choice, regulatory, and/or labor economics. *Amici* submit this brief in support of Petitioners Ndioba Niang and Tameka Stigers because the United States Court of Appeals for the Eighth Circuit erroneously upheld Missouri's burdensome and irrelevant licensing scheme requiring African-style hairbraiders like Petitioners to become licensed barbers and/or cosmetologists to practice their trade. In so doing, the Eighth Circuit embraced the speculative justifications for the licensing scheme of the United States District Court for the Eastern District of Missouri, discounting the adverse consequences such regulations have on the occupational freedom of Petitioners and other hairbraiders in Missouri.

Amici believe they are uniquely positioned to provide the Court with the practical implications of the Eighth Circuit's erroneous ruling. Relevant theoretical and empirical research contained in this *amicus* brief provides that occupational licensing causes a host of negative effects, including increased barriers to entry for potential entrepreneurs and higher prices for

¹ Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae*'s intention to file this brief. The parties have consented to the filing of this brief in communications on file with the Clerk. 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 person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

consumers. These burdens are often disproportionately felt in low-income and minority communities. If the Eighth Circuit's decision is not reversed, African-style hairbraiders in Missouri will be forced underground, out-of-state, or out-of-business.

The *amici curiae* joining this brief are:

- Morris M. Kleiner, Ph.D., University of Minnesota
- David T. Mitchell, Ph.D., University of Central Arkansas
- Daniel J. Smith, Ph.D., Troy University
- Robert J. Thornton, Ph.D., Lehigh University
- Edward Joseph Timmons, Ph.D., Saint Francis University



STATEMENT

This case challenges a Missouri law that requires African-style hairbraiders to obtain a cosmetology or barber license to practice their trade. Petitioners Ndioba Niang and Tameka Stigers are African-style hairbraiders in St. Louis, Missouri area. The hairbraiding services they provide are all-natural, involving braiding, locking, twisting, weaving, or otherwise physically manipulating hair. Petitioners eschew the harmful chemicals used in many salons, such as chemical relaxers, bleaches, or dyes. Nevertheless, Petitioners are required by Missouri law to obtain irrelevant

barber or cosmetologist licenses to practice hairbraiding. Such licenses require a 1,000-hour barber curriculum or a 1,500-hour cosmetology curriculum. These courses are almost entirely unrelated to African-style hairbraiding and can cost over \$21,000. After completing this instruction, prospective barbers and cosmetologists are tested on concepts that do not include African-style hairbraiding. Yet, African-style hairbraiders in Missouri cannot lawfully practice their occupation without overcoming these unnecessary obstacles.

When Petitioners sought declaratory and injunctive relief against the director and members of the Missouri Board of Cosmetology and Barber Examiners (“Board”), the United States District Court for the Eastern District of Missouri rejected their claims. Petitioners contended that the Fourteenth Amendment forbids states to require costly and burdensome occupational licensing requirements that have little, if any, relation to African-style hairbraiding. On appeal, the Eighth Circuit affirmed the district court’s decision, holding that Petitioners had “the burden to negate not only the State’s justification, but also ‘every conceivable basis which might support it,’” despite finding that ten percent or less of the training requirement pertained to African-style braiding. Pet. App. 5 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)).

The Eighth Circuit’s decision produces a split of authority 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. It further expands a split of authority between the Eighth, Second, and Fourth Circuits on the one hand, and the First, Fifth, Sixth, and Ninth Circuits on the other, as to whether and how to weigh evidence in rational-basis-review cases. Moreover, the Eighth Circuit's decision is at odds with this Court's holding that professional qualifications "must have a rational connection with the applicant's fitness or capacity to practice" that profession. *Schwartz v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957).

Amici respectfully submit that the Eighth Circuit's decision ignores the harmful effects of Missouri's licensing scheme encompassing African-style hairbraiders. To that end, *amici* write separately to describe the practical implications of the Eighth Circuit's ruling and to emphasize the importance of this Court granting certiorari in this case. Overturning the Eighth Circuit's ruling would ensure that African-style hairbraiders in Missouri, like Petitioners, would not be effectively barred from making a living, and that Missouri consumers would not suffer consequences such as higher prices and diminished choice as a result of needless, expensive licensing requirements.



SUMMARY OF ARGUMENT

The central issue in this case is whether Petitioners Ndioba Niang and Tameka Stigers, African-style hairbraiders in Missouri, should be required to be licensed as barbers or cosmetologists to practice African-style hairbraiding, despite the undisputed fact that such licenses are almost entirely irrelevant to African-style hairbraiding. *Amici* believe that in considering this Petition, the Court should consider the demonstrated effects of occupational licensing. Scholars and other policy experts from across the political spectrum, including *amici*, agree that occupational licensing requirements that fail to carefully balance consumer protection with the needs of consumers, workers, and businesses often cause more harm than good. The Eighth Circuit's decision, however, disregards these concerns.

In this brief, *amici* provide both theoretical and empirical evidence of the negative real-world effects that result from unnecessary occupational licensing regulations like the Missouri scheme at issue here. These negative effects include: (1) increased prices, (2) decreased availability of goods and services, and (3) restricted access to employment, especially in low-income and minority communities. All of this for little if any benefit, as occupational licensing has been shown in many cases neither to improve quality nor to promote public health. The research by *amici* and their peers also confirms that these licensing schemes merely serve to insulate already-licensed workers to

the detriment of would-be practitioners of the trade and consumers alike.

For all these reasons, *amici* believe that Missouri's proffered interest in licensing African-style hairbraiding – the protection of consumers from unsafe and unhealthy practices – will not and cannot be achieved by requiring hairbraiders to obtain an unrelated license in cosmetology or barbering. To the contrary, such restrictions do nothing more than harm workers and consumers, especially in low-income and minority communities. Such illogical and irrational restrictions have no place in this nation's market economy and should be overturned. The Petition for Writ of Certiorari should be granted.

ARGUMENT

I. ECONOMIC THEORY PREDICTS – AND THE EVIDENCE CONFIRMS – THAT REQUIRING A LICENSE TO PRACTICE AFRICAN-STYLE HAIRBRAIDING CONFERS NO BENEFIT TO CONSUMERS OR WORKERS.

Occupational licensing takes many forms.² In its most minimal form, the individual may simply register

² See Dick Carpenter, Angela C. Erickson, Lisa Knepper, & John K. Ross, *License to Work: A National Study of Burdens from Occupational Licensing*, Inst. for Justice (May 2012), at 33, available at <http://goo.gl/LZuKH0> [hereinafter “*License to Work*”].

with a state board.³ At the other extreme, the individual may be required to pay a significant fee and meet extensive testing, education, and experiential requirements.⁴

After attaining the license, individuals often must satisfy other requirements to keep the license and continue working in the industry. States often require regular fees and continuing education, and create self-interested commission boards charged with evaluating and responding to ethics and quality complaints from consumers and colleagues.⁵

The trend in this country is to increase such regulations. In the 1950s, less than five percent of the American workforce required a license from the state; today, about 25 percent do.⁶ But while proponents of these licensing requirements argue that they are simply ways to protect the public from “unqualified or

³ See Daniel J. Smith, *Occupational Licensing in Alabama*, 27 LABOUR AND INDUSTRY, no. 2, 2017, at 4, available at <http://goo.gl/UEiY8x>.

⁴ See Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. (Fall 2000), at 191; Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* 1-15 (W.E. Upjohn Inst. for Emp’t Research 2006).

⁵ See *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1106, 191 L. Ed. 2d 35 (2015) (recognizing self-interest of board of dental examiners controlled by active market participants).

⁶ See 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) [hereinafter “*Analyzing the Extent*”].

unscrupulous” individuals,⁷ the broad consensus in the literature suggests otherwise.

The right to work free of unnecessary regulation enjoys support across the ideological spectrum. In July 2015, for example, the White House issued a report that concluded that occupational licensing requirements work only when they are carefully designed and implemented.⁸ That administration therefore joined *amici* and others in widespread support for a reconsideration of the mass licensure of relatively-harmless professions, such as African hairbraiding. The current administration has also called for reductions in occupational licensing regulations.⁹ Twelve states have lifted the same barriers on hairbraiding as Missouri imposes here.¹⁰

⁷ Smith, *supra* at 1.

⁸ *Occupational Licensing: A Framework for Policymakers*, White House Report (July 2015), available at <http://goo.gl/wFSuAY> [hereinafter “W.H. Report”].

⁹ See U.S. Secretary of Labor Acosta Addresses Occupational Licensing Reform, U.S. DEP’T OF LABOR, Press Release No. 17-1053-NAT (July 21, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170721>; Sean Higgins, *Labor Secretary Alexander Acosta calls for less occupational licensing*, WASHINGTON EXAMINER (Jan. 9, 2018), <https://www.washingtonexaminer.com/labor-secretary-alexander-acosta-calls-for-less-occupational-licensing/article/2645434>.

¹⁰ *Model Braiding Law*, INSTITUTE FOR JUSTICE (Apr. 30, 2018), <http://ij.org/activism/legislation/model-legislation/model-braiding-law/> (identifying the following states as having exempted braiding from licensing: Arkansas, Colorado, Delaware, Indiana, Iowa, Kentucky, Maine, Nebraska, New Hampshire, South Dakota, Texas and West Virginia).

A. Occupational Licensing Regulations Do Little To Improve The Quality Of Services.

The district court, affirmed by the Eighth Circuit, held that public health and the protection of consumers were legitimate state interests rationally related to the requirement that African-style hairbraiders have a cosmetology or barbers license. Pet. App. 45. Indeed, this is a typical justification for licensing restrictions.¹¹ In reality, however, such regulations do little to improve the quality of services received by consumers.

The holding below was based on the faulty theory that occupational licensing keeps unqualified and dishonest providers from entering the profession, thereby increasing health, safety, and quality.¹² Proponents claim that excluding unqualified providers from the industry provides consumers with confidence when seeking goods or services. Without a medical education, for example, judging the quality and reliability of a physician might be difficult.¹³

Licensing physicians, however, is an entirely distinct matter from the licensing of low-risk occupations

¹¹ See W.H. Report, *supra* at 11 (“Licensing is usually justified on the grounds that it improves quality and protects the public against incompetent or dangerous practitioners.”).

¹² Amy Fontinelle, David Mitchell & Thomas Snyder, *Unnatural Rights in The Natural State: Occupational Licensing in Arkansas*, Ark. Ctr. for Research in Econ., Univ. Central Ark. (2016), at 9-10; Smith, *supra* at 5; W.H. Report, *supra* at 3.

¹³ See Smith, *supra* at 1.

such as hairbraiding.¹⁴ There is little to no risk in cases where consumers have, or can access, sufficient information to choose a hairbraider based on the quality and price consumers prefer; moreover, the most likely negative outcome of visiting an underqualified hairbraider is a bad hair day.¹⁵

To the contrary, research has shown that licensing of relatively unskilled professions reduces quality by reducing the number of providers and elevating prices.¹⁶ This reduction in employment in an industry relating to restrictive licensing drives up prices for consumers because there is less competition.¹⁷ And, with fewer providers, those faced with incompetent – or overpriced – providers have fewer options for change.

Indeed, as early as the 1960s, researchers challenged the commonly-held belief that licensing ensures quality – that is, that licensing “protect[s] the public

¹⁴ *Id.*; Morris M. Kleiner, Allison Marier, Kyoung Won Park, Coady Wing, et al., *Relaxing Occupational Licensing Requirements: Analyzing Wages and Prices for A Medical Service*, 59 J. L. & ECON. 261 (2016) [hereinafter “*Relaxing Occupational Licensing Requirements*”] (study of relaxed regulations allowing nurse practitioners to do more of physicians’ work showing no change in quality).

¹⁵ See Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?*, *supra* at 98 (“The difference between a good and bad haircut is two days.”).

¹⁶ See, e.g., Smith, *supra* at 4-5.

¹⁷ See Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?*, *supra* at 1-15.

from quacks and incompetents.”¹⁸ Absent a public need for protection, however, the primary effect of a licensing regime is to bar otherwise qualified individuals from the industry.¹⁹ This is particularly true when licensing requirements fail to closely match the qualifications necessary for the profession.²⁰ A licensing regime cannot plausibly meet its purported goal of promoting quality if the license does not require, test, or even attempt to measure the amount of competency necessary to practice the profession.²¹

Empirical research has borne out what theory predicted, for study after study has revealed that professions regulated by occupational licensing regimes did not result in any discernible increase in the quality of services or goods.²² The White House Report’s review of twelve broad occupational-licensing studies identified only two isolated instances in which occupational licensing resulted in any increase in quality.²³ The only

¹⁸ See Milton Friedman, *CAPITALISM AND FREEDOM* 137-60 (1962). See also Stanley J. Gross, *Professional Licensure and Quality: The Evidence*, Cato Inst. Pol’y Analysis No. 79, 1-2 (1986), available at <https://object.cato.org/pubs/pas/pa079.pdf>.

¹⁹ See, e.g., Smith, *supra* at 4-6, 10; W.H. Report, *supra* at 3; Fontinelle, *supra* at 9-10.

²⁰ See W.H. Report, *supra* at 3.

²¹ See *id.*

²² See Morris M. Kleiner, *Occupational Licensing*, *supra* at 189-202 (summarizing studies); Smith, *supra* at 5 (collecting studies); see also, e.g., Gross, *supra*; Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?*, *supra*.

²³ W.H. Report, *supra* at 13, 58-59 (Research App’x); see also Kleiner, *Relaxing Occupational Licensing Requirements*, *supra* at

study in that report related to cosmetology, moreover, observed little if any increase in quality of cosmetology services in states with restrictive licensing regimes.²⁴ That study concluded empirical support is “scant” for the claim that licensing screens out relatively low-quality practitioners from the practice of cosmetology.²⁵ There is no reason to believe that a study of African-style hairbraiding would come to a different conclusion.

Although quality does not noticeably improve with licensing restrictions, prices nevertheless increase. In a study of licensing for cosmetologists, researchers found “support [for] the hypothesis 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.”²⁶ In considering each state’s regulatory requirements for cosmetology licenses, the study estimated that unnecessary regulations increased the price of cosmetology services by about \$2.94 per

284-87 (finding no evidence of quality change when nurse practitioners allowed to work more independently of physicians).

²⁴ *Id.* at 58 (citing Mark A. Klee, *How Do Professional Licensing Regulations Affect Practitioners? New Evidence*, U.S. Bureau of Labor Statistics, SEHSD Working Paper 2013-30 (2013), available at <http://goo.gl/W1ZTdH>).

²⁵ Klee, *supra* at 1 & n. 2 (summarizing empirical studies).

²⁶ A. Frank Adams, John D. Jackson, & Robert B. Ekelund, 23 *Occupational Licensing in a “Competitive” Labor Market: The Case of Cosmetology*, 23 J. LAB. RES. 267, 273 (2002), available at <http://goo.gl/Q8M8wT>.

service.²⁷ In total, “losses owing to such restrictions would constitute an annual loss of billions of dollars.”²⁸

Indeed, some studies have revealed that less restrictive licensing requirements can result in an *increase* in quality. In a study involving real estate brokers, states that required specific education and had low exam pass rates had a longer average duration of vacancy prior to sale, indicating poorer performance.²⁹ The same researchers found that licensing requirements reduced the availability and quality of sanitarians, veterinarians, and optometrists.³⁰

boards’ responses to licensing violations improves the quality of services.³¹ In the present case, like in many others, little evidence exists to suggest that rigid licensing restrictions on a profession results in any benefits to consumers.

B. Occupational Licensing Regulations Harm Potential Entrepreneurs.

Occupational licensing also confers no benefit to workers seeking to enter a licensed industry. Although

²⁷ *Id.* at 272.

²⁸ *Id.* at 273.

²⁹ Sidney L. Carroll & Robert J. Gaston, *State Occupational Licensing Provisions and Quality of Services: The Real Estate Business*, RES. L. & ECON. 1, 10 (1979).

³⁰ Gross, *supra* at 5.

³¹ See David A. Swankin, *Regulation of the Professions: Where Have We Been? Where Are We Going?* FARB Speech (2012); W.H. Report, *supra* at 13 & n. 20.

already-established members of a profession benefit from excluding potential competitors, such restrictions reduce overall employment, diminish entrepreneurship, and restrict mobility.³² Even if licensing requirements artificially elevate wages in a licensed industry, those barred from entering the industry in the first place will receive no such benefit.

The burdens imposed by occupational regulations make the labor market less efficient and, as previously noted, result in substantial cost to consumers. A review of standard economic models by one of the *amici* concluded that occupational licensing requirements cost nearly three million jobs nationwide and raise consumer expenses by over two hundred billion dollars annually.³³

Research has shown real life examples of the costs and benefits associated with changes in occupational licensing standards. For example, a study of Vietnamese manicurists showed that for every additional 100 hours of training required by a state to obtain a license, the number of Vietnamese manicurists declined by *nearly 20 percent*.³⁴ A similar study of interior designers concluded that state license restrictions kept 1,300

³² See Fontinelle, *supra* at 31-37.

³³ Morris M. Kleiner, REFORMING OCCUPATIONAL LICENSING POLICIES, THE HAMILTON PROJECT, BROOKINGS INSTITUTION, 6 & n. 3 (2015), available at <http://goo.gl/vHDPQ>.

³⁴ Maya N. Federman, David E. Harrington & Kathy J. Krynski, *The Impact of State Licensing Regulations on Low-Skilled Immigrants: The Case of Vietnamese Manicurists*, 96 AM. ECON. R. (May 2006), at 237.

potential designers from the workforce, 765 of which would have been self-employed.³⁵ These findings imply that licensing suppresses entrepreneurship in industries well-suited to small businesses, such as the African-style hairbraiding industry.

On the other hand, when states have chosen to deregulate, entrepreneurship flourished. For example, when Mississippi transformed its requirements for African-style hairbraiders from a cosmetology-type requirement, similar to the one at issue here, to a less onerous registration requirement, 300 new braiders registered within six years. Many of the new hairbraiders moved to Mississippi from states with higher requirements, while others moved in from the underground economy.³⁶

Only one group of workers benefits from occupational licensing: those who are already licensed and can exclude others. Professional licensure “enable[s] industry professionals to more systematically exploit any existing information asymmetries” between consumers and practitioners.³⁷ That exploitation occurs, among other ways, through anticompetitive pricing. By

³⁵ David E. Harrington & Jaret Treber, *Designed to Exclude: How Interior Design Insiders Use Government Power to Exclude Minorities & Burden Consumers*, INST. FOR JUSTICE, 8 (Feb. 2009), available at <http://goo.gl/YrFbRx>.

³⁶ Dick Carpenter, *The Power of One Entrepreneur: A Case Study of the Effects of Entrepreneurship*, 4 SO. J. ENTREPRENEURSHIP (Apr. 2011), at 19-35 [hereinafter “*Entrepreneur*”]; Carpenter, *License to Work*, *supra* at 33.

³⁷ Smith, *supra* at 4.

excluding unlicensed workers from the industry through licensing requirements, existing professionals can elevate their prices by between three and sixteen percent.³⁸ As this Court has recognized, giving market participants the power to regulate their own profession creates a “structural risk of market participants’ confusing their own interests with the State’s policy goals.”³⁹ Furthermore, “there is no doubt that the members of such associations often have economic incentives to restrain competition.”⁴⁰ The Missouri cosmetologists imposing the rules here are thus the same ones who most benefit from their imposition.

II. REGULATING AFRICAN-STYLE HAIRBRAIDING IMPOSES HEAVY COSTS ON LOW-INCOME INDIVIDUALS.

In a perfect world, licensing would enable “practitioners to offer services to the full extent of their current competency.”⁴¹ In reality, however, occupational licensing regulations often impose substantial costs on the public. This burden falls most heavily on low-income and minority communities, particularly when,

³⁸ W.H. Report, *supra* at 4; *see also* Kleiner, *Relaxing Occupational Licensing Requirements*, *supra* at 261-91 (finding restrictive state licensing of nurse practitioners, versus physicians, raised price of well-child medical exam by 3 to 16 percent and no influence on quality).

³⁹ *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1106, 191 L. Ed. 2d 35 (2015).

⁴⁰ *Id.*

⁴¹ W.H. Report, *supra* at 5.

as here, African-style hairbraiding is a service commonly provided and sought by members of those communities. There are several reasons why that burden falls so heavily upon those least equipped to bear it.⁴²

A. Occupational Licensing Regulations Disproportionately Impact Low-Income Consumers and Workers.

First, as more states license more occupations, low-income individuals “are denied the occupational choice to enter into what should be low-startup cost professions.”⁴³ To the contrary, instead of providing low-cost entry into the workforce, state-mandated costs of filing paperwork, paying licensing fees, and enduring onerous education requirements make many regulated professions inaccessible to low-income individuals.⁴⁴

In Missouri, 31 low-income occupations, encompassing 30 percent of the state’s low-income occupations, require a license.⁴⁵ The licenses at issue here require a \$125 initial fee, nearly a year of education,

⁴² See Smith, *supra* at 5-6.

⁴³ *Id.*

⁴⁴ *Id.* See also Daniel J. Smith, Courtney Michaluk, David Hall, and Alex Kanode, *The Costs of Occupational Licensing in Alabama*, ALABAMA POLICY INSTITUTE, at 21 (2018) <http://goo.gl/tKcv7s> (estimating initial education costs, for occupations earning an average wage of \$16 per hour, to be \$72,322 and average annual continuing education costs of \$203).

⁴⁵ Carpenter, *License to Work*, *supra* at Table 6.

and success on two exams.⁴⁶ The average tuition at a Missouri cosmetology or barber school is \$11,750, with some exceeding \$21,000. Pet. App. 95.

These costs impose a substantial burden on low-income individuals attempting to enter the workforce. But they are typical of what occupational licensing imposes on prospective professionals. According to one study of low- and moderate-income occupations, the average occupational license requires an average of *nine months* of education and training.⁴⁷ “For low-skilled services, these entry costs represent steep barriers for access to the profession.”⁴⁸

As should be obvious, low-income workers are less able to afford these entry costs and thus to obtain the required license.⁴⁹ At least one study has concluded that “the presence of widespread occupational licensing in a state has a statistically significant negative effect on the rate of entrepreneurship in a state.”⁵⁰

Again, the burdens imposed upon prospective entrants benefit those already in the profession. In one study of barbers, barbers in states requiring an

⁴⁶ *Id.* at 86.

⁴⁷ *Id.* at 14.

⁴⁸ Smith, *Occupational Licensing in Alabama*, *supra* at 10.

⁴⁹ Kleiner, *Analyzing the Extent*, *supra* (using their Westat survey); W.H. Report, *supra* at 18; see Stephen Slivinski, *Boots Trapped Tangled in Red Tape: How Occupational Licensing Hinders Low-Income Entrepreneurship*, 272 GOLDWATER INST. 15 (2015), available at <http://goo.gl/RnPTtm>.

⁵⁰ Slivinski, *supra* at 15.

apprenticeship before starting work were observed to earn an estimated 22 percent more than barbers in states without this requirement.⁵¹ Although superficially appealing, these increased wages result from the barrier to entry caused by the increased time and costs required to become a barber.⁵²

This is all the more disconcerting when the educational requirements, a large part of the costs inherent in licensing, often do not pertain to the profession being licensed. Such is true here, where an irrelevant cosmetology or barber's license is required to practice African-style hairbraiding. These licensing schemes "will likely deny access to what would otherwise be a low-skill and low-start-up-cost occupation that poses no serious health threats to the population."⁵³

Second, low-income individuals suffer the consequences of occupational licensing disproportionately more than higher-income individuals because established, organized groups of practitioners are more likely to engage in and successfully enact occupational licensing regulations against an opposition with limited political power.⁵⁴ Professional associations of licensed workers can source their members for volunteers and donations

⁵¹ See Edward J. Timmons & Robert J. Thornton, *The Licensing of Barbers in the USA*, 48 BRIT. J. INDUS. RELATIONS (Dec. 2010), at 740, 751.

⁵² See *id.*

⁵³ Smith, *Occupational Licensing in Alabama*, *supra* at 5.

⁵⁴ Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, Working Paper #531, Princeton Univ. (2008), available at <http://harris.princeton.edu/pubs/pdfs/531.pdf>.

for legislative lobbying.⁵⁵ And, because licensing artificially increases wages, these associations' members are able to provide the financial and political resources the association seeks to enact further regulations. Through their efforts, already-licensed workers continue receiving higher wages while non-licensed workers are excluded from the profession and its wages.

By excluding potential competitors, established professionals impose a double penalty on the low-income population. Wages for unlicensed workers fall, and a wage gap between the licensed and unlicensed results.⁵⁶ Indeed, unlicensed workers in a profession – who are often forced into the underground economy – are estimated to earn 28 percent less than licensed workers.⁵⁷ On the other hand, consumers forced into lower incomes by occupational licensing must also suffer from the higher prices created by such laws.⁵⁸

Third, occupational licensing hurts low-income communities by preventing them from choosing the

⁵⁵ See, e.g., Benjamin J. McMichael, *The Demand For Healthcare Regulation: The Effect of Political Spending on Occupational Licensing Laws*, 84 SO. ECON. J. 297 (2017) (finding political contributions by healthcare professional groups affected states' decisions regarding enacting occupational licensing laws).

⁵⁶ See Kleiner, *Analyzing the Extent*, *supra* (using their Westat survey); W.H. Report, *supra* at 12.

⁵⁷ *Id.*

⁵⁸ Smith, *Occupational Licensing in Alabama*, *supra* at 5-6; see also Harrington, *supra* at 8 (excluding “entrepreneurs out of the market reduces the number of low-cost competitors, which increases the power of [licensed] designers (and larger design firms) to charge consumers more”).

level of quality and price appropriate for their situation. Instead, occupational licensing forces all consumers to pay a higher price for goods and services, often without any resulting benefit in quality.⁵⁹ Indeed, to the contrary, such price increases will “*reduce* [the] quality received by consumers. This will occur as certain low-income consumers would not receive any service due to rising prices.”⁶⁰ When low-income individuals cannot afford to pay the higher prices charged by licensed professionals, those individuals are forced to either provide the services themselves or go without them.

Even in occupations where it is commonly accepted that some level of licensing is necessary, the evidence has shown that unnecessary and overly-aggressive requirements can in fact cause more harm than good. Proponents of professional licensing would argue that the licensing of electricians will elevate the quality of electrical work, and, as a result, correlate with fewer deaths related to electrocution. Unfortunately, that is not necessarily the case. A study of electrical occupational licensing observed a positive correlation between increased licensing requirements for electricians and an increased number of deaths by

⁵⁹ W.H. Report, *supra* at 14, 60-61 (demonstrating significantly higher prices where licensing requirements were stricter); Adams, *supra* at 272-73 (concluding licensing elevated prices for cosmetology services).

⁶⁰ Kleiner, *Ensuring Quality or Restricting Competition*, *supra* at 8 (emphasis added).

electrocution.⁶¹ Because overly-burdensome requirements resulted in fewer electricians available to the public (at a higher price), individuals with lower incomes who needed an electrician either attempted to do the work themselves or to go without it; the result was an increase in fatal electrocutions.

The same researchers also observed that in locations where veterinarian licensing became more restrictive, the rates of rabies in domestic animals increased. The licensing restriction did not improve quality or public health because those with less expendable income chose not to have their pets vaccinated for rabies, with the expected increase of rabies as a result.⁶² Indeed, *amici* and other scholars in their field have found similarly troubling results in occupations ranging from plumbers to optometrists, no matter the skill and expertise required.⁶³

Economic theory can therefore predict that the effects of requiring a license to practice African-style hairbraiding will disproportionately burden low-income communities. Those who seek hairbraiding services will: (1) do it themselves because they cannot afford the licensed practitioners whose wages are artificially

⁶¹ See Sidney L. Carroll & Robert J. Gaston, *Occupational Restrictions and the Quality of Service Received*, 47 SO. ECON. J. 959, 959-76 (1981).

⁶² See Sidney L. Carroll & Robert J. Gaston, *Barriers to Occupational Licensing of Veterinarians and the Incidence of Animal Disease*, 30 AGRIC. ECON. R. 37, 37-39 (1978).

⁶³ See Smith, *Occupational Licensing in Alabama*, *supra* at 6 (collecting studies).

inflated (to pay for all the unnecessary education and fees required to receive a license), (2) be unable to find a hairbraider for the price they can or want to pay, or (3) seek an unlicensed hairbraider operating underground. The first two options negatively affect hairbraiders who could be working but for restrictive licensing laws. But the last option negatively effects consumers as well: Underground practitioners must keep their occupation quiet, which makes it more difficult for consumers to judge the quality of goods and services. The state's ability to protect consumers from unsafe practices is *reduced* by unnecessary licensing burdens because the state has no information about these underground practitioners.

B. Occupational Licensing Regulations Exclude Minorities.

Licensing laws are especially detrimental to minority communities.⁶⁴ Such barriers result in lower numbers of minorities entering licensed occupations, or larger numbers practicing trades informally.⁶⁵ One study reviewed over 100 professions and concluded that “[d]emographically, the people who work in the 102 low- and moderate-income occupations studied . . .

⁶⁴ See Daniel H. Klein, Benjamin Powell, & Evgeny S. Vorotnikov, *Was Occupational Licensing Good for Minorities? A Critique of Marc Law and Mindy Marks*, 9 ECON. J. WATCH (2012), at 210-33, available at <http://goo.gl/avThXE>.

⁶⁵ See Carpenter, *Entrepreneur*, *supra* at 26 (collecting studies); Carpenter, *License to Work*, *supra* at 6.

make less money; [and] are more likely to be . . . racial/ethnic minorities and to have less education.”⁶⁶

Licensing restrictions such as education and language requirements are particularly effective in excluding minority groups. For example, one study concluded that educational restrictions on the practice of interior design, such as requiring a college degree, were likely to exclude black and Hispanic workers, as well as older “career-switchers,” from the field of interior design.⁶⁷ The regulation of interior design is a relatively recent phenomenon, increasing from 36 percent in 1993 to 60 percent in 2007 the interior designers that were subject to state regulation.⁶⁸ But only 47 percent of black and Hispanic interior designers (including those “grandfathered” into the profession when licensing restrictions were enacted) had a college degree, compared with 66 percent of white interior designers.⁶⁹ In regulated states, even fewer black and Hispanic designers had college degrees – only 39 percent.⁷⁰ Licensing restrictions requiring college degrees to practice interior design will therefore reduce the number of black and Hispanic individuals in the profession, especially as “grandfathered-in” black and Hispanic interior designers retire.⁷¹ And, as discussed, the absence

⁶⁶ Carpenter, *License to Work*, *supra* at 9.

⁶⁷ See Harrington, *supra* at 1.

⁶⁸ *Id.* at 2.

⁶⁹ *Id.* at 5, 9.

⁷⁰ *Id.* at 9.

⁷¹ *Id.* at 9, 14.

of minority interior designers is likely to affect the quality of interior design work available to consumers, especially minority consumers.⁷²

Other educational requirements also serve to exclude minorities. A study of cosmetology licensing regulations revealed “striking differences” between those who passed and those who failed the examination.⁷³ That research found that black cosmetology test-takers who satisfied preliminary requirements failed three times as often as non-black test-takers in Missouri and Illinois.⁷⁴ Moreover, the researchers noted black potential cosmetologists were less likely to take a licensing exam to begin with, being less likely to satisfy the preliminary education and training prerequisites.⁷⁵ The same study concluded that even when education and training backgrounds were the same, “the estimates suggest blacks are 30 [percent] less likely to pass in” Missouri and Illinois.⁷⁶ Because the two states at the time of the study utilized a professionally written exam, the results are likely representative of the exclusive effects of licensing regulations in other states as well.⁷⁷

⁷² *Id.* at 14.

⁷³ Stuart Dorsey, *Occupational Licensing and Minorities*, 7 L. & HUM. BEHAV. 171, 174 (1983).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 175.

⁷⁷ *Id.*

This study also showed that licensing restriction's exclusion of minorities has a ripple effect.⁷⁸ Workers' failure to satisfy licensing requirements results in larger numbers of minorities: being unemployed, spilling into the unlicensed sector and competing for jobs, reducing earnings, and practicing licensed trades without a license.⁷⁹ For Petitioners, the required 1,500 hours for cosmetology school or 1,000 hours for barber school, and required success on the exams, are likely to act as barriers to entry.

One study of low-income entrepreneurship across the United States found that low-income Hispanic and Latino populations had an entrepreneurship rate 2.5 times that of their percentage of the general population.⁸⁰ This is consistent with the fact that "immigrants account for a much higher portion of all low-income entrepreneurs than their percentage of the general survey population would indicate (27 [percent versus] 11 [percent])."⁸¹ The question becomes why "a heavily Hispanic/Latino state like Arizona has a just-below-average rate of low-income entrepreneurship."⁸² "The answer hinges on regulatory barriers that budding entrepreneurs face. . . . Arizona has one of the heaviest average occupational-licensing burdens for low-income

⁷⁸ *Id.* at 177.

⁷⁹ *Id.*

⁸⁰ Slivinski, *supra* at 6.

⁸¹ *Id.* at 4.

⁸² *Id.* at 6.

entrepreneurs.”⁸³ Simply put, occupational licensing reduces minority entrepreneurship.

The study of Vietnamese manicurists discussed previously found similar effects.⁸⁴ Where state licensing law directly or indirectly requires English proficiency, for example, the growth of Vietnamese manicurists is “nearly eliminate[d].”⁸⁵ As would be expected, the study found that “English proficiency requirements impact primarily those with poor English skills.”⁸⁶ The study also suggested that occupational licensing reduces assimilation, as English-proficiency requirements prevent Vietnamese manicurists from entering “counties with no initial Vietnamese population.” Such restrictions “impede assimilation by restricting entry into an occupation in which immigrants arguably face lower costs of learning English and receive benefits from doing so via higher earnings.”⁸⁷ Occupational licensing requirements that are unrelated to the practice at hand, such as language proficiency, thus result in unintended disproportionate effects on minority communities.⁸⁸

Finally, evidence suggests licensing reduces the earnings of minorities. In a national sample of cosmetologists, white cosmetologists earned 16 percent

⁸³ *Id.* at 6.

⁸⁴ Federman, *supra* at 237.

⁸⁵ *Id.* at 238.

⁸⁶ *Id.* at 239.

⁸⁷ *Id.* at 240.

⁸⁸ *Id.* at 237-38.

more than their nonwhite counterparts, all other variables being equal.⁸⁹ Similarly, nonwhite barbers earned an average of 21 percent less than their white colleagues.⁹⁰ The researcher concluded that the results were “consistent with the view that licensing lowers the relative earnings of blacks,” and “licensing inhibits [black barbers’ and cosmetologists’] mobility into higher-paying jobs within the occupation.”⁹¹

Nothing in the foregoing empirical studies suggests the consequences of requiring African-style hairbraiders to have irrelevant cosmetology or barbering licenses is any different.



CONCLUSION

The Eighth Circuit’s decision affirming the district court is at odds with the well-documented, undesirable practical implications that economic theory and empirical research predict will occur from requiring African-style hairbraiders to obtain an unnecessary occupational license to practice their trade. The American public benefits when it can “take full advantage of all of America’s talented labor.”⁹² Licensing African-style hairbraiders confers no benefit, and significant harm, to Missouri’s low-income populations. For all

⁸⁹ Dorsey, *supra* at 178-79.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² W.H. Report, *supra* at 5.

these reasons, *amici curiae* urge this Court to grant the petition for a writ of certiorari.

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