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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Eighth Circuit upheld Missouri's cosmetology and barber licensing scheme as applied to African-style hair braiders despite undisputed evidence that the requirements for a license are predominately irrelevant to African-style hair braiding. In so doing, the Eighth Circuit gave only cursory consideration to record evidence while purportedly applying the rational basis test. The Eighth Circuit's articulation and application of the rational basis test conflicts with the application of that test by the First, Fifth, Sixth, and Ninth Circuits.

The questions presented are:

1. What is the proper application of the rational basis test in cases arising under the Fourteenth Amendment's Due Process and Equal Protection Clauses?

2. Should the *Slaughter-House Cases*, 83 U.S. 36 (1872), be overturned?

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INTEREST OF *AMICUS CURIAE*[1]

Pacific Legal Foundation (PLF) is the nation's oldest public interest legal foundation that seeks to vindicate the principles of limited government, economic liberty, and property rights. Consistent with these goals, PLF attorneys have litigated many cases involving the right to earn a living and occupational licensing, *see*, *e.g.*, *Young v. Ricketts*, 825 F.3d 487 (8th Cir. 2016; *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); and *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014), and have participated in similar cases as amicus curiae. *See*, *e.g.*, *Sensational Smiles, LLC v. Mullen*, 136 S. Ct. 1160 (2016); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); and *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004). This case is important to PLF because the Eighth Circuit's application of the rational basis test below threatens the security of the right to earn a living for countless Americans.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than Amicus Curiae funded its preparation or submission. More than 10 days in advance of filing, all parties received timely notice of Pacific Legal Foundation's intent to file this brief. Counsel for Petitioners and Respondents filed letters of consent to the filing of amicus curiae briefs, and those letters are on file with the Clerk.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Petitioners Ndioba Niang and Tameka Stigers are professional African-style hair braiders, but are not licensed as cosmetologists or barbers. App. 3; *Niang v. Carroll*, 879 F.3d 870, 873 (8th Cir. 2018). The Missouri Board of Cosmetology and Barber Examiners requires hair braiders to be licensed as cosmetologists or barbers even though African-style hair braiding is not included in the cosmetology or barbering school curriculum, and the licensing tests barely test on subjects related to the practice. App. 21; *Niang v. Carroll*, No. 4:14 CV 1100 JMB, 2016 WL 5076170, at *6 (E.D. Mo. Sept. 20, 2016). In order to obtain a Missouri cosmetology license, one must pass a background check, undergo substantial training, and pass an exam. *See* App. 66-67; Mo. Rev. Stat. § 329.050. Before sitting for the exam, an individual must have: (1) graduated from a licensed cosmetology school with at least 1,500 hours of training; or (2) completed an apprenticeship of at least 3,000 hours; or (3) completed similar training in another state. *Id*. Alternatively, obtaining a barbering license requires at least 1,000 hours of training at a licensed barber school or completion of an apprenticeship of at least 2,000 hours. App. 60-61; Mo. Rev. Stat. § 328.080. Because completing the necessary requirements for a license would force Ms. Niang and Ms. Stigers to incur significant costs for irrelevant training, they sued to vindicate their constitutional right to earn a living free of unreasonable governmental interference. *See* App. 17; *Niang*, 2016 WL 5076170, at *3-4.

The Eighth Circuit sustained the licensing requirement for hair braiders because it held that there were conceivable legitimate purposes that were at least minimally advanced by the regulations, and because the district court conceived of other possibly legitimate purposes that Petitioners did not refute. App. 4-7; *Niang*, 879 F.3d at 873-74. The Court should grant the Petition for a Writ of Certiorari because the Eighth Circuit below used an improper, "toothless" standard of review contrary to Supreme Court precedent and deepened a conflict among lower courts over how to apply the rational basis test.

As this brief demonstrates, a long line of Supreme Court cases shows that the rational basis test is a meaningful standard of review. Contrary to the Eight Circuit's holding in this case, plaintiffs prevail in rational basis cases when evidence shows that there is not a sufficient logical connection between legislative means and ends. Further, multiple courts of appeals and other courts have relied on evidence in the record to invalidate economic regulations under the rational basis test, including cosmetology or barber licensing regulations substantially similar to the laws challenged here.

REASONS FOR GRANTING THE PETITION

I

RATIONAL BASIS REVIEW SHOULD PROVIDE A MEANINGFUL REVIEW

Rational basis review is not a set of magic words that guarantee the government's success against constitutional challenges to irrational economic regulations. In a challenge to an economic regulation, "the existence of facts supporting the

legislative judgment is to be presumed . . . *unless in the light of the facts* made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (emphasis added). This seminal description of the rational basis test describes a test that is deferential, but not insurmountable: it establishes, in effect, a rebuttable presumption in favor of legislation that may be overturned by evidence showing that the purpose of the regulation is illegitimate or the means used to accomplish the ends are irrational. *See*, *e.g.*, *Borden's Farm Prods. v. Baldwin*, 293 U.S. 194, 209 (1934) (Rational basis is "not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault."). The rational basis test provides a real measure of review, requiring legislation to be sufficiently related to a legitimate government interest to be rational. *See Romer v. Evans*, 517 U.S. 620, 632-33 (1996).

Plaintiffs challenging economic regulations bear the burden of showing the law's irrationality, but rational basis review is not a rubber stamp of government decision-making. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (Rational basis review is not "toothless."). And courts should not apply rational basis review in a manner that is "tantamount to no review at all." *FCC v. Beach Commc'ns*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in result). That many plaintiffs have won cases under rational basis review is evidence of that fact. *See* Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 Geo. Mason U. Civ. Rts. L.J. 43, 44 n.8 (2014) (collecting cases); *see also* Robert C. Farrell, *Successful Rational Basis Claims in the*

Supreme Court from the 1971 Term Through Romer v. Evans, 32 Ind. L. Rev. 357 (1999) (surveying rational basis cases in the Supreme Court from 1971 to 1996). When properly applied, rational basis review does not require plaintiffs to disprove every conceivable basis for a challenged law. Sandefur, *supra*, at 48. Instead, courts must consider the propriety of the law in light of facts introduced into evidence, and not imagine hypothetical justifications for considering whether a challenged statute passes muster. *Id.* (citing, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447-50 (1985); *Romer*, 517 U.S. at 632-35; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-38 (1973)).

A. This Court's Application of Rational Basis Review

In contrast to the Eighth Circuit's cursory application of the rational basis test below, this Court has struck down numerous laws under rational basis review where they lack a sufficient connection to the government's stated legislative goals.

In *Zobel v. Williams*, 457 U.S. 55, 56 (1982), the Court struck down an Alaska statute that established a program sharing oil revenue with state residents, where the payment amounts were determined by length of residence in the state. The Court held that neither of two justifications proffered by the state passed muster under the rational basis test. *Id.* at 61-63. First, the Court held there was no rational relationship between the state's desire to create financial incentives for people to reside in Alaska and the statute's distinction among beneficiaries based on their length of residency. *Id.* at 61. While the Court acknowledged that payments based on years of

residency may incentivize some people to remain in Alaska in the future, that primary function was undermined by the statute's scheme to provide payments for the 21 years of residency prior to the statute's enactment. *Id*. at 62.

Second, the Court rejected as irrational any connection between the government's stated purpose of encouraging prudent management of the oil revenue fund and granting payments for 21 years of residency that predated the statute's enactment. *Id*. at 62-63. Therefore, *Zobel* shows that true rational basis review demands a logical connection between legitimate ends and the means chosen to accomplish those ends.

In *Quinn v. Millsap*, 491 U.S. 95, 109 (1989), the Court addressed a provision of the Missouri Constitution granting membership on a local government board only to those who owned real property. The provision failed rational basis review because there was no logical connection between the justifications for the provision advanced by the government ("first-hand knowledge" of civic life and a "tangible interest" in the area) and the land-ownership requirement. *Id*. at 107-09. Indeed, the law was irrational even assuming a logical connection between owning real property and having "first-hand knowledge" or a "tangible interest" in the area because renters—who were prohibited from serving on local government boards—have similar knowledge and interests to property owners. *See id*. at 108.

Likewise, in *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970), the Court held irrational, and therefore unconstitutional, a Georgia municipality's law that

made real-property ownership a prerequisite for eligibility to serve on the school board. The Court determined that it could not "be seriously urged" that there was a rational connection between real-property ownership and a school board member's capacity to make wise decisions—the government's proffered justification for the law. *Id.* And a few years later, in a per curiam, one-sentence decision, the Court cited *Turner* to invalidate a similar land-ownership requirement in Louisiana. *See Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977).

Continuing the theme, in *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty.*, 488 U.S. 336, 344-45 (1989), the Court held that a West Virginia county tax assessor's practices could not survive rational basis review. Evidence brought forward by the plaintiffs showed that the assessor's practices created disparities between the assessments of similar properties by 8 to 35 times over. The Court therefore deemed those practices—and resulting assessments—not rationally related to the county's objective of assessing all real property at its true value. *Id.* at 343-45.

In *City of Cleburne*, 473 U.S. at 447-50, the Court held that it was irrational for the city to require a special use permit for a group home for the mentally disabled when it did not require the same permit for other group homes. The permit scheme was ruled unconstitutional because the special permit requirement bore no logical connection, in fact, to the only justifications advanced by the city (concerns that junior high school students across the street may harass the residents; that the home was in a 500-year

floodplain; and that the home was large). *Id.* at 449-50.

In *Williams v. Vermont*, 472 U.S. 14, 15 (1985), the Court reviewed a statute that gave favorable tax treatment to Vermont residents who registered vehicles purchased in other states in Vermont, while denying the same tax benefit to non-residents. The Court held that Vermont's tax scheme was irrational because the purpose of the tax—paying for maintenance and improvement of state roads—was not logically served by arbitrarily granting a credit to one group of road users, and denying the credit to another group. *Id.* at 23-26. Thus, while there was some legitimate governmental purpose that was minimally served by the law, the overall scheme failed rational basis review because it was under-inclusive.

In *Moreno*, 413 U.S. at 529, 532-33, the Court held it was irrational for Congress to exclude households of unrelated people from a federal food stamp program. According to the Court, because the Food Stamp Act's purpose was to "safeguard the health" of the poor, and the Act included measures to prevent fraud, Congress was "wholly without . . . rational basis" to distinguish between households solely based on whether all members were related. *Id.* at 533-38. Congress was "wholly" irrational, despite the fact that the distinction may have minimally advanced the legitimate interest in preventing waste of taxpayer dollars.

In *Mayer v. City of Chicago*, 404 U.S. 189, 190-91 (1971), a misdemeanor defendant sought a transcript of his trial for an appeal, but an Illinois Supreme Court rule provided transcripts only to

felony defendants. This Court held that the rule's distinction between felony and non-felony offenses violated rational basis review, because the state could provide no logical reason for the distinction. *Id.* at 195-96. Even though the policy of not providing transcripts to non-felony defendants could tangentially further a legitimate interest in saving the government money, the rule failed rational basis review due to the arbitrary distinction between felonies and misdemeanors.

In *Schware v. Bd. of Bar Examiners of State of N.M.*, 353 U.S. 232, 234, 238 (1957), a law school graduate challenged the government's refusal to allow him to sit for the bar exam as a violation of his Fourteenth Amendment substantive due process right to earn a living. The Court held that the denial failed to satisfy rational basis review. *Id.* at 246-47. After reviewing all of the evidence offered by the plaintiff in the case, the Court determined that none of the justifications provided by the government sufficiently supported a conclusion that the plaintiff was morally unfit to be a member of the bar. *Id.* at 240-47.

What the above (and other) Supreme Court cases show is that the Court's application of the rational basis test, while deferential to government action, is a meaningful standard of review under which plaintiffs prevail when they adduce facts to rebut the presumption of constitutionality.[2] In this

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[2] Since 1970, plaintiffs have won at least 21 cases at the Supreme Court under the rational basis test. In addition to those already discussed above, other cases include: *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Morrison*, 529 U.S. 598 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000); *United States v.*

case, the district court declined to consider evidence offered by Petitioners that demonstrated the lack of fit between the cosmetology license requirement and the government's interest in health and safety, regarding it as inappropriate "courtroom fact-finding." *See* App. 54-56; *Niang*, 2016 WL 5076170, at *18. In affirming that judgment, the Eighth Circuit wrongly endorsed a form of rational basis review out of line with this Court's precedent.

B. Rational Basis Review in the Courts of Appeals

Like this Court, multiple federal Courts of Appeals have invalidated economic regulations, including occupational licensing regulations, under rational basis review. However, the circuits are split on the standards for doing so, and require this Court to settle the conflict.

In *Craigmiles v. Giles*, 312 F.3d 220, 222-23 (6th Cir. 2002), for instance, casket sellers challenged Tennessee's requirement that they be licensed as funeral directors. The law in Tennessee had a mismatch between means and ends similar to the cosmetology license requirements in the instant case. The funeral director license required two years of training—without any guarantee of more than minimal training related to public health or safety—and successful completion of an exam that predominately tested topics unrelated to casket sales.

Lopez, 514 U.S. 549 (1995); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985); *Metro Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *James v. Strange*, 407 U.S. 128 (1972); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Reed v. Reed*, 404 U.S. 71 (1971).

312 F.3d at 222-23. The court struck down the law on the basis of evidence introduced by the plaintiffs, because the license requirements bore "no rational relationship to any of the articulated purposes of the state." *Id.* at 225-28.

Similarly, in *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217-18, 227 (5th Cir. 2013), Louisiana's requirement that intrastate casket sellers be licensed as funeral directors was held unconstitutional under rational basis review. Just like the court in *Craigmiles*, the Fifth Circuit painstakingly considered each of the government's rationales for the law, and analyzed each in relation to the evidence. *Id.* at 223-27. Because the facts belied the government's rationales, the court concluded that the licensing scheme was irrational. *Id.*

The Ninth Circuit provides yet another example. In *Merrifield*, the court determined on the basis of record evidence that it was irrational to require certain pest controllers to have a license while exempting others. 547 F.3d at 990-92. The government's stated purpose for the law was to ensure that exterminators most likely to be exposed to pesticides were properly trained. *Id.* Under the scheme, exterminators who trapped mice, rats, and pigeons (the three most common vertebrate pests) were required to get a license, but exterminators who trapped other types of vertebrates were not required to get a license. *Id.* Reviewing the evidence, the court found that the exterminators most likely to encounter pesticides were those who worked with the least common vertebrates. *Id.* at 990-91. The court held, therefore, that although the objectives of the licensing law were legitimate, there was an insufficiently

logical relationship between the government's interests and the means it chose to advance them.

The above courts of appeals decisions faithfully engaged in rational basis scrutiny in line with the test set out by this Court. In contrast, the Eighth Circuit has employed an impermissible "toothless" form of review.

II

THE CIRCUIT SPLIT AT ISSUE IN THIS CASE HAS LED TO DIFFERENT RESULTS IN NEARLY IDENTICAL CASES

Prior to this case, at least three federal district courts considered the constitutionality of cosmetology and barber licensing schemes as applied to hair braiders. *See Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012); *Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W.D. Tex. 2015). All three of those courts held that the licensing schemes failed to satisfy rational basis review. Below, the Eighth Circuit was dismissive of those cases as "not persuasive" because they considered record evidence in rendering judgment rather than deferring to legislative will. *Niang*, 879 F.3d at 875 n.3. The conflicting approach to rational basis review among the lower courts creates uncertainty for government officials and for hair braiders in many states. The Court should grant the Petition to put the conflict to rest.

In *Cornwell*, the state of California classified anyone who arranged, beautified, or "otherwise treat[ed] [hair] by any means," as subject to licensure as a cosmetologist. 80 F. Supp. 2d at 1103 n.5.

Aspiring hair braiders were required to complete 1,600 hours of training and pass a written and practical exam. *Id.* at 1113, 1115. However, evidence showed that the training curriculum, textbooks, and exams provided little instruction in hair braiding. *Id.* at 1109-17. According to the court's analogy: "Assume the range of every possible hair care act to involve tasks A through Z. [Hair braiding] would cover tasks A, B, and some of C. The State's cosmetology program mandates instruction in tasks B through Z. The overlap areas are B and part of C." *Id.* at 1108. The court held that it was irrational to require hair braiders to have a cosmetology license because there was insufficient overlap between skills used in the practice of hair braiding and skills taught and tested for a cosmetology license. *Id.* at 1108, 1119.

Similarly, in *Clayton*, Utah required hair braiders to be licensed as cosmetologists. 885 F. Supp. 2d at 1214. Under Utah law, before receiving a cosmetology license, an aspiring hair braider had to complete 2,000 hours of training and pass a written and practical exam. *Id.* at 1215. At most, however, only 20-30% of the training curriculum was indirectly relevant to hair braiding, and even that minimal amount received only cursory instruction. *See id.* Indeed, 98% of the material in the textbooks used in Utah cosmetology schools covered topics other than hair braiding, and of the 2% that did discuss hair braiding, it primarily did so generally, without specific application to the African-style hair braiding at issue. *See id.* Most egregiously, the required practical exam did not test skills at all relevant to hair braiding, and it was at best unclear whether the written exam required any knowledge of hair braiding. *Id.* Because Utah's cosmetology licensing scheme was "so

disconnected from the practice of African hair braiding, much less from whatever minimal threats to public health and safety are connected to braiding," the court held that requiring hair braiders to be licensed as cosmetologists failed rational basis review. *Id.* at 1215-16.

In *Brantley*, Texas hair braiders could obtain a hair braiding license after completing 35 hours of training. 98 F. Supp. 3d at 887-88. But only classes taken at licensed barbering schools counted toward the 35-hour requirement. *Id.* at 888. To be licensed as a barbering school, facilities were required to comply with minimum chair, sink, and square-footage requirements. *Id.* The plaintiff school, The Institute of Ancestral Braiding, challenged the barbering-school facility requirements as irrational. *Id.*

The *Brantley* court held that all three facility requirements were irrational when applied to schools that teach only hair braiding. 98 F. Supp. 3d at 891-94. First, the court held that it was irrational to require the plaintiff school to install a minimum of ten barber chairs because another part of the law only required schools to provide an "adequate number" of chairs to ensure a clean environment. *Id.* at 891-92. Second, the court held that a five-sink minimum was irrational as applied to hair braiding schools because, as a factual matter, hair braiders were not required to use sinks to clean their braiding tools; and because hair braiders were not allowed to wash hair under the law, the need for sinks was negated. *Id.* at 892. Third, the court held that the minimum square-footage requirement was irrational because mandating all schools to be of a minimum size was not logically connected to the government's stated purpose to

maintain a well-managed school inspection program. *Id.* at 892-93.

The courts in each of these cases reviewed similar laws under the rational basis test. Each of them engaged with evidence presented by plaintiffs to determine that there was in fact no logical connection between the governments' stated ends and the means chosen to pursue them. All three courts therefore struck down the unnecessary burdens imposed on the hair braiders as irrational and, therefore, unconstitutional. In contrast, the Eighth Circuit and the district court below reviewed a similar application of cosmetology licensing requirements to hair braiders and came to the opposite result. The difference is that the courts below in this case declined to seriously engage with the evidence of irrationality presented by the braiders. These disparate applications of the rational basis test among lower courts have created uncertainty for both regulators and hair braiders in determining what they may or must do. Only this Court can put that uncertainty to rest.

CONCLUSION

The Eighth Circuit's ruling misapplies the rational basis test, exacerbating a conflict among circuits concerning the nature of rational basis review. Moreover, the decision below stands in conflict with other decisions freeing hair braiders from requirements that they obtain cosmetology licenses before pursuing their occupation. The Eighth Circuit's judgment creates confusion for both hair braiders and regulators that can only be resolved by this Court. Accordingly, the Court should grant the Petition for a Writ of Certiorari.

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