IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 16-3968

NDIOBA NIANG and TAMEKA STIGERS,
Plaintiffs-Appellants,

v.

EMILY CARROLL, in her official capacity as executive director of the Missouri Board of Cosmetology & Barber Examiners; WAYNE KINDLE, in his official capacity as a member of the Missouri Board of Cosmetology & Barber Examiners, et al.,
Defendants/Appellees.

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, and SENATOR RAND PAUL IN SUPPORT OF APPELLANTS

On Appeal from the United States District Court
For the Eastern District of Missouri, Eastern Division

No. 4:14-cv-01100-JMB
The Honorable John M. Bodenhausen,
United States Magistrate Judge

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Dated: January 10, 2017

s/ Ilya Shapiro
Ilya Shapiro

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INTEREST OF *AMICI CURIAE*

This case concerns *amici* because occupational licensing that has no purpose but protectionism harms consumers, markets, and, ultimately, the Constitution's protection of economic liberty. *Amici* are as follows:

The **Cato Institute** is a nonpartisan public policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

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Senator Rand Paul is a U.S. senator from Kentucky elected by his fellow citizens to enact laws which permit the full enjoyment of life, liberty, and the pursuit of happiness. Essential to that pursuit of happiness is examination of laws which unfairly and unduly burden those who seek to enter a profession, but are barred from doing so by cumbersome licensing requirements.

No person other than *amici* and their counsel authored any portion of this brief or paid for its preparation and submission. All parties have consented to this filing. Fed. R. App. P. 29(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff-appellants Ndioba "Joba" Niang and Tameka Stigers are two African-style hair braiders who wish to operate traditional African-style hair-braiding salons in the state of Missouri. Missouri law currently requires hair braiders to obtain a license to practice either cosmetology or barbering—occupations neither Niang nor Stigers practice or intend to practice—in order to braid hair professionally. To become a Missouri-licensed cosmetologist or barber, an applicant must complete a 1,500-hour (cosmetologist) or 1,000-hour (barber) mandatory training curriculum and pass a licensing exam that contains written and

practical components. These requirements are overseen by the Missouri Board of Cosmetology and Barber Examiners, the defendants-appellants here.

Plaintiffs-appellants have challenged Missouri's licensing requirements, claiming that they violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. *Amici* support them, urging the Court to reverse the district court—which upheld the licensing regime as rationally related to the legitimate state interests of promoting the public health and protecting consumers from incompetence or fraud—and reject its rubber-stamp approach to rational basis review.

As applied by the district court, the rational basis test undermines the constitutional guarantee of procedural due process by denying plaintiffs both the right to a meaningful opportunity to be heard and to have their case judged by an impartial tribunal. Deprivations of economic liberty require meaningful rational basis scrutiny that actively engages with the facts of the case without putting a finger on the scales in favor of the government. As the Supreme Court has held in other contexts, meaningful scrutiny is especially important in situations like this one, where there are strong indicators that the government's proffered justifications are merely pretextual smokescreens for illegitimate anti-competitive cartel behavior and when the victims of the regulations lack sufficient numbers and resources to overcome the cartel through political means.

ARGUMENT

I. THE LOWER COURT'S APPLICATION OF THE RATIONAL BASIS TEST UNDERMINES PROCEDURAL DUE PROCESS

The overly deferential version of rational basis review adopted by the district court is constitutionally suspect in several ways. Any application of the rational basis test that fails to engage the factual record to determine whether the government's proffered interests are *actually* rationally related to the policy being challenged is merely a rubber stamp with the phrase "government wins" on it. It is at best an abdication of the judicial responsibility to safeguard individuals' constitutional rights against state overreach, at worst an active encouragement of such overreach—akin to the court's putting its finger on the scale by conceiving and accepting justifications the government itself failed to assert. All constitutional cases deserve meaningful scrutiny, and allowing a judge to act as de facto co-counsel to the government while offering justifications that the plaintiffs had no opportunity to refute is no scrutiny at all.

While plaintiff-appellants in this case have not brought a separate procedural due process cause of action, the district court's overly deferential application of the rational basis test has resulted in a significant deprivation of the procedural component of plaintiff-appellants' due process rights under the Fifth and Fourteenth Amendments. In order for a legal proceeding to comport with due process, each party must be guaranteed, *inter alia*, both an impartial tribunal and a

meaningful opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). By engaging in factually unsupported speculation in order to find hypothetical rational bases for the board's licensing requirements—an exercise that can *only* possibly benefit the government defendant—the district court impermissibly placed a finger on the scales of justice in favor of one party, denying plaintiff-appellants their right to a neutral arbiter. And by engaging in this speculation only after the conclusion of discovery and briefing, proffering justifications never advanced by the government, it denied plaintiff-appellants an opportunity to negate facts supporting those justifications and failed to provide them a meaningful opportunity to be heard.

A. The District Court Did Not Act as an Impartial Decision-Maker

At the most basic level, a court is simply a place where two parties to a dispute agree to let a third party with no personal interest decide the outcome in an attempt to avoid unnecessary violence. And while modern judicial and administrative systems with vast bureaucracies now tend to fill this role rather than kings or tribal chieftains, the fundamentals of that role remain the same: parties seek out and respect the decisions of judges based on the assumption that a disinterested, mutually agreeable arbiter will weigh both arguments fairly and evenly, producing an unbiased judgment that all can accept even if it is adverse to one party. The impartiality of the decision-maker, both real and perceived, is

absolutely essential to the legitimacy of the entire process. As the Supreme Court has repeatedly affirmed, "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 137 (1955)). This Court has also been unequivocal in the importance of judicial impartiality: "A judge best serves the administration of justice by remaining detached from the conflict between the parties . . . . When the judge joins sides, the public as well as the litigants become overawed, frightened and confused." *Reserve Mining Co. v. Lord*, 529 F.2d 181, 186 (8th Cir. 1976).

The need for an impartial decision-maker is most often invoked when a judge is asked to recuse due to a personal or financial interest in a case, *see, e.g.*, *Caperton*; *Tumey v. Ohio*, 273 U.S. 510 (1927). The rule, however, has wider applicability than merely preventing personal bias. In *Tumey*, the Court stated that "Every procedure . . . which might lead [an average person acting as a judge] not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." 273 U.S. at 532. The Court reiterated point this in *Murchison*: "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." 349 U.S. at 136. Indeed, *any* factor that may cause a judge to place a finger on the scales in favor of one party over another conflicts

with the Due Process Clause, regardless of the presence or absence of any personal interest or animus on the part of the judge.

Amici do not argue that the district court was personally biased or deliberately impartial against the plaintiffs-appellants in evaluating this case. The bias here is in the constitutional test endorsed by the district court, a test that does not deserve to be described as "scrutiny" but instead turns the judge into the government's agent and advocate. By failing to scrutinize the government's justifications even a little, the district court's "test" is a serious threat to the Constitution's protection of procedural due process.

When a judge assists the government by inventing their own justifications for the government's actions, as the district court did here, they fail in their duty to "apply the law to [a party] in the same way he applies it to any other party." *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002). The district court, in its overly deferential application of the rational basis test, ceased being an unbiased decision-maker and effectively acted as the government's co-counsel once it started actively concocting ways for the government to win rather than impartially weighing the arguments and facts presented by each side.

The court suggested that Missouri may have been attempting to "stimulate the market for African-style hair braiding instruction" and/or to provide "incentive [to] braiders to offer more comprehensive services," despite there not being a shred

of evidence indicating that either was the case. *Niang v. Carroll*, No. 4:14 CV 1100, 2016 U.S. Dist. LEXIS 127885, at *34 (E.D. Mo. Sep. 20, 2016). The court then continued: "In the end, whether it relates to the interests articulated by the State, or the conceivable interests discussed above, '[t]he assumptions underlying these rationales may be erroneous, but the very fact that they are *arguable* is sufficient, on rational-basis review, to immunize the [State's] choice from constitutional challenge.'" *Id.* (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 320 (1993)) (emphasis added). The problem with this reasoning is that the court has set the bar for "arguable" so low as to be meaningless. Are we meant to believe that any bald-faced assertion, lacking any evidentiary support whatsoever, not even conceived of by the people *whose job it is* to come up with plausible justifications for government actions, is sufficient justification for a constitutionally suspect policy as long as it's said with a straight face?

Under the standard articulated by the district court, is there *any* justification that would be too far-fetched to pass rational basis review? What if the Board required hair braiders to earn a law degree in order to ply their trade? It is "arguable," after all, that hair braiders with JDs would be of particularly high quality and would be particularly attentive to customers' needs. A creative judge could certainly argue that the state may have been attempting to "stimulate the market for African-style hair braiding instruction" within the nation's law schools,

or that a thorough understanding of American (tort?) law would be relevant to hair braiders in some capacity. This hypothetical may seem ridiculous, but according to the version of the rational basis test followed by the court below, it is not the judge's place to question the plausibility of any justification—certainly not by impartially weighing the evidence actually presented by both sides. When judges can simply use their imaginations to help the government, there are no meaningful limits on the government's ability to regulate the economic lives of its citizens.

B. Procedural Due Process Requires a Meaningful Opportunity to Be Heard

The right to a meaningful opportunity to be heard is equally if not more important to constitutional due process as the right to a neutral arbiter. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914)). A real chance to present arguments and marshal evidence provides decision-makers with a fuller, more nuanced view of the dispute, allowing them to make a more informed and (presumably) fairer judgment.

Meaningful participation in the adjudicative process also has value independent of its actual affect on the outcome of the case. The legitimacy of a legal system in the eyes of the citizenry relies on a belief that everyone gets their fair shake and that no one is simply ignored. *See* Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 Va. L. Rev. 1401, 1411–

14 (1979) (finding that individuals are more satisfied with the results of an adversarial criminal process than an inquisitorial process lacking meaningful party participation, independent of whether the verdict is guilty or innocent).

Constitutional litigation can be like a game of whack-a-mole: as the government proffers justifications for possibly unconstitutional policies, the plaintiff has to whack each of them down. This is difficult enough in normal situations, but when the judge starts offering his own justifications after the mallet has been taken out of the plaintiff's hands, it becomes impossible. That is essentially the situation the plaintiffs experienced here when the district court invented its own alternative justifications for Missouri's licensing scheme—*after* both discovery and briefing were over. This is akin to a prosecutor withholding evidence until the last days of a trail and the judge prohibiting the defendant from rebutting it—and it is just as constitutionally suspect. Had those justifications been presented at an earlier point in the litigation, plaintiffs-appellants would have had an opportunity to rebut the factual assertions underlying them, as is required for literally any other type of argument made during a formal judicial proceeding.

The district court relied on a statement from *Beach Commc'ns, Inc.*: "[T]ose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." 508 U.S. at 315 (internal quotation marks omitted). But anticipating and "negativing" literally every

conceivable justification for a government policy ahead of time is impractical, if not outright impossible, in the real world. The number of potentially conceivable justifications is nearly infinite, but word counts for legal briefs are not. All parties must necessarily prioritize what they include in their briefing and oral argument based on what they believe to be the most relevant and persuasive points. Allowing courts to invent new justifications *after the fact* means that cases will hinge not on the parties' arguments but on how creative the particular judge is feeling that day.

Plaintiffs-appellants don't even ask the impossible—leave from the court to file an infinitely long brief. They merely ask for a meaningful opportunity to *negative assertions that have been raised*. If procedural due process doesn't guarantee at least that, then the clause becomes a nullity.

II. COURTS MUST APPLY MEANINGFUL JUDICIAL SCRUTINY IN LICENSING CASES BECAUSE LICENSURE HAS A LONG HISTORY OF ABUSE AND ITS VICTIMS LACK POLITICAL POWER TO CHALLENGE IT DEMOCRATICALLY

Why do different tiers of scrutiny exist? Why do some constitutional harms receive a thorough vetting from courts, while others are essentially rubber stamped or, as here, receive active support from the court? These questions have long been both vexing and controversial. *See, e.g.*, Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479 (2008). Many courts and scholars have struggled with the nuanced distinctions between rational basis, intermediate scrutiny, and strict scrutiny, not to mention the interloper "rational basis with bite."

Despite this confusion, the Supreme Court has provided some consistent justifications for why certain constitutional classifications receive heightened scrutiny, and two of those justifications apply to the present case. The Court has clearly said that, *inter alia*, heightened scrutiny is proper where there is a long history of government abuse and pre-textual lawmaking, and when the injured parties are part of a class that lacks the political power typically required to achieve redress through traditional legislative means. *Amici* do not ask that this Court apply heightened scrutiny to the regulations at issue, just that it apply *any* level of *meaningful* scrutiny. Meaningful scrutiny is warranted both because regulations like Missouri's hair braiding rules have a long history of abuse—that is, of using *post hoc* public health and safety arguments to justify purely protectionist laws—and also because small businesses and entrepreneurs lack the political power to achieve their goals through traditional democratic means. Together, these two factors counsel this court to apply actual scrutiny to the challenged regulations.

A. The Supreme Court Has Often Applied Meaningful Scrutiny When There Is a Long History of Legislatures' Passing Laws for Unconstitutional Ends

Neither *amici* nor plaintiffs-appellants are advocating here for a departure from properly and meaningfully applied rational basis scrutiny for deprivations of economic liberty. Nevertheless, an examination of common justifications for

heightened scrutiny in racial- and gender-discrimination cases is helpful in illustrating the need for rejecting the lower court's brand of rubber-stamp review.

1. The Supreme Court has applied meaningful scrutiny when it discovers a long, widespread history of discrimination and abuse.

A powerful theme running through the Supreme Court's racial-discrimination jurisprudence is that the United States' long history of invidious discrimination against racial and ethnic minorities—particularly black Americans—makes it more likely that racial classifications will be based on prejudice and stereotypes rather than any legitimate government purpose. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns."). *See also Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1004 (1984) (noting Mississippi's long history of using "poll taxes, literacy tests, residency requirements, white primaries, and violence to intimidate black persons from registering to vote" in upholding a district court's decision to redraw an allegedly discriminatory voting district map); *S.C. v. Katzenbach*, 383 U.S. 301, 330 (1966) (noting that the use of "tests and devices" for voter registration purposes are suspect due to "their long history as a tool for perpetrating the evil [of racial discrimination and disenfranchisement]"); *United States v. Fordice*, 505 U.S. 717, 744 (1992) (O'Connor, J., concurring) ("In light of the State's long history of discrimination, and the lost educational and career opportunities and

stigmatic harms caused by discriminatory educational systems, the courts below must carefully examine Mississippi's proffered justifications for maintaining a remnant of *de jure* segregation to ensure that such rationales do not merely mask the perpetuation of discriminatory practices.") (citations omitted).

While the Court has not extended strict scrutiny to sex discrimination, much of the same reasoning applies. There is a pattern of classifications based on sex or sexual orientation receiving heightened scrutiny in part because the long history of discrimination against women and gay people makes it more likely that such classifications have been made with discriminatory purposes in order to achieve unconstitutional, discriminatory effects. *See United States v. Windsor*, 133 S. Ct. 2675, 2683 (2012) (citing the lower court's discussion of the history of discrimination against gay people); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives, and are in many settings unconstitutional.") (citations omitted).

In both the racial and sex discrimination contexts, the Court's awareness of a long history of discrimination, while alone not conclusive evidence that a certain classification or policy is unconstitutionally discriminatory, is an important

indication that a state's proffered justifications may not be genuine and that unconstitutional goals are being pursued through means that are benign on the surface. Those seemingly benign means are accordingly scrutinized. The presence of a long history of abuse counsels courts to engage in a less deferential examination of the government's motivations than it ordinarily would.

2. Missouri's laws are part of a long and widespread tradition of using licensing laws to stifle competition rather than to promote public health or safety.

While the Board claims that its licensing regime serves the twin purposes of promoting public health and protecting consumers from the dangers of unqualified hair braiders, a careful examination of facts surrounding this case makes it readily apparent that this is merely a pretext for industry insiders' self-serving desire to limit the number of potential competitors entering the market as well as to collect tens of thousands of dollars on training programs run by those same insiders. In fact, seven out of nine members of the Board are already licensed cosmetologists, barbers, or cosmetology school owners with direct financial interests in maintaining the status quo. Mo. Rev. Stat. § 329.015.1. That fact alone should justify applying meaningful scrutiny to the regulations at issue.

The public health and safety rationale blindly accepted by the district court falls apart under even the most rudimentary scrutiny, as detailed in plaintiffs-appellants' brief. For instance, while unlicensed hair braiders operating in salons

are apparently such a hazard to the Missouri public as to merit *criminal* prosecution, Mo. Rev. Stat. § 329.250.1, unlicensed hair braiders working at public-amusement and entertainment venues are perfectly safe—at least judging by the state's exemptions to the law. Mo. Rev. Stat. § 316.265. By the government's own admission, hair braiding is neither taught nor tested as part of the mandatory licensing curriculum, and only a small fraction of the curriculum is even broadly applicable to hair braiders. Missouri's licensure requirement for traditional African hair braiders has nothing to do with public health and safety and everything to do with the barber and cosmetology industry acting like a protectionist cartel.

It would be bad enough if this was some sort of isolated incident of rare regulatory capture, but this sort of anticompetitive cartel behavior via occupational licensing regime is extremely widespread, and it goes back, in one way or another, long into the nation's past. Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. Pub. Pol'y 209, 212–13 (2016). Many licensing boards tasked with overseeing these regimes are staffed by self-interested members of the professions themselves, who are free to determine qualifications, write and grade qualifying exams, and make disciplinary decisions with little legislative oversight, as is the case here. Larkin, *supra*, at 213.

Similar lawsuits to this one, challenging occupational licensing regimes as merely pretexts for anticompetitive rent-seeking by industry insiders, have been

brought—and won!—by people engaged in professions as diverse as, for example, making and selling caskets, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), giving guided sight-seeing tours, *Edwards v. District of Columbia*, 755 F.3d 996 (DC Cir. 2014), and teeth-whitening, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). Two district courts have already struck down hair-braiding licensing regimes almost identical to the one at issue here as irrational restrictions on the right to earn an honest living with no reasonable relation to protecting public health or welfare. *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

The abuse of occupational licensing to protect insiders from competition is widespread. Nearly a third of U.S. workers must have a license, according to a recent White House report. The White House, *Occupational Licensing: A Framework for Policymakers* 17 (July 2015), http://bit.ly/1LgnSt1. Yet the justifications for many of these requirements fall apart under even the most passing scrutiny. It is quite likely that many occupational-licensing regimes are motivated by, and achieve, improper, anticompetitive purposes, strongly suggesting that courts should be less deferential than the district court was in this case.

B. The Supreme Court Has Often Applied Meaningful Scrutiny When Historically Disadvantaged Classes Have Lacked Political Power

This case is not about racial or sex discrimination—though there is of course a racial component, as plaintiffs-appellants are two black women engaging in

traditional African hair braiding for predominantly black clients. Yet not only have licensing regimes like Missouri's long been used by well-connected rent-seekers to quash competition, those who have most been hurt by those schemes are too often women and racial minorities. Plaintiffs-appellants, as small-business owners serving predominantly lower-income minority communities, are emblematic of the sort of relatively powerless victims commonly injured by these unjust regimes.

The Supreme Court has bestowed heightened scrutiny on some types of cases due to the relative political powerlessness of certain groups. This can be seen most clearly in racial-discrimination cases. *Carolene Products*' famous Footnote 4, which provided the inspiration for the current system of tiered scrutiny, indicated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" and thus "may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

In the prototypical case of black Americans, hundreds of years of chattel slavery, followed by decades of deliberate and systematic disenfranchisement, as well as public and private discrimination, have left them particularly vulnerable to government abuse. The courts must therefore be particularly careful to ensure that state power is not used in a discriminatory fashion.

Discrimination against other racial minorities, as well as discrimination against whites or *in favor* of minorities, is also officially afforded strict scrutiny, though courts' perceptions of each group's history of discrimination and relative political power clearly influence how vigorous scrutiny will be applied. *See, e.g.*, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (upholding the University of Texas's race-conscious admissions policy under a strict scrutiny standard). *But see Fisher*, 136 S. Ct. at 2216 (Alito, J., dissenting) (accusing the opinion's author Justice Kennedy of giving the university "blind deference," despite claiming to have applied strict scrutiny); Peter N. Kirsanow, *Race Discrimination Rationalized Again*, in 2015–2016 Cato Sup. Ct. Rev. 59, 59–78 (2016).

Unlike racial classifications, gender classifications receive only intermediate scrutiny, even though there is also a long history of gender discrimination, including but not limited to the fact that women were mostly denied the franchise until the ratification of the Nineteenth Amendment in 1920. This is a result of several factors, including courts' finding actual biological differences (real or imagined) between men and women that justify disparate treatment, *see, e.g.*, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 134–41 (1873) (Bradley, J., concurring) (A state law excluding women from the practice of law was constitutional because "in view of the peculiar characteristics, destiny, and mission of woman [to be a wife and mother], it is within the province of the Legislature to

ordain what offices, positions and callings shall be filled and discharged by men.");[1] as well as the argument that strict scrutiny should not apply to gender since the Fourteenth Amendment was written when women were still denied the vote and was thus not originally intended to apply to gender classifications. *See Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) (stating that the original purpose of the Equal Protection Clause was only to limit *racial* discrimination). There is also the more modern perception that women, as a demographic as well as political majority, are perfectly capable of protecting their own rights at the ballot box. *See* John Hart Ely, Democracy and Distrust 169 (1980). There thus appears to be at least some connection between the perceived political power of the discriminated-against class and the level of scrutiny courts tend to apply.

While it is often suggested that the remedy for the wrongs suffered by plaintiffs-appellants is at the ballot box rather than the courthouse, a practical political remedy does not really exist for those boxed out of professions by irrational licensing laws. Each licensing scheme impacts relatively few voters, and those who are excluded lack the political power to combat an organized, licensed interest group. See, Robert McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 50 (1962)

[1] The Supreme Court did not invalidate a gender classification as unconstitutional until 1971. *Reed v. Reed*, 404 U.S. 71 (1971).

("[S]cattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined.").

Plantiffs-appellants' case is illustrative. They have chosen to mount a constitutional challenge in court against a licensing scheme that would make it impossible to practice their chosen profession without spending a year of their lives and tens of thousands of dollars to receive irrelevant training. Yes, they could have instead attempted to remedy their situation via the democratic process, but that would have required them to influence the state legislature to such an extent that it either passed a law limiting the reach of the Board or otherwise reconfigured the Board to be more amenable to traditional African hair braiding.

But there are relatively few people attempting to operate traditional African hair-braiding salons, and small-business owners catering primarily to black women don't tend to have the political connections or financial resources necessary to mount successful lobbying campaigns—particularly when they are legally prohibited from plying their trade during the process. And because many licensure boards are comprised of members of the very profession being regulated, as is the case with a majority of the Missouri Board of Cosmetology and Barber Examiners, Mo. Rev. Stat. § 329.015.1, in order to have a direct impact on the Board's actions, one must first become licensed. In reality, were licensing schemes amenable to democratic action, they probably would have disappeared long ago because

"licensing regulations do not improve market performance, [but i]nstead, they impose welfare losses on consumers." Stuart Dorsey, *Occupational Licensing and Minorities*, Law and Human Behavior, Vol. 7, Nos. 2/3 (1983).

There is also evidence that occupational licensing disproportionately harms racial minorities like plaintiffs-appellants. A recent study found that such schemes "can pose substantial barriers for those seeking work, particularly those most likely to aspire to [licensed] occupations—minorities, those of lesser means and those with less education." Dick M. Carpenter et al., *License to Work: A National Study of Burdens from Occupational Licensing* 4, Inst. for Justice (2012), http://bit.ly/1THHCt6. This problem is the exact sort of systematic deficiency in our democratic system that most demands meaningful judicial scrutiny.

CONCLUSION

This Court should reverse the court below because Missouri's hair-braiding licensing rules are not rationally related to any legitimate governmental purpose.

Respectfully submitted,

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Dated: January 10, 2017

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 5,122 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. Civ. P 32(a)(5) and the type style requirements of Fed. R. Civ. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: January 10, 2017

s/ Ilya Shapiro
Ilya Shapiro

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system. I also certify that this brief was scanned for viruses using Malwarebytes Anti-Malware Home (Free) 2.2.1.1043.

Dated: January 10, 2017

s/ Ilya Shapiro
Ilya Shapiro