No. 17-1428

IN THE

Supreme Court of the United States

NDIOBA NIANG AND TAMEKA STIGERS,

PETITIONERS,

V.

BRITTANY TOMBLINSON, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MISSOURI BOARD OF COSMETOLOGY AND BARBER EXAMINERS, ET AL.,

RESPONDENTS.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Ilya Shapiro
Counsel of Record
Trevor Burrus
J. Aaron Barnes
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
tburrus@cato.org

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QUESTIONS PRESENTED

1. Should this Court finally overturn its decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)?

2. What level of judicial scrutiny is proper for courts to apply when reviewing infringements of the right to earn a living under the Fourteenth Amendment?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case concerns *amicus* because the right to earn a living is one of the basic rights our Constitution was formed to protect, with state infringements subject to meaningful judicial scrutiny under the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Ndioba Niang and Tameka Stigers are traditional African-style hair braiders, a unique skill with a rich history and profound cultural significance. They wish to support themselves by offering their services to willing customers. The Missouri Board of Cosmetology and Barber Examiners, however, demands that they first pay inordinate amounts of money to receive completely irrelevant training. This Court should help ensure that these petitioners—and countless others like them—can earn a respectable living without having to kowtow to protectionist licensing regimes.

To that end, the Court should overturn the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) and re-

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[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief, and have consented. No counsel for any party authored any part of this brief. No person or entity other than *amicus* funded its preparation or submission.

store the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause. *Amicus* does not request the invalidation of a nearly century-and-a-half old precedent lightly. But *Slaughter-House* not only remains a prominent blemish on this Court's record, it also continues to wreak havoc on the coherence of constitutional jurisprudence. The egregious infringement of petitioners' fundamental rights to earn a living provides the perfect vehicle for righting this wrong and subjecting violations of long-recognized rights to meaningful judicial review.

But even if the Court elects not to revive the "superior alternative" of the Privileges or Immunities Clause and instead falls back on the "tenuous footing" of substantive due process, *McDonald v. City of Chicago,* 561 U.S. 742, 812 (2010) (Thomas, J., concurring), the right to earn a living should still be treated as fundamental—with any abridgements subject to meaningful judicial review. The right is both deeply rooted in Anglo-American legal tradition and inherent in a free and open society. Moreover, the Court has often scrutinized rights violations directed at politically powerless groups, looking behind the pretexts offered as justification. Because infringements on the right to earn a living often impact powerless groups and are all-too-commonly driven by self-seeking economic protectionism, meaningful scrutiny is warranted.

ARGUMENT

I. THE RIGHT TO EARN A LIVING IS FUNDAMENTAL UNDER THE PRIVILEGES OR IMMUNITIES CLAUSE

The Fourteenth Amendment's Privileges or Immunities Clause states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. 14, § 1. But any consideration of which particular rights are covered by that provision was effectively foreclosed a mere five years after the amendment's enactment by the decision in the *Slaughter-House Cases*. *See* 83 U.S. (16 Wall.) 36 (1873). But for this erroneous decision, the Clause would protect a wide array of historically recognized rights from state infringement—including the right to earn a living—and subject government infringements of these rights to meaningful judicial scrutiny. The current case presents the Court with a prime opportunity to finally right this wrong.

A. *Slaughter-House* Misinterpreted the Privileges or Immunities Clause

There is widespread agreement among scholars that this Court completely botched its interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases*. *See*, *e.g.*, Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & Liberty 1096, 1098 (2005) ("In the eyes of virtually all historians, there is little doubt that *Slaughter-House* is wrong"); Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 123 n.327 (2000) ("Virtually no serious modern scholar—left, right, or center—

thinks [that *Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment."). Like the current case, that case also involved occupational freedom, specifically, whether New Orleans could charter a monopolistic corporation with the power to dictate where butchers could legally slaughter animals. *Slaughter-House*, 83 U.S. at 57. While the Court recognized that the right to carry on a lawful occupation had long been guaranteed by the states, it found that the Privileges or Immunities Clause only implicated federal rights as opposed to these sorts of state-protected rights. *Id.* at 74–78. According to the *Slaughter-House* majority, such federal rights were relatively limited in scope and included, among others, the right to access seaports, to use navigable waters, and to demand protection on the high seas. *Id.* at 79–80. The fundamental flaw there was the illogical conclusion that federally guaranteed rights and state-guaranteed rights are mutually exclusive—that if states are responsible for protecting one set of rights, then *ipso facto* the federal government cannot protect those same rights, and vice versa.

This bifurcation of rights into exclusively state- and federally protected categories is now the antiquated remnant of an abandoned doctrine. Nearly all of the enumerated rights originally protected against infringement by the federal government have now been incorporated against state governments, albeit through the Due Process Clause. *See, e.g.*, *McDonald v. City of Chicago,* 561 U.S. 742, 791 (2010) (plurality) (incorporating the right to keep and bear arms).

This incorporation of rights reflects a conception of federalism that the justices in the *Slaughter-House* majority would have found incomprehensible. A guiding rationale of Justice Samuel Miller's decision was

his conviction that the Fourteenth Amendment could not possibly have been meant to "radically change the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people." *Slaughter-House*, 83 U.S. at 78. But, as modern scholarship has demonstrated, such a radical change was exactly what the Fourteenth Amendment was designed to do by, among other things, constitutionalizing the Civil Rights Act of 1866—which was passed by Congress in response to the odious "black codes," which themselves were a response by southern states to the Thirteenth Amendment. *See* Philip Hamburger, *Privileges or Immunities*, 105 Nw. U.L. Rev. 61, 116–17 (2011).

The *Slaughter-House* holding also makes no sense when considering the structure set forth by the Constitution itself. As Justice Stephen Field carefully laid out in dissent, the Privileges or Immunities Clause recognizes that already-existing rights "belong of right to citizens as such" and "ordains that they shall not be abridged by State legislation." *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting). If the rights covered by the Clause were only "such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States," then "no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference." *Id*. This is because "[t]he supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character." *Id*.

In other words, the *Slaughter-House* majority's interpretation rendered the Clause "a vain and idle en-

actment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *Id.* This Court should heed Chief Justice Marshall's time-tested advice in *Marbury v. Madison*: "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." 5 U.S. (1 Cranch) 137, 174 (1803).

B. The Right to Earn a Living Is One of the Privileges and Immunities Protected by the Fourteenth Amendment

Upon dispensing with *Slaughter-House*'s faulty interpretation, the Court would need to begin its search for a reliable method of determining the scope and meaning of the Privileges or Immunities Clause. The best source for understanding the Clause remains its analogue in Article IV of the Constitution, which simply states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. That is because, as the Court recognized in *Saenz v. Roe*, the Framers of the Fourteenth Amendment modeled the Privileges or Immunities Clause on its Article IV counterpart. 526 U.S. 489, 503 n. 15 (1999).

While the Article IV Privileges *and* Immunities Clause certainly inspired the Framers of the Fourteenth Amendment, the two clauses evince somewhat different purposes. Article IV was meant "to help fuse into one Nation a collection of independent, sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), and "to place the citizens of each State upon the same footing with citizens of other States." *Paul v. State of Virginia*, 75 U.S. 168, 180 (1868). The Fourteenth Amendment's Privileges or Immunities Clause, on the

other hand, was meant to guarantee a certain baseline of rights across the nation. *See McDonald*, 561 U.S. at 808 (Thomas, J. concurring). Nevertheless, despite this difference in purpose, it makes sense to consult rulings involving Article IV in order to determine the scope of the Fourteenth Amendment counterpart.

Justice Bushrod Washington's famous 1823 opinion in *Corfield v. Coryell*, which "indisputably influenced the Members of Congress who enacted the Fourteenth Amendment," 526 U.S. at 526 (Thomas, J., dissenting), is a logical starting point. *Corfield* points to the right to earn a living as being central to a proper understanding of what the terms "privileges" and "immunities" encompass. Although Justice Washington found it "more tedious than difficult to enumerate" all the rights covered by the clause, he included in his list both the right "to pursue and obtain happiness" and to "pass through, or to reside in any other state, for purposes of trade, agriculture, *professional pursuits*." 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (emphasis added).

The "pursuit of a common calling" has remained central to Privileges and Immunities jurisprudence in the two centuries since *Corfield*, with the Court recognizing that "[m]any, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity." *United Bldg. & Const. Trades Council of Camden County & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 219 (1984); *see also, McBurney v. Young*, 569 U.S. 221, 227 (2013) ("the Privileges and Immunities Clause protects the right of citizens to ply their trade, practice their occupation, or pursue a common calling").

Finally, Representative John Bingham, one of the principal architects of the Privileges or Immunities

Clause, unambiguously explained that the intent of the clause was, among other things, to protect "the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil." Cong. Globe, 42d Cong., 1st Sess. App. 86 (1871). The right to earn a living is not merely included in, but rather is essential to, any valid understanding of what constitutes privileges and immunities. Accordingly, when a state puts onerous restrictions on working in an "honest calling," the onus should be on the government to prove a sufficiently important interest and proper means-end fit before depriving someone of his or her livelihood.

II. VIOLATIONS OF THE RIGHT TO EARN A LIVING ARE ALSO SUBJECT TO MEANINGFUL JUDICIAL SCRUTINY UNDER THE DUE PROCESS CLAUSE

If the Court is still unready to overturn *Slaughter-House*, the Court's existing jurisprudence regarding another constitutional provision easily protects the right to earn a living: the Due Process Clause. As a matter of original public meaning, the Privileges or Immunities Clause is a better vehicle for protecting economic liberties, but this Court has also recognized that the right "to engage in any of the common occupations of life" is among the "fundamental rights which must be respected" under the Due Process Clause. *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923).

Moreover, this Court is often called upon to protect the powerless from the powerful, and the Due Process Clause passes a scrutinizing eye over violations of mi-

nority rights for personal gain. Those harmed by unnecessary occupational licensing are often politically powerless to effect change and there is a history of such regulations' being motivated by pure economic protectionism, so such laws warrant meaningful judicial scrutiny under the Due Process Clause.

A. The Right to Earn a Living Is a Fundamental Right Protected by the Due Process Clause

In order to receive protection under the "substantive" component of the Due Process Clause, the Court must view the right being asserted as "fundamental." Such rights typically receive more exacting judicial scrutiny. *See*, *e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993). This Court's precedents define fundamental rights as those that are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Under both metrics, the right to earn a living qualifies as a fundamental right.

1. The right is deeply rooted in the nation's history and tradition.

The right to earn a living stretches back to English common-law cases decided more than a century before the founding of the United States. *See, e.g.*, *The Case of the Bricklayers*, 81 Eng. Rep. 871 (K.B. 1624) (holding that plasterers did not have to be licensed to practice their trade). For example, in *The Case of the Tailors*, Sir Edward Coke wrote that "at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all

evil." *The Ipswich Tailors' Case*, 77 Eng. Rep. 1218, 1219 (K.B. 1615). Another notable case was *Allen v. Tooley*, which involved an upholsterer who had the audacity to open his business before completing an apprenticeship. *See* 80 Eng. Rep. 1055 (K.B. 1614). In finding for the upholsterer, Lord Coke observed that the common law protected the right of "any man to use any trade thereby to maintain himself and his family." *Id*. at 1055. A century and a half later, Sir William Blackstone reaffirmed this sentiment by similarly commenting that "[a]t common law every man might use what trade he pleased." 1 William Blackstone, *Commentaries on the Laws of England* 427.

Lord Coke's legal writings were "to be the training books for generations of lawyers, including Thomas Jefferson, John Adams, and John Marshall." Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 216 (2003). It is therefore unsurprising to read Jefferson's comment that "everyone has a natural right to chuse that [vocation] which he thinks most likely to give him comfortable subsistence." Thomas Jefferson, "Thoughts on Lotteries" (February 1826), in *The Jeffersonian Encyclopedia* 609 (John P. Foley ed., Funk & Wagnalls Co. 1900). Not to be outdone, the Constitution's primary Framer, James Madison, explained that the right to earn a living through a trade or business was at the heart of American liberty:

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations.

See James Madison, *Property* (1792) (Mar. 29, 1792), in *The Papers of James Madison* (William T. Hutchinson et al. ed., 1987), http://bit.ly/2wwNNfO.

Finally, these deep roots recognizing the right to earn a living were echoed in the mid-19th century by Justice Field in his *Slaughter-House* dissent. Field observed that "when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country." *See* 83 U.S. at 105. It is difficult to imagine a right that is any more "objectively, deeply rooted in this Nation's history and tradition."

2. The right is implicit in the concept of ordered liberty.

Justice William O. Douglas once called the right to earn a living "the most precious liberty that man possesses." *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting). This sentiment remains alive today, as demonstrated by then-Justice Don Willett's succinct and eloquent explanation that "self-ownership, the right to put your mind and body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity." *Patel v. Texas Dep't of Licensing & Reg.*, 469 S.W.3d 69, 92 (Tex. 2015) (Willett, J., concurring).

For Justice Joseph Bradley, the "right to choose one's calling [was] an essential part of that liberty which it is the object of government to protect." *Slaughter-House Cases*, 83 U.S. at 116 (Bradley, J.,

dissenting). No right was "more essential and fundamental than the right to follow such profession or employment as each one may choose." *Id.* at 119. Fellow *Slaughter-House* dissenter Justice Field agreed, writing that "the right to pursue a lawful employment in a lawful manner" is one of the rights that "belong to the citizens of all free governments." *Id.* at 97.

But as compelling as the words of these eminent jurists may be, perhaps the best explanation of the importance of the right to earn a living did not emanate from the bench, but rather from a member of the class of individuals that the Fourteenth Amendment was specifically designed to benefit: a former slave. In recalling the first time he earned payment after escaping slavery, Frederick Douglass remarked as follows:

> I was not long in accomplishing the job when the dear lady put into my hand two silver half dollars. To understand the emotion which swelled in my heart as I clasped this money, realizing that I had no master who could take it from me—that it was mine—that my hands were my own, and could earn more of the precious coin—one must have been in some sense himself a slave. . . . I was not only a freeman but a free-working man, and no Master Hugh stood ready at the end of the week to seize my hard earnings.

Frederick Douglass, *The Life and Times of Frederick Douglass*, reprinted in *Douglass: Autobiographies* 654 (Henry Louis Gates Jr. ed., 1994). Such sentiments reveal the indispensable nature of the right to earn a living, both among free and open societies in general and in the Anglo-American legal tradition in particular.

B. Infringements of the Right to Earn a Living Are Subject to Meaningful Judicial Scrutiny

Because the Due Process Clause protects the right to earn a living, violations of that right deserve some sort of meaningful scrutiny—something more than a rubber stamp. In footnote four of *Carolene Products*, this Court provided the basic framework for when "more exacting" judicial scrutiny is warranted: 1) "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments"; 2) when the statute evidences a "prejudice against discrete and insular minorities"; and 3) when a law "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (cleaned up). The latter two circumstances are germane to the current case.

1. Meaningful scrutiny is proper when rights violations are directed at politically disadvantaged groups—and those shut out by irrational licensing regimes are often politically powerless.

This Court has recognized that the judiciary has a "special role in safeguarding the interests of those groups that are relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (internal quotation marks omitted). Meaningful scrutiny has thus often been applied in cases involving groups lacking sufficient political power, with footnote four serving as the foundation for this practice.

While it is often suggested that the remedy for the wrongs such people suffer 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 affects relatively few voters directly—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) ("[S]cattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined.").

Petitioners, as small-business owners serving predominantly lower-income minority communities, provide a typical example of the sort of relatively powerless victims commonly injured by these unjust regimes. They have chosen to mount a constitutional challenge 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 legislature to such an extent that it passed a law either limiting the board's reach or otherwise reconfiguring it to be more amenable to African hair-braiding.

The reality is that 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. This is so particularly

when they are legally banned 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 here—one must first become licensed in order to have a direct impact on the relevant board's actions. In reality, were licensing schemes amenable to democratic action, they 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 & Human Behavior, Vol. 7, Nos. 2/3 (1983).

2. Long histories of abuse and pretextual lawmaking justify more judicial scrutiny.

A long history of government abuse often serves as an important indication that the state's proffered justifications may be a disingenuous smokescreen for the pursuit of improper ends through seemingly benign means. And where illegitimate motives are likely to be the driving force behind government action, courts are justified in more closely scrutinizing both the state's asserted ends and the means it chooses to employ. These considerations are relevant in instances of occupational licensing.

The prototypical case of historical discrimination warranting greater judicial scrutiny involves black Americans, whose history includes hundreds of years of chattel slavery followed by decades of deliberate and systematic disenfranchisement, as well as public and private discrimination. *See, e.g.*, *United States v. Fordice*, 505 U.S. 717, 744 (1992) (O'Connor, J., concurring) ("In light of the State's long history of discrimination

. . . 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); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25-26 (1971) (finding that schools "in a system with a history of segregation" that are "predominately of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation"); *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966) (holding that the use of "[t]ests and devices" for voter registration purposes is suspect due to "their long history as a tool for perpetrating the evil [of racial disenfranchisement]").

Because of this history of invidious discrimination, this Court considers it more likely that laws involving racial classification to have been motivated by prejudice and stereotypes than a 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."). That is the case even when the government offers pretextual justifications for the law. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (reiterating the rule that "a racial classification, regardless of purported motivation, is presumptively invalid" still applies "to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination"). In other words, after applying strict scrutiny, the Court typically strikes down rationales that are found to be mere pretext. *See Shaw v. Hunt*, 517 U.S. 899, 932 (1996).

In *Yick Wo v. Hopkins*, the Court struck down a San Francisco ordinance requiring laundries in buildings not constructed of brick—which were primarily operated by Chinese persons—to obtain a business permit from city officials with unfettered discretion to grant or deny the permits. 118 U.S. 356 (1886). The *Yick Wo* law was only one of many attempts at the time "to shut down Chinese laundries, or at least to give white competitors an advantage over Chinese laundrymen." David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 Wm. & Mary L. Rev. 211, 211-12 (1999). Accordingly, even though "the law itself be fair on its face and impartial in appearance," the Court held this thinly veiled attempt to burden Chinese laborers for the benefit of whites as "a violation of the fourteenth amendment." *Yick Wo*, 118 U.S. at 373–74.

While this Court has not employed strict scrutiny when reviewing gender discrimination, classifications based on gender still receive intermediate scrutiny partially based on the long history of bias against women. *Compare United States v. Virginia*, 518 U.S. 515, 531 (1996) ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."), *with Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) ("[W]e find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts."). As a result of this history, the Court has declared "that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *See Virginia*, 518 U.S. at 535–36.

3. Infringements on the right to earn a living are often driven by economic protectionism.

Men have often passed laws to help men and hurt women. Whites have often passed laws to help whites and hurt African Americans. That history is well known, and courts thus treat such classifications with a skeptical eye. But entrenched businesses and professions likewise often pass laws to help established businesses and hurt competitors. That history is equally well known, and such laws also deserve this Court's scrutinizing eye. *See generally* Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. Pub. Pol'y 209, 212–13 (2016).

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—commonly staff occupational licensing boards. *Id*. at 213. That is exactly the circumstance here, where seven of nine board members are already licensed cosmetologists, barbers, or cosmetology school owners with direct financial interests in maintaining the status quo. *See* Board of Cosmetology and Barber Examiners, http://bit.ly/2wrviJO (last visited May 10, 2018). The Court has recognized the obvious dangers of such arrangements in other circumstances, explaining that when government authority is exercised solely on behalf of "those with a stake in the competitive conditions within the market, there is a risk that public power will be exercised for private benefit." *Hoover v. Ronwin*, 466 U.S. 558, 585 (1984).

In fact, infringements on the right to earn a living are often not even pretextual—they're nakedly protectionist, and proud of it. Challenges to the mandatory licensing of casket sellers are particularly instructive. Over the course of a decade, four circuit courts decided similar cases involving the sale of caskets without a license, with one circuit upholding such a regulation, *see Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), and the other three striking down analogous schemes. *See St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). The Sixth Circuit was especially candid, finding that the statute was the legislature's "naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers." *Craigmiles*, 312 F.3d at 229. The three courts that struck down the regulations based their rulings on the proposition that mere economic protection of a particular industry is not a legitimate governmental interest.

In Missouri, in addition to the restrictions on cosmetology challenged here, the state's "certificate of need" laws stopped anybody from operating a moving company without first navigating the process of obtaining a certificate from the Motor Carrier Services Division of the Department of Transportation. *See generally* Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 Geo. Mason Univ. Civ. Rts. L.J. 159 (2013). Worse still, applications could be challenged by incumbent moving companies on the basis that granting the certificate would lead to "the diversion of revenue or traffic from existing carriers." *Id*. Unsurprisingly, these laws were systematically exploited by existing movers from 2005

through 2010, with all 17 applicants who applied for statewide licenses during that time being challenged by existing firms for no other reason than that they would engender unwanted competition. *Id.* at 180-81. None of the objections by incumbent companies identified any public-safety risk; not a single consumer ever filed an objection. *Id.* at 181. Despite this, the applications of even fully qualified applicants were routinely denied. *Id.* at 183–84. The state ultimately repealed these laws in 2012—in the midst of pending constitutional litigation, *id.* at 185—but this history provides a window into the self-serving use of government regulations by market participants determined to deny potential competitors the opportunity to earn a living.

Unlike Missouri's moving companies, the board here had the decency to half-heartedly put forward two rationales for its licensing scheme: the promotion of public health and the protection of consumers from the ever-lurking menace of unqualified hair braiders. Yet those justifications fall apart under even the most rudimentary scrutiny. First, barriers to entry such as unnecessary occupational licensing actually disadvantage consumers by increasing the costs of services, with one recent study estimating an 18 percent increase in hourly wages resulting from licensing. *See* Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1113 (2014). And, as administrative-law experts have long recognized, these increased consumer costs not only result from the cost of regulatory compliance, but can also be attributed to increased opportunities to price gouge. *See, e.g.*, Stephen Breyer, *Regulation and Its Reform* 32

(1982) ("[R]egulation can make predatory pricing easier, since it often provides the barriers to entry necessary for a potential predatory pricer to succeed.").

The real motivation of the industry insiders who chiefly populate the board here is neither public health nor consumer protection, but rather a self-serving desire to limit market entry by potential competitors while collecting tens of thousands of dollars on training programs run by those same insiders. As the state itself admitted, hair-braiding is neither taught nor tested as part of the board's mandatory licensing curriculum, with only a small fraction of the curriculum even broadly applicable to braiders. In addition, the regulatory scheme's internal irrationality betrays the board's self-interested motivations. For instance, while unlicensed hair-braiders operating in salons are apparently such a hazard to the 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. It's not hard to deduce an explanation for this blatant inconsistency: the board members see the former as economic competition, while the latter group constitutes no threat.

CONCLUSION

The right to earn a living is under persistent legislative and regulatory attack and is desperately in need of real judicial protection. Whether the Court ultimately achieves that noble goal by finally washing clean the stain of *Slaughter-House* from the Fourteenth Amendment, placing the onus on government to justify its infringements under the Due Process

Clause, or merely requiring courts to scrutinize the government's actual rationale for a challenged law, the petition should be granted for all of the foregoing reasons, as well as those advanced by the petitioners.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
J. Aaron Barnes
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
tburrus@cato.org

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