No. 16-3968

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NDIOBA NIANG, TAMEKA STIGERS,
Plaintiffs - Appellants,
v.

EMILY CARROLL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MISSOURI BOARD OF COSMETOLOGY AND BARBER EXAMINERS; WAYNE KINDLE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE MISSOURI BOARD OF COSMETOLOGY AND BARBER EXAMINERS,
Defendants – Appellees,

BETTY LEAKE,
Defendant,

JACKIE CROW, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE MISSOURI BOARD OF COSMETOLOGY AND BARBER EXAMINERS, ET AL.,
Defendants - Appellees.

On Appeal from the United States District Court
for the Eastern District of Missouri-St. Louis
Hon. John M. Bodenhausen, U.S. Magistrate Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt national public interest law foundation incorporated under the laws of California. Founded in 1973, PLF supports the principles of limited government, economic liberty, and the right to own and make reasonable use of private property. PLF has litigated many cases involving the right to earn a living and occupational licensing,[1] *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 has 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).

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, its donors, and its counsel made a monetary contribution to the preparation and submission of this brief. Both parties, through their counsel, consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Missouri law requires practitioners of African Style hair braiding (hair braiders) to be licensed as a cosmetologist or barber. *Niang v. Carroll*, 2016 WL 5076170, at *1 (E.D. Mo. 2016). In order to obtain a Missouri cosmetology license, one must pass a background check, undergo substantial training, and pass an exam. *See* 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*. Similarly, 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. Mo. Rev. Stat. § 328.080. Despite these burdensome requirements, neither the cosmetology nor the barbering curriculum teach African Style hair braiding; and both the cosmetology and barbering exam include few questions on hair braiding. *Niang*, 2016 WL 5076170, at *5.

Appellants Ndioba Niang and Tameka Stigers are professional hair braiders, but are not licensed as cosmetologists or barbers. *Id*. at *2-3. 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 the practice. *Id*. at *6. 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 government interference. *See id*. at *3-4.

The district court upheld the licensing requirement for hair braiders because, according to the court, there were conceivable legitimate purposes that were at least "minimally" advanced by the regulations, and because the court conceived of other possibly legitimate purposes. *Id*. at *14, *18. This Court should reverse the district court because it ruled for the government under an improper, "toothless" standard of review contrary to Supreme Court precedent.

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 holding of the lower court, plaintiffs prevail in rational basis cases where evidence shows that there is not a logical connection between legislative means and ends. Further, multiple Courts of Appeals and other

courts have invalidated economic regulations under the rational basis test on the basis of evidence presented by plaintiffs, including cosmetology/barber licensing regulations substantially similar to the law challenged here.

ARGUMENT

I

RATIONAL BASIS REVIEW PROVIDES A MEANINGFUL REVIEW

Rational basis review is not a set of magic words that practically 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 its foundation is 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. *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 decisionmaking. *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. 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 generally* 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 regardless of the evidence presented in the case. Sandefur, *supra*, at 48. Instead, courts must rely on 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. The Supreme Court's Application of Rational Basis Review

The Supreme 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 Supreme Court struck down an Alaska statute that established a program that shared oil revenue with state residents, where the payment amounts were determined by length of residence in the state. The Court held that neither of the two rationales offered by the state passed muster under the rational basis test. *Id*. at 61-63.

First, the Court held that distinguishing between residents based on length of residency was not rationally related to creating financial incentives to reside in Alaska. *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, such a connection was irrational because the statute also provided payments for the 21 years of residency prior to the statute's enactment. *Id.* at 62. Thus, even though there was some minimal rational connection, that was not enough to establish a means-end fit under rational basis review because the law's primary function lacked a rational connection.

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 under rational basis review, the Supreme Court demands a logical connection between legitimate ends and the government's means of pursuing 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, even assuming a rational connection between owning real property and having "first-hand knowledge" or a "tangible interest," the logical connection between them was lacking because it was irrational for the state to deny that connection is also present with renters and others who live in the area. *See id.* at 108.

Similarly, 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" 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. Because the assessor's practices created disparities between the assessments of similar properties by 8 to 35 times over, the Court 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 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 flood plain; 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 it was minimally rational to grant the credit to a single group, 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 with unrelated people living together from eligibility in the federal food stamp program. According to the Court, because the Food Stamp Act was intended 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 because even though it was minimally rational to seek to prevent waste of taxpayer dollars, overall it was

irrational to only exclude particular households from the food stamp program in order to pursue that result.

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 reserved that right to felony defendants only. The U.S. Supreme 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. In other words, even if the distinction was minimally rationally related to the purpose of saving the government money, the rule failed rational basis review due to the arbitrary distinction between felonies and misdemeanors in that instance.

And 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 pursue a profession. The Supreme 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 the government's 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 a presumption of constitutionality.[2] Thus, if a law has an insufficient logical fit between its means and ends, it fails rational basis scrutiny. Because the court below rejected the search for a sufficient rational connection between means and ends to be inappropriate "courtroom fact-finding," it conducted a form of review out of line with Supreme Court precedent. *See Niang*, 2016 WL 5076170, at *18.

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[2] Since 1970 plaintiffs have won 21 cases at the Supreme Court under the rational basis test. In addition to those already discussed above, the cases are: *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 614-14 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer*, 517 U.S. at 634-35; *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 623 (1985); *Metro Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *James v. Strange*, 407 U.S. 128, 141-42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972); and *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

B. Rational Basis Review in the Courts of Appeals

Multiple sister Courts of Appeals have also invalidated laws, including economic regulations, under rational basis review.

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 requirement mandated two years of training—without any guarantee of more than minimal training related to public health or safety—and successful completion of an exam which predominately tested on topics other than casket sales. 312 F.3d at 222-23. The court struck down the law, on the basis of evidence introduced by the plaintiffs, because it 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. *See id.*

The Ninth Circuit provides yet another example. In *Merrifield*, the court determined on the basis of the record that it was irrational to require a license for exterminators who refrained from using pesticides but trapped mice, rats, and pigeons (the three most common vertebrate pests.) 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.* Yet the court found the exterminators most likely to encounter pesticides were those who worked with the least common vertebrates. *Id.* at 990-91. Therefore, while there was a minimally rational connection between pesticide-related training imposed by the license requirement and the risk that exterminators of the most common vertebrates would encounter pesticides, the court nevertheless held that there was an insufficient logical relationship between the government's interests and the means it chose to advance them.[3]

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[3] The court below attempts to find support in *Merrifield* for the contention that a licensing exam in which few test questions specifically relate to the relevant trade can be rational. *See* 2016 WL 5076170, at *17. But the
(continued...)

The above Courts of Appeals decisions faithfully engaged in a kind of rational basis scrutiny in line with the test set out by the Supreme Court. In support of the district court's unduly deferential application of rational basis review, it cited *Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, MO*, 742 F.3d 807 (8th Cir. 2013). That case is distinguishable, however, and does not endorse an abdication of the court's judgment in rational basis cases.

Kansas City Taxi involved taxi regulation, which is distinguishable from occupational licensing affecting ordinary occupations like hair braiding. 742 F.3d at 810. In that case, this Court upheld a city ordinance regulating the issuance of taxi permits. *Id.* at 808-09. The ordinance survived rational basis review because the Court found that the ordinance was rationally related to creating investment incentives and increasing quality in the taxi industry—purposes acknowledged by the Court to favor existing taxi firms, but were nonetheless legitimate. *Id.* at 809.

The Fifth Circuit recently distinguished between rational basis cases involving taxi regulation and those involving occupational licenses. In

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[3] (...continued)
Merrifield court actually reviewed all of the exterminator exam questions in evidence, and disagreed with the challenger by concluding that many exam questions were relevant to his practice. 547 F.3d at 988.

Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston, 660 F.3d 235, 240 (5th Cir. 2011), the court upheld an ordinance similar to the one at issue in *Kansas City Taxi* because there was "no real dispute that promoting full-service taxi operations is a legitimate government purpose under the rational basis test." And in *St. Joseph Abbey*, 712 F.3d at 223, the Fifth Circuit confirmed *Greater Houston*'s analysis, while still conducting a searching review of the Louisiana funeral board's alleged governmental purposes for its licensing requirement. Thus, in *Kansas City Taxi*, the Court recognized that taxi regulations are viewed in the context that protecting existing taxi firms is a legitimate government purpose, and additionally cited with approval to *St. Joseph Abbey*'s distinction between taxi and occupational licensing cases. 742 F.3d at 810.

II

THE RATIONAL BASIS TEST HAS BEEN APPLIED CORRECTLY BY OTHER COURTS IN CASES INVOLVING HAIR BRAIDERS

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.

In *Cornwell*, 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 California hair braiders were required to complete 1,600 hours of training, and pass a written and practical exam. *Id.* at 1113, 1115. However, 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. Therefore, because there was insufficient overlap between skills used in the practice of hair braiding and skills taught and tested for a cosmetology license, the court held that the government's means did not fit its goals. *Id.* at 1108, 1119. Thus, the government could not rationally require hair braiders to be licensed as cosmetologists. *Id.*

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 hardly more than 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 African hair braiding. *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*. As a result, 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 requiring hair braiding schools to install a minimum of ten barber chairs was irrational because the statute exempted braiding-only schools from that minimum. *Id*. at 891-92. Second, the court held that the five-sink minimum was irrational as applied to hair braiding schools because hair braiders were not required to use sinks to clean their braiding tools; and because hair braiders were not allowed to wash hair, 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 need to maintain a well-managed school inspection program. *Id.* at 892-93.

The courts in each of these cases reviewed the challenged laws under the rational basis test, but engaged with evidence presented by plaintiffs to determine that there was in fact no logical connection between the government's 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.

CONCLUSION

For the foregoing reasons, the lower court should be reversed.

DATED: January 9, 2017.

Respectfully submitted,

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CALEB R. TROTTER