No. 15-507

IN THE

Supreme Court of the United States

SENSATIONAL SMILES, LLC, D/B/A SMILE BRIGHT,

Petitioner,

v.

JEWEL MULLEN, DR., COMMISSIONER, CONNECTICUT DEP'T OF PUBLIC HEALTH, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND ST. JOSEPH ABBEY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government and free enterprise in the courts of law and public opinion. SLF strives to protect individuals and businesses stymied by excessive government regulation and strives to help America work by supporting those who are simply trying to do their jobs, run their businesses and raise their families. This case is of particular interest to SLF not only because the decision below deepens an already existing circuit split, but also because it eviscerates this Court's rational basis test. The approach taken by the Second and Tenth Circuits removes the power of the federal courts to review economic legislation for irrationality. SLF has a continuing interest in economic freedom and separation of powers, and has participated in litigation all over the country, including in this Court in cases such as *Utility Air Regulatory Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than *amici curiae*, their members, or their counsels made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2, each party has been given 10-day notice and consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

Amicus St. Joseph Abbey (the Abbey) is a Benedictine monastery founded in 1889 whose primary operation is the St. Joseph Seminary College in Covington, Louisiana. Like Petitioner, the Abbey was a victim of economic protectionism—prohibited from financially supporting itself through the production and sale of caskets by a state law that allowed only licensed funeral establishments to sell caskets within Louisiana. *See* La. Stat. Ann. §§ 37:831(42), 848(C) (2015). After years of frustration with the legislative process, the Abbey turned to the courts and filed suit. Yet the Fifth Circuit, unlike the Second Circuit in the case at bar, correctly held that an economic regulatory law is unconstitutional when its only purpose is to protect an industry at the expense of competitors. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013).

St. Joseph Woodworks. In 2005, Hurricane Katrina destroyed the Abbey's timberlands, depriving it of its key source of income. *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149, 153 (E.D. La. 2011). In need of a new way to financially support itself, in 2007, the Abbey opened St. Joseph Woodworks to sell simple wooden caskets, like the ones the monks had crafted for themselves for generations, to the public. *Id.*

The Abbey sold its two models of caskets below the market price offered by licensed Louisiana funeral homes. *St. Joseph Abbey*, 712 F.3d at 217. The lower prices and increased competition quickly caught the attention of the State Board of Embalmers and Funeral Directors (the State Board). Shortly after the Abbey invested $200,000 to establish St. Joseph Woodworks, the State Board sent the Abbey a cease

and desist letter threatening it with fines and criminal penalties. *Id.* at 219. When the Abbey refused to shut down its business, a funeral director filed an official complaint with the State Board. *Id.*

Failure in the Legislative Process. In the face of threats and questioning by the State Board, the Abbey appealed to the Louisiana State Legislature for help. On March 17, 2008, the Abbey's state representative, Scott Simon, introduced a bill that would have allowed anyone to sell caskets within Louisiana, not just licensed funeral homes. H.B. 221, 2008 Reg. Sess. (La.). Licensed funeral directors attended the House Commerce Committee meeting and vehemently opposed removing their intrastate monopoly on the casket industry. Trial Tr. at 19–21, *St. Joseph Abbey*, 835 F. Supp. 2d 149 (E.D. La. 2011) (No. 10-2717). The bill died, never making out of committee. *Id.* at 21.

Two years later, the Abbey approached the State Legislature with a more modest accommodation. During the 2010 legislative session, State Senator Francis Thompson introduced a bill that would have expanded the right to sell caskets intrastate to a "Louisiana nonprofit corporation organized for civic, charitable, or religious purposes which is registered with the secretary of state." S.B. 613, 2010 Reg. Sess. (La.). Shortly following the introduction of the bill, the monks at the Abbey were served with a subpoena to appear before the State Board. Decl. of Justin Brown at ¶ 13, *St. Joseph Abbey*, 835 F. Supp. 2d 149 (E.D. La. 2011) (No. 10-2717). Despite the Abbey's continued efforts, the State Senate took no further action on Senator Thompson's bill. Trial Tr. at 21, *St.*

Joseph Abbey, 835 F. Supp. 2d 149 (E.D. La. 2011) (No. 10-2717).

Having failed twice to get the Louisiana State Legislature to amend the law, the Abbey turned to the courts.

Litigation. In 2010, the Abbey filed a lawsuit in the Eastern District of Louisiana against the State Board. *St. Joseph Abbey*, 835 F. Supp. 2d at 151. The district court found Louisiana's regulatory scheme to be the last of its kind in the nation. *Id.* at 160. Notably, prior to its effort to halt the Abbey's casket sales, the State Board had never succeeded in an enforcement action against a third-party seller. *St. Joseph Abbey*, 712 F.3d at 218. During litigation, the State Board argued that the law protected a legitimate state interest: the health and safety of the public. *St. Joseph Abbey*, 835 F. Supp. 2d at 156. Conducting its own inquiry, as required by this Court's equal protection jurisprudence, the district court found the State Board's arguments "hollow" because, among other reasons, state law imposed no requirement to bury bodies in caskets, and consumers could legally purchase a casket on the Internet from any out-of-state seller. *Id.* at 160. The district court held that the law requiring intrastate casket sellers to be licensed funeral directors failed the rational basis test and enjoined the State Board from enforcing the law. *Id.*

On appeal, the Fifth Circuit affirmed the district court and went a step further, chastising Louisiana for its "nonsensical explanations for regulation." *St. Joseph Abbey*, 712 F.3d at 226. Applying rational basis, the Fifth Circuit challenged the state's

justification for the law and found no connection between the law and the protection of public health and safety, even "insist[ing] only that Louisiana's regulation not be irrational—the outer-most limits of due process and equal protection." *Id.* at 227. The court ruled in favor of the Abbey because the *real* reason behind the law was to protect the lobby of licensed funeral homes—as the district court found—and not to protect the public's health and safety.

The Fifth Circuit flatly rejected the State Board's claim that economic protection itself could be a legitimate government purpose. *Id.* at 222. Pointing out the pitfalls of laws grounded in economic protectionism and warning state legislatures against enacting such laws, the Fifth Circuit explained, "The principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as 'economic' protection of the rulemakers' pockets." *Id.* at 226-27.

More than a quarter of all workers in the United States are required to have an occupational license. The White House, *Occupational Licensing: A Framework for Policymakers* 3, (2015), https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf. That number has increased 500% since the 1950's. *Id.* More concerning than the increase in licensing requirements itself is that an overwhelming number of those requirements were enacted to protect particular industries. *See infra* Section II. State laws with the purpose of providing economic protection to

particular industries—whether the purpose is implicit or explicit—cannot pass the rational basis test as it has been articulated by this Court. Given the now-deepened circuit split and the important question of federal law presented in this case, *amici* respectfully request that this Court grant *certiorari* to provide the lower courts with the guidance needed to move beyond the "nonsensical explanations" of state legislation and to resolve whether protecting, for protection's sake, some economic players at the expense of others is constitutional.

ARGUMENT

I. This case presents this Court with an opportunity to uphold the Fifth, Sixth, and Ninth Circuits' correct reasoning on rational basis review of economic protectionism.

The Courts of Appeals are fundamentally divided over how to address equal protection challenges to state licensing schemes. *Compare St. Joseph Abbey*, 712 F.3d at 227, *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008), *and Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002), *with Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015), *and Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004). The Fifth Circuit's reasoning, as well as precedent, logic, and fairness, dictate that "naked" economic protectionism is not a legitimate state interest. *See St. Joseph Abbey*, 712 F.3d at 223. Economic protectionism excludes countless entities from the marketplace and limits the economic competition that benefits consumers. This case presents this Court with an opportunity to instruct

lower courts that arbitrary licensing requirements with no true benefit to the consumer violate the Equal Protection Clause.

A. The Fifth Circuit's opinion in *St. Joseph Abbey* confirms this Court's guidance that, when applying the rational basis test, courts must find a reasonably conceivable state of facts that could provide a rational basis.

In the 1930's this Court adopted a rebuttable presumption of constitutionality when reviewing economic legislation and regulation. *See Nebbia v. New York*, 291 U.S. 502, 503 (1934) (noting that the Court will only question state legislation if the plaintiff succeeded in affirmatively establishing that it was unreasonable or arbitrary); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 (1938) (explaining that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such character as to preclude the assumption that it rests upon some rational basis with the knowledge and experience of the legislators.").

In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), this Court replaced this rebuttable presumption with a highly deferential standard. This Court stated that such a law may exact a needless, wasteful requirement, but it was for the legislature and not the courts to balance the advantages and disadvantages of the requirement. *Id.* at 487. This Court cemented the deferential standard in *New Orleans v. Dukes*, 427 U.S. 298 (1976), concluding that states must be afforded discretion even if the solutions they adopt are imperfect, or only

partly address a perceived evil. *Id.* at 303–04. Unless a classification impedes fundamental personal rights, or is drawn upon inherently suspect distinctions such as race, religion, or alienage, it is entitled the broad discretion allowed in *Lee Optical*; only invidious discrimination is inconsistent with the Fourteenth Amendment. *Id.*

Although the reasoning used in *Dukes* and *Lee Optical* represent the high point of deference to state legislatures, this Court has since demonstrated a greater willingness to strike down protectionist state economic legislation under the rational basis test. Applying rational basis review in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), this Court found a state statute unconstitutional because the promotion of domestic businesses by discriminating against nonresidents is not a legitimate state purpose, *id.* at 882–83, and explained that the state's tax scheme was "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent" *id.* at 878 (internal citation omitted). This Court noted that Alabama had "erected barriers to foreign companies who wish to do interstate business in order to improve its domestic insurers' ability to compete at home." *Id. Metropolitan Life* showed this Court's commitment to the notion that the Equal Protection Clause prevents states from enacting legislation solely for the economic protection of its residents. *Id.* at 879. Since *Metropolitan Life*, protection of an in-state industry has not constituted a legitimate state purpose, according to this Court. *Id.* at 883.

In the same year as *Metropolitan Life*, this Court bristled against accepting a state's interest in protecting its local automobile dealers at the expense of out-of-state dealers. *See Williams v. Vermont*, 472 U.S. 14, 17, 20–21 (1985). There, Vermont's tax on non-residents who purchased motor vehicles out-of-state and then registered them in-state violated the Equal Protection Clause because the same tax was not imposed on Vermonters who purchased vehicles in-state before registering them. *Id.* at 16. In so concluding, this Court not only rejected the legitimacy of Vermont's interest in benefiting its automobile dealers at the expense of other states', but also rejected the state's contentions that out-of-state purchasers and in-state purchasers were treated similarly under the law. *Id.* at 21, 23. This Court's willingness to critically examine the true purpose of the law, and the legitimacy thereof, demonstrated a shift from its prior extreme of deference.

The Fifth Circuit's approach in *St. Joseph Abbey* was appropriately consistent with this shift. Even acknowledging that state economic regulation is due "great deference," the court refused to blindly adopt the state's explanations for prohibiting the intrastate sale of caskets by anyone but licensed funeral directors. *St. Joseph Abbey*, 712 F.3d at 226. Rather than accepting at face value the state's arguments that its statute protected consumers and advanced health and safety goals, the court noted that a law will fail the rational basis test when its challengers plainly refute the rationality of its articulated justifications at trial. *Id.* at 223.

The Second Circuit's decision undermines this Court's recent opinions regarding protectionist legislation and the use of arbitrary classifications. If the Second Circuit's decision is allowed to stand, countless entities could be prevented from entering the market because of discriminatory regulations treating them differently than their politically favored counterparts. Naked economic protectionism, as sustained by the Second Circuit, is not compatible with constitutional standards.

B. The Fifth, Sixth, and Ninth Circuits demonstrate the correct application of this Court's precedent, contrary to the Second and Tenth Circuits.

The Second Circuit's decision deepens the already existing circuit split regarding whether "naked" economic protectionism is a legitimate state interest. *Compare St. Joseph Abbey*, 712 F.3d at 227 (finding economic protection of funeral directors to not pass rational basis review), *Merrifield*, 547 F.3d at 992 (finding economic protection of exterminators to not pass rational basis review), *and Craigmiles*, 312 F.3d 225 (finding economic protection of funeral directors to not pass rational basis review), *with Sensational Smiles*, 793 F.3d at 286 (finding economic protection of dentists to pass rational basis review), *and Powers*, 379 F.3d at 1221 (finding economic protection of funeral directors to pass rational basis review). This case provides this Court an opportunity once and for all to state that economic protectionism is not a legitimate state interest.

Despite stating that it based its decision on "precedent, principle, and practicalities," the Second

Circuit actually based its decision on the Tenth Circuit's improper interpretation of this Court's opinions regarding rational basis review of economic legislation. *See Sensational Smiles*, 793 F.3d at 286. The Second and Tenth Circuits relied heavily on *Lee Optical* and *Dukes*, failing to mention or even acknowledge the shift in this Court's precedent governing rational basis review of arbitrary classifications used to promote an intrastate industry or economy. *See Sensational Smiles*, 793 F.3d at 287; *Powers*, 379 F.3d at 1220–21. Instead, the Tenth Circuit relied on *Carolene Products* and *Dukes* (and the Second Circuit on *Dukes*), cases that are 77 and 39 years old, respectively. *See Sensational Smiles*, 793 F.3d at 287; *Powers,* 379 F.3d 1216–17. Not all state regulation schemes are arbitrary—legal and medical regulation are examples—but when a state cannot show any justification that will pass muster, save economic protection, this Court cannot allow Circuit Courts to enforce these provisions that fly in the face of its precedent.

On the other hand, the Fifth, Sixth, and Ninth Circuits have ruled that "naked" protectionism is not a legitimate state purpose under rational basis review. *See St. Joseph Abbey*, 712 F.3d at 226; *Craigmiles*, 312 F.3d at 222; *Merrifield*, 547 F.3d at 991. In all three cases, the arbitrary classifications resulted in no consumer or health benefits. *See St. Joseph Abbey*, 712 F.3d at 226; *Craigmiles*, 312 F.3d at 222; *Merrifield*, 547 F.3d at 991. The facts in *Craigmiles* were strikingly similar to those in *St. Joseph Abbey*. There, Tennessee argued that the law requiring a license to sell funeral caskets was needed to safeguard the public health from poor-quality

caskets and to protect vulnerable consumers from aggressive sales tactics during a vulnerable time. *Craigmiles*, 312 F.3d at. 228–29. Applying this Court's precedent in *Metropolitan Life* and *Williams*, the Sixth Circuit held the state's law unconstitutional, finding that the true purpose of the law was to protect the funeral directors' monopoly and not to advance the state's health and safety interests. *Id.* at 299. A decade later in *St. Joseph Abbey*, the Fifth Circuit also held that the true purpose of a Louisiana law that prevented anyone from selling caskets who was not a licensed funeral director was to protect the funeral directors' monopoly and not to advance the state's health and safety interests. *St. Joseph Abbey*, 712 F.3d at 226–27.

The Fifth and Sixth Circuits considered state legislatures' claimed purposes for enacting laws, but did not accept those reasons at face value. *See St. Joseph Abbey*, 712 F.3d at 226 (explaining that the rational basis test does not require courts to defer to state legislatures and accept their nonsensical explanations); *Craigmiles*, 312 F.3d at 228 (finding no rational relationship to any of the articulated purposes offered by the state). In doing so, both courts held that states do not have a legitimate government interest in mere economic protection of a particular industry when the action being prevented raises no genuine concerns for health, safety or consumer protection. *St. Joseph Abbey*, 712 F.3d at 226; *Craigmiles*, 312 F.3d at 225-26. The underlying facts in both cases reflect the notion that, if allowed, state legislatures will pass protectionist legislation for politically favored groups that does not protect consumers. *See St. Joseph Abbey*, 712 F.3d at 227;

Craigmiles, 312 F.3d at 223. The laws at issue in *St. Joseph Abbey* and *Craigmiles*—enacted to protect the funeral industries in Louisiana and Tennessee—represent the type of arbitrary rationales that this Court struck down in *Williams*. *See St. Joseph Abbey*, 712 F.3d at 225–27; *Craigmiles*, 312 F.3d at 223.

As the Fifth and Sixth Circuits have both recognized, this Court's precedent obligates the lower courts to find a reasonably conceivable state of facts that could provide a rational basis for a state's challenged law, and not to simply accept the state's stated purpose—especially when the actual effect is to protect a particular group. *Williams*, 472 U.S. at 25.

II. The constitutionality of laws grounded in pure economic protectionism is an important federal question because irrational licensing laws are widespread and consequential.

Economic protectionism produces unjustifiably negative consequences to the economy and to society. Protectionism often takes shape in the form of licensing requirements for given industries, such as the licensing requirement to sell caskets in Louisiana or to whiten teeth in Connecticut.

Over the last 60 years, there has been an explosion in licensing regimes, the vast majority of which are at the state level. Accompanying this explosive growth has been the trend of unequal regulation and a lack of reciprocity across state lines, which creates strong disincentives for families to move from one state to another, and decreases mobility for a substantial

percentage of the population. Many licensing regulations purport to protect the health and safety of consumers, but are in reality arbitrary, with a true purpose to protect a favored economic group.

This Court has said protectionism alone is not a legitimate government interest, *Metropolitan Life*, 470 U.S. at 880, yet two circuit courts have ignored this Court's equal protection jurisprudence and held otherwise. *Sensational Smiles*, 793 F.3d at 286; *Powers*, 379 F.3d at 1211. Continued tacit sanction of protectionist legislation and regulation endorses their continuing negative societal and economic impacts. Therefore, this deepening circuit split presents a federal question of substantial importance.

In the 1950's, states required licenses for less than 5% of the entire workforce in the United States. Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 British J. of Indus. Relations 670, 670 (2010). By 2006, approximately 29% of the workforce was required to obtain a license. *Id.* at 670. Roughly two-thirds of this increase can be attributed solely to an increase in licensing regimes across the country. The White House, *supra* at 3. Recent estimates indicate that over 1,100 occupations are regulated in at least one state, yet only 60 occupations are regulated in all 50 states. *Id.* at 4. There is a statistically identifiable trend of increasing regulation of occupations, much of which is burdensome and fundamentally protectionist in nature.

From 1990 to 2000 the growth rate in some occupations was 20% lower in states with licensing requirements than the rate of growth in those

occupations in unregulated states. Morris M. Kleiner, *A License for Protection: Why are States Regulating More and More Occupations?* Cato Institute, 19 (2006), http://object.cato.org/sites/cato.org/files/serials/files/regulation/2006/10/v29n3-2.pdf. Moreover, licensing restricts the supply of persons employed in a given profession and artificially raises wages, a cost borne by consumers. *Id.* at 19–20. Between 4% and 17% of the difference between hourly earnings in 50 occupations can be attributed to licensing. *Id.* at 20. Estimates suggest that restricted entry and wage inflation redistributes $116 to $139 billion from consumers and reduces economic output by $35 to $42 billion per year. *Id.*

However, licensing largely does not improve the quality of goods and services. In a recent review of 12 studies on quality, only two studies showed an increase in quality where strict licensing requirements exist. The White House, *supra* at 13. Meanwhile, nine of 11 studies surveyed about cost found an increase in cost to consumers where there were strict licensing requirements. *Id.* at 14. "[E]conomic studies have demonstrated far more cases where occupational licensing has reduced employment and increased prices and wages of licensed workers than where it has improved the quality and safety of services." Morris M. Kleiner, *Reforming Occupational Licensing Policies*, The Hamilton Project, 6 (2015), http://www.brookings.edu/~/media/research/files/papers/2015/03/11-hamilton-project-expanding-jobs/thp_kleinerdiscpaper_final.pdf.

In addition to its pure economic impact, licensing also imposes undue societal costs such as a restriction on mobility. States that do not offer license reciprocity impose a second set of requirements, usually an educational requirement and payment of fees, on individuals in a licensed occupation who wish to move to another state with a licensing requirement for that occupation. Dick M. Carpenter et al., *License to Work: A National Study of Burdens from Occupational Licensing*, Institute for Justice, 15 (2015), http://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf. Evidence indicates that this additional burden significantly reduces migration between states because individuals choose not to relocate instead of undertaking an additional burdensome licensing process. *Id.* This type of restriction is especially harmful for certain sub-populations. For example, military spouses are highly mobile and frequently must relocate across states; thus, they have a difficult time obtaining a new license every time they move. The White House, *supra* at 8.

Moreover, occupational licensing often unfairly excludes immigrants with extensive and significant training and experience from using their skillsets in the United States. Many arrive in America having completed extensive education, job training, or work experience elsewhere. *Id.* at 38. Thirty percent of working-age immigrants in 2010 had at least a college degree, yet research indicates that highly skilled immigrants have difficulty finding work that allows them full use of their skills. *Id.* In many instances, states will not recognize training and experience gained elsewhere. *Id.* For example, in Illinois, an

engineer who earns a degree abroad must show that she worked under an engineer in the United States for four years because work experience abroad does not satisfy the licensing requirement. *Id.* at 38–39.

Another example of pure economic protectionism is Iowa's licensing requirement for hair braiders, a job that employs no chemicals and poses no health risk to consumers. *See* Iowa Code §§ 157.1–.16 (2015). The law requires hair braiders to pay a licensing fee of $175, Carpenter, *supra* at 66, and complete 2,100 hours at a for-profit cosmetology school, requiring thousands of dollars in tuition, Iowa Code §157.10; Iowa Admin. Code 645-61.14(157). Even undergoing 900 hours of cosmetology school in Minnesota and training under braiding instructors in two other states does not satisfy the Iowa requirement. Editorial, *Iowa Rightly, Finally Sued over Job Licensing Law*, De Moines Register, (Oct. 28, 2015), http://www.desmoinesregister.com/story/opinion/editorials/2015/10/27/editorial-iowa-rightly-finally-sued-over-job-licensing-law/74636646/. Moreover, an applicant must have completed high school simply to apply for a license. Iowa Code Ann. § 157.3(1).

The most onerous licensing requirements are for would-be interior designers. Although the profession only requires a license in three states and Washington D.C., applicants must pass a national exam, pay on average $364 in licensing-related fees, and complete on average 2,200 days of education and apprenticeship to become licensed. Carpenter, *supra* at 14. The lack of a licensing requirement in the vast majority of states clearly indicates the arbitrary and protectionist nature of such a requirement.

An Emergency Medical Technician (EMT), on average, must complete 33 days of training. *See* Carpenter, *supra* at 29. However, the average cosmetologist spends 372 days in training. *Id.* Thus, EMTs provide life-saving medical services yet are subjected to significantly less burdensome licensing requirements than hair braiders. *See Id.* Surely, under a rational regime purporting to further public health and safety, a profession that deals with life-and-death situations daily should have more stringent requirements than the profession of hair stylist.

A Wisconsin legislator once noted that her daughter had no practical hope to become a watchmaker, but could still aspire to become President. Walter Gellhorn, *The Abuse of Occupational Licensing*, 44. U. Chi. L. Rev. 6, 13 (1976) (citing Ruth B. Doyle, *The Fence-Me-In Laws*, Harper's Magazine, August 1952, at 89, 89). Economic protectionist legislation and regulation stifles competition in an occupation and artificially raises wages of practitioners at the expense of consumers. It hinders and excludes entrance into the profession for entire classes of people. Onerous requirements have become widespread across many occupations, whereas some occupations are subjected to licensing in only a few states. A lack of reciprocity between states limits the mobility across state lines of individuals in licensed occupations. Occupations that should be open to low-income and low-skilled workers have become off-limits because of protectionist measures. At root, licensing regimes are often born from successful lobbying of state legislatures by

industry practitioners seeking to insulate themselves from competition.

Licensing regimes have become increasingly widespread, unduly onerous, and protectionist of industry practitioners. Many licensing requirements claim to serve public health and safety or some public interest, but in fact are arbitrary and created to protect the industry requiring the license. This Court has declared economic protectionism to be an illegitimate government interest, yet courts continue to uphold these laws and by doing so deepen a circuit split on the constitutional issue. *Compare Metropolitan Life*, 470 U.S. at 880 ("[P]romotion of domestic businesses by discriminating against nonresident competitors is not a legitimate state purpose."), *with Sensational Smiles*, 793 F.3d at 286 (economic favoritism is a rational basis under the Fourteenth Amendment), *and Powers*, 379 F.3d at 1221 ("[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest."). Therefore, this Court should grant *certiorari* to address a deepening circuit split with widespread and consequential implications and affirm the Fifth, Sixth, and Ninth Circuits.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to grant the Petitioner's Petition for Writ of Certiorari and reverse the decision of the Court of Appeals for the Second Circuit.

Respectfully Submitted,

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