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 AT ST. LOUIS

BRIEF OF APPELLANTS

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In this case, two African-style hair braiders challenge Missouri's cosmetology and barbering licensing scheme under the Due Process and Equal Protection clauses of the Fourteenth Amendment, and also show how the lower court's application of rational-basis review violated procedural due process.

African-style hair braiders in Missouri are required to obtain a license in one of two occupations they choose not to practice—cosmetology or barbering—in order to braid hair for a living. This requires completing a 1,500-hour or 1,000-hour training curriculum in cosmetology or barbering, respectively, and passing a licensing exam. But the undisputed facts show that: (1) the licensing scheme does not require hair braiding to be taught or tested; (2) very little, if any, of the required instruction is even generally relevant to braiding; and (3) the Board admits that the scheme is "not adequate to qualify, certify or license African-style hair braiders."

The district court upheld the application of the licensing scheme to African-style hair braiders because it held that they at least minimally advance legitimate government interests, including interests invented by the district court.

Appellants request 30 minutes per side for oral argument. This case presents several important constitutional claims, ripe for resolution in this Circuit, about the permissible scope of occupational licensing and how rational-basis review should be conducted. Accordingly, substantial time for oral argument is warranted.

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Plaintiffs-Appellants filed this lawsuit for violations of the Fourteenth Amendment to the United States Constitution under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. § 2201. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1367.

This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment, entered on September 20, 2016, disposing of all claims following cross-motions for summary judgment. JA11-14. Plaintiffs-Appellants timely filed their notice of appeal on October 17, 2016.

STATEMENT OF ISSUES

1. Whether the district court erred in concluding that requiring African-style hair braiders in Missouri to obtain a cosmetology or barber license—which includes completing 1,500 and 1,000 hours of largely irrelevant mandatory training in those professions respectively—before providing all-natural braiding services does not violate the Due Process Clause and/or Equal Protection Clause of the Fourteenth Amendment. *See Zobel v. Williams*, 457 U.S. 55 (1982); *Peeper v. Callaway Cty. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012); U.S. Const. amend. XIV, § 1; Mo. Rev. Stat. § 316.265.

2. Whether the district court erred by engaging in speculation unsupported by evidence—after discovery and briefing had concluded—to proffer its own alternative justifications for upholding the application of Missouri's cosmetology and barber licensing regimes to African-style hair braiders. *See Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993); *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir. 1956); U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Missouri requires Plaintiffs-Appellants Ndioba "Joba" Niang and Tameka Stigers, two African-style hair braiders, to obtain a license in one of two occupations they do not practice—cosmetology or barbering—in order to braid hair for a living. JA1729-30, JA1737, JA1755-57, JA1762, JA1767-68; *see also* JA1800-01. To become a Missouri-licensed cosmetologist or barber, an applicant must complete a 1,500-hour or 1,000-hour mandatory training curriculum, respectively, and pass a licensing exam that contains a written and practical component. JA1772, JA1777.

Defendants-Appellees, the executive director and members of the Missouri Board of Cosmetology and Barber Examiners in their official capacities (collectively, "the Board"), claim that this licensing requirement furthers two

categories of government interests: (1) promoting public health and (2) protecting consumers. ADD26. But the record shows it does neither because:

- In the Board's own words: "African Hairbraiders are currently required under Missouri law to complete and pay tuition for months of training that does not relate to their occupation—African Hair braiding." JA1807, JA571-72, JA822-37, JA1800-01.

- At most 10%, and likely much less, of the mandatory cosmetology/barbering curricula—100 or 105 hours, respectively—is even generally relevant to braiding, while the vast majority is about specific techniques and practices not used by African-style hair braiders. JA1807-10, JA1773-80.

- African-style hair braiding is neither taught nor tested under Missouri's mandatory licensing regime. JA1797, JA1849, JA1868.

- The Board admits the licensing regime is "not adequate to qualify, certify, or license African-style hair braiders" and offers no guarantee of training, knowledge, experience, competence, or safety in African-style hair braiding. JA1861-67, JA1849-50; ADD45-49; *see also* ADD43.

The result is a licensing requirement that is both wildly overbroad and tremendously under-inclusive for African-style hair braiders.

Section A, below, explains how the record demonstrates that the licensing regime is wildly overbroad and unduly burdensome because it is not designed for African-style hair braiding and requires braiders to waste many hundreds of hours learning techniques and services they do not use or offer, while paying tens of thousands of dollars in tuition. Section B explains how the record shows that Missouri's cosmetology/barber licensing regime is tremendously under-inclusive for African-style hair braiders because it requires no teaching or testing of braiding

and is therefore wholly inadequate to ensure that licensees can competently or safely braid hair. Section C summarizes the procedural history.

A. Missouri's cosmetology/barber licensing regime is wildly overbroad and unduly burdensome for African-style hair braiders.

The undisputed record shows that, for African-style hair braiders, Missouri's cosmetology/barber licensing scheme is (1) wildly overbroad and (2) unduly burdensome.[1]

1. Missouri's cosmetology/barber licensing regime is wildly overbroad for African-style hair braiders.

As the Board admits, "these [cosmetology/barber] curricula are not designed to be specific to hair braiding, and they require many hours of instruction that does not particularly relate to that practice." JA1795. "Many hours," here, means at least 90% of their training and nearly a year of their lives. JA1807-08. The record demonstrates the chasm between African-style hair braiding and cosmetology/barbering:

- African-style hair braiding is a completely distinct occupation from cosmetology/barbering that offers distinct services, employs very different

[1] The Board does not dispute about 250 paragraphs of Plaintiffs-Appellants' Statement of Undisputed Material Facts, but offers a bizarre "General Objection," JA1727-28, denying that testimony of the Board's Rule 30(b)(6) witness represents the Board because it has not voted on her testimony. The Board also offers meritless objections to leading questions of its 30(b)(6) witness, e.g., JA1853-56, and generally fails to cite specific evidence for facts it "disputes," as the Local Rules require; accordingly, all such facts "shall be deemed admitted for purposes of summary judgment." E.D. Mo. L. R. 7-4.01(E).

techniques, and only uses simple tools. JA1743-51, JA1800-01; *see also* JA1755-59, JA1762-66.

- Missouri's licensing scheme requires African-style hair braiders to learn a completely different occupation that they choose not to practice and often reject on principle. JA1747, JA1800-01, JA1807; *see also* JA734-35, JA571-72, JA822-37, JA1760-62, JA1761, JA1767.

- The Board admits that less than 7% of the 1,500-hour cosmetology curriculum and about 10% of the 1,000-hour barbering curriculum—covering general health/safety or business practices topics—is even generally relevant to African-style hair braiders. JA1807-09.

- But the Board cannot guarantee that *any* of the 100 or 105 hours of instruction on those topics actually contains material relevant to braiding. JA1810.

- The vast majority of required hours are about specific techniques and services not offered by African-style hair braiders. JA1743-51, JA1773-80, JA1807-09.

- Recognizing that the cosmetology/barber licensing scheme "includes a great deal of information [hair braiders] will never use," the Board supports creating a separate braiding license with substantially fewer hours (300 or 600) of braider-specific training. JA1801-06; ADD39-40.

a. African-style hair braiding is a completely distinct occupation from cosmetology/barbering.

African-style hair braiding is a distinct occupation that predates modern cosmetology/barbering, JA1743-51, JA1800-01, but there is no evidence it was considered when Missouri enacted its cosmetology/barber licensing regime in the early 20th Century. JA1796-97.

African-style hair braiding is a form of natural hair care with its own geographic, cultural, historical, and racial roots that date back centuries to Africa. JA1744. Its unique techniques involve the braiding, locking, twisting, weaving, and cornrowing of "tightly textured" or "coily" hair, which is most often associated with people of African descent. JA1744, JA1754. These techniques were brought by Africans to this country and have endured over the ensuing centuries as a popular form of hair styling, primarily for persons of African descent. *Id.*

Cosmetologists/barbers typically do not provide any hair braiding, let alone African-style hair braiding. JA1748-49. Because African-style hair braiding was never originally considered part of cosmetology/barbering, it is generally not learned at cosmetology/barber school. JA1746-47, JA1844. Unsurprisingly, the vast majority of those who provide African-style hair braiding are not licensed cosmetologists or barbers. JA1747-49, JA1800-01, JA521.

b. African-style hair braiders offer completely different services from cosmetologists/barbers.

African-style hair braiders use different techniques, methods, and simple tools to provide very different services from cosmetologists/barbers. JA1748-51; *see also* JA1757-59, JA1764-66. African-style hair braiding celebrates naturally "tightly textured" or "coily" hair and rejects modern cosmetology techniques that use chemicals or heat to straighten naturally textured hair to emulate European hair. JA1744-46, JA1754; *see also* JA1760-61, JA1767.

Accordingly, nobody goes to African-style hair braiders for typical cosmetology/barber services. While a typical visit to a cosmetology salon might involve an hour or two of having one's hair shampooed, straightened, cut, bleached/dyed, and possibly permed using various specialized equipment, heat, and chemicals (plus possibly a manicure/pedicure or facial), a typical visit to an African-style hair braider takes many hours, sometimes an entire day, on a single service: the braider uses her fingers and a comb, pick, or hook tool on one's hair (sometimes weaving in synthetic or natural hair extensions) to create dozens, even hundreds, of intricate braids, twists, or locs in styles such as micro braids, Senagelese twists, and Sisterlocks. *See* JA1748-51, JA1755-59, JA1762-16.

c. Missouri's mandatory cosmetology/barbering curricula offer instruction in services irrelevant and antithetical to African-style hair braiding.

Missouri's mandatory cosmetology/barber curricula were designed to prepare cosmetologists/barbers to practice cosmetology/barbering, not African-style hair braiding. JA1795, JA512-13. Accordingly, African-style hair braiders are forced to complete hundreds of hours of training on irrelevant techniques and services, which are often antithetical to natural hair care. These subjects include: "Hair coloring, bleaches, and rinses" (130 hours), "Hair cutting and shaping" (130 hours), "Permanent waving and relaxing" (125 hours), "Hairsetting, pin curls, fingerwaves, thermal curling" (225 hours), and "Manicuring, hand and arm

massage and treatment of nails" (110 hours). JA1743-46, JA365-66, JA548-50, JA1810.

d. At most, only a small fraction of the mandatory cosmetology/barbering curricula is relevant to African-style hair braiding.

At most, only a small fraction of the mandatory cosmetology/barbering curricula is relevant to African-style hair braiding. The Board identified topics totaling only 100 hours of the 1,500-hour cosmetology curriculum, and 105 hours of the 1,000-hour barbering curriculum, that it claimed are necessarily relevant to African-style hair braiding. JA1807-09, JA550. Therefore, even according to the Board, less than 7% of the cosmetology curriculum and about 10% of the mandatory barbering curriculum is even broadly relevant to African-style hair braiding. JA1808-10.

But even for these topics, the Board could offer no assurances that *any* of those hours would actually be relevant to braiding. JA1810. For example, the only relevant instruction of the 20 hours spent on "Anatomy" would be on hair and scalp, which the Board's expert dermatologist testified could be taught in one hour. JA1809-10, JA1819. African-style hair braiders do not provide scalp treatments, JA1743-51, and the Board's expert dermatologist testified that spending 30 hours on "Scalp treatments and scalp diseases" was unnecessary and "excessive" for braiders. JA1819. "Sanitation and sterilization" includes instruction on how to

sanitize tools and equipment that braiders don't use, JA1810, while business-practices topics such as "Salesmanship and shop management," "Professional image," and "State law" are not even specific to cosmetology/barbering, let alone braiding. JA550-52.

e. The Board has repeatedly endorsed creating a separate braiding license and the Missouri legislature recently exempted braiders at certain venues from licensing.

Both the Board and the Missouri legislature have recognized that African-style hair braiders do not need to be licensed as cosmetologists/barbers to safely braid hair.

The Board has repeatedly endorsed a separate braiding license for African-style hair braiders with dramatically fewer required hours of instruction. JA1801-1804; ADD39-40. One proposal would have required 300 hours of instruction, including 195 hours dedicated to "hairbraiding and braid styling." JA1803-04. The Board admits this 300-hour mandatory curriculum would fulfill all of the government interests. JA1805.

Meanwhile, the Missouri legislature recently exempted braiders from *all* cosmetology/barber licensing requirements if they provide their services at public-amusement or entertainment venues. JA1786-87. Of course, as the Board admits, there is nothing special about such venues that makes them a safer place to perform hair braiding. JA1790-91.

2. Missouri's cosmetology/barber licensing scheme is unduly burdensome for African-style hair braiders.

As the Board admits, under Missouri's licensing scheme, "African Hairbraiders are currently required under Missouri law to complete and pay tuition for months of training that does not relate to their occupation—African Hair braiding." JA1807, JA571-72, JA822-37. It can take a year or more to complete 1,500 hours of instruction, and the average cost of tuition at a Missouri cosmetology/barber school is $11,750, with some exceeding $21,000. ADD10; JA1786; *see also* JA1734-35, JA1742.

B. Missouri's cosmetology/barber licensing regime is badly under-inclusive—and wholly inadequate—for African-style hair braiders because it does not teach or test braiding.

Missouri's cosmetology/licensing scheme does not even attempt to train African-style hair braiders in their craft. It is undisputed that one can become a licensed cosmetologist/barber in Missouri despite **not receiving a single hour of instruction** on braiding, and **never being tested** on braiding, let alone African-style hair braiding. JA1797-99, JA1847-49, JA1856-58, JA1862-68.

The complete inadequacy of Missouri's cosmetology/barber licensing regime for African-style hair braiders is demonstrated by the undisputed evidence showing that (1) cosmetology/barbering instruction does not train someone to safely or competently braid hair, and (2) the cosmetology/barbering exams do not test ability to safely or competently braid hair.

1. Cosmetology/barbering instruction does not train someone to competently or safely braid hair.

The Board admits that the cosmetology/barber curricula "do[] not include various aspects of African Hair Braiding." JA1807. In fact, because no braiding instruction is required and because braiding is nearly absent from the textbooks, the Board admits one may graduate from cosmetology/barber school without *any* training or experience in braiding. JA1799. Moreover, the required training either completely omits or barely mentions health information that the Board claims is *essential* for braiders. The record demonstrates:

- Missouri's mandatory cosmetology/barbering curricula are not designed to teach braiding and *do not require a single hour of instruction* on braiding. JA1795-96.

- The Board does not monitor whether any braiding instruction is provided in cosmetology/barber schools and has zero oversight over the quality or quantity of any braiding instruction. JA1812-13, JA1839-43.

- African-style hair braiding is generally not taught in Missouri cosmetology/barber schools. JA1746-47, JA1842-47.

- The textbooks used in cosmetology/barber schools have very little, if any, instruction on any kind of braiding—fewer than 50 of nearly 3,000 pages mention braiding—and the material is cursory and riddled with errors. JA1827-29; *see also* ADD9.

- The Board's health-and-safety concerns about braiding are not required to be taught, are omitted or barely mentioned in the textbooks, and the Board exercises no oversight over whether they are taught. JA1829-40, JA1859-61.

- The Board's own expert dermatologists testified that the textbooks are inadequate for instruction on health-and-safety issues they believe braiders need to know to braid safely. JA1838-39.

- Recognizing the inadequacy of cosmetology/barber licensing for braiders, the Board supported a separate braiding license that would focus on providing braiding-specific instruction. JA1805; ADD39-40; *see supra* p. 9.

2. The cosmetology/barbering exams do not test ability to competently or safely braid hair.

Missouri's cosmetology/barber licensing exams are completely inadequate for testing braiders. The record shows:

- The Board and its expert admit that Missouri's cosmetology/barber exams are "not adequate to qualify, certify, or license African-style hair braiders." ADD43; JA1866-67.

- The Board admits that "passing those exams does not demonstrate competence in the material deemed necessary for the safe practice of braiding." JA1863.

- The Board's three health-and-safety concerns specific to braiding are not tested on any exam and its expert concluded the exams inadequately test healthy-and-safety issues relevant to braiding. JA1858-61, JA1866.

- Hair braiding is not tested on the practical portion of either exam, or on the written portion of the barbering exam. JA1849.

- Hair braiding is either not tested on the written portion of the cosmetology exam, or there is a single question (out of 110) about health-and-safety information relevant to braiding.[2] JA1849, JA1856-58; *see also* ADD9-10.

[2] In the past ten years, 43.5% (54 of 124) of exams lacked any questions about braiding. For the remaining exams, none of the questions that tested health-and-safety information relevant to braiding appeared on the same exam. JA1857-58.

- The exams are designed to license cosmetologists/barbers, not braiders, and thus have no "linkage" with the actual practice of braiding. JA1850-56.

C. The procedural history of this case.

On June 16, 2014, Plaintiffs-Appellants filed this civil-rights lawsuit in the Eastern District of Missouri, alleging that Missouri's requirement that they obtain a cosmetology license to perform African-style hair braiding violates their rights under the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment. JA7. Plaintiffs-Appellants subsequently amended their complaint to include a challenge to Missouri's barber licensing requirements. JA9. After extensive discovery, cross-motions for summary judgment were filed on September 30, 2015, JA11-12, and oral argument was held on January 19, 2016. JA13. On September 20, 2016, Magistrate Judge Bodenhausen entered judgment granting Defendants-Appellees' motion for summary judgment and denying Plaintiffs-Appellants' motion. ADD38.

Magistrate Judge Bodenhausen granted summary judgment to Defendants-Appellees on all three counts,[3] recognizing that under both equal protection and substantive due process the court should apply rational-basis review. ADD23, ADD36. Although the district court recognized at oral argument that the "fit is awful" between the practice of African-style hair braiding and the licensing

[3] Plaintiffs-Appellants conceded that their Privileges or Immunities claim was foreclosed. JA2010.

requirement because "[l]ess than ten percent overlap is pretty bad," JA1904, the district court concluded that the licensing requirement was still rationally related to the government's purported public health and consumer protection interests. ADD32-33. The district court also proffered two additional justifications never proffered by the State for upholding the licensing requirements: Missouri may have been trying to "stimulate the market for [African-style hair braiding] education" and/or "incentivize hair braiders to offer more comprehensive services." ADD34.

Plaintiffs-Appellants filed a timely notice of appeal. JA14.

SUMMARY OF ARGUMENT

Missouri's cosmetology/barber licensing regime is "not adequate to qualify, certify or license African-style hair braiders" and yet, "African Hairbraiders are currently required under Missouri law to complete and pay tuition for months of training that does not relate to their occupation—African Hair braiding." Those are the Board's own admissions describing Missouri's requirement that African-style hair braiders obtain a license in a different occupation—either cosmetology or barbering—in order to braid hair for a living. This requirement is irrational, and thus unconstitutional, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The undisputed facts show that hair braiding is not required to be taught or tested under Missouri's cosmetology/barber licensing regime, and very little, if

any, of the required instruction is even generally relevant to braiding. Indeed, 1,400 hours of the 1,500-hour cosmetology curriculum are spent on instruction regarding services and techniques that are not offered or used by African-style hair braiders. The remaining 100 hours of instruction that the Board claims are relevant to African-style hair braiders cover general health-and-safety and business-practices topics such as "Anatomy," "Salesmanship and shop management," and "State law." While African-style hair braiders might learn something useful from this instruction, so too could virtually anyone in any occupation. Moreover, no one should be required to waste hundreds of hours on irrelevant instruction—and spend tens of thousands of dollars on tuition—because a small fraction of the total instruction *might* be relevant to their occupation. Indeed, two other federal district courts have sustained nearly identical rational-basis challenges brought by African-style hair braiders to cosmetology/barber licensing regulations.

The district court declined to follow those rulings because it disagreed with how those courts employed rational-basis review—by looking at the evidence to see whether there actually was any rational connection between the licensing scheme and the government interests. Instead, the district court held that the question of rational connections was not subject to fact-finding. Thus, despite what it recognized as an "awful" fit between the cosmetology/barber licensing scheme

and African-style hair braiding, it held that some "minimal overlap" between the two was sufficient to sustain the licensing regulations under rational-basis review.

But that ruling cannot be squared with how the U.S. Supreme Court, this Court, and other federal courts have applied rational-basis review. Rational-basis review, although deferential, is not toothless; it is a meaningful standard of review under which plaintiffs sometimes win. Plaintiffs can do so by adducing evidence that demonstrates the absence of a means-ends fit between the government's purported interests and the means it uses to advance those interests, or by demonstrating that the means employed by the government impose a burden that is irrationally disproportionate to any potential benefit. Such is the case here, where the evidence not only shows that licensing African-style hair braiders as cosmetologists/barbers fails to advance government interests, but also that it imposes burdens irrationally disproportionate to any putative benefit. Viewed through the lens of either substantive due process or equal protection, such an awful means-ends fit cannot survive rational-basis review.

Finally, as part of conducting rational-basis review, the district court conjured two new justifications for applying the licensing scheme to African-style hair braiders. This is reversible error. It deprived Plaintiffs-Appellants of their procedural due-process rights to a meaningful opportunity to be heard by a neutral tribunal. Specifically, by announcing these justifications after discovery had

concluded, the district court deprived Plaintiffs-Appellants of the opportunity to conduct discovery to "negative" these justifications. By hypothesizing legal justifications (which it viewed as dispositive) that could benefit only one side, the district court effectively abandoned its role as a neutral arbiter and put its finger on the scale to favor the government. Rational-basis review may be deferential, but it cannot require judges to abandon their neutrality in order to conceive of justifications that immunize a challenged government regulation. Additionally, the district court's new justifications lack a rational connection to the licensing scheme and fail to save it.

STANDARD OF REVIEW

Appellate courts "review a district court's grant of summary judgment de novo, and view the record in the light most favorable to the nonmoving party." *Butts v. Cont'l Casualty Co.*, 357 F.3d 835, 837 (8th Cir. 2004).

ARGUMENT

As this Court has recognized, "rational basis review is not toothless." *Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, Mo.*, 742 F.3d 807, 810 (8th Cir. 2013) (internal citations omitted); *see also Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983) ("Although states may have great discretion . . . they do not have unbridled discretion.") The district court, however, adopted an approach to rational-basis review so toothless and deferential that it

would allow Missouri to require virtually anyone in *any* occupation to obtain a cosmetology/barber license before practicing their occupation. But, as explained in Part I, the district court's application of rational-basis review cannot be squared with how the test is actually applied by the U.S. Supreme Court, this Court, and other federal courts. As explained in Part II, Missouri's requirement that African-style hair braiders obtain a cosmetology/barber license before practicing their profession fails rational-basis review and violates their substantive due-process rights. Part III illustrates how licensing African-style hair braiders under the separate professions of cosmetology/barbering lacks a rational basis and violates the equal-protection rights of braiders. Finally, as explained in Part IV, the district court erred in concocting two new justifications for the challenged regulations after discovery had concluded, thus depriving Plaintiffs-Appellants of their procedural due-process rights to a meaningful opportunity to be heard by an impartial tribunal. The new justifications also lack a rational connection to the licensing scheme.

I. Rational-Basis Review, While Deferential, Is a Meaningful Standard of Review That Considers Actual Evidence.

The district court's opinion repeatedly emphasizes the deferential nature of rational-basis review. ADD24-30, ADD32-36. It is apparent that the district court incorrectly viewed rational-basis review as toothless: Despite recognizing the poor "fit" between the cosmetology/barber licensing scheme and African-style hair braiding, the district court indicated that it felt "bound by the standard of review

articulated by the Supreme Court and the Eighth Circuit in cases such as [*FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993)] and [*Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, Mo.*, 742 F.3d 807, 809 (8th Cir. 2013)]." ADD36.

Misinterpreting *Beach* and *Kansas City Taxi* as tying its hands, the district court rejected the prior holdings of two federal district courts in nearly identical braider cases because "those courts engaged in a hard look at the actual connection between the State's asserted interests and how each aspect of the licensing regime advanced the State's interests in concrete ways," including by looking at the overbreadth and under-inclusiveness of the licensing requirements. ADD35.

The district court also thought those courts improperly considered evidence about "how each aspect of the State's licensing regime promotes [the state's asserted] interests" because it is "not consistent with Supreme Court case law which holds that those connections are 'not subject to courtroom fact-finding.'" ADD35 (quoting *Gallagher v. City of Clayton*, 699 F.3d 1013, 1020 (8th Cir. 2012)). But *Gallagher* does *not* say courts cannot consider evidence about rational connections during rational-basis review; rather, it explains that "the strong presumption of validity" means courts need not resolve factual disputes about the validity of the harm being addressed if it is reasonably plausible. *Id.* at 1020 ("We need not determine whether outdoor secondhand smoke exposure actually causes

harm"). *Gallagher* is inapposite; this case does not involve any factual dispute about the validity of Missouri's interests in regulating hair braiders. Instead, it challenges whether requiring cosmetology/barber licensure for braiders is rationally connected to those interests.

The district court was mistaken about whether evidence is considered in rational-basis cases. Rational-basis review relies on evidence because plaintiffs in rational-basis cases bear the burden of using evidence to rebut any rational connection between challenged laws and any proffered government purpose. *See*, *e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) ("[T]he 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 within the knowledge and experience of the legislators.") (emphasis added).

The district court also apparently believed that plaintiffs could not win a rational-basis case by challenging the means-ends fit; at oral argument, the district court explained that it thought plaintiffs only won rational-basis cases with a showing of improper purposes: "And it seems like when there's proper purposes, when I look at the cases, the State wins." JA1904. The district court was again mistaken. Rational-basis review is not just about whether the government states a proper purpose; it is a two-part test that looks at both whether there is a legitimate

government purpose *and* whether there is a rational connection—or means-ends fit—between the means chosen by the government and a legitimate purpose. *See Romer v. Evans*, 517 U.S. 620, 631-33 (1996). Contrary to the district court's view, laws are invalidated under rational-basis review when they "lack[] a rational relationship to legitimate state interests." *Id.* at 632.

In other words, rational-basis review is *not* toothless; it is a meaningful, albeit deferential, standard of review that relies on actual evidence. Plaintiffs have prevailed in 21 rational-basis cases at the U.S. Supreme Court from 1970 to the present, both before and after *Beach*.[4] Plaintiffs prevail in rational-basis cases before the U.S. Supreme Court when they have adduced evidence and/or provided reasoning establishing the lack of logical connection between the challenged statutory scheme and any plausible, legitimate purpose.[5] So too in cases before this

[4] *See United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *id.* at 2706 (Scalia, J., dissenting) (noting that the Court relied on rational-basis review); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 614-15 (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); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *infra* note 5 (identifying nine additional cases).

[5] *See*, *e.g.*, *Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (ability to grasp politics not logically connected to land ownership); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty., W. Va*, 488 U.S. 336, 345 (1989) (disparities in tax rates so enormous as to be illogical); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50 (1985) (group home being too big not logical basis for permit denial

Court.[6] The district court's extremely deferential, facts-do-not-matter approach to rational-basis review cannot be reconciled with these cases.

This case is primarily about means-ends fit—whether the evidentiary record negates any rational connection between the cosmetology/barber licensing scheme and legitimate government interests in regulating African-style hair braiders. Among the things courts consider when analyzing means-ends fit are: (1) whether *evidence* establishes there is no rational connection, or fit, between the government

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when identical homes routinely granted permits); *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985) (encouraging Vermont residents to make in-state car purchases not logical basis for tax on car that Vermont resident purchased out-of-state before becoming Vermont resident); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) (no rational relationship between program that distributed Alaska's oil money to residents in 1980 based on length of state residency since 1959 and state's purported objectives); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam) (ability to grasp politics not logically connected to property ownership); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (stimulating agricultural economy not logically connected to whether people in household are related); *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971) (if inability to pay is no basis to deny transcript to felony defendant, then it is no basis for denying transcript to misdemeanant); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (no rational interest in underlying property-ownership requirement for political office).

[6] *See*, *e.g.*, *Peeper v. Callaway Cty. Ambulance Dist.*, 122 F.3d 619, 620 (8th Cir. 1997) (striking down government board's resolution limiting officeholder's employment due to her being married to employee overseen by board); *Ranschburg v. Toan*, 709 F.2d 1207, 1208 (8th Cir. 1983) (striking down statute which irrationally discriminated between classes of disabled persons based on which government program provided them with public assistance despite similar eligibility requirements); *Fowler v. United States*, 633 F.2d 1258, 1262 (8th Cir. 1980) (finding no rational basis for statutes providing employment benefits to non-mentally-disabled workers but not to mentally disabled workers).

action and legitimate government interests; and (2) whether evidence establishes that the burdens imposed by the government are *irrationally disproportional* to any purported benefits, such as whether regulations are so overbroad or under-inclusive as to be irrational.

Plaintiffs in the U.S. Supreme Court, this Circuit, and other federal courts prevail in rational-basis cases—including in challenges to occupational licenses and other economic regulations—when they negate each of the government's proffered purposes for the challenged laws using specific factual evidence.[7]

[7] *See*, *e.g.*, *Schware v. Bd. of Bar Exam'rs of New Mexico*, 353 U.S. 232, 235-47 (1957) (finding no rational basis for excluding applicant from bar admittance after carefully reviewing detailed evidentiary record regarding his moral fitness); *Planned Parenthood of Minnesota v. Minnesota*, 612 F.2d 359, 362-63 (8th Cir. 1980) (addressing and rejecting the three justifications proffered by the government in support of a statute with reference to specific evidence in the factual record); *Miller v. Ackerman*, 488 F.2d 920, 922 (8th Cir. 1973) (finding no rational basis for proscribing short-hair wigs for military reservists in weekend training program based on record evidence that the wigs were "neat and presentable" and did not inhibit performance); *see also St. Joseph Abbey v. Castille*, 712 F.3d 215, 223-24 (5th Cir. 2013) (striking down Louisiana casket-sale regulations after plaintiffs produced evidence disproving government's claimed interest in consumer protection by demonstrating, e.g., that funeral-director training did not include instruction on caskets or counseling grieving customers); *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (holding irrational a pest-control licensing requirement because of evidence that the category of pest controllers exempted from licensing were actually more at risk to pesticide exposure than those who were required to be licensed); *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (rejecting government's public-health justification—"that the education and training required for licensure insures that those who handle dead bodies may dispose of them safely and prevent the spread of communicable diseases"—noting plaintiffs' evidence that casket retailers do not handle human remains); *Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Lyskowski*, No.

The U.S. Supreme Court has repeatedly used rational-basis review to strike down laws when there is an extreme mismatch between a law's alleged benefits and its demonstrable costs such that no rational legislator would countenance them.[8] Likewise, plaintiffs in this Circuit and others prevail in rational-basis cases

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2:15-CV-04273-NKL, 2016 WL 2745873, at *1 (W.D. Mo. May 11, 2016) (holding that revocation of an ambulatory surgical center license was without a rational basis based on an evidentiary record demonstrating harsher treatment than normal after plaintiffs provided notice that they would be without a doctor with hospital privileges); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 700 (E.D. Ky. 2014) (striking down Kentucky's certificate-of-need regulation for movers after finding "no link between the protest and hearing procedures and any alleged government interest in health and safety").

[8] *See*, *e.g.*, *Allegheny*, 488 U.S. at 340-46 (rejecting property-tax-assessment scheme which unfairly resulted in gross disparities in tax assessments); *Plyler*, 457 U.S. at 230 (rejecting government's assertion that denying public education to children of illegal immigrants could help save government funds as a "wholly insubstantial [benefit] in light of the costs involved to these children, the State, and the Nation" of creating a subclass of illiterates); *Zobel*, 457 U.S. at 61-62 (rejecting Alaska's rationale that retroactive oil-dividend distribution scheme would encourage settlement in Alaska because scheme disproportionately benefitted long-term residents, despite creating some financial incentives for people to settle in Alaska); *James*, 407 U.S. at 141-42 (harm inflicted on debtors by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate to state funds saved); *Lindsey*, 405 U.S. at 77-78 (cost savings from deterring a few frivolous appeals were insufficient to justify a surety requirement that allowed many frivolous appeals, blocked many meritorious appeals, and conferred windfall on landlords); *Reed*, 404 U.S. at 76-77 (reducing workload of probate courts by excluding women from service as administrators in certain cases would be unconstitutionally arbitrary).

where there is an irrationally disproportionate burden imposed by the government that outweighs any putative benefits.[9]

As Part II demonstrates, Plaintiffs-Appellants prevail under both frameworks.

II. The District Court Erred in Concluding That Requiring African-Style Hair Braiders to Obtain a Cosmetology/Barbering License Does Not Violate Their Substantive Due-Process Rights.

The district court erred by failing to recognize that licensing African-style hair braiders as cosmetologists/barbers violates Plaintiffs-Appellants' substantive

[9] *See*, *e.g.*, *Peeper*, 122 F.3d at 623-24 (holding irrational a public board resolution limiting participation of a board member whose husband's employment was overseen by the board because the board's legitimate interest in avoiding conflict-of-interest prohibitions was "not served by vast portions" of the resolution); *Ackerman*, 488 F.2d at 922 (finding "no rational basis for the proscription of short-hair wigs" given the disproportionate burden imposed by requiring those who spend the vast majority of their time working and living in civilian society to have a military haircut, compared to the minimal benefits of improving "the spirit of the Corps"); *Merrifield*, 547 F.3d at 991-92 (holding pest-controller licensing scheme irrational—despite finding it had some rational connection to government interest in promoting pesticide safety—because those at greater risk of pesticide exposure were exempted, and thus the licensing burden was disproportionately born by pest controllers who were at lesser risk of pesticide exposure); *Lakeside Roofing Co. v. Nixon*, No. 4:10cv1761, 2012 WL 709276, at *15 (E.D. Mo., March 5, 2012) (striking down Missouri's excessive unemployment law as irrational because, even though the law may have benefitted Missouri workers, it burdened many others, and thus imposed burdens disproportionate to any claimed benefits).

due-process rights because there is no rational connection to any legitimate interest.[10]

Professional qualifications required by a state must have a "rational connection with the applicant's fitness or capacity to practice" her occupation. *Schware*, 353 U.S. at 239. Although there does not have to be "a perfect fit" between any legitimate government interest in regulating an occupation and the occupational regulation, "there must be some congruity between the means employed and the stated end." *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214 (D. Utah 2012) (quoting *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999)).

Under rational-basis review as it has been applied by the U.S. Supreme Court, this Court, and other federal courts, Missouri's requirement that African-style hair braiders become licensed as cosmetologists/barbers cannot survive review. Section A explains how the district court erred in conducting rational-basis review of Plaintiffs-Appellants' substantive due-process claim. Section B demonstrates how the district court erred, on this evidentiary record, in holding that there is a rational connection between the cosmetology/barber licensing

[10] The district court also mischaracterized Plaintiffs-Appellants as arguing that "the practice of [African-style hair braiding] is safe, and does not significantly impact the State's interest in public health." ADD26. That was not a point of emphasis in Plaintiffs-Appellants' summary judgment briefing, which focused on the absence of a rational connection. *See* Mem. Supp. Pls.' Mot. Summ. J. (ECF 49-1) 14-26.

scheme and any government interests in regulating African-style hair braiders. Section C shows how the district court erred, on this evidentiary record, by failing to hold that the burdens imposed on African-style braiders are irrationally disproportionate to any legitimate interest.

A. The district court erred in how it conducted rational-basis review of Plaintiffs-Appellants' substantive due-process claim.

The district court erred in how it approached rational-basis review of the substantive due-process claim by: (1) incorrectly relying on *Kansas City Taxi*, a case about improper purposes, rather than *Peeper* and other cases decided on the means-ends fit at issue in this case; (2) rejecting three federal cases that addressed this precise issue because they (correctly) looked at evidence to determine whether there actually was a means-ends fit; and (3) failing to fully recognize the importance of a statutory exemption that undercut the government's claimed interests for subjecting braiders to the cosmetology/barber licensing scheme.

1. The district court erred in holding that *Kansas City Taxi*, a case about illegitimate purpose, rather than cases about means-ends fit, such as *Peeper*, determines the outcome of this case.

The district court viewed this case through the wrong lens, believing it to be controlled by *Kansas City Taxi*, ADD36, a case about the legitimacy of the government purpose. (This is perhaps because the district court incorrectly believed that rational-basis cases could only be won with a showing of improper

purpose. *See supra* Part I; JA1904.) But this case turns on means-ends fit, which this Circuit has addressed in a separate line of cases, such as *Peeper*, *Ackerman*, and *Planned Parenthood of Minnesota*.

Unlike this case, *Kansas City Taxi* was not really about the means-ends fit; the primary dispute was about whether the government was pursuing legitimate ends by limiting the number of taxi permits. 742 F.3d at 809-10. This Court did not discuss any evidence presented by the cab-driver plaintiffs to challenge the means-ends "fit."[11] Instead, unlike the present case, the *Kansas City Taxi* plaintiffs focused on challenging the legitimacy of the purported government interests, arguing that the restrictions were really designed to advance economic protectionism. *Id.* This Court rejected their argument, holding that, "[w]hile these provisions favor existing firms, they are constitutionally permissible," *id.* at 809, and concluded that "there is no real dispute that promoting full-service taxi operations is a legitimate government purpose under the rational basis test." *Id.* at

[11] The cab-driver plaintiffs only presented one such fact noted by the district court: that no taxicab company had voluntarily surrendered permits since the ordinance was enacted. *See Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, Mo.*, No. 12-00158-CV-W-GAF, 2013 WL 12142542, at *6 & n.3 (W.D. Mo. Jan. 30, 2013).

810 (quoting *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011)).[12]

In contrast, this case is about means-ends fit, similar to cases such as *Peeper*. In *Peeper*, this Court invalidated a public board's resolution limiting a board member's participation because her husband's employer was overseen by the board, holding that the resolution "place[s] limitations on Peeper that are not rationally related to the goals of Missouri conflict-of-interest law." 122 F.3d at 622-24. Despite recognizing the legitimacy of the board's stated interests, this Court noted, "the portions of the resolution that restrict Peeper from participating in or even hearing discussions not directly related to her husband do not rationally relate to [the board's legitimate] interests." *Id.* Accordingly, this Court held "the Board's interest . . . is not served by the vast portions" of the resolution, and struck the entire resolution. *Id.* Here, Plaintiffs-Appellants challenge the licensing scheme because no government interests are served by vast portions of the scheme due to the absence of means-ends fit.

A closely related line of cases in this Circuit considers record evidence in evaluating the means-ends fit; these cases should guide this Court because of the substantial evidence presented in this case to challenge means-ends fit. For

[12] In determining the legitimacy of the government interest, this Court explicitly cabined its decision to "the context of taxicab regulation," and noted with approval that the Fifth Circuit in *St. Joseph Abbey* "affirm[ed] *Greater Houston Small Taxicab Co.* as to taxicabs, while following *Craigmiles* as to casket sales." *Id.*

example, in *Ackerman*, this Court held that a proscription on military reservists' use of short-hair wigs in a weekend training program lacked a rational connection to a legitimate purpose based on record evidence that the wigs were "neat and presentable" and did not inhibit performance. 488 F.2d at 922. Likewise, in *Planned Parenthood of Minnesota*, this Court struck down a statute denying grants for pre-pregnancy planning services to any nonprofit that performed abortions, other than licensed hospitals or HMOs, based on a district court's "detailed findings of fact" about the plaintiff's accounting practices, which undermined three justifications proffered for the law. 612 F.2d at 362-63.

The district court erred by viewing this case through the wrong lens of rational-basis analysis. This case is not a challenge to the legitimacy of the government purpose controlled by *Kansas City Taxi*, but rather a challenge to the means-ends fit like *Peeper*, *Ackerman*, and *Planned Parenthood of Minnesota*.

2. The district court erred by rejecting three federal district court decisions holding that applying state cosmetology/barber regulations to African-style hair braiders (and instructors) lacks a rational basis.

The district court erred by rejecting three very similar cases—two practically identical to this case—in which federal district courts ruled for plaintiffs in rational-basis challenges to regulations that treat African-style hair braiders (and instructors) as cosmetologists/barbers. *See Brantley v. Kuntz*, 98 F. Supp. 3d 884, 894 (W.D. Tex. 2015) (striking down application of Texas's barber school

regulations to school that exclusively teaches African braiding); *Clayton*, 885 F. Supp. 2d at 1215-16 (striking down application of Utah's cosmetology/barber licensing regime to African braiders); *Cornwell*, 80 F. Supp. 2d at 1118-19 (striking down application of California's cosmetology licensing regime to African braiders). In each case, the courts considered evidence to evaluate the means-ends fit and whether the burdens imposed were disproportionate to any purported benefit. *See Brantley*, 98 F.Supp.3d at 891 ("Plaintiffs have successfully refuted every purported rational basis for the [challenged requirements] articulated by Defendants, and the Court can discern no other rational bases for the [challenged requirements] in light of the facts at hand."); *Clayton*, 885 F. Supp. 2d at 1214 ("the facts of this particular case must be considered"); *Cornwell*, 80 F. Supp. 2d at 1106-18 (holding that substantial evidence was determinative in evaluating the rationality of applying the licensing regulations to African hair braiders).

The district court explained that it rejected *Clayton* and *Cornwell* because those courts looked at the "actual connection between the State's asserted interests and how each aspect of the licensing regime advanced the State's interests in concrete ways" and considered evidence as part of that analysis. ADD34-35. The district court incorrectly believed that *Kansas City Taxi* foreclosed this approach, as explained *supra* in Part II.A.1. And, as explained *supra* in Part I, the district court was incorrect in believing that rational-basis plaintiffs cannot win by

challenging means-ends fit or by adducing evidence in support of such arguments. In fact, the approach used in *Cornwell*, *Clayton*, and *Brantley* is the appropriate way to conduct rational-basis review. Had the district court correctly applied rational-basis review using the evidence presented in this case, it would have also struck down the application of the challenged licensing scheme to African-style hair braiders. *See infra* Part II.B.

3. The district court erred in failing to accord full weight to the statutory exemption permitting unlicensed hair braiding at public-amusement venues, which undercuts the government interests.

A key statutory exemption undermines the claimed government interests in licensing African-style hair braiders as cosmetologists/barbers: The Missouri legislature recently exempted hair braiding "without the use of potentially harmful chemicals . . . while working in conjunction with any licensee for any public amusement or entertainment venue" from cosmetology licensure requirements. *See* Mo. Rev. Stat. § 316.265; JA1786-87. But if the legislature was genuinely concerned about health-and-safety issues related to braiding, and thought licensure was important to protect the public, it would not allow *absolutely anyone* to braid hair at a county fair, circus, or music festival.

Where the legislature's own statutory exemptions undermine the government's claimed interests, those interests cannot be regarded as legitimate interests that provide a rational basis for challenged regulations. *See Merrifield*,

547 F.3d at 991 (noting the irrationality of upholding licensing requirement on one rationale while justifying statutory exemption on completely contradictory rationale); *see also Brantley*, 98 F. Supp. 3d at 891-92 (noting two instances in which proffered state interests were "fatally undermined" by statutory exemptions demonstrating those interests were spurious).

The district court acknowledged that the exemption "somewhat undercuts the State's asserted interests, because the State is permitting unlicensed braiders to practice their craft on the public at entertainment and amusement venues." ADD33 n.17. However, the district court excused this inconsistency by noting that "[l]egislatures may implement their program step by step, in . . . economic areas." *Id.*

But the Missouri legislature was not implementing a regulatory program one step at a time; rather, as in *Merrifield*, it passed a new statutory *exemption* undercutting the very justification for the existing program. *Cf.* 547 F.3d at 981, 991 ("In 1995, the California legislature enacted an express exemption from the Branch II license requirement."). The Board cannot identify any justification for this exemption, and the Board's President admitted there is no reason why braiders at such venues would be any safer than braiders at salons. JA1790-92. In fact, the government's interests in protecting the public are likely *greater* at seasonal amusement parks and carnivals, which attract tourists and visitors, and are often

more itinerant in nature than braiding salons, which rely more heavily on repeat business and local reputation.

Given the undisputed evidence that braiding is just as safe at a salon as at an amusement park, it would be nonsensical to exempt some braiders from the licensing requirement if the legislature believed that hair braiding actually posed serious health or safety risks. Instead, just as in *Merrifield*, "the government has undercut its own rational basis for the licensing scheme by excluding [Plaintiffs] from the exemption. The exemption from the license is given to those [braiders] who are most likely to [harm the public/consumers]. Additionally, the [braiders] who are least likely to [harm the public/consumers] must remain part of the licensing scheme." 547 F.3d at 992. The district court thus erred by taking the Board's asserted governmental interests on faith when those claimed interests are directly undermined by the statute's exemption from the licensing scheme.

B. On this evidentiary record, the district court erred in holding that there was a rational connection between cosmetology/barber licensing and any legitimate government interests in regulating African-style hair braiders.

The district court erred in upholding the application of Missouri's cosmetology/barber licensing scheme to African-style hair braiders despite recognizing that "much of the education and training that traditional cosmetologists and barbers undergo is not directly relevant to the narrow practice of [African-style hair braiding]." ADD31. At oral argument, the district court noted

that "**the fit is awful** in Missouri . . . [l]ess than ten percent overlap is pretty bad," which it described in the opinion as "**this marginal overlap** between the actual practice of hair braiders and the training/testing requirements." JA1904, ADD35 (emphasis added). In light of the "awful" means-ends fit presented by this record, the district court was required to strike down the application of the licensing scheme under rational-basis review, as other federal courts have done.

Clayton and *Cornwell*—the two braiding cases nearly identical to this one—reviewed a number of factors to evaluate means-ends fit between cosmetology/barber licensing and legitimate government interests in regulating African-style hair braiding. *Clayton*, 885 F. Supp. 2d at 1215; *Cornwell*, 80 F. Supp. 2d at 1106-18. These factors included the extent to which the required curriculum, standard textbooks, and exams were relevant to braiding. *Id.* In the present case, Plaintiffs-Appellants adduced evidence on each of these factors that was similar or identical—if not superior—to the evidence adduced by the plaintiffs in *Clayton* and *Cornwell*, demonstrating that Missouri's cosmetology/barber licensing regime has very little, if any, relevance to braiding, and thus no rational connection with any legitimate interests in regulating braiders. *See supra* pp. 3-13; *see also* ADD8-10, ADD27.

As demonstrated below, the licensing scheme is an awful fit for licensing braiders because: (1) it is wildly overbroad, requiring a tremendous amount of

training and testing irrelevant to braiders, and (2) it is badly under-inclusive and totally inadequate for training or testing braiders. Moreover, (3) Missouri may not bootstrap the entire licensing scheme under rational-basis review based on a small percentage of "minimally related" features.

1. Cosmetology/barber licensing is an awful fit for African-style hair braiding because it is wildly overbroad.

The licensing scheme is an awful fit for braiders because it was designed to teach cosmetologists/barbers, not African-style hair braiders. *See supra* pp. 3-8. As a result, it is wildly overbroad for African-style hair braiders, requiring them to spend 895 or 1,400 hours learning techniques they do not use. *See supra* pp. 7-9. Such overbreadth problems are given significant weight by courts in rational-basis cases. For example, both *Clayton* and *Cornwell* focused on the extent to which the mandatory cosmetology/barber curricula required training that was irrelevant to African-style hair braiding. *See Clayton*, 885 F. Supp. 2d at 1215 ("Most of the cosmetology curriculum is irrelevant to hairbraiding. Even the relevant parts are at best, minimally relevant."); *Cornwell*, 80 F. Supp. 2d 1118 (the mandatory curriculum "requires hair braiders to learn too many irrelevant, and even potentially harmful, tasks").

Likewise, in *Peeper*, this Court explained that it was striking down a government board's resolution that covered "a wide range of matters, **most of which do not involve the concerns expressed by the Board**" where the

government interest was "not served by . . . **vast portions**" of the resolution. 122 F.3d at 624 (emphasis added). Notably, this Court struck down the *entire* resolution even though it recognized the legitimacy of the board's interest in complying with Missouri's conflict-of-interest law, and that *some* of the limitations on Peeper's participation advanced that goal. Specifically, the overbreadth of the resolution in "prohibit[ing] Peeper from participating in any matter dealing with any employee's records, any testing material, or the hiring or firing of any employee" rendered it irrational because it went far beyond restrictions "directly related to her husband." *Id.*

Relatedly, in *Craigmiles*, the Sixth Circuit rejected the government's public-health justification for allowing only licensed funeral directors to sell caskets, noting that the evidence showed that the education and training required for licensed funeral directors was not relevant to casket retailers because, unlike funeral directors, the casket-retailer plaintiffs did not handle human remains or offer embalming services. 312 F.3d at 225. Similarly, here, the record shows that training African-style hair braiders as cosmetologists/barbers is unnecessary because they do not offer the same services as cosmetologists/barbers. *See supra* pp. 3-8.

2. Cosmetology/barber licensing is an awful fit for African-style hair braiding because it is badly under-inclusive—and wholly inadequate—for teaching or testing braiders.

As the record demonstrates, *see supra* pp. 11-13, Missouri's cosmetology/barber licensing regime is totally irrational for licensing braiding because it was not designed for braiding and—like the regimes in California (*Cornwell*) and Utah (*Clayton*)—fails to require any instruction or testing on braiding. 885 F. Supp. 2d at 1215; 80 F. Supp. 2d at 1106-18. Therefore, as in *Cornwell* and *Clayton*, the evidence shows that the licensing regime is not just largely irrelevant, but also wholly inadequate, for training or testing African-style hair braiders.

Even the Board admits that cosmetology/barber licensing is "not adequate to qualify, certify or license African-style hair braiders" and "does not provide a guarantee of competence for braiders." ADD45-49; JA1866-67; *see also* ADD43. It cannot be rational to require African-style hair braiders to obtain such a license in order to protect the public from incompetent or unsafe braiders when the evidence shows it can do neither.

In stark contrast, the Sixth Circuit upheld Tennessee's 300-hour "natural hair styling" license precisely *because* it focused on 180 hours of braiding-specific instruction. *Bah v. Attorney General of Tennessee*, 610 Fed.Appx. 547, 549 (2015). Notably, unlike *Cornwell, Clayton*, and this case, the challenged license in *Bah* did

not require someone "to become a full cosmetologist to practice African hair braiding." *Id.* at 552.

The evidentiary record here is also quite similar to the record in *St. Joseph Abbey* showing that the required funeral-director training did not include instruction on caskets or counseling grieving customers, which the Fifth Circuit held demonstrated the irrationality of the funeral-director licensing requirement for casket sales. 712 F.3d at 223-24.

3. A handful of "minimally related" features may not bootstrap a largely irrelevant licensing scheme

The district court held that the licensing scheme survived rational-basis review because "**various features** of the Missouri cosmetology and barbering licensing regimes are at least **minimally related** to the State's legitimate interest[s]." ADD32 (emphasis added). The district court erred in permitting the state to bootstrap an entire licensing scheme based on three "minimally related" features it identified: some topics of instruction, character-and-fitness screening, and establishment inspections. ADD31-32. Even under rational-basis review, courts do not allow governments to bootstrap wildly overbroad regulations based on a handful of provisions that are minimally related to a legitimate purpose, as demonstrated below.

First, the district court pointed to the handful of curriculum topics that the Board claimed were generally relevant to braiding. *See* ADD31-32. In fact, the

Board could only identify topics totaling 10% or less of the mandatory cosmetology/barbering curricula (100 hours of the 1,500-hour cosmetology curriculum and 105 hours of the 1,000-hour barbering curriculum) as relevant to African-style hair braiding, and it could offer no assurances that *any* of those hours would actually contain material relevant to braiding. *See supra* pp. 8-9; JA1806-10. Such a low ratio of relevant-to-irrelevant instruction was also held insufficient to satisfy the rational-basis standard in both *Clayton* and *Cornwell*. *See Clayton*, 885 F. Supp. 2d at 1215 (up to 30% of the curriculum was alleged to be relevant); *Cornwell*, 80 F. Supp. 2d at 1109 (less than 10% of the curriculum was relevant).

Peeper provides an analogous example where minimal overlap was insufficient to save the ordinance under rational-basis review.[13] 122 F.3d at 624. Only one of six sections (17%) of the challenged ordinance specifically identified restrictions related to the board's legitimate interest in preventing Peeper "from acting in matters that would result in a specific monetary benefit to her or her spouse." *Id.* at 621. The other sections would have only advanced legitimate interests if they prohibited Peeper from involvement in board activities "directly related to her husband." *Id.* at 624. In much the same way, requiring braiders to go

[13] *See also Lakeside Roofing*, 2012 WL 709276, at *15 (holding that legitimate interest in "increased employment of Missouri residents . . . is only a corollary to the decreased employment of residents of restrictive states" and striking down Missouri's Excessive Unemployment Law as irrational despite those "corollary" benefits to legitimate government interest).

through Missouri's cosmetology/barber licensing scheme only advances legitimate interests to the extent it requires instruction or testing related to the practice of African-style hair braiding, which the record shows is very minimal.

Zobel provides another example where minimally promoting a legitimate interest was insufficient to save a challenged law under rational-basis review. Although invalidated by the Supreme Court, Alaska's oil-dividend distribution scheme modestly advanced the legitimate purpose of attracting and keeping new residents. *See* 457 U.S. at 57. Specifically, first-year Alaska residents were eligible for one share of state oil proceeds worth $50 (compared to 21 shares worth $1050 for Alaskans in residence since 1959) plus an additional share each additional year of residence. *Id.* But this minimal overlap with the state's interest in encouraging settlement in Alaska was insufficient to immunize the scheme under rational-basis review. Instead, the Court struck down the law because the benefits disproportionately went to residents who had already chosen to live in Alaska prior to the law's enactment. *Id.* at 62.

The second "feature" identified by the district court—background checks for character-and-fitness issues—is an ancillary requirement that has no logical connection to requiring 1,500 or 1,000 hours of training and an examination. As in *Peeper*, *Zobel*, and *Lakeside Roofing*, such a minor regulatory appendage cannot be used to bootstrap an entire licensing scheme. If this were sufficient to uphold

the licensing scheme, anyone in any profession could be required to waste 1,500 hours on cosmetology instruction in order to pass a background check.

The district court further erred in identifying a third purported "feature" of the scheme—establishment inspections—which are not actually part of the challenged individual licensing regulations.[14] ADD32.

C. On this evidentiary record, the district court erred in allowing the state to impose a serious burden on braiders that is irrationally disproportionate to any purported benefits.

The district court failed to recognize that the burdens imposed on braiders by the licensing scheme are irrationally disproportionate to any plausible benefits, and it erred in holding the scheme rational because "the licensing regime at least **minimally promotes** [government] interests." ADD27 (emphasis added). There can only be, at most, minimal benefits from requiring braiders to obtain a "minimally related" license that "minimally promotes" government interests, while the compliance costs of the licensing scheme are particularly onerous. Indeed, requiring someone to spend thousands of hours and tens of thousands of dollars on irrelevant training to learn a different occupation from the one she actually chooses to practice is completely pointless and irrational on its face. "Marginal overlap" is

[14] Plaintiffs-Appellants made clear that they challenged only the individual licensing requirement and *not* the establishment license that forms the basis of the establishment inspection regime under, e.g., Mo. Rev. Stat. §§ 328.115, 329.045. *See* Pls. Reply Mem. (ECF No. 50) 12-14; Pls.' Opp'n Mem. (ECF No. 51) 21-23; JA1976-77, JA1990-91.

not a sufficient justification for imposing these burdens on braiders like Joba and Tameka, who braid to provide for their families.

As shown below, (1) the benefits of a "minimally related" scheme for licensing braiders are necessarily minimal, if any, while (2) the licensing scheme is tremendously burdensome. This renders the scheme irrational, as applied to African-style hair braiders.

1. The benefits of requiring braiders to receive "minimally related" instruction are necessarily also minimal, if any.

Because even the "minimally related" features of Missouri's licensing scheme are not specific to braiding and are completely inadequate for training braiders, s*ee supra* Part II.B.1-2, they necessarily can provide only minimal benefits, which are tangential to any government interests.[15] *See supra* Part II.B.3. For example, the district court cited the possibility that a braider might use cosmetology education in conducting evaluations of customers' scalps prior to braiding their hair. ADD31. But both of the Board's expert dermatologists noted many failures of the cosmetology/barbering textbooks and curricula to provide useful instruction on these topics, particularly for African-style hair braiders, who typically serve African-American customers with darkly pigmented skin. JA1829-34. The Board also admitted that braiders do not need to accurately identify hair

[15] Any purported benefits are also undercut by the legislature's exemption for braiders at public amusement and entertainment venues. *See supra* Part II.A.3.

and scalp conditions so long as they can recognize that there is an unusual condition, decline to braid the customer's hair, and refer the customer to a doctor. JA1702. As the Board's dermatologist experts testified, this does not require hundreds or thousands of hours of training. JA1818-20.

Moreover, whatever minimal benefits might accrue to braiders from 100 hours of education on, e.g., "Sanitation and sterilization" or "Salesmanship and shop management" are hardly unique to braiders. Virtually every profession could plausibly benefit from knowing more about sanitation, salesmanship, and business management skills. If a mandatory 1,500-hour licensing curriculum satisfies rational-basis review because it "minimally promotes" government interests in this manner, then practically every occupation in Missouri could be subject to cosmetology/barber licensing. Such a result is absurd, particularly when the burdens of licensing are so high, as discussed *infra*.

2. The burden imposed by Missouri's licensing scheme is very high and irrationally disproportionate to any alleged benefits.

The cost of complying with the licensing scheme is tremendous—thousands of hours of training and tens of thousands of dollars in tuition, for an education that is almost completely irrelevant to braiding. *See supra* p. 10. These burdens pose costly or even insurmountable barriers to entry for African-style hair braiders like Joba and Tameka, who cannot afford to stop supporting their families for a year or

more while they waste a thousand or more hours and tens of thousands of dollars learning cosmetology/barbering skills they do not need and will never use. JA1729-30, 1734-37, 1741-43. These burdens can even interfere with developing competence in braiding. *See Cornwell*, 80 F. Supp. 2d at 1106 n.16 ("if would-be braiders spend scarce money and time to get a cosmetology license, that individual may have few or no resources remaining to devote to the pursuit of his or her own craft.")

In *Merrifield*, the Ninth Circuit noted the impermissible burden of the licensing scheme in *Cornwell*, which "required a hair braider to engage in business activities that she otherwise would not have engaged in during the course of her business to get the license." 547 F.3d at 987. The record demonstrates precisely the same problem here. *See supra* pp. 5-7. Based on the licensing requirements at issue in *Merrifield*, the Ninth Circuit held it was irrational to require those least likely to benefit from the training provided by the licensing scheme to bear the burden of licensure, even if they might derive some benefit. 547 F.3d at 992. So too here, it makes little sense to require African-style hair braiders to spend hundreds of hours training to perform services they will not offer because they might derive some incidental benefits. As in *Cornwell* and *Merrifield*, the burden imposed exceeds the plausible benefits of licensure.

Likewise, in *Peeper*, this Court was unwilling to burden the interests of a public board member in participating on the board with overbroad restrictions because the benefits of, e.g., ensuring compliance with conflict-of-interest laws was dwarfed by the intrusion on Peeper's right to participate on the board in matters that did not relate to her husband. 122 F.3d at 624. Therefore, because "provisions of the May resolution infringe[d] upon Peeper's constitutional rights," this Court struck down the entire resolution despite recognizing that small parts of it advanced legitimate government interests. *Id.*; *see also Lakeside Roofin*g, 2012 WL 709276, at *15 (burdens imposed on out-of-state workers outweighed "corollary" benefits of employment law to Missouri workers.)

So too in *Zobel*, where the Supreme Court held that the minimal benefit of providing a small financial incentive for newer Alaska residents was insufficient to justify the primary effect of the scheme: windfall rewards to long-term residents which effectively imposed a disproportionate burden on newer residents who would have received a much smaller percentage of the oil revenue. 457 U.S. at 62.

Therefore, as in cases such as *Zobel*, *Peeper*, *Merrifield*, and *Lakeside Roofing*, as well as *Cornwell* and *Clayton*, this case presents a situation in which the mismatch between the minimal purported benefits versus the burden imposed is so disproportionate as to render application of the licensing scheme to braiders irrational.

As in *Clayton*, "[Missouri's] cosmetology/barbering licensing scheme is so disconnected from the practice of African hairbraiding, much less from whatever minimal threats to public health and safety are connected to braiding, that to premise [Joba and Tameka's] right to earn a living by braiding hair on that scheme is wholly irrational and a violation of [their] constitutionally protected rights." 885 F. Supp. 2d at 1215-16.

III. The District Court Erred in Concluding that Requiring African-style Hair Braiders to Obtain a Cosmetology/Barbering License Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

The district court erred in holding that Missouri's cosmetology/barber licensing regime does not violate Plaintiffs-Appellants' Fourteenth Amendment equal-protection rights. ADD18-24. In Section A, Plaintiffs-Appellants demonstrate that, contrary to the district court's view, the right to equal protection prohibits arbitrarily treating two distinct and different occupations as if they are the same. In Section B, Plaintiffs-Appellants explain that African-style hair braiders are not cosmetologists or barbers, and Missouri's cosmetology/barber licensing regime is almost entirely irrelevant to African-style hair braiding. Therefore, requiring braiders to obtain a cosmetology/barber license violates equal protection.

A. The Fourteenth Amendment's Equal Protection Clause prohibits arbitrarily treating different and distinct occupations as if they are the same.

The guarantees of Equal Protection under the Fourteenth Amendment protect not only similarly situated individuals from disparate treatment, but also differently situated individuals from arbitrarily being treated as if they are the same. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."). Equal-protection jurisprudence recognizes that even the uniform application of regulations can have an unconstitutional discriminatory effect. *See*, *e.g.*, *Jenness* 403 U.S. at 441-42 (characterizing the law in *Williams* as creating a disproportionate burden on differently situated political candidates); *Williams v. Rhodes*, 393 U.S. 23, 34 (1968) (striking down Ohio's election law because it resulted in discriminatory treatment of minor third parties); *St. Joseph Abbey*, 712 at 226-27 (invalidating licensing requirement on the grounds that it treated casket makers and funeral directors as if they were the same); *Clayton*, 885 F. Supp. 2d 1212 (D. Utah 2012) (invalidating cosmetology/barber licensing requirement because of the complete disconnect between African-style hair braiding and cosmetology/barbering). Accordingly, government cannot arbitrarily treat two individuals in distinct, different occupations as if they are in the same occupation. Plaintiffs-Appellants accurately relied upon the Court's equal-protection analysis

set out in *Jenness* in asserting that Missouri's cosmetology/barber licensing requirement violates their equal-protection rights.

1. The district court misread *Jenness* and the significance of why the Court reached a different conclusion in *Williams*.

The district court fundamentally misread *Jenness*. *See* ADD20-21 (claiming that the Supreme Court's equal-protection conclusion was merely dicta and unsupported by case law). Underlying the Court's equal-protection analysis is the principle that regulations, whether they are uniformly applied or target a specific group, may not be arbitrary or irrational. The Georgia election law challenged in *Jenness* survived precisely because Georgia's law treated *differently* situated political candidates *differently*.

In *Jenness*, Georgia's process for independent candidates to qualify for the general-election ballot was challenged as a violation of equal protection. *Jenness*, 403 U.S. at 432-34. Under Georgia's election code, in order for an independent candidate to have his or her name added to the general election ballot, the candidate had to collect a minimum number of voter signatures by the same deadline required for a candidate filing in a party primary. *Id.* at 433-34. Independent candidates argued it is "inherently more burdensome for a candidate to gather the signatures . . . than it is to win the votes of a majority in a party primary." *Id.* at 440. The Court found no violation of equal protection.

Contrary to the district court's understanding, *see* ADD21, the Supreme Court found no equal-protection violation precisely because Georgia treated independent political candidates and party candidates differently. *See Jenness*, 403 U.S. at 441 (comparing Georgia's "alternative paths" to the ballot with the burdens inflicted by Ohio's election law in *Williams*). Equal treatment in this instance, as requested by plaintiffs, would have forced independent candidates to comply with the same elaborate election requirements of a political party, without regard for how independent candidates lack the political infrastructure to meet those requirements. *Id.* at 434-35, 441 (stating that a significant reason for the Court's invalidation of Ohio's election law in *Williams* was that Ohio imposed the same "requirements on small and new political organizations").

The district court overlooked that the Court found no equal-protection violation in *Jenness* because it held the opposite in *Williams*. *Id.* The Court invalided Ohio's election law a few years earlier in *Williams* because it arbitrarily imposed the same election-law requirements on all political parties regardless of their size, history, or prominence. *Id.* at 441-42. By contrast, the Court upheld Georgia's election law because it took those differences into account. *Id.* at 442. Recognizing the injustice that uniform equal treatment would entail, the Court in *Jenness* concluded, referencing *Williams*, that "[s]ometimes the grossest

discrimination can lie in treating things that are different as though they were exactly alike." *Id*.

2. The district court erred in dismissing *Jenness*'s equal-protection analysis as unsupported by case law.

Far from dicta, the Supreme Court's conclusion in *Jenness* has been repeatedly reaffirmed, including by this Court.[16] *Jenness* is routinely cited for the proposition advanced by the braiders in this case: Applying the same requirements to differently situated individuals can have a discriminatory effect that violates equal-protection rights. *See*, *e.g.*, *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 694 (6th Cir. 2015); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 231 (2d Cir. 2010); *Wood v. Meadows*, 207 F.3d 708, 711 (4th Cir. 2000); *MacBride v. Exon*, 558 F.2d 443, 448-49 (8th Cir. 1977).

For example, only a few years after *Jenness*, the Supreme Court invalidated a uniform filing deadline that did not account for the difference between political candidates. *See Anderson v. Celebrezze*, 460 U.S. 780, 799-801 (1983).[17] It reached that decision because both partisan candidates, who participate in a party

[16] *Jenness* and *Williams* are commonly cited in cases where independent candidates and minor third parties challenge election ballot laws. But as shown *infra* in Part III.A.3, the same reasoning has also been adopted by courts that have invalidated occupational licensing laws.

[17] Although the Court did not engage in a separate equal-protection analysis, it relied on a number of prior equal-protection election cases, including *Williams*, to determine if the uniform deadline at issue served a sufficient state interest to justify the burden imposed. 460 U.S. at 786 n.7, 789.

primary, and independent candidates, who do not, were subject to the same deadline. *Id.* at 799. The State's interest in the equal treatment of all political candidates "simply [was] not achieved." *Id.* at 801 (citing *Jenness*, 403 U.S. at 442).

Likewise, in *Libertarian Party of North Dakota v. Jaeger*, 659 F.3d 687 (8th Cir. 2011), this Court explicitly adopted the reasoning of *Jenness* and *Williams* to determine whether North Dakota's minimum-vote requirement violated equal protection. *Id.* at 702; *see also MacBride*, 558 F.2d at 449 (8th Cir. 1997) (noting importance of determining "the arbitrariness of the statute" (citing *Jenness*, 403 U.S. at 441-42)). Although this Court upheld the election law in *Jaeger*, it did so only after determining that the uniform application of the minimum-vote requirement did not disproportionately burden minor political parties.

The district court's dismissal of Plaintiffs-Appellants' reliance on *Jenness* was simply wrong. Rather than being a unique articulation of the Equal Protection Clause, *Jenness* reinforces that the law, regardless of how it is applied, cannot be arbitrary or irrational.

3. The same equal-protection analysis used in *Jenness* has been used to invalidate occupational licensing requirements.

The equal-protection analysis articulated in *Jenness* is not confined to election law cases. The same approach has been used to invalidate occupational-licensing laws where two different occupations were arbitrarily treated as if they

were the same. *See St. Joseph Abbey*, 835 F. Supp. 2d 149, 160 (E.D. La. 2011), *aff'd*, 712 F.3d 215 (5th Cir. 2013); *Clayton*, 885 F. Supp. 2d at 1214.

In *Clayton*, as discussed *supra* in Part II, the district court invalidated the requirement that African-style hair braiders obtain a cosmetology/barbering license. 885 F. Supp. 2d at 1215 (stating that "Utah has irrationally squeezed two professions into a single, identical mold" (internal citations and quotations omitted)). The facts of *Clayton*, which are almost identical to those presented by this case, led the court to conclude that Utah's cosmetology/barber licensing scheme was so disconnected from the practice of African-style hair braiding, that requiring a hair braider to obtain a cosmetology/barber license was wholly irrational. *Id.* at 1215-16.

In *St. Joseph Abbey*, the Fifth Circuit affirmed the district court's invalidation of Louisiana's requirement that casket sellers comply with funeral-director licensing requirements and funeral-home regulations as a violation of equal protection. *St. Joseph Abbey*, 712 F.3d at 223-27. The district court, in ruling for the casket-making monks on equal-protection grounds, explicitly recognized that Louisiana "in essence treat[ed] two distinct and different occupations as the same." 835 F. Supp. 2d at 160. Affirming the district court's decision, the Fifth Circuit recognized the complete mismatch between the practice of funeral directing and the simple act of casket making and selling. Specifically, the court noted that

the government's interests in consumer protection and public health was belied by the fact that funeral directors received no training on caskets and were not required to have any special expertise in caskets. 712 F.3d at 224, 226.

Although the courts in these occupational-licensing cases did not invoke *Jenness*, it is clear they employed the same reasoning. The Equal Protection Clause guards against the arbitrary classification of individuals, even when that means two differently situated people are arbitrarily treated as if they are the same. Plaintiffs-Appellants were right to rely on *Jenness* in their challenge to Missouri's cosmetology/barbering license requirement because the reasoning behind the Court's equal-protection analysis in *Jenness* is the same analysis employed in cases such as *St. Joseph Abbey* and *Clayton*.

B. Forcing African-style hair braiders to arbitrarily comply with cosmetology/barbering licensing requirements violates their equal-protection rights.

Applying the correct equal-protection standard, requiring African-style hair braiders to obtain a cosmetology/barbering license violates their equal-protection rights for three reasons. First, Missouri arbitrarily treats African-style hair braiders as if they are cosmetologists/barbers, even though African-style hair braiding is not the practice of cosmetology/barbering. Second, requiring African-style hair braiders to obtain a cosmetology/barbering license is not rationally related to any legitimate government interest. Third, the cosmetology/barber licensing

requirement imposes substantial, irrational burdens on African-style hair braiders. Thus, treating African-style hair braiders as if they are cosmetologists/barbers is exactly what the Supreme Court in *Jenness* referred to as the "grossest" form of discrimination.

1. African-style hair braiding is a distinct occupation from cosmetology/barbering.

The first step is to determine whether Missouri arbitrarily treats two different occupations as if they are the same by looking at the evidence. *See Clayton*, 885 F. Supp. 2d at 1215 (detailing the significant disconnect between the practice of African-style hair braiding and cosmetology/barbering); *St. Joseph Abbey*, 712 F.3d at 217 (noting that the Abbey only builds and sells caskets, and does not engage in any funeral-director or funeral-home services). Broad practice act definitions do not preclude courts from concluding that an individual is in fact engaged in a different occupation. *See*, *e.g.*, *Clayton*, 885 F. Supp. 2d at 1214-15 (holding that, notwithstanding the statutory definition, "the scope of [plaintiff's] activities "are distinct and limited when compared to cosmetologists").

The record here demonstrates that African-style hair braiding is very different from cosmetology/barbering. *See supra* pp. 3-8 (demonstrating the unique history, services, and clientele of African-style hair braiding), pp. 8-9, 11-13 (cosmetology/barbering scheme does not include African-style hair braiding and even the Board believes braiders should have a separate license with braiding-

specific requirements). *See Clayton*, 885 F. Supp. 2d at 1215 (recognizing that African braiders are not cosmetologists/barbers based on nearly identical evidence).

2. Requiring African-style hair braiders to obtain a cosmetology/barbering license is not rationally related to any legitimate government interest.

When an occupational licensing requirement shoehorns one occupation into a different occupation, it must be rationally related to a legitimate government interest. *See St. Joseph Abbey*, 712 F.3d at 223 (inquiring whether requiring casket sellers to comply with funeral-director licensing is rationally related to public health and consumer protection); *Clayton*, 885 F. Supp. 2d at 1214; *cf*. *Jaeger*, 659 F.3d at 702-03 (evaluating whether North Dakota's minimum-vote requirement was rationally related to state's interests). Where the facts demonstrate that there is effectively no connection between the licensing requirement and government interests, courts find no rational basis. *See*, *e.g.*, *St. Joseph Abbey*, 712 F.3d at 226-27; *Clayton*, 885 F. Supp. 2d at 1215-16.

As demonstrated *supra* in Part II.B, there is no rational relationship between the licensing requirement and legitimate government interests. Nearly identical facts were present in *Clayton*, where it was also undisputed that "one with a cosmetology/barber license is not required to have any experience or skill in African hair braiding." 885 F. Supp. 2d at 1215. The Fifth Circuit reached a similar

conclusion in *St. Joseph Abbey*, noting that funeral-director training did not include any training on caskets. *St. Joseph Abbey*, 712 F.3d at 224-25.

This Court should apply the same analysis as *Clayton* and *St. Joseph Abbey*, recognizing that treating two distinct occupations as if they are the same is not rationally related to any legitimate interest, particularly when the facts demonstrate that obtaining a cosmetology/barber license does not ensure any competence to safely provide African-style hair braiding.

3. Treating African-style hair braiders as if they are cosmetologists or barbers imposes substantial, irrational burdens on braiders.

Finally, as demonstrated *supra* in Part II.C.2, requiring braiders to obtain a cosmetology/barber license imposes substantial, irrational burdens on braiders. Similar burdens in *St. Joseph Abbey* and nearly identical burdens in *Clayton* led those courts to invalidate funeral director and cosmetology/barber licensing requirements for those engaged in different occupations. *St. Joseph Abbey*, 712 F.3d at 218; *Clayton*, 885 F. Supp. 2d at 1215.

Federal courts, including this Court, have repeatedly struck down regulations that were disproportionately burdensome. *See supra* Part II.C.2; *see also*, *e.g.*, *Clayton*, 885 F. Supp. 2d at 1215-16 ("[The] licensing scheme is so disconnected from the practice of African hairbraiding . . . that to premise [plaintiff's] right to

earn a living by braiding hair on that scheme is wholly irrational."); *cf. Jaeger*, 659 F.3d at 702. This Court should do the same.

IV. The District Court Erred in Proffering its Own Alternative Justifications for the Licensing Regime.

In its opinion, the district court announced that "the Court can conceive of other plausible reasons for the licensing regime, other than the ones propounded by the State" and offered two additional justifications. ADD33. In so doing, the district court erred. First, it deprived the Plaintiffs-Appellants of their procedural due-process rights to a meaningful opportunity to be heard by a neutral arbiter. Second, it offered new justifications that are not rationally related to the licensing regime.

A. The district court erred by depriving Plaintiffs-Appellants of their due-process rights in proffering alternative justifications for the licensing regime.

The district court erred by proffering alternative justifications for the licensing regime, depriving Plaintiffs-Appellants of their procedural due-process rights in two distinct ways. First, by announcing new rationales *after* discovery had closed, the district court deprived Plaintiffs-Appellants of an opportunity to conduct discovery to negate the factual underpinnings for these new rationales. Then, by engaging in speculation about alternative justifications *for* the licensing scheme—a form of speculation that could only benefit the government—the district court deprived the Plaintiffs-Appellants of an impartial tribunal. Because

any version of rational-basis review that violates procedural due process is improper, the district court erred in proffering these justifications, and its judgment should be reversed on these grounds.

1. The district court erred by proffering its own alternative justifications after discovery and briefing had concluded, thus depriving Plaintiffs-Appellants of the opportunity to negate facts supporting the justifications.

By announcing newly conceived rationales for the licensing regime after discovery had closed, the district court deprived Plaintiffs-Appellants of the opportunity to conduct discovery on facts that could "negative" the newly announced rationales.[18] As *Beach* explains, "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." 508 U.S. at 315 (internal quotation marks omitted); *see also Carolene Prods. Co.*, 304 U.S. at 152 (noting that facts may negate presumptions in rational-basis cases). In other words, plaintiffs in rational-basis cases bear the burden to negate the reasons proffered by the government for the challenged law by adducing evidence of irrationality. *See supra* Part I. A party's ability to conduct discovery in a civil case in order to oppose summary judgment and meet its burden of proof is part of the "meaningful opportunity to be heard" protected by

[18] Plaintiffs could have conducted discovery, for example, regarding whether cosmetology/barber schools planned to add braiding instruction if this case were unsuccessful, or whether African-style hair braiders would actually offer the sort of chemical or heat treatments that are anathema to natural hair care if forced to learn such subjects.

procedural due process. *See*, *e.g.*, *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) ("The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause."); *Snook v. Trust Co. of Georgia Bank of Savannah,* 859 F.2d 865, 870 (11th Cir. 1988) (party opposing summary judgment has right to take discovery). But Plaintiffs had no opportunity to conduct discovery to negate the district court's proffered rationales because they were unaware of these rationales until *after* discovery had concluded.[19] Under the district court's version of rational-basis review, plaintiffs have no opportunity to refute hypothetical justifications concocted by the court after discovery and are thus deprived of the opportunity to be meaningfully heard.

2. The district court erred by engaging in speculation unsupported by evidence which could only benefit one side, depriving Plaintiffs-Appellants of an impartial tribunal.

The district court also erred when it based its opinion, in part, on additional plausible reasons for the licensing regime that the court itself had conceived. This required the district court to abandon its role of impartial arbiter and engage in creative legal thinking that could benefit only one side: the government. That is because, unlike other types of cases, in which rational speculation alone may not be dispositive, rational-basis cases can arguably be decided by "speculation

[19] That Plaintiffs-Appellants could have independently conceived of these rationales, or many others, is of no matter. Contra *Beach*, discovery is limited and cannot actually be conducted on "every conceivable basis." 508 U.S. at 315.

unsupported by evidence or empirical data" because laws must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *Beach*, 508 U.S. at 313, 315. Thus, by conceiving of justifications not advanced by the government and holding them to be "sufficient, on rational-basis review, to immunize the [State's] choice from constitutional challenge," the district court provided argument and support for the government.[20] ADD33 (quoting *Beach*, 508 U.S. at 320).

The district court was following untested dicta from *Beach* and its progeny suggesting that a court may go beyond merely accepting the government's "rational speculation unsupported by evidence" and may *itself* engage in "rational speculation" to *independently* conceive of a "state of facts that could provide a rational basis for the classification." *Beach*, 508 U.S. at 313, 315. But even in *Beach*, the rationale relied on was not the pure invention of a judge; it originally came from agency findings in an administrative proceeding, which were later ratified in an agency report. *Id.* at 312, 317.

In any other proceeding, judges engaged in "rational speculation unsupported by evidence" to conceive of justifications that support only one side would instantly raise red flags. *See*, *e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)

[20] To be clear, Plaintiffs-Appellants are not accusing the district court of consciously impartial consideration of this case, but are instead highlighting a systemic constitutional infirmity in this approach to rational-basis review.

("Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.") (internal quotation marks omitted). Impartiality in the judicial context "assures equal application of the law. . . it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002). But, when rational-basis review is conducted as it was by the district court, a judge does *not* apply the law to plaintiffs in the same way that he applies it to government defendants; instead, the judge's own imagination becomes a powerful legal instrument for government parties, which can shield the government from loss even when the government's counsel may be unable to present plausible justifications for the challenged government action.

A legal requirement that judges provide this type of aid for only one party, based solely on that party's classification as a government entity, creates "an impermissible risk of actual bias" that violates procedural due process under *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). Under the current standard, courts ask whether the risk of bias "so endanger[s] the appearance of neutrality" that the practice "'must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 1908-09 (quoting *Withrow*, 421 U.S. at 47). Remarkably, there is a near 100% probability of actual bias when a judge believes

his judicial duty is to engage in "rational speculation" to determine if there are any "reasonably conceivable state of facts that could provide a rational basis" that would immunize a challenged government program.

It is instructive to compare these concerns with the concerns voiced in an oft-cited appellate case involving judicial bias, *Knapp v. Kinsey*, in which a trial judge improperly "took an active part in assisting the plaintiffs in presenting their case and in proving their contentions." 232 F.2d 458, 464 (6th Cir. 1956). In *Knapp*, the Sixth Circuit warned against judicial behavior that might clearly indicate "an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party," because it "indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored." *Id.* at 466. The "alignment" of the court with one of the parties "for the purpose of furthering or supporting the contentions of such party" is precisely the problem raised by rational-basis review as it was exercised by the district court. Under rational-basis review, there is no corresponding obligation for a judge to fabricate theories that could support parties *challenging* government actions. But, under the incorrect version of rational-basis review applied by the district court, the judge is effectively aligned with government parties for the purpose of furthering the development of "any reasonably conceivable state of facts that could provide a

rational basis" for the challenged government regulation. The *Knapp* court held that the judge violated his role as an impartial arbiter when "he, figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff." *Id.* at 467. So too here, if the judge is asked to assist the government in formulating its own arguments by imagining hypotheticals that could justify the government's position. That is akin to advocacy because this improper version of rational-basis review is so deferential: because justifications need only be "reasonably conceivable" to sustain the challenged government program, the very act of imagining legal hypotheticals that could support a rational basis is to effectively engage in advocacy for the government. Consider that *the outcome of this case would not have changed* even if the district court had rejected the government's proffered justifications because the court held that its own "conceivable interests" were "sufficient, on rational-basis review, to immunize the [State's] choice from constitutional challenge." ADD34 (quoting *Beach*, 508 U.S. at 320).

B. The district court erred in crediting its own additional "plausible reasons for the licensing regime," which have no rational connection to the licensing scheme.

The district court imagined two new justifications for the licensing scheme: It hypothesized that the State may have been trying to "stimulate the market for [African-style hair braiding] education by requiring hair braiders to become

licensed" or trying to "incentivize hair braiders to offer more comprehensive services by requiring them to be licensed, thereby offering additional options for their customers." ADD34. These purported justifications are not rationally connected to the licensing regime.

First, requiring braiders to obtain an education in a field *other than braiding* is an exceedingly peculiar way to try to stimulate education about braiding, particularly when not a single hour of instruction on hair braiding is required by the cosmetology/barbering curricula, nor does a single question about hair braiding necessarily appear on the exams. *See supra* pp. 11-13. Given those strong counter-incentives, it is implausible that cosmetology schools would spend time teaching subjects that are neither required nor tested. The district court explained that this requirement "could act as an incentive to the creation of more schools and coursework specifically focused upon [African-style hair braiding]." ADD33-34. That not only ignores the record evidence indicating that African-style hair braiding is a completely separate profession with its own history, culture, and traditions, none of which are typically taught in cosmetology schools, but also ignores the record evidence that few if any of Missouri's cosmetology/barber schools offer any instruction in African-style hair braiding despite the longstanding existence of this requirement. JA1746, JA1844-47. It cannot be rational to make people spend thousands of hours and tens of thousands of dollars to be trained in a

separate occupation because it *might* somehow cause schools that offer instruction in that occupation to offer some instruction in a new occupation. Yet, without a "rational connection with the applicant's fitness or capacity to practice," *Schware*, 353 U.S. at 239, there is no limiting principle. There would be just as much of a rational connection between requiring African-style hair braiders to get a dental license or obtain a CPA and encouraging dental and accounting schools to offer more education about African-style hair braiding. Moreover, requiring extensive unrelated training is actually *counterproductive* to government interests. *See Cornwell*, 80 F. Supp. 2d at 1106 & n.16 (noting opportunity cost of requiring braiders to attend cosmetology school).

Second, the new justification that requiring cosmetology/barber licensing will encourage braiders to offer cosmetology/barbering services suffers from the same flaws—ignoring the record evidence about the very distinct nature of African-style hair braiding, that chemical and heat treatments offered by cosmetologists/barbers are anathema to natural hair care, and the desires of providers and consumers of natural hair care to avoid traditional cosmetology services. *See supra* pp. 3-8. In short, African-style hair braiders choose to provide African-style hair braiding because they want to offer an *alternative* to cosmetologists/barbers, and do not want to provide cosmetology/barbering services. JA1729, JA1737, JA1744-46, JA1760-61, JA1767. This arbitrary

shoehorning of one profession into another is exactly why the courts in *St. Joseph Abbey*, *Clayton*, and *Cornwell* invalidated the challenged licensing requirements. Again, there is no limiting principle. If arbitrarily forcing someone to become licensed in a different occupation under the guise of one-stop shopping were a legitimate interest, *Clayton* and *St. Joseph Abbey* would have turned out differently. Moreover, there would be no limit to the government's ability to require any individual to obtain additional licenses in other occupations for the purpose of providing more comprehensive services; states could require braiders—or workers in any occupation—to train as automobile mechanics because it *might* help consumers if their braider/accountant/dentist were also able to replace their car's transmission.

CONCLUSION

Plaintiffs-Appellants have demonstrated that there is no rational basis for Missouri to require African-style hair braiders to obtain licenses as cosmetologists or barbers in order to practice their occupation. For the foregoing reasons, the district court's decision should be reversed, and this case should be remanded with instructions to enter summary judgment for the Plaintiffs-Appellants.

Respectfully submitted,

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Dated: January 3, 2017

/s/ Dan Alban
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I hereby certify that on this 3rd day of January, 2017, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that the Brief of Appellants has been scanned for viruses using Webroot Endpoint Protection, Version 9.0.9.78, and according to the program is free of viruses.

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