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,

MISSOURI AFRICAN HAIRBRAIDERS AND THEIR CUSTOMERS; PACIFIC LEGAL FOUNDATION; PUBLIC CHOICE SCHOLARS; CATO INSTITUTE; REASON FOUNDATION; INDIVIDUAL RIGHTS FOUNDATION; SENATOR RAND PAUL; GOLDWATER INSTITUTE; BEACON CENTER OF TENNESSEE; THE SHOW-ME INSTITUTE,
Amici on Behalf of Appellant(s).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI AT ST. LOUIS

REPLY BRIEF OF APPELLANTS

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Introduction

The district court wrongly held that it was rational for Missouri to require Plaintiffs-Appellants Joba Niang and Tameka Stigers, two African-style hair braiders from St. Louis, to spend 1,500 hours—**less than 7%** of which is even generally relevant to braiding—and nearly $12,000 to obtain cosmetology/barber licenses that Appellees (collectively, the "Board") admit are "not adequate to qualify, certify, or license African-style hair braiders." JA1867.

Defending the district court's opinion, the Board offers a radical, toothless version of rational-basis review that highlights the gulf between the district court's analysis and how rational-basis review is actually conducted by the Supreme Court, this Circuit, and other federal courts. The case law makes clear that rational-basis review, while deferential, is not a rubber stamp; it is a **rebuttable presumption** that may be overcome by evidence or logic demonstrating the absence of a rational connection between a legitimate government interest and the means chosen to advance that interest (the means-ends fit). But the version of rational-basis review advocated by the Board, and applied by the district court, would transform this rebuttable presumption into irrefutable dogma, rendering it meaningless as a standard of review.

The Board's brief highlights the most extreme, abstract statements from case law about the deferential nature of rational-basis review, but fails to engage with

any of Plaintiffs-Appellants' examples of courts actually applying rational-basis review in analogous situations. Instead, the Board offers cursory efforts to distinguish these cases on the flimsiest of grounds. Crucially, the Board identifies no errors in those courts' rational-basis analyses.

The Board's brief also largely ignores the evidentiary record. The Board thus concedes that the overwhelming record evidence demonstrates the disconnect between the Board's stated concerns about braiding and what is actually taught and tested under the cosmetology/barber licensing regime. The Board also fails to address, and thus concedes, the undisputed record evidence—including the Board's own admissions—demonstrating that African-style hair braiding is a separate occupation from cosmetology/barbering. Instead, the Board relies on a tautology, pointing to the overbroad scope-of-practice definitions for cosmetology/barbering in the very licensing scheme Plaintiffs-Appellants challenge.

Finally, highlighting just how toothless it believes rational-basis review should be, the Board responds to Plaintiffs-Appellants' procedural due-process arguments regarding the district court's newly concocted justifications for the licensing scheme by claiming that, even though rational-basis plaintiffs have the burden of negating every conceivable basis for a law, they are not entitled to take discovery in order to do so.

I. Appellees and the District Court Have Misconstrued Rational-Basis Review, Effectively Rendering It Toothless.

The district court and the Board offer a toothless interpretation of rational-basis review which is at odds with rational-basis case law on two key questions:

- Do courts consider evidence when examining whether there is a rational connection between a legitimate government interest and the means chosen to advance that interest?
- Do courts consider how overbroad or under-inclusive a challenged measure is—and whether the burden imposed is irrationally disproportionate to plausible benefits—when determining whether it is a reasonable means to advance a legitimate interest?

As Plaintiffs-Appellants demonstrated in their opening brief, and explain below, the answer to these questions is yes.

A. Rational-basis review permits consideration of evidence regarding whether there is a rational connection between a legitimate government interest and the means chosen to advance that interest.

Both the district court and the Board reject the idea that courts should review evidence when considering whether there is an "actual" rational connection, or means-ends fit, between a legitimate government interest and the means chosen to

achieve that goal. ADD35; Board Br. 29.[1] While the means chosen does not have to be successful, it must plausibly address a legitimate interest, and cannot be upheld if there is no actual rational connection to a legitimate interest, as the case law demonstrates. *See* Appellants Br. 21-22 n.5. Both the district court and the Board mistake admonishments that courts should not second-guess the factual validity of plausible **government interests**—such as the factual validity of plausible harms to be addressed—for an admonition to not consider evidence about the absence of a **rational connection**. Both rely on *Gallagher v. City of Clayton*, 699 F.3d 1013, 1020 (8th Cir. 2012), in support of this point, *see* ADD35; Board's Br. 13-14, 19, but the plaintiff in *Gallagher* challenged the validity of the asserted harm, "the dangers to the public from secondhand smoke in outdoor areas," and not the rational connection between those dangers and the means chosen to address them, a ban on smoking in city parks. 699 F.3d at 1020. *Gallagher* only declined to resolve the factual dispute about the alleged harm: "[w]e need not determine whether outdoor secondhand smoke exposure actually causes harm." *Id. Gallagher* explains that the ordinance's "strong presumption of validity" means courts need not resolve factual disputes about the validity of the harm so long as it could reasonably be believed to be true. *Id. Gallagher* is inapposite because there is no

[1] However, the Board also recognizes that it is not the rational connection, but the "asserted legislative interest [that] 'is not subject to courtroom factfinding.'" Board Br. 12 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)).

factual dispute about the validity of Missouri's concerns regarding braiding. Instead, the evidence presented in this case challenges whether the means chosen by Missouri—requiring braiders to obtain cosmetology/barber licenses—is rationally related to Missouri's interests. In other words, Plaintiffs-Appellants present evidence to challenge the rational connection, **not** the government interest.

One important way courts determine whether there is a rational connection between a challenged law and a government interest is by reviewing the evidence. Although deferential, rational-basis review "must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). The "strong presumption of validity" accorded to challenged laws is a rebuttable presumption, *id.* at 319, and may be overcome with evidence demonstrating the absence of a rational connection. *See*, *e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (stating that legislative facts are to be presumed *unless precluded* by other facts). As Plaintiffs-Appellants have demonstrated, plaintiffs in the Supreme Court, this Circuit, and other federal courts prevail under rational-basis review when they introduce evidence showing that there is no rational connection between the means chosen by the government and legitimate interests. *See*, *e.g.*, *Schware v. Bd. of Bar Exam'rs of N.M.*, 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);[2] *Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359, 362-63 (8th Cir. 1980) (rejecting three justifications proffered by the government by pointing to specific record evidence, e.g., that Planned Parenthood's accounting practices permitted the segregation of restricted funds);[3] *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 actual—not hypothetical—wigs were "neat and presentable" and did not inhibit performance);[4] Appellants Br. 23 & n.7 (noting additional cases). The

[2] The Board claims that *Schware* "did not engage in an analysis of rational-basis review under the current framework," Board Br. 15, but fails to identify any way in which *Schware* departs from the "current framework." In fact, *Schware* was decided two years after *Williamson v. Lee Optical*, which the Board cites twice as an example of the "current framework." Board Br. 24-25. While *Schware* would likely be considered under a First Amendment rubric today, the Supreme Court in *Schware* nonetheless applied rational-basis review, examining the evidence in a search for a rational basis. 242 U.S. at 246-47.

[3] The Board suggests *Planned Parenthood* is not relevant because it "addressed regulations that appeared to target Planned Parenthood specifically," Board Br. 16, but offers no explanation for how that affected the application of rational-basis review in the case, nor the Court's consideration of record evidence. 612 F.2d at 361-62. The Board does not dispute that *Planned Parenthood* correctly applied rational-basis review under this Circuit's precedent.

[4] The Board suggests *Ackerman* is inapplicable because it involved "a challenge regarding an individual's personal liberty" and "did not even reference Equal Protection or the Due Process Clause." Board Br. 15. But *Ackerman* is a substantive due-process case, *see* 488 F.2d at 922 (citing *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971) (identifying due-process right)), that demonstrates how this Circuit applies rational-basis review. The Board does not dispute this.

Board offers no direct response to this argument.[5] The Board's suggestion that all these cases should be disregarded undermines its claim that "the braiders invite this Court to set aside decades of precedent" and renders hollow the Board's concern about "open[ing] the floodgates to litigation." Board Br. 5, 47. Courts have examined evidence in rational-basis cases for decades without any floodgates opening.

B. Rational-basis review considers how overbroad or under-inclusive a challenged measure is—and whether the burden imposed is irrationally disproportionate to plausible benefits—when determining whether it is a reasonable means to advance a legitimate interest.

Both the district court and the Board reject the notion that rational-basis review considers overbreadth and under-inclusiveness, and, relatedly, whether the burden imposed is irrationally disproportionate to plausible benefits. ADD35; Board Br. 24 ("tailoring is simply not required under rational-basis review"); *id.* at

[5] The Board implies that the rational-basis cases cited by Plaintiffs-Appellants are no longer good law because many of them predate *Beach*, *Gallagher*, and *Kansas City Taxi*, Board Br. 14, but offers nothing to indicate that those cases contradict or were superseded by *Beach*, *Gallagher*, or *Kansas City Taxi*. Moreover, five of the rational-basis cases cited in which plaintiffs prevailed in the Supreme Court were post-*Beach*, *see* Appellants Br. 21 n.4, as was this Court's opinion in *Peeper v. Callaway Cty. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997), as well as *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), plus a number of district court opinions, including *Lakeside Roofing Co. v. Nixon*, No. 4:10cv1761, 2012 WL 709276 (E.D. Mo. Mar. 5, 2012), and all three braiding cases: *Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W.D. Tex. 2015); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

13, 24-28. But this fails to recognize that, while rational-basis review does not involve the "narrow tailoring" analysis undertaken during strict scrutiny, courts do consider the means-ends fit, and invalidate laws when that fit is either so minimal as to render the law irrational or when the burden is irrationally disproportionate to any plausible benefit. *See* Appellants Br. 24-25, 36-47. The Board, however, claims that "courts should not and cannot strike [a] measure down on rational-basis review simply because it may be overbroad or underinclusive" and that "courts do not weigh benefits and burdens as part of rational-basis review." Board Br. 25, 28. But this ignores the many examples cited by Plaintiffs-Appellants where courts have done just that. *See*, *e.g.*, *Zobel v. Williams*, 457 U.S. 55, 57, 62 (1982) (finding Alaska's oil-dividend distribution scheme, which purportedly would attract and retain residents, irrationally overbroad because the vast majority of the scheme benefitted long-time residents, at disproportionate cost to new residents);[6] *Peeper*, 122 F.3d at 624 (holding irrational an overbroad public board resolution that disproportionately burdened a board member "in a wide range of matters, most of which" were irrelevant to the board's legitimate interest, which was "not served

[6] The Board claims *Zobel* did not find "any connection to [the] state's interests." Board Br. 27-28. In fact, the *Zobel* opinion specifically identified the financial incentives that *would* minimally advance legitimate interests of attracting and retaining residents. 457 U.S. at 57-58, 62. Despite these minimal connections to legitimate interests, the Court invalidated the scheme because the primary effect was "favoring established residents over new residents." *Id.* at 65.

by [] vast portions" of the resolution);[7] *St. Joseph Abbey*, 712 F.3d at 223-24 (finding funeral-director training irrationally under-inclusive for casket sellers because it did not include instruction on caskets or counseling grieving customers); *Merrifield*, 547 F.3d at 991-92 (holding pest-controller license irrational because licensing burden was disproportionately born by those at less risk of pesticide exposure); *Craigmiles*, 312 F.3d at 225 (rejecting public health justification for funeral-director licensing for casket retailers as irrationally overbroad because, unlike funeral directors, casket retailers did not handle human remains or offer embalming services and had no need for such training);[8] *Lakeside Roofing*, 2012 WL 709276, at *15 (striking down Missouri's irrationally overbroad excessive unemployment law because burdens imposed on out-of-state workers outweighed "corollary" benefits to Missouri workers); *Clayton*, 885 F. Supp. 2d at 1215 ("Most

[7] The Board's only mention of *Peeper* claims that "the court's concern was with First Amendment associational rights." Board Br. 15. That is incorrect—*Peeper* also found that "[t]he resolution's provisions injure Peeper's . . . Fourteenth Amendment equal protection rights"—and irrelevant, because this Court was nonetheless engaged in rational-basis review. 122 F.3d at 623. More importantly, the Board does not dispute that *Peeper* correctly applies rational-basis review as it is conducted in this Circuit.

[8] The Board's description misunderstands the holding of *Craigmiles*. Board Br. 28. One reason the *Craigmiles* court held the law was not rationally related to any legitimate interest was the overbreadth of Tennessee's funeral-director licensing requirements; there was no public-health benefit to training casket sellers to perform tasks that were not part of their jobs (much like in this case). 312 F.3d at 225. The "weakness of Tennessee's proffered explanations" refers, in part, to this overbreadth problem. *Id.*

of the cosmetology curriculum is irrelevant to hairbraiding. Even the relevant parts are at best, minimally relevant."); *Cornwell*, 80 F. Supp. 2d at 1118 (the mandatory curriculum "requires hair braiders to learn too many irrelevant, and even potentially harmful, tasks"); *see also* Appellants Br. 24-25, 36-46; Amicus Br. Pac. Legal Found. 6-8, 10-11, 13-14 (identifying other examples where "minimal" rational connections were insufficient to uphold challenged measures that were too overbroad or too under-inclusive).

Therefore, as demonstrated above and in Plaintiffs-Appellants' opening brief, the Supreme Court, this Circuit, and other federal courts do consider overbreadth and under-inclusion in rational-basis cases and strike down laws when the means-ends fit is so minimal as to render the law irrational or when the burdens imposed are irrationally disproportionate to putative government benefits.

II. The District Court Erred on Plaintiffs-Appellants' Substantive Due Process Claim.

The Board fails to address the undisputed record evidence demonstrating the absence of a rational relationship between Missouri's legitimate interests and requiring African-style hair braiders to obtain a cosmetology/barber license. Specifically, the undisputed record evidence demonstrates that (A) there is no rational connection between the licensing scheme and Missouri's legitimate public-health and consumer-protection interests, and (B) the burden imposed on braiders is irrationally disproportionate to any minimal government benefit. In addition,

(C) the statutory exemption for braiders at public amusement or entertainment venues undercuts the justifications for the licensing scheme.

A. The undisputed record evidence shows there is no rational connection between Missouri's legitimate interests and requiring braiders to obtain cosmetology/barber licenses.

Plaintiffs-Appellants have repeatedly emphasized that they do not contest the legitimacy of the government's interests, and—unlike the plaintiffs in *Gallagher* and *Sensational Smiles*—they also do not dispute that the Board has identified (minimal) health concerns related to braiding. Instead, Plaintiffs-Appellants have focused on challenging the means-ends fit: whether there is a rational connection between those concerns and requiring braiders to obtain cosmetology/barber licenses. The undisputed record evidence shows there is not. Even the district court recognized, "[t]he **fit is awful** in Missouri . . . [l]ess than ten percent overlap is pretty bad." JA1904 (emphasis added).

The Board responds by noting that there may be "'an imperfect fit between means and ends'" and that "[l]aws need not be made 'with mathematical nicety.'" Board Br. 13 (quoting *Heller*, 509 U.S. at 321). But the fit here is not merely "imperfect"; it is "awful," as the district court noted. This is not merely a problem of mathematical nicety, but a total mismatch: even the Board claims only 100 of the 1,500 cosmetology training hours—**less than 7%**—are generally relevant to braiders. Indeed, the Board dramatically understates the problem when it

acknowledges that "the licensing process may not perfectly train an individual to become an expert in African-style hair braiding." Board Br. 25. In fact, African-style hair braiding is neither taught nor tested under Missouri's mandatory licensing regime. JA1797, JA1849, JA1868. Moreover, the Board admits the regime is "not adequate to qualify, certify, or license African-style hair braiders," JA1867, and offers zero guarantee of training, knowledge, experience, competence, or safety in African-style hair braiding. JA1861-67, JA1849-50; ADD45-49; *see also* ADD43. The Board completely fails to address this undisputed record evidence.

1. *There is no rational connection between the cosmetology/barber licensing requirements and health concerns related to braiding.*

The Board's discussion of the record evidence is woefully incomplete. The only evidence the Board addresses in any detail is the testimony of the Board's dermatologist experts regarding potential health concerns related to braiding. Board Br. 17-19. What the Board fails to address, however, is that those same dermatologist experts also testified about the absence of a rational connection between those concerns and cosmetology/barber licensing, specifically that **the cosmetology/barber textbooks and exams were wholly inadequate** for teaching or testing the health concerns they identified. JA1829-39, JA1858-63, JA1866-67.

The Board's experts identified three health concerns specific to braiding—traction alopecia, CCCA, and braiding children's hair—but the Board admits these

topics are not required to be taught, are not tested, two of the three are absent from the textbooks, and the Board exercises no oversight over whether they are taught.[9] JA1822, JA1826, JA1829-40, JA1859-61. For example, the Board admits that special concerns related to braiding childrens' hair are: not part of the required curriculum, JA1822, not tested on the licensing exams, JA1861, absent from the textbooks, JA1833, JA1836, and are not taught at any cosmetology/barber school to the Board's knowledge. JA1826.

The Board's experts also identified several medical conditions that braiders should know about, but the Board admits many of these conditions are absent from the textbooks, are not taught in cosmetology/barber schools, and are not tested on the exams, while the others are only briefly defined and insufficient information is provided, such that cosmetologists/barbers are not any better equipped to address these conditions than anyone else. JA1831-33. The Board admits no information about any connection between braiding and these conditions is taught or tested. JA1832. Moreover, the information about bacteria and infection-prevention make up just nine pages (of nearly 3,000 total pages) in the textbooks, and the Board admits that it consists of basic information such as washing your hands and cleaning tools between customers. JA1833-34.

[9] Traction alopecia is absent from the barbering textbooks, JA1836, and the Board's dermatologist experts testified that the brief discussion of traction alopecia in the cosmetology textbooks was insufficient to teach braiders what they need to know to safely braid hair. JA1837-39.

As for the exams, Dr. Wright testified they do not "adequately test health and safety issues relative to braiding" and are not adequate "to qualify, certify, or license braiders." ADD43. The Board also admits that "passing those exams does not demonstrate competence in the material deemed necessary for the safe practice of braiding." JA1862-63.

Therefore, Missouri's cosmetology/barber licensing scheme—which the Board and its experts admit is completely inadequate for addressing the Board's health concerns about braiding—cannot possibly satisfy the rational-connection requirement.

2. *There is no rational connection between the cosmetology/barber licensing requirements and generic concerns about consumer protection.*

The district court and the Board both point to the state's consumer-protection interests to justify the licensing regime. Board Br. 22-23. But it cannot be rational to make someone go to school for a year in order to make them go through a background check. The character-and-fitness screenings and disciplinary procedures have no rational connection to the training and examination requirements. If these concerns were sufficient to justify licensing braiders as cosmetologists, **Missouri could require anyone in any occupation to complete 1,500 hours of cosmetology training** in order to conduct background screenings and have disciplinary authority. Cases such as *Peeper*, *Zobel*, and *Lakeside*

Roofing rejected such naked attempts to bootstrap a challenged government program based on features that are only minimally related to a legitimate interest. Appellants Br. 39-42. This Court should do the same.

B. The undisputed record evidence shows the burden imposed on African-style hair braiders by the cosmetology/barber licensing scheme is irrationally disproportionate to any minimal public benefits.

The Board fails to address any of the undisputed record evidence presented by Plaintiffs-Appellants regarding the irrationally disproportionate burden imposed on braiders compared to any plausible public benefits. *See* Appellants Br. 3-13, 42-45. Instead, the Board argues that Plaintiffs-Appellants err by only looking to the benefits braiders receive from the instruction, rather than the overall benefits to the public. Board Br. 27. The Board is mistaken. Plaintiffs-Appellants' argument presumes that the legitimate interests being pursued by Missouri are *public* health and *consumer* protection. The fact that there is no required braiding training or testing of braiding skills under Missouri's cosmetology/barber licensing scheme demonstrates that the scheme does nothing to protect consumers from braider "incompetence," a consumer-protection interest (wrongly) claimed by the Board as justifying the licensing scheme. Board Br. 3, 5, 7. The Board further claims that "the braiders overlook the State's interests in the benefits of training beyond acquiring expertise in African-style hair braiding, including broader skills in business management." Board Br. 27. Plaintiffs-Appellants do not overlook this

training—it is part of the 100 hours of training the Board claims is generally relevant to braiders, which comprise less than 7% of the 1500-hour cosmetology curriculum. JA1807-09. In other words, the public "benefit" is braiders receiving, at most, a few weeks of vaguely "relevant" training (that is not about braiding), while the cost imposed on braiders is enduring a year or more of very expensive and otherwise irrelevant training.

On the issue of irrationally disproportionate burdens, the Board compares braiders to attorneys and psychiatrists. Board Br. 8, 23. That the Board thinks licensing doctors and attorneys—two of the most highly educated and highly regulated professions—is comparable to licensing people who **literally braid hair with their hands** speaks volumes about the irrational burdens imposed by this licensing scheme. Unlike braiders, attorneys owe their clients a fiduciary duty and need a broad base of legal knowledge to fully protect their clients' rights. Also, a far greater proportion of legal practice shares a common core of knowledge—e.g., how to analyze an opinion or interpret a statute, an understanding of procedure and evidence—than in grooming occupations, which focus on largely unrelated technical skills. Even the Board claims only 100 of the 1,500 required hours of cosmetology training have even minimal overlap with the practice of braiding—the remainder is spent learning to perform services braiders don't offer.

C. The statutory exemption for braiders at public amusement or entertainment venues undermines the government's claimed interests in licensing braiders.

The Board's attempt to minimize the statutory exemption for braiding at public amusement or entertainment venues is misleading and unavailing. The Board notes "an individual is exempt from the requirements of Chapter 329 only when they are working in conjunction with a licensee." Board Br. 25-26. But the "licensee" in question is a "licensee for any public amusement or entertainment venue." Mo. Rev. Stat. § 316.265. Thus, this exemption allows **literally anyone to braid without a cosmetology/barber license** at county fairs, circuses, or music festivals (with the venue licensee's permission), undercutting Missouri's claimed public health and consumer protection interests. *See* Appellants Br. 32-34. Despite the Board's citations to *Gallagher* and *Dukes*, Board Br. 26, this is a newly created statutory exemption to a pre-existing scheme, as in *Merrifield*, and is therefore *not* analogous to legislatures gradually implementing regulations. *See* Appellants Br. 33-34.

III. The District Court Erred on Plaintiffs-Appellants' Equal-Protection Claim.

The Board's argument that there is no equal-protection violation in subjecting African-style hair braiders to Missouri's cosmetology/barber licensing requirements is incorrect for three reasons: (A) the Board mischaracterizes *Williams v. Rhodes*, 393 U.S. 23 (1968), and repeats the lower court's mistake of

dismissing the equal-protection principle articulated in *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971), as merely dicta; (B) the Board fails to recognize that the *Jenness* equal-protection principle has been relied upon by several courts, including this Circuit, to evaluate and/or strike down arbitrary regulations; and (C) the Board ignores the extensive record demonstrating that African-style hair braiding is a separate occupation from cosmetology/barbering.

A. The Board mischaracterizes *Williams* in an attempt to marginalize the equal-protection principle articulated in *Jenness*.

To bolster the district court's opinion, the Board claims that the equal-protection principle articulated in *Jenness* is merely dicta by mischaracterizing *Williams*, upon which *Jenness* relied. But in *Jenness*, the Court accurately summarized the principle, first applied in *Williams*, that arbitrarily treating two differently-situated individuals as if they are the same can violate equal protection.

The Board argues that *Williams* actually concerned "differently situated groups . . . treated differently" and thus *Jenness* does not stand for the equal-protection principle argued by Plaintiffs-Appellants. Board Br. 33. The Board's argument is fatally incomplete.

The Court's primary concern in *Williams* was Ohio's burdensome prerequisite that **all** electoral candidates comply with elaborate political-party requirements regardless of their ability to do so. *See Williams*, 393 U.S. at 25 n.1 (citing the lower court's dissent exclusively discussing the burdensome, uniformly

enforced political-party requirements); *id*. at 36-37 (Douglas, J., concurring); *Jenness*, 403 U.S. at 435 n.13. This regulation—not the regulation cited by the Board—was the Court's basis for holding that Ohio's election laws violated equal protection. *Jenness*, 403 U.S. at 441 ("[A] large reason for the Court's invalidation of the Ohio election laws in *Williams v. Rhodes* [] was precisely that Ohio did impose just such ["elaborate statewide, county-by-county, organizational paraphernalia"] requirements on small and new political organizations."). When the Court in *Jenness* states that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike," *id.* at 442, the Court is summarizing its reasoning in *Williams*, decided just two years prior, while noting that Georgia's election laws were not guilty of the same offense.

Thus, the Board significantly mischaracterizes both cases. *See* Board Br. 32-34. *Williams* does concern differently situated parties arbitrarily treated as if they were the same, and *Jenness* accurately summarizes the Court's holding in *Williams* striking down such arbitrary treatment as an equal-protection violation. Moreover, the equal-protection principle articulated in *Jenness* can hardly be characterized as dicta in light of its routine citation by courts confronted with similar equal-protection challenges.

B. The equal-protection principle articulated in *Jenness* has been routinely relied upon to evaluate and strike down arbitrary regulations.

Whether or not courts ultimately strike down a regulation, courts have explicitly and implicitly relied on the equal-protection principle in *Jenness* to evaluate regulations that arbitrarily treat differently-situated parties as if they are the same.

The Board's cursory review of *Jenness*' case law is replete with inaccuracies. The Board argues that some cases are inapposite because they concern differently-situated parties that are treated differently, but the Board fails to acknowledge that even those courts endorse the *Jenness* equal-protection principle. *Compare* Board Br. 34-36 *with Green Party of Tenn. v. Hargett*, 791 F.3d 684, 694 (6th Cir. 2015) (citing the Court's equal-protection analysis in *Jenness*). Alternatively, the Board argues that other cases do not engage in equal-protection analysis at all. *See* Board Br. 36-37. But these cases do rely on *Jenness* for the same proposition advanced by Plaintiffs-Appellants. *See*, *e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7 (1983) (noting that while the Court did not engage in an independent equal-protection analysis, it relied on a number of prior equal-protection cases, including *Williams*); *see also Woods v. Meadows*, 207 F.3d 708, 710-711 (4th Cir. 2000) (citing *Anderson* and *Jenness*); *MacBride v. Exon*, 558 F.2d 443, 448-49 (8th Cir. 1977) (citing *Jenness* and *Williams*).

Finally, this Circuit has explicitly adopted the proposition that uniform application of a neutral regulation to differently-situated parties can result in unequal, discriminatory effects that violate equal protection. *See Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 702-03 (8th Cir. 2011) (citing *Jenness* and *Williams*). This is the same analysis that led the courts in *St. Joseph Abbey* and *Clayton* to find equal-protection violations where licensing schemes arbitrarily treated two different occupations as the same. *See* Appellants Br. 52-54.

Contrary to the Board, *see* Board Br. 37-38, the equal-protection principle applied by this Circuit in *Jaeger* is precisely the same as Plaintiffs-Appellants raise here. Although African-style hair braiders and cosmetologists are subject to the same licensing requirements, the effect of those requirements is unequal and violates equal protection. As demonstrated in Section C below, while cosmetology training is relevant to a prospective cosmetologist, it is overwhelmingly irrelevant to an African-style hair braider. *See* Appellants Br. 3-13; *supra* Part.II.A-B.

C. The Board's argument that African-style hair braiding is not a distinct occupation is both tautological and contrary to the extensive record developed below.

The Board claims African-style hair braiding is not a separate occupation from cosmetology/barbering because (overbroad) scope-of-practice definitions for cosmetology/barbering encompass hair braiding. Board Br. 40-41. This is tautological and ignores the record evidence to the contrary.

According to the Board, the challenged cosmetology/barber licensing scheme is constitutional simply because the scope-of-practice definitions for cosmetology/barbering in the challenged scheme include hair braiding. *See* Board Br. 40. But the Board offers no support for this tautology. Although deferential, rational-basis review does not permit legislatures to define the constitutionality of regulatory schemes simply by crafting overbroad statutory definitions. *See supra* Part I.B; *St. Joseph Abbey*, 712 F.3d at 223-25; *Clayton*, 885 F. Supp. 2d at 1215-16; *Cornwell*, 80 F. Supp. 2d at 1108 ("Even if [plaintiff] were defined to be a cosmetologist, the licensing regimen would be irrational as applied to her because of her limited range of activities.") Mortgage brokers, investment advisors, and CPAs could also be lumped together by an overbroad scope-of-practice definition, but it would be irrational to require each profession to obtain a CPA license based solely on that statutory definition. Instead, courts would consider what those professions actually do and how that matches up with the licensing requirements.

Here, the record evidence (which the Board ignores) demonstrates that African-style hair braiding is distinct from cosmetology/barbering. Indeed, the Board admits that African-style hair braiding is a different occupation from both cosmetology and barbering. JA1747, JA1800-01. The Board also admits that African-style hair braiding is culturally, historically, and racially distinct from cosmetology/barbering, JA1744; provides distinct services using only simple tools

and unique braiding/locking/twisting/weaving techniques, JA1743, JA1750-51; opposes cosmetology's use of harsh chemicals to straighten textured hair, JA1744-46; has a distinct clientele, JA1751, JA1754; and is generally performed by people who exclusively braid hair (not cosmetologists/barbers) at braiding salons that exclusively provide braiding services, JA1748-50, JA1800-01. *See also* Appellants Br. 2-13.

Three federal courts, relying on nearly identical facts, have found African-style hair braiding is a distinct occupation from cosmetology/barbering because the scope of practice is distinct and very limited. *See Brantley*, 98 F. Supp. 3d at 893-94; *Clayton*, 885 F. Supp. 2d at 1215 ("The scope of [plaintiff's] activities are distinct and limited when compared to cosmetologists. She does not use chemicals, shampoo, cut or color hair, or do facials, shaves, esthetics, or nails."); *Cornwell*, 80 F. Supp. 2d at 1108 ("[Plaintiff's] activities are minimal in scope compared to the activities of a cosmetologist. Because her activities are of such a distinguishable nature, she cannot reasonably be classified as a cosmetologist.").

As the evidence and case law demonstrates, African-style hair braiding is a distinct occupation from cosmetology/barbering. The undue burden imposed on braiders by treating them as cosmetologists/barbers is therefore precisely the discrimination that *Jenness* warns against.

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

The Board's brief underscores Plaintiffs-Appellants' concerns about the procedural-due-process problems created by judge-invented justifications for challenged laws. The Board says Plaintiffs-Appellants failed to carry their burden because they could not read the district court's mind, claims rational-basis plaintiffs are not even entitled to take discovery to meet their burden, and merely recapitulates the version of rational-basis review that Plaintiffs-Appellants challenge. The Board's arguments miss the point of Plaintiffs-Appellants' position that the district court erred in proffering alternative justifications for the licensing scheme, which (A) deprived Plaintiffs-Appellants of a meaningful opportunity to be heard, and (B) deprived Plaintiffs-Appellants of an impartial tribunal. Additionally, (C) the Board offers no support for the district court's alternative rationales.

A. The district court erred by depriving Plaintiffs-Appellants of a meaningful opportunity to be heard.

Plaintiffs-Appellants explained that the district court erred by announcing its newly conceived justifications for the licensing regime after discovery and briefing had closed, thus depriving Plaintiffs-Appellants of a meaningful opportunity to be heard. Appellants Br. 59-60.

In response, the Board demonstrates the impossible burden it asks this Court to impose on rational-basis plaintiffs, claiming that Plaintiffs-Appellants failed to carry their burden because they "did not anticipate and refute the[] alternative rationales" introduced by the district court judge after discovery and briefing had closed. Board Br. 44. This only serves to highlight the problem identified by plaintiffs—discovery is limited and plaintiffs cannot take discovery on "every conceivable" rationale. Without any notice of the justifications they must negate before discovery closes, rational-basis plaintiffs may not correctly anticipate which justifications a court finds conceivable. As a result, they will not have had the opportunity to gather evidence through discovery to oppose summary judgment and will be deprived of a meaningful opportunity to be heard, as in this case.

The Board also claims that plaintiffs in rational-basis cases are not even entitled to take discovery: "Those challenging a statute under rational-basis review are not entitled to engage in discovery to refute every conceivable rationale." Board Br. 43. This contradicts nearly 80 years of rational-basis precedent. *See*, *e.g.*, *Carolene Products*, 304 U.S. at 152 (indicating that evidence may negate presumptions in rational-basis cases); Appellants Br. 23 & n.7. The cases cited by the Board do not support this sweeping claim. Instead, they permit courts to decide some rational-basis cases at the motion-to-dismiss stage when plaintiffs do not allege facts (and thus, do not seek discovery) that would undermine the rational

connection between a legitimate interest and the means chosen to pursue that interest. Indeed, both cases cited by the Board primarily involved equal-protection challenges to statutory classifications of government employees based on logical arguments—not evidence—that it was improper to provide different benefits to different classes of employees, and thus required no discovery to determine whether any facts undermined the statutory classifications. *See Carter v. Arkansas*, 392 F.3d 965, 968-69 (8th Cir. 2004) (noting that, by statute, public-school employees and state employees have different employers, and finding that difference justified differential treatment); *Knapp v. Hanson*, 183 F.3d 786, 789 (8th Cir. 1999) (finding it rational for Iowa to offer longevity pay to Highway Patrol members, but not other state employees, in order to retain an experienced Highway Patrol workforce). This case, in contrast, focused on whether there is a rational connection between the government interests in regulating braiders and the means chosen to advance those ends (licensing them as cosmetologists/barbers). Such questions necessarily turn on discovery about the relevance of cosmetology/barber licensing requirements for braiders. Denying discovery to rational-basis plaintiffs challenging the means-ends fit would make it impossible for them to prevail in fact-dependent cases.

B. The district court erred by depriving Plaintiffs-Appellants of an impartial tribunal.

Plaintiffs-Appellants contend that the district court abandoned its role of impartial arbiter by independently conceiving of, and advancing, its own justifications for the government licensing scheme, which it then found dispositive under rational-basis review. Appellants Br. 60-64. The Board's response misses the point by simply reciting the version of rational-basis review that Plaintiffs-Appellants contend runs afoul of procedural due process, Board Br. 42-44, arguing that a court is "not limited to the reasons proffered by the State when undertaking its rational-basis review." Board Br. 8, 42.[10] But this Circuit does sometimes appear to only consider the reasons proffered by the government, even when rational justifications are readily conceivable. *See*, *e.g.*, *Fowler v. United States*, 633 F.2d 1258, 1263 (8th Cir. 1980) (ignoring obvious rationales for not expanding employee benefits, such as agency cost savings).

The question Plaintiffs-Appellants raise is not whether some courts have previously said they are applying rational-basis review in this manner, but whether

[10] The Board argues that the Supreme Court ratified this approach in *Beach* by following a justification offered by Judge Mikva, Board Br. 44-45, but as Plaintiffs-Appellants pointed out in their opening brief, the rationale suggested in Judge Mikva's concurrence originally came from agency findings in a prior administrative proceeding concerning the precursor regulations to the Cable Act challenged in *Beach*. 508 U.S. at 317. The agency later ratified this rationale in a report filed with the D.C. Circuit in subsequent briefing. *Id.* at 312. Thus, even in *Beach*, the Court did not simply invent a justification that hadn't already been proposed and ratified by the government agency.

doing so is consistent with the procedural due-process obligation to remain a neutral arbiter. As Plaintiffs-Appellants previously explained, Appellants Br. 62-63, requiring a judge to provide this type of aid only for the government creates an "impermissible risk" of actual bias that violates procedural due process because there is a near-certainty of actual bias when judges believe they are obligated to imagine justifications that would save challenged government programs from rational-basis challenge. The Board merely begs the question when it counters that "there is no bias present merely by the judge following Supreme Court precedent in reaching its decision." Board Br. 45.

To ensure that rational-basis review remains consistent with the judicial impartiality required by due process, this Court should hold that rational-basis review, properly conducted, does not permit judges to independently imagine new justifications for challenged government programs that have not been advanced by counsel for the government. This is consistent with *Beach*, which does not require that courts independently engage in "rational speculation unsupported by evidence," while still allowing government counsel to suggest justifications for a challenged measure even in the absence of legislative facts. 508 U.S. at 315.

C. The Board offers no support for the district court's alternative justifications.

The Board recites the district court's additional rationales, Board Br. 46, but fails to address the undisputed record evidence and logical reasoning which undermines those rationales. *See* Appellants Br. 65-67.

Conclusion

For the reasons stated herein, and in Plaintiffs-Appellants' opening brief, the district court's decision should be reversed, and this case should be remanded with instructions to enter summary judgment for Plaintiffs-Appellants.

Respectfully submitted,

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Dated: February 21, 2017

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I hereby certify that on this 21st day of February, 2017, I caused this Reply 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 Reply 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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