Case No. 16-3968

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NDOBIA NIANG, ET AL.,

Plaintiffs-Appellants,

v.

EMILY CARROLL, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
(District Court Case 4:14-cv-01100-JMB)

BRIEF OF *AMICI CURIAE* MISSOURI AFRICAN HAIR BRAIDERS AND THEIR CUSTOMERS IN SUPPORT OF APPELLANTS AND REVERSAL

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The undersigned *amici* are five Missouri African hair braiders and five Missouri African hair braiding customers. *Amici* believe that the decision of the district court below, if allowed to stand, would heavily and irrationally burden not only the ability of many thousands of people to earn a living in relatively harmless occupations, but also consumers' ability to locate and afford African hair braiding services. All parties have consented to the filing of this brief.

The *amici* joining the brief are:

Braiders

- Rachel Mutindi Patrick of St. Louis, Missouri;
- Maty Fall of St. Louis, Missouri;
- Elom Efua Essien of St. Louis, Missouri;
- Aida Diop of St. Louis, Missouri;
- Fatoumata Maiga of St. Louis, Missouri.

Customers

- Angela Long of St. Charles, Missouri;
- Kristine Fields of Oakfield, Missouri;
- Rachel Johns of St. Louis, Missouri.
- Jerika Tyler of St. Louis, Missouri.
- Ursula Mitchell of St. Louis, Missouri.

RULE 29(C)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5), the Missouri African-style hair braiders and their customers state:

(1) No party's counsel authored this brief in whole or in part.

(2) No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

(3) No person—other than the *amici curiae* or their counsel—contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. Braiders' Chosen Occupation is Braiding, Not Cosmetology and Not Barbering.

> "*Wherever they exist in the world, black women braid hair. They have done so in the United States for more than four centuries. African in origin, the practice of braiding is as American – black American – as sweet potato pie*." Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 379.

As a young girl growing up in Kenya, Rachel Mutindi Patrick watched her grandmother, mother, aunts and sisters braid hair. She would then sit and use grasses, over and over, to practice the techniques they had used. Around the time she was 11 years old, Rachel demonstrated enough skill that she was put in charge of braiding her sisters' hair. Thirteen years ago, she moved to the United States and began the path to citizenship, believing that this country was a place where anything was possible if someone found a skill they were good at and worked hard to put that skill to use for others. Braiding hair is Rachel's gift. For years she has applied her passion and talent not only to earn a living for herself, but also to build friendships and to teach white mothers of adopted black children how to care for their children's hair and to help those children appreciate the way their hair connects them to a distinctively African culture and heritage.

Each of the other braiders represented in this brief have stories similar to Rachel's. They learned to braid at a young age, each taught by family members or friends within their communities, and they set out to achieve their own version of

the American Dream by applying their skills for the benefit of customers, such as those participating in this brief, who were happy to pay for the braiders' services. *Amici* braiders and customers share a passion for natural hair styling, believing it to be a celebration of their heritage and their community, as well as a rejection of the idea that black women can only find social acceptance and success if they let their hair be straightened so that it appears more like European or Asian hair.[1]

The facts presented in the record of this case show that, like the *amici* braiders, the vast majority of those who provide African-style hair braiding are not licensed cosmetologists or barbers, and that licensed cosmetologists or barbers typically do not offer African-style hair braiding. JA1748-49. The skillsets required for these different occupations have very little overlap—so little, in fact, that the Appellees admitted that at most only about ten percent of the classroom training required for cosmetologists or barbers has even *minimal* relevance to African-style hair braiders. JA1807-10. Like the Appellants, the *amici* braiders just want to braid hair using

[1] A useful explanation of the cultural significance of black women's hair may be found in both Monica Bell's *The Braiding Cases, Cultural Deference, and the Inadequate Protection of Black Women Consumers*, 19 YALE J.L. & FEMINISM 125, and Paulette Caldwell's *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

natural techniques. They ***do not*** want to be cosmetologists or barbers.

For the *amici* braiders, the practice is not just an occupation; it is a practice that connects them to their culture and heritage, and it is also an important, artistic way not only of expressing themselves, but of helping other people of African descent express themselves as well. Their decision to focus on natural forms of hairstyling and to embrace the inherent quality and beauty of African hair sets them apart not only from the profession of cosmetology, but also from cultural norms that all too frequently treat African hair as something undesirable or embarrassing rather than something to be celebrated. *See, e.g.,* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 383. Cosmetology schools' mandatory curriculum emphasizes the use of chemicals to alter the way that hair looks, behaves, and feels; to the extent that it addresses braiding at all, it focuses on simple braiding styles commonly used with straight hair rather than the "tightly textured" or "coily" hair most often associated with people of African descent. JA1744-46, JA1754.

The problem that Missouri African-style hair braiders face is that the state legislature has defined the practice of cosmetology and barbering very broadly, giving the Appellees the authority to force braiders to become cosmetologists and barbers, even though (1) the braiders do not want to learn or practice these occupations, (2) it is prohibitively time-consuming and expensive for most braiders

to learn to practice these occupations, and (3) the expensive, time-consuming education required to lawfully practice these occupations is, at best, only minimally relevant to the occupation in which the braiders actually do wish to engage. For the *amici* braiders, as for the appellants, this case is not just an academic exercise—its outcome will determine whether they will be free to choose their own occupation or whether the government can force them either to learn a new one, or to lose their livelihood altogether.

II. Partial Exemptions From Licensing Requirements Can—and in This Case Do—Violate the Equal Protection Clause.

> "Although economic rights are at stake, we are not basing our decision today on our personal approach to economics, but on the Equal Protection Clause's requirement that similarly situated persons must be treated equally." *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).

Amici would like to focus in particular on one specific error made by the trial court in this case. In considering the Appellants' claim that the cosmetology and barbering license requirements violate the Equal Protection Clause as applied to African-style hair braiders, the District Court focused exclusively on the question of whether principles of Equal Protection are implicated where a law imposes similar requirements on sets of people that are dissimilar; the court below concluded that such a situation does not constitute unequal treatment. *See Niang v. Carroll*, 2016 WL 5076170, *10-12 (E.D. Mo. Sept. 20, 2016). Although *amici* believe this

conclusion to be incorrect for the reasons explained in the Appellants' Brief, they also believe that the more grievous error was the trial court's failure to address or properly comprehend the Ninth Circuit's Equal Protection analysis in *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008).

In *Merrifield*, the Ninth Circuit assessed an occupational licensing scheme regulating pest control professionals which required these workers to be educated in the use and handling of pesticides, even if the pest controllers were never going to use pesticides. The plaintiff in that case, a non-pesticide-using pest control professional, argued that these licensing requirements violated both the Due Process and Equal Protection clauses of the Fourteenth Amendment. The Ninth Circuit rejected the Due Process claim on the grounds that pest controllers who did not themselves use pesticides might still encounter places where pesticides had been used; the Court deemed it rational for the legislature to assume that training in pesticide use could lessen a potential threat to the public health or safety. *Id.* at 988.

But the statute at issue in *Merrifield* also exempted from the licensure requirement "persons engaged in the live capture and removal or exclusion of vertebrate pests, bees, or wasps from a structure without the use of pesticides." *Id.* at 981-82. The statutory definition of "vertebrate pests" included "bats, raccoons, skunks, and squirrels" but did not include "mice, rats, or pigeons[.]" *Id*. at 982. The plaintiff's business focused on the pesticide-free removal or exclusion of rodents and

pigeons. In regard to his Equal Protection claim, the plaintiff argued not only that the it was unconstitutional to treat different groups (pesticide-using pest controllers and pesticide-free pest controllers) as though they were the same, but also that it was unconstitutional to exempt one set of pesticide-free pest controllers from licensure while at the same time requiring another set of pesticide-free pest controllers to be licensed. *Id.* at 988-89. The Ninth Circuit agreed, holding that insofar as the exemption granted in that statute singled out workers similar to the plaintiff for exemption while not extending the exemption to all such similarly-situated workers, the licensing requirement violated the Equal Protection Clause. *Id.* at 991-92.

The instant case presents a nearly identical distinction. Initially, Missouri's cosmetologist and barber licensing scheme treated all African-style hair braiders equally in that they were all required to obtain a cosmetology and/or barber license before they could lawfully earn money by braiding hair. But in 2014 the Missouri General Assembly passed a bill that exempts from the licensure requirements an "employee or employer… working in conjunction with any licensee for any public amusement or entertainment venue[.]" Mo. Rev. Stat. § 316.265. Thus, under the current law, the *amici* braiders cannot lawfully earn a living in their chosen profession—but if a Missouri braider happens to live near a "public amusement or entertainment venue" as defined in Mo. Rev. Stat. Chapter 316, and if that braider is able to work out an arrangement with a licensee for such a venue, they would be

entirely exempted from the licensing and oversight requirements imposed by Mo. Rev. Stat. Chapter 329. Because the legislature has created an exemption that allows *some* non-licensed Missouri braiders freely to practice their craft without submitting to the licensing and oversight requirements of Mo. Rev. Stat. Chapter 329, but other braiders (including *amici*) are ***not*** exempted from those requirements, the law has impermissibly created different sets of rules for similarly-situated persons. As was the situation in *Merrifield*, this exemption violates the Equal Protection Clause.

The District Court upheld the application of the cosmetology/barbering licensing scheme to African-style hair braiders because the government asserted that the braiders' inclusion was rationally related to the government's asserted interests in: (1) protecting the public health and safety, and (2) consumer protection. But, as in *Merrifield*, the existence of this "entertainment venue" exemption thoroughly undercuts those justifications. The exemption is not supported by any suggestion that braiders who might be "working in conjunction with any licensee for any public amusement or entertainment venue" are somehow more skilled or more trustworthy than braiders who serve clients in different circumstances. Furthermore, although most people seeking someone to braid their hair would have an opportunity to learn something about the braiders who live and offer services in their community, someone choosing to have their hair braided at "a public amusement or entertainment venue" is likely making a spur-of-the-moment decision and is unlikely

to have much opportunity to evaluate the skill or trustworthiness of a braider working at such a location. Thus, if there was any setting in which braiding customers might benefit from alleged "assurance" that a person who holds a cosmetology or barbering license has a basic level of training and/or has been vetted for trustworthiness, it would be in the context of "a public amusement or entertainment venue." But, ironically, these are precisely the circumstances under which the government has determined that braiders need not be licensed.

This Court should follow the Ninth Circuit's guidance in *Merrifield* and should hold that because the "public amusement or entertainment venue" exception created by the legislature reveals that there is no legitimate justification for requiring braiders to be licensed as cosmetologists or barbers, all African-style hair braiders in Missouri should be exempted from the licensing requirements of Mo. Rev. Stat. Chapter 329.

III. Upholding the Decision Below Would Lead to Absurd, Protectionist Results.

> "Possibly some barbers like some lawyers and other persons who have attained successful and remunerative positions in professional and commercial life become anxious to shut out competition… but such a scheme is entirely un-American[.]" *Moler v. Whisman*, 147 S.W. 985, 989 (Mo. 1912).

Courts have long recognized that certain industry groups, if given the opportunity, would persuade legislatures to define licensed professions in such a way that those within the industry group would have improper advantages over those

outside of that group. In 1889, when occupational licensing was still a relatively new, limited phenomenon, the Michigan Supreme Court remarked:

> It is quite common in these latter days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it was enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be… framed and devised. This kind of legislation should receive no encouragement at the hands of the courts. *Chaddock v. Day*, 42 N.W. 977, 978 (Mich. 1889).

In the middle of the 20th Century the North Carolina Supreme Court expressed a similar sentiment, saying, "[T]here is not a calling or trade, however simple and harmless, that may not be preempted and monopolized by the first group that stakes out its claim and raises over the camp the 'keep off sign.'" *State v. Harris*, 6 S.E.2d 854 (N.C. 1940). Indeed, this Court's sister circuits have recently acknowledged this problem, but are in conflict as to whether courts are authorized to apply meaningful scrutiny to laws that are designed exclusively to put favored groups in an advantageous position in relation to others. *See St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (holding that economic favoritism is not a legitimate basis for occupational licensing); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (holding that economic protectionism is "favored pastime of state and local governments" and a legitimate government interest); *Craigmiles v. Giles*, 312 F.3d

220 (6th Cir. 2002) (protecting interest group from economic competition not legitimate basis for occupational licensing).

In its misguided effort to identify any potential justification the government might possibly advance in support of the challenged licensing scheme, the trial court below suggested that the government would survive constitutional scrutiny even if it decided to shoehorn entrepreneurs into tangentially-related professions in order to "incentivize" them to offer more comprehensive services to their customers. *Niang*, 2016 WL 5076170 at *18. Under this rationale, nothing in the U.S. Constitution would prevent a state from choosing to require tree trimmers or lawn mowers to become licensed landscape architects[2] before they were allowed to help homeowners with routine maintenance. The legislature could choose to require an auto mechanic to get an advanced engineering degree before he or she would be permitted to work at an oil change business, because even though a job changing oil would never require more than a tiny fraction of what the worker learned getting that degree, the additional information could conceivably come in handy one day. Regulatory boards could threaten lawsuits and criminal prosecution against ordinary farm hands who engaged in traditional animal husbandry practices such as branding and castrating

[2] Mo. Rev. Stat. § 327.612.

cattle without first becoming veterinarians or veterinary technicians.[3]

The district court's opinion thus practically invites industry groups to push lawmakers for new licensing restrictions that would (1) protect favored insiders from competition, (2) allow insiders to control how people are permitted to practice an occupation, and/or (3) secure a steady stream of revenue for industry groups in the form of license fees and tuition payments for the mandatory educational prerequisites for licensure. Research shows that increased occupational regulation does little to improve the quality of services available to consumers while, at the same time, it makes those services more expensive and, thus, less accessible for low-income consumers. *See, e.g.*, Brief of *Amicus Curiae* Public Choice Scholars. Each new hurdle that the government places in the path of would-be entrepreneurs reduces the number of people who manage to reach the finish line and provide services to others. If their current, trusted African-style hair braiders are forced to exit the market, it will be more difficult for people such as *amici* customers to find new service providers, to schedule appointments with those providers, and to afford the higher rates that result when supply shrinks in relation to demand.

[3] This is not a hypothetical situation – it is already happening in Missouri. *See Mo. Veterinary Med. Bd. v. Gray*, 397 S.W.3d 479, 486 (Mo. Ct. App. 2013).

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the District Court and to enter judgment in favor of the Appellants.

Respectfully submitted this 17th day of January, 2017.

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CERTIFICATE OF COMPLIANCE

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I certify that a copy of the forgoing was filed electronically with the Clerk and delivered by operation of the CM/ECF system to the counsel of record on January 17, 2017.