No. 22-42

In The Supreme Court of the United States

DIPENDRA TIWARI; KISHOR SAPKOTA; GRACE HOME CARE, INC.,

Petitioners,

v.

ERIC FRIEDLANDER, in his official capacity as Secretary of the Kentucky Cabinet for Health and Family Services; ADAM MATHER, in his official capacity as Inspector General of Kentucky,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF GOLDWATER INSTITUTE AND MANHATTAN INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan-institute.org

TIMOTHY SANDEFUR*
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*

Counsel for Amici Curiae Goldwater Institute and Manhattan Institute

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Does the Fourteenth Amendment require meaningful review of restrictions on the right to engage in a common occupation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Goldwater Institute ("GI") is a public policy foundation devoted to the principles of individual freedom and limited government. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are implicated. GI devotes substantial resources to defending the constitutional right to earn a living—in state and federal courts, *see*, *e.g.*, *Women's Surgical Center, LLC v. Berry*, 806 S.E.2d 606 (Ga. 2017); *Singleton v. North Carolina Department of Health & Hum. Servs.*, No. COA 21-558 (N.C. Ct. App., pending); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). GI scholars have also published extensively on the constitutional right to earn a living—and how Certificate of Need laws like those challenged here violate this right. *See*, *e.g.*, Flatten, *CON Job: Certificate of Need Laws Used to Delay, Deny Expansion of Mental Health Options* (Goldwater Institute, 2018)[2]; Sandefur, *State "Competitor's Veto" Laws and the Right to Earn A Living*, 38 Harv. J.L. & Pub. Pol'y 1009 (2015); Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our*

---

[1] Pursuant to Rules 37.6 and 37.2(a), all parties consented to this brief's filing. Counsel of record for all parties received notice at least 10 days before the due date of amici's intention to file this brief. Amici affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than amici, their members, or counsel, made a monetary contribution for its preparation or submission.

[2] https://goldwaterinstitute.org/wp-content/uploads/2018/09/Mark-CON-paper-web.pdf.

Society's Values, 26 Notre Dame J.L. Ethics & Pub. Pol'y 381 (2012). GI believes its experience and policy expertise will assist this Court in its consideration of the petition.

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting economic freedom and opposing government self-dealing. MI recently brought on as a senior fellow one of this brief's counsel, Ilya Shapiro, to direct its Constitutional Studies Program, which aims to restore constitutional protections for individual liberty and limited government.

SUMMARY OF ARGUMENT

The right to earn a living, free of unreasonable government interference, is a necessary component of liberty. It is also deeply rooted in this nation's history and tradition. Indeed, it is so central to the concept of "the American Dream" that it is impossible to imagine any conception of the latter that fails to provide meaningful security for this crucial human right.

Yet this Court—notwithstanding occasional protestations to the contrary, *cf. Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)—has relegated this right to second-class status. It has principally done so through the application of "rational basis scrutiny," a low-yield form of judicial review so extremely biased against

plaintiffs that lawyers regard it as a joke. *See*, *e.g.*, *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (nothing fails rational basis review except laws that "strik[e] us with 'the force of a five-week-old, unrefrigerated dead fish.'" (citation omitted)).

Judges have sometimes admitted that this "test" renders them incapable of discharging their legal and ethical obligation to protect this precious individual right. *See*, *e.g.*, *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown & Sentelle, JJ., dissenting); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 99 (Tex. 2015) (Willett, J., concurring). Yet it persists, with the consequence that the right to earn a living for oneself and one's family, which this Court once correctly regarded as the "distinguishing feature of our republican institutions," *Dent v. West Virginia*, 129 U.S. 114, 121 (1889), has been effectively abandoned to the mercies of legislative factions that enjoy free rein to enrich themselves through the political process at the expense of minorities, and with no meaningful checks or balances.

That is *precisely* the fate the Fourteenth Amendment was written to prevent. Yet thanks to the virtual erasure of the Privileges or Immunities Clause in *The Slaughter-House Cases*, 83 U.S. 36 (1872)—a decision now almost universally acknowledged to be incorrect—and the subsequent creation of the rational basis test in *Nebbia v. New York*, 291 U.S. 502 (1934), as well as the later reduction of even the minimal scrutiny *Nebbia* promised, the courts have crippled the promise of that amendment.

Consider the facts here. They may seem mundane, but they describe just one of countless injustices attributable to the judiciary's indefensible refusal to enforce the supreme law of the land. Dipendra Tiwari and Kishor Sapkota want to open a home health care business to care for patients too ill to leave their homes—and to provide these services in patients' native language, which would naturally result in better outcomes for these disadvantaged patients. Yet they are forbidden to do so, *not* because they are incompetent or unqualified—but solely because the state has decided to protect the economic interests of existing businesses that don't want to compete fairly in the marketplace.

Kentucky's Certificate of Need ("CON") laws allow these existing firms to veto their own competition—a sort of heckler's veto that would never be tolerated, were the right at issue free speech, or free religion, or freedom of travel. CON laws deprive people like Dipendra and Kishor of their right to earn a living for reasons unrelated to their "fitness or capacity to practice" their profession. *Schware v. Bd. of Exam'rs*, 353 U.S. 232, 239 (1957).

True, the state mustered an intellectual rationalization for this injustice, just as it might rationalize violating the freedoms of speech, religion, or travel. Were it to attempt the latter, courts would examine the state's arguments and engage in the type of judgment courts are expected to undertake. But because this case concerns rights characterized as "economic," existing precedent deprives Dipendra and Kishor of their right to a judicial weighing of the evidence—and leaves

their freedom to make economic choices at the mercies of legislative majorities—which is to say, abandons them to the factionalism our constitutional checks-and-balances system was supposed to rectify.

This Court should take this opportunity to make two points clear: first, that the right to earn a living is a *fundamental* constitutional right deserving meaningful judicial protection—and second, that this right is also among the privileges or immunities of citizens which no state may abridge.

ARGUMENT

I. The right to earn a living is a fundamental constitutional right.

This Court has held that the "liberty" protected by the Constitution refers either to freedoms that are "of the very essence of a scheme of ordered liberty"—meaning principles that are of such a nature "that neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)—or to rights that are "deeply rooted in this Nation's history and tradition." *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977). The first is an objective inquiry into the nature of constitutional freedom. The latter is an historical inquiry into precedent. The right to earn a living passes both tests.

A. The right to earn a living is essential to any scheme of ordered liberty.

Rights are not mere customs or collective habits, but principles rooted in human nature. They are best seen as elements of that freedom which is inherent in each person by virtue of the fact that each individual is a self-directed entity responsible for her actions.

No person can alienate her self-responsibility, any more than she can her education, tastes, hopes, or fears. And where a person has a responsibility—where she is accountable for her actions—she must also have the freedom to choose those actions. *See* Palmer, *Realizing Freedom* 80 (2d ed. 2014) ("each [person] governs in his or her own body [and]. . .is held by others to be responsible for what he or she does with that body. . . . [This] offer[s] a secure foundation for the entire structure of rights.").

To survive and thrive, each person must provide for herself—which means she must have the freedom to act for self-preservation. Humans are not animals whose mere instincts provide for their survival; instead, their flourishing depends on self-initiated thought and action. Their lives therefore *require* that they be free from force or fraud.

This freedom is limited solely by the fact that others have the same right. Although they may collaborate or cooperate to provide for themselves, each person is ultimately responsible for her own flourishing—which means she must have a realm of liberty within which to pursue that flourishing. *See* Smith,

Judicial Review in an Objective Legal System 106 (2015) ("[t]he concept of rights addresses a jurisdictional issue: Who should control an individual's actions—that person himself, or someone else?").

Rights are best seen as particular instances of general liberty. *Liberty* is not a list of discrete freedoms; it means an "unobstructed action according to our will, within the limits drawn around us by the equal rights of others." Thomas Jefferson to Isaac Tiffany, Apr. 4, 1819, in *Jefferson: Political Writings* 224 (Appleby & Ball, eds., 1999). But we conceptualize liberty, in the context of any particular situation, as a "right." Thus free speech means liberty with respect to expression; freedom of religion means liberty with respect to belief—etc. Rights are therefore not social constructs—which is why they "may not be submitted to vote" and "depend on the outcome of no elections." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). They are instead aspects of that inherent freedom with which each person is born. *See The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825) ("That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.").

This political/legal assumption that people are free to act unless and until they harm others—embodied in the ancient *sic utere* maxim—is also no social construct. It is a necessary consequence of the logical principle that someone who makes a positive

assertion—i.e., who claims he may justly forbid another person from acting—bears the burden of justifying that claim. *See id*. at 107–08 (discussing *onus probandi* with respect to individual liberty).

If it were otherwise—if people were presumptively unfree, until they proved to the government's satisfaction they should have freedom—the result would be what philosopher Anthony de Jasay called "a needle-in-the-haystack type of task," because there is always some potential objection to her being free. *Justice and Its Surroundings* 150 (2002). "Taken literally, the presumption that every act may be harmful. . .would freeze everything into total immobility." *Id.* Indeed, the person would be stuck in an infinite regress, having to prove that she should be free to prove that she should be free, etc. *See* Sandefur, *The Permission Society* 8–11 (2016). The presumption of liberty is therefore required by the logical rule of *onus probandi*. *Cf. N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111, 2156 (2022) ("We know of no. . .constitutional right that an individual may exercise only after demonstrating to government officers some special need.").

This is the (brief) argument for *all* individual rights. It does not depend on appeals to subjective preferences, religious faith, mere historical tradition, or policy goals, let alone judicial fiat; it depends on the facts of human nature. It is not mere rhetoric or custom, but an actual fact that people are "equally free and independent and have certain inherent rights," which include "the enjoyment of life and liberty, with the means of acquiring and possessing property, and

pursuing and obtaining happiness and safety." Va. Decl. of Rights § 1 (1776).

To put the point another way, no mature human being is self-evidently marked out as the ruler of another. *See* Thomas Jefferson to Roger Weightman, June 24, 1826, in *Jefferson: Political Writings, supra* at 149 ("the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately."). Consequently, each person is a *self*-owner, responsible for her own survival and success. And if she owns her faculties, she necessarily has the right to engage in voluntary transactions with others, including the right to exchange labor for pay.

Individual rights must therefore include the right to make economic decisions for oneself, just as one has the right to make one's own decisions about travel, about whom to vote for, what opinions to express, what books to read, etc.

It is impossible to imagine a "scheme of ordered liberty," *Palko*, 302 U.S. at 325, that does not include the right to engage in economic transactions of one's choice. The dismal histories of countries where this right has been effectively abolished is proof enough of its vital importance. One need not detail the suffering of such places as the Soviet Union, North Korea, or the People's Republic of China, where efforts to stamp out economic liberty have led to unimaginable misery, to recognize that "neither liberty nor justice" have existed where this right was "sacrificed." *Id*. at 326. Consider

just one example. In 1930s, the USSR effectively outlawed the sale of goods "with the intention of profiting." Hessler, *A Social History of Soviet Trade* 263 (2004). This effective prohibition of all economic transactions resulted in mass arrests,[3] and only the fact that it was haphazardly and arbitrarily enforced prevented total social collapse. *Id.* at 264–65.

Economic liberty is also logically inextricable from other rights. Obviously, the right to property includes the right to buy, sell, and use it. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992). So, too, the right to a lawyer at one's trial would be meaningless without the right to hire (i.e., to pay) the lawyer of one's choosing. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006). The right of free speech would necessarily be curtailed by a law forbidding a person from paying another to disseminate a message, *cf. Meyer v. Grant*, 486 U.S. 414, 422–23 (1988), or to buy a book. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1052 (Colo. 2002).

What this Court said of property rights in *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972), is equally true of the right to make one's own economic choices: the alleged dichotomy between economic freedom and other kinds of freedom "is a false one," because the right to engage in a business, "no less than the right to speak or the right to travel, is in truth, a

[3] The dissident writer Vasily Grossman vividly recalled the way police arrested women "on the street for selling the string shopping bags that they wove at night in their rooms." *Everything Flows* 81 (Robert Chandler, trans. 2009).

'personal' right," and "a fundamental interdependence exists" between it and other kinds of rights. "Neither could have meaning without the other." Economic liberty easily passes the *Palko* test: it is "of the very essence of a scheme of ordered liberty," and "neither liberty nor justice would exist if [it] were sacrificed." 302 U.S. at 325–26.

B. The right to earn a living is also deeply rooted in this nation's history and tradition.

Unsurprisingly, this right to economic freedom has a long legal pedigree. *See generally* Mayer, *Liberty of Contract* 11–42 (2011); Calabresi & Leibowitz, *Monopolies and the Constitution*, 36 Harv. J.L. & Pub. Pol'y 983 (2013). It was a major concern to Sir Edward Coke, who wrote extensively about the illegality of royal monopolies—i.e., licenses whereby the king allowed only a single merchant to engage in a particular business. *See*, *e.g.*, 3 E. Coke, *Institutes* **181–85 (1797); 2 *id.* *47.

As Chief Justice, Coke authored several decisions declaring that subjects had the right "to use any trade thereby to maintain [themselves] and [their] famil[ies]," *Allen v. Tooley*, 80 Eng. Rep. 1055, 1055 (K.B. 1615), and that royal monopolies or guild rules "which prohibit any from working in any lawful trade" were void because they violated the Magna Carta's Law of the Land Clause. *The Ipswich Tailors' Case*, 77 Eng. Rep. 1218, 1219 (K.B. 1615). *See also Weaver of*

Newbery's Case, 72 Eng. Rep. 962, 962 (K.B. 1616); *Davenant v. Hurdis*, 72 Eng. Rep. 769 (K.B. 1598); *Chamberlain of London's Case*, 77 Eng. Rep. 150, 150 (K.B. 1590). *See also Darcy v. Allen*, 77 Eng. Rep 1260 (K.B. 1602) (famous case reported, but not decided, by Coke, declaring monopolies unlawful under Magna Carta).

After being removed from his post by King James I, Coke was elected to Parliament, where he authored the 1623 Statute of Monopolies, forbidding the monarch from establishing them except for patents for inventions. Coke later devoted several passages of his classic *Institutes* to explaining why any law "whereby any person" is permitted "the sole buying, selling, making, working" of anything violates the Magna Carta. 3 E. Coke, *Institutes* *181. "[A] man's trade is accounted his life," he wrote, "because it maintaineth his life, and therefore the monopolist that taketh away a man's trade, taketh away his life, and therefore is. . .odious." *Id.*

On the basis of decisions by Coke and his contemporaries, William Blackstone remarked that "[a]t common law every man might use what trade he pleased." 1 W. Blackstone, *Commentaries* *415 (1765). In the American colonies, that right was viewed not only as a matter of common law, but also of natural right. Among the colonists' objections to British rule was the fact that the Crown imposed trade restrictions that arbitrarily deprived Americans of their right to earn a living. Benjamin Franklin wrote in 1768 that "[t]here cannot be a stronger natural right than that of a man's

making the best profit he can of the natural produce of his lands," but that British restrictions on iron manufactures, the making of hats, and other ordinary occupations violated this right by "oblig[ing] the Americans to send their [raw materials] to England to be manufactured, and purchase back [finished goods] loaded with the charges of a double transportation." *Causes of the American Discontents before 1768* (1768), *in Benjamin Franklin: Writings* 613 (Lemay ed., 1987). Jefferson reiterated this point in his pamphlet, *A Summary View of the Rights of British America*, complaining of these restrictions that they existed solely "for the purpose of supporting not men, but machines, in the island of Great Britain." *Jefferson: Political Writings*, *supra* at 110.

John Locke had argued that each person "has a property in his own person" and therefore "the labor of his body, and the work of his hands" are "properly his," *Second Treatise* § 27 at 328 (Laslett, rev. ed. 1963), and Adam Smith echoed this, writing that everyone has a "property. . .in his own labor" which is "most sacred and inviolable," because it is "the original foundation of all other property"—indeed, it is "[t]he patrimony of the poor man," who may lack an inheritance, but can still climb the economic ladder as long as anti-competitive licensing laws and other monopolies do not stand in his way. 1 *An Inquiry Into the Nature & Causes of the Wealth of Nations* 138 (Indianapolis: Liberty Fund, 1976) (1776). For government "to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbor, is a plain

violation of this most sacred property," Smith wrote, and a "manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him." *Id*.

It was this conception of the right to put one's skills to use in providing for oneself that the founders called the right to "pursu[e] and obtain[] happiness and safety," Va. Decl. of Rights § 1, or, more simply, the right to "the pursuit of happiness." Decl. of Independence, 1 Stat. 1 (1776). In *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 310 (C.C.D. Pa. 1795), Justice Paterson explained that the phrase "pursuit of happiness" referred to the right to engage in "honest labour and industry." *Id*. *Accord, Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823).[4]

As the English precedents made clear, this right was often violated by government actions that prohibited new businesses from opening, or restricted how they could operate, so as to protect existing firms against legitimate competition. The founders regarded these laws as unjust. As James Madison observed in 1792, a government that imposes "arbitrary restrictions, exemptions, and monopolies" that "deny to part of its citizens [the] free use of their faculties" is "not a just government." *Property* (1792), *in Madison: Writings* 516 (Rakove, ed., 1999).

---

[4] Earlier this month, the Fourth Circuit described this right as "fundamental," albeit under the Privileges and Immunities Clause of Article IV, not the Fourteenth Amendment. *Brusznicki v. Prince George's Cnty*., No. 21-1621, 2022 WL 3036980 at *5 (4th Cir. Aug. 2, 2022).

The most glaring contradiction of the right of economic freedom was slavery[5]—and among the abolitionists' foremost charges against that institution was that it deprived slaves of their right to earn a living for themselves. "The labor of the hands is the principal source of profit to a very large portion of the human family," wrote one abolitionist. "[T]o deprive them of this is to deprive them of everything. . . . Slavery robs a man of the fruit of what he does. . .[so] that the master and his family should live by it." 1 C. Elliott, *Sinfulness of American Slavery* 117 (1850). Abraham Lincoln agreed. "In the right to eat the bread, without leave of anybody else, which his own hand earns," he said, "[the slave] *is my equal. . .and the equal of every living man*." *The Complete Lincoln-Douglas Debates of 1858* at 117 (Angle, ed., 1991). British abolitionists, too, held that every person should have "the liberty to take his labour, the only property he has, to the best market, to select his own employer, to negotiate for his own wages, to earn his own bread, and to enjoy the fruits of his labour unmolested." *Debates in Parliament on the Resolutions and Bill for the Abolition of Slavery* 358 (1834).

The conviction that slavery was evil because it deprived individuals of their right to earn a living for themselves formed the keystone of what historian Eric Foner has called "free labor ideology," which prioritized

---

[5] Women, too, were denied the right to make their own economic choices, thanks in part to this Court's rulings in such cases as *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), and *Muller v. Oregon*, 208 U.S. 412 (1908).

"economic independence." *Free Soil, Free Labor, Free Men* 16–17 (1970). Northern victory in the Civil War marked the triumph of that creed, and at the war's close, the Republicans sought to memorialize it in the Constitution, in the form of the Fourteenth Amendment.

That Amendment not only made clear that the freedmen were now citizens, but it also guaranteed the privileges or immunities of citizenship (which included the right to earn a living, *see* Sandefur, *Right to Earn a Living, supra* at 41–44) and forbade the states from depriving people of liberty without due process of law—which meant, depriving people of liberty for arbitrary or unjustifiable reasons. *See generally* Sandefur, *The Conscience of The Constitution* 71–120 (2014). Already by that time, the idea that America is a refuge where the oppressed can enjoy economic liberty had become central to the nation's self-conception. This Court called it the "distinguishing feature of our republican institutions." *Dent*, 129 U.S. at 121.

Sadly, during the late nineteenth and early twentieth centuries, state governments frequently imposed restrictions on the economic liberty of minorities, in order to exclude them from competing in the job market. In cases such as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Truax v. Raich*, 239 U.S. 33 (1915), and *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), this Court invalidated such laws, because "the right to work for a living" is "the very essence of the personal freedom and opportunity that it was the

purpose of the [Fourteenth] Amendment to secure." *Truax*, 239 U.S. at 41.

Obviously, government's power to regulate businesses to protect public health and safety had always been acknowledged as legitimate—even by Lord Coke—but those regulations were legitimate only if they actually served public needs and did not abridge economic liberty to benefit incumbent firms. *See*, *e.g.*, *City of London's Case*, 77 Eng. Rep. 658, 663 (K.B. 1610) ("[T]he King may erect. . .a fraternity or society or corporation of merchants, to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, and not for the hindrance. . .of it.").

Today, the idea that economic freedom is central to the nation's self-conception is still embodied by phrases such as "land of opportunity" and "the American Dream." The latter phrase was the coinage of James Truslow Adams, whose book *The Epic of America* (1931) defined it as "the belief in the common man and the insistence upon his having, as far as possible, equal opportunity in every way with the rich one." *Id.* at 135. And in the daily lives of actual Americans, this liberty is relied upon far more than other rights that typically characterized as "fundamental." Relatively few people exercise their right to vote, or to travel to Washington, D.C., to petition Congress, compared to the number who exercise their rights to sell labor, start a business, sign contracts, or otherwise make their own economic choices.

Justice Scalia once objected that the Court had never "explain[ed] what makes a right fundamental in the first place." *Gonzalez v. United States*, 553 U.S. 242, 257 (2008) (Scalia, J., concurring). And it's true that existing cases provide no single test. But the fundamentality of economic liberty is established by *whatever test* one applies.

Its societal significance is obvious. Its importance in individual life is profound. Its logical necessity as part of human life is clear. Its historical pedigree is unimpeachable. It is implicitly guaranteed by the Constitution, which is a classical liberal document rooted in private property, individual autonomy, and freedom of exchange—with express references to ownership, contracts, and legal tender. And it is explicitly guaranteed through its references to "liberty," which necessarily includes the right to make economic choices for oneself. If anything is a fundamental constitutional right, economic liberty is.

II. Decisions relegating the right to earn a living to secondary status are poorly reasoned and untenable.

Under immense political pressure in 1934, this Court in *Nebbia* wiped away the longstanding "affected with a public interest" test, which for half a century marked the line between private transactions the government had no business controlling, and public enterprises subject to regulations such as price controls. *Nebbia* substituted the rational basis test—which it

manufactured without any constitutional foundation—saying states could "adopt whatever economic policy may reasonably be deemed to promote public welfare," as long as "the laws passed are seen to have a reasonable relation to a proper legislative purpose." 291 U.S. at 537.

That passive voice concealed crucial questions: seen by whom, and how? Nine months later, *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194 (1934), said the rational basis test "is a presumption of *fact*," and "*not* a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault." *Id.* at 209 (emphases added). The Court stressed that this evidentiary presumption is "rebuttable," *id.*, and that the rational basis test must not be perverted into a charade by allowing "any fanciful conjecture" about a challenged law's foundations to be "enough to repel [legal] attack." *Id.* Instead, "where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts. . .these facts are properly the subject of evidence and of findings." *Id*. at 210. *Accord, United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–54 (1938); *Polk Co. v. Glover*, 305 U.S. 5, 9–10 (1938); *Nashville, C. & St. Louis Ry. v. Walters*, 294 U.S. 405, 414–16 (1935).

Nevertheless, in the years that followed, this Court increasingly *did* treat the rational basis test as a conclusive presumption, and *did* allow fanciful conjectures by government defendants to repel legal attacks. Beginning in the 1950s, it began saying that challenged laws could be upheld based on what "the

legislature *might have* concluded," rather than what it *actually* concluded. *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) (emphasis added). In fact, it said laws should be upheld whenever a judge could *imagine* some *possible* world in which there was a legitimate rationale for the challenged law—and that it is "constitutionally irrelevant whether this reasoning *in fact* underlay the legislative decision." *Flemming v. Nestor*, 363 U.S. 603, 612 (1960).[6]

It is widely admitted that the fundamental/nonfundamental rights distinction, and the strict scrutiny/rational basis distinction, are artifacts of an era in which this Court sought to increase government's power to control the economy in ways the Constitution never contemplated. *See*, *e.g.*, 2 Ackerman, *We the People: Transformations* 7–11 (1998). Part of that effort entailed reducing the degree to which laws characterized as "economic" were subject to checks and balances. The Court tried to justify this in *Carolene Products*, but that explanation made no sense; it said "discrete and insular minorities" deserve heightened protection, and that laws "restrict[ing] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" warrant judicial skepticism,

---

[6] The Court has not applied that rule consistently. In *Romer v. Evans*, 517 U.S. 620, 632–33 (1996), for example, it said that in rational basis cases, "we insist on knowing the relation between the classification adopted and the object to be attained," to ensure "that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." But the 1950s version of rational basis remains prevalent—even though it contradicts what the *Nebbia*/*Borden's Farm* Court said.

304 U.S. at 152 n.4—but economic regulations such as the laws challenged here cross *both* of those lines.

As Robert McCloskey observed, "the scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined. . . . [They] have no more chance against the entrenched influence of the established bartenders and master plumbers than the Jehovah's Witnesses had against the prejudices of Minersville School District." *Economic Due Process and the Supreme Court*, 1962 Sup. Ct. Rev. 34, 50 (1962).

Yet rational basis, as currently practiced, blinds courts to tyranny-of-the-majority concerns in just this one realm, and effectively "allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions" in ways that would never be tolerated if the right at issue were travel, speech, religion, etc. *Hettinga*, 677 F.3d at 482–83 (Brown & Sentelle, JJ., concurring).

It's been said that "the categorical and inexplicable exclusion of so-called 'economic rights'" from Due Process protection "unquestionably involves policymaking rather than neutral legal analysis." *United States v. Carlton*, 512 U.S. 26, 41 (1994) (Scalia & Thomas, JJ., concurring). Professor Tribe agrees: failing to protect economic freedom, he writes, "overlooks the importance of property and contract in protecting the dispossessed no less than the established" and "forgets the political impotence of the

isolated job-seeker who has been fenced out of an occupation." *American Constitutional Law* 1374 (2d ed. 1988). The facts and law bear them out.

III. The Court should take this opportunity to revisit the viability of *The Slaughter-House Cases*.

This Court should also take this opportunity to reconsider the infamously wrong *Slaughter-House Cases*.

Legal scholars across the ideological spectrum have reached a consensus that *Slaughter-House* was wrong to effectively erase the Privileges or Immunities Clause from the Constitution. *See McDonald v. City of Chicago*, 561 U.S. 742, 756–57 (2010). The idea that that Clause—which was intended as the Amendment's *primary* source of rights-protections—only secures such rights as, e.g., "free access to [national] seaports," *Slaughter-House*, 83 U.S. at 79, or to travel to Washington, D.C., *id.*, is not plausible in light of the Clause's history, which makes clear that it was written to protect far more valuable rights, including the right to engage in a lawful trade. *See*, *e.g.*, Barnett & Bernick, *The Original Meaning of the Fourteenth Amendment* 176 (2021); Sandefur, *Right to Earn a Living, supra* at 41. *See also* Cong. Globe, 42d Cong., 1st Sess. app. 86 (1871) (Clause author John Bingham, explaining that it was written to protect "the liberty. . .to work in an honest calling and contribute by your toil in some sort to the support of yourself [and] to the support of your fellowmen.").

As Justice Field explained six months after *Slaughter-House*, the Clause was "intended to. . .extend[] the protection of the National government over the common rights of *all* citizens," and "would do so if not shorn of its [efficacy] by construction." *Bartemeyer v. Iowa*, 85 U.S. 129, 140–41 (1873) (Field, J., concurring).

Slaughter-House never examined the Clause's original meaning or the origin of the phrase "privileges or immunities." It engaged in cursory historical analysis—limited solely to the phenomenon of slavery—and reduced its consideration of the Clause's function to a rhetorical question: "Was it the purpose of the fourteenth amendment. . .to transfer the security and protection of. . .civil rights. . .from the States to the Federal government?" 83 U.S. at 77. The answer was emphatically *yes*. The country had just fought a bloody civil war and amended its fundamental law to accomplish *exactly* that—i.e., to limit the alleged sovereignty of states, which had abused their authority by tyrannizing over their populations. But the Court answered no, because faithfully applying the Clause would "radically change[] the whole theory of the relations of the State and Federal governments." *Id*. at 78. That was policy-making, not legal analysis.

The *McDonald* plurality saw "no need" to reassess *Slaughter-House*, because it could rely on the Due Process Clause. 561 U.S. at 758. But by that reasoning, no erroneous precedent could *ever* be overruled, as long as lawyers find a clever work-around. Nor could *Slaughter-House* ever be directly challenged, except by a

plaintiff who waives her Due Process cause of action in order to assert *only* a Privileges or Immunities claim that is foreclosed by existing precedent—in hopes of ultimately obtaining this Court's discretionary review, which is a long-shot, and one some plaintiffs have already tried, unsuccessfully. *Courtney v. Danner*, 572 U.S. 1149 (2014); *Courtney v. Danner*, 141 S.Ct. 1054 (2021).

In other words, *McDonald*'s rationale for leaving *Slaughter-House* untouched has the perverse consequence of making it a "super-precedent," *cf.* Gerhardt, *Super Precedent*, 90 Minn. L. Rev. 1204 (2006), *not* because "public institutions have heavily invested, repeatedly relied, and consistently supported [it] over a significant period of time," *id*. at 1205—they haven't[7]—but because it is so badly reasoned that plaintiffs simply avoid the subject.

Any constitutional interpretation that renders language surplusage is incorrect. *Marbury v. Madison*, 5 U.S. 137, 174 (1803). But *Slaughter-House* did that with the Privileges or Immunities Clause. That Clause was supposed to be the Fourteenth Amendment's

---

[7] Justice Stevens claimed that overturning *Slaughter-House* would require "dislodg[ing] 137 years of precedent." *McDonald*, 561 U.S. at 860 (Stevens, J., dissenting). That is not true. Since *Slaughter-House*, the only cases to enforce the Privileges or Immunities Clause have been *Colgate v. Harvey*, 296 U.S. 404 (1935), which was overruled in *Madden v. Kentucky*, 309 U.S. 83 (1940), and *Saenz v. Roe*, 526 U.S. 489 (1999), which Justice Stevens wrote. That is the *entirety* of the "137 years of precedent" that would be "dislodge[d]" if *Slaughter-House* were revisited.

crown jewel. It should never have been shorn of its efficacy by construction.

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

ILYA SHAPIRO
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@
manhattan-institute.org

TIMOTHY SANDEFUR*
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL
LITIGATION AT THE
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@
goldwaterinstitute.org

**Counsel of Record*