No. 22-1208

In The Supreme Court of the United States

URSULA NEWELL-DAVIS; SIVAD HOME AND COMMUNITY SERVICES, LLC,

Petitioners,

v.

COURTNEY N. PHILLIPS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH, ET AL.,

Respondents.

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

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the state may deny equal protection of the laws and exclude people from a lawful trade for the sole purpose of "conserving administrative resources."

2. Whether the Court should overrule *The Slaughter-House Cases*, 82 U.S. (16 Wall.) 36 (1873), and recognize a right to engage in a common occupation as a privilege or immunity protected by the Fourteenth Amendment.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a public policy foundation devoted to 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 right to earn a living, particularly against "Certificate of Need" (CON) or "Facility Need Review" laws such as those challenged here. *See*, *e.g.*, *Women's Surgical Center, LLC v. Berry*, 806 S.E.2d 606 (Ga. 2017); *Singleton v. N.C. Dep't of Health & Hum. Servs.*, No. COA 21-558 (N.C. App., pending); *McDonald v. Chicago*, 561 U.S. 742 (2010).

GI scholars have also published extensively on the right to earn a living, and how CON laws violate this right. *See*, *e.g.*, Flatten, *CON Job: Certificate of Need Laws Used to Delay, Deny Expansion of Mental Health Options* (Goldwater Institute, Sept. 25, 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*

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[1] Pursuant to Rule 37, counsel for amicus affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than amicus, its members, or counsel, made any monetary contribution to its preparation or submission. All parties received notice of amicus' intention to file at least ten days before the due date.

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

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

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This Court has set forth two overlapping tests for determining whether a right is "fundamental" for purposes of due process of law: the historical test and the conceptual test. The historical test asks whether the right is "'deeply rooted in this Nation's history and tradition,'" while the conceptual test asks whether the right is "'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). The right to earn a living—to put one's skills and education to work in providing for oneself and one's family—qualifies under either test.

In fact, this right is so deeply rooted in this nation's history and fundamental principles that it has come to be called "the American Dream."

As for *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the time has come for this Court to confront the error of that decision. It was wrong when decided, and it remains a blot on this Court's record.

REASONS FOR GRANTING THE PETITION

I. The right to earn a living is deeply rooted in this nation's history and tradition and necessary to any system of ordered liberty.

A. The right to earn a living is historically rooted in American legal tradition.

Legal recognition of the right to earn a living free from unreasonable government interference dates back at least to the 1377 case of John Peachie, who obtained a royal monopoly on the sale of wine in London, for which—according to Lord Coke—he was "severely punished." 3 E. Coke, *Institutes* *181. But it was in the early seventeenth century that English courts began vigorously protecting this right as one of the freedoms protected by Magna Carta's "law of the land" clause. *See*, *e.g.*, *The Case of Monopolies*, 77 Eng. Rep. 1260 (K.B. 1603).

In case after case, courts declared it unlawful for the government to give exclusive commercial privileges to particular businesses—that is, to prohibit economic competition against them—although the government could limit entry into a trade to protect public health and safety. *See*, *e.g.*, *Weaver of Newbury's Case*, 72 Eng. Rep. 962 (K.B. 1616); *The Ipswich Tailors' Case*, 77 Eng. Rep. 1218 (K.B. 1615); *Case of the Bricklayers, etc.*, 81 Eng. Rep. 871 (K.B. 1624).

Coke, the era's foremost legal thinker, and the principal source of the American Founding Fathers' own legal education, said the "monopolizer . . . engrosseth to himself what should be free for all men"—

that is, the right to earn a living. 3 *The Selected Writings of Sir Edward Coke* 1201 (Sheppard ed., 2003). And he became the leading champion of this right. His legal rulings repeatedly invalidated many government-created monopolies, and after King James removed him from the bench, he entered Parliament, where he drafted the Statute of Monopolies, 21 Jac. 1 c.3 (1623). Except for patents, it forbade the government from outlawing economic competition. Finally, in retirement, he wrote the *Institutes*, where he repeatedly made clear that "monopolies are against [Magna Carta]," because "if a grant be made to any man to have . . . the sole dealing in any . . . trade, that grant is against the liberty and freedom of the subject that before did, or lawfully might have used that trade." 2 E. Coke, *Institutes* *47 (spelling modernized).

Licensing laws or their equivalent—i.e., permission from an established "guild"—were that era's principal means of creating such monopolies. Thus, in *The Case of the Upholsterers*, 80 Eng. Rep. 1055 (K.B. 1614), the court declared invalid an effort by the upholsterer's guild to bar a person from practicing upholstery without permission. As always, the argument in favor of the restriction was that it somehow protected public safety. But the court recognized that as a pretext for the restriction's true purpose: restricting competition. While government could regulate businesses to protect public safety, the court said, it could not use that rationale as an excuse merely to restrict trade:

> [B]y the very common law, it was lawful for any man to use any trade thereby to maintain

> himself and his family; this was both lawful, and also very commendable, but yet by the common law, if a man will take upon him to use any trade, in the which he hath no skill; the law provides a punishment for such offenders, and such persons were to be punished.

Id. at 1055. Or, as *The City of London's Case* put it, government could restrict entry into a trade "for the increase and advancement of trade and merchandise, *and not for the hindrance or diminution of it*." 77 Eng. Rep. 658, 663 (K.B. 1610) (emphasis added).

The difference between legitimate regulation and illegitimate monopoly is that the former protects the public from genuine harm, while the latter restricts competition for the benefit of existing firms. (Modern antitrust law employs something like the same principle: courts routinely determine whether *private* entities' activities are lawful by asking whether they "serve legitimate business interests" or merely function as "restraints of trade." *See*, *e.g.*, *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2162–63 (2021)).

The seventeenth-century English principle of the right to earn a living was implemented in the colonies perhaps even more than in the mother country, given that there was no guild system here. Massachusetts Bay Colony declared economic freedom to be among its legally protected "liberties" in 1641, pronouncing that "no monopolies shall be granted or allowed amongst us" except temporary patents. Conant, *Antimonopoly*

Tradition Under the Ninth and Fourteenth Amendments, 31 Emory L.J. 785, 797 (1982) (marks and citation omitted).

The founders shared that understanding. Everybody, wrote Thomas Jefferson, "has a natural right to choose for his pursuit such [trade] as he thinks most likely to furnish him subsistence." *Thoughts on Lotteries, in* 17 *Writings of Thomas Jefferson* 449 (Bergh ed., 1903). Madison wrote that a government under which "arbitrary restrictions, exemptions, and monopolies deny to part of its citizens [the] free use of their faculties, and free choice of their occupations," is "not a just government." *Property* (1792), *in Madison: Writings* 516 (Jack Rakove ed., 1999).

Indeed, one of the principal causes of the Revolution was the British government's imposition of restrictions that barred people from engaging in business—not to protect public safety, but to enrich British-based companies by restricting competition. For example, British law forbade colonists from making hats out of furs, or consumer goods out of iron; they had to send raw materials to England to be made into consumer goods, which were then shipped back for resale. Jefferson and Benjamin Franklin denounced this because, in Franklin's words, "[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." *Causes of the American Discontents Before 1768* (1768), *in Franklin: Writings* 613 (Lemay ed., 1987); *see also* Jefferson, *A Summary View of the Rights of British America* (1774) *in Jefferson: Writings* 110 (Peterson

ed., 1984) (protesting against trade restrictions that existed "for the purpose of supporting not men, but machines, in the island of Great Britain").

This economic freedom was central to what the Founders meant by the right "to pursue happiness," Declaration of Independence, 1 Stat. 1 (1776). *See also* Va. Dec. of Rights § 1 (protecting "the enjoyment of life and liberty, with *the means of acquiring* and possessing property, *and pursuing and obtaining* happiness and safety" (emphasis added)). And by the time the Constitution was written, the principle that one had the right to engage in a lawful trade, and that government could regulate it only to protect public safety, but not to restrict competition for the benefit of existing businesses, was already deeply rooted in the nation's history and tradition. *See* Conant, *supra* at 806 ("The antimonopoly tradition of the English Constitution . . . was a significant element of American constitutional heritage.").

When Justice Patterson said in *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795), that people have the right to engage in "honest labour and industry," and when Justice Washington said the same thing in *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823), they were invoking a legal tradition that was already centuries old. *See further* Calabresi & Leibowitz, *Monopolies and the Constitution*, 36 Harv. J.L. & Pub. Pol'y 983, 983–1067 (2013) (detailing history of legal right to economic freedom); Mayer, *Liberty of Contract: Rediscovering a Lost Constitutional Right* 11–19 (2011) (same).

The idea that the "privileges and immunities" of citizenship include legal protections for "the right to acquire and possess property" and "to pursue and obtain happiness and safety," subject only to "such restraints as the government may justly prescribe for the general good of the whole" remained commonplace throughout the nineteenth century. *Corfield*, 6 F. Cas. at 551–52.[3] Courts (imperfectly) protected this right in the years before the Civil War, although the cases typically arose in state courts, given that the Fourteenth Amendment had not yet enshrined the right in the federal Constitution. *See* Calabresi & Leibowitz, *supra*, at 1067–81.

After that Amendment was ratified, the very first case in which this Court interpreted it—*Slaughter-House*—involved a government-created monopoly that drove hundreds of butchers out of business. Although this Court upheld that monopoly, it never denied that the right to earn a living was deeply rooted in American history and tradition. On the contrary, in the decades that followed, this Court called that right the "distinguishing feature of our republican institutions." *Dent v. West Virginia*, 129 U.S. 114, 121 (1889), and gave it meaningful, if inconsistent, protection.

Economic freedom—and consequently the rate of social and technological progress—are typically believed to have reached their zenith at this period. Yet

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[3] *Corfield* was, of course, the primary source relied upon by framers of the Fourteenth Amendment's Privileges or Immunities Clause. *See McDonald v. City of Chicago*, 561 U.S. 742, 819–20 (2010) (Thomas, J., concurring).

governments still frequently interfered with the right to earn a living. The Michigan Supreme Court said so in *Chaddock v. Day*, 42 N.W. 977, 978 (1889), when striking down an ordinance that prohibited people from selling fresh meat in certain quantities from mobile carts, but allowed identical sales in storefronts. The ordinance did not protect public health, because it allowed the same meat to be sold in stores that was prohibited in carts, and made "no reference whatever to the character or condition of the meat sold." *Id.* Thus, it "increase[d] the price of fresh meat to the consumer, while it could serve no useful or beneficial purpose," and consequently violated the Due Process of Law Clause. *Id.*

"It is quite common," said the court, "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." Such laws "seldom benefit[] the general public," it noted, "but nearly always aid[] the few for whose benefit [they are] enacted . . . at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised." *Id.* Such legislation "should receive no encouragement at the hands of the courts," the justices concluded, "and [should] only [be] upheld when it is strictly within the legitimate power of congress, or the state or municipal legislatures." *Id.*

Despite the nineteenth century's reputation as an era of *laissez-faire*, government actually found many

ways to restrict economic liberty in order to keep disfavored minorities subservient—often by pretending these laws were "helping" those regarded as weak. Frederick Douglass remarked upon this when General Nathaniel Banks issued an order requiring former slaves in New Orleans to get his permission before accepting employment—in order, Banks claimed, to "prepare the negro for as perfect an independence as that enjoyed by any other class." *See What the Black Man Wants* (1865), 4 *The Life and Writings of Frederick Douglass* 544 n.1 (Foner ed., 1955). Douglass called this a betrayal of the freedom for which the Union had fought. "What is freedom?" he demanded. "It is the right to choose one's own employment . . . and when any individual or combination of individuals undertakes to decide for any man when he shall work, where he shall work, at what he shall work, and for what he shall work, he or they practically reduce him to slavery." *Id.* at 158.

Likewise, states frequently deprived women of the right to earn a living, ostensibly for their own good. This Court, unfortunately, allowed this in cases such as *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), and *Muller v. Oregon*, 208 U.S. 412 (1908). As Justice Ginsburg observed, such cases upheld laws that deprived women of economic liberty "to shield or favor the sex regarded as fairer, but weaker, and dependent-prone." *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 Hofstra L. Rev. 263, 269–70 (1997). Laws restricting economic liberty

"were premised on the notion that women could not cope with the world beyond hearth and home without a father, husband, or big brother to guide them." *Id.*

Decisions like *Bradwell* and *Muller* violated the principle that government may restrict entry into business *only* to prevent public harm—*not* to promote private interests. *Dent*, the first case in which this Court addressed the constitutionality of occupational licensing laws, allowed them, but only "to secure [consumers] against the consequences of ignorance and incapacity, as well as of deception and fraud." 129 U.S. at 122. If states imposed licensing criteria that were not "appropriate to the calling or profession, [or] attainable by reasonable study or application," those restrictions would be unconstitutional. *Id.*

Between *Dent* and the invention of "rational basis" review,[4] courts usually applied meaningful scrutiny to protect economic liberty—a right the Court called "the

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[4] In *Nebbia v. New York*, 291 U.S. 502, 537 (1934). It's notable that those who championed *Nebbia*'s reduction of protections for economic liberty acknowledged at the time that they were seeking to *break with tradition*, and with the economic freedom that they *conceded* was "deeply rooted" in that tradition. John Dewey, for example, argued that the 1930s marked a new wave of liberalism—while acknowledging that the "earlier liberal philosophy" which had generated the Constitution placed a high value on the "freedom of economic enterprise." *The Future of Liberalism*, 32 J. Phil. 225, 225 (1935). President Roosevelt's allegation that the pre-1937 Court was stuck in a "horse and buggy" mindset was also an implicit concession that legal protections for economic freedom were deeply rooted in constitutional history and tradition. Shesol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* 149 (2010).

very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915). Even after the advent of rational basis, that principle has remained in place. In *Schware v. Bd. of Exam'rs*, 353 U.S. 232 (1957), the Court was relying on plenty of legal history when it barred states from restricting entry into professions for reasons unrelated to protecting consumers. *Even under rational basis*, the Court said, licensing laws "must have a rational connection with the applicant's fitness or capacity to practice" the profession in order to be constitutional. *Id.* at 239.

Aside from history, economic freedom is also deeply rooted in America's *cultural* conception of liberty. Popular culture has celebrated "self-made" entrepreneurs at least since the days of Franklin's *Autobiography*, which for generations served as a sort of cultural bible of entrepreneurialism. *See generally* Huang, *Benjamin Franklin in American Thought and Culture 1790–1990* (1994). Frederick Douglass's autobiography celebrated economic liberty, too. Describing his first job after escaping freedom, he related that "the emotion which swelled my heart" after earning his first pay, "realizing that I had no master who could take it from me—*that it was mine—that my hands were my own*, and could earn more of the precious coin," were indescribably joyful. *The Life and Times of Frederick Douglass* (1893) *reprinted in Douglass: Autobiographies* 654 (Gates ed., 1994).

When historian James Truslow Adams coined the phrase "American Dream" in *The Epic of America*

(1931), he defined it as including people's desire to "better their condition . . . in the social and economic scale" through "the exercise of [their] talents and ambition." *Id.* at 36. Since before the founding, he wrote, people have come to America seeking "a civilization . . . in which they would each be freer, richer, and more independent." *Id.* at 37–38.

Today, almost a century later, "the American Dream" is still associated with freedom of economic opportunity. President Obama observed in 2013 that laws that deprive people of the right to "fully participate in the economy . . . pose a fundamental threat to the American Dream, our way of life, and what we stand for around the globe." Remarks by the President on Economic Mobility (Dec. 4, 2013).[5] Two years later, his Administration published a report decrying the ways in which "licensing requirements raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across State lines." Dept. of Treasury Office of Econ. Policy, *Occupational Licensing: A Framework for Policymakers* 3 (July 2015).[6]

In *Barsky v. Bd. of Regents*, 347 U.S. 442 (1954), Justice Douglas called "[t]he right to work" the "most precious liberty that man possesses," and a central "American ideal," because "[t]he great values of

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[5] https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/remarks-president-economic-mobility.

[6] https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man." *Id.* at 472 (Douglas, J., dissenting). He spoke from a foundation deeply rooted in this nation's history and tradition.

B. The right to earn a living is conceptually inherent in political liberty.

The right to earn a living also passes the conceptual test for fundamentality: whether the right is "'implicit in the concept of ordered liberty.'" *Glucksberg*, 521 U.S. at 721 (citation omitted). The basic premise of freedom is that every person is fundamentally a self-owner, responsible for her own survival and success. And if a person owns her faculties, she necessarily has the right to engage in voluntary transactions with others, including the right to exchange her labor for pay. Thus, individual rights *must* include the right to make economic decisions for oneself, no less than the right to make one's own decisions about travel, whom to vote for, what opinions to express, what books to read, etc.

It's impossible to imagine a "scheme of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), 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 in such places as the Soviet Union, North Korea, or 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 the 1930s, the USSR effectively outlawed the sale of goods "with the intention of profiting." Hessler, *A Social History of Soviet Trade* 263 (2004). This effectively prohibited all economic transactions—resulting in mass arrests.[7] Only the fact that it was haphazardly and arbitrarily enforced prevented total social collapse. *Id.* at 264–65.

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

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[7] 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 (Chandler, trans. 2009).

II. *Slaughter-House* is indefensible and its reckoning is long overdue.

The historical record is clear that the Privileges or Immunities Clause was intended to be the centerpiece of the Fourteenth Amendment—its primary source of legal protection for individual rights. Those rights had, in the eyes of the antislavery leaders who drafted the Amendment, been unconstitutionally disregarded and overridden by states for decades before the Civil War, and it was the drafters' intention to rectify those abuses by providing a permanent federal safeguard for the fundamental rights of all citizens against state interference.

Before the Amendment was adopted, antislavery thinkers argued that the Privileges and Immunities Clause of Article IV prohibited states from depriving Americans of their rights. Lawyer Joel Tiffany, for example, made this the centerpiece of his argument, in his *Treatise on the Unconstitutionality of American Slavery* (1849), that slavery was already unconstitutional. He said the Article IV Clause implicitly recognized two kinds of citizenship—federal and state—and that no state could justly override the rights of federal citizenship, which included the right to liberty. *See id.* at 84–97. Tiffany further argued that black Americans, including those then enslaved, were American citizens—nothing in the Constitution said otherwise—and thus states practicing slavery were violating the Article IV Clause. *See id.* at 88–93. Many abolitionists agreed. *See*, *e.g.*, Spooner, *The Unconstitutionality of Slavery* 51–54, 90–94 (1847); Douglass, *The*

Constitution of the United States: Is It Pro-Slavery or Anti-Slavery? (1860) *in* 2 *Life and Writings*, *supra* at 467.

More moderate antislavery thinkers such as Abraham Lincoln and Salmon Chase regarded that view as extreme, but southern defenders of slavery endorsed an equally extreme theory: that states practicing racial oppression could not be accused of violating the Article IV Clause because there was no such thing as federal citizenship *at all*. John C. Calhoun, for example, proclaimed that the term "citizen of the United States" was "a perfect nondescript." *See* Speech on the Revenue Collection Bill (1833), *in* 2 *Works of John C. Calhoun* 242 (Crallé ed., 1883).

The Constitution's text failed to resolve this dispute, because it did not then define the word "citizen." Instead, federal citizenship was regarded as a function of one's state citizenship—and because states had different qualifications for citizenship, the stage was set for constitutional crises. Perhaps the most dramatic involved South Carolina's Negro Seaman's Act, which required that all black sailors on ships landing in South Carolina ports be jailed until the ship departed. *See* Sandefur, *The Conscience of the Constitution* 45–47 (2014). Black residents of Massachusetts could be citizens of Massachusetts, and, consequently, citizens of the United States—but black South Carolinians could not be citizens of that state, and thus could not be *federal* citizens there. Massachusetts, accusing South Carolina of violating the Article IV Clause with respect to Massachusetts sailors jailed there, sent delegate

Samuel Hoar to Columbia to complain in person. South Carolina officials expelled him from the state. *See id.* Of course, the dispute over citizenship was "settled" by *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which held that black Americans were not and could not be federal citizens.

In the wake of the Civil War, when Congress—unimpeded by representatives from Confederate states—drafted the Fourteenth Amendment, their aim was not so much to *change* the Constitution as to *rescue it* from misinterpretations foisted upon it by such pro-slavery rulings as *Dred Scott*. *See generally* tenBroek, *Equal Under Law* 201–33 (rev. ed. 1969). They saw themselves as restoring the Constitution's proper understanding, more than altering its nature. They clarified that native-born Americans of all races are citizens, and that their federal citizenship includes protections for basic rights against state interference. This undid *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and unambiguously protected the rights recognized by federal law—including natural rights—against state government. *See* Curtis, *No State Shall Abridge* 173–74 (1986); Barnett & Bernick, *The Original Meaning of the 14th Amendment* 61–155 (2021).

> As Justice Field later remarked, the Clause
>
> > recognized, if it did not create, a National citizenship . . . and declared that their privileges and immunities, which embrace the fundamental rights belonging to citizens of all free governments, should not be abridged by any State. This National citizenship . . . clothes its

> possessor, or would do so if not shorn of its efficiency [sic] by [*Slaughter-House*], with the right, when his privileges and immunities are invaded by partial and discriminating legislation, to appeal from his State to his Nation.

Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 140–41 (1873) (Field, J., concurring).

Some, however, insolently refused to implement that new protection. Among these was California's Supreme Court. In *People v. Brady*, 40 Cal. 198 (1870), a litigant relied on the new Clause to challenge the constitutionality of a state law that prohibited Chinese people from testifying against whites in trials. The court rejected that argument, likening federal protections for civil rights against state legislation to "law[s] apparently legalizing murder or robbery," and concluding that the court, even if persuaded that this was the Clause's actual meaning, would still "be diligent to find out some construction" to avoid that outcome. *Id.* at 220.

The *Slaughter-House* Court was equally "diligent" in neutering the Clause. When it posed the rhetorical question, "[w]as it the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?" 83 U.S. (16 Wall.) at 77, the correct answer was *yes*—but the Court answered no.

Slaughter-House made many obvious errors. It rendered the Privileges or Immunities Clause

effectively redundant of the Supremacy Clause—by holding that a state only violates the former when it interferes with rights already secured by the latter, such as habeas corpus or the right to use waters of the United States.[8] *See id.* at 79. It almost entirely ignored history—history Justice Field's dissent mustered in detail. It essentially erased the Clause from the Constitution, not because that was the correct interpretation, but to achieve a preferred policy outcome: the Court did not want to become what it called "a perpetual censor" with responsibility for protecting "the civil rights of [states'] own citizens." *Id.* at 78.

Little wonder, then, that scholars from across the ideological spectrum agree that "the Clause does not mean what the Court said it meant in [*Slaughter-House*]." *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting) (collecting authorities). And little wonder that in *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010), **no justice on this Court made any effort to defend the correctness of the *Slaughter-House* decision**. Instead, the Court declined to address the issue, relying on *stare decisis*.

Yet if any precedent fails the *stare decisis* test, it's *Slaughter-House*. That case "was egregiously wrong from the start." *Dobbs*, 142 S. Ct. at 2243. "Its reasoning was exceptionally weak." *Id.* It had "damaging consequences," *id.*—notably abdicating this Court's

[8] Actually, lower courts have even refused to use the Clause to protect the right to use navigable waters. *See Courtney v. Danner*, 801 F. App'x 558 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1054 (2021).

responsibility to guarantee civil rights, and voiding legal securities that were supposed to prevent Confederate revanchism. *See*, *e.g.*, Lane, *The Day Freedom Died* (2008) (describing how *Slaughter-House* and its progeny let southern states effectively reinstate slavery). And, if it's true that "when it comes to the interpretation of the Constitution," courts should "place a high value on having the matter 'settled right' " than on adhering to precedent, *Dobbs*, 142 S. Ct. at 2262, there's no excuse for keeping *Slaughter-House* on the books.

III. This Court should no longer delay addressing these questions.

The question of the constitutional status of the right to earn a living has bedeviled the Courts of Appeals for at least two decades now. The underlying issue—the degree to which this right is protected by the Fourteenth Amendment's guarantee of "liberty"—is obviously older than that, but the circuits have struggled with one particular aspect of it since the conflicting opinions in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), and *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), were announced.

Those cases diverged on the question of whether economic protectionism—that is, making it illegal to compete against a particular business or group of businesses—is a legitimate interest under the Fourteenth Amendment. Since then, the divisions have only worsened, to the point that Judge Ho recently (and vainly) reiterated the now-widespread request that this Court

take up the matter. *See Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 981 (5th Cir. 2022) (Ho, J., concurring). That question is at the core of this case, and it's time to address it.

Craigmiles is typical of these cases. It concerned an occupational licensing law which required a person to become a licensed funeral director before making or selling coffins. To obtain such a license required extensive (and expensive) training in such things as embalming. *See generally* Sandefur, *The Right to Earn a Living* 150–52 (2010). Yet coffin-sellers do not officiate at funerals or handle corpses, and the plaintiff only wanted to "sell a box." *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 663 (E.D. Tenn. 2000). He argued that requiring him to undergo extensive training in unnecessary skills failed rational basis review.

The Sixth Circuit agreed. Taking a realistic, rather than a formalistic, view, it said the law had no connection to public health or safety. Instead, its "obvious illegitimate purpose" was to "impose[] a significant barrier to competition," for the benefit of those companies lucky enough to already have funeral director licenses. 312 F.3d at 228. But, the court said, a "naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers" is not a *public* purpose. *Id.* at 229. In keeping with four centuries of Anglo-American legal tradition, it held that the government can regulate economic transactions for the *public* welfare, but not for the private benefit of those wielding political power: "[P]rotecting a

discrete interest group from economic competition is not a legitimate governmental purpose." *Id.* at 224.

Only days later, however, an Oklahoma District Court upheld an almost identical law in *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002), and the Tenth Circuit affirmed, 379 F.3d 1208 (10th Cir. 2004). In direct conflict with the Sixth Circuit, the Tenth Circuit held that "economic protectionism constitutes a legitimate state interest." *Id.* at 1221. In other words, state legislatures have no obligation to pursue *even an arguable* public interest, but may restrict competition for the express purpose of enriching private interest groups who have wielded political power to obtain what they want.

Notwithstanding the circuit split, this Court denied certiorari. 544 U.S. 920 (2005).

Then, in *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008), the Ninth Circuit deepened the split, siding with the Sixth Circuit and holding that "economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest." And in *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013), the Fifth Circuit also agreed with *Craigmiles* that the government must regulate in the public interest—in at least *some* sense—rather than merely prohibiting competition to benefit those who have the required government licenses (i.e., government permission) to work.

This Court again denied certiorari. 571 U.S. 952 (2013).

Then, in *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015), the Second Circuit broadened the split by rejecting *Craigmiles* and agreeing with *Powers* that "economic favoritism" satisfies rational basis review.

Yet again, this Court denied certiorari. 577 U.S. 1137 (2016).

Then, in *Birchansky v. Clabaugh*, 955 F.3d 751, 757 (8th Cir. 2020), the Eighth Circuit held that "insulating existing entities from new competition" is constitutional if done "to promote quality services and protect infrastructural investment"—a rationale that would entitle the government to prohibit all competition against any existing business, simply because the latter already exists. And in *Tiwari v. Friedlander*, 26 F.4th 355 (6th Cir. 2022), the Sixth Circuit reiterated its view from *Craigmiles* that "[a] law that serves protectionist ends and nothing else . . . does not satisfy rational-basis review," but added that if "a legislator plausibly could think" that banning new competition will enable existing businesses to "maintain financial viability," then it would be constitutional . . . even though the latter is true of *every* law banning competition. *Id.* at 367–68.

Still, this Court denied certiorari. 143 S. Ct. 444 (2022).

Lower courts have repeatedly asked for clarification about how rational basis review works and the proper means of judicially protecting the individual's right to make her own economic choices. In *Hettinga v. United States*, 677 F.3d 471 (D.C. Cir. 2012), for example, Judges Brown and Sentelle decried rational basis review because its "practical effect" is to eliminate "any check on the group interests that all too often control the democratic process." *Id*. at 482–83 (Brown, J., concurring).

Yet this Court again denied certiorari. 568 U.S. 1088 (2013).

And this past October, Judge Ho urged this Court to address the nature of "the right to earn a living," which, he said, "despite its deep roots in our Nation's history and tradition," has never been labeled "fundamental" by this Court. *Golden Glow*, 52 F.4th at 981 (Ho, J., concurring).

And yet this Court denied certiorari again. 143 S. Ct. 1085 (2023).

It's past time for this Court to address these questions.

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

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