No. 22-1208

IN THE
Supreme Court of the United States

URSULA NEWELL-DAVIS; SIVAD HOME AND COMMUNITY SERVICES, L.L.C.,

Petitioners,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE PROFESSOR STEVEN G. CALABRESI, PROFESSOR CHRISTOPHER R. GREEN, CARDINAL INSTITUTE FOR WEST VIRGINIA POLICY, THE GEORGIA PUBLIC POLICY FOUNDATION, AND THE PALMETTO PROMISE INSTITUTE SUPPORTING PETITIONERS

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QUESTION PRESENTED

This brief addresses the original meaning of the Fourteenth Amendment's requirement of equal citizenship in the context of limits on occupational freedom, using traditional multiple-beneficiaries trust law and moden arbitrary-and-capricious administrative law as a model to replace the approval of hypothetical interests in *Williamson v. Lee Optical*, 348 U.S. 483 (1955), and *McGowan v. Maryland*, 366 U.S. 420 (1961).

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INTEREST OF AMICI

Two of the amici[1] are scholars of the original meaning of the Reconstruction Amendments, especially the the Fourteenth Amendment's requirement of equal citizenship. Members of this Court have cited their work in the past. See, e.g., *United States v. Vaello-Madero*, 142 S.Ct. 1539, 1544-52 (2022) (Thomas, J., concurring) (proposing a move to equal citizenship as the basis for antidiscrimination law and citing Professors Calabresi and Green). The other three amici—the Cardinal Institute for West Virginia Policy, the the Georgia Public Policy Foundation, and the Palmetto Promise Institute—promote entrepreneurial liberty in West Virginia, Georgia, and South Carolina.

SUMMARY OF ARGUMENT

Republicans' core objective in the Civil Rights Act of 1866 and the Fourteenth Amendment was equal occupational freedom for all American citizens. Freedmen's equal right to "make contracts" was the very first right in their list. Civil Rights Act of 1866, 14 Stat. 27, 27. Republicans repeatedly involked the right to "acquire and possess property of every kind" and to engage in "trade" and "professional pursuits" as core rights of citizens. *Corfield v. Coryell*, 6 Fed. Cas. 546, 551, 552 (1825). Of course, even in a world of equal citizens, freedom of enterprise is "subject

[1] Pursuant to this Court's Rule 37.6, counsel for amici curiae certify that this brief was not authored in whole or in part by counsel for any party and that no one other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

nevertheless to such restraints as the government may justly prescribe for the general good of the whole." *Id*. A citizen of a state is a "component part of the people for whose welfare and happiness government is ordained." *Civil Rights Cases*, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting). If states' duty to serve all citizens' interests were modeled on fiduciary law, then all citizens' interests, like multiple beneficiaries' interests, would be entitled to the state's "fair and impartial attention." Lewin, A Practical Treatise on the Law of Trusts and Trustees 414 (1857). Because the law of multiple beneficiaries has long required a "good reason" for departures from equal treatment, *Astry v. Astry*, 24 Eng. Rep. 124, 124 (1706), cases on arbitrary and capricious action like *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), and *Motor Vehicle Manufacturers v. State Farm*, 463 U.S. 29, 43, 52 (1983), offer a better model for assessing Fourteenth Amendment arbitrariness than *Williamson v. Lee Optical*, 348 U.S. 483 (1955), and *McGowan v. Maryland*, 366 U.S. 420 (1961). In particular, the "simple but fundamental rule of administrative law" that courts "must judge the propriety of such action solely by the grounds invoked by the agency," *Calcutt v. FDIC*, 143 S.Ct. 1317, 1318 (2023), should replace this Court's approval of whatever "might be thought … rational," *Williamson*, 348 U.S. at 488, or of whatever "any state of facts reasonably may be conceived to justify," *McGowan*, 366 U.S. at 426. The history of modern administrative law rebuts any fear that this would produce chaos.

Lowering supply and raising prices always helps *some* citizens—current sellers—and thus has a "rational basis" of one sort. But this Court should require the state to explain why current providers matter more than citizens who benefit from *higher* supply and *lower* prices: i.e., consumers and potential competitors like the plaintiffs here. For goods like tobacco or narcotics that may risk addiction, there is obviously a strong argument that lower production and higher prices really do serve the general good. But not for respite care.

ARGUMENT

I. The Fourteenth Amendment secures equal civil rights, including equal occupational rights, for all citizens.

Beginning most prominently with John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992), and as recognized by Justice Thomas in his concurrences in *United States v. Vaello Madero*, 142 S.Ct. 1539, 1544-52 (2022), and *SFFA v. Harvard*, 2023 WL 4239254, *24-*33, recent academic work has argued that the Privileges or Immunities Clause and its associated citizenship declarations, not the Equal Protection Clause, were the vehicle for constitutionalizing the Civil Rights Act of 1866. Just as Article IV guarantees American citizens civil rights equal to the rights of all similarly-situated citizens when visiting other states, free from the restrictions characteristic of alienage, the

Privileges or Immunities Clause protects citizens of the United States more generally.[2]

On March 27, 1866, in his veto of the Civil Rights Act, President Johnson asked regarding the freedmen whether "it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?" Cong. Globe, 39th Cong. 1st Sess. 1679 (1866). The nation answered yes, beginning with the Republicans' override of Johnson's veto on April 9 and in John Bingham's proposal of the Privileges or Immunities Clause—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"—to the Joint Committee on Reconstruction on April 21.

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[2] For other work focusing on equal citizenship as the basis for Fourteenth Amendment equality, see Barnett & Bernick, The Original Meaning of the Fourteenth Amendment 117-155 (2021); Green, Equal Citizenship, Civil Rights, and the Constitution (2015); Calabresi & Leibowitz, Monopolies and the Constitution: A History of Crony Capitalism, 36 Harv. J. L. & Pub. Pol'y 983 (2012); Upham, Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause, 42 Hastings Const. L. Q. 213 (2015); Wurman, The Second Founding: An Introduction to The Fourteenth Amendment 93-103 (2021); and Lash, The State Citizenship Clause, U. Pa. J. Const. L. (forthcoming 2023), https://ssrn.com/paper=4196204.

For an explanation of the more limited scope of "protection of the laws," see Green, The Original Sense of the (Equal) Protection Clause: Pre-Enactment History, 19 Geo. Mason U. Civ. Rights L. J. 1 (2008); and Green, The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application, 19 Geo. Mason U. Civ. Rights L. J. 219 (2009).

When the Clause was unveiled, the press described the amendment as "intended to secure to all citizens of the United States, including the colored population, the same privileges and immunities." Raleigh, N.C., Tri-Weekly Standard, May 3, 1866, at 2. Representative Henry Raymond said that Section One "secures an equality of rights among all the citizens of the United States." Cong. Globe, 39th Cong. 1st Sess. 2502 (1866). Senator John Conness said that to be "treated as citizens of the United States" is to be "entitled to equal civil rights with other citizens of the United States." *Id*. at 2891. Speaker of the House Schuyler Colfax said that the Civil Rights Act's requirement of equality "specifically and directly declares what the rights of a citizen of the United States are." Cincinnati Commercial, Speeches Of The Campaign Of 1866, at 14 (1866). Benjamin Butler said that the Privileges or Immunities Clause would require "that every citizen of the United States should have equal rights with every other citizen of the United States, in every State." *Id*. at 41. William Dennison summarized the Privileges or Immunities Clause: "[T]he colored man shall have all the personal rights, all the property rights, all the civil rights of any other citizen of the United States." *Id*. at 44.[3]

Governors throughout the Union characterized the Privileges or Immunities Clause, or all of Section 1, as a guaranty of equal civil rights: "equal rights and impartial liberty" (Vermont), "equality of right" between the freedmen and white citizens (New York), "equal liberty of all [the Union's] citizens in every

[3] For much, much more, see the work cited above in note 2.

State in the Union" (Illinois), for "all citizens of the United States equal civil rights" (Minnesota); "equality before the law" (Wisconsin), "civil equality before the law" (Massachusetts with specific reference to the Privileges or Immunities Clause), and "'equality before the law' for all citizens" (California). Pennsylvania's governor explained that Section 1 would secure "to all classes the benefit of American civilization" such that "all persons, of whatever class, condition, or color should be equal in civil rights before the law." Wisconsin's governor advocated an amendment that would protect "the sacred natural rights of the humblest citizen, whatever may be that citizens' creed or color," including the freedom to make and enforce contracts, and "to pursue any and all avocations for which he is qualified." Reams & Wilson, Segregation and the Fourteenth Amendment in the States 35, 273, 409, 677, 715 (1975); Reports Made to the General Assembly of Illinois 30 (1867); Amercan Annual Cyclopedia 518 (1866); Egle, Life and Times of Andrew Gregg Curtin 194 (1896); Thwaites, ed., Civil War Messages and Proclamations of Wisconsin War Governors 266 (1912).

Chief among these civil rights were economic liberties such as the right to "to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise," "to make and enforce contracts" and "to inherit, purchase, lease, sell, hold, and convey real and personal property," and immunity from discriminatory taxation ("exemption from higher taxes or impositions than are paid

by the other citizens of the State").[4] Or as Senator John Henderson elaborated, the rights of citizens include "the right to acquire property, to enter the courts for its protection, to follow the professions, [and] to accumulate wealth." *Id.* at 3035. Hence a central purpose of Section 1, and the Privileges or Immunities Clause and its citizenship declarations in particular, were to secure to all Americans the equal enjoyment of these entrepreneurial rights.

At least some opponents and supporters of the Fourteenth Amendment affirmed that it would prohibit the retroactive occupational limits imposed in some states against the former secessionists. Just after Congress approved the Amendment, one newspaper taunted that "it is a nice question for Missouri and Tennessee radicals to decide, how, under this amendment, they could make their test oath work with [the Privileges or Immunities Clause]." *Constitutional Amendment*, The Weekly Caucasian, June 20, 1866, at 2. The Supreme Court struck down such limits in *Cummings v. Missouri*, 71 U.S. 277 (1867), and *Ex Parte Garland*, 71 U.S. 333 (1867), while states were ratifying the Fourteenth Amendment. Senator Matthew Carpenter appealed at length to *Cummings* and *Garland* in explaining the Privileges or Immunities Clause in February 1872, calling

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[4] These rights are listed in either the Civil Rights Act of 1866, 14 Stat. 27, or *Corfield v. Coryell*, 6 F.Cas. 546 (E.D. Pa. 1825), as quoted by Senator Howard and many others. See Cong. Globe, 39th Cong. 1st Sess. 474-75, 1117-18, 1835, 2765 (1866). This Court recognized the importance of *Corfield* to the Privileges or Immunities Clause in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2248 n.22 (2022).

Cummings the "best definition I know" for the privileges of citizens of the United States. While *Cummings* merely described such rights in explaining the baseline for punishment, Senator Carpenter applied *Cummings*'s statement that in America, "all avocations, all honors, all positions are alike open to everyone," 71 U.S. at 321, directly to the Privileges or Immunities Clause. Cong. Globe, 42nd Cong. 2nd Sess. 762 (1872). The Privileges or Immunities Clause, said Carpenter, "offers all the pursuits and avocations of life to the colored man, in all the States of the Union." *Id*.

II. States Must Treat All Citizens as Their Beneficiaries.

A. Equal-Beneficiary Status for All Citizens Turns *Dred Scott* on Its Head.

Justice Thomas was right in *Vaelllo-Madero* and *SFFA* to see the Fourteenth Amendment as the reverse image of *Dred Scott*. Chief Justice Taney explained there that only those treated as equals by the government could be considered citizens, because government was instituted for the benefit of all of its citizens:

> It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and *for them and their posterity*, but for no one else.

60 U.S. 393, 406 (1857) (emphasis added). The Fourteenth Amendment turned this reasoning on its head. By establishing African-American citizenship and the entitlement of the freedmen to the rights of citizenship, the Fourteenth Amendment required that states act for the benefit of African Americans too, not just white citizens.

Stephen Douglas and other Democrats in Congress amplified Taney's point that the government was made *for the benefit of* white men and their posterity. Citizens were those for whose benefit the government was made. For Douglas, that did not mean African Americans. Douglas explained himself at length when debating Lincoln:

> I ask you, are you in favor of conferring upon the negro the rights and privileges of citizenship? … For one, I am opposed to negro citizenship in any and every form. I believe this government was made on the white basis. I believe it was made by white men, *for the benefit of white men and their posterity forever*, and I am in favor of confining citizenship to white men, men of European birth and descent, instead of conferring it upon negroes, Indians, and other inferior races. … [T]he Republicans say that he ought to be made a citizen, and when he becomes a citizen he becomes your equal, with all your rights and privileges. They assert the *Dred Scott* decision to be monstrous because it denies that the negro is or can be a citizen under the Constitution.

3 The Collected Works of Abraham Lincoln 9, 11 (Basler ed. 1953) (first debate in Ottawa) (emphasis added). He used very similar language at the third debate in Jonesboro and the fourth debate in Charleston, and in Congress in 1860 discussing Kansas's admission as a state. See *id*. at 112, 177-78, Cong. Globe, 36th Cong. 1st Sess. 915, 920 (1860). Democrats in Congress echosed Douglas repeatedly as they discussed how to reconstruct (or not reconstruct) the South. See Cong. Globe, 38th Cong. 1st Sess. 67 (1864) (Senator Lazarus Powell); Cong. Globe, 38th Cong. 2nd Sess. app. 80 (1865) (Representative Joseph Edgerton); Cong. Globe, 39th Cong. 1st Sess. 196 (1866) (Andrew Jackson Rogers of the Joint Committee on Reconstruction); Cong. Globe, 39th Cong. 2nd Sess. 42 (1866) (Willard Saulsbury); Cong. Globe, 40th Cong. 2nd Sess. 2450 (1868) (Representative James Beck quoting Douglas).

Republicans during Reconstruction made clear that the scope of government's beneficiaries—whether government was only for the benefit of white citizens, or for freedmen too—was precisely the bone of contention between the parties on civil rights. Senator Henry Wilson replied to Saulsbury, describing his speech while in Delaware:

> I laid down the broad principle that I would give to every man of any race, color or condition the same rights and privileges that I possessed myself, or that anybody in the country possessed. … I regarded every man before the law of my country my peer and my equal, whether he was a white man or a black man. I

> certainly laid down doctrines plain and clear, which the Senator had a right to understand meant giving to colored men all the rights and all the privileges of citizens of the United States.

Cong. Globe, 39th Cong. 2nd Sess. 42 (1866). Representative Burt Van Horn replied similarly to Rogers. Cong. Globe, 39th Cong. 1st Sess. 284 (1866), and Senator James Dixon elaborated on the same theme, *id*. at 1040-41.

This particular background—in which extending the rights of citizenship to African Americans is attacked precisely because such an extension would undermine the idea that government is for the benefit of white men—makes it clear that citizens are government's beneficiaries. Imposition of such a duty was the point of the Fourteenth Amendment. As the first Justice Harlan put it, the point was to incorporate the freedmen as a "component part of the people for whose welfare and happiness government is ordained." *Civil Rights Cases*, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting).

B. The Social Contract Requires Equal Beneficiary Status for All Citizens.

Long before the Fourteenth Amendment, citizenship marked those for whom a particular state has concern. While English law usually spoke in terms of subjects, rather than citizens, the idea of a state as a commonwealth promoting the interests of all of its parts is very old indeed. Cicero wrote in the middle of the first century B.C. of rulers' duty to "watch for the

well-being of their fellow-citizens," to "care for the whole body politic and not, while they watch over a portion of it, neglect other portions," and not to "take counsel for a part of their citizens and neglect a part." Cicero, De Officiis, book I, section 25, at 53, 54 (Andrew P. Peabody trans. 1887). Merely refraining from purposeful, intentional harm was obviously not enough for Cicero; he insisted on the duty to pay attention—to "watch over" and "take counsel for"—all citizens' interests. A slogan of Cicero's, *salus populi suprema lex esto*—the welfare of the people should be the supreme law—was very widely quoted all over Europe, and particularly in English law, beginning in the sixteenth century.[5] It even became the epigraph

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[5] For the story of Cicero's enormous influence, and widespread use of his *salus populi suprema lex esto* maxim, see Miller, Defining the Common Good: Empire, Religion, and Philosophy in Eighteenth-Century Britain 21-87 (1994) (tracing late-Renaissance and early-modern obsession with Cicero to Marc-Antoine Muret's 1582 lectures on Tacitus and Cicero).

For the influence of "salus populi suprema lex esto" in English law, see, e.g., *Bate's Case*, 145 Eng. Rep. 267 (1606); *Tanistry's Case*, 80 Eng. Rep. 516, 520 (1608); *Keighley's Case*, 77 Eng. Rep. 1136, 1137 (1609); *Attorney General v. Griffith*, 80 Eng. Rep. 1028, 1028 (1613); *Burrowes v. High-Commission Court*, 81 Eng. Rep. 42, 44 (1615); *Cole v. Foxman*, 74 Eng. Rep. 1000, 1000 (1617); Rutherford, Lex, Rex: The Law and the Prince 119 (1893) (orig. 1644) (calling it "the supreme and cardinal law to which all laws are to stoop" and erroneously attributing it, as John Selden did, to Rome's twelve tables); *id.* at 137 (calling it "one fundamental rule … like the king of the planets, the sun, which lendeth star-light to all laws, and by which they are exponed"); *Rex v. Carew*, 36 Eng. Rep. 1016, 1017 (1682); *Grand Opinion for the Prerogative Concerning the Royal Family*, 92 Eng. Rep. 909, 922 (1717); *Low v. Peers*, 97 Eng. Rep. 138, 142 (1770) ("the common law['s] … favourite dominant principle");

for Locke's Second Treatise on Government and the motto of Missouri. During Edward VI's reign around 1549, those opposed to the enclosure of common land began to be called "commonwealth men." Edward Coke in the next century often invoked Cicero, and after the English Civil War the government called itself a commonwealth, a move later copied by Massachusetts, Pennsylvania, Virginia, and Kentucky. In 1866, Charles Sumner began his argument for universal suffrage with the principle of the duty to promote the general welfare; after reviewing Plato, Aristotle, and Cicero, he said, "[T]here are two principles which all these philosophers teach us: the first is justice, and the second is the duty of seeking the general welfare." Cong. Globe, 39th Cong. 1st Sess. 677 (1866). Representative John Hubbard relied on Cicero as well: "[T]here is an old maxim of law in

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Campbell v. Hall, 98 Eng. Rep. 848, 878 (1774); *British Cast Plate Manufacturers v. Meredith*, 100 Eng. Rep. 1306, 1308 (1792); *Mayor and Burgesses of Lyme Regis v. Henley*, 110 Eng. Rep. 29, 33 (1832); *Feather v. Queen*, 122 Eng. Rep. 1191, 1195 (1865).

For citations of the maxim at this Court, see *License Cases*, 46 U.S. 504, 632 (1847); *West River Bridge v. Dix*, 47 U.S. 507, 545 (1848); *Passenger Cases*, 48 U.S. 283, 298 (1849); *Ex Parte Milligan*, 71 U.S. 2, 81 (1866); *Mississippi v. Johnson*, 71 U.S. 475, 487 (1867); *Richmond v. Smith*, 82 U.S. 429, 434 (1873); *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1878); *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 752 (1884); *United States v. Pacific Railroad*, 120 U.S. 227, 234 (1887); *Leisy v. Hardin*, 135 U.S. 100, 129, 145, 158 (1890); *St. Louis Railway v. Mathews*, 165 U.S. 1, 24 (1897); *Workman v. New York*, 179 U.S. 552, 585 (1900); *Texas Railway v. Miller*, 221 U.S. 408, 415 (1911); *Omnia Commercial v. United States*, 261 U.S. 502, 513 (1923); and *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 476 (1934).

which I have considerable faith, that regard must be had to the public welfare; and this maxim is said to be the highest law." *Id*. at 630.

While Locke's theory of the social contract was highly influential, Emer de Vattel expressed his version of the social contract more prominently in terms of citizenship: "The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages." Vattel, Law of Nations 217 (2008) (English translation of 1797). Chief Justice Marshall quoted this passage for the Supreme Court in 1814 in explaining the federal government's duties to U.S. citizens abroad during the War of 1812. The Venus, 12 U.S. 253, 289 (1814). John Adams's preamble to the Massachusetts Constitution of 1780 echoed the same idea: "The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good." Mass. Const. pmbl (1780). The responsibility of each nation-state to promote the welfare of its citizens was a staple of mid-nineteenth-century international law. One treatise put it quite simply: "[E]ach state is the trustee of its citizens for public objects." Daniel Gardner, Institutes of International Law 484-85 (1860).

The Supreme Court explained the state's duty to promote all citizens' interests in an early dormant-commerce-clause case, *City of New York v. Miln*:

> [I]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends…

36 U.S. 102, 139 (1837). Senator Willard Saulsbury quoted this passage in Congress as a warning against the implications of the Civil Rights Act of 1866. Cong. Globe, 39th Cong. 1st Sess. 478-79 (1866).

Democratic arguments in 1866 were likewise put in terms of the obligation of the federal government to serve the interests of citizens from all sections equally. Daniel Voorhees complained that protectionism put the interests of sellers over consumers:

> The European manufacturer is forbidden our ports of trade for fear he might sell his goods at cheaper rates and thus relieve the burdens of the consumer. We have declared by law that there is but one market into which our citizens shall go to make their purchases, and we have left it to the owners of the market to fix their own prices. The bare statement of such a principle foreshadows at once the consequences which flow from it. One class of citizens, and by far the largest and most useful, is placed at the mercy, for the necessaries as well as the luxuries of life, of the fostered, favored, and protected class to whose aid the whole power of the Government is given. … Must the western people, because they are consumers and not manufacturers, be compelled by indirection to

> meet a large proportion of the debts of their fellow-citizens in other sections?

Cong. Globe, 39th Cong. 1st Sess. 154 (1866). Note particularly Voorhees's statement that the costs of protectionist tariffs were indirect; even facially neutral policies could run afoul of the obligation to serve all citizens' interests impartially.

The Court in *Minor v. Happersett* echoed Vattel and Adams's preamble for the Massachusetts Constitution:

> The very idea of a political community such as a nation is implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. … For convenience, it has been found necessary to give a name to this membership. … Citizen is now more commonly employed…

88 U.S. 162, 165-66 (1875).

In light of all of this background, the imposition of African-American citizenship on the South had a well-understood meaning. The word "citizen" was the vehicle for demanding that the South—and of course other states in the Union—live up to their side of the social contract. In requiring states to take the freedmen's citizenship seriously, the Fourteenth Amendment required them to behave as a trustee with multiple beneficiaries.

III. Trustees Must Give "Fair and Impartial Attention" to All Beneficiaries' Interests.

A. English Multiple-Beneficiary Law.

English multiple-beneficiary law, like its obsession with Cicero, began under Elizabeth I. *Rooke's Case* prevented the commissioners of sewers from imposing taxation unequally, on a single landowner. 77 Eng. Rep. 209 (1598). Reporter Edward Coke referred to "cases of equality founded on reason and equity." *Id.* at 210. *Keighley's Case*, another case from Coke, also involved sewer commissioners with a duty to repair a wall. In the case of accidents, commissioners had a duty to spread the cost to all landowners, but more specialized taxation could be imposed given a particular reason. 77 Eng. Rep. 1136 (1609). Coke quoted Cicero's maxim: "The reason … is *pro bono publico,* for, *salus populi est supreme lex.*" *Id*. at 1137. Salus populi—the welfare of the people—was understood to require impartial promotion of the interests of *all* the relevant people. Special reasons could justify a departure from such a rule, but an equal-distribution-of-costs rule was the default.

Astry v. Astry considered a widow with power to distribute her husband's estate "amongst his three children." 24 Eng. Rep. 124 (1706). The Court followed the rule from an earlier case in which the devise stated that the widow should distribute the estate "in such proportions as she should think fit." *Id.* Despite this broad language of discretion, "[S]he must divide it amongst them equally, unless a good reason can be given for doing otherwise." *Id.*

Ord v. Noel considered the duty of a trustee conducting a sale. Vice-Chancellor Sir John Leach set out a rule paraphrased repeatedly in American statements of the law:

> Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in the execution of their trust they will pay equal and fair attention to the interests of all persons concerned.

56 Eng. Rep. 962, 963 (1820).

B. American Multiple-Beneficiary Law During Reconstruction.

American trust law at the time of Reconstruction repeatedly used the phrase "fair and impartial attention" to describe the duty of trustees with multiple beneficiaries. Frequently a single beneficiary is called a "cestui que trust," and multiple beneficiaries "cestuis que trust." These sources all use very similar language. The Supreme Court of North Carolina said in 1844, relying on *Ord* but changing "equal and fair" to "fair and impartial,"

> Every trustee for sale, is bound by his office to bring the estate to a sale, under every possible advantage to the cestui que trust, and, when there are several persons interested, with a fair and impartial attention to the interest of all concerned. He is bound to use, not only good faith, but also every requisite degree of diligence and prudence, in conducting the sale.

Johnston v. Eason, 38 N.C. 330, 334 (1844). For repetition of the "fair and impartial attention" language, see Lewin, A Practical Treatise on the Law of Trusts and Trustees 414 (1857); Burrill, A Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors 498 (2nd ed. 1858); *Sales and Titles Under Deeds of Trust*, 2 Am. L. Reg. 641, 705, 713 (1863); *Swortzell v. Martin*, 16 Iowa 519, 523 (1864); and Perry, A Treatise on the Law of Trusts and Trustees 721 (1872).

C. Multiple-Beneficiary Law Today.

Multiple-beneficiary law today has changed remarkably little since the sorts of rules articulated over three centuries ago in *Astry*. Distinctions between beneficiaries are allowed for good reason, but in the absence of such a reason, equal treatment is demanded. As modern portfolio theory has developed more sophisticated understanding of the different investment needs of different beneficiaries, multiple-beneficiaries law has kept pace. The basic obligation has not changed, however: a trustee must attend to, and promote, all beneficiaries' interests fairly and impartially. "If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any different interests of the beneficiaries." The Uniform Prudent Investor Act § 6 (1994). Note particularly here the importance of paying attention as well as requiring flexibility with respect to beneficiaries' different interests. "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests."

Uniform Trust Code § 803 (2000). A comment amplifies the fact that equality is not always required: "The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust." *Id.* cmt. The Restatement Third of Trusts similarly requires "due regard" for multiple beneficiaries' interests: "A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust. … [T]he trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust." Restatement Third of Trusts § 79, at 127 (2001). A comment explains the importance of attending properly to the complexities of different beneficiaries' interests:

> It would be overly simplistic, and therefore misleading, to equate impartiality with some concept of "equality" of treatment or concern—that is, to assume that the interests of all beneficiaries have the same priority and are entitled to the same weight in the trustee's balancing of those interests. Impartiality does mean that a trustee's treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee's personal favoritism or animosity toward individual beneficiaries, even if the latter results from antagonism that sometimes arises in the course of administration. Nor is it permissible for a trustee to ignore the interests of some beneficiaries merely as a result of oversight or neglect, or because a

> particular beneficiary has more access to the trustee or is more aggressive, or simply because the trustee is unaware of the duty stated in this Section.

Restatement Third of Trusts § 79, comment at 128 (2001).

D. Administrative Law Offers a Better Model for Assessing Arbitrariness.

Gary Lawson and Guy Seidman, who first canvassed the English law set out above, have noted that the demand in historic English multiple-beneficiaries law for an *explanation* of costs imposed on particular beneficiaries is strikingly similar to modern American administrative law. Lawson & Seidman, "A Great Power of Attorney": Understanding the Fiduciary Constitution 164 (2017). This should not be surprising; before cases like *Williamson*, arbitrariness was the central consideration in the Supreme Court's law of equality,[6] while a major portion of modern administrative law consists in assessment of when agencies are "arbitrary and capricious." 5 U.S.C. § 706(2)(A). *Astry*'s demand for a "good reason" for inequality is quite similar to what *State Farm* demands of agencies. The requirement that trustees attend to costs borne by beneficiaries, in

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[6] See, e.g, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Gulf Railway v. Ellis*, 165 U.S. 150, 159 (1897); *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352 (1918); *Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923); *Schlesinger v. Wisconsin*, 270 U.S. 230, 240 (1926); *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 461 (1937).

turn, is quite similar to the sort of inquiry the Court required in *Overton Park* with respect to the Memphis Zoo, which was obviously not targeted for purposeful harm, but merely seen as insufficiently important to change the path of I-40. The Court elaborated in *State Farm*,

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.*

463 U.S. 29, 43 (1983) (emphasis added). The Court's final line here is in stark contrast with the excessive deference in cases like *Williamson*, under which judges may rely on post-hoc rationalizations rather than the actual interest that motivated a legislature. 348 U.S. 483, 488 (1955). The Court has recently reminded the Sixth Circuit in a summary reversal of this "simple but fundamental rule of administrative law." *Calcutt v. FDIC*, 143 S.Ct. 1317, 1318 (2023) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). As the Court explained in 1947,

> [A] reviewing court, in dealing with a determination or judgment which an administrative

> agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Chenery Corp, 332 U.S. at 196. Just eight years later, however, the Court relied on what "might be thought … rational" in order to prevent judicial invalidation of an eyeglass cartel. See *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955). Six years later still the Court said, "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). But the duty of "fair and impartial attention" to all citizens' interests exists at the time of regulation itself. Why did the interests of consumers in lower prices, or the interests of possible competitors offering lower-cost alternatives, not receive the same sort of attention as current sellers' interests? For potentially-addictive products like tobacco or narcotics, or products or services with externalities, a free-market level of consumption might not serve the general welfare. For eyeglasses or filled milk, though, that story is very hard to tell. See *Lee Optical v. Williamson*, 120 F.Supp. 128, 135-39 (W.D.Okla. 1954); *Milnot Company v. Richardson*, 350 F.Supp. 221, 225 (S.D.Ill. 1972) (glossing Equal Protection Clause as banning "arbitrary or capricious distinctions" and finding obsolete the justifications for the act upheld in *United States v. Carolene Products*, 304 U.S. 144 (1938)). For respite care, it is

clearly impossible. Louisiana has not even begun to explain why investigating the *question* whether fewer respite services on the market, for higher prices, might somehow serve the general good of its citizens. Requiring states to supply justifications at the time of regulation will sharpen their responsibility to act as trustees for the benefit of all of their citizens.

CONCLUSION

The Court should grant certiorari and reverse the judgment below.

Respectfully submitted,

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