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, and

KENTUCKY HOSPITAL ASSOCIATION,
Intervenor-Respondent.

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

BRIEF AMICUS CURIAE OF PHILLIP TRUESDELL, LEGACY MEDICAL TRANSPORT, LLC, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

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

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amicus Phillip Truesdell is the owner of Legacy Medical Transport, LLC, a family-run ground ambulance business located in Ohio, just a mile from the Kentucky border. While Truesdell has quickly grown his business in Ohio, he has been locked out of Kentucky due to the state's Certificate of Need law. Like Petitioners, Truesdell and Legacy have challenged provisions of Kentucky's certificate of need law in Federal Court.

Amicus Curiae Pacific Legal Foundation (PLF) is a nonprofit legal foundation that defends the principles of liberty and limited government, including the right to earn a living. For over 40 years, PLF has litigated in support of the rights of individuals to pursue the livelihood of their choice free of arbitrary or irrational interference. PLF currently represents Phillip Truesdell and Legacy Medical Transport in their challenge to portions of Kentucky's Certificate of Need law.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have received timely notice and consented to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to earn a living was at the top of the minds of the Fourteenth Amendment's framers. During his presentation of the Amendment's § 1 language to the House of Representatives, its author, Rep. John Bingham, forcefully explained that it was drafted to protect "the liberty ... to work in an honest calling and contribute by your toil in some sort to yourself [and] to the support of your fellowmen," among other rights, privileges, and immunities, against abridgment by state governments. Cong. Globe, 42nd Cong. 1st Sess., App. 86 (1871). Passed in the wake of the Civil War, this Amendment was intended to transform the Federal government's role in protecting individual rights. Despite this clear purpose, for much of the last century, courts have used a rational basis test to review economic regulations, effectively ensuring that "any law that legislators pass will be sustained unless they were in a complete state of lunacy at the time they acted." BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 121 (1st ed. 1980). The Fourteenth Amendment's "guarantee of liberty deserves more respect—a lot more." *Hettinga v. United States*, 677 F.3d 471, 483 (D.C. Cir. 2012) (Brown, J., concurring).

In some cases, where discrimination or protectionism is a motive, the right to engage in a common occupation without undue interference is properly safeguarded by the Equal Protection Clause. *See*, *e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008). In other cases, it is appropriate to accord strong protection to this right, which is "deeply rooted

in this Nation's history and tradition," *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quotation omitted), under the Due Process of Law Clause. In recent decades, academics and some members of this Court have urged that the original meaning of the Privileges or Immunities Clause counsels in favor of reconsidering the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), and locating the right to engage in one's chosen trade or calling there. *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT 175 (2021). What is plain is that the modern rational basis test leaves this right substantially unprotected, creating a deeply troubling split with the meaning and history of the Fourteenth Amendment itself.

I. The framers of the Fourteenth Amendment wrote the Privileges or Immunities Clause to protect basic civil liberties from state infringement—including the right to pursue a lawful occupation. The Court should correct its longstanding error in the *Slaughter-House Cases* and interpret the clause in accordance with its original meaning.

II. Even if the Court declines to revisit the *Slaughter-House Cases*, the right to pursue a lawful occupation fits comfortably under the test for "deeply rooted" rights recently articulated by this Court. The right is found in common law and has been repeatedly acknowledged by both federal and state courts since the nation's founding. But most importantly, this right was among the basic civil liberties which were the very focus of the Fourteenth Amendment in the period following the Civil War. Acknowledging the right as fundamental would avoid the confusion

among lower courts when applying the rational basis test, as described by the Petitioners.

III. Finally, this Court could, at the very least, improve the protection of the economic liberty by revisiting the rational basis test as it was articulated in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955), and *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). The existing framework fails to protect rights with considerable historical pedigree, has resulted in hardship for those who simply want to earn an honest living, and caused proliferation of arbitrary and protectionist legislation that deprives people of opportunity.

ARGUMENT

I. The Court Should Reconsider the *Slaughter-House Cases* and Hold that the Privileges or Immunities Clause Secures the Right to Engage in a Common Occupation.

This Court has been clear that interpretation of the Constitution depends on a "textual analysis" focused on "normal and ordinary meaning." *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127 (2022); *D.C. v. Heller*, 554 U.S. 570, 576 (2008) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.") (citation omitted). The existence of contrary precedent does not relieve the Court of its duty to look to the text. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1894 (2021) (Alito, J.,

concurring) (citing cases) ("[E]ven though we now have a thick body of precedent regarding the meaning of most provisions of the Constitution, our opinions continue to respect the primacy of the Constitution's text."); *N.L.R.B. v. Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring) (arguing that even longstanding practice "does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding").

The Fourteenth Amendment prohibits states from abridging the "privileges or immunities of citizens of the United States." U.S. Const. amend. XIV. The Clause has had little application since its enactment because this Court interpreted it in the *Slaughter-House Cases* to secure only a short list of "federal" rights such as a right of free access to seaports and the right to demand the protection of the federal government on the high seas. This relegated the clause to a "vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage". *Slaughter-House Cases,* 83 U.S. at 96 (Field, J., dissenting). As this Court has acknowledged, the *Slaughter-House Cases* are widely regarded today as wrongly decided. *See McDonald v. City of Chicago*, 561 U.S. 742, 756–57 (2010) ("Today, many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation."). Several concurring and dissenting opinions in recent years have therefore argued that the *Slaughter-House Cases* should be revisited. *See Dobbs*, 142 S. Ct. at 2302 (Thomas, J., concurring) (arguing the Court should "consider whether any of the rights announced in this Court's substantive due process cases are 'privileges or immunities of citizens

of the United States' protected by the Fourteenth Amendment."); *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) ("As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause."); *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting) (scholars of the Fourteenth Amendment agree "that the Clause does not mean what the Court said it meant in 1873").

The continuing discussion is not surprising; Justice Miller's majority opinion in the *Slaughter-House Cases* evidenced more concern with political factors than the meaning of the text. The Court's opinion stated its aim to prevent "radical[] changes" in "the whole theory of the relations of the State and Federal governments to each other" which the Court believed would result from any other reading of the Clause. *Slaughter-House Cases*, 83 U.S. at 78. As Justice Bradley argued in his dissent, however, the "right to choose one's calling" and "adopt such calling, profession or trade as may seem to him most conducive" were plainly within the contemporary and historical understanding of "privileges or immunities" at the time of the Fourteenth Amendment's enactment. *Id.* at 116 (Bradley, J., dissenting); *accord id*. at 96–97 (Field, J., dissenting).

Despite the error of the *Slaughter-House Cases*, this Court has hesitated to overturn the case because of apparent uncertainty over the precise scope of the Privileges or Immunities Clause. *See McDonald*, 561 U.S. at 758 (observing that there is no "consensus" on

the proper scope of the Privileges or Immunities Clause "among the scholars who agree that the *Slaughter-House Cases*' interpretation is flawed"). But this challenge does not eliminate the duty of the Court to say what the law is. As Justice Jackson wrote in his concurring opinion in *Edwards v. California*, "[T]he difficulty of the task does not excuse us from giving these general and abstract words whatever of specific content and concreteness they will bear as we mark out their application, case by case." 314 U.S. 160, 183 (1941) (Jackson, J., concurring). *See also McDonald*, 561 U.S. at 854–55 (Thomas, J, concurring) ("The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application."). And as Justice Field argued in his *Slaughter-House Cases* dissent "[t]he privileges and immunities designated [in the Fourteenth Amendment] are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons," making the application of the Clause plain in this case. *Slaughter-House Cases*, 83 U.S. at 97. (citation omitted).

"The usual grievance against the Court relates to its excesses—creating powers and rights—usually criticized as judicial activism," but "[f]ailure to implement existing rights is no less an error than enforcing non-existent rights." BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION 81 (1987). This case provides an excellent vehicle for the Court to recognize the right to engage in a common occupation

as fundamental and secured by the Privileges or Immunities Clause.

II. The Right to Engage in a Common Occupation Is Deeply-Rooted

The right to "pursue a lawful employment in a lawful manner," discussed by Justice Field as a "great fundamental right[]" in his *Slaughter-House Cases* dissent, has a long historical pedigree. 83 U.S. at 97–98. Even if the Court is reluctant to restore the Privileges or Immunities Clause, the Court's existing precedent explains that the Fourteenth Amendment's Due Process of Law Clause protects rights that are "deeply rooted in [our] history and tradition" and "essential to our Nation's scheme of ordered liberty." *Dobbs*, 142 S. Ct. at 2247 (quoting *Timbs*, 139 S. Ct. at 686). *See also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Some recognition of a right to engage in a common occupation has been deeply embedded, first in the common law, then in the legal history of the United States, for centuries, entitling that right to greater protection than it is now afforded.

a. English Common Law Recognized the Right to Earn a Living

The right to earn a living predates Independence and was enshrined in the common law even before. This is confirmed by the "eminent common-law authorities" which this Court has repeatedly relied upon. *See Dobbs*, 142 S. Ct. at 2249 (citation omitted). Perhaps the most famous English case discussing this right was the *Case of Monopolies*, also known as *Darcy v. Allein*, 77 Eng. Rep. 1260 (1603). In *Darcy*, as

reported by Sir Edward Coke, the court determined that state established monopolies restricting the right to engage in common occupations were contrary to the common law and various Acts of Parliament, as well as Magna Carta. *Id.* at 1262–65 (citing Magna Carta Ch. 18). Coke's report expressed the sentiment that "every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life." *Id.* at 1263–64 (citing Deuteronomy 24:6).

Coke would go on to fight labor restrictions as Lord Chief Justice. For example, in *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218 (K.B. 1615), he held that a man could work as a tailor notwithstanding his failure to serve as an apprentice, and declare that "at the common law, no man could be prohibited from working in any lawful trade … and therefore the common law abhors all monopolies which prohibit any from working in any lawful trade." *Id.* at 1218–1220. Similarly, in *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614), Coke rejected the argument that an unskilled or untrained man could not practice a trade, concluding instead that "it was lawful for any man to use any trade thereby to maintain himself and his family … if a man will take upon him to use any trade, in the which he hath no skill" then he could be sued. *Id.* at 1055. Coke's hostility to monopoly[2] ultimately

[2] Coke was not alone in resisting monopoly in the early 17th century; there are several examples of courts striking them down as contravening the right to earn a living. *See, e.g.*, *Colgate v. Bacheler*, 78 Eng. Rep. 1097 (K.B. 1602) (it "[i]s against law, to prohibit or restrain any to use a lawful trade at any time, or at any place … for being freemen, it is free for them to exercise their

led to his drafting of the landmark Statute of Monopolies in 1623, which firmly struck back against the monarch's longstanding practice of arbitrarily allowing certain businesses exclusive rights while punishing would-be competitors. Coke's famous and oft-cited treatise of the common law confirms the common law's disdain for monopoly, and, as in *Darcy*, traces it to the Magna Carta. *See* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 47 (1797 ed.) ("Generally all monopolies are against this great charter, because they are against the liberty and freedom of the subject, and against the law of the land.").

Sir William Blackstone, writing very close to the founding, reaffirmed Coke's conclusions on freedom of labor. In his Commentaries on the Laws of England, Blackstone wrote that, under the common law, "every man might use what trade he pleased." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 427–28 (8th ed. 1780). Blackstone went on to discuss how, where the public interest might warrant exceptions to this general rule, the courts carefully restrained and examined such exemptions. *Id.* In particular, Blackstone discussed English laws limiting the liberty of those that served as apprentices. As Blackstone explained, such laws "occasioned a great variety of resolutions in the courts of law" and "in general [were] rather confined than extended." *Id.* at 428 (citing cases).

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trade in any place."). *See also* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW 468–81 (2010) (digital edition) (citing cases).

b. Early American Law Recognized the Right to Earn a Living

Early American statements of fundamental rights reaffirmed the importance of the right to earn a living. Virginia's Declaration of Rights stated that "all men are by nature equally free and independent, and have certain inherent rights … [including] the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Virginia Decl. of Rights § 1. Thomas Jefferson followed this structure in the Declaration of Independence, writing that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Declaration of Independence para. 2 (U.S. 1776). Jefferson would go on to repeat the importance of the right to earn a living, stating in his first inaugural address as President that the "sum of good government" was one which "restrain[ed] men from injuring one another" and otherwise left them "free to regulate their own pursuits of industry and improvement."[3]

Freedom to pursue a trade was not merely aspirational. The "most important early American edition of Blackstone's Commentaries," *Dobbs*, 142 S. Ct. at 2251, reported that the freedom of "every

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[3] First Inaugural Address of Thomas Jefferson (Mar. 4, 1801), *available at* https://founders.archives.gov/documents/Jefferson/01-33-02-0116-0004. *See also* Timothy Sandefur, *The Right to Earn a Living*, 6 Chapman L. Rev. 207, 220–24 (2003) (discussing founders' views on free labor).

man to use what trade he pleased" was protected by law in Virginia. 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 427–28 (1803). Early caselaw throughout the country affirmed the existence of this fundamental freedom. For example, in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823), Supreme Court Justice Bushrod Washington listed it among the "fundamental" privileges and immunities of "citizens of all free governments." *Id. See also id.* at 552 (interpreting Section 2 of Article IV of the Constitution, discussing "privileges and immunities", listing "[T]he enjoyment of life and liberty, with the right to acquire and possess property of every kind. … [and] the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise").

One scholar identifies about sixty cases between 1823 and 1873 which discuss the common law right to free labor. *See* Sandefur, 6 Chapman L. Rev. at 225. For example, in 1830, the Massachusetts Supreme Court decided *Sewall v. Jones*, which considered the breadth of a tax provision, and held that "[s]tatutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be construed strictly." 26 Mass. (1 Pick.) 412, 421 (1830). In another example, Supreme Court of Alabama Justice Goldthwaite cited to the Alabama Constitution's provision that "no man, or set of men, are entitled to exclusive, separate public emoluments or privileges" to conclude that "every one has the same right to aspire to office, or to pursue any avocation of business or pleasure, which any other can." *In re Dorsey*, 7 Port. 293, 360–61 (1830) (citing Ala. Const. art. I § 1 (1819)).

c. The Lead Up to the Ratification of the Fourteenth Amendment Confirms the Importance of this Right

In *McDonald*, this Court focused on the history of the Fourteenth Amendment's enactment in determining that the Second Amendment's right to bear arms was incorporated against the states. *See McDonald*, 561 U.S. at 775–78. As the Court explained, Southern states after the Civil War routinely denied the right of black citizens to keep and bear arms, leading Congress to enact two major legislative solutions. *Id.* at 772–73. First, Congress passed the Freedman's Bureau Act of 1866, which promised protection for "the right ... to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms … without respect to race or color, or previous condition of slavery." *Id.* at 773 (citing 14 Stat. 176–177). Second, Congress passed the Civil Rights Act of 1866, guaranteeing the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." *Id.* at 774 (citing 14 Stat. 27). However, these laws were insufficient. "Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent" persuaded Congress that a constitutional amendment was necessary to constitutionalize and protect "fundamental" civil rights, including the right to bear arms. *Id.* at 775.

But what the *McDonald* court did not have reason to discuss is that the urgent need to protect various

economic rights was far more central to this story than even the right to bear arms. For example, the rights listed in the Freedman's Bureau Act and the Civil Rights Act of 1866 overwhelmingly involve the protection of personal liberty and property. Indeed, the Civil Rights Act of 1866, which the Fourteenth Amendment was adopted to constitutionalize, does not mention the right to bear arms at all. It does, however, list a series of protections for *economic* liberties, stating that all "citizens ... shall have the same right … to make and enforce contracts … and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Civil Rights Act of 1866 (14 Stat. 27–30). The act's sponsor in the Senate, Lyman Trumbull, responded to Andrew Johnson's veto of the bill by confirming that the Act was intended to protect fundamental economic rights, such as the right to "acquire and enjoy property," citing much of the history mentioned above, including Blackstone and *Corfield*. 39th Cong. Globe 1757.

This focus on economic rights makes sense. The Southern Black Codes, which these Acts were intended to reverse, often directly limited former slaves' freedom to work. For example, South Carolina's Black Code provided specifically that "No person of color shall pursue or practice the art, trade or business of an artisan, mechanic or shop-keeper, or any other trade … until he shall have obtained a license therefore from the Judge of the District Court."[4] Similarly, both North Carolina and Texas

[4] ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA PASSED AT THE SESSIONS OF 1864–1865 at 299 (1866).

limited black freedmen's labor through a variety of contract, anti-enticement, apprenticeship, and vagrancy laws. *See* Joseph A. Ranney, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 Tex. Wesleyan L. Rev. 1, 17 (2002). Reversing limitations of this sort and advancing a free labor ideology was a major motivation behind the Reconstruction Congress. As preeminent Reconstruction-era historian Eric Foner has written: "[t]he Civil Rights Act of 1866, in part a response to Southern Black Codes that severely limited the liberty of former slaves, enshrined free labor values as part of the definition of American citizenship." ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN XXXV (1995 ed.).

In the *Slaughter-House Cases*, even Justice Miller's majority opinion accepted the existence of some right to labor in a lawful occupation. *Slaughter-House Cases*, 83 U.S. at 61 ("[I]t is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation."). Despite this, the Court concluded this right was outside the ambit of federal protection and Louisiana's slaughterhouse monopoly was permissibly driven by health and safety concerns. *Id.* The majority even discussed the *Case of Monopolies*, but argued that it represented only a "contest of the commons against the monarch" and was irrelevant where the restriction came from a state legislature. *Id.* at 65–66.

But the Court's ultimate refusal to limit the Louisiana State legislature in the *Slaughter-House Cases* should be afforded no weight. By its own admission, the Court was protecting the prerogatives of state legislatures, rather than discerning and

applying the actual meaning of the Fourteenth Amendment.[5] In doing so, the Court set out on a false path: "A judicial system more concerned to protect the power of the government than the freedom of the individual has lost its mission under the Constitution." SIEGAN, ECONOMIC LIBERTIES 6.

By contrast, the dissenting opinions in the *Slaughter-House Cases* all explain the historical importance of the right to earn a living, describing it as a "fundamental" right belonging to "citizens of all free governments." *Id.* at 97 (Field, J., dissenting). Justice Field, writing for all four dissenters, described the right of "free labor" as "one of the most sacred and imprescriptible rights of man" and found the Court's contrary decision "a matter of profound regret." *Id.* at 110. Justice Bradley wrote "[i]n my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of the most valuable rights, and one which the legislature of a state cannot invade, whether restrained by its own constitution or not." *Id.* at 113–114 (Bradley, J., dissenting). Similarly, Justice Swayne explained: "Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all

[5] Eric Foner has also argued that Justice Miller "seems to have thought that … he was contributing to the goal of protecting" the then-biracial Reconstruction legislature in Louisiana. ERIC FONER, THE SECOND FOUNDING 136 (2019). But in fact, the main effect was a "dramatic increase in demand for Slaughter-House Company stock." *Id.*

solid individual and national prosperity." *Id.* at 127 (Swayne, J., dissenting).

d. The Right to Earn a Living Continued to be Recognized After the *Slaughter-House Cases*

Despite the setback of the *Slaughter-House Cases*, courts around the country—including this Court—continued to cite and rely on the freedom to earn a living.[6] Justice Bradley, in a well-cited concurring opinion in *Butchers' Union v. Crescent City Co.*, reiterated that the Fourteenth Amendment protects "the right to follow any of the common occupations of life" and that this was encapsulated in the Declaration of Independence's phrase "pursuit of happiness." *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring). In *Yick Wo v. Hopkins*, the Court struck down a California ordinance regulating Chinese laundries under the Equal Protection Clause, once again using language suggesting the importance of the right to earn a living: "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails."

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[6] Meanwhile a few lower courts disregarded the majority opinion in *Slaughter-House Cases* entirely, relying on the dissents to support hold that the police power did not extend to "the destruction or driving to inconvenient and unprofitable localities of necessary or useful occupations." *See The Stockton Laundry Case*, 26 F. 611, 614 (C.C.D. Cal. 1886). *See also In re Sam Kee*, 31 F. 680, 681 (C.C.N.D. Cal. 1887).

118 U.S. 356, 370 (1886). In *Dent v. West Virginia*, the Supreme Court held that "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling … subject only to such restrictions as are imposed upon all persons of like age, sex, and condition." 129 U.S. 114, 121 (1889). Supreme Court cases continued to emphasize this right, constrained by the *Slaughter-House Cases* precedent to find an alternative source of protection in the Due Process of Law Clause. *See Meyer v. Neb.*, 262 U.S. 390, 399 (1923); *Allgeyer v. La.*, 165 U.S. 578, 589–90 (1897) (recognizing the right of an individual "to earn his livelihood by any lawful calling"); *Powell v. Pa.*, 127 U.S. 678, 684 (1888).

State courts, likewise, often defended a right to earn a living in this period. *See Ritchie v. People*, 40 N.E. 454, 458 (Ill. 1895) (holding that women, as well as men, have "the right to gain a livelihood by intelligence, honesty, and industry"); *People v. Marx*, 2 N.E. 29, 33 (N.Y. 1885) (holding it "it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit"); *State v. Moore*, 18 S.E. 342, 347 (N.C. 1893) (rejecting a law banning emigrant agents as illicitly restricting the right to pursue an occupation); *In re Aubry*, 78 P. 900, 903 (Wash. 1904) (voiding conviction for pursuing the occupation of horseshoeing without a license); *see also Commonwealth v. Perry*, 28 N.E. 1126, 1126–27 (Mass. 1891); *Low v. Rees Printing Co.*, 59 N.W. 362, 366–68 (Neb. 1894); *In re Jacobs*, 98 N.Y. 98, 108–110 (1885); *Godcharles v. Wigeman*, 6 A. 354, 356 (Pa. 1886).

Even after *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the right to pursue a lawful occupation has continued to be cited and relied upon. *See, e.g.*, *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (citing *Dent*, 129 U.S. 144, and acknowledging a "generalized due process right to choose one's field of private employment"); *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 n.9 (1985) (describing "the pursuit of a common calling" as "one of the most fundamental of those privileges" protected by the Privileges and Immunities Clause); *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (liberty "denotes … the right of the individual … to engage in any of the common occupations of life"); *Brusznicki v. Prince George's County*, No. 21-1621, slip op. at 12 (4th Cir. Aug. 2, 2022) (per curiam) (noting a "fundamental right" to "pursue a common calling") (citing *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978)); *Tiwari v. Friedlander*, 26 F.4th 355, 360 (6th Cir. 2022) (acknowledging that laws which interfere with the "right to engage in a chosen occupation" violate the Fourteenth Amendment); *Trejo v. Shoben*, 319 F.3d 878, 889 (7th Cir. 2003) (same); *Stidham v. Texas Comm'n on Priv. Sec.*, 418 F.3d 486, 491 (5th Cir. 2005) ("We have confirmed the principle that one has a constitutionally protected liberty interest in pursuing a chosen occupation."); *Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69, 92 (Tex. 2015) (Willett, J., concurring) ("Self-ownership, the right to put your mind and body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity.").

This history is utterly conclusive: the right to earn a living is deeply rooted in American law. This right was particularly emphasized by the drafters of the Fourteenth Amendment, who were themselves subscribers to a free labor ideology and sought to protect the economic freedom of formerly enslaved persons. Further, the right has continued to be recognized even as real judicial protection for it has waned. But today, the right is under siege, with many courts unaware of its importance or historical provenance. *See, e.g.*, Sandefur, 6 Chapman L. Rev. at 259–61 (discussing confusion among courts with respect to the right to earn a living).

III. The Rational Basis Test Provides Little-to-No Protection for this Fundamental Right

Despite overwhelming evidence of its historical importance, under existing Supreme Court precedent, government restrictions on the right to earn a living are often upheld unless challengers can negate "every conceivable basis which might support it" and even without any "evidence or empirical data" justifying government actions. *See Beach Communications*, 508 U.S. at 315. This reasoning is most directly rooted in *Williamson*, where the Court acknowledged some right to earn a living but upheld an Oklahoma statute limiting the activities of opticians, observing that "[i]t is enough that there is an evil at hand for correction, and that *it might be thought* that the particular legislative measure was a rational way to correct it." 348 U.S. at 488.

The practical consequence of this lax standard has been the proliferation of economic protectionism, notably in the form of licensing and certificate of need laws. As two judges of the D.C. Circuit have observed, "[t]he practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process." *Hettinga*, 677 F.3d at 482 (Brown, J., concurring); *see also Patel*, 469 S.W.3d at 104–05 (Tex. 2015) (Willett, J., concurring) (discussing how rational basis scrutiny has led to laws protecting practitioners from unwanted competition); Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 191–92 (2003). Under the existing standard, challenges to questionable laws sometimes cannot even make it past motions to dismiss, regardless of the content of the allegations. *See* Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity"*, 25 Geo. Mason U. Civ. Rts. L.J. 43, 44 (2014). Two examples, including Amici's pending case, suffice to demonstrate the point.

First, Amici's due process claims against Kentucky's CON law were dismissed without even the benefit of discovery.[7] Phillip Truesdell and his Ohio-based family business, Legacy Medical Transport, challenged a Kentucky Certificate of Need law that effectively gives veto power to incumbent ambulance providers over potential competition. 2d Am. Compl., *Truesdell v. Friedlander*, No. 3:19-cv-00066-GFVT-EBA (E.D. Ky. Sept. 30, 2020), ECF. No. 63. Truesdell started his business as a way to keep his family

[7] Amici's dormant Commerce Clause claim remains pending.

employed and close to home after the local power plant closed and the family was about to lose their jobs. The Truesdells were able to quickly grow their company in Ohio, and sought to operate just across the river, only one mile away, in Kentucky. But they were thwarted by Kentucky's Certificate of Need program. Plaintiffs' complaint alleges that the law operates solely to protect the economic interests of incumbents, that it bears no relationship to health or safety, that it is costly, that it creates shortages, and that it jeopardizes public health. *Id.* ¶¶ 38–46. Under the CON regime for ambulances, incumbent businesses can protest applications for any reason, subjecting them to thousands of dollars in increased costs and substantial delay. The effects of protests over the past 10 years speak for themselves: protested applications are routinely denied, unprotested applications are almost always approved. Most commonly, incumbents leverage their protest for a legally binding agreement from the applicant not to compete. Like many other businesses, Truesdell was denied a Certificate after his application was protested by his competitors. *Id.* ¶¶ 54–60. Despite these allegations, Truesdell's due process claim was dismissed with prejudice. The Court determined that Defendants' mere *assertion* that the CON statute benefitted the public was sufficient to defeat Truesdell's well-pleaded claims under the rational basis test. Mem. Op. & Order at 9–10, *Truesdell v. Friedlander*, No. 3:19-cv-00066-GFVT-EBA (E.D. Ky. May 3, 2022), ECF. No. 94.

Similarly, in *Wilson-Perlman v. MacKay*, No. 2:15-CV-285 JCM (VCF), 2016 WL 1170990, at *8 (D. Nev. Mar. 23, 2016), the Court dismissed a claim brought by a woman who wished to expand the limo business

she shared with her husband. The duo already operated a successful business in Reno, and already owned the vehicles that they sought to add to their Nevada fleet. But they were denied, after being protested, without any regard to their qualifications or safety record. The Court denied the plaintiffs the ability to seek discovery, notwithstanding allegations that the scheme served no interest beside protectionism. *Id.* at *7. The irony was that the plaintiff had moved from South Africa lured by the possibility of entrepreneurship—a possibility embraced by history, but currently foreclosed by the courts.

These examples along with the facts in *Tiwari* illustrate how the right of some to earn a living can be subjugated for the benefit of entrenched interests without meaningful scrutiny under the rational basis test. The highlighted individuals are ordinary people who want only to earn a living and improve their communities. Their right to do so was enshrined in the Fourteenth Amendment, but courts have all but ignored it. This Court should begin the process of repairing this damage by articulating a standard more protective of individual rights.

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Respectfully submitted,

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