NO. 22-42

In the Supreme Court of the United States

DIPENDRA TIWARI, ET AL.,

Petitioners,

v.

ERIC FRIEDLANDER, SECRETARY, KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, ET AL.,

Respondents.

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

BRIEF OF AMICI CURIAE EXPERTS IN THE FIELD OF PUBLIC CHOICE AND REGULATORY ECONOMICS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The undersigned *amici* are professors of law and economics, scholars, and former Federal Trade Commission officials with expertise in the field of public choice and regulatory economics. *Amici* have researched, published, and taught in the areas of public choice, competition, antitrust, and law and economics. *Amici* believe that context and research regarding the field of public choice economics will aid the Court's interpretation of the record in this case and its analysis of the statute at issue, as well as the consequences that ensue from a lack of meaningful judicial review of such statutes.

Todd Zywicki is Professor of Law at the Antonin Scalia Law School at George Mason University, a Senior Fellow of the Cato Institute, a Senior Fellow at the James Buchanan Center for Political Economy Program on Philosophy, Politics, and Economics, and former Executive Director of the Law & Economics Center. He previously served as the Director of the Office of Policy Planning at the FTC and is co-author of the textbook LAW AND ECONOMICS: PRIVATE AND PUBLIC (2018), with Maxwell Stearns and Tom Miceli.

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[1] Pursuant to Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

the Antonin Scalia Law School at George Mason University. From 2013 to 2015 he served as a member of the FTC. He has published more than 100 articles and book chapters, co-authored a leading antitrust casebook, and edited several volumes on topics including antitrust law and economics.

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James C. Cooper is Professor of Law and Director of the Program on Economics & Privacy at George Mason University Antonin Scalia Law School. He previously served as Deputy and Acting Director of the FTC's Office of Policy Planning. In 2018-19 he served as a Deputy Director in the FTC's Bureau of Consumer Protection. His research focuses on the law & economics of privacy, data security, and consumer protection, as well as a wide variety of topics surrounding competition policy, and it regularly appears in top academic journals.

SUMMARY OF ARGUMENT

Kentucky's certificate-of-need statute blocks new businesses from entering the healthcare market for no reason other than to protect the economic interests of incumbents in the sector. The Petition for Certiorari asks whether this sort of restriction on economic liberty should be subject to meaningful judicial review. *Amici* are experts in the field of public choice, a branch of economics that has spent decades extensively researching the process by which anticompetitive regulations like Kentucky's are enacted, the consequences of such regulations for consumers and the economy, and the systemic barriers which prevent their repeal. *Amici* believe that an overview of public choice economics and its principal research findings—as well as a discussion of how public choice applies specifically to Kentucky's statute—will aid the Court in resolution of the issues presented by this case.

The general premise of public choice theory is straightforward: Politicians and special interest groups are rational economic actors whose decisions tend to be motivated by economic self-interest. Public choice recognizes that special interest groups, like the Intervenor-Respondent Kentucky Hospital Association ("KHA") in this case, have strong incentives to lobby the government for regulations that will economically benefit their members, a process economists call "rent-seeking." And once an interest group has secured such regulations, public choice theory predicts that it will fight hard to keep them in place.

The present case shows how this premise is more than just theoretical: Virtually any economist looking at this record would conclude that it is a textbook example of public choice theory at work. Though couched in the language of health and safety, Kentucky's certificate-of-need requirement has nothing to do with safeguarding public welfare or ensuring quality, accessibility, and affordability of health care. Behind a smokescreen of justifications, the law's true purpose and effect is to benefit the economic interests of incumbent healthcare businesses by shielding them from competition, at consumers' and taxpayers' expense. The statute is a paradigmatic example of the type of rent-seeking regulation predicted by public choice theory, a protectionist measure divorced from legitimate purpose that exists to effectuate a wealth transfer from consumers to an entrenched interest group.

Considerable evidence (cited *infra* in Part II) shows that by restricting competition, certificate-of-need laws worsen the problems they are meant to address, lowering healthcare quality, limiting access to care, and driving prices up, with significant negative consequences for patients and the economy. But certificate-of-need laws are also emblematic of another, broader issue: the proliferation of occupational licensing regulations in recent decades as a direct result of interest groups' lobbying efforts. These regulations, like the Kentucky statute at issue here, erect a barrier to entry in many industries and have a profound impact on the national economy, by some estimates costing millions of jobs and billions of dollars.

The disproportionate influence wielded by lobbying groups compared to individual consumers means these sorts of regulations are likely to become entrenched,

with little hope of repeal through the democratic process. In some cases, the only realistic avenue to challenge such regulations is through the courts. However, under the highly deferential rational-basis test, only the most glaringly egregious and nonsensical regulations will be struck down, and sometimes not even those. Indeed, the Second and Tenth Circuits have held that rent-seeking regulations pass the rational-basis test even when the only justification for them is blatant economic protectionism.

Amici advance no opinion on the precise standard of review courts should apply to challenges to anti-competitive regulations. *Amici* do, however, respectfully suggest to the Court that a lack of any meaningful judicial review would effectively enshrine into law regulations that are often just naked transfers of wealth from the public to special interest groups, without any mechanism of opposing such laws either through the political or judicial processes.

ARGUMENT

I. SPECIAL INTEREST GROUPS LIKE KHA WILL LOBBY THE GOVERNMENT FOR ANTICOMPETITIVE REGULATIONS FOR THE BENEFIT OF THEIR CUSTOMERS AND TO THE DETRIMENT OF CONSUMERS.

A. Public Choice Economics Explains How Anticompetitive Regulations Originate.

Public choice economics is, in a nutshell, "the economic study of nonmarket decision making, or simply the application of economics to political science." Dennis C. Mueller, PUBLIC CHOICE III 1 (2003). Public choice theory has been "almost universally accepted among economists" since the mid-1980s as an explanation for much economic regulation. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 n.6 (1986). Underscoring the significance of public choice theory, not only did one of its primary exponents, James M. Buchanan, receive a Nobel Prize for it in 1986, but at least a dozen recipients of that prestigious award have contributed to the study of the field. Maxwell L. Stearns & Todd J. Zywicki, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW ix (1st ed. 2009). In recent decades, courts have increasingly turned to public choice theory in a variety of circumstances. *See, e.g., Sensational Smiles, LLC v. Mullen,* 793 F.3d 281, 285 (2d Cir. 2015) (citing an amicus brief on public choice in challenge to anticompetitive dental regulations); *Campion, Barrow & Assocs. v. City of Springfield,* 559 F.3d 765, 771 (7th Cir. 2009) (recognizing public choice as a tool for

explaining collective decision-making); *Riley v. St. Luke's Episcopal Hosp.,* 252 F.3d 749, 762 n.16 (5th Cir. 2001) (using public choice to explain government behavior).

Public choice theory rests on the fundamental assumption that politicians and constituents are rational economic actors who tend to act in their own self-interest; that is, constituents compete with one another to seek political favors from the government, and politicians use the powers of the state to provide such favors in return for continued support. "The interest group most able to translate its demand for a policy preference into political pressure is the one most likely to achieve its desired outcome." James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC,* 72 ANTITRUST L.J. 1091, 1100 (2005). Economists call this process "rent-seeking." *See* Stearns & Zywicki, *supra*, at 45; James M. Buchanan, RENT SEEKING AND PROFIT SEEKING, IN TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 7-8 (James M. Buchanan et al. eds., 1980).[2] As a result of such rent-seeking, outcomes of the political process will not always reflect the preferences of a majority of the electorate but may instead reflect the comparative advantage of special interest groups to organize and exert influence relative to larger and more diffuse groups such as

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[2] An industry's ability, through an anticompetitive regulation, to raise prices above the price that would be charged in an otherwise open market, generates what economists call "economic rents." James Buchanan has defined "rent" as "that part of the payment to an owner of resources over and above that which those resources could command in any alternative use," or "receipt in excess of opportunity cost." James M. Buchanan, RENT SEEKING AND PROFIT SEEKING, IN TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 3 (Tex. A&M Univ Pr. 1980).

consumers and the public at large. *See* Richard A. Posner, ECONOMIC ANALYSIS OF LAW § 19.3, at 534-36 (6th ed. 2003); Mancur Olson, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 132-67 (2d ed. 1971). In light of special interest groups' "superior efficiency in political organization relative to consumers," it is therefore unsurprising that "consumer interests often are subservient to industry interests in the regulatory process." Cooper, *supra,* at 1099-1100. The result of rent-seeking is unnecessary economic regulation that restricts competition in a particular market. This reduced competition inevitably leads to lower quality and higher prices, harming consumers while economically benefiting members of the interest group.

These sorts of protectionist regulations are "designed and operated primarily for [the industry's] benefit." George J. Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971). "[T]he justification is always said to be the necessity of protecting the public interest"; however, the pressure for such regulations "rarely comes from members of the public who have been . . . abused," but rather "from members of the occupation itself." Milton Friedman, CAPITALISM & FREEDOM 140 (2002). And once it has obtained economic benefits through rent-seeking regulation, an interest group will mount a powerful opposition to any attempts to repeal it, even in cases where its actual gains from the regulation are only transitory. *See* Gordon Tullock, *The Transitional Gains Trap*, 6 BELL J. ECON. 671, 676-78 (1975).

One common and particularly pernicious type of rent-seeking regulation are those enforced in whole or in part by members of the regulated industry themselves.

This is often the case in licensed industries where the pertinent licensing board is dominated by members of the licensed profession, for example dentists on a state licensing board who use the authority of their position to restrict non-dentists from offering teeth-whitening services, thereby insulating themselves from competition. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 500-01 (2015). Certificate-of-need laws often have a similarly anticompetitive measure built in, dubbed the "competitor's veto," by which incumbent businesses already holding certificates of need are allowed to file an objection to a new applicant. *See* Timothy Sandefur, *State "Competitor Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARVARD J.L. & PUB. POL'Y 1009, 1024-25 (2015). Once an objection is filed, "the applicant must then participate in a hearing before the agency to prove that a new firm is desirable under the criteria listed in the statute," and the law typically "give[s] the agency extremely broad discretion to determine whether a new firm is desirable." *Id.* at 1025. In practice, this competitor's veto is "a barrier to entry that . . . is often insurmountable to the applicant." *Id.*

Public choice theory predicts that if a law empowers existing businesses to prevent potential competitors from obtaining a certificate of need, or at least delay or burden their efforts to do so, then they will exploit this advantage whenever it is profitable to do so, particularly where the cost of filing an objection is small and the burden on a new competitor is so onerous. *Id.* at 1035. Judge Richard Posner has written about how such laws serve as barriers to entry, noting that before entering the market, a new firm must persuade a government agency to allow it to do so, which involves

"substantial legal and related expenses, and a delay often of years . . . The costs and delay are alone enough to discourage many a prospective entrant. Much more is involved than running a procedural gauntlet, however, for ultimate success is by no means certain. The favor with which regulatory agencies look upon entry varies . . . but the predominant inclination has been negative." Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 612 n.125 (1969).

In sum, decades of research in public choice economics show that the popular conception of governmental regulations as "unbiased and conscientious" attempts to advance "the public interest" is often false; instead, they are typically the result of interest group lobbying and serve to benefit interest groups at consumers' expense. *See* John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 ANTITRUST L.J. 1075, 1075 (2005).

B. This Case Is a Textbook Example of Public Choice Economics in Action.

If much of the above discussion seems theoretical, the theory is nonetheless borne out by the facts of this case. Kentucky's certificate-of-need statute is a paradigmatic example of a rent-seeking regulation, and the fact that it is still on the books is solely attributable to the efforts of an influential special interest group.

The statute's rent-seeking nature was evident to the district court, which noted that its "rent-seeking features" were "especially disturbing." Pet.App.99. One such element singled out by the court was the state's convoluted formula for determining "need."

Under this formula, new home health businesses are entirely barred in 114 of 120 counties in Kentucky. *Id.* at 75. And in the remaining six, new businesses are subject to different rules than existing firms: the state's formula must indicate at least 250 additional patients in a county need home health services, a much higher threshold than those for existing home health businesses (125) and existing hospitals wishing to expand into home health (50). *Id.* at 99. These lower thresholds make it easy for incumbent businesses to expand and prevent the "need" from ever reaching 250 patients, thus effectively keeping all newcomers out of the market.[3] The near-total ban this formula imposes on new businesses serves to insulate existing businesses from competition and predictably drives up costs to consumers (or taxpayers, in the case of Medicare-funded services). *See, e.g.*, Maureen K. Ohlhausen, *Certificate-of-Need Laws: A Prescription for Higher Costs*, 30 ANTITRUST 50, 52-53 (2015) ("[Certificate-of-need laws] tend to help incumbent firms amass or defend dominant market positions. . . . Ironically, a government program originally aimed at reducing health care prices is likely inflating them"); Christopher J. Conover & James Bailey, *Certificate-of-Need Laws: A Systemic Review and Cost-Effectiveness Analysis*, BMC Health Serv. Res. 20:748 at 7 (2020)[4] ("[T]he weight of the evidence suggests that CON creates more costs

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[3] The state's arbitrary threshold of 250 applies equally to all counties, regardless of population, making it especially insurmountable in a county like Robertson, whose population is just 2,257. *See* U.S. Census Bureau, *QuickFacts*, https://www.census.gov/quickfacts/fact/table/robertsoncountykentucky,KY/PST045221.

[4] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7427974/pdf/12913_2020_Article_5563.pdf.

than benefits. . . . our best estimate is that social welfare would increase by several hundred million dollars a year if CON were repealed in . . . states that retain it.").

Another rent-seeking feature cited by the district court is the review process. After an application for a certificate of need is filed, Kentucky law permits any "affected person" to object to the issuance of the certificate. Ky. Rev. Stat. § 216B.085. Once an "affected person"—almost always an existing business seeking to restrict competition—objects, the statute triggers a procedure closely resembling a judicial one, including the right to be represented by counsel, introduce evidence and cross-examine witnesses at a hearing, and file motions for summary judgment. For a fledgling business like the Petitioners' in this case, the cost of retaining legal counsel for this process, on top of the already substantial costs of preparing and filing the initial application, serves as a further and often insurmountable bar to entering the market. Here, after Petitioners filed their application, a competitor filed an objection, resulting in the state ultimately denying Petitioners' application, "as it does nearly every time an incumbent opposes a start-up provider's application." Pet.App.80. In effect, Kentucky lets the foxes guard the hen house, allowing incumbent firms a role in the regulatory process not unlike the dentists' in *N.C. State Bd. of Dental Exam'rs.*

The fact that Kentucky's statute is still on the books at all is a further example of public choice economics in practice. In 1987, after experience and critical scholarship showed that certificate-of-need laws were ineffective in solving the problems they were meant to address, Congress repealed the requirement that states have such laws, and in the decades since, the

FTC and DOJ's Antitrust Division, together with an overwhelming scholarly consensus, have called for them to be modified or repealed. Pet.App.18. In 2013, Kentucky hired an outside consulting firm, Deloitte, to study the state's healthcare capacity; the resulting report recommended that the state "consider suspending/discontinuing the CON program for Home Health Agencies."[5] But, as public choice theory predicts, a powerful special interest group went into action to prevent that from happening. KHA, which represents 95 percent of hospitals in the state, makes no secret of its interest in preserving the state's certificate-of-need law. Pet. C.A. Brief at 29-30. It has a "certificate-of-need committee" whose purpose is "to make recommendations on changes to the State Health Plan and Kentucky's CON laws," and a key component of KHA's "Strategic Plan" is to "advocate for CON."[6] After Deloitte's report was issued, KHA went to work protecting its rent-seeking regulations, lobbying the state to retain certificate-of-need requirements for home healthcare. In the end, the state disregarded Deloitte's recommendation and kept the certificate-of-need requirement. And, of course, when this case was filed, KHA promptly intervened as a defendant to argue for preservation of its CON law in the courts.

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[5] Deloitte, *The Commonwealth of Kentucky Health Care Facility Capacity Report* 86 (2013), https://chfs.ky.gov/agencies/os/oig/dcn/Documents/Facilitystudy.pdf.

[6] *KHA Strategic Plan: 2021-2022,* https://www.kyha.com/assets/docs/KHAStrategicPlan.pdf.

II. SPECIAL INTEREST RENT-SEEKING HAS LED TO AN EXPLOSION OF LAWS RESTRICTING THE RIGHT TO WORK, OF WHICH CERTIFICATE-OF-NEED LAWS ARE A PARTICULARLY EGREGIOUS EXAMPLE.

This Court has long recognized that "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose," subject to the state's power to impose regulatory conditions "for the protection of society" and "provide for the general welfare." *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889) (upholding licensing requirements for doctors); *see also* Pet.Br. at 29-34 (detailing the long history of the right to work). However, thanks in large part to special interest groups, the landscape today is considerably different than when *Dent* was decided. In recent decades, interest groups have been ruthlessly effective at shutting potential competitors out of the market, both through the introduction of licensing schemes in industries that had never been regulated before and the expansion of licensing requirements in previously regulated industries, like healthcare.

Today, nearly a third of American workers are in jobs subject to state, local, and federal licensing schemes. That figure rose from less than five percent in the early 1950s to 29 percent by 2008. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market,* 31 J. LABOR ECON. S173, S175-76 (2013). Licensing has expanded considerably into sectors where it was previously thought unnecessary. "[A]mong licensed workers today, fewer than half are in health care, education, and law—traditionally very highly licensed occupations. Instead, large shares of licensed workers today are in

sales, management and even craft sectors like construction and repair." Department of the Treasury Office of Economic Policy, Council of Economic Advisers, Department of Labor, *Occupational Licensing: A Framework for Policymakers* 21 (2015).[7] And the proliferation of occupational restrictions has come at a profound cost. By one estimate, licensing restrictions cost up to 2.85 million jobs nationwide and raise consumer expenses by over $203 billion. Morris M. Kleiner, The Hamilton Project, *Reforming Occupational Licensing Policies* 6 (2015).[8] *See also* Morris M. Kleiner & Evgeny S. Vorotnikov, Institute for Justice, *At What Co$t? State and National Estimates of the Economic Costs of Occupational Licensing* 5 (2018)[9] (finding licensing laws result in an annual loss of $6.2 to $7.1 billion in lost output and between $183 and $197 billion in misallocated resources).

The FTC has long been concerned with the harms caused by occupational regulations. Since the 1970s, it has conducted numerous studies into the effects of occupational restrictions and has "submitted hundreds of comments and *amicus curiae* briefs to state and self-regulatory entities on competition policy and antitrust law issues" relating to licensed professionals, including real estate brokers, electricians, accountants, lawyers, dentists and dental hygienists, nurses, eye doctors and opticians, veterinarians, and funeral home

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7 https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

8 http://www.hamiltonproject.org/papers/reforming_occupational_licensing_policies.

9 https://ij.org/wp-content/uploads/2018/11/Licensure_Report_WEB.pdf.

directors. *See Barriers to Entrepreneurship: Examining the Anti-Trust Implications of Occupational Licensing: Hearing Before the Comm. on Small Business,* 113th Cong. 20-21 (July 16, 2014) (statement of Andrew Gavil, Director, Office of Policy Planning, Federal Trade Commission).[10] The FTC has "seen many examples of licensure restrictions that likely impede competition and hamper entry into professional and services markets, yet offer few, if any, significant consumer benefits." *Id.* at 3. With regard to certificate-of-need laws in particular, the FTC issued a joint statement with DOJ's Antitrust Division in 2015 encouraging their repeal, noting that they "create barriers to entry and expansion, limit consumer choice, and stifle innovation," and that "incumbent firms seeking to thwart or delay entry by new competitors may use CON laws to achieve that end." Federal Trade Commission & Department of Justice Antitrust Division, *Joint Statement to the Virginia Certificate of Public Need Work Group* at 2 (2015).[11]

Of course, not all occupational restrictions are problematic; many regulations are genuinely intended to address legitimate health and safety concerns. However, this is patently not the case with certificate-of-need laws, which "do not even pretend to protect public safety by ensuring that practitioners are educated or skilled; they exist for the explicit purpose of

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[10] https://www.congress.gov/113/chrg/CHRG-113hhrg88720/CHRG-113hhrg88720.pdf.

[11] https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-virginia-certificate-public-need-work-group/151026ftc-dojstmtva_copn-1.pdf.

preventing competition." Timothy Sandefur, *CON Job: State "Certificate of Necessity" Laws Protect Firms, Not Consumers,* 34 REGULATION 42, 46 (2011). Although defenders of these laws claim they increase quality and cost-effectiveness of healthcare and access to care, such claims run counter to basic economic theory as well as the empirical evidence. *See, e.g.,* Emily Whelan Parento, *Certificate of Need in the Post-Affordable Care Act Era,* 105 KY. L.J. 201, 207, 228 (2017) (citing "considerable evidence" that "CON programs do more harm than good in the healthcare markets in which they operate" and noting that "the evidence seems to support the conclusion that CON programs restrict access to care"); Departments of HHS, Treasury, and Labor, *Reforming America's Healthcare System Through Choice and Competition* 51 (2018)[12] ("available evidence suggests that CON laws have failed to produce . . . higher quality healthcare"); Matthew D. Mitchell, Mercatus Center, *Certificate-of-Need Laws: Are They Achieving Their Goals?* 3 (2017)[13] ("In short, there is no evidence to indicate that CON programs increase access to care, and they may actually be limiting access for rural residents of CON states"); Christopher Koopman et al., Mercatus Center, *Certificate-of-Need Laws: Implications for Kentucky* 2 (2015)[14] (citing research showing CON laws do not increase access to health care for the poor). To put it simply, certificate-

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12 https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf.

13 https://www.mercatus.org/system/files/mitchell-con-qa-mop-mercatus-v2.pdf.

14 https://www.mercatus.org/system/files/Elbarasse-Certificate-of-Need-KY-MOP.pdf.

of-need laws accomplish none of their stated purposes, but simply effect "a naked transfer of wealth." *See St. Joseph Abbey v. Castille,* 712 F.3d 215, 222-23 (5th Cir.), *cert. denied,* 134 S.Ct. 423 (2013).

Problematic and unnecessary restrictions like those in home healthcare abound in all sorts of industries. People have been cutting flowers and arranging them in vases for thousands of years, but in Louisiana all flower arranging must be supervised by a licensed florist, and obtaining a license requires traveling to Baton Rouge and paying $150 for a florist exam. *See* Testimony of Timothy Sandefur before the House Small Business Committee at 6 (Mar. 26, 2014).[15] Hair-braiding has been a common practice for millennia, but in some states licensed cosmetologists have used their positions on state cosmetology boards to block competition from hair-braiders, requiring them to obtain cosmetology licenses, even though cosmetology schools usually don't even teach braiding. *See* Paul Avelar & Nick Sibilla, Institute for Justice, *Untangling Regulations: Natural Hair Braiders Fight Against Irrational Licensing* 3 (2014).[16] And in Florida, aspiring interior designers must complete six years of education, pay $1,120 in fees, and pass an exam, requirements that seem excessively burdensome given that 47 states do not license interior designers at all. Dick M.

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15 https://republicans-smallbusiness.house.gov/uploadedfiles/3-26-2014_sandefur_testimony.pdf.

16 http://ij.org/wp-content/uploads/2015/03/untangling-regulations.pdf.

Carpenter II et al., Institute for Justice, LICENSE TO WORK 62 (2d ed. 2017).[17]

III. SYSTEMIC FACTORS CONTRIBUTE TO RENT-SEEKING REGULATIONS BECOMING ENTRENCHED, LEAVING JUDICIAL REVIEW AS THE ONLY REALISTIC MEANS OF UNDOING THEM.

A. Public Choice Theory Explains Why It Is Extremely Difficult to Undo Rent-Seeking Regulations Through the Legislative Process.

Both the district court and the Sixth Circuit understood the public choice issues in this case, including the rent-seeking characteristics of Kentucky's certificate-of-need statute and the myriad ways it worsens the problems it purports to address. The Sixth Circuit's response is that plaintiffs in cases like this one should turn to state legislatures: "Our custom . . . is to assume that democracy eventually will fix the problem. . . . [F]lawed laws will eventually be rectified by the democratic process." Pet.App.19 (internal quotations and citation omitted). *See also Powers v. Harris,* 379 F.3d 1208, 1225 (10th Cir. 2004) ("Under our system of government, Plaintiffs must resort to the polls, not to the courts for protection against" anticompetitive statutes) (internal quotations and citation omitted).

This approach has a certain simplistic appeal, but it is not grounded in Kentucky's reality: Lobbying efforts by the two Petitioners are almost certain to fail when running up against the long-established and well-organized statewide influence of a powerful lobby group

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17 https://ij.org/wp-content/uploads/2017/11/License_to_Work_2nd_Edition.pdf.

like KHA, which, through its PAC, Kentucky Hospitals' Circle of Friends, contributes thousands of dollars each year to Kentucky legislators.[18] But practical considerations aside, public choice theory has identified at least two broader systemic factors that contribute to rent-seeking regulations becoming entrenched once they are put in place.

The first is what economists refer to as "rational ignorance," which means exactly what it sounds like: Consumers are ignorant of the existence and effects of rent-seeking regulations, and this unawareness is perfectly rational. Higher prices and diminished consumer choice are costs typically spread thinly across the population of consumers as a whole, giving each individual consumer little incentive to learn about and organize to oppose an anticompetitive rule. The public's rational ignorance about rent-seeking regulations is not unlike how small shareholders of large corporations are usually rationally apathetic about the specific details of how the corporations are run. *See generally* Ilya Somin, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2013). In economic terms, "[r]ational ignorance means that individuals will decline to invest in obtaining information where the marginal costs of gathering that information exceed the expected marginal benefits." Stearns & Zywicki, *supra,* at 56 n.41. In other words, where the time, effort, or financial cost does not make it worthwhile for individuals to determine the degree to which rent-seeking regulations inflate the prices of goods or services, it is

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[18] *See* quarterly reports filed by the PAC with the Kentucky Registry of Election Finance, *available at*: https://secure.kentucky.gov/kref/publicsearch/OrganizationalSearch/OrganizationalReports/2161.

rational for them to remain ignorant of the regulations. *See id.* at 56 (explaining how consumers are rationally ignorant of price increases caused by steel tariffs in consumer goods that incorporate steel). Thus, individual members of the public often lack the individual incentive to organize and use the political process to repeal an existing rent-seeking regulation.

Second, the possibility of opposition to protectionist regulations by the electorate is also impaired by free-riding, where "[e]ach individual consumer will rationally decline to invest in opposition" because "[e]ach person or firm hopes that other similarly situated consumers will lobby in his or her place." *Id.* Because the incentive to free ride is universal, "it is rational for the group as a whole to decline to make the necessary investment" to oppose a rent-seeking regulation. *Id.* Furthermore, where the benefits of the group's collective efforts are shared among all members of the group (in this case, consumers of healthcare), whether they contributed to securing those benefits or not, this can be an additional disincentive to join the group's effort and can even lead to a "vicious cycle" where the group fails to obtain the resources necessary to operate effectively. *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31,* 138 S.Ct. 2448, 2491 (2018) (Kagan, J., dissenting). The freeriding problem is exacerbated when the full extent of the economic rent generated from an anticompetitive regulation is spread over many years and when the goods or services covered by such regulations are infrequently bought, such as home healthcare, caskets, and pest control. In those situations, the burdens that such regulations pose for individual consumers are further reduced, although

the burdens on consumers as a whole remain significant. *See* Stearns & Zywicki, *supra*, at 56.

B. Judicial Review Safeguards Economic Liberties From Protectionist Regulations, But Application of the Rational-Basis Test Has Yielded Unsatisfactory and Inconsistent Results.

Judicial review is perhaps the lone effective tool available to combat excessive rent-seeking by interest groups. In two recent cases, this Court has ruled in favor of challenges to rent-seeking regulations. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas,* 139 S.Ct. 2449 (2019) (dormant Commerce Clause challenge to residency requirement for liquor store license), *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494 (2015) (antitrust challenge to state licensing board). While those cases were an important step in ensuring judicial reviewability of some anticompetitive regulations, most cases are still subject only to Fourteenth Amendment rational-basis review, which has yielded inconsistent results.[19] Nonetheless, even that level of review has afforded at least some measure of relief, since purely protectionist regulations often operate in ways that directly undercut the asserted consumer-

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[19] The opinion below raises the question of whether it makes sense to subject protectionist regulations to differing standards of review based on which side of the state line a plaintiff lives on: "[S]hould [a challenged statute] receive more rigorous review under the dormant Commerce Clause solely when the entrant happens to be from another State? Put more specifically, should [Petitioners'] challenge have a better chance of success if they move to Indiana?" Pet.App.27. *Amici* advance no opinion on this question but suggest that this disparity in standards of review is another consideration that warrants granting the Petition.

safety rationales used to justify them. *See, e.g., St. Joseph's Abbey*, 712 F.3d 217, 226-27 (statute requiring monks who made and sold caskets to be licensed funeral directors was merely "the taking of wealth and handing it to others . . . not as economic protectionism in service of the public good but as 'economic' protection of the rulemakers' pockets"); *Craigmiles v. Giles,* 312 F.3d 220, 229 (6th Cir. 2002) (requiring casket sellers to take embalming courses and obtain a funeral director license was a "naked attempt to raise a fortress protecting the monopoly rents funeral directors extract from consumers"); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (requiring pest control license for removal of bats, raccoons, skunks and squirrels, but not mice, rats, or pigeons lacked any rational basis; "economic protectionism for its own sake . . . cannot be said to be in furtherance of a legitimate governmental interest.").

Unfortunately, in many cases, the rational-basis test has meant little more than a judicial rubber stamp of regulations economists would recognize as purely rent-seeking in nature. *See, e.g., Powers*, 379 F.3d 1208, 1218-19 (upholding pure economic protectionism as a legitimate state interest justifying regulation of casket sellers); *Niang v. Carroll*, 879 F.3d 870 (8th Cir. 2018), *vacated as moot*, 139 S.Ct. 319 (2018) (requirement that hair-braiders complete a 1500-hour hairdressing course that did not teach braiding passed rational-basis scrutiny); *Meadows v. Odom*, 360 F.Supp.2d 811, 822-25 (M.D. La. 2005), *vacated as moot*, 198 Fed.Appx. 348 (5th Cir. 2006) (florist licensing requirement constitutional because of the risk consumers will be injured by "broken wire" or "dirt" in an unlicensed floral arrangement).

Although the "ghost of *Lochner*" rattles its chains in some of the above opinions, the court below aptly noted that "the current deferential approach to economic regulations may amount to an overcorrection in response to the *Lochner* era at the expense of otherwise constitutionally secured rights." Pet.App.26. *Amici* respectfully submit that because of the systemic roadblocks to repeal of rent-seeking regulations through the legislative process, and because judicial review has offered only a limited and often inconsistent means of reviewing such regulations, the Petition should be granted to consider whether it is time to address that overcorrection.

CONCLUSION

For the reasons stated above, anticompetitive regulations have a substantial negative effect on consumer costs, the job market, and the economy as a whole, and the question of whether and how courts should review them is an issue of critical importance warranting this Court's review. The petition for a writ of certiorari should be granted.

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