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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICI CURIAE BRIEF OF SEWA INTERNATIONAL USA AND DR. THOMAS DAVIS IN SUPPORT OF PETITIONERS

HELEN O. TURNER
Counsel of Record
JORDAN A. RODRIGUEZ
LOCKE LORD LLP
600 Travis Street, Suite 2800
Houston, TX 77002
(713) 226-1200
helen.turner@lockelord.com
jordan.rodriguez@lockelord.com

Counsel for Amici Curiae

314480

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, Sewa International USA and Dr. Thomas Davis respectfully submit this brief in support of Petitioners.[1]

Amicus Sewa International USA (Sewa) is a Hindu faith-based nonprofit organization that serves refugees, migrants, and other disadvantaged communities in the United States and abroad. Since its founding in 2003, Sewa has strived to ensure that underserved and economically vulnerable groups receive access to high quality health care. To that end, Sewa partners with volunteer physicians and medical professionals who provide health care services to non-English speakers.

Amicus Dr. Thomas Davis is an emergency room physician at Baptist Health Louisville. Dr. Davis routinely sees and treats patients whose first language is not English, or who speak no English at all, including a significant number of Nepali-speaking patients. Although Baptist Health uses a language line translation service when necessary to assist non-English speaking patients, this service often fails to timely provide interpreters

1. *Amici curiae* sought and received consent from counsel of record for both the Petitioner and Respondents for the filing of this brief. Pursuant to Rule 37.2(a), *amici curiae* gave 10 days' notice of its intent to file this brief to all counsel. *Amici curiae* further state 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 or entity, other than *amici curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

who speak the appropriate language. When this happens, patients must wait in the ER—sometimes for many hours—until appropriate interpreters become available, if they become available at all. Dr. Davis has witnessed firsthand how, even with Baptist Health's language line translation service, treating patients with limited or no English proficiency is less personalized and more time-consuming for both patients and providers than treatment offered to English-speaking patients.

This brief will provide the Court with a better understanding of how the application of the rational-basis test impedes the ability of immigrants, refugees, and American citizens with limited English proficiency (LEP) to have full access to quality health care. This brief also will show how the extremely deferential rational-basis test has strayed from this Court's early precedents, which made clear that the test is an evidentiary *presumption* of a law's constitutionality—not an impenetrable shield against constitutional attack. And this brief will explain how the rational-basis test and Fourteenth Amendment analysis hinder Petitioners' efforts to overcome linguistic and cultural barriers in the health care system.

INTRODUCTION AND SUMMARY OF ARGUMENT

On November 25, 1986, Lia Lee, the four-year-old daughter of Hmong refugees living in California's San Joaquin Valley, presented at Merced Community Medical Center in status epilepticus. It was Lia's 16th admission. At the age of three months, she first showed signs of having what the Hmong call *quag dab peg* (the spirit catches you and you fall down), the condition known in

the West as epilepsy. While her highly competent doctors sought the best treatment through a dizzying array of pills, Lia's parents, who understood and spoke limited English, preferred a combination of Western medicine and traditional Hmong healing remedies designed to coax her wandering soul back to her body. Over the next four years, profound cultural differences and linguistic miscommunication exacerbated the rift between Lia's loving parents and her caring and well-intentioned doctors, eventually leading to the loss of all Lia's higher brain functions.[2] Lia's story illustrates how language and cultural barriers have a profound impact on the quality of health care delivered to individuals with limited or no English proficiency, and why it is essential for these individuals to communicate with health care providers who speak their language.

Petitioner Grace Home Health Care (Grace) wants to care for Louisville's Nepali-speaking refugees in a language they can understand. But under Kentucky's Certificate of Need law, new home health companies cannot open in Louisville—and nearly the entire state—unless they prove their services meet a vague standard of "need." Because new home health care companies like Grace are banned from operating in the Louisville area, Kentucky's Certificate of Need law reinforces cultural and linguistic barriers between patients and health care providers. This, in turn, exacerbates existing disparities

2. The story of this very sickly girl, her refugee parents, and the doctors who struggled desperately to save her becomes, in Anne Fadiman's *The Spirit Catches You and You Fall Down*, at once a cautionary study of the limits of Western medicine and a parable for the modern immigrant experience. *See* Anne Fadiman, *The Spirit Catches You and You Fall Down* (1997).

in health care access that disproportionately burden LEP individuals.

In a thoughtful opinion, Judge Sutton of the Sixth Circuit upheld Kentucky's Certificate of Need law under the most deferential version of the rational-basis test. Judge Sutton did so despite acknowledging both Petitioners' "formidable" arguments against the law's constitutionality and their "considerable evidence showing that, in practice, Certificate of Need laws often undermine the very goals they purport to serve—lower costs and better care." *Tiwari v. Friedlander*, 26 F.4th 355, 364 (6th Cir. 2022). The court also acknowledged the Certificate of Need law's "pernicious effects, particularly when it comes to incumbency protection and undue barriers to new entrants in the market." *Id.* But bound by this Court's rational-basis precedents, some of which suggest that even overwhelming empirical evidence is constitutionally irrelevant, Judge Sutton reluctantly gave Kentucky's law a "pass," albeit with a "low grade." *Id.* at 363. In effect, the court ruled that Petitioners' evidence showing that Kentucky's Certificate of Need law does not work for Louisville's Nepali-speaking residents—buttressed by considerable critical scholarship showing that the law is a failed experiment—has no bearing on whether the law is "rational" and comports with the Constitution. That was error. For though the rational-basis test calls for judicial deference to legislative decisions involving debatable policy issues, it does not force courts to blind themselves to reality.

Amici's position is that the extreme rational-basis test applied by the courts below is incompatible with this Nation's legal history and tradition of protecting the right to pursue a common occupation. *See Conn. v.*

Conn v. Gabbert, 526 U.S. 286, 291–292 (1999); *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 238–39 (1957) *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Dent v. State of W.Va.*, 129 U.S. 114, 121 (1889). *Amici* do not question the presumption of statutory constitutionality. Rather, *amici* urge this Court to reconsider and recalibrate the rational-basis test and clarify that an objectively verifiable fit must exist between the ends the government seeks to pursue and the means it adopts to pursue them. That is to say, the Court should apply the meaningful level of scrutiny urged by Petitioners when evaluating Fourteenth Amendment claims concerning the fundamental right to engage in a common occupation.

ARGUMENT

I. Health Disparities and Lack of Culturally Competent Care Are Well-Known and Widespread.

Over the past 20 years, scores of government reports, academic studies, and policy proposals have examined disparities in the American health care system caused by language and cultural barriers. Federal agencies have issued myriad reports focusing on the critical need for culturally competent health care to address health disparities suffered by immigrants, refugees, and non-English speakers.[3] The federal Department of

3. In a 2014 report on the subject, the Agency for Health Research and Quality defines "culturally competent care" as "care that respects diversity in the patient population and cultural factors that can affect health and health care, such as language, communication styles, beliefs, attitudes, and behaviors." Agency for Healthcare Research and Quality. (2014). Improving Cultural Competence to Reduce Health Disparities for Priority

Health & Human Services' Office of Minority Health, for instance, offers cultural competence training resources and has developed national standards for culturally and linguistically appropriate services (CLAS) in health care, based on their potential to "improve the quality of services provided to all individuals, which will ultimately help reduce health disparities and achieve health equity."[4] Today, 32 states, including Kentucky, implement these standards.[5] Moreover, California, New Jersey, New Mexico, and Washington require health professionals to complete cultural competence training, while New Jersey requires such training for physicians, dentists, and podiatrists. For its part, Kentucky has established an Office of Health Equity to "address[] health disparities among racial and ethnic minorities and rural Appalachian populations"[6] and incorporate cultural competency as one of its five "focus areas and goals."[7]

Populations: Evidence-Based Practice Center Systematic Review Protocol, https://effectivehealthcare.ahrq.gov/products/cultural-competence/research-protocol

4. *See* U.S. Department of Human and Services, Culturally and Linguistically Appropriate Services (CLAS), https://thinkculturalhealth.hhs.gov/clas/what-is-clas.

5. *See* U.S. Department of Health and Human Services, Office of Minority Health. (2016). National Standards for Culturally and Linguistically Appropriate Services in Health and Health Care: Compendium of State-Sponsored National CLAS Standards Implementation Activities, https://thinkculturalhealth.hhs.gov/assets/pdfs/CLASCompendium.pdf

6. *See* Kentucky Cabinet for Health and Family Services, Department of Public Health, Office of Health Equity, https://chfs.ky.gov/agencies/dph/oc/Pages/heb.aspx

7. *Id.*

At the local level, a 2011 report by the Louisville Metro Department of Public Health & Wellness (Louisville Metro) flagged the significant language and cultural barriers that immigrants and refugee populations face when seeking health care.[8] This report emphasizes that "[h]ealth care providers and institutes need to proactively respond to cultural, language, and health literacy disparities."[9] More recently, a 2019-2020 Louisville Metro Community Health Assessment included eight focus groups composed of underrepresented Louisville residents—one of which was composed of Nepali and Bhutanese individuals. The summary of the Nepali-Bhutanese focus group's findings indicated that cultural and language barriers are critical challenges to be addressed, as they constitute a significant non-financial barrier to health care access.[10]

Academic research supports those findings. A recent systematic review of the effect of language barriers in health care concluded that these barriers "lead to miscommunication between the medical professional and patient, reducing both parties' satisfaction and decreasing the quality of health care delivery and patient safety."[11] The authors of the systematic review

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8. *See* Louisville Metro Health Equity Report: The Social Determinants of Health in Louisville Metro Neighborhoods (2011), https://louisville.edu/cepm/westlou/louisville-wide/lmph-health-equity-report-2011/

9. *Id.* at 43–44

10. *See* Louisville Metro Community Health Assessment (2018), https://nortonhealthcare.com/wp-content/uploads/community-health-needs-assessment-2018.pdf

11. *See* Al Shamsi et al., *Implications of Language Barriers*

identified 14 peer-reviewed studies on the topic, five of which were from the United States. One study contacted 1,200 California residents through a telephone survey conducted in 11 languages and focused on medical comprehension, including whether the respondents experienced problems understanding a medical situation, reported confusion about medication use, had trouble understanding drug labels, or experienced an adverse drug reaction. Survey respondents with LEP and a language-discordant physician were more likely to report problems understanding a medical situation, have trouble understanding drug labels, and experience adverse drug reactions.[12]

Another study that examined adverse events in six accredited U.S. hospitals found that LEP patients were more likely to report problems understanding a medical situation and an adverse reaction to medication due to problems understanding a medication label than English speaking patients.[13] Adverse events suffered by LEP patients were also more likely to be attributable to communication errors than adverse events suffered by non-LEP patients.

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for Healthcare: A Systematic Review. Oman Med. J. (2020), Vol. 35, No. 2, https://pubmed.ncbi.nlm.nih.gov/32411417/

12. Wilson et al., *Effects of Limited English Proficiency and Physician Language on Health care comprehension*. 20 J. Gen. Intern. Med. 800-806 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1490205/

13. Divi *et al.*, *Language proficiency and adverse events in US hospitals: a pilot study.* Int. J. Qual. (2007), Vol. 19, No. 2, 60-67, https://pubmed.ncbi.nlm.nih.gov/17277013/

Finally, a 2005 review article in Health Affairs (a peer-reviewed health policy journal) expanded on these points:

> The literature shows that language barriers have a demonstrable negative impact on access, quality, patient satisfaction, and sometimes cost. Compared with proficient English speakers, people with limited English proficiency (LEP) are less likely to seek care and to receive needed services when they do. They have fewer physician visits and receive fewer preventive services, even after such factors as literacy, health status, health insurance, regular source of care, economic indicators, or ethnicity are controlled for. Language barriers are associated with poor quality of care in emergency departments (EDs); inadequate communication of diagnosis, treatment, and prescribed medication, and medical errors. Patients with language barriers have lower satisfaction with care, even when compared with patients of the same ethnicity who have good English skills. Language barriers can also create additional costs . . . LEP patients have more diagnostic tests, presumably because of physicians' attempts to compensate for communication difficulties, and are more likely to be admitted to the hospital from the ED.[14]

14. Brach et al., *Crossing the Language Chasm*. Health Affairs (2005), Vol. 24, No. 2, 424-434, https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.24.2.424

Cultural competency, particularly with regard to language, applies similarly in the home health care setting. Home health service providers who relate to a particular group are more likely to be accepted by patients who are inviting the providers into their homes. Communications between the patient and the home health care provider are smoother, more efficient, and less prone to error when the patient and provider share a common culture and language—particularly when the population in question is "discrete and insular." The ability to communicate symptoms and medical history is severely compromised when the patient and provider do not speak the same language or when a trained interpreter is not available. With the increasing number and diversity of immigrants and refugees seeking a better life in the United States, particularly in its urban centers, these barriers may become even more formidable.

2. The Rational-Basis Test Is a Rebuttable Presumption of Fact, Not a Conclusive Presumption or Rule of Law that Renders Legislation Invulnerable to Constitutional Challenge.

The rational-basis test is the most deferential standard of judicial review. As articulated in *Nebbia v. People of New York*, 291 U.S. 502 (1934), and further elaborated in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the rational-basis test provides that a statute regulating economic matters starts with a presumption of constitutionality, unless the plaintiff presents evidence that the statute is not rationally related to a legitimate government interest. If the challenged statute has "a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory, the requirements [of this test] are satisfied." 291 U.S. at 537.

In its nascent years, the rational-basis test was deferential, but not insuperable. Indeed, in the same year as *Nebbia*, this Court unanimously reversed the dismissal of a complaint in a rational basis test case, explaining that the presumption of constitutionality "is a rebuttable presumption" "of fact," and "not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. *Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack*." *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934) (emphasis supplied).

Stressing that it is "imperative" for courts in rational-basis cases to engage with facts and "not proceed upon false assumptions," *id.* at 210–11, this Court explained that when a plaintiff challenges an economic regulation, she "must carry the burden" of proving its irrationality—either by facts "which may be judicially noticed, or [by] other legitimate proof." *Id.* at 209. Where a statute is challenged under the rational-basis test, the validity of that statute is "properly the subject of evidence and of findings." *Id.*; *accord Charleston Corp. v. Chastleton Corp. v. Sinclair*, 264 U.S. 543, 549 (1924).

A year after *Nebbia* and *Borden's Farm Products*, this Court reversed a Tennessee Supreme Court decision which refused to consider the plaintiff's evidence when adjudicating a rational-basis challenge. In *Nashville, C. & St. L. Ry. v. Baker*, 167 Tenn. 470, 71 S.W.2d 678 (1934), *rev'd sub nom. Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935), the lower tribunal had refused to consider evidence, holding that if the legislature believed a law was rational, that was enough to pass constitutional muster. *See* 71 S.W.2d at 680. But Justice Brandeis wrote that "[a] rule to the contrary is settled by the decisions of this

Court. A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in conditions to which it is applied." 294 U.S. at 415 (citations omitted). To "refus[e] to consider" the facts presented in evidence was "obviously err[oneous]." *Id.* at 416. By relying on hypothetical rationales to dismiss the case, instead of considering whether changes in factual circumstances rendered the statute irrational, the state court had failed to fairly apply the rational-basis standard. *Id.* at 428. This Court thus remanded for fact-finding. *Id.* at 432–33.

Similarly, in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), this Court made clear that where the question of a challenged law's rationality "depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry," and a plaintiff may prevail "by showing to the court" that the "facts" upon which the statute's constitutionality is predicated "have ceased to exist," or by "proof of facts tending to show that the statute as applied to a particular article is without support in reason." *Id.* at 153–54 (citations omitted).[15]

15. *Carolene Products*' announcement of the changed-circumstances doctrine was not dicta. This is true for two reasons. First, *Carolene Products* is the foundational decision upon which the entire edifice of rational-basis review rests, and it must be reckoned with in a case, such as this one, that is ultimately about the application of the rational-basis test. Second, the discussion of the changed circumstances in *Caroline Products* was not dicta because it was integral to the elucidation of the rational-basis standard, which in turn was the basis for rejecting the constitutional claim at issue. *See, e.g., Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996) (explaining that a case's holding includes "those portions of the opinion necessary to the result").

Decades later, in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), the plaintiffs challenged the constitutionality of a law giving in-state companies preferences over their out-of-state competitors. This Court found that "the Equal Protection Clause was intended to prevent" this "very sort of parochial discrimination," *id.* at 878, and then remanded to the Court of Appeals to conduct an *evidence-based* determination of whether the law was rationally related to a legitimate government interest rather than unconstitutional favoritism. *Id.* at 875; *accord Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) ("We are not imposing our view of a well-functioning market on the people of [this state]. Instead, we invalidate only the [decision-making body]'s naked attempt to raise a fortress protecting [one subsection of an industry at the expense of another similarly situated]….").

Showing that a challenged law is irrational may be difficult, but it is obviously possible, because this Court has struck down laws under the rational-basis test. In *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985), this Court invalidated a Texas municipality's decision to prevent construction of a home for the mentally disabled, finding that decision discriminatory and arbitrary. Again in *Romer v. Evans*, 517 U.S. 620, 632 (1996), this Court struck down a law that lacked a rational connection to legitimate public interest. While acknowledging that rational-basis review is deferential, this Court held that it nonetheless requires a genuine "relation between the classification adopted and the object to be attained," and instructed courts to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633. The same principle has applied to economic restrictions designed to confer benefits on favored insiders. *See U.*

S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–36 (1973) (holding that the government's denial of food stamps to "hippie" communes failed the rational-basis test because it was not a "rational effort to deal with these concerns").

As these cases show, the rational-basis test is deferential, but not "toothless," *Mathews v. De Castro*, 429 U.S. 181, 185 (1976), and it surely does not absolve courts of their duty to give plaintiffs the opportunity to prove well-pled and plausible allegations. *Nashville, C. & St. L. Ry.*, 294 U.S. at 414–15. But in this case, the Sixth Circuit's near-total deference led it to conclude that "a State need not proffer more than 'rational speculation unsupported by evidence or empirical data.'" *Tiwari*, 26 F.4th at 367 (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)).[16] That approach conflicts with this Court's instructions that changed circumstances can render a regulation unconstitutionally arbitrary. *Nashville, C. & St. L. Ry.*, 294 U.S. at 414–15; *Carolene Products Co.*, 304 U.S. at 153–154. Worse still, the lower courts' approach transforms the rational basis test from a rebuttable presumption into an impenetrable shield, contrary to well-established law. *See Borden's Farm Prods. Co.*, 293 U.S.

16. *Beach Commc'ns* is often cited to justify the most extreme form of rational-basis review. But that decision preceded *Heller v. Doe*, 509 U.S. 312 (1993), which clarified that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Id.* at 321. And, as Justice Stevens pointed out in *Beach Commc'ns*, extreme rational-basis review is tantamount to the total abandonment of judicial review: "[T]he Constitution requires something more than mere a 'conceivable' or 'plausible' explanation for the unequal treatment." *Beach Commc'ns*, 508 U.S. at 323 (citation omitted) (Stevens, J., concurring in judgment).

at 209 (rational basis "is not a conclusive presumption"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) (rationality review "is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.").

A legislature's mere *ipse dixit* cannot inoculate a law against constitutional review, because the government defendant will, quite understandably, *always* assert that its laws or actions are "reasonable" or that they might benefit the public in some way. If courts are required to accept such assertions, even in the face of "considerable evidence" of "pernicious effects," then the rational basis test would be tantamount to abdication of judicial responsibility. The test does not go so far. If a plaintiff meets her heavy burden of negating the rational bases for the law, she should be entitled to judgment on the merits. *See, e.g.*, *Craigmiles*, 312 F.3d at 228–229; *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008); *St. Joseph Abbey v. Castille*, 700 F.3d 154, 161 (5th Cir. 2012).

Even in rational-basis cases, courts cannot just take the government at its word without factual substantiation, because courts are duty-bound to safeguard "the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action." *Raines v. Byrd*, 521 U.S. 811, 829 (1997). The Constitution's authors, aware that factions, including economic interest groups, would try to exploit legislative power to benefit themselves at the expense of the general public, expected courts to act as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority," so as to "guard the

Constitution and the rights of individuals." *The Federalist* No. 78 (A. Hamilton).[17] For that reason, the judiciary stands "as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement." *Chambers v. State of Fla.*, 309 U.S. 227, 241 (1940).

This duty applies no less in rational-basis cases than elsewhere. That is why *Nebbia*, arguably the first decision to apply the modern rational-basis test, nonetheless declared that "the function of the courts" in cases like this one "is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." 291 U.S. at 536. As Professor Fallon writes, "[f]or rationality review to be real rather than a sham, the court must be willing to make

17. The Constitution's Framers also recognized that judicial review does not entail a direct conflict between the judiciary and the people's will; instead, it is the legislative will that sometimes must be thwarted in the name of the Constitution. In fact, this very lack of identity between the people and their representatives forms the foundation of Alexander Hamilton's defense of judicial review in *The Federalist* No. 78: "[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former." In exercising judicial review, Hamilton concluded, the courts act not in contravention of the people but as "an intermediate body between the people and the legislature." *Id.* Although "representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves," Hamilton would have none of it. *Id.* No. 71 (A. Hamilton).

some independent assessment of legislative purpose."[18] To the extent that this Court's pronouncements suggest otherwise, this Court should return the rational-basis test to its original moorings.

3. An Extremely Deferential Rational-Basis Test Fails to Protect Language Minorities and Other Politically Powerless Groups Against Discrimination.

This Court has recognized that the Fourteenth Amendment's Due Process and Equal Protection clauses afford some measure of protection for language minorities. *See Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (upholding parents' rights to send children to private language schools); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 524–525 (1926) (protecting rights of Chinese business persons in Philippines to pursue occupations); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (identifying fundamental right of language teachers to choose their employment); *cf. Hernandez v. New York*, 500 U.S. 352, 369 (1991) (noting that in some contexts proficiency in particular languages might be "treated as a surrogate for race"). But while these decisions acknowledged that state deprivation of a right or privilege based on language may implicate the Fourteenth Amendment, they left unanswered how far courts can go in protecting those rights.

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18. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 316 n.38 (1993); *see also* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 69 (1985) (rationality review should "ensure that disparate treatment is justified by reference to something other than an exercise of political power by those benefitted").

In 1970, the Department of Health, Education and Welfare—a predecessor to both the Department of Health and Human Services and the Department of Education—explained that Title VI of the Civil Rights Act prohibits national origin discrimination, including discrimination against persons with LEP. *Notice*, 35 Fed. Reg. 11,595 (July 18, 1970). And in 2000, the Department of Justice explicitly identified "discrimination against persons with [LEP]" as national origin discrimination under Title VI. Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance, 65 FR 50123-01.

This Court originally agreed in *Lau v. Nichols*, 414 U.S. 563 (1974). But, as this Court later recognized, *Lau* "interpreted § 601 [of Title VI] itself to proscribe disparate-impact discrimination"—an interpretation that subsequently has been rejected. *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001) (holding that there is no implied private right of action to enforce disparate impact regulations adopted by federal agencies under Title VI). Moreover, this Court's Equal Protection Clause jurisprudence makes clear that the Fourteenth Amendment's substantive prohibition, like Title VI's, reaches only demonstrably intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.")

Taken together, these rulings—which *amici* do not call into question here—leave language minorities, especially immigrants and refugees who do not have voting representation in Congress, to "the vagaries of the political process." *United States v. Vaello Madero*, 142 S. Ct. 1539, 1560 (2022) (Sotomayor J., dissenting). That result is particularly perverse since *Carolene Products*—this Court's seminal rational basis decision—voiced special concern for protecting minorities against the predations of political majorities.

Times have changed since 1938. *Carolene Products*' assumptions about which groups are "discrete and insular minorities" deserving special solicitude are not necessarily valid today when this Nation's demographic makeup is far different than eighty decades ago.[19] Indeed, the Louisville Metro area has experienced an explosion of its foreign born pollution—up 112.4% between 2000 and 2010, and up 18.5% between 2010 and 2016—with many of these individuals arriving from Africa, Asia, and South America.[20] A doctor working in Louisville in 1938, or even 1982 (when Kentucy's CON law was enacted), would not expect to encounter a Nepali-speaking patient in her practice. In 2022, that is no longer the case.

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19. This point has been made by Christina M. Rodríguez in *Latinos: Discrete and Insular No More*, 12 Harv. Latino Rev. 41 (2009) (observing that since "white" Americans may cease to be a majority by the mid-21st century, it is becoming increasingly inappropriate to frame social and political relations in the United States in terms of a majority-minority dynamic that existed in the mid-20th century).

20. New American Economy, Global Louisville: A Demographic and Economic Snapshot of the Foreign-Born (2018), https://www.newamericaneconomy.org/wp-content/uploads/2018/06/Louisville_Brief.pdf

Twentieth century notions of which of racial and ethnic groups are "discrete and insular" deserving of enhanced judicial protection are losing their descriptive validity and must be adapted to reflect changing times and circumstances. As certain groups grow in number and political influence, they can protect their interests through the political process instead of the courts. But groups that have yet to come into their electoral own—many of whom are not U.S. citizens and lack the right to vote—have no such recourse. It is thus worth recalling this Court's words from more than 80 years ago: "No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining [the Fourteenth Amendment's] shield deliberately planned and inscribed for the benefit of every human being subject to our constitution—of whatever race, creed, or persuasion." *Chambers*, 309 U.S. at 241.

"The Constitution does not protect racial [or language] minorities from political defeat." *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291, 391-92 (2014) (Sotomayor, J., dissenting). But even if the majority has not "use[d] its numerical advantage to change the rules mid-contest and forever stack the deck against," *id.* at 392, Petitioners and Nepali-speaking residents, practical political realities[21] implicate the judiciary's role in safeguarding the interests of politically powerless groups. Giving the government *carte blanche* to legislate without needing to justify its actions with evidence is bad enough. But, as this case shows,

21. *See generally* J. Buchanan & G. Tulloch, *The Calculus of Consent* (1962) (arguing that all rational actors, including those in government, pursue power).

allowing courts to come up with justifications itself—even ones the legislature never considered—falls most heavily on the least politically powerful. If ever there were justification for judicial review of constitutional provisions that protect "discrete and insular minorities," *Carolene Products Co.*, 304 U.S. at 152, surely that principle would apply to Petitioners.[22]

CONCLUSION

The Court should grant a writ of certiorari, reverse the Sixth Circuit, and clarify that the longstanding right to engage in a common occupation enjoys meaningful judicial protection.

Respectfully submitted,

HELEN O. TURNER
Counsel of Record
JORDAN A. RODRIGUEZ
LOCKE LORD LLP
600 Travis Street, Suite 2800
Houston, TX 77002
(713) 226-1200
helen.turner@lockelord.com
jordan.rodriguez@lockelord.com

Counsel for Amici Curiae

22. In other contexts, members of this Court have recognized how excessively deferential judicial standards tend to encourage "those citizens with disproportionate influence and power in the political process" to victimize the weak. *See, e,g.*, *Kelo v. City of New London,* 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting).