No. 22-42

In The Supreme Court of the United States

DIPENDRA TIWARI; KISHOR SAPKOTA; and 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 A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Kentucky Hospital Association is a Kentucky non-profit corporation, and there is no parent corporation or publicly held corporation that owns 10% or more of its stock.

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INTRODUCTION

This case concerns Petitioners' challenge under the Fourteenth Amendment to the constitutionality of the certificate of need (CON) program that regulates home health agencies in Kentucky. Petitioners' claims are subject to rational-basis review. The Sixth Circuit below—like every other circuit that has considered the constitutionality of healthcare CON programs under the Fourteenth Amendment—held that Kentucky had articulated rational bases in support of the program. Petitioners cannot show that the Sixth Circuit erred in its application of rational-basis review. Nor can they identify any conflict between the decision below and a decision of any other circuit. Instead, Petitioners (at 2) ask the Court to "recalibrate" the rational-basis test to make it less deferential to state legislatures.

Petitioners list a series of perceived flaws in the rational-basis test, including that it does not provide "meaningful review," and that it creates "absurd" results and inconsistent outcomes. But the Sixth Circuit did conduct a meaningful review below and wrote an opinion that was well-reasoned, thorough, and consistent with all other decisions of the circuit courts concerning healthcare CON programs. And although Petitioners cite to unrelated decisions of other courts applying rational-basis review, those decisions provide no reason for the Court to review this decision.

Any recalibration of the rational-basis test applied by the Sixth Circuit below would require courts to weigh the costs and benefits of laws, which would be a

clear encroachment on the province of state legislatures. As the Sixth Circuit explained: "Any other approach would require us not just to decide whether a plausible rational-basis exists but then to balance out the totality of costs and benefits, a value-laden task that no two judges could ever do in the same way." Pet. App. 20. The Sixth Circuit conducted an appropriate review under the Fourteenth Amendment. The Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

A. Home Health Services

CON programs in the United States are prevalent and well-established. There are 35 states with CON programs, although the programs can vary greatly. Pet. App. 18. Of those 35 states, 16, including Kentucky, have CON programs that cover home health agencies. *Id.* In 2018, Petitioners applied for a CON to establish a home health agency in Jefferson County, Kentucky. D.C. Dkt. 1118.[1] Home health agencies provide home health services, which are medical services that require a prescription from a physician. *See* 902 KAR 20:081, Section 2 ("A home health agency shall provide part-time or intermittent health and health related services to a patient in his or her place of residence, either singly or in combination as required by a plan of care prescribed by a licensed physician."). Home health

[1] These citations refer to Page ID#s in the district court's docket.

agencies are required to provide skilled nursing services and at least one therapeutic service, medical social service, or home health aide service. 902 KAR 20:081, Section 5(1). These medical services are provided in the homes of patients by skilled professionals. Thus, although home health agencies do not require heavy investment in facilities, they have high staffing costs. D.C. Dkt. 1991.

B. Statutory Background

In 1980, the Kentucky General Assembly enacted the CON program that Petitioners challenged below. When it did, it took the unusual step of articulating the reasons for enacting the program in a statute, KRS 216B.010. The statute lists three main objectives: (1) improve the quality of healthcare in the Commonwealth; (2) improve access to healthcare facilities, services, and providers; and (3) create a cost-efficient healthcare delivery system. *See* KRS 216B.010.

The law requires anyone wishing to establish a "health facility" in Kentucky, or to make any substantial change to an existing health facility, to first obtain a CON. KRS 216B.061(1). The term "health facility" is defined by statute to include home health agencies. KRS 216B.015(13). The first step in the process is submission of an application for a CON to the Office of Inspector General (OIG) of the Kentucky Cabinet for Health and Family Services (Cabinet). KRS 216B.062. To obtain approval of a CON application, an applicant must show that its project is consistent with five

statutory criteria: (1) consistency with the State Health Plan; (2) need and accessibility; (3) interrelationships and linkages; (4) costs, economic feasibility, and resources availability; and (5) quality of services. KRS 216B.040. Each of these five criteria are intended to advance the stated purposes of the CON program.

The State Health Plan contains specific review criteria for each type of facility or service subject to the CON requirement. KRS 216B.015(28). The primary State Health Plan criterion for establishing or expanding a home health agency is based on a formula that seeks to identify counties in Kentucky in which residents are utilizing home health services less than expected based upon the population of the county compared to the average statewide use rate for home health services:

> The need for home health services is determined on a county-by-county basis by applying target rates estimating the number of individuals per 1,000 population expected to require home health services. Age cohort target rates are calculated for the plan year and are based on the average number of unduplicated patients served statewide in each age cohort for the most recent two (2) calendar years in the Kentucky Annual Home Health Services Report. Age cohort rates are applied to the plan year county population projections to determine expected need for home health services. The number of additional patient services needed in a county is then determined by subtracting the average number of

> unduplicated patients served in the county for the most recent two (2) calendar years, as reported in the Kentucky Annual Home Health Services Report, from projected need.

D.C. Dkt. 1938. If this calculation yields a need of at least 250 patients for a county, a CON application to establish a home health agency in that county will be consistent with the State Health Plan. *Id.* The State Health Plan defines "to establish a home health service" to mean "to establish a parent home health agency or a subunit as defined by Medicare in a county." *Id.* Requiring new home health agencies to show a need of at least 250 patients ensures sufficient patient volume for the home health agency to be financially feasible because 150 patients is the typical break-even point for new home health agencies. Pet. App. 59.

If the State Health Plan calculation yields a need of at least 125 patients for a county, an application to expand a home health agency into the county will be consistent with the State Health Plan. D.C. Dkt. 1938-39. The State Health Plan defines "to expand a home health service" to mean "to add to the applicant's existing service area a Kentucky county or counties that are contiguous to the applicant's existing service area if the expansion does not involve the establishment of a parent home health agency or subunit as defined by Medicare." *Id.* at 1938. The patient volume threshold is lower for an expansion of a home health agency because "overhead costs are lower when an agency expands." Pet. App. 59.

A third criterion in the State Health Plan permits the establishment of a home health agency to alleviate an emergency. D.C. Dkt. 1939. A fourth criterion permits an acute care hospital or nursing facility to establish a home health agency to serve exclusively patients discharged from its facility if it documents that it has been unable to timely discharge patients who require home health services in the last 12 months. *Id.*

To satisfy the "need and accessibility" criterion, the applicant must show that its proposal meets an identified need in a defined geographic area and that it will be accessible to all residents of the area. KRS 216B.040(2)(a)2.b. The "interrelationships and linkages" criterion requires that home health agencies will have appropriate and effective linkages with other healthcare services and facilities to ensure comprehensive care, proper utilization of services, and efficient functioning of the healthcare system. KRS 216B.040(2)(a)2.c.

The "costs, economic feasibility, and resources availability" criterion requires the applicant to show that its "proposal, when measured against the cost of alternatives for meeting needs, shall be judged to be an effective and economical use of resources, not only of capital investment, but also ongoing requirements for health manpower and operational financing." KRS 216B.040(2)(a)2.d. Finally, the "quality of services" criterion requires the applicant to show that it will provide quality healthcare services. KRS 216B.040(2)(a)2.e.

After an applicant submits its completed application, the Cabinet gives notice to the public of the application through a newsletter posted on the Cabinet's website. 900 KAR 6:060. At that time, any "Affected Person" may request a public hearing on the application. KRS 216B.085(1). "Affected Person" is broadly defined as:

> the applicant; any person residing within the geographic area served or to be served by the applicant; any person who regularly uses health facilities within that geographic area; health facilities located in the health service area in which the project is proposed to be located which provide services similar to the services of the facility under review; health facilities which, prior to receipt by the agency of the proposal being reviewed, have formally indicated an intention to provide similar services in the future; and the cabinet and third-party payors who reimburse health facilities for services in the health service area in which the project is proposed to be located.

KRS 216B.015(30). If an Affected Person requests a hearing, a public hearing is conducted by a hearing officer of the Cabinet with authority to independently make a final decision concerning the application. KRS 216B.085(2). After the hearing, the hearing officer either approves or disapproves the application based upon the administrative record. KRS 216B.085(4). If no party requested a hearing, the hearing officer's decision is based solely upon the application. The hearing

officer's final decision may be appealed to the Franklin Circuit Court in Frankfort, Kentucky. KRS 216B.115.

KRS 216B.062(1) requires that the hearing officer make a final decision within 90 days from the date of public notice of the CON application unless the applicant requests a deferral. The majority of CON applications for home health agencies that have been submitted for a decision have been approved. From January 1, 2000, through March 30, 2020, independent hearing officers approved 53 CON applications to establish or expand a home health agency, while denying 42 applications. D.C. Dkt. 1971. At least ten CON applications to establish or expand a home health agency within the last decade have been approved despite opposition from one or more existing agencies. *Id.* at 1972.

C. Factual and Procedural Background

When Petitioners filed an application to establish a home health agency in Jefferson County in 2018, there were already nine home health agencies serving that county. D.C. Dkt. 1972. An independent hearing officer of the Cabinet denied the application under Review Criterion No. 1 as inconsistent with the State Health Plan. *Id.* at 1739. Petitioners then filed this lawsuit alleging that Kentucky's CON requirement for home health agencies violated the Equal Protection Clause, the Due Process Clause, and the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* at 1.

Respondents moved to dismiss Petitioners' Complaint. Petitioners amended their Complaint in response, but Petitioners later failed to substantiate several of their key allegations in discovery. In their Amended Complaint, Petitioners alleged that they "are personally aware of Nepali-speaking individuals who cannot find adequate home health services from Nepali-speakers," but discovery showed that was not true. *Id.* at 95, ¶ 40. Despite multiple opportunities during the discovery phase of the case, Petitioners could not identify one person who had sought home health services from a home health agency in Jefferson County and had been turned away. Petitioners were eventually forced to admit that "Grace has not identified the specific Nepali speakers who have specifically been prescribed home health services and would like to see Grace open." *Id.* at 3338.

Petitioners claim (at 15) that they "want to provide Nepali-language home health service that is unavailable in Louisville," but that assertion is unsupported by the record. Petitioners never investigated whether any of the nine home health agencies serving Jefferson County have Nepali-language home health services available. Furthermore, federal law requires home health agencies to provide language interpretation services for patients. *See* 42 C.F.R. § 484.50(f). The record contains evidence that Nepali-speaking patients are being served by existing home health agencies. VNA Health at Home, which is one of the home health agencies serving Jefferson County, provides language interpretation services, including video-based

interpretation services on demand from Cultralink. D.C. Dkt. 3276. The agency has received no complaints about the Cultralink interpretation services from any Nepali-speaking patients or their family members. *Id.*

In addition, discovery revealed that Petitioners' projections for the patients they planned to serve were baseless. When Petitioner Dipendra Tiwari was asked to explain the methodology used to calculate the projections in Petitioners' CON application, Mr. Tiwari's response was: "There's no methodology." *Id.* at 2856. In fact, as the case progressed below, Petitioners appeared confused about what services home health agencies provide. At his deposition, Petitioner Kishor Sapkota identified as potential clients individuals in Louisville needing transportation and food preparation services. *Id.* at 2572-79. But transportation and food preparation services are personal care services, not home health services. KRS 216.710(9). A CON is not required in Kentucky to establish a personal care services agency. 906 KAR 1:180. In fact, Grace Home Care had a personal care services agency certification and could have provided those services but never did. D.C. Dkt. 2807.

Finally, Petitioners alleged in the Amended Complaint that the CON law allowed competitors to "veto" new businesses. *Id.* at 104. But discovery revealed that competitors cannot "veto" new applications. They may only present evidence at a public hearing in front of an independent hearing officer. 900 KAR 6:090. And at least ten CON applications to establish or expand a home health agency within the last decade have been

approved despite opposition from one or more existing agencies. D.C. Dkt. 1972.

In the district court, Respondents filed motions to dismiss the Amended Complaint, which the district court denied with respect to the Due Process and Equal Protection claims but granted with respect to the Privileges or Immunities claim. At the conclusion of discovery, both Petitioners and Respondents filed motions for summary judgment. *Id.* at 807, 1869. The district court granted summary judgment to Respondents on the remaining Equal Protection and Due Process Clause claims. The court held that Petitioners had "not negated every conceivable basis for the Commonwealth's CON program in the [home health agency] context" and had "not shown that the CON laws irrationally discriminate against agencies in the [home health agency] context." Pet. App. 57, 64. Petitioners appealed the district court's grant of summary judgment on the Equal Protection and Due Process Clause claims to the Sixth Circuit.

D. Decision of the Sixth Circuit

In a unanimous decision authored by Judge Jeffrey Sutton, the Sixth Circuit affirmed the judgment of the district court. The question before the Sixth Circuit was whether the CON law survived rational-basis scrutiny. The Sixth Circuit did not consider whether the right to engage in a particular occupation is a fundamental right because Petitioners did not raise that issue below. *See* Pet. App. 8 ("Infringements on such

fundamental rights receive skeptical review from the courts. But the claimants do not make any such argument.").

The court held that there was a rational connection between the law and its objectives including increasing cost efficiency, improving quality of care, and improving the existing healthcare infrastructure. *Id.* at 15. With regard to cost efficiency, the court concluded that:

> One could plausibly think that, by tailoring services to need in a given market, current providers could use the larger market share and increased patient volume that come with the entry restriction to operate more efficiently and to ensure a wide range of services in areas with smaller populations. Providers could use their enhanced purchasing power to buy supplies and equipment at reduced prices. The increased patient volume also could permit the companies to spread fixed costs across more patients.

Id. Likewise, the court held that the General Assembly was rational in believing that the CON program might increase the quality of home health services available in the state:

> The State could plausibly think that a higher patient volume for all certified providers in the market will lead to higher quality service. Whether by the downstream benefits of achieving scale or the quality-improving expertise and specialization that come from

> repeated services within a market, the State could plausibly think that the certificate-of-need program would increase quality in one way or another.

Id. at 15-16. After determining that there was a rational connection between the CON law and its stated objectives, the court reviewed the evidence presented by Petitioners, which consisted mostly of "economic scholarship" that Petitioners contended showed that the law "did not work as planned." *Id.* at 17-19. The court held that such evidence did "not push the rationality of this law beyond dispute." *Id.* at 29.

The court explained that allowing courts to wade into the evidence concerning the effectiveness of laws in achieving their stated objectives would pose two problems under the Constitution. First, the Constitution presumes that flawed laws will "eventually be rectified by the democratic process." *Id.* at 19 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). The court observed that the "courts would be busy indeed if a law could be invalidated whenever evidence proves that it did not work as planned." *Id*. Second, the court held that Petitioners' arguments would necessarily require it to weigh the costs of the CON law against its benefits, and "[w]hatever the substantive limits of the Due Process Clause may be, they do not establish a cost-benefit imperative." *Id.* The court held that "the policy-making calculation of whether to adopt the law in the face of competing costs is eminently a legislative task, not a judicial one." *Id.* at 20.

With regard to their Equal Protection claim, Petitioners argued below that the General Assembly irrationally exempted physician offices and continuing care retirement communities from the ambit of the CON law. *Id.* at 29. The Sixth Circuit rejected that argument, and drawing from this Court's precedent, noted that under rational-basis review the Constitution "'does not require' Kentucky 'to draw the perfect line.'" *Id.* (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012)). The court concluded that there were rational reasons for treating physician offices differently including: "the modest supply of physicians in parts of Kentucky, the more urgent need for physicians than home healthcare agencies throughout the State, and the more heavily regulated nature of the requirements for becoming a physician." Pet. App. 29-30. Likewise, the court held that continuing care retirement communities were distinct in multiple ways:

> these facilities sometimes provide services to their residents comparable to the services home healthcare companies provide. But the facilities serve only the residents that already live there, and they provide a vast array of services, both medical and nonmedical, that home healthcare companies do not. Moreover, these facilities do not receive Medicaid funding, meaning that the State does not subsidize this care in the same way it subsidizes home healthcare providers.

Id. at 30. The court explained that the line might have been drawn differently, but "that consideration is one for the legislature, not the judiciary, to make." *Id.* For

those reasons, the Sixth Circuit affirmed the decision of the district court.

REASONS FOR DENYING THE PETITION

It is clear that this petition is not really about the decision of the Sixth Circuit below. The Question Presented in the petition is: "Does the Fourteenth Amendment require meaningful review of restrictions on the right to engage in a common occupation?" But, as evidenced by the analysis in its decision, the Sixth Circuit *did* conduct a meaningful review of Kentucky's CON requirement for home health agencies. As the Sixth Circuit explained, while challengers to laws subject to rational-basis review do have a heavy burden, the rational-basis test does provide them meaningful review. "While the route is difficult, it is not beyond category. Laws premised on utterly illogical grounds or fantasy premises will not be upheld." Pet. App. 10.

Tellingly, much of the petition is devoted to a discussion of cases that have nothing to do with the decision below or CON programs for healthcare services. Petitioners cite a series of district court and circuit court decisions that they contend show the rational-basis test has caused confusion in the lower courts, inconsistent outcomes, and absurd results. This is not one of those cases. There is no reason for this Court to review this case because of decisions in other, unrelated cases, many of which this Court previously declined to review. The Sixth Circuit conducted a

straighforward and meaningful application of the rational-basis test. Its decision is consistent with the decision of every other circuit that has reviewed the constitutionality under the Fourteenth Amendment of CON programs for healthcare facilities and services.

The decision below represents how rational-basis review should work—a test that is deferential to state legislatures so as to afford them their rightful independence and ability to function but that strikes down laws premised on utterly illogical grounds or fantasy premises. The Court should deny the petition for writ of certiorari.

I. There has been no confusion in the lower courts or inconsistent outcomes with regard to the application of the rational-basis test in challenges to healthcare CON programs.

Petitioners argue (at 1) that the rational-basis test has created "tumult in the lower courts" and led to inconsistent outcomes. With regard to healthcare CON programs, those assertions are inaccurate. There is no circuit split for the Court to resolve here. As the Sixth Circuit acknowledged and Petitioners do not dispute, "[n]o court to our knowledge has invalidated a healthcare certificate-of-need law under the rational-basis requirements of the Fourteenth Amendment." Pet. App. 17. Since 1989, four federal circuits, including the Sixth Circuit below, have considered the constitutionality of healthcare CON laws under the Fourteenth

Amendment, and all four have upheld them. In 1989, the Ninth Circuit held that the CON regulations of the Commonwealth of the Northern Mariana Islands rationally related to the legitimate governmental interest of preventing the needless duplication of dental services. *Madarang v. Bermudes*, 889 F.2d 251, 254 (9th Cir. 1989). More recently, the Fourth Circuit ruled in 2013 that Virginia's CON program for computed tomography (CT) scanners and magnetic resonance imaging (MRI) machines passed rational-basis review. *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 541 (4th Cir. 2013). Finally, in 2020, the Eighth Circuit upheld Iowa's CON program for outpatient surgery centers. *Birchansky v. Clabaugh*, 955 F.3d 751, 754 (8th Cir. 2020).

Tellingly, Petitioners devote almost none of their petition to cases involving healthcare CON programs. Instead, Petitioners (at 16) try to bolster their petition by identifying two circuit splits, but neither split is implicated by the decision below. First, Petitioners state that there is a 3-2 circuit split on the issue of whether economic protectionism is a legitimate government interest under rational-basis review. Petitioners assert that the Fifth, Sixth, and Ninth Circuits have held that it is not, but the Second and Tenth Circuits have gone the other way. However, the Sixth Circuit's decision below did not turn on that issue because it found that "[p]rotectionist though this law may be in some of its effects, that is not the only effect it has or the only goal it serves." Pet. App. 25.

The second split identified by Petitioners (at 18) concerns the selling of caskets. Under the Fourteenth Amendment, the Sixth and Fifth Circuits have struck down laws that required any person engaged in the sale of caskets to be a licensed funeral director, but the Tenth Circuit upheld a similar law in Oklahoma. Pet. 18-19. But this is obviously not a casket-selling case, and as the Sixth Circuit put it, "there is a lifetime of difference between the providing of healthcare and the making of caskets."[2] Pet. App. 25.

More generally, Petitioners (at 13-15) cite a series of unrelated cases concerning subjects ranging from floristry licenses to sex offender laws that they argue show that the rational-basis test has produced some absurd results. But the decisions of the courts in those cases do not justify review of the well-reasoned decision below. In fact, in several of the cases cited by Petitioners, this Court denied petitions for writ of certiorari. *See*, *e.g.*, *Powers v. Harris*, 544 U.S. 920 (2005); *Castille v. St. Joseph Abbey*, 571 U.S. 952 (2013); *Doe v. Settle*, 597 U.S. 3396 (2022). And there is nothing absurd about the Sixth Circuit's decision below, which is consistent with the decisions on the subject by every other circuit court since 1989.

Additionally, Petitioners argue (at 20) that the Court should "recalibrate" the rational-basis test because it "distorts procedure." Petitioners contend (at 2) that it should have been "impossible" for the Sixth

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[2] Petitioners (at 19) also cite some cases concerning licenses for hair braiders but do not identify a circuit split.

Circuit to note that Petitioners had "ample evidence" and "formidable" arguments while at the same time affirming summary judgment for Respondents. But, as the Sixth Circuit explained in its lengthy decision, under the Constitution, Petitioners' economic scholarship evidence is for the legislature to consider, not the judiciary. Pet. App. 19-20. As the Fourth Circuit explained in a case challenging Virginia's CON program, "[l]egislators, not jurists, are best able to compare competing economic theories and sets of data and then weigh the result against their own political valuations of the public interests at stake." *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 158 (4th Cir. 2016).

Petitioners' evidence and arguments below concerned whether the law has been effective in achieving its intended objectives. The evidence did not show that the General Assembly was irrational in believing that the CON program would achieve its legitimate goals. While Petitioners' arguments and evidence might be appropriate for the legislature, the evidence did "not push the rationality of this law beyond dispute," which is what the Constitution requires before the judiciary invalidates a law passed by a state legislature. Pet. App. 29.

II. The Sixth Circuit appropriately conducted a meaningful review under the rational-basis test.

Petitioners claim (at 8) that "[t]he opinion below suggests that rational-basis review is no review at all,"

but a plain reading of the opinion shows that not to be true. In the opinion, the Sixth Circuit addressed the critics of rational-basis review, who like Petitioners complain that rational-basis review is meaningless:

> To critics of rational-basis review, the standard is too daunting. Whereas a claim implicating a fundamental right requires the State to run the gauntlet of strict scrutiny, a claim implicating rational-basis review seems to require the individual to run the gauntlet of strict scrutiny—so many and so modest are the explanations for upholding such laws. ***But that exaggerates***. While the route is difficult, it is not beyond category. Laws premised on utterly illogical grounds or fantasy premises will not be upheld.

Pet. App. 10 (emphasis added). The Sixth Circuit went on to observe that "[n]ot all laws have cleared this low bar [of rational-basis review], however. Several cases go the other way." *Id.* at 12. The Sixth Circuit proceeded to conduct a meaningful review of Kentucky's CON law under the rational-basis test. This was not a case in which "the government wins no matter how absurd its position." Pet. 1.

As the Sixth Circuit observed, it was rational for the General Assembly to believe that the CON program might advance the objectives that the General Assembly articulated for the law in KRS 216B.010. With regard to cost efficiency, the Sixth Circuit found that:

> One could plausibly think that, by tailoring services to need in a given market, current providers could use the larger market share and increased patient volume that come with the entry restriction to operate more efficiently and to ensure a wide range of services in areas with smaller populations. Providers could use their enhanced purchasing power to buy supplies and equipment at reduced prices. The increased patient volume also could permit the companies to spread fixed costs across more patients.

Pet. App. 15. And, although evidence of effectiveness is not required to satisfy rational-basis review, there is evidence that the CON program for home health agencies is having a positive effect on cost-efficiency in Kentucky. The most recent empirical study on home health CONs from 2020 found a "significant association of [home health] CON laws with lower per-patient costs." D.C. Dkt. 3543-57. Moreover, Kentucky's Medicare reimbursement per patient is lower than the neighboring, non-CON states of Ohio and Indiana. *Id.* at 1982-86.

With regard to quality of care, the Sixth Circuit observed that:

> The State could plausibly think that a higher patient volume for all certified providers in the market will lead to higher quality service. Whether by the downstream benefits of achieving scale or the quality-improving expertise and specialization that come from repeated services within a market, the State

> could plausibly think that the certificate-of-need program would increase quality in one way or another.

Pet. App. 15-16. Again, evidence proves that the CON law is effective in promoting quality. The Centers for Medicare and Medicaid Services (CMS) publishes Home Health Compare, which uses Medicare data to assign a star rating to each home health agency according to the level of quality care that each agency provides, with five stars being the best. D.C. Dkt. 2019. Kentucky home health agencies averaged 3.5 stars in 2020, while the adjacent states of Ohio and Indiana, which do not have a CON requirement, averaged just 3 and 2.5 stars, respectively. *Id.* at 2021. In addition, the quality data from CMS for all states showed a strong correlation between a CON requirement for home health agencies and quality care. Of the states with CON regulation of home health services, 20% had an average 4-star rating for their agencies compared to only 3.2% without CON regulation. *Id*. at 2020. When considering states averaging either a 3.5- or 4-star rating, 75% of CON states were within this range, while only 32.2% of non-CON states received these ratings. *Id.*

The economies of scale created by Kentucky's CON program can also finance programs to improve access to home health services. Evidence demonstrates that at least one home health provider in Jefferson County "leverages the scale of its patient population to offer specialized programs for various conditions that home healthcare patients may face." Pet. App. 22. As

the Sixth Circuit observed, "[i]t is even possible that scale makes it easier for some companies to do what the claimants hope to do here—hire employees who can meet the language and cultural needs of their clients." *Id*.

While reasonable people may disagree on the best way to achieve the objectives of the CON program, the Sixth Circuit's analysis showed that the Kentucky General Assembly's decision was not illogical or based on fantasy premises. The Sixth Circuit conducted a meaningful analysis under the rational-basis test that does not warrant review by this Court.

III. This case provides no reason to "recalibrate" the rational-basis test applied by the Sixth Circuit.

Petitioners argue (at 2) that this Court should grant their petition to decide whether to "recalibrate" the rational-basis test. But the rational-basis test applied by the Sixth Circuit needs no recalibrating. Heightening the review under the rational-basis test would invade the province of state legislatures. Furthermore, a less deferential standard of review would result in a flood of challenges to all sorts of economic litigation requiring judges to make policy judgments for which they are ill-equipped.

There may be cases in which courts have applied the rational-basis test in ways that have produced absurd results, but this is not one of those cases. This is a case in which the Sixth Circuit afforded the

Kentucky General Assembly its rightful independence in rationally trying to address difficult problems. State legislatures such as the Kentucky General Assembly passed CON laws in an effort to tackle complex issues. As the Fourth Circuit has observed, "[t]he healthcare market is infamously complicated, with patients, providers, insurers, government, and many others all attempting to come to terms over a particular service touching physical wellbeing and sometimes even life itself." *Colon Health Ctrs.*, 813 F.3d at 159-60. And, as a subset of the healthcare market, home health agencies are difficult to operate.

Although Petitioners compare home health agencies to hamburger restaurants, the two have little in common. And Petitioners' characterization (at 4) of home health services as "uncomplicated" would likely be surprising to the nurses and other medical professionals who provide these services. Agencies must be staffed with medical professionals who have the skill and integrity to provide healthcare services in patients' homes independently. Consequently, although home health agencies do not require heavy investment in facilities, they have high staffing costs. D.C. Dkt. 1991.

As the Sixth Circuit astutely observed below, "[h]ealthcare is uniquely complex, with 'its own idiosyncrasies,' and with many different metrics upon which to gauge success." Pet. App. 21 (quoting *Colon Health Ctrs.*, 813 F.3d at 158). The market for healthcare services behaves very differently from the market for most other goods and services, especially

fast food. "Prices in this market often are determined by the government (Medicare and Medicaid) or private insurance companies, and patients usually pay a minor cost of the care. Price shopping for healthcare services is the exception, not the rule." Pet. App. 16. Providing healthcare is not like selling hamburgers.

This Court has appropriately observed that the judiciary does not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Heller v. Doe*, 509 U.S. 312, 319 (1993). Thus, rational-basis review is appropriately "a paradigm of judicial restraint." *FCC v. Beach Commc'ns*, 508 U.S. 307, 314 (1993). As this Court has repeated many times, "'[o]nly by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973)).

In cases such as this one, Petitioners' proposal would push the courts out of their constitutionally directed role and would result in a flood of never-ending litigation. As the Sixth Circuit observed below, "[t]he courts would be busy indeed if a law could be invalidated whenever evidence proves that it did not work as planned." Pet. App. 19. Moreover, whether in fact a law has worked as planned is often far from clear. Rarely, if ever, are the consequences of a law passed by a legislature entirely positive or entirely negative.

Almost always, the decision to enact a law involves the weighing of costs and benefits. These are value-based judgments that fall within the realm of elected representatives, not judges. As Justice Scalia put it in a Dormant Commerce Clause case: "It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines." *Colon Health Ctrs.*, 813 F.3d at 156 (quoting *Dep't of Revenue v. Davis*, 553 U.S. 328, 360 (2008) (Scalia, J., concurring)). As the Sixth Circuit noted, "it is precisely such weighing of costs and benefits that is so beyond judicial capacity . . . the policymaking calculation of whether to adopt the law in the face of competing costs is eminently a legislative task, not a judicial one." Pet. App. 20. This Court should resist the invitation of Petitioners and their amici to wrest from the democratic process economic policy decisions such as whether a state should have a CON program. Under the Constitution, those decisions belong to state legislatures, and the rational-basis test applied by the Sixth Circuit strikes the appropriate balance.

In addition, many of Petitioners' amici argue that the Court should grant the petition because the right to work is fundamental and should be protected as such. Although Petitioners hint (at 29) at that argument in their petition, they waived any such argument below. *See* Pet. App. 8 ("Infringements on such fundamental rights receive skeptical review from the courts. But the claimants do not make any such argument."). The Court normally does not address issues not raised below. *EEOC v. Fed. Labor Relations Auth.*, 476 U.S. 19,

24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals."). It should not do so here.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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