No. 22-42

In The Supreme Court of the United States

DIPENDRA TIWARI; KISHOR SAPKOTA; GRACE HOME CARE, INC.,

Petitioners,

v.

ERIC FRIEDLANDER, in his official capacity as Secretary of the Kentucky Cabinet for Health and Family Services; ADAM MATHER, in his official capacity as Inspector General of Kentucky,

Respondents, and

KENTUCKY HOSPITAL ASSOCIATION,

Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

Along with the hospital association trying to keep Grace Home Care out of business, the State opposes certiorari. But consider what it does *not* dispute about the rational-basis test.

It doesn't dispute most of Grace's description. Not that the test is inconsistent, and not that there are circuit splits. *Compare* Pet. 9–13 *with* BIO 16–19. On the procedural mess, it lets the lower courts have the last words: "dilemma," "perplexing," "confusing." *Compare* Pet. 21–23 *with* BIO 16–19. It admits "[t]here may be cases in which" the test has "produced absurd results." BIO 23. There's no arguing that one: just three months ago, the D.C. Circuit held it rational to ban daycare providers without associate's degrees in education, in part because college courses on "art and history" could help adults answer "a two-year-old repeatedly asking 'why.'"[1] The State, in sum, does not dispute just how far the test has rotted out the law.

The State also doesn't dispute the criticism. *Compare* Pet. 24–28 *with* BIO 16–27. It does not mention the chorus of judges or the wide spectrum of scholars. (When else does Richard Epstein agree with Erwin Chemerinsky?[2]). It does not cite a single person who

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[1] *Sanchez v. Off. of State Superintendent of Educ.*, 45 F.4th 388, 397 (D.C. Cir. 2022).

[2] Richard Epstein, *Rational Basis Review and FDA Regulation: Why the Two Do Not Mix*, 14 Geo. J.L. & Pub. Pol'y 417, 417–26 (2016) (rational-basis "law has strayed from well-established historical principles"); Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 Geo. J.L. & Pub. Pol'y

defends the test as fine the way it is. It praises the opinion below but skips past a key part of it: Judge Sutton's suggestion, which only this Court can address, that the critics might be right.

Most tellingly, the State doesn't dispute, or even mention, that the right to engage in a common occupation is deeply rooted in our history and tradition. *Compare* Pet. 29–34 *with* BIO 16–27. As centuries of law show, it is just as embedded as other rights the Court has recognized, and far more embedded than those the Court has rejected.[3] Yet, despite those deep roots, the most common articulations of the rational-basis test afford the right no meaningful protection.

Put simply, the State never disputes that the Question Presented is *important*. It argues, instead, that the Court should deny the Petition for three reasons:

- four circuits have upheld medical certificate-of-need laws under the rational-basis test, BIO 16–19;

401, 410 (2016) ("the Court should require a closer fit between means and ends than traditionally imposed under the rational basis test").

[3] *Compare* Pet. 29–34 (tracing right to earn a living from Magna Carta through twentieth century) *with*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2138–56 (2022) (recognizing right to open carry); *Timbs v. Indiana*, 139 S. Ct. 682, 687–89 (2019) (recognizing limits on fines), *and*, *e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2249–56 (2022) (rejecting right to abortion); *Washington v. Glucksberg*, 521 U.S. 702, 710–19 (1997) (rejecting right to assisted suicide).

- the Sixth Circuit already conducted a "meaningful" review, BIO 19–23; and
- there are systemic reasons not to "recalibrate" the rational-basis test, BIO 23–27.

The Court should reject these arguments. As Grace next shows in Section I, the first two arguments simply miss the point. Grace is not asking the Court to wade into a fact-bound dispute about which CON laws are and are not rational. It is asking the Court to answer an important legal question about a substantive constitutional standard. In Section II, Grace refutes the last argument. There is every reason for the Court to reexamine how the judiciary treats the right to earn an honest living.

ARGUMENT

I. This case is a good vehicle because it "teeter[s] on the edge."

The State's first argument is that there is no circuit split about the rationality of CON laws because, at least in medicine, three other circuit cases have upheld them. BIO 16–17 (citing *Madarang v. Bermudes*, 889 F.2d 251 (9th Cir. 1989) (CON law for dental offices); *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 547–48 (4th Cir. 2013) (medical imaging devices); *Birchansky v. Clabaugh*, 955 F.3d 751 (8th Cir. 2020) (ambulatory surgery centers)). Of course, this unanimity could itself stem from a rubber-stamp version of the

test.[4] But, either way, this objection misunderstands the Question Presented.

Grace is not asking this Court to resolve a circuit split about the rationality of CON laws (particularly not when each of the circuit cases involves a separate program for a separate medical service). Rather, Grace asks the Court to answer a purely legal question: whether the right to engage in a common occupation deserves meaningful judicial protection, and, if so, how does that protection work? Grace showed at length why this question is "important" within the meaning of Rule 10(c), and the State, for its part, hardly argues otherwise. This Court routinely reviews important substantive constitutional questions like this, even without a circuit split on how the standard applies to precise facts. *See*, *e.g.*, *Jackson Women's Health Org. v. Dobbs*, 141 S. Ct. 2619 (May 17, 2021) (right to abortion); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (Jan. 24, 2022) (race in public-college

[4] Under even slightly more demanding review, courts usually reject the dubious arguments that prop up CON laws under the rational-basis test. *See Walgreen Co. v. Rullan*, 405 F.3d 50, 60 (1st Cir. 2005) (invalidating pharmacy CON law under *Pike* balancing because it could not plausibly increase access); *Medigen of Ky., Inc. v. Pub. Serv. Comm'n*, 985 F.2d 164, 167 (4th Cir. 1993) (invalidating transportation CON law under *Pike* balancing because it could not plausibly increase access or reduce prices); *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 573–74 (4th Cir. 2005) (invalidating dealership CON law under *Pike* balancing because barrier to market entry outweighed weak interest in protectionism); *In re Certificate of Need for Aston Park Hosp., Inc.*, 193 S.E.2d 729, 734–35 (N.C. 1973) (invalidating hospital CON law under "real or substantial" test because it lacked reasonable relation to hospital quality and efficiency).

admissions); *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 812 (Jan. 10, 2020) (free speech); *Ramos v. Louisiana*, 139 S. Ct. 1318 (Mar. 18, 2019) (jury unanimity); *Franchise Tax Bd. v. Hyatt*, 138 S. Ct. 2710 (June 28, 2018) (sovereign immunity). It should do the same here.

The State's response amounts to "not this case." That's wrong. Although the State bickers about the facts for half its brief, BIO 2–11, 21–23, facts are not what this case turns on now. Rather, on the entire record, Judge Sutton thought the CON law was "outrageous," and he wrote for the panel that though the law passed the rational-basis test "with a low grade," it "teeter[ed] on the edge." Pet. 5, 7, 24. That means the substantive constitutional standard is likely dispositive. Tweak the standard toward meaningful review and the law likely falls. Tweak it toward "imagin[ing] if anything could be right with the statute," *see* Pet. 26, and the law survives. On that sort of important and likely dispositive question, this Court's review is warranted.[5]

Moreover, the history of this case confirms the need for review. As Grace explained (and as the State does not dispute), this case has already seen three versions of the rational-basis test. Judge Walker relied on

[5] The Court would not need to resolve how Kentucky's CON law, as applied to Grace or other home health agencies, fares on cross-motions for summary judgment. If it wished, the Court could hold that the Sixth Circuit was too deferential to the State, clarify the appropriate test, and then remand for the Sixth Circuit to apply it.

the "four decades of academic and government studies saying Certificate of Need laws accomplish nothing more than protecting monopolies held by incumbent companies." He held that there was "every reason to think that Kentucky's law increases costs, reduces access, and diminishes quality—for no reason other than to protect the pockets of rent-seeking incumbents at the expense of entrepreneurs who want to innovate and patients who want better home health care." Pet. 6–7. Under the version of rational-basis test that Judge Walker applied—"a law must be 'reasonable, not arbitrary' and have 'a fair and substantial relation' to its purpose," App. 83—one can't help but think that Grace would have won. Then, under the version of the test from summary judgment, Grace had no chance. Under that version, evidence suggesting a law is worsening the interests it purports to serve is not merely not dispositive (which is fine) but outright *irrelevant*. App. 48. So Chief Judge Stivers refused to consider evidence supporting the same allegations that had stated a claim under Judge Walker. Then the Sixth Circuit split the difference, considering Grace's evidence, holding that it was just barely insufficient, but questioning whether the test itself might be incorrect. Pet. 7, 24–25. This whipsawing further shows why the Court should take up the question now. There is no better opportunity to answer, "What is the right substantive standard?" than a case that has already bounced between three substantive standards.

The State also argues that this case is a bad vehicle because the Sixth Circuit already "appropriately

conducted a meaningful review under the rational-basis test." BIO 19. This argument fails for two reasons.

First, the Court should simply take the Sixth Circuit at its word. Again, Judge Sutton wrote that this case teeters on the edge, that critics of the rational-basis test may have a point, and that this Court has the power to change things. In other words, a different standard would make a difference. That alone makes this case a good vehicle.

Second, the review below was *not* meaningful enough to protect the deeply rooted right to earn a living. The Sixth Circuit's opinion was certainly scholarly, and, yes, it acknowledged that some laws fail the rational-basis test. BIO 20. But after saying so, the circuit still applied the most deferential version of the test. Remember, the Sixth Circuit held that it was rational to believe that blocking new services could reduce costs because "[p]roviders could use their enhanced purchasing power to buy supplies and equipment at reduced prices." BIO 21 (quoting App. 15). Set aside that this was on summary judgment and Grace had introduced "considerable evidence showing that, in practice, certificate-of-need laws often undermine the very goal[of] . . . lower costs." App. 17. Just consider the theory: that bigger businesses can sometimes buy cheaper in bulk would justify a CON in every industry imaginable. Or consider the even more outlandish speculation about quality. The Sixth Circuit went as far as holding that it is rational to ban a Nepali-language agency *to get more Nepali language services*. (It is, after all, *imaginable* that concentrating extra

profit in existing businesses could encourage them to spend that profit "hir[ing] employees who can meet the language and cultural needs of their clients." BIO 22–23 (quoting App. 22).) This kind of analysis might look like review, but that is because the Sixth Circuit was doing its best to meaningfully apply a meaningless test.

All told, the State's vehicle arguments do not hold up. Grace is not asking the Court to dive into a split about CON laws but to articulate a legal standard. The case has seen three of them already, and the Sixth Circuit said it makes a difference. So this is the right vehicle to address a question that is undisputedly important.

II. The judiciary can and should meaningfully protect the right to engage in a common occupation.

The State ends its brief with a request for minimalism. At bottom, the State's position is not that the right to engage in a common occupation is unimportant or newfangled, but that the judiciary, as an institution, simply should not protect it. "Heightening the review under the rational-basis test," the State claims, "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." BIO 23. Every bit of this is wrong.

As to invasions against other branches, our Nation rejected this argument long ago. The Founders understood that there would always be factions like the hospitals here that would "sacrifice to [their] ruling passion or interest both the public good and the rights of other citizens." The Federalist No. 10 (James Madison). That is why there are "courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist 76 (Alexander Hamilton). Everyone agrees there are times the Court must "invade the province" of the elected branches to protect constitutional rights, *see*, *e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Loving v. Virginia*, 388 U.S. 1 (1967), and there is little dispute that the Constitution protects unenumerated rights on top of enumerated ones, *see*, *e.g.*, *Saenz v. Roe*, 526 U.S. 489 (1999); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). As Judge Walker so aptly put it below, "judges do not become policymakers when they apply the original meaning of constitutional text to a reality the state would prefer to disguise. Instead, they abdicate their judicial duty when they don't." App. 84.

Nor would meaningfully protecting the right to engage in a common occupation "wrest" "economic policy decisions" "from the democratic process." BIO 26. As Grace explained, the Court *already* engages in meaningful review under the rational-basis test, if only inconsistently. Pet. 9–13. No one thinks that decisions like *Schware* and *Cleburne* have taken an axe to

democracy.[6] Nor have the state and circuit cases that applied similarly meaningful review swept away representative government in a "flood of challenges." *See*, *e.g.*, *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 91 (Tex. 2015) ("Surely if those cases represented a 'monster' running amuck in Texas, this Court would have long ago decisively dealt with it."); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir. 2013) ("[n]or do we doom state regulation"). Under any path the Court may take—bite in the rational-basis test, revived Privileges or Immunities jurisprudence, another tier of scrutiny, a historical review of the long tradition of in-home care—it should arrive at a standard under which the elected branches can genuinely regulate in the public interest *and* the judiciary can guard against factional abuse.[7]

Finally, the State is wrong to take such a dim view of the judiciary's capability to protect deeply rooted rights. Judges may be "ill-equipped" to make policy

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[6] *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232 (1957); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

[7] All these options are open to the Court. Contra BIO 26–27. Petitioners preserved a challenge under the Privileges or Immunities Clause. App. 30. And although they did not argue below for a different test for their Due Process and Equal Protection claims—an argument which would have been precluded—the issue is purely legal, and the Court has discretion to reach it. *See*, *e.g.*, *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991) (considering new constitutional argument because "[t]his Court . . . has exercised its discretion to consider nonjurisdictional claims that had not been raised below"); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) ("Though we do not normally decide issues not presented below, we are not precluded from doing so.").

judgments, but they are well prepared to smoke out government abuse. They do it all the time. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–45 (1993) (finding illegitimate government purpose "from both direct and circumstantial evidence"); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2246 (2019) (finding constitutional violation because the Court could "[ ]not take . . . history out of the case"). For example, tweak the CON to make it *less* restrictive. Suppose the State said only that Grace could not advertise. And suppose the State gave all the same reasons: it wanted to steer patients toward incumbents because buying in bulk lowers costs, "practice makes perfect" improves quality, and banning niche language services allows incumbents to buy remote-translation apps, which, in turn promotes access to niche language services. Under the intermediate scrutiny applied to restrictions on commercial speech, judges would reject these arguments as the fictions that they are. *See*, *e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 569 (1980) (invalidating advertising restriction when link to prices was "tenuous" and "highly speculative"). Judges can do the same when assessing the right to earn a living.

In the end, Grace's request is hardly as radical as the State would frame it. Grace does not ask the Court to invent a claim from nothing or to revolutionize the law. Grace asks only that the Court make good on what it and the common law have promised for centuries: that there is a meaningful right to earn an honest living.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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