UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-60898

GOLDEN GLOW TANNING SALON, INCORPORATED,
PLAINTIFF-APPELLANT,

versus

CITY OF COLUMBUS, MISSISSIPPI,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI
USDC No. 1:20-CV-103

Before JONES, HO, and WILSON, *Circuit Judges*.

[Excerpt from opinion filed November 8, 2022]

JAMES C. HO, *Circuit Judge*, concurring:

The Supreme Court has recognized a number of fundamental rights that do not appear in the text of the Constitution. But the right to earn a living is not one of them—despite its deep roots in our Nation's history and tradition. Governing precedent thus requires us to rule against the countless small businesses, like Plaintiff here, crippled by shutdown mandates imposed by public officials in response to the COVID-19 pandemic. Cases like this nevertheless raise the question: If we're going to recognize various unenumerated rights as fundamental, why not the right to earn a living?

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The COVID-19 pandemic triggered "one of the broadest exercises of state power over individuals in the country's history." Eugene Kontorovich, Lochner *Under Lockdown*, 2021 U. CHI. LEGAL F. 169, 182 (2021). Millions of wage earners and small business owners watched helplessly as public officials claimed the "extraordinary power to force people from their chosen occupations, destroy vast investment and reliance interests, and make millions dependent on government assistance"—marking a "radical departure from prior practice, and perhaps prior imagination, of the scope, intensity, and duration of government power over private business." *Id.*

It was only by the grace of government that we would eventually begin our return to normalcy. That's because our current law of unenumerated rights prioritizes non-economic activities over economic endeavors.

A principled approach to the Constitution can take one of two forms: We can enforce only those rights that are expressly enumerated in the Constitution. Or we can recognize a broader range of fundamental rights, including those not expressly stated in the Constitution, by appealing to some principle not explicit in the text.

The Supreme Court has taken the latter approach. It has long said that it will recognize "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (cleaned up). And it reaffirmed this approach earlier this year. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 2246 (2022).

Under the Court's approach to unenumerated rights, we privilege a broad swath of non-economic human activities, while leaving economic activities out in the cold. Scholars have suggested, however, that this may get things backwards. After all, if anything, "the right to pursue callings and make contracts . . . have *better* historical grounding than more recent claims of right that have found judicial favor." James W. Ely Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 953 (2006) (emphasis added). *See also*, *e.g.*, TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING:

ECONOMIC FREEDOM AND THE LAW (2010); David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. F. 287 (2016); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983 (2013); Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207 (2003).

For over a century before our Founding, English courts protected the right to pursue one's occupation against arbitrary government restraint. *See*, *e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 415 ("At common law every man might use what trade he pleased."); Sandefur, *supra*, at 18–23; Calabresi & Leibowitz, *supra*, at 989–1003. This right emerged out of the struggles between the Crown and the courts over the problem of monopoly—a term that was understood at the time to mean any "company insulated from competition by a special legal privilege which barred others from competing." Sandefur, *supra*, at 219–20. The Crown attempted to confer special privileges by allowing only a select few to practice certain occupations. *See* SANDEFUR, *supra*, at 20–21; Calabresi & Leibowitz, *supra*, at 996–1003. English courts responded with hostility to such efforts. For example, Lord Chief Justice of England Edward Coke observed that "the common law abhors all monopolies, which prohibit any from working in any lawful trade." *The Case of the Tailors, &c. of Ipswich*, 77 Eng. Rep. 1218, 1219 (K.B. 1615). Eventually, Parliament enacted the Statute of Monopolies in 1623, prohibiting monopolies while allowing exceptions for patentable inventions. *See* Sandefur, *supra*, at 20–21;

Calabresi & Leibowitz, *supra*, at 996–1003. *See also* Bernstein, *supra*, at 288 (describing the "ancient Anglo-American constitutional tradition opposed to governmental grants of monopoly power to aid favored businesspeople and exclude others") (collecting authorities).

This aversion to monopolies was brought to the American colonies. The Massachusetts Body of Liberties of 1641 contained an express prohibition on monopolies, stating that "[n]o monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Countrie, and that for a short time." *See also* Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendment:* Slaughter-House Cases *Re-Examined*, 31 EMORY L.J. 785, 797 (1982). And later, members of the Founding generation agreed on the fundamental importance of the right to pursue one's occupation. Benjamin Franklin wrote that "[t]here cannot be a stronger natural right than that of a man's making the best profit he can of the natural produce of his lands." *Causes of the American Discontents before 1768*, *in* Benjamin Franklin: Writings 613 (Lemay ed., 1987). George Mason authored the Virginia Declaration of Rights and included an express provision securing "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." VA. DECL. OF RIGHTS § 1 (1776). *See* SANDEFUR, *supra*, at 24. Mason would later oppose the Constitution precisely because he feared that, absent express protections, "Congress may grant monopolies in trade and commerce." 1 DEBATES ON THE ADOPTION OF THE FEDERAL

CONSTITUTION 496 (Jonathan Elliot, ed. 1866). *See generally* Conant, *supra*, at 801. In his writings to Thomas Jefferson about the Bill of Rights, James Madison noted that monopolies "are justly classed among the greatest nuisances in government." *Letter from James Madison to Thomas Jefferson* (Oct. 17, 1788), *in* 14 THE PAPERS OF THOMAS JEFFERSON 21 (Princeton 1958). And Jefferson agreed. In his public and private writings, Jefferson "attach[ed] as much importance to the English constitutional immunity from grants of monopoly as he did those privileges and immunities which eventually appeared in the First Amendment." Conant, *supra*, at 800. *See also id.* at 799–800 (same).

Similar sentiments were expressed in the years leading up to the Civil War and the Reconstruction Amendments. In his debates with Stephen Douglas, Abraham Lincoln emphasized the fundamental importance of the right to exercise one's labors: "In the right to eat bread, without leave of anybody else, which his own hand earns, *he is my equal and the equal of Judge Douglas, and the equal of every living man*." *The Ottawa Debate*, *in* THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 117 (Angle ed., 1991). Representative John Bingham, one of the primary drafters of the Fourteenth Amendment, later explained that "our own American constitutional liberty . . . is the liberty . . . to work an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil." Cong. Globe, 42nd Cong., 1st Sess. App. 86 (1871) (statement of Rep. Bingham). The Supreme Court

echoed these sentiments, observing that "[t]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915). *See also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing the right "to engage in any of the common occupations of life").

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The First Amendment guarantees the freedom of speech and religion. But the meaningful exercise of those freedoms often requires the expenditure of resources. The Fourth Amendment secures the people in their houses, papers, and effects, and the Fifth Amendment protects property from taking without just compensation. But it's virtually impossible for most citizens to obtain property without an income.

In short, the right to engage in productive labors is essential to ensuring the ability of the average American citizen to exercise most of their other rights. *Cf.* JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2007).

So it's not surprising that various scholars have determined that the right to earn a living is deeply rooted in our Nation's history and tradition—and should thus be protected under our jurisprudence of unenumerated rights.

But that is for the Supreme Court to determine. *See*, *e.g.*, Pet. for Writ of Certiorari in *Tiwari v. Friedlander*, No. 22-42 (U.S.). In the meantime, governing precedent requires us to affirm. Accordingly, I concur.