No. 22-543

In The
Supreme Court of the United States

ALTAGRACIA SANCHEZ, DALE SORCHER, AND JILL HOMAN,

Petitioners,

v.

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION AND DISTRICT OF COLUMBIA,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Pacific Legal Foundation (PLF) is a nonprofit legal foundation that defends the principles of liberty and limited government, including the right to earn a living. For over 40 years, PLF has litigated in support of the rights of individuals to pursue the livelihood of their choice and to raise their children free of arbitrary or irrational interference.

SUMMARY OF THE ARGUMENT

The right to earn a living was at the top of the Bill of Rights' framers' minds. "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 492 (1959). The framers' writings regarding the Ninth Amendment reveal that Amendment was meant to codify unenumerated "natural" rights including "the right[] ... of acquiring property and of pursuing happiness & Safety." Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 Harv. J.L. & Pub. Pol'y 5, 5–6 (2012) (quoting *Roger Sherman's Draft of the Bill of Rights*, *in* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING

[1] Pursuant to this Court's Rule 37.2(a), all parties have received timely notice of Amicus Curiae's intention to file. Pursuant to Rule 37.6, Amicus Curiae affirms 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 other than Amicus Curiae PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

OF THE NINTH AMENDMENT 351 app. A (Randy E. Barnett ed., 1989)). *See also* 6 DEBATES IN CONGRESS 320 (Gales and Seaton 1838) ("[T]here are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.").

At the time of the Bill of Rights' adoption, "economic and personal liberty ... were considered inextricably intertwined." Barnett, 35 Harv. J.L. & Pub. Pol'y at 7. But this original understanding has been undermined by a near century-long bifurcation of economic liberty from all other liberties for purposes of constitutional scrutiny. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). This bifurcation has no basis in the text of the Constitution: The Due Process Clause of the Fifth Amendment draws no distinction between the types of "liberty" it protects. The Court can begin to repair this longstanding mistake by acknowledging a fundamental right to earn a living in common occupations like childcare.

Beyond this ahistorical classification of economic rights as second-class, the current "rational basis test" used to review economic regulations has generated innumerable problems in the lower courts. In many cases, rational basis review ensures that "any law that legislators pass will be sustained unless they were in a complete state of lunacy at the time they acted." BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 121 (1st ed. 1980). The Constitution's

"guarantee of liberty deserves more respect—a lot more." *Hettinga v. United States*, 677 F.3d 471, 483 (D.C. Cir. 2012) (Brown, J., concurring).

One significant problem with the rational basis test, highlighted in this case, is how it has been interpreted by some lower courts to undermine the Rules of Civil Procedure. Rule 8 requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). And, in considering motions to dismiss, factual matters alleged in a complaint must be taken as true—regardless of whether a judge regards recovery as "very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

But in cases involving economic liberty, courts often do not abide the "short and plain statement" requirement. Some lower courts, including the D.C. Circuit in this case, impose an impossible burden on plaintiffs by requiring them to anticipate and refute every conceivable justification for a law in advance. This novel procedure effectively "short-circuits" economic rights lawsuits "by dismissing them prior to any fact-finding, on the theory that plaintiffs could never introduce enough evidence to disprove every conceivable basis for the laws they challenge, and thus could not possibly prevail under the rational basis test." Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity"*, 25 Geo. Mason U. Civ. Rts. L.J. 43, 44 (2014). *See also Sanchez v. Off. of State Superintendent of Educ.*, 45 F.4th 388, 396 (D.C. Cir. 2022) (requiring plaintiff to "refut[e] every conceivable basis which might support" the challenged regulation (quotation omitted)). This

approach turns rational basis into what courts have long said it is not: "a rubber stamp of all legislative action." Sandefur, 25 Geo. Mason U. Civ. Rts. L.J. at 44 (quotation omitted). This Court has never approved this distortion of the Federal Rules and it can use this case as an opportunity to correct the problem.

These problems are particularly impactful here, because of the significant interests at stake. This case implicates more than just the right to earn a living; it indirectly implicates the rights of parents to direct the care of their children. This Court has repeatedly recognized that different rights are in practical reality interconnected, such that a direct restriction on one can lead to an indirect restriction on another. *See, e.g.*, *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (holding that direct violation of NAACP records custodians' freedom of speech indirectly violated NAACP members' freedom of association); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) ("In the domain of ... indispensable liberties ... the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action. ... The governmental action challenged may appear to be totally unrelated to protected liberties."). In Petitioners' case, the direct restriction of Petitioners Sanchez and Sorchers' economic liberty has caused an indirect restriction of Petitioner Homan's fundamental parental rights.

ARGUMENT

I. The right to earn a living in childcare, a longstanding ordinary occupation, is a fundamental right

In *Dobbs*, this Court made clear that it affords strong protection to rights that are "deeply rooted in [our] history and tradition" and "essential to our Nation's scheme of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019)). *See also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). In determining whether a right is "deeply rooted" and "essential" to our scheme of ordered liberty, the Court has "engaged in a careful analysis of the history of the right at issue." 142 S. Ct. at 2246 (internal quotation marks omitted). The methodology applied in *Dobbs* and other cases reveals that the right to earn a living is as deeply rooted as any right the Court has discussed. Some recognition of a right to engage in a common occupation has been recognized, first in the common law, then in the legal history of the United States, for centuries.

This is confirmed by the same "eminent common-law authorities" which this Court has repeatedly relied upon. *See Dobbs*, 142 S. Ct. at 2249 (citation omitted). Sir Edward Coke, for example, repeatedly explained that excessive labor restrictions and state established monopolies violated common law, various Acts of Parliament, and the Magna Carta. *See, e.g.*, *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218 (K.B. 1615) ("[A]t the common law, no man could be prohibited from working in any lawful trade … and

therefore the common law abhors all monopolies."); *Darcy v. Allein*, 77 Eng. Rep. 1260, 1263–64 (K.B. 1603) ("[E]very man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life.") (citing Deuteronomy 24:6). *See also* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 47 (1797 ed.) ("Generally all monopolies are against this great charter, because they are against the liberty and freedom of the subject, and against the law of the land."). Similarly, Sir William Blackstone, writing very close to the founding, wrote that, under the common law, "every man might use what trade he pleased." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 427–28 (8th ed. 1780). Blackstone went on to discuss how, where the public interest might warrant exceptions to this general rule, the courts carefully restrained and examined such exemptions. *Id.* In particular, Blackstone discussed English laws limiting the liberty of those that served as apprentices. Those laws "occasioned a great variety of resolutions in the courts of law" and "in general [were] rather confined than extended." *Id.* at 428 (citing cases).

Early American caselaw throughout the country affirmed the existence of a fundamental freedom to earn a living. For example, in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823), Supreme Court Justice Bushrod Washington listed it among the "fundamental" privileges and immunities of "citizens of all free governments." *Id. See also id.* at 552 (interpreting Section 2 of Article IV of the Constitution, discussing "privileges and immunities," listing "[T]he enjoyment of life and liberty, with the

right to acquire and possess property of every kind. … [And] the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."). Similarly, one scholar identifies about sixty cases between 1823 and 1873 discussing the common law right to free labor. *See* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 225 (2003).

While the Court pivoted away from robust protection of this right in the 1930's, see *Nebbia v. New York*, 291 U.S. 502 (1934), the right to pursue a lawful occupation has continued to be cited and relied on to the present day. *See, e.g.*, *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (citing *Dent v. West Virginia*, 129 U.S. 144 (1889), and acknowledging a "generalized due process right to choose one's field of private employment"); *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 n.9 (1985) (describing "the pursuit of a common calling" as "one of the most fundamental of those privileges" protected by the Privileges and Immunities Clause); *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (liberty "denotes … the right of the individual … to engage in any of the common occupations of life"); *Brusznicki v. Prince George's County*, 42 F.4th 413, 421 (4th Cir. 2022) (per curiam) (noting a "fundamental right" to "pursue a common calling") (citing *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978)); *Tiwari v. Friedlander*, 26 F.4th 355, 360 (6th Cir. 2022) (acknowledging that laws which interfere with the "right to engage in a chosen occupation" violate the Fourteenth Amendment); *Trejo v. Shoben*, 319 F.3d 878, 889 (7th Cir. 2003) (same); *Stidham v. Texas Comm'n on Priv. Sec.*, 418 F.3d 486, 491 (5th

Cir. 2005) ("We have confirmed the principle that one has a constitutionally protected liberty interest in pursuing a chosen occupation."); *Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69, 92 (Tex. 2015) (Willett, J., concurring) ("Self-ownership, the right to put your mind and body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity.").

Despite these cases, many courts are unaware of the right to earn a living's importance or historical provenance. *See, e.g.*, Sandefur, 6 Chap. L. Rev. at 259–61 (discussing confusion among courts with respect to the right to earn a living). The consequence has been the proliferation of protectionist licensing and certificate of need laws, and needlessly burdensome professional requirements, as in this case. As two judges of the D.C. Circuit have observed, "[t]he practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process." *Hettinga*, 677 F.3d at 482 (Brown, J., concurring); *see also Patel*, 469 S.W.3d at 104–05 (Willett, J., concurring) (discussing how rational basis scrutiny has led to laws protecting practitioners from unwanted competition); Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 191–92 (2003).

II. This Court should clarify the application of the rational basis test

Even if the right to earn a living is not afforded enhanced scrutiny, this Court should correct the lower

courts in their application of the rational basis test. The test was originally conceived as a rebuttable presumption of constitutionality for economic regulation. However, today, many lower courts treat the test as an effectively irrebuttable rubber stamp. This is most evident at the motion to dismiss stage, where, as in this case, courts require plaintiffs to affirmatively refute in an initial pleading every conceivable justification for a challenged law.

This version of the rational basis test is inconsistent with the Federal Rules of Civil Procedure. Numerous courts have acknowledged this and have adopted a different approach at the pleading stage. *See, e.g.*, *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008) (treating rational basis standard as rebuttable "presumption of rationality"); *Wroblewski v. Washburn*, 965 F.2d 452, 460 (7th Cir. 1992) (same).

a. Rules 8 and 12 of the Federal Rules of Civil Procedure require plaintiffs have the opportunity to prove a law's irrationality, even if alternative explanations are plausible

Plaintiffs, under Rule 8, need only plead a "short and plain statement" of their claim. Fed. R. Civ. P. 8(a)(2). But when a court presented with a 12(b)(6) motion requires the plaintiff to affirmatively rebut every "conceivable basis which might" justify a challenged law, plaintiffs are no longer pleading the factual elements of a claim but writing a brief arguing against and proving false every hypothetical

justification a judge could imagine. This is anathema to ordinary civil practice.

In FEDERAL PRACTICE AND PROCEDURE, the influential treatise on the Federal Rules, the authors cite three propositions that are at the "heart" of the 12(b)(6) motion and have "universal acceptance:" "(1) the complaint is construed in the light most favorable to the plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader." *See* § 1357 Motions to Dismiss—Practice Under Rule 12(b)(6), 5B FED. PRAC. & PROC. CIV. § 1357 (3d ed.). But it is impossible to square these propositions with a standard which requires plaintiffs to affirmatively rebut all conceivable justifications for a challenged law for several reasons.

First, such a requirement presents plaintiffs with the "logically impossible task ... [of] draft[ing] a complaint that guessed at every possible purpose for the law, including speculative ones that perhaps no legislator or official ever thought of before, and then positively disprove each of these foundations." Sandefur, 25 Geo. Mason U. Civ. Rts. L.J. at 68–69. Requiring plaintiffs to guess at hypothetical justifications cannot possibly be consistent with the requirement that a complaint be construed in the light most favorable to the pleader. Rather, it is the opposite rule: any justifications that plaintiffs do not anticipate and positively disprove are considered sufficient to defeat a claim. Plaintiffs under this version of rational basis get *un*favorable inferences—their allegations are construed narrowly and skeptically.

Second, by requiring plaintiffs to positively disprove all justifications at the pleading stage, Rule 12(b)(6) is transformed from an analysis of the adequacy of pleadings into an adjudication on the merits wherein governmental justifications of interest, legislative intent, and rational relation are taken at face value. Again, this is the opposite of the ordinary rule, where plaintiffs' allegations are taken as true—under this version of the rational basis test, plaintiffs must prove up their allegations at the pleading stage, and against judicial assumptions of fact which they expressly deny and which they can never in practice disprove.

Third, this version of rational basis improperly assumes that the plausibility of plaintiff's claim should be weighed against the judge's guess as to the plausibility of alternative explanations for a law. But it should not matter whether or not a court believes it more plausible that the legislature acted rationally. As numerous courts have explained, "a court … may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 846 (2013). *See Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) ("For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.").

b. Many lower courts, including the D.C. Circuit here, improperly apply Rule 12(b)(6) in rational basis cases

In affirming the dismissal of the Plaintiffs' complaint, the D.C. Circuit made each of these errors. For example, the Circuit Court repeatedly refused to assume the truth of the Plaintiffs' factual allegations, concluding that degrees in education are by definition relevant to caretaker competency, 45 F.4th at 397–98, and that the Defendant could have "rationally concluded that its college requirements would improve the quality of childcare provided in licensed facilities," notwithstanding Petitioners' substantial and detailed allegations to the contrary, Complaint ¶¶ 94, 119–36, 123–26. The lower court ultimately dismissed Plaintiffs' claims because it weighed the evidence and found, on its own judgment and in direct contradiction to the allegations, that it was implausible the legislature acted irrationally. 45 F.4th at 398 (challenged requirement is "self-evidently" rational). And although the court stated in a conclusory manner that "pleading facts plausibly showing a challenged policy's irrationality will adequately negate any rational explanation for the policy so as to survive a motion to dismiss, without the complaint's needing to refute a laundry list of potential justifications," *id.* at 396, the court's analysis shows the falsehood of this claim, repeatedly citing hypothetical justifications to support the challenged provision.

The D.C. Circuit is far from alone in this approach. Numerous other courts have made the same mistakes, defying ordinary 12(b)(6) analysis to dismiss rational

basis claims without giving plaintiffs their day in court. *See, e.g.*, *Midkiff v. Adams Cnty. Reg'l Water Dist.*, 409 F.3d 758, 769–71 (6th Cir. 2005); *Carter v. Arkansas*, 392 F.3d 965, 968–69 (8th Cir. 2004); *Star Sci., Inc. v. Beales*, 278 F.3d 339, 349 (4th Cir. 2002); *Jones v. Temmer*, 829 F. Supp. 1226, 1229, 1234–36 (D. Colo. 1993), *vacated as moot*, 57 F.3d 921 (10th Cir. 1995); *Hettinga v. United States*, 770 F. Supp. 2d 51, 54–55, 59–60 (D.D.C. 2011), *aff'd,* 677 F.3d at 479; Mem. Op. & Order at 9–10, *Truesdell v. Friedlander*, No. 3:19-cv-00066-GFVT-EBA (E.D. Ky. May 3, 2022), ECF No. 120. These cases generally require plaintiffs plead away every conceivable justification for a law in order to survive a motion to dismiss.

This standard impacts real people who are simply trying to earn a living and affects the perceived fairness of the federal courts. In one case, litigated by Amicus, *Wilson-Perlman v. MacKay*, No. 2:15-CV-285 JCM (VCF), 2016 WL 1170990, at *8 (D. Nev. Mar. 23, 2016), a district court dismissed a claim brought by a woman who wished to expand the limousine business she shared with her husband. The duo already operated a successful business in Reno, and already owned the vehicles that they sought to add to their Nevada fleet. But they were denied, after being protested by a competitor, without any regard to their qualifications or safety record. The court denied the plaintiffs the ability to seek discovery, notwithstanding allegations that the scheme served no interest beside protectionism. *Id.* at *7. Instead, the court held that the plaintiffs—somehow—needed to affirmatively negate without the benefit of discovery every single boilerplate justification recited in the statutory purposes in order to overcome a

motion to dismiss. *Id.* at *8. The irony was that the plaintiffs had moved from South Africa, lured by the possibility of entrepreneurship.

c. Rational basis review, properly understood, is not in tension with the pleading standard—but courts remain confused and divided

Using the understanding of the rational basis test advanced by the D.C. Circuit, it is unclear how plaintiffs could ever survive a motion to dismiss, much less win their case. Under the D.C. Circuit's analysis, plaintiffs must prove—without the benefit of discovery—that "no conceivable set of facts" could exist which would support a challenged policy. *Sanchez*, 45 F.4th at 396. But a clever government lawyer will always be able to invent something "conceivable," putting plaintiffs in an impossible bind.[2]

Contrary to this understanding of the rational basis test, this Court has repeatedly reversed dismissals for failure to state a claim in rational basis cases, emphasizing the importance of facts in the rational basis analysis. *See, e.g.*, *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934) ("[W]here the legislative action is suitably challenged, and a

[2] Indeed, the Department of Justice has argued to the federal courts that judges using federal rational basis would have to uphold a law based on the theory that it is necessary to protect the earth from "space aliens … in invisible and undetectable craft." *See* Oral Argument 34:37–35:27, *Alaska Cent. Exp. Inc. v. United States*, 145 F. App'x 211 (9th Cir. 2005), https://cdn.ca9.uscourts.gov/datastore/media/2005/07/13/03-35902.mp3.

rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings."); *Polk Co. v. Glover*, 305 U.S. 5, 9–10 (1938) (plaintiff's allegations "were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity"); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (stating, when reversing dismissal for failure to state a claim, that a plaintiff can prevail on a rational basis challenge "quite apart from the [government's] subjective motivation"). Lower courts have followed this lead on many occasions. *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1183–84 (10th Cir. 2009); *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1190–92 (N.D. Cal. 2011); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1276, 1278 (S.D. Cal. 1997); *Tiwari v. Friedlander*, No. 3:19-CV-884-JRW-CHL, 2020 WL 4745772, at *6 (W.D. Ky. Aug. 14, 2020); *Munie v. Koster*, No. 4:10CV01096 AGF, 2011 WL 839608, at *7–8 (E.D. Mo. Mar. 7, 2011).

In spite of these cases emphasizing the importance of facts, courts have described the interplay between the rational basis test and Rule 12(b)(6) as "confusing," *Baumgardner v. Cnty. of Cook*, 108 F. Supp. 2d 1041, 1055–56 (N.D. Ill. 2000), and "perplexing." *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995). *See also Giarratano*, 521 F.3d at 303; *Wroblewski*, 965 F.2d at 460; *Brace v. Cnty. of Luzerne*, 873 F. Supp. 2d 616, 630 (M.D. Pa. 2012).

The source of this confusion is a small handful of cases, outside the 12(b)(6) context, in which this Court used unduly formalistic language to describe the rational basis test. *See, e.g.*, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (stating that rational basis challengers must negate "every conceivable basis which might support" a challenged policy and the government need not provide any "evidence or empirical data" to justify their decisions); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

But *Beach Communications* and *Williamson* do not fairly represent how the Court has applied the rational basis test. For example, only a year after *Beach Communications*, this Court ruled 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*." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (emphasis added). *See also Romer v. Evans*, 517 U.S. 620, 632–33 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (carefully reviewing the record in a rational basis case).

This Court should grant cert in Petitioners' case to reject this formalistic approach and clarify the application of the rational basis test in the 12(b)(6) context. A proper test would ensure that challengers

who make specific, concrete allegations about a law's irrationality and demonstrate a plausible disconnect between a law's apparent purposes and its actual impact can receive their day in court.

III. This case is particularly important because it indirectly implicates the rights of parents to direct the care of their children

Not only has the D.C. Circuit applied an overly deferential rational basis test in the Rule 12(b)(6) context to D.C.'s direct infringement of Petitioners Sanchez and Sorchers' right to earn a living, it has also improperly applied this test to the regulations' indirect infringement of Petitioner Homan's "fundamental right [as a] parent[] to make decisions concerning the care, custody, and control of [her] child[]." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (citing "extensive precedent" recognizing the fundamental nature of this right under the Due Process Clause).

Parents have a fundamental right to choose whom to entrust with their children's upbringing. *See, e.g.*, *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923). Petitioner Homan has asserted this right as a basis for her Fifth Amendment Due Process claim. Complaint ¶ 242. D.C.'s educational requirements for caregivers strongly implicate this right by taking away parental choice over what qualifications are sufficient to satisfy parents' trust. Moreover, the requirements irrationally and unnecessarily deny parents the

ability to entrust their children to affordable caregivers in order to open time to work and provide for their family.

This Court has recognized that "the Constitution's protection is not limited to direct interference with fundamental rights. ... 'Freedom ... [is] protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Healy v. James*, 408 U.S. 169, 183 (1972) (quoting *Bates*, 361 U.S. at 523). *See also Patterson*, 357 U.S. at 461 (freedom of association); *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707 (1981) (freedom of religion); *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (right to migrate). In *Bates*, this Court held that city ordinances requiring disclosure of NAACP membership by custodians of local branch records, 361 U.S. at 517–19, directly violated these custodians' freedom of speech. *Id.* at 527 (Black and Douglas, JJ., concurring). This direct violation, in turn, was an indirect violation of other non-party NAACP members' right to freedom of association. *Id.* at 523. *See also id.* at 523 n.9 ("The cities do not challenge ... the right of the organizations in these circumstances to assert the individual rights of their members.").

In Petitioners' case, D.C. has directly restricted Petitioners Sanchez and Sorchers' rights to earn a living, and indirectly restricted Petitioner Homan's fundamental right to direct her child's upbringing. This Court has before "stressed that ... legislation ... which on its face sought to regulate labor unions and to secure stability in interstate commerce, would have the practical effect 'of discouraging' the exercise of

constitutionally protected political rights." *Patterson*, 357 U.S. at 461 (citing *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 393 (1950)). In other words, this Court has recognized that economic regulation can indirectly infringe upon "non-economic" rights. Some lower courts have held that "[w]here the government has only indirectly infringed upon a parent's right, the infringement will be 'subject to minimum scrutiny.'" *T.W. by and through Waltman v. S. Columbia Area Sch. Dist.*, No. 4:20-CV-01688, 2020 WL 5751219, at *5 (E.D. Penn. Sept. 25, 2020) (quoting *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 344 (3d Cir. 2004)). But as with direct infringements of the right to earn a living, the rational basis test does not allow courts to disregard the normal pleading requirements of Rules 8 and 12 when plaintiffs allege that their fundamental parental rights have been indirectly infringed.

The D.C. Circuit recognized that a more direct infringement of parental rights, such as "requir[ing] parents to obtain associate's degrees in early-childhood education before supervising their kids' friends would raise significant questions." *Sanchez*, 45 F.4th at 400. Nonetheless, the Circuit Court failed to recognize that there is no substantial difference between a group of nine children's parents entrusting a neighborhood friend to watch the kids at the friend's house and the same group of parents entrusting Petitioner Sanchez to watch their children at her own house.

This case's strong connection to these important parental rights further emphasizes the importance of

the D.C. Circuit's errors, and warrants the Court's involvement.

CONCLUSION

The right to earn a living protects ordinary people who want only to improve their lives and their communities. This right has been respected in Anglo-American law since before the founding, but courts too often ignore it, permitting widespread economic protectionism and regulatory capture. The Court's confusing jurisprudence here has also begun to affect fundamental civil procedure, preventing individuals from even obtaining a day in court to defend their rights. These rights are particularly important where, as here, fundamental parental rights are strongly implicated.

The Supreme Court should begin repairing this damage and articulate standards which are more protective of individual rights.

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Respectfully submitted,

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