No. _____

In The

Supreme Court of the United States

GOLDEN GLOW TANNING SALON, INCORPORATED,

Petitioner,

versus

CITY OF COLUMBUS, MISSISSIPPI,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the right to pursue a lawful occupation a fundamental right deeply rooted in this nation's history and traditions such that any infringement upon that right must be subjected to strict scrutiny?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States:

1. Golden Glow Tanning Salon, Incorporated, Petitioner; and
2. City of Columbus, Mississippi, Respondent.

CORPORATE DISCLOSURE STATEMENT

Golden Glow Tanning Salon, Incorporated, is a Mississippi corporation, which is wholly owned by Larry S. Pyle and Crystal Pyle.

RELATED CASES

Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi, No. 1:20-CV-103, U.S. District Court for the Northern District of Mississippi. Judgment entered November 9, 2021.

Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi, No. 21-60898, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 8, 2022.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published and found at 52 F.4th 974 (5th Cir. 2022), and is attached as App. 1-19. The opinion of the United States District Court for the Northern District of Mississippi is unpublished and found at 2021 WL 5225617 (N.D. Miss. 2021), and is attached as App. 20-30. The unpublished Oder of the United States District Court for the Northern District of Mississippi is attached as App. 31-32.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on November 8, 2022, by Writ of *Certiorari*, under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENT PROVIDED

The Fourteenth Amendment of the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Because of the COVID-19 pandemic, in the spring of 2020, all fifty (50) states' governors ordered many businesses shut down indefinitely.

These business shutdown orders represented an "extraordinary power to force people from their chosen occupations, . . . and make millions dependent on government assistance. This is one of 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).

In general, the orders shut down those businesses which were labeled "nonessential."

The governor of the State of Mississippi ordered some businesses closed, but permitted local governments, such as Respondent, to close other businesses.

Consistent with the authority granted by the governor, Respondent adopted a resolution which provided:

> Because of the likelihood of close person-to-person contact, which increases dramatically the likelihood of the spread of infectious disease, effective at 5:00 p.m. on March 21, 2020, and continuing until further action of the Mayor and Council of the City of Columbus, all . . . nail and tanning salons [and other similar personal care businesses] . . . shall be closed for business.

Petitioner operated tanning salons in several locations, including Columbus, Mississippi. Because tanning salons do not involve close person-to-person contact, Petitioner requested that Respondent allow its tanning business to remain open. Petitioner explained that only one person enters a tanning room at a time, and there was no "likelihood of close person-to-person contact. . . ." Nevertheless, Respondent would not relent, and closed Petitioner's business indefinitely.

Petitioner filed suit against Respondent seeking damages for the income lost during the time Respondent closed the business. Petitioner's suit alleged that closing its tanning business, but not other businesses, such as liquor stores, is subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

The United States District Court for the Northern District of Mississippi granted Respondent's motion for summary judgment, expressly rejecting Petitioner's argument that the "'right to work' is a fundamental right. . . ." *Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi*, 2021 WL 5225617, at *3 (N.D. Miss. 2021), aff'd, 52 F.4th 974 (5th Cir. 2022); App. 27.

The Fifth Circuit affirmed, holding that the "Supreme Court does not now recognize a fundamental right to work and has consistently applied rational basis review 'to state legislation restricting the availability of employment opportunities.'" *Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi*, 52 F.4th 974, 979 (5th Cir. 2022); App. 7-8. According to

the Fifth Circuit, since only "rational basis review" applies, "overinclusive and underinclusive classifications are permissible, as is some resulting inequality." *Golden Glow Tanning Salon, Inc.*, 52 F.4th at 980; App. 9.

Nevertheless, the Fifth Circuit majority opinion conceded that the "draconian shutdowns were debatable measures from a cost-benefit standpoint, in that they inflicted enormous economic damage without necessarily 'slowing the spread' of Covid-19." *Golden Glow Tanning Salon, Inc.*, 52 F.4th at 977; App. 2.

Judge Ho's concurrence was more emphatic, stating:

> 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."

Golden Glow Tanning Salon, Inc., 52 F.4th at 982, quoting Eugene Kontorovich, Lochner *Under Lockdown*, 2021 U. Chi. Legal F. 169, 182 (2021) (Ho, J., concurring); App. 13-14.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED IN ORDER TO DECIDE WHETHER THERE EXISTS A FUNDAMENTAL RIGHT TO WORK IN ONE'S OWN BUSINESS TO EARN A LIVING.

Although compelled to join the majority by what he viewed as "[g]overning precedent. . . .," *Golden Glow Tanning Salon, Inc.*, 52 F.4th at 984, App. 13, Judge Ho noted that *Dobbs v. Jackson Women's Health Org.*, ___ U.S. ___, 142 S. Ct. 2228, 2242 (2022), reaffirmed that there are certain fundamental rights which are not expressly listed in the Constitution, but which are "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." *Golden Glow Tanning Salon, Inc.*, 52 F.4th at 982, quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (Ho, J., concurring); App. 14.[1]

Judge Ho expressed his displeasure, that "our current law of unenumerated rights prioritizes non-economic activities over economic endeavors," which are left "out in the cold." *Golden Glow Tanning Salon, Inc.*, 52 F.4th at 982 (Ho, J., concurring); App. 14.

According to Judge Ho, "the right to pursue callings and make contracts . . . have better historical grounding than more recent claims of right that have found judicial favor." *Golden Glow Tanning Salon, Inc.*,

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[1] Counsel is grateful for the kind assistance of Hunter Heck, student at the University of Virginia School of Law, in sharing her research for this Petition.

52 F.4th at 982, quoting 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) (Ho, J., concurring); App. 14-15.

"[T]he right to engage in productive labors is essential to ensuring the ability of the average American citizen to exercise most of their other rights . . . [and] 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." *Golden Glow Tanning Salon, Inc.*, 52 F.4th at 984 (Ho, J., concurring) (citation omitted); App. 19.

Judge Ho is not alone. Chief Judge Sutton of the Sixth Circuit Court of Appeals expressed similar sentiments in *Tiwari v. Friedlander*, 26 F.4th 355 (6th Cir.), cert. denied, 143 S. Ct. 444 (2022). *Tiwari* was an attack upon a state's requirement for a "certificate of need" in order to enter the healthcare business. The Sixth Circuit rejected a claim that the right to earn a living is a fundamental right. Nevertheless, Chief Judge Sutton pointed out that "the current deferential approach to economic regulations may amount to an overcorrection in response to the *Lochner* era at the expense of otherwise constitutionally secured rights." *Tiwari*, 26 F.4th at 368.

Chief Judge Sutton wrote that there may be "something to Justice Frankfurter's criticism of the dichotomy between economic rights and liberty rights,

. . . But any such recalibration of the rational-basis test and any effort to create consistency across individual rights is for the U.S. Supreme Court . . . to make." *Tiwari*, 26 F.4th at 369.

The holding in *Tiwari* and in the instant case, that the right to earn a living is a disfavored economic right, is likely founded upon the abrogation of *Lochner v. New York*, 198 U.S. 45 (1905), by *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *Lochner* voided a statute which restricted the weekly hours employees might be required to work. *Lochner* is now so discredited, that it is characterized as an "anticanon." Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011). The actual holding of *W. Coast Hotel Co.*, abrogating *Lochner*, was only that the state's regulation of the number of hours that women could work per week, was "a matter for the legislative judgment." *W. Coast Hotel Co.*, 300 U.S. at 400. *W. Coast Hotel Co*., like *Lochner*, never addresses whether the right to earn a living in one's own business is a fundamental right.

The only case actually cited by the majority in *Golden Glow Tanning Salon, Inc.* as supporting the proposition that the right to work for a living is not fundamental is *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). *See Golden Glow Tanning Salon, Inc.*, 52 F.4th at 979; App. 8. *Dandridge*, like *Lochner* and like *W. Coast Hotel Co*., does not address the issue of whether one has a fundamental right to work in one's own business in order to earn a living. Instead, *Dandridge* attacked the "validity of a method used by Maryland, in the administration of an aspect of its

public welfare program, to reconcile the demands of its needy citizens with the finite resources available to meet those demands." *Dandridge*, 397 U.S. at 472. In balancing these interests, the state limited its aid to dependent children to the maximum amount by placing a cap on the amount "any single family may receive. . . ." *Dandridge*, 397 U.S. at 474. Of course, the receipt of welfare benefits is the polar opposite of the right to use one's initiative to open one's own business and earn a living.

While not cited by the Fifth Circuit, a case most emphasized by Respondent below is *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955), which stated that the "day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson*, like *W. Coast Hotel Co.*, *Lochner*, and *Dandridge*, also never addresses whether there exists a fundamental right to operate one's own business such that a local government's outright closure of a business would implicate a fundamental right. *Williamson* upheld a statue requiring one to be licensed as an ophthalmologist in order to engage in the business of "fitting or duplicating lenses. . . ." *Williamson*, 348 U.S. at 486. *Williamson* did not address whether the right to engage in one's own business, such as the lense-fitting business, is a fundamental right, such that strict scrutiny is required when the Equal Protection Clause is invoked.

In stating that "governing precedent requires us to affirm," Judge Ho may have meant only that modern precedent "requires us to affirm." *Golden Glow Tanning Salon, Inc.*, 52 F.4th at 984 (Ho, J., concurring); App. 19. Precedents before *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, hold that the right to earn a living in one's own business is fundamental. *Truax v. Raich*, 239 U.S. 33, 41 (1915), decided a decade after *Lochner*, had established that there is a fundamental right to earn a living in one's own business. *Truax* attacked a state statute which required that an employer employ "not less than 80 per cent qualified electors or native-born citizens of the United States. . . ." *Truax*, 239 U.S. at 40. In holding the statute unconstitutional, this Court stated that it "requires no argument to show that the 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 Amendment to secure." *Truax*, 239 U.S. at 41. *Truax* was endorsed by *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923), which stated that the liberty guaranteed by the Fourteenth Amendment

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common

> law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 399 (emphasis added).

An attack on *Truax* and *Meyer*, as overruled by more modern precedent, is unfounded, since *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972), quoted *Meyer* for the proposition that the liberty guaranteed in the Fourteenth Amendment includes "the right of the individual . . . to engage in any of the common occupations of life. . . ."

Another case relied upon by Respondent below, as negating any notion that the right to work for a living is fundamental, is *Conn v. Gabbert*, 526 U.S. 286 (1999). There, an attorney sued for violation of his liberty right to practice his profession because a search warrant was executed upon him while his client was testifying before a grand jury. This Court stated:

> No case of this Court has held that such an intrusion can rise to the level of a violation of the Fourteenth Amendment's liberty right to choose and follow one's calling. That right is simply not infringed by the inevitable interruptions of our daily routine as a result of legal process, which all of us may experience from time to time.

Conn, 526 U.S. at 292.

Thus, *Conn* recognized a "liberty right to choose and follow one's calling," but held that this liberty right was not infringed by the brief time needed to execute a search warrant. *Conn*, 526 U.S. at 292.

Contrary to Judge Ho's concurrence, this Court has never, even in the modern cases discrediting *Lochner* as the "anticanon," "repudiated the recognition that a citizen has the right to work for a living and pursue his or her chosen occupation." *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 920 (W.D. Pa. 2020), vacated as moot, *Cnty. of Butler v. Governor of Pennsylvania*, 8 F.4th 226 (3d Cir. 2021), cert. denied sub nom. *Butler Cnty., Pennsylvania v. Wolf*, ___ U.S. ___, 142 S. Ct. 772 (2022).

The case most supportive of the notion that the right to earn a living is a disfavored economic right, not a fundamental right, is *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938). *Carolene Prod. Co*. upheld, against constitutional challenge, a statute which regulated the interstate transportation of filled milk. *Carolene Prod. Co.* may be read to preclude strict scrutiny review since it stated that

> regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Carolene Prod. Co., 304 U.S. at 152 (emphasis added).

In its famous footnote 4, *Carolene Prod. Co.* stated that "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those

of the first ten Amendments. . . . the presumption of constitutionality. . . ." may be more narrow. *Carolene Prod. Co.*, 304 U.S. at 153, n. 4.

Carolene Prod. Co. refers to only "ordinary commercial transactions. . . ." *Carolene Prod. Co.*, 304 U.S. at 152. The case does not characterize the right to engage in a lawful business in order to earn a living as an "ordinary commercial transaction[ ]."

Furthermore, to the extent *Carolene Prod. Co*. requires that a right be deemed fundamental only if it is listed in the "first ten Amendments," that case must be read in light of *Dobbs*' recognition, that even unenumerated rights are fundamental if they are "'deeply rooted in this Nation's history and tradition' [or] 'implicit in the concept of ordered liberty.'" *Dobbs*, 142 S. Ct. at 2300, quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (Thomas, J., concurring).

Under Respondent's 2020 resolution, "entire industries were shut down indefinitely, and often fatally. State and local shut-down and social distancing orders have prohibited contractual relations on a scale previously unimagined. . . . The broad closures and lockdowns that are characteristic of governments' COVID-19 responses, and will likely characterize responses to future pandemics, are unprecedented." Lochner *Under Lockdown*, 2021 U. Chi. Legal F. at 170.

Absent this Court's grant of review, these indefinite and often fatal closures can easily reoccur when another pandemic or other emergency arises. A shut down of entire industries will be subject to only

rational review. Rational review is, in effect, no review at all, since the disfavored class must meet the nearly impossible burden to "negate every conceivable basis. . . ." for differing treatment. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993). This means that if Respondent "is incapable of making its case [for differing treatment between businesses], judges must help it do so." Andrew Ward, *The Rational-Basis Test Violates Due Process*, 8 N.Y.U. J.L. & Liberty 714, 724 (2014).

CONCLUSION

This Court should grant the Writ to clarify whether the right to earn a living is fundamental, such that the states must be held to a strict scrutiny standard when the states choose which private businesses to shut down.

Respectfully submitted,

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