No. 24-102

In the Supreme Court of the United States

MANUEL ADAMS, JR., PETITIONER

v.

CITY OF HARAHAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PROFESSOR MICHAEL H. LEROY AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

The freedom to pursue one's chosen occupation has deep roots in Anglo-American law. From the Middle Ages onward, English courts recognized occupational-liberty claims, invaliding both private agreements and royal monopolies that barred workers from their chosen fields. The Founding generation not only shared those principles but also invoked British infringement on occupational liberty as grounds for independence. And both early American courts and the Reconstruction Congress acknowledged and upheld that freedom. This Court has too. From the nineteenth century onward, the Court has repeatedly recognized—and reaffirmed—that the Constitution protects the freedom to pursue one's occupation.

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[1] Counsel of record for all parties received timely notice of *amicus*'s intent to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity aside from *amicus* and his counsel funded its preparation or submission.

[2] *Amicus* files this brief in his individual capacity only, not as a representative of the University of Illinois, Urbana-Champaign or any of its academic or administrative units.

The Court should grant review to clarify what standard applies when a plaintiff seeks to vindicate that important freedom. Few liberties are so deeply rooted or so consequential for ordinary Americans. Yet the decision below puts occupational-liberty claims all but out of reach—breaking with four other circuits along the way. This Court's review is badly needed, and the interests at stake are too important to save for another day.

ARGUMENT

I. The freedom to pursue an occupation of one's own choosing is deeply embedded in Anglo-American law.

This Court has long recognized that the Constitution protects the freedom to pursue one's chosen occupation without arbitrary government interference. At times, that principle has been described as a "liberty" interest protected by the Fifth and Fourteenth Amendments under the doctrine of procedural due process. See *Greene* v. *McElroy*, 360 U.S. 474, 492 (1959); see also *Conn* v. *Gabbert*, 526 U.S. 286, 291–92 (1999) (citing *Dent* v. *West Virginia*, 129 U.S. 114 (1889); *Truax* v. *Raich*, 239 U.S. 33 (1915)). At other times, this Court has stated that the freedom is protected under the doctrine of substantive due process. See *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). And on occasion, Justices of this Court have also described the right to pursue an occupation as one of the privileges and immunities of citizenship. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 113–14 (1872) (Bradley, J., dissenting); *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (Washington, J.).

Whatever its textual and doctrinal underpinnings, however, there can be no doubt that this freedom has

a deep historical pedigree. See generally *Golden Glow Tanning Salon, Inc.* v. *City of Columbus*, 52 F.4th 974, 982–84 (5th Cir. 2022) (Ho, J., concurring).

A. An individual's liberty interest in pursuing his chosen profession traces back to English common law.

1. The English common law long upheld an individual's freedom to pursue his own occupation. The roots of that freedom stretch back at least to 1414, when the King's Bench decided *John Dyer's Case* (1414), 2 Hen. V, 5, pl. 26 (K.B.). The defendant there was sued for violating the terms of an agreement not to work in his trade for six months. *Id.* The court held the restriction invalid. In its view, the restraint at issue was not only unenforceable but also criminal: "if the plaintiff were here he should go to prison until he paid a fine to the King." *Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 436 n.1 (1932) (quoting *Dyer's Case*, 2 Henry V, 5, pl. 26).

The same principle found expression in *Mitchel* v. *Reynolds* (1711), 24 Eng. Rep. 347, 347 (Q.B.). There, an apprentice baker sold his bakehouse in consideration of a five-year bond not to practice his trade within the Parish of St. Holborn. He later broke that promise and was sued for damages. *Id.* While the court ruled against the baker, reasoning that his restraint was geographically limited, it added that a "general" restraint "not to exercise a trade throughout the kingdom" would be "void." *Id.* at 348. It stated: "[T]here is more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, tho[ugh] it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime." *Id.* at 351.

2. English courts also protected individual liberty to pursue an occupation without state encroachment. In medieval and early-modern England, the Crown created royal "monopolies"—"exclusive grant[s] of power" from the government to "work in a particular trade or to sell a specific good." Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 984 (2013). Originally meant to foster new industries, such governmental monopolies could also—when abused—preclude those without a royal grant from working a particular trade. When such abuses began to recur in the early seventeenth century, see 1 William Blackstone, *Commentaries on the Laws of England* 427 (Philadelphia, Union Library 1771), courts stepped in to protect occupational freedom. As Lord Chief Justice Coke explained in *The Case of the Tailors* (1615), "the common law abhors" state monopolies that "prohibit any from working in any lawful trade." 77 Eng. Rep. 1218, 1219 (K.B.). Coke echoed that theme in his in his influential treatise, declaring: "if a [grant] be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that [grant] is against the liberty and freedome of the subject" and "against the law of the land." Edward Coke, *The Second Part of the Institutes of the Lawes of England* 47 (London, E&R Brooke 1797).

That is not to say that English law recognized no constraints on an individual's occupational pursuits. For example, a 1363 statute limited a person to one fixed and permanent craft. See William Alexander Sanderson, *Restraint of Trade in English Law*, 11, note e (1926) (discussing 37 Edw. 3, cc. 5, 6, which "forb[ade] merchants to trade in more than one ware and direct[ed] artificers and 'handicraft people' to

hold them every one to one mystery ….”). Likewise, while it was “lawful for any man to use any trade thereby to maintain himself and his family,” the law still could “provid[e] a punishment” for one who purported to perform a trade in which “he hath no skill.” *Allen* v. *Tooley* (1614), 80 Eng. Rep. 1055, 1055 (K.B.).

Still, courts remained deeply skeptical of attempts to prevent a man from practicing his chosen trade—particularly when that restraint came from the state itself. As Coke explained, “it appeareth that a mans trade is accounted his life, becau[s]e it maintaineth his life”—so a restriction that “taketh away a man’s trade, taketh away his life.” Edward Coke, *The Third Part of the Institutes of the Lawes of England* 181 (London, E&R Brooke 1797).

B. The freedom to practice a chosen trade was among the Founding generation’s central motivations.

Skepticism of governmental attempts to restrict occupational freedom, particular through royal monopolies, also took hold across the Atlantic. Indeed, the Crown’s infringement of this liberty interest became an important justification for the colonists’ break with England.

1. Occupational liberty was prominent in the writings of the Founding generation. Benjamin Franklin, for example, declared: “There 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[.]” Benjamin Franklin, *Causes of the American Discontents Before 1768* (Jan. 5–7, 1768), bit.ly/3SN5j7m. Along similar lines, George Mason wrote in the Virginia Declaration of Rights that the “inherent rights” that men retain when they “enter into a state of soci-

ety" include "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), bit.ly/3YNTilM.

For the Framers, perhaps the most pressing threat to their liberty was the existence of government-sanctioned monopolies, which came into being despite the efforts of English courts to protect the right to work. See Calabresi & Leibowitz, *supra* at 1007–08. Historians deem such monopolistic behavior "one of the most potent causes of the American Revolution." Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 Yale L.J. 42, 51–52 (1926). In fact, it was the Crown's support for the East India Company—which made it impossible for colonial merchants to compete on an equal footing in the tea trade—that led American colonists to dump British tea into Boston Harbor on December 16, 1773. See Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev 207, 218 (2003).

2. The threat that state monopolies posed to occupational liberty was the subject of intense debate at the Constitutional Convention. The Framers considered—and ultimately rejected—a proposal to give the federal government the power to grant "charters of incorporation." Calabresi & Leibowitz, *supra* at 1011 (citation omitted). Meanwhile, Mason ultimately refused to sign the Constitution in part because he believed that the Necessary and Proper Clause gave Congress the power to "grant monopolies in trade and commerce[.]" George Mason, *Objections to This Constitution of Government* (Sept. 1787), bit.ly/3WQxx2h.

And occupational liberty remained top-of-mind for the Framers even after the Convention. Before the

Constitution was even ratified, for example, Thomas Jefferson wrote James Madison to complain about the omission of a bill of rights—including a right "providing clearly & without the aid of sophisms for … restriction against monopolies." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), bit.ly/4ctqQsF. Madison later agreed that monopolies "are justly classed among the greatest nuisances in Government." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), bit.ly/3Ap0V86. While the eventual Bill of Rights did not incorporate the right that Jefferson had envisioned, he returned to the theme in his first inaugural address—admonishing that "a wise and frugal Government" is one that "shall leave [men] otherwise free to regulate their own pursuits of industry and improvement …." Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), bit.ly/3T5XVE2.

C. Occupational liberty was a recurring theme during the Antebellum and Reconstruction eras.

1. These threads carried forward to the Antebellum period, when numerous judicial opinions recognized the common-law right to earn a living. See Sandefur, *supra*, at 225–26, 263–66 (collecting cases). Most notably, in the 1823 case *Corfield* v. *Coryell*, Justice Bushrod Washington wrote that he considered the right "to pass through, or to reside in any other state, for purposes of trade, agriculture, [or] professional pursuits" to be one of the "fundamental" rights that belongs "to the citizens of all free governments." 6 F. Cas. at 551–52. Likewise, in the 1848 case *City of Memphis* v. *Winfield*, the Tennessee Supreme Court held that a statute imposing a 10 P.M. curfew on Black inhabitants was "both unnecessary and oppres-

sive"—and therefore "void"—because "in cities, very often, the most profitable employment is to be found in the night." 27 Tenn. 707, 708–10 (1848). As the court explained, "[t]he lot of a free negro is hard enough at best, … and it is both cruel and useless to add to his troubles by unnecessary and painful restraints in the use of such liberty as is allowed him. He must live, and, in order to do so, he must work[.]" *Id.* at 709. See also *Smith* v. *Spooner*, 20 Mass. 229, 230 (1825); *Sewall* v. *Jones*, 26 Mass. 412, 414 (1830); *Drexel & Co.* v. *Commonwealth*, 46 Pa. 31, 36 (1863).

Nineteenth-century courts were also skeptical of attempts to impose contractual restraints on occupational freedom. For example, in the 1839 case *Ross* v. *Sadgbeer*, the New York Supreme Court of Judicature explained that "the law will not permit" a "contract to deprive a man of his livelihood, and the public of a useful member, without any benefit to the plaintiff." 21 Wend. 166, 167 (N.Y. Sup. Ct. 1839). And in the 1898 case *Lufkin Rule Co.* v. *Fringeli*, the Ohio Supreme Court explained that the presumption that general restraints on trade are illegal "arises from the fact that any restraint of the kind tends to oppression, by depriving the individual of the right to engage in a pursuit or trade with which he is generally most familiar, and consequently the community of the services of a skillful laborer." 49 N.E. 1030, 1032 (Ohio 1898).

2. Occupational liberty was also a focus of the abolitionist movement and the Reconstruction Congress. See generally Michael H. LeRoy, *Targeting White Supremacy in the Workplace*, 29 Stan. L. & Pol'y Rev. 107, 108 (2018) (discussing the history of civil rights legislation from the Reconstruction era). Representative Evan Ingersoll of Illinois, speaking on June 15,

1864, offered his support for an amendment to abolish slavery because doing so would "secure to the oppressed slave his natural and God-given rights," including the "right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor." Cong. Globe, 38th Cong., 1st Sess. 2990 (1864) (statement of Rep. Ingersoll). And Representative John Bingham of Ohio, one of the principal drafters of the Fourteenth Amendment, described constitutional liberty as including the right "to work in 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).

To be sure, this Court did not immediately embrace the view that the Fourteenth Amendment protects the freedom at issue here. In the *Slaughter-House Cases*, decided in 1872, the Court reviewed several consolidated challenges to a Louisiana statute that established a monopoly in the state slaughter-house industry. 83 U.S. at 57. The plaintiffs, an association of butchers, argued that the monopoly violated their "right to exercise their trade," as guaranteed by the Fourteenth Amendment. *Id.* at 60. This Court disagreed, holding that the Privileges or Immunities Clause protected only the rights of United States citizenship, not the rights of State citizenship, and that only the latter included the right to work. *Id.* at 78–79. But see *Saenz* v. *Roe*, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting) (arguing that the *Slaughter-House Cases* were wrongly decided); *McDonald* v. *City of Chicago*, 561 U.S. 742, 851–52 (2010) (Thomas, J., concurring) (same).

But this Court soon recognized the right to pursue an occupation of one's choosing as a liberty interest under the Due Process Clause. In *Dent* v. *West Virginia*, the Court reviewed the conviction of a physician who had practiced unlicensed medicine, in violation of a state statute. 129 U.S. at 121. This Court ultimately affirmed the conviction on the ground that the statute was a reasonable regulation imposed by the state to promote the general welfare. *Id.* at 121–22, 128. Along the way, however, the Court deemed it "undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose," adding that "[t]his right may in many respects be considered as a distinguishing feature of our republican institutions." *Id.* at 121.

D. Twentieth-century cases consistently recognized that the Due Process Clause protects occupational liberty.

This Court reaffirmed the *Dent* principle in a series of twentieth-century cases, repeatedly invoking the liberty to pursue a chosen occupation. One such case was *Truax* v. *Raich*, decided in 1915. The Court there held that an Arizona statute restricting the employment of non-citizen workers violated the Equal Protection Clause. 239 U.S. at 35, 39–43. In doing so, it explained 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 [Fourteenth] Amendment to secure." *Id.* at 41. If that right "could be refused solely upon the ground of race or nationality," the Court reasoned, "the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." *Id.*

Occupational liberty also featured in *Meyer* v. *Nebraska*, decided in 1923. *Meyer* held that a Nebraska statute that forbade the teaching of German in classrooms violated the Fourteenth Amendment because it "unreasonably infringe[d] the liberty guaranteed … by the Fourteenth Amendment." 262 U.S. at 399. While the Court did "not attempt[] to define with exactness the liberty" guaranteed in the Fourteenth Amendment, it explained that liberty "denotes not merely freedom from bodily restraint" but also various other freedoms—including "the right … to engage in any of the common occupations of life." *Id.*

The Court revisited occupational liberty in greater depth in *Green* v. *McElroy*, decided in 1959. The plaintiff in *Green* was an aeronautical engineer whose security clearance had been revoked by the government, effectively preventing him from obtaining a job in his field. 360 U.S. at 475–76. He sued, arguing that the government's decision—which rested on confidential statements made by informants after a procedure authorized by neither Congress nor the President—unconstitutionally deprived him of "liberty" and "property" without "due process of law." *Id.* at 492 (quoting U.S. Const. amend. V). This Court agreed, explaining that "the 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 Due Process Clause, and that the government had violated the engineer's due process rights by failing to provide a fair procedure. *Id.* at 492, 508.

The issue also arose in *Conn* v. *Gabbert*, decided forty years later. *Conn* was a dispute between a defense lawyer and a California prosecutor. The defense lawyer claimed that the prosecutor violated his pro-

cedural due process rights by causing police to search him just before his client testified to a grand jury. 526 U.S. at 287–89. The Court disagreed that the prosecutor had interfered with the defense lawyer's constitutional right to practice his profession, reasoning that such a "brief interruption" was not actionable. *Id.* at 292. In so holding, however, the Court reaffirmed the principles that it recognized in earlier cases like *Dent* and *Truax*. See *id.*

II. The Court should grant review to clarify the proper standard for vindicating this important freedom.

Coke and Blackstone, Madison and Jefferson, the Reconstruction Congress: all cared deeply about the liberty interest at issue here—and for good reason. The freedom to pursue one's chosen occupation is a foundation stone of Anglo-American law, and for centuries courts have carefully protected that interest. As the petitioner explains, however, the decision below "guts this right for every person living in the Fifth Circuit," Pet. 4, creating an "intractable circuit conflict" in the process, *id.* at 1.

No matter which side of that split is correct, the question presented matters too much to leave for another day. If the Fifth Circuit is right, then employers throughout the First, Third, Ninth, and D.C. Circuits—from small businesses to cash-strapped municipalities—can be threatened with damages liability under circumstances that cannot lawfully support an occupational-liberty claim. On the other hand, if the First, Third, Ninth, and D.C. circuits are right, then thirty-eight million Louisianans, Mississippians, and Texans are now all but unable to vindicate their interests in occupational liberty. Meanwhile, employers

and employees in the other circuits will have to guess which rule applies until this Court intervenes.

Few petitions involve liberty interests with such a long pedigree—or such tremendous consequence to ordinary Americans. If the freedom to pursue an occupation of one's choosing was vital enough to cross the Atlantic, then it is too important to leave up to geographical happenstance: the Constitution should mean the same thing in Harahan, Louisiana as it does in Hallowell, Maine. This Court should grant review, resolve the circuit split, and clarify the proper standard for occupational-liberty claims.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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