No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourteenth Amendment require meaningful review of restrictions on the right to engage in a common occupation?

CORPORATE DISCLOSURE STATEMENT

Petitioner Grace Home Care, Inc., has no parent corporation, and no publicly held company owns any stock in it.

STATEMENT OF RELATED CASES

Tiwari v. Friedlander (W.D. Ky.), No. 3:19-CV-00884 (judgment entered April 14, 2021)

Tiwari v. Friedlander (6th Cir.), No. 21-5495 (judgment entered February 14, 2022)

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PETITION FOR WRIT OF CERTIORARI

This petition seeks to resolve the longstanding confusion over whether the Fourteenth Amendment guarantees meaningful judicial review of laws that restrict the right to earn a living. This right is deeply embedded in our history and tradition: "At common law every man [could] use what trade he pleased," 1 William Blackstone, *Commentaries* *427, and still today—at least in theory—"the Fourteenth Amendment . . . includes some generalized . . . right to choose one's field of private employment . . . subject to reasonable government regulation," *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999). In practice, however, things have gone amiss.

The culprit is the rational-basis test. Since the Court sundered constitutional rights into favored and non-favored groups, *see United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938), rights seen as non-fundamental, including the right to engage in a common occupation, have been consistently reviewed under the rational-basis test. But this Court has described the test inconsistently. In some opinions, the rational-basis test is what it claims to be: a test. Deferential, but also genuinely assessing arguments and evidence to determine truth. In other opinions (at least if every word is read literally) it is not a test but a rule: the government wins no matter how absurd its position.

The result is tumult in the lower courts. In some cases, courts hold that preposterous laws are

"rational." In others, courts split on identical issues because they follow different articulations of the test. In still others, courts distort procedure beyond recognition—including in this one, in which the Sixth Circuit did without comment something that should have been impossible: acknowledge Petitioners' "ample evidence" and "formidable" arguments, then hold that there was no genuine dispute sufficient to overcome summary judgment. App. 17, 20.

Members of this Court, judges of the courts of appeals, and others have criticized the situation. Indeed, Judge Sutton did so here. Writing for the court below, he explained that "many thoughtful commentators, scholars, and judges have shown that the current deferential approach to economic regulations may amount to an overcorrection . . . at the expense of otherwise constitutionally secured rights." App. 26. But, he wrote, "recalibration of the rational-basis test . . . is for the U.S. Supreme Court, not our court, to make." App. 27.

So it is. And because the confusion that exists in this case exists throughout the judiciary, it is time for the Court to take up the issue. The Court should accept Judge Sutton's invitation, grant a writ of certiorari, and decide whether to recalibrate the test.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 26 F.4th 355. The district court's opinion granting summary judgment against Petitioners, App.

32, is unreported but available electronically at 2021 WL 1407953. The district court's opinion holding that Petitioners stated a claim, App. 67, is unreported but available at 2020 WL 4745772.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on February 14, 2022. On April 18, 2022, Justice Kavanaugh extended the time to petition for a writ of certiorari through July 14, 2022. The petition was timely filed on July 12, 2022. Petitioners invoke this Court's jurisdiction under 28 U.S.C § 1254(1).

RELEVANT PROVISIONS

Section 1 of the Fourteenth Amendment provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

The text of three relevant statutory sections is reproduced in the Appendix.

STATEMENT OF FACTS

This case challenges Kentucky's Certificate of Need law, which allows existing home health agencies to block their would-be competitors from opening.

Petitioners Dipendra Tiwari and Kishor Sapkota are Nepali-speaking immigrants who live in Louisville. App. 78-79. Mr. Tiwari is an accountant who used to work at a home health agency, and Mr. Sapkota is a home health aide. *Id.* Together, they formed Petitioner Grace Home Care to provide same-language services to the large community of Nepali-speaking refugees and immigrants in Louisville. *Id.* Home health services are uncomplicated: they tend to involve things like skilled nursing; physical therapy; and help with bathing, using the bathroom, and taking medication. App. 5. Home health is also not a big capital investment for providers the way a hospital is. App. 21. But it is a problem when patients and caregivers do not speak the same language. App. 79. And obviously so. No English-speaker seeking help for an elderly loved one, for example, would choose a service where everyone speaks Nepali. No patient would prefer to communicate with a caretaker through a translation app. Those are the sorts of problems that Grace sought to fix. App. 5.

But Grace could not open. Under the Certificate of Need law, Kentucky had determined that there was no

"need" for any new home health services in Louisville—or, in fact, nearly the entire state—because a mathematical formula projected that there were already enough providers. App. 75. That meant it was illegal to open a new service. (It is a bit like the government prohibiting new hamburger restaurants based on a calculation about the number of Burger Kings.) An existing provider intervened in Grace's application process to point out that Grace was banned, and Grace's application was denied without consideration of the need Grace was trying to meet. App. 79-80.

Invoking 42 U.S.C. § 1983, Grace and its owners sued in the Western District of Kentucky. They claimed that the Certificate of Need Law violated their right to earn a living under the Due Process, Equal Protection, and Privileges or Immunities clauses of the Fourteenth Amendment. App. 81. The Kentucky Hospital Association quickly intervened to defend the law *because* it protects existing agencies from competition. App. 100; Oral Argument 15:59, *Tiwari v. Friedlander*, 26 F.4th 355 (6th Cir. 2022) (Judge Sutton: "Don't you agree it's very protectionist and, I mean, kind of outrageous the way it works?" A: "Well, I think that it is somewhat protectionist, but there's a reason for that . . . ").[1] This protectionism, the argument goes, might have the side effects of improving cost, quality, and access. App. 86. The lower the competitive pressure, it's claimed, the more monopolies and oligopolies will use their privilege to benefit the public rather than themselves.

[1] *Available at* https://tinyurl.com/yk6ww6w6

Grace argued the opposite: that no rational observer would think that care is cheaper, better, or more accessible for Nepali-speaking patients forced to use English-language agencies and interact with caretakers they cannot understand.

What happened next exemplifies the widespread confusion about the rational-basis test: three opinions applied three versions of the test, each of which finds support in language from this Court.

The first was Judge Walker's opinion denying a motion to dismiss for failure to state a claim. As the Sixth Circuit later remarked, this "thoughtful and thorough opinion" "ably la[id] out the powerful case against [Certificate of Need] laws—cataloguing the ill effects they wreak on entrepreneurs and consumers alike." App. 6, 17. Most importantly, Judge Walker held plausible Grace's common-sense arguments. He held that the law might not rationally connect to improving quality because "prevent[ing] members of Louisville's large Nepali-speaking community from accessing health care in their homes from people who speak their language . . . hurts the health of those patients." App. 95. That "limiting the supply of home health care" might not rationally improve access because it "seems like a recipe for *decreasing* Kentuckians' access to home health care." App. 91. That "basic economics" might confirm that "limiting supply does not lower consumer costs." App. 87. Judge Walker also noted that "on Plaintiffs' side are four decades of academic and government studies saying Certificate of Need laws accomplish nothing more than protecting monopolies

held by incumbent companies." App. 71. Ultimately, Judge Walker concluded 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." App. 105-06.

After Judge Walker left for the D.C. Circuit and a new judge was assigned, the district court did an about-face. As just one example, in granting summary judgment against Grace, the court held "irrelevant" "much of Plaintiffs' evidence," App. 48—even though Judge Walker had held that the same evidence, once introduced, would support Grace's claims. Indeed, the court wrote that the rational-basis test limited its consideration of Grace's evidence to something that seems like it could not exist: "evidence of the factual circumstances underlying the policy which will show the assumptions or speculations supporting it, though permissibly erroneous, were impermissibly irrational." *Id*. (How could the assumptions underlying the Certificate of Need law be both "permissibly erroneous" and "impermissibly irrational"?)

On appeal, the Sixth Circuit took yet another approach. Affirming the grant of summary judgment, it held that the Certificate of Need law passed the rational-basis test "perhaps with a low grade but with a pass all the same." App. 15. Toward the end of Judge Sutton's opinion, however, the panel questioned the rational-basis test itself.

This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents important questions about the rational-basis test. The opinion below suggests that rational-basis review is no review at all. Whether it is—and what that means for different aspects of the test—are important questions. But, as discussed in Part I.A, "[t]he most arrogant legal scholar would not claim that [this Court's] cases [have] applied a uniform or consistent test," *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176-77 n.10 (1980). So those questions have never been truly settled.

If the Court does not settle them, the confusion described in Part I.B will continue to plague the lower courts. Without intervention, courts will continue to bless absurd arguments that no one using the normal definition would call "rational." *See* Part I.B.1. They will continue to split on identical issues depending on which version of the test they apply. *See* Part I.B.2. And they will continue to bend procedure until it breaks. *See* Part I.B.3.

The Court need not take Petitioners' word that there is a problem. As discussed in Part II, the situation is widely criticized—most recently by Judge Sutton below, but also by other circuit judges, by members of this Court, and by scholars of all stripes.

That matters, because, as discussed in Part III, the right to engage in a common occupation is "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *see also Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022) (slip op. 5). Today the rational-basis test applies in more contexts than ever. And threats to the right to engage in a common occupation will continue to abound so long as courts remain unwilling to consistently safeguard it.

I. Rational-basis law is incoherent.

A. This Court has described the rational-basis test inconsistently.

Justice Stevens once put it, "[c]ases applying the rational-basis test have described that standard in various ways." *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 132 (1999) (dissenting). That is an understatement. Since the most famous footnote in constitutional law, the rational-basis test in this Court has ping-ponged between a real-world, evidence-based test and near-total deference to the government.

In *Carolene Products* itself the Court explained that facts and evidence matter in rational-basis cases. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938). The Court emphasized that plaintiffs could invalidate a law "by proof of facts tending to show" the law "is without support in reason," including proof that facts forming the basis of the law "ha[d] ceased to exist." *See id.* at 153-54 (citation omitted). Not only

could plaintiffs offer evidence, courts had to grapple with it, because a law's rationality "depend[ed] on the relevant circumstances of each case[.]" *Id.* at 154. At bottom, although judges might not probe as closely into economic laws as into some others, *see id.* at 152 n.4, the original modern formulation of the test said that "[w]here the existence of a rational basis for legislation . . . depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry." *Id.* at 153.

But in a short 17 years, the Court used different language in *Williamson v. Lee Optical of Oklahoma, Inc*. That case became the touchstone of a toothless test, holding that a state could "exact a needless, wasteful requirement" based on what the legislature "might have concluded," apparently even if record evidence undermined or disproved that view. 348 U.S. 483, 487 (1955). "For protection against abuses by legislatures," *Lee Optical* explained, "the people must resort to the polls, not to the courts." *Id*. at 488. It was a repudiation of the limited but real protection that *Carolene Products* had promised: "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." *Id*.

Yet *Lee Optical* did not wholly carry the day either. For example, in *Schware v. Board of Bar Examiners*, decided just two years later, the Court determined that Schware's due process right to practice as an attorney

had been violated because the weight of the evidentiary record did not "rationally justif[y] a finding that [he] was morally unfit to practice law." 353 U.S. 232, 246-47 (1957). The facts showed that Schware had used an assumed name, been repeatedly arrested, and been a member of the Communist Party. *Id*. at 240-44. But Schware introduced extensive evidence showing that he had good character and had not been in trouble for twenty years. *Id.* at 235-45. Rather than accept New Mexico's contention that this record justified its concerns about Schware's fitness to practice law, this Court ruled that the evidence failed—given Schware's own "forceful showing of good moral character"—to justify the denial. *Id.* at 246. That is, although the Court recognized a legitimate interest underlying the state's action and some evidence to support it, the Court ruled, based on the balance of the evidence, that there was no rational connection to justify the heavy burden of depriving Schware of his occupation.

In the decades since, the rational-basis test continued to change descriptions. In many cases, although not the majority, plaintiffs stated or won valid claims.[2] In one case in 1980, "there were three opinions, each of which formulated the rational-basis standard differently from the other two." *Cent. State Univ.*, 526 U.S.

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[2] *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 Ind. L. Rev. 357, 416-17 (1999).

at 132 (Stevens, J., dissenting) (discussing *Fritz*, 449 U.S. 166).[3]

In the 1990s, the Court would articulate yet another framework. In *Beach Communications*, it pronounced, though in dicta, a hyper-deferential version of the test:

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . [T]hose attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it."

FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993) (citation omitted). If taken literally—if the limits of state power really are whatever could be "conceived" by the human imagination—this language would mean that plaintiffs could never win rational-basis cases. And yet even after *Beach Communications*, the Court continued to see irrationality. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam).

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[3] 1985 delivered a particularly robust form of rational-basis review. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

Put simply, the Court has explained the rational-basis test differently at different times. In cases like *Schware* and *Carolene Products*, the test is deferential but still an assessment of evidence. In cases like *Beach Communications* and *Lee Optical*—at least if every word is taken literally—it "is tantamount to no review at all." *Beach Commc'ns*, 508 U.S. at 323 n.3 (Stevens, J., concurring).

B. The inconsistency has led to confusion in the lower courts.

The Court's rational-basis cases have, to put it mildly, proven difficult for the lower courts to follow. Worst of all, courts straining for rationality under the more deferential descriptions of the test have reached plainly irrational conclusions. There are also multiple circuit splits over aspects of the test, which in turn lead to splits over outcomes. And the test defeats normal procedure.

1. Absurd results

Courts sometimes take *Beach Communications* and *Lee Optical* to extremes and reach results that cannot meet a normal definition of rational.

Take *Meadows v. Odom*, which involved a challenge to Louisiana's "floristry licensing scheme" and its "written and practical" licensing exam. 360 F. Supp. 2d 811, 822-25 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006). The exam that prevented

would-be florists from working was judged by already-licensed florists (*i.e.*, applicants' future competitors) and had nearly half the passage rate of the state bar exam.[4] So the plaintiffs put on straightforward evidence showing that unlicensed florists in Louisiana prepared arrangements without incident and that "people handle millions of unlicensed floral arrangements around the world every year without being harmed." *Id.* at 824. Yet after a long discussion of *Lee Optical*, the district court accepted the testimony of a single state witness that "believed" the licensing scheme "protect[ed] people from injury." The witness invoked dangers that included "a flower that has some type of infection, like, dirt that remained on it when it's inserted into something they're going to handle." *See id.* There was no evidence that anyone anywhere in the world had ever been harmed by a floral arrangement. And yet, even on summary judgment, a single person's far-fetched testimony was enough to bar workers from a harmless occupation. *Id.* Because of infected dirt.

Unfortunately, the supposed danger of unlicensed flowers is not even an outlier. The Third Circuit has held it rational to ban serving food (although not non-alcoholic beverages) at funeral homes because one could imagine the embalming process contaminating the hors d'oeuvres (but not the sodas).[5] The Fourth

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[4] Br. of Appellants 4, *Meadows v. Odom*, 198 F. App'x 348 (5th Cir. July 1, 2005).

[5] *Heffner v. Murphy*, 745 F.3d 56, 85-86 (3d Cir. 2014).

Circuit has held it rational to keep people on a sex-offender registry longer for propositioning children than for raping children, based on "imagining" the "pure hypothetical" that this could help children who are themselves sex offenders.[6] The Eighth Circuit has held it rational to require African-style hair braiders to take almost 1,500 hours of irrelevant training,[7] even though, it turns out, the necessary skills can be taught in a four-to-six-hour video.[8] The Tenth Circuit, as discussed *infra*, has held it rational to require *online* casket sellers to embalm 25 corpses for practice.[9]

Indeed, one could look to the opinion below. Again, Petitioners want to provide Nepali-language home health service that is unavailable in Louisville, but the law finds no "need" for it. Somehow, one ground for upholding the law was that it might lead to *more* same-language care. In the Sixth Circuit's view, the law's protectionism allows existing agencies to make more money. And existing agencies could, hypothetically, invest that money into hiring staff who speak more languages. App. 22. So it is "rational" for a legislature to ban something to get more of it.

And this is just a small sampling from the circuits. Further out, there are even stranger examples. One district court, for instance, has claimed that

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[6] *Doe v. Settle*, 24 F.4th 932, 943-45 & n.10 (4th Cir. 2022).

[7] *Niang v. Carroll*, 879 F.3d 870, 874 (8th Cir.), *vacated as moot*, 139 S. Ct. 319 (2018).

[8] *See* Mo. Rev. Stat. § 329.275(4).

[9] *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004).

"policymakers can make 'rational' decisions that, when implemented, are . . . contrary to all past experience and evidence," even if there is "proof demonstrating that the policy does not, in fact, achieve the desired result."[10] The Department of Justice has gone as far as arguing that Congress could rationally justify a law on the ground that "space aliens are visiting us in invisible and undetectable craft."[11]

2. Inconsistent outcomes

Results under the rational-basis test are not just bizarre, they are also inconsistent. With many articulations of the test to choose from, the lower courts divide over aspects of the test and how it applies. *See Dobbs*, 597 U.S. __ (slip op. 60-61) (criticizing legal standard that "generated a long list of Circuit conflicts").

Start with what state interests are legitimate. This topic alone has a 3-2 circuit split. In the Fifth, Sixth, and Ninth circuits, economic protectionism for its own sake is not a legitimate government interest that could supply the rational basis for a law. In the Second and Tenth circuits, it is.[12]

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[10] *Wagner v. Haslam*, 112 F. Supp. 3d 673, 692-93 (M.D. Tenn. 2015).

[11] Oral Argument 34:37-35:27, *Alaska Cent. Exp. Inc. v. United States*, 145 F. App'x 211 (9th Cir. 2005), *available at* https://cdn.ca9.uscourts.gov/datastore/media/2005/07/13/03-35902.mp3.

[12] *See Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015) ("We . . . conclude that economic favoritism is

The circuits also split over how "rationality" works. Courts regularly disagree about how close the nexus between a law and the interests it purportedly serves must be. The Fifth Circuit, for example, will not defer to a health and safety justification when the "purported rationale for the challenged law elides the realities" of the situation.[13] The Eighth Circuit, by contrast, has held that a burdensome requirement is rational even when the evidence proves that 90 percent of the burden does not further the purported state interest.[14] Courts likewise split on how much—or even whether—to use evidence in determining rationality. For instance, in one Ninth Circuit case, the court held irrational a licensing law related to pesticide training because the record showed that the exterminators most likely to use pesticides were exempt.[15] But the Seventh Circuit has upheld a prohibition on grocery

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rational for purposes of our review of state action under the Fourteenth Amendment."); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) ("neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose"); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose."); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[M]ere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."); *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) ("[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.").

[13] *St. Joseph Abbey*, 712 F.3d at 226.

[14] *Niang*, 879 F.3d at 874.

[15] *Merrifield*, 547 F.3d at 991.

stores selling cold beer on the theory that the prohibition could channel underage would-be purchasers to liquor stores, even though record evidence showed that the liquor stores had a *worse* record of compliance with alcohol regulations. To the Seventh Circuit, that "mode of argument d[idn't] suffice under rational basis review."[16]

Given the inconsistent doctrine, it is no surprise that courts reach irreconcilable results in cases involving nearly identical restrictions on earning a living. The best examples come from cases involving licensing regimes for casket sales and hair braiding.

The casket-selling cases—*Craigmiles*, *Powers*, and *St. Joseph Abbey*—exemplify rational-basis cases that should, but do not, reach consistent results. In *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), the Sixth Circuit rejected Tennessee's requirement that caskets be sold only by licensed funeral directors because the record evidence showed that the requirement did not advance the state's interest in a way that rationally justified the heavy burden it imposed. Likewise, in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), the Fifth Circuit struck down a Louisiana regulation preventing monks who were not licensed funeral directors from selling caskets based on record evidence that there was no connection to any legitimate interest that would rationally justify imposing "significant regulatory burdens" including mandatory training and

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[16] *Ind. Petrol. Marketers & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 325 (7th Cir. 2015).

testing requirements. *Id.* at 218. Yet the Tenth Circuit, in *Powers v. Harris*, thought that the same case should have been disposed of in a single sentence. According to the *Powers* court, *Lee Optical* "so closely mirror[ed] the facts of th[at] case that, but for the Siren's song that has recently induced other courts to strike state economic legislation . . . merely a citation to [*Lee Optical*] would have sufficed." 379 F.3d 1208, 1221 (10th Cir. 2004).[17]

Lower courts have also split when considering challenges brought by hair braiders to nearly identical licensure requirements. Each case involved challenges to state regulations that required African-style braiders (or individuals seeking to instruct would-be braiders) to comply with requirements designed for traditional cosmetology, including extensive training and education obligations, that were irrelevant to braiders. And in each of California, Texas, and Utah, a district court struck down the requirement based on articulations of the rational-basis test from this Court. *See Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1104-06 (S.D. Cal. 1999) (acknowledging *Beach Communications*, *Schware*, and *Cleburne*); *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 890-91, 894 (W.D. Tex. 2015) (citing *Schware* and treating *Lee Optical* as limited by *St. Joseph Abbey)*; *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214 n.6 (D. Utah 2012) (citing *Schware*, but not *Beach*

[17] Afterward, relying on *Beach Communications*' "conceivable interest" language, the Tenth Circuit resolved the case on a circuit-splitting ground that neither side had even briefed: that intrastate protectionism is a legitimate state interest. *Id.* at 1217-18.

Communications or *Lee Optical*). Yet on materially indistinguishable facts, the Eighth Circuit upheld a braiding regulation and rejected the district court cases in a single footnote: "Because these decisions do not appropriately defer to legislative choices, they are not persuasive." *Niang v. Carroll*, 879 F.3d 870, 875 n.3 (8th Cir.), *vacated as moot*, 139 S. Ct. 319 (2018).

In short, the lower courts disagree about how the rational-basis test works. They disagree about what interests are legitimate, they disagree about what relationships are rational, and they disagree about the outcomes of identical cases. It's gotten so bad that they even disagree about metaphors. *Compare Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000) ("rational basis review is not a rubber stamp"), *with United States v. Sahhar*, 917 F.2d 1197, 1201 n.5 (9th Cir. 1990) ("The rational basis test is, more or less, a judicial rubber stamp."); *Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998) ("the 'rational basis' standard . . . is not 'toothless.' "), *with In re Agnew*, 144 F.3d 1013, 1014 (7th Cir. 1998) (per curiam) ("Although review for clear error or abuse of discretion is deferential, it is not toothless after the fashion of review for a rational basis.").

3. Distorted procedure

On top of confusing substance, the rational-basis test also distorts procedure. Practices routine in every other field of law go out the window under the rational-basis test. *See Dobbs*, 597 U.S. at __ (slip op. 62-63)

(criticizing legal standard that "led to the distortion of many important but unrelated legal doctrines").

Take motions to dismiss. Federal Rule of Civil Procedure 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." So a complaint needs "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). But how does that square with negativing every conceivable justification under *Beach Communications*? In some cases, courts construe a rational-basis claim like any other. *See*, *e.g.*, *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 591 (9th Cir. 2008) (denying a motion to dismiss a rational-basis claim after reading a few sentences from the complaint in the light most favorable to the plaintiff); *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009) (same). But other times courts simply dismiss on the pleadings, invoking:

- A "tension between the Rule 12(b)(6) standard and rational basis review," *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 712 n.20 (D.C. Cir. 2007) (en banc);
- A "dilemma created when the rational basis standard meets the standard applied to a dismissal under Fed. R. Civ. P. 12(b)(6)," *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (internal quotation omitted);
- A "perplexing situation . . . when the rational basis standard meets the standard

> applied to a dismissal under Fed. R. Civ. P. 12(b)(6)," *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992); and
>
> - A "complicat[ion] . . . when we review a plaintiff's claim under the rational basis standard," *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995).[18]

Two Sixth Circuit opinions exemplify this confusion. That court has gone as far as requiring—and then not requiring—plaintiffs to invent, plead, and knock down defenses to their own claims. Compare this pleading standard:

> In [Plaintiffs'] view, requiring an equal protection claimant to "incorporate into their pleadings lengthy lists of rebuttable rationales for challenged legislation" is "an impossible" task at odds with *Twombly*'s holding that a complaint need only include enough facts to "raise a right to relief above the speculative level." Plaintiffs are mistaken.[19]

with this one from just five years later:

> It cannot be that the [plaintiff] must concoct and rebut a potentially valid rationale for the

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[18] District courts likewise refer to "unique challenges," *Immaculate Heart Cent. Sch. v. N.Y. State Pub. High Sch. Athletic Ass'n*, 797 F. Supp. 2d 204, 211 (N.D.N.Y. 2011), and "a confusing situation," *Baumgardner v. County of Cook*, 108 F. Supp. 2d 1041, 1055 (N.D. Ill. 2000).

[19] *In re City of Detroit*, 841 F.3d 684, 701 (6th Cir. 2016) (citation omitted).

> [government's] action in order to survive the pleadings stage where the [government] itself has failed to do so. . . .[20]

The same problem arises on summary judgment, when courts are supposed to view the evidence "'in the light most favorable' to the nonmoving party." *See*, *e.g.*, *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2240 n.1 (2021) (per curiam). Courts can grant summary judgment against a party that has only a "scintilla of evidence," *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993), but, usually, disputed facts are supposed to go to trial. That happens in some rational-basis cases, including the *Craigmiles* casket case because the court had "voluminous amounts of factual information" subject to "disputed interpretations," meaning there was "a genuine issue" as to whether the licensing scheme was "rationally related" to the state's interests. *Craigmiles v. Giles*, 2000 WL 33964772, at *5-6 (E.D. Tenn. July 18, 2000). But in the Second Circuit, an opinion upholding a restriction on working acknowledged that the plaintiff "strongly dispute[d] whether the rule at issue rationally relate[d] to" public health, and then affirmed summary judgment against the plaintiff regardless. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 284-85 (2d Cir. 2015). Or consider the opinion below. The Sixth Circuit repeatedly acknowledged that Petitioners had "formidable" arguments, "considerable evidence," and "ample evidence," and that there is a "powerful case" against the

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[20] *Andrews v. City of Mentor*, 11 F.4th 462, 478 (6th Cir. 2021).

Certificate of Need law. App. 17, 20. That is far more than a "scintilla" and thus should have prevented summary judgment. Yet the Sixth Circuit ruled against Petitioners anyway because "[s]ummary judgment is an apt vehicle for resolving rational-basis claims." App. 28. That should not happen in a case that "teeter[s] on the edge." App. 27.

One could go on. The point is that the rational-basis test often trumps normal procedure, including the normal standards for stating a claim and going to trial.

II. Rational-basis law is widely criticized.

Judges, Justices, and scholars are all unhappy about this situation. *See Dobbs*, 597 U.S. at __ (slip op. 61) (criticizing legal standard when the circuits had "candidly outlined" its "many . . . problems"). Consider Judge Sutton's criticism of the rational-basis test below:

> many thoughtful commentators, scholars, and judges have shown 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. We appreciate the points and might add a few others. Is it worth considering whether a similar form of protectionism should receive more rigorous review under the dormant Commerce Clause solely when the entrant happens to be from another State? Put more specifically, should Tiwari and Sapkota's challenge have a better

> chance of success if they move to Indiana? And is there something to Justice Frankfurter's criticism of the dichotomy between economic rights and liberty rights, a dichotomy first identified in *Carolene Products*? One could imagine Susette Kelo, and for that matter Tiwari and Sapkota, thinking their cases involved a liberty right. 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, not our court, to make.[21]

Judges Rogers Brown and Sentelle have been similarly critical, opining that:

> The 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. It allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions. . . . The constitutional guarantee of liberty deserves more respect—a lot more.[22]

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[21] App. 26-27 (citations omitted).

[22] *Hettinga v. United States*, 677 F.3d 471, 482-83 (D.C. Cir. 2012) (Brown, J., concurring). The other judge on the panel, Judge Griffith, did not join with Judges Brown and Sentelle, but he was "by no means unsympathetic to their criticism." *Id.* at 483 (Griffith, J., concurring).

So has now-Judge Willett:

> [F]ederal-style scrutiny is quite unscrutinizing, with many burdens acing the rational-basis test while flunking the straight-face test.[23]
>
> Legal fictions abound in the law, but the federal "rational basis test" is something special; it is a misnomer, wrapped in an anomaly, inside a contradiction. Its measure often seems less objective reason than subjective rationalization.[24]

And so has Judge Goldberg of the Fifth Circuit some forty years ago:

> [T]he standard of review called for in this case, minimum rationality, can hardly be termed scrutiny at all. Rather, it is a standard which invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute.[25]

Members of this Court, too, have questioned the state of constitutional review. Most directly, Justice Scalia thought that "the categorical and inexplicable exclusion of so called 'economic rights' (even though the Due Process Clause explicitly applies to 'property') unquestionably involves policymaking rather than neutral legal analysis." *United States v. Carlton*, 512

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[23] *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 112 (Tex. 2015) (Willett, J., concurring).

[24] *Id.* at 98 (Willett, J., concurring).

[25] *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

U.S. 26, 41 (1994) (Scalia, J., concurring).[26] And, more broadly, some Justices have questioned the idea of tiered scrutiny altogether. *See*, *e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2329-30 (2016) (Thomas, J., dissenting) ("A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment."); *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.").[27]

On top of that, prominent scholars—of all views—believe the rational-basis test needs adjusting. Here is just one example from Dean Chemerinsky:

> [C]ourts should focus on the actual purpose of the legislature rather than ask whether there is a *conceivable* permissible purpose. Also, I believe that the Court should require a closer fit between means and ends than traditionally imposed under the rational basis test; the government's action should be required to

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[26] Justice Scalia of course rejected the substantive due process doctrine, but he did believe that the Fourteenth Amendment protects substantive rights. *See McDonald v. City of Chicago*, 561 U.S. 742, 791-805 (2010) (Scalia, J., concurring).

[27] *See also N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. __ (2022) (slip op. 62-63) (assessing Second Amendment right only historically and noting that "[w]e know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need").

> "meaningfully" achieve the goal. . . . In this way, the rational basis test remains, as it should, quite deferential to the government, but without being the almost empty standard of review that it has been since 1937.[28]

It suffices to say that current rational-basis doctrine has critics.

III. The right to engage in common occupations is crucial and at risk.

This is not some academic exercise. It matters because the right to engage in a common occupation is longstanding, and it is increasingly under attack.

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[28] Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 Geo. J.L. & Pub. Pol'y 401, 410 (2016); *see also*, *e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 316 n.38 (1993) ("The result in such cases is to wash nearly all content from the rational basis requirement. . . . For rationality review to be real rather than sham, the court must be willing to make some independent assessment of legislative purpose."); John O. McGinnis, *Reforming Constitutional Review of State Economic Legislation*, 14 Geo. J.L. & Pub. Pol'y 517, 533-34 (2016) ("In short, the Fourteenth Amendment is best interpreted as requiring three important changes in the expectations that have grown up around the rational basis test. First, the government must produce evidence that the legislation affecting occupational or economic liberty possesses a bona fide police objective. Second, challengers can show that despite the evidence this objective is pretextual. Third, challengers can show that the legislation undermines the very objective it seeks to promote.").

A. The right to engage in common occupations is deeply embedded.

Whether called the right to earn a living, ply a trade, pursue a livelihood, or something else, the right to engage in a common occupation is deeply embedded in this nation's history and tradition. Even before the Constitution was ratified, authorities who influenced the Framers considered the right fundamental. Since the Founding, the right was considered "fundamental" for a century, and its importance continues to be recognized to this day.

The right has deep roots in the English common law. In various sections, Magna Carta limited the King's power in order to preserve the individual's right to "livelihood." *See*, *e.g.*, William S. McKechie, *Magna Carta: A Commentary on the Great Charter of King John* 287-91 (2d ed. 1914) (discussing Chapter 20's limitation that the Crown not "amerce" an individual too heavily because his "means of livelihood must be saved to him"); *id.* at 289 & n.1 ("[T]he Charter saves to him his means of earning a living."). In the centuries that followed, the English courts also did their part to ensure the right's protection. *See*, *e.g.*, Timothy Sandefur, *The Right To Earn A Living*, 6 Chap. L. Rev. 207, 209-17 (2003) (citing cases from the 14th century onward). Not only did English courts strike down Crown-established monopolies for violating the "common law" principle that "no man could be prohibited from working in any lawful trade," *see id.* at 215 (quoting *Case of the Tailors*, 77 Eng. Rep. 1218, 1219 (K.B. 1615) (Coke, C.J.)), they struck down needless licensing

requirements, *see*, *e.g.*, *Case of the Bricklayers*, 81 Eng. Rep. 871 (K.B. 1624), and also prevented undue interference with the right by interlopers, *see* Sandefur at 217 (quoting *Keeble v. Hickeringhill*, 103 Eng. Rep. 1127, 1128 (K.B. 1707) ("[H]e that hinder another in his trade or livelihood is liable to an action for so hindering him.")). Their efforts reflected the view of preeminent legal thinkers that the right to earn a living was foundational. *See*, *e.g.*, 1 William Blackstone, *Commentaries* *427 ("At common law, every man might use what trade he pleased."); John Locke, *Two Treatises of Government* 15 (Edes & Gill 1773) (1690) ("The *labour* of his body, and the *work* of his hands, . . . are properly his."). At one point, Chief Justice Holt even threatened to imprison a private monopolist for interfering with the right to earn a living. *See* Sandefur at 210.

Unsurprisingly, this nation's history and traditions have included a similar protection. The Framers consistently referred to the individual right to earn a living free from unreasonable government interference. Va. Decl. of Rights § 1 (1776) (George Mason) ("[A]ll men . . . have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."); Letter from Madison to Jefferson (Oct. 17, 1788) (expressing that monopolies were "justly classed among the greatest nuisances in Government"); First Inaugural Address of Thomas Jefferson (1801) (describing good government as "leav[ing individuals] to regulate their own pursuits of

industry and improvement" and "not tak[ing] from the mouth of labor the bread it has earned").[29]

The nation's courts have also acknowledged the right to earn a living. *See*, *e.g.*, Sandefur at 224-26, 250-262 & App'x A (collecting additional cases discussing the right). Primary among their decisions was *Corfield v. Coryell*, in which Justice Washington explained that the right to earn a living was "fundamental":

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental. . . . [T]he enjoyment of life and liberty, with the right to acquire and possess property of every kind. . . . *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*. . . .

6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (emphasis added). (This statement still informs what unenumerated rights are protected by the Fourteenth Amendment today. *See Dobbs*, 597 U.S. __ (slip op. 15 n.22)). So strong was the common law right that, more

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[29] In-home health care, it is worth noting, was common at the time. *See* Karen Buhler-Wilkerson, *No Place Like Home: A History of Nursing and Home Care in the U.S.* 1 (2003) ("When families hired physicians or nurses [in "early nineteenth-century America"], professional care was delivered in the patient's home. . . ."). Nurse licensure would not exist for more than a century. Diane Benefiel, *The Story of Nurse Licensure*, 36 Nurse Educator 16 (2011).

than a hundred years before the civil-rights movement, Tennessee's Supreme Court struck down a 10:00 p.m. curfew for free black residents as "cruel and useless," in part because, "very often, the most profitable employment is to be found in the night." *City of Memphis v. Winfield*, 27 Tenn. (8 Hum.) 707 (1848).[30] These courts "exercise[d] common sense, prudence, and a sound and impartial judgment . . . with an anxious view to protect all parties in their just rights, and the profitable and quiet enjoyment and pursuit of their interests." *Wade v. Halligan*, 16 Ill. 507, 512 (1855).

To be sure, the right to earn a living was dealt a heavy blow in *The Slaughter-House Cases*, which read the right out of the Fourteenth Amendment's Privileges or Immunities Clause. 83 U.S. (16 Wall.) 36, 74, 78-80 (1872). But "[v]irtually no serious modern scholar—left, right, or center—thinks that [*Slaughter-House*] is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 & n.178 (2001); *see also McDonald v. City of Chicago*, 561 U.S. 742, 756-57 (2010) (collecting other citations).[31] How could they, when the clause's principal drafter explained that "our own American constitutional liberty . . . is the liberty . . . to work in an honest calling and contribute by your

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[30] For more on governments using economic restrictions to target racial minorities, see David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 San Diego L. Rev. 89 (1994).

[31] Petitioners preserved a Privileges or Immunities claim and a challenge to *Slaughter-House*. App. 30.

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).

Regardless, *Slaughter-House* has not stopped this Court from acknowledging the right to earn a living in later cases. *See*, *e.g.*, *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888) ("enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade . . . is an essential part of his rights of liberty and property as guarantied by the fourteenth amendment"); *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").[32] Nor has

[32] *See also*, *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (describing "the very idea that one man may be compelled to hold his life, or the means of living, . . . at the mere will of another" as "intolerable in any country where freedom prevails"); *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) (referring to the "right of every citizen of the United States to follow any lawful calling, business, or profession he may choose"); *Allgeyer v. Louisiana*, 165 U.S. 578, 590 (1897) (describing "the right to follow any of the ordinary callings of life" as "one of the privileges of a citizen of the United States"); *Truax v. Raich*, 239 U.S. 33, 38 (1915) (referring to "[t]he right to earn a livelihood and continue in employment"); *Schware*, 353 U.S. at 238-39 & n.5 (collecting cases); *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). The same goes for individual members of this Court and for state courts. *See*, *e.g.*, *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 756 (1884) (Field, J., concurring) (noting "the liberty of the individual to pursue a lawful trade or employment"); *Barsky v.*

Slaughter-House stopped this Court from acknowledging that the right deserves meaningful protection. *See Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889) (noting that the right to earn a living, "often of great value to the possessors, . . . cannot be arbitrarily taken").[33]

B. Threats to the right abound.

This right, however, has been increasingly threatened since the Court articulated the supine test of *Lee Optical* in 1955. First, there has been massive growth in laws excluding people from trades. Second, governments and scholars have concluded that occupational licensing is less beneficial and more burdensome than previously assumed. And third, many observers—including this Court—have recognized that state

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Bd. of Regents, 347 U.S. 442, 472-73 (1954) (Douglas, J., dissenting) ("The right to work, I had assumed, was the most precious liberty that man possesses."); Sandefur at 236 n.178 (citing more state cases).

[33] *See also*, *e.g.*, *Chaddock v. Day*, 42 N.W. 977, 978 (Mich. 1889) (admonishing that economic protectionist licensing regimes "should receive no encouragement at the hands of the courts"); Sandefur at 259-60 & nn.314-27 (collecting more state cases). Petitioners of course acknowledge that this right has never been absolute. Meaningful review of prohibitions on entering a professional does not mean that every economic regulation would fall. *See St. Joseph Abbey*, 712 F.3d at 227 ("Nor is the ghost of *Lochner* lurking about. We deploy no economic theory of social statics or draw upon a judicial vision of free enterprise. Nor do we doom state regulation. . . ."); *Craigmiles*, 312 F.3d at 229 ("Our decision today is not a return to *Lochner*, by which this court would elevate its economic theory over that of legislative bodies.").

economic regulation is often used to illegitimately harm the public to help special interests.

First, growth. Certificate of Need laws did not become widespread until the 1970s, and today they still exist in most states even though Congress recognized in 1987 that they fail to achieve their purposes. App. 18. Moreover, there has been a five-fold increase in occupational licensing since *Lee Optical*. In the early 1950s, less than five percent of the U.S. workforce required a license. Today about twenty-five percent does.[34] Two-thirds of that increase came from states licensing ever more occupations, rather than from growth in traditionally licensed occupations.[35] And this growth seems to have been due to industry insiders rather than the public: "[e]mpirical work suggests that licensed professions' degree of political influence is one of the most important factors in determining whether States regulate an occupation."[36]

Second, governments and scholars have mostly concluded that occupational licensing is less beneficial and more burdensome than previously assumed. In 2015, the Obama administration found that "most

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[34] Dep't of the Treasury Office of Econ. Pol'y, Council of Econ. Advisers & Dep't of Labor, *Occupational Licensing: A Framework for Policymakers* 6 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (citing Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. Lab. Econ. S173, S173-S202 (2013)).

[35] *Id.* at 20.

[36] *Id.* at 22 (citations omitted).

research does not find that licensing improves quality or public health and safety."[37] Instead, it found that licensing worsens consumer prices, earnings, and interstate mobility, and that these costs fall disproportionately on the poor, immigrants, those with a criminal history, and military spouses.[38] As the record shows here, there is "ample evidence" the Certificate of Need laws fail as well.[39]

Third, there is greater awareness—including in this Court—that state economic regulations are often used to benefit special interests. This Court recognized that special interests hijack public power for private benefit in both the majority opinion and the dissent in *North Carolina State Board of Dental Examiners v. FTC*. *Compare* 135 S. Ct. 1101, 1108 (2015) (noting that regulatory board consisting of dentists had used government power to protect dentists from competition despite absence of any evidence of consumer harm), *with id.* at 1117 (Alito, J., dissenting) ("Professional and occupational licensing requirements have often been used" to benefit industry insiders and not the public.). The Obama and Trump administrations have also both worried about the threat that occupational licensing[40] and certificate of need[41] laws pose to

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[37] *Id*. at 13, 58-60.

[38] *Id.* at 14-16, 30-32, 35-40, 60-66.

[39] App. 20.

[40] See *Occupational Licensing*, *supra* note 34, at 52; FTC, Economic Liberty, https://www.ftc.gov/policy/advocacy/economic-liberty (last visited June 29, 2022).

[41] App. 90.

pursuing a livelihood. Judges Walker and Sutton raised a similar concern below based on the intervention of existing providers. *See* App. 100 ("[T]he Kentucky Hospital Association intervened, as if to prove the point that incumbents, not patients, are the only ones threatened by Plaintiffs' constitutional challenge."); Oral Argument 15:43-53 (Judge Sutton: "So you're the ones that want to keep 'em out.").

When this Court cemented rational-basis review in *Carolene Products*, it went out of its way to say that "more searching judicial inquiry" was necessary when the political process should not be trusted to "bring about repeal of undesirable legislation." 304 U.S. at 152 n.4. Today, we have ample evidence that restrictions on pursuing an occupation are an example.[42] "To the degree that 'footnote four' of *Carolene Products* says 'discrete and insular minorities' in the political arena deserve special judicial protection, it is tough to imagine a group more disadvantaged by the majoritarian political process than would-be entrepreneurs

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[42] *See generally* Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. Econ. 1089 (1991) (explaining the role of interest groups in "capturing" government decision-making for their own economic advantage); George J. Stigler, *The Theory of Economic Regulation*, Bell J. Econ & Mgmt. Sci., Spring 1971, at 3-21 (showing that industries and professional associations pursue economic regulations to advance their own economic self-interest); *see also*, *e.g.*, Robin W. Roberts & James M. Kurtenbach, *State Regulation and Professional Accounting Educational Reforms: An Empirical Test of Regulatory Capture Theory*, 17 J. Acct. & Pub. Pol'y 209 (1998) (finding adoption of 150-hour accounting education requirement directly related to strength of CPA lobby).

denied their calling by Byzantine, State-enforced barriers enacted at the behest of entrenched, politically powerful interests." *Patel*, 469 S.W.3d at 122 n.210 (Willett, J., concurring). Given the massive increase in regulatory burden—and regulatory capture—since *Lee Optical*, this Court should revisit its prior decisions so that the courts can play their proper constitutional role in protecting a deeply embedded right.

CONCLUSION

The Court should grant a writ of certiorari, reverse the Sixth Circuit, and clarify that the longstanding right to engage in a common occupation receives meaningful judicial protection.

Respectfully submitted,

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