No. 25-787

In the Supreme Court of the United States

JOHN F. CARBIN,

Petitioner,

v.

MASSACHUSETTS BOARD OF STATE EXAMINERS OF PLUMBERS AND GAS FITTERS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM; COMMITTEE FOR A CONSTRUCTIVE TOMORROW (CFACT); ILLINOIS POLICY INSTITUTE; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; JCCWATCH.ORG; TIM JONES, FORMER SPEAKER, MISSOURI HOUSE, FOUNDER, LEADERSHIP FOR AMERICA INSTITUTE; LOUISIANA FAMILY FORUM; JENNY BETH MARTIN, HONORARY CHAIRMAN, TEA PARTY PATRIOTS ACTION; NEW JERSEY FAMILY POLICY CENTER; NEW YORK STATE CONSERVATIVE PARTY; RIO GRANDE FOUNDATION; THE FAMILY FOUNDATION OF VIRGINIA; SUZI VOYLES, PRESIDENT, EAGLE FORUM OF GEORGIA; YANKEE INSTITUTE; AND YOUNG AMERICA'S FOUNDATION IN SUPPORT OF PETITIONER

J. Marc Wheat
Counsel of Record
Timothy Harper (Admitted in DC)
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, D.C. 20004
(202) 780-4848
MWheat@advancingamericanfreedom.com

February 5, 2026 *Counsel for Amici Curiae*

QUESTION PRESENTED

1. Whether a court may relegate a due process claim to rational basis scrutiny merely because the asserted right is not enumerated in the Constitution or previously recognized as fundamental by the Supreme Court, or whether instead courts must apply the history and tradition test recently affirmed in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

2. Whether, under the rational basis test, courts must accept a plaintiff's well-pleaded allegations when resolving a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

3. Whether, under the rational basis test, courts may uphold a challenged law without any inquiry into the relationship between the government's means and asserted end.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom from arbitrary power.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes American prosperity depends on ordered liberty and self-government.[3] AAF file this brief on behalf of its 3,584 members in the First Circuit including 1,852 members in the state of Massachusetts.

Amici Committee For A Constructive Tomorrow (CFACT); Illinois Policy Institute; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, Founder, Leadership for America Institute; Louisiana Family Forum; Jenny Beth Martin, Honorary Chairman, Tea Party Patriots Action; New Jersey Family Policy Center; New York State Conservative Party; Rio Grande Foundation; The Family Foundation of Virginia; Suzi Voyles,

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[1] All parties received timely notice of the filing of this amicus brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Edwin J. Feulner, Jr., Conservatives Stalk the House: The Story of the Republican Study Committee, 212 (Green Hill Publishers, Inc. 1983).

[3] Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at https://advancingamericanfreedom.com/aaff-independence-index/.

President, Eagle Forum of Georgia; Yankee Institute; and Young America's Foundation believe that the right to property is central to American freedom.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns not only a fundamental right recognized in the Anglo-American legal tradition for centuries, but an American's access to judicial review of a violation of that right.

In this case, Petitioner John Carbin seeks to challenge a Massachusetts regulation prohibiting homeowners from repairing the plumbing in their own homes, even subject to permits and inspections. 248 Code Mass. Regs. § 3.05(1)(b)(7)(a). Homeowners in the state of Massachusetts, no matter how capable, must pay a licensed plumber to do plumbing work for them.

The district court below granted respondents' motion to dismiss, preventing Mr. Carbin from even presenting his claims. The court found that, "[s]ince there is no fundamental right to perform plumbing work, the court presumes the regulations challenged by Plaintiff are valid and must uphold the regulations if they are 'rationally related to a legitimate government interest.'" *Carbin v. Town of Savoy*, 2024 WL 6975524 at *2 (D. Mass. Oct. 22, 2024) (quoting *Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008)). For a regulation to meet this standard, the district court only needed to find "'plausible reasons for a statute or regulation," and those reasons need not "have been articulated by the legislature or governing

decisionmaker." *Id.* (quoting *FCC v. Beach Comms. Inc.*, 508 U.S. 307, 313-15 (1993)).

The right to property was critical to the understanding of liberty of both the Founding generation and the Framers and ratifiers of the Reconstruction Amendments. Yet the Court's current precedent provides at least constitutionally inadequate, and often practically no protection for this foundational right.

The Court's rational basis standard fails to provide adequate protection for this fundamental liberty, instead treating it as worse than a "second-class right." The Court's Second Amendment jurisprudence may provide a guide to assessing Americans' constitutional property rights claims.

The Court should grant the petition for certiorari and establish a more robust standard that allows Americans like Mr. Carbin to make their claims in court.

ARGUMENT

This Court has held that the Due Process Clause of the Fourteenth Amendment "protects two categories of substantive rights."[4] *Dobbs v. Jackson*

[4] "[T]he appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause." *Timbs v. Indiana*, 586 U.S. 146, 157 (2019) (Gorsuch, J., concurring) (citing *Timbs*, 586 U.S. at 157-159 (Thomas, J., concurring in the judgment; *McDonald v. Chicago*, 561 U.S. 742, 805-858 (2010) (Thomas, J., concurring in part and concurring in the judgment); Byran Wildenthal, *Nationalizing the Bill of*

Women's Health Org., 597 U.S. 215, 237 (2022). "The first consists of rights guaranteed by the first eight Amendments" and "[t]he second category . . . comprises a select list of fundamental rights that are not enumerated anywhere in the Constitution." *Id.*

When the Court considers "whether a right falls into either of these categories," it "has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" *Id.* at 237-38 (alteration in original) (quoting *Timbs*, 586 U.S. at 149; *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

The right to one's property is both constitutionally enumerated and is among the most deeply rooted rights in America's tradition of liberty.

I. Americans' Fundamental Right to Property Would be Entitled to Full Constitutional Protection Even if it Were Not Enumerated.

Even if the right to property were not enumerated three times in the Constitution, in the Takings Clause and the two Due Process clauses, it would still be entitled to equality of protection with the other rights because it is "deeply rooted in [our] history and tradition" and "essential to our Nation's 'scheme of ordered liberty.'" *Id.*

Rights, 68 Ohio St. L.J. 1509 (2007); Akhil Amar, *The Bill of Rights*, 163-214 (1998); Michael Kurtis, *No State Shall Abridge* (1986)).

A. The natural right to property is deeply rooted in Anglo-American history and tradition.

The recognition of the private right to property extends back centuries, at least to the Coronation Charter of Henry I[5] and Magna Carta. *See Tyler v. Hennepin Cnty.*, 598 U.S. 631, 639 (2023). Blackstone said of the right to property,

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[6]

For, "John Locke, whose work greatly influenced early Americans . . . men created civil society to protect 'property' along with the closely related concepts of life and liberty."[7]

America's Founders fought the Revolution "to *preserve* the rule of law and the freedoms enjoyed by the Framers' generation as Englishmen," one of which "was the ability to acquire and enjoy the use of private property."[8] George Mason, in the Virginia Declaration of Rights, wrote that "all men are born equally free and independent, and have certain inherent natural

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[5] Paul Larkin, *The Original Understanding of "Property" in the Constitution*, 100 Marq. L. Rev. 1, 17 (2016).

[6] Richard Epstein, *Takings* 22 (Harvard University Press 1985).

[7] Larkin, *supra* note 5 at 17.

[8] *Id.*

rights . . . among which are, the enjoyment of life and liberty, with the means of acquiring and possessing property."[9] This formulation became "canonical," being "replicated in four state constitutions."[10]

"Most Colonists owned property," and early Americans "saw 'life, liberty, and property' as 'the fundamental trinity of inalienable rights,' rights that 'individuals could never renounce.'"[11] Accordingly, James Madison argued that a government is not just if "the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of [persons] for the service of the rest."[12] Madison, further:

> [C]riticized a government that used 'arbitrary restrictions, exemptions, and monopolies' to 'deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.'"[13]

The right to property also persisted in the antebellum period. Abolitionist Senator Charles Sumner, for example, argued that slavery was "a local municipal institution which derives its support

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[9] The Virginia Declaration of Rights § 1.

[10] Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause* 43 Harv. J. of Law and Pub. Pol'y 1, 3 (2020).

[11] Larkin, *supra* note 5 at 31 (quoting Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 290 (1996)).

[12] *Id.* at 34 (internal quotation marks omitted).

[13] *Id.*

exclusively from local municipal laws" and that slaves were "persons," not property.[14] Thus, the alleged property right of the slaveholder was distinct from "that property which is admitted to be such by the universal law of nature, written by God's own finger on the heart of man."[15]

The right to property was also a core tenet of Reconstruction era efforts to protect the rights of freed former slaves. The Civil Rights Act of 1866 was passed by Congress as an exercise of its enforcement power under the Thirteenth Amendment and sought to ensure that all citizens enjoyed equal rights under state law, among other things, "*to inherit, purchase, lease, sell, hold, and convey real and personal property*."[16]

Concerned both that the Act would be repealed once southern Democrats returned to office and that it might be scrutinized in court on constitutional grounds, "many in Congress supported a parallel effort to adopt a constitutional amendment to make the freedmen United States citizens and to protect the fundamental rights of all United States citizens from being abridged by state governments."[17] Which rights? "At least the rights listed in the Civil Rights Act, including the rights 'to make and enforce contracts,

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[14] Senator Charles Sumner, *The Landmark of freedom. Speech of Hon. Charles Sumner, against the repeal of the Missouri prohibition of slavery north of 36° 30#. In the Senate, February 21, 1854* available at https://tile.loc.gov/storage-services/service/rbc/rbaapc/28500/28500.pdf.

[15] *Id.*

[16] Barnett, *supra* note 10 at 4.

[17] *Id.* at 5-6.

. . . to inherit, purchase, lease, sell, hold, and convey real and personal property.'"[18]

At both the Founding and during the Reconstruction era, the individual, inherent right to property was widely recognized.

B. The natural right to property is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it was sacrificed."

The right to private property is central to the liberty the Constitution exists to protect. "Traditional legal thinkers in both the Roman law and common law tradition constantly insisted on this key proposition: 'property is the guardian of every other right.'"[19] In fact, the word "right" itself originally "referred only to a valid title of ownership, such as the title to real estate."[20]

The centrality of property to ordered liberty was understood by "the key writers who set the intellectual framework of our Constitution—John Locke, David Hume, William Blackstone, Adam Smith, and James Madison" all of whom "treated private property as a bulwark of the individual against the arbitrary power of the state."[21]

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[18] *Id.* at 6.

[19] Richard Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* 1 (Oxford Univ. Press 2008).

[20] *Larkin*, supra note 5 at 18.

[21] Epstein, *supra* note 19 at 6.

The Founders clearly thought the right to property was essential to the scheme of ordered liberty they were creating.

> James Madison described property broadly to include even one's opinions and beliefs. He argued that property as well as personal rights are an 'essential object of the laws' necessary to the promotion of free government. Alexander Hamilton stated that the preservation of private property was essential to liberty and republican government. Thomas Jefferson depicted property as a 'natural right' of mankind and linked ownership to public virtue and republican government. John Adams described a proper balance of property in society as important to maintaining republican government and connected property ownership to moral worth. Thomas Paine felt that the state was instituted to protect the natural right of property, and Daniel Webster would later link property to virtue, freedom, and power. Numerous Anti-Federalist described a society as free when it protected property rights or equalized property distributions.[22]

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[22] David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 Am. J. Legal Hist. 464, 475-77 (1993).

The right to property was not just another right. It was central to their understanding of liberty and to the role government plays in securing it.

For those drafting and adopting the Reconstruction Amendments, too, the ability of freed slaves to exercise their liberty, including the right to own property, was essential. These Republicans believed that "every person own[s] him or herself," and has "the inherent right to enter into contacts by which they c[an] acquire property in return."[23]

When Senator Jacob Howard defended the Fourteenth Amendment on the Senate floor, he sought to explicate the scope of "privileges and immunities" by, in part, quoting from Justice Bushrod Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230), itself a restatement of Mason's canonical enumeration:[24] "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."[25]

Senator Howard, responding to a hypothetical objection in his remarks, makes a distinction between these rights, including the right to property, and suffrage. He notes that "[t]he right of suffrage is not, in law, one of the privileges and immunities thus

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[23] Randy E. Barnett, *Does the Original Meaning of the Fourteenth Amendment Protect Economic Liberty?* 94 Miss. L. J. 1225, 1226 (2025).

[24] Barnett, *supra* note 10 at 3, 6-7.

[25] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

secured by the Constitution," because "[i]t is merely a creature of law."[26] That is distinct from the privileges and immunities of citizenship which, rather than arising from "local positive law," are "fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism."[27] In short, without adequate protection for the "fundamental right" "to acquire and possess property," the people are slaves.

Further, the law at issue in this case burdens the right of a person to exercise his or her property rights in his own home. This Court has repeatedly recognized the centrality of one's hearth and home, a source of comfort and safety for one's family, to American liberty. In the Fourth Amendment context, the Court recognizes "the constitutional interest at stake: the sanctity of a person's living space." *Lange v. California*, 594 U.S. 295, 303 (2021). Constitutionally, the "home is the first among equals," and the Fourth Amendment's "very core" is "the right of a man to retreat to his own home and there be free from unreasonable government intrusion." *Id.* (internal quotation marks omitted) (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013); *Collins v. Virginia*, 584 U.S. 586, 592 (2018)). It is a "'centuries-old principle' that the 'home is entitled to special protection.'" *Id.* (quoting *Georgia v. Randolph*, 547 U.S. 103, 109, 115 (2006)).

The right to property, including and especially the right to use and enjoy one's home, is thus deeply

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[26] *Id.* at 2766.

[27] *Id.*

rooted in American legal history and tradition and is essential to the scheme of American ordered liberty.

For this Court in *Glucksberg*, the history and tradition analysis was a threshold inquiry. When an alleged right crossed that threshold, a challenged regulation that limited the exercise of that right would have to be shown to bear "more than a reasonable relation to a legitimate state interest." *Glucksberg*, 521 U.S. at 722. Courts applying rational basis review to assess regulations that limit fundamental property rights, however, often do not even engage in cursory analysis of the rationality of the regulation's relation to a state's asserted interest. This absence of protection is constitutionally unacceptable.

II. The Court's Jurisprudence Incorrectly Treats the Fundamental Right to Property as a "Second-Class Right."

In *McDonald v. City of Chicago*, this Court declined the city's request that the Second Amendment "right recognized in *Heller*" be treated "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause." 561 U.S. at 780. The Court should similarly ensure that lower courts do not treat the inherent and inalienable right to property as a "second-class right."

The right to property, as shown above, is 'deeply rooted in [our] history and tradition' and . . . is essential to our Nation's 'scheme of ordered liberty.'" *Dobbs*, 597 U.S. at 237-38 (alteration in original)

(quoting *Timbs*, 586 U.S. at 149; *McDonald*, 561 U.S. at 767; *Glucksberg*, 521 U.S. at 721).

When state action infringes on fundamental rights, those that are "guaranteed by the first eight Amendments" and those which "comprise[] a select list of fundamental rights that are not enumerated anywhere in the Constitution," *Dobbs*, 597 U.S. at 237, that state action must typically survive strict scrutiny. *See, e.g. Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

On the other hand, when a government action does not interfere with a fundamental right, the Court typically asks "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). This rational basis review has been applied with varying degrees of strictness. As the Court acknowledged, "[t]he most arrogant legal scholar would not claim that all" cases applying rational basis review "applied a uniform or consistent test." *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980).

Here, Petitioner sought to challenge a potentially arbitrary restriction on his fundamental property rights but the district court dismissed his claim, writing that, "[s]ince there is no fundamental right to perform plumbing work, the court presumes the regulations challenged by Plaintiff are valid and must

uphold the regulations if they are 'rationally related to a legitimate government interest.'" *Carbin*, 2024 WL 6975524 at *2 (quoting *Gates*, 528 F.3d at 55).

Just as the Constitution does not enumerate a "right to perform plumbing work," *Carbin*, 2024 WL 6975524 at *2, so the Constitution does not enumerate numerous other rights so specifically defined. After all, "it is *a Constitution* [courts] are expounding" which does not "partake of the prolixity of a legal code." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). Judges are not free to create constitutional protection for imagined "rights," but neither are they free to disparage a particularly defined rights claim because the right has not yet been recognized, so defined, by this Court.

Indeed, the anti-federalists demanded the addition of a bill of rights because the Constitution's language was limited.[28] Because the limitation of constitutional language is of necessity, the Bill of Rights contains the Ninth Amendment. U.S. Const. amend IX.

Just as the Constitution does not explicitly protect a "right to do plumbing work," the Constitution does not explicitly protect the right of parents to send their child to a private rather than a public school. Yet the Court has recognized this as an element of the Constitution's implicit protection of the rights of parents. *See Pierce v. Society of Sisters*, 268 U.S. 510, 532-35 (1925). *See also Troxel v. Granville*, 530 U.S. 57, 65 (2000). Similarly, the Constitution does not

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[28] *See* Herbert J. Storing, *What the Anti-Federalists Were For* 66 (1981).

explicitly protect a high school coach's silent prayer after games or religious business owners from state laws compelling their speech, nor does it prohibit prior restraint of speech. Yet, this Court has found that all these limitations on state power are within the scope of the First Amendment. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543-44 (2022) ("Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head.");[29] *303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943)) (finding that, in that case, Colorado sought "to force an individual to 'utter what is not in [her] mind about a question of political and religious significance," which is something "the First Amendment does not tolerate."); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

Property rights are recognized explicitly in the text of the Constitution three times, twice in the Fifth Amendment, U.S. Const. amend V, and once in the Fourteenth Amendment, U.S. Const. amend XIV, and qualify as fundamental rights under this Court's *Glucksberg* analysis, as shown above. Yet, following at least portions of this Court's precedent, the district

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[29] Brief of amici curiae Advancing American Freedom, *Kennedy*, 597 U.S. 507, available at: https://advancingamericanfreedom.com/second-amicus-brief-religious-freedom/.

court asked, "only whether there are 'plausible reasons' for a statute or regulation, not whether those reasons have been articulated by the legislature or governing decision-maker." *Carbin*, 2024 WL 6975524 at *2 (quoting *Beach Comms. Inc.*, 508 U.S. at 313-315). The court found that "Plaintiff's substantive due process challenge is clearly unsupportable." *Id.*

A right so fundamental to liberty and so consistently affirmed in America's legal and political tradition should not be tossed out of court so easily. At the same time, applying strict scrutiny to every state property regulation may prove unworkable as well as overly restrictive. Although the Founding generation had a deep respect for the inherent right to private property, they did not understand that right as a total bar to property regulation.[30] One potential solution to this problem that may provide adequate protection for Americans' fundamental property rights while constraining courts' judgments to constitutional limits would be for the Court to follow its own lead in the Second Amendment context.

To determine whether a regulation unconstitutionally interferes with the Second Amendment "right of the people to keep and bear arms," this Court has "directed courts to examine our 'historical tradition of firearm regulation' to help delineate the contours of the right." *United States v. Rahimi*, 602 U.S. 680, 691 (2024) (quoting *New York*

[30] Larkin, *supra* note 5 at 62 ("The practical and political demands of governance, bolstered by the general historical acceptance of English mercantilism and the theoretical support of jurists like Blackstone, gave rise to widespread local, albeit shallow, forms of regulation of property in the public interest.").

Rifle and Pistol Ass'n, Inc., v. Bruen, 597 U.S. 1, 17, (2022)). When "a challenged regulation fits within that tradition, it is lawful under the Second Amendment," and "when the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to 'justify its regulation.'" *Id.* (quoting *Bruen*, 597 U.S. at 24).

Petitioner here should be able to bring his claim before a court and present evidence that the restriction he challenges is inconsistent with the Constitution's property rights protection and America's history and tradition of property regulation.

The right to property is fundamental and is a central part of America's history of freedom. The Court's rational basis review fails to provide adequate security for this constitutionally-protected right. The Court should grant the petition for certiorari and establish a clear standard for judicial review of property rights claims.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

J. Marc Wheat
Counsel of Record
Timothy Harper (Admitted in DC)
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, D.C. 20004
(202) 780-4848
mwheat@advancingamericanfreedom.com

Counsel for Amici Curiae