No. 22-42

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

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Does the Fourteenth Amendment require meaningful scrutiny of restrictions on the right to earn a living?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case concerns *amicus* because the right to earn a living is one of the basic rights our Constitution protects, with state infringements subject to heightened judicial scrutiny under the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Dipendra Tiwari and Kishor Sapkota want to establish a home healthcare company, Grace Home Care, to satisfy what they believe is an unmet need in Louisville, Kentucky for the city's large Nepali-speaking population. Because "positive health outcomes often occur when" patients are comfortable with their healthcare providers, Tiwari and Sapkota believe that they can uniquely provide comfort to Nepali-speaking patients. *Tiwari v. Friedlander*, 26 F.4th 355, 359–60 (6th Cir. 2022); App. at 5–6. Tiwari and Sapkota understandably believe that effective communication

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and *amicus* alone funded its preparation and submission.

with a healthcare provider is an essential component of competent medical care.

Yet a mathematical formula supported by various existing Kentucky healthcare providers disagreed with Tiwari and Sapkota that the state's citizens' healthcare needs are unmet. While it is difficult to conceive of a mathematical formula that would deduce the medical needs of the city's Nepali-speaking population (or any of the city's population), Kentucky thinks it has one, and existing healthcare providers are more than willing to endorse that determination. Established Kentucky healthcare providers have been empowered by the state's certificate-of-need law (CON) to prevent competition. That anti-competitive, quasi-monopolistic impulse is clear from the existing healthcare associations, such as the Kentucky Hospital Association, which intervened in the case to protect their existing businesses from competition. Pet. at 5.

Tiwari and Sapkota are perfectly capable of running the proposed company. They both have experience in the industry. *Id.* at 4–5. And there is no indication that they themselves lack, or would fail to acquire, anything necessary to supply these services competently and safely.

But Kentucky, like many states, still limits Tiwari's and Sapkota's liberty through CON laws. To determine whether to grant a certificate and allow individuals to open healthcare facilities, Kentucky principally seeks to determine whether there is a "'need'" for a health care facility "'in the desired geographic area'" and whether that facility is "'consisten[t] with'

the State Health Plan.'" App. at 4–5 (citing Ky. Rev. Stat. §§ 216B.040(2)(a)(2), 216B.015(28)).

As the Sixth Circuit pointed out, decades of scholarship and history have "not been good to certificate-of-need laws." *Id.* at 18. There is, to put it mildly, "a rich body of economic scholarship questioning the value of certificate-of-need laws and often showing their pernicious effects, *particularly* when it comes to incumbency protection and undue barriers to new entrants in the market." *Id.* at 17 (emphasis added). As a result, among scholars, it is rare to find "even lukewarm defenders of CON programs." Emily Whelan Parento, *Certificate of Need in the Post-Affordable Care Act Era*, 105 Ky. L.J. 201, 218, 221 (2016). And, since the late 1980s, "the federal government—across different agencies and ideologically diverse administrations—[has] continue[d] to advocate against [CON programs], noting their tendency to increase costs while decreasing access and quality of care." App. at 17–18. These laws are now mainly tools for incumbent businesses to further entrench themselves in the market. *See* Parento, *supra*, at 217.

That CON laws are protectionist seems to be common sense, and they thus deserve meaningful scrutiny from courts—something that has been sorely lacking for many decades. Meaningful scrutiny is required for many of the same reasons that this Court has endorsed heightened scrutiny in other contexts, such as restrictions on political speech as well as and racial and sex-based classifications.

While there are voluminous writings on the justifications for heightened scrutiny, some themes are readily deducible from this Court's precedents. Some

types of laws, such as laws that forbid criticizing government officials—as in the Alien and Sedition Acts of 1798—are essentially presumed to be passed by elected officials for self-serving reasons, reasons that could be accurately described as "protectionist." Given that it can be reasonably presumed that elected officials want to remain in office, it can be further presumed that they would want to pass laws making it easier to ensure that. But because they will never (or at least rarely) disclose their true motivations, a more searching judicial inquiry is required to determine if the law is permissible consistent with its the stated justifications.

Similarly, racial and sex-based classifications often carry a presumption of improper ulterior motives. When an almost entirely white or male legislature passes a law that differentially restricts the freedoms of citizens of a different color or sex—really, just another form of protectionism—it's a safe bet that the law is not actually promoting the public interest. Thus, a more searching judicial inquiry is required.

And just as it is safe to presume that speech-censoring politicians and race- or gender-based legislation proceed from unsavory motives, so it is fair to suspect that the Kentucky Hospital Association did not intervene in this litigation out of an abundance of concern for the public welfare. Yet when it comes to protectionist economic regulations like CON laws, courts apply almost no scrutiny to governments' stated ends and will sometimes even invent ends that were never raised by government defendants. When it comes to laws that affect a politically weak minority—such as

Tiwari and Sapkota and the Napoli-speaking community—and enrich politically powerful interests, meaningful scrutiny is even more necessary.

Moreover, besides the protectionist spirit that often actuates CON laws, burdens on the right to earn a living should be meaningfully scrutinized because that right is fundamental. Going back to Blackstone and before, the right to earn a living free from, at minimum, irrational and protectionist regulations is both deeply rooted in this nation's history and tradition and essential to the concept of ordered liberty. Far from being "just a job," the ability to engage in meaningful work is a crucial component of a well-lived life, not least because for most of us, well over half of our time on this earth is spent working. To treat this right as deserving of less protection than similarly important life decisions—such as the right to determine who we marry—is to downplay one of the most important life choices that people make.

ARGUMENT

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Although not stated explicitly, this Court has recognized that the Fourteenth Amendment "undoubtedly" guarantees that individuals can "follow any lawful calling, business, or profession [that they] may choose." *Dent v. West Virginia*, 129 U.S. 114, 121 (1889); *see also Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999). Unfortunately, however, by erroneously

failing to classify the right as "fundamental," this Court currently provides little protection to those who seek to exercise it. *See e.g., Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487–88 (1955). That is a glaring mistake. Not only is the right to earn a living "fundamental" under any test this Court has promulgated, but it is also a right that the democratic process is uniquely ill-equipped to secure.

I. THE RIGHT TO EARN A LIVING IS A FUNDAMENTAL RIGHT PROTECTED BY THE PRIVILEGES OR IMMUNITIES CLAUSE

This Court has identified certain "'fundamental' liberty interests" and subjected governmental restrictions on them to heightened scrutiny. *Reno v. Flores*, 507 U.S. 292, 302–03 (1993). The right to pursue a lawful occupation is plainly fundamental to liberty. Recognizing that the right is essential to human flourishing and self-identity, our legal tradition has long protected it. And the Fourteenth Amendment—particularly the Privileges or Immunities Clause—further perfected occupational freedom by protecting citizens from their own states' violations of that right.

A. The Right to Earn a Living is a Deeply Personal Right

The protections of Fourteenth Amendment extend "to certain personal choices central to individual dignity and autonomy." *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015). Accordingly, this Court has recognized "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). Similarly, laws that force individuals to express a particular

message—that deny individuals the ability to preserve their integrity as speakers and thinkers—are peculiarly offensive to the Constitution. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977). These more "personal" liberties are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *See Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Laws trenching upon them may particularly warrant judicial scrutiny. Suzanna Sherry, *Selective Judicial Activism: Defending* Carolene Products, 14 Geo. J.L. & Pub. Pol'y 559, 556 (2016).

As this Court has observed, "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." *Truax v. Raich*, 239 U.S. 33, 41 (1915). Representing perhaps the "most precious liberty," *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting), our Declaration of Independence encompassed occupational freedom within the "pursuit of happiness." *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring).

Freedom to work is self-ownership. *Patel v. Texas Dep't of Licensing & Reg.*, 469 S.W.3d 69, 92 (Tex. 2015) (Willett, J., concurring). When Frederick Douglass recalled the first time he earned a wage after escaping slavery, he remarked that only a former slave could "understand the emotion [that] swelled in [his] heart" when he finally experienced being "not only a freeman but a free-working man." Frederick Douglass, *The Life and Times of Frederick Douglass*,

reprinted in *Douglass: Autobiographies* 654 (Henry Louis Gates Jr. ed., 1994).

While thankfully few can now grasp that truth as well as Frederick Douglass did, everyone has experiences that allow them to appreciate the critical importance of the right to earn a living. Most of us will spend our "daily lives at work," and "[f]or many, it is a form of self-expression and central to their self-definition." Evan D. Bernick, *Towards a Consistent Economic Liberty Jurisprudence*, 23 Geo. Mason L. Rev. 479, 499 (2016). Practically speaking, the right to work is "probably more important than other so-called fundamental rights, like the right to vote." Timothy Sandefur, *State Powers and the Right to Pursue Happiness*, 21 Tex. Rev. L. & Pol. 323, 330 (2016). Because while the "chances of your vote counting are virtually zero," your "right to earn a living means a future for yourself and your family." *Id.*

That barriers to entry into lawful professions can also be classified as "economic regulations" should not matter in this case. Attempting to distinguish between "personal" rights and mere "economic" rights is always, to say the least, an imperfect endeavor. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). But the attempted distinction is nonsensical when it comes to "the narrow right to pursue one's chosen profession." Marc P. Florman, *The Harmless Pursuit of Happiness: Why Rational Basis with Bite Review Makes Sense for Challenges to Occupational Licenses*, 58 Loy. L. Rev. 721, 762 (2012). That freedom is as personal a right as any other—and more so than most. The "average American" might not equate the burden of regulations that simply redirect re-

sources—like being required to buy health insurance—"with being forced to attend church, prohibited from having children, or being told who to marry." Sherry, *supra*, 572. But having your vocational prospects dictated by the whim of arbitrary or even nakedly protectionist legislation is equally oppressive.

B. The Right to Earn a Living is Deeply Rooted in Our Nation's History and Tradition

Unsurprisingly, like Tiwari and Sapkota, individuals throughout our history have suffered irrational predations on their fundamental right to work in a chosen occupation. But guarding against such intrusions on liberty is also part of our history. As Justice Field once noted, "when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 105 (1873) (Field, J., dissenting). The "objectively, deeply rooted" nature of this right in our "Nation's history and tradition" should help this Court to identify it as a "fundamental" right secured by the Fourteenth Amendment. *Glucksberg*, 521 U.S. at 720–21.

English courts protected the right to pursue common occupations free of arbitrary restraint for more than a century before the Founding. Timothy Sandefur, *State Competitor's Veto Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38

Harv. J. L. & Pub. Pol'y 1009, 1012 (2015). Importantly here, English courts were deeply skeptical of monopolies and licensing laws. There was a consistent battle between the courts and the Crown over the naked preferences of royal patents granting exclusive rights, for example, to "produce, import, and sell all trading cards in England" or incorporating guilds under a royal charter. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 989–92 (2012) (citing, e.g., *Darcy v. Allen (The Case of Monopolies*), 7 Eng. Rep. 1260 (K.B. 1603); *The Case of the Tailors, &c. of Ipswich*, 77 Eng. Rep. 1218 (K.B. 1614)). Apprenticeships and training requirements for trades were also scrutinized when courts determined that the trade required only unskilled labor. Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 214–15 (2003) (citing e.g., *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614)). Compassing these historical practices, Sir William Blackstone observed that "[a]t common law every man might use what trade he pleased." 1 William Blackstone, *Commentaries on the Laws of England* *427.

The common-law tradition of protecting vocational freedom migrated to America with the colonists, and the Founders plainly understood the critical importance of this right. *See e.g.*, Thomas Jefferson, "Thoughts on Lotteries" (February 1826), in *The Jeffersonian Encyclopedia* 609 (John P. Foley ed., Funk & Wagnalls Co. 1900) ("[E]veryone has a natural right to chuse that [vocation] which he thinks most likely to give him comfortable subsistence."). James Madison warned that a "just government" cannot exist

"where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations." James Madison, *Property* (1792) (Mar. 29, 1792), in *The Papers of James Madison* (William T. Hutchinson et al. ed., 1987). Both prior to and after the ratification of the Fourteenth Amendment, American courts scrutinized laws that impeded entrance into occupations. *See* Sandefur, *The Right to Earn a Living*, *supra*, at 224–26 (collecting cases); *Dent*, 129 U.S. at 122 (noting that "when [regulations of occupations] have no relation to such calling or profession, or are unattainable by such reasonable study and application, they can operate to deprive one of his right to pursue a lawful vocation.").

This Court has held that history and tradition are helpful for identifying fundamental rights protected by the Fourteenth Amendment. The right to earn a living easily satisfies that inquiry.

C. The Privileges or Immunities Clause Gives Individuals Federal Protection from State Actions, Including Protecting the Right to Earn a Living

The Fourteenth Amendment's Privileges or Immunities Clause, contrary to what the majority in the now infamous[2] *Slaughter-House Cases* misconceived,

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[2] *See e.g.*, Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & Liberty 1096, 1098 (2005) ("In the eyes of virtually all historians, there is little doubt that *Slaughter-House* is wrong"); Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 123 n.327 (2000) ("Virtually no serious modern

was designed to "radically change" much "of the relations of the State and Federal governments to each other and of both these governments to the people." 83 U.S. at 78; *see e.g.*, Philip Hamburger, *Privileges or Immunities*, 105 Nw. U.L. Rev. 61, 116–17 (2011) (noting that the Privileges or Immunities Clause was partly designed to constitutionalize the Civil Rights Act of 1866—which was passed by Congress in response to the odious "black codes"). The clause guarantees a baseline of rights across the nation. *See McDonald v. Chicago,* 561 U. S. 742, 808 (2010) (Thomas, J., concurring in part and concurring in judgment). It recognizes that certain already-existing federal or state rights "belong of right to citizens as such" and "ordains that they shall not be abridged by State legislation." *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting). The right to pursue an occupation is plainly among those rights.

The Privileges or Immunities Clause's analogue in Article IV—namely, that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," U.S. Const. art. IV, § 2, cl. 1—is instructive. *See Saenz v. Roe*, 526 U.S. 489, 503 n.15 (1999). Justice Bushrod Washington, in his 1823 opinion in *Corfield v. Coryell*, famously pointed to the right to "to pursue and obtain happiness" and to "pass through, or to reside in any other state, for purposes of trade, agriculture, *professional pursuits*" as central to what the terms "privileges" and "immunities" encompass. 6 F. Cas. 546, 552 (C.C.E.D. Pa.

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scholar—left, right, or center— thinks [that *Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment.").

1823) (emphasis added). That understanding has remained critical to Privileges *and* Immunities jurisprudence. *McBurney v. Young*, 569 U.S. 221, 227 (2013) ("the Privileges and Immunities Clause protects the right of citizens to ply their trade, practice their occupation, or pursue a common calling").

To be sure, the Article IV Privileges *and* Immunities Clause has a separate function in protecting the right to earn a living than does the Fourteenth Amendment's Privileges *or* Immunities Clause. Article IV was meant "to help fuse into one Nation a collection of independent, sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), and "to place the citizens of each State upon the same footing with citizens of other States." *Paul v. State of Virginia*, 75 U.S. 168, 180 (1868). Article IV, then, prohibits a state from discriminating against citizens of another state in their pursuit of obtaining happiness in their labors.

But Justice Washington's opinion in *Corfield* "indisputably influenced the Members of Congress who enacted the Fourteenth Amendment." *Saenz*, 526 U.S. at 526 (Thomas, J., dissenting). Representative John Bingham, one of the principal architects of the Privileges or Immunities Clause, explained that one purpose of the clause was to protect "the liberty . . . 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, 42d Cong., 1st Sess. App. 86 (1871).

This Court should give the Privileges or Immunities Clause its intended effect. To do so, courts should require the government to demonstrate a sufficiently

important interest and proper means-end fit before depriving someone of his or her livelihood.

II. A MORE SEARCHING REVIEW IS NECESSARY TO DISCOVER ILLEGITMATE PRETEXTUAL MOTIVES

Heightened scrutiny of laws is often necessary where the political process is unlikely to work properly. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (cleaned up). That includes cases where a burdened group is systemically impotent relative to a benefiting group. *See id.* (noting that "more exacting" judicial scrutiny is warranted when the statute evidences a "prejudice against discrete and insular minorities"); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (internal quotation marks omitted) (recognizing that the judiciary has a "special role in safeguarding the interests of those groups that are relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"). In those cases, this Court will apply heightened scrutiny to smoke out asserted rationales that are found to be mere pretext for illegitimate motives. *See Shaw v. Hunt*, 517 U.S. 899, 932 (1996).

CON programs certainly fit the bill. These schemes lend themselves perfectly to being used for the sake of economic protectionism and are singularly unamenable to democratic restraint. Courts can and should use a "more searching" standard of scrutiny than the modern rational-basis test allows.

A. Economic Protectionism for Its Own Sake is an Illegitimate Motive

Laws that satisfy the concept of equal justice will be "something more than mere will exerted as an act of power." *Hurtado v. California*, 110 U.S. 516, 535 (1884). This minimal condition for laws is a recognition that a good government will "protect all parties, the weaker as well as the more powerful," from each other. *See* The Federalist No. 51 (James Madison). That can only be done when government acts "*impartially*" towards different groups. Madison, *Property* (1792), *supra* (emphasis original). Under our republican system of government, the "something more" is a "public purpose." *See* Thomas Cooley, General Principle of Constitutional Law 57, 59, 281, 304, 306, 340 (1880); *see also* Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest*, 14 Wm. & Mary Bill Rts. J. 1023, 1035–45 (2006). But laws that are designed to "protect a discrete interest group from economic competition" cannot fulfill this basic requirement. *See Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

The basic principle that all laws must serve a genuine public purpose is perhaps best exemplified in the Fourteenth Amendment's command that no state "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause itself assumes that states "must govern impartially." *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 588 (1979). Impartiality is enforced by demanding, at minimum, that no "classification of persons [is] undertaken for its own sake." *Romer v. Evans*, 517 U.S. 620, 635 (1996). This requires pointing to a justification that is more than a

mere benefit awarded to the advantaged group. *See Nordlinger v. Hahn*, 505 U.S. 1, 34 (1992) (Stevens, J., dissenting) (arguing that all distinctions drawn between individuals must have a "purpose or goal independent of the direct effect of the legislation"). Doing that "includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate *public purpose*[.] *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring) (emphasis added).

Other constitutional provisions likewise impose a requirement of public-spiritedness on freedom-restricting government action. As scholars have long discussed, the Privileges and Immunities Clause of Article IV, the Contract Clause, the speech protections of the First Amendment, and the Takings Clause, to name a few, all evince this same essential requirement. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1708–10, 1719–26 (1984).; *see also* Cooley, *supra*, at 57, 59, 281, 304, 306, 332–35, 340.

True, all these provisions are separate mechanisms for ensuring that governmental actions have a public purpose. They likely serve additional values too. But one thing is certain: Economic protectionism for its own sake is at odds with the entire structure of our Constitution.

B. The Threat of Economic Protectionism is Particularly Acute with Laws Limiting Entry into an Occupation

Interest groups (or "factions" as James Madison would call them) routinely attempt to secure benefits for themselves from the government. *See generally*

The Federalist No. 10 (James Madison). But the likelihood that the democratic process will be impartial towards competing interest groups is not the same in all contexts. *See* Sherry, *supra*, at 566–69. Among the various kinds of "economic regulations," laws that create vocational barriers to entry are especially vulnerable to regulatory capture. *See id.* at 568.

First, it is predicable that legislators and agencies will often protect industry incumbents from competition. Interest groups, of course, "will invest time and money in capturing government powers for their own benefit, so long as doing so will be profitable to them." Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. Ill. U. L. Rev. 457, 478 (2004). All laws restricting competition will tend to decrease the supply of a service. As a rule, this will likely increase the price that incumbents can charge for the service.

The structure of CON programs exacerbates the problem. Incumbents, as here, can use the state to place a cap on competition. Sometimes, through "moratoriums" on, say, certain healthcare activities and capital expenditures, that cap is indefinite. Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies against Trade: A Case Study from the Missouri Moving Industry*, 24 Geo. Mason U. C.R. L.J. 159, 180–85 (2014). Surely, that artificial premium is worth a great deal to incumbents in an industry, and they can be expected to expend considerable resources lobbying to protect their place in the market. *Id.* at 173.

It is also unlikely that those wishing to enter an occupation will have the ability, similar to that of incumbents, to influence the democratic process in their favor. Each barrier to entry affects relatively few voters directly, and those who are excluded from the vocation typically lack the political power to combat an organized interest group. *See* Robert McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 50 (1962) ("[S]cattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined."). Contrary to the assumption of *Carolene Products*, those negatively affected are too "diffuse" to organize effectively. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 17, 24, 28 (1985).

Incumbent businesses, by contrast, are likely to have much greater political influence. Being members of an established and state-sanctioned group, incumbents are likely to have a greater ability to organize. *See id.* Worse still, licensing regimes often allow self-interested members of a given occupation to determine the requisite vocational "qualifications" and also to write, administer, and grade qualifying exams with little legislative oversight. Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. Pub. Pol'y 209, 212–13 (2016). And in the context of certificate-of-need laws, incumbents are frequently given the right to right to request a hearing to object to new business entering the market. *See e.g.*, App. at 4, 6; *see also* Sandefur, *A Public Convenience and Necessity and Other Conspiracies against Trade*, *supra*, at 174–75. These setups create obvious risks "that

public power will be exercised for private benefit." *See Hoover v. Ronwin*, 466 U.S. 558, 585 (1984).

Second, occupational licensing laws and CON programs are historically vulnerable to regulatory capture. As this Court has recognized, a long history of governmental abuse can indicate the inability of the democratic process to remedy a problem. *Compare United States v. Virginia*, 518 U.S. 515, 531 (1996) ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."), *with Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) ("[W]e find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts."). Notably, failing to act in the public interest in response to lobbying for protectionist occupational licensing laws goes back hundreds of years. *See, e.g., Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614); Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, Inst. for Just. 29 (2d ed. 2017) (noting that Adam Smith "observed in 1776 that trades conspire to reduce the availability of skilled craftspeople in order to raise wages").[3] And it continued unabated throughout the nineteenth century. *See generally Yick Wo v. Hopkins*, 118 U.S. 356 (1886). But rather than subsiding, the problem only grows. Morris M. Kleiner, *Occupational Licensing: Protecting the Public Interest or Protectionism?* 1 (Upjohn Inst. Emp. Res., Policy Paper No. 2011-009, 2011) ("Occupational licensing is extensive and growing.").[4] Indeed, today,

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[3] Available at https://tinyurl.com/2v3rwhn4.

[4] Available at https://tinyurl.com/5dpcj9ay.

some occupational licensing laws are openly, avowedly protectionist. *See e.g.*, *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015) (reifying naked vocational protectionism); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (same); *but see e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (holding that economic protectionism is not a legitimate government interest); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (same); *Craigmiles*, 312 F.3d at 222 (same).

Even in the narrow context of certificate-of-need programs, history reveals the disproportionate political power of incumbents. When CON programs first emerged for healthcare facilities, it might conceivably have been rational to suppose they could result in *some* benefits for *some* patients. Parento, *supra*, at 211–12; *but see* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 Stan. L. Rev. 548, 612 (1969). But for decades now, virtually all academic scholarship and even studies by the federal government have concluded that the purported benefits of CON programs, are entirely illusory since and the programs instead mainly just increase anti-competitive practices. App. at 17–18; Parento, *supra*, at 217–18, 21. And yet, despite an initial movement to repeal CON schemes in response to those findings, "the trend toward full repeal has stalled" for over twenty years. Parento, *supra*, 207 n.25, 212–13; *see also Certificate of Need (CON) State Laws*, Nat'l Conf. of St. Legislatures (Dec. 20, 2021).[5] Regulatory capture is the most plausible explanation.

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[5] Available at https://tinyurl.com/2x79b678.

Though some laws restricting entry into an occupation may have a legitimate justification, meaningful judicial scrutiny is needed to ensure it. Insisting that Tiwari and Sapkota resolve their problems at the ballot box is dismissive of a fundamental liberty interest and is an unrealistic assessment of politics to boot.

C. Courts Have the Tools to Discover Illegitimate Pretextual Motives

The Founders created the federal judiciary in part "to thwart more potent threats to the Republic." *Hettinga v. United States*, 677 F.3d 471, 481 (D.C. Cir. 2012) (Brown, J., concurring). But to sift out occupational licensing and CON laws that function principally to protect incumbent businesses from competition, courts needn't resort to "sophisticated economic analysis" or impose their own "view of a well-functioning market." *See Merrifield*, 547 F.3d at 229. They do not necessarily need to peer into the hidden motives of legislatures. *See* Sherry, *supra*, at 566. And they do not need to scrutinize occupational licensing and CON laws to the point of most legislation being struck down. *See* Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 Geo. J.L. & Pub. Pol'y 493, 499 (2016).

In the late nineteenth century, this Court articulated a rational-basis test for legislation that had substantially more teeth than the current test but also sustained most economic regulations. The classic rational-basis test, like the modern one, placed the burden of persuasion on the party challenging the law. But unlike the modern version, the classic test required the challenger only to show that it lacked a

"substantial relation to" achieving a legitimate objective. *Id.* at 496–97 (citing *Mugler v. Kansas*, 123 U.S. 623 (1887); *Atchison, Topeka and Santa Fe R.R. Co. v. Matthews*, 174 U.S. 96 (1899); *Sweet v. Rechel*, 159 U.S. 380, 392–93 (1895)). And only a "clear case" that a law lacked such a relationship to its object was sufficient to invalidate a law. Jackson, *Classical Rational Basis*, *supra*, at 497 (citing *The Sinking Fund Cases*, 99 U.S. 700, 718 (1878)). But importantly, and unlike the current rational-basis test, courts were required to consider actual evidence and established facts. *Id.* at 498.

This Court could devise a similar framework for assessing CON laws and other vocational restrictions without unduly curtailing legitimate state prerogatives. To begin, once a party challenging a law produced evidence that a law did not have a rational relationship to a legitimate end, the government could bear a burden to produce at least some evidence of the law's efficacy. *See* John O. McGinnis, *Reforming Constitutional Review of State Economic Legislation*, 14 Geo. J.L. & Pub. Pol'y 517, 524 (2016). That would reasonably place an evidentiary burden on the party that is likely in the "better position to have access to the facts to justify [the] statute." *Id.* Additionally, this Court could also make clear that changes to factual circumstances and new data *could* render legislation that was once "rational" now "irrational." *See generally* Johanna Talcott, *Aging Disgracefully: Do Economic Laws Remain Rational in Spite of Changed Circumstances*, 11 FIU L. Rev. 495 (2016). Even legislation with an initially permissible goal can turn mainly into a tool for increasing the power of certain

interest groups without providing any genuine public benefit. Judicial scrutiny should reflect that reality.

And if the Court were unwilling to alter the rational-basis standard for all economic regulations, it could isolate laws barring entry into an occupation and subject only that subset of economic regulation to heightened scrutiny. That is as judicially administrable a line as any and a familiar one as well. Thus, commercial speech is subject to heightened scrutiny. *See e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570–72 (2011). Similarly, under the Takings Clause, a government's determination of what is a "public use" *might* be subject to more scrutiny than standard rational-basis review—perhaps something akin to so-called "rational basis with bite." *See Kelo v. City of New London*, 545 U.S. 469, 491–93 (2005) (Kennedy, J., concurring); Wesley W. Horton & Brendon P. Levesque, Kelo *is Not* Dred Scott, 48 Conn. L. Rev. 1405, 1417–18 (2016). Moreover, providing greater scrutiny for vocational restrictions would respect the inherently personal nature of laws limiting entry into occupations as well as the fact that they are uniquely susceptible to regulatory capture. *See* Sherry, *supra*, at 567–68.

CONCLUSION

The right to earn a living has long been—and today remains—under persistent legislative and regulatory attack. For too long this Court has allowed these regulations to escape meaningful judicial scrutiny and go essentially unchecked. This case is a prime opportunity to change course. The Court should

grant the petition and provide meaningful protection for the right to earn a living.

Respectfully submitted,

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