No. 15-507

In the

Supreme Court of the United States

SENSATIONAL SMILES, LLC,
dba Smile Bright,

Petitioner,

v.

JEWEL MULLEN, Commissioner,
Connecticut Department of Public Health, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is protecting favored groups from economic competition a legitimate government interest under the Fourteenth Amendment?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a),[1] Pacific Legal Foundation (PLF) and Cato Institute respectfully submit this brief amicus curiae in support of Petitioner. PLF is the nation's most experienced nonprofit legal foundation representing the views of thousands of supporters who believe in limited government, individual rights, and economic liberty. PLF has litigated many cases involving the constitutional right to engage in economic competition, *see*, *e.g.*, *Hettinga v. United States*, 677 F.3d 471 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 860 (2013); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014), and appeared as amicus curiae in many others. *See*, *e.g.*, *N. Carolina State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101 (2015); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir.), *cert. denied*, 134 S. Ct. 423 (2013). PLF attorneys have also published extensive scholarship on the subject. *See*, *e.g.*, Timothy Sandefur, *The Right to Earn a Living* (2010); 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 (2015).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

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

Amici believe their public policy experience will assist this Court in considering the petition.

SUMMARY OF ARGUMENT

The decision below worsened an existing circuit split on a question of major importance to constitutional freedom and to the health of the American economy. Since the days of the Founding, the basic assumption of American constitutional law has been that legislation must, at a minimum, serve the general welfare, however broadly defined that might be, rather than serving the private interests of those who happen to wield political power. Yet the decision below, like the Tenth Circuit's decision in *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005), holds to the contrary: that legislatures may abridge economic freedom—or any other right falling within the rational-basis category—without even a pretense of serving the public good. Instead, they may restrict liberty solely to advance the private interests of arbitrarily chosen beneficiaries, without *any* consideration *at all* of whether such legislation could serve the public interest in even the broadest imaginable sense.

It is no exaggeration to say that this holding contradicts eight centuries of Anglo-American constitutional tradition, which has held since the days of Magna Carta that the lawmaker must, at the very least, pursue the good of society, rather than the private good of the politically powerful. *Cf. The Case of the King's Prerogative in Saltpetre*, (1606) 77 Eng. Rep. 1294, 1295 (K.B.) (citing Magna Carta for proposition that the King "cannot charge the subject" for things that "do[] not extend to public benefit"). The decision below certainly abandons what the Founders considered the single most important goal of constitutional government: protecting individual rights against the mischiefs of faction. *See The Federalist* No. 10 at 56-65 (J. Cooke ed., 1961) (James Madison).

The question presented here is vital: whether restrictions on economic opportunity, private property rights, or other freedoms, *must serve any public interest at all*, or whether powerful factions may abridge those rights simply because they prefer to do so.

Sadly, this Court has provided little guidance on the meaning of the "legitimate state interest" prong of the rational basis test. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (this Court has "not elaborated on the standards for determining what constitutes a 'legitimate state interest'"). The result is a circuit split on this bedrock principle of constitutionalism. The decision below, which crosses the line from "deference in matters of policy" into "abdication in matters of law," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012), is a result of this lack of guidance. Such judicial abdication

is most threatening to groups with less political power— for example, racial minorities—who lack the legislative influence necessary to counter powerful legislative factions. They necessarily depend upon the courts to protect their constitutional freedoms. Yet the decision below withdraws such protection, at least with regard to other rights to earn a living—"The most precious liberty that man possesses." *Barsky v. Bd. of Regents of Univ. of State of N.Y.*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

ARGUMENT

I

THE DECISION BELOW WORSENS A CIRCUIT CONFLICT THAT UNDERMINES A BASIC PREMISE OF THE RULE OF LAW ITSELF

The decision below widens an existing circuit split. The Third, Fourth, Fifth, Eighth, and Ninth Circuits have held that a bare desire to confer a monopoly on preferred private parties fails the "legitimate state interest" prong of the rational basis test, *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002), *Castille*, 712 F.3d at 222 (5th Cir.), *cert. denied*, 134 S. Ct. 423 (2013), *Merrifield*, 547 F.3d at 991 n.15; *Smith Setzer & Sons, Inc. v. S. Carolina Procurement Review Panel*, 20 F.3d 1311, 1321 (4th Cir. 1994); *Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983); *Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087, 1099-1100 (3d Cir. 1981). The Tenth, and now Second, Circuits hold that protectionism *per se*—forbidding competition without regard to whether doing so is related to the public welfare *in any way*—is itself a legitimate

government interest. *Powers*, 379 F.3d at 1221; Pet. App. at 10.

This conflict results from a lack of guidance from this Court as to the outer bounds of the legitimate-state-interest inquiry. *Nollan*, 483 U.S. at 834. Lower courts' application of the rational basis test is consequently inconsistent, and often unprincipled. Because that test indulges every imaginable justification for a challenged law, this Court's repeated admonitions that the rational basis test is not toothless have had little effect. Only review by this Court can prevent further confusion and ensure that the rational basis test is something more than a set of "magic words that [government] defendants can simply recite in order to insulate their . . . decisions from scrutiny." *Cruz v. Town of Cicero*, 275 F.3d 579, 587 (7th Cir. 2001).

A. The Rule of Law Requires Legislation That Serves the Public Interest, Not the Private Interests of the Politically Influential

One bedrock principle of the rule of law is that government must employ its powers in the service of the *public* good (even if broadly conceived) rather than in the private interests of the rulers or their cronies. *See* Aristotle, *Politics* 1279a, *in Basic Works of Aristotle* 1185 (Richard McKeon ed., 1941) ("[G[overnments which have a regard to the common interest are . . . true forms; but those which regard only the interest of the rulers are all defective and perverted forms, for they are despotic, whereas a state is a community of freemen.").

The difference between a lawful society and a lawless despotism is that, in a despotism, the people exist to serve the rulers, who run the government as a predatory means of enriching themselves. By contrast, a society of laws is, in John Adams's words, "governed by certain laws for the common good," Mass. Const. pmbl., and not for the purpose of enriching factions who use the legislative system for their own self-interest. *See also The Federalist* No. 51 at 351 (J. Cooke ed., 1961) (James Madison) ("Justice is the end of government . . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may . . . truly be said to reign.").

Professor Sunstein describes this principle as the prohibition on "naked preferences," defined as the use of government power by the politically influential to obtain their mere private desires, without regard for the public welfare. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984). The oldest constitutional document in the Anglo-American tradition, the Magna Carta, included a provision forbidding the King from using his powers simply to benefit himself or his friends, and requiring instead that he act in accordance with the "law of the land." That rule is now found in the Constitution's two Due Process of Law Clauses, which require that the government exercise its power for the common good, rather than for private enrichment. *Caldwell v. Texas*, 137 U.S. 692, 697-98 (1891) (due process forbids government from "subjecting the individual to the arbitrary exercise of [its] powers . . . unrestrained by the established principles of private right and distributive justice. The power of the state must be exerted within the limits of those principles,

and its exertion cannot be sustained when special, partial and arbitrary.").

This Court has, without exception, held that state and federal laws that abridge liberty must be aimed at some *public* purpose rather than at gaining some *private* advantage for the politically powerful, or at burdening some disfavored group. *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874); *Romer v. Evans*, 517 U.S. 620, 632-33 (1996). In short, "the rule of law and not of men" means that government must use its powers in conformity with comprehensible principles for the benefit of society, rather than those who happen to wield authority in a given election cycle.

Thus, *Romer* held that however broad the legislature's discretion may be, the legislature may not impose burdens or restrictions on disfavored minorities simply as an act of animus. 517 U.S. at 632-33. Nor may the government evade this anti-animus restriction by claiming that a burden imposed on a disfavored group is really just meant to provide a *benefit* to the *favored* groups. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), involved a discriminatory tax on out-of-state businesses.[2] The Court held that it was "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Id.* at 878. The "domestic preference" which gave "the 'home team' an advantage by burdening all [out-of-state] corporations" could not be distinguished in principle from a burden on out-of-state companies, *id.* at 882; were such a "distinction without a difference" accepted, *id.*, courts would be forced to

[2] Congress had waived its exclusive Commerce Clause authority, so *Ward* involved only a rational basis challenge under the Equal Protection Clause. *See id.* at 880.

uphold "*any* discrimination subject to the rational relation level of scrutiny." *Id.* at 882 n.10.

Following that rule, the Third, Fourth, and Eighth Circuits reject government efforts to grant economic privileges to favored groups in the absence of any public benefit, noting that under the rational basis test, courts must "inquir[e] into whether the state can come forward with a legitimate reason justifying the line it has drawn," *Smith Setzer*, 20 F.3d at 1321, and that rational basis gives states "great discretion," but still requires them to "explain why they chose to favor one group of recipients over another. Thus, it is untenable to suggest that a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest. An intent to discriminate is not a legitimate state interest." *Ranschburg*, 709 F.2d at 1211.

As the Third Circuit observed in *Delaware River Basin Comm'n*, 641 F.2d at 1099-1100, "it is always possible to hypothesize that the purpose underlying a classification is the goal of treating one class differently from another." But this cannot be the proper analysis under any logical mode of scrutiny because if "the [legislative] 'purpose' is, in effect, a restatement of the classification," then it would "always [be] possible to hypothesize that the purpose underlying a classification is the goal of treating one class differently from another." Such reasoning would "render the rational basis standard no standard at all." *Id.*

These decisions simply elaborate on the bottom-line protection provided by the Due Process of Law Clause: its prohibition on arbitrary legislation. *Cf. D.C. v. Heller*, 554 U.S. 570, 628 n.27 (2008)

("rational basis" is "the very substance of the constitutional guarantee" against "irrational laws"). Even in cases involving property rights and economic freedom—which under prevailing legal doctrine enjoy minimal constitutional security—this Court has repeatedly held that government may not restrict such liberty simply to hinder the disfavored or to benefit the favored.

For example, *Schware v. Bd. of Bar Exam'rs of the State of N.M.*, 353 U.S. 232, 239 (1957), held that New Mexico officials could not categorically forbid members of the Communist Party from practicing law, because such a prohibition had insufficient connection to public concerns. A licensing requirement, this Court declared, "must have a rational connection with *the applicant's fitness or capacity to practice* law," *id.* at 239 (emphasis added), rather than being used to express disapproval or to exclude competition.

Likewise, in *Kelo v. New London*, 545 U.S. 469 (2005), which applied rational basis to the use of eminent domain, this Court explained that however deferential that test may be, its outer limit is the *public* good, even if broadly conceived: "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party." *Id.* at 477. Nor could it take property "under the mere pretext of a public purpose" if "its actual purpose was to bestow a private benefit." *Id.* at 478. While the government had broad discretion to condemn property to serve what it considered a public benefit, a condemnation that was "adopted 'to benefit a particular class of identifiable individuals'" would fail the rational basis test. *Id.* (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

In *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985), a city's refusal to issue a land-use permit failed the rational basis test when it was motivated by "irrational prejudice" against the property owners, rather than public concerns. This holding applied the rule of *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), that if the rational basis test means anything, "it must, at the very least, mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute a *legitimate* government interest." *See also Zobel v. Williams*, 457 U.S. 55, 65 (1982) (mere desire to "favor[] established residents over new residents" failed rational basis test).

The decision below rejects *all* these principles. It allows the legislature to deprive people of their constitutionally protected "'right . . . to follow any lawful calling, business, or profession [they] may choose,'" *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (quoting *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889)), on the basis of nothing more than a "simple preference for [some people] over [others]," Pet. App. at 11, rather than on the basis of any *public* considerations. It holds that only where such deprivations "violate specific constitutional provisions" would they be unconstitutional. *Id.* at 10. Presumably the court meant some "specific constitutional provision" *other than* the Due Process of Law and Equal Protection Clauses.

Were that actually the law, *Schware*, *Cleburne*, *Ward*, *Moreno*, *Zobel*, and virtually all of the other cases cited above, were wrongly decided: in none of them did the legislature's action violate some "specific" constitutional provision. Instead, those cases stand for

the proposition that laws motivated by a "simple preference" for some over others—unrelated to the public good—are arbitrary and discriminatory and therefore violate the rational basis test.[3]

The court below explained its holding by asserting that "[m]uch of" the time, legislatures "favor certain groups over others," which that court "call[s] . . . politics." Pet. App. at 11. But the fact that states frequently act in certain ways is *not* proof that those acts are constitutional. Moreover, the purpose of the Constitution is to protect our rights against politics. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The Constitution requires that licensing laws and similar restrictions aim at a public goal. While private benefits may incidentally result from such regulations, "that is a consequence of policy, not its goal." *See*, *e.g.*, *Kotch v. Bd. of River Port Pilot Comm'rs for Port of New Orleans*, 330 U.S. 552, 556 (1947) (licensing law may result in benefits to private parties, but law that "den[ies] a person a right to earn a living or hold any job" for a "reason having no rational relation to the regulated activities" would be unconstitutional).

[3] The Second Circuit's assertion that the Petitioners here were asking the court to "[c]hoos[e] between competing economic theories," Pet. App. at 12, is a straw man. The parties did not argue economic theories. The petitioners argued that the challenged legislation deprived them of liberty without a rational relationship to a legitimate government interest. That is a theory of law, because it turns on the scope of constitutionally protected liberty, and not a theory of economics, which would turn on considerations of supply, demand, etc. Nor is there any economic dispute in this case: all sides agree that the legislation at issue benefits incumbent practitioners at the expense of Petitioners and the public.

The version of rational basis adopted below ignores this longstanding distinction, and adopts a truly "anything goes" approach, under which the legislature's action is constitutional simply because the legislature has chosen to act in that way. The Wisconsin Supreme Court exposed the fallacy of this when it observed:

> That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses, "You shall be vested with 'the legislative power of the state,' " but no one 'shall be disfranchised or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose." In other words, "You shall not do the wrong, unless you choose to do it."

Pauly v. Keebler, 185 N.W. 554, 556 (Wis. 1921) (quoting *Taylor v. Porter & Ford*, 4 Hill 140, 145 (N.Y. Sup. Ct. 1843) (punctuation altered)).

Rational basis is not supposed to be a rubber stamp. *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000). It is a level of constitutional scrutiny—lenient, to be sure, but one which still requires that any government act restricting liberty serve the *public* interest in *some* rational fashion.

B. Lower Courts Need Guidance as to the Basic Limits of Legitimate State Interests

Confusion about whether "naked preferences" satisfy the rational basis test is fostered by lack of guidance from this Court as to the limits of legitimate

state interests. Unless the boundaries of legitimate interests are specified, lower courts confront a logically impossible task: determining whether a challenged law rationally serves a goal, without knowing what that goal might be. This logical shortfall drastically undermines the most basic level of constitutional protection.

As noted above, this Court has sometimes articulated limits on the legitimate state interest test, but it has rarely addressed the question in the context of economic regulations. As a result, lower courts, knowing only that the rational basis test is deferential to the government, have failed to recognize that the limitations must apply in *all* rational basis contexts. Their task is made more difficult by the extreme language in some rational-basis precedents, to the effect that actual facts "ha[ve] no significance in rational-basis analysis," and that courts should indulge "'every conceivable'" justification for a challenged law. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). As one judge put it, these precedents suggest that judges should "cup [their] hands over [their] eyes and then imagine if there could be anything right with the statute." *Arceneaux v. Treen*, 671 F.2d 128, 136 (5th Cir. 1982) (Goldberg, J., concurring).

Such extreme language has often misled lower courts into overlooking blatant instances of "naked preferences." For example, in *Meadows v. Odom*, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot on appeal*, 198 F. App'x 348 (5th Cir. 2006), the district court upheld a Louisiana law requiring florists to undergo a burdensome, expensive, time-consuming licensing procedure before practicing their trade. The evidence showed that the requirement was imposed

solely to protect established florists from having to compete against newcomers. Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 Wm. & Mary Bill Rts. J. 1023, 1061 (2006) (describing record evidence). Yet the court upheld the law on the basis of what it called "'speculation . . . unsupported by evidence,'" 360 F. Supp. 2d at 818 (quoting *Beach Commc'ns*, 508 U.S. at 313). Specifically, the court accepted the government's *post hoc* rationalization that lawmakers might have feared that unless florists completed a rigorous training course, consumers might scratch their fingers on the wires florists use to hold flower arrangements together. This absurd conclusion resulted from the application of the extreme version of rational basis which blinded the court to the naked preferences—protecting existing florists from competition—that were the true explanation for the statute.

In another sad example, the Fourth Circuit, in *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535 (4th Cir. 2013), recently rejected a rational basis challenge to a law that prohibits medical clinics from purchasing medical equipment unless they first obtain consent from other, competing medical clinics. Such "Certificate of Need" laws explicitly bar economic competition against privileged insiders, without regard to their qualifications or honesty—thereby deterring innovation and raising the cost of medical care. *See*, *e.g.*, Christopher Koopman & Thomas Stratmann, *Certificate-of-Need Laws: Implications for North Carolina*, Mercatus Center Paper, Feb. 2015.[4] Given

[4] Http://mercatus.org/sites/default/files/Koopman-Certificate-of-Need-NC-MOP_1.pdf.

that this Court has struck down such laws in every case to consider their constitutionality, *see*, *e.g.*, *City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 87-89 (1958), *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278-79 (1932), *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925), it is at least plausible that they are unconstitutional as applied in a particular case.

Yet the district court in *Colon Health Centers of Am., LLC v. Hazel* dismissed the case on a 12(b)(6) motion, on the theory that actual evidence was "entirely beside the point." No. 1:12cv615, 2012 WL 4105063, at *6 (E.D. Va. Sept. 4, 2012) Citing the extreme deference of the rational basis test, the court held that "[e]ven if plaintiffs had evidence that [the Certificate of Need] laws do not in fact advance [the government's] interest in reducing the cost of medical services, that fact would be of no moment." *Id.* The court of appeals affirmed. 733 F.3d at 548. Yet it is not possible to unmask unconstitutional animus if plaintiffs are barred at the 12(b)(6) stage.

Even worse, in *Hettinga*, 677 F.3d 471 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 860 (2013), the D.C. Circuit affirmed dismissal of a lawsuit challenging a law that was enacted for the sole purpose of excluding one particular individual from operating his business. Hettinga operated a dairy based in Arizona, which for technical reasons was exempt from the minimum price requirements imposed on dairies in California. When competing dairies learned that Hettinga could legally charge lower prices for his milk than they could, the

competitors demanded and obtained new legislation designed for the sole purpose of eliminating Hettinga's competitive advantage. *See generally* Dan Morgan, et al., *Dairy Industry Crushed Innovator Who Bested Price-Control System*, Wash. Post, Dec. 10, 2006.[5] But when Hettinga sued, arguing that the law singled him out for disfavored treatment, the government obtained dismissal simply by asserting—without any evidence—that the law served "a legitimate [government] interest in ensuring the orderly function of milk markets." *Hettinga v. United States*, 770 F. Supp. 2d 51, 59 (D.D.C. 2011). This meant the government "need not even articulate its reasons" for restricting economic liberty, *id.*—so, despite the plain evidence that Hettinga was specifically targeted for unfavorable treatment, his lawsuit was barred merely by the government's utterance of the magic words "rational basis."

The court of appeals felt compelled to affirm, despite acknowledgment by two judges[6] that the extreme form of rational basis had "[t]he practical effect" of eliminating "any check on the group interests that all too often control the democratic process," and consequently "allow[ing] 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." 677 F.3d at 482-83.

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[5] Http://www.washingtonpost.com/wp-dyn/content/article/2006/12/09/AR2006120900925.html.

[6] Although Judge Griffith did not join the opinion of Judges Brown and Sentelle, he expressed his sympathy with their views. *Id.* at 483 (Griffith, J., concurring).

This Court has sometimes disclaimed this extreme version of rational basis, declaring, for example, that the test still requires laws to have "*some footing in the realities* of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (emphasis added), but lower courts still strive so hard to rationalize economic regulations that they often blind themselves to unconstitutional naked preferences.

A few courts overcome the extreme deference to apply common sense, yet the lack of guidance regarding naked preferences still causes confusion in even those cases. In *Castille*, the Fifth Circuit struck down a Louisiana law that forbade people from selling coffins unless they first obtained licenses as funeral directors. The law was plainly an exercise in naked protectionism, since the coffin-sellers were not officiating at funerals, and had no desire to do so; and the public in no way benefitted from requiring coffin retailers to undergo expensive training in funeral directing. 712 F.3d at 223-27. The court rightly found that the state was simply engaged in "pure economic protection of a discrete industry," which it found unconstitutional. *Id.* at 221.

But only two years previously, the same court had upheld a protectionist Houston ordinance that allocated taxicab permits in a biased fashion, giving more permits to large taxicab companies and fewer to smaller ones, regardless of quality, service record, or any other public consideration. *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 237-38 (5th Cir. 2011). The court had upheld this discriminatory statute against a rational basis challenge by imagining that the city might have thought that larger companies would "offer[] better,

more efficient transportation for the public." *Id.* at 241. There was no factual basis for that assumption but, under the rational basis test, the court found "no need" for "factual development" on this matter. *Id.* at 240.

To reconcile that decision with *Castille*, the Fifth Circuit concluded that under the rational basis test, "mere economic protection of a particular industry is [not] a legitimate governmental purpose, but economic protection, that is favoritism, may well be supported by a *post hoc* perceived rationale," meaning some hypothetical, after-the-fact justification—*i.e.*, a rationalization. *Castille*, 712 F.3d at 222-23. *Cf. Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 112 (Tex. 2015) ("All this explains why critics charge the test is less 'rational basis' than 'rationalize a basis.'"). This means that an act of pure protectionism for favored insiders—and exclusion of disfavored outsiders—must be upheld if, afterwards, that act "can be linked," even tenuously, "to advancement of the public interest or general welfare." 712 F.3d at 222.

Remarkably, the decision below goes even further than this extreme deference. It holds that a restriction of liberty is constitutional even if it *cannot in any way*, even in retrospect, be "linked to advancement of the public interest or general welfare." *Id.* It is therefore unnecessary for a court to "perceive[]" *any* "rationale" for such a restriction; the legislature's mere decision to act is enough. *Id.* This is to contemplate lawmaking as a mere exercise of will without rational purpose. But, as Justice Brennan wrote, "there is no state interest in the mere exercise of power; the power must

be exercised for some reason." *Oregon v. Mitchell*, 400 U.S. 112, 242 n.20 (1970) (opn. of Brennan, J.).

However confusing the language of rational basis precedents may be, this Court has said that all legislation must serve in good faith—in at least some broad sense—a general *public* good, rather than a *private* benefit, such as personal spite, hostility, discrimination, or monetary gain. *See Kelo*, 545 U.S. at 477-78. That, after all, is the most basic difference between a rule of law and a rule of men.

II

THE HOLDING THAT PRIVATE-INTEREST LEGISLATION IS IMMUNE FROM CONSTITUTIONAL CHALLENGE HARMS MINORITIES AND THE POLITICALLY POWERLESS

Occupational licensing laws are typically justified as measures to protect the public, but unfortunately are "often . . . used" to "serv[e] the interests of [licensees] and not the public. *N. Carolina State Bd. of Dental Exam'rs*, 135 S. Ct. at 1117; *see also Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) (warning of politically powerful trade groups using licensing "to advance their own interests in restraining competition at the expense of the public interest"). Politically powerful groups have frequently used such laws to deprive "undesirables" of economic opportunity—whether they be racial and ethnic minorities, as in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), or out-of-state business owners, as in *Ward*, 470 U.S. 869, or politically unpopular dissenters, as in *Schware*, 353 U.S. at 239. More often, they are used for purely economic motives: by existing firms seeking

to enrich themselves by outlawing competition. *See generally* Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (2006); S. David Young, *The Rule of Experts* (1987).

The consequences of such anti-competitive regulation are severe, but are often hard to measure, because what is lost is the wealth that is never created, the opportunities that never come to fruition, and the businesses that are never founded. *See* Frédéric Bastiat, *That Which Is Seen and That Which Is Not Seen*, *in* 1 *The Bastiat Collection* 1 (2007) (arguing that the costs of regulation are often "unseen" because they comprise wealth that is left uncreated). It is impossible to measure the costs of stifling economic opportunity. But it is clear that those costs fall disproportionately on people who lack the resources necessary to obtain licenses or the political influence to obtain favorable regulation.

A recent White House report recognized that more than a quarter, and in some states nearly a third, of all workers need some form of government license to do their jobs. *Occupational Licensing: A Framework for Policymakers* 3, 24 (July 2015).[7] Obtaining licenses can be an onerous task—"[s]tates range from Pennsylvania, where it takes an estimated average of 113 days (about four months) to fulfill the educational and experience requirements for the average licensed occupation examined, to Hawaii, where it takes 724 days (about two years)." *Id.* at 25. Members of minority groups, having less access to the capital, education, and time necessary to obtain licenses, are

[7] Https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

therefore disproportionately harmed by such regulations.

For example, Florida law requires anyone wishing to practice interior design to be licensed. *Locke v. Shore*, 634 F.3d 1185, 1189 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1004 (2012). Interior design is a harmless occupation which presents no realistic public health or safety threat. *See* Colo. Dep't of Regulatory Agencies Office of Policy & Research, *2000 Sunrise Review: Interior Designers*.[8] But in a classic example of the mischiefs of faction, the American Society of Interior Design has invested millions in political efforts to persuade legislatures to require licensure, solely to exclude competition against the Society's members. *See* David E. Harrington & Jaret Treber, *Designed to Exclude: How Interior Design Insiders Use Government Power to Exclude Minorities & Burden Consumers* (Inst. for Justice, Feb. 2009).[9] Under Florida's law, licensure requires a college degree. But black and Hispanic Floridians are about 30% less likely to have a degree, and are therefore more likely to be barred from this profession. Sadly, the Eleventh Circuit, employing the rational basis test, upheld that law, without considering any actual facts, based solely on "'speculation unsupported by evidence or empirical data.'" *Locke*, 634 F.3d at 1196.

Licensing laws either disproportionately block members of minority groups from licensed professions entirely, or drive them into the underground economy, where they operate illegally, subject to arrest and

[8] Http://goo.gl/3kMdai.

[9] Http://www.ij.org/images/pdf_folder/economic_liberty/designed-to-exclude.pdf.

punishment, and are unable to obtain loans or to advertise. David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 San Diego L. Rev. 89, 99-103 (1994); Daniel B. Klein, et al., *Was Occupational Licensing Good for Minorities? A Critique of Marc Law and Mindy Marks*, 9 Econ. J. Watch 210, 214 (2012). These are the groups most in need of constitutional security for their economic freedom because they are less able to lobby the legislature or administrative agencies to adopt rules that favor them. As Prof. McCloskey observed, "the scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined. The would-be barmaids of Michigan or the would-be plumbers of Illinois have no . . . chance against the entrenched influence of the established bartenders and master plumbers." Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 50. Such groups necessarily look to the courts to protect them. The decision below denies them even the most basic constitutional protection.

By holding that it is "constitutionally rational," Pet. App. at 13, for the legislature to abridge the constitutional right "to follow a chosen profession free from unreasonable governmental interference," *Greene v. McElroy*, 360 U.S. 474, 492 (1959), *simply because it chooses to do so*, the decision below essentially eliminates *all* constitutional checks on the rent-seeking process, and abandons the right to pursue a trade entirely to "the vicissitudes of political controversy." *Barnette*, 319 U.S. at 638. That is a game minority groups and the poor have little hope of winning;

instead, it is most likely to be won by incumbents who have the political clout and economic wherewithal to exploit government barriers to competition and to absorb regulatory costs. The primary victims are therefore the poor and voiceless—the very people who need economic opportunity, and constitutional protection, the most. *See* McCloskey, *supra*, at 50 ("To speak of [the] power [of would-be entrepreneurs] to defend themselves though political action is to sacrifice their civil rights in the name of an amiable fiction.").

CONCLUSION

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.'" *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (citation omitted). If allowed to stand, the opinion below abandons that duty by proclaiming that the legislature's decision to deprive entrepreneurs, property owners, and others, of their freedom is "constitutionally rational" *simply because the legislature has chosen to do it*. Pet. App. at 13.

That holding conflicts not only with this Court's decisions, and those of other courts of appeals, but it also obliterates a fundamental premise of the Constitution: that society should be governed by laws enacted for the *common* welfare. The decision below withdraws constitutional protections for the economic opportunity at the heart of the American Dream—to the detriment of those who need it most. This Court should not stand for it.

The petition for certiorari should be *granted*.

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Respectfully submitted,

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