IN THE SUPREME COURT OF PENNSYLVANIA

SARA LADD, SAMANTHA HARRIS, AND POCONO MOUNTAIN VACATION PROPERTIES, LLC, Petitioners, v. REAL ESTATE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA AND DEPARTMENT OF STATE (BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS) OF THE COMMONWEALTH OF PENNSYLVANIA, Respondents.	No. 33 MAP 2018

BRIEF OF *AMICUS CURIAE* GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute ("GI") was established in 1988 as a nonpartisan public policy foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, and policy briefings. Through its Scharf–Norton Center for Constitutional Litigation, GI litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated. Among GI's principal goals is defending the vital principles of economic liberty and private property rights, and the independent protections for these and other rights in state constitutions across the country. Promoting the enforcement of these independent guarantees is one of GI's top priorities, and GI has litigated and appeared as *amicus curiae* in the courts of Arizona, New Mexico, Texas, New Jersey, Illinois, Washington, and other states to promote the enforcement of state constitutional protections over and above those provided by the federal constitution. GI has become a national leader in litigating in defense of home-sharing, and is currently litigating cases in California, Washington, Illinois, and Florida, on matters relating to home-sharing. *Hobbs v. Pacific Grove*, No. 18CV002411 (Monterey Cnty. Super. Ct., filed June 26, 2018); *Seattle Vacation Home, LLC v. City of Seattle*, No. 18-2-15979-2, (King Cnty.

[1] Pursuant to Pennsylvania Rule of Appellate Procedure 531, GI affirms that no person or entity other than the *amicus curiae*, its members, or counsel paid in whole or in part for the preparation of this brief or authored it in whole or in part.

Super. Ct. filed June 26, 2018); *Mendez v. City of Chicago*, No. 2016-CH-15489 (Cook Cnty. Cir. Ct., filed Nov. 29, 2016); *Nichols v. Miami Beach*, No. 2018-021933-CA-01 (11th Jud. Cir. Ct. for Miami-Dade Cnty., filed June 26, 2018). GI scholars have also written extensively about the right to earn a living, *see, e.g.*, Timothy Sandefur, *The Right to Earn A Living* (2010), and the rights of home-sharers. *See, e.g.*, Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-Home-Sharing Regulations Chip Away at the Foundation of an American Dream*, 39 U. Haw. L. Rev. 395 (2017). GI believes its legal and policy expertise will benefit this Court in its consideration of this case.

INTRODUCTION

This Court has made clear that the Pennsylvania version of the rational basis test is significantly more protective of individual rights than is the federal version of rational basis. *Shoul v Commw., Dep't of Transp., Bureau of Driver Licensing*, 173 A.3d 669, 677–78 (Pa. 2017). While the federal version of that test is so deferential to the government that courts applying it typically rubber-stamp any assertion of power by the government, *see, e.g., Hettinga v. United States*, 677 F.3d 471, 482–83 (D.C. Cir. 2012) (Brown, J., concurring), this Court has applied a significantly more rigorous scrutiny as a matter of state law. The Pennsylvania rational basis test is still deferential to legislative policy determinations but requires that any law restricting liberty have "'a real and substantial relation' to the

public interests it seeks to advance, and [be] neither patently oppressive nor unnecessary to these ends." *Shoul*, 173 A.3d at 678. That helps prevent legislative abuses and gives effect to the Constitution's protections of liberty.

Unfortunately, the Commonwealth Court in this case not only failed to appreciate the significance of that difference, but actually moved in the *opposite* direction by applying the rational basis test at the preliminary objection stage instead of after fact-finding and briefing at the *judgment* stage, as is proper. *Pa. R. Co. v. Driscoll*, 198 A. 130, 134 (Pa. 1938); *McNeil v. Jordan*, 894 A.2d 1260, 1282 (Pa. 2006) (Saylor, J., concurring). Applying the rational basis test when determining whether to *dismiss* a case, as opposed to the determination of the *merits*, conflicts with the rule that plaintiffs should receive the benefit of the doubt at the preliminary objection stage. *See Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Commw. Ct. 1994).

The rational basis test is a tool for deciding whether a law meets the minimum requirements of constitutionality. It is not a tool for testing the adequacy of pleadings. On the contrary, when assessing preliminary objections, the court must assume the truth of the allegations and draw all inferences in the plaintiff's favor precisely because the plaintiff has not yet had a chance to present evidence. *Commw. v. Musser Forests, Inc.*, 146 A.2d 714, 716 (Pa. 1958).

The pro-defendant, merits-based rational basis analysis is simply incompatible with the pro-plaintiff, pleading-based analysis that applies under Rule 1028. Confusing the two—as the Commonwealth Court did—transforms the rational basis test from a *factual* presumption that applies to the determination of constitutionality into an impenetrable *legal* shield that bars plaintiffs from having the opportunity to make their cases and present evidence to the court. That is a legal error that warrants reversal.

Finally, this Court is right to maintain that the state version of the rational basis test is less deferential than the federal version. *Commw. v. Edmunds*, 586 A.2d 887, 894–95 (Pa. 1991). The state and federal constitutions are differently worded and have different histories. State policy also justifies the Court in applying a stronger, more protective standard under the state Constitution. The trial court in this case was required to determine whether, *as applied in these circumstances*, the licensing requirement is "'unreasonable [or] unduly oppressive or patently beyond the necessities of the case." *Shoul*, 173 A.3d at 677 (quoting *Gambone v. Commw.*, 101 A.2d 634, 636–37 (Pa. 1954)). That cannot be done without allowing the plaintiff to introduce evidence. The dismissal of her case was therefore erroneous as a matter of law.

ARGUMENT

I. THE RATIONAL BASIS TEST DIFFERS FUNDAMENTALLY FROM THE PRELIMINARY OBJECTION PROCEDURE

A. The Rational Basis Test is a Factual Presumption, Not a Rule of Law

The rational basis test was created in 1934 in *Nebbia v. New York*, 291 U.S. 502 (1934). That same year, the Supreme Court made a point of explaining that the test was not a rule of law that "makes legislative action invulnerable to constitutional assault," but only "a rebuttable presumption" of fact. *Borden's Farm Prod. Co. v. Baldwin*, 293 U.S. 194, 209 (1934). That means it is "not a conclusive" rule, and should not be transformed into one by "treating any fanciful conjecture as enough to repel [legal] attack." *Id.* Doing that would make all legislation "immun[e]" to judicial review. *Id.* Instead, rational basis means only that, as a *merits* matter, "there is a presumption of the existence of [a] state of facts" on which the legislature acted when passing the challenged law, and a plaintiff who claims that the law is unreasonable "must carry the burden of showing [that] by … legitimate proof." *Id.* In the years that followed, the Supreme Court reiterated this point: it is legal error to dismiss a well-pleaded rational basis case prior to fact-finding, because the rational basis test is a merits test, and therefore can be applied only after the evidence has been presented. *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405, 414 (1935); *Polk Co. v. Glover*,

305 U.S. 5, 9-10 (1938); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153–54 (1938).

This Court also held that the rational basis test was not a barrier to pleading a complaint but was applied only at the merits stage of a case. In *Driscoll*, 198 A. at 134, a railroad company challenged the constitutionality of a regulation as excessively burdensome, and the trial court enjoined enforcement of the law until it could decide the case. The government sought to appeal that decision, despite its interlocutory nature, *id.* at 133, and argued that the trial court should have simply dismissed the complaint "because the constitutionality of the act was apparent on its face." *Id.* at 134. This Court said no:

> [T]his challenge against the constitutionality of the Full Crew Act depends entirely on facts. We cannot determine whether the act is confiscatory, unreasonable, and arbitrary, or whether it does not reasonably tend to promote safety, *until facts are presented* … . Prima facie, the act is valid and must be so considered by us until its invalidity appears. Whether the measure promotes safety, or has a tendency to do so, *must indubitably turn on facts* and circumstances regarding that subject, and the relation which the provisions of the act bear to safety … . When the result is reached, if it is found the statutory protection is of such slight consequence, or is so incidental, as to cause the provisions of the act to be wholly impractical, and not in promotion of the safety it seems to strive for, then its operation would be unreasonable and arbitrary. *This situation could only be developed by evidence*. In these circumstances, of course, it would be *error to refuse to hear evidence*.

Id. at 134–35 (emphasis added).

Two years later, this Court reiterated this point: "where the validity of legislation is dependent upon the existence of certain facts," it said, "and especially where the facts relate to controlling economic conditions within a given trade or industry," dismissal is not proper, and "such facts are properly the subject of evidence and findings in an appropriate judicial proceeding." *Harrisburg Dairies, Inc. v. Eisaman*, 11 A.2d 875, 877 (Pa. 1940).

Unfortunately, federal courts later altered how the federal rational basis test operates, making it—at least in some cases—just what the *Borden's Farm Products* case said it was not: an impenetrable barrier that renders a statute is "invulnerable to constitutional assault." 293 U.S. at 209. In *F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307, 315 (1993), for instance, the Supreme Court said that facts are actually "irrelevant" in rational basis cases, *id.* at 315, because a court should uphold the constitutionality of a challenged law if it can "imagine any conceivable basis" that might justify the legislature's action. *Id.* at 312 (quotation marks omitted). Of course, if that is the actual standard, then as a logical matter, *all* federal rational basis cases should be dismissed under Fed. R. Civ. P. 12(b)(6), because it is always possible to imagine *some* conceivable facts that might uphold a challenged law, no matter how burdensome or extreme. *See id.* at 323 n.3 (Stevens, J., concurring) (warning that the Court's excessive deference "is

tantamount to no [judicial] review at all."). If a judge must defer to the legislature *that* much, no plaintiff could ever state facts that would entitle her to judgment.

The fact that plaintiffs actually *do* sometimes prevail in rational basis cases proves the inherent contradiction of combining that version of rational basis test with the standard for dismissal under Fed. R. Civ. P. 12(b)(6). *See further* Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 Geo. Mason U. Civ. Rts. L.J. 43 (2014). And, indeed, federal courts have struggled with how to combine the two. *See, e.g., Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008); *Keenon v. Conlisk*, 507 F.2d 1259, 1260–61 (7th Cir. 1974); *Brown v. Zavaras*, 63 F.3d 967, 971-72 (10th Cir. 1995); *Wroblewski v. City of Washburn*, 965 F.2d 452, 459–60 (7th Cir. 1992).

Under Fed. R. Civ. P. 12(b)(6), a federal court must take a pro-plaintiff posture and determine whether, if the plaintiff can prove her allegations, she would be entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). But under the federal version of rational basis, courts are so deferential that judges must "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 n.3 (5th Cir. 1982) (Goldberg, J., concurring). That means government can obtain dismissal by merely reciting "close sesame!": just by *saying*, without evidence, that a law is rational.

In *Hettinga v. United States*, 770 F. Supp. 2d 51 (D.D.C. 2011), the plaintiff challenged the constitutionality of a dairy regulation. The government moved to dismiss, asserting—without any introducing evidence or letting the plaintiff do so—that the law was rational. *Id*. at 59–60. The trial court dismissed, and the court of appeals affirmed, on the grounds that the government "provided a rational explanation" for the law, and that was enough to end the lawsuit. 677 F.3d at 479.

That incorrect holding conflicts with decisions of other federal circuits, *see* Sandefur, *supra*, at 68–83, but it demonstrates how applying the rational basis test—which is meant for evaluating the merits of a lawsuit *after* fact-finding—at the preliminary stage leads to confusion and an abuse of the legal process.

B. The Commonwealth Court Erred by Applying the Rational Basis Test at the Pleading Stage

Regardless of the errors of *federal* courts, the *Pennsylvania* version of rational basis, properly understood, avoids this problem. Because facts *do* matter in the Pennsylvania rational basis test, the difference between it and the procedure for preliminary objections under Rule 1028(a)(4) is clearer.

The Pennsylvania version of rational basis differs "significantly" from the federal version because it forbids the legislature from imposing restrictions on liberty that are "'unreasonable, unduly oppressive or patently beyond the necessities of the case.'" *Shoul*, 173 A.3d at 677 (quoting *Gambone*, 101 A.2d at 636–37); *accord, Nixon v. Commw.*, 839 A.2d 277, 287–88 (Pa. 2003). But that is

a factual determination; the court cannot make it without evidence of what exactly the regulatory burden on the plaintiff is, or what the necessities of the case are. The weighing of burdens and reasonableness cannot be done at the preliminary objection stage.

Thus it is clear that the Pennsylvania rational basis analysis cannot apply to a Rule 1028(a)(4) objection. Such objections are in the nature of demurrers; they seeks only to test the *legal sufficiency* of pleadings. That is why they can be adjudicated without evidence. *Lerner v. Lerner*, 954 A.2d 1229, 1236 ¶ 13 (Pa. Super. 2008). But a determination of constitutionality under the rational basis test is a judgment on the *merits*. It should not be "hybridized" with the preliminary objection procedure. *Jordan*, 894 A.2d at 1282 (Saylor, J., concurring).

As the *Jordan* Court observed, "if a *prima facie* case is stated, a demurrer necessarily will fail," and "by definition, where a *prima facie* case obtains, a court cannot conclude with certainty that no recovery is possible" and it must deny the preliminary objection. *Id.* at 1273. Justice Saylor added that it is not appropriate at the preliminary objection stage to require plaintiffs to "detail the affirmative evidentiary support for … elemental factual allegation[s]," because at that stage the court only evaluates "the legal sufficiency of a plaintiff's averments to state a cause of action assuming their truth," whereas "in actual summary judgment

proceedings predicated on a party's ability to prove essential elements of a claim or defense, discovery is generally available to such party." *Id.* at 1281-82.

The court below committed the error Justice Saylor warned against. The plaintiff contended that forcing her to obtain a real estate license when she was not engaged in brokering real estate, but just operating a small internet-based short-term rental business, was unconstitutional *as applied*. Given the extreme expense and delay she would suffer if forced to obtain a real estate license, and the lack of any meaningful public benefit that would result (because the requirement would do nothing to protect consumers), the plaintiff asked for her day in court to prove that the requirement is unreasonable, unduly oppressive, and patently beyond the necessities of the case. *Ladd v. Real Estate Comm'n of Commw.*, 187 A.3d 1070, 1073–74 (Pa. Commw. Ct. 2018). To *prove* that would require her to introduce evidence regarding her business, the burdens of the testing and licensing requirements, and the nature and extent of the public benefits—if any—that the requirements would accomplish.

But rather than allow that, the Commonwealth Court dismissed, based solely on the government's assertion that the purpose of the licensing statute *facially* is to protect consumers. *Id.* at 1077. Yet the fact that a law, *generally* speaking, is *intended* to protect the public, says nothing whatever about whether the law, *as applied* in a particular case, is unduly oppressive or patently beyond the

necessities. Dismissing an as-applied challenge on the grounds that the law is facially constitutional, based on evidence-free assertions by the government, is simply not proper at the Rule 1028(a)(4) stage.

That was a straightforward legal error. If the plaintiff "bears the burden of demonstrating that the statute 'clearly, palpably and plainly' violates the Constitution," *Estate of Cox*, 476 A.2d 367, 370 (Pa. Super. 1984) (citation omitted), then she must at least have the opportunity to do so. The Commonwealth Court worried that allowing a plaintiff to prove that a licensing requirement is patently beyond the necessities of the case "would effectively upend the legitimacy of any requirement … for a professional license," *Ladd*, 187 A.3d at 1078, but that is not true. So long as the rational basis test bars the government from imposing restrictions on liberty that are patently beyond the necessities of the case, it is proper for courts to let plaintiffs have their day in court on that matter. Courts certainly cannot discharge their duty by throwing out well-pleaded *as-applied* cases based on the government's evidence-free assertion that statute *on their face* are intended to protect the public.

II. THIS COURT SHOULD CONTINUE TO APPLY A MORE PROTECTIVE RATIONAL BASIS STANDARD UNDER THE STATE CONSTITUTION

A. The Pennsylvania Constitution's Rational Basis Test Has Always Been More Protective Than the Federal Counterpart

This Court has applied a rational basis standard that is different and more protective than the federal standard. *Shoul,* 173 A.3d at 677–78. Although that stronger test has been criticized, *see id.* at 688–94 (Wecht, J., concurring), it is necessary and proper and should be retained.

As has often been noted, the federal Constitution provides *minimal* protections for individual rights, but states can provide greater protections. *See, e.g., Commw. v. Sell,* 470 A.2d 457, 467 (Pa. 1983). There is no reason for Pennsylvania courts to follow in lockstep with federal jurisprudence which interprets an entirely different constitution.

The rational basis test that the U.S. Supreme Court fashioned in *Nebbia, supra*, was designed for applying the Fourteenth Amendment's Due Process of Law Clause. But that Clause is worded in entirely different terms from the provision at issue in this case—namely, Pa. Const. art. I § 1, which protects the rights to "enjoy[] … liberty, [to] acquir[e], possess[] and protect[] property and reputation, and [to] pursu[e] … happiness." There is no obvious reason why a federal test created in 1934 for interpreting a federal constitutional provision should be applied when interpreting a wholly different state constitutional

provision first written in 1776. Certainly the authors of the Pennsylvania Constitution cannot have expected that federal jurisprudence from the 1930s would govern the language they wrote 160 years earlier.

Indeed, as this Court has noted, the reverse is true: the state clause predates the federal Bill of Rights, and *this* Court's jurisprudence should guide *federal* courts. *Sanderson v. Frank S. Bryan, M.D., Ltd*., 522 A.2d 1138, 1142 (Pa. Super. 1987); *Edmunds*, 586 A.2d at 894–95. *See also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501–02 (1977).

Pa. State Bd. of Pharmacy v. Pastor, 272 A.2d 487, 490 (Pa. 1971), emphasized that the "difference between federal and state constitutional law represents a sound development," for several reasons. First, state courts are better situated to evaluate the constitutional validity of economic regulations, and their impact on individual rights—just as they are in a better position to apply other types of constitutional values, such as speech or privacy rights. *Cf.* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 178-90 (2018) (App.51–63). Second, state courts are better able to "'adapt their decisions to local economic conditions and needs'" than federal courts are, *Pastor*, 272 A.2d at 490 (quoting John A.C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U. L. Rev. 226, 250

(1958)), meaning that if they err, those errors are easier to correct than if federal courts err in interpreting the federal constitution. Third, the federal constitution allows states to operate as "'economic laboratories,'" *id.* at 490 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)), and state court scrutiny of economic regulation is one version of that autonomy.

Edmunds set forth a test for determining when state courts should "engage in independent analysis in drawing meaning from their own state constitutions." 586 A.2d at 894. Applying that test demonstrates why it is necessary and proper for this Court to continue applying the more protective, less deferential state-law rational basis test.

B. Under *Edmunds,* A Separate and More Protective Rational Basis Standard is Warranted

Edmunds said courts should consider the following four factors when deciding whether to "undertake an independent analysis under the Pennsylvania Constitution." *Id*. at 895: (1) the text of the state constitutional provision at issue, (2) its history, (3) related case law in other states, and (4) policy considerations, particularly of local concern. All of these factors weigh in favor of continuing to apply a separate and more demanding rational basis analysis under the Pennsylvania Constitution.

1. The Pennsylvania Constitution's Unique Language Protects the Right to Economic Freedom

First, the language of the constitutional provisions are wholly different—Pennsylvania's right to pursue happiness provision has no wording in common with the Due Process of Law Clause of the Fourteenth Amendment, which was the source of the "rational basis" test. Instead, the state provision refers to such "inherent and indefeasible rights" as the right to "enjoy[] … liberty," "acquir[e] … property," and "pursu[e] [one's] own happiness." Pa. Const. art. I § 1. This "specific language … cannot be readily dismissed as superfluous," *Kroger Co. v. O'Hara Twp.*, 392 A.2d 266, 274 (Pa. 1978), and it is impossible to imagine these words *not* including the right Sally Ladd asserts: the right to earn a living at a common occupation by devoting her skills and knowledge to providing for herself and her family.

The right to economic liberty is an ancient recognized right, fundamental to the concept of ordered liberty and deeply rooted in Pennsylvania's history and tradition. Benjamin Franklin himself came to Philadelphia from Massachusetts to escape the latter colony's legal restrictions on his freedom to earn a living as a printer. *See* Benjamin Franklin, *Autobiography* (1793), *reprinted in Benjamin Franklin: Writings* 1324-29 (J.A. Leo Lemay ed., 1987) (App.40–45). Economic liberty, in fact, was one of the reasons for the American Revolution. In 1768, Franklin complained of British trade restrictions that barred merchants and traders

from earning a living in order to benefit politically well-connected businesses in England: "There cannot be a stronger natural right than that of a man's making the best profit he can of the natural produce of his lands," he wrote. Yet British restrictions on iron-smithing, hat-making, and other ordinary occupations "restrain[ed] [such] manufacture[s] in America, in order to oblige the Americans to send their [raw materials] to England to be manufactured, and purchase back [finished goods]…loaded with the charges of a double transportation." *Causes of the American Discontents before 1768* (1768), *in Franklin: Writings*, *supra*, at 613 (App.39). Thomas Jefferson echoed this point in his 1774 pamphlet, *A Summary View of the Rights of British America,* complaining of trade restrictions that forbade colonists from manufacturing items from iron, but forced them to purchase iron goods from English manufacturers, "for the purpose of supporting not men, but machines, in the island of Great Britain." *Thomas Jefferson: Writings* 110 (Merrill D. Peterson ed., 1984) (App.37).

The same year the Pursuit of Happiness Clause was written, Adam Smith wrote that every person has a "property … in his own labor" which is "the original foundation of all other property," and is "the most sacred and inviolable" of rights—indeed, it is "[t]he patrimony of a poor man," who may lack an inheritance, but can still climb the economic ladder so long as anti-competitive licensing laws and other monopolies do not stand in his way. 1 Adam Smith, *Wealth of Nations*

123 (Edwin Cannan, ed., 1904) (1776). For government "to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property," wrote Smith, and a "manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him." *Id.*

Not long afterwards, Justice Patterson observed in *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795), that "the late Constitution of Pennsylvania" made this understanding "a fundamental law." The Pursuit of Happiness Clause, he explained, protected right of "acquiring and possessing property," which necessarily includes the right to engage in "honest labour and industry" by which property is acquired. *Id.* Preservation of that right "is a primary object of the social compact." *Id. Accord*, *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823).

Or, as James Madison summarized: government is "not just" if it imposes "arbitrary restrictions, exemptions, and monopolies" that "deny to part of its citizens" the "free use of their faculties, and free choice of their occupations" that are the "means of acquiring property." *Property* (1792) *reprinted in James Madison: Writings* 516 (Jack Rakove ed., 1999) (App.66).

In short, the authors of Article I section 1 understood and intended the right "to pursue [one's] own happiness" as including the right to pursue a common occupation for commercial gain.

2. The Legal History Demonstrates That Protection Against Unreasonable Licensing Requirements is a Long-standing Constitutional Right

Second, the legal history of this provision reflects a commitment to meaningful legal protection of economic liberty against monopolistic restrictions that benefit the private interests of a privileged few, instead of protecting the general public.

The right to pursue happiness was understood in 1776 as including a *legally enforceable* right to economic liberty. James W. Ely, Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. Pa. J. Const. L. 917, 929 (2006) ("in the early decades of the newly independent nation … jurists were prepared to invoke unenumerated rights…and the rights identified as fundamental were largely economic in nature."). By that time, there were nearly two centuries of English common law precedent holding that British subjects had the right to pursue trades without hindrance from government-created monopolies. *See, e.g., The Case of the Tailors*, 77 Eng. Rep. 1218 (K.B. 1614); *The Case of Monopolies*, 77 Eng. Rep. 1260 (K.B. 1602). *See further* Steven G. Calabresi & Larissa C. Leibowitz,

Monopolies and the Constitution: A History of Crony Capitalism, 36 Harv. J.L. & Pub. Pol'y 983 (2013).

Sir Edward Coke wrote in his legal textbooks—studied by America's founders[2]—that monopolies violated the common law and Magna Carta. 2 E. Coke, *Institutes* *47 (App.35). William Penn himself quoted Coke when he wrote that for government to bar people from practicing a trade without adequate justification was contrary to Magna Carta and "against the liberty and freedom of the subject." William Penn, *The Excellent Priviledge of Liberty and Property* 55–56 (1687)[3] (quoting Coke, *supra*). If the government were to give a "grant" to any person for "the sole making of cards, or the sole dealing with any other trade," such a grant would violate the legal rights of the person who "before did, or lawfully might have used that trade." *Id.* Relying on these precedents, William Blackstone wrote—only about 15 years before the Pennsylvania Bill of Rights was drafted—that "[a]t common law every man might use what trade he pleased." 1 W. Blackstone, *Commentaries* *427.

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[2] Citing Coke, Pennsylvania's James Wilson wrote that "no man can be prohibited from exercising his industry in any lawful occupation," because "the common law abhors all monopolies." James Wilson, *Of the Natural Rights of Individuals, in* 2 *Collected Works of James Wilson* 1080 (Steve Sheppard ed., 2003) (App.47).

[3] https://upload.wikimedia.org/wikipedia/commons/2/2b/William_Penn,_The_Excellent_Priviledge_of_Liberty_and_Property_(1897_reprint).pdf

Obviously, the Pennsylvania Constitution has been revised since, and circumstances and case law have evolved. But Article I section 1 has remained unchanged, and this Court has consistently recognized that the *state* constitution protects economic liberty independently of federal legal developments. Even in *Rohrer v. Milk Control Bd.*, 186 A. 336 (Pa. 1936), which upheld the constitutionality of state price controls for milk and relied heavily on *Nebbia*, *supra*, this Court emphasized that the decision was based on the state, not the federal Constitution, *see* 186 A. at 337-39,[4] and that price regulations were valid only because of the national emergency of the Great Depression, *id*. at 345. The *Rohrer* Court reiterated that economic regulations that do not protect "the public at large" or that are "enacted with the purpose of benefiting the employees of certain classes of corporations and no one else," violate the Pennsylvania Constitution. *Id.* at 344.

Only two years later, this Court repeated that "acts of regulation, or limitation of rights, under the police powers must be reasonable," and that such regulations "cannot be sustained if they are capricious, arbitrary, or unduly delimit and unreasonably intermeddle with the rights of … property owner[s]." *Breinig v. Allegheny Cnty.*, 2 A.2d 842, 848 (Pa. 1938). Two years after that, *Commw. v. Zasloff*, 13 A.2d 67, 69 (Pa. 1940) again emphasized that judicial review of

[4] In *Rohrer*, this Court adopted as its own opinion the dissenting opinion of Judge Keller.

economic regulation under the Pennsylvania Constitution would not be the sort of anything-goes deference federal courts employ, "otherwise we would have an absolute instead of a constitutional scheme of government." The *Zasloff* Court articulated the Pennsylvania version of the rational basis test endorsed by *Gambone*, *Nixon*, and *Shoul*: "a law which purports to be an exercise of the police power must not be arbitrary, unreasonable or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the object sought to be attained." *Id.*

This history explains why the *Shoul* Court declined the invitation to abandon the more protective state rational basis standard and adopt the federal version. 173 A.3d at 691–92 (Wecht, J., concurring). Not only is the state-based rational basis approach well-grounded in legal history and Pennsylvania tradition, but the alternative—wholesale adoption of a federal standard that was created to interpret *different* constitutional language in a *federal* constitution written years after Pennsylvania's Pursuit of Happiness Clause—is unwarranted.[5] As described below, the federal standard is excessively deferential, and embracing it at the state level would do violence to the federalist system which was fashioned to empower

[5] Indeed, given that the Pennsylvania Constitution refers to the pursuit of happiness and the freedom to acquire property as "inherent and indefeasible" rights, it would seem more appropriate to regard them as fundamental and deserving of strict scrutiny. *Pa. Bar Ass'n v. Commw.*, 607 A.2d 850, 857 (Pa. Cmmw. Ct. 1992).

state courts to give their citizens stronger protections against wrongful government action than the federal Constitution provides.

3. Other States Have Applied a More Protective Rational Basis Test under Their Constitutions

Thirdly, other state courts have often emphasized a separate and more protective interpretation of the analogous provisions of their constitutions.

The case most like this one is *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), in which the Texas Supreme Court refused to embrace the excessively deferential federal version of the rational basis test when applying that state's "Due Course of Law" Clause. That case, like this one, involved the effort to force a licensing requirement for one trade (barbers and cosmetologists) on practitioners of another trade (eyebrow-threaders). The court found that it was unduly burdensome and irrational to require people who simply trimmed eyebrows with a non-invasive technique using cotton thread. *Id.* at 73.

After a long examination of the history of Texas's rational basis jurisprudence, the court concluded that the state's constitution was "intended to bear at least some burden for protecting individual rights that the United States Supreme Court determined were not protected by the federal Constitution." *Id*. at 87. Given the state courts' obligation to protect rights unduly neglected by federal courts, the Texas justices ruled that the state version of rational basis—in words that echo this Court's words in *Zasloff*, *Gambone, Nixon,* and *Shoul*—requires that

laws not be "so unreasonably burdensome that [they] become[] oppressive in relation to the underlying governmental interest." *Id.*

Other states have done likewise. In *State v. Russell*, 477 N.W.2d 886 (Minn. 1991), Minnesota's highest court ruled that differential sentences for those convicted of cocaine possession and those convicted of possessing crack—a difference with substantially disparate racial effects—violated the state's Equal Protection Clause even though it did not violate the federal Constitution. The court noted that it had consistently applied "what may be characterized as the Minnesota rational basis analysis," by which courts are "unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires." *Id*. at 889. There was "every reason" to continue applying "an independent Minnesota constitutional standard of rational basis," because to do otherwise would cause "the meaning of Minnesota's constitution" would "shift" with every change in federal precedent—and that "would undermine the integrity and independence of our state constitution and degrade the special role of this court, as the highest court of a sovereign state, to respond to the needs of Minnesota citizens." *Id.*

The Alaska Supreme Court, too, applies a "less speculative, less deferential, more intensified means-to-end inquiry" under its state version of the rational basis test. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976). Observing the need for

a "more flexible and more demanding standard" than the ultra-deferential federal test, that court does not "hypothesize facts which would sustain otherwise questionable legislation as was the case under the [federal] rational basis standard." *Id.* And the Utah Supreme Court has also refused to "abandon all scrutiny of economic regulation" by employing the federal version of rational basis—a version the court said was so "extremely" deferential as to render "federal constitutional review of [economic regulation] 'virtually a dead letter.'" *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988) (quoting James C. Kirby, Jr., *Expansive Judicial Review of Economic Regulation under State Constitutions: The Case for Realism*, 48 Tenn. L. Rev. 241, 241 (1981)).

"State courts," said the Utah justices, "have a long tradition, stretching back into the nineteenth century, of being far less willing to find that legislative classifications underlying economic regulations are reasonable. While state courts have been more deferential to legislative classifications at some times than at others, they have never abandoned their review function to the degree that the federal courts have since the mid-1930's." *Id.* This Court has also refused to abandon that obligation—and should continue to refuse.

4. Good Policy Warrants Applying a More Protective Rational Basis Test

Finally, as to policy considerations, cases like *Russell*, *Isackson*, *Mountain Fuel Supply*, and *Patel* make clear why states are justified in employing less

deferential rational basis standards. The federalist structure was designed to allow states to respond to local needs and circumstances, and to "deal[] with threats to liberty" when federal courts have failed in that regard. Sutton, *supra*, at 204 (App.64). The federal rational basis test has, indeed, failed to protect people from unjustified violations of their rights on too many occasions.

The federal rational basis test is often so excessively deferential that it essentially becomes judicial abdication, which violates the separation of powers. *See Hettinga*, 677 F.3d at 482–83 (Brown, J., concurring) ("The practical effect of [federal] rational basis review" is to "allow[] 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.").

Consider, for example, *Meadows v. Odom*, 360 F.Supp.2d 811 (M.D. La. 2005), *vacated as moot on appeal*, 198 Fed. Appx. 348 (5th Cir. 2006). There, the trial court, applying the extreme deference of the federal test, upheld the constitutionality of a licensing requirement for florists, even though unlicensed florists present no realistic threat to public health and safety, and despite clearly established record evidence showing that the requirement was created solely to protect licensed florists from competition. Because the court believed it was necessary to grasp any excuse whatsoever to uphold the law—no matter how unrealistic—it disregarded the actual evidence and based its decision on imaginary

evidence, holding that the legislature *might* have thought a licensing requirement necessary to prevent customers from scratching their fingers on the wires florists use to hold flower arrangements together. *Id.* at 824. There was no evidence that this ever actually happened, but mere "speculation," the court said, was enough. *Id.* at 818.

Meadows was an extreme case, but it demonstrates why the excessive deference federal courts employ has been condemned as "less 'rational basis' than 'rationalize a basis.'" *Patel*, 469 S.W.3d at 112 (Willett, J., concurring).

On the other hand, as suggested above, many states have required a more realistic rational basis standard to prevent such injustices from escaping constitutional scrutiny. A good example of the advantage of using "more flexible and more demanding standard[s]," *Isakson,* 550 P.2d at 362, can be found in the way some state courts responded to the controversial decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which adopted an excessively deferential rational basis standard toward eminent domain, whereby virtually any condemnation of property survives federal judicial review. This Court rejected that approach and was far less deferential in, *e.g.*, *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337-38 (Pa. 2007), in which it noted that the state constitution requires courts to determine the "true purpose" of a taking, to ensure that the reason the legislature gives for the condemnation is not "post-hoc or pre-

textual." *See also In re Opening Private Rd. for Benefit of O'Reilly*, 5 A.3d 246, 258 (Pa. 2010). Unlike under the federal standard, the Pennsylvania standard does not allow a condemnation based on "[t]he mere conferral of an indirect or incidental benefit to the public." *Robinson Twp. v. Cmmw.*, 637 Pa. 239, 320 (Pa. 2016).

Other states, too, have employed a separate state-constitutional analysis to protect property more than federal courts do under *Kelo*. *See, e.g., City of Norwood v. Horney*, 853 N.E.2d 1115, 1140 ¶ 72 (Ohio 2006) (employing independent state constitutional analysis because *Kelo*-style deference is "a wholesale abdication of judicial review."). *See also Manzara v. State*, 343 S.W.3d 656, 678 n.18 (Mo. 2011) (en banc); *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110, 1126–27 (Nev. 2006); *Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 651 ¶ 19 (Okla. 2006) (and cases cited therein).

Applying a more protective rational basis analysis in licensing cases like this one is likewise justified, and—as *Patel* makes clear—for the same reason. The federal rational basis test was created in part to maximize flexibility for states, including allowing them to provide stronger protections when needed. Brennan, *supra*, at 503. The federal courts are at a disadvantage when crafting stricter constitutional standards—a disadvantage not faced by state courts—because it must fashion nationwide standards, whereas the state can fashion standards better

suited to local circumstances. Sutton, *supra* at 16-17 (App.49–50). State courts are also more responsive to state citizens than federal courts are, and are therefore more accountable. Federal jurisprudence has become excessively deferential in this area—often, as in *Meadows,* with terrible results. *See* Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 Notre Dame J.L. Ethics & Pub. Pol'y 381, 401–03 (2012) (describing the tragic aftermath of *Meadows*).

That does not mean, of course, that Pennsylvania rational basis is not deferential—it is. But while the *policy* questions of regulation are matters for the legislature—and deserving of deference—policies that are so burdensome that they unduly or arbitrarily intrude on individual liberty exceed the legislature's purview and become constitutional questions.[6] Courts must then decide. Maintaining the independent state jurisprudence of rational basis helps ensure that federalism works as it should: fostering greater protection for individual rights, while allowing states to interpret their own constitutions, which, after all, were written for different reasons, with different language, at different times, than the federal version.

[6] It is obvious, for example, that if the legislature required Sally Ladd to get a law license, or an architecture license, before operating her website, such demands would be unreasonable and unconstitutional—even though one might contend that legal issues or architectural issues are relevant to the renting out of homes. *Cf. Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1103 n.4 (S.D. Cal. 1999). *Policy* questions are legislative questions—but *constitutional* questions are for courts.

This Court should continue to apply the Pennsylvania standard of rational basis, which requires not only that a law be reasonable, but also that it not be arbitrary, or so burdensome as to be "patently beyond the necessities of the case." *Shoul*, 173 A.3d at 677 (quoting *Gambone*, 101 A.2d at 636–37). That is the least the Court can do to protect the vital rights to "enjoy[] … liberty, [to] acquir[e], possess[] and protect[] property and reputation, and [to] pursu[e] … happiness." Pa. Const. art. I § 1.

CONCLUSION

The rational basis test should be applied on the merits, not at the preliminary objection stage. And the less deferential, more protective version of rational basis that Pennsylvania courts use should be maintained. The decision should be *reversed*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Brief of *Amicus Curiae* Goldwater Institute in Support of Petitioners complies with all requirements of Pennsylvania Rules of Appellate Procedure Rules 124, 531 and 2135. Specifically, the undersigned certifies that *Amicus Curiae*'s Brief but complies with Rule 531(b)(3) because it contains 6,967 words, according to the word processing software used to prepare the brief, excluding those parts of the brief exempted by Rule 2135(b).

Dated: October 9, 2018

/s/ Walter Zimolong
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CERTIFICATE OF SERVICE

I, Walter Zimolong, hereby certify that on October 9, 2018, I caused to be served a true and correct copy of the foregoing document titled Brief of *Amicus Curiae* Goldwater Institute in Support of Petitioners to the following:

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APPENDIX