No. 260PA22 TENTH DISTRICT

****

SUPREME COURT OF NORTH CAROLINA

****

Jay Singleton, D.O.; and Singleton Vision Center, P.A.,

Plaintiffs,

v.

North Carolina Department of Health and Human Services; Roy Cooper, Governor of the State of North Carolina, in his official capacity; Kody H. Kinsley, North Carolina Secretary of Health and Human Services, in his official capacity; Phil Berger, President Pro Tempore of the North Carolina Senate, in his official capacity; and Time Moore, Speaker of the North Carolina House of Representatives, in his official capacity,

Defendants.

From Wake County
No. COA21-558

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BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS

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INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

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BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The identity and interest of amicus are set forth in the accompanying motion for leave to file.

SUMMARY OF ARGUMENT

The Court of Appeals committed reversible legal error by disregarding the Plaintiffs' factual allegations and dismissing their well-pleaded Law of the Land claim at the 12(b)(6) stage without fact-finding, based solely on the legislature's factual assertions in the challenged law itself. *See Singleton v. N.C. Dep't of Health & Hum. Servs.*, 284 N.C. App. 104, 113 ¶ 33, 874 S.E.2d 669, 676 (2023). That decision committed a common—but critical—legal error, confusing the pleading stage with the merits stage of litigation.

The rational basis test applies at the *merits* stage, not at the 12(b)(6) stage. *See generally* Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 Geo. Mason U. Civ. Rts. L.J. 43, 44 (2014). That is because the rational basis test is a *rebuttable factual presumption*, not a shield against all constitutional challenges. In other words, because "[t]he presumption of constitutionality is rebuttable," and the rational basis test "imposes upon the litigant who alleges invalidity the burden of proving that the [challenged law] is unreasonable," *Orange Cnty. v. Heath*, 278 N.C. 688, 692, 180 S.E.2d 810, 812 (1971) (citation omitted), the plaintiff must have the *opportunity* to disprove a law's

[1] No person or entity other than amicus curiae, its members, or its counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

presumptive constitutionality. She does that at the *merits* stage. But at the 12(b)(6) stage, the court is *only* supposed to consider the well-pleaded allegations in her complaint, to determine whether, if proven at trial, her allegations would entitle her to judgment. *Huss v. Huss*, 31 N.C. App. 463, 469, 230 S.E.2d 159, 163–64 (1976). The court is *not* supposed to make merits-based determinations at that stage—but that's just what the Court of Appeals did in Paragraph 33 of its decision.

This brief explains how that error came about, and how courts ought to address 12(b)(6) motions in rational basis cases.

The solution is actually quite simple: a court must take all well-pleaded allegations as true, and allow the plaintiff the opportunity to disprove the presumptive (factual) constitutionality of the challenged law. *See Giarratano v. Johnson*, 521 F.3d 298, 303–04 (4th Cir. 2008). That simply *must* be the proper way to address the intersection of 12(b)(6) and rational basis, because if it were otherwise—if, as the court below held, a judge can dismiss a rational basis challenge *at the pleading stage,* based solely on the fact that the legislature claims its statutes are legitimate—then it would be logically impossible for a plaintiff ever to win a rational basis case. But, of course, plaintiffs do win rational basis cases. *See, e.g., Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Joyner v. Perquimans Cnty. Bd. of Educ.*, 231 N.C. App. 358, 367, 752 S.E.2d 517 (2013).

Indeed, if legislative fact-finding is alone enough to warrant dismissal of a rational-basis challenge, then it would be impossible for any *subsequent* changes in

the facts to render a law unconstitutional. Yet this Court has always said that a law that's constitutional under today's facts may very well become unconstitutional under tomorrow's facts. *See, e.g., City of Winston-Salem v. S. Ry. Co.*, 248 N.C. 637, 642, 105 S.E.2d 37, 41 (1958); *City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. 454, 457–58, 168 S.E.2d 389, 392 (1969). Plaintiffs should be permitted to prove to a court that a law is irrational under the state of facts today, and to rebut the presumption of constitutionality.

ARGUMENT

I. The Court of Appeals erred by confusing the 12(b)(6) dismissal standard with the rational basis standard.

A. The court erred by testing the facts instead of the pleadings at the 12(b)(6) stage.

The court below succumbed to a legal error regarding the standard that plaintiffs must meet to survive 12(b)(6) motions in "rational basis" lawsuits. This Court should clarify these two different standards, both to allow this meritorious case to proceed, and to ensure against confusion in future cases.

The rational basis test and the 12(b)(6) standard are different animals entirely. Rational basis is a *factual* presumption that applies at the *merits* stage of a lawsuit. It holds that, as a general rule, the legislature does not act arbitrarily or unconstitutionally, and that it bases its policies on true facts and circumstances within its legitimate reach. The 12(b)(6) standard, by contrast, holds that a court should dismiss a case only if the plaintiff would not be entitled to prevail even if all her allegations were true. The 12(b)(6) rule is lenient toward the plaintiff: as long

as the plaintiff adequately[2] alleges facts which, if proven true, would entitle her to prevail, she should be allowed to gather and present those facts, and the court should decide the case based on them. The court should *not* dismiss "merely because the claimant's case is weak and he is unlikely to prevail on the merits." *Huss*, 31 N.C. App. at 469, 230 S.E.2d at 163.

These two rules become confused sometimes, because the rational basis test is so lenient that some judges draw the erroneous conclusion that it's *never* possible for a plaintiff to prove a law irrational. That is, that the test requires a court to presume so strongly against the rational basis plaintiff that she could never win anyway. But that's plainly wrong, because plaintiffs can and do win rational basis cases. *See, e.g., Treants Enterprises, Inc. v. Onslow Cnty.*, 83 N.C. App. 345, 355, 350 S.E.2d 365, 372 (1986), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987).

Nevertheless, the error persists, and the court below committed it. That court said the Plaintiffs could not prevail—and therefore should be dismissed before getting a chance to discharge their burden of proof—based exclusively on the legislature's own "findings of fact." *Singleton*, 284 N.C. App. at 113 ¶ 33, 874 S.E.2d at 676. That was error because it confused the pleading standard with the merits standard. "The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading…. The function of a motion to dismiss is to test the law of a claim, *not the facts which support it*. This rule generally precludes dismissal except in

[2] Obviously this standard is not satisfied by merely "conclusory" allegations. *Estate of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 493, 751 S.E.2d 227, 233 (2013).

those instances where the face of the complaint discloses some insurmountable bar to recovery." *Warren v. New Hanover Cnty. Bd. of Educ.*, 104 N.C. App. 522, 525, 410 S.E.2d 232, 234 (1991) (emphasis added, marks and citations omitted).

B. How to correctly reconcile the 12(b)(6) and rational basis rules.

Understanding how to navigate the straits between the rational basis test and the 12(b)(6) standard requires consideration of how the rational basis standard came about. That test was invented by the U.S. Supreme Court in *Nebbia v. New York*, 291 U.S. 502, 537 (1934),[3] and later adopted by this Court. *See* Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L. Rev. 1, 29 (2022) ("North Carolina's courts never used rational basis language until after the federal courts began using that test…").

But only nine months after *Nebbia*, the U.S. Supreme Court issued a ruling intended to clarify how the rational basis standard works. In *Borden's Farm Prod. Co. v. Baldwin*, 293 U.S. 194 (1934), it emphasized that rational basis is only a *rebuttable, factual* presumption, *not* a legal barrier to rational basis lawsuits: "It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault," the Court said. "Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack." *Id.* at 209.

In other words, when a law is challenged, "there is a presumption" by courts that "[the] state of facts" is such that the law will be sustained, *id.*—but a plaintiff

[3] It displaced the prior test of "affected with a public interest," which had been fashioned in *Munn v. Illinois*, 94 U.S. (4 Otto) 113 (1876).

can overcome that presumption if, "after a full showing of facts, or opportunity to show them," she proves that the law "is without rational basis." *Id.* at 210. In other words, a trial court must allow a plaintiff the opportunity to meet her burden of proof by introducing evidence that will show that the law fails the rationality test.

Baldwin was important because the lower court had held the opposite: the court of appeals had declared that as long as it could hypothesize some potential rationale behind the statute, the law would survive constitutional attack even if the facts of reality were at odds with those the judge hypothesized. *See Borden's Farm Prod. Co. v. Baldwin*, 7 F. Supp. 352, 354 (S.D.N.Y. 1934). By reversing that decision, the Supreme Court was emphasizing that the 12(b)(6) motion cannot be used as a "get out of court free" card by the government—or, in the Court's words, as "a rule of law which makes legislative action invulnerable to constitutional assault." 293 U.S. at 209.[4]

A year later, in *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935), the Court reiterated the point. In that case, the Tennessee Supreme Court dismissed a constitutional challenge to a law regulating railway crossings, holding that the trial judge had erred by allowing any factfinding at all, since the case was a rational basis case, and therefore facts were simply irrelevant. *See Nashville C. & S. L. Ry. v. Baker*, 167 Tenn. 470, 71 S.W.2d 678, 680 (Tenn. 1934). The U.S. Supreme Court

[4] Justice Cardozo and then-Justice Stone concurred on the grounds that "it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer." *Id.* at 213 (Stone, J., concurring).

reversed, declaring that the state court was wrong to "decline[] to consider the Special facts relied upon [by the plaintiff] as showing that the order, and the statute as applied, were arbitrary and unreasonable." *Walters*, 294 U.S. at 414.

Writing for the majority, Justice Brandeis made clear that one reason the 12(b)(6) motion cannot be used to block fact-finding in this way is that a law which is rational under the facts in place when it is adopted might later become irrational if the facts change. That meant it was "obviously err[or]" for the lower court to "refus[e] to consider" the facts, even though the case fell within the rational basis category. *Id.* at 415–16.

The Court again emphasized this point three years later, in *United States v. Carolene Products*, 304 U.S. 144 (1938), the case most famous for its "footnote four." There, the Court repeated that the rational basis test is only a *factual* presumption, *not* a barrier against litigation: while laws "affecting ordinary commercial transactions" should be presumed valid, the Court said, those laws could be found unconstitutional if "in the light of the facts made known or generally assumed," it was shown to lack a reasonable foundation. *Id.* at 152. Thus, a plaintiff can prevail in a rational basis challenge "by showing to the court" that the "facts" upon which the statute's constitutionality is predicated "have ceased to exist," or by "proof of facts tending to show that the statute as applied to a particular article is without support in reason." *Id.* at 153–54.

Months later, in *Polk Co. v. Glover*, 305 U.S. 5 (1938), it repeated the point yet again, reversing the dismissal of a rational basis case due to the lower court's

failure to permit factfinding. The allegations in the complaint, said the Court, "were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity." *Id.* at 9–10.

More recently, federal courts have made clear that rational basis cases cannot be dismissed at the 12(b)(6) stage based on the presumption of constitutionality or the state's mere assertion that a law is rational. The leading case on this question is *Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir. 1992), in which the Seventh Circuit admitted that it might at first appear "perplexing" how to reconcile the lenient rational basis standard with the 12(b)(6) standard, but said it was still possible to do so: "The rational basis standard, of course, cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard," it said.

> The latter standard is procedural, and simply allows the plaintiff to progress beyond the pleadings and obtain discovery, while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail on an equal protection claim. While we therefore must take as true all of the complaint's allegations and reasonable inferences that follow, we apply the resulting 'facts' in light of the deferential rational basis standard. To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications.

Id. at 459–60. Since *Wroblewski*, numerous federal courts have followed this rule, holding that well-pleaded rational basis cases can proceed beyond the 12(b)(6) stage, notwithstanding that the plaintiff still faces an uphill battle to prevail. *See, e.g.,*

Giarratano, 521 F.3d at 303–04; *Dias v. City and Cnty. of Denver*, 567 F.3d 1169, 1184 (10th Cir. 2009); *Bower v. Vill. of Mount Sterling*, 44 F. App'x. 670, 677–78 (6th Cir. 2002).

It's true that in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), the U.S. Supreme Court said facts are "entirely irrelevant" in rational basis cases, *id.* at 315, but this was plainly incorrect, and the Court has since then backed away from it. Only a year later, it remarked that "even the standard of rationality as we so often have defined it must find some footing in *the realities of the subject* addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (emphasis added), and in *Romer v. Evans*, 517 U.S. 620, 632 (1996), it said that "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." Courts must attend to the actual facts, it said, in order to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633. It and other federal courts have often ruled in favor of plaintiffs in rational basis cases, based on the facts admitted at trial. *See, e.g., U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 537 (1973); *Zobel v. Williams*, 457 U.S. 55 (1982).

It's common sense, of course, that if a rational basis plaintiff bears the burden of affirmatively disproving the rational bases for a challenged law, she must be given the *opportunity* to do so—that is, must be permitted (if her complaint is well pleaded) to prove up her allegations and thereby discharge her burden of proof.

Accordingly, many courts have held that plaintiffs are entitled to proceed past the 12(b)(6) stage notwithstanding the presumptions of the rational basis test.[5] In all these cases, plaintiffs brought rational basis challenges against laws, and survived motions to dismiss because their complaints made allegations which, if proven true, would entitle them to prevail. And many did ultimately prevail. *See, e.g., Dawkins, supra; Cornwell, supra; Merrifield, supra.*

Notably, the standard under the Federal Rule 12(b)(6) is *more* demanding of plaintiffs than is North Carolina's. While federal courts only let plaintiffs survive the 12(b)(6) stage if they bring "plausible" claims, *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), this state has never adopted that rule: "Instead, [they] use the following [more lenient] standard…: '[W]hether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under *some* legal theory. The complaint must be *liberally* construed, and the court should not dismiss the complaint unless it appears *beyond a doubt* that the plaintiff could not prove any set of facts to support his claim which

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[5] *See, e.g., Pittsfield Dev., LLC v. City of Chicago,* No. 17 C 1951, 2017 WL 5891223, at *10–11 (N.D. Ill. Nov. 28, 2017); *Dawkins v. Richmond Cnty. Sch.*, No. 1:12CV414, 2012 WL 1580455, at *4–5 (M.D.N.C. May 4, 2012); *Immaculate Heart Cent. Sch. v. N.Y. State Pub. High Sch. Athletic Ass'n*, 797 F. Supp.2d 204, 211, 216 (N.D.N.Y June 23, 2011); *Munie v. Koster*, No. 4:10CV01096 AGF, 2011 WL 839608, at *3 (E.D. Mo. Mar. 7, 2011); *Frank v. Gov't of the Virgin Islands*, No. CIV. 2009-66, 2010 WL 1417857, at *12–13 (D.V.I. Mar. 31, 2010); *Bench Billboard Co. v. City of Cincinnati*, No. 1:07CV589, 2008 WL 2220625, at *9 (S.D. Ohio May 28, 2008); *Lazy Y Ranch, Ltd. v. Wiggins*, No. CV 06-340-S-MHW, 2007 WL 1381805, at *8 (D. Idaho Mar. 13, 2007); *Merrifield v. Schwarzenegger*, No. 04-0498 MMC, 2004 WL 2926161, at *4–5 (N.D. Cal. July 16, 2004); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1273 (S.D. Cal. 1997) (same).

would entitle him to relief.'" *Holleman v. Aiken*, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584–85 (2008) (citation omitted; emphasis added).

Thus if rational basis plaintiffs can survive a 12(b)(6) motion in federal court, then as a matter of syllogistic logic, they must be able to survive such motions in North Carolina courts—which means they must be permitted to introduce evidence to disprove the presumptive rationality of a challenged law.

Many state courts have likewise allowed rational basis challenges to proceed beyond the pleading stage precisely because plaintiffs must be entitled to prove up their well-pleaded allegations. *See, e.g. Brigham v. State*, 179 Vt. 525, 889 A.2d 715 (2005); *WHS Realty Co. v. Town of Morristown*, 146 N.J. 627, 684 A.2d 1376 (1996); *Comprehensive Acct. Serv. Co. v. Md. State Bd. Pub. Acct.*, 284 Md. 474, 397 A.2d 1019 (App. 1979); *Thorn v. Jefferson Cnty.*, 375 So.2d 780 (Ala. 1979); *Purdie v. Univ. of Utah*, 584 P.2d 831 (Utah 1978); *Shavers v. Kelley*, 402 Mich. 554, 615–17, 267 N.W.2d 72, 95–96 (1978).

In *Brigham*, for example, the plaintiffs challenged the constitutionality of the state's funding system for schools, bringing causes of action that fell within the rational basis test. The trial court, citing concerns of judicial restraint, dismissed. The Vermont Supreme Court reversed: "Whether or not the Legislature has structured the education-funding system so that Vermont students are provided with a substantially equal educational opportunity is a constitutional issue properly before the court," it said.

> The doctrine of judicial restraint does not allow the court to relinquish its duty to interpret the constitution when judicial intervention may

> potentially block legislative action….. The purpose of a Rule 12(b)(6) motion is 'to test the law of the claim, not the facts which support it….' To sustain dismissal, the court must have no doubt that the alleged facts, if proven, would not entitle the plaintiff to relief under any legal theory.

179 Vt. at 527– 28 ¶¶ 10–11, 889 A.2d at 720.

North Carolina courts have never directly addressed the relationship between the 12(b)(6) motion and the rational basis standard, but they have followed federal precedent to the extent of saying that a law rational under one set of facts may become irrational if those facts change—*see, e.g., City of Winston-Salem*, 248 N.C. at 642, 105 S.E.2d at 41; *City of Raleigh*, 275 N.C. at 457–58, 168 S.E.2d at 392—which means, of course, that plaintiffs must be free to prove that the facts have changed. Notably, in this case, the plaintiff squarely alleged that while the facts may have warranted the kind of legislation at issue in this case when it was first adopted in 1978, those facts have changed today, rendering the challenged laws unconstitutional. *See* Complaint at ¶ 49.

Most notably, in *Howell v. Cooper*, No. COA22-571, 2023 WL 5688779 (N.C. App. Sept. 5, 2023), and *Kinsley v. Ace Speedway Racing, Ltd.*, 284 N.C. App. 665, 877 S.E.2d 54 (2022), decided just months ago, the court of appeals refused to dismiss rational basis lawsuits under 12(b)(6).

Both cases concerned the state's COVID-19 "lockdown" orders. In *Howell,* bar owners challenged the constitutionality of these orders, arguing among other things that they violated the state Constitution's "Fruits of One's Labor" Clause. *See id.* at *1. They alleged also that the orders violated the rational basis test

because they did not apply to restaurants, wineries, etc., but did apply to bars. *See id.* at *5. The court of appeals said that this and other allegations satisfied the 12(b)(6) rule because they "coherently pleaded [that] the Governor's orders violated [the plaintiffs'] constitutional right to earn a living" and "allege[d] … colorable constitutional claim[s]" under other clauses. *Id.* Because that's all the 12(b)(6) standard requires, the court said "the trial court did not err in denying the Motion to Dismiss." *Id.* at *6.

The *Kinsley* court was even clearer. There, too, business owners challenged the constitutionality of the shutdowns on rational basis grounds, and the government argued that the case should have been dismissed at the 12(b)(6) stage. *See* 284 N.C. App. at 676 ¶ 29, 877 S.E.2d at 62–63. The court said that was wrong: because the plaintiff adequately pleaded "that the Abatement Order … [was] unconstitutional as applied to [him]," the plaintiff was entitled to introduce "facts … at a later stage of trial" which "may show" that the plaintiff was correct. *Id.* That meant the case could proceed.

Here, however, the court of appeal barred the Plaintiffs from introducing facts to meet their burden of proof, and dismissed based entirely on the state's own "findings of fact" in the statute—that is, relying solely on the self-serving statements of one side of the dispute and ignoring the arguments on the plaintiffs' side. *Singleton*, 284 N.C. App. at 113 ¶ 33, 874 S.E.2d at 676. That was plain legal error, which misunderstood the relationship between the 12(b)(6) rule and the rational basis test, and perverted that test into exactly what it is not supposed to

be: a "conclusive presumption" in favor of the government that "makes legislative action invulnerable to constitutional assault." *Baldwin*, 293 U.S. at 209. That was reversible error.

II. Actual facts—not just government's assertions—*must* matter in constitutional litigation.

In *Kinsley, supra*, this Court remarked that the Constitution's protections for economic freedom "appl[y] when our government, most often the legislature, enacts a scheme of legislation or regulation *that purports* to protect the public from undesirable actors within occupations." 284 N.C. App. at 675 ¶ 27, 877 S.E.2d at 62 (emphasis added). The italicized phrase underscores the fact (which is true of *all* constitutional rights) that the Constitution can only effectuate its purposes if courts attend to the *actual* facts, and not mere hypotheticals or the bare assertions of one party to the litigation, even if that party is the government.

Here, again, confusion abounds, sparked by misunderstanding of the role that deference plays in these kinds of cases. The purpose of judicial deference—whether it be of the rational basis variety or any other—is to keep the courts within their legitimate limits and to respect the appropriate authority of other branches. *Cf. Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181–82, 594 S.E.2d 1, 16 (2004). But deference must have limits if the rule of law is to have any meaning, and one of those limits is that courts must be able and willing to look behind the legislature's *purported* rationale for any statute. Were it otherwise, the court would be "abdicat[ing] its judicial function," *Macon v. Murray*, 231 N.C. 61, 62, 55 S.E.2d 807,

808 (1949), and replacing judicial review with "a rubber stamp of all legislative action." *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000).

The judicial function, of course, requires that a judge "exercise … his own mental faculties" and "carefully consider and deliberately weigh the evidence," rather than "perfunctorily place the stamp of his approval" upon the factual assertions of another in a "mechanical" fashion. *Macon*, 231 N.C. at 62, 55 S.E.2d at 808. Obviously the "proper exercise of judicial power requires great deference to acts of the General Assembly." *Holmes v. Moore*, 384 N.C. 426, 428, 886 S.E.2d 120, 124 (2023), but it is *improper* for any court to unquestioningly rubber-stamp the factual assertions of any party, *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014)—including those of the legislature.

Were it otherwise, constitutional boundaries would be rendered meaningless, because the legislature can be counted on to *always* say that their actions benefit the public in some sense. If the rational basis test requires nothing more than the legislature's attestation that its laws are good for the public, then the Constitution's boundaries would "amount[] to a test of whether the legislature has a stupid staff." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992). That is, rational basis would require nothing more than the recitation of magic words: the legislature could pronounce "Close Sesame!" to the courthouse doors.

Judicial vigilance is especially important, as *Kinsley* noted, in cases involving economic freedom. Private interest groups or factions have, from time immemorial, abused the political process to obtain monopolies or other forms of economic

favoritism for themselves at the expense of their rivals—and do so while claiming to benefit the general public. As long ago as the seventeenth century, Sir Edward Coke—one of the law's foremost champions of economic liberty[6]—likened businesses that lobby for laws that prohibit competition to a man in a rowboat, who "look[s] one way and row[s] another: they pretend public profit, intend private." 5 *Commons Debates: 1621* at 76 (Wallace Notenstein, et al., eds. 1935) (spelling modernized). Nothing has changed since then; in 1984, Justice John Paul Stevens observed that "private parties have used licensing to advance their own interests in restraining competition at the expense of the public interest" throughout history. *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting).

Of course, the self-serving nature of such legislation may not be obvious even to these factions; as the U.S. Supreme Court observed in *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505 (2015), "[d]ual allegiances are not always apparent to an actor"—meaning that private entities may lobby for legislation to protect themselves against competition, and lawmakers may pass such legislation,

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[6] Coke remains the leading source of law on the meaning of the phrase "law of the land." As Chief Justice of England, he issued a series of rulings holding that the individual's right to earn a living free of unreasonable government monopolies was part of the liberty protected by this clause of Magna Carta. *See, e.g., Allen v. Tooley,* 80 Eng. Rep. 1055, 1059 (K.B. 1614); *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218, 1219 (K.B. 1615). In his famous *Institutes of the Common Law*, Coke (then in retirement) wrote that laws that give one particular business or group of businesses a monopoly against competition violate the "law of the land" because they deprive people of the freedom to earn a living. *See* 2 E. Coke, *Institutes* *47. *See further* Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* 17–23 (2010) (describing Coke's legacy regarding the right to earn a living).

while genuinely believing that their actions are good for the public, when in reality such laws serve "private anticompetitive motives." *Id.*

Thus it is crucial for courts—while remaining deferential to legislative decisions—to nonetheless attend to the actual facts in rational basis cases. A fine example of how that works is offered by *Joyner, supra.* That case concerned a school board's decision not to make a job offer to the petitioner for a teaching position. 231 N.C. App. at 359, 752 S.E.2d at 518–19. As the Court of Appeals noted, the board was entitled to judicial deference—such that its decisions would be upheld if they had a "rational basis in the evidence." *Id.* at 365, 752 S.E.2d at 522 (citation omitted). Yet the court relied on "the … evidence in [the] record," *id.* at 367, 752 S.E.2d at 523, which showed that the board's decision was based on only the most superficial analysis: one board member had heard rumors that the applicant was not doing a good job. *Id.* The board "point[ed] to the findings included in its written decision," but the court found that this record "fail[ed] to disclose a rational basis for the [b]oard's decision." *Id.* Indeed, the board's assertions were self-serving, and the court noted that "[t]o accept the Board's 'findings'" at face value "would be to grant the Board unfettered discretion to act arbitrarily…. [W]hile we acknowledge that the Board is to be accorded broad discretion … we cannot ignore the limitations placed on this discretion by our General Statutes." *Id.*

In precisely the same way, courts cannot simply rubber-stamp the legislature's factual determinations without giving the legislature unfettered

discretion to act arbitrarily. Whatever discretion the legislature may have, it must always be subject to proper fact-based, judicial analysis.

If that were not true—if the legislature's factual assertions in its legislation were sufficient to require dismissal of any constitutional challenge to legislation, as the court below held—it would never be possible for a subsequent change in facts to result in a law's unconstitutionality. Yet North Carolina courts have always recognized that a change in the facts can lead to a law becoming unconstitutional. *City of Winston-Salem*, 248 N.C. at 642, 105 S.E.2d at 41; *City of Raleigh*, 275 N.C. at 457–58, 168 S.E.2d at 392.

What's more, if the role of the judiciary is, at least in part, to protect disenfranchised or politically vulnerable minorities against the factionalism and abusive majoritarianism of the legislative process, then entrepreneurs and those seeking to start new businesses certainly qualify for that protection. As Professor Robert McCloskey noted,

> 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 more chance against the entrenched influence of the established bartenders and master plumbers than the Jehovah's Witnesses had against the prejudices of the Minersville School District.

Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 50.[7]

[7] McCloskey was referring, of course, to *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), which was overruled in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

While deference to the legislature is often explained on the grounds that the legislature speaks for "the people," this is not accurate. The will of the people is manifested in the *Constitution*, not in mere legislation, which only represents the will of a particular legislature at a particular time. *Hoke v. Henderson*, 15 N.C. 1, 7–8 (1833). When courts declare a law unconstitutional, they are *enforcing*, not defying, the will of the people, which is expressed in the Constitution, not in the statute. To deny this, "'would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves.'" *Long v. Watts*, 183 N.C. 99, 110 S.E. 765, 769 (1922) (quoting *The Federalist* No. 78 at 524 (J. Cooke, ed., 1961) (Alexander Hamilton)).

The bottom line is twofold: it is emphatically the role of the judiciary to enforce the *law*—that is, the Constitution—not to uphold any particular statute—and faithfulness to the Constitution requires courts to consider the actual facts, not to rely upon the mere say-so of a party to the litigation. *Regardless* of whether the right to earn a living is regarded as "fundamental"—and the court of appeals' denial in this case that it is fundamental, *see Singleton*, 284 N.C. App. at 113 ¶ 30, 874 S.E.2d at 676, is impossible to square with cases that use the word "fundamental" to describe this right[8]—wholesale deference of this sort is unjustifiable, because *even*

[8] *See, e.g., Howell,* 2023 WL 5688779, at *6; *Kinsley*, 284 N.C. App. at 673 ¶ 23, 877 S.E.2d at 61; *King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014); *Krueger v. N.C. Crim. Just. Educ. & Training Standards Comm'n*, 230 N.C. App. 293, 302, 750 S.E.2d 33, 41 (2013); *Walker v. City of Charlotte*, 262 N.C. 697, 703, 138 S.E.2d 501, 505 (1964); *State ex rel. Util. Comm'n v. Atl. Greyhound Corp.*,

in rational basis cases, a plaintiff has the right to introduce evidence to overcome the presumption of constitutionality with an adequate factual showing. The court of appeals erred by disregarding evidence and relying wholly on the factual assertions of the legislature.

CONCLUSION

The decision of the Court of Appeals should be *reversed*.

Respectfully submitted this 1st day of November 2023 by:

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252 N.C. 18, 22, 113 S.E.2d 57, 61 (1960); *Roller v. Allen,* 245 N.C. 516, 518–19, 96 S.E.2d 851, 853–54 (1957). *Contra, Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 537, 571 S.E.2d 52, 60 (2002) ("The courts of this State have more recently emphasized that economic rules and regulations do not affect a fundamental right for purposes of due process and equal protection." (citing cases)).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS has been served this day by e-mail, addressed as follows:

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