IN THE SUPREME COURT

STATE OF ARIZONA

GREG MILLS and SOUTHWEST ENGINEERING CONCEPTS, LLC, Plaintiffs/Appellants, v. STATE OF ARIZONA, Defendant/Appellee/.	Supreme Court No. CV-25-0002-PR Court of Appeals Division Two Case No. 2 CA-CV 2023-0240 Maricopa County Superior Court No. CV2019013509

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The Goldwater Institute is well known to this Court as a Phoenix-based public policy foundation dedicated to principles of individual liberty and economic freedom. Through its Scharf-Norton Center for Constitutional Litigation, it often represents parties or appears as amicus in cases involving the constitutional right to earn a living. *See, e.g.,* *Singleton v. North Carolina Dept. of Health & Hum. Servs.,* 906 S.E.2d 806 (N.C. 2024); *Raffensperger v. Jackson*, 888 S.E.2d 483 (Ga. 2023). The Institute participated as amicus at an earlier stage of this case. *Mills v. Arizona Bd. of Tech. Registration*, 253 Ariz. 415 (2022).

Institute scholars drafted the Right to Earn a Living Act, 2017 Ariz. Sess. Laws, ch. 138, § 6 (1st Reg. Sess.), and other statutes to protect this crucial individual right, *see, e.g.,* H.B. 2019 (2023), and have published extensively on its constitutional and social dimensions. *See, e.g.,* Sandefur, *The Right to Earn a Living* (2010); Flatten, *CON Job*, Goldwater Inst. (Sept. 25, 2018); Slivinski, *Bootstraps Tangled in Red Tape*, Goldwater Inst. (Feb. 10, 2015).

INTRODUCTION AND SUMMARY OF ARGUMENT

The lower court improperly applied *federal* jurisprudence to answer an *Arizona* question: whether the licensing requirement satisfies the Privileges and Immunities and Due Process of Law Clauses of the *Arizona* Constitution. Opinion at ¶¶ 36-38. There is no justification whatever for using the federal rational basis test to interpret these state constitutional provisions. On the contrary, the "anything goes" federal test is infamous for being little more than a rubber stamp[1] of whatever a government entity does. It is not the proper way to apply Arizona's Constitution.

Quite the opposite: the right to earn a living is a fundamental right, deeply rooted in Arizona's history and tradition, and essential to any scheme of ordered liberty. It is as basic a right as freedom of speech or worship. It deserves the greatest judicial solicitude.

[1] *Patel v. Texas Dep't of Licensing*, 469 S.W.3d 69, 95 (Tex. 2015) (Willett, J., concurring) (describing federal rational basis as "a rubber stamp"); *Wegleitner v. Sattler*, 582 N.W.2d 688, 699 ¶ 34 (S.D. 1998) (calling it "anything goes"); *Warden v. State Bar*, 982 P.2d 154, 17576 (Cal. 1999) (Brown, J., dissenting) (same); *Burris v. Emp. Rels. Div./Dep't of Lab. & Indus.*, 829 P.2d 639, 642 (Mont. 1992) (Trieweiler, J., dissenting) (same); *Arceneaux v. Treen*, 671 F.2d 128, 136 (5th Cir. 1982) (Goldberg, J., concurring) (same).

ARGUMENT

I. The Court of Appeals applied the wrong standard of scrutiny.

The court below relied on *Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550, 555–56 (1981), to apply the federal rational basis test to Petitioner's claims. But *Arizona Downs*'s use of *federal* jurisprudence to decide *Arizona* constitutional questions cannot be justified on the basis of history, text, or policy.

The U.S. Supreme Court invented the "rational basis" test in *Nebbia v. People of New York*, 291 U.S. 502, 537 (1934), to interpret the federal Constitution, and did so more than twenty years *after* Arizona's Constitution was adopted. What's more, *Nebbia* was rooted in federalism concerns—it sought to preserve states' autonomy to "adopt whatever economic polic[ies]" they chose. *Id.* But those federalism concerns have no applicability in the state constitutional context.

Also, while that Court hastened to clarify that rational basis is "*not* a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault," *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934) (emphasis added), it has been treated just that way. Many courts—including *Arizona Downs*—have said it requires courts to manufacture their own, purely hypothetical justifications for challenged statutes,

and uphold those laws based on these acts of pure imagination. *See* Opinion at ¶ 36 ("a statute will be upheld if it has *any* conceivable rational basis" (citation omitted)).

That's not what the test originally called for, *see* *Baldwin*, 293 U.S. at 209 (warning courts *not* to "treat[] any fanciful conjecture as enough to repel attack"), but federal courts have done just that, even saying facts are "constitutionally irrelevant" in rational basis cases. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 318 (1993) (citation omitted).

This has led the federal test to be characterized as "invit[ing] [judges] to cup our hands over our eyes and then imagine if there could be anything right with the statute." *Arceneaux*, 671 F.2d at 136 n.3 (Goldberg, J., concurring). But it's also said the opposite. *See* *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("we insist on knowing the relation between the classification adopted and the object to be attained"). This has led, at best, to confusion—and at worst, to judicial abdication.

The point is, the federal rational basis test, whatever it is, never belonged in Arizona jurisprudence. It *is* not, in fact, Arizona jurisprudence. To the extent it has been incorporated into Arizona jurisprudence, it should be ejected.

A. Parroting the federal "rational basis" test cannot be justified on the basis of Originalism.

As this Court said in *Mountain States Telephone & Telegraph Co. v. Arizona Corporation Commission*, 160 Ariz. 350, 356 (1989), Arizonans "adopted the

Arizona Constitution by popular election," and adopted the state declaration of rights before most of federal constitutional rights were "incorporated" to the states. "Thus, our framers and people must have intended the Arizona declaration of rights to be the main formulation of rights and privileges conferred on Arizonans." *Id.*

If this Court's role is "to give [constitutional] terms the original public meaning understood by those who used and approved them," *Matthews v. Indus. Comm'n*, 254 Ariz. 157, 163 ¶ 29 (2022), it should focus on what Arizonans in 1912 understood "due process of law" or "privileges and immunities" to mean—not on what the federal Supreme Court thinks they mean today, or thought in 1934, when it invented its rational basis test.

Arizona's framers had a healthy respect for the right of individuals to engage in productive pursuits and enjoy the fruits of their labors. *See* Avelar & Diggs, *Economic Liberty and the Arizona Constitution*, 49 Ariz. St. L.J. 355 (2017). Tracing as far back as the 1600s, this right was not only one of the "liberties" protected by the "due process of law," but as one of the "privileges and immunities" of citizens. *See* Calabresi & Leibowitz, *Monopolies and the Constitution*, 36 Harv. J.L. & Pub. Pol'y 983 (2013).

The most famous definition of "privileges and immunities" came in *Corfield v. Coryell,* 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230), which said it includes "the right to acquire and possess property … and to pursue and obtain

happiness and safety." The Fourteenth Amendment's framers based their Privileges or Immunities Clause on *Corfield*. *See* Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1398–401 (1992). It was so much the consensus view that one court said in 1880 that "[n]o enumeration would … be attempted of the [phrase] privileges [and] immunities … which would exclude the right to labor for a living." *In re Tiburcio Parrott*, 1 F. 481, 498 (C.C.D. Cal. 1880).

Nine years later, when Washington drafted its Bill of Rights—on which Arizona's is based—both "due process of law" and "privileges and immunities" were understood to encompass a robust right to economic freedom. This was particularly important in cases involving licensing laws, which "absolutely burgeoned" after the Civil War, as existing businesses got them passed to exclude competition and raise prices, often under the pretense of protecting public safety. Friedman, *A History of American Law* 340 (3d ed. 2005).

In *State v. Smith*, 84 P. 851 (Wash. 1906), Washington's Supreme Court struck down portions of a licensing law for plumbers. It emphasized that although the government obviously may regulate businesses to protect public safety, courts cannot simply rubber-stamp the legislature's claim that licensing actually does this. Government's power to regulate, "however broad and extensive, is not above the Constitution," so licensing requirements "must have some relation" to the purposes

"protect[ing] the public health and secur[ing] the public comfort and safety … . Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded." *Id.* at 851, 854 (citations omitted).

That statute was unconstitutional because while it required master plumbers to obtain licenses, no such requirement applied to journeymen. *Id.* at 853. That and other flaws showed that it lacked any *actual* connection to public safety; it was really just an attempt to prevent competition against licensees. That meant it was arbitrary—and not "Due Process of Law."[2] If such statutes were upheld, the court said, "it will be but a short time before a man cannot engage in honest toil to earn his daily bread without first purchasing a license or permit from some board or commission." *Id.* at 854. *Accord, State v. Walker*, 92 P. 775, 778 (Wash. 1907).

Not only was the right to earn a living understood as one of the "liberties" protected by Washington's Due Process of Law Clause, it also came within the Equal Privileges or Immunities Clause. *See, e.g., Barker v. State Fish Comm'n*, 152 P. 537 (Wash. 1915).

Thus the prevailing understanding when Arizona copied Washington's Bill of Rights was that these clauses provided meaningful protection for the right to

[2] It was widely accepted at the time of Arizona statehood that the phrase "due process of law" forbade laws that were "arbitrary"—meaning statutes that lack a *genuine* connection to a legitimate public goal. *See Hurtado v. People of California*, 110 U.S. 516, 536 (1884).

pursue an occupation without unjustified government interference—and that courts must *actually examine* whether a challenged law *truly* protects public health and safety—not just take the government's word for it.

Not until 20 years after Arizona statehood did federal courts invent their rational basis test. And even then, it instructed lower courts *not* to conjure up "fanciful conjecture[s]" to justify challenged statutes. *Baldwin*, 293 U.S. at 209. Only in *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955), more than four decades after Arizona statehood, did the U.S. Supreme Court say judges should manufacture hypothetical rationalizations for challenged statutes. (Then it appeared to back away from that position in such cases as *Eisenstadt v. Baird*, 405 U.S. 438, 450-52 (1972), and *Zobel v. Williams*, 457 U.S. 55, 65 (1982)).

Whatever the federal rational basis test means nowadays, it *cannot* be true that the framers and ratifiers of Arizona's Constitution expected courts to uphold the constitutionality of licensing laws by rubber-stamping legislative assertions that they're constitutional, or inventing their own hypothetical justifications for such laws. Yet that's just what *Arizona Downs* called for: "the statute will be upheld if it has *any* conceivable rational basis to further *a* legitimate governmental interest." 130 Ariz. at 555 (emphasis added).

If this Court's job is to apply the "the original public meaning" of constitutional terms as "understood by those who used and approved them,"

Matthews, 254 Ariz. at 163 ¶ 29, it *cannot* be correct to interpret those terms by parroting the methodology of *federal* cases interpreting a *different* constitution, decided *two decades after* Arizona's Constitution was ratified. It is literally impossible for our framers to have "understood" or "approved" the use of a federal theory invented only decades later. *See further* *State v. Lupo*, 984 So.2d 395, 408 (Ala. 2007) (Parker, J., concurring) (since Alabama's constitution was written in 1901, it was senseless to interpret based on federal cases from the 1930s).

B. Nor can it be justified on the basis of textualism.

Employment of the federal "anything goes" test also cannot be justified on textual grounds.[3] Neither the phrase "rational basis" nor anything like it appears in our Constitution, which draws no distinction between economic liberty and other kinds of freedom.[4] Instead, it protects all "liberty," "privileges," and "immunities" equally. Ariz. Const. art. II §§ 4, 9.

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[3] Bizarrely, the State argues in its Response to the Petition (at 12) that this Court "should not follow other states with different constitutional language and history"—while simultaneously urging the Court to employ the federal rational basis test, which was fashioned to interpret a constitution with different language and history!

[4] Such a distinction makes no sense, as even the U.S. Supreme Court has admitted. *Cf.* *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause … should be relegated to the status of a poor relation."); *see also* *United States v. Carlton*, 512 U.S. 26, 41 (1994) (Scalia, J., concurring) ("the categorical and inexplicable exclusion of so-called 'economic rights' [from substantive due process protection] (even though the Due Process Clause explicitly applies to 'property') unquestionably involves policymaking rather than neutral legal analysis.").

If anything, it protects economic freedoms *more* than other rights. It mentions "property" and its synonyms well over 100 times, and "trades" and "businesses" of various kinds (e.g., agriculture, aviation, mining) at least 25 times—as compared to, say, "religion" or "religious," which are mentioned only about a dozen times, or free speech, which is mentioned exactly once.

Moreover, the Constitution *expressly* protects the right "to obtain or retain employment." Ariz. Const. art. XXV.

Also, the federal Constitution contains no clause like our equal privileges and immunities clause. While this Court has viewed that Clause as overlapping with the federal Equal Protection Clause, the state language obviously alludes to a concern "to secure equality of opportunity" not present in the federal language. *Valley Nat'l Bank of Phoenix v. Glover*, 62 Ariz. 538, 554 (1945). In any event, when state constitutional language differs from federal constitutional language, there's little justification for reading them as identical. *State v. Gunwall*, 720 P.2d 808, 812 (Wash. 1986).

Textually, "liberty" necessarily includes "[t]he right to follow any lawful vocation, and to make contracts." *City of Tucson v. Stewart*, 45 Ariz. 36, 55 (1935). And given that the Constitution expressly declares that it's government's job "to protect and maintain individual rights," Ariz. Const. art. II § 2, there's no

textual warrant for relegating economic freedom to second-class status, as the federal test does.

Arizona Downs made no effort to justify using the *federal* theory to interpret the *Arizona* text. On the contrary, despite acknowledging that the plaintiffs raised both federal and state claims, 130 Ariz. at 555, it relied without explanation almost exclusively on federal cases interpreting the federal Constitution.[5]

No rationale has therefore *ever* been given as to why a federal test designed to interpret the federal Constitution should be mechanistically applied to the state Constitution despite textual differences. That's because no explanation can be given.

Indeed, the phrase "due process of law" is incompatible with *Arizona Downs*'s rubber-stamp deference. The crucial words in that clause are "*of law*." Not every process is a process of law; an arbitrary, senseless, or fundamentally unfair process—say, a coin-toss—are not a process *of law*. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992). For the same reason, a "process" whereby the legislature—or, here, an unelected bureaucracy—deprives someone of liberty, and pretends that doing so protects the public, when in fact it

[5] The only Arizona cases it cited—*State v. Kelly*, 111 Ariz. 181 (1974), and *Eastin v. Broomfield*, 116 Ariz. 576 (1977)—did nothing more than recite federal jurisprudence.

does not, is an arbitrary act, and therefore not "law." *See generally* Sandefur, *The Conscience of the Constitution* 79-90 (2014).

Simply put, courts *must* engage in meaningful "means-ends" review of any challenged statute. To do otherwise—to simply take the legislature's word for it—is not a process of *law*, any more than it would be to decide a case without reading one side's briefs. Due process *of law* means "a law which hears before it condemns, which proceeds … upon inquiry and renders judgment only after trial." *Marco v. Superior Ct.*, 17 Ariz. App. 210, 212 (1972). The federal "rationalize-a-basis" test, which just accepts the government's say-so as sufficient to uphold a law, falls short of that standard. *Patel*, 469 S.W.3d at 112 (Willett, J., concurring).

C. Nor can it be justified on the basis of policy.

The federal test is bad policy. *See Hettinga v. United States*, 677 F.3d 471, 480-83 (D.C. Cir. 2012) (Brown, J., concurring). It forces judges to ignore facts, making it nearly impossible to protect individuals against the factionalism of politically powerful groups who manipulate the democratic process.[6] Such "abdicat[ion]" of the courts' "constitutional duty" to enforce guarantees for liberty would never be tolerated if the right at issue were, say, the right to vote. *Hettinga*,

[6] *See also* Brown, *A Blind Eye: How the Rational Basis Test Incentivizes Regulatory Capture in Occupational Licensing*, 17 J.L. Econ. & Pol'y 135, 137 (2022) ("The test is far too deferential to the government to serve as an effective check against attempts to undermine the right of occupational freedom in order to protect politically favored actors from competition.").

677 F.3d at 481 (Brown, J., concurring). Yet the test ignores violations of economic liberty, even though far more people actively seek to exercise that right than their right to vote.

The usual rationale for this is that people harmed by unjust economic regulations can lobby the legislature to change the law. But that's totally unrealistic:

> [T]he 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.

McCloskey, *Economic Due Process and the Supreme Court*, 1962 Sup. Ct. Rev. 34, 50. Entrepreneurs or new business owners seeking to get a start are *infinitely* less likely to be able to overcome the well-entrenched beneficiaries of state licensing laws than any "discrete and insular minorit[y]." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

Another rationale for the federal test obviously has no application under the Arizona Constitution: federalism. *Nebbia* was concerned with protecting the states' autonomy to set their own economic regulations without being blocked by federal courts. 291 U.S. at 537. It makes no sense to apply this consideration at the state level, since Arizona is a single, unified entity, not concerned with the

policy diversity that motivates federalism. Yet *Arizona Downs* ignored this fact, parroting the federal courts' rationale for their rational basis test without noting this fallacy: "this rational basis test," it said, "is particularly appropriate to judge statutes in the areas of economics" because "'States are accorded wide latitude in the regulation of their local economies under their police powers.'" 130 Ariz. at 555–56 (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). This simply makes no sense.

II. The right to earn a living is a fundamental right and deserves the fullest constitutional protection.

It's hard to imagine a right more "firmly entrenched in our state's history and tradition and implicit in the concept of ordered liberty" than the right to earn a living. *Standhardt v. Superior Ct.*, 206 Ariz. 276, 281 ¶ 12 (App. 2003).

Not only did this right receive meaningful judicial protection for nearly two centuries before the American Revolution, *see, e.g., Darcy v. Allen*, 77 Eng. Rep. 1260, 1260-61 (K.B. 1602), but protecting it was one of the principal reasons for the Revolution. *See* Mayer, *Substantive Due Process Rediscovered*, 60 Mercer L. Rev. 563, 581 (2009) ("'[p]ursuit of happiness,' as used in the Declaration of Independence … encompassed economic liberty and property rights; it included the right to acquire, possess, and dispose of property."). Arizona's settlers, too, came in search of economic opportunity, such as Joseph and Michael Goldwater,

Polish Jews who fled European persecution to seek their fortunes as merchants. *See* Sheridan, *Arizona: A History* 113-16 (rev. ed. 2012).

The right to earn a living is so deeply rooted in our history and tradition that it's often called "The American Dream." *See, e.g.,* Samuel, *The American Dream: A Cultural History* 173 (2012) (defining the American Dream as "a job you love with which to feed your family."). It's also the Arizona Dream. Economic liberty is so basic to any system of ordered liberty that it is impossible to imagine a free society without the freedom to work as one chooses. *See, e.g., Great Speeches by Frederick Douglass* 52 (Daurio, ed. 2023) ("What is freedom? It is the right to choose one's own employment. Certainly it means that, if it means anything.").

CONCLUSION

Fourteen years after statehood, this Court observed that "the pursuit of happiness, in which the individual is protected by the Constitution of … the state, apply as fully to his right of contract, his right to follow a legitimate vocation untrammeled by unnecessary regulations" as to any other right. *Hartford Fire Ins. Co. v. Jones*, 31 Ariz. 8, 13 (1926) (citation omitted). It deserves the highest legal protection. To the extent that *Arizona Downs* suggested otherwise, it should be overruled.

The Petition should be *granted*.

Respectfully submitted this 9th day of May 2025 by:

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