IN THE SUPREME COURT

STATE OF ARIZONA

GREG MILLS and SOUTHWEST ENGINEERING CONCEPTS, LLC, Plaintiffs/Appellants/Petitioners, v. STATE OF ARIZONA, Defendant/Appellee/Respondent.	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

SUPPLEMENTAL BRIEF OF AMICI CURIAE GOLDWATER INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND CATO INSTITUTE IN SUPPORT OF PLAINTIFFS/APPELLANTS/PETITIONERS

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INTEREST OF AMICI

The amici's interest is set forth in the accompanying motion for leave to file.

INTRODUCTION

This brief addresses the first issue presented: "What Arizona constitutional standard applies to economic liberty claims?" The answer is that economic liberty is a fundamental constitutional right and, consequently, laws restricting it should be subject to strict scrutiny.

By *whatever* test this Court employs, economic liberty is a fundamental constitutional right in Arizona.[1] If the Court uses the "deeply rooted" test, *Standhardt v. Superior Court*, 206 Ariz. 276, 280 ¶ 11 (App. 2003)—it's fundamental. If it uses the "ordered liberty" test, *State v. Arevalo*, 249 Ariz. 370, 373-74 ¶ 11 (2020)—it's fundamental. And if it uses a "living constitution" approach that determines fundamentality based on "evolving standards ... that mark the progress of a maturing society," *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 236 (Iowa 2018) (cleaned up)—it's still fundamental.

And because fundamental rights are accorded the greatest judicial protection, the Court should require that restrictions on this right be "necessary to promote a compelling state interest and … narrowly tailored [to achieve that interest]." *Arevalo*, 249 Ariz. 374 ¶ 15.

[1] Amici take no position on which, if any, of these tests for fundamentality are appropriate. They were all fashioned by *federal* courts interpreting the *federal* Constitution, decades after the adoption of our Constitution. None of them, therefore, were in the minds of those who wrote and adopted Arizona's Constitution.

ARGUMENT

I. Economic liberty is fundamental under the "deeply rooted" test.

The right to work to provide for oneself and one's family is as deeply rooted as any right can be. According to Sir Edward Coke, judicial protections for this right date back at least to 1377, *see* 3 E. Coke, *Institutes* 181 (citing *Peachie's Case*), but certainly by the mid-seventeenth century, it was generally accepted that the individual's right to earn a living without unreasonable government interference (in particular, without being prohibited by licensing restrictions that fail to genuinely protect public health and safety) was secured by the Magna Carta's "law of the land" clause. *See, e.g., Darcy v. Allen*, 77 Eng. Rep. 1260 (K.B. 1603); *The Ipswich Tailors' Case*, 77 Eng. Rep. 1218 (K.B. 1614); *Case of the Bricklayers*, 81 Eng. Rep. 871 (K.B. 1624). *See further* Sandefur, *The Right to Earn a Living* 17-23 (2010).

After leaving the bench, Lord Coke (author of many of these decisions) published his *Institutes*, which included many passages explaining that economic liberty is a basic right protected by "the ancient and fundamental laws of this kingdom." 3 E. Coke, *Institutes* 181 (spelling modernized). The *Institutes* became "the universal elementary book of law students" in the American colonies. *Jefferson: Writings* 1513 (Peterson ed., 1984). Unsurprisingly, therefore, the Patriots placed a high value on economic liberty.

Indeed, Jefferson, Franklin, and other founders protested against laws like the Hat Act,[2] which barred colonists from making hats out of furs trapped on their own land (furs had to instead be sent to Britain to be made into hats, and then sent back to America) and the Iron Act,[3] which forbade colonists from making iron into retail goods and required them to ship iron to Britain to be made into nails,

[2] 5 Geo. 2 c. 22 (1732).
[3] 23 Geo. 2 c. 29 (1749).

horseshoes, etc. *See Jefferson: Writings, supra* at 109-10; *Franklin: Writings* 613 (Lemay ed., 1987). In fact, "the pursuit of happiness" referred to in the Declaration of Independence, 1 Stat. 1 (1776),[4] specifically *is* the right to earn a living free from interference from others or from the state.[5]

After the Revolution, Americans continued to regard economic liberty as a crucial right. Blackstone, whose *Commentaries* became the most popular legal textbook after the Revolution, declared that "at the common law, every man might use what trade he pleased." 1 W. Blackstone, *Commentaries* 415. And James Madison proudly contrasted American law with British trade regulations that, e.g., prohibited the manufacture of buttons or the use of linen for burial shrouds, because such "restrictions, exemptions, and monopolies den[ied] to part of its citizens [the] free use of their faculties, and free choice of their occupations." *Madison: Writings* 516 (Rakove ed., 1999).

Indeed, a foremost objection to slavery was the fact that it deprived the enslaved of their right to earn a living as they chose. "[F]reedom," said Frederick Douglass, means "the right to choose one's own employment…. [W]hen any individual or combination of individuals undertakes to decide for any man when he shall work, where he shall work, at what he shall work, and for what he shall work, he or they practically reduce him to slavery." 4 *The Life and Writings of Frederick Douglass* 158 (Foner, ed. 1955). After the Civil War, the Constitution was

[4] Pursuant to Section 2 of Arizona's enabling act, 36 Stat. 557, 558 (1910), the Declaration is incorporated into our Constitution. *Beck v. Neville*, 256 Ariz. 415, 423 ¶ 26 (2024). Our "individual rights" clause (Ariz. Const. art. II § 2) was consciously chosen to exclude so-called "social" or collective rights. *See* Sandefur, *The Purpose of Government Clauses of State Constitutions* (December 30, 2025).

[5] At the time of statehood, courts generally recognized that the right to "pursue happiness" includes the right to economic liberty. *See, e.g., Marymont v. Nevada State Banking Bd.*, 111 P. 295, 297-98 (Nev. 1910); *Schnaier v. Navarre Hotel & Imp. Co.*, 74 N.E. 561, 562 (N.Y. 1905); *State ex rel. Richey v. Smith*, 84 P. 851, 854 (Wash. 1906); *Bessette v. People*, 62 N.E. 215, 218 (Ill. 1901); *Humes v. City of Little Rock*, 138 F. 929, 932 (C.C.E.D. Ark. 1898).

amended to protect the "privileges or immunities of citizens," which includes the right to economic liberty.[6]

In the years between the end of the Civil War and Arizona's statehood, state and federal courts vigorously protected economic liberty against state infringement. *See, e.g.,* *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897); *Ritchie v. People*, 40 N.E. 454, 455-56 (Ill. 1895); *In re Jacobs*, 98 N.Y. 98, 106-10 (App. 1885); *In re Parrott*, 1 F. 481, 498 (C.C.D. Cal. 1880). In 1889, the U.S. Supreme Court declared "the right of every citizen … to follow any lawful calling, business, or profession he may choose," to be the "distinguishing feature of our republican institutions." *Dent v. W. Virginia*, 129 U.S. 114, 121 (1889).

Naturally, at a time when "incorporation" of the Bill of Rights was in its infancy, most courts upholding the right of economic liberty did so under state constitutions. *See, e.g.,* *Columbia Tr. Co. v. Lincoln Inst. of Ky.*, 129 S.W. 113, 115-16 (App. Ky. 1910); *Wyeth v. Thomas*, 86 N.E. 925, 927 (Mass. 1909); *Valentine v. Berrien Cir. Judge*, 83 N.W. 594, 595 (Mich. 1900). As Virginia's Supreme Court said in 1903, the "liberty" protected by state constitutions includes "the right … to follow such pursuits as may be best adapted to [one's] faculties, and which will give [one] the highest enjoyment … to earn [one's] livelihood." *Young v. Commonwealth*, 45 S.E. 327, 328-29 (Va. 1903).

Of particular significance here are decisions from Washington, from which the authors of our Constitution borrowed much of the Bill of Rights. By 1912, Washington courts had made clear that the "individual rights" protected by Washington's Constitution[7] includes this ancient right of economic liberty. In *In re*

[6] True, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), held that the Clause did not protect this right, but that decision (now widely admitted to have been wrong) did not, in any event, deny that economic liberty is a fundamental right; it simply said this right is "left to the State governments for security and protection." *Id.* at 78.

[7] Wash. Const. art. I § 1; *cf.* Ariz. Const. art. II § 2.

Aubry, 78 P. 900 (Wash. 1904), that state's Supreme Court struck down a city ordinance requiring a license for horseshoeing. Quoting *Allgeyer* to the effect that constitutionally protected "liberty" includes the individual's right "'to earn his livelihood by any lawful calling, [and] pursue any livelihood or avocation,'" the court added that this was "correct," *id.* at 903, and, while acknowledging that the state can regulate businesses to protect "the health and comfort and welfare of the people," found that ordinance did not do so, and was therefore unconstitutional. *Id.* at 902-03. Similarly, in *State ex rel. Richey v. Smith*, 84 P. 851 (Wash. 1906), the court invalidated a licensing requirement for plumbers, because it didn't actually test the applicant's competency; in practice, it established "a sort of guild" which barred competition. *Id.* at 853.

Most strikingly, that court emphasized what we would today call the *fundamentality* of the right to economic liberty: "The public health is entitled to consideration at the hands of the legislative department of the government, but it must be remembered that liberty *does not occupy a secondary place in our fundamental law*." *Id.* at 854 (emphasis added). This was just four years before our Constitution was written.

Finally, in *State v. Walker*, 92 P. 775 (Wash. 1907), the court synthesized these decisions when striking down part of an ordinance requiring a license for barbering. After examining numerous cases that stand for the proposition that economic liberty is one of the "natural rights of the citizen," *id.* at 776, it held that the city could require barbers to prove their competence—because barbers "operate directly upon the person, and therefore affect directly the health, comfort, and safety of the public," *id.*—but could not require them to attend any particular barber college, because that was "unreasonable and arbitrary." *Id.*

This reveals that by the time our Constitution was written, it was generally accepted that among the basic rights of all individuals is the right to earn an honest

living.[8] This was not only a consensus among the legally educated, but among average Arizonans as well. "The right to earn a living," declared the editor of the *Daily Silver Belt*, "is the fundamental right of man." *The People of [the] United States Ought to be Given a Chance to Earn a Living*, Daily Ariz. Silver Belt (Dec. 20, 1908) at 22. The *Arizona Republican* agreed. "The right and liberty to pursue a lawful calling," it declared (quoting a government report), is "one of the greatest, if not the greatest, of the benefits which the social organization confers." *The Boycott,* Ariz. Republican (Mar. 30, 1903) at 2. When the first legislature considered a bill banning non-English-speakers from working in mines, the *Republican* opposed it on the grounds that it "would deprive some thousands of the residents of Arizona of the right to earn a living." *The Kinney Bill*, Ariz. Republican (Apr. 23, 1912) at 4. The *Republican* likewise opposed "closed shops" on the grounds that they would violate "the right to earn a living," *The Gompers Idea*, Ariz. Republican (Jan. 1, 1910) at 4, and the *Silver Belt* supported Grover Cleveland's veto of a business regulation because "the individual has the right to earn a living to feed his family." *Gov. Hughes and His Veto*, Daily Silver Belt (June 19, 1907) at 2.

[8] Thus in 1891, the year Arizonans tried writing their first constitution, a legal scholar explained that the word "liberty" in state constitutions was generally held to include "freedom from restraint in the ordinary pursuits and avocations of the citizen … includ[ing] the right to pursue any lawful occupation in a lawful manner." Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 Harv. L. Rev. 365, 391 (1891). True, Arizonans did not always respect that right. In 1914, they adopted the Alien Labor Law, forbidding businesses from having non-native-born citizens comprise more than 20 percent of its workforce. The U.S. Supreme Court struck this down because "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity" protected by the U.S. Constitution. *Truax v. Raich*, 239 U.S. 33, 41 (1915).

In short, as an Originalist matter , it simply *must* be the case that economic liberty is one of the basic rights protected by our Constitution.[9] That was the general understanding at the time, and it is in the Constitution's text. Not only does it start with the admonition that government exists to protect "individual rights," Ariz. Const. art. II § 2—a term well understood then to encompass economic liberty—but it also contains numerous explicit and implicit protections for this right. In fact, it refers to property, contract, and other economic-freedom concepts more than it refers to *any* other right. It uses the words "business," "trade," "property," or their synonyms over 100 times,[10] whereas it mentions "religion" or "religious" about a dozen, and "speech" only once. If "a fundamental right is one that is 'explicitly or implicitly guaranteed by the Constitution,'" *Evenstad v. State*, 178 Ariz. 578, 586 (App. 1993) (citation omitted), then economic liberty is a fundamental right.

That's not to deny that our Constitution is in many respects a work of "Progressivism." *State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 47 ¶ 10 (2021). Indeed, it contains many forms of Progressive-era economic regulation—everything from the Corporation Commission to an eight-hour workday. But these are literally the exceptions that prove the rule. The very fact that the framers believed it necessary to write these into the Constitution is because freedom of contract was the general rule,[11] so such exceptions had to be stated explicitly. Had

[9] After all, "*Lochner v. New York*, 198 U.S. 45 (1905), was the law of the land." Avelar & Diggs, *Economic Liberty and the Arizona Constitution*, 49 Ariz. St. L.J. 355, 361 n.22 (2017).

[10] It forbids irrevocable franchises, *id.* art. II § 9, special privileges or immunities, *id.* § 13, monopolies, *id.* art. XIV § 15, blacklists, *id.* art. XVIII § 8, the taking of property for private use, *id.* art. II § 17, the intrusion into "private affairs," *id.* § 8, the deprivation of liberty or property without due process, *id.* § 4, the impairment of contracts, *id.* § 25, etc., etc.

[11] *See, e.g., Singer Mfg. Co. v. Rios*, 71 S.W. 275, 276 (Tex. 1903) ("[f]reedom of contract is the rule…."); *James Quirk Milling Co. v. Minneapolis & St. L. R. Co.*, 107 N.W. 742, 743 (1906) ("Exceptions to the general rule which protects the freedom of contract are made in some instances…."); *In re Ten-Hour L. for St. Ry.*

economic liberty been regarded as a "non-fundamental" triviality that could be brushed aside whenever the legislature saw fit, or as a privilege the state could grant or withhold at will, there would have been no need to add, say, Article XVIII to the Constitution, because the framers would have assumed that the legislature could already do those things.

Moreover, western-state Progressives differed from their eastern counterparts in being skeptical of government intervention and its potential for harm. That was why they protected (*inter alia*) the right to one's "private affairs," and made clear that government's job is to "maintain and protect individual rights." Ariz. Const. art. II §§ 2, 8. When a member of the constitutional convention proposed to mandate that businesses pay employees every two weeks, the proposal was rejected because, as another delegate said,

> The laws of this country—the Constitution of the United States—allow me and you to agree that if you work for me for one month I shall pay you ten dollars at stated times during the month until it amounts to one hundred dollars in all. There is no doubt but what that is a constitutional right…. If you pass a law of this kind you deprive a man of the right of making a contract of that kind.

Goff, *Records of the Arizona Constitutional Convention of 1910* at 450 (1991).

Arizona's political culture has always been individualistic, heavily emphasizing economic opportunity and the right to be free of unjustifiable government restraints.[12] "Individualism," declared one newspaper three months after statehood, "is what distinguishes man from the lower animals." *Back to the Constitution*, Copper Era & Morenci Leader (May 10, 1912) at 4. *See also* Reinert, *E Pluribus Unum, in Report of Proceedings of the American Mining Congress in Phoenix* 199 (1915) ("Western development calls for that rampant

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Corps., 54 A. 602, 605-06 (R.I. 1902) (Blodgett, J., dissenting) (ten-hour workday rule "constitutes a unique exception" to "freedom of contract.").

[12] *See* Sheridan, *Arizona: A History* 269 (rev. ed. 2012) (remarking on individualism of Arizona political culture); Berman, *Arizona Politics and Government* 155 (1998) (same).

individualism, the same old notions of freedom, which have made every new country possible.").

The Idaho Supreme Court once observed that "[t]he constitutions of both state and nation were founded upon a capitalistic private enterprise economy and were designed to protect and foster private property and private initiative." *Vill. of Moyie Springs v. Aurora Mfg. Co.*, 353 P.2d 767, 775 (Idaho 1960). That's even truer of Arizona. As this Court observed two years after statehood, "[f]reedom of contract and freedom in the use and disposition of one's own are no less sacred than freedom of speech." *Merrill v. Gordon*, 15 Ariz. 521, 531 (1914).

II. Economic freedom is fundamental under the "implicit in ordered liberty" test.

Legal protections for economic liberty don't rest on mere custom or habit. Such freedom is a principle rooted in human nature, and thus implicit in any scheme of ordered liberty.

Rights are best seen as elements of that freedom which belongs to every person by virtue of the fact that each is a self-directed entity responsible for her actions. None can alienate her self-responsibility, any more than she can her education, tastes, hopes, or fears. And where one has a responsibility—i.e., is accountable for one's actions—one must also have the freedom to choose those actions. *See* Palmer, *Realizing Freedom* 80 (2d ed. 2014); Veatch, *Human Rights: Fact or Fancy?*164-65 (1985).

To survive and thrive, one must provide for oneself—which means one must have the freedom to act for self-preservation. Human flourishing depends on self-initiated thought and action. This means humans must be free from force or fraud to flourish. Thus liberty is best defined as "unobstructed action according to our will, within the limits drawn around us by the equal rights of others." *Jefferson:*

Political Writings 224 (Appleby & Ball eds., 1999). (This latter point reflects the fact that others also have the same right of self-direction.)

Simply put, while people may collaborate to provide for themselves, each is ultimately responsible for her own flourishing—which means she must have a realm of liberty within which to take the steps necessary for that flourishing.[13] *Rights* are particular *instances* of that general liberty; "slices," so to speak, of the "loaf" of freedom. So, e.g., free speech simply means liberty with respect to expression; freedom of religion means liberty with respect to conscience; etc. We conceptualize liberty, in any *specific* context, as a "right," so that the *right* to free speech is *liberty* "sliced" in the context of expression, etc.

In other words, rights are *not* social constructs. They are aspects of the inherent freedom with which each person is born. *See The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825) ("That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.").

The political/legal presumption that people are free to act unless and until they harm others is embodied in the ancient *sic utere* maxim. That, too, is no social construct. It's a necessary consequence of the logical principle that anyone who makes a positive assertion—i.e., who claims he may justly forbid another person from acting—bears the burden of justifying that claim. *See id.* at 107-08 (discussing *onus probandi* with respect to individual liberty).

If it were otherwise—if people were presumptively *un*free until they proved to the government's satisfaction they should have freedom—they would face what

[13] *Cf.* Smith, *Judicial Review in an Objective Legal System* 106 (2015) ("[t]he concept of rights addresses a jurisdictional issue: Who should control an individual's actions—that person himself, or someone else?").

philosopher Anthony de Jasay called "a needle in-the-haystack type of task," because there's always *some* potential objection to her being free, which she'd then be required to disprove. *Justice and Its Surroundings* 150 (2002). Because one can't prove a negative, "the presumption that every act [is prohibited unless approved by others] … would freeze everything into total immobility." *Id.*[14] The presumption of liberty is therefore required by the logical rule of *onus probandi*. *Cf.* *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70 (2022) ("We know of no … constitutional right that an individual may exercise only after demonstrating to government officers some special need.").

That is the (brief) argument for *all* individual rights—be it speech, religion, privacy, or economic liberty. It doesn't depend on appeals to subjective preferences, faith, or tradition, let alone judicial fiat; it depends on the facts of human nature. It's not mere rhetoric, but a literal *fact* that people are "equally free and independent and have certain inherent rights," which include "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Va. Decl. of Rights ¶ 1 (1776).

To put it another way, no mature human is self-evidently marked out as the ruler of another. *See* *Jefferson: Political Writings*, *supra* at 149 ("the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately."). Consequently, each person is a self-owner, responsible for her own survival and success, limited by the equal rights of her fellows. And if she owns her faculties, she necessarily has the right to engage in voluntary commerce with others.

[14] Indeed, she would be stuck in an infinite regress, having to prove that she should be free to prove that she should be free to prove…, etc. *See* Sandefur, *The Permission Society* 8-11 (2016).

Individual rights must therefore include the right to make economic decisions for oneself, just as one has the right to make one's own decisions about travel, what opinions to express, what to read, whom to vote for, etc. It's impossible to imagine "ordered liberty," *Standhardt*, 206 Ariz. at 280 ¶ 11, without the right to engage in economic transactions of one's choice.

The dismal histories of countries where this right has been effectively abolished is proof enough of its vital importance. One need not detail the suffering of such places as the Soviet Union, where efforts to stamp out economic liberty led to unimaginable misery, to recognize that "neither liberty nor justice" have existed where this right was "sacrificed." *Id.* One example suffices: in the 1930s, the USSR effectively outlawed the sale of goods "with the intention of profiting." Hessler, *A Social History of Soviet Trade* 263 (2004). This effective prohibition of all commerce resulted in mass arrests,[15] and only the fact that it was haphazardly and arbitrarily enforced prevented total social collapse. *Id.* at 264-65.

Economic liberty is also logically inextricable from other rights. Obviously, the right to property includes the right to buy, sell, and use it. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992). So, too, the right to a lawyer at one's trial would be meaningless without the right to hire (i.e., pay) the lawyer of one's choosing. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006). The right of free speech would necessarily be curtailed by a law forbidding a person from paying another to disseminate a message, *cf. Meyer v. Grant*, 486 U.S. 414, 422-23 (1988), or from buying a book, *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1052 (Colo. 2002), or from getting a tattoo. *Coleman v. City of Mesa*, 230 Ariz. 352, 358-59 ¶ 23 (2012).

[15] One dissident vividly recalled the way police arrested women "on the street for selling the string shopping bags that they wove at night in their rooms." Grossman, *Everything Flows* 81 (Chandler, trans. 2009).

Economic freedom is inseparable from any system of ordered liberty. Liberty is unimaginable without it.

III. Economic freedom is fundamental under a living-constitution analysis.

If the Court were to apply a "living constitution" approach, economic liberty is still a fundamental right. "'[T]he evolving standards ... that mark the progress of a maturing society,'" *Planned Parenthood*, 915 N.W.2d at 236 (citation omitted), reveal an overwhelming belief in entrepreneurship and the right of economic opportunity.[16] More Americans engage in commerce of some sort today than ever before. Especially revealing is that the number of self-employed people running their own businesses has sharply risen in the past quarter century, now accounting for more than 3/4 of all American jobs.[17] In just the past six years, the number of small businesses has increased from 30.7 million to 34.8 million.[18] This unquestionably reflects a general belief in economic liberty—a principle that long ago became inextricably associated with "the American Dream."[19]

While it was once thought that licensing laws and other regulatory controls could expertly manage an economy and organize it "efficiently," twentieth century economists discovered that this is literally impossible, and that only competition can discern public economic "needs" and obtain efficient resolutions of those needs. *See* Lavoie, *National Economic Planning: What is Left?* (1985). Two discoveries in particular demonstrated the impossibility of central planning.

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[16] *Bipartisan Public Opinion Survey Reveals Significant insights for Growing New Business and Jobs in America*, Right to Start (Sep. 26, 2022).
[17] Shoemaker, *Number of U.S. Nonemployers Grew Faster Than Employer Businesses Nearly Every Year From 2012 to 2023*, Census.gov (July 30, 2025).
[18] *United States Small Business Statistics (2025 Data)*, SellersCommerce (Apr.. 28, 2025).
[19] James Truslow Adams, who coined the term "American Dream," defined it as "the belief in the common man and the insistence upon his having, as far as possible, equal opportunity in every way with the rich one." *The Epic of America* 135 (1931).

The first was the "knowledge problem," which reveals that government entities are literally incapable of rationally organizing an economy, because the information needed to do so literally *doesn't exist* prior to the myriad transactions in the marketplace. *See generally* Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945). The second was the "public choice" problem—i.e., the way that intervention in the economy spurs "rent-seeking" by private entities seeking to obtain regulation in their own favor, rather than the public interest. *See generally* Buchanan & Tullock, *The Calculus of Consent* (1962).

In short, modern economics has proven that whereas government planning might have worked for a primitive horse-and-buggy era, today's complex, interconnected economy is far too intricate to be rationally directed by any centralized authority. Centralized planning is obsolete. *See* Edwards, *Central Planning and Government Failure*, Cato Inst. (Sep. 1, 2015).

Also, since the 1980s, when interest in economic liberty began to revive and Americans started reconsidering old assumptions about regulatory authority,[20] two generations have come of age free to make their own economic decisions in new ways; no erosion of principle going to liberty or personal autonomy has left the principle of economic liberty a mere remnant, and no changes of fact have made plausible the notion that economic freedom is a trivial element of personal liberty, or a mere privilege the state can withhold at pleasure.

If fundamentality turns on whether an asserted right is central to individual self-determination,[21] then economic liberty easily passes the test. Decisions relating to marriage, procreation, and child-rearing are central to personal dignity and autonomy—part of how all people define their own concept of existence—and

[20] This took the form, among other things, of the rise of the "Chicago school" of antitrust thought, deregulation of major transportation industries, and the "silent revolution" of "supply-side economics."
[21] *See, e.g., State v. Watson*, 198 Ariz. 48, 51 ¶ 8 (App. 2000).

so is the right to make economic decisions, including what career to pursue, whether to work for oneself or others, and how to direct one's creative energies to provide for oneself and one's family.

If, on the other hand, fundamentality turns on the role the asserted right plays in the functioning of democratic institutions[22]—like the right to vote or to file a lawsuit—then economic liberty is *again* fundamental, because it has a positive effect on prosperity, the rule of law, and civic virtues such as trust and toleration. *See, e.g.,* *The Freedom and Prosperity Equation* (Negrea, et al., eds., 2023); de Jong, *The Influence of the Market Economy and Economic Freedom on Culture, in Handbook of Research on Economic Freedom* 259-72 (Berggren ed., 2024). Certainly more people in any given year express themselves and their values through economic activity than through voting.

Finally, courts using the living-constitution approach consider recent legal changes, and particularly "'the consistency of the direction of change[s].'" *Roper v. Simmons*, 543 U.S. 551, 566 (2005) (citation omitted). And in recent years, many state courts have adopted stronger protections for economic liberty. *See N. Carolina Bar & Tavern Ass'n v. Stein,* 919 S.E.2d 684, 694-95 (N.C. 2025); *Raffensperger v. Jackson*, 888 S.E.2d 483, 489-91 (Ga. 2023); *Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69, 80-90 (Tex. 2015); *Ladd v. Real Est. Comm'n*, 230 A.3d 1096, 1108-16 (Pa. 2020). These decisions have all gone one direction: no state of which amici are aware has ruled that economic liberty, having previously been regarded as fundamental, is now considered less-than-fundamental.[23] Any way you slice it, economic liberty is a fundamental right.

[22] *See, e.g., State v. Key*, 128 Ariz. 419, 421 (App. 1981).
[23] One exception might be *Yim v. Seattle*, 451 P.3d 694 (Wash. 2019), a property-rights case in which the court bizarrely overruled *sixty-one* previous cases and—by pure *ipse dixit*—adopted rubber-stamp rational basis in the property context.

IV. Rational basis review is out of place in Arizona law.

The Attorney General (AG) says the anything-goes standard known as rational basis scrutiny is "deeply rooted" in Arizona. AG Resp. to GI Br. in Support of Pet. at 2. That isn't true.

The cases she cites, *Dunbar v. Cronin*, 18 Ariz. 583 (1917), *Arizona E. R.R. Co. v. State*, 19 Ariz. 409 (1918), and *City of Tucson v. Arizona Mortuary,* 34 Ariz. 495 (1928), not only don't use the term "rational basis," but weren't even due process or equal protection cases. (Rational basis scrutiny is a due process / equal protection test). *Cronin* was about whether the legislature had constitutional power to appoint a state librarian. After an exhaustive 16 pages of consideration, the court said it did. *Arizona E. R.R. Co.* was about the Corporation Commission's powers, and also involved a thorough exegesis of constitutional language. And whatever *Arizona Mortuary* did, it didn't employ today's rational basis standard.[24] It applied a "substantial relation" test, instead, 34 Ariz. at 507, and said that laws "which, *after giving due weight to the new conditions,* are found clearly not to conform to the Constitution, of course, must fall." *Id.* at 502 (emphasis added). That's not rational basis, under which restrictions on economic freedom are upheld if "'any reasonably conceivable state of facts'" can support them. *Bianco v. Cessna Aircraft Co.*, No. 1 CA-CV 03-0647, 2004 WL 3185847, at *11 ¶ 62 (Ariz. App. Oct. 19, 2004) (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 315 (1993)). Courts don't weigh new conditions, under today's rational basis test, because actual facts "[have] no significance" under that test. *Beach Commc'ns, Inc.*, 508 U.S. at 315.

[24] The court certainly didn't think so in *City of Phoenix v. Collins*, 22 Ariz. App. 145, 147-48 (1974), which distinguished *Arizona Mortuary*'s substantial relation test from the rational basis.

The history of rational basis scrutiny is complex, but to briefly summarize, before *Nebbia v. New York*, 291 U.S. 502 (1934), the prevailing test for whether government intrusion into the market was constitutional was the "affected with a public interest" test from *Munn v. Illinois*, 94 U.S. (4 Otto) 113 (1876). True, one can find pro-deference language in case law before 1934,[25] but only in *Nebbia*, 291 U.S. at 537, was *Munn* overruled and replaced with the rational-basis rule. *See Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 445 n.9 (Cal. 1963). Even then, however, it was just a *rebuttable factual presumption*—as the Court emphasized nine months later in *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934). But over the next 20 years, the test metastasized, ceasing to be rebuttable and becoming "well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954). Later cases included inconsistent statements regarding the relevance of facts in rational basis analysis, but one thing's clear: the "facts are irrelevant" approach known today as "rational basis" was neither federal nor state law when our Constitution was written.

In fact, it wasn't even the law in 1941, when this Court struck down a licensing requirement for photographers in *Buehman v. Bechtel*, 57 Ariz. 363 (1941). Far from accepting legislative assertions at face value, the Court said "[t]he business or profession of taking photographs of people, animals and things … needs no policing." *Id.* at 367. The Court expressly *rejected* reliance on *Nebbia*, holding instead that "[t]he business or profession of making photographs … is an entirely innocent occupation." *Id.* at 372.[26]

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[25] *See* Sanders, *The "New Judicial Federalism" Before Its Time*, 55 Am. U. L. Rev. 457, 505-06 (2005).

[26] True, the Court had embraced *Nebbia* a month earlier, in *State v. Walgreen Drug Co.*, 57 Ariz. 308, 312-14 (1941), but that case appears to have been decided exclusively under the Fourteenth Amendment, whereas *Bechtel* involved a state constitutional claim.

Nor was rational basis the test in *Findlay v. Bd. of Supervisors*, 72 Ariz. 58 (1951), in which, again, the Court examined the facts instead of deeming them irrelevant, *see id.* at 65, or in *Edwards v. State Board of Barber Examiners*, 72 Ariz. 108 (1951), in which the Court struck down a price-fixing law for barbers because it lacked "any relationship, either in logic or common sense" to public health and safety. *Id.* at 113. Quoting *Lochner*, 198 U.S. at 56, this Court said "'there is a limit to the valid exercise of the police power by the state.'" *Id.* at 114.

True, by 1949, this Court had endorsed *Nebbia* in at least some contexts, *see, e.g., Am. Fed'n of Lab. v. Am. Sash & Door Co.*, 67 Ariz. 20, 28 (1948), yet it still applied the "affected with a public interest" test as late as 1963, when it said that under *our* Constitution, economic regulations fall into three categories: (a) regulation of prices (governed by the *Munn* test); (b) police power regulations for public safety, such as licensing laws; and (c) power to create monopolies. *Visco v. State ex rel. Pickrell*, 95 Ariz. 154, 159-60 (1963). The *Visco* Court emphasized that category (b) must never be allowed to encroach into category (c). Far from endorsing anything-goes rational basis scrutiny, it said courts have a "duty" to carefully scrutinize economic regulations to ensure that they aren't pretexts for creating monopolies. *Id.* at 162. "'The stifling of competition through an exercise of the State's police power,'" said the Court, "'is never justifiable except that it be done, *and actually be*, in the public interest…. [T]he police power must, at all times, be exercised with *scrupulous regard* for constitutionally guaranteed private rights … and, if exercised otherwise, the exertion will be stricken down.'" *Id.* (citation omitted; emphasis added)).

In other words, courts must apply *attentive* scrutiny to regulations to ensure they don't create monopolies in the guise of public safety. *See id.* at 165 ("'[N]o one would contend that the Board of Medical Examiners should be given the power to decide how many doctors might practice.'" (citation omitted)). It was a

"fallacy," *Visco* said, to think that "because health regulations may, and should be adopted in certain businesses," the state can also impose restrictions that favor established companies against legitimate competition. *Id.* at 167.

Visco also cited *State v. Borah*, 51 Ariz. 318 (1938), which upheld medical licensing laws but emphasized the need for genuine judicial scrutiny of those laws. *Borah* said that the government cannot use licensing laws to "merely giv[e] a certain class of men a monopoly." *Id.* at 329. While "[c]ourts will never assume to determine" whether a health and safety regulation is "wise" or "the best means," there still is "a limit…. A law enacted in the exercise of the police power *must, in fact, be a police law*," and courts must apply means-ends scrutiny to ensure this:

> In this day, when so many selfish and private schemes in the way of securing monopolies and excluding competition in trade are attempted under the mask of sanitary legislation, it may be an important question whether the judiciary are concluded by the mask, or whether they may tear it aside in order to ascertain who is in it.

Id. (citation omitted). There's *no* way such non-deferential, independent review can be called rational basis scrutiny.

It's also not true, as the AG claims, that realistic means-ends scrutiny undermines the separation of powers. Courts use realistic scrutiny in many contexts already, and it hasn't proven unworkable. Voting, for example, is a fundamental right, but the state regulates it, and courts frequently review such regulations. Sometimes they find them unconstitutional,[27] sometimes they don't.[28] The right to travel is fundamental, but the state regulates it; courts review those regulations under strict scrutiny, sometimes upholding them,[29] sometimes not.[30]

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[27] *See, e.g.*, *In re Matter of Wood*, 257 Ariz. 549, 555-56 ¶¶ 18-19 (App. 2024).
[28] *See, e.g.*, *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 402 ¶ 5 (2020).
[29] *See, e.g.*, *Fuenning v. Superior Ct.*, 139 Ariz. 590, 595 (1983).
[30] *See, e.g.*, *Bd. of Supervisors v. Robinson*, 10 Ariz. App. 238, 240 (1969), *vacated as moot*, 105 Ariz. 280 (1970).

On the other hand, one might deploy the same straw-man argument the AG offers in those contexts, too, and say courts shouldn't protect voting rights, or speech, or religious liberty, or the right to possess firearms, because that's "policy-making." Obviously, that would be nonsense. Separation of powers leaves *policy*-making to the legislature, but requires courts to police the *constitutional* limits on policy-making. To hold otherwise would *betray* the separation of powers, by making the legislature the judge of its own powers and allowing it to definitively interpret the Constitution. *Cf.* *Arizona Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 355 ¶ 34 (2012). The legislature lacks authority to adopt unconstitutional policies, so courts don't trespass on its domain when they declare unconstitutional laws invalid.

Courts must engage in meaningful means-ends review of challenged laws, because if they don't, it's too easy for legislatures and executive agencies to deprive the politically powerless of their liberty under the guise of protecting the public. That's just what has happened in federal courts, where

> [t]he practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. It allows 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.

Hettinga v. United States, 677 F.3d 471, 482-83 (D.C. Cir. 2012) (Brown & Sentelle, JJ., concurring). Other courts have rightly rejected such "rationalize-a-basis" scrutiny, *Patel*, 469 S.W.3d at 112 (Willett, J., concurring), and this Court should, too.

CONCLUSION

The judgment should be *reversed*.

Respectfully submitted this 10th day of February 2026 by:

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