

IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

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Case No. 2D15-1722

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THOMAS HALSNIK, et al.,

Petitioners and Appellants,

v.

HILLSBOROUGH COUNTY PUBLIC  
TRANSPORTATION COMMISSION, et al.,

Respondents and Appellees.

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On Appeal from the Circuit Court, 2nd Judicial Circuit,  
in and for Hillsborough County, Florida  
(Case No. 13-CA-11087)

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**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF APPELLANTS**

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## **IDENTITY AND INTEREST OF AMICUS**

Pacific Legal Foundation (PLF) is the nation's most experienced nonprofit legal foundation of its kind. PLF's Atlantic Center is located in Palm Beach Gardens, Florida, and enjoys the support of many Floridians dedicated to limited government, free enterprise, and individual liberty.

PLF is devoted to protecting individuals' right to earn a living without unreasonable government interference, and has litigated numerous lawsuits challenging anti-competitive barriers to entry—particularly in the transportation industry. *See Underwood v. MacKay*, No. 13-16313, 2015 WL 3620638 (9th Cir. June 11, 2015); *Pabst v. Fox*, No. 6:15-cv-00006-CCL (D. Mont. filed Jan. 29, 2015) (dismissed as moot when state repealed challenged law); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014). PLF has also appeared as amicus in cases involving economic liberty and the federal rational basis test. *See N. Carolina State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101 (2015); *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235 (5th Cir. 2011). PLF believes its litigation experience and public policy perspective will aid this Court in consideration of this case.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The Plaintiffs in this case, a limousine owner and potential customers, seek the

simple right to bargain freely with each other to mutual advantage. Both the federal and state constitutions protect this right from arbitrary government interference. *See Dent v. W. Va.*, 129 U.S. 114, 121 (1889); *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1215 (Fla. 2000). The federal Constitution provides a floor of protection for this right, which Florida is free to, and has chosen to, exceed through its own constitution. Fla. Const. art. I, §§ 2, 9. By adding an additional bulwark against state infringements of individual rights, Florida's Constitution provides "double security" for economic liberty. *See State v. Kelly*, 999 So. 2d 1029, 1044 (Fla. 2008).

The court below undermined that double security by conflating the federal and state rational basis standards, thereby subjecting the Plaintiffs' rights to the virtually toothless federal test. *Halsnik v. Hillsborough Cnty. Pub. Transp. Comm'n*, No. 13-CA-11087, slip op. at 6 (Fla. Cir. Ct. Mar. 23, 2015). The federal rational basis test is not supported by Florida precedent, gives short shrift to important rights, and is particularly harmful to minorities and the politically powerless. Nothing obligates Florida courts to blindly follow federal precedent and apply this test when interpreting state constitutional provisions. Instead, "Florida's state courts are bound under federalist principles to give primacy to [the] State Constitution." *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992). This Court should disregard the federal rational basis test and apply instead meaningful judicial review under the state constitution.

## ARGUMENT

### I

#### FLORIDA COURTS SHOULD NOT FOLLOW THE FEDERAL RATIONAL BASIS STANDARD

As the Florida Supreme Court has rightly pointed out, “the federal Bill of Rights . . . secur[es] . . . a uniform minimum” which states are free to exceed. *Traylor*, 596 So. 2d at 962. The rule that states may provide greater constitutional protections than the federal Constitution provides is “not just [a] sterile rule[] of law developed in the abstract,” but lies instead “at the heart of American society.” Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707, 709 (1983). States enjoy this flexibility so that they may respond to their unique problems and constituents, and take local preferences into consideration. *See Traylor*, 596 So. 2d at 962. Even when state constitutional language is identical to federal provisions, a state’s own history and experience may justify departing from federal precedent. *See Rachel A. Van Cleave, State Constitutional Interpretation and Methodology*, 28 N.M. L. Rev. 199, 203 (1998).

The Florida Supreme Court has instructed state courts to independently examine what the state constitution requires, and has interpreted several of its provisions as granting more protection for individual rights than their federal counterparts. *See, e.g., Rigterink v. State*, 66 So. 3d 866, 889 (Fla. 2011) (interpreting

state’s protection against self-incrimination more “broadly and independently” than federal standard); *Cochran v. Harris*, 654 So. 2d 969, 972 (Fla. 4th DCA 1995) (requiring “greater due process protection in seizures than is required under federal law”); *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989) (interpreting the right to privacy more broadly than the federal standard). These decisions and others instruct state courts to conduct an independent inquiry into the state constitution and to reject federal precedent when necessary to do justice, to protect important rights, or when federal precedent was developed in the context of wholly federal concerns. *See, e.g., Kelly*, 999 So. 2d at 1040 (courts should not “mechanically” follow federal precedent and instead give “due regard to . . . the policies underlying specific constitutional guarantees”); *Traylor*, 596 So. 2d at 963 (courts should construe Florida Constitution to maximize individual liberty); *Transamerica Ins. Co. v. Barnett Bank of Marion County, N.A.*, 524 So. 2d 439, 443-44 (Fla. 5th DCA 1988) (courts should not follow federal precedent that is based solely on federal interests).

Given these criteria, Florida courts should not interpret the rational basis standard under the state constitution as identical to the federal standard. While Florida has a history of engaging in meaningful review of legislative enactments, the overly deferential federal rational basis test has been reduced to meaningless rubber-stamp review that deprives the politically powerless of the judicial protections to which they are entitled. State courts are free to exceed federal constitutional

minimums when adjudicating state constitutional claims, and this Court should do so by interpreting Florida’s rational basis test as more protective than the federal standard.

**A. The Federal Rational Basis Standard  
Fails to Protect Individual Rights and Liberty**

As originally conceived, the federal rational basis test was a factual presumption in favor of the constitutionality of a law, subject to rebuttal by evidence. *See, e.g., Borden’s Farm Products Co. v. Baldwin*, 293 U.S. 194, 204 (1934). But beginning in the 1940s, the Supreme Court diluted that standard, gradually making it what the *Borden’s* Court said it should not be: “a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault.” *Id.* at 209. In *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487 (1955), for example, the Court declared that a law would be upheld if a court could invent any possible reason why the Legislature *might* have passed that law—even if such speculation is contradicted by evidence in the record. Since then, the Court has even said that facts are “constitutionally irrelevant” in federal rational basis cases. *F.C.C. v. Beach Commc’ns*, 508 U.S. 307, 318 (1993).

Today, a court can uphold virtually *any* law under the federal rational basis test by finding some possibility that the Legislature *might* have enacted it. Under that standard, a law is virtually always declared rational, as plaintiffs will never be able

to prove a negative. The effect is to render the rational basis test “tantamount to no review at all.” *See Beach Commc’ns*, 508 U.S. at 343 n.3 (Stevens, J., concurring). As one judge put it, the test requires judges to “cup [their] hands over [their] eyes and then imagine if there could be anything right with the statute.” *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).<sup>1</sup>

## **B. Minorities and the Politically Powerless Suffer Most from Federal Rational Basis Review**

Federal courts typically relegate the rights to earn a living and to bargain freely to the toothless protection of rational basis scrutiny. The resulting decisions harm entrepreneurs generally by allowing legislatures and administrative agencies virtually limitless control over citizens’ economic choices, and the results have been particularly harsh for the politically powerless.

Consider, for example, occupational licensing laws. Though justified as measures to protect the public, licensing is frequently exploited by incumbent businesses who benefit by excluding potential competition—at the expense of the public at large. *See Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J.,

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<sup>1</sup> Federal courts have become so deferential to the government’s assertion of rationality in federal rational basis cases that they have even dismissed as-applied rational basis challenges prior to any fact-finding, on the theory that the plaintiffs could not possibly introduce enough evidence to contradict every possible rationale for the law. *See Carter v. Arkansas*, 392 F.3d 965, 969 (8th Cir. 2004); *Hettinga v. United States*, 770 F. Supp. 2d 51 (D.D.C. 2011), *aff’d*, 677 F.3d 471 (D.C. Cir. 2012), *cert. denied*, \_\_\_ U.S. \_\_\_.

dissenting) (warning of politically powerful trade groups using occupational licensing “to advance their own interests in restraining competition at the expense of the public interest”). These laws are also used to protect privileged classes against competition from minority groups considered undesirable, whether they be racial and ethnic minorities, as in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), or *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948), out-of-state business owners, as in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985), or politically unpopular dissenters, as in *Schware v. Bd. of Bar Exam’rs of State of N.M.*, 353 U.S. 232 (1957). When legislatures take away economic opportunity from these groups to benefit the politically powerful, today’s federal rational basis test leaves the excluded with no meaningful recourse in the courts.<sup>2</sup>

*Meadows v. Odom*, 360 F. Supp. 2d 811, 825 (M.D. La. 2005), offers a tragic instance of a court indulging in fact-free speculation under the federal rational basis standard to uphold a plainly pointless restriction on economic freedom. The plaintiff challenged the constitutionality of a Louisiana law that requires people who want to work as florists to undergo a burdensome two-part written and practical exam to obtain florist licenses. *Id.* at 823. It is absurd to suggest that floristry is a threat to

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<sup>2</sup> Transportation regulations have a particularly sordid history, *see* Timothy Sandefur, *Can You Get There From Here?: How the Law Still Threatens King’s Dream*, 22 *Law & Ineq.* 1, 2 (2004) (taxicab licensing laws hampered the ability of black leaders, including Martin Luther King, Jr., to sustain boycotts protesting bus segregation).

public safety that requires an extensive licensing procedure, and the plaintiffs introduced evidence showing that the state adopted the law solely to protect established florists against competition. Nevertheless, the court upheld it on the grounds that consumers might scratch their fingers on the wires florists use to hold flower arrangements together—and the licensing requirement might prevent that by ensuring that florists knew how to properly use wire. *Id.* at 824.

There was no evidence that wire scratches had ever occurred, or were a significant health threat, or that the licensing scheme prevented such injuries. But under the federal rational basis test, the court felt obliged to uphold the law on these purely imaginary grounds. The result was to exclude people—many destitute and with few other options—from entry-level flower-arranging jobs which might have allowed them to provide for themselves and their families.<sup>3</sup>

Numerous additional examples abound. Oklahoma requires people who want to sell caskets to be licensed funeral directors—which requires onerous educational training. When Kim Powers and Dennis Bridges wanted to sell caskets over the internet, they challenged the law as restricting their economic freedom. *See Powers*

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<sup>3</sup> Indeed, plaintiff Sandy Meadows lost her job as a result of the licensing requirement, and, lacking the education and resources to find other employment, died in poverty shortly after the court rejected her challenge. *See Timothy Sandefur, Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 Notre Dame J.L. Ethics & Pub. Pol'y 381, 401-03 (2012).

*v. Harris*, 379 F.3d 1208, 1211 (10th Cir. 2004). It requires little training to sell what is, in essence, a box—undermining any consumer safety rationale. Nevertheless, the Tenth Circuit upheld the law on the basis that, under the federal rational basis test, it was “obliged to consider every plausible legitimate state interest that might support the [law], not just the consumer-protection interest forwarded by the parties.” *Id.* at 1218. Conceding that the law “may exact a needless, wasteful requirement in many cases,” *id.* at 1225, the court upheld it on the theory that the state’s favoritism of licensed funeral directors was rational.

The excessive deference of the federal rational basis test also has tragic results in cases involving property rights—such that, in addition to the livelihoods, the homes of the politically powerless are left to the whim of the Legislature, and victims are left without meaningful judicial review. Perhaps the most well-known example of the harmful consequences of federal rational basis scrutiny in this context is *Kelo v. City of New London*, 545 U.S. 469 (2005), which upheld Connecticut’s seizure of private homes to transfer to a private developer to bulldoze and replace with luxury condominiums that would be privately owned and generate private profits. *Id.* at 483. The result of the extreme deference the Court gave the Legislature, as the dissenters observed, meant that “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.” *Id.* at 503 (O’Connor, J., dissenting).

Not surprisingly, the consequence of judicial deference in eminent domain cases has been primarily to harm minority groups, who most frequently reside in the areas targeted for condemnations. *See id.* at 521 (Thomas, J., dissenting); *see also* Jim Bailey, *Ethnic and Racial Minorities, the Indigent, the Elderly, and Eminent Domain: Assessing the Virginia Model of Reform*, 19 Wash. & Lee J. Civil Rts. & Soc. Just. 73, 90 (2012) (empirical analysis shows that majority property taken belongs to ethnic minorities). The eminent domain program sanctioned in *Berman v. Parker*, 348 U.S. 26, 32 (1954), uprooted over 20,000 black residents and replaced their homes with retail buildings and middle-income housing. Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol’y Rev. 1, 41 (2003).<sup>4</sup>

Because members of minority groups typically have less political power to stave off proposals to condemn their property, these groups are forced to rely on courts to protect them against majoritarian abuse. They ask courts to be “the poor man’s shield against oppression . . . the saving quality that will make this government one of laws and not a government of men.” *Inquiry Concerning Miller*, 644 So. 2d 75, 79 (Fla. 1994) (citation omitted). But the excessive pro-government bias of the

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<sup>4</sup> Recognizing the inevitable effect on minority homeowners of extreme judicial deference in eminent domain cases, “[f]ew protested the *Kelo* ruling more ardently than the NAACP.” *See* David T. Beito & Ilya Somin, *Battle over Eminent Domain is Another Civil Rights Issue*, Kansas City Star, Apr. 27, 2008.

federal rational basis test deprives them of that protection, *see Hettinga*, 677 F.3d at 482-83 (Brown, J., concurring) (rational basis review “allow[s] 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”), and makes it difficult, if not impossible, for courts to scrutinize the true purpose of legislation restricting economic liberty or property rights—laws often used to the detriment of those who need the courts’ help most.

### **C. Florida Precedent Favors Departing from the Federal Rational Basis Test**

Florida Supreme Court decisions instruct state courts to conduct an independent inquiry into the state constitution and reject federal precedent when necessary to do justice, to protect important rights, or when the federal precedent was developed in the context of wholly federal concerns. *See, e.g., Kelly*, 999 So. 2d at 1029; *Transamerica Ins. Co.*, 524 So. 2d at 443-44. All these factors weigh in favor of departing from federal precedent here.

In *Kelly*, 999 So. 2d at 1043, an indigent defendant pled no contest to a misdemeanor charge without representation by counsel, and the court was asked to decide whether that conviction could constitutionally be used to enhance penalties for a later conviction. The court first had to determine whether the state constitution entitled him to representation for the misdemeanor charge. The state argued that the

court should follow the Federal Sixth Amendment standard and hold that he was not entitled to counsel because he was not imprisoned. The court rejected that argument, holding that it should not “unquestionably follow” Supreme Court decisions when “faced with questions of state law.” *Id.* at 1041. Instead, state courts should interpret the state constitution independently—taking into consideration the state’s history, pre-existing case law, and tradition. *Id.* Given state precedent, considerations of fairness, and the policy of imposing imprisonment only where convictions are reliable, the court held that mere *possibility* of imprisonment is sufficient to trigger the right to representation. *Id.*

State courts should also depart from federal precedent when those decisions are based primarily on federal concerns. *Transamerica Ins. Co.*, 524 So. 2d at 443-44. *Transamerica Ins. Co.* involved a dispute between a bank and a surety—a type of case that had largely been litigated in federal courts under federal law. *Id.* at 443. The Florida Supreme Court declined to follow federal decisions because those courts based their opinions on “factors and viewpoints” relevant to federal concerns, and were “not relevant to doing justice between civil litigants in a state judicial system.” *Id.* Accordingly, the court found that it was “in the best interest of . . . the state of Florida not to follow federal precedent” and to decide the case based on an independent interpretation of state law. *Id.*

The excessive deference of federal courts under the federal rational basis

standard is not consistent with Florida’s tradition of protecting rights through meaningful judicial scrutiny, and it is based on concerns that are unique to the federal judiciary. The federal standard is based on the notion that federal courts are limited in their ability to supervise state legislatures. But “[t]he Federal Constitution . . . is silent with respect to the powers of the coordinate branches of *state* governments and the relationship among those branches.” *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 488 (1981) (Stevens, J., dissenting) (emphasis added).

Florida courts have a strong tradition of using judicial review and the state constitution to protect individual liberty. The Florida Supreme Court has, “perhaps more so than many others, been alert to any trespass upon the citizens’ constitutional rights.” *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371, 374 (Fla. 1949). Famed Florida Supreme Court Justice Leander Shaw “conceived of Florida state law as possessing far great power in American federalism than federal law.” Daniel Gordon, *Leander Shaw’s Mission: Developing a State Constitutional Philosophy of Individual Human Rights*, 32 T. Marshall L. Rev. 85, 95 (2006). He therefore urged state courts to “construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.” *Traylor*, 596 So. 2d at 963.

While federal courts emphasize that it is not their place to sit as superlegislatures, Florida courts emphasize that it is crucial to scrutinize laws to make sure they comport with the state constitution. *See In re Senate Joint Resolution of*

*Legislative Apportionment 1176*, 83 So. 3d 597, 608 (Fla. 2012) (“this Court is *required* by the state constitution to evaluate whether” the law in question “conflict[s] with Florida’s express constitutional standards”).

In *N. Florida Women’s Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 627 (Fla. 2003), the plaintiffs challenged an act requiring minors to notify parents in cases of abortion as violating their state constitutional right to privacy. The state argued that the court had to accept the Legislature’s statements of policy and fact, and that the principle of separation of powers meant that courts could not “giv[e] their own factual findings precedence” over legislative declarations. *Id.* The court disagreed, and held that legislative statements and declarations are not entitled to a presumption of correctness and are subject to independent scrutiny. *See also Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030, 1033 (Fla. 1999) (scrutinizing the evidence and statute to determine whether the state’s position was borne out); *Riley v. Sweat*, 110 Fla. 362, 369 (1933) (“To give real vitality and life to the substantial guaranties inherent in the language of the Constitution is a judicial function of the highest importance.”). This is in direct contradiction to federal courts’ extreme deference to legislative statements under the federal basis test.

Florida courts have even struck down minimum price laws under the rational basis test. *See, e.g., State ex rel. Fulton v. Ives*, 123 Fla. 401, 418 (1936); *Liquor Store*, 40 So. 2d at 375; *Stadnik v. Shell’s City*, 140 So. 2d 871, 875 (Fla. 1962).

Though the court upheld a minimum price law for milk in *Miami Home Milk Producers Ass'n v. Milk Control Bd.*, 124 Fla. 797 (1936), it did so expressly because the Legislature had declared an emergency that threatened “an essential commodity of almost universal consumption” throughout the state. *Id.* at 813.

The court took care to distinguish earlier cases like *Ives*, 123 Fla. 401, which struck down a minimum price law in the barber industry. That industry could not be said to be a “chief industry of the state of Florida so that its general welfare and prosperity depend upon it in a very large and real sense.” *Id.* at 418. There was therefore no compelling reason to abridge the liberty of contract of both barbers and their customers; barbers were entitled to charge whatever they thought their services were worth. Neither price competition nor the desire “to secure to the ‘average barber’ and his family suitable nourishment and maintenance,” could justify restricting this right. *Id.* at 422. To increase prices “by legislative fiat” would harm industrious barbers and consumers, and “put the service to be rendered still further beyond the means” of the less privileged. *Id.* at 419. Such a regulation could only be maintained if the barber trade was “a paramount industry of the state intimately connected with its welfare,” which it was not—and notably, neither is the limousine industry here. *Id.* at 423.

While the lax federal rational basis test has inflicted serious harm on entrepreneurs, property owners, and others who seek protection from the courts,

Florida courts do not owe the Legislature that same blind deference.

## II

### **SEVERAL OTHER STATES HAVE CHOSEN TO EXCEED THE FEDERAL FLOOR**

Several state courts interpret their state constitutions to give greater protection to liberty than that provided by the federal rational basis standard. *See* John A.C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U. L. Rev. 226, 235 (1958).

The Texas Supreme Court decision in *Patel v. Texas Dep't of Licensing & Regulation*, No. 12-0657, 2015 WL 3982687 (Tex. June 26, 2015), provides a striking example. In that case, a group of eyebrow threaders argued that a law requiring them to obtain a cosmetologist's license violated due process because it forced them to undergo training neither related to their trade, nor to protecting health and safety. The court agreed, employing a more rigorous state rational basis test. It held that because 58% of the required training hours were arguably relevant to their job, while 42% were not, and because the costs associated with the requirements were so high, the requirement was irrationally burdensome. *Id.* at \*15. The majority rejected the dissent's proffered federal rational basis standard because it "is for all practical purposes no standard. The only way an enactment could fail the test the dissenters advocate is if the purpose of the enactment were completely mismatched"

with the means.<sup>5</sup> *Id.*

Other courts have likewise departed from federal standards when necessary to protect liberty. Generally they do so by refusing to speculate whether there is *any* rational basis for the law, and instead scrutinizing the rationale provided. *See, e.g., Minnesota v. Russell*, 477 N.W.2d 886, 892 (Minn. 1991) (“[W]e have been unwilling to hypothesize a rational basis to justify a classification” and instead “have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged regulation and the statutory goals.”); *Rushworth v. Registrar of Motor Vehicles*, 413 Mass. 265, 269-79 (1992) (state courts are “less willing than the Federal courts to ascribe to the Legislature speculative and implausible ends”); *Union Carbide & Carbon Corp. v. White River Distributors*, 224 Ark. 558, 568 (1955) (looking behind stated motivation to determine actual motivation, concluding that the rationale was interest group pressure, and striking down the law).

Perhaps the best example of states protecting individual rights through a more

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<sup>5</sup> Justice Willett, concurring, affirmed that “the right to put your mind and body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity.” *Id.* at \*17. If courts are to protect that right, it cannot relegate it to the federal standard—which acts as a “rubber stamp” for the government. *Id.* at \*20. Even if the Texas counterpart “mirrored perfectly the federal Due Process Clause, that in no way b[ound] Texas courts to cut-and-paste federal rational-basis jurisprudence,” *id.* at \*22, which renders courts powerless. Like the majority, he agreed that Texas should instead institute “rational basis with bite, demanding actual rationality, scrutinizing the law’s actual basis, and applying an actual test.” *Id.* at \*23.

realistic rational basis review arose in the wake of *Kelo*. See Ilya Somin, *The Judicial Reaction to Kelo*, 4 Alb. Gov't L. Rev. 1, 7-23 (2011). In *City of Norwood v. Horney*, 853 N.E.2d 1115 (2006), the Ohio Supreme Court rejected the *Kelo* decision by holding that, as a matter of Ohio constitutional law, the rational basis test applicable to condemnations required a realistic and independent judicial review. *Id.* at 1136-37 (While “deference must be paid to a government’s determination that there is sufficient evidence to support a taking,” the courts cannot satisfy their duty by applying “superficial scrutiny . . . . To the contrary, [judicial review] remains an essential and critical aspect in the analysis of any proposed taking.”); see also *Bd. of Cnty. Comm’rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 651 (Okla. 2006) (state constitutional eminent domain provisions “place more stringent limitation on governmental eminent domain power than [those] imposed by the Fifth Amendment”); *Benson v. South Dakota*, 710 N.W.2d 131, 146 (S.D. 2006) (same). This Court should likewise hold that the Florida Constitution requires an independent and objective analysis of a challenged statute under the rational basis test.

### III

#### **FLORIDA COURTS HAVE A TRADITION OF USING THE STATE CONSTITUTION TO PROTECT ECONOMIC LIBERTY**

Florida courts have long recognized that the right to earn a living and bargain freely are fundamental rights, and have given them strong protection under the state

constitution. *Ives*, 123 Fla. at 412 (The constitution protects the “freedom of contract—[c]hief among such contracts is that of personal employment . . . [.] If that right be stricken down or arbitrarily interfered with, there is a substantial impairment in the long-established constitutional sense.”).

Cases striking down restrictions on economic liberty demonstrate a willingness to scrutinize not just the stated purpose of the challenged law, but also whether the law actually accomplishes that purpose. *See Butler*, 770 So. 2d at 1215. In *Dep’t of Ins. v. Dade County Consumer Advocate’s Office*, 492 So. 2d 1032 (Fla. 1986), the Florida Supreme Court struck down two statutes that prohibited insurance agents from bargaining over their commission with their customers. Although the state argued that the laws protected consumers by ensuring that they paid the same rates for the same policies, the court found that agents’ commissions had no effect on the net insurance premium, and were unrelated to the quality of policies. Noting that it had historically “carefully reviewed laws that curtail the economic bargaining power of the public,” it found the statutes unrelated to any legitimate state purpose.

Florida courts have also held that, even if a law is related to a legitimate state purpose, due process requires that any restriction on economic liberty not be unreasonable. *Riley*, 110 Fla. at 369 (“Suppression of lawful callings through burdensome and oppressive conditions precedent . . . are as much subject to the inhibitive force of the organic law as are statutes which in terms directly prohibit

lawful businesses.”). In *State v. Saiez*, 489 So. 2d 1125 (Fla. 1986), the Supreme Court struck down a law prohibiting the possession of embossing machines. Though the court acknowledged that statute was related to the valid public purpose of preventing credit card fraud, it held that the law was not rational because it swept too broadly, and was thus overly onerous. This represents a departure from the lax federal rational basis test, and contravenes the lower courts holding that the two tests are the same.

### CONCLUSION

Florida courts have “promote[d] a ‘double security,’” *Kelly*, 999 So. 2d at 1044, for the economic rights of Floridians under the state constitution. This Court should not reduce the state’s due process protections by making them redundant of the federal Constitution. The lower court’s opinion should be overturned.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: October 2, 2015.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS was electronically served upon the following via the Florida Courts E-Filing Portal, the 2nd day of October, 2015:

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