No. 22-1208

IN THE

Supreme Court of the United States

URSULA NEWELL-DAVIS, ET AL.,

Petitioners,

v.

COURTNEY N. PHILLIPS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Michael Pepson
Counsel of Record
Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae

July 13, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Other Authorities

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. One of those key ideas is that the Constitution protects liberty—including economic liberty. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF has an interest in this case because it believes the Fourteenth Amendment's Privileges or Immunities Clause protects both individual rights enumerated in the Bill of Rights and fundamental liberties deeply rooted in our history and tradition, including economic liberties, against state invasion and arbitrary government regulation.

AFPF also opposes certificate of need (CON) laws. *See, e.g.*, Kevin Schmidt & Thomas Kimbrell, Permission to Care: How Certificate of Need Laws

---

[1] All parties have received timely notice of *amicus curiae*'s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Harm Patients and Stifle Health Care Innovation, Americans for Prosperity Foundation (Oct. 20, 2021) [hereinafter "Permission to Care"];[2] Br. of *Amicus Curiae* AFPF in Support of Pet'r, *Tiwari v. Friedlander*, No. 22-42 (U.S., filed Aug. 22, 2022). More broadly, AFPF opposes cronyism, rent seeking, and protectionist legislation that shields special interest groups from competition by creating senseless barriers to entry.

SUMMARY OF ARGUMENT

Our Nation is founded on the idea that the rights to "Life, Liberty and the pursuit of Happiness" are "unalienable." Declaration of Independence ¶2 (1776). And that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed[.]" *Id.* As the signers of the Declaration understood, these unalienable liberties, all deeply rooted in our history and tradition at the Founding, are not contingent on or provided by government but are natural rights we possess by virtue of our humanity. Among these preexisting negative liberties is the right to pursue a common, lawful occupation without arbitrary government regulation.

Positive law has also recognized economic liberty for centuries. "Lord Coke wrote a series of decisions striking down restrictions on economic liberty under the law of the land clause of the Magna Carta."

---

[2] https://americansforprosperityfoundation.org/wp-content/uploads/2021/10/Permission-to-Care-AFPF-CON-report.pdf.

Timothy Sandefur, *State Powers and the Right to Pursue Happiness*, 21 Tex. Rev. Law & Pol. 323, 323–24 (2016); *see* Magna Carta, ch. 29 (1225). Our founding document likewise protects "Privileges and Immunities," U.S. Const. Art. IV, § 2, cl. 1, including the fundamental right to earn a living, as Justice Bushrod Washington famously explained in *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823). Section 1 of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, protects these same "Privileges or Immunities" against state invasion, as Justice Field explained in his dissent in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 95–98 (1872).

But the *Slaughter-House* majority mistakenly nullified the protection provided by the Fourteenth Amendment's Privileges or Immunities Clause for a large swath of deeply rooted, fundamental, unalienable negative rights, including the right to earn an honest living free from arbitrary government regulation, and instead left intact protection of only a short list of rights deemed "national."[3] Broad application of this demonstrably erroneous decision has had pernicious practical consequences for the lives and livelihoods of countless individuals, as this case well illustrates.

Petitioner, Ms. Ursula Newell-Davis, is "a mother, social worker, [and] entrepreneur," Pet. App. 79a, who

---

[3] *See* Br. of *Amicus Curiae* AFPF in Support of Pet'rs, *Courtney v. Danner*, No. 20-361, at 13–15, 20–21 (U.S., filed Nov. 2, 2020) (identifying access to the navigable waters of the United States as a right of national citizenship specifically recognized in *The Slaughter-House Cases*, 83 U.S. at 79–80).

"want[s] to be able to provide respite services for parents of special needs children who qualify for such care." Pet. App. 82a. She is eminently qualified to do so. *See* Pet. App. 79a–80a (¶¶2–5). Louisiana law, however, bars Ms. Newell-Davis from even applying for a license to provide respite services unless state officials deign to declare these critical services "needed" after conducting a "Facility Need Review" (FNR). *See* La. Admin. Code tit. 48, § 12523(A). And here, these unelected bureaucrats arbitrarily denied Ms. Newell-Davis's FNR for reasons unrelated to her qualifications. Pet. 6–10 & n.4; Pet. App. 4a. This scheme is patently unconstitutional. It beggars belief to contend the state's mere desire to "ease[] its regulatory burden" of administering the program, *see* Pet. 8 (citing ROA.2420, ROA.2440), is a legitimate government interest sufficient to sustain the economic regulation at issue here. That makes no sense. Nor does the state have evidence to support this claim. *See* Pet. 8 (citing ROA.2457-2458, ROA.2417-2420). Ms. Newell-Davis's right to pursue her calling should not turn on bureaucratic grace.[4] Yet, as the decision below recognized, this Court's precedent "foreclosed" Petitioners' "Privileges or Immunities Clause claim." Pet. App. 2a.

This state of affairs should not be allowed to continue. And this case provides an ideal vehicle to overturn the *Slaughter-House Cases* and return to the

---

[4] "The Department does not have any internal documents, procedures, or protocol to guide the four-person FNR Committee in determining whether a new provider is 'needed.'" Pet. 6 n.4 (citing ROA.2703:16-25, ROA.2771:20-2772:4, ROA.2748:14-2749:18, ROA.2761:1-13).

Fourteenth Amendment's Privileges or Immunities Clause's original public meaning. The law at issue is a clear violation of the Clause's protection of the fundamental right to earn an honest living in a lawful occupation free from arbitrary regulation. After all, the law here bars people like Ms. Newell-Davis from even applying for a license to enter a long-recognized lawful profession—indeed, to provide care for children with special needs—without the government's permission. *Cf.* Permission to Care, *supra*. Nor would overruling the *Slaughter-House Cases*—which a broad and growing consensus of jurists and scholars agree were wrongly decided—provide a permission slip for judicial activism, inviting courts to "find" new rights nowhere to be found in the Constitution or rooted in our history or tradition. The "privileges or immunities" entitled to protection are preexisting, deeply rooted in history and tradition at the time of ratification and inherent in the concept of ordered liberty.

This case also provides an opportunity for this Court to jettison *United States v. Carolene Products* footnote four's judicially created dichotomy between favored and disfavored fundamental rights, *see* 304 U.S. 144, 152 n.4 (1938), as well as its problematic theory of tiered-scrutiny review, and restore consistency to the treatment of individual negative rights.

For the foregoing reasons, this Court should grant the Petition.

ARGUMENT

I. The Right to Pursue a Common Occupation Is Deeply Rooted.

"Economic liberty is deeply rooted in this Nation's history and tradition[.]" *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 122 (Tex. 2015) (Willett, J., concurring) (cleaned up). "Cases stretching back centuries treat economic liberty as constitutionally protected—we crossed that Rubicon long ago[.]" *Id.* at 95 (Willett, J., concurring); *see* James W. Ely Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. Pa. J. Const. L. 917, 953 (2006); *see also* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 989–1016 (2013). "[T]he right to earn a living" has particularly "deep roots in our Nation's history and tradition."[5] *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 981 (5th Cir. 2022) (Ho, J., concurring); *see* Ely, 8 U. Pa. J. Const. L. at 953 ("[T]he right to pursue callings and make contracts can be traced far into the past[.]"). "For over a century before our Founding, English

---

[5] To be sure, "there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)." *N.Y. State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111, 2138 (2022). But both at the Founding and in 1868, when the Fourteenth Amendment was ratified, the right to earn a living was well established.

courts protected the right to pursue one's occupation against arbitrary government restraint." *Golden Glow*, 52 F.4th at 982 (Ho, J., concurring); *see, e.g.*, *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614); *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218 (K.B. 1610); *The Case of the Monopolies*, 77 Eng. Rep. 1260 (K.B. 1602); *Davenant v. Hurdis*, 72 Eng. Rep. 769 (K.B. 1599).[6] *See generally* Calabresi & Leibowitz, 36 Harv. J.L. & Pub. Pol'y at 989–1003; Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 209–17 (2003).

"[W]hen the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country." *Slaughter-House*, 83 U.S. (16 Wall.) at 105 (Field, J., dissenting); *see* 1 William Blackstone, Commentaries on the Laws of England 415 ("At common law every man might use what trade he pleased."). The right to earn a living "has a far stronger historical pedigree than other rights that the Court has held to be protected by the Fourteenth Amendment[.]" Ilya Shapiro & Josh Blackman, *The Once and Future Privileges or Immunities Clause*, 26 Geo. Mason L. Rev. 1207, 1224 (2019).

Against this backdrop, "it's not surprising that various scholars have determined that the right to

---

[6] *Cf.* Magna Carta, ch. 29 (1225); *id.* ch. 20 (1215) (preserving to free men the tools of their livelihood against fines).

earn a living . . . should thus be protected under our jurisprudence of unenumerated rights." *Golden Glow*, 52 F.4th at 984 (Ho, J., concurring). And for good reason. After all, "[l]iberty is not *provided* by government; liberty *preexists* government. It is not a gift from the sovereign; it is our natural birthright. Fixed. Innate. Unalienable." *Patel*, 469 S.W.3d at 92–93 (Willett, J., concurring). Among other things, this means "[s]elf-ownership, 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.*; *see* Timothy Sandefur, A *Rebuilding the Fourteenth Amendment: The Prospects and the Pitfalls*, 12 NYU J.L. & Liberty 278, 300 (2019) ("economic liberty and private property are fundamental human rights"). Exactly so.[7]

Indeed, "[t]he great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man." *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J.); *see Dent v. West Virginia*, 129 U.S. 114, 121 (1889) ("This right may in many respects be considered as a distinguishing feature of our republican institutions.

---

[7] At the Founding and when the Fourteenth Amendment was ratified, "both the States and the Federal Government had long recognized the inalienable rights of their citizens." *McDonald v. City of Chi.,* 561 U.S. 742, 822 (2010) (Thomas, J., concurring in part, concurring in judgment). Among those inalienable rights is the right to earn a living. *See The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825) (Marshall, C.J.) ("That every man has a natural right to the fruits of his own labour, is generally admitted[.]").

Here all vocations are open to every one on like conditions."). And as Judge Ho observed, "the right to engage in productive labors is essential to ensuring the ability of the average American citizen to exercise most of their other rights." *Golden Glow*, 52 F.4th at 984 (concurring). That sums up well the importance of the negative right at issue here.

II. The Fourteenth Amendment's Privileges or Immunities Clause Protects Deeply Rooted Negative Rights.

The Fourteenth Amendment's Privileges or Immunities Clause protects not only the individual rights enumerated in the Bill of Rights but also safeguards deeply rooted, yet unenumerated, negative rights, such as the right to earn an honest living in a lawful profession free from arbitrary regulation.

"Constitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our founding document means." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244–45 (2022) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 186–89 (1824)); 1 J. Story, Commentaries on the Constitution of the United States § 399, p. 383 (1833)). Section 1 of the Fourteenth Amendment provides in no uncertain terms that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States."[8] U.S. Const. amend. XIV, § 1. "On its face, this appears to grant the persons just made United States citizens a certain collection of rights—*i.e.*, privileges or immunities—attributable to that status." *McDonald*, 561 U.S. at 808 (Thomas, J., concurring in part, concurring in judgment).

"At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' The two words, standing alone or paired together, were used interchangeably with the words 'rights,' 'liberties,' and 'freedoms,' and had been since the time of Blackstone."[9] *Id.* at 813 (Thomas, J., concurring in part and concurring in judgment) (citing 1 W. Blackstone, Commentaries *129); *see* Michael Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071 (2000) (surveying historical usage of "privileges" and "immunities"); *semble Mallory v. Norfolk S. R.R. Co.,* 600 U.S. ____ (2023) (slip op., 6) (Alito, J., concurring in part, concurring in judgment) (referencing "substantive rights" that "may have originally been intended to reside" in and "that might otherwise be guaranteed by

---

[8] "The historical record suggests that the Privileges or Immunities Clause was the heart and soul of the Fourteenth Amendment." Michael McConnell, *Ways to Think About Unenumerated Rights*, 2013 U. Ill. L. Rev. 1985, 1995 (2013).

[9] "The terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the [Fourteenth] amendment was adopted." *Slaughter-House*, 83 U.S. (16 Wall.) at 97 (Field, J., dissenting).

the Fourteenth Amendment's Privileges and Immunities Clause").

But constitutional analysis does not take place in a vacuum divorced from history and deeply rooted traditions. *See Moore v. Harper,* 600 U.S. ____ (2023) (slip op., 24) ("We have long looked to 'settled and established practice' to interpret the Constitution." (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). The Constitution's common-law backdrop and historical practice and tradition at the time of ratification may be probative of original public meaning.[10] *See Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2428 (2022); *Bruen*, 142 S. Ct. at 2130; *Tyler v. Hennepin County*, 143 S. Ct. 1369, 1375–76 (2023). So too here.

"To the framers of the Fourteenth Amendment, the meaning of privileges or immunities was clear: they included not only the Bill of Rights but also the rights protected under common law, such as those set out in the Declaration of Independence. This included the right 'to work in an honest calling and contribute by your toil in some sort to yourself, to the support of your fellow-men, and to be secure in the enjoyment of the fruits of your toil.'"[11] Josh Blackman & Ilya Shapiro,

---

[10] Statutes enacted contemporaneously with constitutional amendments may also provide evidence of a constitutional provision's original public meaning. *See Haaland v. Brackeen*, 599 U.S. ____ (2023) (slip op., 28).

[11] "Any plausible list of the privileges or immunities of citizenship must include economic-liberty rights—the exercise of

Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending The Right to Keep and Bear Arms To The States, 8 Geo. J.L. & Pub. Pol'y 1, 61 (2010) (quoting Akhil Reed Amar, America's Constitution: A Biography 389–90 (2006) (quoting Rep. John Bingham)). "[M]embers of the Thirty-ninth Congress regularly linked the Bill of Rights with the classic common-law rights of individuals exemplified in Blackstone, *Corfield*, and the Civil Rights Act of 1866."[12] Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1269 (1992). And as Justice Thomas has observed:

> The colonists' repeated assertions that they maintained the rights, privileges and immunities of persons "born within the realm of England" and "natural born" persons suggests that, at the time of the founding, the terms "privileges" and "immunities" (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens, and more broadly, by all persons. . . .

---

which may, of course, be reasonably regulated." Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment 354 (2021).

[12] *Cf.* Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 124 (2000) ("[T]he Fourteenth Amendment incorporates more than the Bill of Rights. Magna Carta, the English Petition of Right, the Declaration of Independence, state bills of rights—all these, too, were proper sources of guidance for interpreters in search of fundamental rights and freedoms.").

> Justice Bushrod Washington's landmark opinion in *Corfield* v. *Coryell* reflects this historical understanding.

Saenz v. Roe, 526 U.S. 489, 524 (1999) (Thomas, J., dissenting) (citation omitted).

Justice Bushrod Washington explained in *Corfield* that Article IV's Privileges and Immunities Clause protects, among other things, "the right to acquire and possess property of every kind . . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . [and] to take, hold and dispose of property, either real or personal[.]"[13] 6 F. Cas. at 551–52. The Reconstruction understanding of "privileges or immunities" tracks that of the Founders, as set forth in *Corfield*. *See Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting) ("The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing."). "Justice Washington's opinion [in *Corfield*] served as an authoritative explication of the meaning of privileges or immunities[.]" Blackman & Shapiro, 8 Geo. J.L. & Pub. Pol'y at 9. It "indisputably influenced the Members of Congress who enacted the Fourteenth Amendment." *Saenz*, 526 U.S. at 526 (Thomas, J.,

---

[13] This Court has observed "the right to pursue a common calling . . . has long been seen as one of the privileges of citizenship" protected under Article IV. *McBurney v. Young*, 569 U.S. 221, 229 (2013) (citing *Corfield*, 6 F. Cas. at 552). That "Clause protects the right of citizens to ply their trade, practice their occupation, or pursue a common calling." *Id.* at 227 (cleaned up).

dissenting) (citing John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L. J. 1385, 1418 (1992)). Justice Field's dissent in the *Slaughter-House Cases*—which were decided in 1872 only four years after the Fourteenth Amendment was ratified—likewise reflects the influence of *Corfield* on the Reconstruction era understanding of the fundamental liberties recognized as privileges and immunities.

As Justice Field explained: "The terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the amendment was adopted. They are found in" Article IV's Privileges and Immunities Clause. *Slaughter-House*, 83 U.S. (16 Wall.) at 97 (Field, J., dissenting). Accordingly, Justice Field looked to Justice Washington's opinion in *Corfield,* describing it as "a sound construction of the clause in question." *Id.* (Field, J., dissenting). Drawing from Justice Washington's exposition of privileges and immunities in *Corfield*, Justice Field wrote: "The privileges and immunities designated are those which of right belong to the citizens of all free governments[, including] . . . the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons." *Id.* (Field, J., dissenting).

Justice Bradley elaborated on this point: "[T]he right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of his most valuable rights, and one which the legislature of a State cannot invade, whether restrained by its own constitution or not." *Id.* at 113–14 (Bradley, J., dissenting). Justice Bradley continued:

> For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

Id. at 116 (dissenting).

In sum, as Justice Field's and Justice Bradley's opinions in the *Slaughter-House Cases* recognize, the Fourteenth Amendment's Privileges or Immunities Clause, as originally understood, protects fundamental deeply rooted unenumerated negative rights, including the right to pursue a common occupation free from arbitrary regulation. That is, the Clause confirms that the privileges and immunities protected against federal infringement, as described by *Corfield*, are also protected against state invasion.[14] *See United States v. Vaello-Madero*, 142 S.

---

[14] The Fourteenth Amendment's Privileges or Immunities Clause also confirmed that all individual rights enumerated in the Bill of Rights apply against the States. *See McDonald*, 561 U.S. at 805–58 (Thomas, J., concurring in part and concurring in judgment); *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring); *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting).

Ct. 1539, 1550 n.3 (2022) (Thomas, J., concurring) ("[T]he Privileges or Immunities Clause may have confirmed that *States* specifically could not abridge the rights of national citizenship[.]").

III. This Court Should Squarely Overrule the *Slaughter-House Cases*.

A. The *Slaughter-House Cases* Are Demonstrably Erroneous.

Unfortunately, Justice Field's and Justice Bradley's well-reasoned opinions did not carry the day. Instead, the *Slaughter-House* majority rejected the view that the Clause "was intended as a protection to the citizen of a State against the legislative power of his own State[.]" 83 U.S. (16 Wall.) at 74. In so doing, "the Court all but read the Privileges or Immunities Clause out of the Constitution[.]"[15] *Saenz*, 526 U.S. at 521 (Thomas, J., dissenting); *see* Harrison, 101 Yale L. J. at 1387, 1414. "The *Slaughter-House Cases* sapped the Clause of any meaning." *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting); *see* Amar, 114 Harv. L. Rev. at 123 n.327 (noting *Slaughter-House Cases* "(on the most straightforward and conventional reading) basically read the clause—

---

[15] "*Slaughter-House* involved special-interest favoritism masquerading as a public-health measure, a law granting a private corporation an exclusive benefit at the expense of hundreds of local butchers." *Patel*, 469 S.W.3d at 98 n.40 (Willett, J., concurring). "There, this Court upheld a Louisiana statute granting a monopoly on livestock butchering in and around the city of New Orleans to a newly incorporated company." *McDonald*, 561 U.S. at 851 (Thomas, J., concurring in part, concurring in judgment) (citing *Slaughter-House*, 83 U.S. 36).

the central clause of Section 1!—out of the [Fourteenth] Amendment.").

The *Slaughter-House Cases* were wrongly decided. As Professor Amar has explained: "Virtually no serious modern scholar . . . thinks this a plausible reading of the Amendment." Amar, 114 Harv. L. Rev. at 123 n.327; *see, e.g.*, Barnett & Bernick, *supra*, 206; Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & Liberty 1096, 1098 (2005) ("In the eyes of virtually all historians, there is little doubt that *Slaughter-House* is wrong"). *See generally* Pet. 26 n.9 (surveying scholarship). As Justice Thomas put it, "[l]egal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873." *Saenz*, 526 U.S. at 522 n.1 (dissenting). In short, this precedent is demonstrably erroneous and should therefore be overruled.

B. Enforcing the Privileges or Immunities Clause's Original Public Meaning Will Not Open Pandora's Box.

Overruling the *Slaughter-House Cases* would not threaten federalism or open the floodgates to judicial activism.[16] As Justice Thomas has explained: "The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of

---

[16] As Justice Thomas has suggested, "[b]efore invoking the Clause, . . . [this Court] should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant." *Saenz*, 526 U.S. at 528 (Thomas, J., dissenting).

principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress' power or is otherwise prohibited." *McDonald*, 561 U.S. at 854 (2010) (concurring in part, concurring in judgment). For example, it would strain credulity to assert that the Framers of the Fourteenth Amendment intended the Privileges or Immunities Clause to confer positive entitlements. *See* Blackman & Shapiro, 8 Geo. J.L. & Pub. Pol'y at 7 ("No, the Constitution cannot be properly read to protect positive rights. Pandora's box will thus remain sealed.").

Nor does enforcing the Privileges or Immunities Clause threaten our system of federalism. As Justice Thomas has suggested: "The better view, in light of the States and Federal Government's shared history of recognizing certain inalienable rights in their citizens, is that the privileges and immunities of state and federal citizenship overlap. This is not to say that the privileges and immunities of state and federal citizenship are the same." *McDonald*, 561 U.S. at 853 (concurring in part, concurring in judgment). Justice Swayne's dissent in *Slaughter-House* put it thus: "The citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also." 83 U.S. (16 Wall.) at 126.

In other words, not all rights protected under state law qualify as privileges or immunities protected under the Fourteenth Amendment. *See Mills v. Rogers*, 457 U.S. 291, 300 (1982); *Am. Legion v. Am.*

Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) ("[T]he Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor."). *See generally* Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018). Instead, the Privileges or Immunities Clause safeguards liberty by protecting against state oppression. And the negative liberties it does protect were all well-established beyond peradventure when it was ratified. After all, the Constitution's "meaning is fixed according to the understandings of those who ratified it." *Bruen*, 142 S. Ct. at 2132.

Viewed through this lens, the Privileges or Immunities Clause protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[17] *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (cleaned up); *see* Blackman & Shapiro, 8 Geo. J.L. & Pub. Pol'y at 30. In other words, "such a right would need to be rooted in the Nation's history and tradition." *Dobbs*, 142 S. Ct. at 2248 n.22 (citing *Corfield*, 6 F. Cas. at 551–52). This properly cabins the Privileges or Immunities Clause's scope to its original public meaning, guarding against novel expansion or

---

[17] This formulation of the relevant inquiry "appears to arrive at a result similar to that urged by the dissenters from the Supreme Court's opinion in *Slaughter-House*." *Nordyke v. King*, 563 F.3d 439, 446 n.5 (9th Cir. 2009) (O'Scannlain, J.), *vacated and remanded*, 611 F.3d 1015 (9th Cir. 2010) (en banc).

judicial creativity. *See* Blackman & Shapiro, 8 Geo. J.L. & Pub. Pol'y at 86. *Cf. Hettinga v. United States*, 677 F.3d 471, 481 (D.C. Cir. 2012) (Brown, J., concurring); *Patel*, 469 S.W.3d at 95 (Willett, J., concurring) ("[T]here is a fateful difference between active judges who defend rights and activist judges who concoct rights.").

The right to earn a living in a lawful profession free from arbitrary regulation easily meets this test. Indeed, this "Court has repeatedly declared that the right to pursue a lawful calling 'free from unreasonable governmental interference' is guaranteed under the federal Constitution, and is 'objectively, deeply rooted in this Nation's history and tradition.'" *Patel*, 469 S.W.3d at 93 (Willett, J., concurring) (quoting *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Glucksberg*, 521 U.S. at 703).

IV. This Court Also Should Abandon *Carolene Products* Footnote Four.

At a minimum, this Court should grant certiorari on the first question presented. As Petitioners explain, "accepting the Fifth Circuit's argument under due process would eviscerate rational basis scrutiny altogether."[18] Pet. 15. And if allowed to stand, the decision below would transform the rebuttable presumption, under this Court's jurisprudence, that

---

[18] *Cf. Tiwari v. Friedlander,* 26 F.4th 355, 368–69 (6th Cir. 2022) (Sutton, C.J.) (acknowledging criticisms of rational-basis test), *cert. denied*, 143 S. Ct. 444 (2022); *Hettinga,* 677 F.3d at 480 (Brown, J., concurring) (similar); *Patel,* 469 S.W.3d at 98–99 (Willett, J., concurring) (similar).

economic legislation is constitutional into a rubber-stamp, rendering rational-basis review a nullity; "a rule of law which makes legislative action invulnerable to constitutional assault."[19] *Borden's Farm Prod. Co. v. Baldwin*, 293 U.S. 194, 209 (1934). *Cf.* Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 Const. Comment. 61, 71 (2017) ("A rational basis test ought not mean that courts are obliged to accept explanations that beggar all belief.").

More broadly, this case provides an ideal vehicle for this Court to revisit this Court's footnote four in *Carolene Products*, 304 U.S. at 152 n.4, which relegated our fundamental, unalienable, economic liberties to second-class status. As Justice Thomas has explained: "[O]ur Constitution renounces the notion that some constitutional rights are more equal than others. . . . A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment." *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 643 (2016) (dissenting). But *Carolene Products* footnote four did just that, purporting to create a false dichotomy between economic and *other* negative liberty rights. This inconsistent treatment has no basis in the Constitution's original public meaning. And this case provides an opportunity for this Court to "create consistency across individual rights" by repudiating this wayward footnote and restoring the

---

[19] Under this Court's precedent, any presumption that legislation is constitutional "is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption." *Borden's Farm Prods.*, 293 U.S. at 209; *see Carolene Prods.*, 304 U.S. at 152.

Constitution's original public meaning. *See Tiwari*, 26 F.4th at 369. *Cf. Buffington v. McDonough*, 143 S. Ct. 14, 17–22 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

There is no principled reason why fundamental economic liberties deeply rooted in our history and tradition should receive less constitutional protection than other fundamental rights. And this Court should make plain that *all* fundamental rights—whether economic or not—are entitled to the same high level of protection against government infringement.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

Michael Pepson
Counsel of Record
Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae July 13, 2023

No. 22-1208

IN THE

Supreme Court of the United States

URSULA NEWELL-DAVIS, ET AL.,

Petitioners,

v.

COURTNEY N. PHILLIPS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUSIANA DEPARTMENT OF HEALTH, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

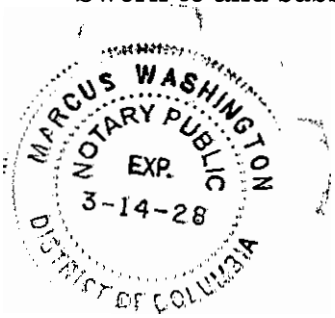
BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,290 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Sworn to and subscribed before me this 13th day of July 2023.



MARCUS WASHINGTON
NOTARY PUBLIC
District of Columbia

My commission expires March 14, 2028.

WILSON-EPES PRINTING CO., INC. Est. 1941

E-Mail Address:
briefs@wilsonepes.com

Web Site:
www.wilsonepes.com

1115 H Street, N.E.
Washington, D.C. 20002

Tel (202) 789-0096
Fax (202) 842-4896

No. 22-1208

URSULA NEWELL-DAVIS, ET AL.,

Petitioners,

v.

COURTNEY N. PHILLIPS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUSIANA DEPARTMENT OF HEALTH, ET AL.,

Respondents.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on July 13, 2023, three (3) copies of the BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

LAWRENCE G. SALZMAN
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
(916) 419-7111
Party name: Ursula Newell-Davis, et al.

SHAE GARY MCPHEE JR.
LOUISIANA DEPARTMENT OF JUSTICE
1885 N 3rd St.
Baton Rouge, LA 70802
(225) 938-0779
Party name: Courtney N. Phillips, et al.

The following email addresses have also been served electronically:

mpepson@afphq.org
lsalzman@pacificlegal.org
mcphees@ag.louisiana.gov

ALAN JAMES SMITH
WILSON-EPES PRINTING COMPANY, INC.
1115 H Street, N.E.
Washington, D.C. 20002
(202) 789-0096

Sworn to and subscribed before me this 13th day of July 2023.

MARCUS WASHINGTON
NOTARY PUBLIC
District of Columbia

My commission expires March 14, 2028.

MARCUS WASHINGTON NOTARY PUBLIC EXP. 3-14-28 DISTRICT OF COLUMBIA

Kiren Mathews

From: no-reply@sc-us.gov
Sent: Thursday, July 13, 2023 8:08 AM
To: Incoming Lit
Subject: Supreme Court Electronic Filing System

Follow Up Flag: Follow up
Flag Status: Completed

A new docket entry, "Amicus brief of Americans for Prosperity Foundation submitted." has been added for Ursula Newell-Davis, et al., Petitioners v. Courtney N. Phillips, in Her Official Capacity as Secretary of the Louisiana Department of Health, et al.. You have been signed up to receive email notifications for No. 22-1208.

If you no longer wish to receive email notifications on this case, please click here.