No.

In the Supreme Court of the United States

HEATHER SWANSON AND ONEIDA HEALTH, LLC,
Petitioners,

v.

MIKE HILGERS, NEBRASKA ATTORNEY GENERAL, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A certified nurse-midwife and her medical practice brought a constitutional challenge to Nebraska statutes that prohibit certified nurse-midwives from attending home births and bar them from working at all unless they purchase a "practice agreement" with a physician. Petitioners alleged in detailed factual terms how the scheme undermines maternal safety, restricts access to care—particularly in rural areas—and bears no rational relationship to the State's asserted health and safety interests. At the pleading stage, those allegations were required to be accepted as true.

Nevertheless, the district court dismissed the complaint, and the Eighth Circuit affirmed in a brief opinion that disregarded the complaint's factual allegations, reasoning that the legislature *could have* rationally believed that restrictions on nurse midwives would generally promote health and safety.

The questions presented are:

1. Does rational basis review permit courts, at the Rule 12(b)(6) stage, to treat plaintiffs' well-pleaded factual allegations as irrelevant?
2. Does rational basis review permit courts to uphold a law without any inquiry into whether the means bear a rational connection to the government's stated ends?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Heather Swanson and Oneida Health, LLC.

Respondents are Nebraska Attorney General Michael Hilgers and Ashley Newmyer.[1]

CORPORATE DISCLOSURE STATEMENT

Appellant Oneida Health, LLC, is a limited liability company wholly owned by Appellant Heather Swanson. It has no publicly or privately owned parent corporation.

[1] Ashley Newmyer was automatically substituted for her predecessor, Charity Menefee, under Federal Rule of Appellate Procedure 43(c)(2). App 1a, n.1.

STATEMENT OF RELATED CASES

The proceedings in federal district and appellate courts identified below are directly related to the above-captioned case in this Court.

Heather Swanson, et al. v. Mike Hilgers, et al., No. 4:24–CV–3072 (D. Neb. Sep. 9, 2024)

Heather Swanson, et al. v. Michael Hilgers, et al., No. 24-3027 (8th Cir. August 22, 2025)

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PETITION FOR A WRIT OF CERTIORARI

This case presents a fundamental question about constitutional adjudication under the Fourteenth Amendment: whether a statute the government labels a "public health" measure is functionally immune from judicial review—no matter what the statute actually requires and no matter what the plaintiff plausibly alleges. In short, this case asks whether litigants under the rational basis test retain any judicial recourse under the Due Process Clause at all. Lower courts are deeply divided on that question and many—including the court below—have applied rational basis review in a manner that conflicts with the core tenets of due process. Petitioners, Dr. Heather Swanson and her business Oneida Health, LLC,[1] ask this Court to confirm what its precedents already require: that rational-basis review remains a real judicial test and not a pointless litigation ritual.

The decision below reflects the problems that arise when rational-basis review is applied without meaningful judicial inquiry. Petitioners alleged, in detailed factual terms, that Nebraska requires certified nurse-midwives to pay physicians thousands of dollars for the privilege to work—a requirement that leaves women with fewer and riskier childbirth options while conferring economic protection on entrenched interests. *See e.g.,* App. 32a-33a, 35a-36a. At the pleading stage, those allegations were required to be taken as true. Yet the Eighth Circuit did not engage with them at all. *Id.* at 5a. Instead, it upheld the law in a few sentences because the gov-

[1] (Collectively "Dr. Swanson").

ernment asserted generalized "health and welfare" interests and because the legislature *could have believed* that restricting nurse-midwives might advance those interests—even if those beliefs were contradicted by the complaint's well-pleaded facts. *Id.* at 4a-5a.

That approach does not apply rational basis review—it nullifies it. If invoking a "health" interest excuses courts from examining whether a law bears any relationship to its asserted end—or from crediting well-pleaded facts—then most laws affecting nonfundamental rights become effectively unchallengeable, no matter how irrational, self-contradictory, or detached from reality. Plaintiffs will not lose because their allegations are implausible; they will lose because their allegations have not been considered at all. That approach conflicts with this Court's precedents, has produced a deep and acknowledged circuit split, and has transformed rational-basis review from a deferential, but meaningful constitutional safeguard into a doctrine of judicial abdication. Because rational-basis scrutiny governs the overwhelming majority of constitutional cases, the stakes could hardly be higher.

OPINIONS BELOW

The district court's order dismissing Petitioners' complaint and the Eighth Circuit's affirmance are reproduced in the appendix.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The district court granted the defendants' motion to dismiss on September 9, 2024. Petitioners filed a timely appeal to the Eighth Circuit, and a panel of the Eighth Circuit affirmed dismissal on August 22, 2025. On October 14, 2025, this Court granted Petitioners' motion for an extension of time within which to file a petition for a writ of certiorari until December 22, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Section 1 of the Fourteenth Amendment reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nebraska Revised Statute 38-609 reads as follows:

> Practice agreement means the written agreement authored and signed by the certified nurse midwife and the licensed practitioner with whom he or she is associated which:
>
> (1) Identifies the settings within which the certified nurse midwife is authorized to practice;

(2) Names the collaborating licensed practitioner or, if more than one licensed practitioner is a party to such practice agreement, names all of the collaborating licensed practitioners;

(3) Defines or describes the medical functions to be performed by the certified nurse midwife, which are not inconsistent with the Certified Nurse Midwifery Practice Act, as agreed to by the nurse midwife and the collaborating licensed practitioner; and

(4) Contains such other information as required by the board.

Nebraska Revised Statute 38-611 reads as follows:

A certified nurse midwife may, under the provisions of a practice agreement, (1) attend cases of normal childbirth, (2) provide prenatal, intrapartum, and postpartum care, (3) provide normal obstetrical and gynecological services for women, and (4) provide care for the newborn immediately following birth. The conditions under which a certified nurse midwife is required to refer cases to a collaborating licensed practitioner shall be specified in the practice agreement.

Nebraska Revised Statute 38-613 (1-3) reads as follows:

(1) The specific medical functions to be performed by a certified nurse midwife within the scope of permitted practice prescribed by section 38-611 shall be described in the practice agreement which shall be reviewed and approved by the board. A copy of the agreement shall be maintained on file with the board as a

condition of lawful practice under the Certified Nurse Midwifery Practice Act.

(2) A certified nurse midwife shall perform the functions detailed in the practice agreement only under the supervision of the licensed practitioner responsible for the medical care of the patients described in the practice agreement. If the collaborating licensed practitioner named in the practice agreement becomes temporarily unavailable, the certified nurse midwife may perform the authorized medical functions only under the supervision of another licensed practitioner designated as a temporary substitute for that purpose by the collaborating licensed practitioner.

(3) A certified nurse midwife may perform authorized medical functions only in the following settings:

(a) In a licensed or certified health care facility as an employee or as a person granted privileges by the facility;

(b) In the primary office of a licensed practitioner or in any setting authorized by the collaborating licensed practitioner, except that a certified nurse midwife shall not attend a home delivery; or

(c) Within an organized public health agency.

STATEMENT OF THE CASE

A. Nebraska's restrictive scheme

This case challenges two features of Nebraska law that regulate certified nurse-midwives ("CNMs"). First, Nebraska requires every CNM to secure a "practice agreement" with a supervising physician as a precondition to practicing midwifery in any setting. Neb. Rev. Stat. § 38-609, 611. The statute supplies no specific standards governing these agreements. Physicians may refuse to enter into them for any reason, including economic competition, institutional policy, liability concerns, or personal preference—or for no reason at all. App. 33-35a. Many hospitals prohibit their employed physicians from entering into such agreements altogether, effectively vetoing CNM practice across large portions of the state. *Id.* at 35a. And these agreements often function as a simple exchange of money for the right to practice, with no meaningful supervision or collaboration thereafter. *Id.*

Further, while unattended home birth remains entirely legal, Nebraska law categorically prohibits CNMs from attending any home birth, regardless of their training, experience, or the medical appropriateness of the birth setting. Neb. Rev. Stat. § 38-613(3)(b). Thus, even a fully licensed, board-certified CNM with decades of experience may not attend a low-risk home birth under any circumstances even while a mother gives birth at home unattended. Violation of this prohibition is a felony.

Although the State has recently extended certain regulatory restrictions to other categories of childbirth attendants through judicial construction, *State*

of Nebraska v. Jones, 317 Neb. 559 (2024), the statutory prohibitions challenged here fall most heavily on licensed CNMs. CNMs are the only category of childbirth providers with advanced, formal medical training whose practice is otherwise comprehensively regulated by the State. The result is not a coherent regulatory framework for maternal safety, but an internally inconsistent scheme that permits risky home birth with no attendants at all while prohibiting home birth with the most highly trained and educated attendants available. On its face and in practice, that structure is irrational.

B. Petitioners

Dr. Swanson is a highly trained, board-certified CNM with a Doctor of Nursing Practice degree and more than twenty years of combined clinical and academic experience. App. 30a. She owns and operates Oneida Health, LLC, which provides maternity-care services to women across rural Nebraska, including in communities with limited access to prenatal care and long travel distances to the nearest hospital. *Ibid.* Many Nebraska women—including Amish families and others with deeply held personal, religious, cultural, or logistical reasons—regularly seek home-birth care from Dr. Swanson and other CNMs. *Id.* at 46a. Dr. Swanson stands ready to provide care to low-risk mothers who choose that option. *Ibid.* But because Nebraska law categorically forbids CNMs from attending home births and requires her to enter into a physician practice agreement, she must turn those women away —regardless of their medical suitability for home birth and regardless of her own qualifications.

C. Effect on Expectant Mothers and Rural Communities

Nebraska faces a well-documented shortage of maternity-care providers, particularly in rural counties, where many women must travel more than an hour for prenatal visits or hospital delivery. *Id.* at 34-35a. For women who choose home birth—whether for religious, personal, medical, or logistical reasons—Nebraska's prohibitions eliminate the option of receiving care from a trained, licensed CNM. These restrictions do not promote maternal or infant safety. *Id.* at 38-40a. Instead, they operate arbitrarily—preventing qualified providers from serving low-risk patients while leaving families to rely on unregulated or informal attendants, or to give birth without any trained assistance at all. *Id.*

D. Procedural History

Plaintiffs filed this action in the United States District Court for the District of Nebraska, alleging that Nebraska's statutory scheme violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. App. 10a. Nebraska moved to dismiss under Rule 12(b)(6). *Ibid.* Dr. Swanson opposed the state's motion, emphasizing that at the pleading stage the district court was required to accept the complaint's factual allegations as true and to determine only whether those allegations plausibly stated a constitutional claim. The district court nevertheless dismissed the complaint in its entirety. Applying rational basis review, the court concluded that the challenged statutory scheme is supported by a conceivable legitimate governmental interest because it falls under the category of health and safety. App. 25-26a. The court did not analyze the specific

statutory requirements governing CNMs, examine how the two challenged provisions function together in practice, or evaluate whether the scheme actually advances—or instead undermines—the state's asserted safety rationale.

The United States Court of Appeals for the Eighth Circuit affirmed in a sparse opinion. Once again, the court did not take Dr. Swanson's detailed allegations seriously, ignoring them as immaterial because "the legislature rationally could have believed" restrictions on CNMs in general could serve state interests. App. at 5a. The court did not analyze the specific statutory mechanisms at issue or substantially address the complaint's allegations that the scheme reduces access to trained care, worsens rural maternity-care shortages, and increases reliance on unregulated attendants. And it did not consider whether the two challenged provisions actually bear a rational relationship to the asserted safety interest.

Thus, the lower courts disposed of this case at the pleading stage without examining how Nebraska's statutory scheme works and without engaging with the complaint's allegations showing irrationality and inconsistency. That posture squarely presents the question whether a court may ignore the pleading standard of Rule 12(b)(6) and render a statute unchallengeable based solely on a generalized invocation of "health and welfare" as a government interest and without examining either the actual statutory mechanics or the facts alleged in the complaint.

REASONS FOR GRANTING THE PETITION

I. Courts Are Hopelessly Divided Over How to Apply the Rational Basis Test

This case concretely illustrates a decades-old problem. Rational-basis review no longer operates as a judicial test in many courts. Instead, it has fractured into multiple, inconsistent applications with some preserving meaningful inquiry into rationality and others treating entire categories of legislation as effectively immune from constitutional challenge. Still others will uphold a law notwithstanding the parties' arguments so long as the court itself can dream up its own health and safety rationale for the government. *See e.g., Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City*, 742 F.3d 807, 809 (8th Cir. 2013) (courts are "not bound to consider only the stated purpose of a legislature").

The decision below reflects one of the most extreme versions of the rational basis inquiry. The Eighth Circuit did not examine the specific statutory mechanics at issue, analyze the relationship between Nebraska's specific restrictions on CNMs and public safety, or engage at all with Dr. Swanson's detailed factual allegations that the challenged scheme undermines, rather than advances, the State's asserted interests. App. 5a. Instead, the court disposed of the case in two sentences by invoking "health and welfare" and stating that the legislature "could have rationally believed" restrictions like those challenged would generally further those interests. *Ibid.* That approach is not merely deferential. It eliminates rational-basis review as a form of judicial inquiry altogether. And it cements the Eighth Circuit on one

side of an entrenched conflict over what rational-basis review requires.

This problem is the product of the Court's internally inconsistent descriptions of rational-basis review, which have produced confusion, fractured outcomes in similar cases, and procedural breakdowns across the lower courts. This case squarely presents the need for this Court to resolve those conflicts and restore rational-basis review to a relaxed but meaningful judicial inquiry.

A. This Court's precedents are inconsistent

Members of this Court have long acknowledged that its rational-basis decisions cannot be reconciled into a single, coherent framework. In *U.S. R.R. Ret. Bd. v. Fritz*, the Court observed that even "[t]he most arrogant legal scholar would not claim that all of these [rational basis] cases applied a uniform or consistent test under equal protection principles." 449 U.S. 166, 176 n.10 (1980); *see also Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 132 (1999) ("[c]ases applying the rational-basis test have described that standard in various ways.") (Stevens, J., dissenting). Since the Court first articulated modern rational-basis review in *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (1938), the doctrine has repeatedly swung between a relaxed but meaningful inquiry into whether the government's means rationally relate to some legitimate end and near-total deference to the government.

At the outset, the Court grounded rational-basis review in facts and evidence. In *Carolene Products*, the Court explained that legislation may be invalidated "by proof of facts tending to show" that it "is without support in reason," including proof that the

factual assumptions underlying the statute "ha[d] ceased to exist." *Id.* at 153-54. And that rationality "depend[s] on the relevant circumstances of each case." *Id.* at 154. Where the existence of a rational basis "depends upon facts beyond the sphere of judicial notice," those facts "may properly be made the subject of judicial inquiry." *Id.* at 153. Thus, even at the dawn of modern rational-basis review, this Court made clear that deference did not eliminate the role of evidence—or the judiciary's duty to engage with it.

The Court later adopted markedly different language in *Williamson v. Lee Optical of Oklahoma, Inc.*, a decision that became the standard for toothless rational-basis review. 348 U.S. 483, 487-88 (1955) (holding that the government could "exact a needless, wasteful requirement" based on what the legislature "might have concluded," and that "[f]or protection against abuses by legislatures, the people must resort to the polls, not to the courts"). But just two years later, in *Schware v. Board of Bar Examiners*, this Court held that New Mexico violated due process by denying bar admission where the evidentiary record did not "rationally justif[y]" a finding of moral unfitness. 353 U.S. 232, 246-47 (1957). The plaintiff had introduced substantial evidence of good character and decades without legal trouble, *id.* at 235-45. The Court accordingly refused to accept the state's justifications at face value and held that, in light of the record, no rational connection existed between the government's asserted concerns and the challenged deprivation. *Id.* at 246.

In *City of Cleburne v. Cleburne Living Center*, this Court made clear that rational-basis review requires a genuine judicial inquiry, not blind acceptance of any conceivable justification. 473 U.S. 432 (1985).

The city denied a special-use permit for a group home for mentally disabled adults based on speculative concerns about student harassment, flood risks, and residents' legal responsibility. *Id.* at 435, 449. The Court rejected those conceivable explanations and concluded that the decision rested on "irrational prejudice against the mentally retarded." *Id.* at 450. As Justice Marshall observed, the test applied in *Cleburne* was "most assuredly not the rational-basis test of *Williamson v. Lee Optical*." *Id.* at 458 (Marshall, J., concurring in part and dissenting in part).

The Court has applied similar reasoning in other rational-basis cases where the challenged means bore only a weak, distorted, or underinclusive relationship to the state's asserted ends. In *Zobel v. Williams*, for example, the Court applied rational-basis review to invalidate an oil-dividend distribution scheme, even though the law marginally advanced the concededly legitimate interest of attracting and retaining new residents. 457 U.S. 55, 57 (1982). The Court concluded that the scheme's heavy favoritism toward longtime residents rendered the connection between the classification and the asserted interest too attenuated to satisfy even deferential review. *Id.* at 62. *See also Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (land-ownership requirement for local office irrational though land ownership could rationally relate to qualifications to hold office); *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985) (statute imposed a burden disproportionate to the state's asserted interest and was therefore irrational); *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971) (underinclusive statute was irrational even though it served the interest of reducing court costs). The reasoning in these cases contrasts starkly with the decision below,

which contained no analysis of the relationship between the challenged statute and the interests it purportedly serves.

In *FCC v. Beach Communications, Inc.*, the Court articulated an especially permissive version of rational-basis review in dicta, stating that a statute must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and that challengers must "negative every conceivable basis which might support it." 508 U.S. 307, 314-15 (1993). Taken literally, that formulation would permit patently absurd regulations to stand. For example, a state could prohibit CNMs from attending home births within 48 hours of a full moon on the widely-believed theory that emergency-room utilization will increase, thereby straining backup services.[2] Under an unbounded conceivability standard, the legislature could "rationally believe" such a restriction helpful. Yet no serious application of rational-basis review could sustain a law that conditions the legality of professional medical practice on the lunar cycle.

Further, subsequent decisions confirm that—even after *Beach Communications*—the rational basis test remains a real inquiry into unconstitutional irrationality. *Romer v. Evans*, 517 U.S. 620, 621 (1996) (holding that the challenged law could not "be ex-

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[2] Schuld, et al. *Popular Belief meets Surgical Reality: Impact of Lunar Phases, Friday the 13th and Zodiac Signs on Emergency Operations and Intraoperative Blood Loss* (Sep. 2011), available at https://pubmed.ncbi.nlm.nih.gov/21713579/ (last accessed December 19, 2025).

plained by reference to [the State's asserted justifications]"); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (reaffirming that even under deferential review, irrational and arbitrary classifications remain unconstitutional). Given these conflicting demands, the lower courts have struggled to discern what rational basis review requires in practice.

1. Lower courts are deeply divided about almost every aspect of the test

The lower courts are understandably confused and apply markedly different versions of the test. Under one of the most permissive formulations, courts have strained to invent justifications that will allow them to uphold facially irrational regulations. Under another, courts have thrown out ordinary procedural rules that govern Rule 12 motions to deny the plaintiffs the opportunity to seek evidence even after plausibly pleading that a law is not related to its purported end or only furthers an illegitimate end. Circuit splits have emerged over core features of the doctrine, producing directly conflicting outcomes regarding materially indistinguishable laws.

First, Courts are divided over whether they can consider evidence of irrationality or must take the government at its word. This Court has made clear that rational-basis review creates a rebuttable presumption of constitutionality—not "a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault." *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934). Consistent with that understanding, the Court has ruled for plaintiffs on the merits in appropriate cases brought under rational-basis review, albeit infrequently. *See, e.g.*, *Eisenstadt v. Baird*, 405

U.S. 438, 446-47 (1972); *Romer v. Evans*, 517 U.S. 620, 632–33 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-41 (1985); *Zobel*, 457 U.S. 55; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Vill. of Willowbrook*, 528 U.S. at 565 (per curiam); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985). At bottom, rational-basis review requires plaintiffs to *demonstrate* with evidence that a law bears no rational connection to a legitimate governmental interest because it is so disconnected from the state's asserted objective that it is arbitrary or irrational. *Cleburne*, 473 U.S. at 446. Yet, because this Court's formulations of the test have wavered, the courts of appeal are now deeply divided on whether judges can consider a plaintiff's well-pleaded allegations, or record evidence, that rebuts the government's bare assertions that the challenged law is rationally related to a legitimate end.

On one side of that divide, several circuits treat rationality as an evidentiary question. In *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), the Sixth Circuit invalidated Tennessee's restriction limiting casket sales to licensed funeral directors after considering evidence that the required training—embalming, handling remains, and funeral services—was entirely irrelevant to casket retail. *Id.* at 225. Although the state asserted a public-health justification, the court found that justification refuted by the evidence. *Id.* at 224-25 (holding that the state's justification "come[s] close to striking us with 'the force of a five-week-old, unrefrigerated dead fish.'").

Likewise, in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), the Fifth Circuit struck down Louisiana's casket-sales restrictions after reviewing evidence demonstrating that none of the required

training was relevant to casket sales. *Id.* at 218. The court also rejected Louisiana's consumer-protection justification as "betrayed by the undisputed facts," noting that no licensure requirements applied to casket retailers and that general consumer-protection law already prohibited deceptive practices. *Id.* at 223-25. The Ninth Circuit followed the same evidentiary approach in *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), where it invalidated California's pest-control licensing scheme after examining record evidence showing that exempted pest controllers were more likely to encounter dangerous pesticides than those required to be licensed. *Id.* at 991.

By contrast, the Eighth Circuit's decision below adopts the opposite rule. It holds that when a plaintiff alleges a statute lacks a rational connection to a legitimate governmental interest, the government may obtain dismissal under Rule 12(b)(6) before any discovery or weighing of evidence by simply asserting that the challenged law generally relates to such an interest. App. 4-5a. Even under the most deferential articulation of the test, it is not enough for the court to merely invoke a permissible objective and end the inquiry as the lower court did here.

That approach shifts rational-basis review from the merits stage to the pleading stage, permits the government to foreclose factual development altogether, and effectively transforms the presumption of constitutionality into near-total immunity from challenge for broad categories of legislation. *See also, Carter v. Arkansas*, 392 F.3d 965, 968 (8th Cir. 2004) (declaring that a judge "may conduct a rational basis review on a motion to dismiss" and that it is "'not necessary to wait for further factual development'").

The Fourth Circuit follows a similar rule. In *Colon Health Centers of Am. v. Hazel*, 733 F.3d 535 (4th Cir. 2013), the court permitted discovery on a Dormant Commerce Clause challenge to a Virginia statute, yet refused to allow any factual development on parallel due process and equal protection challenges based solely on the state's asserted justifications. *Id.* at 547-48. The Second Circuit has taken the same approach. *See Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 283-85 (2d Cir. 2015) (upholding Connecticut's restriction on non-dentists shining LED lights into customers' mouths despite record evidence that dentists were not trained in LED use and that consumers were freely permitted to use the same lights themselves.)

The Seventh Circuit, meanwhile, has gone both ways. In *Keenon v. Conlisk*, 507 F.2d 1259 (7th Cir. 1974), it reversed dismissal of a rational-basis claim, holding that "the district judge could not properly have determined that the practices complained of were reasonable from the record before him," and that "[b]ald assertions that the [government's actions] are reasonable cannot be considered." *Id.* at 1261. Yet in *Hager v. City of W. Peoria*, 84 F.3d 865, 874 (7th Cir. 1996), the same court affirmed dismissal of a rational-basis challenge before any fact-finding based solely on the government's assertion that its conduct was rationally related to a legitimate interest.

Second, even when courts agree that rational-basis review applies, they sharply disagree on a threshold question: what kinds of governmental interests are "legitimate" in the first place. *See* Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14

Geo. J.L. Pub. Pol'y 537, 556 (2016). On this issue, the courts of appeal are squarely and irreconcilably divided.[3] For example, in the Fifth, Sixth, and Ninth Circuits, economic protectionism for its own sake is not a constitutionally legitimate interest capable of sustaining a law. *See St. Joseph Abbey*, 712 F.3d at 222 ("neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose"); *Craigmiles*, 312 F.3d at 224 ("[p]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose"); *Merrifield*, 547 F.3d at 991 n.15 ("[m]ere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review").

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[3] Judicial dissatisfaction with modern rational-basis review is also widespread. *See Tiwari v. Friedlander*, 26 F.4th 355, 372 (6th Cir. 2022) ("[A]ny . . . recalibration of the rational-basis test and any effort to create consistency across individual rights is for the U.S. Supreme Court, not our court, to make."); *Hettinga v. United States*, 677 F.3d 471, 482-83 (D.C. Cir. 2012) (Brown, J., concurring) ("[Rational basis review] 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."); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 112 (Tex. 2015) (Willett, J., concurring) ("[F]ederal-style scrutiny is quite unscrutinizing, with many burdens acing the rational basis test while flunking the straight-face test."); *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring) ("[Rational basis scrutiny] can hardly be termed scrutiny at all. Rather, it is a standard which invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute.").

By contrast, the Second and Tenth Circuits have taken the opposite view, holding that favoritism toward a discrete interest group is itself a constitutionally sufficient end. *See Sensational Smiles*, 793 F.3d at 286 ("We . . . conclude that economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment."); *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) ("[a]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.").

There are also unresolved and deepening conflicts over other asserted interests such as whether administrative convenience or cost savings alone can qualify as a legitimate interest under rational-basis review. For example, in *Newell-Davis v. Phillips*, No. 22-30166, 2023 WL 1880000 at *4 (5th Cir. Feb. 10, 2023), the Fifth Circuit upheld Louisiana's exclusion of would-be respite-care providers solely on the ground that doing so reduced the state's regulatory workload. The court reasoned that limiting the number of licensees allowed the state to focus its oversight resources on fewer providers and that this administrative convenience alone satisfied rational-basis review. *Ibid.* That conclusion sits uneasily alongside this Court's repeated statements that administrative efficiency and fiscal savings, standing alone, do not justify burdens on constitutional interests. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 227 (1982). At the same time, other decisions such as *Armour v. City of Indianapolis*, 566 U.S. 673, 681-83 (2012), have accepted some fiscal and administrative considerations as sufficient under rational-basis review. The result is yet another unresolved fault line

in rational-basis doctrine, leaving lower courts without clear guidance as to how the test applies.

The decision below illustrates the danger of evaluating governmental interests at an abstraction so high that the label itself becomes dispositive. Rather than identify the concrete interests Nebraska's specific restrictions actually serve, the Eighth Circuit treated the generic invocation of "health and welfare" as sufficient to dismiss the case without examining whether the statute meaningfully advances those interests. App. 4-5a. That approach conflicts with decisions like *St. Joseph Abbey* and aligns with the most extreme readings of the rational basis inquiry, underscoring the need for this Court to reaffirm that rational-basis review requires engagement with a statute's actual operation—not merely accept the state's characterization at face value.

Third, the circuits are also divided over what it actually means for a law to be "rational." In practice, courts disagree sharply about how close the connection between a statute and its asserted objectives must be. For example, the Fifth Circuit has rejected health-and-safety justifications where the "purported rationale for the challenged law elides the realities" of how the regulatory scheme actually operates. *St. Joseph Abbey*, 712 F.3d at 226. This follows this Court's precedent suggesting that it is not enough for the government to merely assert a rational end; the means chosen must bear a rational relationship to that end. *See Turner v. Fouche*, 396 U.S. 346, 363-64 (1970).

But the Eighth Circuit has upheld onerous occupational requirements as rational even where the record showed that roughly ninety percent of the

burden imposed did nothing to advance the state's stated interest. *Niang v. Carroll*, 879 F.3d 870, 874 (8th Cir). Similarly, the Seventh Circuit has upheld a ban on grocery stores selling cold beer on the theory that it might channel underage purchasers to liquor stores—even though the evidence showed that liquor stores had a worse record of compliance with alcohol laws. To the Seventh Circuit, that evidentiary showing "d[idn't] suffice under rational basis review." *Ind. Petroleum Marketers & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 325 (7th Cir. 2015).

This doctrinal instability has produced irreconcilable outcomes in cases involving nearly identical regulations. The casket-sales cases alone illustrate the point: materially indistinguishable licensing schemes were struck down in the Fifth and Sixth Circuits but upheld in the Tenth. Compare *Craigmiles*, 312 F.3d 220, and *St. Joseph Abbey*, 712 F.3d 215, with *Powers*, 379 F.3d at 1221. On virtually the same facts, one set of plaintiffs prevailed because courts required a real connection between means and ends; the other lost because the court treated deference as dispositive. *Id.* ("[*Lee Optical*] so closely mirror[ed] the facts of th[at] case that . . . merely a citation to [*Lee Optical*] would have sufficed."). That kind of split is not the product of factual differences, but of conflicting understandings of what rational-basis review requires.[4]

[4] A similar split has also emerged in challenges to cosmetology licensing requirements imposed on African-style hair braiders. District courts in California, Texas, and Utah struck down materially identical requirements as irrational under rational-basis review. *See Cornwell v. Hamilton*, 80 F.

Last, the confusion surrounding rational-basis review extends beyond substance and into procedure, where ordinary rules that govern every other category of federal litigation are forced to give way. Under Federal Rule of Civil Procedure 8, a plaintiff need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief," and a complaint must contain only "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That standard sits uneasily with the *Beach Communications* directive that a plaintiff must "negative every conceivable basis" that might support the challenged law. 508 U.S. at 314-15.

In some cases, courts attempt to apply rational-basis review consistently with ordinary pleading rules. *See, e.g., Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 591 (9th Cir. 2008) (denying a motion to dismiss a rational-basis claim after reading the complaint's allegations in the light most favorable to the plaintiff); *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009) (same). In other cases, however, courts dismiss at the pleading stage while openly acknowledging the conflict between rational-basis review and Rule 12(b)(6). *See Abigail All. for Better Access to Developmental Drugs v. von Eschen-*

Supp. 2d 1101 (S.D. Cal. 1999); *Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W.D. Tex. 2015); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012). Yet on indistinguishable facts, the Eighth Circuit upheld the same type of regulation and dismissed those decisions because they did "not appropriately defer to legislative choices." *Niang*, 879 F.3d at 875 n.3.

bach, 495 F.3d 695, 712 n.20 (D.C. Cir. 2007) (noting a "tension between the Rule 12(b)(6) standard and rational basis review"); *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (recognizing a "dilemma created when the rational basis standard meets the standard applied to a dismissal under Rule 12(b)(6)").

District courts have likewise acknowledged their own uncertainty in navigating this terrain. *See Immaculate Heart Cent. Sch. v. N.Y. State Pub. High Sch. Athletic Ass'n*, 797 F. Supp. 2d 204, 211 (N.D.N.Y. 2011) (describing a "unique challenge" in applying rational-basis review at the pleading stage); *Baumgardner v. Cnty. of Cook*, 108 F. Supp. 2d 1041, 1055 (N.D. Ill. 2000) (lamenting the resulting "confusing situation"). The result is a procedural regime in which the same constitutional claim may proceed to discovery in one circuit but be extinguished at the courthouse door in another. There are even internal conflicts with circuits. *Compare In re City of Detroit*, 841 F.3d 684, 701 (6th Cir. 2016) (citation omitted) ("In [Plaintiffs'] view, requiring an equal protection claimant to "incorporate into their pleadings lengthy lists of rebuttable rationales for challenged legislation" is "an impossible" task at odds with Twombly's holding that a complaint need only include enough facts to "raise a right to relief above the speculative level…Plaintiffs are mistaken.") *with Andrews v. City of Mentor*, 11 F.4th 462, 478 (6th Cir. 2021) (opposite view).

That procedural breakdown is precisely what occurred here. Petitioners pleaded detailed factual allegations showing that Nebraska's CNM restrictions undermine maternal safety, reduce access to care, and irrationally prohibit trained providers while al-

lowing unregulated attendants. App. 32-40a. Under ordinary Rule 12(b)(6) principles, those allegations were required to be accepted as true and tested through factual development. Instead, the courts below treated rational-basis review as a license to disregard the pleadings entirely, credit speculative justifications unsupported by any record, and dismiss at the threshold. This case thus squarely presents the procedural incompatibility between hyper-deferential rational-basis review and the Federal Rules of Civil Procedure—and the resulting denial of any meaningful opportunity to be heard.

II. This case presents issues of nationwide importance

The rational basis test is one of the most commonly used standards that courts employ. It affects many important unenumerated rights, from the right to earn a living, to the right to equality in adoption proceedings, to the right to save your life. It has also crept into other areas of constitutional law, like takings cases and dormant commerce clause analysis. Yet it's also one of the most widely criticized legal doctrines. *See, e.g.,* Andrew Ward, *The Rational-Basis Test Violates Due Process*, 8 N.Y.U. J.L. & Liberty 714, 721 (2014); Richard A. Epstein, *Judicial Engagement with the Affordable Care Act: Why Rational Basis Analysis Falls Short*, 19 Geo. Mason L. Rev. 931 (2012) ("The rational basis test inverts the proper assumption behind our whole system of limited government"); Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479, 1496 (2008) (arguing that the rational basis test violates the Ninth Amendment); Evan Bernick, *Subjecting the Rational Basis Test to Constitutional Scrutiny*, 14 Geo. J.L. & Pub. Pol'y

347 (2016) (listing a long list of academic articles criticizing the test); Bernard Siegan, *Economic Liberties And The Constitution*, 320 (1980) (arguing that modern rational basis review has effectuated "judicial withdrawal from the protection of economic liberty" that "violates Article III."); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & Liberty 898, 914 (2005); Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity"*, 25 Geo. Mason U. Civ. Rts. L.J. 43 (2014) (criticizing formulations of the test that do not allow parties to pass the motion to dismiss stage). *Tiwari*, 26 F.4th at 368 ("many thoughtful commentators, scholars, and judges have shown that the current deferential approach to economic regulations may amount to an overcorrection in response to the Lochner era at the expense of otherwise constitutionally secured rights.") (Sutton, J., concurring); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 112 (Tex. 2015) (Willett, J., concurring) ("many burdens ac[e] the rational-basis test while flunking the straight-face test").

Perhaps the most consequential criticism is that the test suffers from serious constitutional concerns.[5]

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[5] Danger to politically powerless minority groups is also concrete here. *Hettinga*, 677 F.3d at 482-83 (modern rational-basis review too often "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.") (Brown, J., concurring). Nebraska's scheme burdens certified nurse-midwives and the women they serve, including religious minorities such as the Amish. App. at 36a. Yet their claims fail under the decision below not on the merits, but because their allegations are treated as legally irrelevant.

See, e.g., Andrew Ward, *The Rational Basis Test Violates Due Process*, 8 N.Y.U. J.L. & Liberty 714, 721 (2014); Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14 Geo. J.L. & Pub. Pol'y 537, 546 (2016). It turns judges into lawyers for the government, creates an insurmountable obstacle at the pleading stage, and requires judges to abdicate their Article III duty to exercise reasoned judgment, meaning it violates of the separation of powers. This Court should grant certiorari to restore the rational basis test to its proper role: a deferential, but meaningful limit on arbitrary deprivations of rights.

A. The rational basis test violates core tenets of due process

The rational basis test turns judges into lawyers for the government. Ordinarily, parties forfeit arguments they do not make in court. *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). Under the rational basis test, however, judges are free to dream up their own justifications for a challenged law even if never put forward by the government, even if affirmatively disproven by the evidence, and even if explicitly disclaimed by the attorneys in the case. *See, e.g., Meadows v. Odom*, 360 F. Supp. 2d 811, 822-25 (M.D. La. 2005) ("we are not bound by the parties' arguments as to what legitimate state interests the statute seeks to further. In fact, 'this Court is obligated to seek out other conceivable reasons for validating [a state statute.]'" (quoting *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001)); *Gill v. Off. of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387-88 (D. Mass. 2010) ("the fact that the government has distanced itself" from certain rationales

for a challenged law "does not render them utterly irrelevant"). This privilege does not run both ways; judges may not come up with arguments never argued by the plaintiff; they act as second chair only for the government. This establishes a systematic judicial thumb on the scale in favor of the state.

Just this term, this Court ruled that the Fourth Circuit violated the rule of party presentation when it reversed a conviction based on an argument never made by the defendant. *Clark v. Sweeney*, 607 U.S. ___, No. 25-52, 2025 WL 3260170 (Nov. 24, 2025). That's because under our adversarial system, the parties "frame the issues for decision," while the court serves as "neutral arbiter of matters the parties present." *Sineneng-Smith*, 590 U.S. at 375. Put another way, courts "call balls and strikes"; they don't get to play as batters. *Lomax v. Ortiz-Marquez*, 590 U.S. 595, 599 (2020). Yet the rational basis test requires judges to take a swing in each case and to rule against the plaintiff so long as it can conceive of a rationale for the challenged law.

The idea that judges can affirmatively advocate on behalf of one party not only flips the adversarial system on its head, it also deprives civil rights plaintiffs of a neutral arbiter—a core principle of due process. *See Tumey v. Ohio*, 273 U.S. 510, 535 (1927). Impartiality requires that judges hear the arguments before them and make a reasoned judgment rooted in fact. The rational basis test forces courts to make up their own arguments and make judgments rooted in unsupported factual assertions. This state of affairs runs head long into the supposed justification for the rational basis test in the first place: keeping courts from substituting their own beliefs for the judgment

of the legislature.[6] *Beach Communications*, 508 U.S. at 314-15.

What's more, even when judges rely solely on the arguments presented to them, the test requires judges to rule in favor of the government so long as it asserts a general interest in health or safety. *Beach Commc'ns*, 508 U.S. at 315 (government's assertions are not subject to "courtroom factfinding" and need not be supported in evidence). As the decision below demonstrates, judges need not explain *how* the challenged law even relates to the purported end. It's enough for the government states that its law is the solution. This makes the test insurmountable. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 306 (1976) ("*Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous.").

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[6] As Professor Jeffrey Jackson has pointed out, the idea that judges must uphold a law so long as they can conjure a reason for it is also not supported by precedent:

> The Court in *FCC v. Beach Communications* offered this contention as a quote from the 1973 case *Lehnhausen v. Lake Shore Auto Parts Co.*, which in turn quoted the 1940 case *Madden v. Kentucky*. For this dubious statement, the Court in *Madden* cited *Lindsley v. Nat. Carbonic Gas Co.*, but *Lindsley* says no such thing. Instead, *Lindsley* is a classical rational basis case, with the classical burden of proof. It allows for the assumption of any reasonably conceived statement of facts that supports the enactment; an assumption that is subject to rebuttal with evidence that it does not rest upon such a basis.

Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 Geo. J.L. & Pub. Pol'y 493, 509 (2016).

Even this Court speaks about the rational basis test in such terms. *See, e.g.* Tr. of Oral Arg., *Chiles v. Salazar*, No. 24-539, 2025 WL 2856141, at *84 (Justice Alito referring to rational basis review as "anything goes."); *Free Speech Coalition v. Paxton,* 606 U.S. 461 (2025), (Justice Jackson asking "but wouldn't rational basis allow you to do anything?"); *United States v. Skrmetti*, 605 U.S. 495, 585-86 (2025) (rational basis review "demands hardly more than a cursory glance at the State's reasons for legislating") (Sotomayor, J., dissenting); *Trump v. Hawaii*, 585 U.S. 667, 705 (2018) ("the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny."). There is no other way to describe the rational basis test than as a judicial rubber stamp.

B. Irrational results

The result of the rational basis test is that courts uphold palpably irrational laws that defy basic common sense. In *Meadows v. Odom*, 360 F. Supp. 2d 811, 822-25 (M.D. La. 2005), a court upheld Louisiana's floristry licensing requirement, which required people from working as a florist unless they passed a floral arrangement making test graded by the licensed florists—i.e., their would-be competitors. The exam had a passage rate less than half that of the state bar exam. *Id.* at 822-23. Despite that the plaintiffs introduced uncontroverted evidence that unlicensed florists routinely prepare floral arrangements without incident and that "people handle millions of unlicensed floral arrangements around the world every year without being harmed," *id.* at 824, the court accepted the state's unsupported belief that the scheme protected consumers from such specula-

tive dangers as poking their fingers on floristry wire. There was no evidence that anyone anywhere had ever been injured by a floral arrangement. Nonetheless, the government's mere speculation was enough to keep people out of work. The plaintiff later died in poverty. *When Rational Basis Review Bit*, 138 Harv. L. Rev. 1843, 1844 (2025).

The irrationality doesn't stop there. The Third Circuit said it was rational to ban serving food—but not beverages—at funeral homes because one could imagine that the embalming process might contaminate food (but apparently not drinks). *Heffner v. Murphy*, 745 F.3d 56, 85-86 (3d Cir. 2014). The Fourth Circuit has upheld a scheme that keeps individuals on a sex-offender registry longer for propositioning children than for sexually assaulting them, after the court hypothesized that such a rule could somehow benefit children who are themselves sex offenders. *Doe v. Settle*, 24 F.4th 932, 943–45 & n.10 (4th Cir. 2022). The Fifth Circuit upheld a licensing regime that excluded a social worker from even applying for permission to offer caregivers respite from the rigors of child-rearing special needs children, despite extensive evidence showing the exclusion made access, quality, and prices worse in Louisiana (and the government's own evidence showing a shortage of respite care). *Newell-Davis*, 2023 WL 1880000 at *4. It did so solely to ease the state's regulatory burden in overseeing the industry. *Id.*

The Eighth Circuit has deemed it rational to require African-style hair braiders to complete nearly 1,500 hours of irrelevant training even when record evidence proved the relevant skills could be taught via a 4-6 hour video and the law was more squarely aimed at illegitimate economic protectionism. *Niang*,

879 F.3d at 874 (8th Cir). The Tenth Circuit has held it rational to require online casket sellers to practice embalming corpses. *Powers*, 379 F.3d at 1225. And in *Abigail Alliance*, the D.C. Circuit held that terminally ill patients could be barred from accessing potentially life-saving experimental drugs even where the patients' life expectancy was shorter than the testing period for the drug. 495 F.3d at 712-13.

In sum, the very test used to adjudicate whether laws are arbitrary and violative of due process itself violates due process. *See, e.g.*, Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 Harv. J.L. & Pub. Pol'y 283, 287 (2012) (tracing the Due Process of Law Clause to Magna Carta's requirement that to qualify as "law," a deprivation of liberty not be arbitrary). It seats judges at the government's counsel's table and permits arbitrary laws without meaningful judicial review. This Court should grant certiorari to clarify that judges need not make or accept arguments never put forward by the parties, nor turn a blind eye to plaintiffs' plausible allegations at the motion to dismiss stage, both of which deprive civil rights plaintiffs of neutral arbiters.

C. The rational basis test blurs the separation of powers

Relatedly, the rational basis test improperly blurs the separation of powers. The Constitution separates government into three branches: the legislature, which passes the laws; the executive, who enforces them; and the judiciary, whose duty it is to exercise reasoned judgment to interpret the law and

apply law to facts. The Constitution is also supreme to state law.

By forcing judges to accept the legislature's bare assertions of rationality in place of their own reasoned judgment, the rational basis test forces judges to abdicate their Article III duty. *See, e.g.*, Joseph Diedrich, *Separation, Supremacy, and the Unconstitutional Rational Basis Test*, 66 Vill. L. Rev. 249 (2021). In one stark example, a court granted summary judgment to the Defendants in a single paragraph that did not articulate any of its own reasoning and instead incorporated by reference the government's brief. *Schultz v. Washington Dep't of Health*, No. 23-2-4262-34 (Wash. Sup. Ct. Aug. 21, 2025) (ruling for the government "for each and every one of the reasons articulated in [the state's] briefing").[7]

By allowing judges to abandon their duty to consider evidence and to exercise their own judgments on matters of law, opinions like these allow judges to delegate their power to the government actor litigating before them. And because the effect is to bless even palpably arbitrary exercises of power, the test subverts federal constitutional rights to state legislative whim. As one scholar has written, judicial proceedings under the rational basis test are no more consistent with the Article III judicial power than would be "trial by combat" or deciding cases by "tossing a coin." Neily, *Litigation Without Adjudication*,

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[7] Notably, the court didn't even correctly identify the subject of the lawsuit, suggesting instead the government could regulate "horse teeth flossing" however it wished. *Id.* Horse floating is not horse flossing.

supra at 552. It leaves non-fundamental unenumerated rights at the mercy of ipse dixit.

This perverts constitutional design. The judiciary is often regarded as the "least dangerous branch," since it has no power to make laws that take away our liberty and may only secure liberty from the other branches. The Federalist No. 78 (Alexander Hamilton). But as the Founders recognized, "liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments," because "there is no liberty if the power of judging be not separated from the legislative and executive powers." *Ibid.*

The rational basis test thus presents many of the same constitutional problems lurking underneath *Chevron* deference. Like *Chevron* deference, the rational basis test "prevents the Judiciary from serving as a constitutional check" on the legislature "[b]y tying a judge's hands" in favor of the government. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 414 (2024) (Thomas, J., concurring). As this Court recognized in *Loper Bright*, the courts have a mandate under Article III to independently say what the law is. *Id.* at 385 (majority opinion). But by requiring judges to ignore their independent judgment in favor of the government's unsupported assertions that a law protects health or safety, the rational basis test "curbs the judicial power afforded to courts" under Article III, while "simultaneously expand[ing]" the legislative power "beyond constitutional limits." *See id.* at 414 (Thomas, J., concurring) (discussing separation-of-powers concerns with Chevron deference); *see also* Brief of the Cato Inst. & Comm. for Justice as Amici Curiae in Support of Petitioners at 4, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (No.

22-451) (highlighting constitutional problems with *Chevron* deference).

In sum, the test vexes courts, implicates constitutional concerns, occupies an outsized amount of attorney time, while stifling a broad array of unenumerated rights—from the right to earn a living, to the right against the government handing your home over to a private party for economic development, to the right to procure potentially life-saving drugs, to the right to be treated equally during adoption proceedings—even though, as several justices have recognized, there's no constitutional basis for sorting constitutional rights into different levels of scrutiny to begin with. *Whole Woman's Health v. Hellerstedt,* 579 U.S. 582, 639 (2016) ("The Constitution does not prescribe tiers of scrutiny.") (Thomas, J., dissenting). To resolve this, this Court need not do much. It should only restore the test to the standard as it was originally conceived: a rebuttable presumption of constitutionality that considers the legitimacy of the government's asserted ends, and whether the law rationally relates to this end, or whether instead the evidence demonstrates (or, at the 12(b)(6) stage, plaintiffs' well-pleaded allegations plausibly allege) that the law is *not* rationally related to a legitimate end. In short, rather than asking whether there's any conceivable rationale for a law, courts should determine whether the government's stated rationale is plausible. And they must explain how the law fits that end rather than assuming it's so merely because the government said so.

CONCLUSION

For the reasons set forth above, this petition should be granted.

Respectfully submitted,

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