No. 14-952

IN THE
Supreme Court of the United States

CINDY VONG AND LA VIE, LLC,
Petitioners,

v.

DONNA AUNE, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE ARIZONA BOARD OF COSMETOLOGY,
Respondent.

On Petition for a Writ of Certiorari to the Arizona Court of Appeals, Division One

BRIEF OF *AMICI CURIAE* CIVITAS INSTITUTE AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. In the context of "fish spas," an activity that has never once been shown to cause harm anywhere in the world,

A. Does the rational basis test under the Fourteenth Amendment require a greater justification for completely prohibiting the activity rather than merely regulating it to ameliorate any possible health or safety risks?

B. Does the rational basis test allow the government to treat very different economic activities as if they were the same? and

C. Under *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), does the rational basis test allow the government to completely prohibit an economic activity while allowing and subjecting to modest regulation demonstrably dangerous activities within the same profession absent some justification for the differential treatment?

2. Should the Court's decision in *The Slaughter-House Cases*, 83 U.S. 36 (1873), be reconsidered in light of its adverse jurisprudential and real-world consequences and widespread criticism from legal scholars and members of this Court?

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INTEREST OF *AMICI CURIAE*[1]

Established in 2005, the Civitas Institute is a Raleigh-based nonprofit corporation organized for the purpose of conducting research, sponsoring educational activities, and disseminating information to promote the general public's understanding of the benefits of limited government and free market economies. The Institute has published a number of articles on occupational licensing at its website, *Civitas Review*, and seeks to expand constitutional protections for economic liberties in North Carolina and beyond.

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the *Cato Supreme Court Review*.

This case concerns *amici* because occupational licensing that has no purpose but protectionism harm consumers, markets, and, ultimately, the Constitution's protection of economic liberty.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* made a monetary contribution its preparation or submission. All parties were given timely notice of *amici*'s intent to file.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner Cindy Vong seeks this Court's attention. Her petition, like many that come before this Court, implicates questions that reach beyond her individual case. While the harm done to Ms. Vong by the Arizona Board of Cosmetology ("the Board") is indeed serious and merits review, her cert. petition presents broader questions that, in an increasingly regulated society, are in dire need of answering. At its core, Ms. Vong's petition asks the Court to clarify the judiciary's role in evaluating the legitimacy of occupational licensing schemes nationwide. Such a clarification would benefit not only the one-in-three working Americans who are directly affected by occupational licensure, but also the state actors who enact and enforce such laws.

1. Ms. Vong's case presents the Court with the opportunity to clarify whether and to what extent courts may scrutinize the motivations of state actors when applying rational basis review to economic regulations. In modern history, courts have not considered the motivations of state actors so long as there is some conceivably rational link between the state's action and its legitimate interest. But recent cases have caused confusion as to whether such judicial deference continues to be warranted.

2. Further, Ms. Vong has presented the Court with a clear split among lower federal courts regarding how to treat economic prohibitions (as opposed to mere regulation). Occupational licensure is the ideal setting in which to address this judicial confusion. Licensing boards by their very nature have the power to completely prohibit economic

activities, and such prohibitions directly impact a substantial portion of the population. Considering the amount of confusion that exists surrounding this rapidly growing issue, the Court should grant the petition in order to provide clarity.

3. Finally, this case provides the Court the opportunity to consider whether the *Carolene Products* rationale for requiring higher judicial scrutiny in certain circumstances—as stated in the famous "Footnote Four"—now applies to occupational licensing laws, which pose an often insurmountable barrier to entry into more professions than ever before. The Court should review the question whether occupational licensing boards comprised of members of the very profession being regulated constitute the exact sort of deficiency in our democratic system that Footnote Four targeted.

ARGUMENT

I. THIS COURT SHOULD CLARIFY THE EXTENT TO WHICH JUDGES MAY QUESTION LEGISLATIVE MOTIVE WHEN APPLYING RATIONAL BASIS REVIEW

In upholding the Arizona Board of Cosmetology's prohibition of Ms. Vong's "Spa Fish" business under the rational basis test, the court below cited the legitimate state interest in public safety as an overriding factor in the analysis. This despite the fact that the Board offered no evidence of harm and nearly zero evidence of even a potential risk of harm.

There is no question that safety is indeed a legitimate state interest, in Arizona as elsewhere. *See*, *e.g., City of Tucson v. Grezzafi*, 23 P.3d 675 at 682 (Ariz. 2001). There is some confusion, however,

as to how readily courts must believe a state actor's appeal to this, or any other, legitimate state interest in the face of an individual constitutional challenge. Considering that the Arizona Board of Cosmetology is comprised of a majority of licensed cosmotologists with whom Ms. Vong would potentially compete, the issue of whether and how courts should consider regulatory motive is relevant to her case.

Ever since the rational basis test was established in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), courts have avoided questioning state actors' motivations regarding economic regulations. This hesitation to engage in searching judicial inquiry arises from a fear that the judiciary might become "a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Traditionally, "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied." *Nebbia v. People of New York*, 291 U.S. 502, 537 (1934). At its peak, this judicial deference has become so permissive that economic regulations can be struck down "only if no grounds can be conceived to justify them." *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969). This very Court has offered its support for this deference:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional

> purposes whether the conceived reason for the challenged distinction actually motivated the legislature.

FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

Federal courts across the nation continue to agree that a challenged economic regulation receives a "strong presumption of validity" and is upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Craigmiles v. Giles*, 312 F.3d 220, 222 (6th Cir. 2002). Still, recent cases have questioned the traditional wisdom that it is "constitutionally irrelevant" whether the claimed rational basis "in fact underl[ies] the legislative decision." *Flemming v. Nestor*, 363 U.S. 603, 612 (1960).

For example, in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), the Fifth Circuit drew a new line. Addressing Louisiana's argument that a ban on unlicensed casket sales served the state interest of public health and safety, the court stated:

> The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the contest of its adoption nor does it require courts to accept nonsensical explanations for the regulation. The deference we owe expresses mighty principles of federalism and judicial roles. The principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the

> public good but as "economic" protection of the rulemakers' pockets.

Id. at 226-227.

On one hand, this statement by the Fifth Circuit is representative of an "emerging split over whether in-state economic protectionism is a legitimate state interest and hence a constitutional justification for economic regulation." Steve Menashi, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & Liberty 1055, 1058 (2014). However, at a deeper level the Fifth Circuit has called into question whether, and if so how, courts should evaluate the ostensible rationale behind economic regulations. Inherent in the rejection of Louisiana's argument in *St. Joseph Abbey* is the assumption that courts are free to disbelieve a state actor's rationale for economic regulation if that rationale is so attenuated from any legitimate state interest as to require "judicial blindness" to be accepted as rationally related.

Just last week, this Court reprimanded licensing boards seeking to mute competition under color of state law. *N.C. State Bd. of Dental Examiners v. FTC*, No. 13-534, 574 U.S. __ (Feb. 25, 2015) (slip op.).[2] While that case turned on antitrust rather than individual constitutional claims, it demonstrated this Court's recognition that such boards can have illegitimate motivations. It also stressed that states may not "abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies." *Id*. at 18.

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[2] Full opinion at http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf.

In ruling against economic regulators in the antitrust context, this Court emphasized that the dentistry board's motivations were sparked not by complaints about "possible harm to consumers" but rather "a principal concern with the low prices charged by nondentists." *Id.* at 3. It is perhaps time for this Court to clarify whether and to what extent such motivations are relevant to individual constitutional challenges to the actions of occupational licensing boards.

If any case presents this Court with the opportunity to decide whether and to what extent a court should question the motivations of state actors when applying rational basis review, it is this one. Here, despite having produced no evidence of harm and citing only the fact that "the risk is not zero," a licensing board comprised largely of Ms. Vong's potential business competitors has shut down her business simply by appealing to public safety. This is blatant economic protectionism cheaply dressed up as a safety issue. The petition should be granted so the lower courts can be counseled to see past such blatant pretext and defend the individual rights these type of laws threaten.

II. THIS COURT SHOULD ADDRESS THE CIRCUIT SPLIT REGARDING TOTAL ECONOMIC PROHIBITIONS THAT AFFECT MILLIONS OF WORKING AMERICANS

A society based on the rule of law is characterized by stability and predictability. It is the goal of our legal system to "furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Moragne*

v. States Marine Lines, Inc., 398 U.S. 375 (1970). This goal is undermined when different federal courts apply differing legal standards, as is the case with a circuit split.

Confusion exists among federal and state courts regarding how to treat complete prohibitions of economic activity. This confusion appears most clearly in the Fifth, Sixth, and Tenth Circuits' differing treatments of state bans on direct consumer sales of caskets. *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). These courts' treatments of total prohibitions of direct-to-consumer casket sales have varied widely. The Fifth Circuit held that the state's ostensible rationale for prohibition was little more than economic protectionism disguised as regulation. *St. Joseph Abbey*, 712 F.3d at 226. This despite the fact that the Tenth Circuit declared that very same economic protectionism to be a legitimate state interest. *Powers*, 379 F.3d at 1221. Indeed, that court went so far as to explicitly delineate the nature of its split from the Sixth Circuit:

> In so holding, we part company with the Sixth Circuit's *Craigmiles* decision, which struck a nearly identical Tennessee statute as violating the Equal Protection Clause and substantive due process.

Id. at 1223.

One might contend that this split is irrelevant to the broader public because it touches only the sale of caskets. Even beyond the facts presented here, however, these cases deal broadly with complete

prohibitions of economic activity—prohibitions exactly like the one currently affecting Ms. Vong.

It is inherent in the very nature of occupational licensing boards that they may completely prohibit economic activity. Under these legislative schemes, the boards may ban any activity that they view as either an unlicensed business practice or a practice in violation of the board's regulations.

For example, in North Carolina one must pass a state exam and become a member of the state bar before receiving a license to practice law. If one has not received this license, one simply cannot practice law. N.C. Gen. Stat. § 84-4. Further, the North Carolina State Bar is empowered to investigate and enjoin unauthorized activities. N.C. Gen. Stat. § 84-37. Perhaps the most well-known example of this scheme at work is the recent litigation between the North Carolina State Bar and LegalZoom.com, Inc. regarding whether or not LegalZoom's services constitute the unauthorized practice of law, and are therefore prohibited. See *Legalzoom.com, Inc. v. N. Carolina State Bar*, 2014 NCBC 9 (2014).

Occupational licensing schemes touch more American lives than ever before—and yet most individuals facing such a board do not possess the sophistication or funds necessary to litigate a state antitrust case like LegalZoom. As of 2012, one in three Americans required a license to pursue their profession. Dick M. Carpenter et al., *License to Work: A National Study of Burdens from Occupational Licensing* 6, Institute for Justice (2012).[3] Contrast

[3] Full report available at www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf.

this with the fact that "only about five percent of American workers were subject to licensing requirements during the 1950s." Aaron Edlin et al., *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny*?, 162 U. Pa. L. Rev. 1093, 1096 (2014).

Given the increasing prevalence of economic prohibitions in modern American life, this Court should take up Ms. Vong's case as a means of providing clarity as to how such prohibitions should be evaluated by federal courts.

III. THE FOOTNOTE FOUR RATIONALE FOR HEIGHTENED SCRUTINY SHOULD APPLY TO OCCUPATIONAL LICENSURE

If the Fifth Circuit's concerns regarding abuse of occupational licensure in favor of "the rulemakers' pockets" are valid, this may provide an additional framework for reconsidering such laws—the one laid out in Footnote Four of *Carolene Products*. After stating that economic regulations should enjoy a presumption of constitutionality, the Court there noted that it reserved the right to judge "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

In that famous footnote, the Court in part expressed its concern that legislation that distorted or rigged the political process might require a heightened judicial inquiry, eventually leading to the

"tiers of review" that every law student learns today. However, the Court's default position was then, and remains today, that "[a]s long as the political process is inclusive and open, the courts should keep out, whatever decisions the political process reaches." David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. Ill. L. Rev. 1251, 1259 (2010). The question for this Court is whether the state of occupational licensure law has eroded to the point where it presents exactly the sort of systematic threat to the operation of the American constitutional system that the *Carolene Products* Court sought to avoid.

The Court assumed in Footnote Four that economic rights "typically do not implicate the special considerations associated with vulnerable minorities." Austin Raynor, *Economic Liberty and the Second-Order Rational Basis Test*, 99 Va. L. Rev. 1065, 1066 (2013). It is time for the Court to reconsider whether this assumption still holds true in the occupational licensure context.

Indeed, this case exemplifies the political and economic barriers posed by occupational licensure boards. A month before Spa Fish opened, the Arizona Board of Cosmetology conducted a routine inspection of the salon. Despite Ms. Vong's invitation to the Board to observe a treatment, it chose not to do so. Nor did it perform *any* research on the risks posed by Spa Fish. Instead, citing a rule that was written with metal instruments in mind—rather than fish or any other object, tangible or otherwise—the Board completely shut down the business. Despite Ms. Vong's willingness to develop a health and safety protocol and demonstrate her procedures, the Board chose to act with little to no substantive analysis.

While it is often suggested that the remedy for such wrongs is at the ballot box rather than the courthouse, does a practical political remedy really exist for those boxed out of professions? While occupational licensing schemes as a whole affect more than one third of Americans, each scheme impacts only those who fall within its purview.

Ms. Vong's case is illustrative. She has chosen to mount a constitutional challenge in court against a complete economic prohibition of her business. Yes, she could have instead attempted to remedy her situation via the democratic process. But this would have required her to influence the state legislature to such an extent that it either passed a law limiting the reach of the Board of Cosmetology or otherwise reconfigured the Board to be more amenable to her business. But prohibitions of "spa fish" businesses currently affect exactly one Arizona citizen: Cindy Vong. Thus, such a large organizational effort on the part of a small business owner—one who, throughout this entire hypothetical legislative campaign, would be prohibited from plying her trade—is unrealistic due to the nature of the very system she is attempting to influence. Were licensing schemes amenable to democratic action, one would think that they would have long ago disappeared. "Most economists agree that licensing regulations do not improve market performance, [but i]nstead, they impose welfare losses on consumers." Stuart Dorsey, *Occupational Licensing and Minorities*, Law and Human Behavior, Vol. 7, Nos. 2/3 (1983).

Licensure schemes by their very nature impact a minority—the minority of citizens who seek to ply a given trade. Among "those political processes

ordinarily to be relied upon to protect minorities," one must certainly include the legislative and administrative processes that can provide or deny them the ability to earn a basic living. The reality is that there are very few avenues through which to influence such licensing agencies.

In fact, many, if not most, licensure boards are comprised of members of the very profession being regulated, as is the case with a majority of the Arizona Board of Cosmetology. A.R.S. § 32-502. This means that in order to have a direct impact on the actions of the agency, one must first become licensed—a Catch-22 that denies those boxed out of a profession the chance to influence the very actions that are keeping them out of work.

There is also evidence that occupational licensing disproportionately harms racial minorities. A recent study found that such schemes "can pose substantial barriers for those seeking work, particularly those most likely to aspire to [licensed] occupations—minorities, those of lesser means and those with less education." Dick M. Carpenter et al., *License to Work: A National Study of Burdens from Occupational Licensing* 4, Inst. for Justice (2012).[4] The time is ripe for the Court to consider whether this problem constitutes the exact sort of systematic deficiency in our democratic system that demands a higher level of scrutiny.

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[4] Full report available at www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf

CONCLUSION

For the aforementioned reasons and those stated by the petitioners, *amici* request that the petition be granted.

Respectfully submitted,

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