No. 25-787

In the Supreme Court of the United States

JOHN F. CARBIN,
Petitioner,
v.
MASSACHUSETTS BOARD OF STATE EXAMINERS OF PLUMBERS AND GAS FITTERS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICI CURIAE BRIEF OF THE BUCKEYE INSTITUTE AND MANHATTAN INSTITUTE FOR POLICY RESEARCH IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a court may relegate a due process claim to rational basis scrutiny merely because the asserted right is not enumerated in the Constitution or previously recognized as fundamental by the Supreme Court, or whether instead courts must apply the history and tradition test recently affirmed in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

2. Whether, under the rational basis test, courts must accept a plaintiff's well-pleaded allegations when resolving a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

3. Whether, under the rational basis test, courts may uphold a challenged law without any inquiry into the relationship between the government's means and asserted end.

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

SUMMARY OF THE ARGUMENT

The rational basis test, as currently applied, has become a mechanism for judicial abdication rather than judicial review. Under prevailing formulations, courts routinely uphold laws that burden individual liberty so long as any conceivable justification—real or imagined—can be hypothesized after the fact. This approach does not "respect" legislative judgment; it replaces the judiciary's independent duty to interpret and enforce constitutional limits with reflexive deference that effectively immunizes government action from meaningful scrutiny.

The Constitution was not designed to subordinate liberty to legislative convenience. From the Declaration of Independence to the Constitution's Preamble, the central purpose of American government is the preservation of individual freedom. While tiers of scrutiny emerged as pragmatic tools, rational basis review has devolved into a doctrine that allows courts to affirm nearly any law, no matter how intrusive, arbitrary, or protectionist. When judges are permitted—or required—to invent rationales on the government's behalf, judicial review becomes indistinguishable from no review at all.

This Court has repeatedly reaffirmed that the judicial power requires the exercise of independent judgment. Just as courts must independently determine whether agencies have exceeded statutory authority, they must also determine whether legislatures have exceeded constitutional boundaries. Due respect for the political branches does not entail blind acceptance of their assertions. Courts remain obligated to verify that challenged laws actually

pursue legitimate governmental objectives through rational means, based on evidence and articulated purposes—not speculative justifications supplied by the judiciary itself.

A meaningful rational basis inquiry is neither radical nor unworkable. At a minimum, it requires courts to insist that the government clearly identify a legitimate interest with some degree of specificity. Vague, evidence-free incantations of "health," "safety," or "public welfare" cannot suffice where liberty interests are at stake. Courts should ask: whose safety, and from what harm? What specific health concern is addressed? Is the asserted justification genuine, or merely a pretext for something else? These are ordinary judicial tasks, well within the competence of courts acting as neutral factfinders.

Equally important, courts must examine whether the challenged law is actually rationally related to the asserted interest. A test that permits laws to stand without any real connection between means and ends invites abuse and accelerates the erosion of liberty. When courts fail to engage in this inquiry, they empower government at the expense of the People.

This case also highlights the need to reconsider the role of the Privileges or Immunities Clause in evaluating legislative restrictions on our liberties. The right to purchase, own, and maintain one's home is rooted in Anglo-American legal tradition. Historically, individuals were free to use and enjoy their property so long as they did not harm others, and government interference required compelling justification. Reviving this historical understanding would bring

coherence to property-rights jurisprudence and restore constitutional grounding to judicial review.

Massachusetts's unprecedented requirement that homeowners obtain a professional license to perform basic plumbing in their own homes exemplifies the dangers of an enfeebled rational basis test. If upheld without meaningful scrutiny, such laws invite limitless expansion of state control over ordinary life. This case presents a clean and compelling vehicle for this Court to reexamine rational basis review, restore judicial engagement, and reaffirm that liberty—rather than unexamined deference—remains the Constitution's guiding principle.

ARGUMENT

All rights are equal, but some rights are more equal than others. Yet other rights are deemed unprotectable. Such is the jurisprudence of tiers of scrutiny.

This case illustrates that courts sometimes allow legislators to squelch Americans' individual rights with nary a sideways glance. Americans are losing their freedoms, one law at a time. We are like the boiled frog—heated in a legal stew one statute or regulation at a time, until our freedoms are relegated to a memory. Too often, governments' solution to too much law is even more law. Indeed, over the past 50 or so years, "our laws and regulations have exploded in number and have come to reach much more deeply into our daily lives." Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* 4 (2024). President Ronald Reagan warned, "as government expands, liberty contracts." Ronald Reagan,

President, Farewell Address to the Nation (January 11, 1989).[2] And the courts—there to protect our rights—have shrugged, rather than evaluated, these legislative encroachments.

I. Rational basis analysis requires respect, not subservience or blind deference.

In this 250th year of American liberty, we may well ask if we have upheld the Declaration's promise of liberty—that our government was instituted "to secure" the "unalienable rights" endowed on them by the Creator. Declaration of Independence para. 2 (U.S. 1776). And has the Constitution—created to "secure the Blessings of Liberty," U.S. Const. pmbl.—fulfilled the measure of its creation?

Since the inception of the Republic, the Court has struggled with the courts' role in securing those blessings. This Court created the tiers of scrutiny to accomplish that goal. Unfortunately, the lowest tier of scrutiny falls short of providing any protection at all. These tiers, while conceived out of practicality and compromise, have transformed the Framers' original vision of a "scheme of islands of federal powers in a sea of liberty . . . into a regime of islands of rights in a vast sea of national power." Randy E. Barnett, *The Case for the Repeal Amendment*, 78 Tenn. L. Rev. 813, 814 (2011).

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[2] https://www.reaganfoundation.org/ronald-reagan/speeches/farewell-address-to-the-nation.

A typical formulation of the rational basis test asks "whether the policy in question is 'rationally related to a legitimate [government] interest . . . ." Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14 Geo. J.L. & Pub. Pol'y 537, 539 (2016) (alterations in original) (quoting *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). Another formulation "asks whether there is 'any reasonably conceivable state of facts that could provide a rational basis for the classification [or regulation].'" *Id.* (alterations in original) (quoting *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). And, as the petitioners point out, the test has been articulated differently by different courts, or even differently by the same court. See Pet. at 8–13 and 18–19.

But the test has no basis in the Constitution. And "[p]erhaps the most glaring constitutional problem with the rational basis test is the formulation, explicitly embraced by at least three circuits, that requires judges to serve as advocates for the government . . . ." Neily, *supra*, at 550–51. In any other context, courts would reject the task of advocating for one party over the other.

The Court has found that, in the context of an equal protection challenge, "a legislative classification must be upheld 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and that "[w]here there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'" *Beach Commc'ns, Inc.*, 508 U.S. at 323 n.3 (Stevens, J., concurring in the judgment). But Justice Stevens eschewed this broad test because "it is

difficult to imagine a legislative classification that could *not* be supported by a 'reasonably conceivable state of facts.' Judicial review under the 'conceivable set of facts' test is tantamount to no review at all." *Id.* (Stevens, J., concurring in the judgment). Rather, "when the actual rationale for the legislative classification is unclear, we should inquire whether the classification is rationally related to 'a legitimate purpose that we may *reasonably presume* to have motivated an impartial legislature.'" *Id.* Stevens, J., concurring in the judgment) (citation omitted).

Judges are to call balls and strikes, including protecting rights and interpreting the Constitution. "In our adversarial system of adjudication, we follow the principle of party presentation." *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375 (2020). By giving the Government a strong—and under the rational basis test nearly irrebuttable—presumption of validity, the Court ceases to be an unbiased umpire and subverts its duty to adjudicate impartially.

In *Loper Bright Enters.*, the Court recognized that courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . . ." *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 412 (2024). Likewise, the courts have an obligation to exercise independent judgment in deciding whether legislatures have acted within their constitutional authority. "The judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws. . . . The judicial power was understood to include the power to resolve these ambiguities over time." *Perez* v. *Mortg. Bankers Ass'n*,

575 U.S. 92, 119 (2015) (Thomas, J., concurring in the judgment). Of course, that includes—or should include—the ultimate law of the land—the Constitution of the United States.

So why give such deference to the government? There are at least two reasonable explanations. First, arguably it "preserve[s] to the legislative branch its rightful independence and its ability to function." *Beach Commc'ns, Inc.*, 508 U.S. at 315 (citations omitted).

Legal expert Clark Neily suggests a second explanation, convenience.

> Compared to actual adjudication, with its careful sifting of facts, painstaking evaluations of credibility, and deliberate weighing of competing explanations and arguments, deciding rational basis cases is easy. You simply start from the conclusion that the government should win and work your way backwards from there, filling in factual gaps with "rational speculation," waving away inexplicable inconsistencies and implausible contradictions, and glibly presuming your way to an effectively predetermined outcome.

Neily, *supra*, at 556.

Indeed, determining government interests, the individual rights involved, and the source of those rights, and then balancing the individual's rights against government interests, is hard work. *See id.* And creating a coherent, consistently applicable test

is perhaps even harder. Faithfully finding, interpreting, and applying the law is often difficult, but the answer is not to ignore core parts of the Constitution.

Of course, courts should give "due respect for the views" of the Legislative and Executive Branches in their respective efforts to follow constitutional restraints as they enact laws to pursue legitimate governmental objectives. *Loper Bright Enters.*, 603 U.S. at 403. But due respect does not require subservience or blind acceptance. Rather, it requires the courts to trust the legislature but verify the constitutionality of the challenged laws.

So, what is the solution? There are several straightforward considerations. First, the courts should engage in a genuine factual inquiry—as they do in all other types of cases—without putting a judicial thumb on the government's side of the scale. The court can respect the government's presentation on the why and how of legislation without manufacturing justifications for the government.

Second, the courts should require the government to be precise in its governmental interest. A simple incantation of "safety," or "public health," morals, or general welfare should not trigger an automatic judicial affirmation. A general assertion of public purpose is overly broad. The government should have the obligation to state its legislative purpose with some degree of particularity. This case illustrates the test's excessive latitude given to the government. The district court accepted health or safety as an acceptable justification for this overbearing law.

Rather, the rational basis test should trigger a simple inquiry: Whose safety? Safe from what? What health concern? If "public morals" is the justification, what moral is involved? When protecting "the public welfare," what is protected—health, happiness, wealth, or something else? And, of course, the stated purpose must be legitimate, not some sham or pretextual claim, as appears to be the case here. Since millions of Americans have done their own plumbing for decades and even centuries, and no other state has such an overbearing law, this smacks of a protectionist measure for licensed plumbers, not a legitimate safety measure. Courts, as fact finders, are well-suited to sniff out the truth. Here, the lower courts did not even try to find the truth.

Nor should courts be permitted to manufacture a justification for the law themselves. As the petitioner points out, the Court's standard in *Beach Commc'ns, Inc.* suggests that a law should be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Pet. at 12 (citing *Beach Commc'ns, Inc,* 508 U.S. at 313–314). The court should not be in the business of justifying what the government has failed to justify.

Courts also owe challengers a genuine inquiry as to whether the policy is rationally related to the purported legitimate governmental interest. As Petitioner points out, some courts require "a real connection between means and ends" while others do not. Pet. at 19. Failure to fully examine this question empowers the government to the detriment of the People's liberty.

Finally, courts should look to the liberties impacted by the government law, under the Privileges or Immunities Clause in the Fourteenth Amendment. When the Framers created a new type of government, they recognized "certain unalienable rights" that are worthy of protection, not abandonment. For that purpose, the Fourteenth Amendment included the Privileges or Immunities Clause in the Fourteenth Amendment. Of course, enumerating such privileges is another task, as challenging as it is important.

While the Clause is sometimes considered a dead letter, it is there, and like a tall mountain, it is there to be climbed.[3] On the mountain, we find the right to purchase, own, and use our property. We know this because the Founders placed signposts on the mountain guiding us to that right.

II. The right to use and enjoy one's property without impacting others is a privilege of American citizenship.

Under overly deferential tests that require little or no judicial scrutiny, courts are unable to evaluate basic property rights with any consistency. Implementing the Privileges or Immunities Clause is helpful to understanding how to protect rights without adding gradations to the tiers of scrutiny.

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[3] When George Leigh Mallory was asked why he wanted to climb Mount Everest, he famously responded, "because it's there." *"Because it's there"*, Forbes (Oct. 29, 2001), https://www.forbes.com/global/2001/1029/060.html?sh=28b98af20802.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1, cl. 2. The words "privileges" and "immunities" as applied to citizens "had a long historical acceptance and would not have sounded odd to U.S. citizens in the 1860s, as it does to our modern ears." Anthony B. Sanders, "*Privileges and/or Immunities" in State Constitutions Before the Fourteenth Amendment*, 26 Geo. Mason L. Rev. 1059, 1060 (2019).

If this Court were to "look to history to ascertain the original meaning of the [Privileges or Immunities] Clause," it would find that the frameworks necessary to adjudicate these matters are found in the societal knowledge of the traditional privileges or immunities of English citizenship. *Saenz* v. *Roe*, 526 U.S. 489, 522–23 (1999) (Thomas, J., dissenting). And while it may be "tedious" for the Court to enumerate those rights, in recovering that ancient knowledge, the Court would make life easier for itself, lower courts, and Americans at large. *Id*. at 525.

William Blackstone would likely be surprised that our analysis of the protection of property rights does not start with determining the particulars of those rights. Anglo-American law has established principles that inform disputes regarding laws affecting property rights, dating back centuries. And while these liberties were "more generally talked of, than thoroughly understood," 1 William Blackstone, *Commentaries on the Laws of England*; *In Four Books* 143 (Callaghan and Cockcroft, 1871), their influence nevertheless caused American colonists to incorporate them into the New World. For example, the 1606

Charter of Virginia provided that "all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realme of England." 7 Francis Thorpe, *Federal and State Constitutions, Colonial Charters and Other Organic Laws* 3788 (1909).

Blackstone's commentaries expounded on the scope and limitations of these privileges, starting with Magna Carta. *See generally* Blackstone, *supra*. In general, "these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, *and of private property*." *Id.* at 143.

Indeed, Blackstone explained that "Englishmen enjoy natural rights under natural law." Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 San Diego L. Rev. 777, 790 (2008). "In principle, these foundational statutes do not give English subjects new rights; they merely 'declare' that the subjects have in civil law rights they already enjoy as a matter of natural law." *Id*.

Similarly, "American colonial laws quite early claimed that the colonists were entitled to all the 'rights liberties immunities priviledges [sic] and free customs' enjoyed by 'any natural [sic] born subject of England,' as articulated in the Maryland Act for the Liberties of the People in 1639." Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1094 (2000) (citation

omitted). Professor Claeys summarized that "privileges and immunities relate to both natural and civil law. They are creations of positive law, but with the purpose of carrying the natural law into effect." Claeys, *supra*, at 785.

Blackstone's understanding aligns with the subsequent decision in *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (Washington, Circuit J.), an early circuit court decision widely regarded as the most important case interpreting the original meaning of the Privileges and Immunities Clause in Article IV, and thus, relevant to interpreting the Privileges or Immunities Clause of the Fourteenth Amendment.

In *Corfield*, Justice Bushrod Washington expounded that privileges and immunities are those "which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign." *Id.* at 551–52. Importantly—and relevant here—those privileges—include "the enjoyment of life and liberty, with *the right to acquire and possess property of every kind*, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." *Id.* (emphasis added).

Magna Carta provides a strong foundation for property rights. Indeed "Magna Carta's emphasizes the strong need to protect all aspects of property ownership. Thirty-eight of the sixty-three articles in the Great Charter protected feudal property rights." Paul J. Larkin, Jr., *The Original Understanding of*

"Property" in the Constitution, 100 Marq. L. Rev. 1, 17–18 (2016) (internal citations omitted).

Edward Coke, William Blackstone, and John Locke all "believed that when individuals organize themselves into nation states, governments needed to recognize the fundamental rights of "life, liberty, and property" as central to human fulfillment in societal justice. James Madison wrote that the end of just government was to protect property and "secure[ ] to every man, whatever is his own." Gouverneur Morris expressed similar views at the Constitutional Convention of 1787: "[P]roperty was the main object of Society." Jan G. Laitos, *Property and the Police Power Without Reviewing Courts: Three Truths*, 52 Fla. St. U. L. Rev. 53, 94 (2024) (citation omitted).

More recently, Professor Randy Barnett argued that Privileges or Immunities includes "those privileges and immunities . . . such as . . . *the right to acquire and possess property* of every kind, and to . . . *inherit, purchase, lease, sell, hold, and convey real* and personal property . . . ." Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 Harv. J. L. Pub. Pol'y 1, 9–10 (2020) (emphasis added).

Early on, the Court provided an expansive description of property rights included in the Fourteenth Amendment, explaining that it "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that . . . all persons should be equally entitled to pursue their happiness, and *acquire and enjoy property*." *Barbier* v. *Connolly*, 113 U.S. 27, 31 (1884) (emphasis added).

More recently, this Court has shown a renewed interest in protecting property, "having noted that protection of property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 147 (2021) (quoting *Murr* v. *Wisconsin*, 582 U. S. 383, 394 (2017)).

Of course, even Blackstone, while strongly supporting property rights—defining "the absolute right of property as consisting in the individual's '*free use, enjoyment*, and disposal of all his acquisitions without any control or diminution,'—recognized that they could be limited 'by the laws of the land.'" Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. Cin. L. Rev. 67, 73 (1985) (quoting Blackstone, *supra*, at 137).

But neither he nor this Court would allow the government unbridled discretion to undermine, limit, or abolish those rights by enacting any law it chose. That would eviscerate the right which Blackstone regarded as "absolute," and this Court has recognized as "necessary to preserve freedom."

Recognition of the privilege of using and enjoying property requires courts to do more than blindly accept the state's dismissal of a property right solely upon the mere incantation of a "health and safety" justification. Instead, such a recognition reiterates the need for a genuine examination of whether the governmental interest is real and whether the policy is question is rationally related thereto. The Court need not elevate the right to enjoy or use property to that of a fundamental right, thus triggering a higher

standard of review, but rather the Court should clarify that courts must do more than give unbridled deference and a blind eye to reality when evaluating restrictions on individual property rights.

III. This case is an ideal vehicle to reexamine the rational basis test.

This case is a clean vehicle to reexamine the rational basis test. The courts in this case demonstrate some courts' willingness to accept government's invocation of "magic" words to justify taking away American liberties. Massachusetts is the only state that has gone so far as to require a homeowner to obtain a professional license before working on his or her residence. See Pet. at 4–5. And others may well follow if courts are not required to put teeth into the rational basis test.

And if Massachusetts can require a homeowner to get a license before installing a bathroom faucet, then the logical extension is that Massachusetts could prohibit Home Depot, Lowe's, and local hardware stores from selling faucets, pipes, toilets, plumbing tools, or other plumbing supplies to homeowners unless they first display a plumber's license. Next, Massachusetts might prohibit homeowners from common and mundane home maintenance without a professional license, asserting the bare "safety" justification, such as:

a. Changing a light switch or bulb;

b. Fixing a car engine;

c. Changing a tire;

d. Carpentry work as a hobby; or

e. Tree pruning.

These might seem like laws that would never realistically be passed, but that misses the point. If such a law were passed—if, say, Massachusetts banned changing your own light bulbs and cited "health and safety" for the justification—would a court meaningfully scrutinize the law if challenged? Would it look to whether and how people get hurt changing light bulbs? Would it look to whether the law actually addresses any dangers that might exist? A light-bulb-changing law might require watching a three-hour online video, or it might require thousands of hours of classes. Such laws should be scrutinized differently, but too often they aren't scrutinized at all.

Moreover, would a court ask whether there is an unenumerated right to change your light bulbs that is inherent in the right to keep and enjoy property? Would it ask whether protecting the light-bulb-changing guild—a guild that would inevitably arise should such a law be passed—is the actual purpose behind the law? Unfortunately, under this Court's rational basis jurisprudence and the lack of a robust explanation of the Privileges or Immunities Clause, it is unclear whether courts are under any charge to scrutinize the law beyond seeing if government officials to repeat the words "health and safety." The Constitution demands more than that.

This brief does not assert that Massachusetts could not pass such laws, only that such laws should be subject to meaningful judicial review if challenged. This case provides the opportunity to give courts the tools they need to address challenges to laws that not

only appear over-protective, but perhaps also unconstitutional.

CONCLUSION

Under the current rational basis test, many courts are abdicating their Article III duties in favor of subservience to the other two branches. The Court should grant the Petition for Certiorari to reexamine the test and the scope of American liberty via the Privileges or Immunities Clause.

Respectfully submitted,

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