No. 04-716

In the
Supreme Court of the United States

KIM POWERS, et al.,
Petitioners,
v.
JOE HARRIS, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Fourteenth Amendment, states may regulate economic activity in ways that are rationally related to a legitimate state interest. Is the protection of particular interest groups against economic competition by others, apart from any protection of public health or safety, a legitimate state interest?

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INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. PLF's Economic Liberty Project protects the right to earn a living both through direct litigation and by participating as amicus curiae in appellate courts. PLF has participated as amicus curiae in cases such as *RUI One Corp. v. City of Berkeley*, No. 04-582; *Bank of America v. San Francisco*, 309 F.3d 551 (9th Cir. 2002), and in this case, before the Tenth Circuit Court of Appeals. Because of its history and expertise with regard to economic liberty and the right to earn a living, PLF believes its perspective will aid this Court in considering the petition for certiorari.

The Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited constitutional government. To further those ends, Cato Institute scholars have published a number of works discussing the importance of Constitutional protections for property rights and economic liberty against unreasonable government interference. *See*, *e.g.*, Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges and Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol'y 1 (1998). The instant case

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

raises important questions concerning the Fourteenth Amendment's limits on government's power to regulate the economy for the benefit of private interest groups, and is thus of substantial interest to the Cato Institute.

SUMMARY OF ARGUMENT

This Court has upheld the authority of states to regulate economic matters whenever such regulations are "rationally related to a legitimate government interest." But what is a legitimate government interest? Although the Court has "not elaborated on the standards for determining what constitutes a 'legitimate state interest,'" *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987), it has established a basic guideline: government exists to protect the public welfare, not to serve the bare private interests of politically powerful groups.

In *Nebbia v. New York*, 291 U.S. 502 (1934), for example, the Court held that states have wide latitude to make economic policy, *id.* at 537, but that such regulations must be "neither arbitrary nor discriminatory." *Id.* Likewise, in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), the Court held that the rational basis test gives states broad discretion to regulate the economy, even when such regulations end up benefitting private parties, but that the state may not engage in "invidious discrimination . . . [or] wholly arbitrary act[s]." *Id.* at 303-04. In short, the Fourteenth Amendment requires the government to regulate for the public welfare, not to exploit government power for the benefit of political insiders.

The decision below, however, holds that "intrastate economic protectionism constitutes a legitimate state interest." *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004). This means that the government may protect favored businesses, even if such protections have *no connection* to protecting the public health, safety, or welfare.

This holding not only extends the rational basis test's deference far beyond the standard articulated in *Nebbia*, but conflicts with the decisions of at least three circuit courts, which have all held that economic regulations must serve some public purpose rather than a mere intent to discriminate. *See*, *e.g.*, *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("protecting a discrete interest group from economic competition is not a legitimate governmental purpose"); *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1322 (4th Cir. 1994) (protectionism must "advance[] a purpose, beyond . . . naked preference . . . . [or] 'parochial discrimination' "); *Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983) ("it is untenable to suggest that a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest").

Moreover, the decision below cuts at the very heart of judicial review. The Tenth Circuit held that granting political benefits to a successful group simply because of its political power is a legitimate state interest. *See Powers*, 379 F.3d at 1220 ("protecting or favoring one particular intrastate industry . . . is a legitimate state interest"). This is tantamount to saying that the government's choice to benefit a group is justified simply by the fact that the government chose to do so. Yet the Court has consistently held that the legislature may not simply enact the preferences of legislative majorities irrespective of whether public purposes are served by the legislation. *See*, *e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained").

Finally, the decision below implicates vital federal questions. The right to earn a living without arbitrary government interference has a centuries-long history as one of the essential rights of citizens of all free governments. *See*

generally, Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207 (2003). This right deserves protection as a fundamental right.

The decision below conflicts with the holdings of at least three other circuit courts, as well as the decisions of this Court, and implicates important questions of constitutional law. The petition for certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I

THE COURT MUST RESOLVE THE CONFLICT BETWEEN THE SIXTH, FOURTH, NINTH, AND TENTH CIRCUITS

The decision below holds that "intrastate economic protectionism constitutes a legitimate state interest." *Powers*, 379 F.3d at 1221. In other words, the government may regulate to protect favored businesses even where the regulation bears no relation to protecting the public health or safety against dangerous or wrongful business practices.

Recently, the Ninth Circuit also held that protecting discrete economic interest groups from fair competition by outsiders is a legitimate state interest. In *Sagana v. Tenorio*, 384 F.3d 731 (2004), *petition for cert. filed*, (Dec. 6, 2004) (No. 04-774), the court upheld the Northern Mariana Islands' Nonresident Workers Act, which imposes several legal burdens on lawfully admitted nonresidents who wish to work in the Islands. The Ninth Circuit held that "giving job preference to its residents, and protecting the wages and conditions of resident workers" against fair competition by lawfully admitted nonresidents was a "reasonable, important purpose[]" satisfying the rational basis test. *Id.* at 741.

Like *Sagana*, the decision below conflicts with the decision of the Sixth Circuit in *Craigmiles*, 312 F.3d 220,

which held that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Id.* at 224. Instead, economic regulations that benefit one group over another must bear some rational connection to a public purpose: namely, protecting the public health, safety, and welfare, rather than simply granting market preferences to a favored group. *Id.* at 225.

The decision below also conflicts with the Fourth Circuit's decision in *Setzer*, 20 F.3d 1311. *Setzer* addressed the constitutionality of a South Carolina law which required cities to purchase products from in-state industries if the in-state product was up to five percent more expensive than the out-of-state alternative. *Id.* at 1315. A North Carolina company challenged this law on equal protection grounds, arguing that this preferential treatment to a local company was not a legitimate state interest for rational basis purposes. *Id.* at 1320.

The *Setzer* court relied on this Court's decision in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985), which held that an Alabama law giving domestic insurance companies a preference over out-of-state insurance companies violated the Equal Protection Clause. The court of appeals noted that, consistent with *Ward*, courts reviewing economic regulation under the rational basis test must "inquir[e] into whether the state can come forward with a legitimate reason justifying the line it has drawn," *Setzer*, 20 F.3d at 1321, and that mere favoritism is not a legitimate reason:

> In *Ward*, Alabama asserted that the distinction the statute made was legitimate simply because it would benefit certain individuals (*i.e.*, domestic insurance companies). But . . . . "under the State's analysis, *any* discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of

> another . . . ." Instead, the Court demanded not only that Alabama state that the line being drawn would benefit some group (a truism), but also that it articulate some legitimate reason for the line to be drawn at all. Looking into the second matter, the Court perceived . . . nothing more than "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent."

Setzer, 20 F.3d at 1321-22 (quoting *Ward*, 470 U.S. at 882, 878).

The decision below commits the same sort of fallacious analysis that the *Setzer* court rejected. It holds that the plain fact that one group (licensed funeral directors) is benefitted at the expense of its potential competitors (those who wish to sell caskets online), as well as consumers, is enough to justify the discrimination at issue. But this simply bypasses the rational basis analysis, because all discrimination, by definition, benefits the favored class over the disfavored class. One might as well say that the legislature's decision is constitutional simply because the legislature decided it—an illogical answer, because

> the beginning point of legal reasoning, or, stated syllogistically, the major premise, must not be a statement of the suggested conclusion . . . . [T]his practice is . . . *Petitio principii*, more colloquially referred to as 'begging the question' . . . . a process of circular reasoning that fails to prove the initial thesis propounded and uses the argued thesis as proof of itself.

Edelson v. Soricelli, 610 F.2d 131, 133 (3d Cir. 1979).

The same point was made by the Eighth Circuit in *Toan*, 709 F.2d at 1211. There, the court noted that while rational basis gives states "great discretion," it still requires states to "explain why they chose to favor one group of recipients over

another. Thus, it is untenable to suggest that a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest. An intent to discriminate is not a legitimate state interest." The *Toan* and *Setzer* courts understood that adopting the question-begging rationale of the court below, that mere favoritism is a legitimate state interest, would essentially end all judicial review of laws subjected to rational basis scrutiny. As Daniel Webster put it in one of his oral arguments, "We come before the Court alleging the law to be void an unconstitutional; they stop the inquiry by opposing to us the law itself. Is this logical?" *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 242 (1827) (Argument of Mr. Webster). Adopting the rationale of the decision below would mean the end of any judicial review under the rational basis test, which is why the Third Circuit has also rejected it.

> [I]t is always possible to hypothesize that the purpose underlying a classification is the goal of treating one class differently from another. A statute's classifications will invariably be rationally related to a purpose so defined, since the "purpose" is, in effect, a restatement of the classification . . . . [This] would . . . render the rational basis standard no standard at all.

Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth., 641 F.2d 1087, 1099-1100 (3d Cir. 1981).

The state's authority to regulate the economy derives from its duty to pursue the public interest, rather than abusing the political process to benefit particular private interests at the expense of legislative minorities. *Cf. United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961) ("a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance").

In protecting the public welfare, government may act in a way that incidentally benefits private parties. This can be a regrettable side effect. *See Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens and Blackmun, JJ., dissenting) ("The risk that private regulation of [the] market . . . may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been [a] central concern of . . . the common law."). But the decision below goes further. It holds that using the legislature to grant monopoly benefits to insiders is *in itself* a legitimate public interest. This decision conflicts with other circuit court decisions as well as decisions of this Court, and warrants a grant of certiorari.

II

THE DECISION BELOW VALIDATES SPECIAL INTEREST LEGISLATION WHICH THIS COURT HAS REPEATEDLY HELD INVALID

For well over a century, this Court has recognized that government's power to regulate the economy can be abused to harm minorities just as much as the government's power to regulate speech, marriage, or other matters. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court struck down a San Francisco ordinance requiring all laundries to be built out of brick, on the grounds that the law was a disguised attempt to harass Chinese immigrants. The Chinese were a persecuted minority in San Francisco at that time, principally because they competed for jobs against white laborers. *See* Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. Ill. U. L. Rev. 457, 469-71 (2004). The law in *Yick Wo* was one of many attempts "to shut down Chinese laundries, or at least to give white competitors an advantage over Chinese laundrymen." David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 Wm. & Mary L. Rev. 211, 211-12 (1999). The Court

held that burdening Chinese laborers solely for the benefit of whites who did not wish to compete for jobs was "a violation of the fourteenth amendment." *Yick Wo*, 118 U.S. at 374.

Yick Wo stands in sharp contrast to the decision below, which holds that naked economic protectionism of a politically favored group—or, in the court's words, "dishing out special economic benefits to certain in-state industries" over others, *Powers*, 379 F.3d at 1221—is a legitimate state interest.

This Court also struck down a protectionist law in *Truax v. Raich*, 239 U.S. 33 (1915), which prohibited Arizona corporations from drawing more than 20 percent of their workforce from non-native-born American citizens. *Id.* at 35. The Court noted that the law had no *public* goal. *Id.* at 39 (act "does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state"). Rather,

> the purpose of this act is . . . frankly revealed in its title. It is there described as "an act to protect the citizens of the United States in their employment against noncitizens of the United States, in Arizona" . . . . It is an act aimed at the employment of aliens, as such, in the businesses described.

Id. at 40-41.

The state argued that protecting the jobs of natives against competition from immigrants was a legitimate state interest. But the Court rejected this argument, noting that "[t]he discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law." *Id.* at 43.

Although the Court took a far more deferential attitude toward economic regulation in the 1930s, the principle that

economic protectionism *per se* is not a legitimate state interest remains a valid one.

For example, in *Nebbia*, 291 U.S. 502, perhaps the most deferential case of the New Deal era, the Court held that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare," *id.* at 537, but the Court did not erase all limits on the regulatory power: "If 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," *id.* (emphasis added).

As the Court's qualification suggests, the rational basis test does not permit legislatures to regulate in the interest solely of private parties: if a state adopts an economic policy which is arbitrary or discriminatory, the judiciary retains the power to strike it down. Arbitrary is defined as " 'without adequate determining principle' . . . 'or arrived at through an exercise of will . . . without . . . reference to principles' " *United States v. Carmack*, 329 U.S. 230, 246 (1946) (quoting dictionaries). *See also Fagan v. City of Vineland*, 22 F.3d 1296, 1325 (3d Cir. 1994) (defining arbitrary as " 'not founded in the nature of things . . . depending on the will alone' " quoting *Black's Law Dictionary* 104 (6th ed. 1990)). Discrimination is defined as "differential treatment of similarly situated groups." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring); *see also La Fata v. Raytheon Co.*, 302 F. Supp. 2d 398, 416 (E.D. Pa. 2004) (defining discrimination as "confer[ring] particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges," quoting *Black's Law Dictionary* 467 (6th ed. 1990)).

Even the deferential rationality standard adopted in *Nebbia*, therefore, holds that state economic policy may not be established in a manner that depends solely on the legislature's

collective will, to confer a benefit to a class distinguished from others on no principled public basis. *See also Dukes*, 427 U.S. at 303-04 ("invidious discrimination . . . [and] wholly arbitrary act[s]" exceed rational basis).

That arbitrary or discriminatory economic policies violate the Fourteenth Amendment is revealed by such cases as *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948). In that case, the Court struck down a California law which prohibited Japanese aliens from obtaining licenses to fish off the state's coast. *Id.* at 413. The Court held that, although the federal government may regulate immigration, such a power does not permit a state to "adopt . . . the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living." *Id.* at 418-19.

Nor does this principle apply only in cases of racial discrimination. In *Schware v. Bd. of Bar Examiners of the State of N.M.*, 353 U.S. 232, 244-45 (1957), this Court, employing the rational basis test, held that a man who had been a member of the Communist Party could not be denied the opportunity to practice law for that reason. The Court held that, although states have the authority to regulate professions by requiring that a person demonstrate his qualifications,

> any qualification must have a rational connection with the applicant's fitness or capacity to practice . . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

Id. at 239. Occupational licensing could not be used for the sole purpose of excluding those who are unpopular, the

Schware Court held; rather, such laws must promote the legitimate state interests of protecting the public safety by ensuring that practitioners are qualified.

Although it was not a Fourteenth Amendment case, *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), is instructive on the legitimacy of using government's regulatory authority to benefit private interests rather than the public. In that case, the Court held that a California scheme for setting the prices at which wine could be sold violated the Sherman Antitrust Act. *Id.* at 106. A wine producer wishing to sell wine for a lower price brought suit under the Act, and the state argued that sovereign immunity barred the suit. *Id.* at 104. This Court held that the state was not immune, because the scheme was not being employed to protect the public, but rather to protect the private interests of certain wine producers: "The State neither establishes prices nor reviews the reasonableness of the price schedules," the Court noted. *Id.* at 105. Thus the price-setting scheme was "a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106. Protecting the private interest of wine producers was not a legitimate government policy.

Finally, in *Romer*, 517 U.S. 620, this Court reiterated that the rational basis test, while deferential, is not toothless, and that an unadorned desire to discriminate is not a legitimate state interest. It held that even when employing rational basis scrutiny, the Court "insist[s] on knowing the relation between the classification adopted and the object to be attained." *Id.* at 632. Doing so "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633. *Romer* establishes that animosity in itself is not a legitimate state interest. But there is no principled ground on which to distinguish such animosity against political losers from naked preferential treatment granted to political winners. *Cf. Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) ("it

could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other"). Just as simple animosity toward some due to their unpopularity with the legislature is not a legitimate state interest, so, too, conferring economic benefits on an interest group because it is politically successful violates the Fourteenth Amendment.

In short, the decision below not only conflicts with the decisions of the Fourth and Sixth Circuits, but with the rational relationship test as articulated by this Court. While the Court has upheld broad legislative authority to establish even monopolistic economic policies, *see*, *e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), it always has done so on the grounds that some legitimate *public* interest is being served. It has *never* upheld the legislature's authority to grant monopoly markets to political insiders *simply because they are insiders*. The Fourteenth Amendment requires legislatures to pursue some legitimate public interest when regulating economic matters, just as they must pursue a legitimate public interest when regulating other sorts of conduct.

The decision below violates this principle and in so doing validates the legislature's ability to substitute its will for the authority of the Constitution. This Court has long held that the judiciary has a "special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). By holding that the legislature may advance the private interests of political favorites without any connection to public welfare, the decision below conflicts with the very principles of judicial review, and requires a grant of certiorari. *See further FCC v. Beach Communications*, *Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) ("Judicial review under the

'conceivable set of facts' test is tantamount to no review at all.").

III

THE RIGHT TO EARN A LIVING DESERVES PROTECTION AS A FUNDAMENTAL RIGHT

Justice Douglas once called the right to earn a living "the most precious liberty that man possesses." *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting). That statement rests on a long history of decisions from this and other courts holding that"'[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose . . . .' [subject only to regulations which] 'have a rational connection with the applicant's fitness or capacity to practice' the profession." *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (quoting *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889); *Schware*, 353 U.S. at 239). *See further* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207 (2003) (describing history of legal protection for right to earn a living). This right is so long-standing and so essential to life in a free society that it deserves protection as a fundamental right.

This Court has held that the Due Process Clause protects certain fundamental rights against any deprivation by government. Such fundamental rights are those rights "which are 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' " *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). The Court has long recognized that the "liberty" protected by the Fourteenth Amendment includes the rights

> to engage in any of *the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God

> according to the dictates of his own conscience, and generally to enjoy *those privileges long recognized at common law* as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added).

It would be hard to imagine a right more deeply rooted in this Nation's history and tradition than the right to earn a living without arbitrary government interference. The right to engage in a lawful occupation was protected by common law courts more than a century before the founding of the United States. *See generally*, *The Case of the Monopolies*, 77 Eng. Rep. 1260 (K.B. 1602); *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614). Sir Edward Coke explained in his *Institutes of the Common Law* that monopolies were illegal at common law because they prohibited others from competing fairly and earning a living. *See* 2 Edward Coke, *Institutes of the Common Law* **47-48. Blackstone, likewise, noted that "[a]t common law every man might use what trade he pleased." 1 William Blackstone, *Commentaries* *427. The founders were well aware of this tradition; the Virginia Declaration of Rights, written by George Mason and James Madison, declared that "all men are by nature equally free and independent, and have certain inherent rights . . . [including] the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Madison later explained that the right to earn a living through gainful trade was at the heart of American liberty:

> That is not a just government . . . where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which . . . are the means of acquiring property . . . . What must be the spirit of legislation where a manufacturer of linen

> cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbour who manufactures woolen cloth . . . !

James Madison, *Property* (1792) *reprinted in Madison: Writings* 516 (Jack N. Rakove ed., 1999).

Like the Nation's founders, the framers of the Fourteenth Amendment saw the right to earn a living as among the fundamental rights which the Constitution should protect. Representative John Bingham, for example, one of the principal architects of the Privileges or Immunities Clause of the Fourteenth Amendment, explained that it was intended to protect, among other things, "the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil." Cong. Globe, 42d Cong., 1st Sess. App. 86 (1871). The Due Process Clause, as well, was long understood as protecting the right to earn a living without unreasonable government interference. The term "due process" derived from the Magna Carta's "law of the land" provision, which Coke believed protected the right of subjects to engage in a gainful trade without arbitrary interference by the government. *See* Bernard H. Siegan, *Protecting Economic Liberties*, 6 Chap. L. Rev. 43, 47 (2003). This interpretation of the term "due process" was well understood at the time that the Fourteenth Amendment was ratified. *See* Thomas M. Cooley, *Constitutional Limitations* 351-53 (The Legal Classics Library 1987) (1868). Courts have long seen the right to be free from arbitrary regulation of economic liberty as at least equally important as the right to be free from arbitrary regulation of freedom of speech, or of religion. *See*, *e.g.*, *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534-36 (1925) (upholding on freedom of contract grounds, teachers' right to teach in private schools).

Because this right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," *Glucksberg*, 521 U.S. at 721 (citations omitted), the right to earn a living free from unreasonable government interference deserves protection from this Court as a fundamental right. Such a recognition would still permit the government to regulate trades for legitimate public reasons—such as ensuring that a person who practices a profession is qualified. *See Schware*, 353 U.S. 232. But it would require something more than "[a]n intent to discriminate." *Toan*, 709 F.2d at 1211 (8th Cir. 1983).

The Court should grant certiorari to ensure that this right receives serious judicial protection.

CONCLUSION

As Justice Stevens explained in *Hoover*, 466 U.S. at 585, when government authority is exercised solely on behalf of "those with a stake in the competitive conditions within the market, there is a risk that public power will be exercised for private benefit." The decision below, however, sees this not as a *risk*, but as a legitimate state interest. Such a decision conflicts with the holdings of at least three circuit courts, as well as the decisions of this Court, and implicates vital constitutional questions involving the scope of state regulation

of economic liberty. The petition for a writ of certiorari should be *granted*.

DATED: December, 2004.

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