NO. 12-506

In the
Supreme Court of the United States

HEIN HETTINGA, ET AL.

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

BRIEF OF THE CATO INSTITUTE AND INSTITUTE FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*[*]

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato established its Center for Constitutional Studies in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward that end, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Founded in 1991, the Institute for Justice is a nonprofit public-interest law firm that advances a rule of law under which individuals can control their own destinies as free and responsible members of society. To that end, the Institute for Justice litigates to secure greater judicial protection for individual liberty and to restore constitutional limits on the power of government. It is the nation's leading advocate for occupational freedom and brings many cases challenging occupational regulations that have no purpose other than economic protectionism. Those cases are all decided under the rational-basis test. *See, e.g.*, *St. Joseph Abbey v. Castille*, __ F.3d.

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[*] Counsel for all parties received notice of *amici's* intent to file this brief 10 days before its due date, and both parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

__, 2012 WL 5207465 (5th Cir. Oct. 23, 2012); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Clayton v. Steinagel,* __ F. Supp. 2d __, 2012 WL 3242255 (D. Utah Aug. 8, 2012), and *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

This case is important to both Cato and the Institute of Justice because it concerns the judiciary's role in ensuring the proper functioning of our political institutions. That role includes the responsibility to prevent factions from hijacking democratic processes and using the state's coercive power to enrich themselves at the expense of disfavored minorities and the public at large. *See generally* Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Hurt the 99%*, 60 Drake L. Rev. 1085 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2053595. Wary of the problems of judicial imperialism, this Court has deferred to the policy judgments of the political branches and upheld economic regulation against constitutional challenge as long as it has some rational relationship to a legitimate government interest. But it has never abdicated its responsibility to guard against naked economic favoritism. The Constitution's guarantee of equal protection necessarily means that the courts should not allow the actions of the political branches to escape scrutiny when they extend special favors to one group to the detriment of another.

The D.C. Circuit's decision below overlooks these basic constitutional principles and, adding to the

confusion among the lower courts on the important, recurring question of how rational-basis review is supposed to be applied, abdicates the judiciary's critical role in protecting against improper private favoritism. Accordingly, *amici* submit this brief to urge the Court to grant the petition and to correct the lower court's misguided decision.

SUMMARY OF ARGUMENT

The decision below defines rational-basis review as a mere defendant-focused pleading requirement that obligates courts to uphold challenged economic regulation at the motion to dismiss stage (regardless of what the evidence may actually show) as long as the government defendant *asserts* that the regulation has some rational relationship to a legitimate government interest. But properly understood, rational-basis review is more than a mere pleading burden: It is a mechanism through which courts ensure the fair and proper functioning of our democratic institutions. By requiring that government establish a plausible, rational, public-interested justification for challenged economic regulation, and by protecting against laws that are proven to advance only illegitimate government interests, such as economic protectionism or irrational animus, rational-basis review helps to prevent legislatures from covertly seeking to enrich privileged groups at the expense of the politically disfavored and the public at large.

This Court's intervention is needed to provide much-needed guidance to the lower courts on the proper application of rational-basis review. The D.C.

Circuit's decision is not only out-of-step with decisions from other courts of appeals, but it is also a dangerous abdication of the judiciary's obligation to ensure that our democratic institutions produce policies that reflect legitimate democratic choices and are not the result of a factional takeover. Illegitimate economic protectionism is a serious problem in a whole host of areas where democratic processes have not worked as they should and government regulation is being used by powerful and entrenched interests to impose disproportionate burdens on the underprivileged and politically disfavored. The Court should grant review to ensure that the judiciary remains an essential bulwark against this form of illegitimate government action.

ARGUMENT

I. Correctly Applied, The Rational Basis Test Ensures The Proper Functioning Of Our Democratic Institutions.

The D.C. Circuit dismissed petitioners' challenge to the constitutionality of the Milk Regulatory Equity Act of 2005 at the pleading stage merely because the government "provided a rational explanation for its decision to close two loopholes in the [Agricultural Marketing Agreement Act of 1937] scheme—that large dairy businesses have used the exemptions to gain a substantial—and ultimately disruptive—competitive advantage over their regulated competitors." *Hettinga v. United States*, 677 F.3d 471, 479 (D.C. Cir. 2012) (per curiam). Under the lower court's approach, as long as the government is willing to assert some potential rational basis for

challenged economic regulation at the pleading stage, the court should dismiss and uphold the regulation no matter what the complaint has alleged or what the evidence might eventually show.

That approach is deeply misguided. It rests on a basic misunderstanding of the purpose of rational-basis review. Contrary to what Judge Brown suggested in her concurrence below, applying rational-basis review does not *invariably* mean "the absence of any check on the group interests that all too often control the democratic process." *Id.* at 482 (Brown, J., concurring). Rational-basis review is not supposed to be a refuge for those seeking to commandeer the public power of government for purely private ends. Instead, correctly understood, rational-basis review prevents the judiciary from intruding on the prerogatives of legislative policy judgments but also preserves the judiciary's traditional role of ensuring that our institutions produce policies that are democratic in the way the Framers envisioned.

Although the Constitution starts with the principle that a "dependence on the people is . . . the primary control on the government," the Framers recognized that "auxiliary precautions," including an independent judiciary, are needed to protect against the improper influence of "factions" that might otherwise seize control of government power to further their own parochial interests. The Federalist No. 51 at 322 (Madison) (Clinton Rossiter ed., 1961); *see also id.* (recognizing that in framing a democratic government, "you must first enable the government to control the governed; and in the next place oblige

it to control itself"). As James Madison explained, unless our democratic institutions function properly, factions may gain control of the political process and seek to promote their "immediate interest[s]" while "disregarding the rights of another or the good of the whole." The Federalist No. 10 at 80 (Madison) (Clinton Rossiter ed., 1961); *see also* Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction,* 65 B.U. L. Rev. 205, 222–28 (1985) (explaining Framers' expectation that legislatures would be vulnerable to the flames of faction).

The Framers' concerns about the pernicious influence of factions were well justified. As political science and economics scholarship has shown, even small interest groups can seize control over political processes and use the coercive power of the state to extract rents from the citizenry. *See generally* Mancur L. Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965). Indeed, countering the influence of interest groups to ensure that regulation is public-interested has become a central problem of modern political and legal theory. *See generally* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 Harv. L. Rev. 1328, 1341–43 (1994); Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991).

The politically insulated judiciary has long played an important role in protecting against the improper influence of factions. At an earlier time in American history, courts substantively reviewed economic regulation to strike down legislative

intrusions on economic liberty. *See Lochner v. New York*, 198 U.S. 45 (1905); *but see* David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (2011). More recently, this Court has concluded that close scrutiny of the substantive justification for economic regulation is unnecessary because "political processes . . . can ordinarily be expected to bring about repeal of undesirable legislation." *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938). Accordingly, under this Court's more modern precedent, "it is for the legislature, not the courts, to balance the advantages and disadvantages" of economic legislation. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955).

But that is not to say that the Court has adopted a rule of absolute deference, leaving citizens at the mercy of unfair and arbitrary regulations crafted by influential factions and interest groups. *See*, *e.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *see also Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934) (rational-basis test does not make "legislative action invulnerable to constitutional assault"). Although a challenged economic regulation "bear[s] a strong presumption of validity," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), it must be struck down if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Indeed, this Court has made clear that pure economic protectionism—the mere desire to reward a group of entrenched

interests at the expense of potential competitors—is *never* a legitimate justification for legislation. *See*, *e.g., Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878–80 (1985); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949). To the contrary, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been enacted." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

The rationality requirement thus constitutes an important bulwark against unjust, illegitimate, socially harmful laws. Demanding that the government show *some* conceivable rational basis for the distinctions drawn by a particular act of legislation ensures that regulation with no justification beyond naked protectionism cannot be allowed to stand. As one respected scholar has explained:

> [The rational-basis] requirement "filters out" illegitimate motivations. When the asserted benefits turn out to be illusory, or are minimal in relation to the burdens imposed, there is good reason to suspect that an illegitimate motivation—something other than the asserted benefits—in fact accounts for the regulation.

Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1706–07 (1984).

In this fashion, the rational-basis requirement *reinforces* basic principles of democratic self-government rather than subverting them. In

particular, rational-basis review promotes democratic principles, while limiting the risk of judicial imperialism, by demanding at a minimum that there be in fact *some* conceivable public-interested justification for a particular legislative decision. Judicial review serves not to overrule legislative judgments but rather "operates as a check against the possibility of covert protectionism." *Id.*

In its decision below, the D.C. Circuit eliminated that important check. By weakening the rational-basis requirement to an easily satisfied pleading hurdle for the government, the court of appeals removed any opportunity for a plaintiff to prove that a challenged law bears no rational relationship to any legitimate government interest. In other words, in precisely those situations where the judiciary's oversight is most needed—where our democratic institutions have failed and factions have manipulated them for purely private gain—the D.C. Circuit has adopted a rule that, regardless of what the reality may be, even a fig leaf of an explanation offered by the government is enough to avoid judicial scrutiny. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (the Constitution "'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections") (citations omitted).

As the petition explains, the decision below creates a conflict with decisions from other courts of appeals and adds to the persistent confusion among the lower courts on the proper application of rational-basis review to economic regulation. Equally importantly, the decision creates an intolerable

situation as a matter of constitutional first principles: Although this Court has held that courts do not have the authority to overturn legislative judgments about the necessity of regulation, deference in "matters of policy" has never justified "abdication in matters of law." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (Opinion of Roberts, C.J.). Indeed, the higher the standard of deference, the more important it is for safeguards to remain in place for ensuring that, at a minimum, regulation is in fact supported by *some* public-interested justification.

The D.C. Circuit's novel approach essentially eliminates this critical role for the courts. If it is not corrected, it is the D.C. Circuit's approach, not this Court's rational-basis jurisprudence, that will allow "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." *Hettinga*, 677 F.3d at 482–83 (Brown, J., concurring).

II. Economic Protectionism Is A Recurring, Widespread Problem That Harms The Politically Disadvantaged.

In addition to the split in authority and the confusion among the lower courts, the exceptional importance of the question presented is a further reason to grant review. Even a brief survey of protectionist economic policies across the nation shows why the courts must play a role in guarding against the danger that special interests will hijack political processes. Protectionist regulations—often described as important, public-interested health and

safety measures—all too frequently fail to match their description and, in fact, serve only to enrich the powerful at the expense of disfavored, politically weak groups or individuals.

This has been true throughout American history. *See generally* Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 Cal. L. Rev. 487 (1965). For example, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court confronted a San Francisco ordinance that forbade the operation of laundries in wooden buildings absent a license from the Board of Supervisors. The Court struck down the licensing regime based on evidence that permits were withheld on a racially discriminatory basis: 200 Chinese applicants were denied licenses, while 80 non-Chinese applicants received licenses. *Id.* at 374.

While *Yick Wo* is remembered today as an early precedent striking down racial discrimination, it is also a classic example of how powerful economic interests—in that case, white business owners—can seek to use the state's coercive power to stifle competition. *See generally* David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 Wm. & Mary L. Rev. 211 (1999). *Yick Wo* arose in the nineteenth century, but protectionist laws are alive and well today.

Indeed, state and local governments have enacted thousands of licensing requirements on various occupations. For example, some states have laws limiting the right to sell caskets to the public only to those who are licensed as funeral directors. Such laws have the effect of excluding from the

market those who wish to sell simple wood caskets but who cannot afford to pay the substantial costs involved in becoming trained as full-time funeral directors. *St. Joseph Abbey v. Castille*, __ F.3d __, 2012 WL 5207465, at *1 (5th Cir. Oct. 23, 2012). Some courts confronting such laws have rightly concluded that they are unconstitutional, as they serve no legitimate purpose other than "impos[ing] a significant barrier to competition." *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002). But not all courts have agreed. *See Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004).

To take another example, many states' laws require hair stylists to obtain cosmetologists' licenses, which require hundreds or thousands of hours of training at significant expense—even though much or all of that training is not relevant to hair styling nor necessary to ensuring public safety. Such laws are designed solely to create barriers to entry and thereby enrich established business interests. Confronted with such a regulatory scheme, a federal court recently held that the cosmetology licensing requirement could not be constitutionally applied to an individual who sought to sell African hair-braiding services to the public. *See Clayton v. Steinagel*, __ F. Supp. 2d __, 2012 WL 3242255 (D. Utah Aug. 8, 2012).

The D.C. Circuit's understanding of the rational-basis requirement poses a threat to citizens' ability to challenge arbitrary, discriminatory, and unfair laws. By definition, those who suffer as a result of protectionist laws are not having their interests protected in the political process. Accordingly, if the

judiciary is to remain as an essential check against factionalism and naked protectionism, plaintiffs who adequately plead that a law has no rational relationship to any legitimate government interest should be given a fair opportunity to introduce evidence to prove those allegations. At the motion to dismiss stage, the government will almost always be able to offer the bare *assertion* that a challenged law has some relationship to a legitimate interest. But if that were enough to evade judicial scrutiny the constitutional inquiry would be doomed at the outset.

That is not what the Constitution demands. And it is not how this Court has said rational-basis scrutiny is supposed to work. The Court should therefore grant the petition and reverse the D.C. Circuit's dangerous revision to the rational-basis requirement.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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