No. 25-533

In the Supreme Court of the United States

MINNESOTA DEER FARMERS ASSOCIATION, ET AL.,
Petitioners,

v.

SARAH STROMMEN, COMMISSIONER OF THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES, OR HER SUCCESSOR, ET AL.
Respondents.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Thomas A. Berry
Counsel of Record
Dan Greenberg
Sam Rutzick
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(443) 254-6330
tberry@cato.org

December 1, 2025

QUESTION PRESENTED

Whether the right to pursue one's chosen profession is a fundamental right under the Fourteenth Amendment.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

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

The Cato Institute's scholars have published extensive research on regulation and constitutional law. This case interests the Cato Institute because it concerns the legality of a contested regulation that implicates a fundamental right.

[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

For over a century, American farmers have raised deer. Deer farmers help maximize the value of marginally productive land and provide consumers with a high-quality source of lean protein (venison) and other natural products like pelts and antlers. However, concerns about the spread of cervine disease led Minnesota to stop issuing new deer farming licenses. Furthermore, existing licenses can only be transferred once—to immediate family members—with the permission of Minnesota's Board of Animal Health.

The Minnesota Deer Farmers Association sued, arguing that these licensing restrictions violated the fundamental right to pursue a profession. The district court dismissed the action, finding that it failed to state a claim. The Eighth Circuit Court of Appeals affirmed the lower court, finding that Minnesota's licensing scheme did not intrude on a fundamental right.

However, the Eighth Circuit's understanding of the suit was too narrow. That court asked: Does Minnesota's statutory scheme intrude upon the fundamental right to farm white-tailed deer? But that is the wrong question. The issue this action raises is: Does Minnesota's statutory scheme intrude upon the fundamental right to pursue a chosen profession?

A right is fundamental if it is "deeply rooted in the nation's history" and "implicit in the concept of ordered liberty." Protecting the rights of merchants and traders to engage in their occupations predates Magna Carta. Work is fundamental to American life and liberty.

This case is an ideal vehicle to correct a persistent misunderstanding of this fundamental right. The fundamental right to pursue a lawful profession is central to the American tradition of ordered liberty, and the Court should grant certiorari to clarify the nature of this right. For almost a thousand years, Anglo-American jurists have recognized this right. This Court has regularly recognized it. The Court should restore the right to pursue one's chosen profession to its proper status as a fundamental right.

ARGUMENT

I. THE LOWER COURT MISCHARACTERIZED THE NATURE OF THE FUNDAMENTAL RIGHT AT ISSUE IN THIS CASE.

A court that analyzes a fundamental right must supply a "'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997).[2] That analysis rests on a fulcrum of constitutional rights and liberty interests; if the right is defined too broadly or too narrowly, then either there will be more than enough evidence or no evidence at all to support the finding of a fundamental right.

The Eighth Circuit Court of Appeals determined that the right at issue in this case was the

[2] Although the *Glucksberg* test is not identical with the ideal test for applying the original meaning of the Fourteenth Amendment, it is currently the binding precedent of this Court and it is close enough to the correct approach that the differences have no effect in this case. *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER & SPIRIT 257 (2021) (explaining how the ideal test for determining which rights are protected by the Fourteenth Amendment would differ from *Glucksberg*).

"fundamental right to pursue their chosen profession *of white-tailed deer farming* . . . ." Pet. App. 7a (emphasis added). Unsurprisingly, that court could find no evidence for the existence of such a right. *Id.* at 9a–10a.

But the Eighth Circuit's finding refutes an argument that was never raised. "The argument is not that farming is a constitutional right," let alone the farming of white-tailed deer. Pet. at 10; *see also id.* at 17. The fundamental right that the Petitioners asserted here is the right to pursue a profession. And when a plaintiff asserts an articulated constitutional right, it is the job of the court to "investigat[e] whether a right with those properties is sufficiently deeply rooted." BARNETT & BERNICK, *supra*, at 237. It is not the job of the court to rephrase and narrow the right into one that the plaintiff never claimed.

The lower court confused an *instance* of the right with the right itself. That is a mistake both of nomenclature and of analysis. Consider an analogy: there is no particular right to freedom of speech *online*, nor a particular right to bear a *SIG Sauer P365 handgun*, nor a particular bar on quartering troops in a home *with central heating*. As a formal matter, the Constitution expressly protects general rights: the right to freedom of speech, the right to bear arms, and the bar on quartering troops generally. When courts resolve questions about a fundamental right, they must begin by examining the right as articulated by the plaintiff and determining whether the claimed right has been framed accurately, neither too broadly *nor* too narrowly. *See* BARNETT & BERNICK, *supra*, at 237 (when applying the "careful description" prong of the

Glucksberg test, "'[c]arefully' could be considered synonymous with 'accurately.'").

In this case, the Court should begin its analysis by identifying the nature of the fundamental right at issue—the right to pursue one's chosen profession—and then apply the law to the concrete issue at hand. Of course, any analysis of fundamental rights requires a high degree of prudence and circumspection. Pet. App. 10a (quoting *Glucksberg*, 521 U.S. at 720) ("We have always been reluctant to expand the concept of substantive due process") (quotation cleaned up by Eighth Circuit). But Petitioners did not ask the Eighth Circuit to discover a new right where one did not previously exist. Rather, Petitioners asked that court—and now ask this Court—to recognize the fundamental right to pursue one's chosen profession. That right has deep roots in this nation's case law. Just as importantly, that right is both deeply rooted in our nation's history and implicit in ordered liberty.

II. THE PURSUIT OF A CHOSEN PROFESSION IS A FUNDAMENTAL RIGHT.

A. *Glucksberg*'s Two-Part Test Identifies a Fundamental Right.

The Constitution prevents the government from wrongfully exercising its powers, and the Fourteenth Amendment's Due Process Clause prevents that wrongful exercise even if the procedures it rested on were enacted fairly. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). Constitutional protections are stronger when government actions jeopardize a fundamental right. Those actions must pass strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 302 (1993). The Court rarely identifies new fundamental rights. *Glucksberg*,

521 U.S. at 720 (listing fundamental rights); *Collins,* 503 U.S. at 125.

As *Glucksberg* explains, a two-part test determines if a right is "fundamental." After a "'careful description' of the asserted fundamental liberty interest," a right must be both "deeply rooted in this Nation's history and tradition" and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg,* 521 U.S. at 721 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion); *Palko v. Connecticut* 302 U.S. 319, 325–26 (1937)).

The realm of fundamental rights is not one where "judges have felt free to roam where unguided speculation might take them." *Poe v. Ullman,* 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Rather, there are "certain interests" that are so directly related to liberty that they "require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Id.* at 543.

B. The Right to Pursue One's Chosen Profession Is Deeply Rooted in the Nation's History and Tradition.

The right to choose and pursue a profession is deeply rooted in the Anglo-American legal tradition. That may be an understatement: Perhaps it is more accurate to say that the right just *is* part of the Anglo-American legal tradition. Magna Carta ensured that "all merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and

lawful customs." *Magna Carta,* U.K. NAT'L ARCHIVES.[3] Notably, Magna Carta didn't originate those rights; rather, it memorialized the "ancient and lawful customs" which long predated the royal charter. *Id.*

At common law, "every man might use what trade he pleased." 1 WILLIAM BLACKSTONE, COMMENTARIES, *427. Sir Edward Coke, the Elizabethan champion of the rule of law, noted that a licensure system that gave a "grant to the Plaintiff to have the sole making of [playing cards] is against the Common Law." 1 EDWARD COKE, THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 1155–56 (Steve Sheppard ed., 2003).[4] The courtroom debate during the playing-card case was rife with references to the codes of Emperors Justinian and Zeno. *Id.* at 1160–61. Coke believed that a man's life was his trade, because his trade supported his life. Monopolistic regulations that destroyed that trade thereby destroyed a life. *See* Timothy Sandefur, *The Right to Earn a Living,* 6 CHAP. L. REV. 207, 216 (2003).

Such common law protections shaped the legal framework of colonial America. George Mason began the Virginia Declaration of Rights by proclaiming 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

---

[3] Available at https://bit.ly/4nDRmVO.

[4] At the time, Coke was Attorney General for England and Wales and bore the duty to bring the government's case in defense of the monopoly. His laudatory account of the case for the opposing counsel's position is therefore especially notable. "Coke, at least formally, lost the Case, although his heart was probably not in it." *Id.* at 1146 (editor's note).

obtaining happiness and safety." *The Virginia Declaration of Rights,* NAT'L ARCHIVES.[5] Jefferson echoed those sentiments when he averred that all men have the right to "life, liberty, and the pursuit of happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Early American law upheld the common law right to pursue one's chosen profession. In *Corfield v. Coryell*, Justice Bushrod Washington, riding circuit, wrote that there were certain "fundamental principles" that "belong, of right, to the citizens of all free governments." *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C. E.D. Penn. 1823). Justice Washington's account shows Mason's influence: Those principles include "the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . ." *Id.* And just as Magna Carta protected merchants' right to travel, Justice Washington recognized the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." *Id*. Protecting the right to pursue one's chosen profession sometimes lowered racial barriers. In antebellum Tennessee, the state Supreme Court struck down a curfew that targeted black laborers in *City of Memphis v. Winfield*, 27 Tenn. (8 Hum.) 707 (Tenn. 1848). That court found that the law prevented black laborers from engaging in "the most profitable employment," labeling the law "an attempt to impair the liberty of a free person unnecessarily" and "to restrain him from the exercise of his lawful pursuits." *Id*. at 709. Sandefur's research identified roughly 60

[5] Available at https://bit.ly/43dwU6K.

opinions between *Corfield* and the *Slaughter-House Cases* that recognized a common law right to pursue one's chosen profession. Sandefur, *supra*, at app. A.

Even after the *Slaughter-House Cases,* courts continued to recognize constitutional protections for professional pursuits. In *Dent v. West Virginia*, this Court recognized a property interest in pursuing "any lawful calling." 129 U.S. 114, 121 (1889). That property interest cannot be taken away "arbitrarily." *Id.* The Court upheld the licensure scheme at issue in *Dent*, but only after ensuring that there was "nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians, except those who may be called for a special case from another State; it imposes no conditions which cannot be readily met." *Id.* at 124.

In contrast, when the Court detected genuine arbitrariness in the regulatory restrictions it examined, such as in *Yick Wo v. Hopkins*, it struck down those restrictions because they were inappropriate for a "harmless and useful occupation." Evan Bernick, *Towards a Consistent Economic Liberty Jurisprudence*, 23 GEO. MASON. L. REV. 479, 482 (2019) (quoting *Yick Wo v. Hopkins,* 118 U.S. 356, 374 (1886)).

The "right to follow any of the ordinary callings of life," of "following the pursuit which [one] prefers," was repeatedly recognized as one of the rights protected by the Fourteenth Amendment. *Allgeyer v. Louisiana,* 165 U.S. 578, 590 (1897) (quoting *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 764–65 (1884)).

However, the right to choose and pursue one's profession is distinct from the right to contract. Protection of the latter right famously reached its

high-water mark in *Lochner v. New York,* 198 U.S. 45 (1905), when the Court struck down legislation that capped bakers' daily and weekly work hours. The *Lochner* era ended nearly a century ago, but that trend in the law is distinct from the established judicial protection of the fundamental right to pursue a profession. It is one thing for a state to limit the types of contracts that may be entered while pursuing one's possession, but it is quite another to bar someone from pursuing that possession *entirely*. The law at issue in this case is not akin to a law capping bakers' hours; it is akin to a hypothetical law forbidding every and any prospective new baker from entering into the labor market at all. That legislation would run afoul of the general right to pursue a chosen profession—a right that the Court has recognized and continues to recognize.

In *Conn v. Gabbert,* the Court recognized that there is "some generalized due process right to choose one's field of private employment," even if it is "subject to reasonable government regulation." *Conn v. Gabbert,* 526 U.S. 286, 291–92 (1999). A multitude of modern-day appellate opinions have held that various schemes of occupational regulation serve no legitimate government interest and thereby flunk rational basis review. *See, e.g., Saint Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). Although the right to choose and pursue an occupation is deeply rooted and ultimately should trigger strict scrutiny, these decisions suggest that this right persists today.

Modern law has shifted ground from Blackstone's rule that "every man might use what trade he

pleased." 1 WILLIAM BLACKSTONE, COMMENTARIES, *427. Nonetheless, that right—in some form—still lives. Where does *Conn*'s "generalized due process right" come from? We can trace back the chain. *Gabbert* recognized the right in *Dent*, which itself recognized it as a "distinguishing feature of our republican institutions." *Dent*, 129 U.S. at 121. That distinguishing feature was recognized by the Framers in our founding documents, who saw that it emerged from Anglo-American common law. That legal tradition was older than Magna Carta; it extended back to antiquity.

The right to pursue one's chosen profession is deeply rooted in our legal tradition. This Court has recognized as much in the past, and it should reaffirm it here. Under the test this Court laid out in *Glucksberg*, there is a fundamental right to pursue a profession.

C. The Right to Choose and Pursue a Profession Is Implicit in the Concept of Ordered Liberty.

Making choices about livelihood and pursuing one's chosen profession are at the core of ordered liberty. These matters are essential elements of the pursuit of happiness. Marc P. Florman, *The Harmless Pursuit of Happiness: Why Rational Basis with Bite Review Makes Sense for Challenges to Occupational Licenses*, 58 LOY. L. REV. 721, 741 (2012). In *Gabbert,* the Court recognized that the pursuit of one's chosen profession has some degree of constitutional protection. *Gabbert*, 526 U.S. at 291–92. The connection between pursuing a profession and liberty is long established in the law.

The domains of economic rights and civil rights sometimes overlap. Many economic rights implicate civil rights; many civil rights implicate economic rights. And both are valuable: For instance, "most men would probably feel that an economic right, such as freedom of occupation, was at least as vital to them as the right to speak their minds." Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial,* 1962 SUP. CT. REV. 34, 46 (1962). It is unclear "why liberty of economic choice is less indispensable to the 'openness' of a society than freedom of expression." *Id.* The protection of economic rights prevents the persecution of scattered minorities in much the same way that the protection of civil rights does; "the scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined." *Id.* at 50.

Invocations of the right to pursue one's chosen profession are not "just a patriotic shibboleth." Bernick, *supra*, at 498. "The right to work, [Justice Douglas] had assumed, was the most precious liberty that man possesses." *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting) After all, Americans use a great deal of their liberty to work. Many derive meaning and emotional fulfillment from work. Many understand work to be "a form of self-expression and central to their self-definition." Bernick, *supra*, at 498. Some would likely place a higher value on the freedom to pursue a profession than on the freedom to travel to Washington and lobby their Member of Congress.

The Fourteenth Amendment protects economic liberty. That Amendment provided the foundation for

the Civil Rights Act of 1866, which protected the economic rights of the once-enslaved, newly freed black citizens of the South. Sandefur, *supra*, at 228. The Act protected the security of everyone's property—regardless of race. *Id.* Representative John Bingham, one of the authors of the Fourteenth Amendment, believed that the core of liberty included the right "to work in an honest calling and contribute by your toil in some sort to the support of your fellowmen." *Id.* at 229 (quoting CONG. GLOBE, 42d Cong., 1st Sess. App. 86 (1871)). Our Fourteenth Amendment conception of ordered liberty is inseparable from the right to pursue one's chosen profession.

This Court's protection of ordered liberty, and of the constitutional rights that breathe life into it, is at the center of the American jurisprudential tradition. The continued advancement of individual autonomy through the protection of constitutional rights—such as those in the First and Second Amendments—is a fundamental implication of that tradition. This Court is appropriately skeptical of the constitutionality of laws that intrude on the right to speak, the right to worship, and the right to bear arms. It should be similarly skeptical when faced with a law that unambiguously intrudes on the right to choose and pursue a profession. As explained above, the freedom to pursue one's chosen profession is just as intrinsic a right as any others "implicit in the concept of ordered liberty."

CONCLUSION

This case is not about the fundamental right to farm white-tailed deer—any more than *Loving v. Virginia* is about the fundamental right to marry Mildred Loving. *Loving v. Virginia,* 388 U.S. 1 (1967)

(finding that arbitrary deprivation of the fundamental right to marry was impermissible). Rather, this case is about the fundamental right to choose and pursue a profession. This right has deep roots in our legal traditions. It is an essential part of our conception of ordered liberty. *Glucksberg*'s logic demonstrates that the right to pursue one's chosen profession is fundamental, and that any scheme that infringes on it requires the application of strict scrutiny.

We are asking the Court to grant the petition for certiorari for these reasons, and for those described by the Minnesota Deer Farmers Association. We do not ask the Court "to roam where unguided speculation might take them." *Poe,* 367 U.S. at 542 (Harlan, J., dissenting). Rather, we ask the Court to follow its own test and respect its own precedent. The test in the Court's caselaw establishes the fundamental right to pursue one's chosen profession. The Court should grant this petition and clarify the law by recognizing the proper status of this fundamental right.

Respectfully submitted,

Thomas A. Berry
Counsel of Record
Dan Greenberg
Sam Rutzick
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(443) 254-6330
tberry@cato.org

December 1, 2025