IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ELIJAH "LIJ" SHAW, et al.,	)	
	)	
Plaintiffs/Appellants,	)	
	)	
v.	)	Case No. M2019-01926-SC-R11-CV
	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
	)	
Defendant/Appellee.	)	

On Application Pursuant to Tenn. R. App. P. 11

Tennessee Court of Appeals Case No. M2019-01926-COA-R3-CV

Chancery Court for Davidson County Case No. 17-1299-II

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS

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The National Federation of Independent Business Small Business Legal Center ("NFIB SBLC") is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington, DC, and all fifty state capitals. Founded in 1943 as a nonprofit, non-partisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, NFIB SBLC frequently files *amicus curiae* briefs in cases that affect small businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves rights so fundamental that they have been protected by courts for centuries. The first is an individual's right to use his or her property in a reasonable manner without causing harm or injury to others. The second is an individual's right to earn a living and pursue an occupation free from arbitrary government interference. The United States Supreme Court has long affirmed that securing the first is essential to preserving the second. In *Lynch v. Household Fin. Corp.*, the Court said, "the dichotomy between personal liberties and property rights is a false one." 405 U.S. 538, 552 (1972). The Court has also observed that "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993). Most recently, and perhaps most forcefully, the Court declared

that the "Founders recognized that the protection of private property is indispensable to the promotion of individual freedom[,]" quoting with approval John Adams' adage that "'[p]roperty must be secured, or liberty cannot exist.'" *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (quoting Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851)). Without property, there can be no liberty. *Id.*

Channeling that spirit, Plaintiffs-Appellants Lij Shaw and Pat Raynor ("Homeowners"), two Nashville-based entrepreneurs, seek to serve clients out of their home-based businesses and use their homes in such a way as to not disturb or harm their neighbors. The Metropolitan Government of Nashville and Davidson County ("Metro"), however, shut down Homeowners' businesses for violating the city's "Client Prohibition," without any evidence that their businesses harmed or disturbed their neighbors. While Metro barred Homeowners from having any clients on-site, they allowed (and still allow) thousands of other home-based businesses to serve twelve or more clients each day. R.658, 647–77. Despite acknowledging the "voluminous materials" in the record and Homeowners' uncontested material facts, the Chancery Court found that the Client Prohibition, as applied to Homeowners, "has a rational relationship to the public safety, health, morals, comfort, and welfare," and granted summary judgment for Metro. *Id.* at 10. In doing so, the Chancery Court embraced a standard in evaluating Homeowners' claims suggesting facts do not matter – a mere distortion of judicial review that is inappropriate where, as here, arbitrary zoning restrictions infringe

upon Homeowners' rights to earn a living and use their properties in the pursuit of their chosen professions.

NFIB SBLC respectfully urges this Court to reject the superficial federal "rational basis" standard urged by Metro, which is incompatible with Tennessee's legal history and tradition of protecting private property rights and economic liberty. Although Tennessee courts presume that statutes and regulations subjected to the lowest constitutional scrutiny are constitutional, and uphold them if there is a reasonable difference of opinion as to their propriety, courts must require that an objectively verifiable fit exist between the ends the government seeks to pursue and the means it adopts to pursue them. That is, courts should apply the elevated level of scrutiny urged by Homeowners, Homeowners' Br. 28–30, as the minimum standard for evaluating laws challenged under article I, section 8 and article XI, section 8 of the Tennessee Constitution—especially where the government unreasonably interferes with individual rights deeply rooted in American common law and history. *See id.* at 37.

1. **Property Rights and Economic Liberty Are Deeply Rooted in American Common Law and History.**

Few rights are so embedded in American history and tradition as the right to own, use, and enjoy one's property and to apply one's own talent and initiative to earn a living free from arbitrary government interference. *See, e.g.*, *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2. Dall.) 304, 310, (Cir. Ct. Pa. 1795) ("[T]he right of acquiring and possessing

property, and having it protected, is one of the natural, inherent, and unalienable rights of man."); *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.").

These rights were well-established at common law for more than a century before America's founding, being most clearly articulated in the English case of *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1613). In *Allen*, Chief Justice Edward Coke held that both the Magna Carta and the common law protected the right of "any man to use any trade thereby to maintain himself and his family." *Id.* at 1055. A century later, Judge William Blackstone, who profoundly influenced the Founders, acknowledged the fundamental right to economic liberty, affirming the general proposition that "[a]t common law every man might use what trade he pleased." 1 WILLIAM BLACKSTONE, COMMENTARIES *427. Blackstone placed equal value on protecting private property rights, writing: "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." *Id.* at *139.

The Framers of the United States Constitution also viewed property rights and the right to earn a living as fundamental liberties, embracing the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society . . . ." JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 82 (Barnes & Nobel

Publishing, Inc. 2004) (1690). James Madison, Thomas Jefferson, and Alexander Hamilton all declared these rights fundamental. *See, e.g.*, THE COMPLETE MADISON 267–68 (Saul K. Padover, ed., 1953), published in National Gazette (March 29, 1792) (emphasis in original); 3 THOMAS JEFFERSON, *Thoughts on Lotteries*, in MEMOIRS, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON 429 (Thomas Jefferson Randolph ed. 1829); THE FEDERALIST No. 1, at 30 (Alexander Hamilton) (Clinton Rossiter ed. 1961); THE FEDERALIST No. 17, at 115 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

In 1796, Tennessee ratified its first constitution, and included a Declaration of Rights in article XI that was drawn from existing state constitutions. *See In re Estate of Trigg*, 368 S.W.3d 483, 491 (Tenn. 2012); *see also* Lewis L. Laska, *A Legal and Constitutional History of Tennessee, 1772-1972*, 6 MEM. ST. U. L. REV. 563, 592 (1972). Tennessee's broad and comprehensive Declaration of Rights begins with the statement that "all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness[.]" TENN. CONST. art. I, § 1. Article I, section 2 continues: "That government being instituted for the common benefit, the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." *Id.* § 2. Finally, the Tennessee Constitution's penultimate provision declares:

> The declaration of rights hereto prefixed is declared to be a part of the Constitution of the state, and shall never be

> violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the general powers of government, and shall forever remain inviolate.

Id. art. XI, § 16. This classically American theory of the relationship between the government and its citizens is heavily aligned with the thinking of our nation's Founders. It is thus no surprise that Thomas Jefferson described Tennessee's founding document as "the least imperfect and most republican of the state constitutions." Lewis L. Laska, *A Legal and Constitutional History of Tennessee, 1772-1972*, 6 MEM. ST. L. REV. 563, 582–83 (1976) (quoting JAMES G.M. RAMSEY, THE ANNALS OF TENNESSEE TO THE END OF THE EIGHTEENTH CENTURY 657 (Kingsport Press 1926) (1853)).[1]

Like the Founders, the framers of the Tennessee Constitution cherished private property rights, which they viewed as inherently bundled with and essential to personal liberty. Nearly four decades into Tennessee's statehood, the Declaration of Rights in article XI rose to even greater prominence, becoming article I in the Constitutions of 1834 and 1870. *May v. Carlton*, 245 S.W.3d 340, 351 n.5 (Tenn. 2008). This Court has safeguarded Tennesseans' uses and enjoyment of property since at least 1839. *See Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 474 (Tenn. 2012) (holding that a landowner "'may use his land according to

[1] Laska notes, however, that although this quotation appears in *The Annals of Tennessee*, Ramsey does not document his source. *Id.* at 583 n.90.

his own judgment, without being answerable for the consequences to an adjoining owner, unless by such occupation he either intentionally or for want of reasonable care and diligence inflicts upon him an injury.'" (quoting *Humes v. Mayor of Knoxville*, 20 Tenn. (1 Hum.) 403, 407 (1839)).

2. This Court Should Reject the Superficial Federal Rational Basis Test and Adopt a "Real and Substantial" Review.

It is axiomatic that this Court is "free to expand the minimum level of protection mandated by the [F]ederal [C]onstitution." *Burford v. State* 845 S.W.2d 204, 207 (Tenn. 1992). Accordingly, this Court has declined to interpret the Tennessee Constitution as "coextensive" with the federal Constitution simply because its past decisions have identified linguistic parallels between the two. *See Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 14–15 (Tenn. 2000) ("Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards."). Exercising its power to "impose higher standards and stronger protections[,]" this Court has interpreted the Law of the Land Clause in article I, section 8, as providing more protection than the federal Due Process Clause. *Id.* at 15; *see also, e.g.*, *State v. Ferguson*, 2 S.W.3d 912, 914 (Tenn. 1999) (finding broader due process rights under Tennessee's constitution than in the federal Constitution); *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn. 1988) (stating that Tennessee's Due Process Clause under article I, section 8 is "not identical" to its federal counterpart).

As these precedents counsel, this Court should reject the superficial rational basis review argued by Metro and make clear that laws challenged under the due process and equal protection provisions in article I, section 8 and article XI, section 8 of the Tennessee Constitution must, at a minimum, have a "real and substantial" connection—an objectively discernable fit—to a legitimate government interest.

a. The Federal "Rational Basis" Test Has Caused Confusion and Sacrificed Important Constitutional Values.

Federal "rational basis" review has an arduous history. When rational basis review gained prominence in a series of cases in the 1930s, the United States Supreme Court claimed that it was merely a rebuttable evidentiary presumption, and "not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault." *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934). *Borden's* emphasized that courts evaluating constitutional challenges to statutes should not "treat[] any fanciful conjecture" about the legislature's purposes "as enough to repel [constitutional] attack." *Id.* Instead, courts should presume that statutes have constitutionally sufficient factual bases, while also giving plaintiffs the opportunity to "show[] by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof," that a challenged law is unconstitutional. *Id.* The Court repeated this point throughout the 1930s. *See Nashville, C. & S.L. Ry. v. Walters*, 294 U.S. 405, 414–33 (1935) (reversing Tennessee Supreme Court's decision applying a form of

rational basis review that refused to consider specific facts proffered to show that a state law was arbitrary and unreasonable); *Polk Co. v. Glover*, 305 U.S. 5, 10 (1938) (per curiam).

Beginning in the 1950s, however, the Court began to transform the presumption of constitutionality into an impenetrable shield. Thus, in *Berman v. Parker*, 348 U.S. 26 (1954), the Court held that when a state legislature determines that the use of eminent domain to encourage private development would benefit the economy, such a determination is "well-nigh conclusive." *Id.* at 32. The Court appeared to endorse a more extreme proposition in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), when it announced that a court should uphold a challenged law by imagining whether a hypothetical legislator might have thought the law would accomplish a public good—even where such speculation contradicted actual evidence. *See id.* at 487 ("[T]he legislature might have concluded . . . [o]r the legislature may have concluded . . . ."). It was on the basis of these precedents that the Court in *FCC v. Beach Communications, Inc.*, 508 US 307 (1993) declared that in a rational basis case, a court should uphold a law regardless of its actual purposes or effects, so long as the judge could imagine some hypothetical justification for that law. 508 U.S. at 315 ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.").

This superficial form of rational basis review undermines the bedrock principle that "it is the province and duty of the judicial

department to say what the law is."[2] *See Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995) ("Since . . . *Marbury v. Madison* [], it has been the sole obligation of the judiciary to interpret the law and determine the constitutionality of actions taken by the other two branches of government."). Rational basis review has been defended as a "paradigm of judicial restraint" that does not provide a "license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 US at 313–14. This reluctance no doubt arises from the recognition that responsibility for legislation and policymaking lies with elected officials. But it is hardly a "paradigm of judicial restraint" for a court to supply justification for a law when a party fails to do so, as often occurs when courts apply the most superficial form of rational basis review. "There is a difference between judicial restraint and judicial abdication." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 374 (2010) (Roberts, C.J., concurring).

This extremely deferential rational basis test is incompatible with due process guarantees of fairness and impartial justice. By requiring a plaintiff to disprove the rationality of a challenged statute, in essence, federal rational basis review requires a litigant to prove a negative. *See, Alcazar v. Hayes*, 982 S.W.2d 845, 854 (Tenn. 1998) ("it is virtually impossible to prove a negative, so it would be difficult if not impossible

[2] The rational basis review also undermines separation of powers principles. *See* discussion *infra* Section 2(b).

for the claimant to prove" its case). The problem is exacerbated when courts require a plaintiff to disprove *hypothetical*, post-hoc rationalizations for a law. Consequently, "even foolish and misdirected provisions are generally valid if subject only to rational basis review." *Craigmiles v. Giles*, 312 F.3d 220, 224–25 (6th Cir. 2002); *see also Beach Commc'ns*, 508 U.S. at 323 n.3 (Stevens, J., concurring) (observing that the rational basis review "sweeps too broadly, for 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."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 68 (1973) (White, J., dissenting) ("[Not] requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture."); *James v. Valtierra*, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting) (condemning excessively deferential review as "no scrutiny whatsoever"). Unsurprisingly, federal courts have applied the rational basis test inconsistently.

While the Supreme Court has sometimes asserted in *dicta* that under this test it is "irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature," *Beach Commc'ns*, 508 U.S. at 315, at other times it has declared that rational basis review "is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme," *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975),

and has "declined to manufacture justifications in order to save an apparently invalid statut[e]." *Schlesinger v. Ballard*, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting). Following the Court's decision in *Beach Communications*, the Court clarified that even rational basis review "must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). Indeed, the Court has repeatedly ruled in favor of plaintiffs by refusing to indulge in hypothetical rationalizations for the challenged laws. *See, e.g.*, *Romer*, 517 U.S. 620, 632–34 (1996); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985); *Zobel v. Williams*, 457 U.S. 55, 65 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–38 (1973).

Worse than this confusion as to what rational basis means are the consequences of excessive judicial deference. By blinding courts to the disproportion between challenged statutes and the purposes they are alleged to serve, and by encouraging judges to manufacture hypothetical justifications for challenged laws, the federal rational basis test has inflicted serious harm on entrepreneurs, property owners, and others who seek judicial protection for a class of rights that have been wrongly "relegated to the status of a poor relation" in federal jurisprudence. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). "The practical effect" of the superficial rational basis review "is the absence of any check on the group interests that all too often control the democratic process." *Hettinga v. United States*, 677 F.3d 471, 482 (D.C. Cir. 2012) (Brown, J.,

concurring).[3] This gives 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." *Id.* at 482–83.

This type of federal rational basis review is merely a rubber stamp for almost any government regulation, no matter its effect, and this Court should reject it as the test for reviewing whether laws or regulations contravene article I, section 8 and article XI, section 8 of the Tennessee Constitution.

b. Tennessee Citizens Deserve the Protection of Independent Courts, Not Superficial Federal-Style Rational Basis.

This Court is not required to copy the confusing and often unjust precedent set by federal due process jurisprudence and instead is "free to expand the minimum level of protection mandated by the federal [C]onstitution." *Burford*, 845 S.W.2d at 207.[4] This is not unique to Tennessee jurisprudence; several state supreme courts have gone a step further, counseling state courts to "jealously reserve the right under [their] state constitution provisions to reach results different from

[3] Judge Griffiths expressed sympathy with the views of his colleagues. *Id.* at 483.

[4] Sixth Circuit Judge Jeffrey Sutton argues that when a state supreme court analyzes a state constitutional provision with an analogous federal constitutional provision, the court should interpret the provisions independently. "State courts have authority to construe their own constitutional provisions however they wish." JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 16 (2018).

current United States precedent . . . ."[5] *State v. Ingram*, 914 N.W.2d 794, 799 (2018) (Iowa 2018) ("The caselaw and law commentaries now groan with the volume and weight of ample materials for lawyers to construct independent state constitutional law varying from applicable federal precedent."). Other state supreme courts have held that their constitutions extend broader protections to their citizens than the federal Constitution, considering factors such as differences in the texts; state constitutional history; preexisting state law; and structural differences.[6] Many of those factors apply to the Tennessee Constitution's due process and equal protection provisions, and support adopting a meaningful, yet

[5] *See also State v. Jewett*, 500 A.2d., 233, 236 (Vt. 1985) (cautioning against "legal argument [that] consists of a litany of federal buzz words[,]" and urging lawyers to "aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of [the state's residents] however the philosophy of the United States Supreme Court may ebb and flow."); *Wallace v. State*, 905 N.E.2d 371, 377–78 (Ind. 2009) ("When we interpret language in our state constitution substantially identical to its federal counterpart, we may part company with the interpretation of the Supreme Court of the United States, or any other court based on the text, history, and decisional law elaborating the Indiana constitutional right." (cleaned up)).

[6] *See, e.g.*, *State v. Schwartz*, 689 N.W.2d 430 (S.D. 2004) (four divergence criteria); *Saldana v. State*, 846 P.2d 604, 624 (Wyo. 1993) (Golden, J., concurring) (six non-exclusive criteria); *State v. Wheaton*, 121 Idaho 404, 407, 825 P.2d 501, 504 (1992) (Bistline, J., concurring); *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991); *State v. Jewett*, 146 Vt. 221, 500 A.2d 233, 237-238 (1985); *State v. Hunt*, 91 N.J. 338, 450 A.2d 952, 962–63 (1982) (Hander, J., concurring) (seven divergence criteria); *see also* Phillip Bobbitt, CONSTITUTIONAL FATE — THEORY OF THE CONSTITUTION 25 (1982) (quoting J. Story, 1 Commentaries on the Constitution of the United States § 407, at 390 n. 1 (1st ed. 1833)) (discussing six types of constitutional argument—the historical, the textual, the doctrinal, the prudential, the structural, and the ethical).

still deferential standard of review, rather than the superficial federal rational basis test.

To begin, the Tennessee Constitution's language differs from its federal counterpart not only by using the phrase "Law of the Land" but by using the phrase twice—in article I, section 8 and article XI, section 8. *See* TENN. CONST. art. I, § 8, art. XI § 8. While this Court has recognized that these provisions contain similar language to those found in the Fifth and Fourteenth Amendments of the federal Constitution, textual parallels alone are not dispositive. *See Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979) ("[A]though state courts cannot interpret their state constitutions so as to *restrict* the protections afforded by the [F]ederal [C]onstitution, as interpreted by the United States Supreme Court, they may *expand* protections on the basis of a textually identical state constitutional provision."). Far from a mirror image of its federal counterpart, the Tennessee Constitution's Law of the Land provision prohibits several other state actions not mentioned in the federal Due Process Clause, including the "tak[ing]," "imprison[ment]," or "exile[]" of Tennessee citizens. TENN. CONST. art. I, § 8. Article I, section 8 also protects "freeholds," suggesting a heightened concern and respect for private property rights. *Id.* These textual differences counsel against interpreting the Tennessee and federal Constitutions' due process and equal protection provisions as identical in application. *See Planned Parenthood*, 38 S.W.3d at 14 (explaining the Court may not "discount the fact that the Framers of our constitution used language different from

that used by the Framers of the United States Constitution. No words in our constitution can properly be said to be surplusage, and differences in expressions of right are particularly relevant in determining the 'concept of liberty' embodied in our constitution."); *see also State v. Doelman*, 620 S.W.2d 96, 99 (Tenn. Crim. App. 1981) (noting "the Tennessee Constitution is somewhat more protective of private property rights").

Furthermore, there are key structural differences between the Tennessee and United States Constitutions, which support an independent standard of review for laws that infringe on private property rights and the right to earn a living. The Tennessee Constitution contains an open courts provision, article I, section 17, which is not found in the United States Constitution. This provision grants every Tennessean the right of access to the courts, which reinforces the guarantee of "an independent judiciary and the impartial administration of justice through the exercise of arbitrary power by a separate branch of the government motivated by policy and political concerns inimical to an independent system of justice." *Town of S. Carthage v. Barrett*, 840 S.W.2d 895, 899 (Tenn. 1992); *see also Leighton v. Henderson*, 414 S.W.2d 419, 421 (Tenn. 1967) (stating article XI, section 6 ensures "every litigant the cold neutrality of an impartial court"). Indeed, as this Court stated at the time of the adoption of the Constitution of 1834, "[t]he independence of the judiciary ought to be anxiously preserved unimpaired; not on account of individuals who may happen to be judges — they are nothing — but on account of the security of life, liberty, and

property of the citizen." *Summers v. Thompson*, 764 S.W.2d 182, 189 (Tenn. 1988) (quoting *Fisher's Negroes v. Dabbs*, 14 Tenn. 199, 139 (1834)).

The deference to the legislature demanded by the superficial federal rational basis test would deprive Tennesseans of a meaningful right of access to the courts because it would make the courts a mere rubber stamp for legislative determinations. Some federal courts have gone so far as to hold that the rational basis test not only permits, but mandates that the reviewing court invent valid justifications for the law on behalf of the government.[7] Allowing or even requiring the reviewing court to assist one of the parties violates the guarantee of a neutral adjudicator—one of the most basic principles of the rule of law. *See, e.g.*, *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972); *Leighton v. Henderson*, 414 S.W.2d 419, 421 (1967); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Moreover, if the legislature's declaration that a statue rationally served some legitimate purpose were conclusive, then the concept of due process would be meaningless, as any act by lawmakers would automatically qualify as lawful. The Tennessee Constitution would then impose no meaningful restraint on the legislature. However, Tennessee

[7] *See, e.g.*, *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) ("As such, we are not bound by the parties' arguments as to what legitimate state interest the statute seeks to further. In fact, 'this Court is *obligated* to seek out other conceivable reasons for validating a state statute.'" (cleaned up) (emphasis in original) (quoting *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st. Cir. 2001)).

courts have rejected that proposition. *See City of Memphis v. Shelby Cty. Election Comm'n*, 146 S.W.3d 531, 538 (Tenn. 2004) (ruling that the commission had exceeded its constitutional authority because it had "usurped the power of the judiciary to determine the substantive constitutionality of duly enacted laws"); *Biggs v. Beeler*, 173 S.W.2d 946, 948 (Tenn. 1943) ("[O]ur Courts have not hesitated to strike down legislative action which disregarded, transgressed and defeated, either directly or indirectly, mandates of the organic and fundamental law laid down in the Constitution."); *Scopes v. State*, 289 S.W. 363, 366 (Tenn. 1927) ("[W]hile 'in no case can the court directly compel the Legislature to perform its duty,' i.e. carry out a mandate of the Constitution, 'in a plain case the court can prevent the Legislature from transgressing its duty under the Constitution by declaring ineffective such a legislative act.'").

Such a result cannot be reconciled with the basic tenants of our constitutional structure. It is not hyperbole to recall the words of Chief Justice John Marshall: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. When the judiciary fails to objectively scrutinize whether a challenged law serves a legitimate state interest, it risks making another branch of government the sole judge of the extent of its powers, thereby violating the separation of powers enshrined in article II, section 2 of Tennessee's Constitution. *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 843 n.8 (Tenn. 2008) (defining the scope of the powers, functions, and

prerogatives of the three branches of government); *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 449–51 (Tenn. 1995) (recognizing that "it has been the sole obligation of the judiciary to interpret the law and determine the constitutionality of actions taken by the other two branches of government."); *Mabry v. Baxter*, 58 Tenn. 682, 689 (1872) ("It is essential to the maintenance of republican government, that the action of the legislative, judicial and executive departments should be kept separate and distinct, as it is expressly declared it shall be by the Constitution, Art. 2, secs. 1 & 2"); *Governor v. Porter*, 24 Tenn. 165, 167 (1844) (explaining that the legislature enacts law, but that once the laws are enacted, it is up to the "judiciary to ascertain their meaning, and determine upon their construction. Any other doctrine would destroy the checks contained in the Constitution against the abuse of power, and tend to a concentration of all power in a single department of government.").

This violation of the principle of the separation of powers occurs whenever the judiciary fails to exercise its independent judgment about the propriety of the state's chosen means to its purported ends. As this Court acknowledged in *Richardson v. Young*, 125 S.W. 664, 670 (Tenn. 1910), "[t]he powers that are committed by the people to one branch cannot be exercised by those performing duties in another without express authority to do so, or the exercise of such powers becomes essential or appropriate to the effective discharge of duties imposed upon such branch." Excessive deference to the legislature, through this superficial version of the federal rational basis test, enlarges the

legislature's powers beyond their constitutional limits, undermines the tripartite system established by article I, section 2, and deprives the people of Tennessee of the benefits of a checks-and-balances system.[8]

Tennessee's legal history also counsels against mirroring federal rational basis jurisprudence. Because the state constitution postdates the federal Constitution, it should be read in light of its own unique history. As one commentator has observed:

> The frontier Tennesseans distrusted government and sought economic independence, distancing themselves from the peering eyes from others. To secure property for themselves and their posterity, these Tennesseans were willing to defend against the various vagaries of the wilderness. Obviously, such a people would not establish a constitution that would slavishly impose on its people the conformity of the day in matters of speech, religion, or otherwise. The interpretation of the Tennessee Constitution should be infused with a search for those enduring values that have given a spirit of individuality and uniqueness to this state and its people.

Francis S. Le Clerq, *The Process of Selecting Constitutional Standards: Some Incongruities of Tennessee Practice*, 61 TENN. L. REV. 573, 589 (1994).

[8] Advocates of rational basis scrutiny often claim that the political process sufficiently safeguards the rights of business owners and entrepreneurs, so that judicial protection of their rights is unnecessary. But this is false; entrepreneurs like the Homeowners in this case or the property owners in *Kelo v. City of New London*, 545 U.S. 469 (2005), are often politically powerless, with little money or lobbying power, and no realistic way to obtain legislative relief against the interests who benefit from the laws in question.

Finally, Tennessee courts recognize the importance of property rights and economic liberty. *See Livesay v. Tenn. Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 211 (Tenn. 1959) (observing that "the right to pursue one's occupation is an inherent property right protected by the due process clause of our State and Federal Constitutions."); *Hughes*, 387 S.W.3d at 474–75 ("A property owner's right to own, use, and enjoy private property is a fundamental right" such that restrictions on use—even private restrictions—are "not favor[ed] … because they are in derogation of the rights of free use and enjoyment of property."). Of course, this Court has consistently affirmed the well-established principle that the government may regulate the practice of a trade in order to protect the public from fraud or other public harms—just as it may regulate property use to protect against nuisances. *See, e.g.*, *Samuels v. Mayor of Nashville*, 35 Tenn. 298, 301 (1855) ("Every man or corporation must so use their own property as not to injure others. A nuisance would have this effect, and, therefore, may be prohibited."). By contrast, laws that prohibit persons from practicing a trade or profession without having a legitimate connection to public health and safety cross the line into unconstitutionality.

Thus, in *City of Memphis v. Winfield*, 27 Tenn. 707 (1848), this Court invalidated an ordinance that barred free African Americans from being in public after 10:00 p.m. *Id.* at 708. In striking down the law, this Court focused on how it obstructed African Americans' right to practice various trades. In a strongly-worded opinion this Court declared that "in

cities, very often, the most profitable employment is to be found in the night" and that the "curfew law . . . is high-handed and oppressive, and an attempt to impair the liberty of a free person unnecessarily, to restrain him from the exercise of his lawful pursuits, and to make an innocent act a crime . . . ." *Id.* at 709–10. This was no exaggeration: such an infringement on liberty, if enforced against free white persons, would have aroused public indignation, and subjected the city to lawsuits "to recover back the fine, [and] also for false imprisonment." *Id.* at 709."[A man] must live," the Court declared, "and, in order to do so, he must work." *Id.* at 707.

In *Campbell v. McIntyre*, 52 S.W.2d 162 (Tenn. 1932), this Court struck down a statute prohibiting anyone from doing accounting work without a state-issued professional license. The Court initially observed that "it is now more important to the preservation of constitutional government that emphasis be placed . . . upon the constitutional restraints on the police power of the legislature, rather than upon the extent to which that broad power may be exercised." *Id.* at 163. Relying on *Meyer v. Nebraska*, 262 U.S. 390 (1923) as construing the "personal rights of individuals" that were "substantially the same" as those found in the Tennessee Constitution, this Court emphasized its duty to evaluate whether the law "has a real tendency to promote or protect the public interest and safety, whether it bears a reasonable relationship to such end, and whether the interests of the public generally, as

distinguished from the interests of a particular class, reasonably require the protection of this restrictive legislation." *Campbell*, 52 S.W.2d at 164.

The United States Supreme Court has likewise affirmed that the right to make reasonable use of one's property is not only a fundamental constitutional right, but also one that cannot be divorced from other individual liberties:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. … In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property.

Lynch, 405 U.S.at 552 (citing J. Locke, J. Adams, and W. Blackstone)*; see also Cedar Point*, 141 S. Ct. at 2071 (affirming that "the protection of property rights is necessary to preserve freedom and empowers persons to shape and to plan their own destiny in a word where governments are always eager to do so for them.") (cleaned up). Applying this superficial rational basis review to government infringements on economic liberty and private property cannot be reconciled with the Tennessee and United States Supreme Courts' statements affirming the fundamental nature of private property rights and the right to earn a living. Were the political branches the sole arbiters of whether a law deprives citizens of due process and equal protection, then article I, section 8 and article XI, section 8 would be insignificant.

To vindicate Tennesseans' rights to use and enjoy their property and their right to earn a living this Court need not decide that article I, section 8 and article XI, section 8 protect a different or broader set of rights and interests than the federal Due Process and Equal Protection Clauses.[9] Instead, this Court need merely conclude that Tennessee courts applying the state constitution to laws that infringe on the right to use and enjoy one's property and the right to pursue a lawful occupation must do so under a deferential, but neutral and objective standard based on record evidence. To hold otherwise, and to adopt the form of rational basis review created by federal courts, would reduce "state courts . . . to mere conduits through which federal edicts would flow." *Miller*, 584 S.W.2d at 760. Such a result would be contrary to Tennessee's unique legal history, values, and traditions.

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[9] This Court has held that the Law of the Land Clause should be read as substantively identical to the federal Due Process Clause. Even assuming, *arguendo*, that the substance of the two provisions is the same, this Court is not bound to apply the federal form of the rational basis test. On the contrary, as the Law of the Land Clause was originally adopted in 1796, well before the origin of the rational basis test, and as Justice Parker of the Alabama Supreme Court has argued, where a state constitutional provision implemented "strong protections for economic liberties", it should not be read to incorporate federal judicial interpretations that post-date the state constitutional provision. *State v. Lupo*, 984 So. 2d 395, 407–11 (Ala. 2007) (Parker, J., concurring) (Alabama Constitution's Due Process Clause predates federal rational basis jurisprudence and thus should not be read to incorporate that jurisprudence). Even the U.S. Supreme Court—in rejecting the invitation to apply rational basis scrutiny to Second Amendment rights—has recognized that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not …future judges think that scope too broad," *D.C. v. Heller*, 554 U.S. 570, 634–35 (2008).

3. The Federal "Rational Basis" Test Was Partially Designed to Allow States to Provide Greater Judicial Protections—and Tennessee Should Do So.

One reason for the particular deference federal courts provide under the name "rational basis" is to encourage states to develop their own independent standards. *Dandridge v. Williams*, 397 U.S. 471, 485–86 (1970). Indeed, the Supreme Court has often encouraged states to adopt their own, higher standards to protect individual rights. *See, e.g.*, *Kelo*, 545 U.S. at 489 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (declaring that a state may "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."); *Cooper v. State of Cal.*, 386 U.S. 58, 62 (1967) (explaining that states can "impose higher standards . . . than required by the Federal Constitution.").

Perhaps the best example of states protecting individual rights through a more meaningful review is the Ohio Supreme Court's decision in *City of Norwood v. Horney*, 853 N.E.2d 1115 (2006), an eminent domain case decided shortly after *Kelo*.[10] In *Norwood*, the Ohio Supreme

[10] The *Kelo* decision was roundly denounced by citizens, political leaders, and lawyers, and, as noted above, several state courts soon declared that their state constitutions did not call for the same degree of deference to the legislature. *See* Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV'T L. REV. 1, 7–23 (2011).

Court rejected the *Kelo* decision by holding that, as a matter of Ohio constitutional law, the rational basis test applicable to condemnations required a realistic and independent judicial review. *See Norwood*, 853 N.E.2d at 1138 ("[O]ur role—though limited—is a critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure that the state . . . proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or improper purpose."). The court recognized the importance of courts respecting legislative determinations supporting economic redevelopment, but also noted that "the separation-of-powers doctrine 'would be unduly restricted' if the state could invoke the police power to virtually immunize all takings from judicial review." *Id.* at 1137 (citation omitted). Thus while "deference must be paid to a government's determination that there is sufficient evidence to support a taking," the courts cannot satisfy their duty by applying "superficial scrutiny . . . . To the contrary, [judicial review] remains an essential and critical aspect in the analysis of any proposed taking." *Id.* at 1136–37. The court therefore held that a meaningful rational basis scrutiny should apply. *See id.* at 1138–39.

To this day, state courts across the country meaningfully scrutinize legislative acts that infringe on the right to practice one's trade. In recent years, the supreme courts of Texas and Pennsylvania both explicitly rejected this superficial federal rational basis test in favor of a more demanding standard—all whist asserting the importance of property

rights in their state constitutions. *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 82, 87 (Tex. 2015)*; Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1108 (Pa. 2020).

In *Patel*, the Texas Supreme Court interpreted the Texas Due Course of Law provision to require a more searching review than the "rational relationship" test applied by federal courts, which it criticized as being "for all practical purposes no standard" at all. *Patel*, 469 S.W.3d at 90. Instead, it held that courts must look at a "statute's actual, real-world effect" and determine if it is both related to a legitimate government interest and not "so burdensome as to be oppressive in light of, the governmental interest." *Id.* at 87; *see also id.* at 120 (Willett, J., concurring) (stating that, under such review, "an independent judiciary must judge government actions, not merely rationalize them").

In May 2020, the Pennsylvania Supreme Court enthusiastically embraced the *Patel* majority's analysis in striking down licensing requirements for short-term vacation property managers. *Ladd*, 230 A.3d at 1096. Notably, the Pennsylvania Supreme Court adopted a "heightened rational basis review," that was "similar" to the *Patel* test, explaining that the "Commonwealth's police power must be exercised in a constitutional manner, one that is not unreasonable, unduly oppressive, or potentially beyond the necessities of the case, and bears a

real and substantial relation to the purported policy objectives." *Id.* at 1108, 1112, 1116.[11]

This Court should likewise require that Tennessee courts apply a deferential, but independent and objective, analysis of a challenged statute. When Tennessee courts fail to interpret the Tennessee Constitution independently, they effectively repeal or render moot the state constitutional provisions, allowing federal courts to have final say on the meaning of the Tennessee Constitution, without regard to what makes the state and its governing document unique. This Court should ensure that does not happen to Tennessee's due process and equal protection provisions.

[11] Also, in September 2020, Justice Bolick of the Arizona Supreme Court lauded Justice Willett's concurrence in *Patel* as an example of the "pro-liberty presumption" that was "hardwired" into Arizona's Constitution as it was into Texas'—and which state judges should enforce as "neutral arbiters, not bend-over-backwards advocates for the government." *State v. Arevalo*, 470 P.3d 644, 655 (Ariz. 2020) (Bolick, J., concurring).

CONCLUSION

For these reasons, this Court should refuse to mimic the federal "rational basis" standard, which is flawed, inconsistently applied, and has failed to protect constitutional rights. Instead, Tennessee courts applying the minimum standard of constitutional scrutiny should, while presuming in favor of constitutionality and upholding a law if there is a reasonable difference of opinion as to its propriety, require that an objectively verifiable fit exist between the ends the state seeks to pursue and the means it adopts to pursue them. Rather than surrendering interpretation of article I, section 8 and article XI, section 8 to the United States Supreme Court, this Court should adopt a "real and substantial" basis review as the minimum standard for challenges brought under Tennessee's due process and equal protection clauses. The decision below should be *reversed*.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 7,390 words in the portions of the document that are subject to the word limits of the Tennessee Supreme Court Rule 46, as measured by the undersigned's word-processing software.

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