No. 14-53

In The Supreme Court of the United States

ERNEST F. HEFFNER, *et al.*,

Petitioners,

v.

DONALD J. MURPHY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
JEFFREY T. ROWES*
RENÉE D. FLAHERTY
ROBERT E. JOHNSON
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
jrowes@ij.org

POST & SCHELL, P.C.
JAMES J. KUTZ
JASON G. BENION
17 North Second Street, 12th Floor
Harrisburg, Pennsylvania 17101
(717) 731-1970
jkutz@postschell.com

Counsel for Petitioners

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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Certiorari is needed to correct the Third Circuit's anomalous view of the law, which splits with precedents of this Court and the Courts of Appeals, and which eliminates a vital constitutional protection against irrational government action. More broadly, this case presents an ideal vehicle to rectify deep-seated confusion about the scope of rational-basis review – the constitutional standard that applies to the widest array of laws – and thus has serious implications beyond the dispute between the particular parties.

Respondents fail to refute the Petition's two principal justifications for review. First, the Third Circuit's decision conflicts with this Court's foundational rational-basis opinion in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which established that changed circumstances can render a once-rational law unconstitutional. And that conflict is not limited to *Carolene Products*. Across this Court's precedents in virtually every area of constitutional law – including, most recently, in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) – constitutional analysis looks to the facts of the world today, not the facts of a bygone era.

Second, there is an undeniable split between the Third Circuit and other Courts of Appeals, as well as state high courts, over whether rational-basis review focuses on a law's rationality when passed or instead on the rationality of its application in the present.

Respondents simply ignore numerous cases cited by the Petition to establish the split, presumably because Respondents recognize there is no way to reconcile those decisions.

Unable to convincingly deny the existence of these conflicts, Respondents devote most of their opposition to technical arguments about whether the question presented was adequately briefed or addressed below. These arguments lack merit. The district court and the Third Circuit parted ways precisely because they disagreed about how changed circumstances should factor into a rational-basis analysis. And those courts were forced to confront the question because Petitioners argued below that dramatic changes in the world since 1952 had transformed the challenged regulations from a set of legitimate public protections into a scheme for protecting the purely private financial interests of entrenched funeral-industry incumbents.

The significance of the question presented extends well beyond this dispute. This Petition is fundamentally about the proper scope of judicial review under the rational-basis standard. In particular, to what extent may plaintiffs introduce evidence to carry their burden of negating hypothetical justifications for a law? Though deferential, rational-basis review is a vital safeguard against irrational governmental action because it provides the only constitutional constraint on the overwhelming majority of laws and regulations that restrict individual liberty. That safeguard will cease to properly function –

whether on questions of homosexual rights, economic liberty, Commerce Clause limitations, or property rights – if courts are compelled to uphold irrational restrictions on individual liberty merely because those restrictions, at least hypothetically, *used to be* rational at an earlier time.

I. The Question Presented Was Squarely Addressed Below.

Respondents devote the bulk of their opposition to arguing that neither the courts nor the briefing below adequately addressed the question presented. This attempt to conjure up a vehicle problem cannot withstand even a cursory review of the record.

A. The issue of "changed circumstances" was central to the disagreement between the courts below.

The district court's analysis hinged on the irrationality of applying half-century-old regulations to Petitioners today. The court conducted an exhaustive review of Pennsylvania's regulations and their operation in light of contemporary business practices, and ultimately found Pennsylvania's laws "antediluvian," Pet'rs' App. 102, "antiquated," *id.* at 237, and "clearly outdated," *id.* at 235. For instance, the requirement that every funeral home maintain a preparation room at enormous cost was plainly irrational in light of the fact "that allowing the use of centralized facilities" for preparation of remains "has already become commonplace," resulting in many such facilities going entirely unused. *Id.* at 170. The district court concluded

that "a clearly ossified Board has refused to revisit regulations that appear both obsolete and ultimately unconstitutional." *Id.* at 237 n.29. In other words, the district court found Pennsylvania's regulatory framework so incompatible with modern circumstances as to be irrational.

The Third Circuit then reversed, rejecting the proposition that changed circumstances matter. Having announced at the outset that the fact that a law is "antiquated" is "not . . . a constitutional flaw," Pet'rs' App. 5, the Third Circuit proceeded to conduct an analysis that focused on the rationality of the *initial* legislative choice in 1952 and ignored the irrationality of enforcing those choices today. For example, the Third Circuit asked what "the Pennsylvania legislature could have reasonably concluded," *id.* at 48, or what the "Pennsylvania General Assembly could have rationally believed," *id.* at 55, and explained that it is "for the legislature, not the courts, to balance the advantages and disadvantages" of regulation, *id.* at 60. *See also id.* at 62 ("We fail to see anything irrational in the legislative decision. . . ."). In considering the law's restriction on serving food in a funeral home, the Third Circuit deemed it irrelevant that "the legislature's concern had more force in an earlier time when refrigeration and sanitation were not as developed." *Id.* at 62. Rather, the Third Circuit found "a fundamental difference between legislative enactments that may be archaic and those that are irrational for purposes of our substantive due process inquiry." *Id.* at 63. Thus, the question presented was

not only addressed below, but is the crux upon which both opinions turn.[1]

B. Respondents are equally wrong to suggest that the issue of changed circumstances was not briefed below. As a preliminary matter, the extent to which the question presented was addressed in the briefing is irrelevant because the question was so clearly central to the Third Circuit's decision.[2]

In any event, the issue of changed circumstances was addressed in the briefing. Petitioners' position below was that Pennsylvania's regime was irrational in light of current business practices. *See*, *e.g.*, Br. of Appellees at 3, *Heffner v. Murphy*, No. 12-3591 (3d Cir. Mar. 28, 2013) (arguing that "advances in mortuary science and health regulation have virtually

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[1] Respondents argue that review is futile because the Third Circuit would reach the same result under the rule Petitioners advocate. But there is no reason for this Court to credit Respondents' self-serving speculation. The district court – the only court to consider the case under a correct view of the law – found the regulations patently irrational. And to the extent that there is any question that the Third Circuit would follow suit, this Court should remand for reconsideration under the proper standard. *See*, *e.g.*, *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2421 (2013).

[2] If Respondents mean to suggest the issue has not been preserved, that suggestion lacks merit. There is no question that Petitioners presented their rational-basis claims in the Third Circuit, and "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

eliminated the public health risks associated with preparation and disposition of the deceased"); *see also id.* at 1 (explaining that "[p]owerful trade associations have joined a captured regulatory agency in defending a 195[2] statute that the Pennsylvania legislature itself describes as the same in purpose and scope as laws from the 1930s"); *id.* at 17-19 (describing increasing irrationality of ownership restrictions over time); *id.* at 34 (challenging regulations as irrational in light of emerging business practice of consolidating operations at a central location); *id.* at 38 (same). Respondents, on the other hand, urged the Third Circuit to focus exclusively on the rationality of the initial legislative choice, insisting, for example, that the relevant question was "whether the *legislature's* choices are rational" and that the issue had to be addressed in a factual vacuum. Br. for Appellants at 30, *Heffner v. Murphy*, No. 12-3591 (3d Cir. Mar. 25, 2013); *see also id.* at 40 (issues presented are "for the legislature"); *id.* at 45 ("the legislature could rationally believe"); *id.* at 47 ("the legislature could rationally have believed"). Like the Third Circuit, Respondents framed the legal standard to eliminate the possibility that a rational legislative choice could be rendered irrational in application by changed circumstances.

Respondents, in fact, continue to press the issue in *this* Court. Respondents assert that the terms "'antediluvian,' 'outdated' and 'obsolete' are *not* synonymous with 'irrational' in its constitutional sense." Opp'n 12. Respondents present this conclusion as self-evident *ipse dixit*. But in fact that is the very

question that divided the Third Circuit and the district court, and that now is squarely presented to this Court.

In short, the parties litigated this case as a clash between two legal theories – one, that the rationality of Pennsylvania's regime must be assessed in light of current facts, and, two, that the only relevant issue is the rationality of the initial legislative choice, no matter how long ago. The district court agreed with Petitioners and adopted the first approach, but the Third Circuit adopted the second. That legal divide is properly presented for review.

II. The Decision Below Conflicts With Decisions Of This Court And Other Courts Of Appeals.

Respondents devote comparatively little attention to the division of authority identified by the Petition. Indeed, they effectively ignore *all* of the cases with which the Third Circuit parted ways. Respondents barely mention the Supreme Court authority on which the Petition relied, and likewise ignore all but a few of the cited lower court decisions. Respondents' silence amounts to a tacit concession that this authority cannot be reconciled with the Third Circuit's decision and thus underscores the need for review.

A. Although the Petition demonstrated that the Third Circuit's decision conflicts with decisions of

this Court, Respondents largely ignore this glaring problem.

Respondents relegate to a footnote their discussion of *Carolene Products*, 304 U.S. 144, notwithstanding the Petition's prominent and repeated citation to that decision, and they dismiss *Carolene Products*' announcement of the changed-circumstances doctrine as "dicta." Opp'n 15-16 n.4. This is wrong for two reasons. First, *Carolene Products* is *the* foundational decision upon which the entire edifice of rational-basis review rests, and it cannot be waved off in responding to a Petition that is ultimately about the meaning of the rational-basis test. Second, the discussion of changed circumstances in *Carolene Products* was not dicta because it was integral to the elucidation of the rational-basis standard, which in turn was the basis for rejecting the constitutional claim at issue. *See*, *e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) (explaining that a case's holding includes "those portions of the opinion necessary to the result").

In addition to misunderstanding *Carolene Products*, Respondents flatly ignore numerous decisions from this Court relying on the changed-circumstances doctrine outside the rational-basis context. *See* Pet'n 25-29. In the most recent of these decisions, the Court explained that "[t]here is no valid reason to insulate" legislation from constitutional scrutiny "merely because it was previously enacted [decades] ago," *Shelby County*, 133 S. Ct. at 2630, and criticized reliance on "40-year-old facts having no logical relation to the

present day," *id.* at 2629. Respondents do not even mention this authority, much less explain how it can be squared with the Third Circuit's ruling.

B. The Third Circuit's decision is equally irreconcilable with decisions of other Courts of Appeals. Respondents do briefly attempt to address this circuit split, *see* Opp'n 13-16, but fail even to mention the majority of the decisions cited in the Petition.

Respondents ignore cases from the Fourth, Fifth, Seventh, and Tenth Circuits, as well as numerous state high courts, that have applied the doctrine of changed circumstances to rational-basis cases. *See* Pet'n 20-22 (citing cases). These decisions – which hold that a restriction, rational at the time of its enactment, can be rendered irrational by passage of time – would have come out differently and wrongly under the Third Circuit's rule. For example, the Tenth Circuit would not have reversed dismissal of a challenge to a pit-bull ban on the ground that new scientific knowledge cast the ban's rationality into doubt. *See* Pet'n 20 (citing *Dias v. City & Cnty. of Denver*, 567 F.3d 1169 (10th Cir. 2009)). Similarly, the Minnesota Supreme Court would not have struck down a Prohibition-era dram-shop law if rational-basis doctrine forbade it from acknowledging that Prohibition ended long ago. *See* Pet'n 21-22 (citing *Wegan v. Village of Lexington*, 309 N.W.2d 273 (Minn. 1981)). Respondents thus deliberately overlook significant authority that conflicts with the decision below.

The cases that Respondents *do* cite and discuss all demonstrate pervasive confusion about the changed-circumstances doctrine. *See* Opp'n 13-15.[3] Respondents appear to believe that certiorari is unwarranted because these opinions have cast doubt on the changed-circumstances doctrine in ambivalent terms. Yet that fact only *highlights* the confusion running through the law and hence the need for certiorari.

III. The Decision Below Exposes A Fundamental Contradiction Within Rational-Basis Review, As Well As Uncertainty Over Its Proper Scope.

This case provides an important opportunity to address fundamental contradictions within an area of constitutional doctrine that is essential to the protection of individual liberty. Under a proper view of the law, plaintiffs in rational-basis cases are entitled to

[3] The Ninth Circuit, in *Burlington Northern Railroad Co. v. Department of Public Service Regulation*, 763 F.2d 1106, 1111 (9th Cir. 1985), opined that this Court has been "ambivalent on whether changed circumstances can transform a once-rational statute into an irrational law." And the Second Circuit, in *United States v. Then*, 56 F.3d 464, 466 (2d Cir. 1995), "decline[d]" to adopt a concurrence that itself spoke about changed circumstances in ambivalent terms – both acknowledging that changed circumstances doctrine "might" apply and criticizing the doctrine as "hazardous," *id.* at 468 (Calabresi, J., concurring). *See also Murillo v. Bambrick*, 681 F.2d 898, 912 n.27 (3d Cir. 1982) (stating that this Court had not "definitively" addressed relevance of changed circumstances to rational-basis standard).

introduce evidence to prove that it would be irrational, in the world as it is today, to apply a challenged law. This is the rule articulated by *Carolene Products*, *see* Pet'n 13-14, and applied in virtually every other area of constitutional law, *see id.* at 24-29. Yet this Court also has articulated a rational-basis standard that can be read to suggest that evidence does not matter, and that the only valid consideration is the rationality of the law in the abstract when enacted. *See id.* at 14-16. The role of contemporary record evidence in rational-basis cases is thus a subject of pervasive – and unwarranted – uncertainty.

This confusion matters. The overwhelming majority of laws and regulations in this country are subject only to rational-basis scrutiny, and thus courts applying the rational-basis test often stand as the only meaningful safeguard to shield individuals from irrational exercises of governmental power by the elected branches. And this is true regardless of whether irrationality is the result of majority tyranny or – as public-choice theory makes clear will often be the case – sophisticated and highly-motivated special interests. Under the Third Circuit's approach to this essential constitutional check, the right of free individuals to engage in productive economic and social activity may arbitrarily depend on the rationality of decades-old legislative judgments about facts that no longer exist.

That constricted scope for rational-basis review will affect real people in profound ways. Plaintiffs in rational-basis cases often challenge laws that have

been on the books for a long time. *See*, *e.g.*, Pet'n 32-33 (discussing history of Filled Milk Act of 1923). In practice, courts frequently allow such plaintiffs to present contemporary evidence of irrationality: The monks of Saint Joseph Abbey, for example, recently prevailed in a challenge to Louisiana laws that made it a crime for them to sell caskets by proving that application of the 1960s-era law served no legitimate public purpose and instead simply shielded entrenched funeral-industry incumbents from honest competition. *See id.* at 17 (citing *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir. 2013)). The Third Circuit's approach would have denied the monks the opportunity to have a court evaluate the constitutionality of that regime in the real world as it is today.[4]

Some of this Court's most important lines of cases in recent years have involved rational-basis review. *See*, *e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Romer v. Evans*, 517 U.S. 620, 631-36 (1996); *see also United States v. Lopez*, 514 U.S. 549, 557 (1995) (explaining that the constitutionality of Commerce Clause enactments turns upon whether "a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce"). Yet none of these cases has fundamentally been *about* rational-basis review. This Court's cases applying the rational-basis test generally involve laws of recent

[4] It is telling that the Third Circuit did not even cite *St. Joseph Abbey* despite the obvious relevance of that decision to Petitioners' constitutional challenge to funeral regulations.

provenance (*e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 309 (1993)), an invalid legislative purpose (*e.g.*, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985)), unique liberty interests (*e.g.*, *Lawrence*, 539 U.S. at 573-75), or some combination of the above (*e.g.*, *Romer*, 518 U.S. at 631-36), and thus do not squarely implicate the question of changed circumstances. Yet people routinely confront laws – like the ones at issue here – that were passed decades ago. Many such laws will still make sense in the present day. But some will not. And courts need to know whether to evaluate such laws by looking at conditions now or at conditions in a former age.

The principle at stake in this Petition is fundamental to our Constitution: Restriction of liberty *today* must be justified by some legitimate public purpose *today*. A contrary rule tilts the scales of the law in favor of entrenched interests and against ordinary Americans. Because the decision below embodies a deep and pervasive confusion about that basic principle, it warrants this Court's review.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
JEFFREY T. ROWES*
RENÉE D. FLAHERTY
ROBERT E. JOHNSON
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
jrowes@ij.org

POST & SCHELL, P.C.
JAMES J. KUTZ
JASON G. BENION
17 North Second Street, 12th Floor
Harrisburg, Pennsylvania 17101
(717) 731-1970
jkutz@postschell.com

Counsel for Petitioners

**Counsel of Record*