STATE OF WISCONSIN SUPREME COURT

Case No. 2016AP1599

E. GLENN PORTER, III and HIGHLAND MEMORIAL PARK, INC.,
Plaintiffs-Appellants-Petitioners,

v.

STATE OF WISCONSIN, DAVE ROSS and WISCONSIN FUNERAL DIRECTORS EXAMINING BOARD,
Defendants-Respondents.

NONPARTY BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

Appeal from the Circuit Court of Waukesha County
Honorable Patrick C. Haughney Presiding
Case No. 14-CV-1763

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INTEREST OF NONPARTY

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to securing the constitutional protections necessary for individual liberty. One of IJ's primary missions is protecting the right to economic liberty, and IJ has litigated dozens of cases for this purpose. Most relevant to this brief, IJ successfully litigated *Kivirist v. Department of Agriculture, Trade, and Consumer Protection*, No. 16-CV-06 (Lafayette Cnty. Cir. Ct., May 31, 2017) and *Ibrahim v. City of Milwaukee*, No. 11-CV-15178 (Mil. Cnty. Cir. Ct., Apr. 16, 2013).

INTRODUCTION

Americans have a right to economic liberty. Protected by both the federal and state constitutions,[1] this right protects people's ability to pursue their chosen occupations without contending with arbitrary or protectionist regulation. This Court should reaffirm that Wisconsin safeguards economic liberty with a robust legal standard.

Rights become meaningless if they are not protected. Unfortunately, in the federal courts, where economic-liberty

[1] The federal courts have interpreted this right to be rooted in the Fourteenth Amendment's protections for substantive due process and equal protection, while states courts have interpreted the right to be found in their own state constitutional provisions. In Wisconsin, this right is found in Article 1, section 1.

challenges are evaluated under the federal rational-basis test, this test has sometimes been used as a rubber stamp for government regulation, no matter how senseless. Fortunately, many states have rejected the federal rational-basis test as the standard for economic-liberty claims under their state constitutions, and have instead adopted their own, heightened version of rational-basis review. These more robust standards require an evaluation of the record to determine whether a law has a genuine connection to the public's welfare. Although it is still difficult for a plaintiff to prevail under a heightened rational-basis standard, state courts have used them to repeatedly invalidate laws arbitrarily burdening Americans' ability to support themselves and their family.

Wisconsin is a state that employs a heightened standard in economic-liberty cases.[2] In the last 70 years, Wisconsin courts have used its heightened test in at least eight cases. Five of them occurred in just the last 31 years, including two recently litigated by Amicus. These cases have invalidated laws on occupations as varied as

[2] While in recent years, this Court has applied a robust rational-basis standard in different types of cases, *see, e.g., Ferdon v. Wisconsin Patient Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, this standard has been most consistently, and historically, applied in economic-liberty cases.

supermarket owners, train operators, taxi cab drivers, chiropractors, and even home bakers. In each, the courts followed a three-part framework in analyzing, and ultimately rejecting, the challenged laws.

Amicus requests this Court reaffirm this robust test and its three-part framework. This test has allowed the judiciary to fulfill its intended role as a check on the legislature, freeing countless Wisconsinites and creating thousands of new jobs and businesses. Its continued use is necessary to both the citizenry and the State Constitution.

ARGUMENT

The federal rational-basis test has often been used in a way that does not meaningfully protect the right to economic liberty. Recognizing this, many state courts have interpreted their own constitutions to provide a higher standard of protection. Wisconsin is one of those states, repeatedly articulating a test with meaningful limits against arbitrary and protectionist laws.

A. This Court Should Reject the Federal Rational-Basis Test for Economic-Liberty Challenges.

On its face, the federal rational-basis test requires that an economic regulation be found constitutional if it (1) has a "rational

relation" to a legitimate governmental interest, and that (2) the relationship can be a reason the legislature *might* have had in passing the law. *E.g.*, *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 490-91 (1955). In practice, this standard has typically meant that challenging a restriction on one's right to earn a living is a very difficult task.

Among other hurdles plaintiffs often face under this standard, they must negate any "conceivable" justification for a challenged law. *E.g.*, *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). This means they must prove that not only does a law not further its *actual* objectives, but has also been interpreted at times to require plaintiffs to negate any post-hoc rationales, as well. For example, if discovery shows that the law does not meet any of the government's stated objectives, the government can simply conjure additional rationales after discovery closes. In addition, courts will ignore record evidence establishing a law's irrationality if it is merely imaginable that the law, in some hypothetical circumstance, could lead to some public benefit, however unlikely. *Id.* at 363 n.5.[3]

[3] Overcoming this standard is not an *impossible* task, however, and courts sometimes apply the test in a more liberal fashion. *See, e.g.*, *St. Joseph Abbey v.*

As Federal Fifth Circuit Judge Don Willet stated while on the Texas Supreme Court, "[l]egal fictions abound in the law, but the federal 'rational basis test' is something special; it is a misnomer, wrapped in an anomaly, inside a contradiction. Its measure often seems less objective reason than subjective rationalization." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 98 (Tex. 2015) (concurring).

Fortunately, state courts have frequently rejected this standard, and have instead evaluated laws infringing on economic liberty under a heightened rational-basis standard.

B. Many States Apply a More Robust Standard To Protect Economic Liberty.

As Justice William Brennan famously observed, state constitutions can protect individual rights at a higher level than the federal constitution and how the U.S. Supreme Court interprets that Constitution. William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90. Harv. L. Rev. 489 (1977). This has been especially evident when it comes to the right to economic liberty.

Castille, 712 F.3d 215, 223 (5th Cir. 2013) (striking down funeral director license as applied to selling caskets); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (same).

Forty-seven state supreme courts have found economic regulations to violate their own state constitutions under substantive due process challenges since 1940.[4] Sometimes, the courts' adoption of a heightened standard is merely implicit in the court's analysis. But in a number of these cases, the courts explained that the standard applied to economic-liberty challenges under their own constitutions is more vigorous than that under federal law. *See, e.g.*, *Nixon v. Dept. of Pub. Welfare*, 839 A.2d 277, 286 n.15 (Pa. 2003) ("Although the due process guarantees provided by the Pennsylvania Constitution are substantially coextensive with those provided by the Fourteenth Amendment, a more restrictive rational-basis test is applied under our Constitution . . ."). [5] Similarly, at least nineteen states (including Wisconsin) have sometimes called this test

[4] Anthony B. Sanders, *The New Judicial Federalism Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 A. U. L. Rev. 457 (2005) (appendix listing cases).

[5] *See also State v. Lupo*, 984 So. 2d 395 (Ala. 2007) (striking down licensing requirement for interior designers); *Chicago Title Ins. Co. v. Butler*, 770 So.2d 1210, 1220 (Fla. 2000) (anti-rebate statute); *Muskin v. State Dep't of Assessments & Taxation*, 30 A.3d 962, 969 (Md. 2011) (retroactive impairment of leases); *King v. Town of Chapel Hill*, 758 S.E.2d 364, 371 (N.C. 2014) (fee caps on towing companies); *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) (licensing requirement on eyebrow threaders); *Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue*, 799 S.E.2d 665, 667 (S.C. 2017) (plurality) (cap on liquor stores ownership).

a "real and substantial" standard, to distinguish it from the federal standard.[6]

Whether these heightened standards are termed "real and substantial" tests, "rational basis with bite" scrutiny, or some other moniker, these standards all share a similar analysis: They refuse to rubber stamp regulation, and instead analyze the evidence to see if there is genuine connection between the law and a legitimate government purpose. While a challenger undoubtedly still has a heavy burden under this heightened standard, it allows judges to invalidate laws that are demonstrably unreasonable.

Although Wisconsin has a long history of applying this heightened standard in economic-liberty challenges, the lower

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[6] *See Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 946-48 & n.7 (Pa. 2004); *Omya, Inc. v. Town of Middlebury*, 758 A.2d 777, 780 (Vt. 2000); *Peppies Courtesy Cab Co. v. Kenosha*, 165 Wis. 2d 397, 401, 475 N.W.2d 156 (Wis. 1991); *Katz v. S.D. State Bd. of Med. & Osteopathic Exam'rs*, 432 N.W.2d 274, 278-79 & n.6 (S.D. 1988); *Louis Finocchiaro, Inc. v. Neb. Liquor Control Comm'n*, 351 N.W.2d 701, 704-06 (Neb. 1984); *Myrick v. Bd. of Pierce Cnty. Comm'rs*, 677 P.2d 140, 143 (Wash. 1984) ; *Red River Constr. Co. v. City of Norman*, 624 P.2d 1064, 1067 (Okla. 1981); *Rockdale Cnty. v. Mitchell's Used Auto Parts, Inc.*, 254 S.E.2d 846, 847 (Ga. 1979); *In re Florida Bar*, 349 So. 2d 630, 634-35 (Fla. 1977) (per curiam); *McAvoy v. H. B. Sherman Co.*, 258 N.W.2d 414, 422, 427-29 (Mich. 1977); *Dep't for Natural Res. & Envtl. Prot. v. No. 8 Ltd. of Va.*, 528 S.W.2d 684, 686-87 (Ky. 1975); *Hand v. H & R Block, Inc.*, 528 S.W.2d 916, 923 (Ark. 1975); *Leetham v. McGinn*, 524 P.2d 323, 325 (Utah 1974); *Md. State Bd. of Barber Exam'rs v. Kuhn*, 312 A.2d 216, 224-25 (Md. 1973); *People ex rel. Orcutt v. Instantwhip Denver, Inc.*, 490 P.2d 940, 943-45 (Colo. 1971); *Brennan v. Ill. Racing Bd.*, 247 N.E.2d 881, 882-84 (Ill. 1969); *Coffee-Rich, Inc. v. Comm'r of Pub. Health*, 204 N.E.2d 281, 286-89 (Mass. 1965); *Zale-Las Vegas, Inc. v. Bulova Watch Co., Inc.*, 396 P.2d 683, 691-93 (Nev. 1964); *Berry v. Koehler*, 369 P.2d 1010, 1014-15 (Idaho 1961); *Christian v. La Forge*, 242 P.2d 797, 804 (Or. 1952).

courts still need clarity on this standard. *See, e.g.*, *State v. Radke*, 2002 WI App 146, ¶¶13-15, 256 Wis. 2d 448 (expressing uncertainty as to whether federal test or a "more demanding standard" applies). This confusion may be because of the predominance of federal caselaw in both our law schools and legal culture.[7] Whatever the reason, this Court should take this opportunity to reaffirm that in economic-liberty cases, Wisconsin's own robust rational-basis test applies.

C. Wisconsin's Heightened Rational-Basis Test is the Proper One for Economic-Liberty Cases.

Wisconsin's heightened rational-basis test has been repeatedly used not just in early economic-liberty cases, as briefed extensively by the Appellants, but in eight such cases since 1947.[8] Five of these

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[7] Although this Court has sometimes said the federal and state rational-basis tests are the same, in practice, there is no question that the test applied by this Court is more searching than the review applied in *Lee Optical* and its progeny.

[8] *Peppies*, 165 Wis. 2d at 401-05 (reversing circuit court and holding unconstitutional a city ordinance requiring taxi drivers to adhere to a dress code and certain grooming requirements); *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee,* 105 Wis. 2d 203, 313 N.W.2d 805 (1982)*; Chicago & N.W. Ry. Co. v. La Follette*, 169 N.W.2d 441, 451 (Wis. 1969) (holding unconstitutional a state requirement of a three-man crew for single train engines operating outside railroad yards); *Clark Oil & Refining Corp. v. City of Tomah*, 141 N.W.2d 299, 304-05 (Wis. 1966) (holding unconstitutional ordinance that prohibited trucks carrying more than 1,500 gallons of gasoline from delivering gas to gas stations in the town or otherwise parking in the town, as the ban did not further the town's safety concerns); *State ex rel. Week v. Wisconsin State Bd. of Examiners,* 252 Wis. 32, 36, 30 N.W.2d 187 (1947) (invalidating continuing educational licensing requirement on chiropractors after concluding "the state was acting for the benefit of [one chiropractor] association primarily, which is not within the legitimate exercise of police power"); *Wisconsin Wine & Spirit Institute v. Ley*, 141

cases were decided in the last 31 years, including two recently litigated by amicus, *Kivirist v. Department of Agriculture, Trade, and Consumer Protection*, No. 16-CV-06, (Lafayette Cnty. Cir. Ct., May 31, 2017) and *Ibrahim v. City of Milwaukee*, No. 11-CV-15178 (Mil. Cnty. Cir. Ct. Apr. 16, 2013) (both included in this brief's appendix ("App.")). Each of these cases invalidated challenged regulations, resulting in demonstrably positive results.

Although these cases involved occupations as varied as chiropractors to cabbies, a careful review shows they generally employ the same three-part framework to evaluate the challenged law:

- First, the court refuses to take the government's purported rationales for the law at face value.
- Second, if there are allegations that the law actually had an illegitimate purpose, such as protecting "special interest groups as an anticompetitive measure," the court considers if evidence supports this illegitimate purpose. *E.g.*, *Grand Bazaar Liquors,* 105 Wis. 2d at 210-211.[9] If so, the court evaluates the government's

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Wis. 2d 958, 971 (Ct. App. 1987) (holding grandfather clause of liquor license restriction was unconstitutional); *Kivirist v. Department of Agriculture, Trade, and Consumer Protection*, No. 16-CV-06, (Lafayette Cnty. Cir. Ct. May 31, 2017) and *Ibrahim v. City of Milwaukee*, No. 11-CV-15178 (Mil. Cnty. Cir. Ct. Apr. 16, 2013).

[9] Courts found such economic protectionism to be at play in *Grand Bazaar Liquors, Week, Wisconsin Wine & Spirit Institute, Kivirist,* and *Ibrahim.* The laws challenged in the other three cases were invalidated because they were just plainly irrational.

alternative rationales for the law with "skepticism." *E.g.*, *id.* at 211; *Kivirist*, App. at 38-40.

- Finally, the court determines whether the law has a genuine connection to a *legitimate* justification. In doing so, it examines the record, including any expert testimony.

Kivirist illustrates this three-part framework in action. Plaintiffs there challenged the state's ban on selling home-baked goods after facing thousands of dollars in fines and even jail time for selling cookies, muffins and bread from their homes. *See Kivirist*, App. at 30-31. At the time of the suit, Wisconsin was one of only two states that banned the sale of home-baked goods. *Id*. at 43. Although bills to lift the ban had passed the Senate unanimously on two different occasions, and enjoyed broad bipartisan support, the house speaker had prevented the bills from ever getting a vote in the Assembly. The evidence showed the speaker was protecting commercial bakeries and groceries, who had repeatedly lobbied to keep the ban in place to shut out competition.[10]

The government claimed the law was actually justified by food safety concerns. But because the record was "replete" with

[10] *See, e.,g.*, CBS SUNDAY MORNING, *In Wisconsin Selling Cookies Can Land You in Jail* (April 9, 2017), https://www.cbsnews.com/news/in-wisconsin-selling-cookies-can-land-you-in-jail/.

evidence of anti-competitive forces, the court viewed these safety concerns with "skepticism." *Id*. at 38-40. In fact, after careful examination of the record, including expert testimony from both parties, the court found that home-baked goods were incredibly safe and that there was no evidence of anyone ever becoming sick from home-baked goods, even though they were already legally sold in 48 states. *Id*. at 43-45. The court also found that home-baked goods were safer than many of the other homemade foods that the state already allowed for sale, such as popcorn, jams, raw apple cider, and syrups. *Id*. at 55. The court thus held that the ban was irrational and violated home bakers' rights under both substantive due process and equal protection.

This three-part framework was also used to invalidate an economic restriction in *Ibrahim*. App at 2. There, cab drivers challenged Milwaukee's cap on taxi cab permits after the cap had resulted in an increase of the price of a permit from $85 to $150,000—putting the dream of owning a taxi business out of most people's reach. *See id*. at 7. Once again, the court refused to demur to the government's purported objective for the law. Instead, it considered evidence showing that the true purpose of the law was

actually to enrich existing permit holders, who had lobbied the city for the law to "cut[] off competing businesses from entering the field." *Id.* at 11-17.

In light of this evidence, the court evaluated the city's stated objective—increasing professionalism among the taxi industry—with a critical eye. *Id*. at 15-16. Like in *Kivirist*, the court concluded this objective was supported by neither logic nor the extensive record. *Id*. The court thus found that the law violated both substantive due process and equal protection.

The outcomes in *Kivirist*, *Ibrahim*, and the other cases applying the heightened standard are largely commonsense. Yet the Appellees still warn that this standard could lead to judicial activism. However, there is no evidence of judicial activism—or any other ill effect—in over a century of this standard's use. To the contrary, it has led to demonstrably positive results. After the *Kivirist* ruling, for example, home bakers started hundreds of new baking businesses to support themselves and their families. Research suggests that those most benefiting from these new

businesses are retirees and lower-income women in rural areas.[11] Consumers are also pleased, as they now have greater choice to buy fresh and local goods.

The *Ibrahim* decision similarly benefited lower income Wisconsinites. Before the lawsuit, Milwaukee had only about 321 taxi permits, almost half of which were owned by a single owner. *See id.* at 6. Now, with the cap lifted, there are many more permits, allowing cab drivers, many of them immigrants, to finally have their own business.

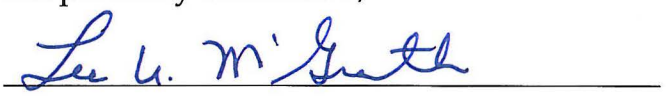
Indeed, far from leading to judicial activism, the heightened rational-basis test merely lets judges do their jobs and judge. The judiciary's primary role is to keep the other two branches in check, protecting the citizenry from senseless and ill-gotten regulation. Judges cannot fulfil this role if they ignore evidence and take the government's word for a law's constitutionality.

[11] Jennifer McDonald, *Flour Power: How Cottage Food Entrepreneurs are Using Their Home Kitchens to Become Their Own Bosses* 19-20, 27 (2017), http://ij.org/report/cottage-foods-survey/.

CONCLUSION

Therefore, this Court should reaffirm that the Wisconsin Constitution, like that of other states, provides robust and independent protections for Wisconsinites who seek to exercise their basic right to earn an honest living.

Respectfully submitted,



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CERTIFICATION OF BRIEF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with a proportional font. The length of this brief is 2,995 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 809.19 (12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Nonparty Brief of Institute for Justice and it's Appendix in Support of Plaintiffs-Appellants-Petitioners were served via U.S. Priority Mail, postage prepaid, on the 20th day of March, 2018 to counsel of record at their respective addresses as follows:

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