No. 22-50908

In the United States Court of Appeals for the Fifth Circuit

RAFAEL MARFIL, VERGE PRODUCTIONS, LLC, ENRICO MARFIL, NAOMI MARFIL, KOREY A. RHOLACK, DANIEL OLVEDA, AND DOUGLAS WAYNE MATHES,

Plaintiffs-Appellants,

v.

CITY OF NEW BRAUNFELS, TEXAS,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Texas, Waco Division
No. 6:20-cv-002484-ADA-JCM
Alan D. Albright, Judge Presiding

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS–APPELLANTS

Arif Panju
INSTITUTE FOR JUSTICE
816 Congress Avenue, Ste 960
Austin, Texas 78701
(512) 480-5936
apanju@ij.org

Elizabeth Sanz
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, Virginia 22203
(703) 682-9320
bsanz@ij.org

Counsel for Amicus Curiae

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, as required by Fifth Circuit Rule 29.2, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae
Institute for Justice

Counsel for *Amicus Curiae*
Elizabeth Sanz (Institute for Justice)
Arif Panju (Institute for Justice)

Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amicus curiae* Institute for Justice is not a publicly held corporation, does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

Dated: December 20, 2022

/s/ Elizabeth Sanz
Elizabeth Sanz
Counsel for Amicus Curiae
Institute for Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Texas Constitution

Rules

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit public interest law firm that litigates for greater judicial protection of individual rights, including rights that are not currently deemed "fundamental" and are therefore subject to rational basis review. It routinely represents homeowners and entrepreneurs *pro bono* in property rights and economic liberty cases. The Institute also litigated *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), this Circuit's definitive framework for reviewing the constitutionality of economic restrictions under rational basis review.

ARGUMENT

The purpose of this brief is to provide this Court with guidance on how the Fifth Circuit and Supreme Court apply rational basis review, including at the motion to dismiss stage. It is often difficult to reconcile the deference of rational basis review with the serious analysis that all constitutional claims deserve. Some courts allow such deference to be a complicating factor at the motion to dismiss stage, but they shouldn't.

[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amicus curiae*—contributed money that was intended to fund preparing or submitting this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amicus* states that counsel for all parties have consented to the filing of this brief.

This brief proceeds in three sections. First, *amicus* demonstrates that the rational basis test, as applied by the Supreme Court and the Fifth Circuit, is a meaningful standard of review that requires courts to employ reasonable but not unfettered deference, and to look at record evidence and the statutory context of the challenged restriction. Second, *amicus* explains why this Court should not allow the rational basis test to swallow whole the standard Rule 8 and 12(b)(6)[2] procedures used to analyze a motion to dismiss. Finally, *amicus* analyzes the homeowners' equal protection and state due-course of law claims to illustrate how a motion to dismiss should be analyzed as to those federal and state claims.

I. Under Supreme Court and Fifth Circuit precedent, rational basis review is a meaningful standard—not a rubber stamp.

Rational basis review is a deferential standard, but plaintiffs can and do win under it. This is true both at the Supreme Court and in this Court. And that makes sense. If plaintiffs never won under a certain standard of review, that standard would be no standard at all—it would only be an empty, expensive process at the end of which challenges to laws, regulations, and the use of government power would always be judicially affirmed. Since that is not what actually happens in rational

[2] *See* Fed. R. Civ. P. 8(a) ("Rule 8") and Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)").

basis cases—since plaintiffs can and do win, and courts can and do invalidate government action—rational basis review must have some teeth.[3] These teeth are revealed by examining how the test is *applied* in the Supreme Court and Fifth Circuit, not just how it is *described*.

The Supreme Court engages with evidence, facts, and statutory context when applying the rational basis test. So does the Fifth Circuit, as exemplified by *St. Joseph Abbey v. Castille*—this Court's definitive framework for conducting rational basis review in constitutional challenges to restrictions on people and property, economic and otherwise. 712 F.3d 215 (5th Cir. 2013). That's because rational basis review, though deferential, demands that a law actually be rational, and requires courts to scrutinize justifications asserted by the government by applying an actual test. *See id.* at 223 ("[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality."); *see also Hines v. Quillivan*, 982 F.3d

[3] *See Harris County v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 323–24 (5th Cir. 1999) ("[T]he rational basis test 'is not a toothless one.'" (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976))).

266, 278 (5th Cir. 2020) (Elrod, J., dissenting in part) (rational basis review "is a level of scrutiny, not a rubber-stamping exercise").

Part A below demonstrates that at the Supreme Court plaintiffs can and do win under rational basis review, and they generally do so by showing a lack of legitimate interest, logical means-ends connection, and/or proportionality. Part B shows that the Fifth Circuit treats the rational basis test as the Supreme Court does: by engaging with evidence.

A. At the Supreme Court, plaintiffs can and do win under rational basis review.

Since 1970, plaintiffs have repeatedly won rational basis cases at the Supreme Court.[4] Those cases show that the Court invalidates government action under rational basis review in three circumstances: (1) when the law lacks a legitimate governmental interest; (2) when there

[4] *See United States v. Morrison*, 529 U.S. 598, 614–15 (2000); *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Quinn v. Millsap*, 491 U.S. 95, 108 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 345 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449–50 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24–25 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 61–63 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *James v. Strange*, 407 U.S. 128, 141–42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77–78 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 196–97 (1971); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Turner v. Fouche*, 396 U.S. 346, 363–64 (1970).

is no logical connection between the law and the governmental interest proffered for it; and/or (3) when the law lacks proportionality (it imposes a public harm that vastly outweighs any plausible public benefit). These cases further show that, under rational basis review, the Court does not settle for conjecture or bare assertions from any party; rather, the Court evaluates a challenged law in the context of the record and wider statutory background. As the Court recognized in *Heller v. Doe*: "[E]ven the standard of rationality as we have so often defined it must find some footing in the realities of the subject addressed by the legislation." 509 U.S. 312, 321 (1993).

Legitimacy of Interest. First, a statute fails the rational basis test when the government only asserts illegitimate interests.[5] For instance, sheer animus against a disfavored group is not a legitimate government interest.[6] Neither is naked economic protectionism where there is no

[5] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 706 (5th ed. 2015) ("Although the Court has phrased the test in different ways, the basic requirement is that a law meets rational basis review if it is rationally related to a legitimate government purpose.").

[6] *See City of Cleburne*, 473 U.S. at 448 (finding that prejudice against the mentally handicapped motivated the adverse government decision to deny a group home permit); *Romer*, 517 U.S. at 635 (finding no legitimate interest in anti-gay animus); *Hooper*, 472 U.S. at 623 (finding no legitimate interest in creating different classes of bona fide residents); *Zobel*, 457 U.S. at 65 (finding no legitimate interest in creating permanent classes of bona fide residents); *Moreno*, 413 U.S. at 534 (holding that a

other rational connection to any valid public justification.[7]

Logical Connection. Second, the means-ends fit must be rational. To survive under rational basis review, a law must be "*rationally related* to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (emphasis added). The Court's decisions show that a law, including one that classifies people, is not rational if it is not logically connected to the governmental interest offered to support it. Such a law is arbitrary and will be struck down under rational basis review. For example, in *Zobel v. Williams*, 457 U.S. 55 (1982), a state program distributed oil money to Alaskans based on the length of their state residency, with those who lived in the state long before the

"bare congressional desire to harm a politically unpopular group" is not a legitimate government interest).

[7] When the government favors one group over another, it must justify the unequal treatment with something more than a naked desire to benefit the favored group. *See Metro. Life Ins. Co. v. Ward*. 470 U.S. 869, 878 (1985) (invalidating an Alabama law that protected domestic insurance companies from out-of-state competition when the law was naked economic favoritism with no rational connection to any valid public justification). To be sure, the Supreme Court has sometimes upheld laws that clearly benefited some businesses at the expense of others. However, the Court does not uphold these laws because protectionism is a legitimate governmental interest in and of itself. Rather, the Court upholds such a law only if it is rationally related to a separate, *legitimate* governmental interest. In *Fitzgerald v. Racing Ass'n of Central Iowa*, for example, the owners of racetracks challenged a law that legalized slot machines at racetracks but subjected them to higher taxes than slot machines on river boats. 539 U.S. 103 (2003). The Court found that the differential treatment of riverboats was justified not solely by a desire to financially benefit riverboats, but by the state's desire "to encourage the economic development of river communities." *Id*. at 109.

enactment of the law receiving considerably more than those who moved to Alaska later. *Id.* at 57. Alaska justified the law, in part, by asserting that the statute would encourage settlement in the sparsely populated state. *Id.* at 61. The Court rejected this justification because, if the goal was to encourage people to move to Alaska, it made no sense to pay long-term residents more than recently arrived residents. *Id.* at 62–63. The Court struck down the program because Alaska's asserted rationales provided no logical support for the law.[8] *Id.* at 65.

Proportionality. Finally, a statutory classification fails rational basis review when the challenged law causes a public harm that far outweighs any plausible public benefit. For example, in *Plyler v. Doe*, the

[8] *See also City of Cleburne*, 473 U.S. at 449–50 (finding no logical connection between the City's asserted interest in ensuring group homes were not too big and the City's routine granting of permits for group homes of similar too-big size); *Williams*, 472 U.S. at 24–25 (finding no logical connection between Vermont's asserted interest in encouraging state residents to purchase cars in state and Vermont's taxing of cars that were purchased out of state *before* their owners moved to Vermont); *Quinn*, 491 U.S. at 108 (finding no logical connection between an individual's ability to understand politics and an individual's ownership or non-ownership of land); *Chappelle*, 431 U.S. 159 (same); *Moreno*, 413 U.S. at 534 (finding no logical connection between stimulating the agricultural economy and providing food stamps only to households containing people who are related to one another); *Mayer*, 404 U.S. at 196 (finding, where the government had adopted a policy that inability to pay was not a sufficient reason to deny a transcript to a felony defendant, there was no logical reason that policy should not extend to a misdemeanor defendant*); Turner*, 396 U.S. at 363–64 (finding no logical connection between fitness for political office and property ownership).

government argued that denying public education to the children of illegal immigrants could help save the government money. 457 U.S. 202 (1982). The Court rejected this argument, noting that the alleged benefit was "wholly insubstantial in light of the costs involved to these children, the State, and the Nation" from creating a subclass of illiterates. *Id.* at 230.[9]

The rational basis test is a meaningful standard of review. This is true even though dicta from the Court, if taken literally, would mean that it is no test at all. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993) ("[A]bsent some reason to infer antipathy . . . judicial intervention is generally unwarranted[.]"); *City of New Orleans*, 427 U.S. at 303 ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . ."); *see also*

[9] *See also Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. at 343–46 (holding that the asserted public benefit of administrative convenience for the government was trivial compared to the manifest injustice of assigning tax liability arbitrarily); *James*, 407 U.S. at 141–42 (holding that the state funds saved by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate to the harms it inflicted on debtors); *Lindsey*, 405 U.S. at 77–78 (holding that the cost savings from deterring a few frivolous appeals were insufficient to justify a surety requirement that allowed many frivolous appeals, blocked many meritorious appeals, and showered a windfall on landlords); *Reed*, 404 U.S. at 76–77 (holding that attempting to reduce the workload of the probate courts by excluding women from service as administrators in certain cases would be unconstitutionally arbitrary).

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955). However, what matters is how the rational basis test is *applied*, not merely how it is *described*. Government defendants often invoke these familiar boilerplate phrases from Supreme Court dicta to argue that the rational basis inquiry ends once they articulate a legitimate governmental interest. But relying on rhetoric purporting to describe rational basis review (e.g., that plaintiffs negate "every conceivable basis") cannot ignore what the Supreme Court actually does when applying that standard.

B. The Fifth Circuit applies the rational basis test as the Supreme Court does—by engaging with evidence.

The rational basis test is a meaningful standard of review in the Fifth Circuit. As explained above, when the Supreme Court engages in rational basis review, it does not stop at the government's asserted interest. Rather, the Court applies an actual test. It evaluates the legitimacy of the asserted governmental interest; it determines whether the means and ends are logically related to that interest in light of the record and wider statutory background; and it does not ignore the proportionality between a substantiated public harm caused by a

challenged law and the claimed public benefit it supposedly delivers. The Fifth Circuit does the same.

In this Court, like at the Supreme Court, plaintiffs can and do win rational basis cases.[10] The Fifth Circuit's decision in *St. Joseph Abbey v. Castille* provides the definitive framework for applying rational basis review, including for the case at bar. 712 F.3d 215 (5th Cir. 2013). In *St. Joseph Abbey*, this Court struck down a Louisiana law prohibiting casket sales except by licensed funeral directors because the law was not rationally related to any legitimate governmental interest. *Id.* at 227. In its analysis, this Court's unanimous panel applied the requisite deference and gave due attention to the validity of the government interests while engaging with the evidentiary record, the wider statutory context, and the logic of the government's asserted rationales. The Court also

[10] *See, e.g.*, *Stratta v. Roe*, 961 F.3d 340 (5th Cir. 2020); *Da Vinci Inv., Ltd. P'ship v. Parker*, 622 F. App'x 367 (5th Cir. 2015); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 746 (5th Cir. 2008); *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 251 (5th Cir. 2000); *Wheeler v. Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. Unit B Dec. 1981); *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1039–40 (5th Cir. 1980), *rev'd on other grounds*, 455 U.S. 283 (1982); *Doe v. Plyler*, 628 F.2d 448, 459 (5th Cir. 1980); *Harper v. Lindsay*, 616 F.2d 849, 855 (5th Cir. 1980); *Thompson v. Gallagher*, 489 F.2d 443, 449 (5th Cir. 1973).

addressed the dicta often invoked by the government to cast the rational basis test as a rubber stamp.

First, this Court rejected Louisiana's argument that economic protectionism alone—a naked desire to enrich funeral directors at the expense of other entrepreneurs and the public—is a legitimate government interest.[11] *Id.* at 222.

Next, this Court recognized that Louisiana had asserted other public health and safety rationales for the challenged law that *were* legitimate, and that plaintiffs had a right to introduce evidence to negate those asserted rationales. "[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality." *Id.* at 223. Then, this Court explained that its analysis would be "informed by the setting and history of the challenged

[11] This Court, along with the Sixth and Ninth Circuits, have held that private economic protectionism is not a legitimate interest. *See St. Joseph Abbey*, 712 F.3d at 222; *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *see also Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011) (upholding Houston's method of distributing new taxicab permits as rationally related to a legitimate government interest but making clear that pure economic protectionism alone is insufficient to sustain the law). Nevertheless, two circuits have gone rogue and held that economic protectionism in and of itself is a legitimate governmental interest. *See Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004).

rule." *Id.* This latter point is crucial because it illustrates that courts should not look at a governmental interest only in the abstract or in hypothetical terms. Rational basis review must be rational.

Finally, this Court considered Louisiana's legitimate interests in consumer protection and public health and safety, and found that the record evidence negated any logical connection between the challenged licensing law and those interests. The Court first analyzed the licensing board's assertion that the law "restrict[ed] predatory sales practices by third-party sellers and protect[ed] consumers from purchasing a casket that is not suitable for the given burial space" and found that, although the argument was, on its face, a "perfectly rational statement of hypothesized footings for the challenged law," the hypothesis was nevertheless "betrayed by the undisputed facts." *Id.* at 223. The Court went on to consider how the challenged law fit within the full "matrix of Louisiana law," *id.* at 225–26, and concluded that the "grant of an exclusive right of sale adds nothing to protect consumers and puts them at a greater risk of abuse including exploitative prices." *Id.* at 226. The government further asserted that permitting only trained funeral directors to sell caskets would protect consumers, but the plaintiffs used

evidence to show that funeral director training in Louisiana required no instruction on casket sales or how to counsel grieving customers. *Id.* at 224. The record evidence negated the consumer protection rationale. *Id.*

This Court found that "no rational relationship exists between public health and safety and restricting intrastate casket sales to funeral directors," noting that, for example, Louisiana "does not even require a casket for burial." *Id.* at 226. This Court invalidated Louisiana's licensing statute because the facts and context demonstrated the absence of a logical connection between the challenged law and the two legitimate interests advanced by the government.

Notably, in *St. Joseph Abbey* the Fifth Circuit addressed the government's reliance on the Supreme Court's decision in *Williamson v. Lee Optical*, which portrayed rational basis review as no different than a rubber stamp in the government's favor. The Court explained that it did not matter how the Supreme Court *described* the rational basis test in *Lee Optical*; rather, what matters is how the Supreme Court applied the test. *See id.* at 223 ("*Williamson* [*v. Lee Optical*] insists upon a rational basis"). On the heels of the decision in *St. Joseph Abbey*, the district court in *Brantley v. Kuntz* addresses this point directly:

> In considering the agency's argument, the Fifth Circuit discussed *Lee Optical* at length, noting *Lee Optical* "is generally seen as a zenith of [ ] judicial deference to state economic regulation" and embodied a "willingness to accept post hoc hypotheses" to shield such regulation against constitutional challenge. *Id.* But, the Fifth Circuit explained, despite its healthy measure of deference to the legislature, *Lee Optical* "placed emphasis on the 'evil at hand for correction' to which the law was aimed" and "insist[ed] upon a rational basis, which it found." *Id.* at 221, 223. Thus, for the *St. Joseph Abbey* panel, "[t]he pivotal inquiry" remained whether a rational basis "that can now be articulated and is not plainly refuted by the Abbey" supported the Louisiana scheme. *Id.* at 223. The Fifth Circuit therefore evaluated the agency's proffered rational bases "informed by [the scheme's] setting and history," "[m]indful that a hypothetical rationale, even post hoc, cannot be fantasy," and urging the correct "analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts." *Id.*

98 F. Supp. 3d 884, 891 (W.D. Tex. 2015) (quoting *St. Joseph Abbey*, 712 F.3d 215).[12] The *Brantley* court recognized that rational basis review is not a rubber stamp, neither under *St. Joseph Abbey* or *Lee Optical*. If the test is actually a test, evidence plays a role.

St. Joseph Abbey shows that rational basis review in the Fifth Circuit is deferential but real: "When a plaintiff provides a court with

[12] In *Brantley*, the court declared Texas's mandatory minimum barber facility requirements unconstitutional as applied to African hair-braiding schools, and did so with the benefit of a full record at summary judgment. *See* 98 F. Supp. 3d at 894.

undisputed context that betrays the otherwise rational basis the state has offered, the state can no longer expect the court's deference." *Hines v. Quillivan*, 982 F.3d 266, 278 (5th Cir. 2020) (Elrod, J., dissenting in part). "[A] hypothetical rationale, even post hoc, cannot be fantasy, and . . . the [government's] chosen means must rationally relate to the state interests it articulates[.]" *St. Joseph Abbey*, 712 F.3d at 223.

II. Under the Federal Rules, in the Supreme Court and in the Fifth Circuit, when factual allegations are plausible, plaintiffs may adduce evidence of irrationality.

In Part A below, amici demonstrate that at the motion to dismiss stage, the Federal Rules of Civil Procedure govern, and judicial standards of review for the merits of a claim are correctly applied at the merits stage. If plaintiffs plead sufficient facts to make their claims facially plausible, they survive a motion to dismiss and move into discovery. In Part B, *amicus* shows that when plaintiffs win in rational basis review cases, it is often on a robust factual record, which means that government assertions are not always supported by fact. Courts should not snuff out constitutional challenges at the motion to dismiss stage unless plaintiffs fail to state a claim under the Rules—even if it "appears" to the court that the plaintiff's ultimate success "is very remote and unlikely." *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 555–56 (2007) (internal citations omitted).

A. At the dismissal stage, Rule 8 and 12(b)(6)—not rational basis review—govern procedures and analyses.

Federal Rule of Civil Procedure 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." So a complaint needs "only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. That done, courts must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555–56.

For instance, the Equal Protection clause demands that the government not treat similarly situated people differently unless the government has a rational basis for doing so. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (reversing dismissal of an Equal Protection claim based on the four corners of the complaint). Therefore, to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient facts, taken by the court as true, to make it facially plausible that he is similarly situated to other people, that he was treated differently, and that the government has no rational basis for so treating him. Nowhere in the Rules or in Supreme Court precedent are courts

tasked at the 12(b)(6) stage with determining whether a plaintiff's allegations and arguments will *prevail* under rational basis review.

In other words, courts do not look beyond the facts pleaded in the complaint, nor is it proper to implicitly credit the government's bare assertions as if they are fact, and rely on those bare assertions to conclude that the government will prevail under rational basis review's presumption of rationality. Why? Because if the government's bare assertions and conceiving of justifications is implicitly credited as true at the motion to dismiss stage, then plaintiffs would never be able to put on evidence to disprove any of it. The result would be that every law, classification and government action subject to rational basis review would be found valid at the dismissal stage. That result is not what the cases reflect. Rather, as shown above, plaintiffs can and do survive dismissal and go on to win under rational basis review at the Supreme Court and in the Fifth Circuit.[13] As the Fifth Circuit has held, "plaintiffs may . . . negate a seemingly plausible basis for the law by adducing evidence of irrationality." *St. Joseph Abbey*, 712 F.3d at 223.

[13] *See also Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 591 (9th Cir. 2008) (denying a motion to dismiss a rational basis claim after reading a few sentences from the complaint in the light most favorable to the plaintiff); *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009) (same).

Rule 8(a) and 12(b)(6) have their own standards, and courts can and should be deciding motions to dismiss based on those standards. Courts should not allow the deference afforded the government under rational basis review to swallow those standards whole. To do so not only ignores those standards but also treats the rational basis test as a rubber stamp bearing the words *government always wins*. Neither individual liberty, nor the separation of powers upon which liberty depends, can tolerate a degree of rational basis deference that functionally nullifies pleading standards under Rules 8 and 12. This is especially true given that rational basis is the standard applicable to almost all government action.

B. When plaintiffs win under rational basis review, it is often on significant factual records developed during discovery.

Plaintiffs win under rational basis review, *see supra* I.A., and when they do it is often based on a significant factual record developed during discovery.[14] This fact further animates why courts must be cautious to not deviate from standard Rule 8 and 12(b)(6) procedures at the motion to dismiss stage. Evidence matters in constitutional cases—including

[14] Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 Geo. J.L. & Pub. Pol'y 373 (2016).

cases decided under rational basis review. If that were not so, landmark cases applying the rational basis test would have come out differently.

Factual evidence adduced by plaintiffs can be critical in identifying illegitimate government interests and disproving rationales which the government asserts. For example, in *City of Cleburne v. Cleburne Living Center*, the Supreme Court held the law to have an illegitimate purpose (animus). 473 U.S. 432 (1985). As a reason to deny the plaintiffs the permit at issue, the government posited that junior high students across the street from the proposed group home might harass the mentally handicapped. *Id*. at 449. The Supreme Court rejected the plausibility of this explanation based on the evidence that the junior high school was itself attended by thirty mentally handicapped students. *Id*.[15] In *Cleburne* the Northern District of Texas had determined the appropriate scrutiny to be rational basis.[16] If it had then dismissed the plaintiffs'

[15] *See also Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (invalidating a law preventing casket retailers from selling caskets unless it employed a licensed funeral director, when the government asserted that the education and training required for funeral director licensure ensured that those who handled dead bodies disposed of them safely and prevented the spread of communicable diseases, because evidence showed that casket retailers did not handle human remains); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (invalidating a law which withheld funds from local school districts for the education of illegal-alien children and authorized schools to deny such children enrollment, when the government asserted that illegal-alien children would perhaps be less likely to remain in the state, because record evidence refuted such assertion).
[16] *City of Cleburne*, 473 U.S. at 437.

claim based on the City of Cleburne's bare assertion that junior high school kids would tease the mentally handicapped, the plaintiffs would not have had the opportunity to negate the government's assertion with evidence that the junior high itself had mentally handicapped students.[17]

In *Schware v. Board of Bar Examiners*, the plaintiff sought to take the bar exam but was denied due to his past membership in the Communist Party—a fact which, the government asserted, indicated the plaintiff had bad moral character.[18] 353 U.S. 232 (1957). The Supreme Court extensively discussed the robust factual record to determine that Mr. Schware was of good moral character, and rejected the government's rationale for barring him from taking the bar exam.[19] *Id.* at 246–47.

The plaintiffs in *Cleburne* and *Schware*, and indeed in all of the winning rational basis cases at the Supreme Court and in the Fifth

---

[17] And the *Craigmiles* plaintiffs could not have shown that casket retailers did not handle human remains, and the *Plyler* plaintiffs would not have been permitted to show that illegal-alien children were not less likely to remain in the state.

[18] Today the case would be treated as a First Amendment case. *See Baird v. State Bar*, 401 U.S. 1, 6 (1971) (plurality opinion). In 1957, the Supreme Court analyzed it under rational basis review. *See Schware*, 353 U.S. at 239 ("[A]ny qualification must have a rational connection with the applicant's fitness or capacity to practice law.").

[19] And when changed circumstances call into question the constitutionality of a challenged law, that is an issue of fact which the Supreme Court has said can justify invalidating a law under rational basis review. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.").

Circuit, made sufficient pleadings. But if lower courts had dismissed the plaintiffs' complaints not because of insufficient pleadings but because the courts credited the government's bare assertions and hypotheticals as true, the plaintiffs would not have had the opportunity to invoke record evidence and statutory context to negate the government's asserted justifications for the challenged laws. All would have lost, and those irrational laws and classifications would still stand.

This is not to say that a case must proceed to discovery any time a plaintiff brings a constitutional challenge subject to rational basis review. Far from it. Where plaintiffs do not plead sufficient facts to state a claim, the case will be dismissed. The faithful application of Rules 8 and 12(b)(6) will result in only plausible claims proceeding to discovery. And this is as it should be, because abundant examples show that sufficiently plead complaints—even those of a "short and plain" form[20]—raise viable constitutional challenges that prevail even under rational basis review. This is true despite the deference afforded the government.

***

[20] *See* Fed. R. Civ. P. 8(a).

Granting a motion to dismiss based on the government's mere assertion of rationality and legitimacy effectively moves the rational basis inquiry from the merits stage to the pleadings stage. That is error, and conflicts with this Court's precedent.

III. The district court's Rule 12(b)(6) analysis is flawed, and it also fails to properly analyze the Due Course of Law claim.

In this case, plaintiff homeowners lodge challenges against the City of New Braunfels's ordinance prohibiting short term rentals (STRs), under the Equal Protection clauses of the United States and Texas Constitutions, the Due Process Clause of the Fourteenth Amendment, and the Due Course of Law provision of the Texas Constitution (Article 1, Section 19). ROA.7–28. The magistrate's report and recommendation, adopted wholesale by the district court, improperly analyzes the claims.

As to the federal claims, the court first holds that rational basis review applies to plaintiffs' claims, then points to what it perceives as a dilemma: the relationship between Rule 12(b)(6) and rational basis review. ROA.286–91. It does not rely on, nor does it cite to, *St. Joseph Abbey*. Rather, the district court invokes the Seventh Circuit's decision in *Wroblewski v. City of Washburn* for a rule that if plaintiffs want to survive a motion to dismiss, they "must allege facts sufficient to overcome

the presumption of rationality that applies to government classifications." ROA.287 (citing 965 F.2d 452, 459–60 (7th Cir. 1992)).

The court then skips forward, allowing rational basis review to swallow standard Rule 8 and 12(b)(6) procedures, and finds that the City has legitimate purposes: to protect residential neighborhoods from "perceived issues that accompany STRs," such as "adverse impacts . . . due to excessive traffic, noise, and density" and to "preserve the residential nature of certain areas of the city." ROA.290–91. Because rationality is presumed under rational basis review, and because "the Court [could] conceive that the Ordinance could potentially assuage these problems," the court found that "[a]ny one of [the City's] rationales . . . satisfies the rational basis test" and dismissed the homeowner's complaint. *Id*. In doing so, the court essentially decided the constitutional question on the merits and prevented the homeowners from putting on evidence to negate the City's asserted rationales. That is reversible error.

Take the plaintiffs' federal Equal Protection claim as an example. At this stage, the only question is whether, accepting as true all well-pleaded facts in the homeowners' complaint, the plaintiff homeowners have plausibly alleged that they have been treated differently than other

similarly situated individuals and they have plausibly alleged that no rational basis accounts for the difference. If they have done so, they have stated a claim for an Equal Protection violation and proceed to discovery.

The plaintiff homeowners have plausibly alleged they have been treated differently for no rational reason. They plead facts showing unequal treatment (property owners seeking to rent in the short term are not allowed, while property owners seeking to rent in the long term are allowed; and owners renting on a short-term basis before 2006 are treated differently than those renting after 2006). ROA.20. Plaintiffs also plead facts indicating governmental irrationality: As to the City's interests in preventing too much trash, noise, and parking, plaintiffs allege that the City adopted the STR ban with no explanation or data supporting it (ROA.15); that long-term renters, on a daily basis, do the same things creating trash, noise and parking as do short-term renters (they "come and go, laugh and love, eat and drink, drive and park, party and play" (ROA.21)); and that Texas case law provides that "misconduct concerns about STR[s] are already addressed by ordinances and laws addressed specifically to such misconduct." ROA.21.

Contrary to what the district court seemed to demand, the plaintiff homeowners here do not have to plead facts to rebut every single hypothetical or conceivable governmental rationale for the City's STR ban and its classifications—if plaintiffs *did* have to so plead, their complaint would be a tome, and the only limit to the facts they would have to plead would be the human imagination. The plaintiffs stated federal Equal Protection claims under Rules 8 and 12(b)(6), full stop. Therefore, the court below should not have dismissed the claim.

The district court also improperly dismissed plaintiffs' Article I, Section 19 state constitutional claim ("Due Course of Law"). It did not even analyze the state claim separately—and should have. The district court does cite the Texas Supreme Court's landmark due-course clause decision in *Patel v. Texas Department of Licensing & Regulation*, in acknowledgement that "Texas offers additional review protection," (ROA.289) (citing 469 S.W.3d 69, 86 (Tex. 2015)), but it proceeds to ignore the controlling test. Instead, the court lumps together plaintiffs' federal and state claims—and applies federal rational basis review standards to all of them. ROA.289–92.

Specifically, under the standard of review announced in *Patel*, the district court was bound under Texas state law to consider the STR ban's "actual, real-world effect" which controls both the means-ends fit inquiry and, if a logical means-ends fit exists, the required balancing to analyze separately whether the STR ban is "so burdensome as to be oppressive in light of the governmental interest" in the real world. *Patel*, 469 S.W.3d at 87. Courts reviewing due-course claims under *Patel* must "consider the entire record, including evidence offered by the parties." *Id*.

The district court cannot dismiss a Due Course of Law state constitutional claim governed by *Patel* without analyzing it. Nor can it do so without ignoring that the required constitutional inquiry is grounded in a fact record that reflects the "actual, real-world effect" of the challenged law, *see id*, making dismissal at this early stage improper.

***

Plaintiffs have sufficiently plead both federal and state claims.

CONCLUSION

The district court got the 12(b)(6) analysis wrong. Its flawed analysis resulted in the improper dismissal of plaintiffs' federal and state claims. The Court should reverse to allow the case to proceed to discovery.

Dated: December 20, 2022

Respectfully submitted,

Arif Panju
(TX Bar No. 24070380)
INSTITUTE FOR JUSTICE
816 Congress Avenue, Ste 960
Austin, Texas 78701
(512) 480-5936
apanju@ij.org

/s/ Elizabeth Sanz
Elizabeth Sanz
(CA Bar No. 340538)
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, Virginia 22203
(703) 682-9320
bsanz@ij.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,330 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14pt Century Schoolbook font and 12-point Century Schoolbook font for footnotes.

Dated: December 20, 2022

/s/ Elizabeth Sanz
Counsel for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of December 2022, I caused this Brief of *Amicus Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of bound copies of the Brief of *Amicus Curiae* will be filed with the Clerk of the Court via UPS Next Day Air.

/s/ Elizabeth Sanz
Counsel for Amicus Curiae