No. 280PA22 FIFTEEN-A DISTRICT

****

SUPREME COURT OF NORTH CAROLINA

****

KODY KINSLEY, in his official capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

v.

ACE SPEEDWAY RACING, LTD., AFTER FIVE EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER

From Alamance County

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AMICUS CURIAE BRIEF OF DR. JAY SINGLETON AND SINGLETON VISION CENTER

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INTEREST OF AMICI

Jay Singleton, D.O., and Singleton Vision Center, P.A. (collectively, "Dr. Singleton") are the Plaintiffs in *Singleton v. North Carolina Department of Health & Human Services*, No. 260P22, a constitutional challenge to North Carolina's certificate of need law that is currently pending this Court's discretionary review (and has been since August 15, 2022).[1] *Singleton*, like this case, is on appeal from a motion to dismiss for failure to state viable constitutional claims. *Singleton*, like this case, challenges a public-health law under Art. I, § 19 of the North Carolina Constitution. And *Singleton*, like this case, asks the Court to clarify the test that applies under Art. I, § 19 when the government restricts the right to earn a living. The Secretary here, just like the State in *Singleton*, argues that a fact-free rational-basis test should apply. But as Dr. Singleton argues in his case, and as this Court has long held, Art. I, § 19 affords more protection. Because this Court has not decided whether to grant review in *Singleton*, and the Court's treatment of Art. I, § 19 would have direct implications for one of the core issues in his case, Dr. Singleton files this amicus brief to encourage the Court to reaffirm its long line of

[1] Dr. Singleton certifies that no person other than his undersigned counsel wrote this brief or contributed money for its preparation.

cases applying more meaningful review to laws that restrict the right to earn a living.

INTRODUCTION

The North Carolina Constitution protects the "inalienable" right to earn a living. N.C. Const. art. I, §§ 1 & 19. That right—like any other inalienable right—deserves meaningful judicial protection. And this Court has given that protection for over 100 years, demanding that economic laws be reasonable in light of the evidence before it. But the State wants to change all of that.

The State wants this Court to treat the right to earn a living as a parchment promise subject to the most tepid form of federal rational-basis review. Under that test, the government can restrict the right to earn a living however it pleases, and when a plaintiff sues about it, courts are supposed to ignore the plaintiff's evidence and credit the government's imagined (even outlandish) justifications for the law. Really, the State's "test" is just a rule where it always wins.

But the right to earn a living deserves more. Below, Dr. Singleton shows that (1) the right to earn a living is inalienable, (2) the right to earn a living, like all inalienable rights, deserves meaningful protection, and (3) the State's fact-free

test is meaningless. The Court should reject the State's fact-free test and continue its 100-plus year tradition of defending the right to earn a living.

ARGUMENT

I. The right to earn a living is inalienable.

The North Carolina Constitution forbids the government from restricting "liberty . . . but by the law of the land." N.C. Const. art. I, § 19. That language "was copied in substance from Magna Charta by the framers of the Constitution of 1776." *State v. Ballance*, 229 N.C. 764, 768–69, 51 S.E.2d 731, 734 (1949). It was meant to secure ancient common law rights, *id.*, including the right to earn a living. *See* 1 William Blackstone, *Commentaries* *427 ("At common law every man might use what trade he pleased."); *see generally* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 217 (2003) (surveying evidence for common law right to earn a living from Magna Carta through American Revolution).

At first, sadly, only whites enjoyed the right. *See* Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 Akron L. Rev. 671, 681 (2003) (explaining how, even after the Civil War, the Black Codes continued to "control[] black labor"). But that changed in 1868, when newly enfranchised blacks helped ratify a fresh constitution. Judge Robert Hunter, Jr., *The Past as*

Prologue: Albion Tourgée and the North Carolina Constitution, 5 Elon L. Rev. 89, 97 (2013). They added the "fruits of their labor" clause, which affirmed—once and for all—that the right to earn a living is "inalienable" for all North Carolinians. N.C. Const. art. I, § 1.

Ever since, this Court has held that the law of the land and fruits of their labor clauses protect the "right to work and earn a livelihood." *Roller v. Allen*, 245 N.C. 516, 518, 525–26, 96 S.E.2d 851, 854, 859 (1957).[2] The Court has repeatedly described the right as "fundamental." *E.g.*, *id.* at 518–19, 96 S.E.2d at 854; *King v. Town of Chapel Hill*, 367 N.C. 400, 408–09, 758 S.E.2d 364, 371 (2014). And the Court has stressed that, "[w]hile many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not

[2] The State argues that the "fruits of their labor" clause should be interpreted like the Thirteenth Amendment—not as a font of economic freedom but as a ban on slavery alone. (Pls.' Br. 32–40). But this Court has long held otherwise. *See King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014). And rightly so. For one, the same voters who adopted the fruits of their labor clause adopted a separate anti-slavery clause. N.C. Const. of 1868, art. I, § 33. For another, slavery was not the only threat to free labor in 1868. "North Carolina . . . regulated black labor through contract, anti-enticement, apprenticeship, and vagrancy laws." Joseph Ranney, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 Tex. Wesleyan L. Rev. 1, 17 (2002). By protecting "enjoyment of the fruits of their labor," the voters were also protecting its precondition: the right to work free from "arbitrary government restrictions." *King*, 367 N.C. at 408, 758 S.E.2d at 371.

so yielding. Among them the right to earn a living must be regarded as inalienable." *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940).

II. The inalienable right to earn a living deserves meaningful protection.

This Court has long "recognized the supremacy of rights protected in Article I" and its corresponding "responsibility to protect the state constitutional rights of the citizens." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (citing *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787)). But rights are not inalienable if the government can walk into court and waive them away with magic words, baseless assertions, or vague appeals to the public welfare. If that were the rule, constitutional rights would end where government lawyers' imaginations begin. So, this Court has charted a different course based on a simple rule: laws restricting inalienable rights get meaningful, fact-based review. The right to earn a living is no exception.

A. Inalienable rights get meaningful, fact-based review.

Think of how the Court typically treats inalienable rights. In *King ex rel. Harvey-Barrow v. Beaufort County Board of Education*, this Court applied a fact-based test to protect the right to a sound basic education. 364 N.C. 368, 377, 704 S.E.2d 259, 264 (2010); *see also id.* (holding that a fact-free form of "[r]ational basis

review . . . does not adequately protect student access to [education]"). The Court looked through the record and refused to uphold a student's suspension because the school "did not articulate any reason" for it. *Id.* at 378, 704 S.E.2d at 265. The Court also refused to supply a reason of its own because "it is not the role of this Court to speculate" ways to justify the government's conduct. *Id*.

Or consider gun rights. In *Britt v. State*, the Court applied a fact-based test to hold that a law violated the plaintiff's right to bear arms. 363 N.C. 546, 550, 681 S.E.2d 320, 323 (2009). The law banned the plaintiff from owning a gun because he had committed a nonviolent felony. *Id.* But the Court concluded that the plaintiff's evidence about his crime and rehabilitation "affirmatively demonstrated" that the law's application to him did not "bear a fair relation to the preservation of the public peace and safety." *Id.* at 549–50, 681 S.E.2d at 322–23.

Or consider warrantless searches. In *State v. Grady*, the Court applied a fact-based test in a challenge to warrantless GPS tracking (searches) of people who had served criminal sentences. 372 N.C. 509, 534, 831 S.E.2d 542, 561 (2019). Though the searches were supported by "legislative findings," the Court held that the searches' legitimacy "cannot simply be assumed." *Id.* at 540–41, 831

S.E.2d at 566. Instead, the defendant was entitled to rebut the legislative findings with "evidence . . . to the contrary." *Id.* at 541, 545; 831 S.E.2d at 566 (cleaned up). Because the defendant did so and the government "provided no evidentiary support" for its assertions, the Court struck down the statute as applied. *Id.* at 545, 831 S.E.2d at 569.[3]

B. The inalienable right to earn a living is no exception.

This Court has a long tradition of protecting the right to earn a living with meaningful, fact-based review. *See, e.g.*, *King v. Town of Chapel Hill*, 367 N.C. 400, 758 S.E.2d 364 (2014); *State v. Biggs*, 133 N.C. 729, 46 S.E. 401 (1903). Dr. Singleton has collected many of those cases in the Appendix to this brief and will survey just a few examples here:

In *Roller v. Allen*, the Court struck down a law that banned unlicensed tilework because there was "[n]othing in the record" to show the work needed licensing. 245 N.C. 516, 521–24, 96 S.E.2d 851, 856–58 (1957).

In *City of Winston-Salem v. Southern Railway Co.*, the Court struck down an ordinance that required a railroad to rebuild a trestle after the railroad produced

[3] The list goes on and on. *See, e.g.*, *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 854, 786 S.E.2d 919, 924 (2016) (applying fact-based test to protect property rights); *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) (applying fact-based test to protect voting rights).

"voluminous evidence" at trial showing that "changed economic conditions" had rendered the ordinance "unreasonable and oppressive." 248 N.C. 637, 639–55, 105 S.E.2d 37, 38–50 (1958).

In re Certificate of Need for Aston Park Hospital, Inc., struck down a law that banned new hospital construction, the Court repeatedly noting that "[n]othing in the record" suggested that banning the plaintiff's hospital would promote public health. 282 N.C. 542, 547–49, 193 S.E.2d 729, 733–34 (1973).[4]

In *Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc.*, the Court struck down a law that restricted the prices at which certain retailers could sell watches because there was "no persuasive evidence" that the law was "necessary to protect [watchmakers]." 285 N.C. 467, 479–81, 206 S.E.2d 141, 149–51 (1974).

And in *King v. Town of Chapel Hill*, most recently, the Court held that a cap on towing fees violated the "fundamental" right to earn a living, in part because evidence showed that the cap made it impossible for the plaintiff to earn a profit. 367 N.C. at 408–09, 758 S.E.2d at 371. The Court stressed the importance of

[4] Dr. Singleton is the petitioner in a case currently pending this Court's mandatory and discretionary review that turns, in part, on the legal status of *Aston Park*. *See Singleton v. DHHS*, No. 260P22.

protecting inalienable rights, particularly given the danger of "too ready [a] resort to the police power." *Id.* at 413, 758 S.E.2d at 374.

Across these cases, the Court uses various phrases to describe its test: the law needs a "real or substantial relation" to a legitimate purpose, *Harris*, 216 N.C. 746, 6 S.E.2d at 866 (cite omitted); the law must be "reasonably necessary," *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735 (1973) (cite omitted); the law must further its purpose in a "plain, appreciable, and appropriate manner," *State v. Williams*, 146 N.C. 618, 61 S.E. 61, 64 (1908) (cite omitted). But whatever the precise language, the point is the same: facts matter—just like they do for every other inalienable right.

III. The State's test is meaningless and would not protect the inalienable right to earn a living.

The State wants this Court to adopt a meaningless standard of review so that it can restrict the right to earn a living at will. Specifically, the State urges this Court to adopt a fact-free test that mirrors the most deferential form of federal rational-basis review. Under the State's test, an economic law must be upheld if it is "fairly debatable" (Pls.' Br. 31) (quoting *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 214, 258 S.E.2d 444, 449 (1979)), that the law "bear[s] some rational relationship to a conceivable legitimate interest of the government."

(Pls.' Pet. 15) (quoting *White v. Pate*, 308 N.C. 759, 766–67, 304 S.E.2d 199, 204 (1983)). Taken literally, this is not a form of judicial review at all, but code for "the government always wins." The Court should reject it.

A. The State's fact-free test is meaningless.

The State's view is that, when the government restricts your right to earn a living, facts don't matter. (Pls.' Br. 51). Indeed, "discovery and factfinding" are "intrusive." (*Id.*). That's "because the rationality of [a law] turns on whether a court can *envision* some rational basis for it." (Pls.' Pet. at 16–17; *see also* Pls.' Br. at 48–49). It does not matter if the law is actually rational in the normal sense of that term. (Pls.' Br. at 31). It does not matter what the actual basis of the law is. (Pls.' Pet. at 16–17). Even at the pleadings stage, where the plaintiff's facts are supposed to be presumed true and viewed in her favor, "courts are not limited to reviewing the allegations in a complaint." (*Id.* at 16–17). The government can simply make things up, and courts are supposed to go along with it.

The State presents this as a "burden" that plaintiffs must meet. (Pls.' Br. 32). But if we take the State's test seriously—if courts are supposed to credit any imaginary facts that "could have . . . persuaded a governmental decisionmaker" (Pls.' Pet. 16–17 (cleaned up))—it's an impossible task. "The burden of proving a

negative . . . (i.e., the nonexistence of any conceivable basis for the ordinance) would be insurmountable." *Treants Enters., Inc. v. Onslow County*, 83 N.C. App. 345, 356, 350 S.E.2d 365, 372 (1986), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987). Nothing in the Constitution justifies forcing plaintiffs to push Sisyphus's boulder up a mountain just to defend their right to earn a living.

B. The State's fact-free test yields absurd results.

The State's fact-free test has produced a slew of absurd results in federal court.[5] In *Meadows v. Odom*, for example, a federal court applied the test to uphold Louisiana's ban on unlicensed florists. 360 F. Supp. 2d 811, 822–25 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006). There, the plaintiffs were denied floristry licenses after failing an exam that was judged by licensed florists (future competitors) and had a lower pass rate than the state bar exam. Appellants' Br. 4, *Meadows v. Odom*, 198 F. App'x 348 (5th Cir. July 1, 2005), 2005

[5] Some federal cases, notably, have applied a more engaged rational-basis test. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry[.]"); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[P]laintiffs may . . . negate a seemingly plausible basis for [a] law by adducing evidence of irrationality."); *see also* Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 Geo. J. L. & Pub. Pol'y 373, 382, 388–92 (2016) (collecting cases); Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 Geo. Mason U. C.R. L.J. 43, 53–67, 70–74 (2014) (same).

WL 6111808. The plaintiffs introduced evidence that nobody had ever been injured by a florist. *Meadows*, 360 F. Supp 2d at 824. But the court ignored it, deferring to a government witness who "believe[d]" that licensed florists "protect people" from infected dirt. *Id.* at 824. That far-fetched testimony was enough to justify banning the plaintiffs from arranging flowers for a living. *Id.* at 825.

Or look at *Niang v. Carroll*, where the Eight Circuit applied the fact-free test to uphold a requirement that African-style hair braiders obtain a cosmetology license that took 1,500 hours of training, 90 percent of which was irrelevant to braiding. 879 F.3d 870, 874 (8th Cir.), *vacated as moot*, 139 S. Ct. 319 (2018). In *Powers v. Harris*, similarly, the Tenth Circuit used the fact-free test to uphold a law that required online casket retailers to obtain a funeral director license, even though over 95 percent of the training was irrelevant. 379 F.3d 1208, 1215–16 (10th Cir. 2004).

Some federal courts even say the quiet part out loud: this so-called "rational-basis test" is not really concerned with rationality. *See, e.g.*, *Wagner v. Haslam*, 112 F. Supp. 3d 673, 692–93 (M.D. Tenn. 2015) (rationality includes laws that are "unreasonable, counter-productive . . . or contrary to all past experience

and evidence," even when the plaintiff has "proof demonstrating that the policy does not, in fact, achieve the desired result"). And the U.S. Department of Justice has gotten the message, arguing in one case that the rational-basis test would require a court to uphold a law on the ground that "space aliens are visiting this planet in invisible and undetectable craft." Oral Arg. 34:37–35:27, *Alaska Cent. Exp. Inc. v. United States*, 145 F. App'x 211 (9th Cir. 2005), https://tinyurl.com/ykfn8y8b.

Simply put, the State's fact-free test is "tantamount to no review at all." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring).[6] The Court doesn't have to imagine what the consequences would be here in North Carolina. Many have lived it—like in the aftermath of this Court's infamous decision upholding the forced sterilization of children. *See In re Moore's Sterilization*, 289 N.C. 95, 103–04, 221 S.E.2d 307, 312–13 (1976).

In *Moore's Sterilization*, the Court held that forcing a mentally handicapped mother and child to undergo sterilization, a "potentially dangerous procedure,"

[6] Several jurists have expressed similar concerns. *See, e.g.*, *Tiwari v. Friedlander*, 26 F.4th 355, 368 (6th Cir.) (Sutton, J.), *cert. denied*, 143 S. Ct. 444 (2022); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 112 (Tex. 2015) (Willett, J., concurring); *Hettinga v. United States*, 677 F.3d 471, 480–83 (D.C. Cir. 2012) (Brown, J., concurring).

was a "reasonable exercise of the police power." *Id*. at 104, 108, 221 S.E.2d at 313, 315. Why? Because sterilization "at certain times *may* be in the best interest of that individual . . . [who] *may* not be capable of determining his inability to cope with children . . . [or] *may* be unable to handle the additional responsibility of children . . . [or] practice other forms of birth control." *Id.* at 103–04, 221 S.E.2d at 312–13 (emphases added). *Moore's Sterilization*—a stain on North Carolina's constitutional history—exemplifies the sort of meaningless test the State wants this Court to adopt.

C. The State's cases default to federal standards without explanation.

The State's main cases applying a fact-free test all stem from Fourteenth Amendment cases. The "fairly debatable" test from *A-S-P Associates*, 298 N.C. at 214, 258 S.E.2d at 449, for example, stems from a string-cite of U.S. Supreme Court decisions in *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938). The "any conceivable basis" test from *White v. Pate*, 308 N.C. 759, 766–67, 304 S.E.2d 199, 204 (1983), points to *Vance v. Bradley*, 449 U.S. 93, 97 (1979). And the fact-free test in *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 182, 594 S.E.2d 1, 16 (2004), relies on *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

These cases never explain their break from state constitutional precedent. *See* Judge Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L. Rev. 1, 29 (2022). Or why they adopted the fact-free test only after federal courts started using it. *See id.* That's a problem because Art. I, §§ 1 & 19 are textually richer and have long afforded more protection than the Fourteenth Amendment. Sections I–II, *supra*; *cf. Corum*, 330 N.C. at 783, 413 S.E.2d at 290 ("Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens.").

The State tries to justify these cases by arguing that more engaged review turns judges into policymakers who will "second guess . . . the legislative and executive branches—including through intrusive discovery and factfinding at trial." (Pls.' Br. 51). But what the State calls "second-guessing" is how the Court defends inalienable rights in every other context. Surely the State would not accuse the Court of "policymaking" if it impartially weighed the record evidence in a free-speech case, or a voting-rights case, or a warrantless-search case. The "fundamental" right to earn a living is no less important. *King*, 367 N.C. at 408–09, 758 S.E.2d at 371.

The State also argues that fact-based review would be "destabilizing" because it would empower more people to sue when the government violates their right to earn a living. (Pls.' Br. 51–52). Again, though, that's not a problem for any of the other inalienable rights this Court protects. Nor has the sky fallen after 100 years of fact-based review under Art. I, §§ I & 19. *See* App'x. Nor, notably, have the wheels of government stopped turning in other states whose courts meaningfully protect the right to earn a living. *See, e.g.*, *Ladd v. Real Est. Comm'n*, 230 A.3d 1096, 1108 (Pa. 2020); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015); *Jackson v. Raffensperger*, __ Ga. __ (May 31, 2023), https://tinyurl.com/yc79pd29. The State's concerns are a fantasy that do not justify gutting a century of state constitutional precedent.

CONCLUSION

The Court should reaffirm its precedent affording meaningful, fact-based review for the inalienable right to earn a living.

Respectfully submitted this 2nd day of June, 2023.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the length and typeface requirements of Rule 28(j) of the North Carolina Rules of Appellate Procedure. The brief, excluding cover page, index, table of cases and authorities, certificate of service, and appendix, contains no more than 3,750 words.

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