No. 17-1428

In The Supreme Court of the United States

NDIOBA NIANG and TAMEKA STIGERS,

Petitioners,

v.

BRITTANY TOMBLINSON, in her Official Capacity as Executive Director of the Missouri Board of Cosmetology and Barber Examiners, et al.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This Court has said that rational basis is not "toothless," *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981), and that it requires a genuine, if loose, fit between legislative purposes and means. *Romer v. Evans*, 517 U.S. 620, 632–33 (1996). The Court below, however, held that a judge may manufacture her own, hypothetical justification to uphold a statute, even where the government has not offered that justification and there is no evidence to support it. The question presented here is whether courts can base rulings in rational-basis cases on such entirely imaginary states of affairs. In short,

Can courts simply make things up?

This is not meant disrespectfully. Precedents conflict on whether rational basis is a "rebuttable" "presumption of *fact*," *Borden's Farm Prods., Co. v. Baldwin*, 293 U.S. 194, 209 (1934) (emphasis added)—or whether judges may manufacture their own purely speculative, evidence-free rationalizations for laws whose constitutionality is challenged. *See, e.g.*, *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487 (1955). Courts are also in conflict over whether rational-basis lawsuits can be dismissed under Rule 12(b)(6) under such *post hoc* rationalizations. *Compare Hettinga v. United States*, 677 F.3d 471, 482 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 1088 (2013), *with Carter v. Arkansas*, 392 F.3d 965, 968 (8th Cir. 2004).

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RULES

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute ("GI") was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, GI litigates and files *amicus* briefs when its or its clients' objectives are directly implicated.

GI's litigation often involves matters that are subject to federal rational-basis review, particularly cases involving occupational licensing laws or restrictions on private property. *See, e.g.*, *Women's Surgical Center, LLC v. Berry*, 806 S.E.2d 606 (Ga. 2017); *Vong v. Aune*, 328 P.3d 1057 (Ariz. App. 2014); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012); *Boice v. Aune*, CV2011-021811 (Maricopa Cnty. Super. Ct., filed Apr. 30, 2012). GI also pursues litigation in state courts, under state versions of rational basis—which typically echo or rely on federal standards. *See, e.g.*, *Vong*, 328 P.3d 1057; *Coleman* 284 P.3d 863. GI scholars have also published important scholarship on the history, theory,

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[1] Pursuant to Supreme Court Rule 37(6), *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than *amicus*, their members, or counsel, made any monetary contribution for its preparation or submission. The parties' counsel of record received timely notice of the intent to file the brief, and all parties have consented to the filing of this brief.

and real-life consequences of the rational basis test. *See, e.g.*, Mark Flatten, *Protection Racket: Occupational Licensing Laws and the Right to Earn A Living* (Goldwater Institute 2016)[2]; Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 GEO. MASON U. CIV. RTS. L.J. 43 (2014); Christina & Timothy Sandefur, *The Property Ownership Fairness Act: Protecting Private Property Rights* (Goldwater Institute 2016).[3]

Amicus believes its litigation experience and policy expertise will aid this Court in consideration of the petition.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

There are few questions of constitutional law more pressing than this. *Most* constitutional rights—all except the few classified as "fundamental"—are subject to rational-basis review. While it may be the lowest level of constitutional security, it is, nevertheless, a genuine one *if* it imposes *some* actual limit on the government. Yet the legal theory adopted by the Eighth Circuit removes *any* legal significance from the rational basis test and transforms it into a logically impenetrable shield against judicial review. It allows a court to manufacture a theory in the middle of trial, and to decide the case on that theory *sua sponte*, and

[2] goo.gl/VXnVmr

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not based on the evidence before it (if there even is any). Such an approach contradicts this Court's precedent, conflicts with decisions of other circuits, leads to contradictory and illogical results, and deprives litigants of due process of law. Indeed, it leads to the conclusion—reached by some courts already—that a rational-basis case can be dismissed at the pleading stage, because the plaintiff could never as a logical matter, meet the applicable burden of proof.

This doctrinal disorder arises from a single proposition: that courts in rational-basis cases can concoct their own justifications for challenged laws, and uphold those laws against constitutional challenge if they can *imagine* the *possibility* that under some circumstances other than those that actually exist, the challenged law could have had a constitutionally adequate justification. *See F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) ("it is difficult to imagine a legislative classification that could *not* be supported by a 'reasonably conceivable state of facts.' ").

This Court has cautioned *against* that approach, holding that rational basis is "not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. *Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack*." *Borden's Farm Prods.*, 293 U.S. at 209 (emphasis added). Nevertheless, that is precisely what the court below did, and what other courts have done.

In part, the confusion arises from this Court's contradictory explanations of rational basis. In *Beach Commc'ns*, 508 U.S. at 315, it said that "whether the conceived reason for the challenged [law] actually motivated the legislature," is "entirely irrelevant," and that actual evidence has "no significance in rational-basis analysis." But in cases such as *Romer*, 517 U.S. 620, it has moderated its approach, and said that judges should *not* manufacture their own justifications for challenged laws in rational-basis cases. In short, this Court's precedents on the question are in disarray.

The contradictory and confusing theories about when *purely imaginary notions* may be invoked in rational-basis cases have even led some courts to hold that such cases should be dismissed *at the 12(b)(6) stage* if the government defendant merely *asserts* that there is a rational basis for the challenged law—before any party has engaged in discovery, and even where there is no evidence at all in the record. *See, e.g.*, *Hettinga*, 677 F.3d at 482. Yet that cannot be the rule—because rational-basis cases do survive motions to dismiss—and plaintiffs do win them.

Given the bedrock importance of this issue, this Court should grant the petition to address whether, in rational-basis cases, courts are bound to refer to the evidence, or whether they can manufacture wholly imaginary rationalizations for challenged laws.

ARGUMENT

I. The Decision Below Exacerbates a Long-Standing Conflict Between All Levels of Federal Courts Over the Limits of the Rational Basis Test.

A. Substantial Confusion Abounds Over the Meaning of Rational Basis.

The rational basis test has a bad name—and for good reason. Judges have called it "a judicial rubber-stamp," *United States v. Sahhar*, 917 F.2d 1197, 1201 n.5 (9th Cir. 1990), and "a misnomer, wrapped in an anomaly, inside a contradiction . . . less objective reason than subjective rationalization," *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 98 (Tex. 2015) (Willett, J., concurring). They have said that it "can hardly be termed scrutiny at all," and that it "invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute," *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring). And they have condemned it for having "[t]he practical effect of . . . [eliminating] any check on the group interests that all too often control the democratic process." *Hettinga*, 677 F.3d at 482 (Brown, J., concurring).[4]

[4] Judge Brown's criticism of the rational basis test was joined by Judge Sentelle. Judge Griffith declined to join but stated that he was "by no means unsympathetic to their criticism." *Id.* at 483 (Griffith, J., concurring).

Scholars have called rational basis a "charade," Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test is Unconstitutional*, 14 GEO. J.L. & PUB. POL'Y 537, 546 (2016), a mere "label," RICHARD A. EPSTEIN, TAKINGS 109 (1983), and "something of a joke," Edward McGlynn Gaffney, Jr., *Curious Chiasma: Rising and Falling Protection of Religious Freedom and Gender Equality*, 4 U. PA. J. CONST. L. 394, 404 (2002). They have noted that it is "wholly ineffective at curbing legislative excesses." David M. Burke, *The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 HARV. J.L. & PUB. POL'Y 73, 78 (1994).

The leading cause of these criticisms is that the rational basis test is applied inconsistently. Sometimes, courts employ what can be called "true rational basis" analysis, because they involve a genuine effort to determine whether the law rationally advances the legislature's legitimate interest. *See* Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 176 (1993) (defining "true rational basis"). Examples would include *Romer*, 517 U.S. 620; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Zobel v. Williams*, 457 U.S. 55 (1982), and other cases in which this Court examined the *actual* connection between the *known* facts and the challenged government action. In such cases, the Court has

expressly refused to conjure up its own *post-hoc* rationalizations for challenged laws. *See, e.g.*, *Eisenstadt*, 405 U.S. at 450–52 (rejecting the argument "that the purpose of the amendment was to serve the health needs of the community" because "[i]t is plain that Massachusetts had no such purpose in mind").

In other cases, however, courts have used the fictitious or hypothetical version of rational basis that the court below used—one in which a court disregards the *actual* facts, and asks instead whether *in theory*, it is *possible to imagine* that *some* legislature *could have believed* that the law would advance *some conceivably legitimate* government interest. In practice, this hypothetical version of rational basis functions, as this Court warned in *Borden's Farm Prods.*, as "a rule of law which makes legislative action invulnerable to constitutional assault . . . by treating any fanciful conjecture as enough to repel attack." 293 U.S. at 209.

One good example would be *Meadows v. Odom*, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, 198 Fed. Appx. 348 (5th Cir. 2006), in which the plaintiff challenged the constitutionality of a state law imposing a costly, time-consuming testing and licensing requirement on florists. Extensive testimony before the trial court showed that the unlicensed practice of floristry—which is legal in all states except Louisiana—was not a genuine threat to public health and safety. There were no actual instances of harm to consumers, and the risk was remote in the extreme. The trial court nevertheless ruled against the plaintiffs, not on the basis of the evidence in the record, but instead

on pure speculation and subjective opinion. It quoted a witness saying "I *believe* that the [licensing requirement] does protect people. . . . [Florists are] very diligent about not having an exposed pick, not having a broken wire, not have a flower that has some type of infection, like, dirt that remained on it . . . and I *think* that because of this training, that prevents the public from having any injury." *Id.* at 824 (emphasis added). There was no *evidence* of this actually being a danger in the real world, but the court found that this purely hypothetical possibility was sufficient justification to forbid people from arranging flowers for money without government approval.

The human consequences of that ruling were severe, and show that this is not a matter of mere abstract theory. The plaintiff, once deprived of her means of livelihood, was unable to afford her medical costs and died under tragic circumstances. As her attorney later observed, as quoted in Mark Flatten, *Protection Racket* at 6, "[s]he died a few weeks later—alone, unemployed, and in poverty because . . . a federal judge just determined he would turn a blind eye . . . and pretend as if the state might actually be trying to benefit consumers instead of the anticompetitive interests of the Louisiana State Florists' Association."

B. The Confusion over Rational Basis is So Severe, Courts Now Frequently Dismiss Rational-Basis Lawsuits without Even Allowing Plaintiffs to Introduce Evidence

Another extreme and troubling example is *Hettinga*, 677 F.3d 471. It held not only that courts can invent purely speculative and hypothetical justifications to rule against plaintiffs in rational-basis cases, but that they can do so *at the motion to dismiss stage*. 677 F.3d at 479. Because the government defendant "provided a rational explanation" for the challenged law—not actual evidence, but simply an "explanation" that it advanced in its 12(b)(6) motion—the court found that the plaintiff was not even entitled to put on evidence to prove his well-pleaded allegations. *Id.* And because "the government provided an explanation that is . . . rational on its face," the Court of Appeals affirmed dismissal. *Id.*

Similarly, in *Jones v. Temmer*, 829 F. Supp. 1226 (D. Colo. 1993), *vacated as moot*, 57 F.3d 921 (10th Cir. 1995), the district court dismissed a constitutional challenge to a law limiting the number of taxicabs that could operate in Denver. The plaintiffs alleged that the law's connection to public health and safety was a pretext, and that in fact the law blocked them from practicing their trade without a rational basis. There is nothing inherently implausible about such an argument—indeed, plaintiffs have prevailed in similar cases; *see, e.g.*, *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 700–01 (E.D. Ky. 2014). But the District Court

dismissed the case *prior to any discovery*, based on the government's conclusory assertion *in its motion to dismiss* that the law served public interests. *See, e.g.*, *Jones*, 829 F. Supp. at 1235.

It makes no sense for courts to dismiss rational-basis cases at the 12(b)(6) stage based on the government's mere assertion—backed by no facts—that the challenged law serves a public good. Plaintiffs at the 12(b)(6) stage are entitled to a presumption in their favor. Accordingly, some courts have held that the rational-basis theory *does not* allow a court to simply dismiss at the 12(b)(6) stage. *See, e.g.*, *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009).

Yet the rational basis test cuts in the opposite direction from the pro-plaintiff 12(b)(6) standard—and, indeed, if a plaintiff must negate *every imaginable* basis for a challenged law, even one that has no basis in the record and is made up on the spot by the presiding judge, then courts should, as a matter of logic dismiss *all* rational-basis cases at the 12(b)(6) stage. Of course, they do not do so—because "deference is not abdication and 'rational basis scrutiny' is still scrutiny." *Nordlinger v. Hahn*, 505 U.S. 1, 31 (1992) (Stevens, J., dissenting). And, in fact, plaintiffs do win rational-basis cases.

Courts have struggled with the "perplexing situation" that arises "when the rational basis standard meets the standard applied to a dismissal [motion]." *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). As *Wroblewski* explained, Rule 12(b)(6)

requires courts to construe the facts in the plaintiff's favor, and "[t]he rational basis standard . . . cannot defeat the plaintiff's benefit of [this rule]." *Id*. Thus, weighing the merits of a rational-basis case at the pleading stage is improper. *Id.* at 460. That decision was consistent with the earlier decision of *Keenon v. Conlisk*, 507 F.2d 1259, 1261 (7th Cir. 1974), which held that rational basis is a *merits* analysis that is not properly used at the *motion to dismiss* stage, and that "[b]ald assertions that the [government's actions] are reasonable cannot be considered."

Yet the Seventh Circuit withdrew from that position in a later case, when it held that a trial court *may* "analyze the possible justifications for" a challenged law even at the 12(b)(6) stage before any evidence has been gathered or presented to the court. *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 545 (7th Cir. 2008).

Other courts have likewise struggled with this "perplexing situation," with some holding that rational-basis cases should *not* be dismissed under Rule 12(b)(6)—*see, e.g.*, *Dias*, *supra*; *Silveira v. Lockyer*, 312 F.3d 1052, 1089–92 (9th Cir. 2002); *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991)[5]—and others

[5] In addition to those cited above, *see, e.g.*, *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178 (N.D. Cal. 2011); *Dawkins v. Richmond Cnty. Sch.*, No. 1:12CV414, 2012 WL 1580455 at *5 (M.D.N.C. May 4, 2012); *Immaculate Heart Cent. Sch. v. N.Y. State Pub. High Sch. Athletic Ass'n*, 797 F. Supp. 2d 204, 211, 216 (N.D.N.Y. 2011); *Bench Billboard Co. v. City of Cincinnati*, No. 1:07cv589, 2008 WL 2220625 at *9 (S.D. Ohio May 28, 2008); *Lazy Y Ranch, Ltd. v. Wiggins*, No. CV06-340-S-MHW, 2007 WL 1381805 at *7–8 (D. Idaho Mar. 13, 2007); *Cornwell v. California*

holding the opposite. *See, e.g.*, *Hettinga*, *supra*; *Carter*, 392 F.3d at 968.

Remarkably, some circuits are even in conflict with *themselves* over this matter. The Fourth Circuit, for example, has adopted the rule that rational basis does not entitle a trial court to dismiss a rational-basis case on a 12(b)(6) motion. *See, e.g.*, *Phan v. Virginia*, 806 F.2d 516, 521 n.6 (4th Cir. 1986) ("the simple articulation of a justification for a challenged classification does not conclude the judicial inquiry"); *Giarratano v. Johnson*, 521 F.3d 298, 303–04 (4th Cir. 2008) (rational basis "cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard"). Yet it has subsequently failed to follow that rule. In *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 548 (4th Cir. 2013), for example, it held that dismissal was appropriate so long as a judge could imagine that a rationale existed for a challenged law.

The Sixth and Eighth Circuits are also in internal conflict over whether the "any conceivable basis" barrier to rational-basis challenges should bar plaintiffs from even having the chance to prove their cases. *Compare Midkiff v. Adams Cnty. Reg'l Water Dist.*, 409 F.3d 758, 769–71 (6th Cir. 2005) (dismissal proper), and *Carter*, *supra* (dismissal proper), *with Bower v. Village of Mount Sterling*, 44 Fed. Appx. 670, 678 (6th Cir. 2002) (dismissal improper), and *City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 413 F.2d

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Bd. of Barbering & Cosmetology, 962 F. Supp. 1260, 1273 (S.D. Cal. 1997).

762, 767 (8th Cir. 1969) (rational basis should be decided "upon the whole record").[6]

II. This Court's Own Decisions are In Disarray on This Question.

This contradiction is the result of this Court's own self-contradictory precedents. Some of them endorse the hypothetical rational-basis approach, and some reject that approach.

When it created the rational basis test in 1934,[7] this Court made clear that the test "is a presumption of fact," meaning that it imposes "a rebuttable presumption" that the challenged statute is constitutional. *Borden's Farm Prods.*, 293 U.S. at 209. Judges should not transform the rational basis test into "a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault" by "treating any fanciful conjecture as enough to repel [legal] attack." *Id.* While plaintiffs in rational-basis cases "must carry the burden" of demonstrating

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[6] This confusion has even infected state courts, which often rely on federal rational-basis precedent to apply their own rational basis tests. *Compare Brigham v. State*, 889 A.2d 715, 721 (Vt. 2005); *ABD Liberty, Inc. v. State, Dept. of Envtl. Prot.*, No. SOM-L-505-05, 2005 WL 2095735 *9 (N.J. Super. Ct. 2005) (dismissal of rational-basis case at pleading stage improper), *with Granville v. Minneapolis Pub. Sch. Dist. No. 1*, 668 N.W.2d 227, 234–35 (Minn. Ct. App. 2003) (rational-basis plaintiffs are entitled to present evidence to prove their well-pleaded allegations); *Killeen v. Crosson*, 638 N.Y.S.2d 531, 534 (N.Y. App. Div. 1996) (same).

[7] *Nebbia v. People of N.Y.*, 291 U.S. 502 (1934).

that a challenged law is unconstitutional, they may do so "by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary." *Id.*

The Court reiterated this point in several cases that followed: the rational basis test is not a license for judges to manufacture hypothetical justifications for a challenged law. Nor should it be used to block plaintiffs from presenting evidence to rebut the factual presumption of rationality. In *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 414–15 (1935), this Court reversed a state court's ruling that plaintiffs could not present evidence to challenge the constitutionality of a regulation of railroads. In *Polk Co. v. Glover*, 305 U.S. 5 (1938), it again said that rational-basis plaintiffs are "entitle[d] . . . to an opportunity to prove their case." *Id.* at 9–10.

And *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), made clear once more that the rational basis test is not an impenetrable shield: "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," the Court said. If "the constitutionality of a statute" is "predicated upon the existence of a particular state of facts," then that law's constitutionality "may be challenged by showing to the court that those facts have ceased to exist." *Id*. at 153. In fact, the plaintiff in *Carolene Products* did later succeed in showing the court that the facts justifying the statute had ceased to exist,

and the challenged law was invalidated. *Milnot Co. v. Richardson*, 350 F. Supp. 221, 223–24 (N.D. Ill. 1972).

Later decisions, however, sowed confusion, as the Court began to say that judges could uphold challenged statutes on the basis of imaginary and purely hypothetical *post hoc* rationalizations concocted in the absence of evidence. In *Lee Optical*, 348 U.S. at 487–88, for instance, the Court held that a statute could survive rational-basis review on a purely imaginary theory that the legislature "might have" believed it would serve a legitimate goal.

Yet in still more recent cases, the Court has not followed that rule. In *Eisenstadt, Moreno*, *Zobel*, and other decisions, it *refused* to invent rationalizations to justify laws challenged under rational basis. This led Justice Brennan to conclude that "[w]hile we have in the past exercised our imaginations to conceive of possible rational justifications for statutory classifications," the Court had come to repudiate that approach and had "declined to manufacture justifications in order to save an apparently invalid statutory classification." *Schlesinger v. Ballard*, 419 U.S. 498, 520–21 (1975) (Brennan, J., dissenting).

Confusion remains, however. *Beach Commc'ns*, 508 U.S. at 315, declared facts are "entirely irrelevant" in a rational-basis case, because courts can devise their own after-the-fact justifications for a law, and uphold them even where the actual facts show that the legislature did not contemplate the purposes attributed to those statutes afterwards. Yet only a short time later,

the Court held that under rational-basis review, a statute "must find some footing in *the realities* of the subject," *Heller v. Doe*, 509 U.S. 312, 321 (1993) (emphasis added), and *Cleburne* and *Romer* later refused to manufacture rationalizations for statutes—and actually ruled them invalid under the rational basis test.

This Court's most recent discussion of the role that purely imaginary facts play in the rational basis test came in Justice Kennedy's decisive separate opinion in *Kelo v. New London, Conn.*, 545 U.S. 469 (2005). Observing that rational-basis review applies when property owners challenge the taking of property through eminent domain, he concluded that courts must "review the record" to determine whether a challenged condemnation is constitutional. *Id.* at 491 (Kennedy, J., concurring). If a plaintiff makes "a clear showing" that a condemnation is "pretextual" and designed to benefit a private party, the judge should "*review the record to see if it has merit*, though with the presumption that the government's actions were reasonable." *Id*. (emphasis added). This would make no sense under the hypothetical version of the rational basis test adopted by the court below. Under *that* approach, a court could always manufacture its own purely imaginary basis justifying a condemnation.

Most of all, the version of rational basis endorsed below is disturbing in light of the basic proposition that due process of law protects every person's right to "the benefit of the general law . . . which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only

after trial." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). A legal rule that allows the fact-finder to base its judgment on *admittedly manufactured* evidence—on *post-hoc* rationalizations invented by the judge—violates these basic precepts.

Perhaps the clearest proof of the problems created by the hypothetical rational-basis theory is to be found in an oral argument in a Ninth Circuit case in which Judge William Fletcher sought to clarify what is meant by the idea of negating every "conceivable" basis for a law:

> Judge Fletcher: Can I get at your definition of "conceivable?" To take an outer-boundary sort of example. . . .
>
> [Justice Department Attorney]: Sure.
>
> Judge Fletcher: . . . not related to this case. Is it conceivable that space aliens are visiting this planet in invisible and undetectable craft?
>
> [Attorney]: Is it conceivable?
>
> Judge Fletcher: That's my question.
>
> [Attorney]: Yes, it's conceivable.
>
> Judge Fletcher: And that would be a basis for sustaining Congressional legislation, if . . . the person sponsoring the bill said, "Space aliens are visiting us in invisible and undetectable craft, and that's the basis for my legislation," we can't touch it?

> [Attorney]: If Congress made a finding of that sort?
>
> Judge Fletcher: That's my question.
>
> [Attorney]: Your Honor, I think if Congress made a finding of that sort, I think, Your Honor, it would not be appropriate for this Court to second guess that.
>
> Judge Fletcher: Okay, in other words, "conceivable" is "any piece of nonsense is enough."
>
> [Attorney]: Your Honor, I don't think. . . . It is largely unbounded. It is not completely unbounded. There are the outlying—
>
> Judge Fletcher: How can you say it's not completely unbounded when you agreed with my absolutely preposterous example of what's conceivable?

Quoted in Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1080 n.68 (2007).

That should not be the law—and *cannot* be, since plaintiffs *do* sometimes win rational-basis cases. Yet given the lack of definition in the law, it is a plausible interpretation of what rational basis means. All this confusion proceeds from the same faulty premise: that courts can *manufacture* justifications for challenged laws, without any genuine factual basis in the record. Only this Court can clarify the vague boundaries of

rational basis and ensure that that test is not rendered utterly *irrational*.

CONCLUSION

It should not be a remarkable proposition that courts rely on actual facts in making decisions. The court below, however, relied on a theory that expressly allows courts to manufacture their own facts and to render judgment based not on the reality of the case but on a judge's mere imagination. That rule does not just contradict the basic principles of due process—it generates considerable confusion among trial courts that do not even know how to deal with motions to dismiss in light of this test. This Court alone can resolve this problem.

The petition should be *granted*.

Respectfully submitted:

DATED: May, 2018

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