No. _____

In The

Supreme Court of the United States

URSULA NEWELL-DAVIS; SIVAD HOME AND COMMUNITY SERVICES, LLC,
Petitioners,

v.

COURTNEY N. PHILLIPS,
in her official capacity as Secretary of the Louisiana Department of Health, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Each year, dozens of individuals attempt to secure a "respite care" license in Louisiana, which would allow them to offer short-term relief to primary caregivers of special needs children. But state law excludes 75% of them from the process, no matter their qualifications, on the grounds that they are "unneeded." The Department's sole reason for this scheme is "eas[ing] its regulatory burden," which it contends "self-evidently" benefits the public.

Ms. Newell-Davis brought a civil rights lawsuit arguing that her exclusion from a common and lawful occupation deprived her of equal treatment, due process, and the privileges or immunities protected by the Fourteenth Amendment. The district court ruled that reducing the government's administrative burden satisfies rational basis scrutiny and that Ms. Newell-Davis's Privileges or Immunities claim was barred by the *Slaughter-House Cases*. The Fifth Circuit affirmed. The questions presented are:

1. Whether the state may deny equal protection of the laws and exclude people from a trade for the sole purpose of easing its regulatory burden, or whether restrictions on the right to enter a common and lawful occupation require more scrutiny?

2. Whether this Court should overrule the *Slaughter-House Cases* and hold that the right to enter a common and lawful occupation is a privilege or immunity protected by the Fourteenth Amendment?

PARTIES

Petitioners are: Ursula Newell-Davis and Sivad Home and Community Services, LLC.

Respondents are: Courtney N. Phillips, in her official capacity as Secretary of the Louisiana Department of Health; Julie Foster Hagan, in her official capacity as Assistant Secretary of the Louisiana Department of Health's Office for Citizens with Developmental Disabilities; Facility Need Review Program Manager of the Louisiana Department of Health; Ruth Johnson, in her official capacity as Undersecretary of the Louisiana Department of Health; Tasheka Dukes, in her official capacity as Health Standards Section Director of the Louisiana Department of Health.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporations and no publicly held company owns 10% or more of the stock of the business.

RELATED PROCEEDINGS

The proceedings in federal district and appellate courts identified below are directly related to the above-captioned case in this Court.

Newell-Davis v. Phillips, 551 F. Supp. 3d 648 (E.D. Louisiana Aug. 2, 2021)

Newell-Davis v. Phillips, 592 F. Supp. 3d 532 (E.D. Louisiana Mar. 22, 2022)

Newell-Davis v. Phillips, 55 F.4th 477 (5th Cir. Dec. 13, 2022)

Newell-Davis v. Phillips, No. 22039166, 2023 WL 1880000 (5th Cir. Feb. 10, 2023)

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitution

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Ursula Newell-Davis and Sivad Home and Community Services, LLC, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS

The revised panel opinion of the Court of Appeals, issued at the same time as the denial of petition for rehearing *en banc*, is not published, but is included in Petitioners' Appendix (Pet. App.) at 1a. The decisions of the district court are published at 551 F. Supp. 3d 648 (E.D. La. 2021), and 592 F. Supp. 3d 532 (E.D. La. 2022), and included at Pet. App. 18a, Pet. App. 54a.

JURISDICTION

The district court had jurisdiction over this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The district court granted the defendants' motion for summary judgment on March 22, 2022. Petitioners filed a timely appeal to the Fifth Circuit. On December 13, 2022, a panel of the Fifth Circuit affirmed. Petitioners then filed a timely petition for rehearing *en banc*. The petition was denied on February 10, 2023. This Court granted an extension of time to file this petition to June 12, 2023, and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fourteenth Amendment to the Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. Admin. Code tit. 48, § 12523(A) states:

> No HCBS provider shall be licensed to operate unless the [Facility Need Review] Program has granted an approval for the issuance of an HCBS provider license. Once the FNR Program approval is granted, an HCBS provider is eligible to be licensed by the department, subject to meeting all of the requirements for licensure.

INTRODUCTION

The Louisiana Department of Health effectively grants a monopoly over services for special needs kids, and it does so—in its own words—to "ease[] its regulatory burden."

Respite work[1] is a licensed profession in Louisiana, but before a person can apply for licensure, applicants must undergo what's called Facility Need Review (FNR). La. Admin. Code tit. 48, § 12523(A). FNR does not evaluate an applicant's qualifications, but instead rests on four bureaucrats' determination of whether another provider is "needed" in the community. In 2020, the Department denied FNR to Petitioner Ursula Newell-Davis,[2] a social worker in New Orleans for over twenty years. According to the Department, reducing the number of individuals in the trade (even if they are qualified) "self-evidently" benefits the public by allowing regulators to pay more attention to incumbent licensees. ROA.2420, ROA.2440.[3]

Emboldened by the lack of respite services she had witnessed firsthand and her desire to help New Orleans mothers she had seen struggle without care, Ms. Newell-Davis brought this civil rights lawsuit on the basis that FNR deprives her of equal protection, due process, and the privileges or immunities protected by the Fourteenth Amendment. The district court dismissed her privileges or immunities claim as precluded by the *Slaughter-House Cases*. Pet. App. 74a. On summary judgment, it ruled that the Department could deny equal protection and deprive people of their ability to enter a lawful trade to

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[1] Respite services are "an intermittent service designed to provide temporary relief to unpaid, informal caregivers of the elderly and/or persons with disabilities." La. Admin. Code tit. 48, § 5003.

[2] Petitioners are referred to collectively as "Ursula Newell-Davis."

[3] All citations to the record are to the Fifth Circuit's Record on Appeal (ROA).

conserve its resources for other administrative tasks. Pet. App. 47a. The Fifth Circuit affirmed, holding that "by limiting the number of providers in the respite care business, the State can focus its resources on a manageable number of providers." Pet. App. 9a.

Both rulings were wrong. While rational basis scrutiny is deferential, the Fifth Circuit's rationale would eviscerate it altogether because arbitrarily discriminating between parties or depriving them of their constitutional rights can *always* be said to conserve governmental resources in some way.

This Court has held that a government agency's administrative ease, or in the Fifth Circuit's wording, the state's ability to "focus its resources," doesn't satisfy rational basis scrutiny. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982); *Mayer v. City of Chicago*, 404 U.S. 189, 198 (1971); *Vlandis v. Kline*, 412 U.S. 441, 451 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). But at other times, it has said the opposite. *See, e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 673 (2012); *Mathews v. Lucas*, 427 U.S. 495 (1976). This Court should grant certiorari to clarify that the state cannot deny equal treatment or deprive qualified individuals of their right to enter a trade simply to make the state's job easier.

This Court should also grant the petition to recognize that the right to enter a common and lawful occupation is entitled to a higher level of protection, either because it is a deeply rooted, fundamental right under *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228 (2022), or because it is a privilege or immunity protected by the Fourteenth Amendment. The right to

enter a common and lawful occupation has a historical pedigree unmatched by nearly any other right. *See, e.g.*, *Golden Glow Tanning Salon, Inc. v. Columbus*, 52 F.4th 974, 982 (2022) (Ho, J., concurring) (recounting the right's historical grounding). Yet it has been relegated to the lowest tier of scrutiny under the Due Process Clause and written out of the Privileges or Immunities Clause entirely by the *Slaughter-House Cases*, 83 U.S. 36 (1873).

Scholars, historians, and jurists agree, *Slaughter-House* was egregiously wrong. By narrowing the Privileges or Immunities Clause to rights that "owe their existence to the federal government," *id.* at 79, it "strangled the … clause in its crib." *See, e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 305 (1998). As is nearly universally acknowledged, "[t]he Civil War was not fought because States were attacking people on the high seas or blocking access to the Bureau of Engraving and Printing." Tr. of Oral Arg., *McDonald v. City of Chicago*, 561 U.S. 742 (2010). It was fought to protect the right of every citizen to speak, to defend oneself, and to earn a living. The text and history show that the Privileges or Immunities Clause protects at least those rights secured by the Civil Rights Act of 1866 and the Privileges *and* Immunities Clause as articulated in *Corfield v. Coryell*, 6 F. Cas. 546 (1823), which include the right to enter a common and lawful occupation. This case presents an excellent vehicle to correct that 150-year-long error, which subverts civil rights law to this day.

STATEMENT OF THE CASE

A. Factual Background

1. The Louisiana Law

Respite workers offer parents, family members, and other caregivers of special needs children short-term relief from caregiving. La. Admin. Code tit. 48, § 5003. In Louisiana, becoming a respite provider requires licensure, including meeting minimum standards, initial inspections, and re-licensure every year. La. Admin. Code. tit. 48, Pt. I, §§ 5005, 5007, 5009, 5017. But before anyone can even apply for licensure in the state, they must first convince the Department of Health that another provider is "needed" through a process called Facility Need Review. La. Admin. Code tit. 48, § 12523(A).

FNR was instituted by the Department through regulation in 2012. It has nothing to do with a person's qualifications; it pertains solely to whether the Department believes there is a satisfactory number of providers in the community. If an applicant can persuade the FNR committee that another provider is needed, he or she may then proceed to licensure. If not, the applicant is locked out of the trade.[4]

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[4] The Department does not have any internal documents, procedures, or protocol to guide the four-person FNR Committee in determining whether a new provider is "needed." ROA.2703:16-25, ROA.2771:20-2772:4, ROA.2748:14-2749:18, ROA.2761:1-13. And it testified that FNR decisions are often not actually based on the applicant's evidence but instead on what Committee members already believe to be true about the need in

The entire FNR charade seems unnecessary given that the Department itself testified that more respite services are needed in Louisiana. *See, e.g.*, ROA.3115:24-3116:5 (testifying that "there's always a need" for more respite providers in Louisiana); ROA.2782:3-25 (testifying to a shortage of center-based respite providers); *see also* ROA.2624 ("short-term respite providers are always needed"). Nevertheless, the Department denies about 75% of those who apply. ROA.3239.

As a social worker, Ms. Newell-Davis witnessed the need for more respite services firsthand, so she set out to apply for FNR in 2019. She presented evidence that respite services were lacking in New Orleans, including statements from local leaders and state officials supporting her application. ROA.2636-2642. She also cited studies showing that respite care can lead to better behavioral outcomes for children and less stress for their family members. But in 2020, the Department denied her application in a two-page form letter. ROA.3356. The Department freely admits the denial had nothing to do with her qualifications. ROA.2416, 3356. It further admits that it denies qualified applicants through FNR and that there's no reason to believe that a person who has been granted

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a given area. ROA.2693:8-18. That probably explains why, when presented with five prior applications at his deposition, the Department's 30(b)(6) witness could not correctly identify the outcome of a majority of them. *See, e.g.*, ROA.2716:24-2717:4, ROA.2469; ROA.2718-22, ROA.2474; ROA.2719:15-2760:1, ROA.2476.

FNR approval is any more fit to provide care than someone who has been denied. ROA.2714:15-2715:5.

2. The State Interests Served by FNR

Throughout the entirety of litigation, the only justification the Department gave for FNR is that "limiting the number of HCBS providers eases its regulatory burden," which it contends "self-evidently" benefits the public. ROA.2420, ROA.2440. The Department does not have any evidence that this is true. ROA.2457-2458, ROA.2417-2420. Nor does it have any evidence that respite care was worse prior to FNR, ROA.3053:8-12, or that it cannot adequately regulate more providers, ROA.3057:23-3058:1, ROA.3057:23–3058:1, ROA.2425–2426, or that the quality of care would worsen if FNR was removed. The Department doesn't measure the quality of care at all. ROA.2457-2458.

Ms. Newell-Davis argued that easing the Department's regulatory burden, alone, cannot justify treating similarly situated individuals unequally or depriving them of their constitutional rights. She also provided evidence that FNR was not rationally related to any public benefit and instead is associated with higher costs and lower quality care, and makes an existing shortage worse. She further presented testimony from four mothers describing inadequate respite care in New Orleans. Pet. App. 86a-100a. One mother recounted that she experienced such difficulty attempting to find respite care for her special needs son that she lost her job, and then her home, while trying to care for her child herself. Pet. App. 90a-91a. She finally reached a point of "such emotional and

financial desperation" that she considered the "unimaginable" choice of giving up her son for adoption. *Id*. Yet another testified that a lack of respite care caused her to halt proceedings to adopt a child with severe behavioral challenges. Pet. App. 87a.

The Department's own expert report further supports the conclusion that FNR irrationally puts scarce care further out of reach. The expert determined that more than 80% of licensed respite providers in New Orleans are either limiting new clientele or cannot be reached at all. ROA.3236-3237. He testified that New Orleans parents in need of respite care are "almost twice as likely *not* to be able to reach [a] provider" than able.[5] ROA.3236-3237 (emphasis added).

The Department never contended that FNR directly improves quality of care, but Ms. Newell-Davis introduced evidence that FNR does not. She showed that the number of complaints in Louisiana has risen year after year, ROA.825, and a national survey suggests Louisianans are less satisfied with their care than residents of other, non-FNR states. ROA.819. An expert analyzed 72 peer-reviewed studies and concluded that need review does not have

[5] In other words, the Department has been making FNR decisions based on a misunderstanding of the actual number of businesses operating in Louisiana, since 36% are fully non-operational and another 44% are limiting new clientele. And it has been limiting the number of respite providers by as much as 75% during a time when there is a shortage. If that isn't arbitrary or irrational, nothing is.

any beneficial effects on quality, costs, spending, or access. ROA.3314.

The Department did not offer one piece of evidence to the contrary apart from its expert report, and the author testified that he did not consider or study the quality of care in the state. ROA.3159:15–19, ROA.3205:14-16. He further testified that he was unaware of "any evidence that need review improves quality in home health in any state." ROA.3218:8-15.

3. Petitioners

Ursula Newell-Davis is a mother, entrepreneur, and social worker, and a resident of Orleans Parish, Louisiana. Pet. App. 79a. She holds undergraduate and master's degrees in Social Work from Southern University at New Orleans and has been employed as a social worker in Louisiana for over two decades. *Id*.

As the mother of a special needs child, she is devoted to offering other parents the same support that she is fortunate enough to have and dedicated to child welfare. Pet. App. 79a-82a. As a social worker, she witnessed firsthand that when parents lack access to care, they sometimes leave their children home alone. *Id*. Between the lack of care and their disabilities, these children neglect their homework or fail at basic tasks like showering, brushing their teeth, or changing their clothes, which can result in being bullied at school. *Id*. Being left unsupervised can also leave children that are eager for acceptance vulnerable to crime. *Id*. In 2019, after being asked by several families to provide respite care, she had seen

enough heartbreak in her community and applied for Facility Need Review. Pet. App. 83a.

B. Legal Background

1. District Court Proceedings

Ms. Newell-Davis brought this civil rights lawsuit under the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment to the U.S. Constitution and the due process and equal protection provisions of the Louisiana Constitution. On August 2, 2021, the district court granted the Department's motion to dismiss her Privileges or Immunities claim but denied the motion in all other respects. Pet. App. 54a. On March 22, 2022, the district court granted the Department's motion for summary judgment on the basis that it may constitutionally exclude people from respite care solely to conserve its resources for "focus[ing] on regulating already-licensed providers." Pet. App. 47a.

2. The Fifth Circuit's Decision

On December 13, 2022, the Fifth Circuit affirmed, ruling that FNR benefits the public by allowing the Department to focus its resources on fewer licensees. *Newell-Davis v. Phillips*, 55 F.4th 477 (5th Cir. 2022). It took "no stance" on whether the right to earn a living in a chosen profession free from unreasonable government interference "is cognizable under the Due Process Clause." *Id.* at 485. But assuming that it was, the Panel held that the law satisfied due process for the same reason it satisfied equal protection. It further ruled that the Privileges or Immunities claim

was foreclosed because the clause only protects "uniquely federal rights." *Id.* at 486.

Ms. Newell-Davis then requested rehearing *en banc*. On February 10, 2023, the panel withdrew and revised its decision in light of the petition but denied rehearing. Pet. App. 1a. In its revised opinion, the Panel once again ruled that "by limiting the number of providers in the respite care business, the State can focus its resources on a manageable number of providers." Pet. App. 10a. But this time it added that "the State argues that resource constraints make effective oversight impossible" in the absence of FNR. Pet. App. 10a. That wasn't true. The state had never argued that it would be unable to complete its required regulatory tasks absent FNR. ROA.3057:23-3058:1. In fact, the Department admitted it does not consider its resources during the FNR process, ROA.1241-1242, it has no idea how many licensees it has the capacity to regulate, and it does not know whether it has the capacity to regulate more licensees than it currently does. ROA.2425-2426. It merely asserted that removing FNR would require it to regulate "unnecessary" parties and the Department would prefer to use those resources for periodic inspections that aren't even required by law. La. Admin. Code. tit. 48, Pt. I, § 5017.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Opinion Conflicts with This Court's Precedent, Which Itself Is Unclear

The Fifth Circuit ruled that the Department can deny individuals equal protection and their

constitutionally protected right to enter a lawful trade because doing so helps it to better regulate those already within the profession. That holding conflicts with this Court's precedent. In several cases, this Court has ruled that the Constitution requires that the government have good reason for treating similarly situated parties differently or depriving people of constitutionally protected liberty, and saving time or money isn't one of them. *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (rejecting state's argument that it could deny equal protection to "preserv[e] … the state's limited resources"); *cf. Mayer v. City of Chicago*, 404 U.S. at 198 (1971) (state's "fiscal interests" could not justify line drawing); *see also Vlandis v. Kline*, 412 U.S. at 451 (1973) (the state's interest in "administrative ease" did not satisfy due process); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (state's interest in "prevent[ing] any increase in its fiscal and administrative burdens" was not sufficient to satisfy procedural due process); *see also Vote Forward v. DeJoy*, 490 F. Supp. 3d 110, 128 (D.D.C. 2020) (saving money on voting procedures cannot justify disenfranchisement). That's true even if the government thinks depriving people of liberty or equality for its own administrative ease benefits the public.

In *Plyler*, 457 U.S. at 227, for example, Texas eliminated educational funding for undocumented children so it could focus its resources on students that were documented. It reasoned that more spending on documented children would result in better quality education for those children. *Id.* This Court ruled that "concern for the preservation of resources standing alone," could not "justify the

classification used in allocating those resources." *Id.* The State failed to show that there'd be an influx of immigrants absent the law leading to some kind of burden on the state. *Id.* at 227-30. Nor could it show that increasing spending would improve the quality of education. *Id.* at 227-30. But even assuming either was true, such a rationale did not bear a rational relationship to the classification between documented and undocumented children, since there was no evidence that undocumented students presented a special burden on state coffers. *Id.*

In other cases, however, this Court has deviated from that principle. In *Armour*, 566 U.S. 673, which the Department cited in its briefs on appeal, this Court upheld a city's refusal to issue refunds for tax assessments that had been paid before it adopted a new tax law. The result was that some residents, who had paid early, ended up paying more than the residents who had elected to delay payment. Its sole justification was that issuing refunds would cause the government to incur additional expenses. Yet this Court ruled that "administrative considerations can justify a tax-related distinction." *Id.*

Similarly in *Mathews*, 427 U.S. 495, this Court ruled that a state's presumption that legitimate children were dependents (and illegitimate children were not) did not violate equal protection because it allowed the state to avoid the burden and expense of individualized determinations. *Id.*

This Court should clarify that the principles announced in *Plyler* prevail. First, equal protection does not merely require a legitimate end; it requires

that the end rationally relate to the classification. Here, for example, administrative ease does not relate to the classification between those allowed and those excluded. FNR does not exclude providers who are less fit, who may drain state resources, or those providers who would otherwise have the biggest effect on state coffers. As the Department testified, there is no reason to believe someone who passes FNR is more qualified than someone who does not. Nor does FNR make distinctions based on whether the applicant would provide high-quality service, offer lower prices, or improve access to care. The result is to deny even the most qualified individuals—who would make the Department's job *easier*—permission to seek licensure. The Fifth Circuit's rationale would thus justify even indisputably irrational measures, like limiting licenses to people whose last names start with A, since such an absurd restriction would nonetheless limit the number of providers and make it easier to regulate existing licensees. FNR is arbitrary discrimination, pure and simple, and it should not be allowed given the existence of a constitutional provision that promises equal protection of the laws.

Second, accepting the Fifth Circuit's argument under due process would eviscerate rational basis scrutiny altogether. The panel's argument is circular: the Department can deprive people of constitutional rights because doing so allows it to oversee fewer people exercising their constitutional rights. This is especially problematic because limiting the number of people exercising their rights can always be said to save the government time or money. If there were fewer voters, the government could spend fewer

resources on ballots and election judges. If there were fewer restaurants, the government could spend less on inspections. If there were fewer drivers, the government could spend less on roads, or DMV workers, or highway patrol. The way the government ensures health and safety is by enforcing health and safety regulations, not by limiting the number of qualified people who can lawfully exercise their rights.[6]

This Court should grant the petition to clarify that even under rational basis scrutiny, the government cannot exclude people from an occupation for reasons unrelated to their qualifications to make it easier for the government to regulate those already within it.

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[6] If conserving resources to regulate other parties were enough to satisfy the rational basis requirement, then every regulation limiting economic activity would have to be upheld. It would mean that *Plyler*, *Zobel v. Williams*, 457 U.S. 55, 56 (1982) (invalidating residency-based tax dividend structure), and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating the exclusion of certain households from food stamp eligibility), were all wrong, since they could be said to have saved the government money, which it could use to enforce other regulations. The Fifth Circuit's holding makes the "presumption of constitutionality" traditionally afforded to economic regulations exactly what the Supreme Court has said that it is not: "a rule of law which makes legislative action invulnerable to constitutional assault." *Borden's Farm Prod. Co. v. Baldwin*, 293 U.S. 194, 209 (1934).

II. The Right to Enter a Common and Lawful Occupation is a Deeply Rooted Right

In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), this Court clarified the framework for determining when a right is "fundamental": it must be "deeply rooted in this nation's history" and "essential to our Nation's 'scheme of ordered liberty.'" *Id.* at 2246. The right to enter a common and lawful occupation, particularly the centuries-old occupation of caring for children, fits squarely within that framework, and this Court should grant the petition to say so.

First, the right is deeply, *deeply* rooted. The right to enter a "known established trade" was "among the most cherished principles in English law," dating back as far as the 14th century. *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 209-17 (2003) (collecting cases dating back to 14th century); Bernard H. Siegan, *Protecting Economic Liberties*, 6 Chap. L. Rev. 43, 51 (2003) (citing common law cases protecting economic rights generally). Blackstone wrote that "[a]t common law, every man [was free to] use what trade he pleased." Commentaries Vol. 1 *427. The English had a "hatred of monopolies," Steven G. Calabresi, et al., *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 989 (2013), which included not only exclusive grants to a single provider, but also exclusive grants to a favored group of providers, like a guild. *See The Tailors of Ipswich Case*, 77 Eng. Rep. 1218, 1219 (K.B. 1614) (Coke, C.J.)

Sir Edmund Coke was a vociferous opponent of monopolies, which he believed violated both the

Magna Carta and the common law. His account of *Darcy v. Allen*, 77 Eng. Rep. 1260 (Q.B. 1603), heavily influenced the Founders. In that case, the English common law court struck down a royal grant to produce and sell trading cards. Coke's account notes that "all grants of monopolies are against the ancient and fundamentall laws of this kingdome," because "a mans trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a mans trade, taketh away his life." Edward Coke, *The Third Part of The Institutes of The Laws of England* 181 (1669). Like Coke and other Englishmen before them, the Founders were concerned about laws that excluded individuals from their desired trade and deprived them of a living. Such opposition stemmed from the Lockean belief in self-ownership and antipathy towards class-legislation. Calabresi, *supra*, at 1024-26.

According to James Madison, it "is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called." James Madison, *Property* (Mar. 29, 1792) in 14 *The Papers of James Madison* (William T. Hutchinson et al. ed. 1987). In a letter to Madison, Thomas Jefferson noted that he disapproved the proposed Constitution's omission of "a Bill of rights providing clearly … for freedom of religion, freedom of the press, protection against standing armies, *restriction against monopolies*, the eternal and unremitting force of the habeas corpus laws, and

trials by jury." Letter from Jefferson to Madison (Dec. 20, 1787), *in* 12 *The Papers of Thomas Jefferson* 438, 440 (J. Boyd ed. 1955) (emphasis added).[7] Six of the ratifying states recommended an explicit prohibition on monopolies. Calabresi, *supra*, at 1013-15. For comparison, just four demanded express protections for due process of law, speedy and public trials, and the right to assemble and petition the government. *See* Conant, *supra*, at 800.

Several state courts recognized the common law right against exclusions from a trade in the years leading up to the Fourteenth Amendment. Calabresi, *supra*, at 1043. Others exhibited commitment to the right to enter an occupation, subject to health or safety regulations, in cases enforcing the Contracts Clause and the Privileges and Immunities Clause of Article IV. *See, e.g.*, *Corfield v. Coryell*, 6 F. Cas. 546, 552 (1823) (calling the right "to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise" foundational). In 1776, George Mason began the Virginia Declaration of Rights with the phrase, "That all men are by nature equally free and independent, and have certain inherent rights ... namely, the enjoyment of life and liberty, *with the means of acquiring and possessing property*, and pursuing and obtaining happiness and safety." 6 Robert Allen

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[7] Jefferson repeated his desire for a prohibition on monopolies in letters to Madison in 1788 and in 1789. *See* Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 Emory L.J. 785, 800 n.72 (1982).

Rutland, *George Mason: Reluctant Statesman* 111 (1961) (emphasis added).

Slaughter-House, of course, upheld a monopoly. But in doing so, the Court didn't deny the long history of anti-monopoly in the common law or the existence of a right to enter a trade. It said only that the right wasn't protected by the Privileges or Immunities Clause. After *Slaughter-House*, this Court continued to recognize the right to enter a common occupation under the Due Process and Equal Protection Clauses. *See, e.g.*, *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888) ("enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade ... is an essential part of his rights of liberty and property as guarantied by the fourteenth amendment"); *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) (referring to the "right of every citizen of the United States to follow any lawful calling, business, or profession he may choose"); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (the Fourteenth Amendment encompasses "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned"); *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("[T]he right to work for a living" is "the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (The Fourteenth

Amendment includes "the right of the individual to contract, to engage in any of the common occupations of life … and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."). *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (same).

It wasn't until the New Deal that the right to enter a trade, at one time the "distinguishing feature of our republican institutions," *Dent v. West Virginia*, 129 U.S. 114, 121 (1889), was pushed aside, first with *Nebbia v. New York*, 291 U.S. 502 (1934), which reduced the standard of review, then *United States v. Carolene Products*, 304 U.S. 144, 150 n.4 (1938), which created tiers of judicial scrutiny that relegated the right to earn a living to the lowest level of protection. The consequence has been a legal regime that harms the vulnerable individuals and groups it purports to protect, since they no longer have effective judicial redress against rent-seeking by politically powerful groups. *See* David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 San Diego L. Rev. 89 (1994). And it will continue to be minorities and the politically powerless that suffer. *See Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) (the judiciary's excessive deference in takings cases "guarantees that these losses will fall disproportionately on poor communities").[8]

[8] The right at issue in this case is doubly deeply rooted, given that it entails caring for children—a profession that has existed since time immemorial. Licensure for things like respite care,

Many have observed that the right to enter a common occupation "has better historical grounding than more recent claims of right that have found judicial favor." James W. Ely Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. Pa. J. Const. L. 917, 953 (2006). It arguably has more of a historical pedigree than other unenumerated rights this Court has deemed fundamental, including the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to refuse unwanted lifesaving medical treatment, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535 (1942); to direct the upbringing of one's child, *Troxel v. Granville*, 530 U.S. 57 (2000); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923), or to travel, *Saenz v. Roe*, 526 U.S. 489 (1999).

In addition to being deeply rooted, the right to enter a common and lawful occupation is also

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daycare, and related trades did not exist until relatively recently, and babysitting continues to be unregulated. *See* Geraldine Youcha, *Minding the Children: Child Care in America from Colonial Times to the Present* (2005) (describing the history of childcare in the United States). Even within the occupation of respite care, Louisiana's scheme is an outlier. It is the only state that fully excludes qualified applicants through need review, rather than simply regulating the trade by imposing licensure or other health and safety requirements. ROA.2288:13-17. And need review laws in general did not exist until the 1970s. ROA.2151.

"essential to our Nation's 'scheme of ordered liberty.'" Indeed, it combines many of the most fundamental rights, like the right over one's faculties and one's labor and the right to equal treatment under law. It is a prerequisite to the exercise of most other rights, since the right to travel, speak, acquire property, and many others often require a livelihood to engage in them. What good is the right to speak if one cannot purchase paper or a pen? As this Court has written, the ability to deprive individuals "the opportunity of earning a livelihood" is "tantamount to the assertion of the right to deny them entrance and abode, for, in ordinary cases, [people] cannot live where they cannot work." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

As one Congressman said during the debates over the Fourteenth Amendment,

> it is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and rewards of labor.

Cong. Globe, 39th Cong., 1st Sess. 1833 (1866) (statement of William Lawrence). Because the "property which every man has in his own labor" is "the original foundation of all other property, [it] is the most sacred and inviolable." 1 Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* 151 (2d ed. 1778) (1776).

Given its rich history and fundamental nature, jurists have called on this Court to reconsider its

treatment of the right to enter a common occupation. Judge Sutton of the Sixth Circuit, for instance, recently remarked that:

> Many thoughtful commentators, scholars, and judges have shown that the current deferential approach to economic regulations may amount to an overcorrection in response to the *Lochner* era at the expense of otherwise constitutionally secured rights. And is there something to Justice Frankfurter's criticism of the dichotomy between economic rights and liberty rights, a dichotomy first identified in *Carolene Products*? But any such recalibration of the rational-basis test and any effort to create consistency across individual rights is for the U.S. Supreme Court, not our court, to make.

Tiwari v. Friedlander, 26 F.4th 355, 368-69 (6th Cir. 2022) (citations omitted).

Judge Ho of the Fifth Circuit similarly observed:

> The Supreme Court has recognized a number of fundamental rights that do not appear in the text of the Constitution. But the right to earn a living is not one of them—despite its deep roots in our Nation's history and tradition. Cases like this nevertheless raise the question: If we're going to recognize various unenumerated rights as fundamental, why not the right to earn a living? But that is for the Supreme Court to determine.

Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 981 (5th Cir. 2022) (Ho, J., concurring).

In a spirited concurrence, Judges Janice Rogers Brown and David Sentelle of the Court of Appeals for the District of Columbia lamented that:

> The practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions.

Hettinga v. United States, 677 F.3d 471, 482 (D.C. Cir. 2012) (Brown, J., concurring). She concluded "[r]ational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more." *Id.* at 483.

Recognizing the right to enter a common and lawful occupation does not mean that occupations cannot be regulated at all. Like any fundamental right, the government may not deprive people of it entirely, but it may impose restrictions on it. States can therefore impose health or safety regulations on people in the trade, including licensure requirements. Recognizing the right as fundamental merely requires that regulations that wholly exclude individuals from a lawful occupation for reasons unrelated to their fitness, let alone ones that do so solely to simplify a bureaucrat's workload, be accorded meaningful judicial scrutiny.

III. *Slaughter-House* Was Wrong and This Is an Excellent Vehicle to Overturn It

A. *Slaughter-House* Was Egregiously Wrong

Slaughter-House is atextual and ahistorical. "[V]irtually no serious modern scholar—left, right, or center—thinks that it is a plausible reading of the [Fourteenth] Amendment."[9] Akhil Reed Amar,

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[9] Even where they disagree on the Clause's scope, a vast array of scholars agree that *Slaughter-House* was wrong. *See, e.g.*, Randy E. Barnett & Evan Bernick, *The Original Meaning of the Fourteenth Amendment* 22 (2021); Ilan Wurman, *The Second Founding: An Introduction to the Fourteenth Amendment* (2020); Christopher R. Green, *Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause* (2016); Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 313-15, 317-18 (2007); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & Liberty 334, 342 (2005); Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. Contemp. Legal Issues 3, 20-25 (2009); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 Geo. L.J. 1241, 1244, 1287 (2010); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J. L. & Liberty 115 (2010); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio State L.J. 1509, 1562-63 (2007); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 22-30 (1980); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 163-230 (1998); Laurence Tribe, *American Constitutional Law* § 7-6 at 1320-31 (2000); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 Vand. L. Rev. 409, 449 (1990); Ilan Wurman & Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*,

Substance and Method in the Year 2000, 28 Pepp. L. Rev. 601, 631 & n.178 (2001). This Court should overturn that widely disparaged holding and make clear that the Privileges or Immunities Clause protects the right to enter a common and lawful occupation.

In *Slaughter-House*, 83 U.S. 36, a group of butchers challenged a Louisiana law that granted a monopoly over slaughtering in New Orleans to a single corporation. The butchers argued that the law deprived them of their livelihoods in violation of the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* at 60. In rejecting the butchers' claim, the five-justice majority distinguished between privileges or immunities of state and federal citizenship, ruling that the Clause protected only the latter. *Id.* at 74-75. According to Justice Miller, the butchers' reading would have "radically changed the whole of government," *id.*, and thus could not possibly have been the framers' intention. Instead, the Clause only secured rights that "owe their existence to the Federal government, its national character, its Constitution, or its laws," like the right to petition the government, to freely access to its seaports, and to demand the protection when on high seas or abroad. Later in *United States v. Cruikshank*, 92 U.S. 542 (1875), the Court narrowed those rights even further by ruling that inalienable rights that pre-dated the

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61 N.Y.U. L. Rev. 863, 932 (1986); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 628 n7 (1994) (collecting even more articles).

Constitution were also not protected, since they did not owe their existence to the federal government.

While the *Slaughter-House* majority relied on the "far reaching consequences" of the butchers' interpretation, the four dissenting justices analyzed the text and purpose of the Clause. In his dissent, Justice Field observed that the Fourteenth Amendment did, in fact, radically change the whole system of government by making Federal citizenship primary. 83 U.S. at 95. If the majority was correct that the Privileges or Immunities Clause only protected those rights of a national character, then it was redundant to the Supremacy Clause, which had always prohibited states from passing laws that conflicted with federal law or authority. *Id.* at 96.

In Justice Field's view, the Privileges or Immunities Clause protected those rights specified in the first section of the Civil Rights Act (which the Fourteenth Amendment was intended to codify), those rights protected by the Privileges *and* Immunities Clause (as elucidated in *Corfield v. Coryell*), and those that belong to "citizens of all free governments," which included "the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons." *Id.* at 98.

In his separate dissent, Justice Bradley agreed that the Clause protected fundamental rights that belong to "citizens of any free government," including "the rights of Englishmen," that "[t]he people of this country brought with them to its shores" and which had been wrested from English sovereigns at various periods of the nation's history." *Id.* at 114. Among

these rights were those protected by the Bill of Rights and the Privileges and Immunities Clause of Article IV.

Tracing the longstanding English opposition to monopolies through English history, Justice Bradley called "the right … to follow whatever employment he chooses to adopt (submitting himself to all lawful regulations)" one of the "most valuable rights." After all, no right was truly secure without the ability to earn. "Without this right," no one can "be a freeman." *Id.* 113-14. While states can "prescribe the manner of [its] exercise … [they] cannot subvert the right[] [itself,]" as Louisiana had by locking a large class of citizens out of the trade completely. *Id.* at 114.

In the final dissent, Justice Swayne responded to the majority's assertion that the dissenters would have rendered the federal government's power "novel and large." *Id.* at 129. "The answer," he wrote, "is that the novelty was known, and the measure deliberately adopted." *Id.* Before the Civil War, "ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States." *Id.* "That want was intended to be supplied" by the Fourteenth Amendment. "Without such authority, any government claiming to be national is glaringly defective." The majority's interpretation, he said, subverted both the intention and meaning of the clause and turned "what was meant for bread into a stone." *Id.* Scholars now agree that the dissenters were right: *Slaughter-House* "strangled the privileges-or-immunities clause in its crib." *See, e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 305 (1998).

First, the text. Even before the Founding, the terms "privileges" and "immunities" were used broadly to mean "rights," "liberties," or "freedoms." *See* Amar, *Bill of Rights* at 166-69. Blackstone's *Commentaries* spoke of "those 'immunities' that were the residuum of natural liberties and those 'privileges' that society had provided in lieu of natural rights." In several American colonial charters, the terms are used generically to mean "rights." Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 San Diego L. Rev. 777, 788 (2008) (citing charters of Virginia, Carolina, Maryland, and others).

This understanding continued through the framing of the Fourteenth Amendment. *See, e.g.*, N. Webster, *An American Dictionary of the English Language* 1039 (C. Goodrich & N. Porter rev. 1865) (defining "privilege" as "a right or immunity not enjoyed by others or by all" and listing as synonyms: "immunity," "franchise," "right," and "liberty"); *id.* at 661 (defining "immunity" as "[f]reedom from an obligation" or "particular privilege"); *id.* at 1140 (defining "right" as "[p]rivilege or immunity granted by authority"); *see also McDonald v. Chicago*, 561 U.S. 742, 814 (2010) (Thomas, J., concurring) (citing other dictionary definitions); Ohio Const. of 1851 art. I, § 2 (state constitution of Ohio, where the Clause's principal drafter John Bingham was barred, stating that "no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly"); Richard L. Aynes, *Ink Blot or Not? The Meaning of Privileges and/or Immunities*,

11 U. Pa. J. Const. L. 1295, 1312 (2009) (citing other contemporary examples).

Where a more specific right was intended, that specific right was articulated. The Articles of Confederation, for example, referred to the specific privileges of trade and commerce. Articles of Confederation and Perpetual Union, art. IV, § 1. The framers of the Fourteenth Amendment would not have used conceptual terms signifying broad and fundamental principles (well understood by the public) to secure the truncated list of rights recognized by the *Slaughter-House* majority.

"The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application." *McDonald*, 561 U.S. at 854 (Thomas, J., concurring). The Civil Rights Act and the Privileges and Immunities Clause offer two textual anchors for interpreting the Privileges or Immunities Clause. Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 Harv. J.L. & Pub. Pol'y 1 (2020); Randy E. Barnett & Evan Bernick, *The Original Meaning of the Fourteenth Amendment* 22 (2021); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J. L. & Liberty 115 (2010).

In the wake of the Civil War, Congress had first attempted to protect substantive rights through the Civil Rights Act of 1866. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, *supra*. That Act passed, but only after surmounting President Andrew Johnson's veto with a supermajority vote. *Id.* Because Johnson had argued

that the Act exceeded Congress's power under the Thirteenth Amendment, legislators sought to allay any lingering concerns by writing its protections into the Constitution via the Fourteenth Amendment. Those rights protected by the Civil Rights Act thus provide insight into the substantive rights protected by the Privileges or Immunities Clause. *Id.*

A second textual clue is the Privileges *and* Immunities Clause of Article IV. As Justice Field correctly observed in his *Slaughter-House* dissent, both clauses use the same terms, which would not have been lost on the Framers or the public. Under *Corfield v. Coryell*, 6 F. Cas. 546, 552 (1823), the Privileges and Immunities Clause was understood to protect the bill of rights and natural fundamental rights which "belong … to the citizens of all free governments."

The congressional debates confirm this understanding of the Clause. In a speech articulating the Amendment's meaning, Senator Jacob Howard, the Act's sponsor, said that while the full scope of the privileges or immunities "cannot be fully defined in their entire extent and precise nature," there were at least two places in the text of the Constitution that informed the definition: the federal Bill of Rights and Article IV's Privileges and Immunities Clause. Cong. Globe, 39th Cong., 1st Sess. 2764-67 (May 23, 1866) (speech of Jacob Howard). "The great object of the first section of this amendment," he said, "is to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* Representative John Bingham, who Justice Black called the "Madison of the first section of the

Fourteenth Amendment," *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting), similarly argued that an Amendment was needed to secure substantive rights given *Barron v. Baltimore*, which had ruled the Bill of Rights inapplicable to the states. Cong. Globe, 39th Cong., 1st Sess. 1089-90 (1866).

History further bolsters this interpretation. The Fourteenth Amendment arose in response to recalcitrance by former slave states, who continued to deprive former slaves their civil rights through the Black Codes even after those states' defeat in the Civil War and passage of the Thirteenth Amendment. *See* Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, *supra*. It was enacted against a backdrop of rampant discrimination and oppression, including deprivation of the right to bear arms, suppression of anti-slavery speech, and denial of property and contract rights. *See Report of The Joint Committee on Reconstruction* (1866) (detailing violence and deprivation of rights requiring new, substantive protections). The Fourteenth Amendment wasn't enacted to protect citizens, including newly freed Black individuals, on the high seas. It was meant to secure their civil rights, including rights to earn a living and keep what was justly theirs.

The *Slaughter-House* majority did not evaluate the original meaning of "privileges or immunities" as it was used by the public and the Framers of the Fourteenth Amendment. Instead, the opinion is based on the majority's incorrect belief that the Framers did not intend to "radically change[ ] the whole theory of the relations of the State and Federal governments." *The Slaughter-House Cases*, 83 U.S. at 78. But that

was the entire point: to make Federal citizenship paramount, and to act as a radical bulwark against state infringements of liberty. The majority's holding has rendered the Clause a "vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *Id.* at 96 (Field, J., dissenting).

B. The Right to Enter a Common and Lawful Occupation Is a Privilege or Immunity Protected by the Fourteenth Amendment

If the Privileges or Immunities Clause protects those rights secured by the Civil Rights Act, the Privileges and Immunities Clause as articulated in *Corfield* and other fundamental rights, then it protects the right to enter a common and lawful occupation. The Civil Rights Act was overwhelmingly concerned with protecting the economic rights of free Blacks. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment* 176 (2021).*See* also Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of The Republican Party Before the Civil War* ix (2d ed. 1995); James W. Ely, Jr., "*To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. Pa. J. Const. L. 917, 932 (2006). Moreover, *Corfield* mentions economic rights when interpreting the Privileges and Immunities Clause of Article IV. *See also* Cong. Globe, 35th Cong., 2nd Sess. 984, 985 (1859) (Section 1's author John Bingham arguing that the Privileges *and* Immunities Clause includes the right "to work and enjoy the product of [one's] toil."). Finally, as shown above, this

right had a long history dating back to English common law.

Representative John Bingham, primary author of Section 1, later said that "our own American constitutional liberty ... is the liberty ... to work an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil." Cong. Globe, 42nd Cong., 1st Sess. App. 86 (1871) (statement of Rep. Bingham). No reasonable person at the time of the Framing would have understood the Privileges or Immunities Clause to have excluded this right, and yet it is among the least protected in constitutional law today. This Court should grant certiorari to rectify that mistake.

C. This Case Is an Excellent Vehicle for Resolving the Questions Presented

If the Court is to overturn *Slaughter-House* and restore the Privileges or Immunities Clause's meaning, this is the case to do it. First, it does not involve mere regulation of an occupation, but a law that excludes people from even applying for a license to enter a lawful calling. It thus does not implicate run-of-the-mill health or safety regulations or even an abstract right to "economic liberty." It instead implicates the right not to be excluded from a lawful occupation for reasons wholly unrelated to one's qualifications.

Second, this is not a case that requires courts to weigh evidence or a case in which courts might be able to conjure a health or safety rationale for the challenged law. The Department did not assert any

other interest during litigation apart from its own convenience, which it conflated with a public benefit. Ms. Newell-Davis, by contrast, presented copious evidence that demonstrated that FNR is not rationally related to any other conceivable interest, including improving the quality of or preserving access to care. If subjected to anything other than the most toothless version of rational basis review, the state's proffered reason for excluding Ms. Newell-Davis fails.

Third, this is undoubtedly a case of nationwide importance. It involves an error widely believed to have set the trajectory of the Fourteenth Amendment in the wrong direction, and in this case it affects desperately needed care for special needs children and their families. This Court should take up this case to do what the *Slaughter-House Cases* did not: recognize that a Louisiana regulation barring qualified persons from earning their livelihood in a lawful occupation affects a fundamental right protected by the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: June 2023.

Respectfully submitted,

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Appendix A-1

TABLE OF CONTENTS

Filed February 10, 2023

United States Court of Appeals
for the Fifth Circuit

No. 22-30166

URSULA NEWELL-DAVIS; SIVAD HOME AND COMMUNITY SERVICES, L.L.C.,

Plaintiffs—Appellants,

versus

COURTNEY N. PHILLIPS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH; JULIE FOSTER HAGAN, IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH'S OFFICE FOR CITIZENS WITH DEVELOPMENTAL DISABILITIES; FACILITY NEED REVIEW PROGRAM MANAGER OF THE LOUISIANA DEPARTMENT OF HEALTH; RUTH JOHNSON, IN HER OFFICIAL CAPACITY AS UNDERSECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH; TASHEKA DUKES, IN HER OFFICIAL CAPACITY AS HEALTH STANDARDS SECTION DIRECTOR OF THE LOUISIANA DEPARTMENT OF HEALTH,

Defendants—Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
USDC No. 2:21-CV-49

ON PETITION FOR REHEARING EN BANC

Before KING, STEWART, and HAYNES, *Circuit Judges*.

PER CURIAM:*

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED and our prior panel opinion, *Newell-Davis v. Phillips*, 55 F.4th 477 (5th Cir. 2022), is WITHDRAWN. The following opinion is SUBSTITUTED therefor.

Ursula Newell-Davis ("Newell-Davis") and Sivad Home and Community, LLC (collectively "Sivad-Home") appeal the district court's grant of a motion to dismiss and motion for summary judgment for the State after Newell-Davis alleged numerous state and federal constitutional violations in connection with the State's Facility Need Review program ("FNR" or "FNR program"). As a healthcare program, the FNR program survives rational basis review, and the Supreme Court has foreclosed Sivad-Home's Privileges or Immunities Clause claim. Therefore, we AFFIRM.

* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

I. FACTS & PROCEDURAL HISTORY

A. Respite Care Licensing & Pre-Litigation Events

Louisiana law forbids individuals from offering respite care services[1] without first obtaining a license from the Louisiana Department of Health ("LDH"). *See* LA. REV. STAT. § 40:2120.6. Before LDH conducts its official review of a potential respite care business, it requires each prospective business to apply to its FNR program. The FNR program permits LDH to first "determine if there is a need for an additional [respite care] provider in the geographic location for which the application is submitted." LA. ADMIN. CODE tit. 48 § 12523(C)(1). Businesses move past FNR if they can establish "the probability of serious, adverse consequences to recipients' ability to access health care if the provider is not allowed to be licensed." *Id.* at 12423(C)(2). A committee of four members reviews FNR applications every two weeks and works closely with local governments to stay apprised of pending needs in each respective locality.

Newell-Davis is an entrepreneur and licensed social worker in New Orleans. As the mother of a special needs child, she has an intimate understanding of the demand for respite care services. At the request of members of her community, she created Sivad Home and Community Services, LLC with the intention of using her education and

[1] *See* LA. ADMIN. CODE tit. 48 § 5003 (defining "respite care" as "an intermittent service designed to provide temporary relief to unpaid, informal caregivers of the elderly and/or persons with disabilities").

expertise to offer additional respite care services in New Orleans. She sought to license her business in accordance with state law and submitted an FNR application to LDH. Without evaluating her qualifications, LDH denied Sivad-Home's application solely because it did not believe another respite care business was necessary in New Orleans. Dissatisfied with her denial, she sued Courtney Phillips—in her official capacity as Secretary of LDH—and various other state entities (collectively the "State") in federal district court.

B. District Court Proceedings

At the district court, Sivad-Home brought facial and as-applied constitutional challenges to the FNR program under both federal and state due process and equal protection clauses. She also brought a challenge under the Fourteenth Amendment's Privilege or Immunities Clause. Specifically, she contended that FNR: (1) treated her "differently than others similarly situated without serving any legitimate government interest"; (2) drew "arbitrary and irrational distinction[s] between respite care providers who may legally provide care and those who may not"; and (3) interfered with citizens' "right to earn a living in a chosen profession free from unreasonable government interference."

In response to Sivad-Home's suit, LDH filed a Rule 12(b)(6) motion to dismiss. LDH argued that FNR is essentially an economic regulation and, thus, subject to rational basis scrutiny, which FNR survived. The district court granted LDH's motion on the Privileges or Immunities clause issue, holding that the clause

only protects "uniquely federal rights," and that "the right to earn a living in a lawful occupation of one's choice" was not "a uniquely federal right." The district court, however, allowed Sivad-Home's equal protection, substantive due process, and state law claims to go forward.

After discovery, both parties filed cross-motions for summary judgment. First, the district court analyzed Sivad-Home's substantive due process and equal protection claims, concluding that both were "governed by the rational basis standard." The district court reasoned "that FNR [was] rationally related to the legitimate interest of enhancing consumer welfare" because it allowed LDH "to prioritize [] post-licensure compliance surveys that ensure client health, safety and welfare, over the resource intensive and costly initial licensing surveys." Therefore, it held that Sivad-Home did not meet her "heavy burden to negative every conceivable basis which might support FNR."

Second, the district court addressed Sivad-Home's state law claims, noting that "Louisiana's due process guarantee does not vary from the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Accordingly, it held that her "state law due process claim failed for the same reason" as her federal claim. It also ruled against her state equal protection clause claim, holding that she failed to show "that FNR does not suitably further an appropriate state interest." Ultimately, it granted LDH's motion for summary judgment on all three remaining issues. Sivad-Home timely appealed.

On appeal, Sivad-Home asks this court to reconsider her: (1) due process and equal protection claims under the Fourteenth Amendment of the United States Constitution; (2) due process and equal protection claims under Louisiana law; and (3) privileges or immunities claim under the Fourteenth Amendment of the United States Constitution.

II. STANDARD OF REVIEW

A. Due Process and Equal Protection Claims

Because these claims are before us "on cross motions for summary judgment, we review the district court's rulings de novo and construe all evidence and inferences in favor of the non-moving parties." *Evanston Ins. Co. v. Mid-Continent Cas. Co.*, 909 F.3d 143, 146 (5th Cir. 2018). We also "examine each party's motion independently." *Balfour Beatty Constr., LLC v. Liberty Mut. Fire Ins. Co.*, 968 F.3d 504, 509 (5th Cir. 2020) (internal quotations omitted). Summary judgment is appropriate only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *United States v. Nature's Way Marine, LLC*, 904 F.3d 416, 419 (5th Cir. 2018) (quoting FED. R. CIV. P. 56(a)). We may affirm the district court's grant of summary judgment "for any reason raised to the district court and supported by the record, and we are not bound by the grounds articulated by the district court." *Hills v. Entergy Operations, Inc.*, 866 F.3d 610, 614 (5th Cir. 2017).

B. Privileges or Immunities Clause Claim

We likewise review "a district court's decision on a Rule 12(b)(6) motion de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Ferguson v. Bank of New York Mellon Corp.*, 802 F.3d 777, 780 (5th Cir. 2015). We confine our analysis to "the facts stated in the complaint and the documents either attached to or incorporated in the complaint." *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996). "To avoid dismissal, a plaintiff must plead sufficient 'facts to state a claim to relief that is plausible on its face.'" *Ferguson*, 802 F.3d at 780 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

III. DISCUSSION

A. Federal & State Equal Protection Clause Claims

1. Federal Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall deny . . . to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. It "essentially requires that all persons similarly situated be treated alike." *Mahone v. Addicks Util. Dist. of Harris Cnty.*, 836 F.2d 921, 932 (5th Cir. 1988). To succeed on an equal protection claim, a plaintiff must first demonstrate that "two or more classifications of similarly situated persons were treated differently" under the disputed statute. *Duarte v. City of Lewisville*, 858 F.3d 348, 353 (5th Cir. 2017). We then determine what level of scrutiny applies, which

depends on whether a protected class or fundamental right is implicated. *Id.*

Where the alleged violation is not predicated on a protected class or fundamental right, we apply rational basis review. *See Glass v. Paxton*, 900 F.3d 233, 244 (5th Cir. 2018). "Under that standard, a legislative classification must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 244–45; *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993) (noting that the Supreme Court does not require "a legislature to articulate its reasons for enacting a statute [because] it is entirely irrelevant for constitutional purposes whether the conceived reasons for the challenged distinction actually motivated the legislature"). Under that standard, plaintiffs bear the heavy burden of negating "every conceivable basis which might support" the legislative classification. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

"Rational-basis review is guided by the principle that we don't have a license to judge the wisdom, fairness, or logic of legislative choices." *Hines v. Quillivan*, 982 F.3d 266, 273 (5th Cir. 2020). So, when "economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). While "rational-basis review gives broad discretion to legislatures," we have "made clear that 'rational' still must be actually rational, not a matter of fiction."

Hines v. Quillivan, 982 F.3d 266, 273 (5th Cir. 2020) (citing *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013)).

Turning to the merits, we now ask: (1) whether Sivad-Home alleges that the FNR program treats similarly situated businesses differently, and (2) what level of scrutiny controls our analysis. Regarding the first prong, the State concedes that Sivad-Home receives different treatment compared to similarly situated respite care services. With the first prong satisfied, we move on to identifying the correct level of scrutiny with which to analyze her constitutional allegations. Because the parties agree that rational basis review applies, we proceed under that standard. While the State is free to rely on a "hypothetical rationale, even post hoc," the ends–means connection "cannot be fantasy, and . . . the [State]'s chosen means must rationally relate to the state interests it articulates." *St. Joseph Abbey*, 712 F.3d at 223.

Here, the record supports the State's assertions that FNR permits enhancement of consumer healthcare by "allowing [LDH] to prioritize post-licensure compliance surveys that ensure client health, safety and welfare, over the resource intensive and costly initial licensing surveys." By limiting the number of providers in the respite care business, the State can focus its resources on a manageable number of providers. That focus aids the State in ensuring that consumers receive the best possible healthcare in their communities. In other words, the State argues that resource constraints make effective oversight impossible in situations where an inundation of new applications could prevent LDH from effectively

supervising existing healthcare providers. That reasoning states a rational connection between a legitimate interest (improving healthcare) and a means of achieving that interest (limiting the number of new applications LDH must fully evaluate).[2]

Sivad-Home aptly points out that the Supreme Court has distinguished between the permissible enhancing of consumer welfare and impermissible "pure economic protectionism." *Hines*, 982 F.3d at 274 (citing *St. Joseph Abbey*, 712 F.3d at 222–23). Newell-Davis contends that her expert witness, Dr. Matthew Mitchell, demonstrated that the State was not unaware that the FNR program has aspects of economic protectionism. However, we have recognized that a law is not necessarily irrational merely because it is "motivated in part by economic protectionism." *Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011) (emphasis added). Sivad-Home has not established that economic protectionism is the only motivation behind the FNR program.

Next, Sivad-Home argues that the State's own "administrative ease" is not a legitimate purpose. But here, that is not the State's position. The State contends that without its ability to exercise its discretion, it will not be able to ensure the health, safety, and welfare of respite-care recipients *at all*.

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[2] Sivad-Home's arguments attack the State's rationale for limiting new licensees. Although we conclude that the State's decision to implement a limit is rational, the parties have not addressed the separate question whether the FNR program is itself a rational way to put that limit into practice. We thus express no view on that issue.

Furthermore, this is not an instance of bare "economic protection of a particular industry" as was the case in *St. Joseph Abbey*, 712 F.3d 222. Here, however, the evidence supporting FNR's consumer-healthcare benefits forecloses any argument that the program's true motive lies solely in some other goal—whether economic protectionism or bureaucratic ease.

Finally, Sivad-Home argues that the State's proffered rationale would allow it to act in any arena on the mere assumption that decreasing the number of regulated parties increases consumer welfare. We disagree. "Although the legitimate purpose can be hypothesized, the rational relationship must be real"—not simply assumed. *Mahone v. Addicks Util. Dist. of Harris Cnty.*, 836 F.2d 921, 937 (5th Cir. 1988). Our decision today does not indulge assumptions. Instead, we recognize only that, where a government wishes to create consumer benefits by limiting new entrants to the already highly-regulated market for healthcare services, it may use any rational tool to implement that limit—so long as there is a "real" link between the tool and the benefits. *Id.*

In any case where we undertake rational basis review, we must always conduct a fact-specific examination of the record to ensure that the ends–means connection is not "fantasy." *St. Joseph Abbey*, 712 F.3d at 223. Here, specific facts lead us to the determinations that the government's purpose is legitimate and that there is a rational relationship between FNR and its purported healthcare benefits. In the highly-regulated healthcare sector, government resource constraints can be detrimental—even deadly—to consumers. In healthcare, limiting the

number of regulated providers can increase the quality of services for consumers in a way that may not necessarily translate to other industries. Thus, on the facts before us, there is a real link between the means (limiting the number of providers) and the consumer benefits (access only to those providers for whom LDH has sufficient resources to ensure regulatory compliance).

2. State Equal Protection Claim

The Louisiana Supreme Court has interpreted Article I, Section 3 of the Louisiana Constitution as follows:

> Article I, Section 3 commands [Louisiana courts] to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.

Sibley v. Bd. of Sup'rs of La. State Univ., 477 So.2d 1094, 1107 (La. 1985); LA CONST. art. 1, § 3. In comparison to the Fourteenth Amendment's Equal Protection Clause, the Louisiana Supreme Court has

recognized that the state's version moved Louisiana "from a position of having no equal protection clause to that of having three provisions going beyond the decisional law construing the Fourteenth Amendment." *Id.* at 1108.

Sivad-Home contends that the district court erred in applying the deferential "suitably further" standard in this case. She argues that heightened scrutiny should control our analysis because FNR impermissibly burdens disabled persons. She relies on *Clark v. Manuel* to support her argument. 463 So.2d 1276 (La. 1985). In that case, the Louisiana Supreme Court held that a statute requiring individuals to seek licensing to open community homes for the mentally-disabled violated the Louisiana Constitution's equal protection clause. The court relied on Fifth Circuit precedent to reason that a middle-tier level of scrutiny applied to statutes "which affect[ed] the mentally [disabled]." *Id.* at 1284 (citing *Cleburne Living Ctr. v. City of Cleburne*, 726 F.2d 191 (5th Cir. 1984)). It ultimately held that the challenged ordinance was unconstitutional because it made it more difficult for a quasi-protected class to enjoy "an important right." *Id.* at 1285. Sivad-Home asserts that *Clark* is analogous to her situation. Specifically, she contends that FNR harms the disabled community by arbitrarily limiting additional respite care businesses when there is a need. She also argues that the district court erred in concluding that she lacked standing to represent the disabled persons in her community, and that that decision contributed to the district court

incorrectly determining the tier of scrutiny that applied.[3]

The standard under Louisiana law looks not to a law's impact, but to what the "law classifies." *See Sibley*, 477 So.2d at 1107 (internal quotation omitted). Applied here, the FNR program is only aimed at controlling the number of respite service care providers in Louisiana. FNR does not explicitly mention any directives to the disabled communities to control which providers they might select. Instead, it is singularly focused on ensuring the State's control over the number of respite care providers at any given moment. Therefore, by its terms, the law only applies to Louisiana's respite care providers. While Sivad-Home may be correct in her assertion that FNR indirectly burdens the disabled community, she offers no evidence that the program does so directly. Accordingly, we must apply the "suitably further" standard to her Louisiana equal protection argument—the result of which is the same as our previous Equal Protection Clause analysis. *See supra*, Part III.A.1.

Sivad-Home also mischaracterizes what constitutes a quasi-protected class in her reliance on *Clark*. That case premised its decision that disabled persons were entitled to heightened scrutiny on a Fifth Circuit case that was later overruled by the Supreme Court. *See City of Cleburne. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) ("*Cleburne II*"). In *Cleburne II*, the Supreme Court expressly rejected

[3] In light of the ultimate holding and rationale in reaching our final disposition, we pretermit the issue of standing and continue to the merits of Sivad-Home's case.

this court's determination that statutes burdening disabled persons demand heightened scrutiny. *Id.* at 442 (holding that "we conclude for several reasons that [this court] erred in holding [the] mental[ly] [disabled] as a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation"). Because disabled persons are not a quasi-suspect class, and we need not reach the issue of the elderly because the record does not suggest that Sivad-Home is attempting to form a respite organization for that group, her state equal protection claims fail. *See Cleburne II*, 473 U.S. 432.

B. Federal & State Due Process Clause Claims

The Due Process Clause of the Fourteenth Amendment provides that "no State shall . . . deprive any person of life, liberty, or property, without due process of the law." U.S. CONST. amend. XIV. Article I, § 2 of the Louisiana Constitution similarly provides that "[n]o person shall be deprived of life, liberty, or property, except by due process of law." LA CONST. art. 1, § 2. Due process claims that do not involve a fundamental right are subject to rational basis review. *See Reyes v. N. Tex. Tollway Auth., (NTTA)*, 861 F.3d 558, 561 (5th Cir. 2017) (holding that rational basis review is "the default for substantive due process claims that do not implicate a fundamental right"); *see also supra*, Part III.A.1 (discussing the rational basis review standard). "Unlike Louisiana's provision on equal protection which is distinct from that provided in the Fourteenth Amendment, [the] due process guarantee in LA. CONST. Art. I, § 2 does not vary from the Due Process

Clause of the Fourteenth Amendment." *Progressive Sec. Ins. Co. v. Foster*, 711 So.2d 675, 688 (La. 1998).

1. Federal Due Process Claim

Both parties concede that rational basis review controls our analysis. We have already determined that the FNR program withstands rational basis review. *See supra*, Part III.A.1. Therefore, we hold in favor of the State on this issue.

2. State Due Process Claim

For the first time on appeal, Sivad-Home argues that Louisiana law demands a stricter due process analysis because Louisiana has previously recognized that the right to earn a living in a profession of one's choice is fundamental. However, we have repeatedly held that parties "forfeit[] an argument by failing to raise it in the first instance in the district court—thus raising it for the first time on appeal." *Thomas v. Ameritas Life Ins. Corp.*, 34 F.4th 395, 402 (5th Cir. 2022).[4] Accordingly, we decline to reach this argument.

C. Privileges or Immunities Clause Claim

As Sivad-Home concedes, the Privileges or Immunities Clause protects a finite list of "uniquely federal rights," none of which she claims have been

[4] *See Thomas*, 34 F.4th at 492 (explaining that "to preserve an argument for appeal, the argument (or issue) not only must have been presented in the district court, [but] a litigant must also press and not merely intimate the argument during proceedings before the district court.") (internal quotations and citation omitted).

violated in this case. *Deubert*, 820 F.2d at 760. Accordingly, we decline to address her argument on this issue.

IV. CONCLUSION

For the foregoing reasons we AFFIRM the judgment of the district court.

Filed March 22, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

URSULA NEWELL-DAVIS et al.	**CIVIL ACTION**
VERSUS	**CASE NO. 21-49**
COURTNEY N. PHILLIPS et al.	**SECTION: "G"(1)**

ORDER AND REASONS

This litigation concerns a Fourteenth Amendment challenge to a state law economic regulation.[1] Plaintiffs Ursula Newell-Davis ("Newell-Davis") and Sivad Home and Community Services, LLC ("Sivad Home") (collectively, "Plaintiffs") challenge the constitutionality of "Facility Need Review" ("FNR") regulations pertaining to respite service providers, as codified at Louisiana Revised Statute § 40:2116 and Louisiana Administrative Code title 48, §§ 12503(C)(2), 12523 *et seq*.[2] Plaintiffs bring suit against Courtney N. Phillips in her official capacity as Secretary of the Louisiana Department of Health (the "LDH"), Ruth Johnson in her official capacity as the Undersecretary of the LDH, Julie Foster Hagan in her official capacity as Assistant Secretary of the LDH's Office for Citizens with Developmental Disabilities,

[1] Rec. Doc. 1. Plaintiffs also assert analogous state law constitutional challenges. *Id.*

[2] *Id.*

Cecile Castello in her official capacity as Health Standards Section Director of the LDH, and Dasiny Davis in her official capacity as Facility Need Review Program Manager for the LDH (collectively, "Defendants").[3] Pending before the Court are cross-motions for summary judgment filed by the parties.[4]

Under the Fourteenth Amendment, a state law economic regulation will be upheld if it "bear[s] a rational relation to a legitimate governmental purpose."[5] For the reasons explained below, the Court finds that FNR is rationally related to the legitimate interest of enhancing consumer welfare. Therefore, considering the cross-motions, the memoranda in support and in opposition, the record, and the applicable law, the Court grants Defendants' motion for summary judgment. The Court denies Plaintiffs' motion for summary judgment.

I. Background

On January 12, 2021, Plaintiffs filed a complaint in this Court.[6] According to the Complaint, Newell-Davis founded Sivad Home to provide respite care for special needs children and their families.[7] Plaintiffs aver that to provide such respite services, they must participate in the "Facility Need Review" program with the LDH prior to becoming eligible to apply for a

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[3] *Id.* at 4–5

[4] Rec. Docs. 73, 78.

[5] *Duarte v. City of Lewisville*, 858 F.3d 348, 354 (5th Cir. 2017) (citing *Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995)).

[6] Rec. Doc. 1.

[7] *Id.* at 1.

license to operate.[8] Plaintiffs allege that in 2019, Newell-Davis submitted an application for FNR approval in which she included "statistical data that showed . . . a need for services aimed at supervising and caring for young people," descriptions of conversations with local public figures, and citations to studies showing that "respite care can lead to better outcomes for both children and their family members."[9] Yet Plaintiffs aver that the LDH denied Plaintiffs' FNR application on February 19, 2020 for "failure to demonstrate there was a need for additional respite care business in the proposed service area."[10] Plaintiffs claim that they "are unable to lawfully provide respite care as a home and community-based provider in Louisiana because they have not obtained FNR approval."[11]

Plaintiffs contend that FNR "has no rational relationship to any legitimate government interest" and "[b]y reducing the number of respite care providers, the FNR requirement jeopardizes the health and safety of . . . special needs children."[12] Plaintiffs allege violations of the Due Process Clause, the Equal Protection Clause, . . . as well as the due process and equal protection provisions of Article I of

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[8] *Id.* at 2.

[9] *Id.* at 9–10.

[10] *Id.* at 10.

[11] *Id.* at 14.

[12] *Id.* at 13.

the Louisiana Constitution.[13] Plaintiffs seek declaratory and injunctive relief.[14]

On January 4, 2022, Defendants filed the instant motion for summary judgment.[15] Plaintiffs filed their opposition on February 1, 2022.[16] On January 6, 2021, Plaintiffs filed a cross-motion for summary judgment.[17] On February 1, 2022, Defendants filed their opposition to Plaintiffs' cross-motion.[18] On February 11, 2022, with leave of Court, Plaintiffs filed a reply brief in further support of their motion.[19]

II. Parties' Arguments

A. Defendants' Motion for Summary Judgment

1. Defendants' Arguments in Support of the Motion for Summary Judgment

Defendants move the Court to grant summary judgment in their favor dismissing all of Plaintiffs'

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[13] *Id.* at 15–22. *See* U.S. Const. amend. XIV, § 1; La. Const. art. I, §§ 2, 3. Plaintiffs also asserted claims under the Privileges or Immunities Clause of the Fourteenth Amendment. *See* Rec. Doc. 1 at 18–19. On August 2, 2021, the Court granted in part Defendants' motion to dismiss and dismissed Plaintiffs' privileges or immunities claims. Rec. Docs. 31, 45.

[14] Rec. Doc. 1 at 22–23.

[15] Rec. Doc. 73.

[16] Rec. Doc. 87.

[17] Rec. Doc. 78.

[18] Rec. Doc. 86.

[19] Rec. Docs. 94, 95.

claims.[20] Defendants submit that there is no material factual dispute that FNR is rationally related to its legitimate purpose of enhancing consumer protection and welfare.[21]

Defendants argue that Plaintiffs cannot produce sufficient evidence to carry their "heavy burden" under rational basis review.[22] Under this standard, Defendants assert that FNR serves the legitimate purpose of enhancing consumer welfare.[23] Defendants note that although the United States Supreme Court "hardly ever strikes down a policy as illegitimate under rational basis scrutiny," a limited exception applies where "the laws at issue lack any purpose other than a bare desire to harm a politically unpopular group."[24] Here, Defendants assert that Plaintiffs' own expert "agreed during his deposition that FNR was not passed to harm any politically unpopular group."[25]

Defendants note that the Fifth Circuit recognizes an additional exception, holding that "pure economic protectionism is not by itself a legitimate state interest."[26] However, Defendants assert that protecting a particular industry "is not itself an illegitimate interest when protection of the industry

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[20] Rec. Doc. 73-1 at 1.

[21] *Id.*

[22] *Id.* at 8.

[23] *Id.* at 9.

[24] *Id.* (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018)).

[25] *Id.* (citing Rec. Doc. 73-17 at 13–14 (Mitchell Depo.)).

[26] *Id.* at 9–10 (emphasis omitted) (quoting Rec. Doc. 45 at 10).

can be linked to advancement of the public interest or general welfare."[27] Here, Defendants contend that, even if it has protectionist elements, FNR advances the public interest by preserving LDH's resources and allowing LDH to "prioritize complaint surveys and relicensure surveys."[28]

Defendants argue that FNR is rationally related to enhancing consumer welfare.[29] Defendants contend that "factual disputes about whether a law is rationally related to its legitimate purpose are rarely material" because "the Fifth Circuit will sustain a rationale unless it rises to the level of fantasy."[30] Nevertheless, Defendants assert that "the record overwhelmingly shows" that FNR is rationally related to enhancing consumer welfare.[31] Defendants point to evidence that they contend demonstrates that FNR eases the administrative burden on LDH.[32] Defendants assert that this enhances LDH's "ability to supervise existing providers while responding to consumer concerns and needs appropriately."[33] Defendants aver that state and federal courts across the country have upheld similar laws challenged on

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[27] *Id.* at 10 (emphasis omitted) (quoting *St. Joseph Abbey v. Castille*, 712 F.3d 215, 220 (5th Cir. 2013)).

[28] *Id.* at 10–11 (citing Rec. Doc. 73-5 at 3–7 (Castello Decl.); Rec. Doc. 73-19 at 11 (Castello Depo.)).

[29] *Id.* at 12.

[30] *Id.* (quoting *Glass v. Paxton*, 900 F.3d 233, 245 (5th Cir. 2018) (internal quotations omitted)).

[31] *Id.* at 13.

[32] *Id.* at 13–15.

[33] *Id.* at 16 (quoting Rec. Doc. 73-4 at 5 (Lutzky Report)).

due process and equal protection grounds "for a variety of reasons."[34] Moreover, Defendants assert that the democratic process is the constitutionally appropriate method of "rectifying any perceived problems of FNR."[35]

Next, Defendants argue that "Plaintiffs have been unable to produce even a scintilla of evidence demonstrating that FNR harms consumers."[36] Defendants assert that the report of Plaintiffs' expert Dr. Timmons is methodologically unsound.[37] And Defendants contend that Plaintiffs' expert Dr. Mitchell addressed certificate of need laws, "and did not discuss FNR directly."[38]

Finally, Defendants argue that Plaintiffs' state law claims fail for the same reasons.[39] First, Defendants assert that Plaintiffs' state law due process claims fail because the Louisiana and federal due process

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[34] *Id.* at 17–18 (discussing *Women's Surgical Ctr., LLC v. Berry,* 806 S.E. 2d 606, 612–13 (Ga. 2017)*; Colon Health Ctrs. of Am., LLC v. Hazel,* 733 F.3d 535, 548 (4th Cir. 2013)*; Madarang v. Bermudes,* 889 F.2d 251, 253 (9th Cir. 1989)*; Planned Parenthood of Greater Iowa, Inc. v. Atchison,* 126 F.3d 1042, 1048 (8th Cir. 1997); *Women's Cmty. Health Ctr. v. Tex. Health Facilities Comm'n,* 685 F.2d 974 (5th Cir. 1982); *Metro. Hosp. v. Thornburgh,* 667 F. Supp. 208 (E.D. Pa. 1987)).

[35] *Id.* at 18–19 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

[36] *Id.* at 19.

[37] *Id.* at 19–21. Defendants filed a *Daubert* motion to exclude Dr. Timmons' report for the same reasons. *See* Rec. Doc. 64.

[38] Rec. Doc. 73-1 at 21.

[39] *Id.* at 24.

guarantees are identical.[40] Second, Defendants note that Louisiana's equal protection guarantee differs from the federal guarantee.[41] However, Defendants assert that under Louisiana law, when "an economic regulation is challenged as violating the equal protection clause, [a] court may not sit as a super-legislature" and that "it is only the invidious discrimination, the wholly arbitrary act, which cannot stand."[42] Defendants aver that "the record overwhelmingly shows that Louisiana's FNR program is neither invidious discrimination nor wholly arbitrary."[43] Thus, Defendants assert that the Court should grant summary judgment in their favor and dismiss all of Plaintiffs' claims.[44]

2. Plaintiffs' Arguments in Opposition to the Motion for Summary Judgment

In opposition, Plaintiffs argue that administrative convenience is not a legitimate purpose for FNR.[45] Plaintiffs assert that "administrative ease" is "an end unto itself, [because] doing so supposedly always benefits the public."[46] Plaintiffs argue that "if [administrative ease] were enough to satisfy the rational basis requirement, then literally every

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[40] *Id.*

[41] *Id.*

[42] *Id.* at 25 (emphasis omitted) (quoting *Lakeside Imps., Inc. v. State*, 94-0191 (La. 7/5/94); 639 So. 2d 253, 257).

[43] *Id.*

[44] *Id.*

[45] Rec. Doc. 87 at 2.

[46] *Id.* at 3.

regulation limiting economic activity would have to be upheld."[47]

Next, Plaintiffs argue that even if administrative ease were a legitimate purpose, Defendants have not provided evidence to show that FNR advances that purpose.[48] Plaintiffs assert that Defendants offer no evidence quantifying the cost or burden of conducting initial, complaint, or relicensure surveys.[49] Plaintiffs further assert that Defendants have offered no evidence that their "budget is fixed and would not be adjusted if [their] workload grew."[50]

Additionally, Plaintiffs contend that FNR is not a rational means for furthering Defendants' asserted interest of administrative convenience.[51] Plaintiffs assert that FNR does not consider LDH's budget or resources, the effect of a prover on LDH's workload, or the effect of a provider on the number of complaints.[52] Therefore, Plaintiffs assert that FNR is not rationally related to administrative convenience.[53]

Plaintiffs next argue that Defendants are "wrong" to suggest that the Court must defer to the legislature.[54] Plaintiffs aver that need review laws,

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[47] *Id.* at 4.

[48] *Id.* at 6.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 7.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 8.

like FNR, are "often applied in ways that favor entrenched business interests."[55] Plaintiffs assert that the due process and equal protection guarantees are designed to provide individuals with less political influence "a means to vindicate their rights when the legislative process fails them and is harnessed in favor of the politically powerful."[56] Plaintiffs urge the Court not to "abdicate" its "duty to protect people who lack the political power . . . to protect their own rights from exploitation by the majority."[57]

Plaintiffs assert that FNR is irrational on its face, "because its requirements have nothing to do with health or safety."[58] Plaintiffs also point to the report of their expert, Dr. Mitchell, who "was unable to find even one study that concluded that need review improves quality of care outside of highly technical fields."[59]

B. Plaintiffs' Cross-Motion for Summary Judgment

1. Plaintiffs' Arguments in Support of the Cross-Motion for Summary Judgment

In their cross-motion, Plaintiffs move the Court to grant summary judgment and find that FNR violates their right to due process and equal protection as a

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[55] *Id.* at 9.

[56] *Id.*

[57] *Id.* at 10.

[58] *Id.*

[59] *Id.* at 12 (emphasis omitted).

matter of law.[60] Plaintiffs argue that FNR denies Plaintiffs due process of law because "it lacks a rational relationship to any legitimate governmental end."[61] Plaintiffs assert that administrative ease is not a legitimate state interest because laws that restrict entry into a trade necessarily lessen the administrative burden of regulating that trade.[62]

Plaintiffs also assert that FNR "lacks a rational relationship to improving access, reducing costs, or increasing the quality of care."[63] As to improving access, Plaintiffs point to one study that they assert shows that there are fewer "home health service[]" providers in states that have need review regulations compared to states that do not have such regulations.[64] Plaintiffs further assert that home health services are sufficiently analogous to respite care services.[65] Plaintiffs point to testimony from various witnesses that "there's always a need" for more providers.[66] Plaintiffs also contend that the report of Defendants' expert Dr. Lutzky supports their position that FNR limits access to care.[67] In that report, Plaintiffs assert that Dr. Lutzky conducted a survey and found that, of the respite care providers in the New Orleans region, "36% of providers cannot be

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[60] Rec. Doc. 78-1 at 1–3.

[61] *Id.* at 9.

[62] *Id.* at 12.

[63] *Id.* at 13.

[64] *Id.* at 13–14.

[65] *Id.* at 13.

[66] *Id.* at 14 (quoting Rec. Doc. 78-9 at 32–33 (Davis Depo)).

[67] *Id.* at 15.

reached [, 14%] have disconnected phone lines, and 21% do not have voicemail set up or did not return calls."[68] Plaintiffs assert the report also found that "44% of licensees . . . are either not accepting new clients or are only accepting clients in a limited capacity."[69] Plaintiffs argue this demonstrates that LDH "has been rejecting applicants based on a misunderstanding of the active number of providers in Louisiana."[70]

Regarding reducing costs, Plaintiffs assert that the regulation is facially unrelated to costs or spending, and that LDH acknowledges that cost containment is not a consideration in FNR.[71] Plaintiffs also argue that "[b]asic economics predicts that restricting competition will tend to increase . . . costs."[72] Finally, Plaintiffs contend that FNR is not rationally related to improving quality of care.[73] Plaintiffs assert that the regulation is facially unrelated to quality of care.[74] Further, Plaintiffs point to their expert, Dr. Mitchell's, report which they assert "shows that need review tends to harm, not help, the public."[75] Plaintiffs explain that Dr. Mitchell's report reviewed "25 papers examining the link between need review

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 16.

[72] *Id.*

[73] *Id.* at 17.

[74] *Id.*

[75] *Id.*

and quality."[76] Plaintiffs assert that most of the studies Dr. Mitchell reviewed found no effect, mixed results, or negative effects on quality.[77] Plaintiffs distinguish the three papers that found a positive effect by explaining that those papers concerned "highly technical fields."[78] Plaintiffs also assert that one study demonstrates "that Louisiana recipients of respite care are less satisfied with their care than residents of other states."[79] Plaintiffs aver that Defendants have produced no evidence to demonstrate that FNR improves quality.[80] Therefore, Plaintiffs contend that FNR violates their "right to due process as a matter of law" because it "lacks a rational relationship to any legitimate state interest."[81]

As to their equal protection claims, Plaintiffs argue that FNR irrationally treats them differently from others similarly situated.[82] Plaintiffs assert that "FNR sets up a wholly irrational distinction between who may offer respite services and who may not."[83] Plaintiffs also contend that FNR allows the state to show favoritism to incumbent business, which

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[76] *Id.*

[77] *Id.* at 17–18.

[78] *Id.*

[79] *Id.* at 18.

[80] *Id.* at 22.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 23.

Plaintiffs submit is "economic protectionism" and not a "legitimate governmental end."[84]

Finally, Plaintiffs address their state law claims.[85] First, Plaintiffs argue that FNR violates the Louisiana constitution's due process guarantee for the same reasons expressed above.[86] Second, Plaintiffs assert that Louisiana's equal protection guarantee "provides more protection than its federal counterpart."[87] Plaintiffs contend that Louisiana's intermediate scrutiny applies.[88] Plaintiffs assert that Louisiana courts apply heightened scrutiny where a statute makes it more difficult for disabled persons to enjoy an important right.[89] Plaintiffs aver that FNR makes it more difficult to enjoy an important right, and therefore intermediate scrutiny should apply.[90] Plaintiffs also assert that the law is not facially neutral because "it applies only to the care of disabled individuals and the elderly."[91] No matter the scrutiny, Plaintiffs assert that FNR fails because it "can't even satisfy" rational basis review.[92] Therefore, Plaintiffs

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[84] *Id.*

[85] *Id.*

[86] *Id.* (quoting that because "Plaintiff[s'] state due process claim[s are] subject to rational basis scrutiny . . . the same arguments . . . apply").

[87] *Id.* at 24.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 25.

[92] *Id.* at 25.

urge the Court to grant summary judgment in their favor.[93]

2. Defendants' Arguments in Opposition to the Cross-Motion for Summary Judgment

Defendants oppose Plaintiffs' cross-motion.[94] Defendants contend that Plaintiffs have not produced any "reliable evidence measuring FNR's effects on respite care consumers in Louisiana" and thus have not met their "heavy burden" under rational basis review.[95]

Defendants argue that Plaintiffs have no evidence showing that FNR has an improper purpose.[96] Defendants point to record evidence that "FNR was passed for the legitimate purpose of enhancing consumer protection and welfare."[97] Defendants aver that Plaintiffs have provided no evidence to rebut that purpose.[98] Instead, Defendants assert that Plaintiffs construe FNR's purpose as "administrative ease."[99] Defendants assert that this contention is "pure argument," "founded on nothing in the record," and thus is insufficient to carry Plaintiffs' burden under

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[93] *Id.*

[94] Rec. Doc. 86.

[95] *Id.* at 1.

[96] *Id.* at 2.

[97] *Id.* (citing Rec. Docs. 73-4 (Lutzky Rep.); 73-5 (Castello Decl.); 73-19 (Castello Depo.)).

[98] *Id.* at 3.

[99] *Id.* (citing Rec. Doc. 78 at 12).

Rule 56.[100] Moreover, Defendants contend that Plaintiffs' argument is "irrelevant" because "the Court could hypothesize a legitimate purpose not even suggested by the State."[101] Nevertheless, Defendants explain that "FNR's purpose was to limit the number of unnecessary providers and thereby give LDH the ability to focus its time and resources on conducting complaint surveys and relicensure surveys that enhance consumer welfare."[102]

Next, Defendants reiterate their arguments that "the Supreme Court 'hardly ever strikes down a policy as illegitimate under rational basis scrutiny.'"[103] Defendants re-assert that the limited exception—where a law was based out of a "bare desire to harm a politically unpopular group"—is inapplicable here.[104] And Defendants re-iterate that FNR is not "pure protectionism."[105]

Defendants argue that the Court can conclude that FNR is rationally related to enhancing consumer welfare.[106] Defendants assert that Plaintiffs' burden is to show not just that FNR is economic

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[100] *Id.* at 3.

[101] *Id.* (citing *Hines v. Quillivan*, 982 F.3d 266, 274 (5th Cir. 2020)).

[102] *Id.* at 4. Defendants also assert that the United States Supreme Court upheld a city's tax scheme where the scheme eased "an administrative burden." *Id.* (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 686 (2012)).

[103] *Id.* (quoting *Trump*, 138 S. Ct. 2392, 2420 (2018)).

[104] *Id.*

[105] *Id.* at 5.

[106] *Id.*

protectionism, but that it also harms consumers.[107] Moreover, Defendants aver that they are "not required 'to produce evidence to sustain the rationality of a statutory classification.'"[108] Rather, Defendants argue that Plaintiffs must "produce[] sufficient evidence to negate any and every basis that could rationally support FNR."[109] Defendants contend that, even if FNR has protectionist elements, Plaintiffs have produced no evidence that it harms consumers.[110]

Defendants assert that Plaintiffs' evidence does not demonstrate that FNR has a negative effect on consumers.[111] Defendants note that Plaintiffs address three categories of FNR's effects: (1) access to care, (2) cost of care, and (3) quality of care.[112] Regarding access to care, Defendants assert that Plaintiffs gathered no information from providers about whether they were accepting new clients; "[o]nly Defendants' expert, Dr. Lutzky, performed that analysis."[113] Defendants explain that Dr. Lutzky found that consumers had "a fair number of choices" and concluded that FNR is an effective tool.[114] Defendants also note that Dr. Lutzky conducted this

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[107] *Id.* at 5–6.

[108] *Id.* at 6 (quoting *Hines*, 982 F.3d at 273–74 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993))).

[109] *Id.*

[110] *Id.* at 7.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 7–8.

survey shortly after Hurricane Ida and nevertheless concluded that access to care was "positive" compared to other states.[115] Defendants contrast this report with that of Plaintiffs' expert, Dr. Mitchell.[116] Defendants point out that Dr. Mitchell's report concerned certificate of need laws generally and did not address Louisiana specifically.[117] Moreover, Defendants assert that Louisiana is the only state in the country that applies need review to respite care providers.[118]

As to cost of care, Defendants aver that Plaintiffs have no evidence about FNR's effects on the price of respite care.[119] Defendants assert that Plaintiffs cite only to "basic economics" and Dr. Mitchell's report to support their allegation that FNR drives up prices.[120] Defendants reiterate that Dr. Mitchell's report did not consider "Louisiana's unique FNR program for respite care providers."[121] Although Defendants' expert did not analyze whether FNR had any impact on the price of respite care, Defendants aver that "Plaintiffs did not perform this analysis either."[122] Defendants note that "Plaintiffs acknowledge that perhaps 'need review has no effect on costs or spending.'"[123]

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[115] *Id.* at 10.

[116] *Id.* at 8.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 10.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 11.

[123] *Id.* (quoting Rec. Dec. 78 and 17).

Therefore, Defendants argue that "[b]ecause FNR is accorded a presumption of constitutionality, and the issue is at least debatable, Plaintiffs have failed to satisfy their heavy burden."[124]

Concerning quality of care, Defendants contend that the record shows FNR improves the quality of care.[125] Defendants explain that LDH periodically conducts quality control surveys to ensure that licensed providers meet the appropriate standards of care.[126] Defendants assert these surveys are "costly and time intensive—especially for providers who offer in-home services like respite care."[127] LDH also investigates complaints from consumers and conducts relicensure surveys.[128] Defendants argue that "[w]ithout FNR, [LDH] would be required to perform more initial licensing surveys of unnecessary providers," limiting LDH's ability to conduct quality control, complaint, and relicensure surveys.[129] Defendants point to their expert Dr. Lutzky's report wherein he "concluded that FNR is 'likely good for consumers' because '[b]y limiting the total number of providers, FNR allows LDH to dedicate more resources to weeding out sub-par or non-existent providers, responding to complaints accordingly, undertaking periodic inspections, and ensuring

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[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 12.

[129] *Id.* at 13.

licensed providers are providing quality services.'"[130] In contrast, Defendants reiterate that Plaintiffs' expert Dr. Mitchell's report does not address Louisiana's FNR program, but rather considers other states' certificate of need laws in the home health service context.[131] Further, Defendants criticize Plaintiffs' expert Dr. Timmons' report for drawing conclusions from statistically insignificant data, applying circular reasoning, and cherry-picking data.[132]

Defendants argue that Plaintiffs' state law claims also fail.[133] Defendants assert that Plaintiffs' state law due process claims fail for the same reasons discussed above, because those claims are also subject to rational basis review.[134] In their motion for summary judgment, Plaintiffs contend that Louisiana's intermediate level of scrutiny applies to Plaintiffs' state law equal protection claims.[135] Defendants disagree for two reasons.[136] First, Defendants assert that this Court correctly concluded that the lowest level of scrutiny applies because FNR is facially neutral and Plaintiffs do not allege that

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[130] *Id.* (quoting Rec. Doc. 73-4 at 13).

[131] *Id.* at 14.

[132] *Id.* at 14–15. These arguments are also the basis for Defendants' *Daubert* motion to exclude Dr. Timmons' report. *See* Rec. Doc. 64.

[133] Rec. Doc. 86 at 20.

[134] *Id.*

[135] *See id. See also* Rec. Doc. 78-1 at 24–25.

[136] Rec. Doc. 86 at 20.

FNR results in disparate treatment.[137] Second, Defendants argue that there is no third-party standing under Louisiana law.[138] Defendants contend that "[e]ven if Plaintiffs could somehow plausibly allege that FNR harms disabled people," Plaintiffs do not have standing to bring those claims.[139] Therefore, Defendants argue that Plaintiffs' state law equal protection claims "are subject to rational basis review exactly like [their] federal equal protection claims."[140] On that basis, Defendants assert that Plaintiffs' state law equal protection claims also fail for the reasons discussed above.[141]

3. Plaintiffs' Arguments in Further Support of the Cross-Motion for Summary Judgment

In further support, Plaintiffs assert that they need not "affirmatively" show that FNR is "intended to harm anyone" to overcome rational basis review.[142] Rather, Plaintiffs aver that they have satisfied the rational basis standard "[b]ecause FNR lacks any rational connection to a legitimate end."[143] Plaintiffs reiterate their argument that Defendants have

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[137] *Id.* at 20–21.

[138] *Id.* at 21 (citing *Greater New Orleans Expressway Comm'n v. Olivier*, 2004-2147, p. 4 (La. 1/19/05); 892 So. 2d 570, 574).

[139] *Id.*

[140] *Id.* at 22.

[141] *Id.*

[142] Rec. Doc. 95 at 3.

[143] *Id.*

presented no evidence to rebut Plaintiffs' evidence.[144] Plaintiffs assert that the evidence demonstrates FNR irrationally reduces access to care.[145] Plaintiffs contend that Defendants' own employees believe there is an "extreme shortage" in respite care providers.[146] Plaintiffs further contend that Defendants have "no evidence" to support their position that FNR improves quality of care.[147] Similarly, Plaintiffs argue that Defendants have produced no evidence that FNR improves prices or quality.[148]

III. Legal Standard

Summary judgment is appropriate when the pleadings, discovery, and affidavits demonstrate "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[149] To decide whether a genuine dispute as to any material fact exists, the court considers "all of the evidence in the record but refrains from making credibility determinations or weighing the evidence."[150] All reasonable inferences are drawn in favor of the nonmoving party. Yet "unsupported

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[144] *Id.*

[145] *Id.* at 4.

[146] *Id.*

[147] *Id.* at 5–6.

[148] *Id.* at 6–7.

[149] Fed. R. Civ. P. 56(a); *see also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

[150] *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398–99 (5th Cir. 2008).

allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment."[151] If the entire record "could not lead a rational trier of fact to find for the non-moving party," then no genuine issue of fact exists and, consequently, the moving party is entitled to judgment as a matter of law.[152] The nonmoving party may not rest upon the pleadings.[153] Instead, the nonmoving party must identify specific facts in the record and articulate the precise manner in which that evidence establishes a genuine issue for trial.[154]

The party seeking summary judgment always bears the initial responsibility of showing the basis for its motion and identifying record evidence that demonstrates the absence of a genuine issue of material fact.[155] "To satisfy this burden, the movant may either (1) submit evidentiary documents that negate the existence of some material element of the opponent's claim or defense, or (2) if the crucial issue is one on which the opponent will bear the ultimate burden of proof at trial, demonstrate that the evidence in the record insufficiently supports an essential

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[151] *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985); *Little*, 37 F.3d at 1075.

[152] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

[153] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[154] *See id.*; *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

[155] *Celotex*, 477 U.S. at 323.

element of the opponent's claim or defense."[156] If the moving party satisfies its initial burden, the burden shifts to the nonmoving party to "identify specific evidence in the record, and to articulate" precisely how that evidence supports the nonmoving party's claims.[157]

The nonmovant's burden of demonstrating a genuine issue of material fact is not satisfied merely by creating "some metaphysical doubt as to the material facts," "by conclusory allegations," by "unsubstantiated assertions," or "by only a scintilla of evidence."[158] Moreover, the nonmoving party may not rest upon mere allegations or denials in its pleadings.[159] Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible in evidence at trial do not qualify as competent opposing evidence.

However, "where the movant bears the burden of proof at trial, the movant 'must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor. Once the movant does so, the burden shifts to the nonmovant to establish an issue of fact that warrants trial.'"[160] The

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[156] *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 190 (5th Cir. 1991) (quoting *Little*, 939 F.2d at 1299).

[157] *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994), *cert. denied,* 513 U.S. 871 (1994); *see also Morris v. Covan World Wide Moving, Inc.,* 144 F.3d 377, 380 (5th Cir. 1998).

[158] *Little*, 37 F.3d at 1075 (internal citations omitted).

[159] *Morris*, 144 F.3d at 380.

[160] *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 302 (5th Cir. 2020).

nonmoving party can then defeat the motion by either countering with sufficient evidence of its own, or "showing that the moving party's evidence is so sheer that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party."[161]

In addition, on cross-motions for summary judgment, a court examines each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party.[162] "Cross-motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed."[163] Nonetheless, cross-motions for summary judgment may be probative of the absence of a factual dispute when they reveal a basic agreement concerning what legal theories and material facts are dispositive.[164]

IV. Analysis

Cross-motions for summary judgment are pending before the Court. Each party seeks summary judgment in their favor: Plaintiffs urge the Court to find that FNR is not rationally related to a legitimate governmental purpose; Defendants urge the Court to

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[161] *Ridgeway v. Pfizer, Inc.,* No. 09-2794, 2010 WL 1729187, at *1 (E.D. La. Apr. 27, 2010) (Vance, J.).

[162] *White Buffalo Ventures, LLC v. Univ. of Tex. at Austin*, 420 F.3d 366, 370 (5th Cir. 2005).

[163] *Joplin v. Bias*, 631 F.2d 1235, 1237 (5th Cir. 1980).

[164] *Bricklayers Int'l Union of Am., Local Union No. 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1023 (5th Cir. 1975).

find that FNR is rationally related to a legitimate governmental purpose.[165] Both parties agree that there are no material factual disputes.[166] Instead, each party argues that they are entitled to judgment as a matter of law. The Court will address Plaintiffs' federal and state constitutional claims in turn.

A. Federal Due Process and Equal Protection Claims

Plaintiffs challenge Louisiana's FNR regulations on due process and equal protection grounds. As the Court explained in its Order granting in part and denying in part Defendants' motion to dismiss, these claims are both governed by the rational basis standard.[167] Given that the standard is identical for both claims,[168] the Court addresses them together.

Rational basis scrutiny requires that a law "bear a rational relation[ship] to a legitimate governmental

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[165] Rec. Docs. 73, 78.

[166] Rec. Doc. 73-1 at 7; Rec. Doc. 78-1 at 9; Rec. Doc. 86 at 2; Rec. Doc. 87 at 2. Additionally, the parties' proposed pretrial order lists no contested issues of fact and states that "[t]he parties generally agree that there are no contested issues of material fact." Rec. Doc. 106 at 13.

[167] Rec. Doc. 45 at 10, 14.

[168] S*ee FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996) ("[G]overnment action comports with substantive due process if the action is rationally related to a legitimate government interest."); *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 350 (5th Cir. 2013) ("If a law does not implicate . . . a protected right or class, then it need only be rationally related to a legitimate government interest to survive an equal protection challenge.").

purpose."[169] The deferential rational basis standard carries a "strong presumption" in favor of a law's validity.[170] Courts afford "wide latitude" to the decisions of state legislatures.[171] This is because "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one."[172] Those challenging a legislative classification must "negative every conceivable basis which might support it."[173] Moreover, a state "has no obligation to produce evidence to sustain the rationality of a statutory classification."[174] Indeed, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[175]

The Court finds that FNR's purpose is a legitimate government interest. Under the deferential rational basis standard, the Court need not determine the actual purpose of a law.[176] Instead, if the Court is able to "hypothesize a legitimate purpose," the law will be sustained.[177] Here, FNR regulations require an applicant seeking a home and community-based

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[169] *Duarte*, 858 F.3d at 354 (citing *Richard*, 70 F.3d at 417).

[170] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993).

[171] *Duarte*, 858 F.3d at 354.

[172] *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

[173] *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

[174] *Heller*, 509 U.S. at 320.

[175] *Beach Commc'ns, Inc.*, 508 U.S. at 315.

[176] *Mahone v. Addicks Util. Dist. of Harris Cty.*, 836 F.3d 921, 936 (5th Cir. 2015).

[177] *Id.* at 934.

service ("HCBS") provider license to first establish that "there is a need for an additional HCBS provider in the geographic location for which the application is submitted."[178] After making this showing, an applicant proceeds to the initial licensing survey and must meet stringent licensing standards.[179] These initial licensing surveys are "resource intensive and costly."[180] Once a provider is licensed, the Department "conducts periodic licensing surveys . . . to ensure client health, safety and welfare."[181] Therefore, FNR enhances consumer welfare by allowing the Department to prioritize these post-licensure compliance surveys that "ensure client health, safety and welfare," over the "resource intensive and costly" initial licensing surveys.[182] It is well established that the States have broad police powers "to protect the lives, health, morals, comfort and general welfare of the people."[183] Enhancing consumer welfare is plainly aimed at "protect[ing] the lives, health . . . and general welfare of the people" and is, therefore, a legitimate governmental purpose.[184]

Plaintiffs attempt to construe the purpose of FNR as "economic protectionism."[185] Plaintiffs rely

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[178] La. Admin. Code tit. 48, § 12523(C)(1).

[179] *Id.* §§ 5001(A), (C)(4), (C)(6), (D)(1)(b)–(c); 5005; 5007.

[180] Rec. Doc. 73-4 at 6.

[181] La. Admin. Code tit. 48, § 5017.

[182] *Id.*; Rec. Doc. 73-4 at 6.

[183] *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

[184] *Id.*

[185] *See* Rec. Doc. 78-1 at 23.

principally on *St. Joseph Abbey v. Castille*, wherein the United States Court of Appeals for the Fifth Circuit held that pure economic protectionism is not by itself a legitimate state interest.[186] However, the Fifth Circuit went on to explain that even a law "protecting or favoring a particular intrastate industry" serves a legitimate interest "when protection of the industry can be linked to advancement of the public interest or general welfare."[187]

St. Joseph Abbey is easily distinguishable. In that case, the Fifth Circuit struck down a Louisiana state law that gave funeral homes the exclusive right to sell caskets.[188] Unlike the regulation at issue here, burials and caskets were utterly unregulated. Louisiana law did not require caskets for burials.[189] It imposed no requirements on the design or construction of caskets.[190] It did not require caskets be sealed.[191] Individuals could construct their own caskets or purchase them from out of state vendors.[192] And funeral directors were not required to have any special expertise in caskets in order to sell them.[193] Given the absence of any other regulations regarding

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[186] *St. Joseph Abbey*, 712 F.3d at 222–23.

[187] *Id.* at 222.

[188] *Id.* at 217–18.

[189] *Id.* at 218.

[190] *Id.* at 217.

[191] *Id.*

[192] *Id.*

[193] *Id.* at 226.

the sale of caskets, the Fifth Circuit concluded that restricting the sale of caskets to funeral homes could not "be linked to advancement of the public interest or general welfare."[194]

By contrast, FNR can be linked to the advancement of consumer welfare. Unlike the funeral homes in *St. Joseph Abbey*, HCBS providers must meet many licensing requirements, including passing a criminal background check and submitting proof of financial viability.[195] Further, HCBS providers seeking to provide in-home respite care services, like Plaintiffs, must meet additional requirements.[196] FNR allows LDH to focus on regulating already-licensed providers.[197] Although FNR seemingly protects incumbent providers, without it LDH would be forced to spend significantly more resources on the "resource intensive and costly" initial licensing surveys.[198] Therefore, even if FNR has protectionist elements, they "can be linked to advancement of the public interest or general welfare"[199] because LDH can conduct more complaint and relicensure surveys.

Next the Court finds that FNR is rationally related to advancing consumer welfare. "[R]ationality analysis requires more than just a determination that a legitimate state purpose exists; it also requires that

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[194] *Id.* at 222–26.

[195] *See* La. Admin. Code tit. 48, § 5007.

[196] *Id.* § 5083.

[197] *See* Rec. 73-4 at 8.

[198] *Id.* at 6.

[199] *St. Joseph Abbey*, 712 F.3d at 222.

the classification chosen by the state actors be rationally related to that legitimate state purpose."[200] However, "[a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[201] Nor must a state "produce evidence to sustain the rationality of a statutory classification."[202] Instead, a law with a legitimate purpose will stand so long as the question of a rational relationship is "at least debatable."[203]

On the record before the Court, FNR's rationality is "at least debatable."[204] Defendants' expert Dr. Lutzky found that, even with FNR, "LDH primarily reacts to problems rather than preventing them."[205] The Department testified that eliminating FNR would require additional unnecessary initial licensing surveys and limit LDH's ability to address complaint and relicensure surveys.[206] Dr. Lutzky also found that more than 50% of providers in Region 1—where Plaintiffs seek to provide services—are accepting new clients.[207] This suggests that FNR is serving its exact

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[200] *Mahone*, 836 F.2d at 937 (citing *City of Cleburne*, 473 U.S. at 447–50).

[201] *Heller*, 509 U.S. at 320.

[202] *Id.*

[203] *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 674 (1981) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)).

[204] *Id.*

[205] Rec. Doc. 73-4 at 6.

[206] Rec. Doc. 73-19 at 67–68.

[207] Rec. Doc. 73-4 at 9.

purpose. By requiring applicants to demonstrate a need for services in a particular geographic area, FNR allows LDH to limit the number of "resource intensive and costly" initial licensing surveys it must conduct.[208] If there is no demonstrated need for additional services, LDH can deny an application and avoid conducting an initial licensing survey. But FNR is responsive and flexible—when an applicant does demonstrate need, LDH can grant an application and proceed with the initial licensing survey. This flexibility bears a rational relationship to consumer welfare. LDH can add providers when consumers need additional services, and it can prioritize ensuring existing providers are providing quality services when the number of providers is adequate.

Additionally, Plaintiffs have not met their heavy burden to "negative every conceivable basis" which might support FNR.[209] Plaintiffs assert that FNR reduces access to care, drives up costs, and reduces quality of care.[210] In support, Plaintiffs principally rely on the expert opinion of Dr. Mitchell.[211] However, Dr. Mitchell's report reviewed certificate of need laws generally, not Louisiana's FNR law specifically.[212] Plaintiffs also point to an internal email between the Department and Magellan which they contend shows the Department "know[s] that need review tends to

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[208] *Id.* at 6.

[209] *Lehnhausen*, 410 U.S. at 364.

[210] Rec. Doc. 78-1 at 13.

[211] *See* Rec. Doc. 78-11.

[212] *Id.*

create shortages."[213] But the email actually demonstrates that the Department informed a provider that their FNR application would be denied "because there are many home health agencies in the area."[214] Moreover, Plaintiffs cite only to "basic economics" to support their contention that FNR drives up costs.[215] This "unsubstantiated assertion[]" is insufficient to carry Plaintiffs' burden on a motion for summary judgment,[216] let alone rational basis review.

Perhaps the legislature might have formulated a different and potentially more effective scheme. Unfortunately for Plaintiffs, the Supreme Court's mandate is clear: The Fourteenth Amendment does not empower federal courts "to sit as a superlegislature to weigh the wisdom of legislation."[217] Instead, "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process."[218] Even assuming FNR is an improvident method to achieve the State's aims, that is an issue for the legislature, not this Court, to rectify. Accordingly, the Court

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[213] Rec. Doc. 78-1 at 14.

[214] Rec. Doc. 78-3 at 217.

[215] Rec. Doc. 78-1 at 16.

[216] *Little*, 37 F.3d at 1075 (quoting *Hopper v. Frank*, 16 F.3d 92 (5th Cir. 1994)).

[217] *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (quoting *Day-Brite Lighting, Inc., v. Missouri*, 342 U.S. 421, 423 (1952)) (cleaned up).

[218] *City of Cleburne*, 473 U.S. at 440.

grants Defendants' motion for summary judgment as to Plaintiffs' federal constitutional claims.

B. State Law Due Process and Equal Protection Claims

Plaintiffs assert analogous challenges under Louisiana's Constitution's due process and equal protection guarantees. As the Court explained in its Order granting in part and denying in part Defendants' motion to dismiss, Louisiana's due process guarantee "does not vary from the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[219] Accordingly, Plaintiffs' state law due process claim fails for the same reasons explained above.

In that same Order, the Court explained that Louisiana's equal protection guarantee is not coextensive with the federal Equal Protection Clause.[220] Rather, Louisiana courts apply three tiers of scrutiny to equal protection clams. Applying Louisiana law, this Court held that Louisiana's lowest tier of scrutiny applied to Plaintiffs' state law equal protection claim.[221] In Plaintiffs' motion for summary judgment they re-argue that Louisiana's intermediate level of scrutiny applies.[222] Plaintiffs contend that,

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[219] *Progressive Sec. Ins. Co. v. Foster*, No. 97-2985, p. 22 (La. 1998); 711 So. 2d 675, 688. *See also Theriot v. Terrebonne Par. Police Jury*, 436 So. 2d 515, 520 (La. 1983).

[220] *Sibley v. Bd. of Supervisors of La. State Univ.*, 477 So. 2d 1094, 1107 (La. 1985).

[221] Rec. Doc. 45 at 18.

[222] Rec. Doc. 78-1 at 24.

contrary to the Court's holding, FNR "is not facially neutral with regard to disability."[223] Plaintiffs assert that "[b]ecause FNR has a unique impact on the care of disabled children and adults, it should be subject to a higher level of scrutiny."[224]

The Court, again, disagrees. First, as the Court previously explained, FNR applies—on its face—to providers of care to special needs children. Providers of care are not a suspect classification under the standard.[225] Second, the standard under Louisiana law looks not to a law's impact, but to what "the law classifies."[226] Finally, Louisiana law does not recognize third party standing.[227] Even assuming FNR harms disabled people, Plaintiffs, as prospective providers of respite care, do not have standing to challenge the law on behalf of disabled persons. Accordingly, Louisiana's lowest tier of scrutiny applies.

Under this level of scrutiny, a law "shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any

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[223] *Id.* at 25.

[224] *Id.*

[225] *See Sibley*, 477 So. 2d at 1107 (listing "birth, age, sex, culture, physical condition, or political ideas or affiliations" as classifications subject to tier-two scrutiny).

[226] *Id.*

[227] *See, e.g.*, *Greater New Orleans Expressway Comm'n*, 2004-2147 at p. 4; 892 So. 2d at 574 ("To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations." (quotation omitted)).

appropriate state interest."[228] For the reasons explained above, Plaintiffs have not shown that FNR does not suitably further an appropriate state interest. Accordingly, Defendants are entitled to judgment as a matter of law.

V. Conclusion

Considering the foregoing reasons, the Court finds that FNR survives rational basis scrutiny. Accordingly,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment[229] is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment[230] is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' claims are **DISMISSED WITH PREJUDICE**.

NEW ORLEANS, LOUISIANA, this 21st day of March, 2022.

/s/ Nannette Jolivette Brown
NANNETTE JOLIVETTE BROWN
CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[228] *Sibley,* 477 So.2d at 1107.

[229] Rec. Doc. 73.

[230] Rec. Doc. 78.

Filed August 2, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

URSULA NEWELL-DAVIS et al	**CIVIL ACTION**
VERSUS	**NO. 21-49**
COURTNEY N. PHILLIPS et al	**SECTION: "G"**

ORDER AND REASONS

In this litigation, Plaintiffs Ursula Newell-Davis ("Newell-Davis") and Sivad Home and Community Services, LLC ("Sivad Home") (collectively, "Plaintiffs") challenge the constitutionality of "Facility Need Review" ("FNR") regulations pertaining to respite service providers, Louisiana Revised Statute § 40:2116 and Louisiana Administrative Code title 48, §§ 12503(C)(2), 12523 *et seq*.[1] Plaintiffs bring suit against Courtney N. Phillips in her official capacity as Secretary of the Louisiana Department of Health and Ruth Johnson in her official capacity as the Undersecretary of the Louisiana Department of Health (collectively, "Defendants").[2] Pending before the Court is Defendants' "Motion to Dismiss Plaintiffs' Original

[1] Rec. Doc. 1.

[2] *Id.* at 4–5.

Complaint."[3] Considering the motion, the memoranda in support and opposition, the record, and the applicable law, the Court grants the motion to the extent it seeks dismissal of Plaintiffs' privileges or immunities claim and denies the motion in all other respects.

I. Background

On January 12, 2021, Plaintiffs filed a complaint in this Court.[4] According to the Complaint, Newell-Davis founded Sivad Home to provide respite care for special needs children and their families.[5] Plaintiffs aver that to provide such respite services, they must participate in the "Facility Need Review" program with the Louisiana Department of Health (the "LDH") prior to becoming eligible to apply for a license to operate.[6] Plaintiffs allege that in 2019, Newell-Davis submitted an application for FNR approval in which she included "statistical data that showed . . . a need for services aimed at supervising and caring for young people," descriptions of conversations with local public figures, and citations to studies showing that "respite care can lead to better outcomes for both children and their family members."[7] Yet Plaintiffs aver that the LDH denied Plaintiffs' FNR application on February 19, 2020 for "failure to demonstrate there was a need for additional respite care business in the

[3] Rec. Doc. 31.

[4] Rec. Doc. 1.

[5] *Id.* at 1.

[6] *Id.* at 2.

[7] *Id.* at 9–10.

proposed service area."[8] Plaintiffs claim that they "are unable to lawfully provide respite care as a home and community-based provider in Louisiana because they have not obtained FNR approval."[9]

Plaintiffs contend that the FNR process "has no rational relationship to any legitimate government interest" and "[b]y reducing the number of respite care providers, the FNR requirement jeopardizes the health and safety of . . . special needs children."[10] Plaintiffs allege violations of the Due Process Clause, the Equal Protection Clause, and the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution, as well as the due process and equal protection provisions of Article I of the Louisiana Constitution.[11] Plaintiffs seek declaratory and injunctive relief.[12]

II. Parties' Arguments

A. Defendants' Arguments in Support of the Motion to Dismiss

In the instant motion, Defendants contend that Plaintiffs' federal and state constitutional claims must be dismissed for four reasons.[13] First, Defendants argue that the FNR program does not

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[8] *Id.* at 10.

[9] *Id.* at 14.

[10] *Id.* at 13.

[11] *Id.* at 15–22. *See* U.S. Const. amend. XIV, § 1; La. Const. art. I, §§ 2, 3.

[12] Rec. Doc. 1 at 22–23.

[13] Rec. Doc. 31-1.

violate the Equal Protection Clause of the United States Constitution because it furthers the State's legitimate interest in consumer protection.[14] Although Defendants do not dispute Plaintiffs' claim that the FNR program treats Plaintiffs differently than other providers of respite and supervised independent living services, Defendants maintain that the FNR program does not involve any suspect classifications and the FNR program furthers the State's legitimate interest in ensuring consumer protection.[15] Specifically, Defendants argue that routinely surveying home and community based service ("HCBS") providers benefits consumers by ensuring quality care and that limiting the number of HCBS providers "eases the regulatory burden on the State."[16] Defendants also assert that the FNR program "protects the integrity of the State's Medicaid program, and ensures that Medicaid resources are directed to where they are most needed."[17]

Second, Defendants contend that Plaintiffs' substantive due process claim "fully overlaps" with Plaintiffs' equal protection claim and must be dismissed.[18] Third, Defendants argue that Plaintiffs'

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[14] *Id.* at 11.

[15] *Id.* at 13–14.

[16] *Id.* at 15.

[17] *Id.* at 16.

[18] *Id.* at 19. In addition, Defendants assert that to the extent Plaintiffs raise a procedural due process claim, Plaintiffs were "afforded more than constitutionally adequate process" because Plaintiffs received adequate process at the state administrative level through their right to request a supplemental review of the

claim under the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution fails because (1) it is unclear whether the Privileges or Immunities Clause protects Plaintiffs from intra-state discrimination; and (2) Plaintiffs' argument under the Privileges or Immunities Clause duplicates Plaintiffs' Equal Protection Clause claim.[19] Fourth, Defendants assert that Plaintiffs' state constitutional claims should be dismissed because (1) Plaintiffs' state due process claim duplicates Plaintiffs' federal due process claim; and (2) Plaintiffs' state equal protection claim fails to account for the fact that the FNR program furthers the state's legitimate interest in consumer protection.[20]

B. Plaintiff's Arguments in Opposition to the Motion to Dismiss

Plaintiffs set forth four arguments in opposition to the instant motion to dismiss.[21] First, Plaintiffs argue that they have stated a claim that the FNR program violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because Plaintiffs plausibly allege that the FNR program is not rationally related to a legitimate government interest.[22] Specifically, Plaintiffs point to their allegation that "by artificially restricting the

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LDH FNR decision and to seek an administrative appeal. *Id.* at 19–20. Given that Plaintiffs do not assert a procedural due process claim, the Court will not consider this argument.

[19] *Id.* at 20–21.

[20] *Id.* at 21–24.

[21] Rec. Doc. 33.

[22] *Id.* at 10–12.

number of suppliers, FNR drives up costs, drives down quality, and deprives Louisianans of access to qualified providers."[23] Plaintiffs also note that they cite to studies in the Complaint which Plaintiffs contend bolster their allegations that FNR is not rationally related to any legitimate ends.[24]

Second, Plaintiffs aver that they have stated a claim that the FNR program violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because Plaintiffs allege that Louisiana irrationally prohibits qualified and experienced individuals such as Plaintiffs from providing respite care while allowing others similarly situated to do the same.[25] According to Plaintiffs, the substantive due process claim differs from the equal protection claim because the due process claim alleges that FNR does not further any legitimate ends while the equal protection claim alleges that FNR "treats [Plaintiffs] differently without any rational justification."[26]

Third, Plaintiffs contend that they have stated a claim that the FNR program violates Louisiana's constitutional due process provision.[27] Specifically, Plaintiffs assert that they have plausibly alleged that FNR lacks a real and substantial relation to the promotion of the public welfare and substantially

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[23] *Id.* at 12.

[24] *Id.* at 13.

[25] *Id.* at 17.

[26] *Id.*

[27] *Id.* at 18.

interferes with Plaintiffs' fundamental right to earn a living.[28]

Fourth, Plaintiffs argue that their equal protection claim under the Louisiana Constitution should not be dismissed because Plaintiffs have plausibly alleged that FNR does not further any appropriate state interest.[29]

C. Defendants' Arguments in Further Support of the Motion to Dismiss

In reply, Defendants contend that Plaintiffs articulate no meaningful distinction between the legal tests required for determining whether the FNR program survives rational basis under the Equal Protection or Due Process Clause of the United States Constitution.[30] Defendants maintain that Plaintiffs carry a "heavy burden" under the rational basis test and because the FNR program "arguably" furthers its legitimate goals, Plaintiffs' claims should be dismissed.[31] Defendants further contend that, even taken as true, Plaintiffs' factual allegations "at most demonstrate that the State may not have chosen the most efficient mechanism for furthering its rational purpose of consumer protection when adopting the FNR program."[32]

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[28] *Id.* at 19–20.

[29] *Id.* at 20–21.

[30] Rec. Doc. 38 at 3.

[31] *Id.* at 3–7.

[32] *Id.* at 7.

Defendants also argue that Plaintiffs' reliance on the "real and substantial" relationship test for a due process violation under the Louisiana Constitution is misplaced because under Louisiana law, courts apply a rational basis test coextensive with federal jurisprudence.[33] In addition, Defendants contend that the FNR laws are facially neutral and therefore warrant minimal scrutiny under the equal protection provision of the Louisiana Constitution and Plaintiffs have failed to allege that the Louisiana legislature adopted the FNR program for a discriminatory purpose.[34]

III. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides that an action may be dismissed "for failure to state a claim upon which relief can be granted."[35] A motion to dismiss for failure to state a claim is "viewed with disfavor and is rarely granted."[36] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face."[37]

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[33] *Id.* at 8–9.

[34] *Id.* at 9–10.

[35] Fed R. Civ. P. 12(b)(6).

[36] *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

[37] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted).

The "[f]actual allegations must be enough to raise a right to relief above the speculative level."[38] The complaint need not contain detailed factual allegations, but it must offer more than mere labels, legal conclusions, or formulaic recitations of the elements of a cause of action.[39] That is, the complaint must offer more than an "unadorned, the defendant-unlawfully-harmed-me accusation."[40]

Although a court must accept all "well-pleaded facts" as true, a court need not accept legal conclusions as true.[41] "[L]egal conclusions can provide the framework of a complaint, [but] they must be supported by factual allegations."[42] Similarly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" will not suffice.[43] If the factual allegations are insufficient to raise a right to relief above the speculative level, or an "insuperable" bar to relief exists, the claim must be dismissed."[44]

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[38] *Twombly*, 550 U.S. at 555. Put another way, a plaintiff must plead facts that allow the court to draw a "reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

[39] *Iqbal*, 556 U.S. at 678.

[40] *Id.*

[41] *Id.* at 677–78.

[42] *Id.* at 679.

[43] *Id.* at 678.

[44] *Carbe v. Lappin*, 492 F.3d 325, 328 n.9 (5th Cir. 2007); *Moore v. Metro. Human Serv. Dep't*, No. 09-6470, 2010 WL 1462224, at * 2 (E.D. La. Apr. 8, 2010) (Vance, J.) (citing *Jones v. Bock*, 549 U.S. 199, 215 (2007)).

A court considering a motion to dismiss "must limit itself to the contents of the pleadings, including attachments thereto."[45] Attachments to a motion to dismiss are, however, "considered part of the pleadings" if "they are referred to in the plaintiff's complaint and are central to her claim."[46] "In so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated."[47] In addition, a court may consider matters of which judicial notice may be taken.[48]

IV. Analysis

A. Whether Plaintiffs' Claims Under the Fourteenth Amendment to the United States Constitution Should Be Dismissed

Defendants move to dismiss Plaintiffs' Fourteenth Amendment equal protection, due process, and privileges or immunities claims for failure to state a claim upon which relief may be granted. Defendants contend that Plaintiffs' equal protection claim should be dismissed because the FNR requirement furthers the State's legitimate interest in consumer protection.

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[45] *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

[46] *Id.* at 498–99 (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)) (internal quotation marks omitted).

[47] *Carter v. Target Corp.*, 541 F. App'x 413, 416–17 (5th Cir. 2013) (quoting *Collins*, 224 F.3d at 498–99).

[48] *U.S. ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 379 (5th Cir. 2003).

As to Plaintiffs' substantive due process and privileges or immunities claims, Defendants argue these claims duplicate Plaintiffs' equal protection claim and should be dismissed. The Court addresses each of these claims in turn.

1. Equal Protection Clause

Defendants argue that the FNR program does not violate the Equal Protection Clause of the Fourteenth Amendment because the program furthers the state's legitimate interest in consumer protection.[49] In opposition, Plaintiffs contend that they plausibly allege that the FNR program is not rationally related to a legitimate government interest.[50]

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[51] To establish an equal protection claim, a plaintiff must first show that "two or more classifications of similarly situated persons were treated differently" under the challenged statute.[52] "Once that threshold element is established, the court then determines the

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[49] Rec. Doc. 31-1 at 11.

[50] Rec. Doc. 33 at 10–12.

[51] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

[52] *Duarte v. City of Lewisville*, 858 F.3d 348, 353 (5th Cir. 2017) (citing *Gallegos–Hernandez v. United States*, 688 F.3d 190, 195 (5th Cir. 2012); *Stefanoff v. Hays Cnty.*, 154 F.3d 523, 525–26 (5th Cir. 1998)).

appropriate level of scrutiny to apply."[53] "Strict scrutiny is required if the legislative classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution."[54] "If neither a suspect class nor a fundamental right is implicated, the classification need only bear a rational relation to a legitimate governmental purpose."[55]

Under the deferential rational basis standard, courts afford "wide latitude" to the decisions of state legislatures.[56] The United States Court of Appeals for the Fifth Circuit has held that "pure economic protectionism is not by itself a legitimate state interest."[57] Put another way, "[a] law motivated by protectionism may have a rational basis, but 'naked economic preferences are impermissible to the extent that they harm consumers.'"[58]

Here, Plaintiffs have stated a claim for relief under the Equal Protection Clause that is plausible on its face. In the Complaint, Plaintiffs allege that the "challenged laws treat Plaintiffs differently than others similarly situated without serving any

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[53] *Id.*

[54] *Id.* at 353–54 (quoting *Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995)).

[55] *Id.* at 354 (citing *Richard*, 70 F.3d at 417).

[56] *Id.*

[57] *Hines v. Quillivan*, 982 F.3d 266, 274 (5th Cir. 2020) (citing *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013)).

[58] *Id.* (quoting *Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Hous.*, 660 F.3d 235, 240 (5th Cir. 2011)).

legitimate governmental interest."[59] Plaintiffs allege "there are no formal criteria" for determining "need" for FNR approval.[60] Instead, according to Plaintiffs, FNR approval prioritizes existing businesses' economic interests over new businesses.[61] Plaintiffs argue that FNR approval "has nothing to do with an applicant's qualifications or fitness to operate" and that "FNR permits the [LDH] to reject an applicant solely because there are purportedly 'enough' businesses already operating."[62] Plaintiffs contend this constitutes "economic protectionism."[63] Moreover, Plaintiffs note that, after receiving FNR approval, an "applicant must then apply for a license from the Department."[64] Plaintiffs assert that this "independent licensure requirement" serves to protect the "health and safety" of consumers, but the FNR requirement does not.[65]

Additionally, Plaintiffs allege that the FNR process bears no rational relationship to any legitimate state interest because "FNR drives up costs, drives down quality, and deprives Louisianans of access to qualified providers."[66] Therefore, accepting all of Plaintiffs' well-pleaded facts as true, Plaintiffs have stated a claim under the Equal

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[59] Rec. Doc. 1 at 14.

[60] *Id.* at 8.

[61] *Id.* at 1–2.

[62] *Id.* at 2.

[63] *Id.*

[64] *Id.* at 8.

[65] *Id.*

[66] Rec. Doc. 33 at 12.

Protection Clause. Accordingly, the Court denies Defendants' motion to the extent it seeks dismissal of Plaintiffs' equal protection claim.

2. Due Process Clause

Defendants argue that Plaintiffs' due process claim "duplicates" their equal protection claim and thus should be dismissed.[67] Further, to the extent Plaintiffs raise a procedural due process claim, Defendants assert that the statutory administrative procedure satisfies the procedural due process requirement.[68] Plaintiffs respond that they have plausibly alleged that FNR approval is not rationally related to a legitimate government interest.[69]

The Fourteenth Amendment's Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law"[70] To establish a substantive due process claim, a plaintiff must "first identify a life, liberty, or property interest protected by the Fourteenth Amendment."[71] Then, a plaintiff must demonstrate that the challenged government action is not "rationally related to a legitimate governmental interest."[72] It is well established that the right to pursue private employment is a protected interest under the

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[67] Rec. Doc. 31-1 at 18.

[68] *Id.* at 19–20.

[69] Rec. Doc. 38 at 12.

[70] U.S. Const. amend. XIV, § 1.

[71] *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995).

[72] *Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006).

substantive due process clause of the Fourteenth Amendment.[73]

Defendants move the Court to dismiss Plaintiffs' due process claim because it duplicates Plaintiffs' equal protection claim. As the Supreme Court has explained, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."[74] In *Lindquist v. City of Pasadena*, the United States Court of Appeals for the Fifth Circuit held that, where an equal protection claim "fully overlaps" with a substantive due process claim, the substantive due process claim should be dismissed.[75] In that case, a city refused to issue a license to the owners of a used car dealership because the dealership failed to comply with a local ordinance.[76] The owners brought suit after the city issued a license to a competing business that was not in compliance with the ordinance, alleging equal

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[73] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the word "liberty" in the Fourteenth Amendment's due process clause includes "the right of the individual to contract, to engage in any of the common occupations of life"); *Phillips v. Vandygriff*, 711 F.2d 1217, 1222 (5th Cir. 1983) *modified in other part on reh'g*, 724 F.2d 490 (5th Cir. 1984) ("[A] person has a liberty interest in pursuing an occupation.").

[74] *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion)).

[75] 525 F.3d 383, 387 (5th Cir. 2008) (quoting *Willis v. Town of Marshall*, 426 F.3d 251, 266 (4th Cir. 2005)).

[76] *Id.* at 384–85.

protection and due process violations.[77] Both the equal protection claim and the due process claim were based on the city's differential treatment of the owners compared to other similarly situated businesses.[78] In affirming the district court's dismissal of the substantive due process claim, the Fifth Circuit explained that the due process claim was "the [owners'] equal protection claim recast in substantive due process terms" and, thus, must be dismissed.[79]

The Fifth Circuit has not expanded on this rule, but district judges have applied the rule where two theories of constitutional injury are identical. For example, another district judge in the United States District Court for the Eastern District of Louisiana has held that a plaintiff's substantive due process claim should be dismissed because it "fully overlap[ped] with his Fourth Amendment unreasonable seizure claim."[80] In that case, the plaintiff claimed that an officer violated his right to be free from unreasonable seizures without due process by blocking his pathway.[81] The plaintiff separately claimed that the officer "violated his Fourth Amendment right to be free from unreasonable . . . seizures" when the officer blocked his pathway.[82] In

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[77] *Id.* at 385–86.

[78] *Id.* at 386–88.

[79] *Id.* at 387.

[80] *Carpenter v. Webre*, No. 17-808, 2018 WL 1453201, at *7 (E.D. La. Mar. 23, 2018) (Morgan, J.).

[81] *Id.*

[82] *Id.* at *9.

that case, because the two constitutional injuries were identical—unreasonable seizure by blocking plaintiff's path—the Court concluded the claims "fully overlap[ped]" and dismissed the plaintiff's due process claim.[83] Notably, the plaintiff's second due process claim—that his "protected liberty interest to remain in a public place" was violated—did not fully overlap with another claim and was dismissed on alternate grounds.[84]

Here, however, the Court finds that, although similar, Plaintiffs' substantive due process claim does not "fully overlap" with their equal protection claim. Plaintiffs' substantive due process theory is that the FNR process deprives Plaintiffs of the right to earn a living without a rational basis.[85] On the other hand, Plaintiffs' equal protection theory is that the FNR process arbitrarily discriminates between "similarly situated" individuals without a rational basis.[86]

Analyzing Plaintiffs' substantive due process claim, the Court finds that Plaintiffs have stated a claim upon which relief can be granted. Construing the allegations in the light most favorable to Plaintiffs as the non-moving party, Plaintiffs have alleged that the FNR approval scheme burdens their right to earn a living by denying their application for FNR not on the basis of qualifications but because of a lack of

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[83] *Id.* at *7.

[84] *Id.* at *7–9.

[85] *See* Rec. Doc. 1 at 15; Rec. Doc. 33 at 16.

[86] *See* Rec. Doc. 1 at 17; Rec. Doc. 33 at 17.

"need."[87] Plaintiffs further allege that FNR approval bears no rational relationship to a legitimate government interest by driving up costs, limiting access to care, and hampering competition.[88] Accordingly, the Court will deny Defendants' motion as to Plaintiffs' Fourteenth Amendment due process claim.

3. Privileges or Immunities Clause

Defendants argue that Plaintiffs' claim under the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution fails because (1) it is unclear whether the Privileges or Immunities Clause protects Plaintiffs from intra-state discrimination; and (2) Plaintiffs' argument under the Privileges or Immunities Clause duplicates Plaintiffs' equal protection clause claim.[89] Plaintiffs respond that Defendants misconstrue Plaintiffs' Privileges or Immunities Clause claim, brought under the Fourteenth Amendment, as a claim under the Fifth Amendment's Privileges and Immunities Clause.[90]

The Privileges or Immunities Clause of the Fourteenth Amendment pertinently provides: "No

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[87] Rec. Doc. 1 at 10.

[88] *Id.* at 13.

[89] Rec. Doc. 31-1 at 20–21. Defendants' motion to dismiss referred to the Privileges and Immunities Clause. *Id.* Defendants note the Privileges or Immunities Clause is the correct provision. Rec. Doc. 38 at 2, n.2. Accordingly, the Court will address only the Privileges or Immunities Clause. *Compare* U.S. Const. art. IV, § 2, cl. 1 (Privileges and Immunities) *with* U.S. Const. amend. XIV, § 1, cl. 2 (Privileges or Immunities).

[90] Rec. Doc. 33 at 9.

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[91] In the *Slaughter-House Cases*, the Supreme Court concluded that the Fourteenth Amendment creates distinct citizenships, state and national, each conferring its own sets of rights, and that the Privileges or Immunities Clause protects only rights of national citizenship.[92] The Supreme Court therefore clarified that the Privileges or Immunities Clause of the Fourteenth Amendment does not protect states rights of citizenship, but only federal rights of citizenship.[93] In *Deubert v. Gulf Federal Savings Bank*, the Fifth Circuit explained:

> Since the *Slaughter House Cases*, the reach of the privileges and immunities [sic] clause has been narrow. The clause protects only uniquely federal rights such as the right to petition Congress, the right to vote in federal election, the right to interstate travel, the right to enter federal lands, or the rights of a citizen while in federal custody. While the clause supports congressional legislation prohibiting impairment of federal rights, we have found no authority holding that the clause, absent legislation, supports a private cause of action for infringement of a right it secures.[94]

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[91] U.S. Const. amend. XIV, § 1.

[92] 83 U.S. 36, 77–79 (1873).

[93] *Id.*

[94] *Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 760 (5th Cir. 1987) (citations omitted). *Accord Marusic Liquors, Inc. v. Daley*, 55 F.3d 258, 260 (7th Cir. 1995) ("Not since the *Slaughter–House*

In that case, the Fifth Circuit declined to expand the clause to support a private cause of action, reasoning that such a reading "would be a substantial and unprecedented expansion of that clause's effect."[95]

In the Complaint, Plaintiffs allege that the Privileges or Immunities Clause "protects the right to earn a living in a lawful occupation of one's choice" and that "[b]y imposing an arbitrary and discriminatory 'need' requirement to operate as a respite care provider, Defendants . . . are arbitrarily and unreasonably interfering with Plaintiff Newell-Davis's constitutional right to earn a living in a lawful occupation in violation of the Privileges or Immunities Clause."[96] However, as the Fifth Circuit explained, the Privileges or Immunities Clause "protects only uniquely federal rights."[97] Plaintiff alleges a violation of a private right, namely, the "right to earn a living in a lawful occupation of one's choice."[98] This is not a

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Cases has it been seriously maintained that the [F]ourteenth [A]mendment curtails the states' power to restrict competition in business—if they choose, by establishing and limiting systems of occupational licensure. The *Slaughter–House Cases* . . . dispatch any argument that the privileges [or] immunities clause entitled persons to conduct business free of regulation (there, of exclusion, for the state set up a monopoly).") (internal citations omitted).

[95] *Deubert*, 820 F.2d at 760. The Fifth Circuit did not foreclose the use of the Privileges or Immunities Clause to support a private cause of action in the future. *Id.*

[96] Rec. Doc. 1 at 19.

[97] *Deubert*, 820 F.2d at 760.

[98] Rec. Doc. 1 at 19.

"uniquely federal right[]."[99] Accordingly, the Court finds that Plaintiffs have not stated a claim against Defendants under the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution.

D. Whether Plaintiffs' Claims under the Louisiana Constitution Should Be Dismissed

Defendants move to dismiss Plaintiffs' claim under the due process guarantee of the Louisiana Constitution on the basis that it duplicates their federal due process claim.[100] Additionally, Defendants move to dismiss Plaintiffs' claim under the equal protection guarantee on the basis that it furthers the State's legitimate interest in consumer protection.[101] In opposition, Plaintiffs contend that Louisiana's due process guarantee requires a challenged law to have a "real and substantial" relationship to the general welfare, which Plaintiffs assert the FNR requirement lacks.[102] Plaintiffs further contend that the statute "affects a suspect class" and should be subject to intermediate scrutiny under the Louisiana

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[99] See, *e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 983 (9th Cir. 2008) ("However, the Court made it very clear that the traditional privileges and immunities of citizenship 'which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments,' *such as the right to engage in one's profession of choice*, were not protected by the Privileges or Immunities Clause if they were not of a 'federal' character." (emphasis added) (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C. E.D. Pa. 1823)).

[100] Rec. Doc. 31-1 at 22.

[101] *Id.*

[102] Rec. Doc. 33 at 18–19.

constitution's equal protection guarantee.[103] The Court addresses each of these arguments in turn.

1. Due Process Clause

Plaintiffs allege a violation of the Louisiana Constitution's due process guarantee.[104] Louisiana's due process guarantee "does not vary from the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[105] Given that the protections afforded by the Louisiana Constitution's due process provision and the Due Process Clause of the United States Constitution are the same, a separate analysis of the state due process guarantee claim is not necessary. For the reasons set forth above, the Court will deny Defendants' motion to dismiss Plaintiffs' due process claim under the Louisiana Constitution.

2. Equal Protection Clause

Plaintiffs also bring a claim under the Louisiana Constitution's equal protection guarantee.[106] Unlike Louisiana's due process guarantee, the state's equal protection guarantee is not coextensive with the federal Equal Protection Clause.[107] Instead,

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[103] *Id.* at 20.

[104] Rec. Doc. 1 at 19–20.

[105] *Progressive Sec. Ins. Co. v. Foster*, No. 97-2985, p. 22 (La. 1998); 711 So. 2d 675, 688. *See also Theriot v. Terrebonne Par. Police Jury*, 436 So. 2d 515, 520 (La. 1983).

[106] Rec. Doc. 1 at 20–22.

[107] *Sibley v. Bd. of Supervisors of La. State Univ.*, 477 So. 2d 1094, 1107 (La. 1985).

Louisiana courts apply three levels of scrutiny to equal protection claims:

> (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.[108]

In opposition to the motion to dismiss, Plaintiffs assert that intermediate scrutiny applies because "the challenged law applies to providers of care to special needs children."[109]

The Court disagrees. As an initial matter, Plaintiffs did not allege that the law discriminates on the basis of disability in their complaint.[110] "A plaintiff may not amend [its] complaint in [its] response to a motion to dismiss."[111] And, in any event,

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[108] *Id.* (internal citations omitted).

[109] Rec. Doc. 33 at 21.

[110] *See* Rec. Doc. 1 at 20–22.

[111] *Mun. Emps.'s Ret. Sys. of Mich. v. Pier 1 Imports, Inc.*, 935 F.3d 424, 436 (5th Cir. 2019) (alterations in original) (quoting *Lohr v. Gilman*, 248 F. Supp. 3d 796, 810 (N.D. Tex. 2017)).

the law at issue here is facially neutral. Plaintiffs contend that "the challenged law applies to providers of care to special needs children."[112] However, providers of care to special needs children are not a suspect classification under the standard. Thus, the third tier of scrutiny applies.

Nevertheless, under this tier of scrutiny, the Court finds Plaintiffs have plausibly alleged that the law "does not suitably further any appropriate state interest."[113] Plaintiffs assert that the "FNR requirement draws an arbitrary and irrational distinction" that excludes qualified providers, artificially limits supply, "increases costs, jeopardizes public health and safety, and decreases access to care."[114] In support, Plaintiffs allege the Department has "no formal factors" to determine whether to approve or reject an applicant.[115] Plaintiffs contend this leads to a "shortage of care and insulates existing providers from competition" allowing those providers "to charge higher prices and deliver lower-quality services."[116] Additionally, Plaintiffs aver there is a demonstrated need for additional care because they "receive calls on a weekly basis asking when they will begin to operate."[117] Therefore, accepting all of Plaintiffs' well-pleaded facts as true, they have stated a claim against Defendants. Accordingly, the Court

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[112] Rec. Doc. 33 at 21.

[113] *Sibley*, 477 So. 2d at 1107.

[114] Rec. Doc. 1 at 21.

[115] *Id.* at 8.

[116] *Id.* at 13.

[117] *Id.*

will deny the Defendants' motion to dismiss to the extent it seeks dismissal of the Plaintiffs' state constitutional equal protection claim.

V. Conclusion

For the foregoing reasons, the Court finds that Plaintiffs have stated a claim that the FNR process violates the Equal Protection Clause and the Due Process Clause of the United States Constitution, as well as the due process and equal protection provisions of the Louisiana Constitution. However, the Court finds that Plaintiffs have not stated a claim under the Privileges or Immunities Clause of the Fourteenth Amendment. Accordingly,

IT IS HEREBY ORDERED that "Defendants' Motion to Dismiss Plaintiffs' Original Complaint" is G**RANTED IN PAR**T and **DENIED IN PART**.

IT IS FURTHER ORDERED that the Motion is **GRANTED** to the extent Defendants seek dismissal with prejudice of Plaintiffs' claim under the Privileges or Immunities Clause of the Fourteenth Amendment.

IT IS FURTHER ORDERED that the Motion is **DENIED** in all other respects.

NEW ORLEANS, LOUISIANA, this 30th day of July, 2021.

/s/ Nannette Jolivette Brown _
NANNETTE JOLIVETTE BROWN
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Filed January 6, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

URSULA NEWELL-DAVIS, et al.,	**Civil Action No. 2:21-cv-00049-NJB-JVM**
Plaintiffs,	
v.	
COURTNEY N. PHILLIPS, in her official capacity as Secretary of the Louisiana Department of Health, et al.,	
Defendants.	

DECLARATION OF URSULA NEWELL-DAVIS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Ursula Newell-Davis, am a United States citizen and resident of Orleans Parish. I am over the age of 18, am competent to testify, and declare from firsthand knowledge as follows:

1. I am a mother, social worker, entrepreneur, and a plaintiff in this case. The other plaintiff is the business I started, Sivad Home and Community Services, LLC. Sivad is a limited liability company registered in Louisiana and I am its sole owner.

2. I have an undergraduate and a master's degree in social work from Southern University at

New Orleans and have been employed in social work for over twenty years.

3. Over the more than twenty years I have worked as a social worker in Louisiana, I have helped hundreds of families. I have extensive experience empowering people in need, identifying community resources, navigating public service systems, developing action plans, and supporting families through difficult situations and helping them to overcome obstacles in their lives. I am particularly passionate about helping children in need.

4. For twelve years, I worked as a hospice social worker, providing end-of-life support to patients and their loved ones. Even while in this job, I also worked with kids in the afternoon, evenings, and weekends. I later worked for three years at a behavioral health center that provided outpatient mental health services. While there, I managed the center's day-to-day operations, promoted the center's community engagement, and trained staff on Medicaid compliance. All the while, I never stopped working with children.

5. I currently provide consulting services to mental health agencies. I help these agencies train their staff members to work with children, adolescents, and adults with disabilities and I consult with them on how to comply with the applicable regulations. While providing these consulting services, I have continued to work directly with children and their families.

6. Working with people, seeing them face to face, advocating for them, and making an immediate impact in their lives is my calling.

7. By virtue of my career, and as a mother to a special needs child, I have come to know and understand several of the systemic problems plaguing special needs children and teenagers in the New Orleans area.

8. For example, I have seen that when parents don't have care, they must sometimes leave their children unattended and without the assistance necessary to tackle their underlying issues. Not only does this result in prolonged difficult or destructive behaviors that leave struggling parents overwhelmed, it also can lead unsupervised youth (especially those with disabilities, who seek acceptance) to fall into the wrong crowd and turn to criminal activity. In some cases, it means that children with social or emotional difficulties do not complete their homework or take care of other basic tasks, like showering or making themselves food, when left unattended. This can lead to them being bullied for their hygiene at school.

9. Based on my own observations and experience and studies I have read, I believe early intervention in general, and respite care specifically, is key to making an effective and long-term impact on children with disabilities. I believe that I have the skills to support parents of special needs children, to develop relationships with children and teens, and to support them in becoming more independent and thriving in the community.

10. I am also very familiar with these issues on a personal level. As a mother of a son with Asperger's Syndrome and Obsessive-Compulsive Disorder (OCD), I know firsthand the amount of support and consistency needed to successfully guide children and teens suffering from behavioral troubles, social-emotional disabilities, or other special needs. I want to incorporate the skills I've gained over the years working with special needs communities and parenting my own children into my respite services—including gently redirecting behaviors, providing consistency, and bringing empathy and understanding to my work.

11. I also know firsthand that respite services are vital in allowing parents to take time to themselves, whether it be to work, to complete errands, or to simply have respite from the rigors of childcare. As any parent knows, child-rearing can be demanding, and that can be even more so when it comes to children who require more care. Parents sometimes forget to take care of themselves, which takes an emotional toll. As a parent to a special needs son, I am passionate about helping other parents get the support they need.

12. I want to be able to provide respite services for parents of special needs children who qualify for such care. I created Sivad Home and Community Services, LLC with that aim and I would provide such services in New Orleans and the surrounding areas if not for Louisiana's Facility Need Review (FNR) law and regulations.

13. In 2019, I applied for FNR approval to provide respite services in Region 1, which includes New Orleans. A true and correct copy of my application is attached as Exhibit 1.

14. As part of my application, I included statistical data that showed an increase in crimes committed by juveniles, which I believe is evidence of a need for services aimed at supervising and caring for at-risk youth who qualify for respite care. I also described speaking to the local District Attorney, who expressed a "dire need" for more early intervention efforts for juveniles. I further noted that I had spoken with an employee of Magellan Healthcare, an entity that provides behavioral health services to Louisiana youth under the state's Coordinated System of Care, who strongly encouraged me to apply for FNR as a respite provider and told me there was a need in the community for respite services. That conversation furthered my belief that there was a need for more care. I also cited studies in my application that use regression analysis to show that early engagement, including respite care, can lead to better outcomes for both children and their family members and lower incidences of negative behavior in the community.

15. In investigating the need for respite services in New Orleans, I looked up the number of respite providers in the area. I determined that there were only five providers in the vicinity and only two that shared the same zip code as my business. When I called, one of the latter reported having a waiting list for respite services. Given that there was a waitlist, I believed my services were needed.

16. I have been approached by parents who have not received consistent care from existing providers or have otherwise been unable to secure adequate respite care for their children. All of these experiences confirmed my belief that my services were needed and further motivated me to apply.

17. I was also motivated by clients who told me that they didn't want just anyone to take care of their children; they wanted me to provide such care—because they know and trust me. Just last week, a mother that I worked with about a decade ago messaged me and asked if I provide respite services.

18. I have experienced heartbreak that leads me to sympathize with these parents and helps me show empathy as a social worker. In 2015, my oldest son was killed in a drive-by shooting while visiting family in Washington D.C. I understand parents who only want to entrust their children to people they know and trust. In my own experience, childcare is a personal decision and depends on the wants, needs, and comfort level of the individual family involved.

19. In February of 2020, the Louisiana Department of Health denied my application for Facility Need Review. A true and correct copy of the denial letter is attached as Exhibit 2.

20. Helping my community, and particularly children, who are the future of our country, is my passion and I have devoted my career to it. If it were not for the Facility Need Review law, I would pursue my dream of opening a respite care business for Louisiana youth.

I declare, under the penalty of perjury of the laws of the State of Louisiana and the United States, that the foregoing is true and correct.

SIGNED this 3 of January, 2022, in New Orleans, Louisiana.

/s/ Ursula Newell-Davis
URSULA NEWELL-DAVIS

Filed January 6, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

URSULA NEWELL-DAVIS, *et al.*, Plaintiffs, v. COURTNEY N. PHILLIPS, *et al.*, Defendants.	CIVIL ACTION NO. 2:21-CV 00049-NJB-NM

DECLARATION OF SONJA THOMAS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Sonja Thomas, am competent to testify and declare as follows:

1. The following is true and correct to the best of my knowledge.

2. I am not a party to this lawsuit.

3. I am a United States citizen and resident of Jefferson County, Louisiana

4. I am personally acquainted with Plaintiff Ursula Newell-Davis ("Ms. Davis"). There was a period when I cared for a child struggling with numerous cognitive and behavioral issues, and

Ms. Davis was instrumental in assisting me and providing care not otherwise available to me.

5. I was committed to adopting this child and initiated proceedings in the Juvenile Court for the Parish of Jefferson (Docket No. 2014-VT-112) for a voluntary transfer of custody from the child's biological parents. As time went on, the child's behavioral problems increased to a level of severity where I urgently sought out respite services. I was devastated to discover that there were extremely limited options, and the system was wholly unequipped to help me in the care of a child that had no other advocate.

6. I was able to receive some respite services through Magellan Healthcare and their Coordinated System of Care ("CSoC"). However, as any parent trying to care for a child with extreme behavioral challenges and co-occurring disorders will tell you, consistency is key in making any progress. Magellan would send out a different worker each time, and this system was not conducive to the individualized and focused attention my child needed.

7. I was frequently given numbers and contact information for respite providers. I spent hours on the phone trying to reach a live person and left countless messages, only to never receive a response back.

8. I even sought out assistance from Juvenile Court, which suggested that I get the Louisiana Department of Children & Family Services involved as a potential way for me to access the respite services I needed.

9. All of these administrative delays, coupled with the fact that the child's behaviors escalated to a point where I lost multiple jobs and exceeded my ability to care for him as a single mother, led me to the heartbreaking decision to not continue with the custody proceedings. *See* **Exhibit** 1.

10. The lack of respite care for youth struggling with cognitive disabilities is astounding, and I know from firsthand experience that I was not the only parent desperately struggling to obtain respite services. When you have a child suffering from extreme cognitive and behavioral issues, that child needs access to services and care immediately. There is no time to waste.

11. Ms. Davis is unparalleled in her demeanor, professionalism, dedication, and commitment to her clients. In the time she worked with my child, I saw drastic improvements and her consistent schedule with him allowed her to establish a plan of care directly tailored to his cognitive and developmental disabilities.

12. I have no doubt that if Ms. Davis were to operate her own respite business, she would provide a desperately needed service, and provide a level of care that is utterly lacking in the existing market. The denial of her respite care application not only prevented me from being able to help a vulnerable child in our community, but the denial adversely impacts all parents similarly situated in our community.

13. Moreover, if I ever find myself needing respite care in the future, I want to be able to turn to Ms. Davis.

I declare, under the penalty of perjury of the laws of the State of Louisiana and the United States, that the foregoing is true and correct.

SIGNED this 18 December, 2021, in New Orleans, Louisiana

/s/ Sonja Thomas
SONJA THOMAS

Filed February 1, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

URSULA NEWELL-DAVIS, et al.,	**Civil Action No. 2:21-cv-00049-NJB-JVM**
Plaintiffs,	
v.	
COURTNEY N. PHILLIPS, in her official capacity as Secretary of the Louisiana Department of Health, et al.,	
Defendants.	

DECLARATION OF DANA PITTS

I, Dana Pitts, am competent to testify and declare as follows:

1. The following is true and correct to the best of my knowledge.

2. I am not a party to this lawsuit.

3. I am a United States citizen and a resident of Jefferson Parish.

4. I am personally acquainted with Plaintiff Ursula Newell-Davis ("Ms. Davis").

5. I have three children that have struggled with mental and behavioral issues throughout their lives. My youngest son, however, presented the most complex case out of all my children.

6. From the time my son was born, I knew he needed help. As he grew up, his condition and behavior continued to deteriorate. When I tried to seek help from various respite providers, I faced extreme delays in receiving a response, such that by the time I heard back from some of the providers, my son had aged out of certain programs. For those providers that did contact me, they treated my son like a number in system. They downplayed my concerns and observations and were insistent that my son had a simple form of ADHD.

7. Left without any guidance or assistance and trying to understand how to best help my son, I tried to research his symptoms and behaviors on my own, all while trying to care for two other children with their own challenges. My son's situation escalated to the point where I was unable to keep a job and to pay for a home. I lost everything and had to move into my mother's home with my children.

8. I reached a point of such emotional and financial desperation that I considered giving up my son for adoption. This is an unimaginable choice for any mother and I was in complete emotional anguish over the hopelessness that engulfed my life.

9. It was not until my son was 7 years old that I finally found some help. A doctor referred me to Ms. Davis, and I contacted her immediately. She not only sat down with me and listened to me and my son,

but she also provided me with extensive information about testing and resources for him. She understood the complexity of my son's case and provided much needed guidance for my other children as well. After years of being completely abandoned by the system, it was an immense relief to finally find someone that would listen and help.

10. Ms. Davis was not only an advocate for my son, but she taught me how to be one as well. She took extensive time out of her schedule to come with me to various appointments and visits with providers.

11. Most respite providers only focus on the behavior a child demonstrates to them. This is extremely problematic because it results in a child behaving well for the provider, but then resuming their destructive behavior when home alone. As a result of her extensive experience, Ms. Davis was well-aware of this problem, and of my son's own manipulation of other providers. She addressed the root cause of my son's behavioral problems and helped him tremendously throughout his childhood and teen years. Even though my son has now aged out of the respite care system, Ms. Davis continues to check in and maintains a close bond with him.

12. Ms. Davis saved my family, and I cannot emphasize enough the immense gratitude I have for all her dedication and hard work. She went above and beyond any provider I have ever encountered in my life. I truly view her as a member of my family. The fact that my son can live a stable life and my oldest daughter is now enrolled in medical school is a testament of Ms. Davis' work. She is truly

unparalleled in her demeanor, professionalism, dedication, and commitment to her clients.

13. Ms. Davis also made a positive impact in my own life. She encouraged me to return to school, and I have started taking classes so that I can pursue my dreams and further provide stability for my children in the years to come.

14. The lack of comprehensive respite care for youth struggling with cognitive disabilities is astounding, and I know from firsthand experience that I was not the only parent desperately struggling to find responsive and readily accessible respite services. When you have a child suffering from extreme cognitive and behavioral issues, that child needs access to services and care immediately.

15. I have no doubt that if Ms. Davis were to operate her own respite business, she would provide a desperately needed service, and provide a level of care that is utterly lacking in the existing market. The denial of her respite care application adversely impacts all parents similarly situated in our community.

I declare, under the penalty of perjury of the laws of the State of Louisiana and the United States, that the foregoing is true and correct.

SIGNED this 31st day of January 2022, in New Orleans, Louisiana.

/s/ Dana Pitts
DANA PITTS

Filed February 1, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

URSULA NEWELL-DAVIS, et al.,	**Civil Action No. 2:21-cv-00049-NJB-JVM**
Plaintiffs,	
v.	
COURTNEY N. PHILLIPS, in her official capacity as Secretary of the Louisiana Department of Health, et al.,	
Defendants.	

DECLARATION OF DONN'JOANEE THOMAS

I, DonnJoanee Thomas, am competent to testify and declare as follows:

1. The following is true and correct to the best of my knowledge.

2. I am not a party to this lawsuit.

3. I am a United States citizen and a resident of Orleans Parish.

4. I am personally acquainted with Plaintiff Ursula Newell-Davis ("Ms. Davis").

5. I am a single mother caring for three children. I have a daughter and son that suffer from ADHD. My son, however, also struggles with extreme depression and behavioral issues that led him to being hospitalized on at least two separate occasions. It was around November 2020 and after my son's second hospitalization that I met Ms. Davis and she was able to provide care for my son that was not otherwise available to me.

6. From 2016 to 2018, my son received respite services from a Center for Hope, located at 5630 Crowder Blvd., New Orleans, LA 70127.

7. A social worker would come to my house 3 days a week and I felt very comfortable with her interacting with children and being in my home. Unfortunately, she ended up being diagnosed with breast cancer and she was unable to work from 2018-2019. During this time, I kept in contact with her during her medical leave, and I desperately struggled to find another provider I could trust. I attempted to get help for my son through his doctor. The office told me that my son was on a list and that I would receive a call back. I never received any call back, despite contacting the office on multiple occasions.

8. From 2018 to 2020, I was simultaneously trying to balance a job and care for my children, all while receiving multiple calls about his numerous behavioral issues. While I did not have a provider coming to work with my children during this time, I continued receiving medication for my children from a [C]enter for Hope.

9. When my original provider was finally able to return to work, I found out that the [C]enter for Hope refused to let her work with her previous clients, and she was not permitted to work with my children.

10. At the start of the pandemic in 2020, I stopped receiving any communication from a [C]enter for Hope and my children were dropped as clients. I kept trying to call and schedule an appointment, but I did not receive any further information from them, and all of my calls went unanswered.

11. As my son's performance in school continued to deteriorate, he was ultimately hospitalized in November of 2020. At that time, an administrator at the hospital recommended that I reach out to Ms. Davis for help.

12. I quickly contacted Ms. Davis and she was not only responsive but made time to work with my son immediately. She helped me and my family when the entire system had abandoned us. Ms. Davis was instrumental in assisting me and providing care not otherwise available to me.

13. Ms. Davis is unparalleled in her demeanor, professionalism, dedication, and commitment to her clients. I have seen firsthand the drastic improvements in my children's behavior because of her work with them. My son is not only receiving awards at school now, but I have not received a call from his school since September 2021. This is a new record and speaks of the immense progress my son has made with Ms. Davis.

14. The lack of respite care for youth struggling with cognitive disabilities is astounding, and I know from firsthand experience that I was not the only parent desperately struggling to obtain respite services. When you have a child suffering from extreme cognitive and behavioral issues, that child needs access to services and care immediately. There is no time to waste. My sister is experiencing similar struggles in being able to find respite services for her sons.

15. I have no doubt that if Ms. Davis were to operate her own respite business, she would provide a desperately needed service, and provide a level of care that is utterly lacking in the existing market. The denial of her respite care application adversely impacts all parents similarly situated in our community.

I declare, under the penalty of perjury of the laws of the State of Louisiana and the United States, that the foregoing is true and correct.

SIGNED this 31st day of January 2022, in New Orleans, Louisiana.

/s/ Donn'Joanee Thomas
DONN'JOANEE THOMAS

Filed February 1, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

URSULA NEWELL-DAVIS, et al.,	**Civil Action No. 2:21-cv-00049-NJB-JVM**
Plaintiffs,	
v.	
COURTNEY N. PHILLIPS, in her official capacity as Secretary of the Louisiana Department of Health, et al.,	
Defendants.	

DECLARATION OF MALEEKA LEE

I, Maleeka Lee, am competent to testify and declare as follows:

1. The following is true and correct to the best of my knowledge.

2. I am not a party to this lawsuit.

3. I am a United States citizen and a resident of Jefferson Parish.

4. I am personally acquainted with Plaintiff Ursula Newell-Davis ("Ms. Davis").

5. I am a single mother caring for a son that has been diagnosed with ADD Attention Deficit Disorder and ODD Oppositional Defiant Disorder . When my son entered Preschool, I began receiving numerous calls from his school about his disruptive, aggressive, and defiant behavior. It was around that time that I first met Ms. Davis and she was able to provide a level of care for my son that was completely different from what my son received from other providers.

6. When I tried contacting and using other respite providers, I often experienced delays in communication and my son received a superficial level of care that did not fully address all of his needs.

7. Ms. Davis, on the other hand, took the time to understand my son and to establish a strong bond that has helped him make significant strides in his life. Ms. Davis has tirelessly worked with him for years and I credit my son's progress to all of her hard work.

8. Ms. Davis is always available when I call her, and she has been a tremendous blessing to our family. Apart from helping my son with his ADD and ODD, Ms. Davis also recognized my son's longing to have a positive male figure in his life. Through her coordination, my son has been able to spend time with a male mentor that plays football with him and addresses all of my son's concerns from a male perspective. Ms. Davis devotes her own funds to make this happen.

9. Ms. Davis is a never-ending source of guidance and encouragement. Her support has not only made me stronger and sustained me through my own struggles, but she has also helped me reach my son in

a way I did not think was possible. She is truly unparalleled in her demeanor, professionalism, dedication, and commitment to her clients.

10. The lack of comprehensive respite care for youth struggling with cognitive disabilities is astounding, and I know from firsthand experience that I was not the only parent desperately struggling to find responsive and readily accessible respite services. When you have a child suffering from extreme cognitive and behavioral issues, that child needs access to services and care immediately. There is no time to waste.

11. I have no doubt that if Ms. Davis were to operate her own respite business, she would provide a desperately needed service, and provide a level of care that is utterly lacking in the existing market. The denial of her respite care application adversely impacts all parents similarly situated in our community.

I declare, under the penalty of perjury of the laws of the State of Louisiana and the United States, that the foregoing is true and correct.

SIGNED this 31st day of January 2022, in New Orleans, Louisiana.

/s/ Maleeka Lee
MALEEKA LEE

No. _____

In The
Supreme Court of the United States

URSULA NEWELL-DAVIS; SIVAD HOME AND COMMUNITY SERVICES, L.L.C.,

Petitioners,

v.

COURTNEY N. PHILLIPS, in her official capacity as Secretary of the Louisiana Department of Health, et. al,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR A WRIT OF CERTIORARI contains 8,982 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 12, 2023.

s/ Lawrence G. Salzman
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No. _____

URSULA NEWELL-DAVIS; SIVAD HOME AND COMMUNITY SERVICES, LLC,
Petitioners,
v.
COURTNEY N. PHILLIPS,
in her official capacity as Secretary
of the Louisiana Department of Health, et al.,
Respondents.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 12th day of June, 2023, send out from Omaha, NE 3 package(s) containing * copies of the PETITION FOR A WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

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Counsel for Petitioners

Subscribed and sworn to before me this 12th day of June, 2023.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

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Cc:	Larry Salzman; Anastasia Boden; Sarah@pelicaninstitute.org; Cynthia R Piett; Incoming Lit
Subject:	Newell-Davis, et al. v. Courtney Phillips, et al. - Petition for Writ of Certiorari
Date:	Monday, June 12, 2023 4:00:05 PM
Attachments:	Newell-Davis Brief_pdfa.pdf Newell-Davis Appendix_pdfa.pdf Newell-Davis Cert of Compliance_pdfa.pdf Newell-Davis Affidavit of Service.pdf

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Counsel,

On behalf Larry Salzman, Counsel of Record for Petitioners, please find the attached Petition for Writ of Certiorari, Appendix, Certificate of Compliance, and Affidavit of Service that were just submitted for e-filing with the U.S. Supreme Court. A hard copy is being mailed to each of you as well.

Thank you,

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