No. 22-30166

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ursula Newell-Davis; Sivad Home and Community Services, L.L.C.,

Plaintiffs – Appellants

v.

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; Dasiny Davis, in her official capacity as 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; Cecile Castello, in her official capacity as Health Standards Section Director of the Louisiana Department of Health,

Defendants – Appellees

On Appeal from the United States District Court
for the Eastern District of Louisiana
No: 2-21-CV-49, Hon. Nannette Jolivette Brown, Judge

Plaintiffs-Appellants' Principal Brief

SARAH HARBISON
PELICAN INSTITUTE FOR
PUBLIC POLICY
400 Poydras St., Suite 900
New Orleans, LA 70130
Telephone: (504) 952-8016
sarah@pelicaninstitute.org

ANASTASIA P. BODEN
Counsel of Record
LAWRENCE G. SALZMAN
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
ABoden@pacificlegal.org
LSalzman@pacificlegal.org

Counsel for Plaintiffs-Appellants

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiffs-Appellants:

Ursula Newell-Davis
Sivad Home and Community Services, LLC

Counsel for Plaintiffs-Appellants:

Anastasia P. Boden (Lead/Counsel of Record)
Lawrence G. Salzman
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
aboden@pacificlegal.org
lsalzman@pacificlegal.org

Sarah Harbison
Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA
Telephone: (504) 952-8016
sarah@pelicaninstitute.org

Defendants-Appellees:

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 Development Disabilities

Dasiny Davis, in her official capacity as 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

Cecile Castello, in her official capacity as Health Standards Section Director of the Louisiana Department of Health

Counsel for Defendants-Appellees:

Shae Gary McPhee, Jr.
Department of Justice
Office of the Solicitor General
Suite 1850909 Poydras Street
New Orleans, LA 70112
Telephone: (225) 938-0779
mcphees@ag.louisiana.gov

Neal Risley Elliott, Jr.
Department of Health & Hospitals for the State of Louisiana
Suite 861628 N. 4th Street
Bienville Building
Baton Rouge, LA 70802
Telephone: (225)342-1128
Facsimile: (225) 342-2232
neal.elliott@la.gov

Elizabeth Baker Murrill, Esq.
Office of the Attorney General for the State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804-9005
Phone: 225-326-6766
murrille@ag.louisiana.gov

To my knowledge, there are no other interested parties within the meaning of 5th Cir. Rule 28.2.1.

/s/ Anastasia P. Boden
ANASTASIA P. BODEN

Statement Regarding Oral Argument

Plaintiffs-Appellants Ursula Newell-Davis and Sivad Home and Community Services, LLC, respectfully request oral argument. This case raises significant questions regarding the scope of the United States Constitution's due process and equal protection provisions and the appropriate application of rational basis scrutiny affecting vast unenumerated constitutional rights. The case also concerns the appropriate standard of scrutiny under the Louisiana constitution's due process and equal protection provisions, which is of extraordinary consequence to Louisianans. Oral argument will give these issues the attention they warrant, allow the advocates to assist the Court in

understanding the record established at the district court, and aid the Court in a careful consideration of this case.

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Constitutions

Other Authorities

Introduction

Ursula Newell-Davis has worked tirelessly as a social worker in New Orleans for over two decades. Given her observation that special needs kids and their families need more support, she recently sought to offer temporary care, called respite service,[1] to this population. But the Louisiana Department of Health denied her permission to start her business under what's called Facility Need Review (FNR).[2] Appellants brought this civil rights lawsuit to challenge the FNR process as an unconstitutional deprivation of the right to earn a living and a denial of equal protection before the law.

FNR has nothing to do with a person's fitness or qualifications; it relates solely to whether the Department believes another provider is "needed." For the past several years, the Department has determined that about 75% of those who apply to provide respite care are not needed in Louisiana. This exclusion of qualified care providers has demonstrable

[1] Respite care is defined as "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] Defendants-Appellees, individual members of the Louisiana Department of Health who were sued in their official capacity pursuant to 42 U.S.C. § 1983 and the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), are referred to collectively as the "Department."

negative effects, including driving down access to and decreasing the quality of care.

The district court ruled that, notwithstanding Appellants' evidence of FNR's harm, the law survives rational basis review because it saves the Department from having to spend time or effort regulating any new providers, thus allowing it to spend more resources regulating existing providers. That decision must be overturned.

First, states have no legitimate interest in excluding people from the occupation of their choice for the mere purpose of regulating fewer businesses. Such circular reasoning would create a governmental interest in limiting constitutional rights for its own sake and has been repeatedly rejected by the Supreme Court. While rational basis review is deferential, courts have frequently stressed that it is not insurmountable. The district court's decision would reduce rational basis scrutiny to no scrutiny at all.

Second, the undisputed evidence shows that FNR is not rationally related to any legitimate end. Instead, it exacerbates an ongoing shortage of respite care. Department employees testified that "there's always a need" for more providers, and several mothers of special needs children

testified to the harms wrought by an ongoing shortage of respite services. One mother even attested that, after struggling to find a provider who could help her care for her special needs son, she lost her job, then her home, and at her lowest point, considered the "unimaginable" choice of giving her son up for adoption. Capping the number of providers when it's already difficult to access care is not just cruel, it's irrational.

FNR also lacks a rational relationship to decreasing costs or improving quality. A survey of 72 peer-reviewed studies on need review confirms that the process is associated with *higher* costs, *increased* overall spending, and no or negative effects of quality. Predictably, FNR is associated with lower consumer satisfaction. Complaints in Louisiana are rising year after year and survey results indicate that Louisianans are less satisfied with their care than residents of non-FNR states.

The Department did not offer one piece of evidence to the contrary. Instead, it contends it may reduce the number of licensees—without any consideration of the licensee's fitness—solely to conserve its resources for regulating *existing* licensees. But administrative ease cannot justify deprivations of liberty, and because FNR lacks a rational relationship to

any legitimate governmental end, it arbitrarily deprives Appellants of liberty without due process of law.

Third, the district court erred in its treatment of Appellants' equal protection claim. FNR draws an arbitrary line between those who may provide respite care and those who may not. This classification has nothing to do with a person's qualifications; the Department admits that there is no reason to believe a person who satisfies FNR is any more qualified than a person who is denied. And it has nothing to do with protecting the public. Instead, it relates solely to whether an incumbent business is already operating. The result is to deprive people like Ms. Newell-Davis of a livelihood, and special needs families of the care they require, for the purported benefit of the Department. But the real beneficiaries are the existing providers, who enjoy less competition. The evidence further shows that FNR is employed in a way that favors incumbent businesses when they seek expansion of their territory or service. Such arbitrary and protectionist treatment denies Appellants equal protection of the laws.

Last, the court below relegated Appellants' state due process claim to the same level of scrutiny that it applied to Appellants' federal claim

and declined to subject FNR to intermediate scrutiny under the state equal protection clause. But the Louisiana due process provision provides more protection than its federal counterpart, and because FNR affects a suspect class (disabled children and adults), it should've been subject to heightened scrutiny under an equal protection analysis. FNR cannot even satisfy rational basis review, let alone the stricter requirements of the Louisiana constitution.

No facts are in dispute. The sole question in this case is a legal one: whether the government can constitutionally deprive people of their ability to earn a living for the sole purpose of saving itself the hassle of regulating them. This Court should hold that it may not, reverse, and grant summary judgment to Appellants.

Jurisdictional Statement

Plaintiffs-Appellants brought this lawsuit in the district court pursuant to 42 U.S.C. § 1983, the Fourteenth Amendment to the United States Constitution, 28 U.S.C. §1367, and the Louisiana constitution, art. 1, §§ 2–3. ROA.22. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 1367, and 2201–2202. This appeal arises from the district court's order granting Defendants-Appellees' motion for summary

judgment, ROA.3735, as well as an earlier order dismissing Plaintiffs' Privileges or Immunities claim. ROA.339. The district court entered its final judgment on March 22, 2022. ROA.3765. Appellant filed a timely Notice of Appeal on April 5, 2022. ROA.3766. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

Statement of the Issues

1) Whether the state has a legitimate interest in excluding qualified applicants from a trade solely to save itself the trouble of regulating additional licensees?
2) Whether Louisiana's Facility Need Review (FNR) law, which permits the state to deny qualified care providers the opportunity to apply for licensure solely because the Department believes another provider is not "needed," is rationally related to any legitimate state interest?
3) Whether FNR arbitrarily and irrationally favors incumbent providers in violation of the Equal Protection Clause of the Fourteenth Amendment?
4) Whether the Louisiana Constitution offers a heightened standard of scrutiny and whether FNR survives that standard?

Statement of the Case

Plaintiffs-Appellants Ursula Newell-Davis and her business

Ursula Newell-Davis is a mother, entrepreneur, and social worker, and a resident of Orleans Parish, Louisiana. ROA.2629. 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. ROA.2629. Her clients rave about her ability to connect with their children, particularly those with socio-emotional or behavioral challenges. ROA.3588–3591. Her desire to now provide temporary care, called respite care, for these children has deeply personal roots.

As the mother of a special needs child, she knows firsthand that respite services are vital to allowing parents the time they need for work, errands, or a break from the occasional exhaustion involved in rearing special needs kids. ROA.2631. And as a social worker, she's seen what happens when parents lack access to care: they are forced to leave their children home alone. ROA.2630. Between the lack of care and their disabilities, these children may fail to complete their homework or to complete basic tasks like showering, brushing their teeth, or changing

their clothes. ROA.2630. Those practices, in turn, can lead to these kids being bullied at school for bad hygiene or for wearing the same thing two days in a row. ROA.2630. Unsupervised children, especially those with disabilities who seek acceptance, may also turn to criminal activity. ROA.2630. In 2019, after being asked by several families to provide respite care, she started Sivad Home and Community Services and applied for Facility Need Review (FNR) with the aim of opening her own respite care business. ROA.2632.

The Department denied Appellants' FNR application in a two-page form letter in early 2020. ROA.3356. The Department freely admits the denial had nothing to do with Ursula's qualifications. ROA.2416. Instead, the Department denied her solely because it believes another respite care business is not needed in New Orleans. ROA.3356.

Facility Need Review

FNR was instituted by the Department through regulation in 2012 and is entirely separate from the "rigorous" respite provider licensure process. La. Admin. Code tit. 48, § 12523(A). Need review has nothing to do with a person's qualifications; it pertains solely to whether the Department believes there are enough providers to satisfy the

community's demand. ROA.2712:1–14, 20–22. If able to satisfy FNR, an applicant may then proceed to licensure, which evaluates a person's fitness for the trade and implements other health and safety-related requirements. ROA.2712:20–22, ROA.2681:3–9; La. Admin. Code tit. 48, § 12523(A). Because FNR has nothing to do with fitness, the Department admits that it rejects fully qualified applicants under FNR. ROA.2714:20–2715:5. It further admits that there's no reason to believe that a person who has been granted FNR approval is any more fit to provide care than someone who has been denied. ROA.2714:15–25.

To demonstrate "need," an applicant must "establish[] the probability of serious, adverse consequences to recipients' ability to access health care if the provider is not allowed to be licensed." La. Admin. Code tit. 48, § 12523(C)(4). The Department does not have any internal documents, procedures, or protocol to guide the 4-person FNR Committee in making this determination. ROA.2423–2425. The Committee may (and regularly does) consider the number of existing businesses when evaluating need, as it did when evaluating Appellants' applications. La. Admin. Code tit. 48, § 12523(C)(3)(a); ROA.2416.

In practice, FNR is haphazardly applied. Sometimes the 4-person Committee will look outside of the application and consult with local government entities for their opinion on whether another provider is needed; other times it will not. ROA.2703:16–25, ROA.2771:20–2772:4. Sometimes the Committee will attempt to verify statements within the applications; other times it will not. ROA.2748:14–2749:18, ROA.2761:1–13. The Department's 30(b)(6) witness, Paul Rhorer, a member of the FNR Committee, testified that FNR decisions are often based not on the applicant's evidence but on what Committee members already believe to be true about the need in a given area. ROA.2693:8–18. Even where the application indicates a need, the Committee may deny the application if a member already "knows" there to be sufficient providers. ROA.2718:13–2720:14, ROA.2721:25–2722:1. Conversely, the Committee may approve an application even if it lacks documentation if a Committee member "knows" there's a need. ROA.2762:7–19. Though applicants may present testimony from a respite care recipient that he or she is having trouble accessing care, Mr. Rhorer testified that such testimony is probative only if the person has attempted to contact *every single provider in the area.* ROA.2719:7–14 ("This is the … Greater New Orleans area, and I know

there are a large number of providers that she could be able to choose from. Now, if she goes to every single provider and there's a number of parents with similar issues, then that might be a different reason to look at it."). ROA.2703:1–8.

Such a subjective process predictably yields inconsistent results. Applications with binders full of evidence of need are sometimes rejected while one-and-a-half-page applications are approved. When presented at deposition with five prior applications, Mr. Rhorer, who has decided hundreds of applications over his more than a decade on the Committee, ROA.2673:2–6, could not correctly identify the result of 3 out of 5 applications, demonstrating that FNR is little more than a lottery for one's constitutional rights—and one that entails very poor odds of success.

For example, Mr. Rhorer testified that a one-and-a-half-page application for Caring Hands did "not discuss" serious adverse consequences and he would therefore deny it. ROA.2716:24–2717:4. That short application, one of the shortest submitted in recent years, was granted. ROA.2469. He further testified that he would deny the 11-page application for Live Good at Home Care Services, despite testimony that

recipients of respite care were having trouble with a certain provider, because he believed that "there's a number of different agencies in that current area that could provide the services." ROA.2718:13–22. Yet that application was granted. ROA.2474. He testified that he would deny a four-page application for With Loving Kindness because "There's nothing in here that tells me that there would be an adverse consequence to the healthcare of individuals." ROA.2719:15–60:1. That application was granted. ROA.2476.

Mr. Rhorer evaluated two applications consistent with their actual outcome. When asked about an eight-page application for Exceptional Healthcare, he said that "in knowing the programs that we do, there are providers in the area" and so it should be denied. ROA.2721:21–2722:1. He was right; the Department denied the application despite that the applicant presented evidence of a need for respite care, including information gathered from a local Council on Aging, data about waitlists and higher wait times for services in Louisiana than the national average, the views of a focus group she organized, conversations with volunteers at Meals on Wheels and a community center, perspectives from nurses at a Family Medical and Geriatric Center, and information

obtained through interviews of family members of seniors. All of that evidence was rejected in favor of the Department's own assumptions about whether Exceptional Healthcare was needed.[3] ROA.2864–2866.

When asked about a 36-page application for Above and Beyond Care Services, Mr. Rhorer said "it has a list of the names of some individuals that claim they [] need the services but they don't get them," but "there's no determination whether or not these people are even eligible for any of the programs that the state offers. It just could be a list of individuals." ROA.2726:1–8. Thus, "even though" the application contained "some complaint letters that [were] supported from the Mayor, [and] from the North Caddo Medical Center," he would have denied the application. ROA.2726:14–2727:6, ROA.2725:21–24. He was right: the 36-page application with testimony from the mayor and recipients of

[3] Appellants similarly provided evidence of a need for more respite care. For example, they included statistical data that showed an increase in crimes committed by juveniles and therefore a need for services aimed at supervising and caring for young people. ROA.2636–2642. They described speaking to the local District Attorney, who expressed a "dire need" for more early intervention efforts for juveniles. ROA.2636–2642. They also cited studies showing that respite care can lead to better outcomes for both children and their family members and lower incidences of negative behavior in the community. ROA.2636–2642. They further described speaking with representatives from Magellan (the state's Coordinated System of Care for youth with mental health or substance use challenges), who encouraged Appellants to apply. ROA.2636–2642.

respite care was not enough to secure FNR approval. ROA.2463. The applicant later supplemented her application with four binders worth of material attempting to demonstrate lack of care in the area, including studies and dozens of letters from members of the community. ROA.2481–2611. She was denied once again. ROA.2466.

FNR naturally favors the economic interests of established businesses, who enjoy less competition. Indeed, the existence of incumbent businesses makes it less likely that an applicant will secure FNR approval. La. Admin. Code tit. 48, § 12523(C)(3). But FNR also favors incumbents when they seek additional or expanded authority to operate.

For example, although Mr. Rhorer testified that the Committee does not approve applications that lack documentary evidence to support their statements, ROA.2749:16–22, the Committee did just that for an incumbent business called O&M. When asked to explain why O&M was approved despite failing to include any evidence in its application to substantiate its claims, Mr. Rhorer testified that O&M was "already an accredited company under behavioral health," ROA.2760:4–19, and the Committee therefore went out of its way to seek out additional

information in O&M's case "being that this was an already approved, proven mental health agency providing the services." ROA.2761:1–13, 18–22.

Similarly, when asked whether the Committee approved Care, Inc.'s application "because it had knowledge of this entity," and "not because this entity submitted any supporting documents," Mr. Rhorer replied, "that is correct." ROA.2774:3–2775:22; ROA.2776:4–8. When asked about Arc of New Orleans, Mr. Rhorer testified that the application "doesn't provide anything in there" related to "adverse consequences." ROA.2777:6. After being told that the application was approved, Mr. Rhorer said he was "not sure" what happened in that case, but noted Arc of Orleans has "been a provider of services for 20 something years." ROA.2777:9–21.

The state interests served by FNR

Throughout this litigation, the only justification the Department has given for FNR is that "limiting the number of HCBS providers eases [the Department's] regulatory burden," which it contends "self-evidently" benefits the public. ROA.2420, ROA.2440. The Department does not have any evidence that FNR actually benefits the public. 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 the quality of care would worsen if FNR was removed; in fact, the Department doesn't measure the quality of care at all. ROA.2457–2458.

Appellants, by contrast, introduced evidence that FNR contributes to a shortage of providers and is associated with higher costs and lower quality care. For example, Department employees testified that there is a shortage of respite providers, ROA.3115:24–3116:5 ("there's always a need" for more respite providers in Louisiana); ROA.2782:3–25 (testifying to a shortage of center-based respite providers), and internal Department emails reveal the same. ROA.2624 ("short-term respite providers are always needed"). Heartbreaking testimony from four mothers further demonstrates inconsistent and unreliable care in New Orleans and the resulting hardship on special needs families.[4]

[4] Three of the mothers' declarations were the subject of a motion to exclude filed by the Department. ROA.3615. The Department contended that they should be excluded because they were belatedly disclosed, even while acknowledging that it would suffer no prejudice if the declarations were admitted. Appellants contended that the delay was justifiable. ROA.3615. The district never ruled on that motion before ruling on cross-motions for summary judgment.

ROA.2647–2649, ROA.3588–3599. By denying 75% of those that apply for FNR, the program puts respite care further out of reach. ROA.3239.

Worse, it does so without any rational relationship to improving the quality of care. The number of complaints regarding respite care 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.[5] ROA.819. Using national survey data relied on by several states (including Louisiana) and the federal government, ROA.787–789, Appellants' expert, Dr. Ed Timmons, found "enormous" differences in satisfaction between Louisianans and residents of non-FNR states. ROA.791. For example, 46% of survey respondents in Louisiana reported having difficulty accessing respite services, while

[5] The Expert Report of Dr. Ed Timmons, which summarizes the survey results, was the subject of a *Daubert* motion filed by the Department. ROA.406. The Department contended that the survey's sample size and response rate, failure to account for alternative explanations, and use of Arizona over other comparison states, rendered the report inadmissible. ROA.525. Appellants contended that the survey's underlying data was reliable (as evidenced by the fact that Louisiana relies on it to make policy decisions), the Department's concerns about sample size and response rate go to weight, not admissibility, that the Department misstated the response rate, that Dr. Timmons's analysis revealed enormous differences between states and there was no reason to think the Department's alternative explanations were credible, and Dr. Timmons had good reasons for picking his comparison state. ROA.613–631. The district court never ruled on Department's motion to exclude before ruling on cross-motions for summary judgment.

Arizona (the only non-need review state to report over the same time period) reported 14% and the national figure was 24%. ROA.791.

A second expert, Dr. Matthew Mitchell, reviewed 72 studies and concluded that FNR does not have any beneficial effects on costs, spending, or access. ROA.3314. When it comes to quality, for example, *not one study* found that need review improves quality outside of highly technical fields like percutaneous transluminal coronary angioplasties, where repetition of a highly skilled service results in better performance of that service. ROA.3334–3335. Instead, FNR is associated with no effect or negative effects on access, costs, and quality of care. ROA.3314. These conclusions were sustained across diverse healthcare fields and are backed by economic theory. ROA.2653–2654.

The Department does not have one piece of evidence to the contrary. It did not present any evidence to support its assumptions apart from its Expert Report, ROA.2456–2458, ROA.2417–2420, and the report's author, Dr. Stephen Lutzky, 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 stated that he was unaware of "any evidence that need review improves quality in home health in any state." ROA.3218:8–15.

Rather than supporting the program's rationality, Dr. Lutzky's report further underscores FNR's harm and inherent irrationality. Dr. Lutzky conducted a survey using the Department's list of licensees in New Orleans and determined that 36% of businesses were fully unreachable and another 44% were either not accepting new clients at all or were only doing so in a limited capacity. ROA.3236–3237. Just 20% of licensees were accepting new clients without conditions. *Id*. In other words, the Department—which bases its determination of "need" on the number of operating businesses—had been wrong about the actual number of businesses operating all along. Despite all of this, Dr. Lutzky concluded that FNR was beneficial because, without it, the Department would have fewer resources to get non-operational businesses off of the books or to otherwise regulate existing providers. ROA.3240.

Procedural History

Appellants brought this civil rights lawsuit under 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 Appellants' Privileges or Immunities claim but denied the motion in all other

respects. ROA.339. On March 22, 2022, the district court granted the Department's motion for summary judgment on the basis that FNR allows it to conserve resources to "focus on regulating already-licensed providers." ROA.3759. This appeal followed.

Summary of the Argument

The district court ruled that the state may exclude fully qualified applicants from entering an ordinary and lawful trade for the sole purpose of saving itself the expense of regulating additional licensees.[6] It would be bad enough in any case for a federal court to rule that the government can limit constitutional rights for its own convenience, but that holding is especially tragic here, where the trade in question is providing care to special needs children. As the Supreme Court has held, the government may not limit constitutional rights to save itself "some dollars and cents." *Mayer v. City of Chicago*, 404 U.S. 189, 198 (1971); *Vlandis v. Kline*, 412 U.S. 441, 451 (1973) (the "Constitution recognizes higher values than speed and efficiency") (cleaned up). The district

[6] Specifically, the Court ruled that the Department could exclude qualified providers from applying for licensure to save itself the burden of conducting initial licensing inspections (which the Department calls "surveys") of new providers, and to instead focus its resources on conducting more frequent *re*-licensure inspections of existing licensees. ROA.3759–3760. Re-licensure inspections are not even required by law. La. Admin. Code. tit. 48, Pt. I, § 5017.

court's contrary holding creates a freestanding interest in limiting the exercise of constitutional rights, since doing so can always be said to save the government time or money, and would therefore eviscerate due process scrutiny altogether. While the government may exclude people from their desired occupation based on their fitness for the trade, *Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 239 (1957), it may not exclude them *despite of their qualifications* for its own administrative ease. *Doe v. Plyler*, 628 F.2d 448, 459, *aff'd* 457 U.S. 202 (1982) (rejecting cost-saving as a rationale under the equal protection clause because "to accept this contention would mean that cost, in and of itself, could justify the exclusion of any group of people from any government program that requires funding."). The district court was wrong to hold otherwise.

Nor is FNR rationally related to any other legitimate state interest. The evidence in this case, uncontradicted by the Department, shows that FNR reduces access to care, is associated with higher costs and spending, and lacks a rational connection to improving quality. Even under the rational basis test, FNR deprives Appellants of their constitutionally protected right to pursue a livelihood without due process of law.

The district court also got Appellants' equal protection claim wrong. FNR creates an impermissible distinction between those who may provide respite care and those who may not. That classification is not related to fitness; the Department itself testified that there is no reason to believe that a person who has been granted FNR approval is any more qualified than someone who is not. ROA.2714:15–25. Instead, it is an arbitrary classification based on the Department's standardless determination of whether there are enough businesses operating. And it harms entrepreneurs like Ms. Newell-Davis and the children she seeks to serve. Moreover, the Department admitted that it applies FNR in a way that favors incumbent businesses, ROA.2749:16–22, ROA.2760:4–19, ROA.2761:1–13, 18–22. Such discriminatory, protectionist, and irrational treatment deprives Appellants of equal protection before the law. *See, e.g.*, *Plyler*, 628 F.2d at 459; *Newman Marchive Partnership, Inc. v. Hightower*, 349 F. App'x 963 (2009).

The court's reasoning with regards to Appellants' state constitutional claims was also in error. The district court relegated Appellants' state due process claim to the same rational basis test it applied to Appellants' federal claim and declined to evaluate their equal

protection claim to intermediate scrutiny. But Louisiana courts have viewed the right to earn a living as fundamental and have therefore subjected laws that substantially interfere with that right to a heightened standard of review. *Reynolds v. Louisiana Bd. of Alcoholic Beverage Control*, 185 So. 2d 794, 812 (La. 1965). And it has required laws that affect suspect classes, like disabled children and adults, to intermediate scrutiny under an equal protection analysis. *Clark v. Manuel*, 463 So. 2d 1276, 1285 (La. 1985). Because FNR cannot even satisfy rational basis review, it cannot meet these even stricter requirements.

Finally, the district court dismissed Appellants' Privileges or Immunities Clause claim. That Clause was intended to secure to all individuals their civil rights, including the right to earn a living. Recognizing that such a claim is precluded by Supreme Court and Circuit precedent, Appellant raises it here solely for appeal.

Standard of Review

This Court reviews rulings on cross-motions for summary judgment de novo, viewing the facts in the light most favorable to the non-moving party. The Court must determine whether there are any genuine issues

of material fact and whether the district court correctly applied the relevant substantive law. *McCorkle v. Metropolitan Life Ins. Co.*, 757 F.3d 452, 456 (5th Cir. 2014). The Court likewise reviews a ruling on a motion to dismiss under Rule 12(b)(6) de novo. *Lampton v. Diaz*, 639 F.3d 223, 225 (5th Cir. 2011).

Argument

I. FNR Deprives Ms. Newell-Davis of Due Process of Law in Violation of the Fourteenth Amendment

Under the Due Process Clause of the Fourteenth Amendment, any restriction on the right to earn a living must bear a rational connection to a legitimate state interest. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). Though deferential, the rational basis test is "not toothless." *See Louisiana Seafood Management Council, Inc. v. Foster*, 917 F. Supp. 439, 446 (E.D. La. 1996). It establishes a presumption in favor of a law's constitutionality that can be rebutted by evidence demonstrating a law is not rationally tailored to its end, or only furthers illegitimate ends, like economic favoritism. *See, e.g.*, *St. Joseph Abbey*, 712 F.3d at 223.

Using this standard, the Supreme Court has struck down numerous economic regulations that lack a means-end fit to any legitimate end. *See,*

e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (invalidating zoning ordinance that burdened homes for the intellectually disabled); *Zobel v. Williams*, 457 U.S. 55, 56 (1982) (distinctions in state's dividend distribution plan lacked rational relationship to creating incentive for state residency); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (conditions on receiving food stamps were not rationally related to reducing fraud); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (need review law for sellers of ice served no end other than protectionism). So has this Court. *See, e.g.*, *St. Joseph Abbey*, 712 F.3d at 223 (requirement that caskets be sold at licensed funeral homes by licensed funeral directors lacked rational relationship to protecting the public); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008) (restrictions on sale of intimate devices lacked rational relationship to protecting minors); *Harper v. Lindsay*, 616 F.2d 849, 855 (5th Cir. 1980) (requirement of six-inch by six-inch window in massage establishments lacked any conceivable rational purpose); *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1039 (5th Cir. 1980) (age restriction related to coin-operated amusement centers was not rationally related to preventing truancy or exposure to gambling or narcotics); *Plyler*, 628

F.2d at 459 (rejecting cost-saving as a legitimate reason for excluding undocumented children from public schools); *Thompson v. Gallagher*, 489 F.2d 443, 448 (5th Cir. 1973) (prohibition on employment for those with non-honorable military discharges lacked a rational relationship to maintaining quality of city's workforce); *cf. Santos v. City of Houston, Tex.*, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (striking down ban on jitneys because it "deprive[d] the public of another form of public transportation which is desperately needed" and was applied arbitrarily). Courts have even struck down need review laws like the one at issue under rational basis review.[7] *See Bruner v. Zawacki*, 997 F. Supp. 2d 691, 699 (E.D. Ky. 2014).

The district court ruled that FNR satisfies rational basis review because it saves the Department from having to spend resources regulating more providers, thereby making it easier to regulate existing providers. But such circular reasoning, which justifies the curtailment of

[7] Courts have also found that need review laws fail to provide any legitimate local benefits in violation of the commerce clause. *See, e.g.*, *Medigen of Kentucky, Inc. v. Public Serv. Comm'n of West Virginia*, 985 F.2d 164, 167 (4th Cir. 1993) ("providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose"); *Walgreen Co. v. Rullan*, 405 F.3d 50, 59 (1st Cir. 2005); *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 573 (4th Cir. 2005).

the constitutional right to earn a living for the sake of limiting the number of people who exercise it, must be overruled. Contrary to the government's contention, fewer qualified people exercising their right to pursue their calling in special needs care is no "self-evident" benefit to the public. And because FNR is not rationally related to any other legitimate state interest, it deprives Appellants of their constitutionally protected rights without due process of law.

A. The government lacks a legitimate interest in depriving people of constitutional rights for the purpose of conserving resources

Throughout this litigation, the only rationale the Department asserted for FNR was conserving resources to do more regulation of existing licensees, which it contends "self-evidently" benefits the public. ROA.2420, 2440. But that reasoning is not only circular, it has been repeatedly rejected by the Supreme Court. *See, e.g.*, *Mayer*, 404 U.S. at 198 (saving the government "some dollars and cents" is not enough to satisfy rational basis review); *Vlandis*, 412 U.S. at 451 (the "Constitution recognizes higher values than speed and efficiency") (cleaned up); *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); *cf. Vote Forward v. DeJoy*, 490 F. Supp. 3d 110, 128 (D.D.C. 2020) (saving money doesn't satisfy intermediate scrutiny); *Calipo v. Wolf*, No. 1:18-cv-320, 2019 WL 6879570, at *15 (W.D. Pa. 2019) (plaintiffs stated a claim where they alleged prison employees denied inmates adequate restrooms to "save[ ] money on upkeep and remodel of facilities"). It has also been rejected by this Court. *Plyler*, 628 F.2d at 459 (cost-saving was not a legitimate state interest that could justify differential treatment); *Newman Marchive*, 349 F. App'x at 965 (2009) (same).

The Department's rationale 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 Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934). Here, for example, the Department asserted that it has an interest in reducing the number of licensees even though it has no idea how many licensees it has the capacity to regulate or whether it has the capacity to regulate more licensees. ROA.2425–2426. It never stated that it would be unable to complete its required regulatory duties in the absence of FNR.

ROA.3057:23–3058:1. It merely asserted that removing FNR would require it to regulate "unnecessary" parties and the Department would prefer to use those resources doing other things. But the government *can always* assert, without evidence, that reducing the number of people who can exercise their constitutional rights will make things easier on itself.

This is especially the case with regards to occupational regulations, which burden entry into a trade and therefore drive down the number of parties being regulated. By assuming that conserving resources to regulate incumbent businesses is always good for the public, the government's justification begs the very question that the Due Process Clause demands be asked. That is, due process requires a justification for depriving people of their liberty. The Department's argument assumes that depriving people of their liberty is good, since doing so makes it easier for the government to regulate other parties, which purportedly always benefits the public.

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 licensure requirements for casket sellers are rational, because they drive down the

number of people who sell caskets, or that bans on intimate devices are rational because they result in one less product to regulate. Yet courts, including this Court, have repeatedly struck down these laws and other economic regulations. *See, e.g., St. Joseph Abbey*, 712 F.3d at 223; *Reliable Consultants, Inc.*, 517 F.3d 738; *Harper*, 616 F.2d at 855; *Aladdin's Castle, Inc.*, 630 F.2d at 1039; *Plyler*, 628 F.2d at 459; *Thompson*, 489 F.2d at 448; *La. Seafood Mgmt. Council, Inc.*, 917 F. Supp. at 446; *Walters v. Edwards*, 396 F. Supp. 808 (E.D. La. 1975); *Santos*, 852 F. Supp. at 608; *Bruner*, 997 F. Supp. 2d at 699.

The absurdity of the Department's argument becomes clear when one analogizes to other contexts. It's the equivalent of the government suggesting it may cap the number of cars on the road so it can better regulate drivers, or cap the number of voters to better regulate elections, or cap home ownership to better oversee mortgage practices, or cap the number of students to better regulate the quality of education. *Cf. Plyler*, 628 F.2d at 459 (state cannot exclude similarly situated students from public schools for the purpose of conserving resources and improving the quality of education). The district court's rationale would 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.[8] The way the government ensures health and safety is by enforcing health and safety regulations, not by limiting the number of people who can exercise their rights.

The Department's argument is particularly weak here, since it contends that it wants to conserve resources to do things *that are not even required by law*. Its main argument is that it wants to conserve resources to do more "re-licensure surveys," which are inspections that occur at the time of re-licensure. But re-licensure surveys are not required by statute or regulation. La. Admin. Code. tit. 48, Pt. I, § 5017. Its rationale boils down to simply wanting to do other things than allow people to exercise their constitutional rights.

Because such an interest in limiting the exercise of constitutional rights solely for the sake of conserving resources would destroy due process of law under the rational basis test, it is illegitimate, and the

[8] It also has no limiting principle and is arbitrary. Right now, the Department denies about 75% of those who apply for FNR, but it could just as easily deny 80%, 90%, or even establish a monopoly if the Department determines that's all that's "needed" to serve Louisianans.

district court's reliance on it must be overturned. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (rejecting the government's rationale where it "would eviscerate the Equal Protection Clause").

B. FNR is not rationally related to any other, legitimate state interest

1. FNR is not rationally related to increasing access to care

FNR reduces access to care. That should be self-evident, given that the entire point of the program is to limit the number of providers and to save the Department from having to spend resources regulating them. But it's also borne out by the evidence in this case. Appellants' expert, Dr. Matthew Mitchell,[9] summarized the results of 72 peer-reviewed studies on the effects of need review laws in the healthcare field and concluded that 23 of the 24 studies that examined access found that access is worse in states with need review, while one study found mixed effects. ROA.3328–3330. Particularly relevant, need review has been shown to limit access to home health services, an umbrella category that

[9] Dr. Mitchell is an economist who has led a project to study need review laws at George Mason University's Mercatus Center for over a decade. ROA.3314–3315. Together, his team has produced eleven peer-reviewed studies of need review laws and three of these reports were personally authored or coauthored by Dr. Mitchell. ROA.3314–3315.

includes respite care in other states. For example, one report found that "there are fewer home health agencies per capita in states with need review regulations," and non-need review states "have roughly twice as many agencies per Medicare beneficiary." ROA.3330. Another found that there are 13.7% fewer home health agency admissions from hospitals in need review states, meaning people must stay longer in a hospital or another facility rather than receiving care at home. ROA.3332. He also found that need review has a particularly pernicious effect on vulnerable populations. Four of seven studies that evaluated the effect of need review on care for the elderly, rural populations, African Americans, and the uninsured, found that need review limits care for these populations.[10] ROA.3333.

What's worse, FNR reduces access during a time when there is a shortage of respite providers in Louisiana. At deposition, two Department employees testified that there was a need for more respite

[10] Importantly, "access" is not just about numbers; it's also about choice. Some families have contacted Ms. Newell-Davis complaining of inconsistent or poor-quality care. *See, e.g.*, ROA.2647–2649, 3593–3595. But others simply prefer care from Ms. Newell-Davis because she is particularly good at her job and her clients trust her with the deeply personal task of caring for another person's child. By playing a purely numbers game—and a flawed one at that—FNR deprives consumers of access to the provider of their choice.

providers in the state.[11] According to one, in her "[p]ersonal and professional" opinion, "there's always a need" for more providers. *See* ROA.3115:24–3116:5. According to another, there is a shortage of center-based respite care. ROA.2782:3–25. Moreover, Department employees have traded emails with representatives from Magellan (the state's provider of services under its Coordinated System of Care), who have expressed that "short-term respite providers are always needed for the CSoC program." ROA.2624. In one case, a Magellan representative reached out to the Department on behalf of a potential provider who had been told that her application would be "denied because there are many home health agencies in the state." ROA.2624. The Magellan representative said she wanted to make sure the application would not be denied, because respite providers are "always needed." ROA.2624. A member of the Department's Office of Behavioral Health added that this respite business wanted to combine behavioral health services with

[11] Both employees testified under Rule 30(b)(6), meaning their testimony is considered the testimony of the Department itself.

youth respite care and "there is an extreme shortage of providers of this service statewide."[12] ROA.2624.

The testimony of four single mothers further evidences a shortage of care in Louisiana. All four testified to having suffered through a respite care system plagued by ineffective care, a lack of providers, and delays. As one mother recounted, she experienced such difficulty attempting to find a respite provider that she lost her home while trying to care for her special needs child herself. ROA.3588–3591. She finally "reached a point of such emotional and financial desperation" that she considered the "unimaginable" choice of giving up her son for adoption. ROA.3588–3591. But after years of being "completely abandoned by the system, it was an immense relief to finally find someone that would listen and help" in the form of Ursula Newell-Davis, who provided the family with resources, educated the mother about her son's disabilities, attended appointments with providers, addressed root causes of his behavior, and encouraged the

[12] The district court discounted this evidence based on the fact that the Magellan representative had said the applicant was told she'd be denied "because there are many home health agencies in the state." The court concluded that because there are many agencies, there is no shortage. ROA.3761. But this is a plain misreading of the emails. Both the Magellan representative and the Department employee agreed that, *notwithstanding* the existence of many home health agencies in the state, there still was a lack of respite care in the relevant area.

mother to go back to school. ROA.3588–3591. She concluded, "Ms. Davis saved my family," and if allowed, would "provide a level of [respite] care that is utterly lacking in the existing market." ROA.3588–3591.

Another mother described numerous delays when attempting to access respite care for her son and the special attention that Ms. Davis provided as a social worker when the mother lacked other assistance. ROA.3597–3599. Yet another mother stated that Ms. Davis helped her and her children as a social worker when she felt "the entire system had abandoned us," and expressed "no doubt" that Appellants would provide quality respite services that are desperately needed in the state. ROA.3593–3595. Still another testified that her inability to access respite care caused her to halt proceedings to adopt a child with severe behavioral challenges. ROA.2647–2649. All four, and their children, would have benefitted not just from consistent, reliable, and more readily accessible respite care, but respite care from Ursula Newell-Davis.

The Department's own expert report, authored by Dr. Stephen Lutzky, further supports the conclusion that it's difficult to access respite care in Louisiana. Dr. Lutzky called all of the licensed providers in the greater New Orleans area and determined that more than 36% of

providers cannot be reached. ROA.3236–3237. Another 44% of licensees in the area are either not accepting new clients or are only accepting them in a limited capacity.[13] ROA.3236–3237. Just 20% of licensees are accepting new clients without conditions. ROA.3236–3237. As Dr. Lutzky stated, New Orleans parents in need of respite care are "almost twice as likely not to be able to reach [a] provider" than able. ROA.3236–3237. FNR's chaotic regulatory regime prevents new providers from coming in, thereby making it harder on the public it pretends to serve.

The evidence in this case has two implications: first, the Department is limiting the number of respite providers by as much as 75% during a time when there is a shortage of respite care. ROA.3239. That's irrational. Second, the Department has been making FNR decisions based on a misunderstanding of the actual number of businesses operating in Louisiana, since 36% are non-operational and another 44% are limiting new clientele. That's arbitrary.

[13] 11.1% of those Dr. Lutzky called were not accepting new clients at all, 8.3% were not accepting juvenile clients, and 25% were only accepting clients that brought their own staff.

2. FNR is not rationally related to containing costs or spending

The Department does not even contend that FNR somehow reduces costs or spending, and on its face, FNR lacks any such relationship. Instead, as Appellants' expert testified, economic theory predicts that restricting competition will tend to increase costs, ROA.3320, and the research on need review demonstrates that fact by showing FNR is associated with higher prices and spending. ROA.3324–3325. In his review of the literature, Dr. Mitchell found that of the 12 studies that evaluated the effect of need review on spending per service, *not one* found that need review reduces spending. ROA.3324–3325. Six found no effect and six found that need review increased spending, including a study on home health. ROA.3324–3325. Of the 18 studies that examined the effect of need review on total spending per person, once again, *not one* found lower spending. Eleven found higher spending and seven found mixed, negligible, or statistically insignificant effects (including three on home health). ROA.3327–3328. At best, need review has no effect on costs or

spending, and credible evidence shows it may actually drive them up. The Department has not provided one piece of evidence to rebut the point.

3. FNR is not rationally related to improving quality

FNR is not rationally related to improving the quality of care. The research on need review instead suggests it has no effect or a negative effect on quality, and survey evidence demonstrates Louisianans are less satisfied with their care than residents of non-need review states. Dr. Mitchell's report shows that of the 25 papers examining the link between need review and quality, *not one found that need review improves quality outside of highly technical fields*. ROA.3334–3335. Ten found that need review results in lower quality care, including higher hospital readmission rates, higher mortality rates, greater use of physical restraint in nursing homes, and lower survey scores. ROA.3334–3335. Twelve studies found need review has mixed, or, more often, statistically insignificant effects. ROA.3334–3335. Just three found a positive association with quality and all three were in technical fields, like percutaneous transluminal coronary angioplasties, where repetition of a highly skilled service results in better performance of that service. ROA.3334–3335. In sum, three times as many studies find that need

review has a negative effect as find a positive effect, and the only studies to find a positive effect concerned highly technical medical fields.

Of the two studies dealing specifically with home health care, one concluded that in three out of the six areas of study, need review had "enduring statistically and economically significant effects." ROA.2655–2656. For example, the study found that "needs assessment is associated with half as many home health providers per Medicare beneficiary, 13.7% fewer home health admissions from hospitals, and a 1,000-point increase in industrial concentration." ROA.2655–2656. Moreover, 60-day readmission rates are 13% higher in need review states than in states without it. ROA.3337, ROA.2656. It concluded that "needs assessment has large, permanent, and statistically significant associations with diminished access to care and diminished market competition." ROA.2655–2656.

Another study was even more conclusive, finding that states that apply need review to home health are less likely to be considered "high quality." As Dr. Mitchell testified, based on the Home Health Compare database compiled by the Centers for Medicare and Medicaid Services (CMS), which uses nine performance metrics, "home health agencies in

CON states were—and I'm quoting from the study—were about 58 percent less likely to be rated as high quality." ROA.3291:18–21. That conclusion "is statistically significant at the one-percent level meaning that if it were not true, there's a one in 100 chance that they would find that." ROA.3291:21–24. Moreover, home health agencies in need review states "were about 30 percent more likely to be rated as medium quality" compared to those in non-need review states. ROA.3292:1–3.

The evidence also suggests that Louisiana recipients of respite care are less satisfied with their care than residents of other states. Not only are complaints increasing year after year, ROA.825,[14] survey results show that Louisiana recipients of youth respite care have less access to and lower satisfaction with their care than consumers in a comparison state and the national average of participating states. ROA.819. To make this determination, Dr. Timmons looked at survey results from the National Core Indicators (NCI), which is used by the state of Louisiana, the CMS, and various public health agencies across the country to make policy decisions that affect millions of Americans. ROA.616–617.

[14] From 2016 to 2020, the number of HCBS complaints averaged a 5-percentage-point increase year-over-year. Excluding 2020 (given the effect of COVID-19), that figure rises to a 23-percentage-point increase year-over-year.

These survey results show that with the exception of the 2018–2019 Child Family survey, consumers are on average less satisfied with the quality of care in Louisiana than in the comparison state of Arizona and the average of all responding states. ROA.819. For example, 46% of survey respondents in Louisiana reported having difficulty getting access to respite services, while Arizona reported 14% and the national figure was 24%. ROA.791. On average over all survey years, 3.5% more survey respondents indicate unsatisfactory respite care in Louisiana than in Arizona and 3.75% more than the national average. ROA.819. As Dr. Timmons testified, the "observed differences in the data" are "enormous." ROA.791.

With regards to adult respite care, Louisiana scored comparably to the national average and Arizona. However, dissatisfaction among Louisianans grew in both 2015–2016 and 2016–2017. From this, Dr. Timmons concluded that "there is no evidence that adults receive better quality service in Louisiana as a result of FNR regulation." ROA.816.

The NCI survey results are reliable. They are routinely studied for effectiveness, and their sample selection, questions, and design are in accordance with generally accepted standards and procedures in the field

of surveys. ROA.787. According to NCI, the Child Family Survey's "data collection tools . . . are regularly refined and tested to ensure they remain valid, reliable and applicable," and the Adult Consumer Survey has "undergone numerous inter-rater reliability tests" and "all results have shown strong agreement." *Id*. Moreover, Louisiana itself uses NCI data to make healthcare policy decisions affecting its residents. ROA.626–627.

4. FNR is inherently irrational

Nor is FNR rationally related to any other legitimate end—because it is inherently arbitrary. The Department does not use any documents or objective factors to guide committee members' decision making. ROA.2423–2425. The Committee considers different factors and follows a different process for determining need each time. ROA.2703:16–25, ROA.2771:20–2772:4, ROA.2748:14–2749:18, ROA.2761:1–13. If an applicant provides evidence of serious adverse consequences, that evidence is ignored if the FNR Committee does not think there is a need in the area. ROA.2693:8–18, ROA.2718:13–2720:14, ROA.61:25–62:1. If an applicant lacks evidence, that's irrelevant if the Committee thinks there *is* a need. ROA.2762:7–19. If you are an established provider, the Committee will try harder to approve you. ROA.2760:4–19, ROA.2761:1–

13, 18–22, ROA.2774:3–2775:22, ROA.2776:4–8, ROA.2777:9–21. And the Department's 30(b)(6) witness incorrectly predicted the outcome of three out of five applications at deposition. FNR is an irrational means of effectuating *any* goal because it is no better than picking names out of a hat. Due process requires that the state limit entry to a trade based on a person's fitness or capacity to operate, not based on the whim of government officials and their arbitrary and subjective determination of whether a new business is needed. *Schware*, 353 U.S. at 239 ("any qualification" on the right to earn a living "must have a rational connection with the applicant's fitness or capacity to practice").

5. The Department has not a single piece of evidence to the contrary

The Department did not submit any evidence to rebut these facts. Its expert testified that he was not aware of "any evidence" demonstrating that need review improves quality in home health in any state. ROA.3218–15. And its 30(b)(6) witness testified that she didn't know whether she was "qualified to answer" whether "the Department believe[s] that the quality of HCBS providers ha[s] increased since the implementation of Facility Need Review." ROA.3053:8–12. The

Department admitted it has no evidence that shows FNR improves quality apart from the purported "self-evident" nature of their argument and their expert report. ROA.2420. And yet the expert himself testified that his report did not speak to the quality of care in Louisiana. ROA.3159:15–19, ROA.3205:14–16.

The Department's sole piece of evidence in this case, its expert report, merely *assumes* that more licensees will mean more regulatory tasks for the Department, which will somehow cause the quality of respite care in Louisiana to decline. That's an irrational assumption. FNR requires applicants to be denied *despite* their qualifications if the Department determines another provider is not needed. As the Department admits, FNR has resulted in applicants being denied approval who are *more qualified* than existing providers.

Moreover, as Dr. Lutzky admitted, that assumption is based on many further assumptions. For example, it assumes that the Department will always be working with the same budget and same amount of staff, even though Dr. Lutzky does not know how Louisiana's staffing and budget is determined. ROA.3174:1–22. It assumes that new providers will lead to more complaints, even though Dr. Lutzky admitted

complaints might rise, fall, or stay the same in the absence of FNR and he has no data on the issue. ROA.3194:3–3196:17. Moreover, Dr. Lutzky clarified that more inspections wouldn't necessarily mean better performing respite providers, it would mean that the Department would be better able to weed out providers *who aren't providing service at all*. ROA.3205:17–3208:5. And Dr. Lutzky testified that he has no knowledge of whether changing the frequency of inspections has in the past, or would in the future, affect the number of regulatory infractions in Louisiana. ROA.3210:22–25. The assumption that more providers will result in less oversight and worse care is not rational, not backed by evidence, and contradicted by Appellants' evidence. Compared with such irrational speculation, the evidence supports the conclusion that FNR lacks a rational connection to any legitimate end.

II. FNR Irrationally Favors Incumbents in Violation of the Equal Protection Clause

There is one end that FNR is very well tailored to: protecting incumbents from legitimate competition. By drawing an arbitrary line (i.e. whether one receives FNR approval) between who may operate a respite care business and who may not, FNR deprives Appellants of equal protection for impermissible reasons of economic protectionism.

Whereas due process asks whether the government has a legitimate reason for depriving individuals of liberty, equal protection demands that government have a legitimate reason for drawing classifications between similarly situated parties. *See Mikeska v. City of Galveston*, 451 F.3d 376, 381 (5th Cir. 2006); *Newman Marchive*, 349 F. App'x at 965. The line FNR draws between those who may operate and those who may not lacks a rational relationship to any legitimate state interest. It's not related to a person's qualifications and, as demonstrated above, its standards are irrational.

Under the guise of promoting quality of care, FNR permits some people to offer respite services and not others *regardless* of their qualifications. ROA.2714:4–14. As the Department's 30(b)(6) witness testified, there is no reason to believe someone who passes FNR is more qualified than someone who does not. ROA.2714:15–25. Nor does FNR makes distinctions based on whether the applicant would provide high quality service, offer lower prices, or improve access to care. Whereas licensure relates to quality, FNR relates only to the Department's arbitrary determination of need. The result is to deny even the most

qualified providers, people like Ursula Newell-Davis, economic opportunity for the benefit of others similarly situated.

Moreover, the process is also regularly employed in a way that favors incumbent businesses. First, the Department disfavors new entrants when it believes there are a sufficient number of businesses operating. Second, it gives incumbents an advantage should they seek to expand the scope of their territory or service. As explained above, while the Department ordinarily confines its FNR determination to the evidence presented in the applications, it has repeatedly gone out of its way to find information outside of the application that would justify approval for incumbent businesses. That distinction is not rationally related to any legitimate state interest; it is mere favoritism, and economic protectionism is not a legitimate governmental end. *St. Joseph Abbey*, 712 F.3d at 223; *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

Conserving the Department's resources cannot justify FNR's differential treatment. In *Newman Marchive*, 349 F. App'x 963, this Court ruled that a city's refusal to pay judicial interest to the plaintiff while paying interest in other cases lacked a rational relationship to any

legitimate end in violation of the Equal Protection Clause. The City argued that the classification served the legitimate governmental purpose of "protecting taxpayer money." The Court disagreed, ruling that such an end could not explain the City's decision to pay interest in sixteen separate other judgments. Here, conserving resources doesn't explain FNR's arbitrary discrimination.

Similarly, in *Plyler*, 628 F.2d at 459, this Court rejected Texas's argument that it could exclude undocumented children from public schools for the purpose of saving money. It reasoned that, "to accept this contention would mean that cost, in and of itself, could justify the exclusion of any group of people from any government program that requires funding." The Supreme Court affirmed. Not only was the state's justification merely "a concise expression of the intent to discriminate," the law bore no rational relationship to that end. *Plyler*, 457 U.S. at 202. For example, the state did not show that these children posed a special risk to the state's budget, and there was no evidence that excluding them and saving itself resources would actually improve the quality of the state's education system.

Here, FNR may save the government the trouble of regulating additional licensees, but it doesn't explain the wholly irrational distinction between who may offer care and who may not. There is no reason to think that there is anything unique about those who are denied under FNR that makes them a special risk to the state's budget or bureaucratic resources. Instead, these applicants are denied merely because incumbents have already entered the trade. Nor is there is any evidence that this differential treatment benefits the public. Instead, it tends to operate at the expense of the public—depriving Louisianans of access to qualified providers like Appellants, driving up costs, and reducing consumer satisfaction. The only beneficiaries are incumbent businesses, who enjoy less competition. It therefore violates Appellants' right to equal protection. *See also Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (invaliding licensure law for pest removal specialists because exemption had no justification except illegitimate protectionism).

The district court erroneously conflated Appellants' due process and equal protection arguments, stating that "[g]iven that the standard is identical for both claims," it would "address[] them together." ROA.3756.

But as the court itself acknowledged in a prior opinion, those claims are distinct: "[Appellants'] substantive due process theory is that the FNR process deprives Plaintiffs of the right to earn a living without a rational basis. . . . Plaintiffs' equal protection theory is that the FNR process arbitrarily discriminates between 'similarly situated' individuals without a rational basis." ROA.333. Because FNR treats Appellants differently than others similarly situated without rationally furthering any legitimate state interest, it deprives them of equal protection.

III. FNR Violates the Louisiana Constitution

A. Louisiana's Due Process provision demands more than its Federal counterpart

The Louisiana Constitution's due process provision, Article I, Section 2, protects the right to earn a living. *See Banjavich v. Louisiana Licensing Bd. for Marine Divers*, 111 So. 2d 505, 511 (La. 1959) ("the right to engage in a lawful calling is of such a basic nature that the curtailment of the right by oppressive or arbitrary legislation effectuates a deprivation of the complainant's property without due process"); *West v. Town of Winnsboro*, 211 So. 2d 665, 670 (La. 1967) (same). Historically, Louisiana courts have considered the right to earn a living fundamental and have subjected any laws restricting that right to a heightened level

of scrutiny. To meet that burden, a restriction on the right to pursue a livelihood must have a "real and substantial" relationship to the promotion of the general welfare. *City of Shreveport v. Curry*, 357 So. 2d 1078, 1083 (La. 1978) (concluding an ordinance that restricted frog gigging lacked a real and substantial relationship to the promotion of the general welfare); *Reynolds*, 185 So. 2d at 812 (holding a minimum price markup law for alcoholic beverages violated fundamental right of purveyors because it had "no real, substantial, or rational relation to the public safety, health, morals, or general welfare"); *City of Lafayette v. Justus*, 161 So. 2d 747, 749 (La. 1964) (invalidating an ordinance that limited the size of signs advertising gasoline prices because the challenged law lacked "a real and substantial relation to" promoting the general welfare); *State v. Gantz*, 124 La. 535 (1909) (striking down unequal licensing law for electricians because it violated unlicensed electricians' fundamental right to earn a livelihood on equal terms with others); *see also Benelli v. City of New Orleans*, 478 So. 2d 1370, 1372 (La. Ct. App. 1985) (law requiring moonlighting police officers to have employers waive city from any liability for officers' actions violated Louisiana Constitution's due process clause).

In recent years, however, state courts have distinguished between laws that "substantially interfere" with that fundamental right and laws that merely regulate that right. *See, e.g., Lakeside Imports, Inc. v. State*, 639 So. 2d 253, 255 (La. 1994) (subjecting Sunday closing law to rational basis scrutiny because plaintiff failed to show lost profits or any other "substantial interference" with his business); *Forgette v. Vernon Parish Police Jury*, 485 So. 2d 237, 244 (La. Ct. App. 1986) (finding that no fundamental right was abridged where the challenged law was a "minimal restriction" that "at worst would require appellant to relocate a short distance"). Thus, while the Louisiana Supreme Court has said that laws that "do[] not affect fundamental rights, but rather [are] merely economic or social regulation[s]" are subject to rational basis scrutiny, *Progressive Sec. Ins. Co. v. Foster*, 711 So. 2d 675, 688 (La. 1998), such a statement requires courts to first determine whether the challenged law substantially interferes with the fundamental right to earn a living or is merely an economic regulation in the first place.

Here, FNR completely deprives Appellants of the opportunity to enter their chosen trade not based on objective qualifications, but instead based solely on the Department's arbitrary and subjective assessment of

"need." Thus, FNR substantially interferes with Appellants' fundamental right to earn a living and should be subject to heightened scrutiny under the Louisiana Constitution. Because FNR cannot even survive the rational basis test, it does not bear a "real or substantial" relationship to protecting the general welfare.

The district court held that Louisiana's due process clause "does not vary from the Due Process Clause of the Fourteenth Amendment to the United States Constitution" and requires only rational basis scrutiny. ROA.3762. But as argued above, there is a distinction in Louisiana case law between the analysis applied to laws that completely deprive a person of the fundamental right to earn a living and mere "economic regulations," which do not substantially interfere with that right. Because FNR is of the former type, the district court should have evaluated it under heightened scrutiny and found the law unconstitutional under that standard.

B. Appellants' State Equal Protection claim should've enjoyed a higher standard of review

The Louisiana Constitution's equal protection provision, Article I, Section 3, provides more protection than its federal counterpart. *Sibley v. Bd. of Sup'rs of Louisiana State Univ.*, 477 So. 2d 1094, 1108 (La. 1985)

("With the adoption of these guarantees Louisiana moved from a position of having no equal protection clause to that of having three provisions going beyond the decisional law construing the Fourteenth Amendment."); *see id.* at 1107 (noting "federal jurisprudence should not be used as a model for the interpretation or application of" the state equal protection provision).

Louisiana courts apply three standards in equal protection cases:

> (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, 477 So. 2d at 1108. The second, intermediate tier applies here.

In *Clark v. Manuel*, 463 So. 2d at 1285, the Louisiana Supreme Court invalidated a law that applied special restrictions to group homes for the intellectually disabled. Though the plaintiff was the group home itself, and not intellectually disabled individuals, the Court applied

heightened scrutiny because "the statute ma[de] it more difficult for [disabled persons] to enjoy an important right." *Id.*

FNR likewise makes it more difficult for special needs children to enjoy an important right. FNR does not apply to all temporary care—it does not, for example, apply to babysitters, family members, care services or any others who service *non-disabled* populations. Instead, it applies only to the care of disabled individuals and the elderly. La. Admin. Code tit. 48, § 5003. Because FNR has a unique impact on the care of disabled children and adults, it should be subject to an intermediate level of scrutiny.

The district court ruled that the lowest level of scrutiny was appropriate because (1) "Providers of care are not a suspect classification under the standard," (2) standard is based "not [on] a law's impact, but [on] what "the law classifies," and (3) "Louisiana law does not recognize third party standing." But *Clark*, 463 So. 2d at 1285, dictates just the opposite. The level of scrutiny depends on whether the challenged statute affects a suspect class (here, special needs children), regardless of whether a member of that class brought the lawsuit. The district court should have therefore applied the intermediate standard.

Nevertheless, whether FNR is subject to the lowest or middle tier of scrutiny, both are higher standards than federal rational basis review. Even if were true that FNR creates a classification that survives rational basis review—which it does not—it surely fails under the stricter requirements of the Louisiana constitution. *See, e.g.*, *Grider v. Admin., Dep't of Emp't Sec.*, 564 So. 2d 751, 755 (La. Ct. App. 1990) (invalidating irrational distinction in eligibility for public benefits); *see also Police Ass'n of New Orleans v. City of New Orleans*, 649 So. 2d 951, 964 (La. 1995) (invalidating irrational distinction in eligibility for promotion).

IV. The Privileges or Immunities Clause Protects the Right To Pursue a Livelihood

Appellants also brought a claim that FNR violates the Privileges or Immunities Clause of the Fourteenth Amendment. The district court dismissed it under Rule 12(b)(6), reasoning that the claim is precluded by the *Slaughterhouse Cases,* 83 U.S. 36, 77–79 (1872). ROA.339.

A growing body of legal opinions suggests that the *Slaughterhouse Cases* were wrongly decided, and several Supreme Court Justices have indicated doubts about the Court's treatment of the Privileges or Immunities Clause. *See, e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (separate concurring opinions of Gorsuch, J., and Thomas, J.); *McDonald*

v. City of Chicago, 561 U.S. 742, 805 (2010) (Thomas, J., concurring); *Saenz v. Roe*, 526 U.S. 489, 522, n.1 (1999) (Thomas, J., dissenting); Transcript, Kavanaugh Supreme Court Hearing (CNN aired Sept. 5, 2018) (observing that the Ninth Amendment, the Privileges and Immunities Clause, and substantive due process all "protect[] certain unenumerated rights so long as the rights are, as the Supreme Court said in the *Glucksberg* case, rooted in history and tradition.").[15]

The weight of legal scholarship today also urges reconsideration of the *Slaughterhouse Cases*. *See, e.g.*, Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause,* 43 Harvard J. of Law & Pub. Pol'y 1 (2020); Randy E. Barnett and Evan Bernick, *The Original Meaning of the Fourteenth Amendment*, 22 (2021); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J. Law & Liberty 115 (2010); Am. Br. of Constitutional Law Professors in Support of Petitioners, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), 2009 WL 4099504 (Nov. 23, 2009).

The conclusion that the *Slaughterhouse Cases* departs from the original public meaning of the Privileges or Immunities Clause is

[15] *Available at* http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.08.html.

supported by the clause's history and language. The Fourteenth Amendment arose in response to recalcitrance by former slave states, who continued to deprive formerly enslaved blacks of their civil rights in the form of the Black Codes and other state laws even after their defeat in the Civil War and passage of the Thirteenth Amendment. *See* Barnett, *supra, Three Keys to the Original Meaning of the Privileges or Immunities Clause.* The intention was to create federal protection for the Bill of Rights, natural rights, and common law rights. Chief among the author's concern was the right to enter a common occupation. *See* Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (2d ed. 1995) ("[T]he Republican party before the Civil War was united by a commitment to a 'free labor ideology,' grounded in the precepts that free labor was economically and socially superior to slave labor and that the distinctive quality of Northern society was the opportunity it offered.").

Congress also intended to protect those rights protected by the Civil Rights Act of 1866, which had been vetoed by President Andrew Johnson on the basis that it exceeded Congress's power under the Thirteenth Amendment. Though Congress was able to surmount the veto with a

supermajority vote, legislators remained concerned about the law's constitutionality. They therefore sought to constitutionalize that act and the rights it protected, which were far more vast than mere rights of federal citizenship identified in the *Slaughterhouse Cases*.

This broad interpretation of the Privileges or Immunities Clause is further bolstered by the use of the terms "privileges" and "immunities," which were widely understood to be synonymous with "rights" or "liberties." James Madison, for example, spoke of the "freedom of the press" and "rights of conscience" as the "choicest privileges of the people." 1 Annals of Congress 453, 458 (1789). Those same two terms were also used in the Privileges *and* Immunities clause of Article IV, which according to Supreme Court Justice Bushrod Washington, protected:

> the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . [and] to take, hold and dispose of property, either real or personal.

Corfield v. Coryell, 6 F. Cas. 546, 552 (1823). Senator Jacob Howard confirmed this understanding of the words "privileges" or "immunities" when he introduced the Fourteenth Amendment as its sponsor in

Congress. In a speech articulating the Amendment's meaning, he said that while the full scope of the privileges or immunities "cannot be fully defined in their entire extent and precise nature," they included at the very least the federal Bill of Rights, natural rights, and the rights protected by Article IV's Privileges and Immunities Clause. Cong. Globe, 39th Cong., 1st Sess., 2764–67 (May 23, 1866) (speech of Jacob Howard).

Appellants acknowledge that only the Supreme Court can overrule the *Slaughterhouse Cases*, and that Fifth Circuit precedent forecloses a private cause of action to enforce even those limited rights protected by that opinion. *Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 760 (5th Cir. 1987). Appellants nonetheless believe both judgments are contrary to the Fourteenth Amendment and raise the issue here solely to preserve it for *en banc* appeal, or for a petition of writ of certiorari.

Conclusion

Appellants respectfully request that this Court overrule the district court's opinion and grant summary judgment in their favor.

DATED: June 6, 2022.

Respectfully submitted,

/s/ Anastasia P. Boden

SARAH HARBISON
PELICAN INSTITUTE FOR PUBLIC POLICY
400 Poydras St., Suite 900
New Orleans, LA 70130
Telephone: (504) 952-8016
sarah@pelicaninstitute.org

ANASTASIA P. BODEN
Counsel of Record
LAWRENCE G. SALZMAN
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
ABoden@pacificlegal.org
LSalzman@pacificlegal.org

Counsel for Plaintiffs-Appellants

Certificate of Service

I hereby certify that on June 6, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Anastasia P. Boden
ANASTASIA P. BODEN

Certificate of Compliance

1. This brief complies with the type-volume limits of Fed. R. of App. P. 32(a)(7)(B) because it contains 12,336 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

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

DATED: June 6, 2022.

/s/ Anastasia P. Boden
ANASTASIA P. BODEN

Kiren Mathews

From: cmecf_caseprocessing@ca5.uscourts.gov
Sent: Monday, June 06, 2022 5:15 PM
To: Incoming Lit
Subject: 22-30166 Newell-Davis v. Phillips "Appellant/Petitioner Brief Filed"

Follow Up Flag: Follow up
Flag Status: Completed

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.**

PLEASE DO NOT REPLY TO THIS EMAIL AS IT ORIGINATES FROM AN UNATTENDED EMAIL ADDRESS.

United States Court of Appeals for the Fifth Circuit

Notice of Docket Activity

The following transaction was entered on 06/06/2022 at 7:14:44 PM Central Daylight Time and filed on 06/06/2022

Case Name:	Newell-Davis v. Phillips
Case Number:	22-30166
Document(s):	Document(s)

Docket Text:
APPELLANT'S BRIEF FILED by Ms. Ursula Newell-Davis and Sivad Home and Community Services, L.L.C.. Date of service: 06/06/2022 via email - Attorney for Appellants: Boden, Harbison, Salzman; Attorney for Appellees: Elliott, McPhee, Murrill [22-30166] (Anastasia P. Boden)

Notice will be electronically mailed to:

Mr. Neal Risley Elliott, Jr.: neal.elliott@la.gov
Ms. Elizabeth Baker Murrill, Assistant Attorney General: murrille@ag.louisiana.gov, nelsone@ag.louisiana.gov, ecfnotices@ag.louisiana.gov
Mr. Shae Gary McPhee, Jr., Assistant Solicitor General: mcphees@ag.louisiana.gov, nelsone@ag.louisiana.gov, ecfnotices@ag.louisiana.gov
Mr. Larry Salzman: lsalzman@pacificlegal.org, incominglit@pacificlegal.org, kmathews@pacificlegal.org
Ms. Sarah Harbison: sarah@pelicaninstitute.org
Ms. Anastasia P. Boden: ABoden@pacificlegal.org, incominglit@pacificlegal.org

The following document(s) are associated with this transaction:
Document Description: Appellant/Petitioner Brief Filed
Original Filename: 22-30166 App Princ Brief.pdf
Electronic Document Stamp:
[STAMP acecfStamp_ID=1105048708 [Date=06/06/2022] [FileNumber=9863739-0]
[28aa39365f50b977ea8dfa5490be31bfcef4861c3e387aded9d7ef082a436dcb49d2c122f7cfe3d9237f2b451793
bff391b526cde2f6c92b34c6245bffd675b0]]