UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

URSULA NEWELL-DAVIS, et al.,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 2:21-cv-00049-NJB-JVM

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Mother, social worker, and entrepreneur Ursula Newell-Davis wishes to provide respite care[1] to special needs children in New Orleans. As a social worker, Ms. Newell-Davis regularly receives calls from families with children who have behavioral or developmental challenges asking for support, so she founded a respite company and applied to the Department of Health for permission to operate. Given her educational background and years of experience, she is well-qualified to provide this care. But the Department denied Ms. Newell-Davis's application and deprived her of her constitutional right to enter the trade solely because it deemed another business "unnecessary." After being denied approval, Ms. Newell-Davis and her company brought this lawsuit seeking prospective relief.[2]

[1] Respite care is "an intermittent service designed to provide temporary relief to unpaid, informal caregivers of the elderly and/or persons with disabilities." Complaint ¶ 23 (citing La. Admin. Code tit. 48, § 5003).

[2] Defendants, members of the Department of Health, are sued in their official capacities pursuant to *Ex Parte Young*, 209 U.S. 123 (1908), but are referred to collectively as "the Department" for ease of reference.

Plaintiffs allege that Louisiana's Facility Need Review (FNR) law, which requires home and community-based providers[3] to prove that a new service is "needed" before entering the trade, violates the due process and equal protection provisions of the United States and the Louisiana constitutions. They contend that FNR lacks a rational, real, or substantial relationship to any legitimate state interest. FNR does not, for example, keep costs low, expand access to care, or improve quality. And as is apparent from the law's face, it's not related to an applicant's fitness to operate. Instead, as numerous studies from the federal government and elsewhere show, FNR drives up costs, reduces special needs families' access to vital services from qualified individuals like Plaintiffs, and reduces quality—affirmatively harming Louisianans. Plaintiffs further contend that FNR irrationally discriminates between the providers who may legally provide respite care and those who may not, thereby depriving Plaintiffs of equal protection before the law. In effect, they say, FNR serves only to protect existing providers from competition at the expense of entrepreneurs and the public. As a result, irrationally deprives Ms. Newell-Davis of her dream and her constitutional right to start a respite business in Louisiana.

Defendants moved to dismiss pursuant to Rule 12(b)(6) on the theory that, by artificially restricting the number of suppliers, FNR eases the regulatory burden on the State, thereby making it easier to inspect licensees—which they say serves the public. Plaintiffs' allegations, taken as true, contradict Defendants' claims that FNR furthers consumer safety, and those plausible, well-pleaded allegations cannot be defeated by mere assertions on a motion to dismiss. Even under the relatively deferential rational basis standard, plaintiffs have been able to succeed on the merits by

[3] Home and community-based providers are groups that provide "respite care services, personal care attendant (PCA) services, supervised independent living (SIL) services, monitored in-home caregiving (MIHC) services, or any combination of services thereof." La. Admin. Code tit. 48, § 12501.

demonstrating that the challenged laws do not further any legitimate ends. *See St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149, 156 (E.D. La. 2011) (invalidating licensure law under the Fourteenth Amendment), *aff'd*, 712 F.3d 215 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (same) *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (same); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 699 (E.D. Ky. 2014) (invalidating law that required moving companies to demonstrate they were needed under the Fourteenth Amendment). If plaintiffs can win these cases on the merits, they can defeat motions to dismiss. Here, Plaintiffs have pleaded allegations that state valid claims for relief and that are sufficient to survive Defendants' motion. *See St. Joseph Abbey v. Castille*, No. 10-2717, 2011 WL 1361425 at *9 (E.D. La. Apr. 8, 2011) (denying motion to dismiss due process and equal protection claims challenging license requirement for casket sales); *Tiwari v. Friedlander*, No. 3:19-cv-884-JRW-CHL, 2020 WL 4745772 (W.D. Ky. Aug. 14, 2020) (denying motion to dismiss due process challenge to law requiring home healthcare businesses to demonstrate "need"); *Bruner v. Zawacki*, No. 3:12-57-DCR, 2013 WL 684177 (E.D. Ky. Feb. 25, 2013) (denying motion to dismiss due process and equal protection challenge to law that required movers to demonstrate "need").

STATEMENT OF THE FACTS

Plaintiff Ursula Newell-Davis is a mother, experienced social worker, and entrepreneur. Complaint ¶ 1. In addition to holding bachelor's and master's degrees in social work, Ms. Newell-Davis has spent the last two decades providing social services in her New Orleans community. *Id.* ¶ 15. In recent years, she has successfully started and grown a consulting business that aids social workers who provide services to special needs populations. *Id.* ¶ 17. As a consultant, Ms. Newell-Davis teaches mental health workers about best practices for working with children with

disabilities and trains staff on how to properly document their mental health services to ensure they are in compliance with Medicaid requirements. *Id.*

Through her work, Ms. Newell-Davis has encountered children from less fortunate backgrounds who have parents who work unconventional hours (like night shifts), and who are sometimes left at home alone. *Id.* ¶ 18. Between the lack of supervision and their disabilities, some of these children struggle to complete basic tasks. Ms. Newell-Davis has observed that they may not practice personal hygiene, make themselves meals, or complete their homework. *Id.* ¶ 19. Sadly, as a result, these children sometimes are bullied at school for their lack of hygiene or for wearing dirty clothes. *Id.* She has also observed through her work that unsupervised children, especially those with disabilities who seek acceptance, can fall into the wrong crowd and turn to criminal activity. *Id.*

As a mother to a special needs son herself, Ms. Newell-Davis recognizes the importance of giving parents "respite" from the rigors of child-rearing and is passionate about helping children, so she founded Sivad Home and Community Services, LLC (Sivad), to provide safe and affordable respite care in the greater New Orleans area. *Id.* ¶ 19. Sivad would offer temporary relief to parents, family members, and other caregivers of children with disabilities or other challenges. *Id.* ¶ 22. During her time with the children, Ms. Newell-Davis plans to teach them basic life skills to help them develop a successful and independent life. *Id.* But Defendants have denied her that opportunity for no other reason than they decided a new business wasn't "needed" under what's called "Facility Need Review," or FNR.

To become licensed, a respite provider must (1) obtain FNR approval, and (2) secure a license as a "Home and Community Based Services" (HCBS) provider from Defendants.[4] La. Admin. Code. tit. 48 § 5003. *Id.* ¶ 23. The FNR process requires an applicant to apply and pay a $200 nonrefundable application fee. La. Admin. Code. tit. 48, § 12523(C)(1). *Id.* ¶ 25. The Department then reviews the application solely to determine if there is a "need" for an additional provider in the geographic location designated by the applicant. La. Admin. Code tit. 48, § 12523(C)(1). *Id.* ¶ 26.

An applicant will receive FNR approval only if evidence "establishes 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). *Id.* ¶ 26. The applicant carries the burden of proving the probability of such consequences. *Id.* The FNR regulations and the Department's website provide no guidance about how to prove "need," how many other providers are deemed "enough," and how to prove that denial would result in adverse consequences. *Id.* Applicants like Ms. Newell-Davis are left to guess how to convince the Department that their service is needed. *Id.*

The few applicants who are able to convince the Department they are "needed" must then apply for a license. La. Admin. Code tit. 48, § 12523(A). *Id.* ¶ 30. FNR solely pertains to whether

[4] A home and community-based provider is only eligible to apply for a license to operate *after* it receives FNR approval. La. Admin. Code tit. 48 § 12523(A). If Plaintiffs were granted FNR approval, they would then apply for a license. Plaintiffs do not challenge the licensure requirements, which are separate from the FNR approval process, nor do they challenge any other health or safety regulations that pertain to home and community-based service providers. Plaintiffs only challenge the requirement that applicants undergo FNR review and establish "need." Complaint ¶ 23 n.3.

a new business is "needed;" the subsequent licensure requirement relates to health and safety. *Id.* Plaintiffs do not challenge the licensure requirement. *Id.* ¶ 23 n.3.

Between January 2019 and September 2020, nearly seventy-five percent of the applicants for FNR approval were denied. *Id.* ¶ 36. Each and every applicant who was denied received an identical two-page form letter, informing them of the denial and offering no explanation. *Id.* About a quarter of the denials were submitted for supplemental review, and all but one were denied a second time. *Id.* ¶ 35. These applicants were not denied because the Department doubted their fitness, but instead solely because the Department decided there was no "need" for them. *Id.* The result is to deprive economic opportunity to qualified, aspiring entrepreneurs like Ms. Newell-Davis, and to decrease Louisianans' access to care. *Id.*

In 2019, Ms. Newell-Davis applied for FNR approval to provide respite services.[5] *Id.* ¶ 38. In her application, she included statistical data that showed an increase in juvenile criminal activity to show that there is a need for services aimed at supervising and caring for young people. *Id.* She also included speaking to a state program who encouraged her to apply because there was a need for respite care. *Id.* ¶ 39. On February 19, 2020, the Department denied Plaintiffs' FNR application in the same two-page form letter that all other rejected applicants received. *Id.* ¶ 40. This lawsuit followed.

Defendants have moved to dismiss under Rule 12(b)(6) for failure to state a claim. They contend that the law makes it easier to inspect licensees, thereby serving consumer safety.

[5] While Plaintiffs also applied for FNR approval to provide supervised independent living services, this lawsuit is limited to challenging the FNR requirement for respite services.

STANDARD OF REVIEW

Defendants have moved to dismiss for failure to state a claim under Rule 12(b)(6). "A motion to dismiss under 12(b)(6) is viewed with disfavor and is rarely granted." *Shaikh v. Texas A&M Univ. Coll. of Med.*, 739 Fed. App'x 215, 218 (5th Cir. 2018) (cleaned up). When considering a Rule 12(b)(6) motion, courts "accept all well-pled facts as true and view all facts in light most favorable to the plaintiff." *Melendez v. McAleenan*, 928 F.3d 425, 427 (5th Cir. 2019).

At the pleading stage, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). There is no "probability requirement" and "a well-pleaded complaint may proceed even if it strikes a savvy judge that the actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* at 556 (cleaned up). "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his favor, the complaint states any claim for relief." *Lowrey v. Texas A & M Univ. System*, 117 F.3d 242, 247 (5th Cir. 1997) (cleaned up).

"To state a claim for relief in an action brought under § 1983, respondents must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). Plaintiffs meet this standard.

SUMMARY OF THE ARGUMENT

Plaintiffs have stated a claim that Facility Need Review, which deprives qualified individuals of the ability to provide respite care if the Department decides more providers aren't

"needed," is unconstitutional under the due process and equal protection provisions of the United States and Louisiana constitutions.[6]

Plaintiffs contend that the FNR law has no rational, real, or substantial relationship to any legitimate end. Complaint ¶¶ 53–60. Instead, it deprives special needs families of access to vital care, drives up prices, and harms quality. *Id*. In effect, FNR serves only to protect existing respite providers from competition, harming Louisianans in the process and depriving Plaintiffs of their constitutional rights. *Id.* ¶¶ 22, 54, 57. Plaintiffs further contend that FNR arbitrarily discriminates between who may and may not legally provide care. *Id.* ¶¶ 85, 88, 93–94. Those allegations are supported by numerous reports and several cases. *Id.* ¶ 50 n.7, n.8 (citing Thomas Stratmann & Matthew C. Baker, Barriers to Entry in the Healthcare Markets: Winners and Losers from Certificate-of-Need Laws, Mercatus Center at George Mason University, 1, 4–7 (2017) and A Report by the Federal Trade Commission and the Department of Justice, Improving Health Care: A Dose of Competition 1, 304–05 (2004)); *see also Bruner*, 997 F. Supp. 2d at 699; *Tiwari*, No. 3:19-CV-884-JRW-CHL, 2020 WL 4745772 at *15. The Department's bare assertion that FNR satisfies rational basis scrutiny cannot defeat Plaintiffs' well-pleaded allegations on a motion to dismiss. *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 581 (5th Cir. 2020) ("A motion to dismiss for failure to state a claim is not meant to resolve disputed facts or test the merits of a lawsuit. It instead must show that, even in the plaintiff's best-case-scenario, the complaint does not state a plausible case for relief.").

Defendants contend that their interest in administrative ease, which they say protects consumers, is sufficient to dismiss Plaintiffs' well-pleaded claims that FNR does not achieve

[6] Plaintiffs have also stated a claim under the Privileges or Immunities Clause of the Fourteenth Amendment, which as explained below, Defendants fail to address in their motion to dismiss.

legitimate ends.[7] But that argument would eviscerate due process guarantees because the government can always claim that depriving people of their constitutional rights is "easier" than following the Constitution. Moreover, every law regulating an occupation burdens entry in some way, thereby driving down the number of regulated parties and with it, the administrative burden of regulating them. It's circular and inappropriate for the Department to contend it can deprive qualified individuals of their constitutional right to earn a living providing respite care because that would be convenient and would allow the government to conduct more discretionary inspections of licensees.

But more importantly, Plaintiffs have plausibly alleged FNR does *not* protect consumer safety. In fact, they allege that it *undermines* consumer safety by creating a shortage of providers, increasing costs, and decreasing quality. Complaint ¶¶ 54–58, 93, 121. While deferential, the rational basis test is not a rubber stamp, and mere assertions of rationality cannot defeat Plaintiffs' well-pleaded claims on the motion to dismiss. Plaintiffs can and have rebutted the government's claims that the challenged law furthers legitimate ends, either by proving the law does not further the government's purported end or only furthers some illegitimate end. Here, Plaintiffs have alleged facts which, if true, would render FNR unconstitutional.

[7] Defendants focus their arguments for dismissal of Plaintiffs' Privileges *or* Immunities Clause claim (brought under the Fourteenth Amendment) on arguments and cases applicable the Privileges *and* Immunities Clause (of the Fifth Amendment). *See* MTD at 20–21. Because those clauses have different interpretations and offer different protections, Defendants' arguments on this point are inapplicable.

I. PLAINTIFFS HAVE STATED A CLAIM THAT FACILITY NEED REVIEW VIOLATES THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The rational basis standard

Plaintiffs agree that the rational basis test applies to their substantive due process of law claim. As has become axiomatic, the rational basis test asks whether a law is "rationally related to a legitimate government interest." *See, e.g.*, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). While the test is undoubtedly deferential, it is not "toothless." *Louisiana Seafood Mgmt. Council, Inc. v. Foster*, 917 F. Supp. 439, 446 (E.D. La. 1996); *Harris County, Tex. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 323–24 (5th Cir. 1999) (same). It establishes a rebuttable presumption of constitutionality that can be overcome by record evidence demonstrating either that a law does not further its ends, or that its ends are illegitimate. *See, e.g.*, *U.S. v. Carolene Prods.*, 304 U.S. 144, 152 (1938) (stating a law is presumed constitutional "*unless, in the light of the facts made known or generally assumed,* it is of such a character as to preclude the assumption that it rests upon some rational basis") (emphasis added); *see also Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993) ("even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation"). If the evidence shows that the law does not further its ends, or that the law only furthers illegitimate ends, then the legislature did not act rationally and the law deprives a person of due process of law.[8]

[8] As Defendants themselves state in their motion, "rationality analysis requires more than just a determination that a legitimate state purpose exists; it also requires that the classification chosen by the state actors be rationally related to that legitimate state purpose. Although the legitimate purpose can be hypothesized, the rational relationship must be *real*." MTD at 14 (emphasis added) (citing *Mahone v. Addicks Utility Dist. of Harris County*, 836 F.2d 921, 937 (5th Cir. 1988)) (citing *Cleburne*, 473 U.S. at 447–50); *see also St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir.

Using this standard, the Supreme Court has repeatedly struck down regulations where they lack a genuine means-end fit or are otherwise irrational. *See, e.g.*, *City of Cleburne*, 473 U.S. at 440; *Zobel v. Williams*, 457 U.S. 55, 56 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 274 (1932) (striking down a law requiring ice companies to show they are "needed"). So has the Fifth Circuit. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013); *Harris County, Tex. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 323–24 (5th Cir. 1999); *Harper v. Lindsay*, 616 F.2d 849, 855 (5th Cir. 1980); *Thompson v. Gallagher*, 489 F.2d 443, 448 (5th Cir. 1973). And so has this Court. *See, e.g.*, *Castille*, 835 F. Supp. 2d at 156; *Foster*, 917 F. Supp. at 446; *Walters v. Edwards*, 396 F. Supp. 808 (E.D. La. 1975). Thus, even where the government has offered a conceivable justification for its laws, plaintiffs have been able to demonstrate on the merits that the laws do not actually further those (or any other legitimate) goals.

The Fifth Circuit's decision in *St. Joseph Abbey v. Castille*, 712 F.3d 215, is instructive. There, the Fifth Circuit reviewed a district court decision (based on a factual record and issued after trial) and concluded that there was no connection between a law that restricted casket sales to licensed funeral directors and the state's interest in protecting public health and safety. *Id.* at 226–27. Though the government's proffered justifications were "a perfectly rational statement of hypothesized footings for the challenged law," they were "betrayed by the undisputed facts." *Id.* at 223. Given the poor fit between the licensing regime and public health or consumer protection,

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2013) ("although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality").

the court held that "this purported rationale for the challenged law elides the realities of Louisiana's regulation of caskets and burials."[9]

Thus, plaintiffs in rational basis challenges can prove and have proven, that a law does *not* further rational ends despite the government's speculation, or that it furthers only illegitimate ends. At the pleading stage, Plaintiffs need only plausibly allege that FNR is not rationally related to its ends. They've satisfied that burden. *See, e.g.*, *St. Joseph Abbey v. Castille*, No. 10-2717, 2011 WL 1361425 at *9 (E.D. La. Apr. 8, 2011) (denying motion to dismiss due process and equal protection claims under rational basis test); *Bruner v. Zawacki*, No. 3:12-57-DCR 2013 WL 684177 (E.D. Ky. Feb. 25, 2013) (same); *Merrifield v. Schwarzenegger*, No. 04-0498, 2004 WL 2926161, at *5 (N.D. Cal. July 16, 2004) (same); *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662–65 (E.D. Tenn. 2000) (holding an economic regulation failed rational basis review after denying a motion to dismiss and convening a full-scale trial).

B. Plaintiffs have plausibly alleged that FNR is not rationally related to a legitimate government interest

Plaintiffs have plausibly alleged that that Louisiana's FNR requirement is not rationally related to any legitimate state interest. For example, Plaintiffs allege that by artificially restricting the number of suppliers, FNR drives up costs, drives down quality, and deprives Louisianans of access to qualified providers. Complaint ¶¶ 53–60; *see also Craigmiles*, 312 F.3d at 229 ("[n]o sophisticated economic analysis is required to see the pretextual nature of the state's professed explanations for [the challenged law]"); *see also Tiwari*, No. 3:19-CV-884-JRW-CHL, 2020 WL

[9] Defendants argue that *St. Joseph Abbey* has no bearing on the case at hand because "Louisiana heavily regulates HCBS providers and requires their licensure." MTD at 18. That is a distinction without a legal difference. The relevant principle in *St. Joseph Abbey* is that laws must rationally relate to a legitimate state interest. The government cannot bootstrap its way into satisfying rational basis review by implementing more regulation.

4745772 at *17 ("limiting the supply of [health care] doesn't increase access to it"). Plaintiffs have alleged that they personally encounter families with special needs children who have experienced a lack of needed care. Complaint ¶¶ 18, 58. They further allege that FNR is not related to fitness and that it permits the Department to deny applications regardless of a person's qualifications.[10] *Id.* ¶¶ 36, 55. The result is to deny economic opportunity to qualified individuals for the sole benefit of established providers. *Id.* ¶ 79.

The plausibility of Plaintiffs' allegations that FNR is not rationally related to any legitimate ends are bolstered by numerous studies, including those cited in the Complaint. For example, Plaintiffs cite a Federal Trade Commission and Department of Justice joint report that presents empirical studies showing that Certificate of Need programs, which are analogous to FNR review,[11] restrict the entry of higher-quality firms, increase health care costs, and suppress improvement and innovation. Complaint ¶ 50, n.8. They further cite a study from George Mason University's Mercatus Center that shows that forcing providers to prove they are "needed" creates shortages, increase prices, and decreases quality. Complaint ¶ 50, n.7 (citing Thomas Stratmann & Matthew C. Baker, *Barriers to Entry in the Healthcare: Winners and Losers from Certificate-of-Need Laws*, Mercatus Center at George Mason University, 1, 4–7 (2017)); *see also* Maureen S. Ohlhausen, *Certificate of Need Laws: A Prescription for Higher Costs*, 30 Antitrust 50 (2015).

Plaintiffs' allegations are also bolstered by numerous cases striking down analogous laws. Plaintiffs have not only survived motions to dismiss challenges to laws requiring providers to

[10] The *licensing* requirement for respite providers, which is an entirely different regulation and is not challenged in this case, relates to ensuring the fitness of operators and protecting health and safety. Complaint ¶ 23, n.3, 30; *see also* La. Admin. Code tit. 48, § 5001 *et seq*.

[11] Certificate of Need laws are analogous to FNR in that both limit the number of new providers, facilities, or services based on the government's concept of "need."

prove they are "needed," *see Bruner*, No. 3:12-57-DCR, 2013 WL 684177; *see also Tiwari*, No. 3:19-CV-884-JRW-CHL, 2020 WL 4745772 at *15, they have won. *See New State Ice Co.*, 285 U.S. at 274; *Bruner*, 997 F. Supp. 2d at 699.

At the pleading stage, Plaintiffs need only present facts which, if taken as true, plausibly allege that a due process violation has occurred. If it's taken as true that FNR harms access, increases costs, and decreases the quality of care for the purpose of protecting incumbents from competition, and that the licensing requirement separately protects health or safety, these allegations plausibly allege that FNR acts contrary to its goals of consumer protection (albeit in furtherance of the government's desire to have fewer licensees) and is therefore irrational.

C. Defendants' assertions cannot defeat Plaintiffs' well-pleaded allegations

In response, Defendants assert that it may use FNR to artificially reduce the number of respite providers because that will make it easier for them to regulate licensees,[12] and that will in turn further consumer protection.[13] They say that reducing the number of licensees frees up their resources to do things like conducting more discretionary inspections. In other words, the "need" in Facility Need Review relates to the government's needs. This argument fails for at least two reasons. First, this merits stage argument is insufficient to defeat Plaintiffs' well-pleaded claims at

[12] To be clear, administrative ease for its own sake is not a legitimate state interest that can justify depriving people of their constitutional rights. "The Constitution recognizes higher values than speed and efficiency." *Vlandis v. Kline*, 412 U.S. 441, 451 (1973) (cleaned up).

[13] Defendants also argue that "[t]he State's Medicaid budget is of course finite, and any provider who accepts Medicaid funding draws from the pool of available resources. To ensure that this pool is not exhausted, the State has a reasonable interest in ensuring that an appropriate number of Medicaid providers exist in the State." MTD at 16. But Medicaid funding depends on Medicaid *enrollees*. So unless Defendants are arguing that it can use FNR to indirectly limit the number of Medicaid users, the argument is nonsensical.

the motion to dismiss stage. *Sewell*,974 F.3d at 581 ("A motion to dismiss for failure to state a claim is not meant to resolve disputed facts or test the merits of a lawsuit. It instead must show that, even in the plaintiff's best-case-scenario, the complaint does not state a plausible case for relief."). Plaintiffs have alleged that the law does not further consumer safety and instead, by reducing access, driving up costs, and insulating providers from legitimate competition, it *reduces* quality of care and *imperils* consumer safety.[14] Taken as true, these allegations rebut the Department's assertion that the law is rationally related to consumer protection. *See, e.g.*, *Moreno*, 413 U.S. at 529, 532–33 (even if Congress might "*rationally have thought*" that "households with one or more unrelated members are more likely than 'fully related' households" to commit fraud, the challenged law still was not a "rational effort to deal with these concerns") (emphasis added). Second, the Department's administrative ease justification is illegitimate and would justify every single regulation subject to rational basis review by mere ipse dixit.

Defendants' argument for dismissal largely relies on the deferential nature of the rational basis test. While it's true that the standard is deferential, it does not allow the government to evade scrutiny altogether by merely asserting a legitimate end. Plaintiffs retain the ability to prove through the introduction of evidence that the law does not in fact further its goals. The mere assertion of a legitimate interest has never been enough to defeat evidence contradicting the state's claims *on the merits*—let alone is it sufficient to defeat a plaintiff's plausible well-pleaded claims

[14] Defendants further contend that even if Plaintiffs' "free-market approach" would "more efficiently guarantee quality services," that "does not mean the Louisiana Legislature's choice is irrational or illegitimate." MTD at 16. But this fundamentally misunderstands Plaintiffs' allegations. Plaintiffs do not contend that any one approach, let alone a so-called "free market approach," would be more efficient than FNR. In fact, they don't argue for any approach in particular. Instead, they contend that Defendants' approach—implementing the challenged law in this case—is irrational because it does not achieve its goals and because it affirmatively harms Louisianans.

on a motion to dismiss. *See Giles*, 110 F. Supp. 2d at 662, *aff'd*, 312 F.3d 220 (6th Cir. 2002) ("[T]he mere assertion of a legitimate government interest has never been enough to validate a law."); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (pleading standard is a plausibility standard, not a probability standard).

Defendants' argument that they can deprive qualified individuals like Ms. Newell-Davis of their constitutional right to enter a lawful occupation merely because it frees up their resources is also self-justifying and circular.[15] If Defendants were correct that administrative ease were enough to satisfy rational basis review, the government could always satisfy rational basis review by merely asserting that the law was more convenient. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (holding that "acceptance of [the State's] contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause"). Moreover, occupational regulations inherently burden entry into a trade. All regulations therefore limit the number of people who enter a given trade, thereby furthering the government's interest in conserving resources.

Plaintiffs have alleged facts which taken as true, rebut the Department's justifications for FNR. As in numerous cases denying motions to dismiss due process challenges to economic regulations, the motion should be denied so that Plaintiffs may gather evidence to prove their allegations. *See, e.g.*, *St. Joseph Abbey v. Castille*, No. 10-2717, 2011 WL 1361425 at *9 (E.D. La. Apr. 8, 2011) (denying motion to dismiss); *Bruner v. Zawacki*, No. 3:12-57-DCR, 2013 WL

[15] Plaintiffs have also plausibly alleged that FNR is not actually related to the capacity of the Department at all (or any other discernable standard) and is instead a subjective standard that at best is arbitrary and at worst is protectionist. Complaint ¶¶ 29, 79. The Department contends that it seeks to keep licensees at around 600. In discovery, Plaintiffs would seek evidence related to what the actual standard is, whether and how it employs that standard in practice, and whether the Department's assertion is a subterfuge for protecting incumbents from legitimate competition.

684177 (E.D. Ky. Feb. 25, 2013) (same); *Merrifield v. Schwarzenegger*, No. 04-0498, 2004 WL 2926161, at *5 (N.D. Cal. July 16, 2004) (same); *Craigmiles*, 110 F. Supp. at 662–65 (same).

II. PLAINTIFFS HAVE STATED A CLAIM THAT FNR VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Plaintiffs have plausibly alleged an equal protection violation: they allege that Louisiana irrationally prohibits qualified and experienced individuals like Plaintiffs from providing respite care while allowing others similarly situated to do the same. For example, FNR allows licensed providers to provide care even though those parties are no more qualified than Plaintiffs. Complaint ¶¶ 66, 85–87. It also irrationally excludes parties that provide similar services from having to seek FNR approval, including babysitters, care.com providers, neighbors, and friends, even though Plaintiffs are equally (if not more) qualified in all relevant respects. *Id.* ¶¶ 88–89. Once again, the rational basis standard applies to this claim.

In response, Defendants conflate Plaintiffs' due process and equal protection claims, essentially collapsing them into one. But the claims are different in kind. *See Mikeska v. City of Galveston*, 451 F.3d 376, 381 (5th Cir. 2006) ("In contrast to a due process action, which looks solely to the government's exercise of its power vis-a-vis the appellants, an equal protection claim asks whether a justification exists for the *differential* exercise of that power."). Plaintiffs' substantive due process claim alleges that FNR does not further any legitimate ends. Plaintiffs' equal protection claim alleges that FNR treats them differently without any rational justification. That is, it draws an arbitrary line in the sand, cutting off some people from economic opportunity

but not others. Because Defendants admit that FNR has nothing to do with an applicant's fitness[16] and admit that it's an arbitrary line based on their own convenience, Plaintiffs' claim is plausible.

III. PLAINTIFFS HAVE STATED A CLAIM THAT FNR VIOLATES LOUISIANA'S DUE PROCESS PROVISION

A. Real and substantial relationship standard

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 and denies him equal protection of the law"); *West v. Town of Winnsboro*, 211 So.2d 665, 670 (La. 1967) (same). Any laws that burden that right 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 v. Louisiana Bd. of Alcoholic Beverage Control*, 185 So.2d 794, 812 (La. 1965) (holding a minimum price markup law for alcoholic beverages violates fundamental right of purveyors because it "has 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 as a violation of the state due process provision because the challenged law lacked "a real and substantial relation to" promoting the general welfare). Such

[16] As the Supreme Court has made clear, restrictions on people's ability to enter a trade must relate to their qualifications. *See Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232 (U.S. 1957).

a real and substantial relationship is necessary because "[t]he legislature has no power, under the guise of police regulations, arbitrarily to invade the personal rights and liberty of the individual citizen, to interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights." *Reynolds,* 185 So.2d at 811 (cleaned up); *see also Benelli v. City of New Orleans,* 478 So.2d 1370, 1372 (La. App. 4 Cir. 1985) (law requiring moonlighting police officers to have employers waive city from any liability for officers' actions violated Louisiana Constitution's due process clause).

Defendants contend that the same standard of review applies under the U.S. Constitution and the Louisiana Constitution. MTD at 22. That's wrong. Defendants cite to myriad procedural due process cases, which have no bearing on substantive due process, and the two substantive due process cases that Defendants cite to were not cases in which the Plaintiffs alleged a violation of their right to earn a living. As a long line of Louisiana cases involving the right to earn a living in a common occupation demonstrate, the appropriate standard is the "real or substantial relationship" test.

B. Plaintiffs have plausibly alleged that FNR lacks a real and substantial relation to the promotion of the public welfare

Plaintiffs have alleged that the FNR law lacks a real and substantial relationship to the promotion of the general welfare. Complaint ¶ 101. They allege that even though they are fit, willing, and able to provide respite services, they may not engage in their chosen occupation unless they submit to the FNR process. *Id.* ¶¶ 102–03. Further, Plaintiffs contend that the FNR law bears no real or substantial relationship to advancing public health, safety, or welfare nor any other legitimate governmental interest. *Id.* ¶¶ 104, 106. By arbitrarily capping the number of providers, Plaintiffs assert that the FNR process increases costs, lowers quality, and harms access to care. *Id.*

¶ 105. And in practice, it serves only the illegitimate end of economic protectionism, harming Louisiana's special needs children in the process by leaving them without the care that they need. *Id.* ¶¶ 105, 109.

As argued above, Plaintiffs have alleged facts which, taken as true, mean the law cannot survive rational basis scrutiny—let alone any level of heightened scrutiny. Because the challenged law bears no real or substantial relationship to public health and safety and substantially interferes with Plaintiffs' fundamental right to earn a living, Plaintiffs have plausibly alleged that their due process rights under the Louisiana Constitution have been violated. Plaintiffs therefore seek to obtain evidence through discovery to prove their claims. *Lakeside Imports, Inc., v. State*, 639 So.2d 253, 257 (La. 1994) (analyzing a due process claim based on evidence produced at trial).

IV. PLAINTIFFS HAVE STATED A CLAIM THAT FNR VIOLATES LOUISIANA'S EQUAL PROTECTION PROVISION

A. Plaintiffs have plausibly alleged that FNR does not suitably further any appropriate state interest

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.

Id. at 1107–08. Under *Clark v. Manuel*, 463 So. 2d 1276, 1285 (La. 1985), the second, heightened level of scrutiny may be appropriate because the statute in question affects a suspect class. In *Clark*, the Louisiana Supreme Court invalidated a law that applied special restrictions to group homes for intellectually disabled persons. Though the plaintiff in that case was the group home itself, the Court applied heightened scrutiny because "the statute ma[de] it more difficult for [disabled persons] to enjoy an important right." *Id.* Here, the challenged law applies to providers of care to special needs children, thereby making it more difficult for these children to access care. Under *Clark*, intermediate scrutiny applies.

But even under the more deferential test, Plaintiffs have stated a claim because Plaintiffs have plausibly alleged that FNR distinguishes between who may and may not legally provide respite care without any suitably furthering any appropriate state interest. As argued above, Plaintiffs contend that this distinction cannot even satisfy rational basis review, let alone any heightened level of scrutiny under the Louisiana Constitution. They are therefore entitled to collect evidence through discovery to prove their claims.

CONCLUSION

Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss.

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Respectfully submitted,

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**Pro Hac Vice*

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was served by electronic service through the Court's CM/ECF system on March 16, 2021, upon all counsel of record.

/s/Anastasia P. Boden
ANASTASIA P. BODEN