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

JUDGE NANNETTE JOLIVETTE BROWN

MAGISTRATE JUDGE JANIS VAN MEERVELD

OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Department[1] has deprived Ursula Newell-Davis of one of her most precious constitutional liberties: her ability to earn a living by providing care to special needs children. It denied her permission to seek licensure as a respite provider not out of any concern about her fitness or qualifications, but instead solely because it determined under Facility Need Review (FNR) that another business was unnecessary. Yet the Department has not put forward any evidence that demonstrates that using FNR to exclude people from providing respite care is rational. Instead, the Department argues this Court should simply ignore Plaintiffs' evidence that FNR is irrational in favor of its own *ipse dixit* that FNR benefits the public while misrepresenting Plaintiffs' evidence in the process. The Court should not ignore the facts: FNR does not improve access to care; it reduces it. FNR does not keep costs low; it doesn't even consider costs. And FNR

[1] Defendants, members of the Department of Health, are referred to as "the Department."

does not result in better quality care; it is associated with poorer care and lower consumer satisfaction. Those defects are especially glaring here, where the Department often applies FNR in a way that favors established providers. While any benefits (other than to incumbent HCBS providers, who profit from a lack of competition) are speculative, the harm to Plaintiffs and special needs families in Louisiana is real.[2] FNR is therefore not rationally related to enhancing consumer welfare.

The Department has not created any dispute as to the facts, and it is therefore Plaintiffs—not Defendants—who are entitled to summary judgment. This Court should decline to adopt the Department's skewed version of the rational basis test, under which administrative convenience alone is enough to justify virtually any economic regulation. If nothing else, due process and equal protection mean the government cannot rely on expediency alone to take away a person's constitutional rights. The Court should also decline to ignore Plaintiffs' evidence, which is sound and sufficient to defeat even the relatively deferential rational basis standard. Given the unrebutted evidence, Plaintiffs respectfully request that this Court grant summary judgment in their favor.

I. The Department cannot justify FNR based on an interest in limiting the exercise of constitutional rights for its own administrative convenience

According to the Department, the government may deprive people of constitutionally protected rights when doing so will allow it to more easily regulate the few people it allows to enjoy those rights. Defs.' MSJ, Doc. 73-1, at 11–12. Under this view, the Department's administrative convenience necessarily benefits the public. That cannot be correct as a matter of law. Not only has the Supreme Court rejected the proposition that administrative ease or efficiency can justify deprivations of liberty, *see, e.g.*, *Mayer v. City of Chicago*, 404 U.S. 189, 198 (1971)

[2] *See, e.g.*, Decl. of Dana Pitts, Decl. of Donn'Joanee Thomas, and Decl. of Maleeka Lee attached hereto as Exhibits 1, 2, and 3, respectively.

(saving the government "some dollars and cents" is not enough to satisfy rational basis review); *Doe v. Plyler*, 458 F. Supp. 569, 586 (D.C. Tex. 1978) ("[i]t is not sufficient justification" under rational basis review "that a law saves money"); *Vlandis v. Kline*, 412 U.S. 441, 451 (1973) (the "Constitution recognizes higher values than speed and efficiency") (cleaned up); *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*, 2019 WL 6879570, at *15 (W.D. Pa. 2019) (holding plaintiffs stated a claim where they alleged prison employees denied inmates adequate restrooms to "save[ ] money on upkeep and remodel of facilities"); *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),[3] but the Department's reasoning also runs contrary to the very concept of due process. Due process requires a justification for depriving people of their liberty. The Department's argument converts limiting the number of people who can exercise their rights into an end unto itself, since doing so supposedly always benefits the public. Moreover, the Department's proposed standard conflicts with court decisions striking down economic regulations and, even if legitimate, is not rationally furthered by FNR.

A. The Department's proposed standard conflicts with decisions striking down economic regulations

The Department does not cite any case that has approved or applied the novel standard it proposes. That is unsurprising, as its standard would eviscerate constitutional scrutiny altogether. Limiting the ability of people to exercise their constitutional rights can always be said to free up

[3] *But see Armour v. City of Indianapolis, Ind.*, 566 U.S. 673 (2012) (upholding on rational basis review the city's refusal to issue refunds for assessments paid before it adopted a new tax system, since issuing refunds would cause the government to incur additional expenses; "Ordinarily, administrative considerations can justify a *tax-related distinction*.") (emphasis added). Tax refund regulations are categorically different from laws that entirely deprive people of the right to earn a living.

government resources that could be used for other beneficial purposes. If that were enough to satisfy the rational basis requirement, then literally *every* regulation limiting economic activity would have to be upheld. Yet courts, including this Court, have repeatedly struck down economic regulations. *See, e.g.*, *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149, 156 (E.D. La. 2011), *aff'd* 712 F.3d 215, 223 (5th Cir. 2013); *O'Donnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008); *Harper v. Lindsay*, 616 F.2d 849, 855 (5th Cir. 1980); *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1039 (5th Cir. 1980); *Doe v. Plyler*, 628 F.2d 448, 458 (5th Cir. 1980); *Thompson v. Gallagher*, 489 F.2d 443, 448 (5th Cir. 1973); *La. Seafood Mgmt. Council, Inc. v. Foster*, 917 F. Supp. 439, 446 (E.D. La. 1996); *Walters v. Edwards*, 396 F. Supp. 808 (E.D. La. 1975); *see also Bruner v. Zawacki*, 997 F. Supp. 2d 691, 699 (E.D. Ky. 2014) (invalidating need review law for moving companies).[4]

Perhaps to get around this fact, the Department goes to great lengths to distinguish *St. Joseph Abbey*, 712 F.3d at 223, a case arising in this District that struck down an economic regulation. The Department contends that the case is distinguishable because it involved the sale of caskets, which were mostly unregulated, and this case involves the provision of HCBS services, which are highly regulated. It further argues that *St. Joseph Abbey* did not involve a vulnerable population, whereas HCBS services involve the disabled and the elderly. But the first distinction

[4] The Department is flat wrong to suggest that the Fifth Circuit has "recognized the importance of CON laws in ensuring health care services are made available to all citizens in an orderly economical manner." Defs.' MSJ, Doc. 73-1, at 18 (citing *Women's Cmty. Health Ctr. of Beaumont, Inc. v. Tex. Health Facilities Comm'n*, 685 F.2d 974, 979 (5th Cir. 1982)). In the case cited by the Department, the Fifth Circuit merely recognized that the state had an interest in enforcing its laws sufficient to trigger abstention. The Court in no way endorsed, or even analyzed, the law's merits. *See id.* at 982 ("Our emphasis on the state's strong interest in enforcing its laws should not be read in any way as an intimation of our views on the merits of this particular lawsuit. We trust that, consistent with the concept of federalism on which the Younger doctrine is based, the state court will give careful attention to the Center's serious allegations of federal constitutional and statutory violations.").

is irrelevant and the second is false. As to the first, what matters under rational basis is not the regulated or unregulated nature of the trade, but rather the fit between the law's means and its ends. In *St. Joseph Abbey*, the unregulated nature of caskets was relevant only because the state had argued that caskets posed a threat to public health, and the Court reasoned that there could be no rational relationship to public health when the state did not regulate casket construction or even mandate a casket for burial in the first place. *Id.* at 226. But the Court also analyzed other rationales, like consumer protection and preventing predatory sales practices, which involved more regulated aspects of the trade. *Id.* at 223–26. The Court determined that the training required of funeral home directors (who were, in fact, subject to various regulations) had nothing to do with grief counseling, caskets, or predatory practices. *Id.* Moreover, the state's unfair trade practices law already governed that conduct. In sum, what matters is the means-ends fit, not the level of regulation applied to the industry.

As to the second distinction, while the Department attempts to characterize this case as special because it deals with a vulnerable community, *St. Joseph Abbey* also dealt with a highly vulnerable population: the recently bereaved. In any event, consumers can almost always be characterized as susceptible in some way: cosmetologists treat people's scalps, pest removal specialists encounter diseased animals and use chemical pesticides, moving companies drive large, heavy vehicles on public roads and handle people's most treasured possessions, and yet courts have struck down economic regulations in those industries as well. *See, e.g.*, *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 699 (E.D. Ky. 2014). In sum, *St. Joseph Abbey* is on point and it defeats the Department's argument that convenience alone is enough to uphold an economic regulation. Otherwise, the state could have prevailed in *St. Joseph Abbey* merely by

asserting that limiting the number of parties who sold caskets enabled it to better regulate those parties.

B. The Department has not provided evidence to satisfy its proposed standard

Even if easing the Department's workload were a legitimate end, the Department has failed to show how that interest is furthered here. It does not attempt to quantify the cost or burden of conducting surveys—whether initial licensing surveys, complaint surveys, or relicensing surveys. It admits it does not know how many licensees it has the capacity to regulate. Requests for Admission, Doc. 78-3, at Request 17. It asserts that the pre-FNR workload was too much for it to handle, Defs.' MSJ, Doc. 73-1, at 11, but never actually contends that it was unable to perform its required regulatory duties prior to FNR. Nor does the Department state that it would be unable to complete its required regulatory duties in the absence of FNR. It simply says that removing FNR would likely require it to perform some number of "unnecessary" initial licensure surveys or may affect the number of complaint surveys[5] and the Department would prefer to use those resources on more frequent relicensure surveys (although it doesn't say how many more or at what frequency, *id.*, and those surveys are not even required by law). La. Admin. Code. tit. 48, Pt. I, § 5017. These unsubstantiated assertions are not sufficient to demonstrate that removing FNR is any less convenient than the status quo.

Nor does the Department explain or introduce any evidence as to why it assumes that its budget is fixed and would not be adjusted if its workload grew, or how the Department determines regulatory priorities. Instead, it relies on broad generalities about "resource limitations" and

[5] The Department speculates that allowing additional providers to seek licenses could "increase the potential for more complaint surveys," Defs.' MSJ, Doc. 73-1, at 14, but the more likely scenario is that allowing additional qualified providers to offer services would *reduce* the number of complaints.

"wasting precious time and resources on unnecessary initial licensing surveys." Defs.' MSJ, Doc. 73-1, at 15; *see also id.* at 2 ("'Licensing HCBS providers is resource intensive and costly' for LDH."); *id.* at 4 (referring to "resource limitations (such as the number of surveyors)"); Castello Depo., Doc. 73-19, at 67 ("Q: [A]re the Department's resources finite? A: Yes."). But the fact that the government's resources (like all resources) are limited cannot justify locking people out of professions regardless of their qualifications. Otherwise, the government could always bootstrap its way into satisfying rational basis by referencing the fact that its resources are limited. That cannot be the law.

C. FNR is not a rational means of satisfying the Department's asserted interest

Even if the Department could limit the exercise of constitutional rights solely to ease its regulatory burden, and even if the Department had demonstrated that a lack of need review would make its job so inconvenient as to harm the public welfare, FNR is not a rational means of reducing the Department's workload. The FNR process does not consider the Department's budget or resources, the effect of a potential provider on its workload, or the effect of a potential provider on complaints. In fact, the Department is unaware of how many licensees it has the capacity to regulate, Requests for Admission, Doc. 78-3, at Request 17, and never states how many licensees would be most administratively convenient. FNR simply bears no rational relationship to resources. Its only focus is "need." *See* Pls.' MSJ, Doc 78-1, at 13 n.6, 21.

Moreover, the determination of "need" is inherently subjective and is arbitrarily applied. It has no fixed procedure and the Department utilizes no guidance. The Department claims to "regularly stay in contact" with local government entities, Defs.' MSJ, Doc. 73-1, at 5, but it provided zero documents in discovery showing any exchanges between itself and those entities, and the Department's 30(b)(6) witness, Paul Rhorer, testified that (1) it does not always contact the local government entities, Rhorer Depo., Doc. 78-7, at 43:16-17; 107:19–108:12; (2) it did not

contact the local government entity when evaluating Plaintiffs' application, *id.* at 108:13-16; and (3) the FNR committee will not contact those agencies if it already has an opinion as to whether another provider is needed in a given area. *See* Pls.' MSJ, Doc 78-1, at 5. With its subjective standard, lack of guidance, and lack of procedure, FNR yields inconsistent results. Mr. Rhorer, a longtime member of the FNR committee, was unable to correctly replicate the results of three out of five applications during his deposition. *Id.* at 5–6. He further testified that FNR is applied in a way that is biased towards existing businesses. *Id.* at 7.

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In sum, according to the Department's skewed version of the rational basis test, the government may deny a woman her constitutional rights, deprive her of her dreams, and make it harder for special needs children to access care through an arbitrary and subjective process that protects incumbent businesses from legitimate competition, and the only thing it needs to justify that deprivation is to state (without evidence or explanation) that reducing its regulatory obligations necessarily benefits the public. But easing the Department's administrative burden is not a sufficient legitimate end, and even if it were, it is not rationally furthered by FNR.

II. The Department is wrong to suggest that Plaintiffs' constitutional claims are only a matter for the legislature

Need review laws function primarily to protect incumbent businesses from competition. While the Department is correct that they may not be adopted expressly to harm anyone, they are almost always adopted in order to favor certain groups *notwithstanding* the harm they wreak on others.[6] As Plaintiffs' expert Dr. Matthew Mitchell explained, "[t]he most straightforward

[6] The Fifth Circuit has not "taken a small step further" than the Supreme Court in declaring pure protectionism illegitimate. *See* Defs.' MSJ, Doc. 73-1, at 9–10. The Supreme Court itself has recognized that laws intended to protect a certain segment of the population from competition are an invalid exercise of government power. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019) (the police power does not authorize "purely protectionist measures with no

explanation" for need review laws is that they "serve[] the narrow interests of incumbent providers by protecting them from competition." Mitchell Report, Doc. 78-11, at 85. For example, "it is well documented that providers in need review states see more business." *Id.* Need review regulations are anticompetitive and result in more highly concentrated markets. *Id.* Hospital CEO pay is greater in need review states. *Id*. And, as the evidence demonstrates here, the process is often applied in ways that favor entrenched business interests. Pls.' MSJ, Statement of Facts, Doc. 78-2, ¶ 20 It is not surprising, then, that powerful interest groups resist legislative repeal. Mitchell Report, Doc. 78-11, at 86. Yet the Department suggests this Court should abdicate its duty to scrutinize FNR under rational basis review and leave the violation of Plaintiffs' rights to the legislative process. Defs.' MSJ, Doc. 73-1, at 18–19. That gets due process and equal protection exactly backwards. Due process and equal protection guarantee individuals—*particularly* those with less political influence—a means to vindicate their rights when the legislative process fails them and is harnessed in favor of the politically powerful.

Occupational licensing laws have frequently been used to protect privileged classes against competition from political minorities, whether that be racial and ethnic minorities, as in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), or *Truax v. Raich*, 239 U.S. 33 (1915); out-of-state business owners, as in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985); or politically unpopular groups, as in *Schware v. Bd. of Bar Exam. of N.M.*, 353 U.S. 232 (1957). When legislatures take away economic opportunity from

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bona fide relation to public health or safety"). Moreover, while the Department contends that the Supreme Court has only struck down economic regulations where they were aimed at harming someone, again, that's false. It has repeatedly struck down laws that lack a rational connection to their ends. *See, e.g.*, *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty.*, 488 U.S. 336, 344–45 (1989); *Zobel v. Williams*, 457 U.S. 55, 56 (1982); *Quinn v. Millsap*, 491 U.S. 95, 109 (1989); *Turner v. Fouche*, 369 U.S. 363–64 (1970); *Williams v. Vermont*, 472 U.S. 14, 15 (1985).

these or other groups or individuals at the behest of the favored groups, judicial application of the rational basis test is their only recourse. It is therefore the judiciary's duty to protect people who lack the political power necessary to protect their own rights from exploitation by the majority. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (the judiciary has a "special role in safeguarding the interests of those groups that are relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process") (quotation omitted). Most constitutionally protected liberty interests, including the right to privacy, the right of equal treatment as it applies to non-suspect classes like immigrants and the mentally disabled, the right to make private, intimate decisions, and the right to earn a living in a common occupation, are subject to rational basis scrutiny. To fulfill the promise of due process and equal protection, such scrutiny must be meaningful—not wholly abdicated in favor of the legislative process.

III. The Department's arguments do not create a dispute of material fact

As an initial matter, no expert evidence is needed to understand the harm FNR causes. FNR is an irrational way of protecting public health or safety on its face—because its requirements have nothing to do with health or safety. FNR does *not*, for example, impose educational requirements, mandatory training, passage of exams, minimum equipment, annual inspections, or any other requirement that has anything to do with a person's fitness to provide care. *Cf. 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").

Instead, the primary effect of FNR is to destroy the ability of qualified entrepreneurs like Ursula Newell-Davis to provide care in their community, to the detriment of the public. It entrenches incumbent providers and deprives Louisiana families of a worthy caretaker that would allow them to get time to themselves and trust their children are well-cared for. It makes it harder

to access care, meaning families must spend more time trying to find care with fewer options. For families with children with severe behavioral or physical challenges, this can be devastating. *See* Decl. of Dana Pitts, Decl. of Donn'Joanee Thomas, and Decl. of Maleeka Lee, attached hereto as Exhibits 1, 2, and 3, respectively. The experiences of three single mothers, who have written declarations in support of Plaintiffs, are united by a common thread: they suffered through a respite care system plagued by ineffective care, shortages, and delays. *Id.* As one mother testified, she encountered such difficulty attempting to find a respite provider that she lost her home trying to care for her special needs child. *See* Pitts Decl. ¶ 7. Then, "[a]fter 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. *Id.* ¶ 9. Another 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 Plaintiffs would provide quality respite services that are desperately needed in the state. *See* Thomas Decl. ¶¶ 12, 15. Yet another described 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. *See* Lee Decl. ¶¶ 6–9. It is impossible to conceive of any rational way that FNR could be said to have helped these women; instead, it harmed them. All would have benefitted not just from consistent, reliable, and more readily accessible respite care, but care from Ursula Newell-Davis. FNR deprived them of that option and put care farther out of reach.

The FNR scheme is predicated on vague allegations that regulating every qualified provider would be burdensome and that easing the Department's regulatory burden leads to better quality providers. But "[t]he great deference due state economic regulation" does not require courts to accept "nonsensical explanations for regulation," or turn a blind eye to the facts. *See St. Joseph Abbey*, 712 F.3d at 226. There is no evidence in the record tending to show that there is any benefit

from FNR, and rational basis requires more than the Department's irrational speculation before it will countenance the deprivation of constitutional rights.

Even if expert evidence were required to show FNR's irrationality, as discussed below, Plaintiffs have provided it. The Department does not actually rebut this evidence, nor does it present any competing evidence of its own. Instead, it attempts to persuade this Court to *ignore* Plaintiffs' evidence. The Court should decline to do so.

A. Studies regarding need review laws show the irrationality of FNR

Plaintiffs' expert Dr. Matthew Mitchell, the director of a project that studies need review laws at George Mason University's Mercatus Center, surveyed the literature and was unable to find even *one* study that concluded that need review improves quality of care outside of highly technical fields. Mitchell Report, Doc. 78-11, at 77–79, 85. The Department's own expert likewise did not know of any studies tending to show that need review improves quality. Lutzky Depo., Doc. 78-10, at 72:8–15. Studies instead consistently show that need review has negative or, at best, negligible effects on quality, including studies on home health services.[7] Pls.' MSJ, Doc. 78-1, at 16–17.

Rather than presenting any competing evidence,[8] the Department states without any argument or explanation that the 72 peer reviewed studies surveyed by Dr. Mitchell have no

[7] The conclusions of these studies are consistent with the fact that complaints in Louisiana trend upwards and a nationwide survey shows that Louisianans have lower consumer satisfaction in the provision of child respite care than the average of all responding states. Pls.' MSJ., Doc. 78-1, at 18.

[8] As explained in Plaintiffs' Motion for Summary Judgment, the Department's only evidence, Dr. Lutzsky's expert report, did not study and does not speak to the quality of services in Louisiana. It merely studied how many respite providers are available and found that more than 36% of providers in Region 1 cannot be reached and another 44% are either not accepting new clients or are only accepting clients in a limited capacity. The lack of access that Dr. Lutzsky describes reinforces Plaintiffs' argument that FNR is irrational and makes it more difficult for Louisianans to access care even when more providers are needed. It also demonstrates that the Department has

relevance to respite care. Defs.' MSJ, Doc. 73-1, at 21–22. But as Dr. Mitchell has stated, there is no reason to *ignore* the evidence of the effect of need review laws outside the specific context of respite care. This wide body of research is consistent with economic theory and spans several fields, including hospitals, nursing facilities, drug rehabilitation and psychiatric care, and home health. Mitchell Decl., Doc. 78-6, ¶¶ 5–12. Accordingly, "there is no reason to set aside the large body of literature evaluating needs assessment on the belief that respite care somehow defies it." *Id.* ¶ 12.

The Department also mischaracterizes the results of the two studies specific to home health care. For example, the Department claims that the Polsky study found "no significant effects" on consumers of home health services. Defs.' MSJ, Doc. 73-1, at 22. But in three out of the six areas of study, the researchers found "enduring statistically and economically significant effects." Mitchell Decl., Doc. 78-6, ¶¶ 13–17. For example, they found that "needs assessment is associated with half as many home health providers per Medicare beneficiary, 13.7 percent fewer home health admissions from hospitals, and a 1,000-point increase in industrial concentration." *Id.* ¶ 17. In other words, "they [found] that needs assessment has large, permanent, and statistically significant associations with diminished access to care and diminished market competition." *Id.*

The Ohsfeldt 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, the report found that "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." Mitchell Depo., Doc. 78-11, at 38:18–21. That conclusion "is statistically significant at the one-percent level meaning that if it were not true,

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been arbitrarily applying FNR, given that the FNR committee bases its decisions on the number of businesses in operation and, until Dr. Lutzsky's study, the Department had that number entirely wrong.

there's a one in 100 chance that they would find that." *Id.* at 38:21–24. 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. *Id.* at 39:1–3.[9]

The Department does not point to any competing studies or identify flaws in the Ohsfeldt study. Instead, it asks the Court to ignore the Ohsfeldt study because (1) it purported to fill a "gap in the literature" and (2) it included a note, typical to research of this kind, that its conclusions could be "overstated or even entirely spurious" if various factors which were not controlled for "have a negative impact on quality *and are correlated* with the presence of state entry restrictions." Defs.' MSJ, Doc. 73-1, at 22; Ohsfeldt Study, Doc. 73-25, at 15 (emphasis added). But Dr. Mitchell's unrebutted testimony is that both these statements are common research disclaimers; the first because authors seek to get published[10] and the second because it is impossible to control for every variable. Mitchell Depo., Doc. 78-11, at 42:1–10. And with regards to the latter

[9] Dr. Mitchell's conclusions are supported by a cross-border study that found that need review "is uniformly associated with worse outcomes" in home health. "In particular . . . patients in needs assessment states perform worse on functional improvement measures (bathing, ambulating, transferring to bed, managing oral medication, and less pain interfering with activity). They are also more likely to visit the emergency department and are more likely to be hospitalized." *See* Mitchell Decl., Doc. 78-6, ¶ 26; *see also* Bingxiao Wu, Jeah Jung, Hyunjee Kim, and Daniel Polsky, *Entry Regulation and the Effect of Public Reporting: Evidence from Home Health Compare*, Health Economics 28 (4): 492–516 (2019).

[10] As Dr. Mitchell testified, "in order to impress the reviewers of the journal," researchers "want to try to show how their study is unique, is new." Mitchell Depo., Doc. 78-11, at 30:1–19. Thus, whereas other researchers "had done . . . an indirect assessment of the quality," the Ohsfeldt researchers would conduct "a more direct assessment." *Id.*

In any event, what matters according to Dr. Mitchell is not the novelty of a particular study, but "the quality of the study." *Id.* at 39:24–40:21. Even "if there were only one study, you would also be wanting to know two other important factors": whether the study is (1) "consistent with the empirical findings in the larger area" and (2) "consistent with theory." Here, he concluded that the studies regarding home health—including the Polsky and Ohsfeldt studies—"are consistent with . . . the other 68 studies that study facilities need review" and that "all 72 studies are consistent with . . . economic theory and the larger literature." *Id.*

statement, the authors' concern was not that some states might have variables that somehow skew all of their study results. Instead, they noted that there would only be reason to doubt the outcome of the study if an unaccounted-for variable leads to worse health outcomes *and* is correlated with the presence of need review laws. As Dr. Mitchell testified, "if you *have some plausible reason* to believe that these unobserved factors are worse, you know, in a state with [need review] – *and you'd have to have some story for why that is* – then the negative effects of the regulation that they're picking up could be attributed to those spurious factors and not to the regulation itself." Mitchell Depo., Doc. 78-11, at 43:1–19 (emphases added). The Department has failed to suggest any unaccounted-for variable that would undermine or skew the studies on need review and has failed to give any other reason for this Court to discard Dr. Mitchell's conclusions.

B. NCI survey results are reliable and indicate that FNR leads to worse outcomes

Separately, the Department asks this Court to discount Plaintiffs' expert Dr. Edward Timmons's analysis of survey results from the National Core Indicators (NCI), despite the fact that the state of Louisiana, the Center for Medicaid and Medicare Studies, and various public health agencies across the country rely on these survey results when making policy decisions that affect millions of Americans. Pls.' Opp'n to Mtn. to Exclude, Doc. 65, at 2–3. These survey results show that (1) 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. 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. Timmons Report, Doc. 65-3, at 35. In sum, as Dr. Timmons concluded, "patients in Louisiana" are "less satisfied with the child respite care that they receive than the national average." *Id.* With regards to adult respite care, Louisiana scored comparatively to the national average and a comparison state. However, dissatisfaction grew in both 2015–2016 and 2016–2017

in Louisiana. From this, Dr. Timmons concluded that "there is no evidence that adults receive better quality service in Louisiana as a result of FNR regulation." *Id.* at 36.

Contrary to the Department's assertions, these NCI survey results are reliable. They are routinely studied for effectiveness and their sample selection, questions, and design are in accord with generally accepted standards and procedures in the field of surveys. Timmons Decl., Doc. 65-3, ¶ 11. 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." Timmons Decl., Doc. 65-3, ¶ ¶ 11–12. Moreover, Louisiana itself uses NCI data to make healthcare policy decisions affecting its residents. Opp. to Mtn. to Exclude, Doc. 65, at 14–15.

Notably, the Department does not contend that the purpose or design of the NCI survey was flawed, that the wrong population was targeted, or that the questions should have been phrased differently. It critiques only the response rate and sample size. The problems with that critique are three-fold: (1) most importantly, these factors by themselves do not render a survey unreliable nor justify ignoring the results (indeed, courts have admitted survey results with far lower survey results), Opp'n to Mtn. to Exclude, Doc. 65, at 3, 8-9, but even if they did, (2) the Department mistakenly looks at the response rate and sample size by question, rather than looking at the response rate and sample size of the survey as a whole, *id.* at 8–9, and (3) the Department has made no argument about how the response rate or sample size could have skewed the results, *id.* at 10. Finally, while the Department urges that a minimum of 400 responses is necessary for a reliable survey, NCI includes data from states that received fewer than 400 usable surveys (as Louisiana and many other states have a few times over the years) so long as the margin of error stays

within their confidence level of a less than about 7% margin of error. *See, e.g.*, *id.* at 10; NCI Child Family Care Final Report 2019–2020, at 86, 88, *available at* https://www.nationalcoreindicators.org/upload/core-indicators/2019-20_CFS_National_Report.pdf. The Department is wrong to suggest that NCI itself doesn't find the results reliable. And it's wrong to imply that Louisiana doesn't find them reliable, since Louisiana relies on these results itself.

In sum, the Department has not given any legitimate reason to ignore the NCI survey results. The survey is reliable, it has response rates and population sizes consistent with studies accepted by other courts, and the Department's argument misrepresents both the actual number of responses and NCI's own requirements for reliability. Just as Louisiana does not ignore NCI survey results when considering the effect of its policy choices, neither should this Court.

The Department also asks the Court to ignore Dr. Timmons's conclusions about the data because Dr. Timmons did not assess how differences between states might account for Louisianans' dissatisfaction with their care compared to residents of other states. But as Dr. Timmons testified, the "observed differences in the data" are "enormous." *See* Timmons Decl., Doc. 65-3, at ¶ 24. As he noted in his report, 46% of respondents in Louisiana report having difficulty accessing respite care; in contrast, Arizona reports only 14% and the national average is 24%. Timmons Report, Doc. 65-3, at 35, 38. There is no reason to expect that such a large discrepancy could be explained away by controlling for factors like weather or education. Nor has the Department given any. Timmons Decl., Doc. 65-3, ¶ 24.[11] The fact is, there are observed differences in the data (Louisiana performs worse than the national average on the child survey

[11] And while the Department complains that Dr. Timmons didn't compare Louisiana with Missouri, Missouri also performed *better* than Louisiana. *See* Pls.' Opp'n to Mtn. to Exclude, Doc. 65, at 19.

and no better on the adult survey), and the Department has done nothing to discount those differences.

IV. The Louisiana Constitution demands more than its federal counterpart

While Plaintiffs recognize that this Court earlier held that the rational basis standard applies under the due process provisions of the Louisiana Constitution, Doc. 45 at 17–18, Plaintiffs believe 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, which are subject to heightened scrutiny, and mere "economic regulations," which do not substantially interfere with the right to earn a living and which are therefore subject to the rational basis test. Because FNR is of the former type, it should be subject to heightened scrutiny under the Louisiana Constitution.

Historically, Louisiana courts have considered the right to earn a living fundamental. *See, e.g.*, *Reynolds v. La. Bd. of Alcoholic Beverage Control*, 249 La. 127 (1966) (minimum mark-up for alcoholic beverages violated fundamental right of purveyors); *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). In recent years, however, they 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 Plaintiffs of the opportunity to enter their chosen trade, not based on objective qualifications, but based solely on the Department's subjective and arbitrary assessment of "need." Thus, Plaintiffs believe FNR substantially interferes with their fundamental right to earn a living and should be subject to heightened scrutiny under the Louisiana Constitution. Nevertheless, the Court need not accept this distinction for Plaintiffs to prevail, because as discussed above, FNR cannot even survive the rational basis test.

CONCLUSION

The Department's motion for summary judgment, Doc. 73, should be denied, and Plaintiffs' motion, Doc. 78, should be granted.

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Respectfully submitted,

/s/ Anastasia P. Boden

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2022, I electronically filed the foregoing document with the Clerk of the Court via the CM/ECF system, which will cause a copy to be served upon counsel of record.

/s/ Anastasia P. Boden
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