No. _____

In The

Supreme Court of the United States

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

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

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

PARTIES

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

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

CORPORATE DISCLOSURE STATEMENT

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

RELATED PROCEEDINGS

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

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

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

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

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS

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

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

A. Factual Background

1. The Louisiana Law

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

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

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

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

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

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

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

2. The State Interests Served by FNR

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

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

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

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

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

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

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

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

3. Petitioners

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

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

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

B. Legal Background

1. District Court Proceedings

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

2. The Fifth Circuit's Decision

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge Ho of the Fifth Circuit similarly observed:

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

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

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

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

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

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

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

A. *Slaughter-House* Was Egregiously Wrong

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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