No. 22-1208

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 A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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.

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INTEREST OF AMICUS CURIAE[1]

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest law firm. IJ works to defend the essential foundations of a free society—private property rights, occupational and educational liberty, and the free exchange of ideas—from intrusive, ahistorical, arbitrary, or exploitative restrictions. Since its inception, IJ has fought to protect the right to economic liberty, like Petitioners. *E.g.*, *Full Circle of Living & Dying v. Sanchez*, No. 2:20-cv-01306-KJM-KJN, 2023 WL 373681 (E.D. Cal. Jan. 24, 2023); Pet. for Writ of Certiorari, *Sanchez v. Off. of the State Superintendent of Educ.*, No. 22-543 (Dec. 12, 2022), *cert. denied*, 143 S. Ct. 579 (2023); Pet. For Writ of Certiorari, *Tiwari v. Friedlander*, No. 22-42, *cert. denied*, 143 S. Ct. 444 (2022); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

SUMMARY OF ARGUMENT

Petitioner Ursula Newell-Davis has worked as a social worker in Louisiana for more than two decades. After noticing a local need for respite care, and after several families requested her services, she decided to

[1] No counsel for a party authored this amicus brief in whole or in part; and no person other than the Institute for Justice (IJ), its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties were given timely notice that IJ would be filing this brief in support of Petitioners.

open a respite care business. The first step was getting Facility Need Review (FNR) approval from the Louisiana Department of Health (LDH). Although Ms. Newell-Davis is trained to safely provide respite services and although there is a need for respite services,[2] the LDH denied her FNR application.

LDH freely admits that the FNR program limits the availability of care. That's a feature, not a bug. LDH argues that the ban makes it easier to manage existing providers. Pet. App. 9a–10a. The district court and Fifth Circuit accepted this argument even though it extinguishes Ms. Newell-Davis's Fourteenth Amendment rights. As a result, LDH is free to continue enforcing a monopoly[3] in respite care services. *Id*. at 11a–12a.

As this Court recently expressed, the Due Process Clause of the Fourteenth Amendment protects unenumerated rights that are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). The right to earn a living free from unreasonable government

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[2] *See* Pet. App. 28a–29a, 83a–84a, 88a–89a, 97a.

[3] It might be correct to use the term "oligopoly," but it is not clear from the record how many respite care businesses operate or accept new patients (if any) in the geographic area Sivad Home would serve. *See* Pet. App. 28a–29a, 83a. In any event, the FNR Program prohibits Ms. Newell-Davis from exercising her right to work in her chosen occupation free from unreasonable government restrictions.

restrictions is one such right. This right can be traced to Magna Carta; was developed and defended by English common law courts; and remained sacred to the Founders. The Constitution was intended to protect the right to economic liberty.

Moreover, English common law courts and the Founders also developed a rich history and tradition forbidding monopolies. Monopolies are a natural enemy of the right to economic liberty and courts have been striking them down for centuries. In other words, minimal regulation of the right to economic liberty may be tolerable. Banning entry to a trade is not.

The adoption of the Fourteenth Amendment reaffirmed the national commitment to economic liberty and abhorrence of monopolies. Indeed, equality under the law included freedom from castes and monopolies.[4]

But the *Slaughter-House Cases* quickly diminished the meaning of the Privileges or Immunities Clause in the Fourteenth Amendment. Notably, the majority was silent about the protections for economic liberty in the Due Process Clause of the Fourteenth Amendment. After that, *Carolene Products* directed courts to displace the rich history and tradition of economic rights and downgrade them to a disfavored status. But economic liberty has not been abandoned.

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[4] Steven G. Calabresi & Larissa C. Lebowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J. L. & Pub. Pol'y 983, 1034–36 (2013).

Courts continue to recognize the right, although inconsistently.

The challenged FNR program extinguishes Ms. Newell-Davis's right to earn a living and impermissibly grants existing respite care businesses monopoly-power. Congress, federal agencies, and scholars also agree that FNR programs are anti-competitive and harm the public.

The FNR program deprives Ms. Newell-Davis of her right to economic liberty and is at odds with centuries of history and tradition. That same history and tradition prohibit the government from sponsoring monopolies—and certainly not at the expense of the right to earn a living. The FNR program is precisely what the framers of the Fourteenth Amendment aimed to prevent. This Court should grant the petition.

ARGUMENT

I. The Right to Economic Liberty Is Deeply Rooted in This Nation's History and Tradition.

A. English Common Law Recognized the Right to Earn a Living.

The roots of the right to economic liberty stretch back over eight centuries to Magna Carta.[5] As English

[5] Timothy Sandefur, *The Right to Earn a Living*, 6 Chapman L. Rev. 207, 209 (2003).

common law developed, courts and jurists affirmed the existence and importance of this fundamental liberty.[6]

In 1377, a common law court upheld the right to economic liberty in the wine trade. Timothy Sandefur, *The Right to Earn a Living*, 6 Chapman L. Rev. 207, 209 (2003). Of course, cases were not well documented for many centuries. Then, in 1602, Sir Edward Coke reported the now infamous *Case of Monopolies*,[7] which expressly recognized the right to economic liberty in England. Sandefur, *supra* note 5, at 210–11. There, a merchant with an exclusive right to sell playing cards sued when a competitor started selling cards. The court ruled against the merchant. Coke observed that "every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, *no more than of his life*."[8]

Subsequent cases during Coke's eventual tenure as Lord Chief Justice affirmed the value of economic liberty. In *the Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218 (K.B. 1615), the court held that tailors could not be required to complete apprenticeships before working in the trade. In *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614), the court rejected the same argument

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[6] For a more detailed account of the right to economic liberty, see generally Timothy Sandefur, The Right to Earn a Living: Economic Freedom and the Law (2010) ("Economic Freedom").

[7] Calabresi, *supra* note 4, at 989.

[8] Calabresi, *supra* note 4, at 993 (citation omitted) (emphasis in original).

about mandatory apprenticeships for unskilled laborers.

Other judges issued similar rulings. In *Colgate v. Bacheler*, the court held an individual "ought not to be abridged of his trade and living." 78 Eng. Rep. 1097, 1097 (K.B. 1602). And in *Les Brick-Layers & Tilers v. Les Plaisterers*, 81 Eng. Rep. 871, 872 (K.B. 1624), the court struck an ordinance excluding bricklayers from repairing chimneys and granting the Company of Plasterers the exclusive right to plaster chimneys with lime.

As English common law developed in the century and a half leading to the American Revolution, courts continued to protect the right to economic liberty. Many of the English economic liberty cases from this era also addressed the harms caused by monopolies. *See* Section II, *infra*.

The right to economic liberty was so well-established that Sir William Blackstone's Commentaries on the Law of England, written only a few years before the founding, pronounced that "every man might use what trade he pleases."[9] Naturally, the Founders carried the right to economic liberty forward as they sought to build a new republic.

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[9] 1 William Blackstone, Commentaries on the Laws of England *415 (8th ed. 1780).

B. Early American Law Recognized the Right to Earn a Living.

The speeches and writings of the Founders confirm that they believed economic liberty was as—or even more—important to the new American order as it was under the English common law. In 1776, George Mason wrote in the Virginia Declaration of Rights that "all men are by nature equally free and independent, and have certain inherent rights . . . [including] the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Va. Decl. of Rights § 1.

Soon after, Thomas Jefferson followed suit in the Declaration of Independence, when he penned the now famous words "all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). It is generally believed that these words were meant to protect economic rights or the right to livelihood.[10]

Jefferson, in particular, was a strong advocate for economic liberty. He "resented what he would later call the 'artificial aristocracy,' and wanted instead to foster the 'natural aristocracy' of 'virtue and talents,' " where the most skilled would receive their due attention and praise. Sandefur, *supra* note 5, at 220 (quoting Letter of Thomas Jefferson to John Adams (Oct. 28, 1813), *in* The Adams-Jefferson Letters 387–88 (Lester J. Cappon

[10] *See* Economic Freedom, *supra* note 6, at 24.

ed. 1959)). During his first inaugural address he emphasized that good government is one that "shall leave [men] otherwise free to regulate their own pursuits of industry and improvement[.]"[11]

James Madison believed the same:

> There is not a just government, . . . 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[.][12]

As U.S. courts began defending the right to earn a living, some held that the foundation was biblical. *See* Sandefur, *supra* note 5, at 226–27 (collecting cases). Specifically, in Genesis, God tells Adam: "In the sweat of thy face shalt thou eat bread, till thou return unto the ground." *Id.* at 226 & n.124 (quoting Genesis 3:19 (King James)). This is another context in which the right to economic liberty has been woven into our national history.

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[11] First Inaugural Address of Thomas Jefferson (Mar. 4, 1801), https://tinyurl.com/37zm92c7.

[12] James Madison, Property and Liberty, Nat'l Gazette, Mar. 29, 1792, *reprinted in* The Complete Madison: His Basic Writings 267, 267 (Saul K. Padover ed. 1953).

C. The Fourteenth Amendment Protects the Right to Economic Liberty.

At the end of the Civil War, the federal government sought to protect former slaves from oppression by state governments. *See McDonald v. City of Chicago*, 561 U.S. 742, 774–75 (2010). Key among these protections was the Civil Rights Act of 1866 (CRA), which guaranteed the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981)).

The CRA's "primary concern was the protection of economic rights for new black citizens." Sandefur, *supra* note 5, at 228. The Black Codes were crippling the ability of freed slaves to work, earn money, or own property (among other things) in the south. Eric Foner, Free Soil, Free Labor, Free Men xxxv (1995 ed.) (The CRA, "in part a response to Southern Black Codes that severely limited the liberty of former slaves, enshrined free labor values as part of the definition of American citizenship").

But opponents of the CRA argued that Congress lacked authority to enact this sweeping legislation. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199, 2023 WL 4239254, at *25–26 (June 29, 2023) (Thomas, J., concurring). That gave rise to the Fourteenth Amendment, ratified in 1868, and including the Privileges or Immunities Clause. The Privileges or Immunities Clause "was

intended to guarantee and constitutionalize the [CRA]." Sandefur, *supra* note 5, at 228 (quotation omitted).

During debate around the Fourteenth Amendment, one of the authors of the Privileges or Immunities Clause, Representative Bingham, described its purpose as protecting "the liberty . . . to work in 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 your toil." Cong. Globe, 42d Cong., 1st Sess. App. 86 (1871).

Representative Hamilton asked:

> [H]as not every person a right, to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself, as long as it is a legitimate exercise of this right and not vicious in itself, or against the public policy, or morally wrong, or against the natural rights of others?

1 Cong. Rec. 363 (1874); *see also* Cong. Globe, 42d Cong., 2d Sess. 844 (1872) (rights protected by Privileges or Immunities Clause stem from American and English history and common law). Thus, the protections of the Fourteenth Amendment squarely include protection of the right to economic liberty.

At the same time, a challenge to Louisiana a law granting monopoly-power to a single slaughterhouse in the New Orleans area was working its way through the courts. The U.S. District Court for the District of Louisiana ruled that the law was unconstitutional, in

light of the protected right to economic liberty. In interpreting the protections of the Privileges or Immunities Clause, the court pronounced "it would be difficult to conceive of a more flagrant case of violation of the fundamental rights of labor than the one before us." *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 653 (D. La. 1870) (No. 8,408).

On appeal, this Court reversed in a 5-4 opinion. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). The majority ruled that the Privileges or Immunities Clause was not intended to protect the right to economic liberty. *Id*. at 78–79. The decision, however, was silent on whether the Due Process Clause protects the right.

The dissenting opinions, however, emphasized the existence and historical importance of the "fundamental" right to economic liberty:

- Justice Field, writing for all four dissenters: "[T]he right of free labor [is] one of the most sacred and imprescriptible wrights of man[.]" 83 U.S. at 110 (Field, J., dissenting).
- Justice Bradley: "[T]he right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of his most valuable rights, and one which the legislature of a State cannot invade, whether restrained by its own constitution or not." *Id.* at 113–14 (Bradley, J., dissenting).

- Justice Swayne: "Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity." *Id.* at 127 (Swayne, J., dissenting).

Today, scholars "left, right, and center" agree that the Privileges or Immunities Clause "does not mean what the Court said it meant in 1873." *McDonald*, 561 U.S. at 756 (quotations omitted).

D. The Right to Earn a Living Continues to Be Recognized and Defended.

The right to earn a living is recognized post-*Slaughter-House*, both by this Court and in lower courts. This was true even in the years immediately after the decision.

Shortly thereafter, Justice Bradley reiterated that the "liberty of the individual to pursue a lawful trade or employment." *Butcher's Union Slaughter-House v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 756 (1884) (Field, J., concurring); *see id*. at 762 (The Fourteenth Amendment protects "[t]he right to follow any of the common occupations of life.") (Bradley, J., concurring).

Two years later, in *Yick Wo v. Hopkins*, the Court struck an ordinance regulating Chinese laundries in California because "the very idea that one man may be compelled to hold his life, or the means of living, or any

material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails." 118 U.S. 356, 370 (1886). In *Dent v. West Virginia*, the Court was even more explicit, holding that "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose." 129 U.S. 114, 121 (1889).

State courts echoed this position. *See*, *e.g.*, *People v. Marx*, 2 N.E. 29, 33 (N.Y. 1885) ("[I]t is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit."); *Ritchie v. People*, 40 N.E. 454, 458 (Ill. 1895) (holding all have the "right to gain a livelihood by intelligence, honesty, and industry").

Throughout the late 1800s and early 1900s, economic liberty experienced a resurgence. *See*, *e.g.*, Sandefur, *supra* note 5, at 270–77, App'x C–D (collecting cases defending the right to earn a living between 1873 and 1937); *Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468, 486–89 (1937) (Butler, J., dissenting) (citing six cases from this Court recognizing the Fourteenth Amendment's protection for economic liberty). In 1938, however, this Court decided *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), ruling that economic rights were not fundamental and thus afforded little Constitution protection. This ushered in a new era where courts began applying deferential review to laws that interfered with economic liberty.

Yet even after *Carolene Products*, state and federal courts continue to acknowledge the right to pursue a lawful occupation. *See*, *e.g.*, *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (recognizing a "generalized due process right to choose one's field of private employment" (citing *Dent*, 129 U.S. 114)); *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 n.9 (1985) ("the pursuit of a common calling is one of the most fundamental of those privileges" protected by the Fourteenth Amendment (citation omitted)); *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (discussing the liberty "right of the individual . . . to engage in any of the common occupations of life"); *Brusznicki v. Prince George's County*, 42 F.4th 413, 421 (4th Cir. 2022) (acknowledging "fundamental right" to "pursue a common calling" (citing *Hicklin v. Oreck*, 437 U.S. 518, 524 (1978))); *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 981 (5th Cir. 2022) (Ho, J., concurring) (noting that economic liberty has "deep roots in our Nation's history and tradition"); *Tiwari v. Friedlander*, 26 F.4th 355, 360 (6th Cir. 2022) (laws interfering with the "right to engage in a chosen occupation" can violate the Fourteenth Amendment); *Stidham v. Tex. Comm'n on Priv. Sec.*, 418 F.3d 486, 491 (5th Cir. 2005) (reaffirming "the principle that one has a constitutionally protected liberty interest in pursuing a chosen occupation"); *Trejo v. Shoben*, 319 F.3d 878, 889 (7th Cir. 2003) (same); *Full Circle of Living & Dying v. Sanchez*, No. 2:20-cv-01306-KJM-KJN, 2023 WL 373681 (E.D. Cal. Jan. 24, 2023) (granting in part and denying in part death doula's claim that state law unconstitutionally interfered with right to economic liberty); *cf. Members*

of the Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., No. 22S-PL-338, 2023 WL 4285163, at *7 (Ind. June 30, 2023) (Indiana Constitution protects "pursuing a vocation that does not harm others[.]"); *Jackson v. Raffensperger*, Nos. S23A0017, S23X0018, 2023 WL 3727742, at *6, *11 (Ga. Sup. Ct. May 31, 2023) (finding licensing scheme in violation of the Due Process Clause of the Georgia Constitution because it interferes with the protected right to economic liberty), *available at*; *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 92 (Tex. 2015) (Willlett, J., concurring) ("Self-ownership, the right to put our mind and body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity.").[13]

But for each of these cases, there are several more where confused courts have shied away from protecting economic liberty.[14] *See* Sandefur, *supra* note 5, at 259–61. The right to earn a living is fundamental. It was carried over from English common law and is deeply rooted in American tradition. It should be protected accordingly. This case presents the opportunity

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[13] *See also* Sandefur, *supra* note 5, at 258 n.302.

[14] *See*, *e.g.*, *Truesdell v. Friedlander*, No. 3:19-cv-00066-GFVT-EBA, 2022 WL 1394545, at *4 n.7 (E.D. Ky. May 3, 2022) (granting motion to dismiss Fourteenth Amendment due process, equal protection, and privileges or immunities claims where plaintiffs alleged Kentucky's certificate of need law deprives them of their right to economic liberty), *appeal pending* No. 22-5808 (6th Cir. filed Sept. 13, 2022).

to cement its status and ensure uniform, meaningful protection nationwide.

II. Even If Government May Regulate an Occupation, History and Tradition Forbid Banning Entry to an Occupation.

Like the right to economic liberty, the right to compete in a market free from government-sponsored monopolies is deeply rooted in our Nation's history and tradition. And if monopolies are not tolerated, neither are outright bans on occupations. Protection for the right to economic liberty is at its peak when a court prohibits the government from picking winners and losers in the market. Courts have never been afraid to strike laws that create or protect monopolies. In fact, protection of the right to economic liberty demands that they do so.

A. English Common Law Courts Protected the Right to Earn a Living Free From Monopoly Control.

Monopolies derived their early power from the monarchy. They were first known as exclusive "licenses" or "patents" from the King or Queen to trade or sell a good. Calabresi, *supra* note 4, at 984. The first recorded cases of English courts striking monopolies come from the Seventeenth Century *See*, *e.g.*, *Darcy v. Allen*, 77 Eng. Rep. 1260, 1262–65 (K.B. 1602) (striking playing card monopoly); *Case of the Tailors*, 77 Eng. Rep. at 1218–20; *Colgate*, 78 Eng. Rep. at 1097.

Lord Coke, defender of economic liberty, was also a leading advocate for ending monopolies.[15] *See* Section I.A, *supra*. In and out of court, he was adamant in his disdain, stating: "Generally all monopolies are against . . . the liberty and freedom[] of the subject, and against the law of the land." Edward Coke, *The Second Part of the Institutes of the Laws of England* 47 (1797 ed.). Upon his retirement from Parliament, Lord Coke published legal treatises reiterating his antimonopoly position: "all grants of monopolies are against the ancient and fundamental[] laws of this kingdom[]"; and "[n]o man ought to be put from his livelihood without answer." Sandefur, *supra* note 5, at 216 (citation omitted).

English courts continued striking laws that created monopolies. For example, Courts set aside royal monopolies that protected grocers (1678),[16] then bankers (1687),[17] and musicians (1695).[18]

By the mid-eighteenth century, the antimonopoly principle was well-settled. *See*, *e.g.*, Blackstone, *supra* note 8, at *415–16. In fact, "[t]he antimonopoly tradition of the English common law and statutes had achieved constitutional status in England by the time of the adoption of the United States Bill of Rights." Michael Conant, *Antimonopoly Tradition Under*

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[15] *See* Sandefur, *supra* note 5, at 215l; *see also* Calabresi, *supra* note 4, at 996–1003 (describing tensions between King James I and Parliament over monopolies).

[16] *Wade v. Ripton*, 84 Eng. Rep. 79 (K.B. 1678).

[17] *Earl of Yarmouth v. Daniel*, 87 Eng. Rep. 48 (K.B. 1687).

[18] *Robinson v. Groscourt*, 87 Eng. Rep. 547 (K.B. 1695).

the Ninth and Fourteenth Amendments: Slaughter-house Cases *Revisited*, 31 Emory L.J. 785, 828 (1982).

B. From the Founding, This Nation Has Guarded Against Monopolies.

The Founders studied Lord Coke's legal scholarship and "presumed strongly against laws which granted exclusive business privileges." Sandefur, *supra* note 5, at 222; *see id*. at 216 (Coke's legal treatise: "[A] mans [sic] trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a mans [sic] trade, taketh away his life[.]").

"The specter of legally forbidding an honest person from making an honest living haunted the founding generation so much that four states included antimonopoly clauses in their proposed bill of rights." *Id.* at 221 & n.93 (Massachusetts, North Carolina, New Hampshire, and New York) (citing The Debate on the Constitution (Bernard Bailyn ed. 1993)).[19]

The reticence toward *any* type of monopolistic restrictions came up repeatedly during this era.[20]

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[19] Today, 19 states maintain antimonopoly clauses in their constitutions. *See* Calabresi, *supra* note 4, at 1067 n.516.

[20] In fact, the Revolutionary War may have been a reaction to the monarchy's monopoly powers. Sandefur, *supra* note 5, at 223; Calabresi, *supra* note 4, at 1007–08.

Jefferson and Madison were skeptical of patents[21] and copyrights. George Mason announced at the Constitutional Convention that "'[h]e was afraid of monopolies of every sort, which he did not think were by any means already implied' by the commerce clause." Sandefur, *supra* note 5, at 222 (quoting James Madison, Notes of Debates in the Federal Convention 638 (Adrienne Koch ed. 1966)).[22]

Over the next century, courts consistently defended the right to make a living from total bans on entry to the market. As the South Carolina Supreme Court explained, "suppression of a trade is not a regulation. To be regulated, the trade must subsist." *State v. Town Council of Columbia*, 6 Rich. 404, 415 (S.C. 1853). The North Carolina Supreme Court emphasized that "'the people' who were then exercising the highest act of sovereignty—that of making a government for themselves, forbade the creation of monopolies and put an end to all such as then existed." *McRee v. Wilmington & Raleigh R.R. Co.*, 47 N.C. (2 Jones) 186, 190 (1855).

In *Norwich Gaslight Co. v. Norwich City Gas Co.*, the court struck a law granting an "exclusive" right to provide the city with gas, ruling: "the whole theory of a free government is opposed to such grants[.]" 25 Conn.

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[21] *But see Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964) ("Patents are not given as favors, as was the case of monopolies given by the Tudor monarchs[.]").

[22] This aversion to monopolies allowed American industry to thrive. *See* Gordon S. Wood, The Radicalism of the American Revolution 318–19 (1992).

19, 37 (1856). The high court in New York also ruled a city "had no power to grant . . . a [monopoly] franchise[.]" *Davis v. City of New York*, 14 N.Y. 506, 524 (1856). And in Wisconsin, the court held "[o]dious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions[.]" *Shepherd v. Milwaukee Gas Light Co.*, 6 Wis. 539, 547 (1858).

C. The Fourteenth Amendment Affirmed the Constitutional Protections Against Monopolies.

In 1868, the Fourteenth Amendment was ratified. In addition to ending discrimination based on race, the framers sought to end discrimination based on class and economic rights. "The Black Codes were widely criticized as being a forbidden form of class legislation that sought a monopoly over black labor." Calabresi, *supra* note 4, at 1038; *see also id*. at 1031–42 (describing how antimonopoly context led to enactment of Fourteenth Amendment).

Then came the *Slaughter-House Cases*,[23] The dissents remained steadfast that monopolies are disfavored and violate the right to economic liberty. The

[23] The 5-4 majority ruled the Privileges or Immunities Clause did not protect the right to economic liberty but remained silent about other protections for economic liberty in the Fourteenth Amendment.

lead dissent, joined by all four dissenters, recognized:

> The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations.

83 U.S. at 110 (Field, J., dissenting). Justice Bradley separately noted: "If my views are correct with regard to what are the privileges and immunities of citizens, . . . any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens." *Id.* at 122.

Courts continued to be concerned about monopolies post *Slaughter-House*. Justice Bradley wrote that it was "an incontrovertible proposition of both English and American public law, that all *mere* monopolies are odious, and against common right." *Butcher's Union Slaughter-House*, 111 U.S. at 761 (Bradley, J., concurring) (emphasis in original); *see also id.* at 762 ("To deny [economic liberty] to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but . . . to the express words of the constitution."). In his concurrence, Justice Field lamented the evils of monopolies: "[T]hey

destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood. . . . They are void because they interfere with the liberty . . . to pursue a lawful trade[.]" *Id.* at 755–56 (Field, J., concurring).

In 1932, this Court set aside an Oklahoma certificate of need (CON)[24] law for ice manufacturers. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932). The majority ruled that "a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, . . . cannot be upheld consistent with the Fourteenth Amendment." *Id*. at 278.

State courts followed suit. In *Elite Dairy Products, Inc. v. Ten Eyck*, 247 A.D. 443, 446 (N.Y. App. 1936), the court struck a law that required existing milk companies to get a CON before expanding and banned new companies from opening. *Id*. The court held that the Fourteenth Amendment would not permit the milk monopoly. "[N]othing is more clearly settled than that it is beyond the power of a State" to arbitrarily restrict or prohibit a lawful occupation. *Id*. at 446–47; *see also Engberg v. Debel*, 260 N.W. 626, 628 (Minn. 1935) (striking CON law for employment agencies); *cf. People v. Victor*, 283 N.W. 666, 671 (Mich. 1939) (striking price

[24] As used in this brief, a CON law or program is a regulation that allows the government to deny someone entrance into the market if the government perceives there is no "need" for more competitors, just as the FNR program denies Ms. Newell-Davis an opportunity to open a respite care business.

monopoly (minimum markup law) under the Due Process Clause of the Michigan Constitution).

* * *

The right to earn a living free from monopoly control is deeply rooted in our national history and tradition. What started as a means of breaking free from the crown in England was later used to protect freedmen from the Black Codes. That right should endure today.

III. Louisiana's FNR Program Bans Ms. Newell-Davis From Starting a Respite Care Business.

To the Founders, the term monopoly meant "a special legal privilege which barred others from competing, and thereby earning a living."[25] Sandefur, *supra* note 5, at 218–19. Louisiana's FNR program does just that. It blindly privileges some businesses while banning others.

Worse, existing data confirms that FNR laws (called CON laws elsewhere) are harmful to public health. The original architects of healthcare CON laws[26] thought if they controlled the number of hospitals, they

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[25] "There are two kinds of monopoly; one of law, the other of fact." Sandefur, *supra* note 5, at 219 n.82 (quoting *Budd v. New York*, 143 U.S. 517, 550–51 (1892) (Brewer, J., dissenting)).

[26] *See* Grace Bogart, *Iowans Need Change: The Case for Repeal of Iowa's Certificate of Need Law*, 45 J. Corp. L. 221, 222–23 (2019).

could limit government spending on healthcare.[27] They also hoped that controlling the growth of healthcare facilities would increase access and improve the quality of healthcare. The experiment was an abject failure.

Healthcare CON laws rose to prominence in the 1970s. In 1972, Congress passed the National Health Planning and Resources Development Act (NHPRDA),[28] which tied certain federal reimbursements to states adopting CON programs.[29] The inducement ended in 1986,[30] when Congress repealed NHPRDA, explaining CON laws "failed to control healthcare costs and [were] insensitive to community needs."[31] Ironically, Louisiana is the only state that did not adopt a CON program in response to NHPRDA. *Id*. FNR was enacted in 1990.[32]

Researchers have studied CON laws for five decades and found little evidence that they achieve their

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[27] *Id.* at 223–24.

[28] Pub. L. No. 93-641, 88 Stat. 2225 (codified at 42 U.S.C. §§ 300k–300n-6 (1982)), *amended by* Health Planning and Resources Development Amendments of 1979, Pub. L. No. 96-79, §§ 1-129, 93 Stat. 592 (codified at 42 U.S.C. §§ 300k–300t (1976 & Supp. 1981)).

[29] *See* Bogart, *supra* note 24, at 223.

[30] Pub. L. No. 99-660, § 701, 100 Stat. 3745, 3799 (1986).

[31] Jaimie Cavanaugh *et al.*, Institute for Justice, *Conning the Competition: A Nationwide Study of Certificate of Need Laws* 5 (Aug. 2020) (quotation omitted).

[32] *See* H.B. 930, 1990 Reg. Sess. (La. 1990); Act No. 300 § 1 (eff. July 6, 1990).

goals.[33] Just the opposite, the majority of the academic literature shows that CON laws produce either neutral or negative results. Studies find that CON laws reduce access to healthcare,[34] increase mortality rates for treatable conditions,[35] and increase healthcare costs.[36]

The Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) support CON repeal because these laws "can pose anticompetitive risks. . . . CON programs risk entrenching oligopolists and eroding consumer welfare."[37] The

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[33] *See* Christopher Denson & Matthew D. Mitchell, Georgia Public Policy Foundation, *Economic Report on Georgia's Certificate of Need Program* 8, 18–30 (2023) (of 94 CON studies, the majority show CON laws lead to neutral or negative outcomes).

[34] Thomas Stratmann & Christopher Koopman, *Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community*, Working Paper, Mercatus Center at George Mason Univ. (Feb. 18, 2016) (CON states have 30% fewer rural hospitals); James Bailey & Eleanor Lewin, *Certificate of Need and Inpatient Psychiatric Services*, 24 J. Mental Health Pol'y & Econ. 117 (2021) (CON states have 20% fewer psychiatric facilities);

[35] Roy Choudhury et al., *Certificate of Need Laws and Health Care Use during the COVID-19 Pandemic*, 15 J. Risk & Fin. Mgmt. 76 (2022) (CON states have higher mortality rates for chronic lower respiratory disease, diabetes, flu, pneumonia, sepsis, COVID-19, Alzheimer's, and natural death).

[36] James Bailey, *Can Health Spending Be Reined In through Supply Constraints? An Evaluation of Certificate-of-Need Laws*, Working Paper, Mercatus Center at George Mason Univ. (2016), https://tinyurl.com/pebm64ra (hospital charges are 5.5% lower in non-CON states five years after CON repeal).

[37] FTC & DOJ, *Improving Health Care: A Dose of Competition* ch. 8 5 (July 2004), https://tinyurl.com/485684n6.

FTC and DOJ's position has remained consistent throughout Republican and Democratic administrations. The U.S. Department for Health and Human Services (HHS), Department of Treasury (DOT), and Department of Labor (DOL) agree.[38]

Louisiana's FNR program offends Ms. Newell-Davis's right to economic liberty. History and tradition show that the Constitution protects against outright bans on the right to earn a living. This Court should grant the petition to correct the serious errors below. This correction is "arguably even more important in health care, where the stakes are life and death."[39]

[38] HHS, DOT, & DOL, *Reforming America's Healthcare System Through Choice and Competition* (2019), https://tinyurl.com/mtpn4vje.

[39] *Tiwari v. Friedlander*, No. 3:19-CV-884-JRW-CHL, 2020 WL 4745772, at *2 (W.D. Ky. Aug. 14, 2020) (denying government and hospital association's motion to dismiss home health agency CON case).

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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