United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 10, 2023
Lyle W. Cayce
Clerk

No. 22-30166

URSULA NEWELL-DAVIS; SIVAD HOME AND COMMUNITY SERVICES, L.L.C.,

Plaintiffs—Appellants,

versus

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,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-CV-49

ON PETITION FOR REHEARING EN BANC

Before KING, STEWART, and HAYNES, *Circuit Judges*.

PER CURIAM:*

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED and our prior panel opinion, *Newell-Davis v. Phillips*, 55 F.4th 477 (5th Cir. 2022), is WITHDRAWN. The following opinion is SUBSTITUTED therefor.

Ursula Newell-Davis ("Newell-Davis") and Sivad Home and Community, LLC (collectively "Sivad-Home") appeal the district court's grant of a motion to dismiss and motion for summary judgment for the State after Newell-Davis alleged numerous state and federal constitutional violations in connection with the State's Facility Need Review program ("FNR" or "FNR program"). As a healthcare program, the FNR program survives rational basis review, and the Supreme Court has foreclosed Sivad-Home's Privileges or Immunities Clause claim. Therefore, we AFFIRM.

I. FACTS & PROCEDURAL HISTORY

A. Respite Care Licensing & Pre-Litigation Events

Louisiana law forbids individuals from offering respite care services[1] without first obtaining a license from the Louisiana Department of Health ("LDH"). *See* LA. REV. STAT. § 40:2120.6. Before LDH conducts its official review of a potential respite care business, it requires each prospective business to apply to its FNR program. The FNR program permits LDH to first "determine if there is a need for an additional [respite care] provider in the geographic location for which the application is submitted." LA.

---

* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

[1] *See* LA. ADMIN. CODE tit. 48 § 5003 (defining "respite care" as "an intermittent service designed to provide temporary relief to unpaid, informal caregivers of the elderly and/or persons with disabilities").

ADMIN. CODE tit. 48 § 12523(C)(1). Businesses move past FNR if they can establish "the probability of serious, adverse consequences to recipients' ability to access health care if the provider is not allowed to be licensed." *Id.* at 12423(C)(2). A committee of four members reviews FNR applications every two weeks and works closely with local governments to stay apprised of pending needs in each respective locality.

Newell-Davis is an entrepreneur and licensed social worker in New Orleans. As the mother of a special needs child, she has an intimate understanding of the demand for respite care services. At the request of members of her community, she created Sivad Home and Community Services, LLC with the intention of using her education and expertise to offer additional respite care services in New Orleans. She sought to license her business in accordance with state law and submitted an FNR application to LDH. Without evaluating her qualifications, LDH denied Sivad-Home's application solely because it did not believe another respite care business was necessary in New Orleans. Dissatisfied with her denial, she sued Courtney Phillips—in her official capacity as Secretary of LDH—and various other state entities (collectively the "State") in federal district court.

B. District Court Proceedings

At the district court, Sivad-Home brought facial and as-applied constitutional challenges to the FNR program under both federal and state due process and equal protection clauses. She also brought a challenge under the Fourteenth Amendment's Privilege or Immunities Clause. Specifically, she contended that FNR: (1) treated her "differently than others similarly situated without serving any legitimate government interest"; (2) drew "arbitrary and irrational distinction[s] between respite care providers who may legally provide care and those who may not"; and (3) interfered with

citizens' "right to earn a living in a chosen profession free from unreasonable government interference."

In response to Sivad-Home's suit, LDH filed a Rule 12(b)(6) motion to dismiss. LDH argued that FNR is essentially an economic regulation and, thus, subject to rational basis scrutiny, which FNR survived. The district court granted LDH's motion on the Privileges or Immunities clause issue, holding that the clause only protects "uniquely federal rights," and that "the right to earn a living in a lawful occupation of one's choice" was not "a uniquely federal right." The district court, however, allowed Sivad-Home's equal protection, substantive due process, and state law claims to go forward.

After discovery, both parties filed cross-motions for summary judgment. First, the district court analyzed Sivad-Home's substantive due process and equal protection claims, concluding that both were "governed by the rational basis standard." The district court reasoned "that FNR [was] rationally related to the legitimate interest of enhancing consumer welfare" because it allowed LDH "to prioritize [] post-licensure compliance surveys that ensure client health, safety and welfare, over the resource intensive and costly initial licensing surveys." Therefore, it held that Sivad-Home did not meet her "heavy burden to negative every conceivable basis which might support FNR."

Second, the district court addressed Sivad-Home's state law claims, noting that "Louisiana's due process guarantee does not vary from the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Accordingly, it held that her "state law due process claim failed for the same reason" as her federal claim. It also ruled against her state equal protection clause claim, holding that she failed to show "that FNR does not suitably further an appropriate state interest." Ultimately, it granted

LDH's motion for summary judgment on all three remaining issues. Sivad-Home timely appealed.

On appeal, Sivad-Home asks this court to reconsider her: (1) due process and equal protection claims under the Fourteenth Amendment of the United States Constitution; (2) due process and equal protection claims under Louisiana law; and (3) privileges or immunities claim under the Fourteenth Amendment of the United States Constitution.

II. Standard of Review

A. Due Process and Equal Protection Claims

Because these claims are before us "on cross motions for summary judgment, we review the district court's rulings de novo and construe all evidence and inferences in favor of the non-moving parties." *Evanston Ins. Co. v. Mid-Continent Cas. Co.*, 909 F.3d 143, 146 (5th Cir. 2018). We also "examine each party's motion independently." *Balfour Beatty Constr., LLC v. Liberty Mut. Fire Ins. Co.*, 968 F.3d 504, 509 (5th Cir. 2020) (internal quotations omitted). Summary judgment is appropriate only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *United States v. Nature's Way Marine, LLC*, 904 F.3d 416, 419 (5th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)). We may affirm the district court's grant of summary judgment "for any reason raised to the district court and supported by the record, and we are not bound by the grounds articulated by the district court." *Hills v. Entergy Operations, Inc.*, 866 F.3d 610, 614 (5th Cir. 2017).

B. Privileges or Immunities Clause Claim

We likewise review "a district court's decision on a Rule 12(b)(6) motion de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Ferguson v. Bank of New York*

Mellon Corp., 802 F.3d 777, 780 (5th Cir. 2015). We confine our analysis to "the facts stated in the complaint and the documents either attached to or incorporated in the complaint." *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996). "To avoid dismissal, a plaintiff must plead sufficient 'facts to state a claim to relief that is plausible on its face.'" *Ferguson*, 802 F.3d at 780 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

III. Discussion

A. Federal & State Equal Protection Clause Claims

1. Federal Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall deny . . . to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. It "essentially requires that all persons similarly situated be treated alike." *Mahone v. Addicks Util. Dist. of Harris Cnty.*, 836 F.2d 921, 932 (5th Cir. 1988). To succeed on an equal protection claim, a plaintiff must first demonstrate that "two or more classifications of similarly situated persons were treated differently" under the disputed statute. *Duarte v. City of Lewisville*, 858 F.3d 348, 353 (5th Cir. 2017). We then determine what level of scrutiny applies, which depends on whether a protected class or fundamental right is implicated. *Id.*

Where the alleged violation is not predicated on a protected class or fundamental right, we apply rational basis review. *See Glass v. Paxton*, 900 F.3d 233, 244 (5th Cir. 2018). "Under that standard, a legislative classification must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 244–45; *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993) (noting that the Supreme Court does not require "a legislature to articulate its reasons for enacting a statute [because] it is entirely irrelevant for

constitutional purposes whether the conceived reasons for the challenged distinction actually motivated the legislature"). Under that standard, plaintiffs bear the heavy burden of negating "every conceivable basis which might support" the legislative classification. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

"Rational-basis review is guided by the principle that we don't have a license to judge the wisdom, fairness, or logic of legislative choices." *Hines v. Quillivan*, 982 F.3d 266, 273 (5th Cir. 2020). So, when "economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). While "rational-basis review gives broad discretion to legislatures," we have "made clear that 'rational' still must be actually rational, not a matter of fiction." *Hines v. Quillivan*, 982 F.3d 266, 273 (5th Cir. 2020) (citing *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013)).

Turning to the merits, we now ask: (1) whether Sivad-Home alleges that the FNR program treats similarly situated businesses differently, and (2) what level of scrutiny controls our analysis. Regarding the first prong, the State concedes that Sivad-Home receives different treatment compared to similarly situated respite care services. With the first prong satisfied, we move on to identifying the correct level of scrutiny with which to analyze her constitutional allegations. Because the parties agree that rational basis review applies, we proceed under that standard. While the State is free to rely on a "hypothetical rationale, even post hoc," the ends–means connection "cannot be fantasy, and . . . the [State]'s chosen means must rationally relate to the state interests it articulates." *St. Joseph Abbey*, 712 F.3d at 223.

Here, the record supports the State's assertions that FNR permits enhancement of consumer healthcare by "allowing [LDH] to prioritize post-licensure compliance surveys that ensure client health, safety and welfare, over the resource intensive and costly initial licensing surveys." By limiting the number of providers in the respite care business, the State can focus its resources on a manageable number of providers. That focus aids the State in ensuring that consumers receive the best possible healthcare in their communities. In other words, the State argues that resource constraints make effective oversight impossible in situations where an inundation of new applications could prevent LDH from effectively supervising existing healthcare providers. That reasoning states a rational connection between a legitimate interest (improving healthcare) and a means of achieving that interest (limiting the number of new applications LDH must fully evaluate).[2]

Sivad-Home aptly points out that the Supreme Court has distinguished between the permissible enhancing of consumer welfare and impermissible "pure economic protectionism." *Hines*, 982 F.3d at 274 (citing *St. Joseph Abbey*, 712 F.3d at 222–23). Newell-Davis contends that her expert witness, Dr. Matthew Mitchell, demonstrated that the State was not unaware that the FNR program has aspects of economic protectionism. However, we have recognized that a law is not necessarily irrational merely because it is "motivated *in part* by economic protectionism." *Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011) (emphasis added). Sivad-Home has not established that economic protectionism is the only motivation behind the FNR program.

[2] Sivad-Home's arguments attack the State's rationale for limiting new licensees. Although we conclude that the State's decision to implement *a* limit is rational, the parties have not addressed the separate question whether the FNR program is itself a rational way to put that limit into practice. We thus express no view on that issue.

Next, Sivad-Home argues that the State's own "administrative ease" is not a legitimate purpose. But here, that is not the State's position. The State contends that without its ability to exercise its discretion, it will not be able to ensure the health, safety, and welfare of respite-care recipients *at all*. Furthermore, this is not an instance of bare "economic protection of a particular industry" as was the case in *St. Joseph Abbey*, 712 F.3d 222. Here, however, the evidence supporting FNR's consumer-healthcare benefits forecloses any argument that the program's true motive lies solely in some other goal—whether economic protectionism or bureaucratic ease.

Finally, Sivad-Home argues that the State's proffered rationale would allow it to act in *any* arena on the mere assumption that decreasing the number of regulated parties increases consumer welfare. We disagree. "Although the legitimate purpose can be hypothesized, the rational relationship must be real"—not simply assumed. *Mahone v. Addicks Util. Dist. of Harris Cnty.*, 836 F.2d 921, 937 (5th Cir. 1988). Our decision today does not indulge assumptions. Instead, we recognize only that, where a government wishes to create consumer benefits by limiting new entrants to the already highly-regulated market for healthcare services, it may use any rational tool to implement that limit—so long as there is a "real" link between the tool and the benefits. *Id.*

In any case where we undertake rational basis review, we must always conduct a fact-specific examination of the record to ensure that the ends–means connection is not "fantasy." *St. Joseph Abbey*, 712 F.3d at 223. Here, specific facts lead us to the determinations that the government's purpose is legitimate and that there is a rational relationship between FNR and its purported healthcare benefits. In the highly-regulated healthcare sector, government resource constraints can be detrimental—even deadly—to consumers. In healthcare, limiting the number of regulated providers can increase the quality of services for consumers in a way that may not

necessarily translate to other industries. Thus, on the facts before us, there is a real link between the means (limiting the number of providers) and the consumer benefits (access only to those providers for whom LDH has sufficient resources to ensure regulatory compliance).

2. State Equal Protection Claim

The Louisiana Supreme Court has interpreted Article I, Section 3 of the Louisiana Constitution as follows:

> Article I, Section 3 commands [Louisiana courts] to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.

Sibley v. Bd. of Sup'rs of La. State Univ., 477 So.2d 1094, 1107 (La. 1985); LA CONST. art. 1, § 3. In comparison to the Fourteenth Amendment's Equal Protection Clause, the Louisiana Supreme Court has recognized that the state's version moved Louisiana "from a position of having no equal protection clause to that of having three provisions going beyond the decisional law construing the Fourteenth Amendment." *Id.* at 1108.

Sivad-Home contends that the district court erred in applying the deferential "suitably further" standard in this case. She argues that heightened scrutiny should control our analysis because FNR impermissibly

burdens disabled persons. She relies on *Clark v. Manuel* to support her argument. 463 So.2d 1276 (La. 1985). In that case, the Louisiana Supreme Court held that a statute requiring individuals to seek licensing to open community homes for the mentally-disabled violated the Louisiana Constitution's equal protection clause. The court relied on Fifth Circuit precedent to reason that a middle-tier level of scrutiny applied to statutes "which affect[ed] the mentally [disabled]." *Id.* at 1284 (citing *Cleburne Living Ctr. v. City of Cleburne*, 726 F.2d 191 (5th Cir. 1984)). It ultimately held that the challenged ordinance was unconstitutional because it made it more difficult for a quasi-protected class to enjoy "an important right." *Id.* at 1285. Sivad-Home asserts that *Clark* is analogous to her situation. Specifically, she contends that FNR harms the disabled community by arbitrarily limiting additional respite care businesses when there is a need. She also argues that the district court erred in concluding that she lacked standing to represent the disabled persons in her community, and that that decision contributed to the district court incorrectly determining the tier of scrutiny that applied.[3]

The standard under Louisiana law looks not to a law's impact, but to what the "law classifies." *See Sibley*, 477 So.2d at 1107 (internal quotation omitted). Applied here, the FNR program is only aimed at controlling the number of respite service care providers in Louisiana. FNR does not explicitly mention any directives to the disabled communities to control which providers they might select. Instead, it is singularly focused on ensuring the State's control over the number of respite care providers at any given moment. Therefore, by its terms, the law only applies to Louisiana's respite care providers. While Sivad-Home may be correct in her assertion that FNR indirectly burdens the disabled community, she offers no evidence

[3] In light of the ultimate holding and rationale in reaching our final disposition, we pretermit the issue of standing and continue to the merits of Sivad-Home's case.

that the program does so directly. Accordingly, we must apply the "suitably further" standard to her Louisiana equal protection argument—the result of which is the same as our previous Equal Protection Clause analysis. *See supra*, Part III.A.1.

Sivad-Home also mischaracterizes what constitutes a quasi-protected class in her reliance on *Clark*. That case premised its decision that disabled persons were entitled to heightened scrutiny on a Fifth Circuit case that was later overruled by the Supreme Court. *See City of Cleburne. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) ("*Cleburne II*"). In *Cleburne II*, the Supreme Court expressly rejected this court's determination that statutes burdening disabled persons demand heightened scrutiny. *Id.* at 442 (holding that "we conclude for several reasons that [this court] erred in holding [the] mental[ly] [disabled] as a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation"). Because disabled persons are not a quasi-suspect class, and we need not reach the issue of the elderly because the record does not suggest that Sivad-Home is attempting to form a respite organization for that group, her state equal protection claims fail. *See Cleburne II*, 473 U.S. 432.

B. Federal & State Due Process Clause Claims

The Due Process Clause of the Fourteenth Amendment provides that "no State shall . . . deprive any person of life, liberty, or property, without due process of the law." U.S. CONST. amend. XIV. Article I, § 2 of the Louisiana Constitution similarly provides that "[n]o person shall be deprived of life, liberty, or property, except by due process of law." LA CONST. art. 1, § 2. Due process claims that do not involve a fundamental right are subject to rational basis review. *See Reyes v. N. Tex. Tollway Auth., (NTTA)*, 861 F.3d 558, 561 (5th Cir. 2017) (holding that rational basis review is "the default for substantive due process claims that do not implicate a

fundamental right"); *see also supra*, Part III.A.1 (discussing the rational basis review standard). "Unlike Louisiana's provision on equal protection which is distinct from that provided in the Fourteenth Amendment, [the] due process guarantee in LA. CONST. Art. I, § 2 does not vary from the Due Process Clause of the Fourteenth Amendment." *Progressive Sec. Ins. Co. v. Foster*, 711 So.2d 675, 688 (La. 1998).

1. Federal Due Process Claim

Both parties concede that rational basis review controls our analysis. We have already determined that the FNR program withstands rational basis review. *See supra*, Part III.A.1. Therefore, we hold in favor of the State on this issue.

2. State Due Process Claim

For the first time on appeal, Sivad-Home argues that Louisiana law demands a stricter due process analysis because Louisiana has previously recognized that the right to earn a living in a profession of one's choice is fundamental. However, we have repeatedly held that parties "forfeit[] an argument by failing to raise it in the first instance in the district court—thus raising it for the first time on appeal." *Thomas v. Ameritas Life Ins. Corp.*, 34 F.4th 395, 402 (5th Cir. 2022).[4] Accordingly, we decline to reach this argument.

C. Privileges or Immunities Clause Claim

As Sivad-Home concedes, the Privileges or Immunities Clause protects a finite list of "uniquely federal rights," none of which she claims

[4] *See Thomas*, 34 F.4th at 492 (explaining that "to preserve an argument for appeal, the argument (or issue) not only must have been presented in the district court, [but] a litigant must also press and not merely intimate the argument during proceedings before the district court.") (internal quotations and citation omitted).

have been violated in this case. *Deubert*, 820 F.2d at 760. Accordingly, we decline to address her argument on this issue.

IV. Conclusion

For the foregoing reasons we AFFIRM the judgment of the district court.