No. S23X0018

# In the Supreme Court of Georgia

Mary Nicholson Jackson and
Reaching Our Sisters Everywhere, Inc.,

*Cross-Appellants*,

v.

Brad Raffensperger,

*Cross-Appellee*.

On Appeal from the Fulton County Superior Court
Case No. 2018CV306952

## AMICUS BRIEF OF HEALTHY CHILDREN PROJECT, INC. IN SUPPORT OF CROSS-APPELLANTS

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## INTRODUCTION

When the Georgia legislature adopted the Georgia Lactation Consultant Practice Act (the "Act") O.C.G.A. §§ 42-22A-1 to 13, it acknowledged "that the application of specific knowledge and skills related to breastfeeding mothers and babies is important to the health of mothers and babies and acknowledge[d] further that the rendering of sound lactation care and services in hospitals, physician practices, private homes, and other settings requires trained and competent professionals." O.C.G.A. § 43-22A-2. The principal sponsor of the Act has stated that its purpose was intended to "expand access to breastfeeding support in Georgia, not reduce it". R-820. Despite these statements, the legislature adopted a license scheme that, if implemented, will reduce access to care by reducing the number of trained and competent lactation care professionals available to mothers and babies in Georgia. Specifically, the Act will, without justification, prevent qualified lactation care providers from practicing unless they possess certification as an International Board Certified Lactation Consultant ("IBCLC"). While correctly concluding on the Plaintiff's equal protection claim, the Superior Court incorrectly concluded that "the Act does not violate substantive due process rights under the Georgia Constitution". R-1912. Accordingly, that decision of the Superior Court should be reversed.

Healthy Children Project, Inc. ("Healthy Children") submits this brief to support the request of the Cross-Appellants that this Court reverse the decision of the Superior Court. A copy of the Supreme Court's Order granting an extension of time for the filing of this brief is attached as Exhibit A.

## STATEMENT OF INTEREST

Healthy Children is a non-profit, tax-exempt organization established in 1993 to improve child health outcomes in the United States and around the world.[1] Healthy Children promotes healthy breastfeeding through education, collaboration, and research.[2] Through its Center for Breastfeeding, Healthy Children operates the Lactation Counselor Training Course, "a college-level course designed to provide up-to-date, research-based information and clinical competency validation for the provision of professional lactation care."[3] Healthy Children is the largest provider of lactation management for health-care providers and is accredited by the National College Credit Recommendation Service. R-702. Healthy Children trains over

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[1] Healthy Children's international collaborators include but are not limited to the Egyptian Ministry of Health, the Karolinska Institute and Hospital in Sweden, and Latvian Ministry of Health. Healthy Children, *Global Impact*, available at: https://centerforbreastfeeding.org/about/global-impact/.

[2] For example, Healthy Children faculty members, Karin Cadwell and Cynthia Turner-Maffei, have published *Case Studies in Breastfeeding: Problem-Solving Skills and Strategies* (2019).

[3] Healthy Children, *Lactation Counselor Training Course*, available at: https://centerforbreastfeeding.org/lactation-counselor-training-course/lactation-counselor-training-course/.

4,000 participants annually throughout the United States and in U. S. military facilities around the world. R-702. Heathy Children has trained hundreds of CLCs in Georgia through partnerships with hospitals, the State of Georgia, and the federal Women, Infant, and Children ("WIC") program. R-702.

In addition, the Academy of Lactation Policy and Practice ("ALPP"), a division of Healthy Children, operates the Certified Lactation Counselor® ("CLC"®) certification program. The CLC certification program "identifies a professional in lactation counseling who has demonstrated the necessary skills, knowledge, and attitudes to provide clinical breastfeeding counseling and management support to families who are thinking about breastfeeding or who have questions or problems during the course of breastfeeding/lactation."[4]

More than *seven hundred* CLCs certified by ALPP provide vital lactation care and services in Georgia, including rural and underserved counties. R-719. Healthy Children is quite familiar with the skills necessary to promote healthy breastfeeding and the respective qualifications of CLCs and IBCLCs. A majority of Healthy Children's faculty members possess certification as IBCLCs as well as other qualifications.[5] Moreover, Karin Cadwell, the Executive Director of Healthy

4 ALPP, *Certifications*, available at: https://www.alpp.org/certifications/certifications-clc

5 Healthy Children, *Faculty*, available at: https://centerforbreastfeeding.org/about/faculty/.

Children and an expert witness in this case, co-founded the International Lactation Consultant Association which created the IBCLC certification. R-701, 702.[6]

Healthy Children believes that expectant, nursing mothers, and babies are best served when lactation care options are expanded, rather than restricted. Recognizing that the licensure of lactation care providers has the potential to reduce access to care, Healthy Children has offered comments on proposed licensure and reimbursement legislation in several states, including Georgia, and before the Federal Trade Commission.

Because of its experience and expertise, Healthy Children believes its submission will assist the Court in its deliberations in this case. Although this brief is principally focused on the effect of the Act on CLCs, Healthy Children believes that breastfeeding families need access to all types of lactation care providers.

## ARGUMENT

As this Court has recognized, "the Georgia Constitution due process clause entitles Georgians to pursue a lawful occupation of their choosing free from unreasonable government interference". *Jackson v. Raffensperger*, 308 Ga. 736, 740 (2020). Even in the field of health care the right to practice one's profession is

[6] The Secretary claims that Ms. Cadwell agrees that the services provided by IBCLCs "require a 'deeper' understanding of the scientific principles' behind lactation care". Brief of Cross-Appellee at 4. In fact, the quoted statement was not actually made by Ms. Cadwell and is entirely inconsistent with her testimony.

recognized as a property right, and the state is required "to afford any person due process before depriving him of his property as well as his life or liberty; since a license to engage in a profession is a property right … ." *Wills v. Composite Board of Medical Examiners*, 259 Ga. 549, 551 (Ga., 1989). Regulations adopted by the state may "not be unreasonable, arbitrary, or capricious, and that the means adopted must have some real and substantial relation to the object to be attained." *Rockdale City v. Mitchell's Used Parts, Inc.*, 243 Ga. 465, 465 (1979). Although the purpose of the Act is to increase access to lactation care and services, enforcement of the Act will have the opposite effect for no legitimate reason. Enforcement of the Act will, without justification, reduce the number of qualified providers of lactation care and services available to Georgia's families. This disconnect between the Act's purpose and effect establishes the arbitrary, unreasonable, and capricious nature of the Act's licensure requirements. Accordingly, the Act violates the due process rights of the Plaintiffs and the decision of the Superior Court upholding this unreasonable government interference should be reversed.

## I. Contrary to the Act's purported purpose, the Act will reduce rather than increase access to lactation care and services for mothers and babies in Georgia.

Although the purported purpose of the Act is to increase access to lactation care and services, the Act will have the opposite effect. It will reduce access to care

by arbitrarily reducing the number of qualified providers of lactation care and services available to Georgia mothers and babies.

Specifically, the Act will prevent qualified CLCs from providing lactation care and services in Georgia. The Attorney General reviewed the Act and concluded that the definition of "lactation care and services" in the Act encompassed activities included in the CLC scope of practice and further concluded that "the Act prohibits any person, including a CLC, who is not a licensed lactation consultant and who does not fall within one of the Act's exemptions, from practicing the types of acts and services that the Act defines as 'lactation care and services." R-4466.

There is no legitimate justification for restricting the ability of CLCs to practice. CLCs are trained to provide safe and competent lactation care. R-700. There is no empirical evidence that interventions by IBCLCs produce higher quality outcomes for mothers and babies than do interventions by CLCs.[7] R-4483. To the contrary, a review of the effectiveness of lactation consultants and counselors on breastfeeding outcomes found:

[7] The Secretary attempts to argue that IBCLCs possess superior qualifications to other providers of lactation care and services by claiming that "[u]nlike peers and counselors lactation consultants actually 'treat [] medical situations related to breastfeeding". Brief of Cross-Appellee at 4 (citation omitted). This statement demonstrates the failure of the Secretary to understand the profession of lactation care. No lactation care providers are authorized to provide medical services and to the extent that IBCLCs are providing medical services, they are exceeding the scope of their practice and their training.

> Overall, the results were consistent and provide evidence for the use of lactation consultants and lactation counselors [IBCLCs and CLCs] in health systems and local communities. Breastfeeding support interventions using these professionals increased the number of women initiating breastfeeding, improved any breastfeeding rates, and improved exclusive breastfeeding rates.[8]

Enforcement of the Act will create rather than reduce harm. The record does not show any harm resulting from the provision of lactation care services provided by unqualified providers. Indeed, **t**he Secretary has admitted that he was unaware of any evidence that any mother or baby was harmed by a person providing lactation care and services before or after passage of the Act. R-617. The potential harm restricting the practice of lactation care and services to IBCLCs has been recognized by the Georgia Occupational Review Council. The Council reviews bills proposing licensure of a profession or business. R-848. In 2013, the Council reviewed HB 363, an earlier proposal to license IBCLCs that was substantially similar to the Act. The Council recommended against the licensure scheme because licensing IBCLCs would "not improve access to care for the majority of breastfeeding mothers" [R-863] and concluded that "[i]f this legislation prohibited CLCs from providing services, the citizens may be at a greater risk of harm because a majority of lactation consultant providers would no longer be able to provide care." R-859.

[8] Patel and Patel, *The Effectiveness of Lactation Consultants and Lactation Counselors on Breastfeeding Outcomes*, Journal of Human Lactation, R-765-766 (emphasis supplied).

The case of the Plaintiff, Mary Jackson, illustrates the arbitrary nature of the Act. Ms. Jackson, a CLC, has over 31 years of experience as a lactation care professional and has trained doctors and nurses in breastfeeding topics. R-648. Employed by Grady Memorial Hospital, Jackson provides services that fall within the Act's definition of lactation care and services, particularly among African-American women. R-650-652. The Secretary does not dispute that Ms. Jackson provides these services. R-4660. However, because Ms. Jackson does not possess certification as an IBCLC, Grady Hospital has informed Ms. Jackson that, if the law goes into effect, she will no longer be able to provide lactation care and services. R-652. It is apparent that Grady Hospital considers Ms. Jackson qualified to provide lactation care and services within the meaning of the Act. Yet, because she does not possess the IBCLC certification, the Act will deprive Ms. Jackson of her ability to practice her chosen profession. Depriving a highly qualified individual who has a nationally recognized credential, such as Ms. Jackson, of the ability to practice and depriving Georgia families of the benefit of her services can hardly said to be consistent with the Act's goal of improving access to lactation care and services. *See* R-820. Ms. Jackson is not an outlier. Healthy Children has been training CLCs in Georgia for years and hundreds of these experienced CLCs are similarly situated to IBCLCs [R-702] who will likewise be arbitrarily deprived of their right to practice their chosen profession.

The most significant barrier that Georgia families face in achieving their breastfeeding goals is the lack of qualified providers of lactation care and services. Mothers without access to a lactation care provider are less likely to achieve their breastfeeding goals. R-704. As of 2021, there were only 478 IBCLCs practicing in Georgia. R-720. Of these, only 162 have obtained licensure. R-720. In contrast, there were 735 CLCs. R-720. It is beyond serious question that mothers and babies in Georgia need more, not fewer, qualified providers of lactation care and services.[9] By reducing the number of qualified providers of lactation care and services, which includes other providers such as ROSE Community Transformers, the Act will acerbate the situation it purports to remedy.

## II. The pernicious effects of the Act will have a disproportionate impact on rural communities and communities of color.

The adverse impact that enforcement of the Act will have on rural communities of Georgia is stark. The record includes data regarding the geographic distribution of CLCs and IBCLCs. R-673-690. An analysis of that data reveals that there are counties in Georgia where there are no IBCLCs and just CLCs.

[9] The *2016 Breastfeeding Report Card* reported that there were only 5.97 CLCs per 1,000 live births in Georgia while there were only 2.77 IBCLCs per 1,000 live births. *2016 Breastfeeding Report Card* p. 5. https://www.cdc.gov/breastfeeding/pdf/2016breastfeedingreportcard.pdf.

Eliminating the ability of CLCs to practice in these counties will harm Georgia families by dramatically increasing the difficulty in obtaining access to care.[10]

Enforcement of the Act will have a disproportionate impact on communities of color. African-American women disproportionately experience barriers to healthy breastfeeding and have lower breastfeeding rates than other groups of women.[11] CDC data from 2011 to 2015 suggests that while 74.8% of White, non-Hispanic women in Georgia initiated breastfeeding, only 61.1% of Black, non-Hispanic women initiated breastfeeding. R-4484. One of the barriers to breastfeeding, experienced by African-American women, is a shortage of lactation care providers in communities of color.[12]

ROSE was created to "increase awareness of breastfeeding and to make community-based breastfeeding education and support widely available to African-American communities. R-651. ROSE attributes its success to the fact that its employees and volunteers look like and relate to the families they serve. R-944.

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[10] The data does not include information regarding other non-IBCLC providers who may be available to provide lactation care and services in these counties.

[11] Centers for Disease Control and Prevention, *Rates of Any and Exclusive Breastfeeding among Children Born in 2016, National Immunization Survey* (2018). Available at: https://www.cdc.gov/breastfeeding/data/nis_data/rates-any-exclusive-bf-socio-dem-2016.htm.

[12] Anstey, E.H., Shoemaker, M.L., Barrera, C.M., Verma, A.B., and Holman, D.M., *Breastfeeding and Breast Cancer Risk Reduction: Implications for Black Mothers*, American Journal of Preventive Medicine, Volume 53, Issue 3, Supplement 1, Pages S40-S46 (September, 2017), available at: https://www.ajpmonline.org/article/S0749-3797(17)30317-3/fulltext.

This is consistent with research shows that "… African American mothers want community-based breastfeeding support led by other African American mothers who can relate to their unique cultural and social experiences…"[13]

CLCs and non-IBCLC lactation care providers play an important role in ROSE fulfilling its mission. R-497, 4483. CLCs are more diverse than IBCLCs. While twenty-five percent of CLCs are Black, Afro-Caribbean, or African-American while United States Lactation Consultant Association shows that over ninety percent of surveyed IBCLCs were white. R-719-720. CLCs are more likely to serve low-income and minority communities rather than IBCLCs. R-948. R-833 (U.S. Lactation Consultant Association data noting "tremendous racial disparities in the lactation profession" and "the percentage of non-white providers is higher in the non-IBCLC subset").

Because of the lack of diversity among IBCLCs, it is unlikely that IBCLCs will be able replace CLCs and other non-IBCLC lactation care providers. Enforcement of the Act will prevent ROSE from fulfilling its mission to the detriment of communities of color.

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[13] Johnson, A.M., Kirk, R., Rooks, A.J., and Muzik, M., *Enhancing Breastfeeding Through Healthcare Support: Results from a Focus Group Study of African-American Mothers*, Matern Child Health Journal, Volume 20, Supplement 1, 92 (2016).

## III. No other state has adopted a licensure scheme that restricts the ability of qualified lactation providers to provide services.

The fact that no other state has chosen to prohibit the ability of qualified lactation care practitioners to provide lactation care and services is evidence of the irrationality of the Act. Only three states have adopted legislation providing for licensure of IBCLCs.

Rhode Island was the first state to adopt licensure legislation. The Lactation Consultant Practice Act of 2014 directed the Rhode Island Department of Health to promulgate regulations for the licensing of lactation consultants with "due consideration to criteria established by the International Board of Lactation Consultant Examiners (IBLCE), or other national standards established by professional societies with expertise in the training and certification of lactation consultants."[14] In turn, the Rhode Island Department of Health adopted Rules and Regulations for Licensing of Lactation Consultants.[15] The Regulations require a license to practice as a lactation consultant,[16] restrict licensure to IBCLCs,[17] and require lactation consultants to "comply with the Scope of Practice for International

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14 Rhode Island General Laws, Chapter 23-13.6-3(2).

15 Rhode Island Code of Regulations, 216-RICR-40-05-27.

16 *Id*. at § 27.4.1A ("No person can practice as a lactation consultant or represent himself or herself as being able to practice as a lactation consultant in Rhode Island unless the person is licensed in accordance with the provisions of the Act and these Regulations").

17 *Id*. at § 27.4.2A2-3.

Board Certified Lactation Consultant Certificants."[18] Nothing in the law or implementing regulations restricts the ability of CLCs to practice.

While the exemption of CLCs from the licensure regime in Rhode Island was implicit**,** in 2017, the Oregon legislature adopted a licensure statute which explicitly exempted CLCs from its licensure requirement.[19] The Oregon statute requires a license for the practice of lactation consultation and for the use of the title lactation consultant.[20] The statute includes a number of exemptions for the requirement for licensure, including an exemption that permits "a person who is a certified lactation counselor" to provide lactation consultation services as defined by the statute without the requirement of a license.[21]

In the same year, the New Mexico legislature took an innovative approach to licensure by adopting the New Mexico Lactation Care Provider Act[22] (the "New Mexico Act"), which is a voluntary licensure scheme that included licensure for both IBCLCs and CLCs. The New Mexico Act includes a definition of lactation care and services that is nearly identical to the definition of lactation care and

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18 *Id*. at § 27.8.A.

19 Oregon Revised Statutes ("ORS"), Chapter 676.665-689 and 676.850.

20 ORS 676.681(1).

21 ORS 676.681(4)(ORS 676.665 to 676.689 do not require a person who is a certified lactation counselor to obtain a license issued under ORS 676.669 in order to perform any of the services described in ORS 676.665(2)").

22 New Mexico Statutes, Chapter 61, §§ 36-1 to 6.

services in the Georgia Act.[23] Although the New Mexico Legislature adopted essentially the same definition for "lactation care and services" as the Georgia legislature, the New Mexico legislature adopted an inclusive, rather than restrictive, approach to licensure. Rather than license "lactation consultants", the New Mexico Act provides for licensure of a "licensed lactation care provider"[24] and conditions

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[23] The Georgia Act defines lactation care and services as "the clinical application of scientific principles and a multidisciplinary body of evidence for evaluation, problem identification, treatment, education, and consultation to childbearing families regarding lactation care and services. Lactation care and services shall include, but not be limited to:

A. Lactation assessment through the systematic collection of subjective and objective data;
B. Analysis of data and creation of a lactation care plan;
C. Implementation of a lactation care plan with demonstration and instruction to parents and communication to the primary health care provider;
D. Evaluation of outcomes;
E. Provision of lactation education to parents and health care providers; and
F. The recommendation and use of assistive devices. O.C.G.A. § 43-22A-3(5).

The New Mexico Act similarly defines lactation care and services as: "the clinical application of scientific principles and a multidisciplinary body of evidence for the evaluation, problem identification, treatment, education and consultation for the provision of lactation care and services to families, including:

(1) clinical lactation assessment through the systematic collection of subjective and objective data;
(2) analysis of data and creation of a plan of care;
(3) implementation of a lactation care plan with demonstration and instruction to parents and communication to primary health care providers;
(4) evaluation of outcomes;
(5) provision of lactation education to parents and health care providers; and
(6) recommendation and use of assistive devices". New Mexico Statutes, Chapter 61, § 61-36-2D.

[24] *Id*. at § 61-36-4A ("An individual shall not use the title "licensed lactation care provider" unless that individual is a licensee.")

licensure on possession of an "approved certification."[25] The definition of an approved certification is substantially similar to the definition of "approved lactation care providers" in the *Model Policy* that requires accreditation by a "nationally or internationally recognized accrediting agency that is approved by the board [board of nursing]."[26] The regulations implementing the New Mexico Act recognize CLC and IBCLC certifications as approved certifications.[27]

In addition to providing a mechanism for licensing CLCs, IBCLCs, and any other group of lactation care providers who develop an approved accreditation program, the New Mexico licensure program is voluntary. A license is not required to provide lactation care and services.[28]

Even the United States Lactation Consultant Association, the leading proponent for licensure of IBCLCs, has stated "IBCLC licensure bills should be designed so as not to restrain the practice of other types of lactation care providers working within the scope of their certification or license".[29]

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25 *Id*. at § 61-36-4B (3).

26 *Id*. at § 61-36-2B. In addition, the definition requires continuing education.

27 New Mexico Administrative Code, §16.12.11.9 A (1) and (2).

28 New Mexico Statutes, Chapter 61, §61-36-4(C)("Nothing in the Lactation Care Provider Act shall be construed to affect or prevent the practice of lactation care and services by licensed care providers or other persons; provided that a person who is not a licensee shall not hold that person out or represent that person's self to be a licensed lactation care provider.").

29 United States Lactation Consultant Association, *Licensure*, available at: https://uslca.org/wp-content/uploads/2016/12/MODEL-LEGISLATION-FOR-THE-LICENSURE-OF-LACTATION-CONSULTANTS-12-1-16.pdf.

In sum, the restrictive approach to licensure embodied in the Act is an outlier which is likely to harm rather than benefit the citizens of Georgia. The Act will license an activity that women have performed for thousands of years in order to advance the interests a small group of providers. While it is not likely to promote healthy breastfeeding, the Act will insulate IBCLCs from competition from other providers of lactation care and services by prohibiting those providers from practicing. "Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate government purpose." *Craigmiles v. Giles,* 312 F.3rd 220, 224 (6th Cir. 2002) (citations omitted).

## CONCLUSION

For these reasons, this Court should reverse the Superior Court's decision.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of October, filed a PDF copy of this **AMICUS BRIEF OF HEALTHY CHILDREN IN SUPPORT OF CROSS-APPELLANTS** using the Court's SCED E-Filing system, making it available to the Clerk and Court. I FURTHER CERTIFY that I have this day electronically served a copy of this **Amicus Brief** upon the following counsel of record:

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# EXHIBIT A

SUPREME COURT OF GEORGIA
Case No. S23X0018

September 15, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MARY NICHOLSON JACKSON et al. v. BRAD RAFFENSPERGER.

The request of Healthy Children Project, Inc. for an extension of time to file a brief amicus curiae in the above case is granted. You are given an extension until October 27, 2022.

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

**SUPREME COURT OF THE STATE OF GEORGIA**
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk