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

BRIEF OF CROSS-APPELLANTS

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INTRODUCTION

It is settled that "the Georgia Constitution's 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). Now, the question is: What is "unreasonable government interference" with the right to pursue an occupation? This case is the ideal vehicle to decide.

Lactation consulting is a common, safe way to earn a living. Georgia is the *only* state that prohibits hundreds of qualified lactation care providers from working in the field for pay. The superior court ruled that the Georgia Lactation Consultant Practice Act ("the Act") violates the state Constitution's Equal Protection Clause, but not its Due Process Clause. This split decision perpetuates confusion about what legal standard applies in cases involving the right to pursue an occupation. This Court can and should end that confusion now.[1]

The superior court's ruling suggests that review under Georgia's Due Process Clause is no review at all. This is wrong. Georgia courts demand real evidence of a law's connection to its purpose. The Court should reverse the superior court's due process ruling and affirm the equal protection ruling. Hundreds of Georgians support themselves as lactation care providers. The stakes

[1] Plaintiffs cross-appealed the superior court's due process ruling, while Defendant appealed the superior court's equal protection ruling (No. S23A0017).

are too high to apply the wrong legal standard in this case and in future cases involving the right to pursue an occupation.

JURISDICTIONAL STATEMENT AND ENUMERATION OF ERRORS

This is the second time this case has been before this Court. On May 29, 2019, the Fulton County Superior Court dismissed Plaintiffs' claims on the mistaken premise that there is no right to pursue a lawful occupation in Georgia. R-340–42. On May 18, 2020, this Court unanimously reversed and remanded for further proceedings. *Jackson*, 308 Ga. at 742; R-346–61. On March 3, 2022, the superior court granted Plaintiffs' motion for summary judgment "because [the Act] violates the equal protection guarantees of the Georgia Constitution." R-4920. The superior court rightly declared the Act unconstitutional on its face and as applied to Plaintiffs Mary Jackson and Reaching Our Sisters Everywhere, Inc. (ROSE), and permanently enjoined Defendant Secretary of State Brad Raffensperger ("the Secretary") from enforcing it.[2] R-4920. The superior court also ruled that the Act "does not violate substantive due process under the Georgia Constitution." R-4912. On April 4, 2022, the Secretary appealed. R-1. On April 6, 2022, Plaintiffs cross-

[2] Plaintiffs brought claims against the Secretary in both his individual and official capacities. The superior court dismissed the official capacity claims on sovereign immunity grounds and Plaintiffs appealed, R-343–45, but this Court did not address the issue. For now, sovereign immunity is moot since Plaintiffs prevailed on their individual capacity equal protection claim.

appealed. CA R-1. This Court docketed both cases on August 3, 2022. The Court's order granting Plaintiffs an extension of time to file this brief is attached.

This Court has exclusive jurisdiction over challenges to the constitutionality of state statutes. Ga. Const. art. VI, § 6, ¶ II. Plaintiffs raised two constitutional claims in their petition at R-31–38, and the superior court ruled on both claims at R-4912 and R-4920. Plaintiffs cross-appeal the following errors:

1. The superior court applied the wrong legal standard to determine whether the Act violates Plaintiffs' due process right to pursue a lawful occupation.

2. The superior court erroneously ruled that the Act does not violate the Georgia Constitution's Due Process Clause, Ga. Const. art. I, § 1, ¶ I.

STATEMENT OF FACTS

There are no material factual disputes. Everyone agrees that Georgia needs more of all types of lactation care providers. Under the Act, many providers (like Mary Jackson and other ROSE members) will no longer be able to work for pay. The undisputed facts show that the Act will reduce access to safe lactation care and services, especially in underserved rural and minority communities.

I. There is no dispute that Georgia needs more of all types of lactation care providers.

Breastfeeding has many health benefits for both mother and baby, R-500–01, 703, 879–80, and women have been helping each other learn to breastfeed since the dawn of time. R-704, 4644. Today, lactation care providers give

breastfeeding education, assessment, guidance, training, encouragement, and support to new and expecting families in many settings: hospitals, doctor's offices, clinics, nonprofits, in private practice, and in people's homes. R-703–04, 4644, 4646. Lactation care providers "know to stay within their scope of practice." R-652, 668, 703, 712, 714, 987; *see also* R-810–12 (CLC scope of practice). It is undisputed that they do not diagnose or treat medical conditions. R-516–17, 652, 703–04, 706–07, 987. Instead, they work with a team and must refer high-risk patients to a physician. R-652, 676, 704, 712, 714–16, 796, 810, 812, 815, 4713–14. It is undisputed that most mothers have simple questions, like how long they should breastfeed, how to know when their baby is hungry, how to position the baby, and how to create a good latch. R-141, 939, 4645. As ROSE's program director testified, "[t]his is not rocket science." R-676.

Nevertheless, mothers without access to a lactation care provider for these simple questions will often shorten the duration of breastfeeding or forgo it altogether. R-704, 948, 4646. As new mom Nickeysue Christian testified, "[w]ithout the care and support from . . . ROSE, I know I would have given up at breastfeeding." R-141. Certified Lactation Counselors (CLC), International Board Certified Lactation Consultants (IBCLC), ROSE Community Transformers, and Women, Infant, and Children (WIC) Peer Counselors are just a few types of providers who can help mothers reach their breastfeeding goals. R-705, 4648. It is

undisputed that *all* types of lactation care providers have an important role in supporting breastfeeding families. R-705–09, 930–32. The Secretary's expert, Dr. Genae D. Strong, and members of the Lactation Consultant Advisory Board ("Board"), the regulatory board created by the Act, emphasized this. R-503, 517, 519, 533, 4660. As the Secretary's expert put it, "[W]e all serve a role. . . . There is plenty of work for all of us, for all credentials." R-517. Dr. Strong also testified that all types of providers should be paid for their work. R-513–15. Plaintiffs' expert, Dr. Karin Cadwell, an IBCLC and nurse with over 48 years of experience in the lactation field, likewise testified that families need access to all types of lactation care providers. R-705–09. Plaintiffs' second expert, Dr. Lynnette Wilson-Phillips, a pediatrician who specializes in breastfeeding issues, testified that doctors need to refer patients to all kinds of lactation care providers. R-928–31.

Therefore, it is critical that *all* lactation care providers continue to work. The demand for breastfeeding support is, without a doubt, growing. R-718, 932, 4665. New kinds of lactation care providers are filling the gaps. R-662 (describing MiLC, a new credential like a CLC but specially tailored to serve military families). As the Secretary's expert acknowledged, Georgia needs "more, more, more" of all types of lactation care providers. R-518. This is especially true in rural and minority communities where families already find themselves without adequate, "culturally appropriate support." R-947–48, 677, 720, 988.

The disparity in breastfeeding rates between African-American families and white families is undisputed. R-947, 973, 4647, 4484. Founded in 2011, ROSE's mission is to improve health-care access among African-Americans and people of color through training, education, advocacy, and direct support to individuals. R-651, 943. To that end, Plaintiffs Mary Jackson and ROSE "offer breastfeeding support directly within" their diverse communities. R-709, 651. Mary, a CLC, has over 31 years of experience. R-648. Mary and ROSE have trained doctors, nurses, and other professionals on the benefits of breastfeeding and on appropriate techniques for encouraging mothers to breastfeed. R-648, 650, 651, 943.

CLCs like Mary and other non-IBCLC providers are critical to ROSE's mission. R-947, 4483 (expert testimony that "[n]on-IBCLC lactation care providers have an especially important role to play in African-American communities in Georgia"). ROSE attributes its success to the fact that its employees and volunteers look and talk like the mothers they serve and relate to their lived experiences. R-944. This is because CLCs and other non-IBCLC providers are more racially and geographically diverse than IBCLCs, the vast majority of whom are white and live in urban areas.[3] Amy Smolinski, founder of nonprofit Mom2Mom Global, testified

[3] R-688 (map of IBCLCs), 694 (demographics of CLCs), 697 (map of CLCs), 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"), 4711–12 (personal experience of Plaintiffs' expert, an IBCLC with over 48 years of experience), 4748 (IBCLC demographics).

that reducing the number of diverse lactation care providers in Georgia and making CLCs "unemployable" would negatively affect "military spouses of color and lower socioeconomic status." R-663–64. Unlike an IBCLC, a CLC is a "portable, flexible career path" well suited to military spouses. R-663.

ROSE provides its services free to moms, R-141, 943, but lactation care providers must pay the bills. Therefore, ROSE must pay its employees. R-943. To help support their families, many ROSE providers become CLCs, but few become IBCLCs. R-669, 944, 988. In fact, becoming an IBCLC is impossible for many because of the time and expense involved, R-669, 706, 988, and therefore care from an IBCLC is usually more expensive than care from a CLC or other community-based provider. R-141, 708, 4748–49. Becoming a CLC requires 52 hours of training and passing an exam that costs $120, while becoming an IBCLC requires 14 college-level courses, 95 hours of lactation-specific education, 300 to 1,000 hours of experience, and passing an exam that costs $600–$700. R-710–13.

Differences in training do not mean that CLCs are less prepared to support breastfeeding families than IBCLCs. Dr. Cadwell testified that CLCs are trained to provide safe, competent lactation care and services directly to families. R-700, 714–17. The Secretary's expert, Dr. Strong, agreed when she stated that CLCs have the skills to "provide basic breastfeeding support." R-4651. It is undisputed that research shows that "[a]ccess to professional lactation care increases

breastfeeding initiation, exclusivity, and duration rates, regardless of the credential that the [provider] holds." R-708, 775, 4669. ROSE CEO Dr. Kimarie Bugg's experience bears this out. Before becoming an IBCLC, she was a breastfeeding counselor at a hospital. R-940. Breastfeeding rates increased from 8–9% to 20%, and the "key[]" to her success was that she could "relate to the moms" she worked with, not any credential she held. R-940.

II. The Act reduces the number of lactation care providers in Georgia.

In April 2016, the Governor signed the Act into law. O.C.G.A. §§ 43-22A-1 to -13. The Act's sponsor stated that the law was meant to increase access to lactation care and services in Georgia. R-820; *see also* R-498. But the Act only allows one type of lactation care provider to work for pay. To become licensed, one must first become an IBCLC. O.C.G.A. §§ 43-22A-6, -7. Only licensed lactation consultants can practice "lactation care and services," which is broadly defined to include everything a lactation care provider does while working with mothers and babies. O.C.G.A. § 43-22A-3(5), (6). The Secretary agreed not to enforce the Act against unlicensed providers during this lawsuit. R-328, 635–36.

While the Act's definition of "lactation care and services" is broad, the law also contains a patchwork of exemptions. Doctors, physician assistants, osteopaths, dentists, nurses, chiropractors, and dieticians are exempt from the Act. O.C.G.A. § 43-22A-13. While doctors and nurses can have a limited role to play in caring for

breastfeeding families, it is undisputed that they are not equipped to provide the same kind of care as a dedicated lactation care provider.[4] Neither are dentists, chiropractors, or dieticians. R-705. Regardless of training, doulas and childbirth educators, unpaid volunteers, and government employees are also exempt from the Act. O.C.G.A. § 43-22A-13(2), O.C.G.A. § 43-22A-13(4), O.C.G.A. § 43-22A-13(5), O.C.G.A. § 43-22A-13(6).

Both Plaintiffs' experts testified that if the Act takes effect, it will reduce access to lactation care and services in Georgia. R-717–21, 932. Mary's employer told her that she would be re-assigned and would no longer be able to work directly with mothers and babies. R-652. Approximately 10,770 babies are born each month in Georgia. R-628. Georgia has at least 735 CLCs like Mary who are ready and able to help families meet their breastfeeding goals. R-679, 690–93. In part, this is because Georgia pays for WIC Peer Counselors to become CLCs. R-667, 702, 717, 942, 985. There are also an unknown number of other types of lactation

[4] R-497 (Board member Merrilee Gober, a nurse, testified that she learned "[v]ery, very little, [m]aybe 20 minutes' worth of education" on breastfeeding), 502, 511–12 (Secretary's expert Dr. Strong's research showed physicians' and nurses' education and clinical experience with breastfeeding "was lacking significantly"), 520 (Dr. Strong, a nurse, received "very little" breastfeeding training in nursing school), 704–05 (Plaintiff's expert Dr. Cadwell testified that "[b]ecause most physicians and nurses have received very little, if any, breastfeeding-specific training, lactation care providers often know more than physicians and nurses about breastfeeding management and how to successfully encourage nursing moms"), 930 (Plaintiffs' expert Dr. Wilson-Phillips received no breastfeeding education or training in medical school).

care providers such as ROSE Community Transformers and MiLCs working who cannot obtain licenses under the Act. In contrast, there are only 478 IBCLCs in Georgia and only 162 of them are licensed lactation consultants. R-547, 679, 720. Licensees are concentrated in urban areas, R-679, 688, 720, while CLCs are more evenly distributed throughout the state. R-679, 697–98, 719.

III. The Act harms non-IBCLC lactation care providers and the public while benefiting only IBCLCs.

Georgia's Occupational Regulation Review Council ensures that new occupational licenses serve the public. O.C.G.A. § 43-1A-2; R-549. The Review Council unanimously recommended against licensing lactation care providers because licensure "would not improve access to care for the majority of breastfeeding mothers." R-863. As the Review Council found and the record in this case affirmed, there is no evidence that unlicensed lactation care providers have ever harmed the public. R-617 (Secretary admits that he is unaware of complaints or evidence of harm), 859 (Review Council found "no substantive evidence of harm"). Instead, the Act is the product of advocacy by IBCLCs. R-498 (Board member and IBCLC Merrilee Gober helped draft the Act's language), 531 (the Act was based on model language drafted by the U.S. Lactation Consultant Association), 717–18. IBCLCs have pushed for licensure across the country, R-531, but only four states have licensing laws. And Georgia is the *only* state that restricts the practice of lactation care and services to IBCLCs. R-717.

ARGUMENT AND CITATION OF AUTHORITY

This Court reviews a trial court's conclusion regarding the constitutionality of a statute de novo. *State v. Holland*, 308 Ga. 412, 414 (2020). Here, the superior court ruled that the Act does not violate Georgia's Due Process Clause because the General Assembly has "plausible or arguable" reasons for licensing lactation care providers. This was reversible error. The Act does not realistically protect the public or employ means that are reasonably necessary to do so, and it unduly oppresses lactation care providers. This Court should identify and apply the correct legal standard and reverse the superior court's ruling on the due process claim.

I. The superior court applied the wrong legal standard to Plaintiffs' due process claim.

This Court instructed the superior court to decide which legal standard applies. *Jackson v. Raffensperger*, 308 Ga. 736, 742 n.6 (2020). The superior court rubber-stamped the Secretary's due process arguments. A close examination of this Court's precedent shows that the superior court erred, and Georgia courts apply meaningful review to protect due process rights. This Court should clarify and apply that standard in this case.

A. The superior court's "plausible or arguable" test is the wrong standard.

The superior court's "plausible or arguable" test is a caricature of rational basis review rooted in federal law. According to the superior court, "[u]nder the rational basis test, a law is upheld if any plausible or arguable reason supports the

furtherance of a legitimate state purpose." R-4909 (cleaned up). The superior court's ruling listed each of the Secretary's proffered justifications for the Act, stated that they were "plausible," and then ignored undisputed record evidence that the Act fails to achieve those justifications. R-4909–12. Although the court purported to apply Georgia law and did not cite federal law, the "plausible or arguable" test came from federal law. *See City of Lilburn v. Sanchez*, 268 Ga. 520, 522 (1997) ("[A]ny plausible or arguable reason that supports an ordinance will satisfy substantive due process." (citing *Flemming v. Nestor*, 363 U.S. 603, 611–12 (1960))). Indeed, the superior court's perfunctory analysis resembles the most deferential version of the federal rational basis test.[5] *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993) ("Where there are plausible reasons for Congress' action, our inquiry is at an end." (cleaned up)).[6]

[5] Even federal courts sometimes apply a more meaningful legal standard. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry[.]"); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[P]laintiffs may . . . negate a seemingly plausible basis for [a] law by adducing evidence of irrationality.").

[6] The Secretary cites *Beach Communications* in support of his arguments in the principal appeal in this case. *See* Brief of Appellant, *Raffensperger v. Jackson*, No. S230017, at 3, 24.

B. The correct legal standard provides meaningful review of the right to pursue an occupation.

Georgia courts apply a far more rigorous legal standard to due process claims than the superior court did here. First, this Court demands evidence of a law's connection to its purpose. Second, history and context establish that Georgia's Due Process Clause provides greater protection for individual rights than the federal Constitution. Third, Georgia courts have not hesitated to strike down occupational licensing laws interfering with the due process right to pursue an occupation.

1. This Court demands evidence of a law's connection to its purpose.

The superior court cherry-picked deferential language from this Court's cases, but that language belies the Court's actual practice. Even the first Georgia case to use the words "plausible or arguable" applied a rigorous legal standard that demands real evidence of a law's connection to its purpose. This Court has applied that standard, or something similar, in many other cases, too.

In *City of Lilburn v. Sanchez*, the first Georgia case to use the words "plausible or arguable,"[7] the Court upheld an ordinance that prohibited keeping pot-bellied pigs on lots under one acre in size, but only after an extensive analysis

[7] *Sanchez*, 268 Ga. at 522 ("[A]ny plausible or arguable reason that supports an ordinance will satisfy substantive due process." (citing *Flemming*, 363 U.S. at 611–12)).

of both sides of the factual record. 268 Ga. at 522–24. The Court discussed expert and fact testimony about the impact of the pig and its potential to transmit disease, and why larger lot sizes would remedy those problems. *Id.* The Court held that "[s]o long as an ordinance realistically serves a legitimate public purpose, and it employs means that are reasonably necessary to achieve that purpose, without unduly oppressing the individuals regulated, the ordinance must survive a due process challenge." *Id.* at 522. The right to pursue an occupation, one of "the greatest of human rights," *Schlesinger v. City of Atlanta*, 161 Ga. 148, 129 S.E. 861, 866 (1925), deserves as much protection as the right to keep a pet pig.

Other cases, despite using deferential language, have echoed *Sanchez*'s analysis. For example, in *Advanced Disposal Services Middle Georgia, LLC v. Deep South Sanitation, LLC*, the Court relied on evidence about economic feasibility to hold that it was reasonable for a county to enact a trash-hauling ordinance. 296 Ga. 103, 106–07 (2014). Likewise, the Court upheld a statute that banned video poker machines because there had been an "influx" of machines into the state, and research showed that the cost of policing the machines to ensure they were not used illegally was "prohibitive." *State v. Old S. Amusements, Inc.*, 275 Ga. 274, 275, 277 n.5 (2002). *See also, e.g.*, *Bd. of Comm'rs v. Guthrie*, 273 Ga. 1, 4 (2000) (garbage collection ordinance had "real and substantial" relation to its objective); *Davis v. Peachtree City*, 251 Ga. 219, 220 (1983) (overturning liquor

store licensing ordinance when "other, less onerous means" to protect the public existed); *Rockdale County v. Mitchell's Used Auto Parts, Inc.*, 243 Ga. 465, 465 (1979) (demanding "real and substantial" connection between junkyard ordinance and its purpose and remanding case for evidentiary hearing). The Court's deferential language notwithstanding, these cases reflect Georgia's rich, consistent history of vigorously protecting individuals' due process rights.

Plaintiffs will not always win their due process claims, but this Court takes them seriously. "Plausible or arguable" is not the standard. The correct standard is that a law must "realistically serve[] a legitimate public purpose, and . . . employ[] means that are reasonably necessary to achieve that purpose, without unduly oppressing the individuals regulated[.]" *Sanchez*, 268 Ga. at 522.

2. *History and context establish that Georgia's Due Process Clause provides greater protection for individual rights than the federal Constitution.*

The superior court applied a legal standard that resembles the federal rational basis test. This case is about what standard courts should use to evaluate restrictions on due process under *Georgia's* Constitution. To answer that question, we look to how Georgia courts have evaluated the right throughout history. As shown above, even in recent times, Georgia courts take due process rights seriously. The "history[] and context," *Elliott v. State*, 305 Ga. 179, 188 (2019), of Georgia's Due Process Clause and caselaw establish that the Georgia Constitution

provides greater protection for due process rights—especially the right to pursue an occupation—than the federal Constitution.[8]

While the words of Georgia's Due Process Clause are nearly identical to the federal Due Process Clause,[9] that does not mean that it is interpreted in lockstep with the federal Constitution. *See Olevik v. State*, 302 Ga. 228, 234 n.3 (2017) (noting that just because the Georgia Constitution "contains the same language as the Fourth Amendment," "does not mean that our interpretation of [Georgia's provision] must change every time the Supreme Court of the United States changes its interpretation of the Fourth Amendment"); *see also Holland*, 308 Ga. at 413 n.3 ("[T]he United States Supreme Court's construction of a federal constitutional provision does not bind our construction of a similar Georgia constitutional provision[.]"). Moreover, Georgia's Due Process Clause must be read in the "context," *Elliott*, 305 Ga. at 188, of the nearby reminder—not present in the U.S.

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[8] This Court has held in many other contexts that the Georgia Constitution provides greater protection for individual rights than the federal Constitution. *See, e.g.*, *Elliott*, 305 Ga. at 179 (self-incrimination); *Bradshaw v. State*, 284 Ga. 675, 683 n.10 (2008) (cruel and unusual punishment); *Peterson v. State*, 284 Ga. 275, 278–79 (2008) (defendant's right to be present at all critical stages of proceedings); *Powell v. State*, 270 Ga. 327, 330, 331 n.3 (1998) (privacy); *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 118 (1988) (excessive fines and forfeitures); *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 790–92 (1962) (prior restraints on speech).

[9] The Due Process Clause of the Fourteenth Amendment states "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Constitution—that "[p]rotection to person and property is the paramount duty of government and shall be impartial and complete." Ga. Const. art. I, § 1, ¶ II. *See K. Gordon Murray Prods., Inc.*, 217 Ga. at 791 (construing prior restraints on speech in light of "impartial and complete" provision).

The State recognized protection of property and economic rights even before the Bill of Rights was added to the Constitution in 1861. *See Parham v. Justs. of Inferior Ct. of Decatur Cnty.*, 9 Ga. 341, 355 (1851) ("The right of accumulating, holding and transmitting property, lies at the foundation of civil liberty."). In fact, this Court specifically called for the Bill of Rights to protect the right to pursue an occupation. In 1859, this Court struck down a local ordinance that forbade citizens from selling wares outside of a city market except when the market was open. *Bethune v. Hughes*, 28 Ga. 560 (1859). This Court held that "[a] peaceable citizen . . . should be left free and untrammeled as the air he breathes, in the pursuit of his business and happiness," and declared that "a Bill of Rights is *demanded*" to protect this right. *Id.* at 565 (emphasis in original). Two years later, in 1861, Georgia ratified its first Due Process Clause, which provided that "[n]o citizen shall be deprived of life, liberty or property, except by due process of law[.]" Ga. Const. of 1861, art. I, § 4. The 1868 Constitution similarly stated, "[n]o person shall be deprived of life, liberty, or property, except by due process of law." Ga. Const. of 1868, art. I, § 3. The text has remained substantively unchanged ever

since 1868. *See* Ga. Const. of 1983, art. I, § 1, ¶ I. "[A] constitutional provision retained from a previous constitution without material change [retains] the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary." *Elliott*, 305 Ga. at 183. The Due Process Clause retains the same meaning it had two years after this Court's ringing endorsement of the right to pursue an occupation in *Bethune*.

The federal Constitution also protects the right to pursue an occupation. *See, e.g.*, *Truax v. Raich*, 239 U.S. 33, 38 (1915); *Dent v. West Virginia*, 129 U.S. 114, 121 (1889). Specifically, the Fourteenth Amendment to the U.S. Constitution protected the right "to work in an honest calling and contribute by your toil in some sort 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). In practice, however, federal courts have failed to protect the right to pursue an occupation. Since the mid-20th century, the U.S. Supreme Court has been reluctant to strike down economic regulations. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions[.]").

This Court has not followed the federal courts. In 1959, four years after *Williamson v. Lee Optical*, one commentator noted that this Court "has shown no

tendency to be influenced by the new attitude of the Supreme Court of the United States toward economic regulation." Hugh William Divine, *Interpreting the Georgia Constitution Today*, 10 Mercer L. Rev. 219, 220 (1959). Rather, this Court has "taken as a whole . . . a consistent approach to the protection of economic rights. Any regulation that affects the actual pecuniary value of property, of a job opportunity, or of a business must be reasonable in the eyes of the court." *Id.* This Court's "consistent approach" is shown by its frequent willingness to strike down laws interfering with the right to pursue an occupation.

3. This Court has not hesitated to strike down laws interfering with the due process right to pursue an occupation.

This case is about occupational licensing, and in 1868, occupational licensing laws like the Act were virtually nonexistent. In general, "most occupational licensing laws were adopted in the first two decades of the 1900s." Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation*, 65 J. Econ. Hist. 723, 731 (2005). Since occupational licensing laws came into vogue, this Court has not hesitated to strike them down. *See, e.g.*, *Waller v. State Constr. Indus. Licensing Bd.*, 250 Ga. 529, 530 (1983) (overturning plumber licensing law); *Jenkins v. Manry*, 216 Ga. 538 (1961) (same); *Bramley v. State*, 187 Ga. 826, 839 (1939) (overturning photographer licensing law); *Se. Elec. Co. v. City of Atlanta*, 179 Ga. 514 (1934) (overturning electrician licensing law); *Chaires v. City*

of Atlanta, 164 Ga. 755, 139 S.E. 559, 563 (1927) (overturning Jim Crow laws that interfered with African-American barbers' "right to carry on a lawful business"); *see also In re Palazzola,* 310 Ga. 634, 650 (2020) (Peterson, J., concurring specially) (observing that Georgia's Due Process Clause "might prohibit the Court from exercising" certain "far-reaching" rules regarding the practice of law).

Other types of economic restrictions have fared poorly, too. *See, e.g.*, *State v. McMillan*, 253 Ga. 154 (1984) (overturning law conditioning retired judges' benefits upon forgoing the practice of law); *De Berry v. City of La Grange*, 62 Ga. App. 74 (1940) (overturning prohibition on door-to-door solicitation); *Felton v. City of Atlanta*, 4 Ga. App. 183, 61 S.E. 27, 28 (1908) (noting that "those statutes and ordinances which provide that none but examined and licensed persons shall engage in plumbing skirt pretty closely that border line beyond which legislation ceases to be within the powers conferred by the people of the state upon its legislative bodies" (cleaned up)). Georgia courts are quite skeptical of restraints on the right to pursue an occupation. Now is the time to define the legal standard that applies to a law that will put hundreds of Georgians out of work.

C. This Court should clarify that the right to pursue an occupation receives meaningful protection under Georgia's Due Process Clause.

This Court recently declined to decide whether Georgia's Due Process Clause provides greater protection for individual rights than the U.S. Constitution. *See, e.g.*, *Holland*, 308 Ga. at 413 n.3; *Jackson*, 308 Ga. at 742 n.6; *State v.*

Turnquest, 305 Ga. 758, 769–70 (2019). These cases, however, did not squarely present the issue. In contrast, this case presents the Court with the "careful analysis of the language, history, and context of" Georgia's Due Process Clause necessary to decide once and for all. *Turnquest*, 305 Ga. at 769 n.8.

The Supreme Court of Texas seized a similar opportunity in 2015 when it struck down a regulation requiring eyebrow threaders to obtain a cosmetology license. *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69 (Tex. 2015). The court held that a plaintiff can demonstrate "either (1) [a] statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, [a] statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *Id.* at 87. The test required consideration of "the entire record, including evidence offered by the parties." *Id.* The *Patel* court concluded that requiring 750 hours of training to thread eyebrows was "so oppressive" as to violate the Texas Constitution. *Id.* at 90.

Of course, the Texas Constitution and the Georgia Constitution are different. But the *Patel* test is consistent with this Court's historical treatment of due process rights and resembles Georgia's *Sanchez* test.[10] Moreover, this case presents an

[10] Pennsylvania applies a similar test. *Ladd v. Real Est. Comm'n*, 230 A.3d 1096, 1109 (Pa. 2020) ("A law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the

even more egregiously "oppressive" law than *Patel*. In Section II below, Plaintiffs will show that they prevail under the *Sanchez* test.

II. Plaintiffs should have prevailed on their due process claim.

Plaintiffs should have prevailed on their due process claim because the Act does not "realistically" protect mothers and babies or "employ[] means that are reasonably necessary" to do so. *Sanchez*, 268 Ga. at 522. The superior court ignored undisputed evidence that the Act *defeats* its stated purpose by reducing access to safe lactation care and services. The superior court also ignored evidence that the Act's effects are "unduly oppress[ive]." *Id.*

A. The superior court ignored undisputed evidence that the Act does not and cannot achieve its purposes.

The superior court incorrectly assumed that the Secretary's justifications for the Act were "plausible and arguable" and ignored contrary evidence. This was legal error. Instead, this Court must consider whether the Act "realistically" serves its goals with "reasonably necessary" means. *Sanchez*, 268 Ga. at 522. It does not.

1. The Act does not address breastfeeding challenges or reduce the risk of harm.

The superior court found that "[a] recognition that there are substantial benefits of breastfeeding for both mothers and infants, together with the fact that

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necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." (cleaned up)).

some mothers and infants face significant challenges to breastfeeding," and "[a] desire to reduce the risk of harm," justify the Act.[11] R-4909–10. Plaintiffs agree that breastfeeding is important, and a small number of families may face significant challenges. But this does not justify restricting the number of lactation care providers in Georgia, especially when there is no evidence that IBCLCs are uniquely equipped to address challenges or bestow benefits. The Act doesn't reduce the risk of harm—it *causes* harm by reducing access to safe lactation care and services for families who need it.

Unfortunately, the record shows that the most common challenge facing breastfeeding families is finding a lactation care provider.[12] This challenge is even more pronounced in rural and minority communities. R-4484. Already, too few IBCLCs exist to care for all the breastfeeding families in Georgia, and the IBCLCs that do exist are less racially and geographically diverse than CLCs. R-694, 833,

[11] Similarly, the superior court found that "the intimate and confidential nature of lactation care" justifies the Act. R-4910. To the contrary, such intimate care dictates that mothers have a wide array of choices that will provide affordable, culturally appropriate care within their own community. *See supra* 3–8.

[12] *See, e.g.*, R-141 (new mom Nickeysue Christian testified that she would not know where to find an IBCLC), 518 (Secretary's expert testified that "many states . . . experience challenges in accessing IBCLCs"), 532 (Board member Leah Aldridge testified "[i]t's very difficult for many women in Georgia to find clinical lactation care providers through traditional means"), 653 (Mary testified that rural and minority Georgians often lack access to IBCLCs), 677 (ROSE's program director testified to the "huge shortage" of breastfeeding support), 4473 (Ms. Aldridge noted that mothers sometimes travel 40 miles to see her as an IBCLC).

4711–12. Not only will the Act decrease access to care by forcing non-IBCLC providers to stop working, it will decrease access to *culturally appropriate* care.

Existing lactation care, when it is available, is safe. As this Court explained in striking down photographer licensing, if the state can license "innocuous" occupations, then "there is scarcely any kind of business, however innocent and harmless, to which similar regulations might not be applied." *Bramley*, 187 Ga. at 836, 838. Like photographers, lactation care providers have worked safely in Georgia for decades. R-617, 859, 704, 4644. The Secretary has been unable to provide any evidence that a mother or baby has ever been harmed by someone providing lactation care and services in Georgia. R-612, 617, 619, 859. Moreover, there is no empirical evidence that care from IBCLCs produces better outcomes than care from CLCs or other non-IBCLCs. R-4483. Instead, research shows the opposite. Access to *any* lactation care provider is beneficial. R-708, 775, 4669. It is undisputed that every lactation care provider has a role to play. R-503, 517, 519, 533, 705–09, 930–32, 4660. Accordingly, the Georgia Occupational Regulation Review Council unanimously recommended against licensing lactation care providers because it "would not improve access to care for the majority of breastfeeding mothers." R-863. The superior court ignored this and evidence that the Act is a product of advocacy by IBCLCs—the only parties benefitting from licensure. R-498, 531, 717–18. And as this Court has stated, laws must not "set up

trade barriers solely for the purpose of protecting a resident against proper competition." *Moultrie Milk Shed v. City of Cairo*, 206 Ga. 348, 352 (1950).

The Act is meant to increase access to care, R-820, but, by its very nature, the Act cannot do this. Drastically reducing the pool of people who can legally provide a service cannot increase access to that service. Full stop. Instead of protecting public health and safety, the Act will harm it. A statute that creates, instead of cures, a public harm necessarily fails the *Sanchez* test. Putting hundreds of lactation care providers out of work does not "realistically" protect Georgia families from harm or help them face challenges, nor is it a "reasonably necessary" means to do so. *Sanchez*, 268 Ga. at 522.

2. *The Act does not ensure that lactation care providers are properly educated or trained.*

The superior court found that "some level of training is necessary" for lactation care providers, R-4910, and IBCLCs are the only "trained and competent professionals" in the field. R-4910–11. This directly contradicts the undisputed record, which proves that *all* providers have the skills they need to perform their role and can improve breastfeeding outcomes regardless of which credential they hold. R-503, 517, 519, 533, 705–09, 930–32. IBCLCs are not special.

First, IBCLCs' health sciences education does not justify giving them a monopoly. Plaintiffs do not dispute that IBCLCs are required to pass certain college-level courses to obtain IBCLC certification. But this education is not about

breastfeeding, and nor is it comparable to what is required of other professionals who comprise the maternal-child health-care team. R-4486. In fact, the only specific requirements for an IBCLC's college courses are that they are completed and passed at an accredited institution and are at least one academic credit. R-4486.

Second, IBCLCs' 95 hours of lactation-specific training do not justify the Act. Other kinds of lactation care providers have just as strong of a foundation in breastfeeding-specific training, if not more so. Plaintiffs' expert Dr. Cadwell, an IBCLC with 48 years of experience, testified that the certifying organization for IBCLCs does not provide a set curriculum for the 95 hours. R-4484. Instead, IBCLCs pick and choose the courses they want, which can result in serious gaps in their training. Thus, there is no guarantee that an IBCLC will receive education on every important topic. R-4484. In contrast, the CLC curriculum is set and guaranteed to address each important issue lactation care providers will encounter. R-4487–88. Similarly, ROSE Community Transformers receive comprehensive lactation training much like the training WIC Peer Counselors receive, R-706–07, 942, 944, and WIC Peer Counselors can continue working because they are exempt from the Act. O.C.G.A. § 43-22A-13(5).

Third, IBCLCs' direct patient care requirement does not make them uniquely qualified. Again, Dr. Cadwell testified that just like an IBCLC's education, an IBCLC's patient training is not comparable to a nurse's or doctor's

clinical experience with patients. R-4486–87. IBCLCs are not required to address a variety of real-life experiences while completing their hours. R-4487. In contrast, non-IBCLC lactation care providers such as CLCs and ROSE Community Transformers are trained to spot a wide variety of issues that require medical attention and refer families right away. R-4481–82.

If the Act's goal is to ensure that Georgians receive lactation care only from IBCLCs, it fails to achieve that goal. Many individuals, such as doctors, nurses, chiropractors, dentists, and government employees, can offer lactation care and services for pay, regardless of their lactation-specific training. O.C.G.A. § 43-22A-13. And anyone can offer lactation care and services if they do so for free. O.C.G.A. § 43-22A-13(6). Even with less education and experience than Mary, exempted individuals are allowed to provide lactation care and services. No mother should be forced to rely exclusively on her dentist or chiropractor for lactation care because the Act has put experienced and skillful providers like Mary out of work.

The Act's exemptions resemble the plumber license this Court struck down in *Waller v. State Construction Licensing Board*, 250 Ga. 529 (1983). In *Waller*, this Court struck down a law that "denie[d] to a locally-licensed plumber who *is* familiar with the state-wide plumbing code the privileges granted to a formerly state-licensed plumber who has *no* familiarity with the state plumbing code" as violating both Georgia's Due Process and Equal Protection Clauses. *Id.* at

530. Here, an unpaid volunteer, dentist, chiropractor, or government employee with "no familiarity" with breastfeeding has "privileges" that Mary, a CLC with 31 years of experience, does not have. *See also Se. Elec. Co.*, 176 S.E. at 402 (overturning electrician licensing law that exempted public utilities). A law this untethered from its goal cannot stand.

3. The Act creates confusion about lactation care providers' qualifications and does not protect the public from fraud.

The superior court also found that "[a] need to alleviate confusion" and to "protect the public from fraud" justifies the Act. R-4910. Again, the Act achieves the opposite: It *creates* confusion about who is qualified to provide lactation care and services to Georgia families and does nothing to protect against fraud.

First, the record contains no evidence that confusion about lactation care providers' credentials, or fraud, is causing any harm. In fact, Mary and ROSE CEO Dr. Kimarie Bugg, both leaders in the field with decades of experience, testified that they had never experienced rogue, unqualified persons "put[ting] out a shingle" and providing lactation care and services. R-1523, 2879. Second, by limiting licensure to IBCLCs, the Act leads the public to believe that IBCLCs are the only qualified lactation care providers, when they are not. R-4492. This will harm Georgia families who cannot afford IBCLC services, live in an area where IBCLCs are not readily available, or do not want to use IBCLCs because they do not provide culturally appropriate care. R-141, 4492. Lactation care remains

unlicensed in all but three other states, none of which limit paid practice to IBCLCs. R-518. This Court has cautioned that "laws may be passed regulating common occupations which, from their nature, afford peculiar opportunity for imposition and fraud." *Bramley*, 187 Ga. at 838 (cleaned up). The record does not show that lactation care affords a greater likelihood for fraud "from [its] nature." *Id.* There are plenty of "less onerous" options available to combat fraud, such as titling acts, registration, or bond requirements. *Davis*, 251 Ga. at 220. The Act is not "reasonably necessary" to alleviate confusion or prevent fraud. *Sanchez*, 268 Ga. at 522.

B. The superior court ignored undisputed evidence that the Act's effects are unduly oppressive.

A law must not "unduly oppress[] the individuals regulated." *Sanchez*, 268 Ga. at 522; *see also Davis*, 251 Ga. at 220; *De Berry*, 8 S.E.2d at 149 ("Ordinances cannot be oppressive or unreasonable[.]"). Becoming an IBCLC requires taking and paying for 14 college-level courses and 95 hours of lactation-specific training, completing up to 1,000 hours of experience, and passing a $700 exam. R-4654. Understandably, many CLCs, such as ROSE Community Transformer Crystal Flowers, "can't afford the investment of time and money it would take to become an IBCLC." R-988, 669, 706. Requiring an IBCLC credential "unduly oppress[es]" lactation care providers who cannot meet the steep requirements, and who can practice their craft safely without the excessive training. *Sanchez*, 268 Ga. at 522.

It is critical that Georgia families have access to lactation care providers who are members of their own communities. In many communities, not everyone can take college courses, obtain 1,000 hours of experience, and pay $700 for an exam. Lactation care providers cannot be expected to overcome such high barriers to practice an "innocent and harmless" occupation. *Bramley*, 187 Ga. at 838. Lactation care and services are safe. Providers shouldn't have to jump through unnecessary hoops to make their living helping Georgia families breastfeed, especially when there is a critical shortage of care.

CONCLUSION

The Act is unconstitutional. This Court should affirm the superior court's equal protection ruling and reverse the superior court's due process ruling.

DATE: September 12, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day a copy of the foregoing *Brief of Cross-Appellants* was served via email, per prior agreement of the parties, on the following:

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SUPREME COURT OF GEORGIA
Case No. S23X0018

August 04, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARY NICHOLSON JACKSON et al. v. BRAD RAFFENSPERGER.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until September 12, 2022.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1) -(2). No extensions of time for requesting oral argument will be granted. Rule 51(1).

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