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

REPLY BRIEF OF CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

It is time for the Court to explain, once and for all, what constitutes an "unreasonable government interference" with Georgians' right "to pursue a lawful occupation." *Jackson v. Raffensperger*, 308 Ga. 736, 740 (2020). As Plaintiffs demonstrated in their opening brief, the Georgia Lactation Consultant Practice Act ("the Act") violates Plaintiffs' right to pursue their occupation because it does not realistically protect the public or employ means that are reasonably necessary to do so, and it unduly oppresses lactation care providers.

The Secretary's argument can be summed up in four words: "nothing to see here." According to the Secretary, "routine economic judgments" should receive no scrutiny whatsoever under the "ordinary rational-basis test." Br. Cross-Appellee ("Def. Br.") 2, 18. Wrong. The Act is not a "routine economic judgment," and Georgia's test is not the "ordinary rational-basis test." The Act will put hundreds of lactation care providers out of work and reduce access to safe lactation care and services. There isn't a single shred of evidence that licensing lactation care providers is a reasonable means of protecting the public. And under Georgia's Due Process Clause, that evidence must exist. Georgia has its own constitutional path, and the Court should follow it. The decision below is wrong

and should be reversed.[1]

ARGUMENT AND CITATION OF AUTHORITY

I. Georgia's Due Process Clause provides meaningful protection for the right to pursue an occupation.

As Plaintiffs explained in their opening brief, Georgia's Due Process Clause provides meaningful protection for the right to pursue an occupation. Br. Cross-Appellants ("Pls. Br.") 13–20. The Secretary argues that real review of the Act would "depart from roughly a century of precedent," Def. Br. 22, and "wreak havoc" in Georgia. Def. Br. 11. To the contrary, the Secretary strays from the state's unique constitutional path and relies on distinguishable cases. Real review is nothing new and will not cause the sky to fall.

A. Georgia follows its own constitutional path.

Plaintiffs' opening brief described how the "history[] and context," *Elliott v. State*, 305 Ga. 179, 188 (2019), of the Due Process Clause establish that the Georgia Constitution provides greater protection for due process rights than the federal Constitution. Pls. Br. 15–19. Plaintiffs also described a long line of cases in which this Court has struck down economic legislation under the Due Process Clause. Pls. Br. 19–20. The Secretary casually dismisses the history and cases that disprove his arguments.

[1] The Court should affirm the superior court's ruling that the Act violates the Georgia Constitution's guarantee of equal protection. *See Raffensperger v. Jackson*, No. S23A0017, Br. Appellees.

The Secretary argues that "Plaintiffs do not even attempt to explain how . . . Georgia's *due process clause* was originally understood to provide greater limitations on economic regulation." Def. Br. 23. Although Plaintiffs agree that "other provisions of the Georgia Constitution"[2] might also protect the right to pursue an occupation, *see In re Palazzola*, 310 Ga. 634, 650 (2020) (Peterson, J., concurring specially), there is no doubt that the Court has "long recognized" Plaintiffs' rights under Georgia's Due Process Clause. *Jackson*, 308 Ga. at 740 (collecting cases). This was apparent when the provision was first added to the Constitution in 1861, *see* Pls. Br. 15–19, and has been confirmed by the relative frequency with which this Court has struck down economic legislation, as compared to the federal courts. *See* Pls. Br. 19–20; *see also* Br. Mom2Mom Global as Amicus Curiae ("Mom2Mom Global Br.") 18–27; Br. Amicus Curiae of Pacific Legal Foundation and the Goldwater Institute 6–11.

The Secretary calls these cases "dated." Def. Br. 17. He is correct that many of them come from a time closer to the enactment of Georgia's Due Process Clause than the cases he relies on. *See, e.g.*, *Bethune v. Hughes*, 28 Ga. 560 (1859)

[2] As Plaintiffs explained in the principal appeal in this case, the "impartial and complete" provision of Article I, § I, ¶ II also protects the right to pursue an occupation. *Raffensperger v. Jackson*, No. S23A0017, Br. Appellees 22–25. The Secretary asserts that this provision is merely "comparable to the equal protection clause of the Fourteenth Amendment." Def. Br. 22. Plaintiffs explained in the principal appeal why the impartial and complete provision is not coextensive with the Fourteenth Amendment. Br. Appellees 22–25.

(Lumpkin, J.) (striking down ban on selling wares outside a city market two years before enactment of Due Process Clause). That's a good thing. *See, e.g.*, *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, No. S22G0039, 2022 WL 14147669, at *7–10 (Ga. Oct. 25, 2022) (relying on cases decided around enactment of Judicial Power Clause in interpreting it); *Smith v. Baptiste*, 287 Ga. 23, 32 (2010) (Nahmias, J., concurring) (explaining that the Court should look to "contemporaneous" cases to determine original meaning of the Constitution); *State v. Cent. of Georgia Ry. Co.*, 109 Ga. 716, 35 S.E. 37, 40–41 (1900) (relying on cases decided before adoption of Antimonopoly Clause to inform the Court about its meaning). The Court relied on many so-called "dated" cases last time this case was before it. *Jackson*, 308 Ga. at 740 (discussing *Bramley v. State*, 187 Ga. 826 (1939), and *Se. Elec. Co. v. City of Atlanta*, 179 Ga. 514 (1934)).

Moreover, the Court's skepticism of occupational licensing didn't end along with Prohibition.[3] It continued through the enactment of the current 1983 Constitution. *See Waller v. State Constr. Indus. Licensing Bd.*, 250 Ga. 529, 530

[3] And it shouldn't have. "As occupational-licensing regimes have proliferated in recent decades, so too has scholarly research examining those regimes' effects. Empirical studies consistently show that occupational licensing typically does not improve service quality or provide any meaningful public benefit. To the contrary, these same studies repeatedly show that licensing imposes significant costs and harms on individuals and society. These costs and harms disproportionately affect minorities and lower-income individuals." Br. of Amici Curiae Occupational Licensing Scholars 4.

(1983) (striking down plumber licensing law just before 1983 Constitution took effect). There is nothing "dated" about a robust line of cases striking down economic legislation from the mid-19th century to the late 20th century. It has been a "consistent theme" throughout Georgia's history. *Sons of Confederate Veterans*, 2022 WL 14147669, at *8. After all, the language of the Due Process Clause has remained unchanged, and "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.

B. The Secretary's cases are distinguishable.

In a due process challenge to an occupational licensing law, the Court should look to the many other Georgia cases involving occupational licensing laws, which the Court nearly unanimously strikes down. Instead, the Secretary relies on cherry-picked deferential language from readily distinguishable cases. For example, *Gliemmo v. Cousineau*, 287 Ga. 7 (2010), is an equal protection challenge to a law determining who could sue under a medical malpractice statute. Def. Br. 14, 25, 29, 30. Similarly, *State Farm Mutual Automobile Insurance Co. v. Five Transportation Co.*, 246 Ga. 447 (1980), "upheld a ban on subrogation litigation in all accidents involving vehicles weighing less than 6,500 pounds."

Def. Br. 16. And so forth.[4] These cases represent the kinds of "routine economic judgments," Def. Br. 2, that Plaintiffs do not dispute lie within the government's power to regulate in a reasonable manner. The same robust test should apply in such cases (and the Court has not been clear about that), but the result is likely to be quite different than the correct result here. This is not a borderline case. The Act falls well outside the bounds of "routine economic judgments," and as *Women's Surgical Center, LLC v. Berry* (a case heavily relied on by the Secretary) points out, there are limits to the government's ability to enact "sweeping economic regulation."[5] 302 Ga. 349, 355 n.7 (2017).

The Secretary cites *one* case upholding an occupational licensing law (compared to at least seven cases striking them down). Def. Br. 14–15 (citing *Cooper v. Rollins*, 152 Ga. 588, 110 S.E. 726 (1922)). In *Cooper*, the plaintiffs alleged that a barber licensing law violated equal protection and due process

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[4] *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), is a federal case about regulations requiring television stations to be franchised. Def. Br. 14. *Paramount Pictures Corp. v. Busbee* upheld a law regulating "the manner in which motion pictures are distributed for exhibition to the public in Georgia," 250 Ga. 252, 252 (1982), Def. Br. 15, 16, while *State v. Major*, 243 Ga. 255 (1979), upheld a ban on ticket-scalping at sporting events. Def. Br. 15. *Clein v. City of Atlanta*, 164 Ga. 529 (1927), upheld a law regulating the time at which jewelry could be sold at auction. Def. Br. 12, 15. In the same vein, *Old South Duck Tours v. Mayor & Aldermen of City of Savannah*, 272 Ga. 869 (2000), upheld a law prohibiting amphibious vehicles from operating in the city's historic district. Def. Br. 15.

[5] *Women's Surgical Center* upheld Georgia's medical certificate of need law while treating the plaintiff's federal and state claims interchangeably. 302 Ga. at 354.

because it required barbers, but not other "trades involving manual labor," to get a license, and because it exempted existing resident barbers from licensing. 110 S.E. at 727. Here, Plaintiffs do not allege that the Act is unconstitutional because they must get a license, but members of other "trades" do not. Members of other trades do not "perform the same work" and so are not similarly situated to Plaintiffs. *Jackson*, 308 Ga. at 741. Nor do Plaintiffs challenge the Act for grandfathering existing lactation care providers, because the Act does no such thing. *Cooper* is distinguishable.

At most, the Secretary's cases confirm what Plaintiffs readily concede: "Plaintiffs will not always win their due process claims," Pls. Br. 15, and the Court sometimes uses deferential language that can lead to confusion about how the Due Process Clause works. *See* Pls. Br. 13–15. That is why the Court should step in and articulate the correct test in this case.

C. *Sanchez* applies the correct test.

Plaintiffs' opening brief explained that under Georgia's Due Process Clause, the Court demands evidence of a law's connection to its purpose. Pls. Br. 13–15. The Secretary argues that this is a "novel form of heightened scrutiny," Def. Br. 12, and that *City of Lilburn v. Sanchez*, 268 Ga. 520 (1997), is inapplicable. Def. Br. 19–20. The Secretary is wrong on both fronts. Meaningful review is nothing new, and *Sanchez* embodies what that review should look like.

Under *Sanchez*, 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[.]" 268 Ga. at 522. Pls. Br. 15. *Sanchez* was not the first case to use such a robust test[6] (including the "unduly oppressing" component[7]), but it perfectly encapsulates the kind of review this Court regularly applies in due process cases.[8] The Secretary ignores both the

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[6] The Secretary correctly points out that "[t]he [*Sanchez*] Court derived [its] language from [a zoning case], which in turn drew from a 19th century U.S. Supreme Court case, *Lawton v. Steele*, 152 U.S. 133, 137 (1894)." Def. Br. 19 n.2. When *Lawton* was decided in 1894, federal courts applied much more robust scrutiny to economic regulation. *See* Mom2Mom Global Br. 11–13 (collecting cases and noting that prior to 1938, "the state and federal approaches to economic rights under the due process clause were essentially indistinguishable"). In contrast, as Plaintiffs explained in their opening brief, the superior court derived its "plausible or arguable" test from a federal case decided in 1960. Pls. Br. 12.

[7] The Secretary is particularly upset by the "unduly oppressing" component of *Sanchez*'s test. *See, e.g.*, Def. Br. 10, 20, 24–26. This portion of the test has deep roots in Georgia law. *See, e.g.*, *Davis v. Peachtree City*, 251 Ga. 219, 220 (1983); *Se. Elec. Co.*, 176 S.E. at 402 (electrician licensing law was "unreasonable, arbitrary, and oppressive"); *Cooper*, 110 S.E. at 728 (barber licensing law must not be "arbitrary or oppressive"); *Mack v. Westbrook*, 148 Ga. 690, 98 S.E. 339, 341 (1919); *Toney v. Mayor, Etc., of Macon*, 119 Ga. 83, 46 S.E. 80, 82 (1903).

[8] Plaintiffs noted in their opening brief that Pennsylvania uses a similar due process test. Pls. Br. 21 n.10 (describing *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 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)). On October 31, 2022, the trial court in that case applied the test to rule that the state's real estate licensing requirements were unconstitutional as applied to the plaintiff's short-term vacation property management services. *See Ladd v. Real Est. Comm'n*, No. 321 M.D. 2017 (Pa. Commw. Ct. Oct. 31, 2022), *available at* https://ij.org/wp-content/uploads/2017/07/Permanent-Injunction-Granted.pdf.

Court's strong language and its rigorous factual analysis to argue that *Sanchez* "expressly applies rational-basis review." Def. Br. 10. That is incorrect.

Plaintiffs acknowledged in their opening brief that *Sanchez* uses some confusing deferential language in addition to the language quoted above. Pls. Br. 13 ("[a]ny plausible or arguable reason that supports an ordinance will satisfy substantive due process" (citation omitted)). But Plaintiffs also explained that the Court's deferential language contrasts sharply with its careful analysis of the facts. The Court grappled with both sides of an extensive record to uphold an ordinance prohibiting pet pigs on lots under one acre in size. The Court discussed testimony about the plaintiff's pig's impact on neighbors and expert testimony on its ability to transmit disease. The Court concluded that larger lot sizes would remedy those problems. Pls. Br. 13–14; *Sanchez*, 268 Ga. at 522–24. The Secretary ignores the Court's analysis just as he ignores large swaths of the record in this case. *See* Part II *infra*. *Sanchez* applied meaningful review that typifies how this Court engages with the facts. *See also 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).

Next, the Secretary argues that *Sanchez*'s test is "limited to the municipal police-powers context, and in any event was overruled altogether in *King v. City of Bainbridge*, 276 Ga. 484, 488 (2003)." Def. Br. 20. This is incorrect. First, *King*

did not overrule *Sanchez*. *King*, which was about federal preemption of zoning regulations, did not cite or discuss *Sanchez*. *King* merely stated, without explanation, that a single case cited by *Sanchez* (*Cannon v. Coweta County*, 260 Ga. 56, 58 (1990)) was "wrongly decided," not that it used the wrong legal standard. *King*, 276 Ga. at 488. In any event, *Advanced Disposal Services Middle Georgia, LLC v. Deep South Sanitation, LLC*, a case decided nine years after *King* and relied on by the Secretary, extensively quotes the very language from *Sanchez* that the Secretary claims *King* overruled. 296 Ga. 103, 105–06 (2014).

Second, *Sanchez* is not limited to the municipal police-powers context. The Secretary cites nothing to suggest that the state has more power to violate the Constitution than municipalities do and is thus subject to a less strenuous due process test. To the contrary, the Court has cited *Sanchez* in due process challenges to state statutes. *See, e.g.*, *Ga. Dep't of Hum. Res. v. Sweat*, 276 Ga. 627, 629 nn.7, 8, 10 (2003) (challenging statutory child support guidelines); *Barnhill v. State*, 276 Ga. 155, 156 n.8 (2003) (challenging statute regulating driver's licenses). The Court used a test nearly identical to *Sanchez* in *Powell v. State*, a successful due process challenge to Georgia's sodomy statute. 270 Ga. 327, 334 (1998) ("[L]egislation must serve a public purpose and the means adopted to achieve the purpose must be reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon the persons regulated."). *Sanchez* is good law.

The Secretary's test bears no resemblance to *Sanchez*: "[I]f any arguable reason supports [the Act], it must be upheld, and the burden rests with the plaintiff to negate every conceivable rational basis for [it]." Def. Br. 10. Like the superior court's "plausible or arguable" test, the Secretary's test is a watered-down caricature of the federal rational basis test. Pls. Br. 11–13. The Secretary's test is wrong, and his criticisms of *Sanchez* fail.[9]

D. The sky will not fall if the Court applies meaningful review.

Perhaps sensing that the caselaw is not on his side, the Secretary emphasizes the "sweeping and unpredictable" consequences of striking down the Act. Def. Br. 26. The Secretary's catastrophizing is unfounded. Overturning the Act would not "wreak havoc on the State's professional licensing regime," Def. Br. 11, and open "licensure for doctors" to constitutional challenge, Def. Br. 2. Doctor licensing "realistically serves a legitimate public purpose, and . . . employs means that are reasonably necessary to achieve that purpose, without unduly

[9] Still, the Court does not need to rely solely on *Sanchez* for good examples of the proper test. The Court has used similar language in other cases. *See, e.g.*, *Rockdale County*, 243 Ga. at 465 (demanding a "real and substantial" connection between junkyard ordinance and its purpose and remanding case for evidentiary hearing); *Jenkins v. Manry*, 216 Ga. 538, 545 (1961) (striking down plumbing licensing law because there must be some "reasonable ground for [each] subclassification, some difference which bears a just and proper relation to the attempted subclassification," and "some reason connected with or growing out of [public health] relied on for justification of the ordinance"). *See also* Mom2Mom Global Br. 18–22 (collecting cases using various meaningful due process tests).

oppressing the individuals regulated[.]" *Sanchez*, 268 Ga. at 522. Doctors perform surgery and prescribe medication. Lactation care providers help women meet their breastfeeding goals. Pls. Br. 3–4. The undisputed record shows that unlicensed lactation care and services are safe. Pls. Br. 24. Unlicensed doctors are not.

Plaintiffs have never argued that under Georgia's due process standard, plaintiffs will always win. Pls. Br. 15 ("Plaintiffs will not always win their due process claims, but this Court takes them seriously."). Striking the Act down would not endanger the entire occupational licensing code and "inject uncertainty into the realm of economic regulation more generally." Def. Br. 11.

If the Court strikes down the Act, the sky will not fall.[10]

II. The undisputed record shows that the Act violates Plaintiffs' due process right to pursue an occupation because the Act will decrease access to lactation care and services.

As Plaintiffs demonstrated in their opening brief, the Act defeats its own purpose by reducing access to safe, quality lactation care and services. Pls. Br. 8–10, 22–29. The Secretary argues that the Act "satisfies rational basis review"

[10] In their opening brief, Plaintiffs briefly discuss *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), in which the Supreme Court of Texas applied meaningful due process review to hold that eyebrow threaders did not need to obtain cosmetology licenses. Pls. Br. 21. The Secretary devotes entire pages of his brief to criticizing *Patel*, *see* Def. Br. 11, 23–25, 30, but presents no actual evidence that the decision has proven "unworkable." Def. Br. 11. *Patel* was decided in 2015, and yet Texas's occupational licensing code still stands, and Texas's courts have not been clogged with frivolous constitutional challenges.

because it *could* "promote[] access to quality lactation care." Def. Br. 26. As shown above, the Secretary applies the wrong standard. "Could" is not enough under Georgia law. Plaintiffs have already shown that the Act does not "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. The Secretary's response misinterprets the Act and ignores large parts of the factual record.[11]

Plaintiffs' opening brief explains that "the most common challenge facing breastfeeding families is finding a lactation care provider," Pls. Br. 23, and that the

[11] The Secretary also makes several factual and legal misstatements. First, the Secretary wrongly asserts that IBCLCs "treat[] medical situations." Def. Br. 4. The undisputed record demonstrates that no lactation care providers treat medical conditions—only medical doctors can. *See* Pls. Br. 4 (citing R-516–17 (Secretary's expert testified that "treating a medical condition goes beyond the knowledge and training, clinical training of any of these credentials"), 652 (Plaintiffs' expert testified that "[n]either IBCLCs nor CLCs can diagnose or treat medical conditions. That is the work of doctors.")). Second, the Secretary incorrectly attributes testimony from one of Plaintiffs' lay witnesses, Tenesha Sellers, to Plaintiffs' expert. Def. Br. 4 ("As even Plaintiffs' expert agreed, [clinical services] require a 'deeper understanding of the scientific principles' behind lactation care." (quoting R-2184–85, which is Ms. Sellers' deposition)). Finally, the Secretary incorrectly asserts that the Act is not unique because "three other states license lactation consultants," and "Oregon also licenses only IBCLCs." Def. Br. 29 n.3. Plaintiffs agree that four states license lactation care providers. Pls. Br. 10 (stating that "four states have licensing laws"). Oregon's law, however, is not like the Act because it expressly exempts CLCs. Or. Rev. Stat. § 676.681(4) ("[Oregon's law] do[es] not require a person who is a certified lactation counselor to obtain a license . . . in order to perform [lactation consultation services]."). *See also* Amicus Br. of Healthy Children Project, Inc. 12–15 (explaining how lactation consultant licensing works in other states).

Act will put hundreds of lactation care providers, including Mary, out of work. Pls. Br. 8–10. The Secretary's response misinterprets the Act to make it seem like it will allow Plaintiffs to continue working in a limited capacity. *See* Def. Br. 7–8. In the principal appeal in this case, Plaintiffs explained why the Secretary's assertion that under the Act, "Plaintiffs may continue working as peers and counselors," Def. Br. 7, is incorrect.[12] The Act's definition of "lactation care and services," on the face of its plain text, is extremely broad and covers everything a lactation care provider does while working directly with mothers and babies. *Raffensperger v. Jackson*, No. S23A0017, Br. Appellees, 9–15. Accordingly, Mary's employer told her that she would be reassigned and will no longer be able to work directly with mothers and babies if the Act goes into effect. Pls. Br. 9. The Secretary has nothing to say about this. He also has nothing to say about rural and minority Georgians' lack of access to IBCLCs. *See* Pls. Br. 6–7, 9–10, 23–24 (explaining how IBCLCs are concentrated in urban areas and are less racially diverse than CLCs).

[12] Perhaps realizing that "this Court cannot rewrite statutes," *Elliott*, 305 Ga. at 223, the Secretary emphasizes the leniency of the rational basis test more than his interpretation of the Act. The Secretary seems to have abandoned the argument that the Act's exemption for perinatal educators means that all non-IBCLC lactation care providers are exempt from the Act. *See Raffensperger v. Jackson*, No. S23A0017, Br. Appellant 5 (arguing that the Act "does not preclude any provider from providing breastfeeding education and support to mothers for compensation"). As Plaintiffs explained in the principal appeal, that argument is wrong. Br. Appellees 15.

There is no evidence that any lactation care provider has ever harmed a mother or baby in Georgia (or anywhere else). Pls. Br. 10, 24. The record in this case identified *one* problem with lactation care and services in Georgia: access. The Act cannot solve that problem. In fact, it will make it worse. A law that defeats its own purpose cannot "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.

CONCLUSION

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

DATE: November 3, 2022

Respectfully submitted,

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