No. S23A0017

IN THE SUPREME COURT OF GEORGIA

BRAD RAFFENSPERGER,

Appellant/Cross-Appellee,

v.

MARY NICHOLSON JACKSON AND
REACHING OUR SISTERS EVERYWHERE, INC.,

Appellees/Cross-Appellants.

On Appeal from the Superior Court of Fulton County, State of Georgia
(Civil Action File No. 2018CV306952)

BRIEF OF MOM2MOM GLOBAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

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INTRODUCTION

Georgia courts must interpret the Georgia Constitution according to its "original public meaning," with a particular focus on language, history, and context. *Elliott v. State*, 305 Ga. 179, 181, 188 (2019). In holding that the Georgia Lactation Consultant Practice Act ("GLCPA") does not violate Georgia's Due Process Clause, the superior court did not consider the language, history, or context of that clause and instead analyzed whether there is any "plausible or arguable" reason that could have supported the Act. Final Order Denying Def.'s Mot. for Summ. J. and Granting Pls.' Mot. for Summ. J. ("Final Order") at 9–10. Applying the wrong test led to the wrong result. By excluding all but International Board Certified Lactation Consultants ("IBCLC") from providing lactation care, the Act does not promote access to breastfeeding or ensure safety for mothers and babies, let alone advance the other hypothetical goals proffered by the Secretary and superior court. And even though the superior court reached the right result with respect to Plaintiffs' equal protection claim and enjoined the Act on that basis, it did so based on an incorrect "plausible or arguable" standard. This appeal allows the Court not only to clarify the proper test for due process and equal protection claims under Georgia's Constitution, but also to reverse the erroneous due process ruling.

In formulating the proper test for such claims, this Court should look to the text and history of Georgia's Due Process and Equal Protection Clauses, which show

that they are not carbon copies of their federal counterparts. The unique constitutional lineage of those clauses reveals that Georgia's rational-basis test examines whether the means adopted by the Legislature have a *fair and substantial* or *direct and real* relation to a legitimate governmental end, which is a higher level of scrutiny than the minimal rational-basis test applied in federal courts. The "plausible or arguable" test applied by the superior court adopts the watered-down federal standard and ignores how this Court has consistently invalidated irrational and nonsensical licensing restrictions like the one at issue here.

The superior court's use of the wrong test to reach a conflicting result demands correction from this Court, which observed long ago that the "right to make a living is among the greatest of human rights, and, when lawfully pursued, cannot be denied." *Schlesinger v. City of Atlanta*, 161 Ga. 148, 159 (1925). The superior court's ruling undermines that right. Absent correction from this Court, continued confusion over the proper level of scrutiny under Georgia's rational-basis test will lead courts in this state to uphold legislation that should not survive the scrutiny that Georgia law requires under the Due Process and Equal Protection Clauses.

INTEREST OF THE *AMICUS CURIAE*

Mom2Mom Global (dba Breastfeeding in Combat Boots) is a 501(c)(3) nonprofit organization that assists military families with breastfeeding care and support and works to increase access to accredited lactation professionals for

military families. Mom2Mom Global also advocates for civilian and military laws and policies that advance these goals. Georgia is one of three states—along with Texas and New Mexico—where Mom2Mom Global has multiple chapters (at Fort Gordon and Fort Stewart).

Military families face unique challenges when it comes to breastfeeding. Female servicemembers must learn how to breastfeed while fulfilling their military duties, which can include field exercises and deployment to remote locations. And women with a servicemember spouse are subject to frequent moves and often assume primary caregiving responsibilities for their children.

These breastfeeding challenges are particularly relevant to the state of Georgia, where the military has a strong presence—including nine major military installations, the nation's fifth largest active-duty population, and 750,000 veterans.[1] Moreover, spouses and their children account for a significant portion of military families. Demographic data show that 17.2% of active-duty personnel are female, while spouses and children account for 36.8% and 62.8% of active-duty family

[1] Governor's Defense Initative, *available at* https://www.georgia.org/governors-defense-initiative. Specifically, 62,642 active-duty Army, Navy, Air Force/Space Force, Marine Corps, and Coast Guard servicemembers reside in Georgia, along with 26,569 National Guard/reserve members across all branches and 33,888 civilian employees. *See* Number of Military and DoD Appropriated Fund (APF) Civilian Personnel Permanently Assigned, https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports (statistics as of June 2022).

members, respectively.[2] In addition, 37.2% of the children of active-duty members are under the age of 5.[3]

Serving as a lactation care provider is an invaluable service to military servicemembers and their families given the difficulties they face with respect to breastfeeding. A Certified Lactation Counselor ("CLC") credential is particularly helpful to military spouses (many of whom are unemployed or underemployed), who can use a career as a lactation consultant to help other military families while also having an extra source of income for their family. R-662 (¶ 13). It takes 52 hours of in-person training and passing an exam to obtain a CLC credential, and the trainings can be held at a variety of locations. R-660 (¶ 7).

In an effort to expand lactation consulting services, Mom2Mom recently created the "Military Lactation Counselor (MiLC)" credential. R-662 (¶ 12); Deposition of Amy Smolinski ("Smolinski Dep."), R-4022–23 (30:13–31:12). The training for the MiLC credential is similar to CLC training but targeted towards military families. *Id.* The goal of the MiLC is to expand access to lactation counseling services for families and also give military spouses another way to obtain

[2] Profile of the Military Community: 2020 Demographics at iii, 98, *available at* https://download.militaryonesource.mil/12038/MOS/Reports/2020-demographics-report.pdf.

[3] *Id*. at 100.

a lactation counseling credential to support a career, as these spouses often face barriers to obtaining other credentials like the IBCLC. *Id.* The training program is in a hybrid format with online training, external assignments completed in a servicemember's own community, and a telehealth lactation internship. R-4023–24 (Smolinski Dep. 31:13–32:13). The program requires more than 45 hours of work to complete and is recognized as a continuing education option for those with an IBCLC credential. *Id.* at 32:14–33:8.

By contrast, an IBCLC certification 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-706, 713 (¶¶ 14, 84). Most military spouses lack the necessary time and financial resources to complete the required coursework and training for the IBCLC certification. R-662–64 (¶¶ 12–18), 706 (¶ 44). Thus, should the GLCPA take effect, it will cause military mothers to lose portable and useful careers as lactation consultants.

The GLCPA threatens to undermine military families in another way. The military healthcare program (TRICARE) provides Childbirth and Breastfeeding Support Demonstration ("CBSD") services, but there are certain gaps in coverage. For instance, not every TRICARE plan covers those services, and coverage for CBSD services is a five-year demonstration project that will run until December 31,

2026.[4] Furthermore, TRICARE covers lactation counseling services from both IBCLCs and CLCs,[5] which means that military servicemembers or spouses in Georgia who have obtained a CLC certification would risk violating the Act or would have to forego their career as a lactation care provider (or obtain the time-consuming and expensive IBCLC credential). The Act would therefore create a significant shortfall in lactation care and services for military families. There are only 478 IBCLCs in Georgia and only 162 of them are actively licensed. R-720 (¶¶ 107–08). Meanwhile, the vast majority of IBCLCs are located around Atlanta, which is problematic for military families given that nearly all of the state's military bases are located near smaller cities or in rural areas.[6] R-663–65 (¶¶ 14–18), R-720 (¶¶ 109–10).

In sum, regardless of the GLCPA's stated intent, the Act will jeopardize the ability of Georgia military families to obtain quality lactation care services. And should other states enact laws similar to the GLCPA, its harmful effects will spread

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[4] *See* TRICARE Childbirth and Breastfeeding Support Demonstration, https://www.tricare.mil/Plans/SpecialPrograms/CBSD (last accessed Oct. 25, 2022).

[5] *See* https://www.tricare.mil/CoveredServices/IsItCovered/BreastfeedingCounseling (last accessed Oct. 25, 2022).

[6] For instance, there are no IBCLCs located in Columbus (near Fort Benning), Albany (near Marine Corps Logistics Base Albany), or Valdosta (Moody Air Force Base). *Compare* R-688 (map showing locations of IBCLCs), *with* https://www.dca.ga.gov/node/4132 (list of Georgia military bases).

to military families throughout the country. For all these reasons, Mom2Mom Global has a substantial interest in this litigation.

ARGUMENT

I. GEORGIA'S DUE PROCESS AND EQUAL PROTECTION CLAUSES AFFORD GREATER RIGHTS THAN THEIR FEDERAL COUNTERPARTS.

The superior court's rejection of Plaintiffs' due process claim and the Secretary's effort to overturn the court's equal protection ruling suffer from the same original sin: the failure to interpret the Georgia Constitution according to its "original public meaning." *Elliott v. State*, 305 Ga. 179, 181 (2019). In applying rational-basis review to Plaintiffs' due process claim, the superior court relied on case law addressing federal due process claims or treating state and federal claims interchangeably. *See* Final Order at 9. The Secretary makes the same error on appeal with respect to Plaintiffs' equal protection claim. *See* Appellant Br. at 18.

That common error allows this Court not only to affirm the proper test for due process and equal protection claims under Georgia law but to reach the right result under that test—holding that the Act violates both provisions of Georgia's Constitution. As explained below, the required original public meaning analysis establishes that the Due Process and Equal Protection Clauses of Georgia's Constitution afford greater rights than their federal counterparts, which means that rational-basis review for these claims is more rigorous than what the superior court

used for the due process claim or the Secretary seeks for the equal protection claim.

A. The Superior Court Did Not Follow the Correct Framework for Interpreting Georgia's Constitution.

This Court "interpret[s] the Georgia Constitution according to its original public meaning," with particular attention to the "language, history, and context" of the provision at issue. *Elliott*, 305 Ga. at 181, 188. Unlike the United States, Georgia has had "ten constitutions since declaring independence from Great Britain." *Id.* at 182. So in addition to ascertaining the original public meaning of the current state constitution—the 1983 Constitution—this Court employs three other interpretive principles in light of Georgia's unique constitutional history.

The first principle is the "presumption of constitutional continuity," under which this Court presumes that a provision "retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution," absent contrary indication. *Id.* at 182–83. The second, a corollary of the first, is that a provision that is readopted into a new constitution and that "has received a consistent and definitive construction" is presumed to reincorporate that prior construction. *Id.* at 184; *see also Thompson v. Talmadge*, 201 Ga. 867, 885 (1947) (noting that when the framers of a new constitution readopt a provision from a former constitution "to which a certain construction has been given," they are "presumed as a general rule to have intended that these provisions should have the meaning attributed to them under the earlier

instrument"). The third principle is that the rights protected under the Georgia Constitution are not necessarily coterminous with similar provisions of the U.S. Constitution. *Elliott*, 305 Ga. at 187–88. Decisions of the U.S. Supreme Court interpreting identical or similar provisions in the U.S. Constitution are persuasive only to the extent they "actually were guided by [the] same language, history, and context" as the Georgia constitutional provision. *Id.* at 188.

The superior court failed to address those principles in determining that rational-basis review requires only a "plausible or arguable" connection to a legitimate state interest. Final Order at 9–10. It instead relied on two cases that did not analyze the language, text, or history of the Due Process Clause and instead erroneously mimicked the analysis for federal claims. *See id.* at 9 (citing *Barzey v. City of Cuthbert*, 295 Ga. 641, 645 (2014) (addressing claim that statute violated "federal constitutional rights to due process and equal protection") and *Women's Surgical Ctr., LLC v. Berry*, 302 Ga. App. 349, 354 (2017) (treating federal and state claims interchangeably)). The *Barzey* case relied on another decision with a similarly deficient pedigree. *See State v. Nankervis*, 295 Ga. 406, 408 (2014) (citing *Harper v. State*, 292 Ga. 557, 560 (2013) ("When defendants raise challenges based upon the Equal Protection Clauses of both the State and Federal Constitutions, because the protection provided in the Equal Protection Clause of the United States

Constitution is coextensive with that provided in Art. I, Sec. I, Par. II of the Georgia Constitution of 1983, we apply them as one.") (quotation marks omitted)).

This series of decisions leaves no doubt that the superior court failed to conduct the required analysis and instead relied on previous decisions that have parroted the federal standard. The Secretary makes the same mistake with respect to Plaintiffs' equal protection claim. *See* Appellant Br. at 18 (citing *Harper*).

B. Georgia's Due Process Clause Affords Greater Protection to Economic Liberty than the Federal Clause.

In contrast to the approach adopted by the superior court, an analysis of the language, history, and context of Georgia's Due Process Clause shows that it affords greater protection—including to economic liberty—than its federal counterpart.

According to the seminal treatise on Georgia's Constitution, a form of the due process right was first guaranteed in Georgia's colonial charter, which provided that the "by laws, constitutions, orders and ordinances, pains and penalties from time to time to be made and imposed" by the colonial trustees "be reasonable and not contrary to the laws and statutes of this our realm." WALTER MCELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA § 1104 (Harrison Company 1912).

The modern Due Process Clause was added to the Georgia Constitution in 1861, when the state first ratified a Bill of Rights. The original clause 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 clause was readopted in 1868 with nearly

identical language: "No person shall be deprived of life, liberty, or property, except by due process of law." GA. CONST. OF 1868, art. I, § 3. It has remained unchanged ever since. *See* GA. CONST. OF 1983, art. I, § 1.

It is well-established that Georgia's Due Process Clause protects economic liberties, including the right to practice a lawful occupation. *See Jackson v. Raffensperger*, 308 Ga. 736, 740 (2020) ("[W]e have long recognized that the Georgia Constitution's Due Process Clause entitles Georgians to pursue a lawful occupation of their choosing free from unreasonable government interference."). McElreath noted that "[t]he right of private property, is coordinate with and stands upon the same footing as rights of personal liberty and of personal security." MCELREATH, § 1104. Early twentieth-century decisions confirm that position. *See, e.g.*, *Se. Elec. Co. v. City of Atlanta*, 179 Ga. 514 (1934) (invalidating an electrician licensing law on due process and equal protection grounds); *Henry v. Campbell*, 133 Ga. 882 (1910) (striking down municipal plumbing ordinance on due process and equal protection grounds). And as this Court put it in *Schlesinger v. City of Atlanta*, "[t]he right to make a living is among the greatest of human rights, and, when lawfully pursued, cannot be denied." 161 Ga. 148, 159 (1925).

Georgia's protection of economic liberties was not an outlier. Up to the mid-1930s, the United States Supreme Court took a similar approach to the federal due process clause. Consider *Allgeyer v. Louisiana*, where the Supreme Court struck

down a Louisiana statute barring contracts with out of state marine insurance companies who refused to comply with Louisiana law (*e.g.*, by neglecting to appoint an in-state agent). 165 U.S. 578, 589 (1897). The Court held that the word "liberty" in the federal due process clause encompassed more than "the right of the citizen to be free from the mere physical restraint of his person," and included the right "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." *Id.* The Court later invalidated numerous economic regulations on due process grounds. *See, e.g.*, *Adams v. Tanner*, 244 U.S. 590 (1917) (invalidating Washington statute that prohibited employment agencies from collecting any fees for their services); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating Kansas law banning "yellow-dog contracts"—employment contracts under the terms of which an employee is prohibited from joining a union).

During this period of overlap, the state and federal approaches to economic rights under the due process clause were essentially indistinguishable—both Courts engaged in meaningful judicial review to invalidate unreasonable economic regulations on due process grounds. The United States Supreme Court shattered that shared approach in 1938, holding in *United States v. Carolene Products Co.* that "regulatory legislation affecting ordinary commercial transactions" is

unconstitutional only if "it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." 304 U.S. 144, 152 (1938). In contrast, the Court suggested that heightened scrutiny should be applied to laws that curtail important personal liberties, restrict the political process, or discriminate against "discrete and insular minorities." *Id.* at 152 n.4. The United States Supreme Court later cemented that bifurcated approach to economic rights and personal liberties. *See, e.g.*, *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (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, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

Georgia courts did not follow the U.S. Supreme Court's newfound approach. As one legal scholar commented in 1959, the Georgia Supreme Court "has shown no tendency to be influenced by the new attitude of the Supreme Court of the United States toward economic regulation" and "continues to adhere to the doctrines and reasoning of the decisions before 1930." Hugh William Divine, *Interpreting the Georgia Constitution Today*, 10 MERCER L. REV. 219, 220, 224 (1959). If anything, in the decades following the U.S. Supreme Court's shift, the Georgia Supreme Court appeared to apply *greater* scrutiny to cases implicating economic rights—an apparent inversion of *Carolene Products*' footnote four. *See id.* at 222

& n.21 (observing "a stronger presumption of constitutionality in cases deciding [First Amendment] issues than in cases deciding the constitutionality of economic regulations," which "is the converse of the idea suggested by the note to *United States v. Carolene Products Co.*").[7]

This Court's principles for constitutional interpretation support Georgia's refusal to relegate economic rights to second-class status. The presumption of constitutional continuity means that the 1983 Framers reincorporated the vigorous protections afforded economic rights by prior decisions of this Court interpreting the Due Process Clause. *See Elliott*, 305 Ga. at 182–83. And because federal cases like *Carolene Products* and *Lee Optical* deviated from the once-shared history of the state and federal due process clauses, post-1938 Supreme Court decisions are unpersuasive as they relate to Georgia's Due Process Clause. *See id.* at 188.

C. Georgia's Equal Protection Clause Similarly Affords Greater Protection to Economic Rights than its Federal Counterpart.

Georgia's Equal Protection Clause shares a similar constitutional lineage. That clause dates back to the Constitution of 1861, when it was included in the state's first formal Bill of Rights ("the Declaration of Fundamental Principles"). *See* GA. CONST. OF 1861, art. I, § 3. The first sentence of the clause has, aside from the

[7] *See also, e.g.*, *Jenkins v. Manry*, 216 Ga. 538, 545–46 (1961) (plumbing licensing law that exempted employees of public utility corporations violated due process); *Bramley v. State*, 187 Ga. 826, 839 (1939) (invalidating photographer licensing law).

excision of a comma, remained unchanged since 1868: "*Protection to person and property is the paramount duty of government, and shall be impartial and complete*." GA. CONST. OF 1868, art. I, § 1. Significantly, these words appear in no other state constitution. In 1983, the Equal Protection Clause took its current form when a second sentence was added, providing that "[n]o person shall be denied the equal protection of the laws." GA. CONST. OF 1983, art. I, § 1, ¶ 2. This newly appended language is, of course, similar to the federal analogue. *See* U.S. CONST. amend. XIV (providing that "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws").

In addressing the 1983 amendments, this Court recognized that "[t]he Georgia Constitution offers Georgia citizens greater rights and more benefits than the Federal Constitution" and that if the first sentence merely duplicates the second, then the first "becomes 'inoperative,' 'idle,' and 'nugatory.'" *Denton v. Con-Way S. Express*, 261 Ga. 41, 45 (1991). The Court accordingly "refuse[d] to obliterate an entire sentence in [the] Bill of Rights."[8] *Id*. This Court has also stated that "Art. 1, sec. 1,

[8] The year after *Denton*, this Court held in an about-face that "[t]he addition of the second sentence to the second paragraph of the 1983 Constitution does not require a new equal protection rule in this state." *Grissom v. Gleason*, 262 Ga. 374, 375 (1992). The Court further noted that, since the adoption of the 1983 Constitution, "we have reiterated that the protection of the equal protection clause in the 1983 Georgia Constitution and the United States Constitution is coextensive," and that the Court had treated the "impartial and complete" provision as comparable to the Fourteenth Amendment's Equal Protection Clause since at least 1906. *See id.* at

par. 2 of the Constitution, which declares that 'protection to person and property is the paramount duty of government, and shall be impartial and complete,' *means something*, and it places upon the Judiciary the duty to afford that protection." *Ellis v. Parks*, 212 Ga. 540, 541 (1956) (emphasis added).

This Court's early equal protection jurisprudence confirms the breadth of the "impartial and complete" provision. In 1910, for example, the Court struck down a City of Atlanta plumbing ordinance in one of the first equal protection challenges to an occupational licensing law under Georgia's Constitution. *See Henry v. Campbell*, 133 Ga. 882 (1910). The plaintiff in *Henry* was denied a license because, although he was experienced and competent in the field of plumbing, his limited education prevented him from passing the written examination required by the board of plumbing examiners. *Id*. at 882–83. The ordinance, however, permitted plumbing firms to obtain licenses for *all* of their plumber employees based on the issuance of a permit to *one* employee. Because the ordinance arbitrarily distinguished between applicants based on whether they were employed by a firm, the Court held that the

375–76 (citing *Ga. R. & B. Co. v. Wright*, 125 Ga. 589, 601 (1906), *rev'd on other grounds*, 207 U.S. 127 (1907), which did not offer any analysis of the language, history, and context of Georgia's Equal Protection Clause). Notably, the majority in *Grissom* stated that "[w]e do not foreclose the possibility that this court may interpret the equal protection clause in the Georgia Constitution to offer greater rights than the federal equal protection clause as interpreted by the United States Supreme Court." *Id*. at 376 n.1.

conclusion was "inevitable" that the ordinance was "discriminatory" and therefore void. *Id*. at 886–87. Similar rulings invalidating occupational licensing laws on equal protection grounds followed.[9] And like the Due Process Clause, early scholarship on the Equal Protection Clause confirms that the framers intended that economic rights be zealously protected. *See* MCELREATH § 1103 (observing that the "impartial and complete" clause provided the guarantee to the citizens of Georgia that "[t]he right of private property is sacred in the eyes of the law and stands upon the same foundation as the coordinate rights of personal liberty and personal security ….''). Georgia courts maintained that approach even after the U.S. Supreme Court decided *Caroline Products* in 1938. *See* Divine, *supra*, at 220, 224.

There are salutary reasons why this Court should continue to blaze its own constitutional paths. When construing Georgia's Constitution, this Court is not held captive to the ever-evolving jurisprudence concerning the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *See State v. Turnquest*, 305 Ga. 758, 770 (2019) ("[I]t is difficult to conceive how or why Georgians would delegate

[9] *See, e.g.*, *Gregory v. Quarles*, 172 Ga. 45, 49 (1931) (invalidating law that arbitrarily distinguished between "original work and repair work" without a reasonable public health rationale); *Se. Elec. Co. v. Atlanta*, 179 Ga. 514, 514 (1932) (invalidating law that, among other things, arbitrarily required electrical contractors to pass an examination but exempted electrical workmen who actually installed the electrical equipment); *Dewell v. Quarles*, 180 Ga. 864, 866–67 (1935) (invalidating law that arbitrarily gave discretion to mayor and general council to confer licenses on applicants who failed examination).

to the United States Supreme Court the authority to alter the meaning of the Georgia Constitution by unknown future federal decisions."). The rights secured by the Georgia Constitution are not merely generic formulations of the brand-name rights prescribed by the U.S. Constitution. Nor must this state's constitutional text conform with perfect synchronicity to the latest doctrinal labels approved by five out of nine justices on the U.S. Supreme Court.

II. GEORGIA'S RATIONAL-BASIS TEST IS NOT THE SAME AS THE RATIONAL-BASIS TEST EMPLOYED IN FEDERAL COURTS.

Just as Georgia's Due Process and Equal Protection Clauses are different from their federal counterparts, so too does rational-basis review under Georgia's Constitution vary from the test traditionally applied in federal courts. Namely, this Court has held that, to avoid violating Georgia's Equal Protection and Due Process Clauses, the government's classifications must be "reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relation* to the [government's] legitimate objectives." *Clark v. Singer*, 250 Ga. 470, 472 (1983). The superior court failed to grapple with the "fair and substantial" language employed in this Court's precedents, much less explain why the "plausible or arguable" formulation it used is appropriate or why the deference afforded by the federal and state tests are commensurate.

The "fair and substantial relation" test was first applied in a majority opinion of the Georgia Supreme Court in 1940. *See Indep. Gasoline Co. v. Bureau of*

Unemployment Comp., 190 Ga. 613, 616 (1940) (noting that "a classification must be reasonable and have a fair and substantial relation to the object of the legislation" and invalidating unemployment compensation provision that violated equal protection guarantee). Seven years later, the "fair and substantial relation" test was similarly invoked in the case of *Geele v. State*, 202 Ga. 381 (1947), which invalidated a law on equal protection grounds because it required that certain hotels and inns maintain fire escapes *unless* their guests were charged less than two dollars per day. Notably, the Court rejected the State's argument that the classification at issue was necessary to ensure lodging for persons unable to pay two dollars per day (since the costs to comply with the fire escape requirement might lead to rate increases). *Id*. at 387–88. According to the Court, because the amount that guests were charged bore "no conceivable relation to the danger of the fire," the classification was arbitrary. *Id*. at 388. In subsequent decades, the Court continued to employ this "fair and substantial relation" test.[10]

Other decisions of this Court have employed slightly different—though similar sounding—articulations of the rational-basis test. For example, in *Simpson*

[10] *See, e.g.*, *Mansfield v. Pannell*, 261 Ga. 243, 244 (1991) (invalidating statute-of-limitations law under "fair and substantial" test); *Jones v. Jones*, 259 Ga. 49, 50 (1989) (invalidating interspousal immunity law under "fair and substantial" test); *Bailey Inv. Co. v. Augusta-Richmond Cty. Bd. of Zoning Appeals*, 256 Ga. 186, 187 (1986) (invalidating zoning ordinance under "fair and substantial" test).

v. State, the Court stated that

> it is well established by decisions of this court that [the "impartial and complete"] clause of the Constitution allows classification by legislation when and only when the basis of such classification bears a *direct and real relation* to the object or purpose of the legislation . . . .

218 Ga. 337, 338 (1962) (emphasis added). In that case, the Court held that a law prohibiting the sale of obscene materials was unconstitutional because it arbitrarily exempted licensed radio stations, television stations, moving picture theaters, and newspapers.[11] *Id*. at 338–40. This Court has used the same language when applying the rational-basis test to due process claims. *See Cannon v. Ga. Farm Bureau Mut. Ins. Co.*, 240 Ga. 479, 482 (1978); *see also Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 887 (1975) (same). Notably, Georgia appears to be the only state that employs this "direct and real relation" language in describing its rational-basis test.

Other cases have held that Georgia's Constitution requires "that the means adopted have some *real and substantial relation* to the object to be attained." *Rockdale Cty. v. Mitchell's Used Auto Parts, Inc.*, 243 Ga. 465, 465–66 (1979) (emphasis added); *see also Bd. of Comm'rs v. Guthrie*, 273 Ga. 1, 4 (2000) (applying

[11] *See also, e.g.*, *Glenn v. State*, 282 Ga. 27, 28 (2007) (applying "direct and real relation" test); *Morgan Cty. Bd. of Comm'rs v. Mealor*, 280 Ga. 241, 243 (2006) (same); *Roberts v. Burgess*, 279 Ga. 486, 487 (2005) (same); *Kendrix v. Hollingsworth Concrete Prods.*, 274 Ga. 210, 210 (2001) (same); *State v. Callaway*, 236 Ga. 613, 614 (1976) (same).

"real and substantial" test to due process claim).[12]

To be sure, Georgia courts have not always been consistent in articulating the relevant standard, and many courts have simply echoed federal cases when applying rational-basis review. That said, there is substantial support for the proposition that Georgia's rational-basis test—whether expressed as a "fair and substantial," "direct and real," or "real and substantial" test—requires courts to exercise a greater level of scrutiny than that applied in federal courts.

First, as the cases above demonstrate, Georgia's rational-basis test has real teeth. This much is apparent in the relative frequency with which Georgia courts have invalidated unconstitutional laws and regulations under rational-basis review, notwithstanding the due deference traditionally accorded to the policy choices of the political branches in exercising the government's police powers.

Second, the different rational-basis language employed in Georgia Supreme Court decisions *means something*. While many prior Courts have conflated the federal and state rational-basis tests—or, at a minimum, not remarked upon their differences—this Court at other times has made clear that the tests are, in fact, distinct. *See, e.g.*, *Cannon*, 240 Ga. at 481–82 (noting that "[u]nder the Federal Constitution, the underinclusive coverage of a law involving only economic interests

[12] *See also, e.g.*, *Parking Ass'n v. City of Atlanta*, 264 Ga. 764, 765 (1994) (same); *Eubanks v. Ferrier*, 245 Ga. 763, 766 (1980) (same); *Geele*, 202 Ga. at 386 (same).

does not make it unconstitutional where there is no invidious discrimination, but rather only rational classification," whereas the due process and equal protection "guarantee[s] of our State Constitution" require that a classification "bear[] a *direct and real relation* to the object or purpose of the legislation") (emphasis added).

Third, the U.S. Supreme Court has suggested that requiring that a classification bear a "fair and substantial relation" to a legitimate governmental objective necessarily entails a higher level of scrutiny than the traditional federal rational-basis test. For instance, in *M. v. Superior Court*, the Supreme Court suggested that the "fair and substantial relation" test was akin to an intermediate form of scrutiny. *See* 450 U.S. 464, 468–69 (1981) (stating that "the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged," and listing as an example the "fair and substantial relationship" language in *Reed v. Reed*, 404 U.S. 71 (1971)); *see also Schweiker v. Wilson*, 450 U.S. 221, 244–45 (1981) (Powell, J., dissenting) (stating that "the Court should receive with some skepticism *post hoc* hypotheses about legislative purpose, unsupported by the legislative history" and, in such cases, "should require that the classification bear a 'fair and substantial relation,'" which is "marginally more demanding scrutiny").

Fourth, other state supreme courts have commented that similar tests utilized in their jurisdictions demand a more exacting form of scrutiny than that applied

under minimal rational-basis review. *See, e.g.*, *Boulders at Strafford, LLC v. Town of Strafford*, 903 A.2d 1021, 1028 (N.H. 2006) (describing "fair and substantial relation" test as a "middle-tier or intermediate scrutiny" test); *State v. Champoux*, 566 N.W.2d 763, 769 (Neb. 1997) (noting that the "real and substantial connection" test employed in Nebraska "require[s] a greater nexus between the legitimate governmental interest and the . . . regulation at issue than a mere rational relationship") (Gerrard, J., concurring); *Jones v. State Bd. of Med.*, 555 P.2d 399, 407 (Idaho 1976) (the "fair and substantial relation" test "poses a different and higher standard than the traditional restrained analysis of equal protection").

The Texas Supreme Court's opinion in *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), is highly instructive. The plaintiffs in *Patel* were practitioners of commercial eyebrow threading (a grooming practice mainly performed in South Asian and Middle Eastern communities). *Id.* at 73. In 2011, the Texas Legislature opted to regulate commercial threading by categorizing it as the practice of "cosmetology," thereby requiring commercial threaders to obtain at least an esthetician license in order to continue practicing. *Id*. This, in turn, required the threaders to attend at least 750 hours of approved training programs and pass a state-mandated test. *Id*.

The plaintiffs argued that the licensing statute and related regulations deprived them of due process under Texas's Constitution by violating their right to practice

their chosen profession free from unreasonable governmental interference. *Id*. at 74. After the State prevailed in its summary judgment motion in the lower courts, the Texas Supreme Court reversed and held that the eyebrow threading regulations violated the Texas Constitution's Due Course of Law provision. *Id*. at 91–92; *see also* TEX. CONST. art. I, § 19 (providing that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land").

In reaching this holding, the Texas Supreme Court sought to clarify the standard applicable to substantive due process/due course challenges to economic legislation.[13] It noted that "Texas judicial decisions in the nineteenth and early twentieth century indicated that the Texas Due Course of Law Clause and the federal Due Process Clause were nearly, if not exactly, coextensive." *Patel*, 469 S.W.3d at 84. During this period, Texas courts would sometimes state that "a proper review

[13] The Court observed that "Texas courts have not been entirely consistent" in their application of the relevant standard. *Patel*, 469 S.W.3d at 80. Indeed, the plaintiffs identified three different approaches adopted by Texas courts over the years: (1) the "real and substantial" test (the least deferential test); (2) "rational basis including consideration of evidence" (an intermediate test); and (3) "no evidence rational basis," in which economic regulations are upheld "if they have any conceivable justification in a legitimate state interest, regardless of whether the justification is advanced by the government or 'invented' by the receiving court." *Id*. at 80–82. Notably, they contended that twenty other states—including Georgia—utilize the "real and substantial" test. *See id.* at 81 & n.2 (citing *Rockdale Cty. v. Mitchell's Used Auto Parts, Inc*., 243 Ga. 465 (1979)).

involved examining the enactment for a 'real or substantial' relationship to the government's police power interest in public health, morals, or safety." *Id*. at 84–85. Over time, however, "[t]he federal landscape changed"—as signaled by the Supreme Court's decision in *Carolene Products*—and economic regulations were granted increasing deference. *Id*. at 86. As a result, some Texas courts began to adopt more deferential rational-basis tests in line with federal decisions, while others continued to adhere to the stricter "real or substantial" test. *Id*.

Ultimately, after examining its prior jurisprudence and the history of the due course of law language, the Texas Supreme Court rejected the argument that Texas's rational-basis test was equivalent to the federal test and adopted a more rigorous standard.[14] *Id*. at 87. Significantly here, the Court also held that "[a]lthough whether a law is unconstitutional is a question of law, the determination will in most instances *require the reviewing court to consider the entire record, including evidence offered by the parties*." *Id*. (emphasis added).

Whether phrased as a "fair and substantial," "direct and real," or "real and substantial" test, this Court's precedents establish that rational-basis review is more

[14] Specifically, the Court held that litigants challenging an economic regulation under Texas's Constitution "must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the 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." *Patel*, 469 S.W.3d at 87.

demanding than the minimal "plausible or arguable" standard employed by the superior court. Final Order at 10. The federal pedigree of the "plausible or arguable" test confirms that the superior court erred in employing this test.

This Court first articulated that standard in *City of Lilburn v. Sanchez*, relying on a U.S. Supreme Court decision and providing little explanation. 268 Ga. 520, 522 (1997) ("[A]ny plausible or arguable reason that supports an ordinance will satisfy due process." (citing *Flemming v. Nestor*, 363 U.S. 603, 611–12 (1960)).[15] But that was *seventeen years* after the 1983 Constitution was ratified. So unlike the rigorous standards that predate the 1983 Constitution, there is no presumption that the 1983 Framers were aware of or incorporated the "any plausible or arguable reason" test into the 1983 Due Process Clause. *See Elliott*, 305 Ga. at 182–83. And this Court should not look to the *Flemming* decision for guidance because that case postdates *Carolene Products* and articulates an extreme version of the diluted federal standard. *See* 363 U.S. at 611 (recognizing that "the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary

[15] The other cases employing this standard cite only to *Sanchez*. *See, e.g.*, *Adv. Disposal Servs. Middle Ga., LLC v. Deep S. Sanit., LLC*, 296 Ga. 103, 105–06 (2014); *Old S. Amusements*, 275 Ga. at 278. Although the *Sanchez* Court used deferential language, it actually applied the more searching level of scrutiny that Georgia courts have historically employed in due process challenges. *See* Br. of Cross-Appellants at 13–14. This provides another illustration why this Court should provide clarity as to the proper articulation of rational-basis review and how it should be applied.

classification, utterly lacking in rational justification"). *Flemming* is not "guided by [the] same language, history, and context" as Georgia's Equal Protection and Due Process Clauses and is unpersuasive. *See Elliott*, 305 Ga. 188.

This Court's case law amply refutes the notion that the rational-basis test pertinent to equal protection and due process challenges under Georgia's Constitution is a mere rubberstamp or that this Court's rational-basis review must be applied in lockstep with that of federal courts. *See Olevik v. State*, 302 Ga. 228, 234 n.3 (2017) ("[S]tate constitutions are not mere shadows cast by their federal counterparts, always subject to change at the hand of a federal court's new interpretation of the federal constitution."). This Court should seize the opportunity presented by this case to define the proper test and make clear that Georgia's rational-basis test is more demanding than its federal counterpart.

III. THE SUPERIOR COURT ERRONEOUSLY REJECTED PLAINTIFFS' DUE PROCESS CLAIM.

Although the superior court properly enjoined the Act on the ground that it violates Georgia's Equal Protection Clause, it did so based on the wrong test and then applied that test inconsistently with respect to Plaintiffs' due process claim.

In concluding that the Act does not violate due process, the superior court found that there were no fewer than six theoretical reasons that the General Assembly "could have relied upon" in passing the Act, though it was not able to pinpoint the precise rationale for the Act. *See* Final Order at 10 ("Based upon the

record, the Court finds that these reasons *may have included* any or all of the following[.]") (emphasis added). Georgia's rational-basis test does not permit courts to merely hypothesize various reasons why the legislature may have enacted a law and then assume that the law furthers one of those hypothetical reasons. Instead, courts must assess the actual evidence offered by the parties to ensure that the challenged enactment "bears a *direct and real relation* to the object or purpose of the legislation." *Simpson*, 218 Ga. at 338 (emphasis added); *see also Mitchell's Used Auto Parts, Inc.*, 243 Ga. at 465–66 (remanding to allow plaintiff to "*introduce evidence*" that ordinance had no "real and substantial relation" to public health and safety) (emphasis added).

The Act is not reasonably related to any of the six reasons the superior court identified and even directly conflicts with some of those purported objectives. For instance, the superior court hypothesized that the legislature could have enacted the GLCPA to "reduce the risk of harm that mothers and babies" may face and to "protect the public from fraud." Final Order at 11. But the record does not show how the Act's restrictive licensing scheme promotes either asserted rationale. For instance, the Secretary did not provide any evidence that a mother or baby has been harmed during lactation counseling or offer any reason why lactation services would be disproportionately susceptible to fraud. *See, e.g.*, R-617 (admitting that Secretary has no evidence "that any mother or baby was harmed by a person providing

lactation care and services in Georgia" before or after passage of the Act); R-2879; *see also Bramley*, 187 Ga. at 838 (invalidating law requiring photography licenses, noting absence of any showing that photography "afford[s] any greater or more peculiar opportunity for fraud than do most of the other common occupations of life"). Likewise, there is also no evidence that the Act helps "alleviate confusion about which type of providers offer clinical lactation care and services." Final Order at 11; *see, e.g.*, R-1523. And the superior court never even attempted to explain how an IBCLC credential protects the "intimate and confidential nature of lactation care" any more than another type of credential.

The remaining reasons proffered by the superior court do not pass muster under Georgia's rational-basis test either. The recognition that there are "substantial benefits of breastfeeding" as a basis for the Act only proves the lack of any "just and proper" relation to that reason. Final Order at 10; *see also Jenkins*, 216 Ga. at 545. The Act's restrictive licensing scheme will limit the number of lactation consultants in Georgia and thereby make it *more difficult* for mothers to obtain assistance with breastfeeding, a problem that would be particularly acute for military families in the state. R-720 (¶¶ 107–10); R-663–65 (¶¶ 14–18) (showing that there are few IBCLCs in regions where military bases are located). And the "recognition" that "some level of training is necessary" for lactation care ignores how other credentials (including the MiLC offered by Mom2Mom) also require training, including coursework and

other assignments to ensure that lactation consultants are sufficiently equipped. *See* R-4023–24 (Smolinski Dep. 31:13–33:8). Instead of promoting access to qualified lactation care, the Act does the opposite through its unreasonable and oppressive licensing scheme and therefore violates due process.

CONCLUSION

This Court should affirm the superior court's decision with respect to Plaintiffs' equal protection claim and reverse the superior court's due process ruling.

Respectfully submitted this 27th day of October, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2022 I served a true and correct copy of the foregoing **BRIEF OF MOM2MOM GLOBAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES/CROSS-APPELLANTS** upon all counsel of record via the Court's e-filing system. I further certify that I have this day electronically served a copy of this brief upon the following counsel of record:

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