No. S23A0017

In the
Supreme Court of Georgia

Brad Raffensperger,

Appellant,

v.

Mary Nicholson Jackson, et al.,

Appellees.

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

BRIEF OF AMICI CURIAE NATIONAL LACTATION CONSULTANT ALLIANCE, INC. AND GEORGIA PERINATAL ASSOCIATION

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I. THE INTEREST OF AMICI CURIAE IN THIS CASE.

The National Lactation Consultant Alliance, Inc. (NLCA) is a Georgia not-for-profit corporation formed in 2020. It is the only health care organization in the United States with the sole mission of ensuring mothers and babies can access clinical lactation care with an International Board Certified Lactation Consultant (IBCLC).

NLCA is led by a Board of Directors consisting of current and former Board Members of the following state, national and international associations and organizations:

- State breastfeeding coalitions, including the Georgia Breastfeeding Coalition
- The Georgia Perinatal Association
- Baby-Friendly USA
- The Human Milk Banking Association of North America
- The International Lactation Consultant Association (ILCA)
- The United States Lactation Consultant Association (USLCA)
- The Southeastern Lactation Consultants Association (the Georgia chapter of the USLCA)
- The International Board of Lactation Consultant Examiners (IBLCE)

In addition to being IBCLCs, NLCA Board Members hold other health care licenses: one is an Advanced Practice Nurse, three are Registered Nurses, and three

are Registered Dietitians. There are also two board members who are University Faculty Members and three who are La Leche League Leaders. Two NLCA leaders (the current President of the Board and the President of the Advisory Board) are members of the State Bar of Georgia and together have over 50 years of public health non-profit service in Georgia.

The NLCA Board includes current and former editors of the scientific journal *Clinical Lactation* and the Editorial Review Board of the *Journal of Human Lactation*; eight of the ten Board Members have published peer-reviewed scholarly manuscripts in the field of lactation, and one is the renowned textbook author of *Breastfeeding Management for the Clinician*.

These national leaders in clinical lactation care came together to form NLCA for one purpose: to advance health and patient safety by ensuring patients can access the health care provider(s) whose education, training and competencies meet their needs.

The Georgia Perinatal Association (GPA), a Georgia not-for-profit founded in 1977, is a multi-disciplinary organization of maternal and infant health care professionals. GPA membership includes physicians, midwives, nurses, lactation personnel, chiropractors, public health professionals, doulas, childbirth educators, therapists, other professionals and support staff. GPA works to improve perinatal outcomes through education, collaboration and in influencing state policy. GPA

members care for Georgia's pregnant women, from their first prenatal visit through their delivery and beyond, giving care and support to new mothers and their infants. As an organization, GPA strengthens the perinatal maternal infant community so that in every sector, specialists are able to effectively communicate information and knowledge, through evidence-based care and best practice guidelines—all with the goal of improving patient care and safety.

NLCA and GPA jointly offer this Amicus Brief to share our experience and expertise in both Georgia law and lactation consultation and to offer additional viewpoints on the issues before the Court in this case.

II. ARGUMENT AND CITATION OF AUTHORITIES.

Lactation scholars have long identified confusion in the Unites States about the training, education, and competencies of the myriad of lactation personnel. (R-3969). Hospitals, referring physicians, federal and state policymakers, and mothers are often unclear from whom to seek care and to whom to refer when facing urgent and emergent lactation-related medical problems. *Id*. There are over 15 certificate courses, with most courses consisting of two to five days of didactic education, resulting in certifications using acronyms such as CLC (Certified Lactation Counselor), CT (Community Transformers) working for ROSE (Reaching Our Sisters Everywhere), WIC (Women, Infant, and Children) Peer Counselor, CLE (Certified Lactation Educator), among many others. R-3969, 4907. However, the

certification that requires by far the most education, and the only one with a clinical training component, is the IBCLC certification, which combines approximately four semesters (two years) of college-level course preparation with hundreds of hours of clinical training. R-1698.

Each of the above credentials has its appropriate place in the lactation field, depending on the needs of the mother and infant(s). Nevertheless, the Journal of Human Lactation states:

> There is no dispute that the clinical IBCLC lactation professional, the lactation counselor/educator and the peer supporter are all needed and valued by breastfeeding families (U.S. Lactation Consultant Association, 2020b). While all may be equipped to provide breastfeeding education, they cannot all safely provide clinical lactation care (U.S. Lactation Consultant Association, 2020a). The IBCLC has evidence of efficacy from over 50 studies. (Haase et al., 2019; U.S. Lactation Consultant Association, 2019).

R-3978.

Only one certification requires accredited college courses and hands-on clinical care training including in-person, bedside training – the IBCLC. R-2550-51. For this reason, IBCLCs possess clinical expertise that no others in the lactation field possess.

This brief agrees with the trial court's due process finding, that the Georgia Lactation Consultant Act ("Act") does not violate the Appellee's due process rights because "there are plausible and arguable reasons that the Georgia General Assembly could have relied upon in determining that the State should license lactation consultants who are providing clinical lactation care and services and regulate the provision of clinical lactation care and services." R-4909. However, in its equal protection analysis, the trial court contradicts itself, finding that IBCLCs are similarly situated to all other non-IBCLC lactation personnel, despite undisputed testimony and facts in the record to the contrary. R-4916.

In equal protection cases, such as this one, that do not implicate a fundamental right or a suspect class, the rational basis test applies. *See Bunn v. State*, 291 Ga. 183, 186 (2012) (explaining that "the most lenient level of judicial review—'rational basis'—applies" to an equal protection claim "if neither a suspect class nor a fundamental right is implicated"). "Rational basis review involves a two-prong evaluation of the challenged statute. 'Initially, the claimant must establish that he is similarly situated to members of the class who are treated differently from him. Next, the claimant must establish that there is no rational basis for such different treatment.'" *Harper v. State*, 292 Ga. 557, 560 (2013) (*quoting Drew v. State*, 285 Ga. 848, 850 (2009)). "The burden of proof rests upon the claimant because the

statute is presumptively valid." *Stuart-James Co. v. Tanner*, 259 Ga. 289, 290 (1989).

The trial court erred by conflating the education, training and competencies of two very differently situated classes: IBCLCs and all other lactation personnel. The record is clear. The IBCLC and the Appellees do not have the same education, the same training, or the same competencies nor do they perform the same work. Therefore, the equal protection analysis should stop here, and there is no need to further analyze the Act under rational basis review.

However, even if the Act is examined under the rational basis standard, it survives that lenient test. The trial court based its finding that the Act fails rational basis analysis on the erroneous conclusion that the Act prevents CLCs and other lactation personnel from practicing their occupation. R-4917. This conclusion is incorrect. Other lactation personnel can continue to work for pay under the perinatal education functions exception of the Act. O.C.G.A. § 43-22A-13(2).

A. The Trial Court Erred When Finding IBCLCs to Be Similarly Situated to CLCs.

When interpreting the Act, the trial court resolved this case in favor the Appellees on cross motions for summary judgment. R-4903-04. The trial judge explicitly stated he applied Rule 56. *Id*.

In evaluating the appropriateness of a grant of summary judgment, appellate courts employ a de novo standard of review. *Parham v. Stewart*, 308 Ga. 170, 176,

(2020); *Cowart v. Widener*, 287 Ga. 622, 623 (2010). Therefore, this court "must review the record to determine if the trial court" properly granted summary judgment to the Appellees. *See City of Atlanta v. N. by Nw. Civic Ass'n, Inc.*, 262 Ga. 531, 536 (1992).

The trial judge found that CLCs and IBCLCs are "similarly situated" for equal protection purposes. R-4916. The trial court based this finding on the conclusion that the undisputed material facts show that IBCLCs and CLCs "perform the same type of work."[1] R-4914. This conclusion is flawed for three reasons.

First, the trial court misread this Court's instruction in *Jackson v. Raffensperger*, 308 Ga. 736, 741 (2020) and the cases cited in support thereof to mean it need only consider whether the IBCLC and the Appellees do the same general "type" of work to find them "similarly situated." The "same *type* of work" is not the "same work" that this Court gave in its instructions. R-4913-14 (emphasis added). That both non-IBCLCs and IBCLCs are lactation personnel or that a portion of IBCLC and non-IBCLCs' work (the education and support components) may overlap does not mean these very different members of the lactation are similarly situated for Constitutional purposes. Being educated to perform part of the services

[1] This amicus brief addresses the unintended consequences in health care of the trial court's description of "the same type of work" in sub-section II.C., *infra*.

within a scope of practice of another is not the same as being educated and trained to perform the whole scope of practice or the entire job.

Second, framing the classes at issue as IBCLCs and CLCs is incorrect.[2] The Appellees claim that all lactation personnel, regardless of education or training, should be able to perform lactation care and services. Thus, the classes at issue are (1) IBCLCs and (2) all others who work in the lactation field (lactation personnel) and, therefore, the trial court erred in comparing IBCLCs to only CLCs.

Third, while non-IBCLCs[3] and IBCLCs both work in the lactation field, this is not enough to deem them "similarly situated" for equal protection purposes. *See Lewis v. Chatham Cty. Bd. of Comm'rs*, 298 Ga. 73, 74-75 (2015) (magistrate judges and probate judges are not similarly situated for constitutional analysis). The record undisputedly shows that non-IBCLCs and IBCLCs undertake training and educational requirements of a significantly different rigor which results in different

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[2] Not only does the trial court conflate CLCs with all other types of lactation personnel — personnel such as La Leche League Counselors and Community Breastfeeding Educators (CBEs) whom receive even less education and instruction than CLCs (both approximately 20 hours of instruction) — it conflates all CLCs with Ms. Jackson, who has over three decades of experience, which is more experience than that possessed by the typical CLC. R-1646, 3969. For a more detailed analysis on why this is error, *see infra* at p. 13.

[3] In this brief, the term "non-IBCLC" refers to all lactation personnel who do not possess an IBCLC certification and who do not have nor are required to have a license under the Georgia Code.

roles among the two classes.[4] As a result, the record demonstrates that these two classes do not perform the same work.

One can obtain a CLC certificate without a high school diploma after a one-week class, without ever having held a live infant or having touched a human breast. R-1948. In contrast, to obtain an IBCLC certification, a candidate must: (1) pass two years of college health science courses, (2) complete 95 hours of lactation-specific education, (3) complete a minimum of 300 hours of direct clinical patient care in a mentored setting, and (4) pass an independent board examination. R-888, ¶ 35. Therefore, there is no dispute that the IBCLC has far more education and more lactation-specific education than any other non-IBCLCs in the lactation field.

Further, the IBCLC is the only credential-holder who is trained to perform clinical care with in-person, hands-on, bedside training as a prerequisite to certification. R-2550-51.[5] CLCs, ROSE CTs, and all other non-IBCLCs are not

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[4] This brief's position is not that non-IBCLCs and IBCLCs never perform similar work. As both are personnel in the lactation field, there is some overlap among their appropriate roles. This is no different than the overlap among the work of various healthcare team members, such as medical assistants and nurses. *See* discussion *infra*, at sub-section II.C. While both can help prepare patients for examinations, record patient information, or administer medications as directed by a doctor, a nurse's legal scope of practice also includes more clinical tasks, such as assessing patients' conditions and educating patients on coping with illnesses. O.C.G.A. §§ 43-26-12 and 41. Just as a broader, more clinically-focused scope of practice justifies a license requirement for nurses, it does so for IBCLCs as well.

[5] The trial court dismissed this point, stating that it "cannot conclude that IBCLCs and CLCs who have obtained different credentials are not similarly situated…for the

required to have any clinical training or hands-on patient care experience. R-2150, 4027. In fact, Karin Cadwell, the CEO of the Massachusetts company that educates CLCs, states that her CLC students do not provide hands on care; they are taught not to touch a mother or baby, using a "'hands off' technique." R-2587. Hands-on clinical care is not a skill of the CLC or any other non-IBCLC because they have not been clinically trained to perform this care. Put simply, while there is overlap in a few of the education and counseling tasks that all lactation personnel perform, it is well established and undisputed in the record that only the IBCLC is trained to provide clinical care. R-3814, 3816.

Because only IBCLCs are clinically trained, it is no surprise that the lactation field and the broader healthcare community recognize only IBCLCs in the clinical tier of lactation personnel. The ROSE CEO testified that "lactation care and services" is a "spectrum" and personnel are on a "continuum," with "beginning,

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sole reason that the prerequisites for obtaining the various credentials differ." R-4916. However, different amounts of education and training required to become an IBCLC and the lesser instruction associated with other certificate programs is a rational reason to single out IBCLCs for licensure. *See Foster v. Georgia Board of Chiropractic Examiners*, 257 Ga. 409, 419 (1987) (holding that "it is clearly within the province of the General Assembly to determine…only those persons admitted to the practice of medicine," not chiropractors, should be authorized to prescribe a course of vitamins). The year following the *Foster* decision, the General Assembly voted to modify the scope of practice for chiropractors, giving them authority to recommend nutritional supplements. OCGA § 43-9-16(i). This is a perfect example of the judiciary and legislative branches of government functioning as designed by the Constitution. If non-IBCLCs want to have a broader scope of services to provide clinical care, their remedy "is with the Legislature and not with the courts." *Id*.

intermediate, and expert services in care." R-2743. The three tiers of types of personnel in the lactation field — the peer supporter, next the educator/counselor, and finally the IBCLC and other clinicians at the clinical level — is a known, accepted concept in the lactation field. R-1771-72, 3480, 3524-25. These categories of lactation personnel are also well recognized within the broader healthcare community. A number of healthcare organizations and the United States government view the credentials and abilities of CLCs and all other non-IBCLCs differently from IBCLC-licensed lactation consultants.

The Women's Preventive Service Initiative, run by the American College of Obstetricians & Gynecologists (ACOG) and the United States Department of Health and Human Services, identifies "licensed lactation consultants, the IBCLC®, certified midwives, certified nurse-midwives, certified professional midwives, nurses, physician assistants, nurse practitioners, and physicians" as "[c]linical lactation professionals providing clinical care."[6] On the other hand, "[l]actation personnel providing counseling, education or peer support include lactation counselors/breastfeeding educators and peer supporters," such as CLCs. [7] While the

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[6] Women's Preventive Services Initiative, *Breastfeeding Services and Supplies*, WWW. WOMENSPREVENTIVEHEALTH.COM, https://www.womenspreventivehealth.org/recommendations/breastfeeding-services-and-supplies/ (last visited Aug. 23, 2022).

[7] *Id.*

IBCLC is identified as a "clinical lactation professional," the CLC, the ROSE CT and non-IBCLCs at issue in this case are not. Similarly, the Academy of Breastfeeding Medicine, an international organization of physicians who specialize in breastfeeding medicine, also differentiates "International Board Certified Lactation Consultants" from "breastfeeding educators" and "peer support[ers]."[8] Even the former United States Surgeon General, Dr. Regina Benjamin, stated that the IBCLC certification helps ensure "a consistent level of empirical knowledge, clinical experience, and professional expertise." R-1146, 1453.

This view of differing levels of expertise is reinforced by testimony in the record. Tenesha Sellers, Appellee's witness who has been a peer counselor and holds both a CLC and IBCLC certification, emphasized the differences between IBLCs and non-IBCLCs. R-2123-24, 2126. She testified that while those in the lactation field sometimes have overlapping roles, "the one that is completely different, most definitely, is going to the IBCLC's scope of practice." R- 2187. She further acknowledged that "a peer counselor or a CLC [may not] understand why something is happening" but "will know that something is not right." R-2186. Another witness for the Appellees, Ms. Flowers, who is both a CLC and a ROSE CT, testified that she does not believe a CLC should put her hands in a baby's mouth,

[8] Rosen-Carole et al., ABM Clinical Protocol #19: Breastfeeding Promotion in the Prenatal Setting, Revision 2015, 10 BREASTFEEDING MEDICINE 451, 451-53 (2015).

and thinks that only those with specialized training should do so. R-985, 4297. IBCLCs have that specialized training. They receive clinical, hands-on training to conduct an oral assessment to determine whether a baby's tongue can move laterally and "cup" around the nipple, among other training to make other oral observations. R-898-99, ¶68. Further, they regularly put this training to use, as IBCLCs routinely do oral assessments. R-3526, 3530.

Sellers also testified that CLCs know when to refer a matter to a doctor or other qualified healthcare professional. R-2153. When asked who qualifies as a "qualified healthcare professional," she replied "an IBCLC or a speech pathologist or an ENT maybe." *Id.* Sellers testified that a CLC would need to refer a mother to an IBCLC in cases where compatibility of breastfeeding with a medication was needed or if that mother or baby was dealing with a complex issue, such as mastitis. *Id.* If non-IBCLCs and IBCLCs performed the same work or even the "same type of work" at the same level of expertise, there would be no need for CLCs and other non-IBCLCs to refer mothers to IBCLCs.

The above testimony, along with respected healthcare and governmental organizations classifying only IBCLCs as "clinical lactation professionals," illustrates that non-IBCLCs and IBCLCs do not perform the same work. However, the trial court ignored this litany of undisputed evidence and exclusively relied on the testimony and experience of Ms. Jackson, one person, to find that *all* CLCs and

even other non-IBCLCs, "perform the same work" as IBCLCs and are "equally competent to do so."[9] R-4914-16. Yet, Ms. Jackson admitted that *no* clinical experience or mentorship is required before someone can become certified as a CLC. R-1423-24. For this reason, the trial court erred in focusing its analysis on Ms. Jackson when determining IBCLCs possess the same level of competency and perform the "same work" as all other lactation personnel, and therefore erred in finding the Appellee's satisfied the first prong of the equal protection analysis. Put simply, the record is clear that IBCLCs and all other non-IBCLCs are not similarly situated.

B. The Trial Court Erred When It Failed to Interpret the Perinatal Education Functions Exception According to the Rules of Statutory Construction, Which Allows Non-IBCLCs to Continue to Work for Pay Under the Act.

A fundamental principle of constitutional law is that a statute should be construed, if consistent with the statute's purpose and wording, to avoid constitutional issues. *Bd. of Pub. Educ. for City of Savannah v. Hair*, 276 Ga. 575, 576 (2003); *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568,

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[9] Ms. Jackson is a special case, as she has approximately 30 years of on-the-job experience working as a CLC. R-1646. There is no evidence in the record that any other CLCs have the same amount of experience as Ms. Jackson, and other non-IBCLCs have undergone even less lactation education. This is another reason the trial court erred. The Court should also note that Ms. Jackson has had the requisite education and clinical training that is required of an IBCLC applicant. The only reason she is not an IBCLC is because she has been unable to pass the certification examination. R-1648.

575 (1988); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991). When construing a statute, Georgia has basic rules. O.C.G.A. § 1-3-1.

The trial court erred when it failed to apply the basic rules of statutory interpretation to the Act. In its Order, the trial court found that:

> the Act does not prohibit any provider from continuing to provide breastfeeding **counseling**, support or encouragement, whether or not for compensation. For example, doulas and perinatal and childbirth educators may continue to perform "education functions consistent with the accepted standards of their respective occupations" under the Act. O.C.G.A. § 43-22A-13(2).

(emphasis added). R-4907-08. The trial court then simply announced that the Act's "exclusion of CLCs or other licensed and trained professionals is contrary to the Georgia Lactation Consultant Act's stated purpose." R-4917. However, the trial court failed to consider whether the perinatal education functions exception set forth in O.C.G.A. § 43-22A-13(2) allows CLCs and other non-IBCLCs to continue to work under the Act. For this reason, the trial court erred.

The perinatal education functions exception states:

> Nothing in this chapter shall be construed to affect or prevent: (2) … perinatal and childbirth educators from performing education functions consistent with the accepted standards of their respective occupations,

except such persons shall not use the title "licensed lactation consultant" or "licensed L.C." or designate themselves by any other term or title which implies that such person has the clinical skills and education comparable to a licensed lactation consultant.

Two basic rules of statutory interpretation are at play here. The first is "[i]n all interpretations of statutes, the ordinary signification shall be applied to all words…." O.C.G.A. §1-3-1(b). "A statute draws its meaning, of course, from its text," *Chan v. Ellis*, 296 Ga. 838, 839 (2015), and the text must be read "in its most natural and reasonable way, as an ordinary speaker of the English language would." "When we consider the meaning of a statute, we must presume that the General Assembly meant what it said and said what it meant." *Deal v. Coleman*, 294 Ga. 170, 172 (2013).

Applying that rule to O.C.G.A. § 43-22A-13(2) means that the trial court should have determined the meaning of the words "education functions," "consistent with the accepted standards of their respective occupations," and "perinatal educators." [10]

[10] Perinatal means "occurring in, concerned with, or being in the period around the time of birth." *Perinatal*, MERRIAM-WEBSTER DICTIONARY, 2022, https://www.merriam-webster.com/dictionary/perinatal (last visited August 20, 2022). In the health care context, the federal government, among others, has defined the term "perinatal" to mean the period "during pregnancy or up to one year after childbirth." National Institute of Health, *Department of Health and Human Services: Prevention of Perinatal Depression: Improving Intervention Delivery for*

The verb "educate" means "to train by formal instruction and supervised practice esp. in a skill…"[11] Here, the skill is breastfeeding.

"Function" – which the trial court overlooked entirely – is defined as "the action for which a person … is specially fitted …"[12] [13] The use and meaning of the word "functions" is modified by the statute's phrase "consistent with the accepted standards of their respective occupations." The words "standards of their respective occupations" necessarily connotes "functions." The word "functions," a deliberate choice by the General Assembly, ensures that the exception reaches beyond basic breastfeeding instruction to the counseling that lactation counselors, such as CLCs, give.

Another basic principle of statutory interpretation that the trial court overlooked is that courts should give effect to all parts of a statute, if possible. *Bibb Cnty. v. Hancock*, 211 Ga. 429, 440, 86 S.E.2d 511, 519 (1955); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (courts should "give effect, if possible, to every

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At-Risk Individuals (R34 Clinical Trial Required), WWW. NIH.GOV, https://grants.nih.gov/grants/guide/rfa-files/RFA-MH-21-241.html) (last visited Sep. 7, 2022).

[11] *Educate*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY. (10th Ed. 1996).

[12] *Function*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY. (10th Ed. 1996).

[13] For example, the trial court found that Appellee Jackson "helps others use various tools such as breast pumps." R-4915.

clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed"). "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

The trial court's interpretation of the Act renders meaningless the word "functions" because it only interpreted the word "education," but not the word "functions." In its Order, the trial court singled out the word "education." R-4902, 4905, 4906, 4907, 4915. By contrast, the word "functions" appears one time in the trial court's Order, quoting the statute. R- 4908. This oversight became obvious during oral argument when the trial court said:

> When I read that section [definition of "lactation care and services"], it talks about "education and consultation to provide lactation care." It makes it part of the definition. So, if education and consultation is part of the definition, didn't – then – wouldn't that preclude someone who's not an IBCLC-certified lactation consultant from providing education? I mean, at that point – the way I'm reading it is that, you know, if you're not the IBCLC, you can't provide education and consultation.

T-4974. The trial court did not construe the Act as a whole. "All parts of a statute should be harmonized and given sensible and intelligent effect, because it is not presumed that the legislature intended to enact meaningless language." *Grimes v. Catoosa Cnty. Sheriff's Office*, 307 Ga. App. 481, 483-84 (2010).

It is clear from the Act's language that "lactation care and services" includes "education," but also includes significant other clinical activities. O.C.G.A. § 43-22A-3(5). Indeed, the perinatal education functions exception was offered for the very purpose of ensuring others in the lactation field, such as "certified lactation counselors, community transformers, certified lactation educators," and others, could continue to work under the Act. R-1630, 3565-67. The exception's purpose was evident in the State's efforts to educate the public and the various personnel in the lactation field through a proposed rule that they were included as perinatal educators. *Id*. Further, within the lactation field, the term educator and counselor are often used interchangeably or together to denote the same role.[14] This Act was debated during eight public hearings and its language received input from multiple stakeholders, including ROSE, over the course of four years. R-3509. In fact,

[14] One such example is in current pending federal legislation: "(iii) PERINATAL HEALTH WORKER—The term 'perinatal health worker' means a doula, community health worker, **breastfeeding and lactation educator or counselor**, nutritionist or dietitian, childbirth educator, social worker, home visitor, or language interpreter." Advancing Maternal Health Equity Under Medicaid Act, H.R. 6612, 117th Cong. §2 (2021-2022) (emphasis added).

Kimarie Bugg, CEO of ROSE, expressed her approval for HB 649, the bill for the Act, stating that it "looks really good" and "is a great step…to assure all women and babies in [o]ur state can get the breastfeeding promotion, protection, and support they need." R-1865-66. Bugg also testified that "most mothers do not need clinical care," thus the work of these various educators, as the law is written, can continue unimpeded. R-2879. It is critical that *all* lactation care clinicians, counselors and educators continue to work, which is why the General Assembly created the perinatal education functions exception, so they can continue to pursue their various occupations.

Instead of applying the rules of statutory construction to the perinatal education functions exception, the trial court simply announced that the Act's "exclusion of CLCs…is contrary to the Georgia Lactation Consultant Act's stated purpose." R-4917. The trial court incorrectly found that "one group can work and the other cannot" under the Act because non-IBCLCs can continue to work for pay under the perinatal education functions exception. *Id*. Therefore, the Act does not reduce the number of lactation personnel in Georgia or "put hundreds of lactation [personnel] out of work" as the opposing party claims. *See* Brief of Cross-Appellants, Case S23X0018, at p. 25. The Act was designed to protect the health, safety, and welfare of Georgia citizens, and its provisions are rationally related to this purpose. R-3524; O.C.G.A. § 43-22A-2.

A sensible and plausible interpretation of all of the language in O.C.G.A. § 43-22A-13(2) does not put CLCs or other non-IBCLCs out of work. The trial court failed to interpret the phrase "consistent with the accepted standards of their respective occupations." The Appellees advocated their "accepted standards" during oral argument, specifically pointing out CLCs' Code of Ethics that instructs CLCs to "[r]efer clients to appropriate medical and other resources for issues beyond the certificant's scope of practice."[15] R-4953; *See also* Brief of Cross-Appellants, Case S23X0018, at p. 4 (CLCs "know to stay within their scope of practice." R-652, 668, 703, 712, 714, 987).

As noted above, CLCs are taught to know when to "refer a matter to a doctor or other qualified healthcare professional." R-2153. A "qualified healthcare professional" includes "an IBCLC." *Id.* Therefore, this Court should adopt an interpretation of the perinatal education functions exception that is consistent with the purpose of the Act and allows non-IBCLC personnel to perform education functions consistent with their respective occupations for pay.

Such an interpretation is consistent with the rules of statutory interpretation and constitutional law. The General Assembly's decision to allow only those trained in clinical care to perform "the clinical application" of "lactation care and services"

[15] Academy of Lactation Policy and Practice, *ALPP Code of Ethics for Certified Lactation Counselors,* WWW.ALPP.ORG, https://www.alpp.org/pdf/V-4-CLC-Code-of-Ethics.pdf (last visited Aug. 20, 2022).

O.C.G.A. § 43-22A-2(5), while carefully carving out the perinatal education functions exception to allow those without clinical training (non-IBCLCs) to continue to perform non-clinical education and counseling functions, was rationally related to the law's purpose of protecting the health, safety and welfare of the public and will help prevent harm to breastfeeding mothers and babies from inadequate lactation care. R-4474, ¶¶ 15, 17-18. This balance within the law was crafted after holding multiple public hearings and working with more than ten stakeholder organizations that supported IBCLC licensure, such as Georgia health care and medical societies, hospital systems and associations.[16] R-3510-11. Through the perinatal education functions exception, the General Assembly ensured all lactation counselors/educators and peer supporters may continue to work for pay following passage of the Act.

The reasonableness of the General Assembly's consideration of the Act is also shown by the fact it was enacted in 2016 but did not go into effect until 2018, giving other lactation personnel adequate time to become IBCLCs if they desired to become

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[16] ROSE and Jackson claim that the Act is "the product of advocacy by IBCLCs" and that "IBCLC Merrilee Gober helped draft the Act's language." Brief of Cross-Appellants, Case S23X0018, at p. 10. This statement mischaracterizes the number of stakeholders who shaped the language of the Act, which even included the Appellee in this appeal, ROSE. R-1865-66. While Ms. Gober did advocate for this legislation as the Board President of Healthy Mothers, Healthy Babies Coalition of Georgia, she is an OB RN and an attorney. She has never been an IBCLC and has no employment or income of any kind in the field of lactation. R-1689, 1692-93, 1715.

qualified to perform a clinical role.[17] O.C.G.A. § 43-22A-11. The rules of statutory construction demand that the trial court's Order be reversed on appeal.

C. The Trial Court's Order Ignores a Century of Established Healthcare Licensing Laws and the Reality of Overlapping Services in Healthcare, Creating Unintended Consequences with Risks to Patient Safety.

The trial court's order holds that if one class does the "same type of work" as another (even if the overlapping services are only a subset of the entire job, as is the case here), then they are similarly situated for constitutional purposes and may not be treated differently or separately licensed. R-4916. The trial court's decision ignores over a hundred years of healthcare licensing laws in Georgia. The majority of healthcare licensees do the "same type of work" as other healthcare licensees in Georgia; overlap of functions and services within health care is common.

For example, both unlicensed phlebotomists and licensed registered nurses can draw blood, but phlebotomists are not skilled to assist in surgery. Both anesthetists and anesthesiologists can administer anesthesia, but anesthetists and

[17] When this case was first before the Supreme Court for oral argument on January 14, 2020, the Court asked counsel for Jackson and ROSE, "If the Act allowed some period of time that you were practicing when the Act went into effect and within three years you had to do that, would that be an excessive regulation." Counsel for Jackson and ROSE responded, "[t]hat sounds more reasonable, but that's not what's happening here." Recording of Oral Argument at 12:51, *Jackson v. Raffensperger*, 308 Ga. 736 (2020), https://www.gasupreme.us/watch/oa-01-14-20/. Counsel never clarified for the Court that while the law did not have a three-year delay, it did have a two-year delay, and plaintiffs filed their lawsuit just days before the statutory delay of enforcement was set to expire. O.C.G.A. § 43-22A-11.

medical doctors are educated, trained, tested and licensed differently. Similarly, physical therapists, athletic trainers, massage therapists, occupational therapists, chiropractors and physicians who specialize in orthopedic medicine all have overlapping activities, work and skills, but none are similarly situated because their education and training renders each skilled to perform different healthcare services. These personnel often do the "same type of work," but because each has very different education and training, each has a separate state license in Georgia with a different legal scope of practice of work in order to protect the public.

Setting the minimum educational, training, and testing standards when there is risk of public harm has long been held to be the prerogative of the General Assembly in health care, as well as many other fields. *See, e.g., Black v. Blanchard*, 227 Ga. 167, 168 (1971) (legislature allowed to change educational and professional requirements for school superintendents); *Nathan v. Smith*, 230 Ga. 612, 613 (1973) (statute requiring elected solicitor to have practiced law for three years did not violate equal protection); *Baranan v. State Board of Nursing Home Administrators*, 143 Ga. App. 605, 606 (1977) (implementing continuing education requirements for nursing home administrator license renewal did not violate due process); *Cf. Sears v. Dickerson*, 278 Ga. 900, 902 (2005) (county commission could enact a testing certification requirement for appraiser staff).

Here, the trial court concluded – erroneously – that IBCLCs and non-IBCLCs are "similarly situated" because they "perform the same type of work." R-4913-16. The trial court's oversimplification of the phrase to "perform the same type of work" is a very dangerous precedent in the health care field. If this Court affirms the trial court's determination that a clinical health care professional, such as an IBCLC, and a counselor/educator, such as a CLC, "perform the same work," and thus cannot be distinguished under the law, a century of legal precedent and all health care licensing laws will become vulnerable to attack. It will lead to the dismantling of laws designed to delineate who is skilled to perform specific clinical functions based on education and training, jeopardizing patient safety. These unintended consequences are another reason to apply the principle of constitutional avoidance, to reverse the trial court's Order, and to find for the Secretary of State.

III. CONCLUSION.

In conclusion, this Court should determine that it is not necessary to address Appellees' constitutional claims because the General Assembly has given them an exception to perform their work for pay under O.C.G.A. §43-22A-13(2). Alternatively, this Court should find, as a matter of law, that because of the vast differences in education, training, testing, and competencies, and the undisputed evidence that IBCLCs and non-IBCLCs do not perform the same work, the

Appellees are not similarly situated to IBCLCs. As a result, Appellees' equal protection claim fails.

For all of the reasons asserted, Amici Curiae respectfully request that the Court reverse and grant summary judgment in favor of the Secretary of State.

Respectfully submitted, this 16th day of September, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2022, prior to filing the foregoing ***Brief of Amici Curiae National Lactation Consultant Alliance, Inc. and Georgia Perinatal Association*** with the Clerk of Court using the SCED e-filing system, I served counsel of record via email and by placing copies in U.S. Mail, postage prepaid and addressed as follows:

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