No. S23A0017

In the Supreme Court of Georgia

Brad Raffensperger,

Appellant,

v.

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

Appellees.

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

BRIEF OF *AMICI CURIAE* OCCUPATIONAL LICENSING SCHOLARS IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

Amici are economists Dr. Morris M. Kleiner, Dr. Alicia Plemmons, and Dr. Edward J. Timmons—three leading scholars studying occupational licensing.

Dr. Kleiner is Professor and AFL-CIO Chair in Labor Policy at the Humphrey School of Public Affairs at the University of Minnesota, a visiting scholar at the Federal Reserve Bank of Minneapolis and the Upjohn Institute for Employment Research, and a research associate with the National Bureau of Economic Research in Cambridge, Massachusetts. He has published numerous books and articles spanning over two decades of research, with a particular focus on occupational regulation and its effect on quality and costs.

Dr. Plemmons is an Assistant Professor of Business in the Department of General Business at West Virginia University, a Research Fellow of the Knee Center for the Study of Occupational Regulation, and co-founder and leader of the Scope of Practice and Medical Licensure Research Group. Her research as a regulation economist has been published in several academic journals, including the *British Journal of Industrial Relations*, *Health Economics*, and *Annals of Regional Science*. In addition, she has published multiple articles on medical licensure and certificate-of-need laws in various national news outlets.

Dr. Timmons is Service Associate Professor of Economics and Director of the Knee Center for the Study of Occupational Regulation at the John Chambers

School of Business and Economics at West Virginia University. He has written extensively on the effects of occupational regulation, and his research has been published in the *Journal of Law and Economics*, the *British Journal of Industrial Relations*, the *Journal of Labor Research*, and several other academic journals, as well as cited in the national press.

In light of their prolific research and teaching contributions in the area of occupational licensing, *amici* have a professional interest in contributing to the proper interpretation of Georgia law as applied to lactation-consultant licensure. This brief explains how the findings of scholarly empirical studies align with the record evidence in this case, confirming that the Act—like licensing generally—will not improve the quality of care or otherwise benefit Georgia families.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades in Georgia, lactation consultants like Mary Jackson have provided breastfeeding education, guidance, assessment, and general support to families both in clinical settings and in the community, including at families' homes. Ms. Jackson and many others are privately accredited as Certified Lactation Counselors (CLCs). Lactation consultants can also obtain private accreditation as International Board Certified Lactation Consultants (IBCLCs).

In 2013, Georgia legislators sought to introduce occupational licensing for lactation consultants. Under that bill, only state-licensed consultants could provide

lactation care—and only IBCLCs were eligible for licensure. The Georgia Occupational Regulation Review Council cautioned that this requirement "would not improve access to care for the majority of breastfeeding mothers." *See House Bill 363: Georgia Lactation Consultant Practice Act, a Review of the Proposed Legislation* at 17, Ga. Occupational Regul. Rev. Council (Dec. 2013), *available at* https://bit.ly/3Pb1hRr. Instead, by "prohibit[ing] CLCs from providing services"—despite CLCs being "equally as qualified" as IBCLCs—they predicted that the bill may place "the citizens . . . at a greater risk of harm because the majority of lactation consultant providers would no longer be able to provide care." *See id*. The bill failed.

Undeterred, Georgia enacted the Georgia Lactation Consultant Practice Act in 2016. Like the failed 2013 bill, the Act requires lactation consultants to obtain a state license in order to work. Also like the failed 2013 bill, only IBCLCs—not CLCs or any other lactation consultants—are eligible for licensure under the Act. GA. CODE ANN. § 43-22A-6-7; R-1083. According to the State, the Act is intended to increase access to lactation care and services and to "protect the health, safety, and welfare of the public." GA. CODE ANN. § 43-22A-2; R-1080 (citing R-718, 819-20).

The State's proffered rationales crumble under the weight of even the slightest scrutiny. As Appellees' evidence showed below, CLCs and IBCLCs are simi-

larly situated, the Act will not benefit the public, and the Act will cause harm. The court below reasoned that the State offered "no rational reason," much less any factual evidence, "to treat the two groups" of lactation consultants (CLCs and IBCLCs) differently. *See* R-4917. The Act, the court correctly held, violates Appellees' equal-protection rights. *See* R-4920.[1]

What the record below shows about this Act, a vast body of empirical evidence shows about occupational licensing in general. 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.

This body of research spanning decades aligns with the record evidence in this case, confirming that the Act—like occupational licensing generally—will not improve quality or otherwise benefit Georgians. The Act instead will (1) decrease the availability of services available to Georgia families; (2) increase prices of such services; and (3) limit economic mobility for would-be consultants. These harmful

[1] The Superior Court separately held that the Act *does not* violate Appellees' substantive due process rights. *Amici* contend that this holding is erroneous, and to that extent also support Appellees in their related cross-appeal. *See* No. S23X0018.

costs, which will be borne disproportionately by minorities and lower-income individuals, are underscored by the ongoing baby formula shortage. Ensuring access to lactation consultants and the services they provide has been more critical than ever in recent months.

In sum, the record in this case, buttressed by empirical evidence more broadly, disproves the State's proffered rationales for the Act. The Court should affirm that the Act is unconstitutional.

ARGUMENT

I. Contrary to oft-asserted rationales, empirical evidence shows that occupational licensing regimes—like the Act—provide little or no public benefit, while imposing significant costs and causing harm.

Without question, occupational licensing—the "government licensing of jobs," in which working is "illegal without first meeting government standards"—has become one of the most significant labor market institutions in the United States. *See* Morris M. Kleiner, *Guild-Ridden Labor Markets: The Curious Case of Occupational Licensing* 1–2 (2015), *available at* https://bit.ly/3qllBFJ [hereinafter Kleiner, *Guild-Ridden*]. In the 1950s, just five percent of workers needed to secure the government's permission to work. Morris M. Kleiner, *Reforming Occupational Licensing Policies*, Brookings Inst. 5 (Mar. 2015), *available at* https://brook.gs/3zsn7en [hereinafter Kleiner, *Reforming*]. Yet over the past several decades, an "explosion" of licensing laws has increasingly restricted "labor mar-

kets, innovation, and worker mobility." *See* Nat'l Conf. of State Legislatures, *The State of Occupational Licensing: Research, State Policies and Trends* 5, *available at* https://bit.ly/3St5cvI.

Today, roughly one in four workers must obtain a government license to work in nearly 1100 occupations. *See* Dick M. Carpenter II et al., *License to Work: A Nat'l Study of Burdens from Occupational Licensing* 8–9, 13, Inst. for Justice (2017) *available at* https://bit.ly/3Qv4TyU; *see also* Kleiner, *Guild-Ridden*, *supra*, at 1. In Georgia specifically, nearly half a million workers must first obtain a license to work in one of 178 occupations governed by 41 different licensing boards, and collectively pay $40 million each year in fees. *See* Ga. Pub. Policy Found., *Occupational Licensing, an Issue Overdue for Review* (Oct. 11, 2019), https://bit.ly/3SxZHMh. Georgia's licensing regimes—which, on average, require "$185 in fees, 464 hours of education and experience, and about two exams"—rank as the 14th most-burdensome in the nation. Marc Hyden, *Professional Licensing Reform Returns to Georgia*, R Street Inst. (Feb. 8, 2021), https://bit.ly/3bCeODO (citing Carpenter II et al., *supra*, at 22, 64).

The "explosion" of licensing laws has generated considerable scrutiny, including by policymakers—with the Georgia Occupational Regulation Review Council's critique of the 2013 failed licensing bill serving as just one example. *See supra* at 3. Just last year, for instance, President Biden observed in an executive

order that "overly restrictive occupational licensing requirements can impede worker's ability…to move between states," restrict competition, and limit consumer choice. *See* Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021), *available at* https://bit.ly/3z6J3v4; *see also* Karen A. Goldman, Fed. Trade Comm'n, *Policy Perspectives: Options to Enhance Occupational License Portability* iv (2018), *available at* https://bit.ly/3P8xN6K ("Unnecessary or overbroad restrictions erect significant barriers and impose costs that harm American workers, employers, consumers, and our economy as a whole, with no measurable benefits to consumers or society.").

These scrutinizing statements are backed up by decades of scholarly empirical research. *Amici*[2] and their peers have extensively analyzed the effects of occu-

[2] *See, e.g.*, Morris M. Kleiner & Maria Koumenta, *Grease or Grit? International Case Studies of Occupational Licensing and its Effects on Efficiency and Quality* (2022), *available at* https://bit.ly/3F4b22o; Morris M. Kleiner & Evan J. Soltas, *A Welfare Analysis of Occupational Licensing in U.S. States*, Rev. Econ. Studies (forthcoming, 2022); Alicia Plemmons & Edward Timmons, *Occupational Licensing: A Barrier to Opportunity and Prosperity*, in *Regulation and Economic Opportunity: Blueprints for Reform* (ed. Adam Hoffer & Todd Nesbit) (2020), *available at* https://bit.ly/3eYVi63; Kleiner, *Guild-Ridden, available at https://bit.ly/3qllBFJ*; Morris M. Kleiner, *Stages of Occupational Regulation: Analysis of Case Studies* (2013), *available at* https://bit.ly/3D8ap7a; Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (2006), *available at* https://bit.ly/3VJO1HU; Alicia Plemmons, *Occupational Licensing's Effects on Firm Location and Employment in the United States*, Brit. J. Indus. Rels., (2022), *available at* https://bit.ly/3SsyoBI, at 1–26; Morris M. Kleiner & Evan J. Soltas, *A Welfare Analysis of Occupational Licensing in the U.S. States* (Nat'l Bureau of Econ. Research, Working Paper No. 26383 (2019), *available at* https://bit.ly/3PQM08D; Edward J. Timmons, *The Effects of Expanded Nurse*

pational licensing. Their research consistently shows that occupational licensing typically produces little or no improvement in quality of service. To the contrary, licensing imposes significant costs on individuals and society. The evidence is clear: occupational licensing is a net negative. *See* Morris M. Kleiner & Evan J. Soltas, *A Welfare Analysis of Occupational Licensing in the U.S. States* 3, Nat'l Bureau of Econ. Research, Working Paper No. 26383 (2019), *available at* https://bit.ly/3PQM08D.

A. Empirical evidence shows that licensing regimes like the Act provide little or no benefit to the public.

Many legislators and regulators extol occupational licensing as a way to ensure the public receives safe, high-quality services from reputable providers. *See, e.g.*, Kleiner, *Reforming*, *supra*, at 5. That's what the State says about the Act here. *See* GA. CODE ANN. § 43-22A-2 (stating that the Act's purpose is to "protect the health, safety, and welfare of the public by providing for the licensure and regulation" of lactation consultants); *see also* R-1080 (citing R-718, 819-20) (stating that the Act is intended to increase access to lactation care).

Practitioner and Physician Assistant Scope of Practice on the Cost of Medicaid Patient Care, 121 Health Policy 189 (2017), *available at* https://bit.ly/3sjRHTj; Robert J. Thornton & Edward J. Timmons, *The De-Licensing of Occupations in the United States*, Monthly Labor Rev. (May 2015), *available at* https://bit.ly/3umpHyy; Edward J. Timmons & Robert J. Thornton, *The Effects of Licensing on the Wages of Radiologic Technologists*, 29 J. Labor Res. 333 (2008), *available at* https://bit.ly/3gujQo0; Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & Econ. 547 (2000), *available at* https://bit.ly/3DnNEvJ.

But the facts rebut these recycled refrains. Empirical research into many different licensed occupations has consistently found that imposing any occupational licensing requirements, let alone onerous ones like the Act's, generally does *not* improve safety or quality.

Consider a few recent examples. A 2015 study co-authored by one *amicus* examined the quality of optician service in non-licensed states versus states requiring licensure. *See* Edward J. Timmons & Anna Mills, *Bringing the Effects of Occupational Licensing into Focus: Optician Licensing in the United States,* 15 (Mercatus Ctr. at George Mason Univ. Working Paper (2015), *available at* https://bit.ly/3TDS1Io. The study found no significant link between optician licensure and improved service quality. *See id*. at 18. As another example, a study of massage therapists found that licensure did not improve quality. *See* Edward Timmons & Robert Thornton, *Licensing One of the World's Oldest Professions: Massage*, 56 J.L. & Econ. 371 (2013), *available at* https://bit.ly/3F66qsI.

Recent research has similarly revealed no significant correlation between licensure and positive consumer-generated reviews. For example, one *amicus* studied passenger ratings of Uber rides commenced in New Jersey. *See* Morris M. Kleiner, *Regulating Access to Work in the Gig Labor Market: The Case of Uber*, Emp't Research (July 2017), *available at* https://bit.ly/3D6Dekq, at 4, 5–6. Some drivers were from New Jersey, which requires no occupational license to become

an Uber driver; other drivers were licensed in New York, which requires applicants to pay $2000, pass a medical exam, complete a defensive driving course, and pass a background check, among other requirements. *See id.* at 5. Despite the significant difference in licensing standards, the study found no statistically significant difference in passenger ratings. *See id*. at 5–6. This finding echoes the results of other recent consumer-review studies in occupations ranging from interior designers to plumbers. *See, e.g.*, Kleiner, *Stages*, *supra*, at 39–40, 167; The White House, *Occupational Licensing: A Framework for Policymakers* 58 (July 2015), *available at* https://bit.ly/2ZNaqvH.

These recent studies reaffirm decades of scholarship. One of the earliest studies to examine the correlation between licensure and quality focused on repairmen, concluding that licensure did not meaningfully protect the public from "parts fraud," or the use of substandard parts in television repair. *See* John Phelan, Fed. Trade Comm'n, *Regulation of the Television Repair Industry in Louisiana and California: A Case Study* (1974), *available at* https://bit.ly/39Tn8uB. Another foundational study of seven different licensed occupations likewise found no correlation between licensure and service quality. *See* Sidney L. Carroll & Robert J. Gaston, *Occupational Restrictions and the Quality of Service Received: Some Evidence*, 47 S. Econ. J. 959 (1981), *available at* https://bit.ly/3CUCcGl [hereinafter Carroll & Gaston, *Occupational Restrictions*].

Not only do empirical studies consistently find no positive correlation between licensure and quality, but they sometimes find a *negative* correlation. One recent study analyzed pairs of consumer reviews in neighboring states—with only one of the two states in each pair licensing the given occupation—for professionals in six different occupations. Kyle Sweetland & Dick M. Carpenter II, *Raising Barriers, Not Quality: Occupational Licensing Fails to Improve Services*, Inst. for Just. 3 (Sept. 2022), *available at* https://bit.ly/3LAYGA0. Although eight of the nine comparisons in that study yielded no significant correlation between licensure and service quality, the ninth (comparison of tree trimmers in adjacent states) found quality to be statistically significantly higher in the *unlicensed* jurisdiction. *See id*. at 3, 11. Earlier research spanning a range of professions—from optometrists, to real estate brokers, to veterinarians—has found that *less restrictive* occupational regulation correlates with *higher quality*, presumably due to increased competition. *See* Sidney L. Carroll & Robert J. Gaston, *State Occupational Licensing Provisions and Quality of Services: The Real Estate Business*, Res. L. & Econ. 1, 10 (1979), *available at* https://bit.ly/3TLKHua; Stanley J. Gross, *Professional Licensure and Quality: The Evidence*, Cato Inst. Pol'y Analysis No. 79, 5 (1986), *available at* https://bit.ly/3CWsCTi. Indeed, licensing suppresses competition, along with all its positive effects. *See, e.g.*, Daniel J. Smith, *Occupational Licensing in Alabama*, 27 Labour & Industry 77, 78, 80, 88, 92–94 (2017) (citing stud-

ies), *available at* https://bit.ly/3W0O1DM; Morris M. Kleiner, *Occupational Licensing*, 14 J. Econ. Perspectives 189 (2000), *available at* https://bit.ly/3ePGebb. *See generally* Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (2006) [hereinafter Kleiner, *Licensing Occupations*], *available at* https://bit.ly/3VJO1HU.

In sum, empirical scholarship has for decades demonstrated that occupational licensing does not translate into higher quality or safety. Armed with that evidence and the robust record below, this Court can confidently affirm the Superior Court's holding that "no rational reason" exists "to treat the two groups" of lactation consultants (CLCs and IBCLCs) differently. *See* R-4917. The State's arguments to the contrary—that the Act will increase access and improve service quality—run headfirst into real-world facts.

B. Empirical evidence shows that licensing regimes like the Act impose significant costs on individuals and society.

1. While providing little or no public benefit, occupational licensing imposes significant costs and harms on individuals and the public. Empirical scholarship shows how these costs and harms manifest in three primary ways—by (1) decreasing the availability of services; (2) increasing prices; and (3) limiting economic mobility.

First, occupational licensing decreases the overall availability of services. All licensing regimes exclude at least some individuals from working in the field,

thereby reducing supply. *See, e.g.*, Morris M. Kleiner et al., *Relaxing Occupational Licensing Requirements: Analyzing Wages and Prices for a Medical Service*, 59 J. Law & Econ. 261, 261–62 (2016), *available at* https://bit.ly/3z3rxYA [hereinafter Kleiner, *Relaxing*] ("The introduction of occupational licensing may function as a barrier to entry . . ."); Smith, *supra*, at 82; The White House, *supra*, at 3; Amy Fontinelle et al., *Unnatural Rights in The Natural State: Occupational Licensing in Arkansas* 9–10 (2016), *available at* https://bit.ly/3ThppVG; Jeffrey Pfeffer, *Administrative Regulation and Licensing: Social Problem or Solution?*, 21 Social Problems 468 (2014), *available at* https://bit.ly/3CXV0EL.

Such reduced supply is often expressly intended. Governments commonly adopt licensing requirements at the behest of existing practitioners of an occupation (such as IBCLCs) who have every incentive to limit competition. Morris M. Kleiner & Evgeny Vorotnikov, *At What Cost? State and National Estimates of the Economic Costs of Occupational Licensing*, Inst. for Justice 8 (Nov. 2018), *available at* https://bit.ly/3gq2c4F. Those existing practitioners, moreover, routinely comprise part or all membership of the licensing boards empowered to enforce the licensing requirements. *Id.*; *see also N.C. State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 505 (2015) (observing that "when the State seeks to delegate its regulatory power to active market participants, [ ] established ethical standards may blend with private anticompetitive motives").

Second, licensing increases prices for consumers. As a matter of basic economic logic, decreased supply and steady demand mean higher prices. And what logic dictates, empirical research time and again proves: "The introduction of occupational licensing . . . increases the prices of products and services that are produced by licensed workers." Jing Cai and Morris M. Kleiner, *The Labor Market Consequences of Regulating Similar Occupations: the Licensing of Occupational and Physical Therapists,* J. of Labor Research (2020), *available at* https://bit.ly/3sqy2RS; *accord* Pfeffer, *supra*. Depending on location and industry, licensing can cause prices to rise anywhere from five percent to 33%. *See* Kleiner, *Reforming*, *supra*, at 15. In the aggregate, licensing may cost consumers $203 billion annually. *Id.* at 6.

Recent work by *amici* helps illustrate the point. A study of dentists found that in states with more difficult dental license exams, patients pay higher prices for basic dental services without attaining any statistically better dental outcomes. Kleiner, *Reforming*, *supra*, at 6. Another study indicated little change in obstetric healthcare utilization or patient safety after nurse midwives were legally permitted to practice without physician oversight. *See* Lauren Hoehn-Velasco et al. (with Alicia Plemmons), *Health Outcomes and Provider Choice under Independent Practice for Certified Nurse-Midwives*, (July 2021), at 29, *available at* https://bit.ly/3IOSO4F; *cf.* Chris Denson & Edward Timmons, *Addressing Geor-*

gia's Healthcare Disparities: The Benefits of Full Practice Authority for Nurse Practitioners and Physician Assistants, Ga. Pub. Pol'y Found. (Sept. 15, 2022), *available at* https://bit.ly/3C3KJHV. And yet another study showed that broadening the scope of practice for physician assistants correlated with an 11.8 to 14.4% reduction in patient costs—without negative effects on access to care. *See* Edward J. Timmons, *Healthcare License Turf Wars: The Effects of Expanded Nurse Practitioner and Physician Assistant Scope of Practice on Medicaid Patient Access* 17–18, Mercatus Ctr. at George Mason Univ., Working Paper (2016), *available at* https://bit.ly/3cajrVw; *see* Kleiner, *Relaxing*, at 286 (discussing similar findings for nurse practitioners).

Price increases aren't just about money. Limited supply and higher prices can undermine the very safety and quality goals licensing laws profess to advance. A study of electrician licensure found that stricter requirements correlated with higher electrocution rates in the general public—presumably because would-be customers did more electrical work themselves. Carroll & Gaston, *Occupational Restrictions*, *supra*, at 961, 963–65. In a similar vein, the Federal Trade Commission has warned that licensing requirements for opticians could cause increased optical health problems, as increased costs may tempt individuals to wear their contact lenses too long. Maureen K. Ohlhausen et al., Fed. Trade Comm'n, *Possible*

Anticompetitive Barriers to E-Commerce: Contact Lenses 19 (Mar. 2004), *available at* https://bit.ly/3m5EN7U.

Third, by erecting a barrier to entry to prospective workers and entrepreneurs, licensing limits economic mobility. In a well-functioning market, individuals can move to locations where their skills command higher pay. But licensing makes moving difficult. The interstate migration rate for individuals in state-licensed occupations is 36% lower than for individuals in non-licensed occupations. Janna E. Johnson & Morris M. Kleiner, *Is Occupational Licensing a Barrier to Interstate Migration?* 15, Nat'l Bureau of Econ. Research, Working Paper No. 24107 (2017), https://bit.ly/3FfhHoj; *accord* Nat'l Conference of State Legislatures, *Barriers to Work: Low-Income, Unemployed and Dislocated Workers* (2018), https://bit.ly/3olO5j2 [hereinafter Nat'l Conference of State Legislatures, *Barriers*] (finding that migration rates of workers within the most licensed occupations are significantly lower than in the least licensed occupations). Even worse, "[t]he need to obtain a license in another state can sometimes even lead licensees to exit their occupations when they must move to another state." Goldman, Fed. Trade Comm'n, *supra*, at 4. All told, occupational licensing may result in up to 2.85 million fewer jobs nationwide. Kleiner, *Reforming*, *supra*, at 6. Georgia alone has lost an estimated 91,376 jobs due to occupational licensing. *See* Morris M.

Kleiner & Evgeny Vorotnikov, *Analyzing Occupational Licensing Among the States*, 132 J. Regul. Econ. 156 (2017), *available at* https://bit.ly/3TuL8cE.

2. To make matters even worse, occupational licensing's harmful costs fall disproportionately on minorities and lower-income individuals. *See* Daniel H. Klein et al., *Was Occupational Licensing Good for Minorities? A Critique of Marc Law and Mindy Marks*, 9 Econ. J. Watch 210, 228–29 (2012), *available at* https://bit.ly/3TvUVz5; Stuart Dorsey, *Occupational Licensing and Minorities*, 7 L. & Human Behavior (1983), *available at* https://bit.ly/3VZK81R; Nat'l Conference of State Legislatures, *Barriers*, *supra*. This disproportionality materializes both on the supply side and the demand side.

On the supply side, obtaining an occupational license requires substantial time and money. Based on a study of 102 licensed occupations, licensure requires on average almost 12 months of education or training, a passing score on an exam, and payment of more than $260 in fees. *Id.* These costs are particularly difficult for those with lesser means to afford, both in terms of monetary expense and time investment away from other work. *See Economic Report of the President, Investing in People: Education, Workforce Development, and Health* 153, Ch. 4 (2022), *available at* https://bit.ly/3TTrpmr ("[S]imilarly skilled [but unlicensed] workers who lack the resources to acquire a license may be prevented from moving into

jobs where they would be more productive and better paid.").[3] As "occupational licensing [ ] expand[s] to more and more professions," it "denie[s] [ ] occupational choice," especially to those already less fortunate, thereby serving to calcify existing inequalities. Smith, *supra*, at 81–82.

On the demand side, as licensing restricts entry and reduces the availability of services, it inevitably leads to price increases for consumers. *See supra* at 14. Higher prices regressively impact those on the bottom rungs of the economic ladder—again, the very same people who also have the hardest time affording the costs to obtain licensure. In other words, the costs of licensing impact such individuals in potentially two ways: both as consumers and to the extent they are aspiring professionals themselves. As prices rise, those consumers with limited means at some point must "face[ ] . . . the dilemma of scrounging around for the money to buy Cadillac-quality service, go without, or to do it themselves." Smith, *supra*, at 82; *accord* Kleiner, *Licensing Occupations*, *supra*, at 8 ("[C]ertain low-income consumers would not receive any service due to rising prices."); Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 Rev. Econ. Studies 843 (1986), *available at* https://bit.ly/3N2Zuyl. In the aggregate, this leads to *lower*

[3] Recall the Uber drivers from earlier. Does the driver licensed in New York City, who had to pay the government $2000 before earning a living, give higher quality rides than the New Jersey driver? Consumer reviews say "no." At most, the $2000 requirement merely identifies who has money to spare, prophylactically sifting out many individuals of lesser means who seek—and who may have the most pressing need—to contract with Uber.

quality and *decreased* consumer welfare and public health—directly contrary to the licensing regime's purported purpose.

3. All this empirical evidence jibes with the record here. Like occupational licensing generally, the Act imposes high costs on becoming licensed, to the point that becoming licensed will be "impossible for many lactation care providers because of the time and expense involved." R-1043 (citing R-1072). This barrier to entry will reduce the availability of lactation care in Georgia. As a result, prices will rise. R-1072 ("[C]are from an IBCLC is usually more expensive than care from a CLC or other community-based lactation care provider."). All these consequences will disproportionately affect minorities, lower-income individuals, and—especially in Georgia—those living in rural areas. R-1060-61, 1066, 1079-80.[4]

So, while "[a]ccess to professional lactation care increases breastfeeding initiation, exclusivity, and duration rates," the Act promises to achieve the opposite. Anna Blair et al., *Childhood Obesity and Breastfeeding Rates in Pennsylvania Counties-Spatial Analysis of the Lactation Support Landscape*, 8 Frontiers in Public Health 123 (2020), *available at* https://bit.ly/3gE3EAH. The Superior Court recognized that CLCs and IBCLCs both "safely" are "doing the same work," and that the Act's exclusion of CLCs would produce effects "contrary to the Act's stat-

[4] Empirical evidence shows that when stringent licensing requirements are relaxed, health outcomes in rural areas improve. Danny R. Hughes et al., *Nurse Practitioner Scope of Practice and the Prevention of Foot Complications in Rural Diabetes Patients*, J. Rural Health (2021), at 1, 4, *available at* https://bit.ly/3TOJ0Ml.

ed purpose." *See* R-4917. Years of empirical scholarship reinforce the correctness of the court's findings.

C. The ongoing baby formula shortage underscores the Act's harmful potential.

The Act could not come at a worse time. Current events further underscore just how harmful the Act is and will be—not only to the CLCs and other lactation consultants it puts out of work, but also to the babies, mothers, and families its arbitrary regulations affect.

For the better part of a year, a severe shortage of baby formula has afflicted mothers and their babies across the country. Multiple factors contributed to the shortage: private failures at production facilities, general supply-chain disruption, federal regulatory intransigence, international trade policy, and other private and public blunders. *See, e.g.*, Steven M. Solomon, *FDA Concludes Internal Review of Agency Actions Related to the U.S. Infant Formula Supply*, U.S. Food & Drug Admin. (2022), *available at* https://bit.ly/3N0L6qk (concluding that there is "no single action to explain" the shortage, but rather, a "confluence of systemic vulnerabilities"); Scott Lincicome, *Baby Formula and Beyond: The Impact of Consolidation on Families and Consumers*, Cato Institute (2022), https://bit.ly/3P58531 (documenting testimony before Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Committee on the Judiciary, United States Senate); Derek Thompson, *What's Behind America's Shocking Baby-Formula Shortage?*, The At-

lantic (May 12, 2022), https://bit.ly/3P29zLj. Despite efforts to alleviate the shortage, the crisis persists and "will take a while to fix." Deidre McPhillips, *US Formula Shortage Persists and Will 'Take a While to Fix'*, CNN (July 21, 2022), https://cnn.it/3bBo0s5; *accord* Jesse Newman & Jaewon Kang, *Baby-Formula Shortage Deepens, Defying Replenishment Efforts*, Wall St. J. (July 14, 2022), https://on.wsj.com/3OhZaef.

The formula shortage has hit Georgia families particularly hard. Earlier this year, in fact, Georgia faced the highest out-of-stock rate among all states. *See, e.g.*, Martine Paris, *One in Five US States is 90% Out of Baby Formula*, Bloomberg, *available at* https://bloom.bg/3BKQjPB (June 2, 2022) ("Ten states now have out-of-stock rates at 90% or greater. . . . Georgia is the hardest hit at 94%[.]"). Some babies in Georgia were even hospitalized as a result. Helena Oliverio, *Some Children Hospitalized in Georgia Due to Baby Formula Shortage*, The Atlanta Journal-Constitution (May 19, 2022), *available at* https://bit.ly/3BNgXqP.

In response to the dire situation, the Georgia Department of Public Health "strongly encourage[d]" "[a]ll women that are medically able . . . to breastfeed." *Infant Formula Shortage*, Ga. Dep't of Pub. Health, *available at* https://bit.ly/3dglLe4 (last accessed Oct. 24, 2022). This recommendation echoes expert consensus and encouragement nationwide. *See, e.g.*, Scott Horsley, *The Baby Formula Shortage Is Prompting Calls to Increase Support for Breastfeeding*,

NPR (May 30, 2022), *available at* https://n.pr/3colw0n. Dr. Melissa Bartick, an assistant professor at Harvard Medical School, put it bluntly: "If we did more to support breastfeeding, we wouldn't be in this mess." *Id.*[5] "The breast[,]" she added, "is the shortest supply chain." *Id.* (quoting Dr. Kadee Russ, an economist at the University of California, Davis).

Yet, as the evidence presented below shows, breastfeeding—and increasing breastfeeding rates among mothers who choose to breastfeed—is often easier said than done. *See, e.g.*, R-708 (citing R-785-90); R-1067-68. "It's not easy to breastfeed. Mothers need support. It's not an easy process. It's work." Horsley, *supra* (quoting Russ, *supra*). Indeed, 60% of mothers do not breastfeed as long as they originally intended. *Id.*; *see* Erika C. Odom et al., *Reasons for Earlier Than Desired Cessation of Breastfeeding*, 131 Pediatrics 726 (2013), *available at* https://bit.ly/3Tyku2p. These mothers stop early for various reasons, including issues with lactation or latching, concerns about infant nutrition, lack of family support, cultural norms, among others. *See* Odom et al., *supra*; Natasha K. Sriraman & Ann Kellams, *Breastfeeding: What Are the Barriers? Why Women Struggle to*

[5] Shortage or not, increasing breastfeeding rates would likely bring about substantial health care savings and public health gains, because "nursing babies suffer less from ear infections, diarrhea, obesity and other ailments." Horsley, *supra*; *accord* Melissa C. Bartik et al., *Suboptimal Breastfeeding in the United States: Maternal and Pediatric Health Outcomes and Costs*, Maternal & Child Nutrition (2016), at 1, *available at* https://bit.ly/3D4bk6F.

Achieve Their Goals, 25 J. Womens Health (Larchmt.) 714 (2016), *available at* https://bit.ly/3DtdtKT.

CLCs like Ms. Jackson, and organizations like ROSE, play a key role in helping more mothers breastfeed for their intended length of time. The routine questions or concerns that lead many mothers to stop breastfeeding (or to never start) are the very issues Ms. Jackson and her peers are well-equipped to address in providing such support:

> Ms. Jackson counsels new mothers about breastfeeding, assesses breastfeeding challenges facing individual mothers and their babies, creates and implements lactation care plans, evaluates breastfeeding outcomes, assists mothers with babies in the neonatal intensive care with breastfeeding, helps mothers use various tools such as breast pumps, teaches a variety of breastfeeding topics to doctors and nurses, and provides breastfeeding education to medical school students from Morehouse College and Emory School of Medicine.

R-4914-15 (citing R-651, 1075).

Needed all the time, lactation consultants have been especially critical during this year's formula shortage, the detrimental impact of which is still felt in many areas of the country. *See, e.g.*, Dominic Pino, *No, Biden Has Not Fixed the Baby-Formula Shortage*, Nat'l Review (Oct. 18, 2022) (citing U.S. Census Bureau September 2022 survey data concluding that approximately 32% of Americans with infants had difficulty obtaining formula within the last seven days); Julie Creswell & Michael Corkery, *Store Shelves Are No Longer Bare, but Baby Formula Remains in Short Supply*, N.Y. Times (Sept. 12, 2022), *available at*

https://nyti.ms/3U9OHFE. But the Act promises to limit access to lactation consultants. Even in normal times, occupational licensing in general—and the Act in particular—delivers little or no public benefit, while causing substantial public harm. The formula crisis makes what is already clear, devastatingly crystal.

CONCLUSION

This Court should affirm the Superior Court's equal protection ruling and reverse its due process ruling.

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