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 APPELLANT

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INTRODUCTION

The General Assembly enacted the Georgia Lactation Consultant Act, O.C.G.A. § 43-22A-1 *et seq*. because it recognizes the substantial health benefits of breastfeeding for mothers and babies and the vital role of lactation consultants who provide clinical care to mothers and babies in Georgia hospitals, medical offices, clinics, and homes. The Act recognizes that all mothers benefit from breastfeeding education and support. It does not preclude anyone from providing education, counseling, support, and encouragement to a breastfeeding mother for compensation. But the Act also recognizes that some breastfeeding mothers need a higher level of clinical lactation care and services because they or their babies face medical challenges. For this group, the Act establishes the minimum standards for providers of clinical lactation care, which include training in direct patient care prior to licensure and completing educational prerequisites. The Act is not fundamentally different from innumerable other regulatory occupational licensing laws in Georgia, from physician licensure (*see* O.C.G.A. Title 43, Ch. 34) to used motor vehicle dealers (*see* O.C.G.A. Title 43, Ch. 47). Citizens might differ in how *wise* they think these licensing systems are, but they are not legally suspect simply because some think they are bad policy.

Nevertheless, in the decision below, the superior court erroneously held that the Act was unconstitutional, on the grounds that certain

exceptions contained in the Act were sufficient to invalidate the entire Act. Plaintiff-Appellees, Mary Jackson and Reaching our Sisters Everywhere ("ROSE"), alleged that the Act prevents them from continuing to provide lactation care and services and, therefore, infringes on their state constitutional substantive due process and equal protection rights. They brought suit against the Georgia Secretary of State, as the official charged with enforcing the Act. The superior court correctly held that, under the rational basis test, Plaintiffs' substantive due process rights are not violated because the State has plausible and conceivable reasons for establishing a mechanism for licensing lactation consultants and establishing minimum qualifications for licensure. Yet, somehow, the court then held that the Act failed rational basis review under the equal protection clause of the Georgia constitution. This makes no sense, and the superior court made fundamental errors in ruling against the Act.

In rejecting the due process challenge, the superior court correctly held the legislature's decision to require licensure is rational. See *Women's Surgical Ctr., LLC v. Berry*, 302 Ga. 349, 354 (cleaned up) (recognizing that the rational basis test requires only that the challenged law "bears a rational relationship to a legitimate objective of the government.") Here, the Act is supported by plausible reasons that justify any impact on lactation care providers who cannot provide lactation care and services under the Act (including, e.g., a need to alleviate confusion about the variety of providers; to reduce the risk of

harm to mothers and babies; to protect the public from fraud; and a general recognition that some level of training is necessary before a provider can provide lactation care and services). *See* R-4909–10.

But then, in considering Plaintiffs' equal protection arguments, the superior court somehow concluded that the Act was *not* rational, by relying on three exceptions to the licensure law which allow some individuals to practice lactation care and services without holding a license. To reach this conclusion, the court made a number of legal errors. To start, the court wrongly placed the burden on the *State* to *justify* the exceptions to licensure in the Act—that is, the superior court assumed it was the State's burden to *prove* a rational basis. To the contrary, it was Plaintiffs' burden to disprove *any possible* rational basis for the Act, including the licensure exceptions. *Gliemmo v. Cousineau*, 287 Ga. 7, 12 (2010) (citation omitted) (noting that the burden is on the plaintiff to prove that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker"). *See also FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315 (1993). That standard is nearly impossible to satisfy, and that is the point: rational basis review rarely leads to invalidation of a law.

Even setting the burden of proof aside, the superior court erred—indeed, contradicted itself—as to the threshold matter of any equal protection challenge: whether the classes at issue in this case are similarly situated. The superior court correctly held that not all

lactation care providers are doing the type of work regulated by the Act, but it then reached the opposite, unsupported, and incorrect conclusion that *all* lactation care providers are "similarly situated" for purposes of the equal protection analysis. R-4914. Those holdings cannot be reconciled.

Even if the superior court was correct in concluding that everyone is similarly situated, there is no suspect class or fundamental right at issue, so the same rational basis review that applies under substantive due process analysis applies here. Nevertheless, the superior court ignored the Secretary's arguments regarding the reasonable bases for the statutory exceptions to licensure and erroneously held that three exceptions to licensure at O.C.G.A. § 43-22A-13 are sufficient to defeat rational basis review and support a finding that the *entire* Act is unconstitutional. R-4916, 4920. The superior court grossly misunderstood rational basis review, and its decision cannot stand. This Court should reverse the superior court and hold that the Act is valid.

JURISDICTION

The Fulton County Superior Court entered its final order denying defendant's motion for summary judgment and granting plaintiffs' motion for summary judgment on March 3, 2022. The Secretary filed

his notice of appeal on April 4, 2022.[1] R-4–6. This Court has jurisdiction because it is an appeal of a final order in a "case[e] in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question." Ga. Const. art. VI, § VI, ¶ II.

STATEMENT

This case concerns a constitutional challenge to the Georgia General Assembly's decision to regulate the provision of clinical lactation care and services in Georgia and determine who is eligible to hold a license and work as a lactation consultant in the state. *See* O.C.G.A. § 43-22A-1 *et seq.*; *see also* O.C.G.A. § 43-22A-3(5) (defining "lactation care and services.").

A. The Georgia Lactation Consultant Act

The Act requires licensure for individuals providing lactation care and services, as defined by statute, unless they are exempt pursuant to other provisions of the law. It does not preclude any provider from providing breastfeeding education and support to mothers for compensation. Indeed, the Act specifically exempts "perinatal and childbirth educators . . . performing education functions consistent with the accepted standards of their respective occupations" from the license requirement. O.C.G.A. § 43-22A-13(2). There is nothing in the Act that prevents the provision of lactation support and education.

[1] The Secretary also filed an Amended Notice of Appeal on the same date to correct a typo and clarify that the clerk was requested to send the record to this Court and not the Georgia Court of Appeals. R-1–3.

The Act carefully defines terms so that only *specialized, clinical* lactation care is covered by its licensure requirements. The Act defines "lactation care and services" as "the *clinical application* of scientific principles and a multidisciplinary body of evidence for evaluation, problem identification, treatment, education, and consultation to childbearing families regarding lactation care and services." O.C.G.A. § 43-22A-3(5) (emphasis added). Such care and services include:

> (A) Lactation assessment through the systematic collection of subjective and objective data;
> (B) Analysis of data and creation of a lactation care plan;
> (C) Implementation of a lactation care plan with demonstration and instruction to parents and communication to the primary health care provider;
> (D) Evaluation of outcomes;
> (E) Provision of lactation education to parents and health care providers; and
> (F) The recommendation and use of assistive devices.

Id. The Act requires that after July 1, 2018, individuals providing the type of care defined above must be licensed, unless they are specifically exempted from licensure under the Act. O.C.G.A. § 43-22A-11. The exemptions to licensure allow some individuals to perform lactation care and services without a license, namely: other licensed healthcare professionals whose practice overlaps with lactation care and services as defined above; doulas and childbirth educators who provide education; students and interns who work under supervision; government employees who are required to provide lactation care and services as a part of their official duties; volunteers; and non-residents

of Georgia who may practice temporarily in the state if they are licensed by another state. O.C.G.A. § 43-22A-13.

B. The Purpose of the Act

In promulgating the Act, the General assembly expressly stated that "the application of specific knowledge and skills relating to breastfeeding is important to the health of mothers and babies and acknowledges further that the rendering of sound lactation care and services in hospitals, physician practices, private homes, and other settings requires trained and competent professionals." O.C.G.A. § 43-22A-2. It further declared that the purpose of the Act is "to protect the health, safety, and welfare of the public by providing for the licensure and regulation of the activities of personnel engaged in lactation care and services." *Id*.

Both parties acknowledge that the General Assembly was correct regarding the importance of breastfeeding and its related benefits and that mothers and babies gain significant health benefits from breastfeeding. *See generally* R-1100–1102, ¶¶ 1–4. The undisputed material facts also show that while some women can breastfeed without significant difficulty, many experience challenges. R-1102, ¶¶ 5–6. Pediatricians may refer a breastfeeding mother to a lactation care provider for a variety of reasons, including: a baby's loss of birth weight greater than 10%; a baby's jaundice; significant discomfort and pain with breastfeeding; discomfort with a breastfeeding technique; and/or

physical or mental complications from breastfeeding. R-1104, ¶ 14. Breastfeeding mothers may face a variety of challenges to breastfeeding, including sore nipples, inverted nipples, problems from breast reductions, postpartum depression, hormone imbalances, side effects from some medications, physical abnormalities, or problems caused by diseases/viruses. R-1104, ¶ 15. Women who present with underlying medical conditions, or who experience complex breastfeeding challenges, need clinical lactation care that goes beyond education, counseling, or peer support. R-1102, ¶ 7. Some of the challenges that may affect a baby's ability to breastfeed include: prematurity; infection; intolerance to lactose, incompatible blood types that can lead to jaundice and dehydration; abnormalities of a baby's mouth, face, neck and body. R-1105, ¶ 19. Babies who do not receive adequate nourishment can suffer serious health risks including a failure to thrive, brain injuries, and endocrine disorders. R-1107, ¶ 24.

C. Requirements for Licensure: The International Board Certified Lactation Consultant Credential ("IBCLC")

Under the Act, an applicant for licensure must hold certification as an IBCLC. The International Board of Lactation Consultant Examiners certifies individuals as IBCLCs. R-1119, ¶ 74. There are three pathways to certification as an IBCLC, and each requires some level of didactic, college-level education in health sciences, 95 hours of lactation specific education (5 in communication) and from 300–1,000 hours of direct patient care, depending on the pathway, prior to certification. R-

1120–22, ¶¶ 75–78. The IBCLC certification is the only program that has direct patient care as a prerequisite to certification. R-1125, ¶ 91. The United States Surgeon General has recognized that "IBCLC certification helps ensure a consistent level of empirical knowledge, clinical experience, and professional expertise in the clinical management of complex lactation issues." R-1146, ¶ 194.

Requirements for the credential include completion of college level courses at an accredited institution of higher learning including: (1) biology, (2) human anatomy, (3) human physiology, (4) infant and child growth and development, (5) introduction to clinical research, (6) nutrition, (7) psychology or counselling skills or communication skills, and (8) sociology or cultural sensitivity or cultural anthropology. R-1122, ¶ 79. An IBCLC candidate must also complete six additional subjects, either at an institute of higher learning or through continuing education courses including: (1) basic life support, (2) medical documentation, (3) medical terminology, (4) occupational safety and security for health professionals, (5) professional ethics for health professionals, and (6) universal safety precautions and infection control. *Id.* Candidates for the IBCLC credential can use other programs, such as the Certified Lactation Counselor ("CLC") Training Course, to meet part of the 95-hour lactation specific education requirement and/or for continuing education. But, in all cases, the IBCLC requires more education and training than the CLC Training Course. R-1123, ¶ 81. After completing one of the three pathways,

IBCLC candidates may then sit for the exam and receive certification. R-1123, ¶ 82. To maintain their credential, IBCLCs must periodically recertify. R-1124, ¶ 84.

D. Other Types of Lactation Care Providers

While the IBCLC is the only lactation provider that receives a didactic, college-level education together with direct patient care, s*ee* R-1120, 1125, ¶¶ 75, 91, other providers do not have the same stringent education and training. There can be a significant difference between the type of education and training of other providers of lactation care and services, and Dr. Bugg, ROSE's CEO, testified that there are "different levels of training based on where [a lactation provider] is on that "continuum." R-1128 (quoting R-2744, 2749). The training required for other providers range from none for mother-to-mother peer support (other than having breastfed); four hours training in how to actively listen (peer mentors); a two-day course with attendance at summits and Baby Cafes (Community Transformers); a three-day course (WIC Peer Counselors); a self-paced program with a 45-hour internship (Military Lactation Counselors); and a 52-hour course with an exam (Certified Lactation Counselors). *See* R-1133–41. The Community Transformer Coordinator for ROSE, who holds both the IBCLC and CLC credentials, summed up the difference in the education and training IBCLCs receive compared to other providers by noting that the other providers are trained to identify what is "normalcy" but do not

understand the "why" behind the "not normal." R-1143, ¶ 176 (quoting R-2186). In contrast, an IBCLC is educated and trained to understand the "why." *Id.* Compared to any other provider, an IBCLC has both a "higher level" of knowledge and experience performing direct patient care prior to certification. R-1141, ¶ 171 (quoting R-2176–77).

The sheer variety of lactation care providers (IBCLC, CLC, Military Lactation Counselor, ROSE Community Transformers, WIC Peer Counselors, La Leche League leaders, Certified Lactation Educators, Breastfriends) can itself cause confusion. R-1128, ¶¶ 98–99. The number and variety of providers creates "murkiness and misunderstanding" and "confusion" regarding the scopes of practice and credentials of the different providers. R-1129, ¶ 103 (quoting R-4047). This means that a new mother, who may be seeking lactation care confronts an "alphabet soup" of providers from which she must choose. She may face the decision at a time when she is sleep-deprived, labile, exhausted, overwhelmed, and in a fragile emotional state. R-1103, ¶ 12.

E. The Effect of the Act on Plaintiffs and Other Lactation Care Providers

Plaintiff-Appellee Mary Jackson is a lactation care provider who does not hold an IBCLC certification and, therefore, does not meet the minimum requirements to hold a license under the Act. R-8. Plaintiff-Appellee Reaching Our Sisters Everywhere, Inc., ("ROSE"), is a non-profit corporation that provides education and support to breastfeeding mothers. R-10. ROSE relies on many lactation care providers who are

not IBCLCs and, thus, do not qualify for a license under the Act. R-26. This case was brought against the Secretary as the state official charged with administering the Act. *See generally* O.C.G.A. § 43-22A-12.

The Act allows Jackson and the ROSE lactation care providers to provide breastfeeding education and support without obtaining a license. *See*, e.g., O.C.G.A. § 43-22A-13(2). Jackson acknowledges that providing affirmations to a new mother is a "large" part of her job. R-1113, ¶ 48 (quoting R-1506–07); *see also* R-93–99, ¶¶ 5, 16. Jackson admits that under the Act, there are some aspects of her job that she will still be able to perform; ROSE also admits that it will still be able to offer some of its programs and services. R-1113–14, ¶¶ 51-52.

The evidence in the record demonstrates that lactation care and services exist on a "spectrum" and lactation care and service providers fall along a "continuum" based on their training, ranging from mother-to-mother peer support to clinical lactation care and services provided by an IBCLC. R-1110–11, ¶¶ 37–38. There are, in effect, "beginning, intermediate, and expert services in care." *Id*. (quoting, R-2743–44, 2749). The types of services offered by individuals who practice in the field of lactation care and services can be divided into three general categories: (1) clinical lactation care; (2) education and counseling; and (3) peer support. *Id*. Lactation care and support includes providing counseling, education, and assistance to mothers concerning "common concerns and barriers, and challenges." R-1112, ¶ 45.

While there is some overlap in the services offered by individuals who practice in the field of lactation care and services, there is a need for different types of providers depending on the situation. *See generally* R-1110–14. Education and support are important for most breastfeeding mothers but some breastfeeding mothers need a higher level of clinical lactation care and services because either they or their babies have medical issues. For these reasons, it is reasonable to believe the General Assembly chose to restrict licensure of lactation consultants to those individuals who hold the IBCLC credential and are most prepared to provide skilled lactation care and services to mother and babies in Georgia.

F. Proceedings Below

Plaintiffs instituted this action on June 25, 2018, against the Secretary.[2] *See* R-7–80. The Secretary moved to dismiss for failure to state a claim on which relief could be granted as to either the due process or equal protection claims. R-194–213. After a hearing, the superior court granted the Secretary's motion to dismiss, holding that Plaintiffs had failed to state a substantive due process claim or an equal protection claim. R- 336–38. Plaintiffs appealed to this Court. *See Jackson v. Raffensperger*, 308 Ga. 736 (2020).

[2] The action initially named then-Secretary of State Brian Kemp and members of the Lactation Consultant Advisory Group. The advisory group members were later dismissed and current Secretary of State Brad Raffensperger was substituted for Kemp. R-331–35.

This Court held that the superior court erred in dismissing Plaintiffs' claims for two reasons: first, because the superior court had misstated Georgia law by holding that the Georgia Constitution did not recognize a due process right to pursue a chosen occupation, *id*. at 740; and, second, because, at the motion to dismiss stage, and taking the facts of the complaint as true, the Plaintiffs had alleged sufficient facts to demonstrate that they were similarly situated to those who were entitled to a license under the Act. *Id.* at 741–42. This Court remanded the case, "with direction to the superior court to reconsider the motion to dismiss for failure to state a claim." *Id*. at 742. Subsequently, the Secretary withdrew his motion to dismiss in the superior court, and discovery commenced. R-364–66.

After the conclusion of discovery, both parties filed motions for summary judgment alleging that the undisputed material facts demonstrated that they were entitled to judgment in their favor. *See* R-990–92, 993–95. On March 3, 2022, the lower court entered a ruling denying defendant's motion for summary judgment and granting plaintiffs' motion for summary judgment. R-4900–20. The Secretary appeals that order.

ENUMERATION OF ERRORS

The superior court erred when it denied summary judgment to the Secretary and granted summary judgment to Plaintiffs based on a

finding that the Act violates the equal protection guarantees of the Georgia Constitution.

STANDARD OF REVIEW

"On appeal from the grant of summary judgment, the Court conducts a de novo review of the evidence to determine whether there is a genuine issue of material fact and whether the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." *Shekhawat v. Jones*, 293 Ga. 468, 469 (2013). Legal questions are also reviewed de novo. *Barnett v. Caldwell*, 302 Ga. 845, 845 (2018).

SUMMARY OF ARGUMENT

The superior court's holding that the Act violates the Equal Protection Clause of the Georgia Constitution should be reversed because the Act does not treat similarly situated classes differently and, even if the classes were similarly situated, and the superior court applied the rational basis test incorrectly. Not all lactation care providers are similarly situated and even if they were, the Act survives the rational basis test. The superior court erred in applying the rational basis test when it improperly shifted the burden of proof from the Plaintiffs to the Secretary. If the superior court had applied the test properly, it would have required the Plaintiffs to disprove every reasonable basis raised by the Secretary. The superior court also failed to recognized the reasonable bases for the exceptions to the Act—which

are the only provisions of the Act that it found to be irrational. Finally, even if one of more of the licensure exceptions are irrational, the proper remedy would have been for the superior court to have held that *only* the exception is unconstitutional, not the entire Act.

In an equal protection challenge, Plaintiffs must, as a threshold matter, establish that they are "similarly situated to members of the class who are treated differently." *Harper v. State*, 292 Ga. 557, 560 (2013) (citation omitted). The superior court's finding that the classes here are similarly situated was erroneous for at least two reasons. *First*, the superior court erroneously held that all lactation care providers are similarly situated, focusing on the similarities between certain certified providers (CLC vs. IBCLC), when the actual inquiry should whether those individuals who are qualified to obtain a license under the Act (the IBCLCs) are similarly situated to *any* other person who may wish to become licensed under the Act, regardless of certification, education, or experience. *Second*, it was error for the trial court to hold that the two classes are similarly situated, because there is ample undisputed evidence in the record that all of the lactation care providers involved in this case do *not* do the same type of work. *See Jackson*, 308 Ga. at 741–42.

While the Secretary believes that the Court's inquiry should stop here because the classes are not similarly situated, the Act still survives constitutional scrutiny under the lenient rational basis test, which only requires that the state to identify a plausible reason why

the challenged law is rationally related to a legitimate objective of the government. *Women's Surgical Ctr.*, 302 Ga. at 354 (cleaned up). The superior court erred in its application of the rational basis test for three reasons. *First*, the superior court wrongly shifted the burden in this case. Under the rational basis test, Plaintiffs bear the burden of proving that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker." *Gliemmo,* 287 Ga. at 13. The superior court, failed to hold Plaintiffs to this high standard, and, instead, improperly shifted the burden to the Secretary to affirmatively prove that the reasons for the law were in fact the correct policy choice. *Second*, the superior court flatly ignored the plausible reasons the Secretary raised for why the legislature may have exempted volunteers, government employees, and other licensed healthcare professionals from the licensing requirement. *Third,* even if rational basis required a holding that one of the exceptions was irrational, the trial court should have relied on the presumption of severability and invalidated only the specific provision of the exception held to be irrational, not the entire Act. *See* O.C.G.A. § 1-1-3.

ARGUMENT

I. The Act does not violate the equal protection guarantees of the Georgia Constitution.

Plaintiffs contend—and the superior court agreed—that the Act violates the Equal Protection Clause of the Georgia Constitution, Ga. Const. art. I, § 1, ¶ II, because the Act permits IBCLCs to obtain licensure, but not "CLCs and other similarly situated unlicensed lactation consultants." R-33, ¶ 125. That is simply wrong.

To state an equal protection claim, Plaintiffs must first establish as a threshold that they are "similarly situated to members of the class who are treated differently" from them. *Harper*, 292 Ga. at 560 (2013) (citation omitted). Even if the two classes are similarly situated and treated differently under the law, the court applies only the rational basis test unless a suspect class or a fundamental right is at issue. *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"). This standard is the most lenient level of constitutional scrutiny: if any arguable reason supports the law, it must be upheld. *Advanced Disposal Servs. Middle Georgia, LLC v. Deep S. Sanitation, LLC*, 296 Ga. 103, 105 (2014).

The trial court's holding that the Act violates equal protection was incorrect for several reasons. First, the "classes" at issue here are not similarly situated. Second, even if they were, it was Plaintiffs'

obligation to prove that no rational basis existed for treating them differently. And, finally, regardless of the burden of proof, there are multiple rational bases for the Act, as the superior court correctly held in relation to the due process claim.

A. The Act does not treat similarly situated classes differently.

The superior court erred by holding that the two classes in this case are similarly situated. Plaintiffs bore the burden to establish that the classes are similarly situated and they failed to show that all lactation care providers are similarly situated to IBCLCs (who qualify for a license under the Act). *Rodriguez v. State*, 275 Ga. 283, 284–85 (2002). The superior court's ruling to the contrary is based on a flawed understanding of the classes at issue, an erroneous interpretation of the undisputed facts of the case, and a misunderstanding of the legal standard to be applied in determining if the classes are similarly situated.

1. The classes should be defined as those currently eligible for licensure versus everyone else.

Plaintiffs frame the two supposed classes at issue in this case as those lactation care providers who qualify for licensure under the Act, and those who do not. The superior court recognized that this Court treats "individuals who perform the same work as being similarly situated for equal protection purposes." *Jackson*, 308 Ga. at 741–42 (citing *Jenkins v. Manry,* 216 Ga. 538, 545–46). But the superior court

was wrong to rule that "IBCLCs and CLCs with different certifications provide the same lactation care and services to mothers and babies" and that "CLCs without an IBCLC certification are similarly situated to IBCLCs." R-4916. This misses the mark because this case does not concern a choice between an IBCLC and a CLC. There are a host of lactation care providers who are *neither* certified as an IBCLC or a CLC. *See* R-1131–41. The class of individuals who do not meet minimum qualifications for a license under the Act must include *all* individuals who may desire to provide lactation care and services, regardless of whether they have any specific education or training. Moreover, nothing in the law prevents those who aren't currently eligible for licensure from obtaining the IBCLC credential and then applying for a license.

2. The two classes do not do the same type of work.

Even assuming that there are two "classes" here (those who meet minimum qualifications for a license and those who do not), the superior court still erred in treating them as similarly situated. The record indicates a consensus in the lactation community that the work done by lactation care providers exists on a continuum or spectrum. R-1110–11, ¶¶ 37–38. The superior court was correct in its analysis of Plaintiffs' substantive due process claim when it held "that the undisputed material facts in the case show that not all lactation care providers are providing care that rises to the statutory definition of

'lactation care and services' found at O.C.G.A. § 43-22A-3(5)." R-4905. While there may be some overlap in the type or work done by both classes, not *all* lactation care providers do the same type of work and provide the same services to mothers and babies. One of Plaintiffs' witnesses acknowledged this when she testified that there are times when the level of lactation care and support a mother needs is best met with an IBCLC. R-1142. The witness testified that, based on the IBCLC's training, an IBCLC approaches the job very differently than other types of lactation care providers based on the different levels of training. R-2187. And she admitted that an IBCLC's perspective in assessing a breastfeeding challenge would be different than other providers, even to the point of referring certain mothers with medical conditions such as mastitis or mothers taking a medication to an IBCLC. *Id*.

IBCLCs are the "go to" for referrals of complex lactation problems because of their unique training. As discussed, *supra*, IBCLCs complete college-level health science education, specific education in lactation care, basic life support skills, and at least 300 (but as many as 1000) hours of clinical experience before being certified. In contrast, the requirements for the various other types of lactation provider certifications vary widely and require comparatively little (or in some cases zero) education and training. While many of these other providers play an important role in providing counseling, education, and support

to breastfeeding mothers, unlike IBCLCs, they lack the training necessary to provide clinical care to vulnerable populations.

The record demonstrates that IBCLCs are uniquely situated by virtue of their education and training to provide a different type of service than non-IBCLCs. Contrary to Plaintiffs' assertion, not all lactation care providers do the same type of work or provide the same services and the two classes are not similarly situated.

The superior court ignored the undisputed facts and wrongly concluded that individuals doing *any* type of work related to breastfeeding and lactation are all doing the *same* type of work for purposes of determining if the groups are similarly situated. The conclusion is wrong because it ignores that many groups of workers work in related roles, but do not do the same "type of work." Physicians, registered nurses, and phlebotomists may all draw blood, but they are not engaged in the same "type of work." Likewise, over-generalizing doing the same "type of work" could mean that chiropractors, physical therapists, athletic trainers, and/or massage therapists would all be similarly situated for purposes of an equal protection analysis. The differences between the type of work that the two "classes" perform cannot be meaningfully disputed, and it was error for the superior court to hold otherwise.

B. Even if the classes are similarly situated, the classification is rationally related to a legitimate state purpose.

Even if the Act treated similar "classes" differently it would not matter. Unless there is a suspect class or a fundamental right at issue (and there is not) courts still apply only rational basis review. *Advanced Disposal,* 296 Ga. at 106 (citation omitted); *see also State v. Moore*, 259 Ga. 139, 141 (1989) (noting that the Court needed to find a "rational basis for distinction); *Ciak v. State*, 278 Ga. 27, 28 (2004) (noting that "an equal protection challenge is assessed under the "rational relationship" test); *Love v. State*, 271 Ga. 398, 400 (1999) (noting review under the "rational relationship" test). The Act easily satisfies rational basis review. The rational basis test requires only that the challenged law "bears a rational relationship to a legitimate objective of the government." *Women's Surgical Ctr.*, 302 Ga. at 354 (cleaned up).

While the Court may think that the General Assembly could have drawn a different line, made a better classification, or more artfully drafted the regulatory mechanisms of the Act, "[i]t is not necessary that the classification scheme be the perfect the best one" to satisfy rational basis review. *Harper*, 292 Ga. at 561. This means the law "may be imperfectly related to the goals desired," "overinclusive or underinclusive," and neither the "best, [n]or even the least intrusive, means available to achieve its objective." *State v. Old S. Amusements*, Inc., 275 Ga. 274, 278 (2002) (citation omitted). As long as a law is not

"irrelevant" to the government's interests "or altogether arbitrary," it will pass the rational-basis test. *Advanced Disposal*, 296 Ga. at 106 (citation omitted). Moreover, it is the Plaintiffs' burden to prove that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker." *Gliemmo,* 287 Ga. at 13. (citation omitted); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'") (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The superior court's analysis was faulty from beginning to end. It held that the Act is invalid on the basis that a few of the exceptions to licensure found in the Act somehow establish that there is no rational purpose for the *entire* Act. But that holding cannot stand, for three reasons. First, the court erroneously shifted the burden of proof—it is Plaintiffs' burden to *disprove* any potential rational basis for the Act. Second, there are many adequate, plausible reasons for each of the exceptions cited by the superior court. Third, even if one of the exceptions was somehow irrational, the proper remedy is to invalidate the *exception*, not the entire Act.

1. The superior court erroneously shifted the burden of proof.

The superior court wrongly failed to require that Plaintiffs meet their substantial burden in this case to negate all of the General

Assembly's potential reasons for promulgating the Act. Under Georgia law, the reasons or facts on which the legislature based its law need only be plausible—and can be "illogical," "unscientific," or even objectively wrong. *Gliemmo*, 287 Ga. at 12 (citation omitted). Parties or judges may believe a law to be harmful, or unwise, or otherwise bad policy, *Gliemmo*, *id.*, and even have "empirical data" in support of that belief, *Deen v. Stevens*, 287 Ga. 597, 606 (2010) (citation omitted). "It is not the role of the courts, however, to weigh those policy arguments" or "wade into" an evidentiary dispute about which one should prevail. *Id.* (cleaned up). And absent involvement of a fundamental right or suspect class, the Georgia Constitution does not grant courts that discretion. Instead, like the U.S. Constitution, it "presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id.* at 605–06. In this matter, the superior court improperly shifted the burden to the Secretary to prove the rationality of the exceptions to licensure noted by the lower court. And, even though the Secretary presented potential reasons for each exemption, the superior court "waded into" policy decisions which should be left to the legislature.

2. There are rational bases for the exceptions to licensure contained in the Act.

The superior court determined that three of the Act's exceptions—the volunteer exception, the government employee exception, and the licensed professional exception—each create a scenario where individuals may practice "lactation care and services" without a license and, thus, the superior court held, it is not rational or reasonable that CLCs and other non-IBCLC lactation care providers cannot practice "lactation care and services" without a license. *See* R-4916–20. However, rational basis review requires nothing more than a *reason*—not a good reason, not a persuasive reason, just a debatable *reason*—and the superior court mistook its own policy disagreement with the General Assembly as a basis for legal action. Each of the exceptions clears that low bar with room to spare.

a. The Volunteer Exception

The superior court took issue with the Act's licensure exception for volunteers, O.C.G.A. § 43-22A-13(6), which provides that the Act does not prevent individuals from providing lactation care and services without fee or compensation, provided that they do not use the title "licensed lactation consultant" or "licensed L.C." R-4917–18. The superior court did not address all of the plausible reasons raised by the Secretary, some of which are immediately obvious. For instance, the General Assembly could very well think that those holding their services out for *money* are more likely to commit fraud and thus more

likely to require licensure. The General Assembly could also believe it simply did not want to accidentally prohibit certain kinds of care given in non-clinical settings. The Court need go no further than that to recognize that this exception is not *irrational*.

Although the Secretary made these arguments to the superior court, the court did not address them in its order. Instead the superior court erred when it stated that it could not find "any plausible or arguable reason" that the exception serves to further a legitimate state purpose, and that erroneous holding should not be used to invalidate the entire Act.

b. The Government Employee Exceptions

The superior court also erroneously held that the Act irrationally exempts government employees. R-4918. The superior court's order fails to differentiate between the two types of government employee exceptions found at O.C.G.A. § 43-22A-13(4) and (5). The first exception exempts federal employees from licensure when they are engaging in the practice "within the discharge of the employees' official duties" and when they are performing their duties within the "recognized confines of a federal installation." O.C.G.A. § 43-22A-13(4). This exception simply restates the limits of the State's authority for activities carried out on a federal installation because, "[i]t is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation." *Goodyear Atomic Corp. v. Miller*, 486 U.S.

174, 180 (1988). Without question, the State's obligation to comply with federal law is a rational reason for the exception.

The second government employee exemption cited applies to employees of state, county, or local governments who engage "in the practice of lactation care and services within the discharge of the employees' official duties" and specifically exempts peer counselors who work for the WIC program.[3] O.C.G.A. § 43-22A-13(5). But as the Secretary argued below (and the superior court ignored), it is certainly rational for the General Assembly to believe that state and municipal employees—whom the state already has a great deal of influence over—need not apply for a license. R-4610-11. This is a reasonable connection to a legitimate state purpose, and should not invalidate the entire Act.

c. Other Licensed Professions Exception

The superior court also held that exception for other licensed healthcare professions was irrational, but the court's order indicates it misunderstood the exception. *See* O.C.G.A. § 43-22A-13(1). The exception provides that licensed doctors, chiropractors, nurses, physician assistants, or dieticians may engage in "lactation care and

[3] The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) provides federal grants to states for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age 5 who are found to be at nutritional risk. U.S. Dep't of Agriculture, Food and Nutrition Service, https://www.fns.usda.gov/wic (last visited August 28, 2022).

services *when incidental to the practice of their profession."* It also provides that such licensed professionals may not hold themselves out as licensed lactation consultants. *Id.* The undisputed material facts demonstrate that there are activities and procedures performed by these licensed professionals that *may* fall into the Act's definition of "lactation care and services." R-4919. This exception exists simply to ensure that licensed healthcare professionals can practice within their profession's *own scope* of practice without being in violation of the Act. The exception does not give a licensed healthcare professional carte blanche to practice the full extent of "lactation care and services." In fact, the exception prohibits licensed healthcare professionals covered by the exemption from using the title "licensed lactation consultant." Nonetheless, the superior court seems to interpret this exception as allowing healthcare providers to hold themselves out as a licensed lactation consultant. R-4919–20. That is simply wrong. In any event, it is hardly irrational to exempt licensed professionals from practicing their professions where it overlaps with lactation consulting.

3. This Court can declare one or more of the exceptions unconstitutional without invalidating the entire Act.

Even if one of these exceptions was suspect—and they quite clearly are not—that should not invalidate the entire Act. This Court should recognize that the Act "comes to the court cloaked with a presumption of constitutionality." *Cobb Cty. Sch. Dist. v. Barker*, 271

Ga. 35, 36–37 (1999) (citing *State v. Brannan*, 267 Ga. 315, 317 (1996)). Further, absent a specific expression of the legislature otherwise, it is the *exception* that should be nullified, not the rest of the Act. O.C.G.A. § 1-1-3. No provision in the Act prevents this Court from severing an unconstitutional provision and, as noted by this Court, "[t]he General Assembly has created a general presumption of severability." *Jekyll Island-State Park Auth. v. Jekyll Island Citizens Ass'n*, 266 Ga. 152, 153 (1996). Therefore, even if a distinct provision of the Act is irrational, the remainder of the Act should survive.

CONCLUSION

For the reasons set out above, this Court should reverse the judgment of the Fulton County Superior Court granting summary judgment to Plaintiffs and order the superior court to grant summary judgment in favor of the Secretary.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2022, prior to filing this document via the Court's SCED E-filing System, I served Appellant's Brief via email to the following:

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SUPREME COURT OF GEORGIA
Case No. S23A0017

August 04, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BRAD RAFFENSPERGER v. MARY NICHOLSON JACKSON et al.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until September 06, 2022.

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

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

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk