No. S23X0018

In the

Supreme Court of Georgia

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

Cross-Appellants,

v.

Brad Raffensperger,

Cross-Appellee.

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

BRIEF OF CROSS-APPELLEE

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INTRODUCTION

The State of Georgia promotes and supports breastfeeding as the preferred method of feeding infants because it has substantial health benefits for both mothers and infants. Of course, many mothers and infants are able to breastfeed on their own, but others need additional help. Enter lactation care, which includes a wide range of education, support, and clinical services provided both in hospitals and homes to help mothers and infants breastfeed successfully.

To ensure that this important and deeply intimate care is carried out safely and effectively, the General Assembly passed the Georgia Lactation Consultant Practice Act. Subject to a few limited exceptions, the Act requires licensure for the practice of lactation care and services. To obtain licensure, one must become an International Board-Certified Lactation Consultant ("IBCLC"). That certification requires a number of college-level courses including lactation-specific education, 300 hours of supervised clinical experience, and passage of an exam.

Plaintiffs Mary Jackson and her organization, Reaching Our Sisters Everywhere, claim that the Act facially violates their right to substantive due process because it makes these minimum education and training requirements too stringent and thus impacts their right to pursue their occupation. They allege that individuals with less education and training are just as competent as IBCLCs and that the Act therefore harms mothers and infants by reducing access to lactation care and services. Even if Plaintiffs were factually correct, that might support an argument that the General Assembly made a bad policy judgment, but it does not establish a

constitutional violation. As the trial court correctly ruled, under the longstanding rational-basis test that applies to licensure regulations like the Act, it is enough that the General Assembly conceivably could have concluded that tying the Act's licensing requirement to the educational and clinical training requirements for IBCLCs would improve the quality of lactation care for mothers and infants. Whether one agrees with that decision or not, it is the General Assembly's decision to make.

Any other holding would set this Court up as a kind of "superlegislature," *see Advanced Disposal Servs. Middle Ga. LLC v. Deep S. Sanitation, LLC*, 296 Ga. 103, 107 n.5 (2014) (quotation omitted), applying its own policy judgments to determine whether the General Assembly has good *enough* reasons for making routine economic judgments. This would not only make the business of legislating nearly impossible—everything from licensure for doctors to health regulations that make services more expensive would become open to constitutional challenge—but it would embroil the judiciary in what are essentially policy disputes. Not all legislative policies are wise. That does not mean they are illegal. This Court should affirm the judgment below.

STATEMENT

A. Georgia recognizes the importance of breastfeeding and lactation care.

Breastfeeding has substantial health benefits for newborn children and their mothers. For children, it reduces the risk of respiratory infections, asthma, dermatitis, obesity, leukemia, and lymphoma. R-703 ¶ 24; R-786; R-879, ¶ 12. For mothers, it reduces the risk of hypertension, cardiovascular

disease, high cholesterol, and ovarian and breast cancers. R-703, ¶ 24; R-786; R-879–80, ¶ 12. And for both mother and child, breastfeeding promotes psychological wellbeing and emotional bonding. R-703, ¶ 24; R-786; R-879–80, ¶ 12. Unsurprisingly, the World Health Organization, the American Academy of Pediatrics, and the State of Georgia all recommend breastfeeding for at least the first six months of a child's life. R-703, ¶¶ 24–25; Ga. Dep't of Pub. Health, *Breastfeeding*, https://dph.georgia.gov/breastfeeding (last visited Oct. 17, 2022).

Many mothers, however, face challenges in breastfeeding. R-880, ¶ 16; R-1103, ¶ 13. And without professional support, they will quickly abandon breastfeeding or forego it entirely. R-1103, ¶ 13 (noting that only 25% of mothers who attempt breastfeeding are still exclusively breastfeeding after six months). That's where lactation care comes in. Lactation personnel offer a variety of services to help new mothers navigate the physical and emotional challenges associated with breastfeeding. R-880–81, ¶¶ 14–17. These personnel fall into three general categories. R-880, ¶ 17; R. 1771–72; R-3480; R-3524–25. Mother-to-mother "peers" draw on their own breastfeeding experience to provide emotional support and "cheerleading" for new mothers. R-3542–43; *see also* R-3480; R. 1770–71; R-2186. Lactation "counselors" offer education and guidance for families on basic breastfeeding issues. R-3480; R-3424–32. Neither peers nor counselors provide clinical care; they instead focus on education and support. R-852; R-1133, ¶ 121; R-1768–72; R-2186; R-3822.

Lactation "consultants," by contrast, provide "professional, evidence based, clinical lactation management." R-3480. Unlike peers and counselors, lactation consultants actually "treat[] medical situations" related to breastfeeding. R-1774. They observe a child breastfeeding and physically examine the child to check for respiratory issues and oral health. R-3528–36. And they use that information to develop a "plan of care" and instruct the mother on proper breastfeeding techniques. R-3536. As even Plaintiffs' expert agreed, these services require a "deeper understanding of the scientific principles" behind lactation care. R-2184–85. Whereas a peer or counselor may "know that something is not right," a lactation consultant will know "why" it is not right. R-2186.

Lactation personnel may also be certified by private organizations. *See* R-3479–81. These many certifications produce a laundry list of titles and acronyms: International Board Certified Lactation Consultant (IBCLC), Certified Lactation Specialist (CLS), Lactation Education Counselor (LEC), Breastfeeding Counselor (BFC), Certified Lactation Counselor (CLC), Certified Lactation Educator (CLE), to name a few. R-3481. And the requirements for certification vary significantly. Some programs require no more than a few days of classroom instruction, while others require extensive college level coursework and supervised clinical experience. *Id.*

This "alphabet soup" of credentials creates confusion for breastfeeding families. R-3544; *see also* R-3479; R-4017. New mothers, unable to gauge for themselves the quality of a lactation professional's training, may be unsure who they can rely on for assistance. R-891, ¶ 45; R-3544. As a result, many

mothers may abandon their search for professional help and give up on breastfeeding altogether. R-704, ¶ 32. Or worse, mothers may rely on the advice of someone who lacks the education, training, or experience necessary to provide competent lactation care. *See* R-899–900, ¶¶ 72–74 (explaining the "risk of harm to a mother and/or infant if they receive care from an unqualified and untrained lactation care provider"). This concern is especially acute when a mother seeks hands-on clinical care, because the risk of physical harm is elevated in such situations and not all lactation professionals are equipped to provide such care safely. *Id.*; R-3978.

B. The Georgia Lactation Consultant Practice Act ensures breastfeeding families receive quality lactation care.

To address these concerns, the General Assembly enacted the Georgia Lactation Consultant Practice Act, 2016 Ga. Laws 357 (the "Act"), which promotes "the rendering of sound lactation care and services" by requiring individuals who provide such services to be licensed, O.C.G.A. §§ 43-22A-2, 3(5)–(6). The Act defines "lactation care and services" to include only "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." *Id.* § 43-22A-3(5). Non-clinical lactation services—that is, services not based on the clinical application of scientific principles—are not regulated by the Act.

To qualify for a license, an applicant must be certified by the International Board of Lactation Consultant Examiners (IBLCE) as an International Board Certified Lactation Consultant (IBCLC). *Id.* §§ 43-22A-

3(6)(b), 6(2), 7(2). IBCLC certification requires a candidate to complete (1) eight college level courses in subjects including human anatomy, nutrition, and child development; (2) six continuing education courses in subjects relevant to medical professionals; (3) 95 hours of lactation-specific education; and (4) at least 300 hours of supervised, lactation-specific clinical experience. R-888–89, ¶¶ 37–38. Candidates for IBCLC certification must also pass a four-hour examination. R-890, ¶¶ 40–41. And after they are certified, IBCLCs must satisfy continuing education requirements and periodically retake the certification exam. R-890, ¶ 42.

Certification as an IBCLC is widely recognized as the gold standard for lactation professionals, *see* R-1146, ¶ 194, and for good reason. It is the only credential that requires clinical experience as a prerequisite for certification. R-892, ¶ 48; *see also* R-852 (report from the Georgia Occupational Regulation Review Council concluding that IBCLCs are "the only lactation consultants who are trained to perform 'clinical care,' in addition to breastfeeding education and promotion"). This means that certification as an IBCLC is also the only credential that guarantees an individual is equipped to provide the full range of lactation care for which the Act requires a license. O.C.G.A. § 43-22A-3(5) (defining "lactation care" to include "clinical application"). And it means that breastfeeding mothers can be confident in the quality of clinical care they receive from IBCLCs licensed under the Act. *See* R-3545 ("[L]icensure … is a clear demarcation within the lactation field for those who have clinical training and provide clinical lactation care.").

The Act exempts certain individuals from the licensing requirement. O.C.G.A. § 43-22A-13. Licensed medical professionals, as well as doulas and perinatal or childbirth educators, are exempted so long as the lactation services they provide are incidental to their occupation. *Id.* § 43-22A-13(1)–(2), (8). Government employees are exempted either because the state has no regulatory authority over them, in the case of federal employees, or because the state has no need to license them, in the case of state employees whose official duties involve lactation care and services supervised by the state. *Id.* § 43-22A-13(4)–(5). Individuals training to become lactation care providers are exempted if they are supervised by a licensed lactation consultant. *Id.* § 43-22A-13(3). And volunteer lactation personnel are exempted so long as they do not hold themselves out as licensed consultants. *Id.* § 43-22A-13(6).

C. Plaintiffs may continue working as peers and counselors.

Plaintiff Mary Jackson is a lactation counselor and co-founder of Plaintiff Reaching Our Sisters Everywhere (ROSE), a nonprofit that provides education and support for breastfeeding mothers. R-9–10, ¶¶ 6, 8–9. Jackson does not have an IBCLC certification. Instead, she is a "Certified Lactation Counselor" (CLC), R-9, ¶ 6, which required her to complete 45 hours of coursework and sit for an exam, but involved no supervised clinical experience. R-54. Many of ROSE's other employees received even less training. The group's peer counselors and "community transformers," for example, have only their personal experience with breastfeeding and a few days of training with no examination. R-15, ¶¶ 40–41; R-1137, ¶ 143; R-1141, ¶ 169.

Because the Act requires a license only for lactation consultants who provide clinical services, Jackson and other ROSE employees are free to continue their work as lactation peers and counselors. *See* O.C.G.A. § 43-22A-3(5); R-3480 (explaining that peers and counselors provide emotional support and non-clinical education); R-96, ¶ 16 ("Most mothers need nothing more than affirmation and practical guidance."). Jackson, in fact, acknowledged that the educational and support aspects of her work will continue when the Act takes effect. R-2223, ¶ 9.

D. Plaintiffs file suit, but the trial court ultimately rejects their substantive due process challenge.

Although much of their work will be unaffected, Jackson and ROSE petitioned for declaratory and injunctive relief in Fulton County Superior Court challenging the law on equal protection and due process grounds. R-7–41. The trial court granted the Secretary's subsequent motion to dismiss, holding that Plaintiffs failed to state either a due process claim or an equal protection claim under the Georgia Constitution. R-336–38. As to the former, the trial court determined that the Georgia Constitution does not protect the right to work in one's chosen profession. R-337. As to the latter, the trial court concluded that Plaintiffs failed to allege they are similarly situated to the IBCLCs who can obtain a license under the Act. *Id*. This Court reversed both determinations on appeal and remanded for further consideration. *Jackson v. Raffensperger*, 308 Ga. 736 (2020). As to the due process claim, the Court held that there is a substantive due process right to engage in one's chosen profession, *id.* at 740, though the Court did not address the Secretary's argument that licensing schemes of economic activity are subject

to only rational basis review, *id.* at 742 n.6. And as to the equal protection claim, the Court held that Plaintiffs had *alleged* that they were similarly situated to IBCLCs. *Id.* at 742.

Back in the superior court, and following discovery, both parties filed motions for summary judgment. R-990–95. The court granted summary judgment to the Secretary on Plaintiffs' substantive due process claim. Applying a rational basis test, the court concluded that there were no fewer than six plausible grounds the General Assembly could have relied upon to determine that "the State should license lactation consultants who are providing clinical lactation care and services and [to] regulate the provision of clinical lactation care and services." R-4909. Those include (1) "A recognition that there are substantial benefits of breastfeeding for both mothers and infants, together with the fact that some mothers and infants face significant challenges to breastfeeding"; (2) "A need to alleviate confusion about which type of providers offer clinical lactation care and services in an effort to help new mothers evaluate which provider's credentials meet her needs"; (3) "A desire to reduce the risk of harm that mothers and babies may face if they receive unsound care or advice related to lactation"; (4) "An acknowledgement that the intimate and confidential nature of lactation care requires some level of regulation"; (5) "An effort to protect the public from fraud"; and (6) "A general recognition by all parties, including Plaintiffs, that some level of training is necessary before a provider can provide lactation care and services." R-4909–10. Nonetheless, the court granted summary judgment to Plaintiffs on their equal protection claim. R-4913–20.

The Secretary appealed from the equal protection ruling in Case No. S23A0017. Plaintiffs cross-appeal the substantive due process ruling here.

SUMMARY OF ARGUMENT

This Court should affirm the superior court's ruling that the Act does not violate substantive due process.

I. The trial court correctly applied rational-basis review. Substantive due process claims that do not involve either a fundamental right or a suspect class are subject to rational-basis review. This standard is the most lenient level of constitutional scrutiny: if any arguable reason supports the law, it must be upheld, and the burden rests with the plaintiff to negate every conceivable rational basis for the law. This standard applies to economic regulations, including healthcare regulations and licensing requirements like those found in the Act.

Plaintiffs argue that this Court actually applies some form of heightened scrutiny to substantive due process claims, but their contention lacks any basis in Georgia law. They rely primarily *City of Lilburn v. Sanchez,* 268 Ga. 520 (1997), but that decision expressly applies rational-basis review. Its "unduly oppressive" dicta, on which Plaintiffs seize, pertained only to questions of municipalities' proper exercise of police power, and in any event was later overruled in that context. Plaintiffs' other cases either expressly apply rational-basis review or involve analyses limited to other types of claims.

And the Court should decline Plaintiffs' invitation to impose a heightened standard for substantive due process challenges to economic

regulations. Neither the text of Georgia's equal protection clause nor Justice Lumpkin's dicta in *Bethune v. Hughes,* 28 Ga. 560 (1859), signal that Georgia's *due process clause* should be construed to more strictly limit economic regulations. Moreover, the Texas Supreme Court's decision in *Patel v. Texas Department of Licensing and Regulation,* 469 S.W.3d 69 (2015), which imposed a heightened standard asking whether economic regulations are "oppressive" to the plaintiff, employs an unworkable standard that drastically expands the already questionable doctrine of substantive due process. Following Texas's lead and adopting some form of heightened review would wreak havoc on the State's professional licensing regime and would inject uncertainty into the realm of economic regulation more generally. Occupational licensing schemes like this one can raise difficult policy questions, but those are questions for the legislature, not the courts.

II. The trial court correctly concluded that the Act is rationally related to the government's legitimate interests in providing access to safe, high-quality lactation care and services and otherwise protecting public health and safety. The General Assembly could reasonably conclude that breastfeeding provides substantial benefits for the health and welfare of mothers and infants and that the State should therefore promote and support breastfeeding as a matter of public health. The General Assembly could also conclude that setting minimum education and training standards for lactation consultants would promote access to quality lactation care for mothers and infants, and that choosing the educational and clinical training requirements for IBCLCs

is rationally related to this goal. That is enough to satisfy rational-basis review.

ARGUMENT

I. The trial court correctly applied a rational-basis standard.

The Due Process Clause of the Georgia Constitution provides that "[n]o person shall be deprived of life, liberty, or property except by due process of law." Ga. Const. art. I, § I, ¶ I. Although the text of that clause appears to guarantee only a procedural right, this Court, like the U.S. Supreme Court, has permitted so-called "substantive due process" claims that rely on the clause as a source of substantive rights. *See, e.g.*, *Women's Surgical Ctr., LLC v. Berry*, 302 Ga. 349, 354 (2017) (addressing substantive due process challenge). Plaintiffs argue that the Act facially violates their substantive due process right to "pursue a chosen professional calling" by requiring a license to seek compensation for providing lactation care and services, as defined by the Act. R-34–36. But economic regulations like the licensing requirements at issue here do not violate substantive due process as long as they satisfy Georgia's lenient rational-basis test—not the novel form of heightened scrutiny that Plaintiffs propose.

A. Economic regulations do not violate substantive due process rights as long as they are rationally related to a legitimate government interest.

Substantive due process claims under the Georgia Constitution that do not involve a "fundamental right" or "suspect class" have long been subject to the "rational basis test." *Women's Surgical Ctr.,* 302 Ga. at 354 (citation omitted); *see, e.g.*, *Clein v. City of Atlanta*, 164 Ga. 529, 139 S.E. 46, 51 (1927)

("Where there is reasonable relation to an object within the governmental authority, the exercise of legislative … discretion is not subject to judicial review."). That test is a lenient one that permits laws to be imperfectly related to the goals desired, overinclusive or underinclusive, and even unwise or bad policy in the eyes of the parties or the court, as long as they are not irrelevant to government interests or wholly arbitrary. Georgia courts apply that test to economic regulations, including licensing requirements and healthcare regulations like the statute at issue here. Plaintiffs' attempts to divine a heightened standard of review from dicta in cases like *Sanchez* fail. Those cases either expressly apply rational-basis review or involve determinations not relevant to this context.

1. The rational-basis test that applies to substantive due process claims under the Georgia Constitution is "the least rigorous test of constitutional scrutiny." *Advanced Disposal*, 296 Ga. at 106 (citation omitted). The 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 (citation omitted). Under that test, a law must be upheld if "any plausible or arguable reason" supports it. *Advanced Disposal,* 296 Ga. at 105 (quoting *City of Lilburn v. Sanchez*, 268 Ga. 520, 522 (1997)). 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).

A plaintiff attacking the rationality of a law under this standard faces a heavy burden. Because 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 v. Cousineau*, 287 Ga. 7, 12 (2010) (citation omitted)[1]—it is not enough for a plaintiff to allege that potential reasons for a law lack supporting evidence. Instead, 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." *Id.* (citation omitted); *cf. 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)).

2. The rational-basis test applies to regulations "[i]n the arena of social welfare and economics." *Sweat*, 276 Ga. at 629. As this Court explained almost 100 years ago, "[w]hat such regulation shall be, and to what particular trade or business such regulation shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power of the state." *Cooper v. Rollins*, 152 Ga. 588, 110 S.E. 726, 728

[1] *Gliemmo* describes the rational-basis test in the context of an equal protection challenge, but the same test applies to substantive due process claims. *See Advanced Disposal*, 296 Ga. at 105 (applying rational-basis test to substantive due process claim and quoting *Georgia Dep't of Human Res. v. Sweat*, 276 Ga. 627, 628 (2003), an equal protection case, for the test).

(1922). Thus, the Court held, "unless the regulations are so unreasonable and extravagant … that the property or personal rights of the citizens are unnecessarily and … arbitrarily interfered with …, without due process of law, they are not beyond the power of the state to pass." *Id.*

This Court has long rejected the idea that healthcare regulations, occupational licensing requirements, and other economic regulations implicate "fundamental rights"—instead, the Court has subjected such regulations to rational-basis review. That holds true for statewide laws restricting competition among healthcare providers, *see Women's Surgical Ctr.*, 302 Ga. at 355 (certificate of need statute did "not involve a fundamental right" and satisfied rational basis review) (citation omitted); local limitations on the types of vehicles that can be used to operate guided tours, *see Old S. Duck Tours v. Mayor & Aldermen of Savannah*, 272 Ga. 869, 872 (2000) (concluding that "operation of a 'tour vehicle' is not a fundamental right and tour business owners are not a suspect class" and applying "the rational basis test"); limitations on the distribution of films for exhibition in movie theaters, *see Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 256 (1982) (applying rational basis to regulation meant to eliminate "unfair and deceptive trade practices" in movie distribution); prohibitions on the resale of tickets for sporting events, *see State v. Major*, 243 Ga. 255, 258 (1979) (regulation banning ticket scalping "reasonably related" to putting "all sports fans on an equal footing in the race to the ticket window"); and regulations of the public auction of jewelry, *see Clein*, 139 S.E. at 51 (regulation of jewelry

auctioneers was a "reasonable regulation[] governing the conduct of this business").

Cases upholding licensing requirements and other economic regulations under rational-basis review show that the test remains the lenient review consistently applied throughout Georgia case law. For example, in *Old South Amusements*, although the Court agreed that "a less drastic approach" than an outright ban on amusement machines could have been taken to "eliminate the evil of video poker gambling," it was "irrelevant" to the statute's constitutionality. 275 Ga. at 277. Instead, the Court explained that "possession or use of an amusement machine [was] not a fundamental right," applied the "rational basis test," and concluded that the act bore "a rational relation to the State's objective—insuring that amusement machines are not use for illegal cash payouts." *Id.* at 277–78. And in *State Farm Mutual Automobile Insurance Company v. Five Transportation Company,* even with "no statistical evidence" on the record, the Court upheld a ban on subrogation litigation in all accidents involving vehicles weighing less than 6,500 pounds. 246 Ga. 447, 450 (1980). It was simply "logical" to assume that heavier vehicles caused more damage and so a ban in smaller accidents rationally related to eliminating "wasteful litigation" on small claims. *Id.*; *see also Advanced Disposal*, 296 Ga. at 105–107 & n.5 (upholding exclusive-dealing law for trash collection under rational-basis review because it reasonably related to saving the county money and providing a uniform system, despite contentions that other systems would have been superior); *Paramount Pictures*, 250 Ga. at 256 (upholding blind-bidding ban under rational-basis

because it was "rationally relate[d]" to the State's goal of "eliminating unfair and deceptive trade practices").

And this makes sense, because Georgians have a right to conduct their profession, *Jackson,* 308 Ga. at 740, but they do not have a right to do it free from regulation. Perhaps matters would be different (*perhaps*) if the General Assembly tried to completely ban an entire profession. But where the General Assembly merely regulates *how* a profession is to be practiced and what the educational and training requirements are for that activity, the General Assembly's authority is at its maximum.

3. The handful of decisions holding economic regulations invalid do not suggest a more stringent approach to rational-basis review. Some of these (often dated) cases speak in lofty language about "the right to work and make a living" as "one of the highest rights possessed by any citizen," *Jenkins v. Manry*, 216 Ga. 538, 540 (1961) (quoting *Richardson v. Coker*, 188 Ga. 170, 175 (1939)), or declare a "common inherent right of every citizen to engage in any honest employment he may choose," *Bramley v. State,* 187 Ga. 826, 834 (1939) (citing *Felton v. City of Atlanta*, 4 Ga. App. 183 (1908)). But stating that a right exists says little about the standard that applies to protect it, and despite that language, each one of these cases subjects the law in question to rational-basis review.

For example, in *Bramley*, the Court held invalid a licensing statute that required anyone who sought to take someone's picture or even enlarge an existing one to pay a licensing fee, sit for examination, and give reference of good moral character. 187 Ga. at 838–39. The Court described this scheme as

"drastic and extreme," subjecting everyone to the whims and the moral judgments of the board while leaving the public no more protected from fraud then they already were. *Id.* In *Jenkins*, the Court held invalid a statute that purported to regulate plumbing for public safety and yet with "no reasonable basis" allowed anyone working for a company to plumb without a license or even supervision. 216 Ga. at 545–46; *see also Waller v. State Constr. Indus. Licensing Bd.*, 250 Ga. 529, 530 (1983) (holding invalid a licensing provision meant to "insure a plumber's competency and familiarity with statewide plumbing codes" that allowed formerly licensed plumbers with no knowledge of the new code to opt out of the examination). And in *Hughes v. Reynolds*, although the Court held invalid the Sunday closing ordinance, it did so because it was "unreasonable, arbitrary and capricious"—really, bordering on the absurd, since it would allow a book store to sell pornography and a chair on Sunday but fined the furniture store for simply doing the latter, despite having a religious motivation. 223 Ga. 727, 730–31 (1967). In short, lofty language or not, this Court has long applied the ordinary rational-basis test to assess substantive due process challenges to economic regulations like the one here.

4. Plaintiffs nonetheless insist that the trial court erred by applying a rational-basis standard to their substantive due process claim. Br. at 11. They assert that, despite the extensive body of caselaw expressly applying rational-basis review to claims like theirs, somehow this Court *actually* applies a "far more rigorous legal standard to due process claims." Br. at 13. Drawing largely on dicta in *City of Lilburn v. Sanchez,* a 1997 challenge to a

criminal ordinance, Plaintiffs contend that a law can survive a substantive due process challenge only if it "realistically serves a legitimate public purpose, and employs means that are reasonably necessary to achieve that purpose, without unduly oppressing the individuals regulated." *Id.* at 15 (quoting *Sanchez,* 268 Ga. at 522). That argument lacks any basis in Georgia law.

In *Sanchez* itself, the challenge was directed at a municipal criminal ordinance regulating the keeping of Vietnamese pot-bellied pigs as pets. 268 Ga. at 520. The challengers alleged that the ordinance exceeded the scope of the city's police powers and thus violated substantive due process. *Id.* at 521. Before engaging in its analysis, the Court stated that when examining whether an ordinance is a valid exercise of the police power, the ordinance will survive a due process challenge if it "realistically serves a legitimate public purpose, and it employs means that are reasonably necessary to achieve that purpose, without unduly oppressing the individuals regulated." *Id.* at 522.[2] But the Court did not apply or further discuss this standard. Instead, it held that the ordinance "must be examined under the rational basis test," meaning "any plausible or arguable reason that supports an ordinance will satisfy substantive due process." *Id.* at 522. And if that left

[2] The Court derived this language from *Cannon v. Coweta County,* 260 Ga. 56, 58 (1990), a zoning case, which in turn drew from a 19th century U.S. Supreme Court case, *Lawton v. Steele*, 152 U.S. 133, 137 (1894). *See Sanchez,* 268 Ga. at 522 n.10.

any doubt about the leniency of the review, the Court went on to explain that rational basis

> does not require that an ordinance adopt the *best*, or even *the least intrusive*, means available to achieve its objective. To the contrary, the means adopted by an ordinance need only be reasonable in relation to the goal they seek to achieve.

Id. The Court ultimately *upheld* the ordinance under the rational-basis standard, holding that the city had a "legitimate interest" in regulating the keeping of pot-bellied pigs and that "the rational relation between the ordinance and its goals [was] clear." *Id.* at 523.

Sanchez thus did not herald a new era of heightened scrutiny for due process claims, as Plaintiffs suggest. Just the opposite—the Court expressly performed a deferential rational-basis review. And to the extent that *Sanchez*'s "realistically serves/reasonably necessary/unduly oppresses" language once had any relevance, it was limited to the municipal police-powers context, and in any event was overruled altogether in *King v. City of Bainbridge*, 276 Ga. 484, 488 (2003) (abandoning "unduly oppressive" standard and clarifying that a "zoning ordinance does not exceed a city's police powers unless it is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare'"). In short, there is no separate "*Sanchez* test" for substantive due process claims—just rational basis. *See* Br. at 21 (referring to "Georgia's *Sanchez* test").

The same holds true for Plaintiffs' other supposed examples of "heightened scrutiny." Plaintiffs point to several other cases, such as

Advanced Disposal Services and *Old South Amusements*, that they contend "echoed *Sanchez*'s analysis." Br. at 14. That is correct, but hurts rather than helps Plaintiffs: as discussed above, those decisions "echo" *Sanchez* in expressly applying a rational-basis standard. *See Advanced Disposal,* 296 Ga. at 106 (upholding waste-collection ordinance because it was reasonably related to a legitimate public purpose); *Old South Amusements,* 275 Ga. at 278 ("Applying the rational basis test to the Video Poker Act, we conclude that the act bears a rational relationship to the State's objective—insuring that amusement machines are not used for illegal cash payouts."). And while the Court applied a "real and substantial relation" standard in *Board of Commissioners v. Guthrie*, 273 Ga. 1, 4 (2000), and *Rockdale County v. Mitchell's Used Auto Parts, Inc.,* 243 Ga. 465, 465 (1979), *see* Br. at 14–15, that standard is used only in determining whether zoning regulations exceed a county or municipality's police powers, *see King,* 276 Ga. at 488, and has not been extended to substantive due process claims generally. Finally, *Davis v. Peachtree City,* 251 Ga. 219 (1983), *see* Br. at 14–15, involved what appears to be a procedural due process challenge to a municipal ordinance that automatically imposed criminal liability to owners of establishments whose employees sold alcohol on Sunday or to a minor. 251 Ga. at 219. The decision did not purport to announce a "less onerous means" standard for substantive due process challenges and has never been cited for that proposition.

In short, Georgia law is clear that substantive due process claims like Plaintiffs are subject to rational-basis review, and neither *Sanchez* nor Plaintiffs' other cases remotely show otherwise.

B. The Court should decline Plaintiffs' invitation to impose a stricter standard for occupational regulations.

Plaintiffs argue in the alternative that the Court should depart from roughly a century of precedent and hold for the first time that Georgia's due process clause requires application of some form of heightened scrutiny to economic regulations. Br. at 20–21. The Court should decline to do so.

a. Plaintiffs first suggest that the language in Georgia's equal protection clause stating that "protection to the person and property is the paramount duty of government and shall be impartial and complete," which has no counterpart in the federal constitution, signals stronger protection for "property and economic rights" generally. Br. at 16–17 (citing Ga. Const. Art. 1, § 1, ¶ II). But Plaintiffs point to no authority saying as much in the substantive due process context, and this Court has clarified that the "impartial and complete" language is "comparable to the equal protection clause of the Fourteenth Amendment." *Grissom v. Gleason,* 262 Ga. 374, 375 (1992) (citations omitted). In fact, the *Grissom* Court went on to state that the Georgia and federal equal protection clauses are "coextensive" and applied rational basis to a claim under the "impartial and complete" provision. *Id.* at 376–77 (citations omitted). *Grissom* thoroughly undercuts any suggestion that the "impartial and complete" functions as anything other than a guarantee of equal protection.

Second, Plaintiffs point to this Court's decision in *Bethune v. Hughes*, 28 Ga. 560 (1859), in which the Court held invalid a local ordinance criminalizing the sale of wares outside a city market if the market was closed. Br. at 16–18. The Court reasoned that the grant of power to the city to

establish and keep up a market "confer[red] no power to prohibit the sale of marketable articles elsewhere than at the market place." *Id.* at 562. Plaintiffs, however, seize on Justice Lumpkin's dicta later in the opinion stating that a "Bill of Rights is demanded" and that "[a] peaceable citizen … should be left free and untrammeled as the air he breathes, in the pursuit of his business and happiness." *Id.* at 565. Plaintiffs argue that this statement is somehow indicative of the original public meaning of the original Georgia Due Process Clause, which was enacted two years after *Bethune*. Br. at 18 (citing *Elliott v. State*, 305 Ga. 179, 183 (2019)). Yet Plaintiffs do not even attempt to explain how Justice Lumpkin's distaste for the arrest at issue in *Bethune*, and his demand for a Bill of Rights, somehow demonstrates that Georgia's *due process clause* was originally understood to provide greater limitations on economic regulation.

In short, nothing about the text, context, or history of the Georgia Due Process Clause, which was ratified when "occupational laws were virtually nonexistent," Br. at 19, mandates a departure from decades of precedent applying the same rational-basis framework to substantive due process claims, whether asserted under the Georgia or U.S. Constitutions.

b. Plaintiffs also suggest that the Court should follow the Texas Supreme Court's lead in *Patel v. Texas Department of Licensing and Regulation,* 469 S.W.3d 69 (2015). *Patel* involved a challenge to a statute requiring practitioners of eyebrow threading—the removal of eyebrow hair with cotton thread—to obtain a cosmetology license, which requires 750 hours of largely irrelevant instruction in a licensed school and passage of a

state-mandated exam. *Id.* at 73. The court announced a heightened standard for economic regulations: a statute violates substantive due process rights if, "considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *Id.* at 87.

Patel is a quintessential illustration of bad facts making bad law. All of the justices to review the law believed that the statute's training requirements were excessive. *See, e.g., id.* at 142–43 (Guzman, J., dissenting) (agreeing with other dissenters that "on this record, [the] threading regulation is obviously too much"). But the majority then proceeded to displace the legislature's policy preferences with their own by retooling substantive due process review in order to hold the law invalid. As the dissenting justices noted, the court's "oppressive" standard was a "brand-new entrant in the substantive due process lexicon," and amounted to "mak[ing] up substantive due process from scratch." *Id.* at 126 (Hecht, C.J., dissenting).

Even setting aside concerns with "legislat[ing] from the bench" and "revivifying substantive due process, one of the most volatile doctrines in constitutional history," *id.* at 140 (Guzman, J., dissenting), the *Patel* standard raises considerable workability problems. "Oppression is very much in the eye of the beholder," and is thus "no standard at all." *Id.* at 135 (Hecht, C.J., dissenting). How do courts decide if three years of law school versus two is "oppressive"? What about requiring medical students to take courses that are unrelated to their chosen specialties? *Id.* at 137–38. In the end, the *Patel*

court's "'oppressive' test is pure judicial policy." *Id.* at 136. This Court should not adopt the same sort of "loose and non-deferential standard" for Georgia. *See id.* at 135. In Georgia, if not in Texas, courts retain the judicial power, not the legislative power. *See Schoicket v. State*, 312 Ga. 825, 831 (2021) (collecting cases) ("We lack the authority to substitute our policy preferences for those of the General Assembly.").

c. Contrary to Plaintiffs' arguments here, rational-basis review remains the best approach for economic regulations. The leniency of the rational-basis test reflects the understanding that "the Due Process Clause does not empower the judiciary to 'sit as a superlegislature to weigh the wisdom of legislation.'" *Advanced Disposal*, 296 Ga. at 107 n.5 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)). Parties or judges may believe a law to be harmful, or unwise, or otherwise bad policy, *Gliemmo*, 287 Ga. at 12, 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.* (quotation and brackets omitted). 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 (quotation omitted). The Court should let that democratic process play out here.

If the Court were to disagree and adopt a stricter standard of review for economic regulations, the consequences would be both sweeping and unpredictable. At the very least, the entirety of Georgia's licensing code, which governs professions from accounting to landscape architects to wastewater treatment plant operators, *see generally* O.C.G.A. §§ 43-3-1 to 43-51-14, would be called into serious constitutional question. After all, any educational or training requirements could be deemed "oppressive," *see Patel*, 469 S.W.3d at 87, by someone alleging a lack of resources or qualifications to complete them. And the impacts would not stop there. Economic regulations are a pervasive part of modern life. Many of them may be unwise or counterproductive. But making courts the arbiters of whether those regulations "unduly oppress[] the individuals regulated," *see Sanchez*, 268 Ga. at 522, would bury this Court in a never ending review of the "oppressiveness" of the many thousands of state economic regulations.

II. The trial court correctly ruled that the Act is rationally related to legitimate government interests, including promoting access to quality lactation care.

As the trial court properly concluded, the Act satisfies rational-basis review. The General Assembly could reasonably conclude that the Act's licensing requirement promotes access to quality lactation care and services, among other important purposes, and that the handful of limitations on that requirement further that goal and a number of more specific objectives.

"[P]romoting the availability of quality health care services is certainly a legitimate legislative purpose." *Women's Surgical Ctr.*, 302 Ga. at 355 (citation omitted and alterations adopted). So is protecting the public from

fraud and abuse. *See, e.g.*, *City of Newnan v. Atlanta Laundries, Inc.*, 174 Ga. 99, 103–04 (1932) ("[T]he State … may regulate any business, however lawful in itself, which may be so conducted as to become the medium of fraud." (citation omitted)).

The Act is rationally related to these important goals. To start, because breastfeeding is linked to better health outcomes for both mothers and children, R-50; R-703, ¶ 24; R-786; R-879–80, ¶ 12, the General Assembly could reasonably conclude that promoting and supporting breastfeeding will improve public health in Georgia. *See, e.g.*, O.C.G.A. § 43-22A-2. The legislature could further conclude that sound, high-quality lactation care and services are of great importance in helping mothers successfully breastfeed, and that setting minimum standards for the education and training of lactation consultants would ensure and improve access to such high-quality care for Georgia's mothers and infants. *See id.* As the Secretary's expert explained, there "are many reasons that a mother may need to seek out a provider of clinical lactation care," R-882, ¶ 21, but "there is a risk of harm to a mother and/or infant if they receive care from an unqualified and untrained lactation care provider," R-899, ¶ 72. Plaintiffs could hardly dispute this point; after all, the individuals they list as providing lactation care for ROSE all have some degree of education and training in aspects of lactation care. R-14–15, ¶¶ 36–43.

The General Assembly also had "plausible or arguable" reasons for choosing the IBCLC clinical standards and training as the minimum requirements for licensure as a lactation consultant. O.C.G.A. § 43-22A-7.

The legislature could reasonably conclude that the standard strikes an acceptable balance between ensuring access to these important services and assuring that state-licensed lactation consultants provide high-quality care. In particular, it could decide that the IBCLC certification—which involves extensive college-level coursework and is the only program that requires clinical experience—ensures that licensed lactation consultants are qualified to provide the full range of lactation care and services to mothers and infants, including hands-on clinical assessments that help spot potential high-risk issues that need to be referred to doctors. *See, e.g.*, R-49, 53.

The legislature could also decide that the limitations on the licensing requirement would sufficiently preserve access to lactation care and services: In addition to the many IBCLCs who can provide the full array of lactation care, likely thousands of doctors, nurses, and other licensed healthcare professionals can provide lactation care and services that fall within the scope of their practice. O.C.G.A. § 43-22A-13(1). Doulas and perinatal and childbirth educators can continue to educate about breastfeeding. *Id.* § 43-22A-13(2). And community groups, family, and friends can still volunteer support for new mothers and their children. *Id.* § 43-22A-13(6).

Plaintiffs cannot negate these plausible bases for the IBCLC-based standard. They assert that others with less education and training are just as competent as IBCLCs, that there is no evidence of harm from individuals with these certifications, and that requiring this particular set of minimum

standards will reduce the availability of lactation care. Br. at 23.[3] But Plaintiffs cannot satisfy the heavy burden of showing that the General Assembly could not even *rationally disagree with* these factual assertions.[4] It is not enough for Plaintiffs to argue they are *correct* as to policy; they must establish that none of the various possible reasons supporting the Act are even "plausible or arguable," and that they "could not reasonably be conceived to be true by the government decisionmaker." *Gliemmo*, 287 Ga. at 12 (citation omitted). Plus, even if true, these arguments do no more than support the policy arguments oft-directed at licensing standards by those left out: that the General Assembly should have made a different choice (more eligible lactation consultants, lower standards), or that it could have chosen a

[3] Plaintiffs also allege that "Georgia is the *only* state that prohibits hundreds of qualified lactation care providers from working in the field for pay." Br. at 1. This legal assertion is wrong, overbroad, and irrelevant. It is wrong because three other states license lactation consultants, and of those, Oregon also licenses only IBCLCs. *See* R.I. Gen. Laws §§ 23-13.6-1–6; Or. Rev. Stat. §§ 676.665–89; N.M. Stat. Ann. §§ 61-3b-1–7. It is overbroad because, as the trial court concluded, the Act's limitations on its licensing requirement permit many individuals who are not IBCLCs to provide various aspects of lactation care. *See* R-4905–08. And it is irrelevant because the rational-basis test cares only whether the legislature had an arguable reason to limit lactation consulting to IBCLCs, not whether sister states made a different policy judgment.

[4] To the contrary, the record evidence shows that the legislature could conclude that maintaining minimum standards to obtain a license would ensure that mothers could trust and rely on the health assessments and advice of anyone who holds themselves out as a licensed lactation consultant. "Licensure," as the Occupational Regulation Review Council determined, "would assure the consumer that the person delivering services is a credible professional with specific knowledge, training, and competency as approved by the state." R-56; *see also* R-3544 (explaining that licensure helps mothers wade through the "alphabet soup" of private certifications).

better standard to further its purposes. Choosing how to balance competing interests in availability and quality of care is exactly the sort of policy judgment that the rational basis standard commits to legislatures. *See id.*

In the face of policy arguments like these, the "role of the courts" is not "to weigh those policy arguments and decide on that course which is most prudent," but rather "to note the existence of a viable, ongoing debate" and rule that the General Assembly's "approach … is rational." *Deen*, 287 Ga. at 606 (alterations adopted). The trial court properly did so here.

* * *

Adopting Plaintiffs' approach would require courts to engage in a wide variety of policy determinations. Here, that would include "tak[ing] into account the amount, cost, and apparent usefulness of the required training," a lactation care provider's "lost income-earning opportunity," "the danger to public health and safety," "the number and severity of incidents of harm due to poor training," and "the benefit … to the public." *Patel,* 469 S.W.3d at 135 (Hecht, J., dissenting). And so on. "This process is what is generally referred to as *legislating*. It should be done. It should not be done by judges." *Id.* (emphasis added).

CONCLUSION

For the reasons set out above, this Court should affirm the ruling of the Fulton County Superior Court that the Act does not violate Plaintiffs' substantive due process rights.

Respectfully submitted.

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SUPREME COURT OF GEORGIA
Case No. S23X0018

September 20, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARY NICHOLSON JACKSON et al. v. BRAD RAFFENSPERGER.

Your request for an extension of time to file the brief of appellee in the above case is granted until October 24, 2022.

A copy of this order **MUST** be attached as an exhibit to the document for which the appellee 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