IN THE SUPREME COURT OF GEORGIA

No. S23A0017

BRAD RAFFENSPERGER,

Appellee,

v.

MARY NICHOLSON JACKSON,

et al.,

Appellant.

BRIEF OF AMICUS CURIAE SOUTHEASTERN LACTATION CONSULTANTS ASSOCIATION

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DISCLOSURE OF IDENTITY AND INTEREST OF AMICUS CURIAE AS REQUIRED BY GA. SUP. CT. R. 23(4)

The Southeastern Lactation Consultants Association (SELCA) is a professional association, founded in 1988, and currently registered as a Georgia not-for-profit. It was founded by four International Board Certified Lactation Consultants (IBCLCs), including Kimarie Bugg, who is the party representative of ROSE (Reaching Our Sisters Everywhere) in this litigation.

SELCA is a membership organization for the clinical lactation care professional, the IBCLC, but membership is also open to others who work or have interest in the lactation field. In addition to IBCLCs, SELCA has members who are Certified Lactation Counselors (CLC), Certified Breastfeeding Counselors, WIC peer counselors, La Leche League Leaders, and others who work in perinatal settings. SELCA is the local chapter of the United States Lactation Consultant Association (USLCA) and supports the International Lactation Consultant Association (ILCA).

SELCA leadership and membership actively promote representation, diversity and inclusion, and includes Black and Indigenous People of Color, including those of Hispanic ethnicity. Members live in urban, suburban and rural communities, highly variable in resource availability and work in diverse settings including hospitals (mother-baby units and NICU), physician practices, WIC

clinics, private practices and in-home settings. Some members also have dual professional degrees, holding licenses such as nurses or dieticians.

SELCA provides its members with evidence-based continuing education from national experts to improve patient outcomes and patient safety. SELCA also has a structured mentoring program for those who aspire to become IBCLCs and has given scholarships to provide financial assistance to those in need. SELCA and its members also work alongside the Georgia Northwestern Technical College Human Lactation program that was created soon after the state began licensing lactation consultants. (R1698-1700, 3550-51)

SELCA members have led and worked with hospitals to facilitate the implementation of baby-friendly guidelines and have worked with businesses to provide education on the benefits of supporting its breastfeeding employees. SELCA members have helped businesses establish private employee milk expression (pumping) spaces have educated businesses on the benefits of allowing customers to feed their babies in their establishments. SELCA has also provided information to members of the General Assembly on breastfeeding and lactation issues-including information related to legislation regarding employee break time to express milk and testimony related to the legislation that created a licensure requirement for the provision of clinical lactation care.

SELCA offers this amicus brief to the Court in support of the Georgia Lactation Consultant Practice Act in an ongoing effort protect the health, safety, and welfare of Georgians and to increase access to competent clinical lactation care.

FACTS

Childbearing is difficult. It is physically and emotionally exhausting. Breastfeeding is vitally important to an infant's health and development, and it also benefits mothers by reducing the risk of certain cancer, cardiovascular disease, and diabetes. (R1720) Unfortunately, breastfeeding is not always as easy as a mother simply placing a baby at her breast and watching her child feed contentedly. About 84% of mothers leave the hospital breastfeeding. (R1726) Only 22% make it to the six-month mark recommended by the American Academy of Pediatricians. (R1726) Breastfeeding issues are "complicated," and they arise on both the infant's and mother's sides of the equation. (R3533)

Infants fail to latch on properly. About 10% of infants are tongue-tied, which results when the strip of skin that attaches the tongue to the floor of the mouth (the frenulum) is limited in normal movement. An infant can have a muscular restriction in its neck due to its growth in the womb, leaving it physically unable to breastfeed comfortably. There are medical-related issues that may impact an infant's ability to breastfeed, like being born prematurely, having congenital

anomalies, or suffering from a metabolic intolerance to lactose. Mothers may face sore or cracked nipples, and infections from bacteria or yeast, commonly called thrush. A mother can fail to produce enough milk, and infants can fail to thrive, which leaves them vulnerable to serious health risks. A mother can produce too much milk, leaving her with painfully engorged breasts. She can suffer a blocked milk duct, which can lead to mastitis, which in turn can lead to a breast abscess. Medication concerns, systemic illnesses like HIV/AIDS, and obesity can impact a mother's ability to breastfeed.

These issues are only a few that the nursing dyad faces. They typically occur shortly after childbirth, when mothers are sleep-deprived and sore and hungry infants need to feed every few hours. Competent clinical lactation care can assist with these issues. Given the limitations that a new baby places on a parent's time and energy, having the assurance of a licensed clinician is vital. Just as the term "nurse" can be used to mean a Licensed Practical Nurse, a Registered Nurse, an Advanced Practice Nurse, and a Nurse Practitioner, lactation personnel can have similar names but very different qualifications, training, and experience.

This chart, compiled from the information contained at pages 8 through 10 of the Secretary's brief, shows the various education and training requirements for different lactation personnel:

Type of lactation personnel	**Education and/or training required**
Mother-to-mother peer support	None (other than having breastfed)
Peer mentor	Four hours of training on how to actively listen
Community Transformer ("CT")	Two-day course with attendance at summits and Baby Cafes
WIC peer counselor	Three-day course
Military lactation counselor ("MiLC)"	Self-paced program with a 45-hour internship and no clinical training (R3539-40)
Certified Lactation Counselor ("CLC")	52-hour course with exam; one witness described it as a workshop, not training (R3758)
International Board Certified Lactation Counselor ("IBCLC")	Three pathways, each requiring college-level education in health sciences; 95 hours of lactation-specific education; 300 to 1,000 hours of direct patient care prior to certification

And that's where the Georgia Lactation Consultant Practice Act, O.C.G.A. §43-22A-1 *et seq.*, comes in. It reflects a legislative acknowledgment that mothers and babies benefit from the rendering of sound lactation care and services by trained and competent professionals – all to the end of protecting the "health, safety, and welfare of the public by providing for the licensure and regulation of the activities of persons engaged in lactation care and services." O.C.G.A. §43-22A-2. It reflects the discussions of various stakeholders – like Georgia Hospital Association, Georgia Nurses Association, Grady Memorial Hospital, and various medical associations – to build consensus about agreeable language. (R1714) Additionally, it reflects years of discussions, first with an unsuccessful attempt in

2013 through HB 363 (R2417-47), and then until the July 1, 2016, effective date of the Act itself.

The Act provides a comprehensive regulatory framework for "lactation care and services," which is 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). It requires a lactation consultant to be a person over 18 years who has met the educational and clinical standards established for IBCLCs, successfully passed the certifying exam, and has undergone a criminal background check. O.C.G.A. §43-22A-7. It mandates that licensed lactation consultants renew their licenses biennially and fulfill continuing education requires. O.C.G.A. §43-22A-9. And it delineates the type of behavior that can cause a lactation consultant to lose her license. O.C.G.A. §43-22A-12(a).

That the General Assembly requires licensing for medical professionals and related occupations is nothing new. Title 43 (Professions and Businesses) regulates Chiropractors (Chapter 9); Professional Counselors, Social Workers, and Marriage and Family Therapists (Chapter 10A); Dentists, Dental Hygienists, and Dental Assistants (Chapter 11); Dietetics (Chapter 11A); Massage Therapists (Chapter 24A); Music Therapist (Chapter 25A); Nurses (Chapter 26); Occupational Therapists (Chapter 28); Dispensing Opticians (Chapter 29); Optometrists (Chapter

30); Physical Therapists (Chapter 33); Physicians, Acupuncture, Physician Assistants, Cancer and Glaucoma Treatment, Respiratory Care, Clinical Perfusionists, and Orthotics and Prosthetics Practice (Chapter 34); Podiatrists (Chapter 35); Psychologists (Chapter 39); and Speech-Language Pathologists and Audiologists (Chapter 44).

These fifteen chapters impose educational, training, and certification requirements on the license seekers. Here are some of those requirements. Chiropractors must graduate from chiropractic school and receive general college training. O.C.G.A. §43-9-7(d), (e). Counselors, social workers, and therapists must meet their respective education, training, and experience requirements, and pass a specialty-related examination. O.C.G.A. §43-10A-9(1), (2). Dental hygienists must graduate from a dental hygiene program from an accredited school. O.C.G.A. §43-11-71(a). Massage therapists must complete a board-recognized massage therapy educational program with a minimum of 500 hours of course and clinical work, and then pass an exam. O.C.G.A. §43-24A-8(b)(6, 7). Music therapists must hold at least a bachelor's degree from a program approved by the American Music Therapy Association, complete 1200 hours of clinical training, and pass an exam. O.C.G.A. §43-25A-5(2, 3, 5). This is all to the end of ensuring professional, competent, and regulated chiropractors, therapists, dental hygienists, massage therapists, and music therapists.

Lactation consultants, too, should be professional, competent, and regulated – all of which the Georgia Lactation Consultant Practice Act ensures. As the chart on page five demonstrates, IBCLC certification requirements are far more rigorous and scientific than those required for other lactation personnel, including the similarly-named CLC. There is a reason for this rigorous, scientific training. Consider what a clinical encounter by an IBCLC entails. After an IBCLC obtains consent to treat a mother and child, she spends the next hour to two hours:

- Taking a comprehensive history of the mother, baby, and birth, which includes a psychosocial history, and screens for post-partum depression if warranted;
- Physically examining both the mother and baby;
- Weighing the infant before feeding;
- Observing the mother feeding, makes suggestions and adjustments, and watches the baby for changes in color; tension in hands, body, or face; alertness and energy level, and ability to form an interaural vacuum to remove milk successfully;
- Offering the use of, and training on, assistive devices, like a nipple shield or a French 5 feeding tube, to create an at-breast supplementation system;
- Teaching the mother how to listen to ensure her baby is feeding, and how to assess the baby for cues for hunger and satiety;

- Performing a digital oral assessment to evaluate the baby's mouth for cleft palate, lack of fat pads, the shape and function of the tongue, the attachment of the frenulum, the shape and structure of the jaw and neck, any potential issues with respiration and breathing, and whether the tongue can cup the finger properly, with tongue function evaluated and graded by an assessment tool, such as the Hazelbaker or Martinelli instrument;
- Examining the baby particularly for torticollis, a neck condition featuring a muscular imbalance that can impact the baby's ability to feed;
- Performing a post-feed weight check on the infant to determine the amount of milk she withdrew; and
- Drafting a medical or lactation record, creating a plan of care, and providing that plan of care to the baby's and often the mother's treating primary care provider.

(R3527-37)

This process necessarily involves the touching of a woman's breasts, nipples, and newborn infant. Dr. Bugg, the party representative of ROSE, testified at her deposition that if the Act is struck, the standards for and regulation of lactation care and services will be by parents and health care providers; she testified that babies see doctors at regular intervals and that "[p]arents are the

keepers of their children's wellbeing and are pretty fierce protectors." (R2747-48) There is no doubt that infants see doctors and that (most) parents protect their children. But licensure under the Act gives the public a clear standard to determine who is educated and trained to provide professional clinical lactation care. This protects Georgia's mothers and infants at a particularly vulnerable point: Delayed recognition and treatment can alter the course of a dyad's breastfeeding success.

Changing and bettering the status quo can have growing pains, but licensure is leading the profession to increased numbers of lactation personnel and increased access to clinical lactation care. An IBCLC pathway program has begun at Georgia Northwestern Technical College in Rome. *See* *https://www.gntc.edu/081919-lactation* Students in the program are eligible for the HOPE scholarship, Pell grants, and federal and state scholarship monies. (R3550) As of May 2021, "the first cohort of graduates was one-third of women of color, and the current cohort is 50 percent women of color." (R3551) SELCA hopes to replicate that program in other schools. (TR 1779) With licensure, too, Medicaid will pay for the services of licensed lactation consultants. (R1722, 1728-29) This is important in a state where 52% of babies born are on Medicaid, and where private insurance covers lactation benefits. (R1722, 1728-29, 3548-49) Licensing's proponents deemed it a "matter of equity" to "create an opportunity for access to care for Georgia's Medicaid population," not just the population that is privately insured. (R3548-49)

It is against this backdrop that the amicus discusses why this statute does not violate the equal protection clause, the reasonableness of the exceptions to the Act, and why the Court should sever any language that makes the Act unconstitutional, rather than invalidate the entire regulatory scheme.

ARGUMENT AND CITATION OF AUTHORITY

I. The IBCLC and the Appellees are not Similarly Situated nor are They in the Same Class and therefore the Trial Court Erred in Finding that the Appellees Meet the First Prong of the Rational Basis Review of Appellee's Equal Protection Claim

The trial court properly applied rational basis review, which requires the claimant to establish that 1) she is similarly situated to members of the class who are treated differently from her and 2) there is no rational basis for different treatment. *Harper v. State*, 292 Ga. 557, 560 (2013); *see also Stuart-James Co. v. Tanner*, 259 Ga. 289, 290 (1989) (stressing that claimant has the burden of proof "because the statute is presumptively valid"). The Appellees (the claimants here) failed to demonstrate that they are similarly situated to IBCLCs.

A. The IBCLC and the Appellees are in Different Classes Because of the Differences in Their Educational Preparation.

The IBCLC must complete two years of college health science courses, 95 hours of lactation specific education, 300-1000 hours of direct clinical patient care training, and must pass a national/international independent criterion referenced Board examination. College education, clinical training and an independent board

examination are all hallmarks of a clinical healthcare professional. Within the patient care clinical training component, the student learns techniques for taking medical histories, performing physical assessments, creating a list of issues and making clinical judgments on prioritizing those issues to develop a plan of care. This all requires dialogue and feedback from experienced mentors as part of the learning process. (R3813, 3816-18, 3826, 3862-63)

In contrast, a CLC completes a one-week education course, often taught in a hotel ballroom. The course has no prerequisites, possibly not even a high school diploma, and the attendee need not have ever touched a breast or infant before obtaining a CLC Certificate. (R2538, 3538-40) While the Appellees may have basic breastfeeding knowledge, CLC or ROSE Community Transformer lactation personnel are not required to have the same education or training as the IBCLC. (R3834, 3841, 3858-59, 3861-66)

B. The IBCLC and the Appellees are in Different Classes Because of the Differences in Their Training.

Hands-on, or clinical, training allows students to practice on live patients in a mentored setting. (R3813, 3816-18) The IBCLC has been clinically trained for 300-1000 hours, but the CLC has not been. The CLC student receives only book education and possibly a video of someone performing an assessment, and she takes a test at the end of the week by the same persons who conduct the class.

(R3538-40) Even the CEO of the company that certifies the CLC describes a "hands-off" approach and suggests that the CLC is well suited for telehealth services. (R4712-13) CLCs have not been trained to perform clinical care. This is why the General Assembly reserved the "clinical application" of lactation care and services to the IBCLC. OCGA 43-22A-3(5).

C. The IBCLC and the CLC/ROSE CT are in Different Classes Because of Differences in their Skills, Competencies and Work.

The Superior Court erroneously concluded that the IBCLC and other lactation personnel did "the same type of work" and "perform the same services," which rendered them similarly situated for equal protection analysis. (R4914) In contrast to the clinically focused work of the IBCLC, the work of the CLC and ROSE Community Transformer is education and support focused. (R 1767, 3832, 3840-41) "[E]ducators are in a different class and perform different work" than an IBCLC; among other things, IBCLCs perform detailed oral examinations on infants, while CLCs do not. (R3527-37, 4712-13) Even if some CLCs, like Mary Jackson, perform hands-on care (R26), it does not mean that they have the foundational education or training to do so.[1] That is the seminal licensure question that the General Assembly undertook to answer in the Act after years of public

[1] In her deposition, Jackson testified that she knew that there are pathways to IBCLC, but she did not know exactly what they were. (R1449-50) She took the IBCLC certification exam twice but did not pass it. (R1516)

testimony and hearings, and the legislature determined that patient safety, public health and welfare demanded reserving clinical care for those trained to perform it.

Stating that the parties are "similarly situated" because they do the "same type of work" is analogous to stating that a paralegal is similarly situated to an attorney, or an accountant is similarly situated to a certified public accountant (CPA) or a nurse practitioner is similarly situated to a physician. That is not the case. *Cf. Silverstein v. Gwinnett Hosp. Auth.*, 861 F.2d 1560, 1565-66 (11th Cir. 1988)(upholding under Georgia's equal protection clause the ability of a hospital authority to extend staff privileges to allopathic, but not osteopathic, physicians). While they often can competently do some of the same work, it is the education and training of each that causes them to be appropriately separated into different classes—and it remains the prerogative of the General Assembly to determine the appropriate scope of practice for each. *See, e.g., Foster v. Georgia Board of Chiropractic Examiners*, 257 Ga. 409, 412 (1987) (observing that not even a change in the preparatory education curricula by schools can widen a scope of practice –only the General Assembly can do that).

D. The Healthcare Community – From Federal Policymakers to Medical Organizations to the US Surgeon General – all Recognize that the IBCLC and the CLC/ROSE CT are in Different Classes.

Authorities in the maternal-infant healthcare sector consider IBCLCs to be in a different class from CLCs and ROSE Community Transformers.[2] Here are some examples.

- The American College of Obstetricians & Gynecologists and the United States Department of Health and Human Services ("HHS") describe IBCLCs as "[c]linical lactation professionals," while "[l]actation personnel providing counseling, education or peer support include lactation counselors/breastfeeding educators and peer supporters." https://www.womenspreventivehealth.org/recommendations/breastfeeding-services-and-supplies/
- The Academy of Breastfeeding Medicine differentiates IBCLCs from "breastfeeding educators" and "peer support[ers]." https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4685902/pdf/bfm.2015.29016.ros.pdf.

[2] "[I]t is the duty of a court in construing a statute to ascertain and give full effect to the legislative intent, and in doing so the sources of enlightenment are not limited; interpretation is a matter addressed solely to the intelligence, information, and learning of the judge, and he is not restricted as to the means by which he may enlarge those faculties." *Moore v. Robinson*, 206 Ga. 27, 40 (1949).

- In a 2011 Call to Action to Support Breastfeeding, the Surgeon General of the United States recommended that IBCLCs be licensed due to their clinical expertise and training in the clinical management of complex lactation issues. https://www.ncbi.nlm.nih.gov/books/NBK52682/
- The United States Lactation Consultant Association describes three tiers of people in the lactation field, with IBCLCs "qualified to provide clinical lactation care"; CLCs "prepared to provide education and counseling services"; and peer providers "prepared to provide support services." https://uslca.org/wp-content/uploads/2020/05/Clarifying-Clinical-Lactation-vs-Breastfeeding-Support.pdf
- The United States Preventative Task Force separates breastfeeding intervention types into three categories "professionals, peer support, and structured education." https://phpa.health.maryland.gov/mch/Documents/Benefit%20of%20interventions%20to%20support%20BF%20(USPSTF%20-%20JAMA%202016).pdf
- TRICARE – the federal healthcare program for uniformed service members, retirees, and their families – has announced a new Childbirth and Breastfeeding Support Demonstration project to offer breastfeeding education and clinical care to enrolled service members. The

demonstration project clearly identifies two different lactation personnel groups who are authorized to perform services to enrollees of TRICARE: lactation counselors who "offer breastfeeding counseling" and lactation consultants who "provide the full range of breastfeeding care, including support for breastfeeding complications." https://www.tricare.mil/cbsd

- The National WIC Association separates lactation personnel into three categories: "clinical breastfeeding professionals, IBCLCs," "lactation educators and counselors," and "breastfeeding peer counselors." https://s3.amazonaws.com/aws.upl/nwica.org/wics-promotion-and-support-of-breastfeeding.pdf
- HHS's Office on Women's Health, in its free consumer publication, *Your Guide to Breastfeeding,* identifies three categories: 1) "International Board Certified Lactation Consultant" as having the "highest level of knowledge and skill"; 2) "Certified Lactation Counselor or Certified Breastfeeding Educator," as "teache[r]s"; and 3) "mother-to-mother support" which includes "breastfeeding peer counselor[s]" and "La Leche League support." https://thechildbirthprofession.com/wp-content/uploads/2017/07/Your-Guide-to-Breastfeeding-booklet.pdf.

- Congressional legislation identifies and aligns the lactation counselor with nonclinical perinatal community health workers who work in education roles:

  (iii) PERINATAL HEALTH WORKER.—The term 'perinatal health worker' means a doula, community health worker, breastfeeding and lactation educator or counselor, nutritionist or dietitian, childbirth educator, social worker, home visitor, or language interpreter.

  Advancing Maternal Health Equity Under Medicaid Act, H.R. 6612-117th Congress (2021-2022). https://www.congress.gov/bill/117th-congress/house-bill/6612/text#H55446BCBFE744ECDACA4498236829654

There are important education and training differences between IBCLCs and CLCs and ROSE Community Transformers, which result in different skills and competencies. Just working within the same field does not make two separate classifications the same or similarly situated. *See Lewis v. Chatham Co. Bd. of Commrs.*, 298 Ga. 73 (2015)(finding magistrate judges and probate judges are not in the same class for equal protection analysis, as demonstrated in part by the fact that "the cases and daily functions of magistrate judges and probate judges are different and distinct").

As a matter of law, this Court should determine that a CLC (a lactation counselor/educator) and a Community Transformer (a breastfeeding peer

supporter) are not in the same class and are not similarly situated to an IBCLC (a clinically trained lactation consultant).

II. Because the Record and Facts Presented Herein Establish that the IBCLC and the Appellees are Not in The Same Class and are Not Similarly Situated, the Court Erred in Moving to the Second Prong of the Rational Basis Review of Appellee's Equal Protection Claim

Since an IBCLC and the Appellees are not similarly situated and do different work, the same work cases cited by the Superior Court do not apply. (R4914) The General Assembly made a rational and reasonable distinction between those who are clinicians (the IBCLCs) and those who are educators (the CLCs) and peer supporters (the Community Transformers). Ultimately this case reflects a decision by the General Assembly to raise the bar for the profession. *See, e.g., Sears v. Dickerson*, 278 Ga. 900 (2005)(finding no equal protection violation where county required all employees at same level to attain training and experience to achieve requisite certification); *Pace v. Smith*, 248 Ga. 728, 730 (1982)(finding that state can require "high standards of qualification" for the practice of law as long as the qualification has a rational connection with the applicant's fitness and that qualification can include a "testing procedure [to demonstrate that the applicant] meet[s] a minimum level of legal competence."); *Nathan v. Smith*, 230 Ga. 612 (1973)(finding that state law requiring a duly elected solicitor to have actively practiced law for three years prior to taking office did not violate his constitutional

equal protection rights); *Black v. Blanchard*, 227 Ga. 167 (1971)(affirming legislature's right to change the minimum educational and professional requirements in order to secure competence of county school superintendents); *Moore v. Robinson*, 206 Ga. 27 (1949)(finding chiropractic act raising time required for college study had been effected to raise standard of the profession); *Baranan v. State Board of Nursing Home Administrators*, 143 Ga. App. 605 (1977)(observing that state can implement reasonable continuing education requirements in order for a licensee to qualify for licensure renewal); *see also Dent v. West Virginia*, 129 U.S. 114, 122 (1889) (If licensure standards "are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty.").

The Act gave all persons more than two years to obtain the credential. Although the Act had an effective date of July 1, 2016, the General Assembly made the licensure requirement effective on and after July 1, 2018. *See* O.C.G.A. § 43-22A-11.[3] With the stay of enforcement pending the outcome of this litigation,

[3] This Court previously heard oral argument in this case on January 14, 2020. The Court asked counsel for Jackson and ROSE, "If the Act allowed some period of time that you were practicing when the Act went into effect and within three years you had to do that, would that be an excessive regulation?" Counsel responded, "That sounds more reasonable, but that's not what's happening here." (https://www.gasupreme.us/watch/oa-01-14-20/ at 12:51-13:07) Again, this statute carried a two-year delay, with the petition's being filed a few days before its expiration.

all persons have now had more than six years to obtain the IBCLC credential without penalty.

III. The Superior Court Erroneously Concluded that the Exceptions Outlined in the Act Defeated Rational Basis Review.

The Act provides that "[n]othing in this chapter shall be construed to affect or prevent" eight categories of practice. O.C.G.A. §43-22A-13(1-8).[4] The Superior Court relied on four of these categories to determine that the Act did not meet rational basis review: the volunteer exception (§43-22A-13(6)), two government employee exceptions (§43-22A-13(4), (5)), and other licensed clinicians (§43-22A-13(1)). (R4917-21) Contrary to the Superior Court's findings, these exemptions have a rational basis in the lactation field.

A. The volunteer exception (§43-22A-13(6))

This subsection excepts "individual volunteers from providing lactation care and services" as long as they do not designate themselves as licensed lactation consultants and take no fees other than administrative expenses like mileage. O.C.G.A. §43-22A-13(6). This paragraph recognizes the important volunteer work ongoing in this arena by grandmothers, aunts, neighbors, friends, and support

[4] Other licensing statutes contain numerous exemptions. *See* O.C.G.A. §43-11A-18 (reciting ten exceptions to dietician licensing, including other clinicians, dieticians practicing in federal agency, and employees of state, county, or local governments); O.C.G.A. §43-26-12(a) (reciting ten exceptions in RN licensing); O.C.G.A. 43-26-41(a) (reciting seven exemptions in LPN licensing).

groups like the La Leche League. It is plausible and reasonable that the General Assembly wants this work to continue without fear of legal violations. There are provisions in the nursing practice acts for RNs and LPNs with the very same effect. *See O*.C.G.A. § 43-26-3(6) (stating that the "practice of nursing means to perform *for compensation* or the performance *for compensation* of any act in the care and counsel of the ill, injured, or infirm….")(emphasis added); *see also* O.C.G.A. § 43-26-32(7)(exceptions in LPN regulations). The nursing practice act also has a provision to specifically exclude the need for a nursing license for the "incidental care of the sick by members of the family, friends, or persons primarily utilized as housekeepers…." O.C.G.A. § 43-26-12(a)(3); *see also* OCGA § 43-26-41(a)(3) (exceptions in LPN regulations); *cf. Foster v. Georgia Board of Chiropractic Examiners,* 257 Ga. 409, 418-19 (1987)(distinguishing relatives or friends who make medical recommendations and neither expect or receive any compensation for such advice from a licensed chiropractor representing that vitamins sold will cure a disease or ailment).

B. Government employees (O.C.G.A. §43-22A-13(4, 5))

Subsection (4) excepts federal employees "within the discharge of [their] . . . official duties. . . . within the recognized confines of a federal installation regardless of whether jurisdiction is solely federal or concurrent." O.C.G.A. §43-22A-13(4). This subsection merely recognizes that federal employees on federal

property are not constrained by state law but are governed by federal law. *See e.g.*, 10 U.S.C. §1073 & Extramedical Maternal Health Providers Demonstration Project, Pub. L. 116-283, Div. A, Title VII, §746, Jan. 1, 2021, 134 Stat. 3710 (directing Secretary of Defense to commence a demonstration project, including provision of lactation consultants, and allowing Secretary to establish credentialing and requirements for lactation counselors); 38 U.S.C. §7402(b) (discussing appointments to VA). Both the Georgia medical and nursing practice acts, and statutes governing dieticians, have similar provisions at O.C.G.A. §43-34-22(b)(4), §43-26-12(a)(6), and §43-11A-18(2).

Subsection (5) excepts state, county, or local employees acting in the discharge of their official duties, including WIC peer counselors. O.C.G.A. §43-22A-13(5). The WIC peer counseling program is a federally controlled and directed program, with federal job descriptions, being implemented within the state. (R1745-46) Indeed, federal law directs state agencies to expend funds on "breastfeeding promotion" and requires the Secretary of HHS to consider the effectiveness of peer counselor programs. *See* 42 U.S.C. §1786(h)(3), (4)(B). This subsection gives flexibility to a *federally* funded state, county or municipality (or

combined city-county government) that operates a public health breastfeeding peer counselor program.[5]

These are plausible and reasonable explanations for why the General Assembly included these government exemptions for lactation care and services. *Cf. Cooper v. Rollins*, 152 Ga. 588 (1922) (licensing law constitutional even though members of same class treated differently based solely on where they work—rural or urban—because "within the sphere of its operation, it affects all persons similarly situated" and the spread of disease by unsanitary barbers affects more people in large towns or cities).

C. Other licensed clinicians (O.C.G.A. §43-22A-13(1))

The Superior Court also relied on the exception for other licensed clinicians, i.e., "[p]ersons licensed to practice the professions of dentistry, medicine, osteopathy, chiropractic, nursing, physician assistant, or dietetics . . . ." O.C.G.A.

[5] It also follows longstanding statutory precedent in Georgia allowing public health RNs to perform services that are otherwise not allowed under the RN legal scope of practice. Under carefully crafted additional training, protocols, and job descriptions, public health RNs are allowed to perform certain medical procedures (such as female pelvic exams) and are allowed to prescribe certain medications. This special expanded authority for public health nurses is outlined in O.C.G.A. § 43-34-23(b)(2)(A) and in O.C.G.A. § 31-17-7.1(a)(2). Such nurses may only utilize this expanded authority while executing their official duties for public health.

§43-22A-13(1).[6] This paragraph recognizes that other licensed healthcare professionals will occasionally provide a clinical service to a mother or baby related to breastfeeding and lactation needs. The provision of these clinical services is already permitted by Georgia law as they are within the scope of these clinical professionals' licenses. (R1732)

For instance, there are dentists who have acquired the skills to surgically assist mother/baby dyads who are having breastfeeding difficulty due to an anatomical issue within the infant's oral cavity. (R1732-33) Even the Academy of Breastfeeding Medicine allows dentists to be expert members of their organization as well. (R1732) Since the physician community has identified dentists as being eligible to serve with them in advancing research and knowledge in breastfeeding medicine, it was not unreasonable for the General Assembly to recognize dentists for their important clinical role in this sector of care. Similarly, it is plausible that the General Assembly could have noted that chiropractors have special clinical expertise in addressing breastfeeding issues that a mother/baby dyad can have – for instance, when the infant is constrained by the medical condition of torticollis or has other neck, shoulder or spinal alignment issues that impede breastfeeding. (R1735) The trial court seemed to have no concern for the exemption for nurses

[6] A similar exception exists in the licensing relative to dieticians. *See* O.C.G.A. §43-11A-18(3).

and medical doctors. (R. 4920) But the Superior Court's order erroneously singled out doctors of osteopathy (D.O.s), which have the same scope of practice as allopathic medical doctors, (M.D.s). *See* O.C.G.A. §43-34-21. If the exception is rational for an M.D, it is rational for a D.O.

Each of the medical professionals listed in this exemption can have a small but critical role in redressing the clinical needs of the struggling mother/baby dyad. It was reasonable for the General Assembly to list these professions for a clinical exemption. However, whether or not they are specifically listed in this Act, members within these professions can already legally perform "lactation care and services" when such services are within their scope of practice.

IV. Even if the Court Agrees with the Trial Court that Specific Exemptions Render the Act Unconstitutional, the Trial Court Erred in Failing to Sever Said Exemptions from the Act in Accordance with O.C.G.A. Section 1-1-3.

The Superior Court declared the entire Act unconstitutional. (R4921) Part of the support for its finding was the four exclusions in the Act addressed above. The amicus contends that these findings were erroneous. If this Court finds that any exclusion violates the equal protection clause, the remedy is to excise the offending portion, not to declare the entire Act unconstitutional. Georgia law provides as follows:

> Except as otherwise specifically provided in this Code or in an Act or resolution of the General Assembly, in the event any title, chapter, article, part, subpart, Code section, subsection, paragraph, subparagraph, item,

> sentence, clause, phrase, or word of this Code or of any Act or resolution of the General Assembly is declared or adjudged to be invalid or unconstitutional, such declaration or adjudication shall not affect the remaining portions of this Code or of such Act or resolution, which shall remain of full force and effect as if such portion so declared or adjudged invalid or unconstitutional were not originally a part of this Code or of such Act or resolution. The General Assembly declares that it would have enacted the remaining parts of this Code if it had known that such portion hereof would be declared or adjudged invalid or unconstitutional. The General Assembly further declares that it would have enacted the remaining parts of any other Act or resolution if it had known that such portion thereof would be declared or adjudged invalid or unconstitutional unless such Act or resolution contains an express provision to the contrary.

O.C.G.A. §1-1-3.

CONCLUSION

"[S]tates [have] wide discretion in enacting laws which affect some group of citizens differently from others, the due process or equal protection safeguards …being offended only if the resultant classifications or deprivations of liberty rest on grounds wholly irrelevant to a reasonable state objective." *Foster*, 257 Ga. at 419, *quoting McGowan v. State of Maryland*, 366 U.S. 420, 425-426 (1961). IBCLCs are not similarly situated to CLCs or ROSE Community Transformers by virtue of their education and clinical training. The General Assembly has the authority to set minimum education and training standards for the provision of professional clinical patient care in order to protect the health, safety and welfare of Georgia citizens. The Court can and should find that the Georgia Lactation

Consultant Practice Act is constitutional and that the Appellees' remedy "lies with the General Assembly and not the courts." *Foster*, 257 Ga. at 419. Alternatively, if the Court disagrees, the remedy is to uphold the Act and excise the unconstitutional portions.

Respectfully submitted this 16th day of September, 2022.

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CERTIFICATE OF SERVICE

I certify that prior to filing this Amicus Brief via the Court's SCED e-filing system, I served this notice via email on the following counsel of record and placed copies in the United States Mail, with sufficient postage and addressed as follows:

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