No. S23A0017

In the Supreme Court of Georgia

Brad Raffensperger,

Appellant,

v.

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

Appellees.

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

BRIEF OF APPELLEES

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INTRODUCTION

Plaintiffs Mary Nicholson Jackson and her nonprofit, Reaching Our Sisters Everywhere (ROSE), help Georgia families achieve their breastfeeding goals. The Georgia Lactation Consultant Practice Act ("the Act") is a first-of-its-kind licensing law that will put hundreds of lactation care providers like Mary out of a job. The last time Plaintiffs were before this Court, they established that they have a "long recognized" right "to pursue a lawful occupation of their choosing free from unreasonable government interference." *Jackson v. Raffensperger*, 308 Ga. 736, 740 (2020). Plaintiffs then returned to the superior court, built a factual record, and prevailed on summary judgment. The superior court correctly ruled that allowing only one type of lactation care provider to work for pay violates the Georgia Constitution's guarantee of equal protection. The Court should affirm.[1]

The Secretary argues that "[t]he Act is not fundamentally different from innumerable other regulatory occupational licensing laws in Georgia, from physician licensure to used motor vehicle dealers." Br. of Appellant ("Def. Br.") 1 (cleaned up). But the Act *is* fundamentally different. Lactation care providers are not doctors or used car salesmen. The record shows that unlicensed lactation care is safe and beneficial. There are *no* rogue lactation consultants. There is *no*

[1] The superior court incorrectly ruled that the Act does not violate Georgia's Due Process Clause, and the Court should reverse that portion of the ruling. *See* Br. Cross-Appellants, *Jackson v. Raffensperger*, No. S23X0018.

evidence of fraud or harm. There *is* a critical shortage of lactation care. If the Act takes effect, it will reduce the availability of safe lactation care in Georgia, especially in rural and minority communities served by Mary and ROSE.

In light of these facts, the Secretary's interpretation of the Act has become a moving target. Ever since this Court ruled against him, he has been slowly backing away from the law's true meaning. Unlike the last time he was before this Court, the Secretary now argues that the Act only applies to mothers and babies with medical issues and "does not preclude anyone from providing education, counseling, support, and encouragement to a breastfeeding mother for compensation." Def. Br. 1. The Act's plain text does not support this interpretation, and it is contrary to a previous Department of Law opinion interpreting the Act. Moreover, Mary and other lactation care providers assist all mothers and babies with a wide range of services, as they should. The Secretary cannot escape this.

The Secretary's backup argument is that the government can do anything it wants because the equal protection "standard is nearly impossible to satisfy," Def. Br. 3, and Plaintiffs must prove that the legislature's reasons for the Act "could not reasonably be conceived to be true." Def. Br. 24 (citation omitted). This is not the test in Georgia. This Court demands real evidence of a law's connection to its

purpose. Here, the superior court's analysis was correct,[2] but it did not provide a clear test to guide future cases. This Court should clarify the legal standard that will apply to equal protection cases under Georgia's Constitution moving forward.

There is no evidence that the Act will protect the public. In fact, there is evidence that the Act will *harm* the public. Given such facts, the Secretary hides behind the wrong interpretation of the Act and the wrong legal standard. This is the perfect case to hold that this Court demands more from the government.

STATEMENT OF FACTS[3]

I. There is no dispute that Georgia needs more of all types of lactation care providers.

Breastfeeding has many health benefits for both mother and baby, R-500–01, 703, 879–80, and women have been helping each other learn to breastfeed since the dawn of time. R-4644. Today, lactation care providers assist families in many settings: hospitals, doctor's offices, clinics, nonprofits, in private practice, and in homes. R-703–04, 4644, 4646. Lactation care providers "know to stay within their scope of practice." R-652, 668, 703, 712, 714, 987; *see also* R-810–12 (written scope of practice). It is undisputed that they do not diagnose or treat medical conditions. R-516–17, 652, 703–04, 706–07, 987. Instead, they work with

[2] The superior court did not apply the correct standard or analysis to Plaintiffs' due process claim. *See* Br. Cross-Appellants, *Jackson*, No. S23X0018, 11–22. The conflict between these rulings demands this Court's guidance.

[3] The parties agree that there are no material factual disputes. Def. Br. 14.

a team and must refer high-risk patients to a physician. R-652, 676, 704, 712, 714–16, 796, 810, 812, 815, 4713–14. Mothers without access to a lactation care provider will often shorten the duration of breastfeeding or forgo it altogether. R-704, 948, 4646. Certified Lactation Counselors (CLC), International Board Certified Lactation Consultants (IBCLC), ROSE Community Transformers, and Women, Infant, and Children (WIC) Peer Counselors are just a few types of providers who can help mothers reach their breastfeeding goals. R-705, 4648. It is undisputed that they *all* play an important role in assisting breastfeeding families. R-705–09, 930–32. The Secretary's expert and members of the Act's Lactation Consultant Advisory Board ("Board") emphasized this. R-503, 517, 519, 533, 4660. As the Secretary's expert put it, "[W]e all serve a role. . . . There is plenty of work for all of us, for all credentials." R-517. She also testified that all types of providers should be paid for their work. R-513–15. Plaintiffs' expert, an IBCLC and nurse, likewise testified that families need access to all types of lactation care providers. R-705–09. Plaintiffs' pediatrician expert testified that doctors need to refer patients to all kinds of lactation care providers. R-928–31.

The demand for breastfeeding support is, without a doubt, growing. R-718, 932, 4665. New kinds of lactation care providers are filling the gaps. R-662. As the Secretary's expert acknowledged, Georgia needs "more, more, more" of all types of lactation care providers. R-518. This is especially true in rural and minority

communities where families already find themselves without adequate "culturally appropriate support." R-947–48, 677, 720, 988. The disparity in breastfeeding rates between African-American families and white families is undisputed. R-947, 973, 4647, 4484. ROSE's mission is to improve health-care access among African-Americans and people of color through training, education, advocacy, and direct assistance to individuals. R-651, 943. To that end, Plaintiffs Mary and ROSE work within their own diverse communities. R-651, 709. Mary, a CLC, has over 31 years of experience. R-648. Mary and ROSE have trained doctors, nurses, and other professionals on the benefits of breastfeeding and on appropriate techniques for helping mothers to breastfeed. R-648, 650, 651, 943. CLCs and other non-IBCLCs are critical to ROSE's mission. R-947, 4483. ROSE attributes its success to the fact that its employees and volunteers look and talk like the mothers they serve and relate to their lived experiences. R-944. This is because CLCs and other non-IBCLCs are more racially and geographically diverse than IBCLCs, the vast majority of whom are white and live in urban areas.[4]

ROSE provides its services free to moms, R-141, 943, but lactation care providers must pay the bills. Therefore, ROSE must pay its employees. R-943. To

[4] R-688 (IBCLC map), 694 (demographics of CLCs), 697 (CLC map), 833 (U.S. Lactation Consultant Association (USLCA) data noting "tremendous racial disparities in the lactation profession" and greater diversity among non-IBCLCs), 4711–12 (experience of Plaintiffs' expert, an IBCLC with over 48 years of experience), 4748 (IBCLC demographics).

help support their families, many ROSE providers become CLCs, but few become IBCLCs. R-669, 944, 988. In fact, becoming an IBCLC is impossible for many because of the time and expense involved, R-669, 706, 988, and therefore care from an IBCLC is usually more expensive than care from a CLC or other community-based provider. R-141, 708, 4748–49. Becoming a CLC requires 52 hours of training and passing an exam that costs $120, while becoming an IBCLC requires 14 college-level courses, 95 hours of lactation-specific education, 300 to 1,000 hours of experience, and passing an exam that costs $600–$700. R-710–13.

Differences in training do not mean that CLCs are less prepared to assist breastfeeding families than IBCLCs. Plaintiffs' expert testified that CLCs are trained to provide safe, competent lactation care and services directly to families. R-700, 714–17. And it is undisputed that research shows "[a]ccess to professional lactation care increases breastfeeding initiation, exclusivity, and duration rates, regardless of the credential that the [provider] holds." R-708, 775, 4669.

II. The Act reduces the number of lactation care providers in Georgia.

In April 2016, the Governor signed the Act into law. O.C.G.A. §§ 43-22A-1 to -13.[5] The Act's sponsor stated that the law was meant to increase access to lactation care and services in Georgia. R-820; *see also* R-498. But, contrary to the

[5] The Act was set to take effect in 2018, but the Secretary agreed not to enforce the Act against unlicensed providers during this lawsuit. R-328, 635–36.

Secretary's arguments, the Act allows only one type of lactation care provider to work for pay. *See* Argument I, *infra*. Accordingly, Mary's employer told her that she would be re-assigned and would no longer be able to work directly with mothers and babies. R-652. Both Plaintiffs' experts testified that if the Act takes effect, it will reduce access to lactation care and services. R-717–21, 932.

While the Act's definition of "lactation care and services" is broad, the law also contains a patchwork of exemptions. Doctors, physician assistants, osteopaths, dentists, nurses, chiropractors, and dieticians are exempt from the Act. O.C.G.A. § 43-22A-13. While doctors and nurses can have a limited role to play in caring for breastfeeding families, it is undisputed that they are not equipped to provide the same kind of care as a dedicated lactation care provider.[6] Neither are dentists, chiropractors, or dieticians. R-705. Regardless of training, doulas, perinatal and childbirth educators, students, government employees, and unpaid volunteers are also exempt from the Act. O.C.G.A. § 43-22A-13(2), (3), (4), (5), (6).

[6] R-497 (Board member Merrilee Gober testified she learned "[v]ery, very little, [m]aybe 20 minutes' worth of education" on breastfeeding in nursing school), 502, 511–12 (Secretary's expert's research showed physicians' and nurses' education and experience with breastfeeding "was lacking significantly"), 520 (Secretary's expert received "very little" breastfeeding training in nursing school), 704–05 (Plaintiffs' expert testified "[b]ecause most physicians and nurses have received very little, if any, breastfeeding-specific training, lactation care providers often know more than physicians and nurses about breastfeeding management and how to successfully encourage nursing moms"), 930 (Plaintiffs' expert received no breastfeeding education or training in medical school).

Approximately 10,770 babies are born each month in Georgia. R-628. Georgia has at least 735 CLCs like Mary who are ready and able to help families. R-679, 690–93. There are also an unknown number of other lactation care providers such as ROSE Community Transformers working who cannot obtain licenses under the Act. In contrast, there are only 478 IBCLCs in Georgia and only 162 of them are licensed lactation consultants. R-547, 679, 720. Licensees are concentrated in urban areas, R-679, 688, 720, while CLCs are more evenly distributed throughout the state. R-679, 697–98, 719.

III. The Act harms non-IBCLCs and the public while benefiting only IBCLCs.

Georgia's Occupational Regulation Review Council ensures that new occupational licenses serve the public. O.C.G.A. § 43-1A-2. The Review Council unanimously recommended against licensing lactation care providers because it "would not improve access to care for the majority of breastfeeding mothers." R-863. The record affirmed there is *no* evidence that unlicensed lactation care providers have ever harmed the public. R-617 (Secretary admits he is unaware of complaints or harm), 859 (Review Council found "no substantive evidence of harm"). Instead, the Act is the product of advocacy by IBCLCs. R-531 (Act was based on model language drafted by the USLCA), 717–18 ("[T]he Southeastern Lactation Consultant Association (SELCA)," Georgia's "chapter of USLCA . . .

lobbied for passage of the Act").[7] IBCLCs have pushed for licensure across the country, R-531, but only four states have licensing laws. And Georgia is the *only* state that restricts the practice of lactation care and services to IBCLCs. R-717.

ARGUMENT AND CITATION OF AUTHORITY

I. The Secretary's belated attempts to reimagine the Act and lactation care providers' jobs will not magically enable Plaintiffs to work.

The Secretary's chief strategy is to move the goalposts and argue that the Act only requires a license for lactation care providers who work with mothers and babies with "medical issues," Def. Br. 13, and "does not preclude anyone from providing education, counseling, support, and encouragement to a breastfeeding mother for compensation."[8] Def. Br. 1. There are three problems with this argument. First, the Act's text does not support it. Second, non-IBCLC lactation care providers *do* work with mothers and babies with medical issues and provide much more than education, counseling, support, and encouragement. Third, the "perinatal educator" exemption does not apply to non-IBCLCs.

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[7] SELCA, which aims to "enhance the reputation, image and credibility" of IBCLCs, R-718, filed an amicus curiae brief supporting the Secretary in this case.

[8] The last time this case was before the Court, the Secretary did not argue that the Act was only for mothers and babies with medical issues, or that education, counseling, support, and encouragement were exempt from the Act. *See* Br. Appellee 6, *Jackson v. Raffensperger*, 308 Ga. 736 (2020) ("IBCLCs are . . . educated and trained to provide the full scope of lactation care and services *for which* [*the Act*] *requires a license, including education, support,* and clinical applications." (emphasis added)).

A. The Act's plain text does not support the Secretary's interpretation.

First, the Act's text. The Secretary argues that the Act was meant for mothers who "need a higher level of clinical lactation care and services because either they or their babies have medical issues," so only lactation care providers who work with these mothers need a license. Def. Br. 13. But the Act *says nothing* about mothers and babies with medical issues, let alone that the law was enacted "[f]or this group." Def. Br. 1. The Act applies broadly to any lactation care provider who works directly with mothers and babies, including non-IBCLCs.

The Secretary is correct that the Act requires a license for "lactation care and services," defined as "the *clinical* application of scientific principles and a multidisciplinary body of evidence for evaluation, problem identification, treatment, education, and consultation to childbearing families." O.C.G.A. § 43-22A-3(5) (emphasis added). The Secretary argues that the word "clinical" means that the Act only applies to mothers and babies with "medical issues." Def. Br. 13. However, Georgia courts look to a word's "ordinary" meaning when interpreting statutes. *Deal v. Coleman*, 294 Ga. 170, 172–73 (2013). According to Merriam-Webster's dictionary, "clinical" means "involving direct observation of the patient." R-4478. For example, "clinical" psychologists work directly with patients. Students in a law school "clinic" work directly with clients. The word works the same in the lactation field. Even the Secretary's witnesses agree. R-3811

("Clinical lactation care is that which is offered to a patient."); R-500 ("[C]linical breastfeeding care" is "the one-on-one evaluation of a mother and baby"). Clinical lactation care and services include (but are not limited to):

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

O.C.G.A. § 43-22A-3(5) (emphasis added). Everyone who works directly with mothers and babies doing the things listed above (including education[9]) provides "clinical" lactation care and services. This is exactly how Mary's employer interpreted the Act, when it told her that once the law went into effect, she would no longer be allowed to work directly with mothers and babies. R-652.

B. Mary and other non-IBCLCs do much more than cheerlead.

Second, Mary and other non-IBCLCs do the same work as IBCLCs. The Secretary fails at statutory interpretation, but even if he was correct, most of what lactation care providers like Plaintiffs do is *not* education, counseling, support, or

[9] If, as the Secretary argues, the Act "does not preclude *anyone* from providing education . . . to a breastfeeding mother for compensation," Def. Br. 1 (emphasis added), why does the Act's definition of "lactation care and services" include "education"?

encouragement. According to the Secretary's witnesses, those activities amount to mere "cheerleading," R-533, 1770, and "[w]omen who present with underlying medical conditions, or who experience complex breastfeeding challenges, need clinical lactation care that goes beyond education, counseling, or peer support." Def. Br. 8. But the Secretary has not singled out a narrow sliver of Georgia mothers. Rather, the Secretary's list of "challenges" for which a license is required includes situations as anodyne as "physical or mental complications from breastfeeding" and "sore nipples." Def. Br. 7–8. Common sense dictates that most women will face these issues to some degree, and so non-IBCLCs deal with these problems (*and* more serious ones) every day. R-4277–78 (CLC discussing training on how to deal with sore nipples), 4481 (Plaintiffs' expert discussing CLCs' training with wide range of medical issues), 795–98 (CLC course syllabus on wide range of medical issues and breastfeeding challenges).

The Secretary concedes that Plaintiffs are much, much more than cheerleaders, they work with all kinds of mothers, and they know when to refer them to their doctors. For example, the Secretary concedes that Mary is not just a cheerleader who tells breastfeeding mothers "[y]eah, you're doing a great job." R-1770 (defining "support" as "cheerleading"). Mary does everything in the Act's definition of "lactation care and services" with all sorts of mothers, even those who "present with underlying medical conditions, or . . . experience complex

breastfeeding challenges," Def. Br. 8. R-651 (Mary assists mothers who face "challenges" and whose babies are premature), 652 (Mary knows when to refer). The Secretary *does not dispute* that Mary identifies and assesses individual mothers' problems, creates and implements tailored care plans, and follows up to evaluate how the plans went. R-4660. In fact, Mary's job tracks the Act's definition of "lactation care and services" perfectly:

The Act's definition of "clinical lactation care and services" (O.C.G.A. § 43-22A-3(5))	**The undisputed facts about Mary Jackson's job as a lactation consultant, R-4660**
(A) Lactation assessment through the systematic collection of subjective and objective data	"assesses breastfeeding challenges facing individual mothers and their babies"
(B) Analysis of data and creation of a lactation care plan	"creates and implements lactation care plans"
(C) Implementation of a lactation care plan with demonstration and instruction to parents and communication to the primary health care provider	"creates and implements lactation care plans"
(D) Evaluation of outcomes	"evaluates breastfeeding outcomes"
(E) Provision of lactation education to parents and health care providers	"assists mothers with babies in the neonatal intensive care with breastfeeding . . . teaches a variety of breastfeeding topics to doctors and nurses, and provides breastfeeding education to medical school students"
(F) The recommendation and use of assistive devices	"helps mothers use various tools such as breast pumps"

The Secretary believes that the Act requires a license for every row in that chart except (E), "education." *See* R-4466. Mary does all of those things, and she is

not an outlier. Other CLCs perform the same type of work as a large part of their jobs. All types of lactation care providers can work with mothers and babies with medical issues and know when to refer. R-652, 676, 704, 712, 714–16, 796, 810, 812, 815, 4713–14. For example, ROSE member and CLC Crystal Starr Flowers worked in a hospital neonatal intensive care unit (NICU) helping mothers with premature babies who "require[d] a lot of attention and help" to breastfeed. R-4656. ROSE member Tenesha Sellers also worked with mothers in the NICU when she was a CLC. R-670. Working with premature babies and their mothers goes far beyond "cheerleading." *See* Def. Br. 8 (identifying "prematurity" as something that would require a license under the Secretary's current interpretation of the Act).

Likewise, Plaintiffs' expert testified that non-IBCLCs are qualified to do and, in fact, do everything included in the definition of "clinical lactation care and services," beyond education, support, counseling, and encouragement. R-703, 714–17 (chart comparing CLC scope of practice to the Act's definition of "lactation care and services"), 4481–82. The Secretary does not dispute this. R-4466 (Department of Law opinion stating that CLCs "conduct comprehensive assessments of mother and child related to breastfeeding and human lactation; and develop an evidence based care plan specific to the needs identified through assessment and counseling and implement it" (cleaned up)). Finally, ROSE CEO Dr. Kimarie Bugg explained that ROSE Community Transformers review mothers'

complaints, observe feedings and latches, take pre- and post- weight checks, and report to doctors. R-2828–29. This is far more than, "[y]eah, you're doing a great job." R-1770. Sidelining skilled lactation care providers as "cheerleaders" is insulting to them and dangerous to the mothers they serve.

C. The perinatal educator exemption does not apply to non-IBCLCs.

Finally, the Act's exemption for "perinatal educators" does not magically allow Plaintiffs to work without a license, either. The Secretary argues that the Act "does not preclude *anyone* from providing education, counseling, support, and encouragement to a breastfeeding mother for compensation," Def. Br. 1 (emphasis added), because of the "perinatal and childbirth educator" exemption. Def. Br. 5. First, the exemption does not cover "anyone," Def. Br. 1, just "perinatal and childbirth educator[s]," terms not defined by the Act. The Secretary tries to use "perinatal educator" as an umbrella term that sweeps in all non-IBCLCs, but this does not work. Plaintiffs' expert testified that perinatal educators are not lactation care providers. They are separate professionals, separately certified, who have different roles and focus less on breastfeeding care than lactation care providers. R-4480. They are not CLCs, ROSE Community Transformers, MiLCs, or WIC Peer Counselors. They're a different group of people, full stop.

The Secretary's previous interpretation of the Act also exposes his argument as a post-hoc litigation strategy. When asked before this lawsuit whether CLCs

could continue working under the Act, the Department of Law issued an official opinion saying "no." R-4466. If CLCs were exempt from the Act as "perinatal educators" and free to provide education, counseling, support, and encouragement for pay, surely the Department of Law would have said so. The Secretary has only said so *now*, after this Court ruled against him and Plaintiffs built a factual record exposing the Act's dire consequences. The Secretary cannot escape that easily.

II. The Secretary applies the wrong legal standard.

The Secretary sets the bar for winning this case so high that few plaintiffs could ever surmount it. In doing so, he ignores a plethora of cases in which plaintiffs *do* win equal protection challenges. Georgia applies real scrutiny to equal protection claims, especially in the context of occupational licensing laws.

A. Under the Secretary's standard, plaintiffs rarely win.

The Secretary argues that "it is the Plaintiffs' burden to prove that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government." Def. Br. 24 (cleaned up).[10] The Secretary asserts that this standard is "nearly impossible to satisfy" and that "rational basis review rarely leads to invalidation of a law." Def. Br. 3.

[10] The Secretary argues that "the superior court improperly shifted the burden to the Secretary to prove the rationality of the exemptions to licensure[.]" Def. Br. 25. Not so. The superior court found that Plaintiffs' evidence rebutted the Secretary's reasons for the Act's exemptions. R-4916–20. *See infra* III.B.

The Secretary is flatly wrong about what Georgia courts demand in cases like this one.[11] He relies chiefly on *Gliemmo v. Cousineau*, 287 Ga. 7 (2010), a medical malpractice case totally unlike this one. Def. Br. 3, 17, 24, 25. He also relies on a federal case and Georgia cases that do not involve equal protection claims at all.[12] *See* Def. Br. 3, 24 (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993)); 18, 23, 24 (citing *Advanced Disposal Servs. Middle Ga., LLC v. Deep S. Sanitation, LLC*, 296 Ga. 103 (2014)); 23 (citing *State v. Old S. Amusements, Inc.*, 275 Ga. 274 (2002))[13]; 2, 17, 23 (citing *Women's Surgical Ctr., LLC v. Berry*,

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[11] The Secretary is also wrong about the federal test. Federal courts sometimes allow plaintiffs to introduce evidence of a law's irrationality. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation . . . depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry[.]"); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[P]laintiffs may . . . negate a seemingly plausible basis for [a] law by adducing evidence of irrationality."). And federal plaintiffs do win equal protection claims. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

[12] The Secretary's amici cite a handful of cases involving occupations. They aren't relevant here because they (1) involve government employees, a context in which the state has more power to control its own workers, SELCA Br. 19–20 (*Sears v. Dickerson*, 278 Ga. 900 (2005) (county employees); *Nathan v. Smith*, 230 Ga. 612 (1973) ("elected state court solicitors"); *Black v. Blanchard*, 227 Ga. 167 (1971) (school superintendents)); (2) non-constitutional claims, SELCA Br. 20 (*Moore v. Robinson*, 206 Ga. 27 (1949) (chiropractors)); or (3) federal claims, SELCA Br. 20 (*Dent v. West Virginia*, 129 U.S. 114 (1889) (doctors); *Pace v. Smith*, 248 Ga. 728 (1982) (lawyers); *Baranan v. State Bd. of Nursing Home Adm'rs*, 143 Ga. App. 605 (1977) (nursing home administrators)); NLCA Br. 10 n.5 (*Foster v. Ga. Bd. of Chiropractic Exam'rs*, 257 Ga. 409 (1987)).

[13] *Advanced Disposal Services*, 296 Ga. 103, and *Old South Amusements, Inc.*, 275 Ga. 274, apply realistic scrutiny to the plaintiffs' due process claims. The Secretary parrots deferential language from these cases, but the Court's actual

302 Ga. 349 (2017)).[14] These cases are inapposite in a challenge to an occupational licensing law under Georgia's equal protection guarantee.

B. Under the correct standard, plaintiffs often win.

Contrary to the Secretary's argument, Georgia plaintiffs often win equal protection challenges. Like Georgia's Due Process Clause,[15] Article I, Section I, Paragraph II of the Georgia Constitution provides robust protection for individual rights. The Secretary's argument overlooks decades of precedent in which this Court has demanded real evidence of a law's connection to its purpose. The Court should look to those cases here since they informed the framers of the 1983 Constitution. They show that Article I, Section I, Paragraph II provides more protection for individual rights than the federal Constitution.

1. A law must have a real connection to its purpose.

The Secretary relies on inapposite cases and an exaggerated version of the federal rational basis test. *See supra* II.A. Here, the Court should look to Georgia equal protection cases, which show that the Court requires a real connection between a law and its purpose.

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analysis cuts in Plaintiffs' favor. *See* Br. Cross-Appellants 14, *Jackson*, No. S23X0018.

[14] *Women's Surgical Center*, a due process and antimonopoly challenge to Georgia's medical certificate of need law, specifically confines the Court's ruling to that case's "unique context." 302 Ga. at 355 n.7.

[15] *See* Br. Cross-Appellants 13–19, *Jackson*, No. S23X0018.

This Court's skepticism of occupational licensing started early when it struck down a plumbing license under Article I, Section I, Paragraph II's precursor[16] in 1910. *See Henry v. Campbell*, 133 Ga. 882, 67 S.E. 390 (1910). The plaintiff in *Henry* was denied a license because, although he was experienced and competent, his limited education prevented him from passing the written exam required by the plumbing board. 67 S.E. at 391. The ordinance, however, permitted plumbing firms to obtain licenses for all their employees based on the issuance of a permit to one employee. Because the ordinance arbitrarily distinguished between applicants based on whether they were employed by a firm, the Court held that it was "inevitable" that the ordinance was "discriminatory" and therefore void. *Id.* at 393. Like the plumber in *Henry*, Mary is competent and has otherwise meets the requirements to become an IBCLC, but she has not passed the exam. R-1648. And like the law in *Henry*, the Act exempts individuals based on their employer. *See* O.C.G.A. § 43-22A-13(4), (5) (exempting federal and state employees).

After *Henry*, the Court continued to strike down occupational licensing laws. *See, e.g.*, *Gregory v. Quarles*, 172 Ga. 45, 157 S.E. 306, 208 (1931) (invalidating plumber license that arbitrarily distinguished between "original work and repair work"); *Se. Elec. Co. v. City of Atlanta*, 179 Ga. 514, 514, 176 S.E. 400, 402

[16] Article I, Section I, Paragraph II of the Constitution of 1877 read: "Protection to person and property is the paramount duty of government, and shall be impartial and complete."

(1932) (invalidating electrician license that arbitrarily distinguished between workers in various ways); *Dewell v. Quarles*, 180 Ga. 864, 181 S.E. 159, 160–61 (1935) (invalidating plumber licensing law that arbitrarily conferred licenses for "whimsical" reasons); *Bramley v. State*, 187 Ga. 826, 838 (1939) (invalidating photographer license); *Jenkins v. Manry*, 216 Ga. 538, 545–46 (1961) (invalidating plumber and steam-fitter license that exempted public utility workers). The framers of the 1983 Constitution drafted Article I, Section I, Paragraph II when this was the state of the law. And in 1983, just before Article I, Section I, Paragraph II took effect, the Court struck down yet another plumber license that exempted formerly state-licensed plumbers but not locally licensed plumbers because distinguishing between them failed to have any connection to protecting the public from "faulty, inadequate, inefficient or unsafe" plumbing practices. *Waller v. State Constr. Indus. Licensing Bd.*, 250 Ga. 529, 530 (1983).

As recently as 2004, the Court has struck down other economic regulations under equal protection. In these cases, the Court required a real connection between a law and its purpose. Sometimes a law must have a "direct relation" or "direct and real" relation to its purpose. *See, e.g.*, *Ciak v. State*, 278 Ga. 27, 28 (2004) (law discriminating against non-resident drivers with tinted windows denied equal protection because it had no "direct relation to the purpose of" the law); *Love v. State*, 271 Ga. 398, 402 (1999) ("legislative distinction between users of legal

and illegal marijuana" did not bear "a direct relation to" the law's purpose); *State v. Moore*, 259 Ga. 139, 141 (1989) (prohibition on trucks over 60 feet long exempting trucks carrying live poultry bore no "direct and real relation" to protecting the public); *Simpson v. State*, 218 Ga. 337, 338–39 (1962) (law banning distribution of obscenity but exempting "public news" bore no "direct and real relation" to protecting the public).

Other times, a law must have a "fair and substantial" connection to its purpose. *See, e.g.*, *Jones v. Jones*, 259 Ga. 49, 49 (1989) (interspousal immunity doctrine arbitrarily distinguishing between classes of wrongful death claimants had no "fair and substantial" relation to law's purpose); *Bailey Inv. Co. v. Augusta-Richmond Cnty. Bd. of Zoning Appeals*, 256 Ga. 186, 186 (1986) (zoning regulation had no "fair and substantial relation to" the law's purpose); *Clark v. Singer*, 250 Ga. 470, 472 (1983) (statute of limitations scheme had no "fair and substantial relation to" the law's purpose); *Geele v. State*, 202 Ga. 381, 385 (1947) (requiring only pricier hotels to have fire escapes had no "fair and substantial relation to" protecting patrons' safety). Whatever language they use, these cases uniformly demand real evidence of a law's connection to its purpose.[17] This is a rigorous standard under which Plaintiffs can and have won.

[17] This standard resembles the test under Georgia's Due Process Clause. *See* Br. Cross-Appellants 15 (due process requires a law to "realistically serve[] a legitimate public purpose, and . . . employ[] means that are reasonably necessary to

2. Georgia's Article I, Section I, Paragraph II provides greater protection for individual rights than the federal Constitution.

The Secretary cannot rely on a test resembling the federal rational basis test on its very worst day, because Georgia's equal protection standard is different.[18] In fact, the "language, history, and context" of Article I, Section I, Paragraph II show that it "confer[s] greater protections" than the U.S. Constitution. *See Olevik v. State*, 302 Ga. 228, 234 n.3 (2017). Article I, Section I, Paragraph II is written differently than the U.S. Constitution, has a different history, and, as shown above, has generated vastly more plaintiff-friendly caselaw than the federal courts.

Article I, Section I, Paragraph II has a long history, but it took its current two-part form in 1983: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." The "equal protection" provision first appeared in 1868, was removed in 1877, and reappeared in 1983. *See Grissom*, 262 Ga. at 375. The preceding "impartial and complete" provision does not appear in the federal Constitution or in any other state constitution, and its history and subsequent

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achieve that purpose, without unduly oppressing the individuals regulated" (quoting *City of Lilburn v. Sanchez*, 268 Ga. 520, 522 (1997)).

[18] This Court has "occasionally said, without any analysis, that the equal protection clauses of the federal and Georgia Constitutions are 'coextensive.'" *Harvey v. Merchan*, 311 Ga. 811, 825 n.13 (2021) (citing *Harper v. State*, 292 Ga. 557, 560 (2013), and *Grissom v. Gleason*, 262 Ga. 374, 376 (1992)). *Grissom* and *Harper* did not overrule any of the cases discussed by Plaintiffs above at II.B.1.

caselaw indicate that it is more than just a reiteration of the federal right to equal protection. It is a unique provision that expresses the fundamental principle that protection to person and property is "paramount" in Georgia.

The "impartial and complete" provision originated in 1861, though it did not yet contain the phrase "impartial and complete."[19] That language was "included by the drafters of the 1868 Constitution in order to protect against the resistance to Reconstruction and to fully protect the rights of newly freed slaves." *Grissom*, 262 Ga. at 380 n.1 (Sears-Collins, J., concurring). Georgia held "person and property" in especially high regard, and the 1868 framers wanted to make sure that those rights were protected impartially for all Georgians. Article I, Section I of the 1868 Constitution housed the "impartial and complete" provision, and Section II housed the equal protection provision. Equating the 1868 Constitution's "impartial and complete" provision with its equal protection provision would yield the bizarre result of back-to-back, redundant equal protection clauses. The "impartial and complete" provision meant something independent in 1868, as it does today.

The provision has not changed since 1868, save for the excision of a comma, and "a constitutional provision retained from a previous constitution without

[19] It stated, "Protection to person and property is the duty of Government; and a Government which knowingly and persistently denies, or withholds from the governed such protection, when within its power, releases them from the obligation of obedience." Ga. Const. 1861, art. I, § III.

material change [retains] the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary." *Elliott v. State*, 305 Ga. 179, 183 (2019). Thus, as the leading commentary on the Constitution of 1877 observed, the "impartial and complete" provision provides that "[t]he right of private property is sacred in the eyes of the law and stands upon the same foundation as the coordinate rights of personal liberty and personal security[.]" Walter McElreath, A Treatise on the Constitution of Georgia § 1103 (Harrison Co. 1912). The Court's early cases, *supra* II.B.1, striking down occupational licenses under the "impartial and complete" provision alone, with no "equal protection" language, confirm that the "impartial and complete" provision provides special protection to economic rights.

The 1983 framers "considered the possibility of removing" the "impartial and complete" provision but did not. *Grissom*, 262 Ga. at 383–84 (Sears-Collins, J., concurring). According to the rules of constitutional construction, "it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law." *Wellborn v. Estes*, 70 Ga. 390, 397 (1883). And so, "[t]he only proper conclusion is that Georgia's historical emphasis on the protection of person and property and the concept of equal protection under the laws were fused to form a new entity greater than its individual parts." *Grissom*, 262 Ga. at 383–84 (Sears-Collins, J., concurring). Working together, the

two parts of Article I, Section I, Paragraph II specially protect economic rights like the right "to pursue a lawful occupation." *Jackson*, 308 Ga. at 740. Georgians must be treated equally when pursuing their economic rights.

For the most part, federal courts have not shared Georgia courts' skepticism of laws that infringe on economic rights. *See* Br. Cross-Appellants 15–19, *Jackson*, No. S23X0018. *See also, e.g.*, *Beach Commc'ns, Inc.*, 508 U.S. at 315 ("Those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." (cleaned up)); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976) ("[A] statutory classification impinging upon no fundamental interest, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it."). It is impossible to compare federal cases and Georgia cases and come away thinking that they use the same test. And "[i]t is difficult to conceive how or why Georgians would delegate to the United States Supreme Court the authority to alter the meaning of the Georgia Constitution by unknown future federal decisions." *State v. Turnquest*, 305 Ga. 758, 770 (2019). Georgia has its own test under Article I, Section I, Paragraph II.

III. The undisputed facts show that the Act violates equal protection.

The superior court correctly ruled that the Act violates Georgia's equal protection guarantee. R-4920. The Secretary incorrectly argues that Plaintiffs and

other non-IBCLCs are not similarly situated to IBCLCs and distinguishing between them is rationally related to a legitimate state purpose. Def. Br. 18–28.

A. Plaintiffs and other non-IBCLCs are similarly situated to those who can provide lactation care and services under the Act.

The superior court correctly found that "all non-IBCLC providers are similarly situated to IBCLC providers because they perform the same type of work." R-4914. The Secretary argues that the superior court wrongly compared only IBCLCs and CLCs, and the relevant class "must include *all* individuals who may desire to provide lactation care and services, regardless of whether they have any specific education or training." Def. Br. 20. The Secretary is splitting hairs. First, the superior court did include "all non-IBCLC providers" in its comparison. R-4914. Moreover, Plaintiffs have never argued that someone with no breastfeeding training, education, or experience who does not actually provide lactation care and services is similarly situated to *an IBCLC* (although the Act treats them the same because they are both allowed to provide lactation care and services). Rather, that person is similarly situated to someone who is exempt from the Act and also has no breastfeeding training, education, or experience (such as a typical dentist or chiropractor).

This Court has "consistently treated individuals who perform the same work as being similarly situated for equal protection purposes." *Jackson*, 308 Ga. at 741. The Secretary argues that IBCLCs and non-IBCLCs do not perform the same

work. Def. Br. 20–22. This rehashes the Secretary's incorrect argument that non-IBCLCs only provide education, counseling, support, and encouragement. As explained above, Mary and other non-IBCLCs do much more. *See supra*, I.B.[20]

B. The undisputed facts show that the Act does not protect the public.

The superior court correctly found that "the non-IBCLCs documented in the record are 'engaged in lactation care and services,' and doing it safely." R-4917. Therefore, not allowing them to work "is contrary to the Act's stated purpose."[21] *Id.* The Secretary has been unable to provide *any* evidence that a mother or baby has ever been harmed by someone providing lactation care and services. R-612, 617, 619, 859; *see also* R-863 (Review Council finding no harm). Likewise, there

[20] Not every lactation care provider performs every activity in the Act's list of "lactation care and services" every day. If that was required, then no worker would ever be similarly situated to another. Everyone performs different kinds of work within the wider ambit of their profession. For example, plumbers perform "repair and maintenance work" or work on new installations, but they all engage in the "trade of a plumber" and are similarly situated. *See Gregory*, 157 S.E. at 307.

[21] The Secretary argues that the superior court "flatly ignored the plausible reasons the Secretary raised" for the Act's exemptions. Def. Br. 17. First, the standard is "direct and real" or "fair and substantial," not "plausible." Second, the superior court did not "ignore" the Secretary; it described and rejected the Secretary's justifications because of record evidence to the contrary. *See, e.g.*, R-4917 ("The Court disagrees with Defendant's contention that the volunteer exception is a natural extension of the Act," then discussing record); R-4918 ("Defendant states that, by exempting [WIC Peer Counselors], the Act ensures that women in the WIC program will continue to receive services. However, the record shows . . . ."); R-4919 (discussing record evidence about other exemptions).

is no evidence that confusion about lactation care providers' credentials is causing any harm,[22] or that any mother has been defrauded by a lactation care provider.

As the superior court correctly recognized, the Act's exemptions further demonstrate that lactation care and services are safe.[23] For example, if one accepts the Secretary's premise that lactation care is dangerous (it is not), then the reasons for the volunteer exemption are not "immediately obvious." Def. Br. 26. When an occupation is inherently unsafe or potentially harmful, unlicensed individuals are not allowed to perform it for free. Unlicensed doctors and lawyers cannot provide services for free. *See* O.C.G.A. § 43-34-22(a) (doctors); O.C.G.A. § 15-91-50 (lawyers). The General Assembly was obviously confident that no harm would

[22] The Secretary's amici cite materials published by IBCLCs to demonstrate that confusion over lactation care providers' credentials exists. *See* NLCA Br. 3. The cited materials contain no evidence of confusion causing harm. R-4492.

[23] The Secretary's last line of defense is to argue that if the Act's exemptions are unconstitutional, they should be severed. Def. Br. 17, 29–30. This is unworkable for two reasons. First, the Act would still be unconstitutional even if the exemptions did not exist. Distinguishing between IBCLCs and non-IBCLCs is unconstitutional. *See* R-4917. Second, "[w]hen an unconstitutional portion of a statute is so connected with the general scope of the statute that to sever it would result in a statute that fails to correspond to the main legislative purpose, or give effect to that purpose, the statute must fall in its entirety." *State v. Jackson*, 269 Ga. 308, 312 (1998) (citations omitted). Severing the Act's exemptions would lead to the worst possible scenario: Georgia families would lose virtually all existing breastfeeding support. In addition to losing non-IBCLCs, they could no longer rely on unlicensed volunteers, WIC Peer Counselors, knowledgeable physicians, nurses, or doulas. A mother who gave breastfeeding advice to her daughter could be subject to prosecution. The Court should not sever the exemptions.

befall women who receive lactation care from volunteers or dentists, no matter their level of training. And while it may be true that "those holding their services out for *money* are more likely to commit fraud," Def. Br. 26, there is *no* evidence in the record that this has actually happened. Mary and ROSE CEO Dr. Kimarie Bugg, both leaders in the field with decades of experience, have never experienced rogue, unqualified persons "put[ting] out a shingle" as a lactation consultant. R-1523, 2879. This Court has cautioned that "laws may be passed regulating common occupations which, from their nature, afford peculiar opportunity for imposition and fraud." *Bramley*, 187 Ga. at 838. The record does not show that lactation care affords a greater likelihood for fraud "from [its] nature." *Id.*

Like volunteers, doctors, nurses, chiropractors, dentists, and other exempt professionals are unlikely to harm their patients when providing lactation care "when incidental to the practice of their profession." Def. Br. 29 (emphasis omitted). They should be able to continue to help families breastfeed, but they will not provide the same quality of services as a specialized lactation care provider. It makes no sense to prohibit specialists from practicing their craft, while exempting others who may or may not have any relevant training or experience. Doing so has no "fair and substantial" or "direct and real" connection to protecting the public.

Finally, the Act's exemptions for government employees fare no better. The Secretary is correct that the Act cannot supersede federal law and regulate federal

workers, Def. Br. 27–28, but the Act also exempts state and local employees. O.C.G.A. § 43-22A-13(5). The Secretary argues that the exemption is justifiable because "the state already has a great deal of influence over" these employees. Def. Br. 28. But the same was true when this Court struck down licenses for plumbers, steam-fitters, and electrical workers that exempted public utility workers. *Se. Elec. Co.*, 176 S.E. at 400; *Jenkins*, 216 Ga. at 546. Just like in those cases, "the work is just as hazardous when done by the exempt class as when done by the subject class." *Se. Elec. Co.*, 176 S.E. at 402. Here, the work is safe, *not* "hazardous." *Id.* That is why anyone should be able to do it, and it should not be licensed.

CONCLUSION

The Act is unconstitutional. The Court should affirm the superior court's equal protection ruling and reverse the superior court's due process ruling.

DATE: October 17, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day a copy of the foregoing *Brief of Appellees* was served via email, per prior agreement of the parties, on the following:

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SUPREME COURT OF GEORGIA
Case No. S23A0017

September 14, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BRAD RAFFENSPERGER v. MARY NICHOLSON JACKSON et al.

Your request for an extension of time to file the brief of appellee in the above case is granted until October 17, 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