Case Nos. S17A1317 and S17X1318

IN THE SUPREME COURT OF GEORGIA

WOMEN'S SURGICAL CENTER, LLC, et al.,

Petitioners and Cross-Appellees,

v.

CLYDE L. REESE, III, et al.,

Respondents and Cross-Appellants.

Fulton County Superior Court, Case No. 2015-CV-262659

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS AND CROSS-APPELLEES WOMEN'S SURGICAL CENTER, LLC, ET AL.

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INTEREST OF AMICUS CURIAE

Founded in 1973, Pacific Legal Foundation (PLF) provides a voice in the courts for thousands of Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, and the District of Columbia. Its Economic Liberty Project seeks to protect the free enterprise system from regulations that prohibit honest competition to protect the profits of established businesses. PLF has participated as counsel or *amicus curiae* in cases challenging economic protectionism before the United States Supreme Court, the United States Courts of Appeals, and various state courts. *See, e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *GMC v. State Motor Vehicle Review Bd.*, 862 N.E.2d 209 (Ill. 2007). Additionally, PLF has participated as *amicus curiae* before this Court in a case involving constitutional limits on economic regulations. *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 733 S.E.2d 269 (2012).

PLF attorneys are familiar with the legal issues raised by this case and the briefs on the merits filed with this Court. Because this case turns on the interpretation of a law designed to restrict competition, PLF believes its perspective and experience will provide a unique and helpful additional viewpoint on the issues presented here.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Women's Surgical Center, LLC (Women's Surgical), provides state-of-the-art healthcare for women at a relatively low cost. Since 2010, Women's Surgical has grown their practice and wants to build a second operating room and contract with additional doctors to provide more care for more Georgia women. Petitioners' Opening Br. at 3.

Georgia's Certificate of Need (CON) laws, however, prohibit Women's Surgical's expansion without first getting a CON from the Georgia Department of Community Health (Department). O.C.G.A. § 31-6-40(a)(2). Under Georgia's CON laws, competing medical practices are permitted to object to the issuance of a CON to Women's Surgical, triggering a hearing by the Department to determine whether there is a "need" in the community for the applicant's proposed new services. The applicant may not speak at the hearing to rebut arguments made by the established businesses that oppose the new competition. Ga. Comp. R. & Regs. 111-2-2-.07(1)(h)(1).

Women's Surgical challenges Georgia's CON laws under several provisions of the state and federal constitutions. This Court should give effect to the unique provisions and protections established by the Georgia Constitution, and should interpret the Georgia Constitution independently from the Federal Constitution.

This Court has long recognized that the Georgia Constitution strongly protects economic liberty. In this state, the right to earn a living is one of the most important rights an individual has, and laws that restrict that right are suspect. Laws that merely protect established businesses from competition do not achieve any permissible end of public health, safety, or general welfare.

Georgia's CON laws have the purpose and effect of restricting competition. Furthermore, the standards laid out for deciding when to issue a CON are vague and can be manipulated to further protect established business. Therefore, the CON laws violate the Georgia Constitution and this Court should reverse the judgment of the superior court.

I

THE GEORGIA CONSTITUTION PROVIDES MORE PROTECTION FOR ECONOMIC LIBERTY THAN THE FEDERAL CONSTITUTION

A. This Court Should Not Automatically Follow Federal Law When Interpreting the State Constitution

In this case, Women's Surgical alleges violations of both the Georgia and federal constitutions. This Court should analyze the Georgia constitutional provisions at issue independently from similarly worded provisions in the federal constitution. Although case law concerning federal constitutional provisions may be helpful in construing a similarly worded state constitutional provision, that case law is not dispositive. Only this Court has the responsibility of being the final authority

on the meaning of the state Constitution. *State v. Oliver*, 188 Ga. App. 47, 55, 372 S.E.2d 256, 264 (1988) ("The Supreme Court of Georgia is the final construer of our state constitution whereas the United States Supreme Court is the final interpreter of the federal constitution."). Accordingly, federal precedents "are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977).

If a court automatically applies federal case law to state constitutional issues, then it neglects its duty to be an independent interpreter of the law. *McDaniel v. Thomas*, 248 Ga. 632, 633, 285 S.E.2d 156, 157 (1981) ("Judicial review of legislative enactments is central to our system of constitutional government and deeply rooted in our history (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803))).

> When a state court defers to the interpretation of analogous provisions of the Federal Constitution, it effectively declines to exercise judicial review under the state constitution. A presumption that the state constitutional provision has the same meaning as its federal analogue effectively denies the state constitution the judicial enforcement that the Federal Constitution has enjoyed since *Marbury v. Madison*.

Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 Va. L. Rev. 389, 414 (1998).

Indeed, by adopting federal standards for state constitutional provisions, a court is essentially delegating its judicial power to another body. Yet the Georgia

Constitution places its judicial power in Georgia courts. Ga. Const. art. VI, § 1, ¶ I. "If the state courts fail to construe and apply the very document which created them, the bills of rights in the state constitutions amount to nothing more than surplusage. At best, the state clauses will have the meaning which the federal courts impart to the federal Constitution." Dorothy T. Beasley, *The Georgia Bill of Rights: Dead or Alive?*, 34 Emory L.J. 341, 415–16 (1985). "As a result, the federal courts will be the *de facto* interpreters of the state constitutions." *Id.* at 416.

Accordingly, this Court should continue to recognize that even similarly worded provisions in the federal and state constitutions can establish different standards and rights. As former Oregon Supreme Court Justice Hans Linde stated, "[s]ome state courts make too much of identity or slight differences between the texts of similar constitutional clauses." Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 181 (1984). In order to avoid this pitfall, "[t]he first step is to overcome the sense that divergence from Supreme Court doctrines is more legitimate when the state's text differs from its federal counterpart than when they are the same. In truth, the state court is equally responsible for reaching its own conclusion in either case." *Id.* at 181–82.

This Court has recognized that "[n]either is this court bound in construing our State Constitution by the rulings of the courts of other States . . . or of the United States Supreme Court . . . ." *Harris v. Duncan*, 208 Ga. 561, 563, 67 S.E.2d 692, 693

(1951). Instead, "State courts must recognize that only they can assume the role as interpreter of the state constitution. Their oath requires that they construe both [the state and federal] constitutions." Beasley, *supra*, 34 Emory L.J. at 415.

The state constitutional provisions were passed for a purpose, and this Court should give effect to that purpose. "State constitutions allow the people of each state to choose their own theory of government and of law, within what the nation requires, to take responsibility for their own liberties, not only in courts but in the daily practice of government." Linde, *supra*, 18 Ga. L. Rev. at 199. The citizens of Georgia have answered that call. In order to carry out the purpose of the Georgia Constitution, this Court should give independent effect to its provisions, even where they share language with similar federal constitutional provisions.

B. The Georgia Constitution Opposes Economic Protectionism

This Court's constitutional decisions have continually reiterated strong protections for freedom of contract and the right to earn a living. Beasley, *supra*, 34 Emory L.J. at 360 n.69 ("The Georgia Supreme Court has long protected property and economic rights."). The protection of these rights is not trivial. Quite the opposite, "human dignity and individual freedom demand that one engaged in a lawful business injurious to no one must not be arbitrarily prevented from the legitimate prosecution of his business by [laws] which set up trade barriers solely for the purpose of protecting a resident against proper competition." *Moultrie Milk*

Shed, Inc. v. City of Cairo, 206 Ga. 348, 352, 57 S.E.2d 199, 202 (1950). In short, "[t]he right to make a living is among the greatest of human rights, and, when lawfully pursued, cannot be denied." *Schlesinger v. Atlanta*, 161 Ga. 148, 129 S.E. 861, 866 (1925).

To that end, the Georgia Constitution embodies a policy against "defeating or lessening competition, or encouraging a monopoly." *Exec. Town & Country Servs., Inc. v. Young*, 258 Ga. 860, 863, 376 S.E.2d 190, 192 (1989) (citation and quotation marks omitted). The Constitution disfavors "restrictions on the right of any person, firm, or corporation to engage in its business *and to do business with those members of the public who choose to partake of its services*." *Shankman v. Coastal Psychiatric Assocs.*, 258 Ga. 294, 295 n.2, 368 S.E.2d 753, 754 n.2 (1988).

Keeping with that policy, this Court has clearly and consistently reiterated that economic regulations are subject to a more stringent standard of review than the rational-basis standard applied in federal courts. *Harris*, 208 Ga. at 563, 67 S.E.2d at 693; *Cox v. Gen. Elec. Co.*, 211 Ga. 286, 289, 85 S.E.2d 514, 518 (1955); *Gen. GMC Trucks, Inc. v. Gen. Motors Corp., GMC Truck & Coach Div.*, 239 Ga. 373, 376–77, 237 S.E.2d 194, 196–97 (1977). For example, in *Harris*, this Court held that a regulation fixing the price of milk violated the Georgia Constitution, despite the fact that the United States Supreme Court upheld the constitutionality of a similar regulation 15 years earlier. *Harris*, 208 Ga. at 564, 67 S.E.2d at 694 (citing *Nebbia*

v. New York, 291 U.S. 502 (1934)). Distinguishing the holding from *Nebbia*, this Court stated that the Georgia Due Process Clause forbids the regulation of business activities that are not "affected with a public interest," and protecting the profits of the milk industry "does not come within that scope." *Harris*, 208 Ga. at 563, 67 S.E.2d at 693. This Court emphasized that "affecting the public interest" has a very specific meaning, stating that "[f]or an industry or any particular business to become 'affected with a public interest,' its business or its property must be so applied to the public as to authorize the conclusion that it has been devoted to a public use and thereby its use, in effect, granted to the public." *Id.* at 564, 67 S.E.2d at 694; *see also Batton-Jackson Oil Co. v. Reeves*, 255 Ga. 480, 482, 340 S.E.2d 16, 18 (1986).

In short, "[t]he decisions by the Supreme Court of Georgia taken as a whole reflect a consistent approach to the protection of economic rights." Hugh William Divine, *Interpreting the Georgia Constitution Today*, 10 Mercer L. Rev. 219, 220 (1959). Specifically, "[i]n deciding constitutional issues involving economic problems . . . [t]he court is particularly alert to attempts to avoid competition." *Id.* at 224.

This policy against protectionism is maintained through the adoption of the 1983 Georgia constitution, which uses similar language to the preceding constitutions. *Compare* Ga. Const. art. I, § 1, ¶ I, *with* 1945 Ga. Const. art. I, § I, ¶ III; and Ga. Const. art. III, § 6, ¶ V(c)(1), *with* 1945 Ga. Const. art. IV, § IV, ¶ I.

Furthermore, the post-1983 decisions of this Court demonstrate the continuing policy favoring the right to earn a living and free-market competition. *See, e.g.*, *Shankman*, 258 Ga. at 295, 368 S.E.2d at 753-54.

If anything, the adoption of the 1983 Constitution lays out even greater protections for economic liberty. In drafting the 1983 Constitution, those in charge of drafting the document "considered the bills of rights from the states of Massachusetts, New York, Virginia, Florida, Illinois, Texas, Iowa, Colorado, Washington, and California." Beasley, *supra*, 34 Emory L.J. at 376. Many of these states, like Georgia, protect economic liberty above and beyond that of the federal constitution. *See, e.g.*, *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015) ("Given the temporal legal context, Section 19's substantive due course provisions undoubtedly were intended to bear at least some burden for protecting individual rights that the United States Supreme Court determined were not protected by the federal Constitution."). Accordingly, the Georgia Constitution has long protected economic rights, and this Court should decide this case with those protections in mind.

II

GEORGIA CERTIFICATE OF NEED LAWS VIOLATE THE GEORGIA CONSTITUTION

A. The CON Laws Violate the Due Process Clause of the Georgia Constitution

This Court should reverse the judgment of the superior court because the CON laws violate the Due Process Clause of the Georgia Constitution. Consistent with the policy to protect economic liberty, discussed above, the Clause requires that courts "examine closely" any governmental limitations on the "free exercise of business activities." *Porter v. City of Atlanta*, 259 Ga. 526, 528, 384 S.E.2d 631, 634 (1989). As a result, "[t]he regulation of a lawful business . . . is dependent upon some reasonable necessity for the protection of the public health, safety, morality, or other phase of the general welfare . . . ." *Bramley v. State*, 187 Ga. 826, 835, 2 S.E.2d 647, 651 (1939). A regulation is constitutional only if it "can be said to bear some reasonable relation to one or more of these general objects of the police power . . . ." *Id.*

The "reasonable relation" standard under Georgia's Due Process Clause requires Georgia courts to be more vigilant than their federal counterparts applying the rational-basis test under the Federal Constitution. *Gen. GMC Trucks*, 239 Ga. at 376, 237 S.E.2d at 196 ("The courts of Georgia, however, though broadly construing the police power, have traditionally limited the power of the state to regulate private

business."); *see* Hugh W. Divine, *Constitutionality of Economic Regulations*, 2 J. Pub. L. 98, 101–02 (1953). Indeed, this Court has repeatedly emphasized that it applies a more stringent standard of review to business regulations than federal courts. *See, e.g.*, *U.S. Anchor Mfg. v. Rule Indus.*, 264 Ga. 295, 298, 443 S.E.2d 833, 836 (1994) ("The right to contract . . . is a property right protected by the due-process clause of our Constitution, and unless it is a business 'affected with a public interest,' the General Assembly is without authority to abridge that right. [N]o matter what other states or the Supreme Court of the United States may or may not have decided.") (quotation marks and citations omitted); *Cox*, 211 Ga. at 291, 85 S.E.2d at 519 ("We are also familiar with the conflicting decisions on this question by the Supreme Court of the United States . . . . We are also familiar with the modern trend to allow the government to encroach more and more upon the individual liberties and freedoms. So far as we are concerned, we will not strike down the Constitution of our State for this purpose; neither will we follow the crowd.").

For example, under the Georgia Constitution, restrictions on economic activities are "not presumptively reasonable, but must be demonstrably reasonable after the affected interests are balanced." *Porter*, 259 Ga. at 528, 384 S.E.2d at 633. Moreover, Georgia courts will look closely at any challenged regulation to ensure that it serves a public, as opposed to a private, purpose. *Strickland v. Ports Petroleum Co.*, 256 Ga. 669, 670, 353 S.E.2d 17, 18 (1987) (A law which fixed the price of

certain fuels exceeded the state's legitimate police powers because the success of the gasoline industry was not sufficiently connected to the public interest.).

Laws that give special privileges to existing businesses to oppose their own competition are particularly suspect. For example, in *General GMC*, this Court struck down a law that allowed existing truck dealerships to object to the creation of any new dealerships in their area that planned on selling the same line of trucks. 239 Ga. at 375–76, 237 S.E.2d at 196. Like the CON laws at issue here, once an objection was made, the law required the challenged dealership to prove that an existing franchise was "not providing adequate representation in the community or territory or that the addition of another dealer [could] be accomplished without causing a reduction in the business of the existing dealer." *Id.* at 376, 237 S.E.2d at 196. This Court found that the law served no public purpose and thus fell outside the state's police powers. *Id.* at 377, 237 S.E.2d at 196–97. In doing so, it pointed out that while the legislature can regulate the sale of automobiles to prevent fraud and other abuses, it does not have the authority, under the guise of regulation, to "'indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly.'" *Id.* at 379, 237 S.E.2d at 198 (quoting *Nelsen v. Tilley*, 289 N.W. 388, 392 (Neb. 1939)). Accordingly, because the law acted to protect a "special group" (existing franchisors), this Court struck down the law as "purely anticompetitive," and thus beyond the purview of the legislature. *Id.* at 377,

237 S.E.2d at 197. Two years later, in *Georgia Franchise Practices Commission v. Massey-Ferguson, Inc.*, 244 Ga. 800, 802, 262 S.E.2d 106, 108 (1979), this Court struck down a virtual reprint of the law found unconstitutional in *General GMC*, and reiterated that laws which allow existing companies to veto their competition violate "the due process clause by seeking to regulate an industry not affected with a public interest, and by restricting competition."

Recently, In *WMW, Inc. v. Am. Honda Motor Co.*, this Court implicitly reaffirmed the holdings in *General GMC* and *Massey-Ferguson*. 291 Ga. at 686, 733 S.E.2d at 273–74. At issue was a law similar to the law in those cases, and this Court ultimately dismissed the case because the Plaintiff lacked standing. *Id.* at 692, 733 S.E.2d at 277. In the decision, however, this Court noted that the Georgia Constitution was amended in 1992 to allow the legislature "'to regulate . . . new motor vehicle manufacturers, distributors, dealers, and their representatives doing business in Georgia . . . .'" *Id.* at 686, 733 S.E.2d at 273 (quoting Ga. Const. art. III, § 6, ¶ II(c)). This Court stated that the amendment was "needed to overcome" the decisions in *General GMC* and *Massey-Ferguson*. *Id.* at 686 n.3, 733 S.E.2d at 273 n.3. Thus, this Court's holdings that anticompetitive laws violate the Georgia Due Process Clause remain good law, at least with respect to industries other than the motor vehicle industry.

Therefore, under the Georgia Constitution, economic regulations are suspect unless they can be said to advance a legitimate governmental purpose. *See Gen. GMC*, 239 Ga. at 377, 237 S.E.2d at 197 (citing relatively few cases where economic "regulations have been upheld as affecting the public interest and thus proper subjects of legislation under the police power"). In addition, economic regulations must be directed toward a business or property that has been "devoted to a public use . . . ." *Harris*, 208 Ga. at 564, 67 S.E.2d at 694. A law that establishes economic protectionism does not advance any legitimate governmental interest. Instead, it achieves the private interests of some at the expense of others. As this Court has recognized:

> "It is common, however, for certain classes of citizens, those engaged in a particular business, to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids a few for whose benefit it is enacted, not only at the expense and to the detriment of the many for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation ordinarily receives no encouragement at the hands of the courts, and will be upheld only where it is strictly within the legitimate power of the municipal legislature."

Young, 258 Ga. at 864, 376 S.E.2d at 193 (quoting 56 Am. Jur. 2d 391, Municipal Corporations, etc., § 365).

Here, the CON laws set up the type of anticompetitive barriers to entrepreneurship that the Georgia Constitution forbids. When a medical provider seeks to establish or expand its practice, existing providers have the opportunity to object in order to prevent new competition. *See* Ga. Comp. R. & Regs. 111-2-2-.07(1)(h)(1). Those objections need not specify any public health, safety, or welfare concerns. Instead, a competing medical facility may object to creation or expansion of a medical facility simply to advance its narrow private economic interests. Petitioners' Opening Br. at 5. Upon receipt of the objection, the department must hold a hearing to determine whether the upstart competitor's proposed services are "needed"—a hearing at which the CON applicant may not rebut arguments made by the opposing facility. Ga. Comp. R. & Regs. 111-2-2-.07(1)(h)(1). The department then makes a decision based on factors aimed at protecting the profits or market share of existing businesses. O.C.G.A. § 31-6-42.

This anticompetitive purpose is explicit in the third listed factor, which provides that the Department should not issue a CON unless

> [e]xisting alternatives for providing services in the service area the same as the new institutional health service proposed are neither currently available, implemented, similarly utilized, nor capable of providing a less costly alternative, or no certificate of need to provide such alternative services has been issued by the department and is currently valid . . . .

O.C.G.A. § 31-6-42(a)(3). As was the case with the laws this Court found unconstitutional in *Georgia Franchise* and *General GMC*, the CON laws seek to

establish that currently existing businesses deserve to be protected from having to compete fairly against newcomers. Indeed, Respondents concede that the CON laws do not relate to health and safety and are a restraint on trade. Petitioners' Opening Br. at 15, 20. While such protectionism may benefit existing providers, it cannot justify an infringement on economic liberty. As this Court has rightly pointed out, "protecting a resident against proper competition" is not a legitimate state interest. *Moultrie*, 206 Ga. at 352, 57 S.E.2d at 202.

Besides the explicit anticompetitive factors, the CON laws list other factors that have the effect of reducing competition for healthcare. Several factors are vague, which allows established businesses to manipulate their meaning to protect their market position under the guise of protecting public interest. For example, factor eight requires that a CON applicant have "a positive relationship to the existing healthcare delivery system in the service area . . . ." O.C.G.A. § 31-6-42(a)(8). If a competing healthcare provider is going to lose business to a new facility, all it has to do is object and claim that the new facility does not have "a positive relationship" with other healthcare providers.

Furthermore, the CON laws restrict competition by creating standards that are impossible for new businesses to meet. The statute requires that the Department speculate whether "[t]he population residing in the area served, or to be served, by the new institutional health service has a need for such services," O.C.G.A. § 31-6-

42(a)(2), or whether "[t]he proposed new institutional health service encourages more efficient utilization of the health care facility proposing such service . . . ." O.C.G.A. § 31-6-42(a)(9). Together, these factors impose an irrational burden on entrepreneurs. The Act itself fails to define these terms, and instead leaves them to the imagination of the Department. It is simply impossible for an agency, or a court, to determine before a business opening whether that business is needed or will be more efficient than an existing business. The only proper way to make such a "need" determination is for an entrepreneur to try the business model in practice by opening the new business.

Parties act in the market on tacit knowledge that often is difficult or impossible to articulate. As Professor Hadley Arkes explains, it is impossible for entrepreneurs to prove the "necessity" of a new business. Often businesses succeed or fail on the basis of inarticulable consumer desire, or "a hunch that a new establishment could do a better job with a better product." Hadley Arkes, *The Return of George Sutherland* 52 (1994). And it is "hard to see . . . just what evidence would controvert the claim that the commerce . . . in any town or city, was already adequately covered by the firm already on the scene." *Id.* at 54. Moreover, the reaction of consumers to a potential new business is nearly impossible to determine: "even if a second business cannot be sustained, the new business may succeed precisely because it offers a better product with better service." *Id.* at 55. Businesses often succeed for

reasons that consumers themselves find difficult to explain: location, the friendliness of the staff, the cleanliness of the building—any number of factors will matter. Yet these are questions which do not lend themselves to determination by government agencies or courts.

By limiting the freedom of entrepreneurs to enter the market, the CON laws merely protect existing businesses from failure. In doing so, they curtail the experimentation and innovation on which a free market thrives, and deprive society of the benefits and the vibrancy brought by new businesses. Women's Surgical has experimented with new, relatively inexpensive and less time-consuming procedures. Yet, because of the CON laws, far fewer people have access to its medical care.

As Nobel Laureate Friedrich Hayek said: "Freedom granted only when it is known beforehand that its effects will be beneficial is not freedom. . . . It is because we do not know how individuals will use their freedom that it is so important." Friedrich A. Hayek, *The Constitution of Liberty* 31 (1960). If it were otherwise, "the results of freedom could also be achieved by the majority's deciding what should be done by the individuals." *Id.* The Georgia Constitution reflects the principle of economic liberty, and protects the right to conduct business free from arbitrary interference. *Moultrie Milk Shed*, 206 Ga. at 352, 57 S.E.2d at 202. Because the CON laws have the purpose and effect of restricting competition in the healthcare market,

they violate the Due Process Clause of the Georgia Constitution. Accordingly, this Court should reverse the judgment of the superior court.

B. The CON Laws Violate the Anti-Monopoly Clause of the Georgia Constitution

Furthermore, this Court should reverse the judgment of the superior court because the CON laws also violate the Anti-Monopoly Clause of the Georgia Constitution. The clause provides that "[t]he General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of encouraging a monopoly" or "may have the effect of or which is intended to have the effect of defeating or lessening competition." Ga. Const. art. III, § 6, ¶ V(c)(1). The superior court focused on the words "contract and agreement" and narrowly interpreted those words out of context. When placed in the proper context, it is clear that the word "agreement" should be interpreted broadly, and that the Anti-Monopoly clause prohibits regulations, such as the CON laws at issue, "which may have the effect of or which is intended to have the effect of defeating or lessening competition."

The structure of the Anti-Monopoly Clause demonstrates that it is directed at laws enacted by the General Assembly. Article III of the Georgia Constitution lays out the powers of the legislative branch. Section VI is entitled "Exercise of Powers" and paragraph V lists "Specific Limitations" on those powers. Consistent with that

interpretation, this Court has stated that the Anti-Monopoly Clause acts as a limit on legislative power.

In *Massey-Ferguson*, this Court relied on the Anti-Monopoly Clause to strike down portions of the anticompetitive franchise law at issue in that case. 244 Ga. at 801. In holding the law unconstitutional, this Court stated:

> The clear purpose of these sections [of the franchise act] is to permit franchised dealers to restrict competition and create a monopoly in the retail sale of motor vehicles. The provisions permit the establishment of a market allocation among franchised dealers and thereby prevent any competition between dealers and companies in the sale of the same line-make equipment. . . . The unconstitutional sections, by dividing sales areas among the franchised dealers and protecting them from competition, were properly declared to violate the Georgia Constitution.

Id. at 801–02, 262 S.E.2d at 107–08 (citation omitted).

Similarly, this Court has read legislation narrowly to avoid having it conflict with the Anti-Monopoly Clause. *Troup Cty. Elec. Membership Corp. v. Georgia Power Co.*, 229 Ga. 348, 352, 191 S.E.2d 33, 36 (1972). In *Troup County*, this Court considered the Electric Membership Corporation Act, a law that limited the areas in which certain electric service providers could engage in business. *Id.* at 349–50, 191 S.E.2d at 35–36. The question presented was whether the Act prevented the plaintiff company from providing service in a new municipality. *Id.* at 351, 191 S.E.2d at 36. In construing the statute narrowly in favor of the plaintiff company, this Court relied on the Anti-Monopoly Clause and explained that "restrictions on the right of any

person, firm or corporation to engage in its business and to do business with those members of the public who choose to partake of its services are not favored" and that such laws will "not be construed to apply to any situation which was not clearly within the contemplation of the legislature at the time [they were] enacted." 229 Ga. at 351–52, 191 S.E.2d at 36 (citing 1945 Ga. Const. art. IV, § IV, ¶ I). Accordingly, decisions from this Court demonstrate that the Anti-Monopoly Clause applies to more than just contracts and agreements between two entities.

Although it is true that this Court, in *Young*, did state that the Anti-Monopoly Clause is "limited expressly to contracts and agreements," it is unclear how that statement fits with the Court's holding in *Massey-Ferguson* and the reasoning in *Troup County*. *Young*, 258 Ga. at 863, 376 S.E.2d at 192. Arguably, the statement in *Young* was dicta, as this Court held that the trial court erred in not considering certain claims and remanded the case for resolution of those claims. *Id.* at 865, 376 S.E.2d at 193–94. Even if the statements in *Young* are controlling, however, this Court should reconsider the case in light of this Court's other cases and the present circumstance. In doing so, this Court could clearly define the scope of the Anti-Monopoly Clause.

In interpreting the Anti-Monopoly Clause, this Court should give effect to the purpose of the provision, and the purpose of the Georgia Constitution as a whole. Specifically, this Court should remember that the Anti-Monopoly Clause

"illustrate[s] the state policy against 'defeating or lessening competition, or encouraging a monopoly.'" 258 Ga. at 863, 376 S.E.2d at 192. The CON laws have the purpose and effect of lessening competition, and of encouraging monopolies of established healthcare providers. Accordingly, this Court should hold the laws unconstitutional under the Anti-Monopoly Clause of the Georgia Constitution.

DATED: May 25, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS AND CROSS-APPELLEES WOMEN'S SURGICAL CENTER, LLC, ET AL.** with the Clerk of Court via the SCED e-filing system, and served all parties to this matter by email and by depositing a true and correct copy of same in the United States mail, with adequate postage thereon, and addressed as follows:

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