Case No. S20A0039

IN THE SUPREME COURT OF GEORGIA

MARY NICHOLSON JACKSON and
REACHING OUR SISTERS EVERYWHERE, INC.

Appellants,

v.

BRAD RAFFENSPERGER, in his official and individual capacities,

Appellee.

Fulton County Superior Court, Case No. 2018CV306952

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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INTRODUCTION

The trial court erred fundamentally in asserting that the right to earn a living at a profession of one's choice is not recognized under Georgia law. R-337. On the contrary, that right has long been recognized under Georgia law, and it is not voided by the state's authority to regulate. Obviously the state may regulate any business to protect the general public from fraud or force, but the individual right to economic freedom preexists that authority. All people have the right to devote their knowledge and skills to providing for themselves and their families, and the state must respect that right. However, the state also has power to protect the public from wrongdoing by regulating how people go about exercising that right. Freedom is the general rule; restraint is the exception.

Georgia law has long recognized this. Indeed, while federal courts have largely abdicated protections for economic freedom under federal law, Georgia courts have not done so. They have continued to apply a realistic judicial scrutiny to laws that infringe on the right to economic liberty. The Superior Court was simply wrong to claim that no such right exists, and erred in failing to apply the realistic scrutiny required by the allegations in this case.

This Court should therefore remand for the application of realistic judicial scrutiny—and that scrutiny must begin by asking whether it is rational for the state

to require a license for a trade (in this case, advising mothers regarding the best ways to breastfeed their children) *only* where a person does so for money. The answer is no: it is self-contradictory and therefore *prima facie* irrational for the state to require people to get a government license for lactation consulting—but not to require a license, or impose any other regulation, for people who engage in lactation consulting for free. If lactation consulting is so dangerous as to require a burdensome education, training, and testing before a person may do it, then it is arbitrary and irrational to allow people to do it *without* a license as long as they do not charge money.

The existence of the exception is a significant factor that the Superior Court should have considered when determining whether lactation consultancy is so dangerous that the state must require a license for it, or whether it is "harmless and without detriment to the public welfare," and which it is therefore irrational to license. *Bramley v. State*, 187 Ga. 826, 836 (1939).

INTEREST OF *AMICI*

The Goldwater Institute ("GI") was established in 1988 as a nonpartisan public policy foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, and policy briefings. Through its Scharf–Norton Center for

Constitutional Litigation, GI litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated. Among GI's principal goals is defending the vital principle of economic liberty, and the independent protection for this and other rights in state constitutions. Promoting the enforcement of these independent guarantees is one of GI's top priorities, and GI has litigated and appeared as *amicus curiae* in many state courts to promote the enforcement of state constitutional protections over and above those provided by the federal constitution. *See, e.g., State v. Hernandez*, 417 P.3d 207 (Ariz. 2018); *Lathrop v. Deal*, 301 Ga. 408 (2017); *Ladd, et al. v. Real Estate Commission, et al.*, No. 33 MAP 2018 (Pa., pending). GI attorneys represented the appellants in *Women's Surgical Ctr., LLC v. Berry*, 302 Ga. 349 (2017), seeking enforcement of the Georgia Constitution's protections for economic liberty. GI scholars have also written extensively about the right to earn a living, *see, e.g.*, Timothy Sandefur, *The Right to Earn A Living* (2010); Clint Bolick, *Brennan's Epiphany: The Necessity of Invoking State Constitutions to Protect Freedom*, 12 Tex. Rev. L. & Pol. 137 (2007). GI believes its legal and policy expertise will benefit this Court in its consideration of this case.

Pacific Legal Foundation ("PLF") was founded in 1973 to advance the principles of individual rights and limited government, representing the views of

thousands of supporters nationwide. It frequently advocates for economic liberty against regulations that prohibit honest competition and unreasonably interfere with the constitutional right to earn a living. 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., Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047 (7th Cir. 2018); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *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 cases involving constitutional limits on economic regulations. *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683 (2012); *Women's Surgical Ctr., supra.*

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

ARGUMENT

I. The right to earn a living is protected by the Georgia Constitution.

The Superior Court dismissed the Plaintiffs' due process claim on the grounds that "Georgia law does not recognize a constitutional right to work in a

chosen profession." R-337. This is an incorrect statement of the law, and requires reversal. Georgia law has recognized the right to earn a living in a profession of one's choice throughout its entire history. Hugh William Divine, *Interpreting the Georgia Constitution Today*, 10 Mercer L. Rev. 219, 220, 224 (1959) ("[t]he decisions by the Supreme Court of Georgia … reflect a consistent approach to the protection of economic rights … . The court is particularly alert to attempts to avoid competition."). It continues to do so by applying a separate legal analysis, distinct from the federal "rational basis" test, under which the Superior Court should have seriously weighed whether or not the statute at issue here is a legitimate regulation to protect the public—or a protectionist law designed to restrict competition. *Moultrie Milk Shed v. City of Cairo*, 206 Ga. 348, 352–53 (1950); *Waller v. State Const. Indus. Licensing Bd*., 250 Ga. 529, 529-30 (1983).

A. The right to economic liberty is deeply rooted in Georgia's legal history and tradition.

The Georgia Supreme Court emphasized in 1987 that it had "repeatedly declared" that the right to earn a living is "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 … no matter what other states or the Supreme Court of the United States may or may not have

decided." *Strickland v. Ports Petroleum Co*., 256 Ga. 669, 670 (1987) (internal citations omitted).

This right to practice a trade or profession of one's choice is indeed deeply rooted in Georgia jurisprudence. It has been recognized by the Anglo-American common law for at least four centuries. *See* Timothy Sandefur, *The Right to Earn A Living* 17–25, 39–44 (2010). It became the focus of legal dispute in the seventeenth century due to conflicts between Parliament and the British crown over the legal status of monopolies—i.e., government charters that allowed the recipient, and only the recipient, to practice a trade. *See* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 989–1016 (2013). Well over a century before Georgia was founded, British courts deemed these monopolies unconstitutional under the "law of the land" clause of Magna Carta because they unjustly barred people from practicing a trade without government permission. *See, e.g., The Case of Monopolies (Darcy v. Allen)*, 77 Eng. Rep. 1260, 1262–63 (QB 1603); *The Case of the Upholsterers (Allen v. Tooley),* 80 Eng. Rep. 1055, 1057–59 (K.B. 1614).

Government-established monopolies, wrote Chief Justice Sir Edward Coke in his influential *Institutes of the Common Law*, violated Magna Carta's Law of the

Land Clause because they were "against the liberty and freedom of the subject, that before did, or lawfully might have used that trade." 2 E. Coke, *Institutes* *47. By restricting lawful trade to those who obtained a special government grant, such laws privileged the politically well-connected few at the expense of ordinary tradespeople who simply wanted to earn a living. *See, e.g.*, *The Ipswich Tailors' Case*, 77 Eng. Rep. 1218, 1218 (K.B. 1615). Therefore such monopolistic restrictions violated the Magna Carta's Law of the Land Clause. That Clause became the Due Process of Law Clauses of the federal and state constitutions. *Frank v. State*, 83 S.E. 645, 648 (Ga. 1914). These clauses were understood from the outset to protect, among other things, the freedom to practice a trade of one's choice without undue interference from government-established monopolies. *See further* Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209, 259–68 (2016).

Obviously there were exceptions; institutions such as railroads, turnpikes, and other public utilities were long recognized as authorized forms of monopoly. And government could, of course, regulate the practice of a trade so as to protect the public from fraud or other kinds of public harms—just as it could regulate property use to protect against nuisances, without thereby disproving the existence of property rights. *See, e.g.*, *Green v. Mayor & Alderman of Savannah*, 6 Ga. 1, 13

(1849) (prohibition on growing rice in town did not violate economic freedom because "[e]very right" is "subject to the restriction, that it shall be so exercised as not to injure others."). By contrast, laws that barred innocent persons from practicing a trade or profession without a legitimate connection to public health and safety crossed the line into unconstitutionality.

Thus in *Bethune v. Hughes*, 28 Ga. 560 (1859), this Court struck down a Columbus ordinance that forbade people from selling wares outside of a city market except when the market was open. In a strongly worded opinion, the Court described the law as a violation of "[t]he great fundamental principles of human rights." *Id.* at 565. This was no exaggeration: such a restriction on the right of poor laborers to sell goods to provide for themselves—imposed not to protect the public but to "gratify the selfishness, or avarice, or convenience of a favored few" who were legally allowed to trade, *id.* at 564—was a serious matter of principle with profound consequences for those laborers who lacked political clout and whose businesses were thereby destroyed. "A peaceable citizen," the Court declared, "should be left free and untrammeled as the air he breathes, in the pursuit of his business and happiness." *Id*. at 565. *See also Parham v. Justices of Inferior Ct. of Decatur Cnty.*, 9 Ga. 341, 355 (1851) ("[t]he right of accumulating …

property, lies at the foundation of civil liberty. Without it, man no where rises to the dignity of a freeman.").

Georgia courts have largely held to this reasoning. "The right to make a living is among the greatest of human rights," this Court observed in *Schlesinger v. City of Atlanta,* 129 S.E. 861, 866 (Ga. 1925). And in *Felton v. City of Atlanta,* 61 S.E. 27, 27 (Ga. App. 1908), the Court of Appeals observed that the freedom to "labor[] at any honest employment [one] may choose, save only so far as restrictions are necessary to the protection of the public peace, health, safety, and morality, is so well established that limitations thereon are to be strictly construed." .

B. Georgia courts apply realistic scrutiny—not the federal rubber-stamp "rational basis" test—to protect the right to economic liberty.

Securing this right requires courts to distinguish between regulations that protect the public and efforts by the government to unduly restrict the right under the pretext of protecting the public. It is easy for regulatory authorities, acting on behalf of politically influential lobbyists, to impose restrictions that hinder competition, harm ordinary tradespeople, and raise prices for consumers—all under the pretext that such laws serve the public. As Justice John Paul Stevens observed, "private parties have used licensing to advance their own interests in

restraining competition at the expense of the public interest." *See Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (dissenting) (citing Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6 (1976)).

This Court has therefore emphasized the need for judicial vigilance "to determine whether [a regulation] is permissible in behalf of the general welfare, or whether it transcends the power of the General Assembly and violates the constitutional rights of the individual." *Bramley*, 187 Ga. at 835.

Bramley found that a law that prohibited the practice of photography without a license violated the Due Process Clause. While the government could regulate the practice of trades to protect the public safety, *id.* at 834–35, photography is "harmless and without detriment to the public welfare." *Id*. at 836. Therefore, a licensing requirement would not protect the public but would "confer upon a board of examiners, … the power to grant to a selected number the right of pursuing a useful and innocent business. This would be to create a monopoly and thus exclude from the business many competent persons who might find in it a congenial occupation and a means of livelihood." *Id*. at 836-37 (citation and quotation marks omitted).

That decision came after federal courts began to withdraw from meaningful protections for the right to economic liberty. Beginning with *Nebbia v. New York*,

291 U.S. 502 (1934)—in which the Supreme Court abandoned the "affected with a public interest" test it had previously used in determining the constitutionality of economic regulations, and adopted a policy[1] of extreme legislative deference known as the "rational basis" test, instead. Although they have wavered over the precise contours of that test, the result has largely been to abdicate protections for the right to earn a living by essentially letting legislators and regulatory agencies determine the limits of their own power.

One federal judge has described the federal rational basis test as "a standard which invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute." *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring). Another[2] has described it as "a misnomer, wrapped in an anomaly, inside a contradiction." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 98 (Tex. 2015) (Willett, J., concurring). Still others have noted that the "practical effect" of the rubber-stamp approach federal courts

[1] The word "policy" is the precise term here. As Justices Scalia and Thomas observed, "[t]he picking and choosing among various rights to be accorded 'substantive due process' protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called 'economic rights" (even though the Due Process Clause explicitly applies to 'property') unquestionably involves policymaking rather than neutral legal analysis." *United States v. Carlton*, 512 U.S. 26, 41 (1994) (Scalia and Thomas, JJ., concurring).

[2] Judge Willett was at the time a Justice on the Texas Supreme Court.

use "is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions." *Hettinga v. United States*, 677 F.3d 471, 482–83 (D.C. Cir. 2012) (Brown and Sentelle, JJ., concurring).

Fortunately, Georgians have been shielded from this problem by the state judiciary's insistence on a more realistic approach under the state Constitution. As *Strickland* noted, Georgia does not follow federal courts in disregarding the significance of economic liberty as a constitutional right. 256 Ga. at 670. Where federal courts will uphold a restriction on economic freedom if they can imagine a hypothetical world in which it might be legitimate, Georgia courts instead "examine[] closely" any restriction on the "free exercise of business activities," *Porter v. City of Atlanta*, 259 Ga. 526, 528 (1989), to ensure that it "realistically serves a legitimate public purpose, and … employs means that are reasonably necessary to achieve that purpose, without unduly oppressing the individuals regulated." *Advanced Disposal Servs. Middle Ga., LLC v. Deep S. Sanitation, LLC*, 296 Ga. 103, 105 (2014) (citation omitted). Even where the business activity involves health or medicine, the Court applies a realistic scrutiny to restrictions on that business, in order to prevent the abuse of the law for private benefit.

For example, in *Moultrie Milk Shed*, this Court found that a city ordinance that prohibited the sale of milk if it had not been pasteurized at a facility within the county limits was unconstitutional. Obviously the government could impose a pasteurization requirement to protect public health, but the geography limitation was not a public health measure, but an effort to "protect[] a resident against proper competition." 206 Ga. at 352. This was "arbitrary and discriminatory," and violated the "freedom of the individual to engage in competitive and legitimate business." *Id.* The pretense that the restriction was meant to protect the public health should not distract the Court from its obligation to protect individual rights: "The most destructive enemy to free enterprise and individual liberty comes dressed in attractive garments, and is covered with a sugar coating." *Id*. at 352–53.

Similarly, in *Waller*, this Court found a licensing law for plumbers unconstitutional because it included an exemption that was geographically limited in a manner similar to the law in *Moultrie Milk Shed*. There was no question that the plaintiffs were qualified, but the government argued that the licensing restriction was "rational," but the Court disagreed. The licensing law would have "denie[d] to a locally-licensed plumber who *is* familiar with the state-wide plumbing code the privileges granted to a formerly state-licensed plumber who has *no* familiarity with the state plumbing code." 250 Ga. at 530. Therefore the law

did not protect people against unsafe or dishonest business practices. *Id.* And in *State v. Moore*, 259 Ga. 139 (1989), the Court found it unconstitutional for the legislature to restrict the length of truck loads, while exempting trucks that carried poultry. *Id.* at 141.

The bottom line is that it is simply incorrect to assert, as the trial court did, that "Georgia law does not recognize a constitutional right to work in a chosen profession." R-337. On the contrary, "[t]he right to practice any profession or occupation is necessarily a valuable right and is entitled to constitutional protection." *Baranan v. State Bd. of Nursing Home Adm'rs*, 143 Ga. App. 605, 606 (1977); *see also Richardson v. Coker*, 188 Ga. 170, 175 (1939) ("The right to work and make a living is one of the highest rights possessed by any citizen. It may be abridged to the extent, and only to the extent, that is necessary reasonably to insure the public peace, safety, health, and like words of the police power.").

It is certainly true that "'such a right is subordinate to the state's right to regulate,'" R-337 (quoting *Brown v. State Bd. of Examiners of Psychologists*, 190 Ga. App. 311, 312 (1989)), but that does not transform the right to practice a trade into a privilege that the state may grant or withhold at will. Rather, the opposite is true: the individual presumptively has that right—it is not given to her by the state and cannot be taken away by the state unless the state shows good reason to do so.

Cf. Riley v. Wright, 107 S.E. 857, 859 (Ga. 1921) (state must make a showing "[b]efore the right of any citizen to engage in any lawful business, calling, or profession can be taken from him."). The government's authority, by contrast, is not presumptive—instead, that authority is given to it by the people. And it is limited—by, among other things, the due process clause and the long-recognized right of individuals to practice a trade without unreasonable restrictions.

II. A licensing restriction that only applies when the activity is done for money is presumptively irrational.

The purpose of licensing is supposed to be to protect the public from fraud or other such harms, not to protect existing firms against competition. *Coker*, 188 Ga. at 175; *Moultrie Milk Shed*, 206 Ga. at 352. In particular, the rationale for licensing requirements in the healing professions is that the state may require practitioners to have "a certain degree of skill and learning," if the lack of such training could endanger patients and the public. *Dent v. State of W. Va.*, 129 U.S. 114, 122 (1889). This Court has previously said that "[u]nless an occupation affords some 'greater or more peculiar opportunity for fraud than do most of the other common occupations,' the police power is not to be successfully invoked to" justify regulation. *Coker*, 188 Ga. at 174 (citing *Bramley*, 187 Ga. at 838.

Therefore, one revealing question in any case in which the court must determine whether a licensing requirement serves the first goal or the second is to ask whether the law allows the activity to be done *without* a license if it is done for *free*.

If an activity truly is so dangerous or fraudulent that the state must prohibit it to protect the general public, it cannot be rational for the state to simultaneously allow the same activity to go on by unlicensed persons—indeed, to go on without *any regulation whatsoever*—as long as it is done for no charge. Free services are not *ipso facto* safer or less dishonest than services for which a person charges money. Jason F. Brennan & Peter Jaworski, *Markets without Limits: Moral Virtues and Commercial Interests* 10 (2016) ("[T]he market does not transform what were permissible acts into impermissible acts" or vice versa). Therefore if the practice is dangerous enough that it can be restricted only to those persons whom the government authorizes, then it would be irrational to exempt from that prohibition anyone who practices it for free.

The creation of arbitrary exemptions from a blanket prohibition can be an effective way of giving special, anticompetitive privileges to chosen beneficiaries. *Moore*, 259 Ga. at 141; *Waller*, 250 Ga. at 529–30. In other words, such

exemptions can indicate that a licensing requirement is actually irrational and unconstitutional.

In *Merrifield*, the Ninth Circuit found that the California legislature violated the Fourteenth Amendment when it required a license for pest control workers—but exempted workers who did not use chemical pesticides—but then denied that exemption to persons treating pigeon, rat, or mouse infestations. 547 F.3d at 981–82. The government's justification for the licensing requirement was to protect public health, and the justification for the exemption was that practitioners who do not use pesticides are not a threat to public health. But the *denial* of the exemption to a narrow class of practitioners made no sense. "We cannot simultaneously uphold the licensing requirement under due process based on one rationale and then uphold Merrifield's exclusion from the exemption based on a completely contradictory rationale," the court said. *Id*. at 991. Deferential as the federal rational basis test is, it could not permit a licensing requirement that "undercuts the principle of non-contradiction." *Id.*

But a licensing law that requires practitioners to have "a certain degree of skill and learning," *Dent*, 129 U.S. at 122, on the theory that the practitioner might harm a client otherwise—and then *exempts* services that are provided for free is just as self-contradictory and irrational. Nothing about money changing hands can

render an incompetent practitioner competent or vice-versa.

Both *Moore* and *Waller* involved economic regulations that contained exemptions designed, not to protect the public, but to provide special benefits to specifically chosen groups. In *Moore*, the restriction limited the length of loads carried by trucks to sixty feet—but allowed trucks carrying live poultry to be sixty-five feet. This Court, applying the more realistic scrutiny required by Georgia law, found no legitimate basis for concluding that trucks carrying general freight were dangerous at sixty feet "whereas a truck transporting live poultry is *only* a threat to public safety when its length exceeds sixty-five feet." 259 Ga. at 141. This arbitrary exemption lacked a rational basis, and this Court concluded that the length limit was "violative of the Georgia constitution." *Id.* at 142.

Waller involved a licensing requirement for plumbers that exempted some plumbers based on location, rather than on their demonstrated knowledge and skill. Again applying the realistic scrutiny required by Georgia law, this Court found it unconstitutional because the exemption demonstrated that the requirement was not a public-safety measure, but an instance of protectionism. 250 Ga. at 529. *See also Davis v. City of Macon*, 262 Ga. 407, 409 (1992) (Weltner, C.J., concurring) ("The court must stand fast against the unceasing efforts of subsidy-seekers, and against their demands for tax preference and protectionism.").

The Lactation Consultant Practice Act challenged here contains the same fatal irrationality. The legislature declared in that Act that "the rendering of sound lactation care and services … requires trained and competent professionals." O.C.G.A. § 43-22A-2. Yet the Act expressly exempts *free* services by "individual volunteers," as long as they do not claim to have special training. O.C.G.A. § 43-22A-13(6). This is irrational. The state is simultaneously claiming that lactation consultancy is so dangerous that anyone doing it without a license must be punished with fines of $500 for each instance, O.C.G.A. § 43-1-20.1(b)—and that *un*trained, *un*educated, *un*licensed individuals may practice this allegedly dangerous profession subject to *no* regulations, *not* under the supervision of a licensee, *not* in a hospital facility—as long as that person is not paid. The sole distinction is whether money changes hands. But that cannot affect the safety of the practice in question. Thus the exemption in the statute is strong evidence that the licensing requirement itself is not actually a public safety measure, but a protectionist scheme.

It is true, of course, that licensing requirements are not necessarily unconstitutional because they are under-inclusive. *Wilder v. State*, 232 Ga. 404, 407 (1974). But the Act here is *not* under-inclusive. It does not *fail* to cover something. Rather, it expressly contemplates—and even *authorizes* the unlicensed

practice of lactation consulting, as long as the person performs the service "without fee or other form of compensation, monetary or otherwise," O.C.G.A. § 43-22A-13(6)(B), and "receive[s] no form of compensation, monetary or otherwise." O.C.G.A. § 43-22A-13(6)(C). The sole relevant distinction, is not the danger the practitioner might present to a patient or the public, but whether that practitioner receives pay.

There is nothing about the exchange of money that makes what would otherwise be so dangerous as to require government prohibition into an activity safe enough to be done without either a license or any other form of regulation. Thus, as in *Merrifield*, the exemption so contradicts the state's rationale for requiring a license as to "undercut[] the principle of non-contradiction." 547 F.3d at 991.

Because the Superior Court declared categorically that there is no right to engage in a trade of one's choice, it failed to apply the requisite scrutiny to the constitutionality of the licensing requirement. This Court should therefore reverse the dismissal, and remand to the Superior Court for consideration of this question.

CONCLUSION

The decision below should be *reversed*.

DATED: September 13, 2019

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