Case No. S23A0017

IN THE SUPREME COURT OF GEORGIA

BRAD RAFFENSPERGER,
in his official and individual capacity,

Appellant,

v.

MARY JACKSON,
REACHING OUR SISTERS EVERYWHERE, INC.,

Appellees.

On Appeal from the Superior Court of Fulton County
Case No: 2018-CV-306952

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE GOLDWATER INSTITUTE IN SUPPORT OF APPELLEES

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INTRODUCTION

In this case's first trip to this Court, the Court explained that Georgia's Constitution protects the right of individuals to pursue lawful occupations "free from unreasonable government interference." *Jackson v. Raffensperger*, 308 Ga. 736, 740 (2020) (*Jackson I*). The question presented now is whether this right is meaningful, or whether the Court's pronouncement in *Jackson I* was a mere formalism. The Superior Court's adoption of almost unlimited degree of deference to the government effectively neuters the right to earn a living and must be reversed. Unlimited deference is not and cannot be the law.[1]

As this Court recognized in *Jackson I*, Georgia law has long provided meaningful protection for this right. Cases going back to the 19th Century and further support meaningful scrutiny—not the mere rubber stamp of federal rational basis review—whenever government regulations infringe on economic freedom. Georgia's legal tradition of realistic judicial scrutiny is grounded in a long history of protecting individuals from class legislation and state-sanctioned monopolies. But the Superior Court chose a different path, concluding that restrictions on economic

[1] Although this brief is being filed in the main appeal, the brief addresses issues raised in both the main appeal and in the cross appeal, in terms of the importance of the right to earn a living, the correct standard of review, and the usefulness of the federal rational basis standard.

freedom are constitutional whenever a court can think of "any plausible or arguable reason" for the challenged restriction. R-4909.

The Superior Court reached this conclusion by relying on *federal* legal theories—particularly the rational basis standard created by federal courts in 1934—that apply to the federal, not the state Constitution, and that have, in practice, driven federal courts to largely abdicate protection for economic liberty, by accepting even implausible post-hoc government excuses for laws that restrict this vital aspect of individual freedom. *See Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown, J., concurring) (detailing problems with rubber-stamp federal rational basis review); *Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69, 92 (Tex. 2015) (Willett, J., concurring) (same).

The federal approach—which has been rightly called the "rationalize a basis" test, *id*. at 112—has effectively eliminated "any [federal] check on the group interests that all too often control the democratic process," and has "allow[ed] 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*, 677 F.3d at 482–83 (Brown, J., concurring).

This Court should not repeat that mistake under the Georgia Constitution. There is no theoretical justification for adopting a *federal* legal theory when interpreting the *state* Constitution. *See Patel*, 469 S.W.3d at 120–23 (Willett, J.,

concurring) (no basis for following a foreign body of precedent to interpret state constitution); *State v. Lupo*, 984 So. 2d 395, 408–11 (Ala. 2007) (Parker, J., concurring) (same). "Because the Georgia Constitution's Bill of Rights frequently accords Georgia citizens greater protections than does its federal counterpart, this Court is in no way bound by federal case law when ruling on the state constitutional issues involved in this appeal." *Britt v. Smith*, 274 Ga. 611, 619 (2001) (Sears, P.J., dissenting).

Instead, the Court should apply a more realistic standard of review that will permit the State to regulate businesses to protect the general public, without allowing existing businesses to exploit government power to prohibit competition. To protect the right to earn a living that *Jackson I* recognized, courts must examine the *actual* evidence and the reasonableness of the government's justification for restricting that right. Georgia already does this in other contexts under the State's Due Process Clause. Here, real scrutiny simply means that courts should require the government to actually show the existence of the means-end relationship by more than mere speculation.

INTEREST OF AMICI

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 this case as well as in other cases involving constitutional limits on economic regulations. *See Jackson I, supra*; *Women's Surgical Ctr., LLC v. Berry*, 302 Ga. 349 (2017); *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683 (2012).

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 it 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 provided by state constitutions. *See*, *e.g.*, *Jackson I, supra*; *State v. Hernandez*, 417 P.3d 207 (Ariz. 2018); *Lathrop v. Deal*, 301 Ga. 408 (2017); *Ladd v. Real Estate Commission*,

230 A.3d 1096 (Pa. 2020). GI attorneys represented the appellants in *Berry*, *supra*, 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: ECONOMIC FREEDOM AND THE LAW (2010); Clint Bolick, *Brennan's Epiphany: The Necessity of Invoking State Constitutions to Protect Freedom*, 12 Tex. Rev. L. & Pol. 137 (2007).

PLF and GI believe their legal and policy expertise will benefit this Court in its consideration of this case.

ARGUMENT

I. The right to earn a living is deeply rooted in Georgian legal history and tradition, and meaningful judicial scrutiny is crucial to preserving it

In *Jackson I*, this Court remanded to the Superior Court to determine which legal standard applies to a challenge to a law that infringes on the right to pursue a lawful occupation. The Superior Court answered that question by saying that "Georgia Courts have consistently applied the rational basis test" and that this test requires courts to uphold a challenged law if "*any* plausible or *arguable* reason" connects the law's means to a legitimate state purpose. R-4909 (emphasis added).

That was wrong for at least three reasons: it was based on a *federal* legal theory rather than on an independent interpretation of Georgia's Constitution; it contradicts the state's longstanding legal tradition of protecting the right to earn a

living; and it amounts to the kind of "refusal to exercise [judicial] discretion" that this Court has called "an abdication of judicial responsibility," *Rooney v. State*, 287 Ga. 1, 5 (2010) (quoting *Jefferson v. State*, 209 Ga. App. 859, 863 (1993)), and which has effectively eliminated this individual right in many other states.

a. The right to earn a living is deeply-rooted in Anglo-American jurisprudence, but federal precedent leaves it unprotected

Since even before America's founding, the right to earn a living has been at the core of Anglo-American law. British Courts in the seventeenth century deemed it a violation of the Magna Carta for government to prohibit people from practicing a trade simply for the purpose of protecting existing businesses against competition. *See, e.g.*, *Darcy v. Allein* (*The Case of Monopolies*), 77 Eng. Rep. 1260 (1603). *See also* Sandefur, *supra* at 17−25 (discussing early history of right to earn a living). Sir William Blackstone, perhaps the most important common law scholar at the time of the founding, wrote that, under the common law, "every man might use what trade he pleased." 1 W. Blackstone, COMMENTARIES *427.

Early American caselaw affirmed the existence of this fundamental freedom. For example, in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823), Justice Bushrod Washington listed it among the "fundamental" privileges and immunities of "citizens of all free governments." This Court likewise remarked that economic freedom is among "[t]he great fundamental principles of human rights." *Bethune v. Hughes,* 28 Ga. 561, 565 (1859).

Indeed, it is now well established that the right to earn a living without arbitrary government restrictions was considered a fundamental part of the liberty the federal Constitution protects, at least up to the 20th century. *See generally* David N. Mayer, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983 (2013).

In 1934, however, the U.S. Supreme Court radically altered its interpretation of constitutional protections for this right. In *Nebbia v. New York*, 291 U.S. 502 (1934), it replaced the longstanding "affected with a public interest" test with a new rule that states may "adopt whatever economic policy may reasonably be deemed to promote public welfare." *Id*. at 537. This new "rational basis test" held that whenever public officials might reasonably have thought a restriction on the right to earn a living might serve some general public good, it is constitutional—regardless of whether it does, in fact, accomplish that good.

Nebbia's "rational basis test" has never been adopted by this Court—on the contrary, it was explicitly rejected in *Strickland v. Ports Petroleum Co.,* 256 Ga. 669, 670 (1987). And even the U.S. Supreme Court itself said in *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934)—decided the same year as *Nebbia*—that the rational basis test was only "a rebuttable presumption," and not "a rule of law

which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack."

Unfortunately, subsequent federal decisions made it into precisely that. In *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955), the Court held that the question under the federal rational basis test is not whether legislators actually did have a factual basis for believing a challenged statute would serve the public good, but instead whether a judge can *imagine* a *hypothetical* legislator who *could have* thought the law would serve *some imaginable* public good. What's more, in *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 318 (1993), the Court declared that actual facts are "constitutionally irrelevant" in rational basis cases.

Unsurprisingly, hardly any statute, no matter how arbitrary and irrational, can fail this astonishingly lenient standard. As one judge has put it, the test "invites [judges] 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). Such extreme deference effectively eliminates the judiciary's role as a check and balance against the other branches, abdicating the court's obligation to ensure that the legislature stays within its constitutional boundaries. Judicial deference may be appropriate on questions of *policy* or on matters requiring technical *expertise*, *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 638 (2002), but as many judges have observed, the federal

rational basis test goes beyond that and renders courts unable to recognize when laws exceed constitutional boundaries and violate a person's right to earn a living.[2]

In fact, this modern federal version of the rational basis test is "an abdication of judicial responsibility," because it consciously disregards the facts of reality. *Rooney*, 287 Ga. at 5. As Judge Brown has put it, the federal rational basis test "abdicate[s] [the courts'] constitutional duty to protect economic rights completely." *Hettinga*, 677 F.3d at 481 (Brown, J., concurring).

b. Georgia has never followed the federal lead in disregarding the significance of economic liberty

In 1859, this Court struck down a Columbus ordinance forbidding people from selling wares outside a city market except when that market was open. The ordinance, said this Court, violated "great fundamental principles of human rights." *Bethune*, 28 Ga. at 565. *See also Parham v. Justices of Inferior Ct. of Decatur Cnty.*, 9 Ga. 341, 355 (1851) ("The right of accumulating .... property, lies at the foundation of civil liberty."); *Schlesinger v. City of Atlanta*, 129 S.E. 861, 866 (Ga. 1925) ("The right to make a living is among the greatest of human rights.").

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[2] Perhaps the most extreme example is *Meadows v. Odom*, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006), which upheld the constitutionality of a Louisiana statute requiring people to get a government license to work as a florist—on the theory that people might scratch their fingers on the wires used to hold flower arrangements together—despite there being no actual evidence that this ever happened.

Relying on this history, *Jackson I* explained that Georgia's Constitution protects "an individual's right to pursue the lawful occupation of her choosing free from unreasonable government interference." 308 Ga. at 741. Unsurprisingly, the cases this Court cited in *Jackson I* expressly employed a more searching standard than the rubber-stamp federal rational basis test. For example, in *Bramley v. State*, 187 Ga. 826 (1939), this Court struck down a statute requiring anyone practicing photography to pay a licensing fee, sit for an examination, and provide proof of good moral character. *Id.* at 833−34. Recognizing that "some regulations of the business of photography might be permissible," *id.* at 839, the Court nevertheless did not employ the kind of unlimited deference that the federal rational basis test calls for. Instead it concluded that the law must "bear some reasonable relation to one or more [] general objects of the police power" in order to be constitutional. *Id.* at 835. Similarly, in *Jenkins v. Manry*, 216 Ga. 538 (1961), the Court struck down a statute requiring certain lumberers and steam fitters to obtain a license, because there must be a "just and proper relation" between the means and ends of a regulation to satisfy the Constitution. *Id.* at 545.

Jenkins is especially significant because it was decided in the period immediately following the U.S. Supreme Court's decision in *Williamson*, but this Court did not adopt that case's extremely deferential standard. *See also* Hugh William Divine, *Interpreting the Georgia Constitution Today*, 10 Mercer L. Rev.

219, 220 (1959) (observing that this Court "has shown no tendency to be influenced by the new attitude of the Supreme Court of the United States toward economic regulation."). Likewise, in *Strickland*, decided more than 50 years after *Nebbia,* this Court said that Georgia courts still employ the "affected with a public interest" test that the *Nebbia* Court discarded. 256 Ga. at 669−70.[3]

Instead of the *Nebbia*/*Williamson* rule, Georgia follows the rule that laws restricting the "free exercise of business activities" are to be "examine[d] closely." *Porter v. City of Atlanta*, 259 Ga. 526, 528 (1989). Such laws must "realistically serve[] a legitimate public purpose, and … employ[] 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).

Here, the Superior Court ignored all of this history, instead relying on cases that do not involve right to earn a living which cite to the federal rational basis test. Cross-Appellants explain why the standard actually applied in the cases the Superior Court cited do not support the court's conclusion, and why Appellants win even under this so-called *Sanchez* standard. *See* Br. of Cross-Appellants at 13−15; 22−30.

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[3] Indeed, this Court said it was "impressed by the sound view expressed" by the *Nebbia* dissent. *Harris v. Duncan*, 208 Ga. 561, 564 (1951).

But this Court should go further and reiterate Georgia's refusal to adopt the flawed federal rational basis standard.

II. The federal rational basis test is a poor model for Georgia

Federal courts have never been consistent on how rational basis actually works—and the test has never really "worked" at all. Some cases purport to apply rational basis while engaging in an ordinary judicial process, including a review of the record, to determine if a law is arbitrary, excessive, or driven by impermissible purposes. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996). Other cases declare that a judge applying rational basis may use her imagination to speculate about facts and fill in any gaps in the defendant's case. *Beach Communications*, 508 U.S. at 318.

In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court explained the importance of facts in rational basis cases, stating that "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist," and that a statute's constitutionality "may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason." *Id*. at 153−54. But in *Williamson*, the Court held that a state could impose "a needless, wasteful" law, based on what the legislature "*might* have concluded," irrespective of any evidence. 348 U.S. at 487 (emphasis added).

Then, in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), which purported to apply rational basis, the Court engaged in a searching review of the facts—thereby retreating from the *Williamson* anything-goes theory—and concluded that "in our view the record does not reveal any rational basis" for the requirement. *Id.* at 448. But eight years later, the Court moved back to the *Williamson* side of the spectrum, saying in *Beach Communications* that a challenged law must survive review unless a challenger can meet the (logically impossible) burden of "negat[ing] every conceivable basis that might support it." 508 U.S. at 307. There is no practical limit to what the human imagination can "conceive," so this test effectively makes it impossible to ever win a rational basis challenge.[4]

Seven years after *Beach Communications*, the Court again reversed course, declaring in *Romer* that "even in [rational basis cases] … we insist on knowing the relation between the classification adopted and the object to be attained," because this "provides guidance and discipline for the legislature." 517 U.S. at 632. Perhaps the most egregious example of this vacillation over what the federal rational basis test entails came in Justice Kennedy's concurring opinion in *Kelo v. City of New*

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[4] Indeed, the Department of Justice has argued to the federal courts that judges using federal rational basis would have to uphold a law based on the theory that it is necessary to protect the earth from "space aliens … in invisible and undetectable craft." *See* Oral Argument 34:37−35:27, *Alaska Cent. Exp. Inc. v. United States*, 145 F. App'x 211 (9th Cir. 2005), https://cdn.ca9.uscourts.gov/datastore/media/2005/07/13/03-35902.mp3.

London, 545 U.S. 469 (2005). Justice Kennedy, who provided the crucial fifth vote for the majority, declared in his separate opinion that while eminent domain cases are subject to the federal rational basis test, "[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit," *id.* at 491 (Kennedy, J., concurring), a proposition directly contrary to the idea in *Beach Communications* that facts are constitutionally irrelevant.

Decades of equivocation have led to doctrinal confusion and inconsistent outcomes. Plaintiffs sometimes win rational basis cases. *See, e.g.*, *St. Joseph Abbey*, 712 F.3d at 223–27 (licensing statute for casket sales invalid under rational basis); *Merrifield*, 547 F.3d at 991−92 (California pest control licensing scheme invalid under rational basis); *Craigmiles v. Giles*, 312 F.3d 220, 228−29 (6th Cir. 2002) (licensing statute for casket sales invalid under rational basis). Yet this is quite rare, and plaintiffs often lose such cases even where the facts and legal theories are essentially identical, *compare Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004), *with Craigmiles, supra*, or where the purported rationale for the challenged law hardly passes the laugh test. *See, e.g., Odom, supra*.

Because it is logically impossible to prove a negative, *Hyer v. C.E. Holmes & Co.*, 79 S.E. 58, 62 (Ga. App. 1913)—i.e., to "disprove every conceivable basis which might support the [challenged law]," *Panama City Med. Diagnostic Ltd. v.*

Williams, 13 F.3d 1541, 1547 (11th Cir. 1994)—the federal rational basis test is, carried to its logical conclusion, literally insurmountable. It has become what the Supreme Court said it was not: "a rule of law" which, by "treating any fanciful conjecture as enough to repel attack" has made "legislative action invulnerable to constitutional assault." *Borden's Farm*, 293 U.S. at 209.

Georgia should avoid adopting—let alone thoughtlessly parroting—a standard which federal courts themselves have been unable to implement logically, consistently, or fairly—especially on a matter as important as the right to earn a living, a right this Court has referred to as "one of the highest rights possessed by any citizen," *Richardson v. Coker*, 188 Ga. 170, 175 (1939), and "among the greatest of human rights." *Schlesinger*, 129 S.E. at 866. Rather than copying by rote a federal standard that has been justly characterized as "a judicial shrug," *Patel*, 469 S.W.3d at 112 (Willett, J., concurring), this Court should make clear that Georgia's Constitution is, as it always has been, more protective of Georgians' right to earn a living than the federal Constitution is.

III. Preserving the right to earn a living requires a standard of review which examines real-world impact of the challenged statute.

Instead of adopting of the "rubber stamp" federal version of rational basis, *id.* at 95, this Court should adhere to the rule in *Strickland*, *Porter*, and *Advanced Disposal Servs.*: that that courts must "examine[] closely," *Porter*, 259 Ga. at 528, any law restricting a person's right to practice a "competitive and legitimate

business," *Moultrie Milk Shed v. City of Cairo*, 206 Ga. 348, 352 (1950), and declare such a restriction unconstitutional if it fails to "realistically serve[] a legitimate public purpose" or to "employ[] means that are reasonably necessary to achieve that purpose," or if it "unduly oppress[es] the individuals regulated." *Advanced Disposal Servs.*, 296 Ga. at 105.

Most significantly, this Court should refuse to adopt the federal theory whereby courts uphold laws if they can *imagine* or *hypothesize* a state of affairs whereby the statute would be rational.[5] Only a test which permits the challenger to examine the *real-world* effect of a challenged law can ensure the security of Georgians' right to earn a living, as recognized in *Jackson I*.

Georgia courts already use this more realistic test to address due process claims in the zoning context: plaintiffs challenging zoning ordinances must show that such ordinances do not "substantially advance" "public health, safety, morality,

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[5] Even some justices of the U.S. Supreme Court have expressed discomfort with this aspect of the federal rational basis test. *See, e.g., Beach Communications*, 508 U.S. at 323 n.3 (Stevens, J., concurring) ("it is difficult to imagine a legislative classification that could not be supported by a 'reasonably conceivable state of facts.' Judicial review under the 'conceivable set of facts' test is tantamount to no review at all."); *Schlesinger v. Ballard*, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting) ("While we have in the past exercised our imaginations to conceive of possible rational justifications for statutory classifications, we have recently declined to manufacture justifications in order to save an apparently invalid statutory classification." (citation omitted)).

and welfare," *Diversified Holdings, LLP v. City of Suwanee*, 302 Ga. 597, 612 (2017), but such cases are considered on a "case-by-case basis," and a number of factors are relevant to the inquiry. This includes the "relative gain to the public, as compared to the hardship imposed upon the individual property owner." *Id.* While the interest burdened in the zoning context is a property interest, rather than the right to earn a living, this test arises from the same provision of the Georgia Constitution and shows that meaningful due process review—i.e., a rule of law that focuses on the realities of the matter—can co-exist with sensible regulation.

Other states have confirmed the viability of a more robust test than federal rational basis. Under the test adopted by the Texas Supreme Court in *Patel*, a challenger may show, either that "(1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." 469 S.W.3d at 87. The Supreme Court of Pennsylvania also employs a test more rigorous than anything-goes federal rationality review, because Pennsylvania's Constitution provides "greater protections for occupational freedom than the Due Process Clause of the Fourteenth Amendment." *Ladd*, 230 A.3d at 1103. Under that test, a challenged law must not be "unreasonable, unduly oppressive, or patently beyond the necessities of the case,

and the means which it employs must have a real and substantial relation to the objects sought to be attained." *Id.* at 1109 (citation omitted).

This Court has generally not felt bound to follow the deferential path laid out in federal courts in other contexts. *See Strickland,* 256 Ga. 669. Indeed, it has emphasized that Georgia's Due Process Clause does not "change every time the Supreme Court of the United States changes its interpretation of the Fourth Amendment." *Olevik v. State*, 302 Ga. 228, 234 n.3 (2017). That emphatically should be the rule here.

Meaningful judicial scrutiny is particularly necessary, given the importance of the right at stake. Economic liberty is not only "deeply rooted in this Nation's"—and in Georgia's—"history and tradition," but it is "implicit in the concept of ordered liberty" itself. *Powell v. State*, 270 Ga. 327, 330−31 (1998) (citations omitted). It is impossible to imagine a coherent conception of liberty that omits protection for the right of an individual to put her skills to work providing for herself and her family, so long as she is not committing fraud or violence against others. Indeed, the right of economic liberty is central to the very idea of the "American Dream." *See Dossie v. Sherwood*, 308 Ga. App. 185, 186 (2011) (observing that the right to start one's own business is part of the "American Dream."). A legal theory that effectively surrenders judicial protection of this right and allows regulatory agencies or legislatures to override it for virtually any reason they feel like, is a form of judicial

"abdication," which this Court should not endorse. *Patel*, 469 S.W.3d at 95 (Willett, J., concurring).

To secure the right to earn a living, this Court should ensure that laws restricting economic freedom "*realistically* serve[] a legitimate public purpose, and … employ[] means that are reasonably necessary to achieve that purpose, without unduly oppressing the individuals regulated." *Advanced Disposal Servs*., 296 Ga. at 105 (emphasis added).

CONCLUSION

The Act is unconstitutional, which is evident if the Court applies an appropriate standard of review. The Court should affirm the superior court's equal protection ruling and reverse the superior court's due process ruling.

DATED: October 27, 2022.

Respectfully submitted,

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/s/ Wilson C. Freeman
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