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Laney Ivey

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State-Mandated Occupational Licenses, Harmful or Helpful? A Look at the Due Process and Equal Protection Principles Surrounding the Constitutionality of Occupational Licensing Regulations*

I. INTRODUCTION

Mary Jackson, a twenty-eight-year lactation consultant veteran, saw her ability to pursue her passion and her livelihood slip away with the passing of the Georgia Lactation Consultant Practice Act (Act)[1] in 2016.[2] Under the Act, the International Board Certified Lactation Consultant (IBCLC) certification is required by the state of Georgia in order to be considered a licensed lactation consultant.[3] Due to her lack of an IBCLC certification, Jackson, a Certified Lactation Counselor (CLC), cannot legally perform her job, where she provides crucial

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[1] Georgia Lactation Consultant Act, O.C.G.A. § 43-22A-1 (2020).

[2] J. Justin Wilson, *Breastfeeding Battle: New Georgia Law Will Put Many Lactation Consultants Out of Work*, INSTITUTE FOR JUSTICE (June 25, 2018), https://ij.org/press-release/ga-lactation-consultants-sue-to-save-their-jobs-and-end-unconstitutional-licensing-law/.

[3] O.C.G.A. § 43-22A-2 (2020).

lactation support to families and mothers at Grady Memorial Hospital.[4] This Act is one of many the Georgia General Assembly passed over the years in an attempt to expand regulations on occupational licensing in Georgia.[5] However, instead, this Act detrimentally dampened the right of Georgians to pursue the career path of their choosing in lactation care and services.[6]

The battle between the police powers of the State and the right of citizens to freely choose their profession has been a conflict ranging over many centuries with roots in the authorities and rights granted by both the U.S. Constitution as well as the Georgia Constitution.[7] This battle has taken a modern approach as courts now seek to address whether the police powers granted to the State outweigh the constitutional rights of Georgians to pursue the occupation of their choice and to receive equal treatment along with those who fall into the same class.[8] The Georgia Supreme Court delved into this constitutional dilemma once again in *Jackson v. Raffensperger,*[9] when it addressed whether the Georgia Lactation Consultant Practice Act violated the Due Process Clause[10] and Equal Protection Clause[11] of the Georgia Constitution.[12] Relying on precedent, the court reaffirmed Georgians, specifically CLCs like Jackson, that their passion will not go to waste because they have the unwavering right to pursue a career in the occupation of their choosing free from unreasonable government interference.[13] Likewise, the court reaffirmed the right of CLCs to be treated similarly to those with an IBCLC certification.[14]

II. FACTUAL BACKGROUND

Lactation care providers (LCs) offer breastfeeding education, support, and other guidance to families in both clinical settings and in

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[4] J. Justin Wilson, *Breastfeeding Battle: New Georgia Law Will Put Many Lactation Consultants Out of Work*, INSTITUTE FOR JUSTICE (June 25, 2018), https://ij.org/press-release/ga-lactation-consultants-sue-to-save-their-jobs-and-end-unconstitutional-licensing-law/.

[5] *See generally* Bramley v. State, 187 Ga. 826, 2 S.E.2d 647 (1939) (professional photography); Jenkins v. Manry, 216 Ga. 538, 118. S.E.2d 91 (1961) (plumbing).

[6] Jackson v. Raffensperger, 308 Ga. 736, 736 843 S.E.2d 576, 578 (2020).

[7] *See generally* U.S. CONST. amend. XIV, § 1; GA. CONST. art. I, § I, para. I-II.

[8] *See Jackson,* 308 Ga. at 737, 843 S.E.2d at 578 (2020).

[9] *Id.* at 736, 843 S.E.2d at 576 (2020).

[10] GA. CONST. art. I, § 1, para. 1.

[11] GA. CONST. art. I. § 1, para. 2.

[12] *Jackson,* 308 Ga. at 736–37, 843 S.E.2d at 578.

[13] *Id.* at 737, 843 S.E.2d at 578.

[14] *Id*.

their client's homes. It is important to note that LCs are not medical providers, nor can they diagnose or treat any medical conditions. Certification to become a LC is similar to other practitioners in the medical field, where hopeful applicants seek accreditation through private accrediting entities. In Georgia, there are two prominent certifications that LCs can seek, Certified Lactation Counselor (CLC), and International Board Certified Lactation Consultant (IBCLC). While IBCLCs require college-level courses, continuing education courses, and clinical hours on top of the examination in order to gain certification, CLCs only need to complete a forty-five-hour course and pass an examination.[15]

Further, CLCs and IBCLCs differ in a multitude of other ways. There are many diverse settings lactation consultants can work in. CLCs work in client's homes as well as medical settings across the state, thus increasing their accessibility to rural Georgians. IBCLCs, on the other hand, are located primarily in metro Atlanta and other urban areas as they are typically nurses or other healthcare professionals along with their position as an IBCLC. Furthermore, IBCLCs frequently charge their clients more than CLCs, as they are usually associated with hospitals or similar institutions. In the state of Georgia, there are roughly 335 IBCLCs compared to the more than 800 CLCs.[16] Despite the licensure requirement difference, there is no evidence that CLCs or any other unlicensed lactation consultant have ever "harmed public health, safety, or welfare . . . ."[17] Further, CLCs and IBCLCs are "equally competent to provide lactation care and services to mothers and babies."[18]

In June of 2018, a non-profit organization by the name of Reaching Our Sisters Everywhere, Inc. (ROSE) along with Mary Jackson, who is a licensed CLC and the Vice President of ROSE, filed a suit against the Georgia Secretary of State.[19] Jackson and ROSE challenged the constitutionality of the Georgia Lactation Consultant Practice Act (Act), which was created to regulate the practice of lactation care and services by requiring a license from the Secretary of State.[20] Jackson and ROSE alleged that the Act violated the Due Process Clause of the Georgia Constitution, which protects ones right to freely pursue an occupation.[21]

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[15] *Id.*

[16] *Id.* at 737–38, 843 S.E.2d at 579.

[17] *Id.* at 738, 843 S.E.2d at 579.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 736, 843 S.E.2d at 578.

[21] *Id.*

Likewise, Jackson and ROSE also alleged the Act violated the Equal Protection Clause of the Georgia Constitution on the grounds that the Act treats similarly situated individuals differently.[22] The Secretary of State filed a motion to dismiss, stating there was a failure to state a claim upon which relief could be granted. [23] The Fulton Superior Court granted the motion to dismiss, citing that the Georgia Constitution "does not recognize a right to work in one's chosen profession . . . ."[24] The court also referenced a failure on the parts of Jackson and ROSE to adequately allege that a sufficient similarity existed between those who were able to obtain a license and those who were not.[25] Ultimately, the Georgia Supreme Court reversed the holding of the trial court, citing an extensive legal precedent which evidences the protection of Georgians' right to work in their chosen profession without unreasonable government interference.[26] Further, the Georgia Supreme Court again recognized that those who work in the same profession are generally similarly situated.[27]

III. LEGAL BACKGROUND

A. An Overview of the Georgia Lactation Consultant Practice Act

The Georgia Lactation Consultant Practice Act is not the General Assembly's first attempt at regulating the LC profession. In 2013, the Georgia General Assembly considered adopting a bill which would require LCs to obtain licensing. After reviewing the proposed bill, the Georgia Occupational Regulation Review Council (Council) unanimously concluded there was no substantive evidence the LC license requirement would improve the health and safety of Georgia residents, and agreed the exclusion of all lactation certifications except for the IBCLC would lead to a decrease in access to breastfeeding support.[28] The Council also advised that CLCs and IBCLCs are "equally qualified" to provide Georgians with lactation care services.[29] The proposed 2013 bill died in the committee.[30] Following the failure of the 2013 proposed bill, the General Assembly successfully passed the

[22] *Id.* at 736–37, 843 S.E.2d at 578.
[23] *Id.* at 736, 843 S.E.2d at 578.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 737, 843 S.E.2d at 578.
[27] *Id.*
[28] *Id.* at 738, 843 S.E.2d at 579.
[29] *Id.*
[30] *Id.*

Georgia Lactation Consultant Practice Act in 2016 without review by the Council. [31]

The Georgia Lactation Consultant Practice Act outlines what constitutes lactation care and services, as well as the licensing requirements set forth by the state.[32] The Act mandates any person seeking to provide lactation care or services for compensation to acquire a state-issued license.[33] However, not every LC is eligible to obtain the license; only IBCLCs are eligible.[34] The lack of eligibility to obtain a license deprives hundreds of CLCs from their right to legally pursue a career in the field of their choice, lactation care.[35] Looking past the general description of what LCs do, the Act contains multiple exceptions to the licensing requirement, with most regarding healthcare professionals and students being exempt from the licensure requirement.[36] Notably, the Act exempts those who volunteer as an LC from the licensure requirement so long as they do not hold themselves out as a licensed LC, do not charge a fee, and do not receive any form of compensation for their services.[37]

B. The Georgia Constitution Protects the Right to Work in One's Chosen Profession

The Due Process Clause of the Georgia Constitution states, "No person shall be deprived of life, liberty, or property except by due process of law."[38] Recognizing the long line of history surrounding the due process clause, this statute applies to the right to pursue a lawful occupation of one's own choosing, free from unreasonable interference

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[31] *Id.*

[32] O.C.G.A. § 43-22A-3(5) (2020). Lactation care includes lactation assessment through data collection; the creation of lactation care plans; the implementation of lactation care plans through demonstrations and instruction to parents, as well as communication with primary care providers; and the education, recommendation, and use of lactation assistance devices. *Id.*

[33] O.C.G.A. § 43-22A-11 (2020).

[34] O.C.G.A. § 43-22A-7 (2020).

[35] *See Jackson*, 308 Ga. at 738, 843 S.E.2d at 579.

[36] O.C.G.A. § 43-22A-13(4–5) (2020). The Act exempts those in the medical field and other similar fields from needing to obtain a license. Further, those who are students or preparing themselves for a career in lactation services are exempt from needing a license so long as a licensed lactation consultant supervises the student. *Id.*

[37] O.C.G.A. § 43-22A-13(6). Administrative expenses such as mileage are reimbursable. *Id.*

[38] GA. CONST. art. I, § 1, para. 1.

from the government.[39] For instance, the Georgia Supreme Court in *Bramley v. State*[40] struck down a statute requiring photographers to pay a licensing fee, sit for an examination, and to show good moral character in order to practice photography for hire.[41] The Georgia Supreme Court continues to apply this standard through a legal analysis consisting of the court weighing whether or not the statute at issue is a legitimate regulation created to protect a public interest, or if it was created to restrict competition or promote revenue.[42]

The right to pursue the profession or trade of one's choice has a longstanding history in Georgia jurisprudence. The recognition of this right has continued for upwards of four centuries, dating all the way back to Anglo-American common law.[43] The Due Process Clause of state and federal constitutions came into existence from the Manga Carta's Law of the Land Clause, which barred British government charter restrictions that created monopolies due to their unjust nature.[44] These clauses were understood from the beginning to protect the freedom of one to practice a trade of their choice without undue interference from government.[45]

While there is a right to pursue the trade or profession of one's choice, in 1849, the Georgia Supreme Court recognized the right of the government to regulate the practice of a trade so long as it was to protect the public from harm or fraud.[46] The court specifically stated that a prohibition on the growing of rice in a township did not violate economic freedoms because "every right is subject to the restriction, that it shall be so exercised as not to injure others."[47] Following this precedent, the Georgia Supreme Court in *Bethune v. Hughes*[48] struck down an ordinance which prohibited people from selling goods outside of a city market unless the market was open.[49] The court reasoned this ordinance was a violation of basic human rights, and hurt those who

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[39] Hugh William Divine, *Interpreting the Georgia Constitution Today*, 10 MERCER L. REVIEW 219, 220 (1959).

[40] 187 Ga. 826, 2 S.E.2d 647 (1939).

[41] *Id.* at 840, 2 S.E.2d at 654.

[42] Moultrie Milk Shed, Inc. v. Cairo, 206 Ga. 348, 352–53, 57 S.E.2d 199, 202 (1950).

[43] TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING 17 (2010).

[44] Frank v. State, 142 Ga. 741, 747, 83 S.E. 645, 648 (1914).

[45] *Id.*

[46] Green v. Savannah, 6 Ga. 1, 11 (1849).

[47] *Id.* at 13.

[48] 28 Ga. 560 (1859).

[49] *Id.* at 565.

were trying to make a living, instead promoting a selfish mentality of the few who were favored by and benefitted from the ordinance.[50]

Generally speaking, Georgia courts have largely held to the reasoning above, observing that "[t]he right to make a living is among the greatest of human rights, and when lawfully pursued can not be denied."[51] The gospel of public policy is *salus populi suprema lex*, that is, the safety of the people should be the supreme law, and that the good of the public should come before anything else.[52] The Georgia Court of Appeals recognized this ideology in *Felton v. City of Atlanta,*[53] holding that the freedom to work in one's chosen profession, restricted only by that which is necessary to protect public peace, health, safety, and morality, is so deeply recognized that limitations thereon are strictly construed.[54] The court reasoned in *Felton* that when the main goal of public health and safety is no longer the focus, the restrictions put in place on labor are no longer constitutional.[55]

While a person is entitled to the right to pursue a career in the profession of their choice, free from unreasonable interference from the government, the State of Georgia has the right to exercise its police power to "protect public health and welfare" through the regulation of health related trades and professions.[56] This power is given to the State to provide for the general welfare of its people, and allows the State to prescribe any regulations deemed necessary to secure its people against the consequences of ignorance and incapacity, along with deception or fraud.[57] The Georgia Supreme Court confirmed this notion in *Hughes v. State Board of Medical Examiners*,[58] holding the State can exercise its inherent police power through restricting licensees as necessary to promote the welfare and safety of society.[59]

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[50] *Id.* at 564.

[51] Schlesinger v. Atlanta, 161 Ga. 148, 158, 129 S.E. 861, 866 (1925).

[52] Green v. Coast L. R. Co., 97 Ga. 15, 34 (1895).

[53] 4 Ga. App. 183, 61 S.E. 27 (1908).

[54] *Id.* at 185, 61 S.E. at 27.

[55] *Id.*

[56] Brown v. State Bd. of Exam'rs of Psychologists, 190 Ga. App. 311, 312, 378 S.E.2d 718, 720 (1989); *see also* Foster v. Ga. Bd. of Chiropractic Exam'rs, 257 Ga. 409, 419, 359 S.E.2d 877, 884 (1987); Wise v. State Bd. for Examination &c. of Architects, 247 Ga. 206, 207, 274 S.E.2d 544, 546 (1981); Hughes v. State Bd. of Med. Exam'rs, 162 Ga. 246, 258, 134 S.E. 42, 47 (1926).

[57] Dent v. West Virginia, 129 U.S. 114, 122, 9 S. Ct. 231, 233 (1889).

[58] 162 Ga. 246, 134 S.E. 42 (1926).

[59] *Id.* at 256, 134 S.E. at 46.

C. Georgia's Realistic Approach to Due Process

The United States Supreme Court in *Nebbia v. New York*[60] abandoned its previously used "affected with a public interest" test, instead moving toward protecting economic liberties by adopting a policy of extreme legislative deference.[61] The Georgia Supreme Court, on the other hand, adopted a more realistic approach, declaring, "no matter what other states or the Supreme Court of the United States 'may or may not have decided,'"[62] they will not follow the trend of disregarding the significance of economic liberty as a constitutional right.[63] This stance allows Georgia courts to examine all restrictions on the exercise of business activities in order to ensure that regulations serve a legitimate public purpose and do not oppress any person.[64] Following this precedent, the Georgia Supreme Court established a test of reasonability, looking at the impact of the regulation on the licensee and the public.[65] This test ensures a person's constitutional right to practice any profession or occupation.[66]

On the other hand, the Georgia Court of Appeals acknowledged in *Brown v. State Board of Examiners of Psychologists*[67] that "[t]he State of Georgia, in the exercise of its police power to protect public health and welfare, may regulate health and related trades and professions."[68] The court in *Brown* cited to both *Pace v. Smith*[69] and *Baranan v. State Board of Nursing Home Administrators*[70] when it held those in a healthcare profession do not have the constitutional right to practice healthcare, and that states can regulate healthcare licensing.[71] Referencing the reasonability test in *Baranan*, the court determined that a rule requiring applicants graduate from an accredited school was

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[60] 291 U.S. 502, 54 S. Ct. 505 (1934).

[61] *See id.* at 533, 54 S. Ct. at 514.

[62] Strickland v. Ports Petroleum Co., 256 Ga. 669, 670, 353 S.E.2d 17, 18 (1987) (quoting Cox v. GE Co., 211 Ga. 286, 291 85 S.E.2d 514, 519 (1955)).

[63] *Strickland*, 256 Ga. 669, 670, 353 S.E.2d 17, 18 (1987).

[64] Porter v. Atlanta, 259 Ga. 526, 528, 384 S.E.2d 631, 633–34 (1989).

[65] Baranan v. State Board of Nursing Home Administrators, 143 Ga. App. 605, 606–07, 239 S.E.2d 533, 536 (1977).

[66] *Id.*

[67] 190 Ga. App. 311, 378 S.E.2d 718 (1989).

[68] *Id.* at 312, 378 S.E.2d at 720; *see also* Foster v. Ga. Bd. of Chiropractic Exam'rs, 257 Ga. 409, 418, 359 S.E.2d 877, 884 (1987); Wise v. State Bd. for Examination &c. of Architects, 247 Ga. 206, 207, 274 S.E.2d 544, 546 (1981); Hughes v. State Bd. of Med. Exam'rs, 162 Ga. 246, 258, 134 S.E. 42, 47 (1926).

[69] 248 Ga. 728, 286 S.E.2d 18 (1982).

[70] 143 Ga. App. 605, 239 S.E.2d 533 (1977).

[71] *Brown*, 190 Ga. App. at 312, 378 S.E.2d at 720.

constitutional, reasoning the rule was authorized by a statute creating and giving power to the advisory board, and because the rule itself was reasonable.[72]

The right of the state to regulate professions does not, however, turn the right to practice in one's chosen profession into a privilege which can be withheld.[73] Instead, the state must show good reason to take away the constitutional right.[74] The purpose of this good reason safe guard is to protect the public from fraud and harm, not to protect those in the trade already from competition.[75] As mentioned above, the rationale for licensing in the medical profession is one which requires a special level of skill and training, where a lack thereof could endanger the public or a person.[76] The Georgia Supreme Court has previously held 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 support a regulation . . . ."[77] When the basis of the licensing regulation is not reasonable or rational in terms of public safety, the parameters put in place by the state are unconstitutional.[78]

D. Equal Protection of Those in the Same or Similar Classes

The Equal Protection Clause[79] of the Georgia Constitution dates back to 1861, with roots in the State's first Bill of Rights.[80] Under the Equal Protection Clause of the Georgia Constitution, "Protection to the person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."[81] The beginning phrase has remained unchanged since 1868.[82] The creation of a claim under the Equal Protection Clause requires a claimant to establish they are similarly situated to other members of a class who are treated differently.[83] While reasonable

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[72] *Id*.

[73] Riley v. Wright, 151 Ga. 609, 613, 107 S.E. 857, 859 (1921).

[74] *Id*.

[75] Richardson v. Coker, 188 Ga. 170, 175, 3 S.E.2d 636, 640 (1939).

[76] *Dent*, 129 U.S. at 122, 9 S. Ct. at 233.

[77] *Richardson*, 188 Ga. 170, 174, 3 S.E.2d 636, 640 (1939) (citing *Bramley*, 187 Ga. 826, 2 S.E.2d 647 (1939)).

[78] State v. Moore, 259 Ga. 139, 141, 376 S.E.2d 877, 879 (1989).

[79] GA. CONST. art. I, § 1, para. 2.

[80] GA. CONST. art. I. § 1, para. 2 (differs from the original Bill of Rights only by the addition of the second sentence).

[81] *Id*.

[82] GA. CONST. OF 1861, art. I. § 1, para. 3 (1861).

[83] Bell v. Austin, 278 Ga. 844, 847, 607 S.E.2d 569, 573–77 (2005).

classification is allowed, the classifications must be based on a real or substantial distinction, "bearing a reasonable and just relation to the things in respect to which such classification is imposed . . . ."[84]

In 1910, the Georgia Supreme Court struck down an ordinance in the City of Atlanta which required plumbers or those of the like to submit to a written examination before obtaining their license.[85] Plumbing firms could bypass this licensing examination requirement.[86] As long as one employee from a plumbing firm had a license, then all other employees could also obtain licenses.[87] The ordinance arbitrarily distinguished between those who were employed with a plumbing firm, and those who were not, thus making it discriminatory and therefore void.[88] This challenge to the Equal Protection Clause was one of the first which pertained to licensing, and set the stage for similar rulings invalidating occupational licensing laws on the grounds of equal protection.

Following the above referenced precedent, the Georgia Supreme Court has consistently held that those who perform the same work are similarly situated for equal protection purposes.[89] For instance, the Georgia Supreme Court in *Gregory v. Quarles*[90] failed to ascertain a difference between plumbers who were performing repair work in the City of Atlanta, and those who were performing original work.[91] The court thus struck down a law which exempted plumbers who worked on sewer connections that had already been made from taking an examination, while requiring those who worked on new sewer connections to take an examination.[92]

Likewise, in *Southeastern Electric Co. v. Atlanta*[93], the Georgia Supreme Court again struck down a law which treated members of the same class differently.[94] The court held the ordinance unconstitutional due to the absence of a substantial difference or risk of harm related to

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[84] S. R. Co. v. Greene, 216 U.S. 400, 417, 30 S. Ct. 287, 291 (1910).

[85] *Henry*, 133 Ga. at 887, 67 S.E. at 393.

[86] *Id.* at 885, 67 S.E. at 392–93.

[87] *Id.*

[88] *Id.* at 886–87, 67 S.E. at 392–93.

[89] *Jenkins*, 216 Ga. 538, 118 S.E.2d 91.

[90] 172 Ga. 45, 157 S.E. 306 (1931).

[91] *Id.* at 49, 157 S.E. at 308.

[92] *Id.* at 46–47, 157 S.E. at 307.

[93] 179 Ga. 514, 176 S.E. 400 (1932).

[94] *Id.* at 514, 286 S.E.2d at 402–03 (holding that a license requirement for electricians who work on new structures, but not existing ones, is unconstitutional on equal protection grounds).

the type of work performed.[95] Following this decision, in 1939, The Georgia Supreme Court invalidated a law requiring photographers to obtain photography licenses in order to participate in the trade for a profit.[96] The court held photography does not "afford any greater or more particular opportunity for fraud than do most of the other common occupations of life."[97]

Continuing the trend of protecting those who are seeking licensure by the state, in *Jenkins v. Manry*,[98] The Georgia Supreme Court held that plumbers and steam fitters who were not employed by public utility corporations were in the same class as plumbers and steam fitters who were employed by public utility corporations.[99] The court reasoned that a statute requiring the examination of those who are not employees of public-entity corporations while exempting the employees of public-entity corporations is discriminatory.[100] Deeming the statute void, the court debunked the argument which claimed there is a larger risk of public harm from those who are not employed by public-entity corporations than those who are.[101]

Turning to the standards for determining whether a statute or ordinance violates the Equal Protection Clause of the Georgia Constitution, the Georgia Supreme Court established a test used to determine whether government classifications were reasonable and have a fair and substantial relationship to the objectives of the city or government.[102] Employing this test for the first time, the Georgia Supreme Court in *Indep. Gasoline Co. v. Bureau of Unemployment Comp.*[103] noted "a classification must be reasonable and have fair and substantial relation to the object of the legislation,"[104] thus invalidating an unemployment provision on the grounds that it was unconstitutional.[105] The Georgia Supreme Court again applied this standard in *Geele v. State*,[106] striking down another law on the grounds

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[95] *Id.*

[96] *Bramley*, 187 Ga. at 832, 2 S.E.2d at 650.

[97] *Id.* at 838, 2 S.E.2d at 653.

[98] 216 Ga. 538, 118 S.E.2d 91 (1961).

[99] *Id.* at 545–46, 118 S.E.2d at 97.

[100] *Id.*

[101] *Id.*

[102] City of Atlanta v. Watson, 267 Ga. 185, 475 S.E.2d 896 (1996).

[103] 190 Ga. 613, 10 S.E.2d 58 (1940).

[104] *Id.* at 616, 10 S.E.2d at 60.

[105] *Id.*

[106] 202 Ga. 381, 43 S.E.2d 254 (1947).

of equal protection.[107] The court rationalized its decision based off the lack of a relationship between the amount a hotel charged guests and overall fire danger to the structure, thus making the classification arbitrary.[108]

IV. COURT'S RATIONALE

In *Jackson v. Raffensperger*, the Georgia Supreme Court dissected two issues, whether the Georgia Lactation Consultant Practice Act (Act) was constitutional under the Due Process Clause and under the Equal Protection Clause of the Georgia Constitution.[109] Relying heavily on several of the aforementioned cases, the Georgia Supreme Court held the Act violated both the LC's afforded due process rights and their equal protection rights.[110] In reaching its decision, the court first looked at the Due Process Clause, and whether it entitles a person to pursue an occupation of their choice, free from government interference.[111] Turning to relevant case law, the court cited a laundry list of cases where it previously affirmed that a person does in fact have the constitutional right to pursue an occupation of their choosing.[112] Focusing on *Bramley v. State* and *Jenkins v. Manry*, the court confirmed it previously held statutes which prevent a person from seeking the occupation of their choice are unconstitutional, thus demonstrating the trial court erred in concluding an individual has no right to pursue the occupation of their choosing.[113]

Next, the court focused on dismantling the trial court's basis for its findings. Starting with *Brown v. State Board of Examiners of Psychologists*, the court rejected the Georgia Court of Appeal's previous holding that those in the healthcare field do not have a constitutional right to practice since such a right "is subordinate to the state's right to regulate such a profession."[114] Both *Brown* and the trial court decision in this case cited to *Pace v. Smith* and *Baranan v. State Board of Nursing Home Administrators*, where the courts ruled both regulations

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[107] *Id.* at 387–88, 43 S.E.2d at 258. The statute required hotels and inns to maintain proper fire escapes unless they charged their guests less than two dollars per day for the duration of their stay. However, there was no increase in risk between the guests charged different rates, and both were similarly situated. *Id.*

[108] *Id.*

[109] *Jackson,* 308 Ga. at 736–37, 843 S.E.2d at 578.

[110] *Id.* at 742, 843 S.E.2d at 581.

[111] *Id.* at 740, 843 S.E.2d at 580.

[112] *Id.*

[113] *Id.* The occupations in the cases consisted of photography and plumbing. *Id.*

[114] *Jackson,* 308 Ga. at 740, 843 S.E.2d at 580 (quoting *Brown*, 190 Ga. App. 311, 312, 378 S.E.2d. 718 (1989)).

within the respective cases were constitutional.[115] Beginning with *Pace*, this court quickly distinguished the case from *Brown* since *Pace* involved a challenge to a ruling regarding the Georgia Bar Examiners, which has nothing to do with the practice of a healthcare profession.[116]

Turning next to *Baranan*, the Georgia Supreme Court acknowledged the Georgia Court of Appeals previous holding that "the right to practice any profession or occupation is a necessarily valuable right and is entitled to constitutional protection,"[117] before it began to analyze whether the rules in question violated the constitutional rights of the appellant.[118] While the court in *Baranan* later held the rules in question were constitutional, the court never agreed to the notion that a person has no right to pursue the occupation of their choice in healthcare under the Georgia Constitution.[119] The Georgia Supreme Court reasoned *Baranan* stands for the proposition that "an individual's due process right to practice healthcare is subject to reasonable regulation by the State."[120] This reasoning made it evident that the Georgia Court of Appeals in *Brown* erred in concluding to the contrary, and the trial court in *Jackson* erred in concluding that the Georgia Constitution does not protect one's right to pursue an occupation of their choosing, free from unreasonable government interference.[121] Thus, the Georgia Supreme Court held that Mary Jackson and ROSE possess a valid Due Process claim.[122]

Looking next to the Equal Protection Clause of the Georgia Constitution, the Georgia Supreme Court concluded the trial court also erred in failing to find CLCs and IBCLCs similarly situated.[123] The Georgia Supreme Court first reaffirmed the notion that the Equal Protection Clause requires the State to treat similarly situated individuals in a similar way.[124] Next, the court further specified the clause applies to members who fall within the same class.[125] The court outlined a long history, specifically referencing *Jenkins v. Manry*,

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[115] *Jackson,* 308 Ga. at 740, 843 S.E.2d at 580.

[116] *Id.*

[117] *Id.* at 741, 843 S.E.2d at 580–81. (quoting *Baranan*, 143 Ga. App. 605, 606, 239 S.E.2d. 533, 535 (1977)).

[118] *Id.*

[119] *Id.*

[120] *Jackson,* 308 Ga. at 741, 843 S.E.2d at 581.

[121] *Id. at* 741, 843 S.E.2d at 581.

[122] *Id.*

[123] *Id.*

[124] *Jackson,* 308 Ga. at 741–42, 843 S.E.2d at 580–81 (citing Bell v. Austin, 278 Ga. 844, 607 S.E.2d 569 (2005)).

[125] *Id.*

Gregory v. Quarles, and *Southeastern Electric Co. v. Atlanta* as instances where it consistently acknowledged individuals who perform the same type of work are similarly situated for equal protection purposes.[126]

When applying the legal precedent outlined above, the Georgia Supreme Court held IBCLCs and CLCs are similarly situated due to their facilitation of the same lactation care and services, during which both are equally competent to provide lactation care and services to mothers and babies alike.[127] While the certification requirements for IBCLCs and CLCs are different, the court reasoned even though different credentials are obtained, this reason alone is not enough to establish the differences necessary for IBCLCs and CLCs to be in different classes.[128] Thus, the court laid groundwork toward removing arbitrary licenses that recognize little to no differences between those who qualify, and those who do not.

To conclude, the Georgia Supreme Court boiled its opinion down to the analyzation of the Act through the lenses of the Due Process Clause and the Equal Protection Clause of the Georgia Constitution. After addressing the vast legal precedent regarding the right to fair and equal treatment when choosing an occupation, and the ability to freely choose one's occupation without unreasonable government interference, the court concluded the statute violated the rights of LCs, thus remanding the case to the lower court for reconsideration.[129] The statute may have been deemed reasonable had there been tangible differences between the two certifications besides just the credentials, or had there been a risk of public harm or fraud without the regulation. However, without a greater distinction, the Act fails to survive when viewed through the lenses of the Due Process Clause and the Equal Protection Clause.[130]

V. IMPLICATIONS

First, the Georgia Supreme Court broke significant constitutional ground in their application of the Due Process Clause and the Equal Protection Clause to state-mandated occupational licenses. The court established that it will strike down indefensible licensing statutes which only seek to exclude members of a class.[131] This firm stance by

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[126] *Id.* at 741–42, 843 S.E.2d at 581.

[127] *Id.* at 742, 843 S.E.2d at 581.

[128] *Id.*

[129] *Id.* at 742, 843 S.E.2d at 581.

[130] *Id.* at 741–42, 843 S.E.2d at 581.

[131] *Id.*

the court helps to progress the growing idea the State should not have the power to license any occupation it deems necessary for reasons such as increased revenue or to reduce competition in the field.[132] The Georgia Supreme Court's attempt to rein in the police powers of the Georgia General Assembly through requiring licensing regulations to serve a legitimate public interest consequently allows for increased occupational freedom amongst Georgians.[133]

Second, with the downfall of arbitrary occupational licensing comes a newfound autonomy for those seeking to practice a specific profession.[134] The relaxation in state mandated licensing requirements allows for an increase in lactation consultants within the state, with an anticipated rise in healthcare professionals and other professionals on the horizon as more regulations are deemed invalid.[135] Similarly, relaxed licensing requirements will increase the geographic mobility of lactation consultants as well as allow for additional interstate work.[136] This movement away from arbitrary healthcare profession licensing requirements opens the door for an increase in telemedicine and an increase in the presence of professionals across the state, specifically in rural Georgia.[137]

Third, there is no data suggesting that the movement towards relaxed professional licensing risks harm to the public.[138] There is no substantial foundation for restricting licensure, reimbursement, or support of LCs to just IBCLCs.[139] The restrictions do not contribute to existing efforts to support breastfeeding, nor are they associated with higher quality care.[140] Instead, these regulations are the result of lobbying efforts across multiple states, meant to promote IBCLC certification as a requirement for licensing while discrediting other avenues of certification.[141] An increase in unlicensed professionals,

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[132] *Bramley*, 187 Ga. at 837, 2 S.E.2d at 652–53; *Felton*, 4 Ga. App. at 186, 61 S.E. at 28.

[133] *See Felton*, 4 Ga. App. at 187, 61 S.E. at 28; *Jackson,* 308 Ga. at 738, 843 S.E.2d at 579.

[134] *See* Gabriel Scheffler, *Unlocking Access to Health Care: A federalist Approach to Reforming Occupational Licensing*, 29 HEALTH MATRIX 293, 298.

[135] *Jackson,* 308 Ga. at 737–38, 843 S.E.2d at 579.

[136] Scheffler, *supra* at 297–98.

[137] *See id.; Jackson,* 308 Ga. at 737–38, 843 S.E.2d at 579.

[138] FED. TRADE COMM'N, EXAMINING HEALTH CARE COMPETITION 9 (2014), https://www.ftc.gov/system/files/documents/public_comments/2014/04/00150-89997.pdf.

[139] *Id.* at 4.

[140] *Id.*

[141] *See* FED. TRADE COMM'N, EXAMINING HEALTH CARE COMPETITION, 6 (2014), https://www.ftc.gov/system/files/documents/public_comments/2014/04/00150-89997.pdf.

while beneficial to Georgians in terms of access to care and the cost of care, sets the stage for a detrimental blow to the self-regulated economic and competitive interests of those already in the profession.[142] These efforts are not limited to just healthcare professions, they can be found within professions such as podiatry, music therapy, and cosmetology to name a few.[143]

Lastly, within the healthcare community, licensing often represents prestige.[144] The potential slackening of licensing risks the breakdown of the hierarchy licensing creates in the healthcare profession.[145] Further, without a uniform licensing requirement statewide, the standard of care loses its uniformity.[146] The decline in standardized care criteria welcomes the risk of an increase in lower quality care, as well as the allowance for those who practice to increase the risk to public safety in their specified field.[147] The balance of power between protecting the public in terms of harm and honoring the right of people to work in their chosen profession is a delicate one which often flips with differing circumstances and professions.[148] *Jackson v. Raffensperger* represents a niche case in a line of other cases which break the mold of state-issued licenses.[149] Nonetheless, the relaxation of state-mandated licensing advances the emerging belief that rights often outweigh police powers.[150]

Laney Ivey

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[142] Jason Furman, Chairman, Council of Economic Advisers, Transcript of Speech at the Brookings Institution on Occupational Licensing and Economic Rents at 9-10 (Nov. 2, 2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151102_occupational_licensing_and_economic_rents.pdf.

[143] GEORGIA SECRETARY OF STATE, https://sos.ga.gov/index.php/licensing (last visited Nov. 13, 2020).

[144] Scheffler, *supra* at 298.

[145] *Id.*

[146] *See* Dep't of Treasury Office of Econ. Policy, Council of Econ. Advisors & Dep't of Labor, *Occupational Licensing: A Framework for Policymakers,* 11 (2015).

[147] *Id.* at 7.

[148] *See generally Brown*, 190 Ga. App. at 312, 378 S.E.2d at 720; *Baranan*, 143 Ga. App. at 606–07, 239 S.E.2d at 535–36; *Pace*, 248 Ga. at 728, 286 S.E.2d at 18.

[149] *See generally Bramley*, 187 Ga. at 826, 2 S.E.2d at 647 (professional photography); *Jenkins*, 216 Ga. at 538, 118 S.E.2d at 91 (plumbing); *Henry*, 133 Ga. at 882, 67 S.E. at 390 (plumbing).

[150] *See Jackson*, 308 Ga. at 736, 843 S.E.2d at 576.