

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 5150

JAY SINGLETON, D.O., and SINGLETON
VISION CENTER.

Plaintiffs,

vs.

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES, ROY
COOPER, Governor of the State of North
Carolina, in his official capacity; MANDY
COHEN, North Carolina Secretary of Health
and Human Services, in her official capacity;
PHIL BERGER, President Pro Tempore of the
North Carolina Senate, in his official capacity;
and TIM MOORE, Speaker of the North
Carolina House of Representatives, in his
official capacity

Defendants.

**AMICI PROVIDERS AND PROVIDER
ASSOCIATIONS' JOINT BRIEF IN
SUPPORT OF
MOTION TO DISMISS**

Amici are health care providers across the continuum of care and their respective provider associations. Amici jointly submit this brief in support of Defendants' Motion to Dismiss. Plaintiffs make as-applied constitutional challenges to North Carolina's certificate of need ("CON") law. The General Assembly found that the CON law is necessary to improve quality of and access to health care and decrease health care costs. Plaintiffs seek to have the CON law declared unconstitutional based on their speculative and unsupported assumption that they could not obtain a CON for an ambulatory surgical facility in Craven County. Rather than seeking to participate in the existing CON public process to make a CON available in their operating room service area, Plaintiffs skipped these administrative processes and filed this Complaint. Pursuant to Rule 12(b)(1), Plaintiffs' Complaint should be dismissed for failure to exhaust this administrative process and for lack of ripeness.

Plaintiffs' claims are also doomed on the merits. Binding North Carolina precedent has already upheld the constitutionality of the CON law. Plaintiffs' Complaint makes no attempt to distinguish its claims from those that have already been rejected explicitly and implicitly by the North Carolina appellate courts. The CON law serves a legitimate government interest and is consistent with the North Carolina Constitution. Therefore, Plaintiffs' Complaint should also be dismissed under Rule 12(b)(6).

BACKGROUND

A. The Requirements of North Carolina's Current CON Law

Thirty-five states, including North Carolina, have enacted CON laws that govern the process by which certain new health services can be offered. The North Carolina General Assembly enacted the CON law in part because it found that "citizens need assurance of economical and readily available health care" and that, if left unregulated, there would be "less than equal access to all population groups, especially those that have traditionally been medically underserved." *See* N.C. Gen. Stat. § 131E-175(2), (3). To this end, the General Assembly has set out certain categories of health care services and facilities that it has determined should be subject to CON review, referred to in North Carolina as "new institutional health services." N.C. Gen. Stat. § 131E-176(16). Among the categories of new institutional health services are the development or establishment of an ambulatory surgical facility or adding operating rooms ("ORs"). N.C. Gen. Stat. § 131E-176(16)(a); § 131E-176(9b); § 131E-176(16)(u).

To offer or develop a new institutional health service in North Carolina, such as an ambulatory surgical facility, a person must first obtain a CON from the North Carolina Department of Health and Human Services ("the Department"). *Id.* § 131E-178(a). To obtain a CON from the Department, a person must submit a CON application to the Department, through the Division of Health Services Regulation's Healthcare Planning and Certification of Need

Section (“the Agency”). *Id.* § 131E-182. For an application to be approved, the Agency must determine that the application conforms to the statutory review criteria set forth under the CON law. The statutory criteria include, among other things, demonstrating that the project is financially feasible and will meet the needs of the elderly and the medically underserved, such as Medicaid recipients, racial and ethnic minorities, women, and the individuals with disabilities. *Id.* § 131E-183.

During this process, the Agency must determine whether the project is consistent with need determinations set forth in the State Medical Facilities Plan (“SMFP”). *Id.* § 131E-183(a)(1). The SMFP is prepared annually under the direction of the North Carolina State Health Coordinating Council (“SHCC”). The SHCC is composed of individuals from across the healthcare industry (including several licensed physicians), private citizens, and elected officials. Once the SHCC finalizes its draft of the SMFP, it is reviewed and approved by the Governor. *Id.* § 131E-176(25). The development of the annual SMFP is a public process, whereby members of the public have the opportunity to attend SHCC meetings, comment on draft plans, and petition the SHCC for additional need determinations in the next year’s SMFP. *See* Compl. ¶ 99 (incorporating 2020 SMFP into the Complaint); N.C. Gen. Stat. §§ 131E-176(25), 131E-185(a1). Further, anyone interested in revising the SMFP’s policies or methodologies, or seeking adjustments to determinations of need for particular services may submit a petition to the SHCC. 2020 SMFP Excerpts, at 4, 7–12 (attached as Ex. A). These administrative measures allow individuals seeking to provide a new institutional health service to shape the SMFP.

Once the annual SMFP is approved by the Governor, it sets forth “need determinations,” which identify the regions of the state that have a need for certain health services in the coming

year and the services in those regions. The SMFP also provides an application timeline for persons to submit a CON application for those services.

In the event that multiple parties apply for a CON in a single review cycle such that the approval of all applications would exceed the SMFP need determination, the Agency will engage in a comparative analysis of the applications to determine which application or applications will be awarded a CON. *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 385–86 455 S.E.2d 455, 461 (1995). After the Agency issues its decision, affected persons are provided an administrative appeal process and the opportunity for judicial review of the Agency's decision. N.C. Gen. Stat. § 131E-188.

B. The History of North Carolina's CON Law

North Carolina first enacted a CON law in 1971. That version of the law was challenged as violating the State Constitution. *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973). The North Carolina Supreme Court held that North Carolina's original version of the CON law violated the State Constitution's law of the land, anti-monopoly, and exclusive emoluments clauses. *Id.* at 551–52, 193 S.E.2d at 735–36. Plaintiffs rely heavily upon this case but largely ignore the subsequent history.

The next year, in 1974, the United States Congress enacted the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (1975) (repealed 1986). This federal law "requir[ed] a state certificate of need program as a prerequisite to obtaining federal health program financial grants." *Hosp. Grp. of W.N.C., Inc. v. N.C. Dep't of Human Res.*, 76 N.C. App. 265, 267, 332 S.E.2d 748, 750 (1985). The State of North Carolina sued in federal court, arguing that the federal law violated the federal constitution because the CON requirement did not promote a legitimate government interest. *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532, 534–35 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978). A

three-judge panel of the United States District Court for the Eastern District of North Carolina rejected the constitutional challenge, and the United States Supreme Court affirmed. *Id.*; see also *Montgomery County, Md. v. Califano*, 449 F. Supp. 1230, 1247 (D. Md. 1978), *aff'd*, 599 F.2d 1048 (4th Cir. 1979); *Goodin v. Oklahoma ex rel. Oklahoma Welfare Comm'n*, 436 F. Supp. 583, 586 (W.D. Okla. 1977).

In 1977, the North Carolina General Assembly enacted a new CON law. The new CON law more closely tracked the CON laws in other states and differed from the previously rejected law. *Hosp. Grp.*, 76 N.C. App. at 267, 332 S.E.2d at 750; see N.C. Gen. Stat. §§ 131E-175–131E-191.1 (as amended). Unlike the original law struck down in *Aston Park*, the amended version included detailed legislative findings that set out the public need for the law. N.C. Gen. Stat. 131E-175; see *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 583, 398 S.E.2d 466, 473 (1990) (Whichard, J., dissenting on other grounds). As later courts would note, these amendments “mooted” the holding in *Aston Park*. *Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 607, 693 S.E.2d 673, 682–83 (2010), *disc. rev. denied, appeal dismissed*, 364 N.C. 614, 754 S.E.2d 166 (2010) [attached as Ex. B]; *State ex rel. Utilities Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 275, 435 S.E.2d 553, 558 (1993).

Although Congress repealed the federal requirement for state CON laws in 1986, North Carolina (as well as a majority of other states) continues to retain and periodically amend its CON law. Many courts have considered the issue and have found their state's CON laws to be constitutional even after the federal repeal. See, e.g., *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 160 (4th Cir. 2016) [attached as Ex. C]; *Birchansky v. Clabaugh*, 955 F.3d 751, 757–58 (8th Cir. 2020) [attached as Ex. D]; *Women's Surgical Center, LLC v. Berry*, 302 Ga. 349, 355, 806 S.E.2d 606, 612 (2017) [attached as Ex. E]; *Planned Parenthood of Greater Iowa*,

Inc. v. Atchison, 126 F.3d 1042, 1048–49 (8th Cir. 1997); *Miss. State Dep’t of Health v. Sw. Miss. Reg’l Med. Ctr.*, 580 So.2d 1238, 1240 (Miss. 1991); *Madarang v. Bermudes*, 889 F.2d 251 (9th Cir. 1989) [attached as Ex. F]; *Mount Royal Towers, Inc. v. Alabama State Bd. of Health*, 388 So. 2d 1209, 1215 (Ala. 1980) [attached as Ex. G].

North Carolina’s courts have also previously determined that the amended CON law complies with the North Carolina Constitution. In 2009, two physician practices challenged the State’s ability to prohibit those practices from developing new institutional health services (including ambulatory surgical centers) unless they complied with the CON law. *Hope* 203 N.C. App. at 607, 693 S.E.2d at 682. The trial court dismissed the practices’ constitutional claims, and the North Carolina Court of Appeals affirmed unanimously. *Id.* at 608–10, 693 S.E.2d at 683–84. The North Carolina Supreme Court denied discretionary review and dismissed their appeal for failing to raise a “substantial constitutional question.” 364 N.C. 614, 754 S.E.2d 166 (2010).

The *Hope* court analyzed many of the same constitutional provisions raised by Plaintiffs in this case. Relying on *Aston Park*, the *Hope* plaintiffs argued that the agency violated their substantive due process rights under the State Constitution’s Law of the Land Clause. *Id.* at 602, 606, 693 S.E.2d at 680, 682. The court determined that the CON law was an “economic” regulation, which does not implicate a “fundamental right.” *Id.* at 603, 693 S.E.2d at 680. Thus, it was appropriate for the court to defer to the legislature and only ask whether the law was rationally related to a legitimate state interest. *Id.* Under this standard, the court rejected the constitutional challenge. The *Hope* court concluded that the 1977 version of the CON law contained “detailed explanations as to how the requirement of a CON based on need determinations promotes the public welfare.” *Id.* at 607, 693 S.E.2d at 682. These new

legislative findings cured the “deficiencies identified by the Court in *Aston Park*,” rendering the “holding in *Aston Park* [] moot.” *Id.*, 693 S.E.2d at 682–83.

In fact, in a recent similar and unsuccessful challenge to North Carolina’s CON law, a physician and his practice filed a complaint challenging the constitutionality of the CON law. *See Singh v. N.C. Dep’t of Health & Human Servs.*, No. 18 CVS 09498 (Wake Cty. Sup. Ct. Compl. filed July 30, 2018). The *Singh* plaintiffs, represented by the same two law firms as Plaintiffs here, requested a declaration that the CON law, both on its face and *as-applied*, violated certain sections of the North Carolina Constitution, and sought to enjoin the State defendants from implementing, applying, or taking any action whatsoever pursuant to the CON law and regulations promulgated thereunder. The Superior Court dismissed the as-applied constitutional challenges based on a failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs withdrew their appeal and dismissed their entire case.

Plaintiffs’ case here is subject to the same fate because the challenges are a virtually identical attack to the constitutionality of the CON Law. When Plaintiffs’ counsel, the Institute for Justice, lost in *Singh*, the organization immediately recruited another physician to take another bite at the apple. *See* Institute for Justice, North Carolina CON, <https://ij.org/case/north-carolina-con/> (last visited November 30, 2020) (“In the spring of 2020, Dr. Singh had to close his imaging center, in part because of the enormous costs imposed by the CON law. As a result, Dr. Singh’s lawsuit could not continue, but shortly thereafter [the Institute for Justice] joined up with an ophthalmologist from New Bern, NC, to file a new challenge to North Carolina’s CON law.”) The Institute for Justice even describes the current *Singleton* case on its website as “North

Carolina CON II.” See Institute for Justice, <https://ij.org/case/north-carolina-con-ii/> (last visited November 30, 2020).

With respect to the as-applied constitutional challenge in the *Singh* action, “[s]uch a win still could have broader implications for the CON law’s future” and Dr. Singh’s counsel, Joshua Windham, stated that if they won the “as applied” challenge, “[a]t that point, the writing would be on the wall for the CON law. All it would take would be successive plaintiffs to follow up Dr. Singh’s lawsuit with the same legal arguments.” Mitch Kokai, “Wheels of justice hit a rut with challenge of N.C. certificate of need,” *Carolina Journal* (Feb. 20, 2020), available at <https://www.carolinajournal.com/opinion-article/wheels-of-justice-hit-a-rut-with-challenge-of-n-c-certificate-of-need/> (last visited November 30, 2020).

C. Plaintiffs’ Allegations

Plaintiffs here present in the same posture as the *Hope* plaintiffs—they disagree that the CON law serves a rational purpose and wish to establish and develop an ambulatory surgical facility without having to conform to the CON law’s requirements and administrative process. The Complaint alleges that the CON law violates three provisions of the State Constitution: the anti-monopoly, exclusive emoluments, and law of the land clauses. Compl. ¶¶ 130–52. The law of the land clause challenge has previously been decided by our courts in the CON context.

Defendants moved to dismiss the entire Complaint for lack of subject-matter jurisdiction and for failure to state a claim. Amici support Defendants’ motion.

GOVERNING STANDARDS

In their motion, Defendants seek dismissal of Plaintiffs’ constitutional challenges under Rules 12(b)(1) and 12(b)(6).

A. Procedural Standards

Rule 12(b)(1). A motion to dismiss for lack of standing or failure to exhaust administrative remedies is a Rule 12(b)(1) challenge to subject-matter jurisdiction. *E.g., Abrons Family Practice & Urgent Care, PA v. N.C. Dep't of Health & Human Servs.*, 370 N.C. 443, 447, 810 S.E.2d 224, 228 (2018); *In re Wheeler*, 85 N.C. App. 150, 152, 354 S.E.2d 374, 376 (1987). The parties invoking jurisdiction—here, Plaintiffs—bear the burden of establishing it. *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007). To decide whether Plaintiffs have met this burden, the Court may consider matters outside the pleadings. *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 491, 598 S.E.2d 667, 670 (2004).

Rule 12(b)(6). The State's motion also seeks to dismiss the complaint for failure to state a claim. A complaint should be dismissed under Rule 12(b)(6) when any of three things is true: (1) no law supports the plaintiff's claim, (2) the complaint does not plead enough facts to state a legally sound claim, or (3) the complaint discloses a fact that defeats the plaintiff's claim. *Oates v. Jag, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). When a court reviews a complaint under Rule 12(b)(6), it does not pierce the factual allegations in the complaint, but it is free to disregard the complaint's legal conclusions, "unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (quoting *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 226, 274, 620 S.E.2d 873, 880 (2005)).

In addition to the complaint, a reviewing court may also consider other documents that are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001). Here, the Complaint references and quotes the 2020 State

Medical Facilities Plan (2020 SMFP). *See* Compl. ¶ 99. Therefore, it is proper for this Court to consider this document when resolving the motion under Rule 12(b)(6).

B. Standards for Constitutional Challenges

Here, Plaintiffs have brought an as-applied challenge under the State Constitution. “An as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable.” *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015), *rev’d on others grounds and remanded*, 137 S. Ct. 1730 (2017).

As-applied constitutional challenges face an uphill battle because North Carolina courts consider constitutional challenges with “a presumption in favor of the constitutionality of a statute.” *Gardner v. Reidsville*, 269 N.C. 581, 594, 153 S.E.2d 139, 150 (1967). Although courts have the power to declare an act unconstitutional, “it must be plainly and clearly the case.” *Id.*, 153 S.E.2d at 150 (quoting *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 892 (1961)). “If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.” *Gardner*, 269 N.C. at 594, 153 S.E.2d at 150 (quoting *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 892); *accord Hart v. State of North Carolina*, 368 N.C. 122, 131, 774 S.E.2d 281, 287 (2015); *Rockford-Cohen Grp., LLC v. N.C. Dep’t of Ins.*, 230 N.C. App. 317, 320, 749 S.E.2d 469, 472 (2013).

This presumption of constitutionality is especially true in the realm of economic rights and economic policy, since “it is the function of the Legislature, not of the courts, to determine the economic policy of the State and this Court may not properly declare a statute invalid merely because the Court deems it economically unwise.” *Bulova Watch Co., Inc. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 477, 206 S.E.2d 141, 149 (1974); *see also Colon Health Ctrs.*, 813 F.3d at 158 (rejecting a constitutional challenge to Virginia’s CON law, and noting

that courts no longer “rigorously scrutinize economic legislation and presume to make such binding judgments for society. . . . [U]nder rational basis review, reasonable debates such as this one are resolved in favor of upholding state laws.”) (internal quotations and citation omitted).¹

ARGUMENT

This Court need not reach the merits of Plaintiffs’ claims. This Court lacks subject-matter jurisdiction as Plaintiffs have made no attempt to exhaust the administrative remedies available to them and have failed to plead any reason for not exhausting these remedies. Further, Plaintiffs’ claims are not ripe as the harm they allege is speculative. If this Court does consider Plaintiffs’ claims, dismissal is also appropriate because all of Plaintiffs’ claims have previously been explicitly or implicitly rejected by the North Carolina Court of Appeals. Plaintiffs present no argument for why this case should not be dismissed in the same way this Court dismissed the claims in *Singh*. Therefore, Plaintiffs have failed to state a claim.

I. Plaintiffs Have Failed to Exhaust Their Administrative Remedies.

Plaintiffs’ case should be dismissed because they have failed to exhaust the administrative remedies available to them before filing this action. North Carolina courts have

¹ Plaintiffs’ brief ignores this deferential standard—and accompanying presumption of constitutionality—for economic policy such as the North Carolina CON statute. Instead, Plaintiffs cite to the totally inapposite case of *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). *Grady* is a Fourth Amendment search and seizure case, with a much higher standard of scrutiny. For example, the *Grady* Court underscored that “we start with the ‘basic Fourth Amendment principle’ that warrantless searches are presumptively unreasonable” (*Grady*, 372 N.C. at 524, 831 S.E.2d at 555, citing to *United States v. Karo*, 468 U.S. 705, 714–15, 104 S. Ct. 3296, 82 L.Ed.2d 530 (1984)), and thus the party advocating the warrantless search has the burden to show the need for it. *Grady*, 372 N.C. at 524, 831 S.E.2d at 555. Thus, in the Fourth Amendment context, the statutory basis for privacy right intrusions (and the statutory findings supporting such provisions) are far more highly scrutinized than CON statutes (as economic regulations), which are presumed to be reasonable under the deferential rational basis test, as set forth herein.

long recognized the judicial doctrine that a plaintiff must exhaust available administrative remedies before seeking judicial intervention by the courts. *See, e.g., Marion Mfg. Co. v. Bd. of Comm'rs of McDowell Cty.*, 189 N.C. 99, 126 S.E. 114, 116 (1925). Failure to exhaust administrative remedies deprives the court of subject-matter jurisdiction. *See Pender v. N.C. Dep't of Transp.*, 792 S.E.2d 187, 188 (N.C. Ct. App. 2016). Although the administrative remedy must be adequate, “[t]he burden of showing inadequacy is on the party claiming inadequacy, who must include such allegations in the complaint.” *Jackson v. N.C. Dep't of Health Res.*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 903–04 (1998) (emphasis added); *see Huang v. N.C. State Univ.*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992). “The party claiming excuse from exhaustion bears the burden of alleging both the inadequacy and the futility of the available administrative remedies.” *Abrons Family Practice & Urgent Care, PA v. N.C. Dep't of Health & Human Servs.*, 370 N.C. 443, 451, 810 S.E.2d 224, 231 (2018).

In this case, the stated purpose for Plaintiffs’ complaint is for Dr. Singleton to be able to provide outpatient eye surgeries, full time, to all of his patients at the Singleton Vision Center, PA. Compl. ¶ 21. Plaintiffs identify as the sole barrier to achieving this goal the lack of a Certificate of Need. *Id.* ¶¶ 32–35. Plaintiffs do not complain about the other restrictions on being able to provide surgical services, such as the need for the surgeon to be licensed and for the operating room to be accredited and licensed and indeed acknowledges the need for them. *Id.* ¶¶ 1, 18, 27–29. Dr. Singleton would almost certainly protest if an unlicensed surgeon moved next door to his Center and started offering the same procedures at a discounted rate.

Plaintiffs’ case is therefore based on the presumption that because they do not have a Certificate of Need to run an operating room that the law requiring a Certificate of Need must be unconstitutional. This presumption requires a logical leap that reveals why this Court lacks

jurisdiction over Plaintiffs' claims. While it is true that Plaintiffs do not have a Certificate of Need, they have not done anything to attain one. *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 534, 571 S.E.2d 52, 58 (2002) (“[F]utility cannot be established by plaintiffs’ prediction or anticipation that the [agency] would . . . rule adversely to plaintiffs’ interests.”).

The public record reveals that Plaintiffs have never sought a Certificate of Need. Plaintiffs’ brief argues that they have not applied for a Certificate of Need because there has not been a need determination for a new operating room in Dr. Singleton’s geographic area. Pls.’ Br. 12. As the Complaint states: “Because the planners have projected no ‘need’ for a new surgical facility in Dr. Singleton’s area through at least 2022 (and for at least the previous decade), Dr. Singleton is banned.” *Id.* ¶ 2. This statement reveals Plaintiffs’ willful misstatement or ignorance of the dynamic and public health care planning process in North Carolina.

Contrary to Plaintiffs’ allegation, Certificates of Need are not simply doled out by “central planners.” The State Health Coordinating Council (“SHCC”), which is responsible for the development of the State Medical Facilities Plan (“SMFP”), is made up of representatives of different constituencies from across North Carolina. Throughout the development of the SMFP, the SHCC provides opportunities for public review, comment, and input. Ex. A, at 5–6. Every year, the SHCC holds a public hearing to receive comments and petitions for changes in basic policies and methodologies for projecting need. *Id.* at 11–12. Sections of the plan, including the policies and methods for projecting need, are developed with the assistance of the SHCC subcommittees. During each SMFP planning year, anyone wishing to develop or acquire a CON-covered health care service or asset may petition the SHCC to either modify the statewide need methodology for that asset or, alternatively, petition the SHCC to identify a need in a

particular service area even if the standard planning methodology doesn't otherwise show a "need." A proposed plan is assembled and made available to the public. The SHCC then holds public hearings on the proposed plan throughout the state. *Id.* at 4. Comments and petitions received during this public hearing period are considered by the SHCC. Any changes are incorporated into a recommended proposed plan, which is then presented to the Governor for review and approval. *Id.*

The health planning process at issue is not the rigid, bureaucratic process that Plaintiffs characterize it to be. Instead, the process is flexible and driven by public input. In the recent past, the health planning process has led to many changes to the methodology and to policies that have allowed providers to pursue a Certificate of Need. Before filing this action, Plaintiffs have not pursued any available administrative remedy nor have they explained in their Complaint why they should not have to do so. Plaintiffs have not petitioned the SHCC for a methodology change or adjusted need determination to seek an available CON for an operating room in their service area. *Id.* at 7–10. Such petitions could have provided the relief that plaintiffs are seeking in this case—to be able to run an operating room. Plaintiffs also have not applied for a CON. If their application were denied, Plaintiffs would then have the right to appeal the denial to the North Carolina Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 131E-188. Such a contested case would include the ability for Plaintiffs to challenge the denial as exceeding the Agency's authority or jurisdiction and failing to act as required by law, including the North Carolina constitution. *See* N.C. Gen. Stat. § 150B-23(a). The final decision would then be subject to judicial review by the North Carolina Court of Appeals.

Plaintiffs took none of these actions. In their Complaint, Plaintiffs actually allege arguments for why they should be granted an adjusted need determination or policy change.

Paragraph 107 states:

[I]f Dr. Singleton was permitted to run a “formal” surgery program at the Center, the program would:

- Provide high-quality outpatient eye surgeries consistent with the standard of care;
- Be used to provide more affordable outpatient eye surgeries than those offered by established providers (i.e., CarolinaEast) in the area;
- Be open to all of Dr. Singleton’s patients and the broader public, including low-income, minority, handicapped, elderly, and other underserved patients;
- Be the Center’s least costly and most effective means of providing the services;
- Be adequately financed and staffed for as long as the Center operated it;
- Be fully compliant with all relevant local, state, and federal laws and regulations (besides the CON law, which this lawsuit is challenging);
- Promote increased competition for outpatient eye surgeries in the Craven/Jones/Pamlico planning area and beyond, thereby reducing the cost of procedures for North Carolina patients and their insurance providers (public and private).

Compl. ¶ 107. Putting aside the truth or merits of these naked allegations, these and other factors should be considered through the existing administrative process, not immediately brought before this Court. For example, the current planning process specifically authorizes petitions for adjusted need determinations, by “[p]eople who believe that unique or special attributes of a particular geographic area or institution give rise to resource requirements that differ from those provided by application of the standard planning procedures[.]” Ex. A, at 9.

Such petitions are to include the reasons for the proposed adjustment. Thus, there is an established administrative avenue for the Plaintiffs to make these arguments and seek an opportunity to apply for a CON.

If the Court were to entertain these types of arguments, it would put North Carolina Superior Courts in the unenviable position of judicially reviewing Certificate of Need applications or SMFP petitions for hundreds of other providers that may be interested in growing or expanding certain health care services. The existing administrative process ably handles these types of requests.

In their complaint, Plaintiffs state that they prefer not to go through the CON application process because they contend it is expensive, competitive, and may be litigious. Compl. ¶¶ 70–87. However, Plaintiffs make no attempt to plead inadequacy of the administrative remedies available to enable the Plaintiffs to run an operating room. It is too late to do so now. *Jackson*, 131 N.C. App. at 186, 505 S.E.2d at 903–04 (“The burden of showing inadequacy is on the party claiming inadequacy, who must include such allegations in the complaint.”).

Even if this Court were to look at whether the available administrative remedies were inadequate, the North Carolina Court of Appeals has previously rejected a health care provider’s constitutional claims related to the CON law for failing to exhaust administrative remedies under the North Carolina Administrative Procedure Act. *Good Hope Hosp.*, 174 N.C. App. at 271, 620 S.E.2d at 879. Similar to Plaintiffs here, the *Good Hope* plaintiffs raised constitutional claims against State officials for their enforcement of the CON law. In *Good Hope*, plaintiffs also sought administrative review under the Administrative Procedure Act but claimed that the remedies were inadequate. The *Good Hope* court held that it lacked subject-matter jurisdiction because the plaintiffs had failed to exhaust their administrative remedies. *Id.* at 271, 620 S.E.2d

at 879; *see also* *N. Buncombe Ass'n of Concerned Citizens, Inc. v. Rhodes*, 100 N.C. App. 24, 31, 394 S.E.2d 462, 467 (1990); *Murphy v. McIntyre*, 69 N.C. App. 323, 328, 317 S.E.2d 397, 400 (1984). Consistent with these binding precedents and with the exhaustion of administrative remedies doctrine, Plaintiffs' claims should be dismissed for failure to exhaust their administrative remedies.

Plaintiffs make no attempt to distinguish *Good Hope* and instead cite *Hospital Group of Western North Carolina, Inc. v. North Carolina Department of Human Resources*, 76 N.C. App. 265, 332 S.E.2d 748 (1985), for the proposition that the only way to challenge the constitutionality of the CON law is to file an action under the Declaratory Judgment Act and that therefore relieves challengers of the exhaustion requirement. The Court of Appeals' opinion in *Hospital Group*, however, merely rejected a constitutional challenge for not being raised under the Declaratory Judgment Act; it does not address the exhaustion requirement at all. If anything, it suggests otherwise because it requires an action under the Declaratory Judgment Action "by a person directly and adversely affected thereby." *Id.* at 268, 332 S.E.2d at 751. By failing to exhaust the available administrative remedies, Plaintiffs are unable to even show that they have directly and adversely been affected by the CON procedure.

II. Plaintiffs' Claims Are Not Ripe.

"There is a justiciable controversy if litigation over the matter upon which declaratory relief is sought appears unavoidable." *Ferrell v. Department of Transp.*, 334 N.C. 650, 656, 435 S.E.2d 309, 313 (1993). An action for declaratory judgment is ripe for adjudication when "there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *Andrews v. Alamance Cty.*, 132 N.C. App. 811, 813-14, 513 S.E.2d 349, 350 (1999). The ripeness doctrine is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies,

and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 732–33 (1998) (citation and internal quotation marks omitted).

Here, Plaintiffs’ claims are speculative and not ripe for review. Plaintiffs have not sought adjustments to the SMFP, have not applied for a CON, and have not challenged any such denial (if a denial were even to be issued). Instead, Plaintiffs assume—without any support or even argument—that a petition or application would be rejected. Pls.’ Br. 12.

Plaintiffs are asking this court to throw out the CON law as applied to them without ever having demonstrated that they have been or would be harmed by seeking a CON to run an operating room.

III. Binding Precedent Requires Dismissal of Plaintiffs’ Substantive Due Process Claim.

When the Court of Appeals upheld the constitutionality of the CON Law in *Hope*, it held that the law passes rational basis review. 203 N.C. App. at 605–07, 693 S.E.2d at 681–83. That holding—which binds this Court—disposes of the plaintiffs’ substantive due process challenge.

A. *Hope* already rejected a challenge under the law of the land clause.

When the *Hope* court upheld the constitutionality of the CON law, its opinion was primarily dedicated to the *Hope* plaintiff’s *as-applied challenge* under the state constitution’s law of the land clause. 203 N.C. App. at 602–07, 693 S.E.2d at 679–83. The law of the land clause is our State Constitution’s analogue to the due process clauses of the federal constitution. *See Poor Richard’s, Inc. v. Stone*, 322 N.C. 61, 64, 67, 366 S.E.2d 697, 699, 700 (1988) (“For the reasons we have already given in our state constitutional analysis [of the law of the land clause], we conclude that the statute bears a rational relation to a legitimate state objective; therefore it does not contravene the Due Process Clause of the Fourteenth Amendment.”).

The rights protected by the law of the land clause do not stop “the state, through the exercise of its police power, [from] regulat[ing] economic enterprises provided the regulation is rationally related to a proper governmental purpose.” *Hope*, 203 N.C. App. at 603, 693 S.E.2d at 679 (quoting *Poor Richard’s*, 322 N.C. at 64, 366 S.E.2d at 699). This analysis is otherwise known as the “rational basis” test. *N.C. Bd. of Mortuary Sci. v. Crown Mem’l Park, LLC*, 162 N.C. App. 316, 318, 590 S.E.2d 467, 469 (2004). The rational basis test, as applied to the CON law, asks two questions: “(1) whether there exists a legitimate governmental purpose for the creation of the CON law and (2) whether the means undertaken in the CON law are reasonable in relation to this purpose.” *Hope*, 203 N.C. App. at 603, 693 S.E.2d at 679.

The *Hope* court answered both questions in the affirmative regarding the CON law. The General Assembly desired “to ensure that citizens have affordable access to necessary health care,” which “is a legitimate goal.” *Id.* at 605, 693 S.E.2d at 681. The *Hope* court held that the General Assembly had a “reasonable belief that this goal would be achieved by allowing approval of new institutional health services only when a need for such services had been determined.” *Id.* Therefore, the *Hope* court rejected the plaintiff’s *as-applied challenge* under the law of the land clause.

The Plaintiffs contend that a slight difference in the application of rational basis review under the due process clause of the Fourteenth Amendment and the law of the land clause of the North Carolina Constitution warrants a different result here. This is simply not the case. Ultimately, “these constitutional protections have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises *provided the regulation is rationally related to a proper governmental purpose.*” *Poor Richard’s*, 322 N.C. at 64, 366 S.E.2d at 699 (emphasis added). The North Carolina courts have already examined the

CON law under the law of the land clause, determined that it is reasonably related to a proper governmental purpose, and held that it was constitutional. *Hope*, 203 N.C. App. at 606, 693 S.E.2d at 682. Any slight differences in the application of the rational basis test under the law of the land clause and the due process clause of the Fourteenth Amendment already have been addressed and decided by the courts of North Carolina in favor of the constitutionality of the CON law.

In this case, the Plaintiffs are making the same challenge to the CON law that the Court of Appeals has already rejected. If the Plaintiffs do not like the *Hope* Court's decision, they must seek review by the Supreme Court. This Court and the Court of Appeals are both bound by that precedent.

Plaintiffs' as-applied constitutional challenges here, regardless of how Plaintiffs' counsel tries to package them, are subject to and governed by the same precedent set forth in *Hope* and must be dismissed.

B. Rational bases exist to support the CON law.

North Carolina's appellate courts have adopted the deferential rational basis test from federal constitutional law when considering challenges to economic regulations brought under the law of the land clause of the North Carolina Constitution. When a law does not involve inherently suspect classification or fundamental rights, it is only subject to rational basis review. *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam'rs*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978). So, even if the binding precedent in *Hope* did not exist, Plaintiffs' challenge in this case would fare no better. The North Carolina General Assembly made extensive findings of fact about the CON law, codified at N.C. Gen. Stat. § 131E-175, which express multiple rational

bases supporting the CON review process. These findings of fact include, for example, the following:

- “[T]he financing of health care, particularly the reimbursement of health services rendered by health service facilities, limits the effect of free market competition and government regulation is therefore necessary to control costs, utilization, and distribution of new health service facilities...” N.C. Gen. Stat. § 131E-175(1).
- “[T]he increasing cost of health care services offered through health service facilities threatens the health and welfare of the citizens of this State in that citizens need assurance of economical and readily available health care.” N.C. Gen. Stat. § 131E-175(2).
- “[I]f left to the market place to allocate health service facilities and health care services, geographical maldistribution of these facilities and services would occur and, further, less than equal access to all population groups, especially those that have traditionally been medically underserved, would result.” N.C. Gen. Stat. § 131E-175(3).
- “[A]ccess to health care services and health care facilities is critical to the welfare of rural North Carolinians, and to the continued viability of rural communities, and that the needs of rural North Carolinians should be considered in the certificate of need review process.” N.C. Gen. Stat. § 131E-175(3a).
- “[T]he proliferation of unnecessary health service facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services.” N.C. Gen. Stat. § 131E-175(4).
- “[E]xcess capacity of health service facilities places an enormous economic burden on the public who pay for the construction and operation of these facilities as patients, health insurance subscribers, health plan contributors, and taxpayers.” N.C. Gen. Stat. § 131E-175(6).

Accordingly, to support the health and general welfare of North Carolina’s citizens, the General Assembly authorized the CON review process, directing the Agency to evaluate proposals “as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria as determined by [the CON law] or by the North Carolina Department of Health

and Human Services pursuant to the provisions of this Article prior to such services being offered and developed.” N.C. Gen. Stat. § 131E-175(7).

The review criteria established in the CON law closely hew to the legislative purposes set forth in section 131E-175. These criteria assess, for example, whether a proposed project is consistent with the need determinations and policies set forth by the State in the SMFP, whether the project is needed for the population it is intended to serve, whether it supports medically underserved groups, whether it is financially feasible, whether it would not unduly increase the cost of health care services, and whether the applicant has a history of providing quality health care services. *See* N.C. Gen. Stat. §131E-183(a). The General Assembly has established rational bases for the CON law, and the Agency’s review process supports those bases. If this Court finds that the constitutionality of the CON law depends upon the “existence or nonexistence of certain facts or circumstances,” it is this Court’s duty to assume all reasonable facts or circumstances “to give validity to the statute.” *Hart*, 368 N.C. at 131, 774 S.E.2d at 288.

Further, federal and state courts have upheld other states’ CON programs based on nearly identical legitimate interests. *See, e.g., Birchansky*, 955 F.3d at 757–58 (stating that “insulating existing entities from new competition in order to promote quality services and protect infrastructural investment can survive rational basis review” and holding, in an *as-applied challenge*, that Iowa’s CON requirement is rationally related to a legitimate state interest); *Colon Health Ctrs.*, 813 F.3d at 156 (upholding Virginia’s CON program, where the State articulated that the CON program enhanced healthcare quality, supported underserved and indigent populations, incentivized health services to be located in disadvantaged or rural areas, supported safety net hospitals, and reduced capital costs of medical services); *Women’s Surgical Center*, 302 Ga. at 355, 806 S.E.2d at 612 (upholding Georgia’s CON law against substantive due

process challenge because it served legitimate legislative purposes, including “promoting the available of quality health care services” and “ensuring geographically convenient access to healthcare ... at a reasonable cost.”); *Planned Parenthood of Greater Iowa*, 126 F.3d at 1048–49 (holding that Iowa’s CON law serves legitimate state interests); *Madarang*, 889 F.2d at 251 (holding, in an *as-applied challenge*, that the Commonwealth of Northern Mariana Islands’ CON law furthered a legitimate interest in preventing the establishment of unneeded health care facilities).

In an apparent attempt to suggest that the tide is turning away from courts upholding the constitutionality of state CON laws and towards striking them down, Plaintiffs make a fleeting reference via a footnote in their brief to the decision in *Tiwari v. Friedlander*, 2020 WL 4745772 (W.D. Ky. Aug. 14, 2020). *See* Pls.’ Br. 23. Plaintiffs cite this case in support of their arguments that the North Carolina CON law is not constitutional as applied to them. Not surprisingly, the Plaintiffs’ only cite this case in a footnote because it is not applicable to the current case before this Court. The court’s decision in *Tiwari* involved a motion to dismiss addressing the constitutionality of the Kentucky CON law and its application to a unique and limited subset of the healthcare provider population – a home health agency providing in home services to a unique Nepali speaking population. *Tiwari* involves a limited decision on a narrow set of facts that do not exist here. Moreover, that case is an outlier. The vast majority of courts faced with claims like those of Plaintiffs in this case have rejected those claims and upheld the constitutionality of state CON laws. *See, e.g., Birchansky*, 955 F.3d at 757–58; *Colon Health Ctrs.*, 813 F.3d at 156; *Women’s Surgical Center*, 302 Ga. at 355, 806 S.E.2d at 612; *Planned Parenthood of Greater Iowa*, 126 F.3d at 1048–49; *Madarang*, 889 F.2d at 251.

For these reasons, the CON law is rational, economic legislation aimed at improving the quality of health care and decreasing its cost in North Carolina. Plaintiffs may believe that the legislation does not adequately achieve its policy goals, but the CON law “need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.” *Dixon v. Peters*, 63 N.C. App. 592, 601, 306 S.E.2d 477, 483 (1983) (quoting *Williamson v. Lee Optical*, 348 U.S. 483 487–88 (1955)); *accord Hope*, 203 N.C. App. at 603, 693 S.E.2d at 680. Further, the General Assembly remains empowered to amend or repeal the CON law should it decide that changes are needed to achieve the aims of improving the cost, quality, and access to health care services, including to rural and underserved groups.² “Legislators, not jurists, are best able to compare competing economic theories and sets of data and then weigh the result against their own political valuations of the public interests at stake.” *Colon Health Centers*, 813 F.3d at 158.³

² In fact, the North Carolina General Assembly has continued to evaluate and update the CON statute to keep up with changing times. Section 131E-176 of the CON statute alone has been amended on 21 separate occasions since the current statute’s 1977 enactment. The most recent amendments occurred in 2018 and 2019. *See* 1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, ss. 1, 2; c. 1127, ss. 24-29; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1002, ss. 1-9; c. 1022, ss. 2, 3; c. 1064, s. 1; c. 1110, ss. 1, 2; 1985, c. 589, ss. 42, 43(a); c. 740, ss. 1, 2, 6; 1985 (Reg. Sess., 1986), c. 1001, s. 2; 1987, c. 34; c. 511, s. 1; 1991, c. 692, s. 1; c. 701, s. 1; 1993, c. 7, s. 2; c. 376, ss. 1-4; 1997-443, s. 11A.118(a); 2000-135, ss. 1, 2; 2001-234, s. 2; 2001-242, ss. 2, 4; 2003-229, s. 13; 2003-390, ss. 1, 2; 2005-325, s. 1; 2005-346, s. 6(a)-(d); 2009-145, s. 2; 2009-462, s. 4(k); 2013-360, s. 12G.3(a); 2015-288, s. 1; 2018-81, s. 3(a); 2019-76, s. 19. Moreover, the CON statute’s Findings of Fact (in Section 131E-175) have been amended seven separate times. *See* 1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 1; 1983, c. 775, s. 1; 1987, c. 511, s. 1; 1993, c. 7, s. 1; 1997-443, s. 11A.118(a); 2001-234, s. 1; 2005-346, s. 5.

³ Plaintiffs’ counsel’s own web site rails against the rational basis test, while acknowledging the deference due legislation under that standard and that statutory findings need not be proven: “What makes the [rational basis test] so toothless? The Supreme Court has stated that under rational basis review, the government’s true ends in passing a given law are ‘entirely irrelevant’ and those laws may be based on ‘rational speculation unsupported by evidence or empirical data.’ Those seeking to challenge a law under rational basis review must ‘negative every

C. Controlling authority

To the extent that Plaintiffs contend that this authority does not control or mandate dismissal of this case, Plaintiffs are mistaken for the following reasons:

- *Hope*, the seminal case, addressed an *as-applied* substantive due process constitutional challenge to the CON law and held that the CON law passed constitutional muster. *Hope*, 203 N.C. App. at 606, 693 S.E.2d at 682. In addition, *Hope* addressed *Aston Park* and stated that “as this Court has already noted, the holding in *Aston Park* is moot, and [the *Hope*] plaintiffs’ reliance thereon is misplaced.” *Id.* at 607, 693 S.E.2d at 683.
- Notwithstanding the holding in *Hope* that the CON law is constitutional, and that the holding of *Aston Park* is moot, Plaintiffs’ continue to assert that the current CON law is “indistinguishable from the one struck down in *Aston Park*.” Pls.’ Br. 23. However, much like all their arguments in this case, this issue has been addressed by the courts of North Carolina and has been decided against them. Specifically, the *Hope* court addressed the CON law and stated “[t]he current CON law is *distinguishable* from the one invalidated in *Aston Park*.” *Hope*, 20 N.C. App. at 607, 693 S.E.2d at 682 (emphasis added).
- In order for Plaintiffs to prevail on an as-applied constitutional challenge, they must show that they are somehow unique so that the application of an otherwise enforceable statute is unconstitutional as-applied to them. The Plaintiffs have made no such allegations and cannot do so here.

conceivable basis’ for the government’s actions, even ones that are purely speculative or hypothetical. If the court can imagine a ‘legitimate’ interest that might be served by the challenged law, that’s enough to uphold it.” *The Notorious RBT (Rational Basis Test)*, <https://ij.org/center-for-judicial-engagement/programs/the-notorious-rbt-rational-basis-test/> (last visited Nov. 30, 2020).

- The Plaintiffs allege the following: that they are seeking to obtain a CON covered asset – a new surgical facility; that the SMFP has not projected a need for a CON covered asset in Plaintiffs’ service area for the current year; and that the SMFP has not projected a need for a CON covered asset for a number of years. These allegations do not make Plaintiffs unique because the vast majority of healthcare providers in this State also fall into this category.
- As set out previously, the Wake County Superior Court in *Singh* dismissed a virtually identical as-applied substantive due process constitutional challenge to the CON law based on a failure to state a claim.

For all reasons stated herein and the binding precedent from *Hope*, the Plaintiffs’ substantive due process challenge must be dismissed.

IV. The CON Law Does Not Violate the Anti-Monopoly or Exclusive Emoluments Clauses.

Plaintiffs attempt to distinguish *Hope* by arguing that *Hope* did not involve anti-monopoly or exclusive emoluments claims. Pls.’ Br. 15. However, any such distinction is meaningless because the same rational basis test set out in Section III applies to claims under the state’s anti-monopoly and exclusive emoluments clauses. Thus, the CON law likewise does not violate these clauses.

Constitutional challenges brought under the anti-monopoly and exclusive emoluments clauses rise and fall together. North Carolina’s courts have concluded that, if legislation does not violate one of the clauses, it also does not violate the other. *See, e.g., Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 653, 386 S.E.2d 200, 211 (1989); *State v. Warren*, 252 N.C. 690, 697, 114 S.E.2d 660, 666 (1960); *Roller v. Allen*, 245 N.C. 516, 525, 96 S.E.2d 851, 859

(1957); *State v. Felton*, 239 N.C. 575, 582, 80 S.E.2d 625, 631 (1954); *Whaley v. Lenoir Cty.*, 5 N.C. App. 319, 329, 168 S.E.2d 411, 417 (1969).

A. The anti-monopoly and exclusive emoluments clauses call for rational basis review.

These two clauses are governed by the same rational basis test that applies to due process and equal protection challenges. *Aston Park* itself teaches this principle. After *Aston Park* completed its rational basis analysis under the law of the land clause, it automatically concluded that the prior CON law violated the anti-monopoly and exclusive emoluments clauses. 282 N.C. at 551, 193 S.E.2d at 735–36.

Aston Park was not breaking new ground. Three of the cases upon which it relied had also applied the rational basis test to challenges under the anti-monopoly and exclusive emoluments clauses:

- “If the Act is defective, as we think it is, in failing to disclose a justifiable relation to a reasonably necessary public purpose, it is clearly a monopoly offensive to Art. I, Section 31, of the Constitution.” *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 864 (1940).
- “[The law] unreasonably obstructs the common right of all men to choose and follow one of the ordinary lawful and harmless occupations of life as a means of livelihood, and bears no rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare.” *State v. Ballance*, 229 N.C. 764, 772, 51 S.E.2d 731, 736 (1949) (holding that the challenged occupational licensing law violated the anti-monopoly clause).
- “The Act in question here has as its main and controlling purpose not health, not safety, not morals, not welfare, but a tight control of tile contracting in perpetuity by those already in the business.” *Roller v. Allen*, 245 N.C. 516, 525–26, 96 S.E.2d 851, 859 (1957) (holding that the challenged occupational licensing law violated the anti-monopoly clause).

Aston Park relied upon each of these three cases. 282 N.C. at 550–51, 193 S.E.2d at 735.

In fact, a later decision from the North Carolina Supreme Court interpreted *Aston Park* as having performed a rational basis review for the due process and anti-monopoly challenges. *Am. Motors*

Sales Corp. v. Peters, 311 N.C. 311, 320, 317 S.E.2d 351, 358 (1984) (“Our decision [in *Aston Park*] turned on the absence of a rational relationship between the required certificate of need and any public good or welfare consideration.”); *see also Affordable Care, Inc. v. N.C. State Bd. of Dental Exam’rs*, 153 N.C. App. 527, 536, 571 S.E.2d 52, 59 (2002) (“[*Aston Park*] establishes [that] the appropriate analysis is the rational relation test.”).

Our appellate courts have also made clear that the rational basis test applies to claims under the exclusive emoluments clause. *See, e.g., State ex rel. Martin v. Preston*, 325 N.C. 438, 456, 385 S.E.2d 473, 483 (1989) (“[A] statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, section 32, if: (1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.”); *accord City of Asheville v. State*, 192 N.C. App. 1, 46, 665 S.E.2d 103, 134 (2008).

As these cases show, the proper inquiry under the anti-monopoly and exclusive emoluments clauses is the rational basis test. That is the same inquiry required by the law of the land and equal protection clauses. Because *Hope* has already determined that the current version of the CON law passes rational basis scrutiny, Plaintiffs’ anti-monopoly and emoluments challenges automatically fail.

B. The CON Law does not otherwise create a monopoly or convey exclusive emoluments.

Alternatively, the purpose and effect of the CON law passes constitutional muster because it is clear from the documents referenced in Plaintiffs’ own Complaint that the CON law has not resulted in an unconstitutional monopoly or exclusive emolument.

1. The CON law is not a surrender of the legislature's power to regulate private entities.

The framers of our state constitution included these clauses to prevent the legislature from “depriv[ing] itself of the power of providing for the future necessities of the people, and thus disarm[ing] themselves of the powers necessary to accomplish the ends of their creation.” *Thrift v. Bd. of Comm'rs of Town of Elizabeth City*, 122 N.C. 31, 30 S.E. 349, 351–52 (1898) (citation omitted). The purpose of these clauses “was not to prevent ‘the community’ from exercising legislatively authorized powers to operate public enterprises but to prevent ‘the community’ from surrendering its power to another ‘person or set of persons’ by grant of exclusive or separate emoluments or privileges.” *Madison Cablevision*, 325 N.C. at 655, 386 S.E.2d at 212. It is the legislature’s “alienation of powers that is prohibited” by these clauses, not the government’s “retention of powers.” *Id.*

The CON law does not alienate any power of the government. To the contrary, the State has retained exclusive authority to determine when and where CON-regulated services are needed throughout the state, and to assess proposals for new institutional health services to ensure that any such proposals are appropriate and needed. N.C. Gen. Stat. § 131E-177(1), (4), (6). Similarly, while competing applicants and the public have a right to comment on or oppose CON applications, the Agency retains the sole authority to grant or deny CON applications based on its assessments of these proposals. *Id.* §§ 131E-185(a1), -186. The Agency monitors the progress of projects and ensures that projects materially comply with the representations in the application. *Id.* §§ 131E-189, -190. Further, the State has the authority to police the offering and development of projects to ensure they comply with the requirements of a CON, and in the event of violations can withhold federal and State funds, revoke CONs or licenses, and impose civil monetary penalties. *Id.* § 131E-190(d), (e), (f).

2. *The CON law does not create a monopoly.*

In addition, the CON law does not satisfy the required elements for a monopoly in a private market. After *Aston Park*, the North Carolina Supreme Court decided the four elements of an unconstitutional monopoly: “(1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted and (4) the monopolist controls prices.” *Am. Motors Sales*, 311 N.C. at 316, 317 S.E.2d at 356. This analysis is guided by “economic considerations,” with an eye toward determining whether “[t]he result is public harm through the control of prices of a given commodity.” *Id.* at 315–19, 317 S.E.2d at 355. A challenger must prove these elements whenever legislation “affect[s] a private market.” *Rockford-Cohen Grp.*, 230 N.C. App. at 321, 749 S.E.2d at 473.⁴

In *American Motors Sales*, the North Carolina Supreme Court upheld a decision by the Commissioner of Motor Vehicles to revoke a Jeep dealership franchise, permitting only a single Jeep franchise to operate in an area that comprised Wilkes County in its entirety and parts of Surry and Alleghany Counties. *Am. Motors Sales*, 311 N.C. at 316, 317 S.E.2d at 356. The court held in part that the market was defined not by arbitrary borders, but rather proximity to customers:

While [the sole franchisor’s] franchise agreement gives him control of AMC Jeeps in this trade area, we hardly consider it to constitute the “market” as that term is used in our definition of a monopoly. In order to monopolize, one must control a consumer’s access to new goods by being the only reasonably available source of those goods. A consumer must be without reasonable recourse to elude the monopolizer’s reach. Logically, then, the market encompasses geographically at least all areas within reasonable proximity of potential customers. Thus, the AMC Jeep market for a resident of the North Wilkesboro Market Area extends beyond those arbitrary lines set by [the Franchisor].

⁴ By contrast, when legislation converts a “common right,” such as the right to engage in a particular occupation, into an “exclusive right,” courts have applied a different analysis. *Rockford-Cohen Grp.*, 230 N.C. App. at 321–24, 749 S.E.2d at 473–74.

Id. at 316, 317 S.E.2d at 356.

The circumstances here are analogous. Although Plaintiffs are correct that there is only one surgical provider (Carolina East) with licensed ORs in the *Craven/Jones/Pamlico service area*, there is no requirement (under the CON Act or otherwise) that patients needing surgical procedures must use a facility in the county or service area where they live. Further, Dr. Singleton is an ophthalmologist wishing to provide “eye surgeries (e.g., cataract, glaucoma, intraocular lens).” Compl. ¶ 11. Plaintiffs do not allege or suggest that eye surgery patients would be unable to reach a hospital or ambulatory surgical facility in a neighboring county for such elective outpatient procedures, or that doing so would be any less convenient than, for example, visiting a neighboring county to buy a Jeep. Consequently, the market for purposes of a monopoly claim would not be limited to the Craven/Jones/Pamlico service area, but would include neighboring counties and facilities within reasonable proximity to potential patients. *See Am. Motors Sales*, 311 N.C. at 316, 317 S.E.2d at 356.⁵

Even a cursory look at the existing surgical facilities with operating rooms around New Bern shows numerous competing surgical providers nearby. The 2020 State Medical Facilities Plan shows eight (8) competing surgical facilities only one county away from the Craven/Jones/Pamlico service area containing 80 operating rooms.⁶ In Lenoir County, one

⁵ Plaintiffs argue that *American Motors Sales* is distinguishable because it involved a “vertical” restraint of trade and that CON constitutes a “horizontal” restraint. *See* Pls.’ Br. 18. Plaintiffs’ argument ignores the Supreme Court’s clear statement in its *Aston Park* decision that the CON program was a monopoly “turned on the absence of a rational relationship between the required [CON] and any public good or welfare consideration.” *Am. Motors Sales*, 311 N.C. at 320, 317 S.E.2d at 358. Further, although *American Motors Sales* characterized CON as a horizontal restraint, it did not hold that a horizontal restraint on trade necessarily constitutes a monopoly. *Id.*

⁶ *See* Ex. A, at 57 (map of Operating Room service areas).

county to the West, is UNC Lenoir Health Care, an existing hospital with ten licensed ORs. (Ex. A, at 63) In Pitt County, to the North, Vidant Health operates another hospital (Vidant Medical Center) with 33 licensed operating rooms, *and* an ambulatory surgical facility (Vidant SurgiCenter) with ten licensed operating rooms. *Id.* at 66. Also to the North is Vidant Beaufort Hospital in neighboring Beaufort County with six licensed ORs. *Id.* at 58. In Duplin County to the West, Vidant Duplin Hospital has three licensed ORs. *Id.* at 60. In Carteret County, to the Southeast, are Carteret General Hospital, with six licensed ORs, and The Surgical Center of Morehead City, with two ORs. *Id.* at 59. Finally, in Onslow County, to the South, is Onslow Memorial Hospital, with ten licensed ORs. *Id.* at 65.

Of those facilities, both Vidant SurgiCenter in Pitt County and The Surgical Center of Morehead City in Carteret County are separately licensed ambulatory surgical facilities,⁷ and are thus the same type of outpatient facility Plaintiffs propose to license under N.C. Gen. Stat. § 131E-145, *et seq.* Compl. ¶¶ 28, 128.

Nowhere in the Complaint do Plaintiffs allege that the state has granted any entity market power or market dominance over ambulatory surgical procedures in the New Bern Area or even in the Craven/Jones/Pamlico service area, nor that Carolina East controls prices. It is also clear that no single surgical provider is “the only reasonable available source” of ambulatory eye surgery procedures such that “a consumer [would] be without reasonable recourse to elude the monopolizer’s reach.” *Am. Motors Sales*, 311 N.C. at 316, 317 S.E.2d at 356.⁸ Accordingly, Plaintiffs’ anti-monopoly claim fails.

⁷ See Ex. A, at 66 (Vidant SurgiCenter is a “Group 6” surgical facility). “Group 6” facilities include only separately licensed ambulatory surgical facilities – i.e., those not licensed as part of a hospital (2020 SMFP, p. 54).

⁸ In making this determination, the court found that other Jeep dealerships operated in multiple counties adjacent to Wilkes County, which was within “reasonable reach” of the consumers.

3. The CON Law does not grant exclusivity to private entities.

Courts scrutinize grants of exclusivity by the legislature to determine whether the anti-monopoly and exclusive emoluments clauses are violated. But the CON law does not give a private entity a right to unilaterally or directly exclude a competitor. Rather, the CON law provides the State with the authority to assess the need for new health care services, to adopt rules and standards, and to review proposed projects to assess whether a project is consistent or inconsistent with statutory and regulatory review criteria. N.C. Gen. Stat. § 131E-177(4), (6).

The key principle comes from the Supreme Court's analysis in *Madison Cablevision*. The General Assembly had authorized municipalities to own and operate their own cable television systems, while also allowing municipalities to grant franchises to private entities to own and operate cable television systems for the municipality. *Madison Cablevision*, 325 N.C. at 643–44, 386 S.E.2d at 206. If the municipality chose either path, it retained the right to make the municipality-sponsored system exclusive within the municipality for twenty years. *Id.*

The City of Morganton had granted a twenty-year franchise to Madison Cablevision to provide cable television, but that franchise expired in 1986. *Id.* at 636–37, 386 S.E.2d at 201. After a public hearing, Morganton declined to renew Madison's franchise, rejected the applications of two other providers, and directed city staff to begin establishing a city-owned system. *Id.* at 640–41, 386 S.E.2d at 204. The city determined that it would review the decision again in five years. *Id.* Madison then sued and claimed (in part) that this decision violated the anti-monopoly and exclusive emoluments clauses. *Id.* at 637–41, 386 S.E.2d at 202–04.

The Court rejected all of the constitutional challenges. The Court noted that there was no “exclusive” cable provider in Morganton because the town had “not foreclosed for any period the possibility that franchises might be granted to other applicants.” *Id.* at 654, 386 S.E.2d at 211. Rather, Morganton “expressly left open the possibility that other cable companies could apply

for and obtain a franchise in the future.” *Id.* The case did not present an issue of exclusivity, since the state and its municipalities are allowed to grant a “nonexclusive right or franchise” to a private “person or set of persons.” *Id.* at 654, 386 S.E.2d at 210.

Courts interpreting *Madison Cablevision* have deemed this factor to be the case’s key principle. For instance, in *Rockford-Cohen Group*, the Court of Appeals struck down a bail bondsmen training statute. *Rockford-Cohen Grp.*, 230 N.C. App. at 324, 749 S.E.2d at 474. The prior version of the law had allowed anyone to apply to train prospective bail bondsmen for licensure. *Id.* at 320, 749 S.E.2d at 472. An amendment to the law, however, gave a particular private association the exclusive right to train prospective bail bondsmen. *Id.* The Court of Appeals explained that *Madison Cablevision* could not save the law, because the bail bondsman law “foreclose[ed] the opportunity that others could provide this training.” *Id.* at 323, 749 S.E.2d at 474. Unlike the municipal action in *Madison*, the law struck down in *Rockford-Cohen* “did not expressly leave open the possibility that others might be approved in the future.” *Id.*

In contrast, the CON law does not foreclose new entrants into the market in the future, or allow an existing provider to unilaterally bar future competitors. To the contrary, the CON law specifically contemplates new market entrants, and charges the Agency with collecting and analyzing sufficient data yearly to assess the need for new entrants, and to publish its determination in the annual State Medical Facilities Plan, which governs what proposals can be approved. N.C. Gen. Stat. §§ 131E-177(1), (4), -183(a)(1).⁹ Likewise, while incumbent providers may apply and may comment in opposition to new competitors’ applications, the Agency retains the sole authority to approve or deny CON applications. *Id.* § 131E-177(6).

⁹ Further, the planning process embodied in the State Medical Facilities Plan includes two separate processes for any person (including Plaintiffs) to petition for changes to the need determinations for new facilities and services, as discussed in more detail in Section A of the Background section and Section I of the Argument section.

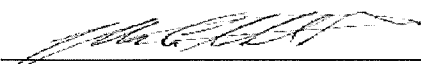
Indeed, one of the mandatory review criteria assessed by the Agency is the extent to which each proposal will affect competition in the proposed service area. *Id.* § 131E-183(a)(18a). As a result, no aspect of the CON law grants exclusivity to any private entity in the provision of healthcare services.

CONCLUSION

Plaintiffs have failed to exhaust any of the available administrative remedies before bringing this action. Further, Plaintiffs' claim are not ripe for disposition. This Court should dismiss Plaintiffs' complaint for lack of subject-matter jurisdiction. If this Court considers the merits of Plaintiffs' complaint, each of Plaintiffs' contentions fails to state a claim upon which relief may be granted. Binding precedent has already determined the constitutionality of North Carolina's CON law. For these reasons, amici respectfully request that Defendants' motion to dismiss be granted.

This the 1st day of December 2020.

FOX ROTHSCHILD LLP



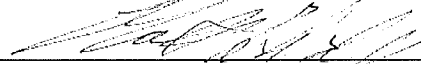
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CERTIFICATE OF SERVICE

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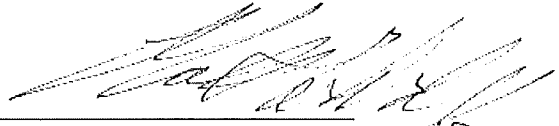
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