

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2020 AUG 21 P 12: 50

20 CVS 05150

JAY SINGLETON, D.O., and SINGLETON, VISION CENTER, PA,) C.S.C.

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.

**MOTION TO INTERVENE
BY**

**NCHA, INC. D/B/A THE NORTH CAROLINA HEALTHCARE ASSOCIATION, THE NORTH CAROLINA HEALTH CARE FACILITIES ASSOCIATION, THE N.C. CHAPTER OF THE AMERICAN COLLEGE OF RADIOLOGY, AND THE NORTH CAROLINA SENIOR LIVING ASSOCIATION
[INTR]**

NCHA, Inc. d/b/a the North Carolina Healthcare Association (hereinafter "NCHA"), the North Carolina Health Care Facilities Association ("NCHCFA"), the North Carolina Chapter of the American College of Radiology, Inc. ("NCACR"), and the North Carolina Senior Living Association ("NCSLA") (collectively, the "Associations"), by and through their undersigned counsel, hereby move pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 24 and 1-260 to intervene in the above-captioned case initiated by Jay Singleton, D.O., and Singleton Vision Center, PA (collectively "Plaintiffs"), as *amicus curiae* to offer written and oral legal arguments opposing the relief sought by Plaintiffs in this action. Counsel for Plaintiffs have consented to the intervention of the Associations in this matter and stated that counsel for the Associations may inform the Court of that consent.

In support of this Motion, the Associations respectfully show the following:

DESCRIPTION OF PARTIES AND NATURE OF ACTION

Parties and Movants

1. NCHA is a nonprofit corporation and trade association organized under the laws of this State to represent the interests of hospitals and health systems across the State of North Carolina with its offices located in Cary, Wake County, North Carolina. NCHA has 130 members, composed of hospitals and health systems licensed and operating in North Carolina which are all subject to the State's Certificate of Need ("CON") Law, N.C. Gen. Stat. § 131E-175 *et seq.* NCHA's mission on behalf of its members is to promote improved delivery of quality and affordable healthcare in North Carolina through leadership, advocacy, information and education in its members' interests and for the public benefit. In addition to providing healthcare services, NCHA's member hospitals and health systems provide jobs and positively affect almost every aspect of community life. Many are the largest or one of the largest employers in their respective counties. Hospitals and health systems contribute to local economic development. The hospital and health system members of NCHA provide, by far, most of the charity care for patients in North Carolina. Plaintiffs' Complaint repeatedly attacks NCHA, assigning nefarious and anti-competitive motives to the Association because of its historical role in advocating for and supporting the CON Law.

2. NCHCFA is a nonprofit corporation and trade association organized under the laws of North Carolina with its offices located in Raleigh, Wake County, North Carolina. NCHCFA is composed of skilled nursing facilities ("SNFs") providing professional skilled nursing care.

According to the 2020 State Medical Facilities Plan (“SMFP”)¹, there were 43,398 licensed nursing beds in North Carolina SNFs as of September 30, 2018. There are over 420 licensed nursing facilities in North Carolina. Approximately 390 of those facilities are represented by and are members of NCHCFA. NCHCFA’s membership cares for nearly 100,000 North Carolina residents annually. As a professional trade association, NCHCFA works closely with state and federal agencies governing skilled nursing facility operations. NCHCFA also coordinates statewide programs and research projects, plans educational programs and membership meetings, and prepares various membership and consumer publications. NCHCFA is a strong and active association dedicated to providing quality long term health care to the residents served by its member facilities. NCHCFA’s members consist of nonprofit, for-profit, faith-based, secular, independently-owned and multi-facility SNFs located throughout the state.

3. NCACR is a nonprofit corporation and trade association organized under the laws of North Carolina to represent the interests of radiologists across the State of North Carolina, with its offices located in Lewisville, Forsyth County, North Carolina. NCACR has over 900 radiology physician members in both academic and community practices across the state. NCACR’s mission is to serve patients and society by advancing the quality and safety of patient care in radiology. NCACR accomplishes this by representing the specialty of radiology within the North Carolina Medical Society, on the NC Medical Care Advisory Committee, and regarding North Carolina legislative and regulatory issues. It also sponsors continuing educational activities in radiology for its membership.

¹ The SMFP is the planning document prepared each year by the Department and the State Health Coordinating Council, and approved by the Governor, to determine the need across the State for certain new institutional health services. N.C. Gen. Stat. § 131E-176(25).

4. NCSLA is a nonprofit corporation and trade association organized under the laws of North Carolina to represent the interests of assisted living facilities across the State of North Carolina, with its offices located in Raleigh, Wake County, North Carolina. Its mission is to: provide effective leadership and assistance to its members that addresses relevant issues and challenges within the industry; unite in fellowship owners, operators, managers and employees of assisted living facilities; promote professionalism and high standards to its members; form partnerships with other agencies and individuals who have an interest in the aging and disabled in North Carolina; advance the knowledge of the profession by continuing education; advance the standards to be followed in assisted living facilities; and work cooperatively with public and private agencies, state agencies, lawmakers and other professionals to ensure that quality of life for the residents of assisted living facilities is preserved.

5. Upon information and belief, Plaintiff Singleton is a citizen and resident of Craven County, North Carolina.

6. Upon information and belief, Plaintiff Singleton Vision Center, PA is a North Carolina professional association with its principal place of business in Craven County, North Carolina.

7. Defendants are public officials that Plaintiffs allege enforce North Carolina's CON Law, N.C. Gen. Stat. § 131E-175, *et seq.*, or who are required to be joined as defendants in any civil action challenging the validity of a North Carolina statute, pursuant to N.C. Gen. Stat. § 1A-1, Rule 19(d) (collectively the "State Defendants").

8. On April 23, 2020, Plaintiffs filed a Complaint, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and the North Carolina Constitution, seeking a declaratory judgment, permanent injunction, and expenses. In their Complaint, Plaintiffs request a declaration that North Carolina's

CON Law, as applied, violates certain sections of the North Carolina Constitution, and seek to enjoin the State Defendants from enforcing the CON Law against Plaintiffs.

9. On June 29, 2020, the State Defendants filed a Motion to Dismiss Plaintiffs' Complaint.

10. The Associations seek to intervene as *amicus curiae* in support of the State Defendants to protect the legal, property, economic, and employment interests of their members, by opposing the relief sought in the Complaint. The declaratory judgment sought by Plaintiffs would affect specific legal rights and property interests of the Associations' members under the CON Law. The Associations seek intervention in this matter for the limited purpose of filing briefs and presenting legal arguments to the Court to support the State Defendants' Motion to Dismiss and any further motions filed by Plaintiffs or the State Defendants, and to oppose the claims and request for relief of Plaintiffs.

Purpose and Goals of the CON Law

11. In enacting North Carolina's CON Law, the General Assembly expressly recognized that government regulation of health care services and facilities is necessary to control health care costs, utilization and distribution of services. The express purpose of the CON Law, articulated in its supporting Findings of Fact, is to avoid the unnecessary duplication of health care services and facilities with the attendant waste of limited resources and inequities in access to services. N.C. Gen. Stat. § 131E-175.

12. The North Carolina appellate courts have recognized and reiterated these goals in numerous cases, stating that "the fundamental purpose of the certificate of need law is to limit the construction of health care facilities in North Carolina to those that are needed by the public and that can be operated efficiently and economically for its benefit." *Living Centers-Southeast, Inc.*

v. N.C. Dept. of Health and Human Services, 138 N.C. App. 572, 574, 532 S.E.2d 192, 194 (2000); *see also Good Hope Hospital, Inc. v. N.C. Dept. of Health and Human Services*, 175 N.C. App. 309, 623 S.E.2d 315 (2006), *rev. denied, cert. denied* 360 N.C. 480, 632 S.E.2d 172, *aff'd*, 360 N.C. 641, 636 S.E.2d 564; *Hope-A Women's Cancer Center, P.A., and Raleigh Orthopaedic Clinic, P.A. v. State of North Carolina*, 203 N.C. App. 593, 693 S.E.2d 673 (2010).

LEGAL AUTHORITY AND RELEVANT FACTS

13. Rule 24 of the Rules of Civil Procedure provides:

Rule 24. Intervention

(a) Intervention of right.--Upon timely application anyone shall be permitted to intervene in an action:

(1) When a statute confers an unconditional right to intervene; or

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention.--Upon timely application anyone may be permitted to intervene in an action.

(1) When a statute confers a conditional right to intervene; or

(2) When an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure.--A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure.

I. INTERVENTION AS OF RIGHT

A. The Declaratory Judgment Act Confers an Unconditional Right to Intervene

14. The controlling provision for intervention is contained in the Declaratory Judgment Act, which provides:

§ 1-260. Parties

When declaratory relief is sought, *all persons shall be made parties who have or claim any interest which would be affected by the declaration,*...

15. The Associations have the right to intervene under Rule 24(a)(1) because the Declaratory Judgment Act grants status as a party to “*all persons who have or claim any interest which would be affected by the declaration, . . .*” N.C. Gen. Stat. § 1-260. As set out in greater detail below, the Associations on behalf of their members claim legal, property, economic, and employment interests that would be affected by the declaration sought by Plaintiffs.

16. The hospitals, health systems, SNFs, physicians and assisted living facilities comprising the membership of the Associations are both regulated by and granted rights under the statute at issue in this matter and would be harmed in their legal rights under the law and in their property, employment and economic interests if the provisions of law at issue here were set aside as unconstitutional. The Associations represent facilities and providers across the State of North Carolina as well as in the service area of Plaintiffs in Craven County.

17. Associations such as the Associations here have standing to intervene on behalf of their members and represent their interests, as well as to initiate legal action. *See Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 595 S.E.2d 773 (2004) (non-profit corporation dedicated to humane treatment of animals had standing to challenge practices of county animal shelter); *N. C. Forestry Ass’n v. N.C. Dep’t of Env’t and Natural Res., Div. of Water*

Quality, 357 N.C. 640, 644, 588 S.E.2d 880, 883 (2003). The courts have upheld the standing of an organization in this situation to sue on behalf of its members and represent their interests before tribunals where:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

River Birch Associates v. City of Raleigh, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990), quoting *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977); see also, *State Employees Ass'n of N.C., Inc. v. State of N.C.*, 154 N.C. App. 207, 218, 573 S.E.2d 525, 532 (2002) (Tyson, J., dissenting in part), *dissenting opinion adopted per curiam*, 357 N.C. 239, 580 S.E.2d 693 (2003).

18. The Declaratory Judgment Act provides liberally for participation of interested persons. As North Carolina nonprofit corporations, each of the Associations is a person, able to sue or be sued under its common name. Each of the Associations constitutes a group of persons of common interest whose legal rights under the CON Law and employment, economic, and property interests would be substantially affected by a declaration that ultimately would eliminate or severely restrict the CON Law and permit Plaintiffs to develop operating rooms without a CON. The Associations thus have standing in a representative capacity.

19. The Associations and their member facilities and providers have a direct interest in preventing the unregulated and unpredictable growth in health care facilities and services which would result from the relief sought by Plaintiffs. As reflected in the inventory in the 2020 SMFP, NCHA's member hospitals and health systems own and operate CON-approved and licensed operating rooms, which Plaintiffs seek to develop without restriction. Operating rooms are subject

to need determination limitations in the current SMFP, which are binding on the Agency and CON applicants under the CON Law. N.C. Gen. Stat. § 131E-183(a)(1).

20. Furthermore, although Plaintiffs claim that their only personal interest in this lawsuit is to be allowed to develop operating rooms without a CON, their challenge is actually much broader. In reality, the Complaint seeks to overturn all aspects of the CON Law. If allowed, such a decision would impact many more health care services provided in North Carolina than the limited operating rooms which Plaintiffs seek to develop and operate.

21. In a recent similar and unsuccessful challenge to North Carolina's CON Law, a physician, Dr. Singh and his practice, Forsyth Imaging Center, LLC, filed a Complaint pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and the North Carolina Constitution, seeking a declaratory judgment, permanent injunction, and expenses. *See Singh v. North Carolina Department of Health and Human Services*, 18 CVS 99498, Wake County Superior Court. There, the plaintiffs 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 in that action granted Associations' motion to intervene as *amicus curiae*. In that matter, 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 later withdrew an appeal and dismissed their entire case. With respect to the as-applied constitutional challenge in the *Singh* action, "such a win would have broader implications for the CON Law's future" and Dr. Singh's counsel stated that if they won the "as applied" challenge, "at 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 July 21, 2020). However, Dr. Singh did not prevail in his action.

22. Interestingly, the same two law firms that represented Dr. Singh in the previous action challenging the CON Law also represent Dr. Singleton in this matter. Here, counsel having failed in their efforts to eradicate the CON Law in the *Singh* action, immediately recruited another physician in an attempt to take yet another bite at the apple. *See* Institute for Justice, North Carolina CON, <https://ij.org/case/north-carolina-con/> (last visited July 20, 2020) (stating “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 (“IJ”) joined up with an ophthalmologist from New Bern, NC, to file a new challenge to North Carolina’s CON law.”) The Institute for Justice, Plaintiffs’ counsel, 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 July 20, 2020). Clearly, the goal of Plaintiffs and their counsel in this matter is to undermine the entire CON Law. A press release by Plaintiffs’ counsel has stated as much – “N’Da [the Nebraska plaintiff] and Dr. Singleton partnered with IJ to file lawsuits challenging CON laws under the Nebraska and North Carolina state constitutions. A win in either case would pave the way for future CON challenges.” *See* Institute for Justice, Apr. 23, 2020 Press Release, IJ Files Two Lawsuits Challenging Laws Limiting Medical Access, <https://ij.org/press-release/ij-files-two-lawsuits-challenging-laws-limiting-medical-access/> (last visited July 20, 2020).

23. One or the other of the Associations' members provide virtually all of the numerous health services which are defined under the CON Law as "new institutional health services," requiring a CON, including but not limited to: (1) acute care beds; (2) operating rooms; (3) GI endoscopy rooms; (4) skilled nursing facility beds; (5) diagnostic centers; (6) assisted living facility beds; and (7) certain medical equipment, including PET scanners, linear accelerators, CT scanners, and mammography scanners. N.C. Gen .Stat. §§ 131E-176. Even though Plaintiffs do not express a desire to obtain or develop these other services, the relief they seek in this case nonetheless ultimately would mean that all of those services would no longer be subject to the CON Law.

24. The stated purposes of the CON Law are the achievement of health care cost control, appropriate utilization, and geographic access, goals beneficial to all citizens of the State. However, the statute also protects the interests of existing health care providers by recognizing that "the 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).

25. The relief sought by Plaintiffs ultimately would, *inter alia*, result in overturning the entire CON Law and its regulatory function, and would result in harm to the Associations and their members via the very proliferation of unnecessary health service facilities, excess capacity, unnecessary use of resources and overutilization of health care services that the CON Law seeks to avoid. The Associations have a direct and real interest in avoiding that outcome for themselves, their members and the citizens of North Carolina.

26. Each of the Associations joining in this Motion have participated for years in the health planning process that has been created to administer the CON Law and to provide for a

reasoned, thoughtful and open health care planning process in which all health care providers of all types, both those already providing care in North Carolina and those who wish to do so, can participate. Each year, the State of North Carolina and its various provider associations, individual providers and other interested parties spend hours at state and regional meetings; work with the State Health Coordinating Council and the Department of Health and Human Services' professional staff; review draft need methodologies for health care services and facilities covered by the CON Law; and attend public hearings and engage in related activities, all designed to promote an orderly, reasoned and fair health care planning process. The relief sought by Plaintiffs in this case would eliminate that entire process and instead permit any individual or entity to build, develop and offer every conceivable health care service or facility imaginable anywhere in the state without regard to need for the service or facility, the resulting costs to providers and the public, the dilution of available staffing and other resources, and the impact on quality of care, all of which are potentially impacted by the unregulated proliferation of health care services and facilities in North Carolina. The Associations have a vital interest in avoiding the outcome sought by Plaintiffs.

B. The Associations Have A Right To Intervene Pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2)

27. The Associations also have the right to intervene in this matter pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2). The Associations meet the criteria required for intervention under Rule 24(a)(2), because the Associations:

- 1) Claim an interest relating to the property or transaction which is the subject of the action;
- 2) Are so situated that the disposition of the action may as a practical matter impair or impede their interests; and

3) Their interests are not adequately represented by existing parties to the matter.

See Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 515 S.E.2d 675 (1999); *Alford v. Davis*, 131 N.C. App. 214, 217-19, 505 S.E.2d 917, 920 (1998); *Hill v. Hill*, 121 N.C. App. 510, 466 S.E.2d 322 (1996); *Councill v. Town of Boone Bd. of Adjustment*, 146 N.C. App. 103, 551 S.E.2d 907 (2001).

1) The Associations Have An Interest Relating To The Property Or Transaction Which Is The Subject Of Plaintiffs' Complaint

28. As demonstrated above, the Associations have a direct and substantial interest in the subject matter at issue in this case because Plaintiffs' claims for relief, if granted, will undermine the State's health planning process, result in unpredictable and unplanned growth in health care services, and dilute scarce resources necessary to the continued viable operation of the Associations' members. For the reasons cited above, the Associations' existing members would be unfairly impacted by the ruling Plaintiffs seek, which would result in the elimination of the CON Law in its entirety.

2) The Associations Are So Situated That The Disposition Of The Action May As A Practical Matter Impair Or Impede Their Interests

29. Having demonstrated an interest in the property or transaction at issue in this case, the Associations are entitled to intervene pursuant to Rule 24(a)(2) if disposition of the matter without the involvement of the Associations will impede or impair their ability to protect their interest. This is the only forum in which the claims of Plaintiffs will be litigated and the disposition of this case will have major statewide impact, including a direct impact upon the interests of the Associations and their member facilities and physicians. For the reasons stated above, the Associations and their members may be practically disadvantaged if the Associations' intervention is not allowed because the case may be litigated to a conclusion which would adversely affect

them. *See State ex rel. Crews v. Parker*, 319 N.C. 354, 354 S.E.2d 501 (1987). Without intervention, the Associations will have no ability to protect their interests or those of their members, which are implicated in Plaintiffs' Complaint.

3) The Associations' Interests Are Not Adequately Represented By Existing Parties To The Matter

30. The interests of the State Defendants in defending the CON Law are aligned with, but not identical to, those of the Associations. The State Defendants focus on the administration and implementation of the statewide health-planning program as a method of ensuring that health care services are accessible and affordable for all citizens. While the Associations share the State's interest in those goals, their additional interests in this litigation are in avoiding the detrimental effects of unregulated, unpredictable and unplanned growth in health care facilities and services on their members' pecuniary interests that would result from Plaintiffs' requested relief and in ensuring an orderly and predictable method of health care and health service allocation and regulation. This is an interest not shared by the State Defendants in this case. The State Defendants will not experience declining revenues, inability to obtain necessary staff or any of the other direct business and operational issues that members of the Associations will experience if Plaintiffs' request for relief is granted. Therefore, the Associations' interests would not be adequately represented by any of the existing parties to this case.

II. PERMISSIVE INTERVENTION

31. In the alternative, the Associations should be permitted to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(b)(2), which provides that a person or entity may be permitted to intervene "[w]hen [its] claim or defense and the main action have a question of law or fact in common."

32. Rule 24 should be liberally construed such that it is consistent with the rules for joinder and “the important policy of avoiding a multiplicity of actions.” G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE, § 24-1 (3d ed. 2007) (citing *Harrington v. Overcash*, 61 N.C. App. 742, 744, 301 S.E.2d 528, 529 (1983)).

33. The Complaint for a declaratory judgment filed by Plaintiffs, and the claims and defenses the Associations propose to assert if their Motion to Intervene is granted, involve common questions of law and fact.

34. In their Complaint, Plaintiffs challenge the constitutionality of the CON Law and the State’s health planning process in general.

35. By virtue of their proposed intervention as *amicus curiae*, the Associations intend to defend against the claims of Plaintiffs by presenting written briefs and oral argument to show that the State’s CON Law and procedures are constitutionally sound, and that Plaintiffs have failed to state a claim upon which relief can be granted in their Complaint.

36. The claims of Plaintiffs and the claims and defenses of the Associations will clearly address the same sets of factual and legal issues and thus the Associations’ Motion to Intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(b)(2) should be granted.

37. The Associations have identified in preceding paragraphs of this Motion numerous direct and pecuniary interests its members have in the subject matter of this litigation. This alone justifies the Associations’ intervention in this matter. The North Carolina courts have found that proposed intervenors with far less direct interests than those of the Associations in this case were properly granted permissive intervention and that in fact no direct or pecuniary interests are required to justify a party’s permissive intervention under Rule 24(b)(2). *See, e.g., Koenig v. Town of Kure Beach*, 178 N.C. App. 500, 631 S.E.2d 884 (2006) (rules governing permissive

intervention do not require a permissive intervenor to show a direct personal interest or pecuniary interest in the subject matter of the litigation).

38. A declaration that the CON Law is unconstitutional, as urged by Plaintiffs, would have a substantial impact on the Associations' members in terms of their ability to: plan for future health care services; protect their investments in existing facilities, services and resources; provide charity care to patients; and avoid unplanned and unpredictable growth in health care facilities and services that would dilute scarce resources and result in underutilization of existing facilities. As such, the interests of the Associations and their member facilities and physicians clearly warrant permissive intervention in this case.

39. This is the only forum in which the claims alleged by Plaintiffs will be decided and should the Court refuse to allow the Associations to intervene, they will be precluded from challenging the allegations and claims of Plaintiffs and from protecting their interests and those of their member facilities and physicians in upholding the CON Law and the related health planning process which is the subject of Plaintiffs' claims.

III. THE ASSOCIATIONS' MOTION TO INTERVENE IS TIMELY FILED

40. This motion to intervene is timely because the Complaint was filed on April 23, 2020, and the State Defendants' Motion to Dismiss was filed on June 29, 2020. Upon information and belief, no discovery has been conducted, no mediation has occurred, and no hearings, motions or other proceedings before the Court have yet been scheduled or occurred. Therefore, the Associations' intervention will not unduly delay the case or prejudice Plaintiffs' claims. Motions to intervene made prior to trial are seldom denied as untimely. *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985); G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE, § 24-5 (3d ed. 2007).

41. Although Rule 24 does not specifically address intervention by *amicus curiae* parties, our courts have recognized and approved intervention in the Superior Courts in that capacity. See, *DeLuca v. Stein*, 261 N.C. App. 118, 820 S.E.2d 89 (2018) *rev'd sub nom. on other grounds by, New Hanover Cty Bd. of Educ. v. Stein*, 374 N.C. 102, 840 S.E.2d 194 (2020); *Surgical Care Affiliates, LLC v. N.C. Indus. Comm'n*, 256 N.C. App. 614, 617, 807 S.E.2d 679, 682 (2017); *Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co.*, 253 N.C. 610, 614, 117 S.E.2d 764, 767 (1961); *Time Warner Entertainment Advance/Newhouse Partnership v. Town of Landis*, 2010 NCBC LEXIS 24 (N.C. Bus. Ct. 2010).

42. Although the Associations seek only to intervene as *amicus curiae* parties, because N.C. Gen. Stat. § 1A-1, Rule 24(c) provides that all motions to intervene shall include a pleading setting forth the claim or defense for which intervention is sought, the Associations have attached hereto as Exhibit A a Motion to Dismiss Plaintiffs' claims pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and (6).

43. Counsel for the State Defendants have advised that the State Defendants consent to the Associations' intervention in this case. Counsel for Plaintiffs have advised that Plaintiffs consent to the Associations' intervention in this case.

WHEREFORE, based on the foregoing, the Associations respectfully request that the Court allow the Associations to intervene in this case as a matter of right, and, in the alternative, by permission of the Court, and to participate as *amicus curiae* in this proceeding by presenting written briefs and oral argument to show that the State's CON Law and implementing regulations and procedures as applied to Plaintiffs are constitutionally sufficient. A proposed Order granting this Motion to Intervene is attached as Exhibit B.

This the 21st day of August, 2020.

POYNER SPRUILL LLP

By: *Kenneth L. Burgess*

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D/B/A THE NORTH CAROLINA
HEALTHCARE ASSOCIATION, THE
NORTH CAROLINA HEALTH CARE
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CHAPTER OF THE AMERICAN COLLEGE
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TIM MOORE, Speaker of the North)
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Defendants.)

EXHIBIT A - FORM OF PROPOSED PLEADING

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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)
Defendants.)

MOTION TO DISMISS

NOW COME PROSPECTIVE AMICUS CURIAE INTERVENORS NCHA, Inc. d/b/a the North Carolina Healthcare Association, the North Carolina Health Care Facilities Association, the North Carolina Chapter of the American College of Radiology, Inc., and the North Carolina Senior Living Association (collectively, the “Associations”), by and through undersigned counsel, and without waiving any motions or defenses not set out herein, and hereby move the Court pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, to dismiss Plaintiffs’ Complaint for Declaratory and Injunctive Relief.

MOTION TO DISMISS-RULE 12(b)(1)

The Associations move this Court pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure to dismiss this action for lack of subject matter jurisdiction on the grounds that, *inter alia*, Plaintiffs lack standing and have failed to exhaust administrative remedies.

MOTION TO DISMISS-RULE 12(b)(6)

The Associations move this Court pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss this action for failure to state a claim upon which relief can be granted on the grounds that, *inter alia*, Plaintiffs lack standing, have failed to exhaust administrative remedies, and the absence of any constitutional bar to the North Carolina General Assembly's authority to enact the statutes referenced in the Complaint and apply those statutes to the Plaintiffs.

WHEREFORE, the Associations pray unto the Court that:

1. The Complaint and all claims for relief against Defendants be dismissed with prejudice;
2. All costs be taxed against Plaintiffs; and
3. For such other and further relief as the Court deems just and proper.

This the 21st day of August, 2020.

POYNER SPRUILL LLP

Kenneth L. Burgess

By: _____

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ATTORNEYS FOR PROSPECTIVE
DEFENDANT-INTERVENORS NCHA,
INC. D/B/A THE NORTH CAROLINA
HEALTHCARE ASSOCIATION, THE
NORTH CAROLINA HEALTH CARE
FACILITIES ASSOCIATION, THE N.C.
CHAPTER OF THE AMERICAN
COLLEGE OF RADIOLOGY, AND THE
NORTH CAROLINA SENIOR LIVING
ASSOCIATION

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 05150

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

EXHIBIT B - FORM OF PROPOSED ORDER

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 05150

JAY SINGLETON, D.O., and SINGLETON)
VISION CENTER, PA,)
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Plaintiffs,)

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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.)

**ORDER GRANTING MOTION TO
INTERVENE FILED BY
NCHA, INC. D/B/A THE NORTH
CAROLINA HEALTHCARE
ASSOCIATION, THE NORTH
CAROLINA HEALTH CARE
FACILITIES ASSOCIATION, THE N.C.
CHAPTER OF THE AMERICAN
COLLEGE OF RADIOLOGY, AND THE
NORTH CAROLINA SENIOR LIVING
ASSOCIATION**

THIS MATTER comes before the presiding Superior Court Judge upon the Motion to Intervene filed by NCHA, Inc. d/b/a the North Carolina Healthcare Association (hereinafter “NCHA”), the North Carolina Health Care Facilities Association (“NCHCFA”), the North Carolina Chapter of the American College of Radiology, Inc. (“NCACR”), and the North Carolina Senior Living Association (“NCSLA”) (collectively, the “Associations”). For good cause shown, the Associations are entitled to intervene as *amicus curiae* in the above-captioned matter to present written briefs and oral argument related to the constitutionality of the State’s CON Law.

NOW, THEREFORE IT IS ORDERED:

1. The Associations’ Motion to Intervene as *amicus curiae* to oppose the claims and request for relief of Plaintiffs is ALLOWED;

2. Counsel for Plaintiffs and Defendants shall serve on counsel for the Associations copies of all pleadings and other materials filed with the Court in this matter; and

3. The Associations shall be entitled to present written briefs and oral argument at any hearing related to any motions filed by Plaintiffs or the State Defendants.

SO ORDERED, this the _____ day of _____, 2020.

Wake County Superior Court Judge Presiding

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day a copy of the foregoing Motion to Intervene and proposed Order was served on the following via United States Mail, First Class postage pre-paid, and addressed as follows:

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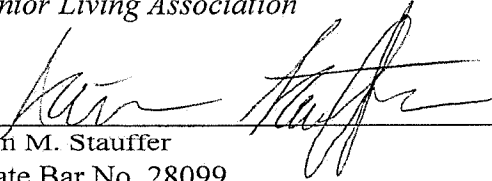
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This the 21st day of August, 2020.

POYNER SPRUILL LLP
Attorneys for NCHA, Inc. d/b/a the North Carolina Healthcare Association, the North Carolina Health Care Facilities Association, the North Carolina Chapter of the American College of Radiology, Inc., and the North Carolina Senior Living Association

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