No. 260P22 TENTH DISTRICT

****

SUPREME COURT OF NORTH CAROLINA

****

Jay Singleton, D.O.; and Singleton Vision Center, P.A.,

Plaintiffs,

v.

North Carolina Department of Health and Human Services; Roy Cooper, Governor of the State of North Carolina, in his official capacity; Kody H. Kinsley, North Carolina Secretary of Health and Human Services, in his 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.

From Wake County
No. COA21-558

****

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS APPEAL

****

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Defendants.

From Wake County
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PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS APPEAL

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA

Dr. Singleton's challenge to the CON law exposes the rampant confusion in this Court's cases about how Art. I, §§ 19, 32, and 34 apply to economic laws. (Pls.' Br. 2–5, 13–35). And this case is a perfect vehicle to resolve that confusion because it has fueled uncertainty over the status of a case—*Aston Park*—that would otherwise control here. *Compare In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551–52, 193 S.E.2d 729, 735–36 (1973) (striking down prior CON law under same three provisions), *with Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 607, 693 S.E.2d 673, 683 (2010) (calling *Aston Park* "moot"); *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 376 N.C. 63, 94, 852 S.E.2d 146, 167 n.9 (2020) (declining to address *Aston Park*'s "continuing validity"). The State's contrary arguments fail.

First, the Court of Appeals did not apply settled law under Art. I, § 19 when it refused to credit Dr. Singleton's factual allegations about the CON law's irrationality over the law's own "findings." Rather, the court picked a side in the very conflict that warrants mandatory review here: whether plaintiffs can use facts to rebut economic laws' presumption of constitutionality. (Section I(A), *infra*). And, by picking the side that says plaintiffs cannot use facts, the Court of

Appeals flouted this Court's decision in *Aston Park*, which warrants discretionary review. (Section I(B), *infra*).

Second, the Court of Appeals' refusal to reach Dr. Singleton's anti-special privileges and anti-monopoly claims does not bar review of those claims. It does not bar mandatory review because this "case" presents substantial questions under Art. I, §§ 32 and 34, which is all N.C. Gen. Stat. § 7A-30(1) requires. (Section II(A), *infra*). And, far from barring discretionary review, the Court of Appeals' refusal to reach these claims—based on the mistaken premise that they are "procedural due process" claims, *Singleton v. N.C. Dep't of Health & Hum. Servs.*, 2022-NCCOA-412, ¶¶ 15, 20—exposed a deep confusion about Art. I, §§ 32 and 34 that shows just how badly this Court's guidance is needed. (Section II(B), *infra*).

The Court should deny the State's motion to dismiss and weigh in on these important constitutional issues.

ARGUMENT

I. The Court of Appeals' refusal to credit Dr. Singleton's allegations about the CON law's irrationality under the law of the land clause shows why review is necessary.

The State tries to paint the Court of Appeals' dismissal of Dr. Singleton's law of the land claim as an application of "settled law" that bars both mandatory and discretionary review. (Defs.' Br. 13–17, 19–20). Not so. The Court of Appeals refused to credit Dr. Singleton's allegations about the CON law's irrationality over the law's own "findings." In doing so, the court picked a side in the very conflict that warrants mandatory review here: whether plaintiffs can use facts to rebut economic laws' presumption of constitutionality. And, by picking the side that says plaintiffs cannot use facts, the Court of Appeals flouted this Court's decision in *Aston Park*, which warrants discretionary review.

A. The Court of Appeals' refusal to credit Dr. Singleton's allegations about the CON law's irrationality warrants mandatory review.

The State argues that, in dismissing Dr. Singleton's law of the land claim, the Court of Appeals applied a test that has "been the subject of conclusive judicial determination." (Defs.' Br. 17 (quoting *State v. Colson*, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968)). Papering over this Court's decisions holding that economic liberty is a fundamental right or that a more rigorous test applies (Pls.'

Br. 14–16), the State collapses a century of confusing jurisprudence under a single label: "rationality review." (Defs.' Br. 14). But the State cannot sweep the confusion under the rug so easily.

This Court's cases are sharply divided on whether plaintiffs can use facts to rebut economic laws' presumption of constitutionality. In *Rhyne*, for example, the Court rejected the plaintiff's attempt to use evidence as "misapprehend[ing] the law regarding the rational basis standard of review." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181–82, 594 S.E.2d 1, 16 (2004). In *Southern Railway Co.*, by contrast, the Court credited the plaintiff's "voluminous evidence" that "changed economic conditions" had rendered the challenged law "unreasonable and oppressive." *City of Winston-Salem v. Southern Ry. Co.*, 248 N.C. 637, 639–55, 105 S.E.2d 37, 38–50 (1958). This conflict pervades decades of the Court's law of the land decisions. (Pls.' Br. 14–16 (collecting cases)).

Far from applying "settled law" (Defs.' Br. 13), the Court of Appeals merely picked a side in this conflict. It held that Dr. Singleton cannot use facts to challenge the CON law. While the State resists this framing (Defs.' Br. 15), there is no denying that is exactly what happened. Dr. Singleton repeatedly alleged that the CON law, as applied, fails to expand access to eye surgeries or to benefit

real patients in any way. (Pls.' Br. 11–12, 20–21 (collecting allegations)). The Court of Appeals did not discuss these allegations. Instead, it relied on the CON law's "findings" that the law is broadly necessary to expand access to care. *Singleton*, 2022-NCCOA-412, ¶¶ 33–35, 42. And it did so despite Dr. Singleton's allegation that "these 'findings of fact' are false." (R pp 18–21, ¶¶ 49–64). This is the facts-don't-matter approach in action.

Tellingly, a different Court of Appeals panel took the opposite approach just a few weeks later. *See Kinsley v. Ace Speedway Racing, Ltd.*, 2022-NCCOA-524, ¶¶ 22–29. Unlike the panel below, *Ace* treated the plaintiff's economic rights as "fundamental." *Id.* ¶ 23 (quoting *Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957)). Unlike the panel below, *Ace* credited the plaintiff's factual allegations that, as applied to its business, the law preventing it from operating was not necessary to protect public health. *Ace*, 2022-NCCOA-524, ¶ 29. And unlike the panel below, *Ace* refused to credit facts outside the complaint that the State said would "unequivocally support" the law. *Id*. That the Court of Appeals took two conflicting approaches to factual allegations in a matter of weeks shows that the confusion has reached a boiling point.

The State tries to wave *Ace* away, arguing that it involved "entirely different constitutional theories," including a "'novel'" claim. (Defs.' Br. 17 (quoting *Ace*, 2022-NCCOA-524, ¶ 27)). But *Ace* is on point in every way that counts. *Ace* was an as-applied challenge under the law of the land clause. *Ace*, 2022-NCCOA-524, ¶ 22. So is this case. True, *Ace* also cited Art. I, § 1. But as Dr. Singleton has already explained (Pls.' Br. 15 n.1), that provision imposes "the same requirement" as the law of the land clause. *Treants Enters., Inc. v. Onslow County*, 320 N.C. 766, 778, 360 S.E.2d 783, 785 (1987). The State does not dispute this. When *Ace* called the claim "novel," it was referring to the fact that the plaintiff had challenged an executive order and not a statute. *Ace*, 2022-NCCOA-524, ¶ 27. But *Ace* did not suggest—and the State does not argue—that the constitutional test is somehow different for executive and legislative acts. The State's attempt to distinguish *Ace* fails.[1]

[1] The State also cites *Town of Beech Mountain v. County of Watauga*, 324 N.C. 409, 414, 378 S.E.2d 780, 783–84 (1989), for the idea that "courts may determine that a law is supported by a rational basis on a motion to dismiss." (Defs.' Br. 16). But nobody disputes that. The question here is whether, in doing so, courts must credit factual allegations about economic laws' failure to serve their purported ends. *Beech* held that the "Plaintiffs have failed to allege facts sufficient, if proven, to overcome the presumption of constitutionality." *Beech*, 324 N.C. at 414, 378 S.E.2d at 784. It did not ignore the plaintiffs' allegations entirely, as the Court of Appeals did below.

In the end, the Court of Appeals' decision to ignore Dr. Singleton's allegations tees up the conflict perfectly for this Court's review. If Dr. Singleton can use facts to challenge the CON law and his allegations are presumed true, then the CON law's application to him reduces access to care, increases costs, and actively harms patients—all to protect one hospital, CarolinaEast, from competition. (Pls.' Br. 11–12, 20–21 (collecting allegations)). If Dr. Singleton cannot use facts, then the legislature's assertions about the CON law are gospel and the law is immune from scrutiny. Either way, this Court's answer will resolve a "substantial question" under the law of the land clause. N.C. Gen. Stat. § 7A-30(1).

B. The Court of Appeals' refusal to credit Dr. Singleton's allegations about the CON law's irrationality conflicts with *Aston Park* and warrants discretionary review.

The State argues that discretionary review of Dr. Singleton's law of the land claim is improper because the decision below supposedly does not conflict with *Aston Park*. (Defs.' Br. 19). As the State tells it, the CON law struck down in *Aston Park* failed to "show" how it served public health, whereas the new CON law "fix[ed]" that problem with legislative findings, so there is no conflict. (Defs.' Br. 19). The State is wrong for several reasons.

First, the State misconstrues *Aston Park*. This Court did not strike down the CON law for failing to use magic words explaining its own rationality. Instead, the Court relied on a *lack of record evidence* that barring Aston Park from opening a new hospital would promote public health. *See, e.g.*, *Aston Park*, 282 N.C. at 547, 193 S.E.2d at 733 ("Nothing whatever in this record suggests that the hospital which Aston Park proposes to construct will not be adequate in design, structure or equipment or that it will not be maintained in accordance with the highest standards of sanitation and patient care."); *id.* ("Nothing in the record suggests that the proposed hospital will not be superior to the present plant in all these respects."); *id.* at 548, 193 S.E.2d at 733 ("Nothing in the record before us suggests that the 69 acre tract on which Aston Park proposes to construct its new hospital is not a suitable location therefor."); *id.* at 549, 193 S.E.2d at 734 ("The record discloses no reason to suppose that [competition will not lower prices and increase quality] in the practice of the healing arts and in the operation of institutions for that purpose."). Simply put, *Aston Park* held that facts matter.

Second, the State's argument hinges on the Court of Appeals' decision in *Hope*, which declared *Aston Park* "moot" based on the new CON law's findings (State's Br. 19–20). But *Aston Park* turned on the record before it. And this is

where the *Hope* plaintiffs failed. Because *Hope* was decided on the pleadings, the record was "limited to the facts" in the complaint and those of which the court could take notice. *Hope*, 203 N.C. App. at 597, 693 S.E.2d at 676 (cite omitted). The *Hope* plaintiffs should have alleged that the CON law failed to promote public health. *But their complaint was factually threadbare*. (App pp 25–43). So the Court of Appeals had no choice but to defer to the CON law's findings. *See Hope*, 203 N.C. App. at 607, 693 S.E.2d at 683 (relying on findings without questioning their validity); *cf. Cheek v. City of Charlotte*, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) (courts must presume economic laws are constitutional "until the contrary clearly appears" (cleaned up)).

Third, the State paints the decision below as a proper application of *Hope*. (Defs.' Br. 19–20). But for the reasons just discussed, *Hope* cannot control here. Unlike in *Hope*, Dr. Singleton made over a dozen allegations about how the CON law's findings are "false," and several more about how the CON law, as applied, fails to promote access to care or to benefit real patients in any way. (Pls.' Br. 11–12, 20–21 (collecting allegations)). Given *Aston Park*'s focus on the factual record, the Court of Appeals should have credited Dr. Singleton's allegations. Instead,

the court ignored them entirely. That is a "conflict" that warrants discretionary review. N.C. Gen. Stat. § 7A-31(c)(3).

II. The Court of Appeals' refusal to reach Dr. Singleton's anti-special privileges and anti-monopoly claims does not bar review, and in fact shows why review is necessary.

The Court of Appeals refused to say whether Dr. Singleton stated viable anti-special privileges and anti-monopoly claims because it mistook them for "procedural due process" claims that require exhaustion under Rule 12(b)(1). *Singleton*, 2022-NCCOA-412, ¶¶ 15, 20. Seizing on that error, the State argues mandatory review is improper because the "decision below" did not analyze these claims and that discretionary review is improper because there is a "jurisdictional bar." (Defs.' Br. 10–11, 17–18). Neither is correct. The Court of Appeals' refusal to reach these claims does not bar mandatory review because this "case" presents substantial questions about Art. I, §§ 32 and 34, which is all N.C. Gen. Stat. § 7A-30(1) requires. And the Court of Appeals' error—confusing two of Dr. Singleton's constitutional claims with an entirely different one—only highlights the need for discretionary review.

A. The Court of Appeals' refusal to reach Dr. Singleton's anti-special privileges and anti-monopoly claims does not bar mandatory review.

The State paraphrases N.C. Gen. Stat. § 7A-30(1) so that it appears this Court only has to review Court of Appeals "decisions" on the merits of constitutional issues. (Defs.' Br. 12). But the mandatory review statute allows appeals "from ***any*** decision of the Court of Appeals rendered ***in a case***" that directly involves a substantial constitutional question. N.C. Gen. Stat. § 7A-30(1) (emphasis added). The *case*—not necessarily the Court of Appeals' decision—must present the constitutional question. That's why Appellate Rule 14(b)(2) notes that mandatory review is proper even where the constitutional question was "***not determined***" (emphasis added). The plain text of these provisions makes this easy: Dr. Singleton has already explained why this "case" presents substantial questions about how Art. I, §§ 32 and 34 apply to economic laws. (Pls.' Br. 23–35). The State had a chance to offer its own perspective on these questions. It chose to say nothing. That should be the end of the matter.

Lacking support in the statute itself, the State cites *Colson* for the idea "that the Court of Appeals must first 'pass upon' a constitutional question for an appeal to lie under the statute." (Defs.' Br. 12 (quoting *Colson*, 274 N.C. at 310,

163 S.E.2d at 386)). But after *Colson*, this Court clarified that the issue need only be "raised and passed upon in the trial court and properly brought forward for consideration by the Court of Appeals." *State v. Cumber*, 280 N.C. 127, 131–32, 185 S.E.2d 141, 144 (1971); *see also* N.C. R. App. P. 14(b)(2) (notice of appeal must "state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not)"). That rule honors the result in *Colson*: The Court refused to review a constitutional question because the appellant failed to raise it before the trial court or preserve it on appeal. *Colson*, 274 N.C. at 309–10, 163 S.E.2d at 386.

By contrast, Dr. Singleton raised and preserved his claims at every step. He raised anti-special privileges and anti-monopoly claims in his complaint (R pp 31–32, ¶¶ 130–43), the Superior Court dismissed them under Rule 12(b)(6) (R p 59), he appealed (R p 60), and he pressed both claims before the Court of Appeals. That is all N.C. Gen. Stat. § 7A-30(1) requires. Which makes sense. Were it otherwise, the Court of Appeals could bar important constitutional cases from reaching this Court by wrongly dismissing them on procedural grounds. The State cites no authority for such a bizarre rule.

B. The Court of Appeals' refusal to reach Dr. Singleton's anti-special privileges and anti-monopoly claims does not bar discretionary review.

The State last argues that because the Court of Appeals dismissed Dr. Singleton's anti-special privileges and anti-monopoly claims under Rule 12(b)(1), "this Court would be ill-served by granting [discretionary] review in a case where those claims face a jurisdictional bar." (Defs.' Br. 17–18). The State has it backward. The Court of Appeals only dismissed these claims because it was deeply confused about Art. I, §§ 32 and 34, which shows just how badly this Court's guidance is needed.

Look at the decision below. The Court of Appeals held that Dr. Singleton did not need to exhaust the CON process before he could bring a challenge under Art. I, § 19 because "substantive" constitutional claims can be brought "regardless of whether administrative remedies have been exhausted." *Singleton*, 2022-NCCOA-412, ¶¶ 21–22 (quoting *Good Hope Hosp. v. N.C. Dep't of Health & Hum. Servs.*, 174 N.C. App. 266, 272, 620 S.E.2d 873, 879 (2005)). The court should have applied that rule to Dr. Singleton's claims under Art. I, §§ 32 and 34, which were no less "substantive." But it didn't. Instead, it treated them as "procedural

due process" claims "properly dismissed under Rule 12(b)(1)." *Singleton*, 2022-NCCOA-412, ¶¶ 15, 20.

That is baffling. Dr. Singleton did not bring a procedural due process claim. (R pp 31–34, ¶¶ 130–52). In fact, he distinguished his claims from a procedural claim multiple times. (Oral Arg., https://tinyurl.com/2ube2s3r, at 2:55–3:02 ("This isn't a challenge to the administrative process itself."); App p 74 (distinguishing Dr. Singleton's "substantive" claims from procedural due process claim brought in another CON case)). And rightly so, because the last time this Court decided anti-special privileges and anti-monopoly challenges to a CON law, procedural due process did not factor in at all. *See Aston Park*, 282 N.C. at 551, 193 S.E.2d at 736 (holding that prior CON law "establishes a monopoly in the existing hospitals contrary to the provisions of Article I, § 34 . . . and is a grant to them of exclusive privileges forbidden by Article I, § 32").

There is only one explanation for the Court of Appeals' mistake: deep confusion over Art. I, §§ 32 and 34. As Dr. Singleton explained in his notice and petition, this Court has not decided similar claims under either provision since *Aston Park*, and those it *has* decided have only muddied the analysis. (Pls.' Br. 23–35 & n.4). With so little recent guidance, the Court of Appeals may have simply

lacked the tools to recognize Dr. Singleton's claims for what they were: the same claims that prevailed in *Aston Park*.

But the Court of Appeals' confusion is a feature here, not a bug. After all, this Court reviews "error[s] of law." N.C. R. App. P. 16(a). The Court of Appeals' error stems, at root, from confusion in this Court's cases over how Art. I, §§ 32 and 34 apply to economic laws. (Pls.' Br. 23–35). That is an issue only this Court, as "the ultimate interpreter of our State Constitution," *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992), can resolve. The Court should certify Dr. Singleton's anti-special privileges and anti-monopoly claims for discretionary review to clarify "legal principles of major significance to the jurisprudence of the State." N.C. Gen. Stat. § 7A-31(c)(2).

CONCLUSION

The Court should deny the State's motion to dismiss and either grant mandatory review or certify this case for discretionary review for the reasons stated in Dr. Singleton's notice and petition.

Respectfully submitted this 12th day of October, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 12th day of October, 2022, a copy of the foregoing brief was served upon all parties to this matter by electronic mail as follows:

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CONTENTS OF APPENDIX

TENTH DISTRICT

****

NORTH CAROLINA COURT OF APPEALS

****

HOPE-A WOMEN'S CANCER CENTER, P.A. and RALEIGH ORTHOPAEDIC CLINIC, P.A.,

Plaintiffs-Appellants,

v.

STATE OF NORTH CAROLINA; BEVERLY EAVES PERDUE, Governor of the State of North Carolina, in his official capacity; NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; LANIER M. CANSLER, Secretary of the North Carolina Department of Health and Human Services, in his official capacity; DAN A MYERS, M.D., Chairman of the North Carolina State Health Coordinating Council, in his official capacity; JEFF HORTON, Acting Director, Division of Health Service Regulation, North Carolina Department of Health and Human Services, in his official capacity; and LEE B. HOFFMAN, Chief of the Certificate of Need Section, Division of Health Service Regulation, North Carolina Department of Health and Human Services, in her official capacity,

Defendants-Appellees.

From Wake County
No. 08 CVS 007955

****

RECORD ON APPEAL

****

VOLUME 1 OF 3

08CV007955

STATE OF NORTH CAROLINA

File No

WAKE County

In The General Court Of Justice
☐ District ☒ Superior Court Division

Name Of Plaintiff	
Hope-A Women's Cancer Center, et al.	
Address	**CIVIL SUMMONS**
100 Ridgefield Court	☐ ALIAS AND PLURIES SUMMONS
City, State, Zip	G.S. 1A-1, Rules 3, 4
Asheville, NC 28806	
VERSUS	
Name Of Defendant(s)	Date Original Summons Issued
State of North Carolina, et al.	Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	Name And Address Of Defendant 2
State of North Carolina Attn: Roy A. Cooper, Attorney General N.C. Department of Justice 9001 Mail Service Center Raleigh, NC 27699-9001	Governor Michael F. Easley Office of the Governor 20301 Main Service Center Raleigh, NC 27699-0301

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and

2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)	Date Issued	Time
Noah H. Huffstetler, III Nelson Mullins Riley & Scarborough LLP GlenLake One, Suite 200 4140 Parklake Avenue Raleigh, NC 27612	5-6-08	2:30 ☐ AM ☒ PM
	Signature	
	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

☐ ENDORSEMENT
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement	Time
	☐ AM ☐ PM
Signature	
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

NOTE TO PARTIES: *Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is $15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.*

(Over)

08CV007955

STATE OF NORTH CAROLINA

File No.

WAKE County

In The General Court Of Justice
☐ District ☒ Superior Court Division

Name Of Plaintiff	CIVIL SUMMONS
Hope-A Women's Cancer Center, et al.	
Address: 100 Ridgefield Court	☐ ALIAS AND PLURIES SUMMONS
City, State, Zip: Asheville, NC 28806	G.S. 1A-1, Rules 3, 4
VERSUS	
Name Of Defendant(s): State of North Carolina, et al.	Date Original Summons Issued
	Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	Name And Address Of Defendant 2
N.C. Dept. of Health & Human Services Division of Health Service Regulation c/o Emery E. Milliken, General Counsel Office of Legal Affairs 2001 Mail Service Center Raleigh, NC 27699-2001	Dempsey E. Benton, Secretary N.C. Dept. of Health & Human Services 2001 Mail Service Center Raleigh, NC 27699-2001

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You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and

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If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)	Date Issued	Time
Noah H. Huffstetler, III Nelson Mullins Riley & Scarborough LLP GlenLake One, Suite 200 4140 Parklake Avenue Raleigh, NC 27612	5-6-08	2:30 ☐ AM ☐ PM
	Signature: CHP	
	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

☐ ENDORSEMENT
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08CV007955

STATE OF NORTH CAROLINA

File No

WAKE County

In The General Court Of Justice
☐ District ☒ Superior Court Division

Name Of Plaintiff	CIVIL SUMMONS
Hope-A Women's Cancer Center, et al.	
Address	☐ ALIAS AND PLURIES SUMMONS
100 Ridgefield Court	
City, State, Zip	G.S. 1A-1, Rules 3, 4
Asheville, NC 28806	
VERSUS	
Name Of Defendant(s)	Date Original Summons Issued
State of North Carolina, et al.	Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	Name And Address Of Defendant 2
Dan A. Myers, M.D. 1106 Walker Drive Kinston, NC 28501	Jeff Horton, Acting Director Division of Health Service Regulation N.C. Dept. of Health and Human Services 2701 Mail Service Center Raleigh, NC 27699-2701

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and

2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)	Date Issued	Time	
Noah H. Huffstetler, III Nelson Mullins Riley & Scarborough LLP GlenLake One, Suite 200 4140 Parklake Avenue Raleigh, NC 27612	5-6-08	2:30	☐ AM ☒ PM
	Signature		
	☒ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court		

☐ ENDORSEMENT
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement	Time	
		☐ AM ☐ PM
Signature		
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court		

NOTE TO PARTIES: *Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is $15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.*

(Over)

08CV007955

STATE OF NORTH CAROLINA

File No.

WAKE County

In The General Court Of Justice
☐ District ☒ Superior Court Division

Name Of Plaintiff	
Hope-A Women's Cancer Center, et al.	
Address	
100 Ridgefield Court	
City, State, Zip	
Asheville, NC 28806	
VERSUS	
Name Of Defendant(s)	Date Original Summons Issued
State of North Carolina, et al.	Date(s) Subsequent Summons(es) Issued

CIVIL SUMMONS

☐ ALIAS AND PLURIES SUMMONS

G.S. 1A-1, Rules 3, 4

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	Name And Address Of Defendant 2
Lee B. Hoffman, Chief Certificate of Need Section Division of Health Service Regulation N.C. Dept. of Health and Human Services 2704 Mail Service Center Raleigh, NC 27699-2704	

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and

2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)	Date Issued	Time
Noah H. Huffstetler, III Nelson Mullins Riley & Scarborough LLP GlenLake One, Suite 200 4140 Parklake Avenue Raleigh, NC 27612	5-6-08	2:30 ☐ AM ☒ PM
	Signature: CHD	
	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

☐ ENDORSEMENT
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement	Time
	☐ AM ☐ PM
Signature	
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

NOTE TO PARTIES: *Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is $15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.*

(Over)

08CV007955

STATE OF NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE

2008 MAY -6 PM 2:31

SUPERIOR COURT DIVISION

COUNTY OF WAKE

WAKE COUNTY, C.S.C.

08 CVS _____

HOPE-A WOMEN'S CANCER CENTER, P.A., and RALEIGH ORTHOPAEDIC CLINIC, P.A.,

Plaintiffs,

vs.

STATE OF NORTH CAROLNA; MICHAEL F. EASLEY, Governor of the State of North Carolina, in his official capacity; NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; DEMPSEY E. BENTON, Secretary of the North Carolina Department of Health and Human Services, in his official capacity; DAN A. MYERS, M.D., Chairman of the North Carolina State Health Coordinating Council, in his official capacity; JEFF HORTON, Acting Director, Division of Health Service Regulation, North Carolina Department of Health and Human Services, in his official capacity; and LEE B. HOFFMAN, Chief of the Certificate of Need Section, Division of Health Service Regulation, North Carolina Department of Health and Human Services, in her official capacity,

Defendants.

COMPLAINT
(COMP & INJU)

Pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and Rule 57 of the North Carolina Rules of Civil Procedure, Plaintiffs Hope-A Women's Cancer Center, P.A. and Raleigh Orthopaedic Clinic, P.A. hereby file this Complaint for a declaratory judgment, preliminary and permanent

injunction, and monetary damages. In support of this Complaint, Plaintiffs allege the following:

PARTIES

1. Plaintiff Hope-A Women's Cancer Center, P.A. ("Hope") is a professional corporation organized under Chapter 55B of the North Carolina General Statutes, having its principal place of business in Buncombe County, North Carolina.

2. Plaintiff Raleigh Orthopaedic Clinic, P.A. (the "Clinic") is a professional corporation organized under Chapter 55B of the North Carolina General Statutes, having its principal place of business in Wake County, North Carolina.

3. Defendant State of North Carolina is a state, with its capital in Raleigh, Wake County, North Carolina.

4. Defendant North Carolina Department of Health and Human Services (the "Department") is an agency of the State of North Carolina, having its principal place of business in Wake County, North Carolina.

5. Defendant Michael F. Easley is the Governor of the State of North Carolina and is a party here only in his official capacity.

6. Defendant Dempsey E. Benton is the Secretary of the North Carolina Department of Health and Human Services and is a party here only in his official capacity.

7. Defendant Dan A. Myers, M.D., is the Chairman of the North Carolina State Health Coordinating Council and is a party here only in his official capacity.

8. Defendant Jeff Horton is the Acting Director of the Division of Health Service Regulation, North Carolina Department of Health and Human Services and is a party here only in his official capacity.

9. Defendant Lee B. Hoffman is the Chief of the Certificate of Need Section, Division of Health Service Regulation, North Carolina Department of Health and Human Services and is a party here only in her official capacity.

JURISDICTION

10. As more fully explained below, an actual, judiciable controversy exists between Plaintiffs and the Defendants, and Plaintiffs are therefore entitled to bring this action under the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.*, to obtain a determination of its rights under the Constitution of North Carolina, the Fourteenth Amendment to the United States Constitution and Chapter 131E, Article 9 of the North Carolina General Statutes (the "CON Law").

11. Plaintiffs have no administrative remedy that they must exhaust before bringing this action.

12. The defense of sovereign immunity is not applicable to this action because it is brought pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, by which the State of North Carolina has waived any defense of sovereign immunity in connection with an action by "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . [to] determine[] any question of . . . validity arising under the . . . statute . . . and [to] obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254.

13. As described below, the public official Defendants, acting in their official capacities, have enforced or threatened to enforce invalid state laws and regulations and have invaded or threatened to invade the personal and property rights of Plaintiffs in disregard of the law. As a result, Defendants are not entitled to any defense based on sovereign immunity.

14. Plaintiffs further have a direct cause of action under the North Carolina Constitution and, as a result, Defendants are not entitled to any defense based on sovereign immunity.

HOPE

15. Founded in 1992, Hope specializes in gynecologic and breast cancer treatment as well as the treatment of other complex breast and gynecologic disorders. Hope offers a range of gynecologic and breast surgical procedures and chemotherapy, serving patients referred by physicians throughout Western North Carolina. Hope physicians are primary investigators for the Gynecologic Oncology Group in Western North Carolina, which is the primary study group for women's cancers in the United States. Additionally, Hope participates in the American College of Surgeons – Oncology Group's breast cancer trials. Hope also participates in other clinical trials in cooperation with the National Cancer Institute to develop new treatments for breast and ovarian cancer and to improve existing treatments.

16. Based on their education, training, and professional experience, the physicians of Hope believe that a comprehensive cancer center offering diagnostic and treatment modalities including advanced imaging, medical and radiation oncology and surgical services in one location improves the continuity of care for cancer patients and enables the highest possible level of care to be provided to those patients.

17. In order to develop a cancer center with such integrated services, Hope wishes to provide its patients with positron emission tomography, magnetic resonance imaging ("MRI") and linear accelerator services at the same location at which it now provides chemotherapy and surgical services.

18. The amount of payment for services provided to Hope's patients is established either by regulations enacted by the federal Centers for Medicare and Medicaid Services or by contracts negotiated with private medical insurance companies. The cost of the facilities and equipment used to provide those services is not a factor in the calculation of the amount of such payments. Therefore, Hope does not have the ability to pass the cost of any of the facilities and equipment which it proposes to develop or acquire on to government programs or private payors by raising the cost of services provided to their covered patients.

THE CLINIC

19. The Clinic, with nineteen physicians, is the largest orthopaedic practice in Wake County. The Clinic has four office locations and serves patients from all of Wake County and a large region of Eastern North Carolina. In 2006, the Clinic's physicians performed over 7,300 orthopaedic surgical procedures; ambulatory surgery procedures comprised 76% of this total.

20. Based on their education, training and professional experience, the physicians of the Clinic believe that single specialty operating rooms, the equipment and staff of which do not need to be changed throughout the day to accommodate different types of surgical procedures, offer significant advantages to physicians and their patients in both the quality and the cost of necessary medical care. Currently, no facility in Wake County has any dedicated ambulatory orthopaedic surgery operating rooms.

21. In order to continue to provide high quality, cost effective medical services to its patients, the Clinic wishes to develop a licensed ambulatory surgery center with six operating rooms dedicated to the provision of orthopaedic surgery.

22. The amount of payment for services provided to the Clinic's patients is established either by regulations enacted by the federal Centers for Medicare and Medicaid Services or by contracts negotiated with private medical insurance companies. The cost of the facilities and equipment used to provide those services is not a factor in the calculation of the amount of such payments. Therefore, the Clinic does not have the ability to pass the cost of any of the facilities and equipment which it proposes to develop or acquire on to government programs or private payors by raising the cost of services provided to their covered patients.

THE CON LAW

23. The CON Law requires that healthcare providers such as Plaintiffs obtain a certificate of need ("CON") prior to developing or offering those projects defined as "new institutional health services." Pursuant to N.C. Gen. Stat. § 131E-176(16), the acquisition of a positron emission tomography scanner, linear accelerator or MRI scanner, the establishment of a new ambulatory surgery facility and the development of one or more operating rooms are all defined as new institutional health services requiring a CON.

24. The criteria used by the Defendants in determining whether or not to grant a CON for a proposed project are contained in N.C. Gen. Stat. § 131E-183. The first of these criteria, set forth in N.C. Gen. Stat. § 131E-183(a)(1), provides that "[t]he proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility [or] operating rooms ... that may be approved."

25. Pursuant to the foregoing statutory provision, the Defendants have consistently refused to review or consider for approval any CON application for a proposed new

institutional health service if the State Medical Facilities Plan (the "Plan") currently in force contains a determination that there is no need for that project. As a result of the Defendants' practice, Plaintiffs and similarly situated applicants for CONs have no opportunity to demonstrate in their applications that the new institutional health services they propose are needed, unless there has been a prior need determination for their proposed service area in the Plan.

26. As set forth on page 1 of the 2008 Plan, a copy of which is attached as Exhibit 1 to this Complaint, the Plan is annually developed by the Department "under the direction of the North Carolina State Health Coordinating Council" (the "Council"). After approval by the Governor, the Plan is adopted by the Department as a rule for the review of CON applications.

27. The Council was established by Executive Order 98 of Governor Michael F. Easley, dated 18 January 2006, a copy of which is attached to this Complaint as Exhibit 2. Among its duties under that Executive Order, the Council is directed to "prepare the annual State Medical Facilities Plan and present the plan to the Governor."

28. Attached as Exhibit 3 to this Complaint is a current list of the members of the Council, as set forth in Table 1A of the 2008 Plan. Plaintiffs are informed and believe, and therefore allege, that the Council is currently comprised of 27 private citizens, at least 23 of whom serve as officers, employees or directors of businesses engaged in providing health care services for compensation within the State of North Carolina. Plaintiffs are further informed and believe, and therefore allege, that the businesses with which those members of the Council are affiliated, as well as their competitors, are subject to regulation under the CON Law, and that the decisions of the Council have a significant, direct financial impact upon those businesses with which members of the Council are affiliated.

29. N.C. Gen. Stat. § 131E-176(25) provides in pertinent part:

> In preparing the Plan, the Department and the State Health Coordinating Council shall maintain a mailing list of persons who have requested notice of public hearings regarding the Plan. Not less than 15 days prior to a scheduled public hearing, the Department shall notify persons on its mailing list of the date, time, and location of the hearing. The Department shall hold at least one public hearing prior to the adoption of the proposed Plan and at least six public hearings after the adoption of the proposed Plan by the State Health Coordinating Council. The Council shall accept oral and written comments from the public concerning the Plan.

30. Except for the above-quoted provisions of N.C. Gen. Stat. § 131E-176(25), the CON Law contains no guiding standards or procedural safeguards applicable to the development of the Plan by the Department under the direction of the Council. So long as the public hearing process set forth in N.C. Gen. Stat. § 131E-176(25) is followed by the Council, the factors considered and methodology used by the Council in making the need determinations for new institutional health services set forth in the Plan are left entirely within the Council's discretion.

THE STATE GOVERNMENT ETHICS ACT

31. The State Government Ethics Act, N.C. Gen. Stat. § 138A-1, *et seq.*, contains comprehensive guiding standards and procedural safeguards applicable to "[a]ny state board, commission, council, committee, task force, authority, or similar public body, however denominated, created by statute or executive order, as determined and designated by the [State Ethics Commission], except for those public bodies who have only advisory authority." "The purpose of this chapter is to ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence." N.C. Gen. Stat. § 138A-2.

32. Among the legislative findings made by the General Assembly when it enacted the State Government Ethics Act are the following:

> [B]ecause many public officials serve on a part-time basis, it is inevitable that conflicts of interest and appearances of conflicts will occur. Often these conflicts are unintentional and slight, but at every turn those public officials who represent the people of this State must ensure that it is the interests of the people, and not their own, that are being served. Officials should be prepared to remove themselves immediately from decisions, votes, or processes where a conflict of interest exists....

2006 Session Laws, Chapter 201, s. 25.

33. The State Government Ethics Act establishes the following procedural safeguards against self-interested decision-making by public officials:

a. The State Ethics Commission is established and authorized to receive complaints alleging unethical conduct by covered persons and conduct inquiries regarding those complaints.

N.C. Gen. Stat. § 138A-12(a).

b. The State Ethics Commission is directed to develop and implement an ethics education and awareness program for covered persons.

N.C. Gen. Stat. § 138A-10(a)(8).

c. Every covered person subject to the State Government Ethics Act is required to file annually a statement of economic interest disclosing, among other things, the identity of any non-publicly owned business of which the person is an officer, employee or director and, for each such business whether it "has any material business dealings, contracts, or other involvement with the State, or is regulated by the State."

N.C. Gen. Stat. § 138A-24(a)(2)(i).

34. Plaintiffs are informed and believe, and therefore allege, that the Council and its members have been determined by the State Ethics Commission not to be subject to any of the procedural safeguards established by the State Government Ethics Act set forth in the preceding paragraph, and that members of the Council have not filed the statements of economic interest required therein.

THE ADMINISTRATIVE PROCEDURE ACT

35. Chapter 150B, of the North Carolina General Statutes (the "Administrative Procedure Act") contains comprehensive guiding standards and procedural safeguards applicable to the promulgation of rules having the force and effect of law by agencies by North Carolina State Government. See N.C. Gen. Stat. §§ 150B-18 through 150B-21.28. Pursuant to N.C. Gen. Stat. § 150B-2(8a)k., "if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the [Rules Review] Commission for compliance with G.S. 131E-176(25), and approved by the Governor," the development of the Plan by the Council is not subject to the comprehensive guiding standards and procedural safeguards applicable to other rules having the force and effect of law under the Administrative Procedure Act.

36. Among its other procedural safeguards applicable to the adoption of rules, the Administrative Procedure Act establishes the Rules Review Commission, which is authorized to determine whether a rule is within the authority delegated to the agency by the General Assembly, is clear and unambiguous, and is reasonably necessary to implement or interpret an enactment of the General Assembly or of Congress. See N.C. Gen. Stat. § 150B-21.9. Because the Plan is exempted from the provisions of the Administrative Procedure Act as set

forth above, the foregoing standards are not applicable to the Plan. See N.C. Gen. Stat. § 150B-2(8a)k.

37. The Administrative Procedure Act also contains provisions for contested case hearings to review decisions of state agencies. See N.C. Gen. Stat. §§ 150B-22 through 150B-37. Persons who are adversely affected by CON decisions are precluded from challenging the decisions in court until they have exhausted their remedies under the Administrative Procedure Act. See N.C. Gen. Stat. §§ 131E-188, 150B-43. In CON cases, contested cases can extend for up to 270 days from the date a petition for a contested case is filed to the date that the administrative law judge makes his or her decision. See N.C. Gen. Stat. § 131E-188(a). Even then, the determination of the administrative law judge is only a "recommended decision" which is reviewed by the Department, which makes a final Agency decision within 60 additional days after receiving the official record of the case. Id.

38. In 2000, the General Assembly amended the Administrative Procedure Act to provide significant protections to persons challenging decisions of state agencies in contested cases, including limitations on the ability of an agency to reject the decision of an administrative law judge in a contested case. See Act of 12 July 2000, 2000 North Carolina Session Laws, Ch. 190 (the "APA Reforms"). However, CON decisions were singled-out as the only type of administrative actions to which the APA Reforms do not apply. Id.

39. Because CON cases were exempted from the APA Reforms, the provisions of N.C. Gen. Stat. §§ 150B-36(b), (b1), (b2), (b3), and (d) and 150B-51 "do not apply to cases decided under" the CON Law. See N.C. Gen. Stat. § 150B-34(c).

40. Because CON decisions were exempted from the APA Reforms, the Department is permitted to freely disregard recommended decisions of administrative law judges which do

not support the Department's initial decisions. Plaintiffs are informed and believe, and therefore allege, that the Department routinely adopts recommended decisions by administrative law judges which support its initial decisions, and routinely rejects recommended decisions of administrative law judges which do not support its initial decisions.

41. The judicial review of administrative decisions which is available under the Administrative Procedure Act is conducted upon the official record created in a contested case. See N.C. Gen. Stat. § 150B-51(c). The Department's rule codified as 10A N.C.A.C. 14C.0402 provides that the "correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing." Because of this rule, persons adversely affected by arbitrary or erroneous need determinations made by the Council and included in the Plan are deprived of effective administrative or judicial review of those decisions.

ADJUSTMENTS TO THE PLAN

42. The 2008 Plan on pages 8-10, a copy of which is attached as Exhibit 4 to this Complaint, provides a process by which the Council can decide at the request of any individual to treat a particular geographic area or institution differently from others similarly situated, stating as follows:

> People 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 and policies may submit a written petition requesting an adjustment be made to the need determination given in the Proposed [Plan].

43. The 2008 Plan on page 10 further states that the Council will decide "whether or not to incorporate the recommended adjustments in the final [Plan] to be forwarded to the

Governor." Nothing in the CON Law, the Administrative Procedure Act or any other statute provides guiding standards to determine what are "unique or special attributes of a particular geographic area or institution" or to direct the Council in making a decision to approve or disapprove any petition "to adjust the need determination." Nothing in the CON Law, the Administrative Procedure Act or any other statute contains procedural safeguards to protect against the Council making decisions to approve or disapprove any such petition which are arbitrary, unreasoned or affected by the self-interest of its members.

44. Hope petitioned the Council to adjust the 2008 Plan to show a need determination for the acquisition of a magnetic resonance imaging ("MRI") scanner to be used exclusively for imaging procedures to diagnose and treat breast cancer. A copy of Hope's petition is attached as Exhibit 5 to this Complaint. Similar petitions to include in the 2003 and 2006 Plans a need determination for the same equipment were approved by the Council in response to petitions filed by Charlotte Radiology, P.A. in Charlotte and Breast MRI Clinic, LLC in Winston-Salem. However, the Council disapproved Hope's petition.

45. On four occasions since 2004, the Clinic has petitioned the Council to include in the Plan a determination of need for new operating rooms in Wake County, North Carolina. On the most recent occasion, the Clinic petitioned the Council to determine a need for six freestanding, single specialty operating rooms in Wake County. A copy of that petition, (without its supporting exhibits) is attached as Exhibit 6 to this Complaint. All four of the Clinic's petitions were disapproved by the Council.

46. In 2007, the Clinic also petitioned Governor Michael F. Easley to exercise his authority to direct the Council to make an adjustment to the 2008 Plan in accordance with the

Clinic's petition to the Council which is attached as Exhibit 6 to this Complaint. However, Governor Easley declined to do so.

FIRST CLAIM FOR RELIEF
DECLARATORY JUDGMENT (DELEGATION OF LEGISLATIVE AUTHORITY)

47. The allegations contained in paragraphs 1-46 are incorporated herein by reference.

48. The CON Law and Executive Order 98 of Governor Michael F. Easley, as applied in this case, delegate the legislative authority to determine what new institutional health services may be developed within the State of North Carolina to the Council, without adequate guiding standards or procedural safeguards to ensure that its decisions are not arbitrary, unreasoned or affected by the self-interest of its members, and therefore violate Article I, § 6 and Article II, § 1 of the Constitution of North Carolina.

49. Pursuant to N.C. Gen. Stat. § 1-253 and Rule 57 of the North Carolina Rules of Civil Procedure, Plaintiffs are entitled to a declaratory judgment that the CON Law and Executive Order 98 of Governor Michael F. Easley are unconstitutional as applied in this case.

SECOND CLAIM FOR RELIEF
DECLARATORY JUDGMENT (PROCEDURAL DUE PROCESS)

50. The allegations contained in paragraphs 1-49 of this Complaint are incorporated herein by reference.

51. Because it requires Plaintiffs to obtain a CON before developing the new institutional health services which they desire to establish, but deprives Plaintiffs of a reasonable opportunity to demonstrate the need for such services and to obtain the necessary CON, the CON Law, as applied in this case, deprives Plaintiffs of their right to procedural due

process of law guaranteed by Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution.

52. Pursuant to N.C. Gen. Stat. § 1-253 and Rule 57 of the North Carolina Rules of Civil Procedure, Plaintiffs are entitled to a declaratory judgment that the CON Law is unconstitutional as applied in this case.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT (SUBSTANTIVE DUE PROCESS)

53. The allegations contained in paragraphs 1-52 of this Complaint are incorporated herein by reference.

54. Because it imposes restrictions on Plaintiffs' fundamental right to carry out their otherwise lawful business activities which are unreasonable in degree in comparison to the probable public benefit, the CON Law, as applied in this case, deprives Plaintiffs of their right to substantive due process of law in violation of Article I, § 19 of the Constitution of North Carolina.

55. Pursuant to N.C. Gen. Stat. § 1-253 and Rule 57 of the North Carolina Rules of Civil Procedure, Plaintiffs are entitled to a declaratory judgment that the CON Law is unconstitutional as applied in this case.

FOURTH CLAIM FOR RELIEF
DECLARATORY JUDGMENT (ACCESS TO THE COURTS)

56. The allegations contained in paragraphs 1-55 are incorporated herein by reference.

57. The CON Law, the Administrative Procedure Act and the Department's rule codified as 10A N.C.A.C. 14C.0402, as applied in this case, deprive Plaintiffs of access to the

courts for a redress of their grievances, in violation of Article I, § 18 of the Constitution of North Carolina.

58. Pursuant to N.C. Gen. Stat. § 1-253 and Rule 57 of the North Carolina Rules of Civil Procedure, Plaintiffs are entitled to a declaratory judgment that the CON Law, the Administrative Procedure Act, and the Department's rule codified as 10A N.C.A.C. 14C.0402 are unconstitutional as applied in this case.

FIFTH CLAIM FOR RELIEF
PRELIMINARY AND PERMANENT INJUNCTION

59. The allegations contained in paragraph 1-58 of this Complaint are incorporated herein by reference.

60. If the Defendants are allowed to refuse to review or to disapprove any CON application submitted by either of the Plaintiffs on the grounds that there is no need determination for the proposed new institutional health service in the Plan, Plaintiffs and their patients will be irrevocably harmed.

61. Plaintiffs have no adequate remedy at law and, without adequate injunctive relief, will suffer immeasurable and incalculable damages.

62. Plaintiffs likely will succeed on the merits of their case.

63. The public interest supports the issuance of an injunction on the facts of this case.

64. The Defendants should be permanently enjoined from refusing to review or disapproving any CON application submitted by either of the Plaintiffs on the grounds that there is no need determination for the proposed new institutional health service in the Plan.

65. To prevent imminent, irrevocable harm to Plaintiffs and their patients, the Defendants should be preliminary enjoined during the pendency of this action from refusing to review or disapproving any CON application submitted by either of the Plaintiffs on the grounds that there is no need determination for the proposed new institutional health service in the Plan.

SIXTH CLAIM FOR RELIEF
MONETARY DAMGES

66. The allegations contained in paragraph 1-65 of this Complaint are incorporated herein by reference.

67. Defendants have violated Plaintiffs' rights under the North Carolina Constitution.

68. As a result of Defendants' violation of Plaintiffs' rights under the North Carolina Constitution, Plaintiffs have been damaged in an amount to be determined at trial, but certainly in excess of $10,000.

69. Plaintiffs have no adequate alternative state remedies for redress of these violations of their rights under the North Carolina Constitution.

70. Plaintiffs have a direct cause of action under the North Carolina Constitution for violation of their constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Hope and the Clinic respectfully request the following relief:

1. That judgment be entered declaring that the CON Law, the Administrative Procedure Act, and the Department's rule codified as 10A N.C.A.C. 14C.0402 and Executive Order 98 of Governor Michael F. Easley are unconstitutional as applied in this case;

2. That the Department be preliminarily and permanently enjoined from refusing to review or disapproving any CON application submitted by either of the Plaintiffs on the ground that there is no need determination for the proposed new institutional health services in the Plan;

3. That Plaintiffs be awarded damages in an amount to be determined at trial for Defendants' violation of their rights under the North Carolina Constitution;

4. That Defendants be ordered to pay pre-judgment interest and post-judgment interest on the amount of damages awarded, together with Plaintiffs' reasonable collection costs and attorneys fees in pursuing this action; and

5. That Plaintiffs be granted such other and further relief as the Court deems just and proper.

This the ____ day of May, 2008.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

Noah H. Huffstetler, III
N.C. State Bar No. 7170
Denise M. Gunter
N.C. State Bar No. 16695
Wallace C. Hollowell, III
N.C. State Bar No. 24304
Elizabeth B. Frock
N.C. State Bar No. 36765

By: Noah H. Huffstetler III

Noah H. Huffstetler III
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 877-3800
Facsimile: (919) 877-3799

ATTORNEYS FOR HOPE- A WOMEN'S CANCER CENTER, P.A. AND RALEIGH ORTHOPAEDIC CLINIC, P.A.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 7955

FILED
2008 DEC 31 P 2:22
WAKE COUNTY, C.S.C.
BY

HOPE-A WOMEN'S CANCER CENTER, P.A., and RALEIGH ORTHOPAEDIC CLINIC, P.A.,

Plaintiffs,

vs.

STATE OF NORTH CAROLNA; MICHAEL F. EASLEY, Governor of the State of North Carolina, in his official capacity; NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; DEMPSEY E. BENTON, Secretary of the North Carolina Department of Health and Human Services, in his official capacity; DAN A. MYERS, M.D., Chairman of the North Carolina State Health Coordinating Council, in his official capacity; JEFF HORTON, Acting Director, Division of Health Service Regulation, North Carolina Department of Health and Human Services, in his official capacity; and LEE B. HOFFMAN, Chief of the Certificate of Need Section, Division of Health Service Regulation, North Carolina Department of Health and Human Services, in her official capacity,

Defendants.

FIRST AMENDED COMPLAINT
(COMP & INJU)

Pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and Rules 15(a) and 57 of the North Carolina Rules of Civil Procedure, Plaintiffs Hope-A Women's Cancer Center, P.A. and Raleigh Orthopaedic Clinic, P.A. hereby file this First Amended Complaint for a declaratory

judgment, preliminary and permanent injunction, and monetary damages. In support of this Complaint, Plaintiffs allege the following:

PARTIES

1. Plaintiff Hope-A Women's Cancer Center, P.A. ("Hope") is a professional corporation organized under Chapter 55B of the North Carolina General Statutes, having its principal place of business in Buncombe County, North Carolina.

2. Plaintiff Raleigh Orthopaedic Clinic, P.A. (the "Clinic") is a professional corporation organized under Chapter 55B of the North Carolina General Statutes, having its principal place of business in Wake County, North Carolina.

3. Defendant State of North Carolina is a state, with its capital in Raleigh, Wake County, North Carolina.

4. Defendant North Carolina Department of Health and Human Services (the "Department") is an agency of the State of North Carolina, having its principal place of business in Wake County, North Carolina.

5. Defendant Michael F. Easley is the Governor of the State of North Carolina and is a party here only in his official capacity.

6. Defendant Dempsey E. Benton is the Secretary of the North Carolina Department of Health and Human Services and is a party here only in his official capacity.

7. Defendant Dan A. Myers, M.D., is the Chairman of the North Carolina State Health Coordinating Council and is a party here only in his official capacity.

8. Defendant Jeff Horton is the Acting Director of the Division of Health Service Regulation, North Carolina Department of Health and Human Services and is a party here only in his official capacity.

9. Defendant Lee B. Hoffman is the Chief of the Certificate of Need Section, Division of Health Service Regulation, North Carolina Department of Health and Human Services and is a party here only in her official capacity.

JURISDICTION

10. As more fully explained below, an actual, judiciable controversy exists between Plaintiffs and the Defendants, and Plaintiffs are therefore entitled to bring this action under the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.*, to obtain a determination of their rights under the Constitution of North Carolina, the Fourteenth Amendment to the United States Constitution and Chapter 131E, Article 9 of the North Carolina General Statutes (the "CON Law").

11. Plaintiffs have no administrative remedy that they must exhaust before bringing this action.

12. The defense of sovereign immunity, to the extent any such immunity may exist regarding the claims asserted in this action, is not applicable to this action because it is brought pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, by which the State of North Carolina has waived any defense of sovereign immunity in connection with an action by "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . [to] determine[] any question of . . . validity arising under the . . . statute . . . and [to] obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254.

13. As described below, the public official Defendants, acting in their official capacities, have enforced or threatened to enforce invalid state laws and regulations and have invaded or threatened to invade the personal and property rights of Plaintiffs in disregard of the law. As a result, Defendants are not entitled to any defense based on sovereign immunity.

14. Plaintiffs further have a direct cause of action under the North Carolina Constitution, including without limitation Article I, and, as a result, Defendants are not entitled to any defense based on sovereign immunity.

HOPE

15. Founded in 1992, Hope specializes in gynecologic and breast cancer treatment as well as the treatment of other complex breast and gynecologic disorders. Hope offers a range of gynecologic and breast surgical procedures and chemotherapy, serving patients referred by physicians throughout Western North Carolina. Hope physicians are primary investigators for the Gynecologic Oncology Group in Western North Carolina, which is the primary study group for women's cancers in the United States. Additionally, Hope participates in the American College of Surgeons – Oncology Group's breast cancer trials. Hope also participates in other clinical trials in cooperation with the National Cancer Institute to develop new treatments for breast and ovarian cancer and to improve existing treatments.

16. Based on their education, training, and professional experience, the physicians of Hope believe that a comprehensive cancer center offering diagnostic and treatment modalities including advanced imaging, medical and radiation oncology and surgical services in one location improves the continuity of care for cancer patients and enables the highest possible level of care to be provided to those patients.

17. In order to develop a cancer center with such integrated services, Hope wishes to provide its patients with positron emission tomography, magnetic resonance imaging ("MRI") and linear accelerator services at the same location at which it now provides chemotherapy and surgical services.

18. The amount of payment for services provided to Hope's patients is established either by regulations enacted by the federal Centers for Medicare and Medicaid Services or by contracts negotiated with private medical insurance companies. The cost of the facilities and equipment used to provide those services is not a factor in the calculation of the amount of such payments. Therefore, Hope does not have the ability to pass the cost of any of the facilities and equipment which it proposes to develop or acquire on to government programs or private payors by raising the cost of services provided to their covered patients.

THE CLINIC

19. The Clinic, with nineteen physicians, is the largest orthopaedic practice in Wake County. The Clinic has four office locations and serves patients from all of Wake County and a large region of Eastern North Carolina. In 2006, the Clinic's physicians performed over 7,300 orthopaedic surgical procedures; ambulatory surgery procedures comprised 76% of this total.

20. Based on their education, training and professional experience, the physicians of the Clinic believe that single specialty operating rooms, the equipment and staff of which do not need to be changed throughout the day to accommodate different types of surgical procedures, offer significant advantages to physicians and their patients in both the quality and the cost of necessary medical care. Currently, no facility in Wake County has any dedicated ambulatory orthopaedic surgery operating rooms.

21. In order to continue to provide high quality, cost effective medical services to its patients, the Clinic wishes to develop a licensed ambulatory surgery center with six operating rooms dedicated to the provision of orthopaedic surgery.

22. The amount of payment for services provided to the Clinic's patients is established either by regulations enacted by the federal Centers for Medicare and Medicaid Services or by contracts negotiated with private medical insurance companies. The cost of the facilities and equipment used to provide those services is not a factor in the calculation of the amount of such payments. Therefore, the Clinic does not have the ability to pass the cost of any of the facilities and equipment which it proposes to develop or acquire on to government programs or private payors by raising the cost of services provided to their covered patients.

THE CON LAW

23. The CON Law requires that healthcare providers such as Plaintiffs obtain a certificate of need ("CON") prior to developing or offering those projects defined as "new institutional health services." Pursuant to N.C. Gen. Stat. § 131E-176(16), the acquisition of a positron emission tomography scanner, linear accelerator or MRI scanner, the establishment of a new ambulatory surgery facility and the development of one or more operating rooms are all defined as new institutional health services requiring a CON.

24. The criteria used by the Defendants in determining whether or not to grant a CON for a proposed project are contained in N.C. Gen. Stat. § 131E-183. The first of these criteria, set forth in N.C. Gen. Stat. § 131E-183(a)(1), provides that "[t]he proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility [or] operating rooms ... that may be approved."

25. Pursuant to the foregoing statutory provision, the Defendants have consistently refused to review or consider for approval any CON application for a proposed new

institutional health service if the currently applicable State Medical Facilities Plan (the "Plan"), which contains unique content each year, contains a determination that there is no need for that project. As a result of the Defendants' practice, Plaintiffs and similarly situated applicants for CONs have no opportunity to demonstrate in their applications that the new institutional health services they propose are needed, unless there has been a prior need determination for their proposed service area in the Plan.

26. As set forth on page 1 of the 2008 Plan, a copy of which is attached as Exhibit 1 to this Complaint, the Plan is annually developed by the Department "under the direction of the North Carolina State Health Coordinating Council" (the "Council"). After approval by the Governor, the Plan is annually adopted by the Department as a rule for the review of CON applications.

27. The Council has been established, rescinded, and re-established several times by Executive Order of the Governor. The Council that prepared the 2008 Plan was established by Executive Order No. 98 of Governor Michael F. Easley, dated 18 January 2006, a copy of which is attached to this Complaint as Exhibit 2. Among its duties under that Executive Order, the Council was directed to "prepare the Annual State Medical Facilities Plan and present the plan to the Governor." Following Governor Easley's approval of the 2008 Plan, he rescinded Executive Order No. 98 and issued Executive Order No. 139, dated 3 March 2008, which once again established the Council and again directed it to "prepare the Annual State Medical Facilities Plan and present the plan to the Governor." See Exhibit 3, attached hereto.

28. Attached as Exhibit 4 to this Complaint is a current list of the members of the Council, as set forth on the Department's website at the following internet address:

http://www.ncdhhs.gov/dhsr/ncshcc/members.html. Plaintiffs are informed and believe, and therefore allege, that the Council is currently comprised of 29 private citizens, at least 25 of whom serve as officers, employees or directors of businesses engaged in providing health care services for compensation within the State of North Carolina, services which may be directly affected by the provisions in the Plan. Plaintiffs are further informed and believe, and therefore allege, that the businesses with which those members of the Council are affiliated, as well as their competitors, are subject to regulation under the CON Law, and that the decisions of the Council have a significant, direct financial impact upon those businesses with which members of the Council are affiliated.

29. N.C. Gen. Stat. § 131E-176(25) provides in pertinent part:

> In preparing the Plan, the Department and the State Health Coordinating Council shall maintain a mailing list of persons who have requested notice of public hearings regarding the Plan. Not less than 15 days prior to a scheduled public hearing, the Department shall notify persons on its mailing list of the date, time, and location of the hearing. The Department shall hold at least one public hearing prior to the adoption of the proposed Plan and at least six public hearings after the adoption of the proposed Plan by the State Health Coordinating Council. The Council shall accept oral and written comments from the public concerning the Plan.

30. Except for the above-quoted provisions of N.C. Gen. Stat. § 131E-176(25), the CON Law contains no guiding standards or procedural safeguards applicable to the development of the Plan by the Department under the direction of the Council. So long as the public hearing process set forth in N.C. Gen. Stat. § 131E-176(25) is followed by the Council, the factors considered and methodology used by the Council in making the need determinations for new institutional health services set forth in the Plan are left entirely within the Council's unguided discretion.

THE STATE GOVERNMENT ETHICS ACT

31. The State Government Ethics Act, N.C. Gen. Stat. § 138A-1, *et seq.*, contains comprehensive guiding standards and procedural safeguards applicable to "[a]ny state board, commission, council, committee, task force, authority, or similar public body, however denominated, created by statute or executive order, as determined and designated by the [State Ethics Commission], except for those public bodies who have only advisory authority." "The purpose of this chapter is to ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence." N.C. Gen. Stat. § 138A-2.

32. Among the legislative findings made by the General Assembly when it enacted the State Government Ethics Act are the following:

> [B]ecause many public officials serve on a part-time basis, it is inevitable that conflicts of interest and appearances of conflicts will occur. Often these conflicts are unintentional and slight, but at every turn those public officials who represent the people of this State must ensure that it is the interests of the people, and not their own, that are being served. Officials should be prepared to remove themselves immediately from decisions, votes, or processes where a conflict of interest exists....

2006 Session Laws, Chapter 201, s. 25.

33. The State Government Ethics Act establishes the following procedural safeguards against self-interested decision-making by public officials:

a. The State Ethics Commission is established and authorized to receive complaints alleging unethical conduct by covered persons and conduct inquiries regarding those complaints.

N.C. Gen. Stat. § 138A-12(a).

b. The State Ethics Commission is directed to develop and implement an ethics education and awareness program for covered persons.

N.C. Gen. Stat. § 138A-10(a)(8).

c. Every covered person subject to the State Government Ethics Act is required to file annually a statement of economic interest disclosing, among other things, the identity of any non-publicly owned business of which the person is an officer, employee or director and, for each such business whether it "has any material business dealings, contracts, or other involvement with the State, or is regulated by the State."

N.C. Gen. Stat. § 138A-24(a)(2)(i).

34. Plaintiffs are informed and believe, and therefore allege, that the Council and its members have been determined by the State Ethics Commission not to be subject to any of the procedural safeguards established by the State Government Ethics Act set forth in the preceding paragraph, and that members of the Council have not filed the statements of economic interest required therein.

THE ADMINISTRATIVE PROCEDURE ACT

35. Chapter 150B, of the North Carolina General Statutes (the "Administrative Procedure Act") contains comprehensive guiding standards and procedural safeguards applicable to the promulgation of rules having the force and effect of law by agencies by North Carolina State Government. See N.C. Gen. Stat. §§ 150B-18 through 150B-21.28. Pursuant to N.C. Gen. Stat. § 150B-2(8a)k., "if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the [Rules Review] Commission for compliance with G.S. 131E-176(25), and approved by the Governor," the development of the

Plan by the Council is not subject to the comprehensive guiding standards and procedural safeguards applicable to other rules having the force and effect of law under the Administrative Procedure Act.

36. Among its other procedural safeguards applicable to the adoption of rules, the Administrative Procedure Act establishes the Rules Review Commission, which is authorized to determine whether a rule is within the authority delegated to the agency by the General Assembly, is clear and unambiguous, and is reasonably necessary to implement or interpret an enactment of the General Assembly or of Congress. See N.C. Gen. Stat. § 150B-21.9. Because the Plan is exempted from the provisions of the Administrative Procedure Act as set forth above, the foregoing standards are not applicable to the Plan. See N.C. Gen. Stat. § 150B-2(8a)k.

37. The Administrative Procedure Act also contains provisions for contested case hearings to review decisions of state agencies. See N.C. Gen. Stat. §§ 150B-22 through 150B-37. Persons who are adversely affected by CON decisions are precluded from challenging the decisions in court until they have exhausted their remedies under the Administrative Procedure Act. See N.C. Gen. Stat. §§ 131E-188, 150B-43. In CON cases, contested cases can extend for up to 270 days from the date a petition for a contested case is filed to the date that the administrative law judge makes his or her decision. See N.C. Gen. Stat. § 131E-188(a). Even then, the determination of the administrative law judge is only a "recommended decision" which is reviewed by the Department, which makes a final Agency decision within 60 additional days after receiving the official record of the case. Id.

38. In 2000, the General Assembly amended the Administrative Procedure Act to provide significant protections to persons challenging decisions of state agencies in contested

cases, including limitations on the ability of an agency to reject the decision of an administrative law judge in a contested case. See Act of 12 July 2000, 2000 North Carolina Session Laws, Ch. 190 (the "APA Reforms"). However, CON decisions were singled-out as the only type of administrative actions to which the APA Reforms do not apply. Id.

39. Because CON cases were exempted from the APA Reforms, the provisions of N.C. Gen. Stat. §§ 150B-36(b), (b1), (b2), (b3), and (d) and 150B-51 "do not apply to cases decided under" the CON Law. See N.C. Gen. Stat. § 150B-34(c). The APA Reforms, therefore, provide no guiding standard to CON decision-making.

40. Because CON decisions were exempted from the APA Reforms, the Department is permitted to freely disregard recommended decisions of administrative law judges which do not support the Department's initial decisions. Plaintiffs are informed and believe, and therefore allege, that the Department routinely adopts recommended decisions by administrative law judges which support its initial decisions, and routinely rejects recommended decisions of administrative law judges which do not support its initial decisions.

41. The judicial review of administrative decisions which is available under the Administrative Procedure Act is conducted upon the official record created in a contested case. See N.C. Gen. Stat. § 150B-51(c). The Department's rule codified as 10A N.C.A.C. 14C.0402 provides that the "correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing." Because of this rule, persons adversely affected by arbitrary or erroneous need determinations made by the Council and included in the Plan are deprived of effective administrative or judicial review of those decisions.

ADJUSTMENTS TO THE PLAN

42. The 2008 Plan on pages 8-10, a copy of which is attached as Exhibit 5 to this Complaint, provides a process by which the Council can decide at the request of any individual to treat a particular geographic area or institution differently from others similarly situated, stating as follows:

> People 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 and policies may submit a written petition requesting an adjustment be made to the need determination given in the Proposed [Plan].

43. The 2008 Plan on page 10 further states that the Council will decide "whether or not to incorporate the recommended adjustments in the final [Plan] to be forwarded to the Governor." Nothing in the CON Law, the Administrative Procedure Act or any other statute provides guiding standards to determine what are "unique or special attributes of a particular geographic area or institution" or to direct the Council in making a decision to approve or disapprove any petition "to adjust the need determination." Nothing in the CON Law, the Administrative Procedure Act or any other statute contains procedural safeguards to protect against the Council making decisions to approve or disapprove any such petition which are arbitrary, unreasoned or affected by the self-interest of its members.

44. Hope petitioned the Council to adjust the 2008 Plan to show a need determination for the acquisition of a magnetic resonance imaging ("MRI") scanner to be used exclusively for imaging procedures to diagnose and treat breast cancer. A copy of Hope's petition is attached as Exhibit 6 to this Complaint. Similar petitions to include in the 2003 and 2006 Plans a need determination for the same equipment were approved by the Council in

response to petitions filed by Charlotte Radiology, P.A. in Charlotte and Breast MRI Clinic, LLC in Winston-Salem. However, the Council disapproved Hope's petition.

45. On four occasions since 2004, the Clinic has petitioned the Council to include in the Plan a determination of need for new operating rooms in Wake County, North Carolina. On the most recent occasion, the Clinic petitioned the Council to determine a need for six freestanding, single specialty operating rooms in Wake County. A copy of that petition, (without its supporting exhibits) is attached as Exhibit 7 to this Complaint. All four of the Clinic's petitions were disapproved by the Council.

46. In 2007, the Clinic also petitioned Governor Michael F. Easley to exercise his authority to direct the Council to make an adjustment to the 2008 Plan in accordance with the Clinic's petition to the Council which is attached as Exhibit 7 to this Complaint. However, Governor Easley declined to do so.

FIRST CLAIM FOR RELIEF
DECLARATORY JUDGMENT (DELEGATION OF LEGISLATIVE AUTHORITY)

47. The allegations contained in paragraphs 1-46 are incorporated herein by reference.

48. The CON Law and Executive Order No. 139 of Governor Michael F. Easley, as applied in this case, combine to delegate the legislative authority to determine what new institutional health services may be developed within the State of North Carolina to the Council, without adequate guiding standards or procedural safeguards to ensure that its decisions are not arbitrary, unreasoned or affected by the self-interest of its members, and therefore violate Article I, § 6 and Article II, § 1 of the Constitution of North Carolina.

49. Pursuant to N.C. Gen. Stat. § 1-253 and Rule 57 of the North Carolina Rules of Civil Procedure, Plaintiffs are entitled to a declaratory judgment that the CON Law and Executive Order No. 139 of Governor Michael F. Easley are unconstitutional as applied in this case.

SECOND CLAIM FOR RELIEF
DECLARATORY JUDGMENT (PROCEDURAL DUE PROCESS)

50. The allegations contained in paragraphs 1-49 of this Complaint are incorporated herein by reference.

51. Because it requires Plaintiffs to obtain a CON before developing the new institutional health services which they desire to establish, but deprives Plaintiffs of a reasonable opportunity to demonstrate the need for such services and to obtain the necessary CON, the CON Law and Executive Order No. 139 of Governor Michael F. Easley, as applied in this case, combine to deprive Plaintiffs of their right to procedural due process of law guaranteed by Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution.

52. Pursuant to N.C. Gen. Stat. § 1-253 and Rule 57 of the North Carolina Rules of Civil Procedure, Plaintiffs are entitled to a declaratory judgment that the CON Law is unconstitutional as applied in this case.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT (SUBSTANTIVE DUE PROCESS)

53. The allegations contained in paragraphs 1-52 of this Complaint are incorporated herein by reference.

54. Because it imposes restrictions on Plaintiffs' fundamental right to carry out their otherwise lawful business activities which are unreasonable in degree in comparison to the

probable public benefit, the CON Law and Executive Order No. 139 of Governor Michael F. Easley, as applied in this case, combine to deprive Plaintiffs of their right to substantive due process of law in violation of Article I, § 19 of the Constitution of North Carolina.

55. Pursuant to N.C. Gen. Stat. § 1-253 and Rule 57 of the North Carolina Rules of Civil Procedure, Plaintiffs are entitled to a declaratory judgment that the CON Law is unconstitutional as applied in this case.

FOURTH CLAIM FOR RELIEF
DECLARATORY JUDGMENT (ACCESS TO THE COURTS)

56. The allegations contained in paragraphs 1-55 are incorporated herein by reference.

57. The CON Law, the Administrative Procedure Act, Executive Order No. 139 of Governor Michael F. Easley, and the Department's rule codified as 10A N.C.A.C. 14C.0402, as applied in this case, combine to deprive Plaintiffs of access to the courts for a redress of their grievances, in violation of Article I, § 18 of the Constitution of North Carolina.

58. Pursuant to N.C. Gen. Stat. § 1-253 and Rule 57 of the North Carolina Rules of Civil Procedure, Plaintiffs are entitled to a declaratory judgment that the CON Law, the Administrative Procedure Act, and the Department's rule codified as 10A N.C.A.C. 14C.0402 are unconstitutional as applied in this case.

FIFTH CLAIM FOR RELIEF
PRELIMINARY AND PERMANENT INJUNCTION

59. The allegations contained in paragraph 1-58 of this Complaint are incorporated herein by reference.

60. If the Defendants are allowed to refuse to review or to disapprove any CON application submitted by either of the Plaintiffs on the grounds that there is no need

determination for the proposed new institutional health service in the Plan, Plaintiffs and their patients will be irrevocably harmed.

61. Plaintiffs have no adequate remedy at law and, without adequate injunctive relief, will suffer immeasurable and incalculable damages.

62. Plaintiffs likely will succeed on the merits of their case.

63. The public interest supports the issuance of an injunction on the facts of this case.

64. The Defendants should be permanently enjoined from refusing to review or disapproving any CON application submitted by either of the Plaintiffs on the grounds that there is no need determination for the proposed new institutional health service in the Plan.

65. To prevent imminent, irrevocable harm to Plaintiffs and their patients, the Defendants should be preliminary enjoined during the pendency of this action from refusing to review or disapproving any CON application submitted by either of the Plaintiffs on the grounds that there is no need determination for the proposed new institutional health service in the Plan.

SIXTH CLAIM FOR RELIEF
MONETARY DAMGES

66. The allegations contained in paragraph 1-65 of this Complaint are incorporated herein by reference.

67. Defendants have violated Plaintiffs' rights under the North Carolina Constitution.

68. As a result of Defendants' violation of Plaintiffs' rights under the North Carolina Constitution, Plaintiffs have been damaged in an amount to be determined at trial, but certainly in excess of $10,000.

69. Plaintiffs have no adequate alternative state remedies for redress of these violations of their rights under the North Carolina Constitution.

70. Plaintiffs have a direct cause of action under the North Carolina Constitution for violation of their constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Hope and the Clinic respectfully request the following relief:

1. That judgment be entered declaring that the CON Law, the Administrative Procedure Act, and the Department's rule codified as 10A N.C.A.C. 14C.0402 and Executive Order No. 139 of Governor Michael F. Easley are unconstitutional as applied in this case;

2. That the Department be preliminarily and permanently enjoined from refusing to review or disapproving any CON application submitted by either of the Plaintiffs on the ground that there is no need determination for the proposed new institutional health services in the Plan;

3. That Plaintiffs be awarded damages in an amount to be determined at trial for Defendants' violation of their rights under the North Carolina Constitution;

4. That Defendants be ordered to pay pre-judgment interest and post-judgment interest on the amount of damages awarded, together with Plaintiffs' reasonable collection costs and attorneys fees in pursuing this action; and

5. That Plaintiffs be granted such other and further relief as the Court deems just and proper.

This the 31st day of December, 2008.

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ATTORNEYS FOR HOPE- A WOMEN'S CANCER CENTER, P.A. AND RALEIGH ORTHOPAEDIC CLINIC, P.A.

No. COA21-558 TENTH DISTRICT

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NORTH CAROLINA COURT OF APPEALS

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Jay Singleton, D.O.; and Singleton Vision Center, P.A., Plaintiffs-Appellants, v. North Carolina Department of Health and Human Services; Roy Cooper, Governor of the State of North Carolina, in his official capacity; Kody H. Kinsley, North Carolina Secretary of Health and Human Services, in his 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-Appellees.	From Wake County

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

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No. COA21-558 TENTH DISTRICT

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NORTH CAROLINA COURT OF APPEALS

****

Jay Singleton, D.O.; and Singleton Vision Center, P.A.,

Plaintiffs-Appellants,

v.

North Carolina Department of Health and Human Services; Roy Cooper, Governor of the State of North Carolina, in his official capacity; Kody H. Kinsley, North Carolina Secretary of Health and Human Services, in his 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-Appellees.

From Wake County

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

****

ARGUMENT

The State wants this case to be about whether the legislature could have thought it was rational to adopt the CON Law over 40 years ago. That is not the question on appeal. The question is whether the trial court rightly dismissed this case because it is clear "beyond a doubt" that the CON Law—as applied to Dr. Singleton today—satisfies Article I, Sections 19, 32, and 34 of the North Carolina Constitution. *Fagundes v. Ammons Dev. Grp., Inc.*, 261 N.C. App. 138, 141, 820 S.E.2d 350, 354 (2018) (cleaned up). The State has not shown this.

This brief proceeds as follows. Section I shows that the State botches the constitutional tests. Dr. Singleton can use facts to prove his claim under Article I, Section 19. The rational-basis test does not apply under Article I, Section 32. And the fact that a CON might someday be available does not mean there is no monopoly today under Article I, Section 34. Section II then shows that the trial court properly rejected the State's exhaustion argument because the CON process is not an effective way to challenge the CON requirement.

The Court should reverse the trial court's decision dismissing this case under Rule 12(b)(6) and affirm its decision under Rule 12(b)(1).

I. THE STATE'S CONSTITUTIONAL ARGUMENTS FAIL.

A. Dr. Singleton can use facts to prove his claim under Article I, Section 19.

The theme of the State's argument under Article I, Section 19 is that Dr. Singleton's factual allegations do not matter and this Court should ignore them. *See* State's Br. 28–37. The State is wrong. Facts matter in as-applied challenges under North Carolina's rational-basis test. And, because they matter, *Hope*—a different as-applied challenge decided on a threadbare complaint—cannot control.

1. Dr. Singleton's factual allegations matter.

Start with the obvious: Dr. Singleton appeals a 12(b)(6) dismissal. That means his factual allegations must be "treated as true," must be "liberally construed," and must be "viewed in the light most favorable to [him]." *Fagundes*, 261 N.C. App. at 141–42, 820 S.E.2d at 354–55 (cleaned up). These are all defining features of how the Court reviews 12(b)(6) dismissals. And

yet, they appear nowhere in the State's summary of the standard of review. *See* State's Br. 17–18. Why?

Because the State wants the Court to make an exception to the 12(b)(6) standard. The idea is that, under the rational-basis test, Dr. Singleton's factual allegations are "irrelevant," State's Br. 35, so the Court can ignore them. But there is no rational-basis exception to the 12(b)(6) standard. *See Toomer v. Garrett*, 155 N.C. App. 462, 471–72, 574 S.E.2d 76, 85 (2002) (reversing dismissal of substantive-due-process claim where the "facts as alleged by plaintiff" were enough to "overcome the high level of deference accorded to governmental action on rational basis review"). And it would be especially wrong to adopt one here, for two reasons.

First, the North Carolina rational-basis test is a reality-oriented test. Under it, a plaintiff can win by showing that the law lacks a "real or substantial relation" to public health or safety. *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988); *accord M.E. v. T.J.*, 275 N.C. App. 528, 545, 854 S.E.2d 74, 93 (2020). That means Dr. Singleton can use facts to prove his case. *See State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 866 (1940)

(holding, under "real or substantial" test, that plaintiffs can overcome "[a]ny presumptions or burdens which may exist . . . when the facts are laid bare to the Court"); *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 547–49, 193 S.E.2d 729, 733–36 (1973) (applying test and relying on lack of evidence "in the record" supporting prior CON Law).

Second, this is an as-applied challenge, so it necessarily turns on "facts" about the "statute's operation, as applied to [the] plaintiff." *Britt v. State*, 363 N.C. 546, 550, 681 S.E.2d 320, 323 (2009). That's no less true in rational-basis cases. *See, e.g., id.* at 549–50, 681 S.E.2d at 322–23 (relying on facts about plaintiff's history in holding that law restricting him from possessing guns did not rationally protect public safety)[1]; *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 459–66, 786 S.E.2d 335, 346–51 (2016) (relying on facts about town's sewage spills in rejecting argument that law preventing defendant from housing animals near lake rationally protected town's water supply).

[1] Although *Britt* was about the right to bear arms under Article I, Section 30, "[t]he Supreme Court . . . cited and quoted the rational basis test." *State v. Whitaker*, 201 N.C. App. 190, 201, 689 S.E.2d 395, 302 (2009).

The State's reliance on *Rhyne* and *Liebes* (State's Br. 34), is misplaced. *Rhyne* was a facial challenge. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004). So it offers little guidance on Dr. Singleton's as-applied claim. *See Genesis Wildlife Sanctuary*, 247 N.C. App. at 460, 786 S.E.2d at 347 ("Only in as-applied challenges are facts surrounding the plaintiff's particular circumstances relevant.") (cleaned up). And *Liebes* was an equal-protection case. *Liebes v. Guilford Cnty. Dep't of Pub. Health*, 213 N.C. App. 426, 426–27, 713 S.E.2d 546, 548 (2011). Which matters because the "real and substantial" test applies in substantive-due-process cases and offers more protection. *Treants Enters., Inc. v. Onslow County*, 83 N.C. App. 345, 351–52, 350 S.E.2d 365, 369–70 (1986).

Again, what the State really wants is for the Court to apply a test so toothless it justifies departing from the 12(b)(6) standard. But the "real and substantial" test demands more. *Cf. id.* at 356, 350 S.E.2d at 372 (rejecting notion that test requires plaintiffs to "prov[e] a negative . . . i.e., the nonexistence of any conceivable basis for the [law]," because that "burden

. . . would be insurmountable"). The Court should apply its ordinary standard of review and engage with Dr. Singleton's factual allegations.

2. *Hope* cannot control.

Because Dr. Singleton's factual allegations matter, *Hope* cannot control. The State calls *Hope* "binding precedent." State's Br. 28–33 (citing *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989)). But a prior panel decision is only binding if it "decided the same issue." *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. *Hope* could not have decided the same issue because it was a *different* as-applied challenge decided on a *different* complaint. 203 N.C. App. at 596, 693 S.E.2d at 676. Indeed, the contrast between Dr. Singleton's detailed allegations and *Hope*'s threadbare complaint are striking:

Dr. Singleton	***Hope* plaintiffs**
Already owns the facility in which he wants to provide services and the facility meets all safety standards necessary to obtain facility license (R pp 10, 12, 15, ¶¶ 3, 11, 27)	Sought *new* diagnostic equipment and 6 *new* operating rooms (App pp 9–10, ¶¶ 17–21)
There are patients in the Craven/Jones/Pamlico area who need more affordable eye surgeries; can provide them at lower prices than the sole provider in his area with a CON (R pp 22, 27, 29–30, ¶¶ 69, 101, 104, 112–13, 121–24)	No comparable allegation

Dr. Singleton (cont.)	***Hope* plaintiffs (cont.)**
Has experience, under narrow CON exemption for "incidental" surgeries, providing affordable surgeries in his facility to patients who needed them and who would not otherwise have been able to afford them (R p 29, ¶¶ 109–11)	No comparable allegation
CON Law's "findings of fact" are now false because Congress repealed the laws on which they were based and there is now overwhelming evidence that CON laws increase costs and reduce access to care (R pp 17–21, ¶¶ 44–59, 63)	No comparable allegation
There is no evidence that, as applied, CON Law "increases access to safe, affordable surgeries in the Craven/Jones/Pamlico area" or offers "any real-world benefits to patient health or safety"(R pp 10–11, 28, 33–34, ¶¶ 3–4, 106, 148–49)	No comparable allegation

The State and its amici do not discuss Dr. Singleton's allegations. Instead, they focus on defending the CON Law's general rationality. *See* State's Br. 28–37; Hospital Providers' Br. 3–9; Association Br. 14–18.[2] But this

[2] The State's amici refer the Court to dozens of pages of supposed evidence that CON laws are rational. Because that evidence falls outside the four corners of the complaint, it "cannot be considered in determining whether the complaint states a claim on which relief can be granted." *Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775, 796 S.E.2d 120, 123 (2017); *see also M.E.*, 275 N.C. App. at 584–89, 854 S.E.2d at 116–19 (holding that amici cannot attach evidence to briefs or introduce new evidence on appeal).

is an as-applied challenge. So arguments that the Law is generally rational miss the mark. *See Genesis Wildlife Sanctuary*, 247 N.C. App. at 460, 786 S.E.2d at 347 (rejecting city's general defense of ordinance in as-applied challenge because city failed to explain how ordinance was rational as applied to property owner).

Look at *City of Winston-Salem v. Southern Railway Co.*, 248 N.C. 637, 105 S.E.2d 37 (1958). There, an ordinance required a railroad to rebuild a trestle—supposedly to meet future traffic demands. *Id.* at 639–40, 105 S.E.2d at 38–40. The railroad challenged the ordinance under Article I, Section 19 and offered "voluminous evidence" that "changed economic conditions" nixed the basis for the ordinance and that, "under all the facts and circumstances of the case," it was "unreasonable and oppressive." *Id.* at 639–55, 105 S.E.2d at 38–50. Based on that evidence, the Court struck down the ordinance as applied. *Id.* at 655–56, 105 S.E.2d at 50.

The State and its amici argue that Dr. Singleton should not receive the same opportunity to build a record because the CON Law's "findings" are absolute. *See* State's Br. 34–37; Healthcare Providers' Br. 3–9; Association Br.

4–6. Not so: "legislative findings and declaration of policy have no magical quality to make valid that which is invalid, and are subject to judicial review." *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 294, 749 S.E.2d 429, 433 (2012) (cleaned up).

This is hardly a new idea. For over a century, the North Carolina Supreme Court has stressed that the police power has "limit[s]":

> It does not at all follow that every statute enacted *ostensibly for the promotion of [the public good]* is to be accepted as a legitimate exercise of the police power of the state. . . . If, therefore, a statute *purporting to have been enacted to protect the public health, the public morals, or the public safety* has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, *it is the duty of the courts so to adjudge* and thereby give effect to the Constitution.

M.E., 275 N.C. App. at 550, 854 S.E.2d at 96 (quoting *State v. Williams*, 146 N.C. 618, 61 S.E. 61, 64 (1908) (cleaned up) (emphasis added)).[3]

Were it otherwise, the legislature could immunize its laws from constitutional scrutiny simply by appending assertions—no matter how

[3] Even *Carolene Products*, which established the federal rational-basis test, noted that plaintiffs can use facts to refute legislative assertions. *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.").

false or irrational—about why they were necessary. As-applied challenges like the one in *Southern Railway Co.* would be impossible. The "inalienable" "right to earn a living," *King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (cleaned up), would be a dead letter.

Fortunately, that is not the law in North Carolina. Dr. Singleton can use facts—about his facility, his patients, the Craven/Jones/Pamlico market, and why the CON Law's "findings" are false for him today—to prove his case. *See Harris*, 216 N.C. 746, 6 S.E.2d at 866 (plaintiffs can defeat economic laws' presumption of validity "when the facts are laid bare to the Court"). That the *Hope* plaintiffs did not even try is not a good reason to deny Dr. Singleton his day in court.

B. The rational-basis test does not apply under Article I, Section 32.

Article I, Section 32 forbids the state from granting "exclusive or separate . . . privileges" except in exchange for "public services." In his opening brief, Dr. Singleton showed that the CON Law violates Article I, Section 32 because it grants a private hospital—CarolinaEast—an exclusive right to run a surgical facility in the Craven/Jones/Pamlico area. *See Aston*

Park, 282 N.C. at 551, 193 S.E.2d at 736 (CON Law granted private hospitals "exclusive privileges forbidden by Art. I, § 32").

The State's response is unconvincing. As the State tells it, Article I, Section 32 has no separate meaning; courts just apply the rational-basis test to figure out whether a law violates the provision. State's Br. 38–40. The State relies on four cases: (1) *Aston Park*, (2) *Lowe*, (3) *Emerald Isle*, and (4) *Carolina Utility*. State's Br. 37–40. These cases do not support the State's position.

First, the State argues that *Aston Park* "only" held that the CON Law violated Article I, Section 32 "in view of" its holding that the Law failed the rational-basis test. State's Br. 39. The State is projecting: *Aston Park* never said its Article I, Section 32 holding was based on its rational-basis holding. Nor is that surprising, given that the Court had previously struck down several laws, not for their irrationality, but for granting *special privileges* to provide *private services*. *See, e.g.*, *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 94, 84 S.E.2d 390, 400 (1954) (special privilege to offer gambling services); *State v. Sasseen*, 206 N.C. 644, 175 S.E. 142, 144 (1934) (special privilege to offer taxicab services). *Aston Park* took the same approach.

Next, the State says that *Lowe*, *Emerald Isle*, and *Carolina Utility* applied the rational-basis test, so this Court should too. But that test applies when a plaintiff challenges "an exemption from a duty imposed upon citizens generally." *Lowe v. Tarble*, 312 N.C. 467, 470–71, 323 S.E.2d 19, 21–22 (1984) (cleaned up); *see also Town of Emerald Isle ex rel. Smith v. State*, 320 N.C. 640, 652–54, 360 S.E.2d 756, 763–64 (1987) (applying *Lowe* in challenge to law exempting a few beachfront properties from general rule that public can use such properties to access beach).

True, *Carolina Utility* applied it in a new context: a law allowing the state to reimburse utility companies for extending gas lines to underserved areas. *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 677, 446 S.E.2d 332, 344 (1994). But the Court did not say it was adopting the test for all future cases. *Cf. Leete v. County of Warren*, 341 N.C. 116, 118, 462 S.E.2d 476, 478 (1995) (explaining that Article I, Section 32 turns on what the text "by its definition . . . precludes").

And besides, this case looks nothing like *Lowe*, *Emerald Isle*, or *Carolina Utility*. Dr. Singleton is not challenging an exemption from a general duty.

He is not challenging a law that reimburses utilities for serving rural areas. He is challenging the CON Law, which bans all healthcare providers but one—CarolinaEast—from running a surgical facility in the Craven/Jones/ Pamlico area. (R pp 32–33, ¶¶ 136–42). Courts do not need the rational-basis test to decide whether laws like this violate Article I, Section 32. Which explains why the State fails to cite any cases about even remotely similar laws.

C. The CON Law grants a monopoly today under Article I, Section 34.

Article I, Section 34 declares that "perpetuities and monopolies are contrary to the genius of a free state." As Dr. Singleton explained in his opening brief, one way the state can grant a monopoly is by (1) requiring permission to operate in a market, then (2) granting permission only to a select few market players. *See, e.g.*, *Aston Park*, 282 N.C. at 544, 551, 193 S.E.2d at 731, 736 (prior CON Law, which required a CON "as a precondition" for a facility license but declared no "need" for new hospitals, "establishe[d] a

monopoly in the existing hospitals")[4]; *Rockford-Cohen Grp. v. N.C. Dep't of Ins.*, 230 N.C. App. 317, 322–23, 749 S.E.2d 469, 473–74 (2013) (law that allowed only members of one trade group to provide bail-bondsman training and "exclude[d] all others from being considered" created a monopoly).

The State agrees with Dr. Singleton's theory in key respects. The State agrees that "an exclusive right to trade in a certain area or to deal in certain goods" is a monopoly under Article I, Section 34. State's Br. 41 (cleaned up). And the State agrees that restrictions on market entry create a monopoly when they "foreclos[e] future competition." *Id*. The parties' main dispute is over what it means to foreclose competition.

In the State's view, a law does not foreclose competition if there is a "possibility" that—someday—others can enter the market. *Id*. (quoting *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 654, 386 S.E.2d 200, 211–12 (1989)). But the reason there was no monopoly in *Madison*

[4] The State repeats its assertion that *Aston Park* "only" held the CON Law created a monopoly because it failed the rational-basis test. State's Br. 43. But the State provides no support for this claim. The Court should reject it for the reasons discussed *supra* p 12.

Cablevision was that the city did not "foreclose[] *for any period* the possibility that . . . . other cable companies could apply for and obtain a franchise." 325 N.C. at 654, 836 S.E.2d at 211 (emphasis added). In other words, companies did not have to wait until a new franchise later became available (which is how the CON Law works) before they could apply.

The State conveniently omits "for any period" from its quote to *Madison Cablevision*. State's Br. 41. But as this Court later noted, the fact that other companies could still apply for and obtain a franchise was significant. *See Rockford-Cohen Grp.*, 230 N.C. App. at 323, 749 S.E.2d at 473–74. If anybody can enter the market by meeting a set of objective criteria, the market is open. *See State v. Call*, 121 N.C. 643, 28 S.E. 517, 517 (1897) (law requiring license to practice medicine did not create a monopoly because "the door stands open to all who possess the requisite age and good character, and can stand the examination").

If, however, there is nothing people can do to enter the market—no objective criteria they can meet—the market is closed. *See Town of Clinton v. Standard Oil Co.*, 193 N.C. 432, 137 S.E. 183, 184 (1927) (ordinance capping

number of gas stations that could obtain a permit granted a monopoly to "the six gasoline places inside the [district]" by "prohibit[ing] defendant from carrying on a like legitimate business in the same limits"). A closed market thwarts the "democratic principle" behind Article I, Section 34: "Equal rights and opportunities to all, special privileges to none." *State v. Felton*, 239 N.C. 575, 587, 80 S.E. 625, 634 (1954) (cleaned up).

The CON Law does not give equal opportunities to all. Dr. Singleton wants to obtain a facility license. (R p 31, ¶¶ 128–29). But he cannot do so without a CON. 10A N.C. Admin. Code 13C.0202. And he cannot apply for a CON until the State Medical Facilities Plan declares a "need" in his area. 2022 SMFP, https://tinyurl.com/3vn9sja7 at 9 (SMFP need determinations "delineate the number of . . . operating rooms . . . that may be applied for and approved"). The SMFP has declared zero need in Dr. Singleton's area through at least 2024. *Id.* at 71. So there is nothing Dr. Singleton can do—no application he can submit or criteria he can meet—to enter the market. He is "categorically banned." (R pp 27, 29, ¶¶ 99, 114).

The fact that the SMFP could declare a need for a CON after 2024 does not change the analysis. That was true in *Aston Park*, where the Medical Care Commission could have changed its mind and declared a "need" for a new hospital at some future point. *See* 282 N.C. at 548, 193 S.E.2d at 733 (noting that whether a CON was available turned on the Commission's "opinion" about where new hospitals were needed). The prior CON Law still created a monopoly. *Id.* at 282 N.C. at 551, 193 S.E. 2d at 736. Because the current Law works the same way, *Aston Park* controls.

II. THE STATE'S EXHAUSTION ARGUMENT FAILS.

The State's exhaustion argument rests on two premises: that Dr. Singleton *can* and *must* apply for a CON before he can challenge the CON requirement. State's Br. 16, 20. Neither is correct. There is no CON available in Dr. Singleton's area and no process can change that any time soon. Moreover, Dr. Singleton does not have to apply for a CON because that would be an ineffective way to challenge the CON requirement. The Court should affirm the trial court's denial of the 12(b)(1) motion.

A. No CON is available and no process can change that any time soon.

The State accuses Dr. Singleton of "sidestepp[ing]" the CON process. State's Br. 3, 14. But when Dr. Singleton sued, there was no CON available in his area (Craven/Jones/Pamlico). (R pp 27, 29, ¶¶ 99, 114). No CON is available today. State's Br. 14 ("[T]he Plan projects no need for the type of services that Dr. Singleton proposes to offer."). And, because the SMFP declares OR need two years in advance, no CON will be available through at least 2024. *See* 2021 SMFP, https://tinyurl.com/mxrxk95b at 70 (declaring no need in 2023); 2022 SMFP, https://tinyurl.com/3vn9sja7 at 71 (declaring no need in 2024).[5]

Because there is no CON to apply for, the State says Dr. Singleton should petition to adjust the need determination. State's Br. 14, 21. But petitions can only adjust *future* need determinations. 2022 SMFP at 8 (noting petitions can be submitted in July to adjust need determinations "in the

[5] The State suggests Dr. Singleton can apply for a CON even without a need determination. *See* State's Br. 22. That is incorrect. 2022 SMFP at 9 ("The final SMFP for the following year contains the need determinations that delineate the number of . . . operating rooms . . . that *may be applied for* and approved by CON during the year.") (emphasis added).

Proposed SMFP"). They cannot change *current* determinations. 2020 SMFP, https://tinyurl.com/2p8ddse7 at 7 (noting SMFP "will be amended only as necessary" to fix errors or respond to legal or budgetary changes).

To illustrate: Dr. Singleton could have petitioned in July 2020 (the year he sued) to add a need determination to the 2021 SMFP. But because the 2021 SMFP declared no need in his area two years in advance, his petition—even if successful—would not have made a CON available until 2023. 2021 SMFP at 70. Of course, it is now 2022. Which means that, on the State's theory, Dr. Singleton must wait until July, petition to adjust the 2023 SMFP, and then—assuming he succeeds—apply for a CON in 2025.

Simply put, the notion that Dr. Singleton "sidestepped" the CON process is a fiction. Dr. Singleton had no way to apply for a CON before he sued, he has no way to apply for one now, and he has no way to make a CON available any time soon. Because he had (and has) "no administrative remedies to exhaust," *L & S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.*, 211 N.C. App. 148, 157, 712 S.E.2d 146, 153 (2011), the State's argument lacks merit.

B. The CON process is not an effective way to challenge the CON requirement.

Even if Dr. Singleton could somehow apply for a CON, he is not required to just to challenge the CON requirement. Plaintiffs only have to exhaust "effective" remedies. *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220–21, 517 S.E.2d 406, 410 (1999) (cleaned up); *see also Abrons Fam. Prac. & Urgent Care, P.A. v. N.C. Dep't of Health & Hum. Servs.*, 370 N.C. 443, 451, 810 S.E.2d 224, 231 (2018) (exhaustion of "inadequate" or "futile" remedies not required). The State argues that exhaustion is required because the CON process could grant Dr. Singleton relief and because Dr. Singleton supposedly failed to allege inadequacy or futility. State's Br. 20–28. Both arguments miss the mark.

1. The CON process cannot provide relief from the CON requirement.

The State misunderstands the relief Dr. Singleton seeks. It's true that Dr. Singleton seeks "the freedom to run a 'formal' surgery program [at his Center] *today*." (R p 30, ¶ 117). But as he alleged, that freedom includes the ability to "apply for a [facility] license" without first having to get a CON.

(R pp 11, 31, ¶¶ 6, 128–29). Forcing Dr. Singleton to expend vast resources trying to get a CON would impose one of the injuries he filed this case to avoid. (R pp 22–25, ¶¶ 70–92 (alleging process is "expensive, burdensome, and fundamentally anti-competitive")).

Such dilemmas are why this Court has held that "a party who seeks to challenge the constitutionality of [the CON Law] *must* bring an action pursuant to . . . the Declaratory Judgment Act." *Hosp. Grp. of W. N.C., Inc. v. N.C. Dep't of Hum. Res.*, 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985) (emphasis added). Even *Hope*—the State's lead merits case—confirms that Dr. Singleton does not have to slog through the CON process before he can challenge the CON Law. *See Hope*, 203 N.C. App. at 596, 608, 693 S.E.2d at 676, 683 (deciding constitutional claims even though "[n]either plaintiff was . . . denied a requested CON or filed a petition for a contested case hearing").

The State does not discuss *Hospital Group*, much less distinguish it. The State does not explain why Dr. Singleton must exhaust the CON process, when the *Hope* plaintiffs did not. And the lone CON case the State cites actually *rejects* the State's argument. *See* State's Br. 20, 25 (citing *Good Hope*

Hosp., Inc. v. N.C. Dep't of Health & Human Servs., 174 N.C. App. 266, 620 S.E.2d 873 (2005)).

In *Good Hope Hospital*, a hospital brought procedural-due-process and equal-protection claims after DHHS denied the hospital a CON exemption. *Good Hope Hosp., Inc.*, 174 N.C. App. at 268–70, 620 S.E.2d at 877–78. This Court dismissed the procedural claim because the hospital failed to appeal the denial. *Id.* at 271, 620 S.E.2d at 879. But the Court resolved the equal-protection claim because "substantive" claims—like Dr. Singleton's—are justiciable "regardless of whether administrative remedies have been exhausted." *Id.* at 272, 620 S.E.2d at 879. *Good Hope Hospital* confirms what *Hospital Group* made clear decades ago: Exhaustion is not required to bring a substantive challenge to the CON Law.

2. Dr. Singleton was not required to allege inadequacy or futility. But he did so anyway.

The State last argues that Dr. Singleton must exhaust because he failed to allege inadequacy or futility. State's Br. 20. That is wrong. Such allegations are unnecessary if "no administrative procedure . . . specifically applies to the plaintiff's . . . claim" and "the trial court had jurisdiction to adjudicate

[it]." *Intersal, Inc. v. Hamilton*, 373 N.C. 89, 105–06, 834 S.E.2d 404, 414–16 (2019). Both conditions are met here: CON officials "lack[] authority" to decide Dr. Singleton's constitutional claims, and the Superior Court can resolve them "pursuant to . . . the Declaratory Judgment Act." *Hosp. Grp. of W. N.C.*, 76 N.C. App. at 267–68, 332 S.E.2d at 750–51.[6] Thus, Dr. Singleton was not required to allege inadequacy or futility.

In any case, he did allege them. Consistent with *Hospital Group*, an administrative remedy is "inadequate" when a plaintiff challenges the validity of the laws or rules governing that remedy. *See, e.g.*, *Shell Island Homeowners Ass'n*, 134 N.C. App. at 224, 517 S.E.2d at 412 (applying for permit was inadequate way to challenge constitutionality of permitting law); *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 211, 443 S.E.2d 716, 723 (1994) (seeking approval to charge illegal fees was inadequate way to challenge fee rule). So, Dr. Singleton alleged inadequacy

[6] The Superior Court, where Dr. Singleton sued, has jurisdiction over civil suits seeking declaratory or injunctive relief to enforce constitutional rights. (R p 11, ¶ 7 (citing N.C. Gen. Stat. § 7A-245(a)).

when he alleged that the CON requirement, as applied, is unconstitutional. (R pp 11, 31–34, ¶¶ 6, 130–52).

Dr. Singleton also alleged futility. A remedy is futile when it is "useless . . . as a legal or practical matter." *Abrons Fam. Prac. & Urgent Care, P.A.*, 370 N.C. at 452, 810 S.E.2d at 231. Dr. Singleton alleged that the CON process is practically useless when he alleged there was no CON he could apply for. (R pp 27, 29, ¶¶ 99, 114). And he alleged that the CON process is legally useless because the ability to "one day" expend vast resources applying for a CON is not a "remedy" for the requirement that he get a CON in the first place. (R pp 29–30, ¶¶ 116–17).

CONCLUSION

For the reasons above, and those in Dr. Singleton's opening brief, the Court should reverse the trial court's decision granting the State's 12(b)(6) motion and affirm the trial court's decision denying the 12(b)(1) motion.

Respectfully submitted this 31st day of January, 2022.

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing brief complies with the length and typeface requirements of Rule 28(j) of the North Carolina Rules of Appellate Procedure, and with this Court's January 20, 2022 order allowing Plaintiffs-Appellants to file a brief not exceeding 5,000 words in length. The brief, excluding the cover page, index, table of cases and authorities, certificate of service, and appendix, contains 4,994 words.

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