STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
Jay Singleton, D.O., and Singleton Vision Center, P.A., *Plaintiffs*, v. North Carolina Department of Health and Human Services; Josh Stein, Governor of the State of North Carolina, in his official capacity; Devdutta Sangvai, 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 Destin Hall, Speaker of the North Carolina House of Representatives, in his official capacity, *Defendants*.	No. 20 CVS 05150

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs file this motion for partial summary judgment, under N.C. Gen. Stat. § 1A-1, Rule 56(a), on two of their claims challenging North Carolina's certificate of need (CON) law, N.C. Gen. Stat. §§ 131E-175 *et seq.*:

1. The CON law violates Art. I, § 32 of the North Carolina Constitution on its face because it grants "exclusive or separate emoluments or privileges" not "in consideration of public services." *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551, 193 S.E.2d 729, 736 (1973). Plaintiffs reserve the right to seek summary judgment on the as-applied aspect of this claim at a later stage should that be necessary to fully vindicate their rights.

2. The CON law violates Art. I, § 34 of the North Carolina Constitution on its face because it grants "monopolies," which "are contrary to the genius of a free state and shall not be allowed." *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551, 193 S.E.2d 729, 736 (1973). Plaintiffs reserve the right to seek summary judgment on the as-applied aspect of this claim at a later stage should that be necessary to fully vindicate their rights.

*

As Plaintiffs will explain in a supporting brief to be filed at a later date, their facial claims under Art. I, §§ 32 and 34 present purely legal questions about which there can be no material factual disputes. Because the CON law violates Art. I, §§ 32 and 34 as a matter of law, summary judgment is proper, *see* N.C. Gen. Stat. § 1A-1, Rule 56(c), and this motion should be granted.

Dated: August 25, 2025.

Respectfully submitted,

/s/ Joshua Windham

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2025, I served a copy of the foregoing document via email as follows:

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EXHIBIT 1

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
Jay Singleton, D.O., and Singleton Vision Center, P.A., *Plaintiffs*, v. North Carolina Department of Health and Human Services; Josh Stein, Governor of the State of North Carolina, in his official capacity; Devdutta Sangvai, 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 Destin Hall, Speaker of the North Carolina House of Representatives, in his official capacity, *Defendants*.	No. 20 CVS 05150

AFFIDAVIT OF JAY SINGLETON, D.O.

Jay Singleton, D.O., being first duly sworn, declares and states as follows:

1. My name is Jay Singleton. I have personal knowledge of the matters set forth in this affidavit and am competent to testify to those matters.

2. I am a licensed physician and board-certified ophthalmologist who practices in New Bern, North Carolina.

3. I am the owner and Chief Executive Officer of Singleton Vision Center, P.A., a North Carolina professional corporation and full-service eye clinic located at 3515 Trent Road, Suite 14, New Bern, North Carolina, which serves patients in and around New Bern.

4. Attached as **Exhibit A** is a true and correct copy of the Amended Complaint filed on June 16, 2025 in this matter.

5. I certify that all factual allegations in **Exhibit A** personal to me, to Singleton Vision Center, and to the impact of North Carolina's certificate of need law (N.C. Gen. Stat. §§ 131E-175 *et seq.*) on our clients, are true and correct to the best of my knowledge. All facts alleged "on information and belief" are facts I believe to be true and correct.

Further Affiant sayeth not.

Jay Singleton, D.O.

STATE OF NORTH CAROLINA
COUNTY OF Craven

I, Abbagale F. Hudson, a Notary Public in the aforesaid County and State, do hereby certify that Jay Singleton, D.O., personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Abbagale F Hudson
NOTARY PUBLIC
Craven County, NC
My Commission Expires March 09, 2030

Abbagale F. Hudson
Notary Public

Abbagale F. Hudson
Printed Name of Notary Public

My Commission Expires: 3.9.2030

EXHIBIT A

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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

Plaintiffs,

v.

North Carolina Department of Health and Human Services; Josh Stein, Governor of the State of North Carolina, in his official capacity; Devdutta Sangvai, 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 Destin Hall, Speaker of the North Carolina House of Representatives, in his official capacity,

Defendants.

No. 20 CVS 05150

PLAINTIFFS' FIRST AMENDED COMPLAINT

INTRODUCTION

1. This state constitutional challenge seeks to vindicate the right and liberty of Dr. Jay Singleton, a licensed physician and board-certified ophthalmologist, to use his own property to perform safe and affordable outpatient eye surgeries for patients who need them. Dr. Singleton owns Singleton Vision Center, a full-service eye clinic in New Bern, North Carolina. For years, Dr. Singleton has wanted to perform life-changing eye surgeries for all of his patients at Singleton Vision Center, which is fully equipped for the procedures his patients need. Performing surgeries at his clinic would save Dr. Singleton's patients and their insurance providers thousands of dollars over the cost of obtaining those procedures at nearby hospitals. But despite these obvious benefits, Dr. Singleton is largely banned from doing so.

2. The barrier Dr. Singleton faces is purely legal. North Carolina bans licensed physicians from running "formal" surgical facilities unless they first obtain a "certificate of need" (CON) from the state. Each year, central planners in Raleigh project how many surgical facilities the state will "need" in two years' time based on factors like the number of facilities already in existence and the number of procedures they conducted. The more established facilities there are, the less likely it is that a new one will be "needed"—or so the theory goes. Because the planners have projected no "need" for a new surgical facility in Dr. Singleton's area through at least 2027 (as with at least the past 15 years), Dr. Singleton is banned from running a "formal" surgical facility at his clinic.

3. North Carolina's CON law has nothing to do with protecting the health or safety of real patients. Indeed, North Carolina already allows Dr. Singleton to perform an "incidental" number of surgeries at his clinic without obtaining a CON. There is no question these surgeries

are performed safely and affordably on patients who need them, and the same would be true if Dr. Singleton could offer these surgeries for all of his patients. Moreover, the state separately licenses surgical facilities to regulate for safety and quality, and there is no question Dr. Singleton could meet those licensing requirements if the CON law did not forbid him from applying for a license in the first place.

4. In truth, forcing Dr. Singleton—or any qualified operating room provider—to get a CON before he can provide otherwise-lawful operating room services serves one purpose only: protecting established providers from competition. That is unconstitutional. The North Carolina Constitution forbids monopolies and exclusive privileges and protects Dr. Singleton's right and liberty to provide safe and affordable eye surgeries to patients who need them free from arbitrary, irrational, and protectionist laws. Because the purpose and effect of North Carolina's CON law is to protect established providers from competition—without any real-world benefits to patient health or safety—the CON law should be declared unconstitutional, both facially and as applied, and Defendants should be enjoined from enforcing the law against Dr. Singleton and all those who are similarly situated.

JURISDICTION AND VENUE

5. Plaintiffs bring this lawsuit under Art. I, §§ 1, 19, 32, and 34 of the North Carolina Constitution and North Carolina's Declaratory Judgments Act, N.C. Gen. Stat. §§ 1-253, *et seq*. Plaintiffs also have an independent cause of action for violations of their constitutional rights under Article I, Section 18 of the North Carolina Constitution.

6. Plaintiffs seek declaratory and injunctive relief against enforcement of North Carolina's CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, the law's implementing regulations,

and Defendants' policies and practices enforcing it, which violate Plaintiffs' right and liberty to use his their property to provide safe and affordable outpatient eye surgeries to patients who need them free from unconstitutional monopolies, exclusive privileges, and arbitrary, irrational, and protectionist laws under the North Carolina Constitution.

7. To ensure meaningful redress for the deprivation of Plaintiffs' and others' rights under Art. I, §§ 1, 19, 32, and 34 of the North Carolina Constitution, Plaintiffs seek declaratory and injunctive relief, and $1 in nominal damages, under *Corum v. University of North Carolina Through Board of Governors*, 330 N.C. 761, 413 S.E.2d 276 (1992).

8. This Court has jurisdiction under N.C. Gen. Stat. § 7A-245(a) because this is a suit for declaratory and injunctive relief against the enforcement and validity of certain statutes and regulations, and for the enforcement and declaration of multiple state constitutional rights.

9. Venue lies in this Court under N.C. Gen. Stat. § 1-82 because multiple Defendants reside in Wake County.

PARTIES

10. Plaintiff Jay Singleton, D.O., is a licensed physician and board-certified ophthalmologist who practices in New Bern, North Carolina. He is the owner and Chief Executive Officer of Singleton Vision Center, P.A.

11. Plaintiff Singleton Vision Center, P.A. ("the Center"), is a North Carolina professional corporation and full-service eye clinic that serves patients in New Bern and the surrounding area. The Center is located at 3515 Trent Road, Suite 14, New Bern, North Carolina.

12. The Center currently has all the equipment, staff, and resources necessary to perform eye surgeries (e.g., cataract, glaucoma, intraocular lens) safely and affordably. Dr.

Singleton would like to use the Center to perform these surgeries on all of his patients. But Plaintiffs are forbidden under the CON law from running a "formal" surgery facility (operating room) and are limited to performing an "incidental" number of surgeries.

13. Defendant North Carolina Department of Health and Human Services ("the Department" or "DHHS") is the executive agency charged with administering and enforcing the CON law. N.C. Gen. Stat. § 131E-177. DHHS is empowered to assess civil penalties against or revoke the license of any person who violates the CON law. *Id.* § 131E-190. DHHS is based in Wake County.

14. Defendant Devdutta Sangvai is sued in his official capacity as North Carolina's Secretary of Health and Human Services ("the Secretary"). The Secretary has "final decision-making authority" over the administration of the CON law and may seek injunctive relief against any person who violates it. N.C. Gen. Stat. §§ 131E-177, 131E-190(h). On information and belief, Defendant Sangvai resides in Wake County.

15. Defendant Josh Stein is sued in his official capacity as North Carolina's Governor ("the Governor"). The Governor supervises the activities of DHHS and holds final authority to approve or amend the State Medical Facilities Plan, which pre-determines the "need" for certain new healthcare services (including surgical facilities) in North Carolina. N.C. Gen. Stat. §§ 131E-175, 131E-176(25), 143B-6. On information and belief, Defendant Stein resides in Wake County.

16. Defendant Phil Berger is sued in his official capacity as the President Pro Tempore of the North Carolina Senate. *See* N.C. R. Civ. P. 19(d). On information and belief, Defendant Berger resides in Rockingham County.

17. Defendant Destin Hall is sued in his official capacity as the Speaker of the North Carolina House of Representatives. *See* N.C. R. Civ. P. 19(d). On information and belief, Defendant Hall resides in Caldwell County.

FACTUAL ALLEGATIONS

Dr. Singleton Wants to Provide Safe and Affordable Surgeries at the Center

18. Dr. Jay Singleton went into medicine to earn a living by helping others. He chose ophthalmology because of the life-changing power of vision correction and eye surgery, and his mission is to provide the best possible care for his patients at a price they can afford.

19. Dr. Singleton received his medical degree from West Virginia School of Osteopathic Medicine in 1999, completed his ophthalmology residency at the University of Louisville in 2003, and was licensed to practice in North Carolina in 2004. That same year, Dr. Singleton opened Singleton Vision Center in New Bern, North Carolina.

20. As an ophthalmologist, Dr. Singleton is qualified to provide comprehensive eye care—everything from routine checkups (e.g., vision tests, eye examinations) to treatment for infections or disorders (e.g., conjunctivitis, macular degeneration) to surgery (e.g., cataract, glaucoma, intraocular lens).

21. Dr. Singleton provides all of his non-surgical ophthalmology services at the Center, but he is legally required to perform the vast majority of the eye surgeries his patients need at CarolinaEast, the local hospital where he maintains surgery privileges.

22. Dr. Singleton believes this system is needlessly inconvenient and expensive for his patients and their insurance providers (public and private), and would like to start providing outpatient eye surgeries, full time, to all of his patients at the Center.

23. Performing outpatient eye surgeries full-time at the Center would save Dr. Singleton's patients and their insurance providers (public and private) thousands of dollars over the price they would otherwise pay at a hospital.

24. For example, Dr. Singleton can perform a cataract surgery at the Center for under $1,800 total (facility and surgery fee included), while CarolinaEast charges almost $6,000 for its facility fee alone.

25. Performing outpatient eye surgeries at the Center is also just as safe (if not safer) than performing them at a hospital.

26. Dr. Singleton has successfully performed over 50,000 outpatient eye surgeries (about 40,000 of which were cataract surgeries) over the course of his career.

27. After starting the Center, Dr. Singleton spent years acquiring the equipment, conducting the renovations, and setting up the operating and recovery rooms necessary to perform high-quality surgeries at the Center.

28. The Center is accredited by the American Association for Accreditation of Ambulatory Surgery Facilities (AAAASF)—a private organization that certifies that a facility meets nationally recognized safety standards.

29. The Center also meets the facility and operational standards necessary to obtain a license under the Ambulatory Surgical Facility Licensure Act. *See* 10A N.C. Admin. Code 13C .0202(a) ("An ambulatory surgical facility shall be deemed to meet the licensure requirements if the ambulatory surgery facility is accredited by . . . AAAASF."); *see also* N.C. Gen. Stat. § 131E-145 (licensure under the Act "ensure[s] safe and adequate treatment of . . . individuals in ambulatory surgical facilities").

30. Moreover, Dr. Singleton follows the North Carolina Medical Board's guidelines for office-based procedures. *See* N.C. Med. Bd., Position Statement on Office-Based Procedures, https://www.ncmedboard.org/resources-information/professional-resources/laws-rules-position-statements/position-statements/office-based_procedures (last visited March 11, 2025).

31. In short, performing outpatient eye surgeries at the Center is perfectly safe, is consistent with the standard of care, and would save patients and their insurance providers (public and private) thousands of dollars per procedure.

32. Yet as explained below, North Carolina effectively bans Dr. Singleton from running a "formal" surgical facility—and therefore from extending these benefits to the vast majority of his patients.

The CON Law Bans Dr. Singleton from Providing Safe, Affordable Surgeries at the Center

The History of North Carolina's CON Law

33. The barrier Dr. Singleton faces is called a "certificate of need" (CON) law.

34. At its core, North Carolina's CON law operates by banning healthcare providers from offering or developing any "new institutional health service" without first obtaining a CON from the state's Department of Health and Human Services. N.C. Gen. Stat. § 131E-178(a).

35. A CON is a written order granting a healthcare provider permission to proceed with a new institutional health service. N.C. Gen. Stat. § 131E-176(3).

36. "Only those new institutional health services which are found by the Department to be needed . . . and granted certificates of need shall be offered or developed within the State." N.C. Gen. Stat. § 131E-190(a).

37. North Carolina's CON law has its origins in a national movement during the mid-1960s by state and local governments to allocate federal funding in a way that would ensure the financial viability of taxpayer-funded hospitals.

38. The theory was that government planners could control healthcare costs by restricting supply and dividing the provision of healthcare services into discrete geographical regions. But the effect was that CON requirements insulated established providers from new competition.

39. Hospitals were quick to recognize that they would benefit financially from the prevalence of state CON requirements. In 1968, the American Hospital Association began a nationwide lobbying campaign to pass state CON laws, and even drafted model legislation to that end.

40. By 1972, twenty states had enacted CON regimes at the American Hospital Association's behest. North Carolina was among these states, enacting its first CON law in 1971. Act of July 27, 1971, ch. 1164, 1971 N.C. Sess. Laws 1715.

41. But in 1973, that law was challenged under Art. I, §§ 19, 32, and 34 of the North Carolina Constitution. *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

42. To protect the fruits of its lobbying campaign, the American Hospital Association (through its subsidiary the North Carolina Hospital Association, which is now called the North Carolina Healthcare Association) filed an amicus brief in defense of the law. *See Aston Park*, 282 N.C. at 544, 193 S.E.2d at 731.

43. The North Carolina Supreme Court framed the case as follows:

> In the present case, the Commission claims and the statute purports to confer upon it the authority to forbid the construction, with private funds and suitable materials, upon private property suitably located, of a well planned hospital which is to be adequately equipped and staffed with a sufficient number of well trained personnel in all categories, the sole reason for such prohibition being that, in the opinion of the Commission, there are now in the area hospitals with bed capacity sufficient to meet the needs of the population. Aston Park, which desires so to engage in the business of caring for sick, injured and infirm people, contends that this is in excess of the constitutional power of the Legislature. We agree.

Aston Park, 282 N.C. at 548, 193 S.E.2d at 733.

44. The Court struck down the 1971 law under the law of the land, exclusive privilege, and anti-monopoly clauses. *Aston Park*, 282 N.C. at 551–52, 193 S.E.2d at 735–36. Plaintiffs assert the same basic rights as those pressed, and vindicated, in *Aston Park*.

45. But *Aston Park* would not mark the end of North Carolina's CON law. Around the time *Aston Park* was decided, Congress was grappling with a related issue: Because Medicare and Medicaid reimbursed healthcare providers for services based on actual expenditures, providers could recoup funds even when those expenditures were inefficient, resulting in price inflation.

46. Congress saw CON requirements as a potential means of holding providers accountable for inefficient expenditures by requiring them to demonstrate that new medical services and capital expenditures were "needed" by the community.

47. The American Hospital Association seized on this opportunity by lobbying Congress to pass a law requiring states to enact CON requirements. The result was the National Health Planning and Resources Development Act of 1974 (NHPRDA), which required states to adopt CON laws in order to receive federal healthcare subsidies and guaranteed funding for the administration of state CON laws that met certain federal guidelines.

48. In 1978—despite the Supreme Court's holding in *Aston Park*—the legislature re-enacted North Carolina's CON regime specifically in response to the NHRPDA. N.C. Gen. Stat. §§ 131E-175, *et seq*.

49. Indeed, the chief update to North Carolina's 1978 CON law was a series of legislative "findings of fact" which claimed, among other things, that the law was enacted in response to the same reimbursement-related concern that inspired the NHPRDA and that a CON requirement was "necessary" to control prices and promote access to care. N.C. Gen. Stat. § 131E-175.

50. Whatever their truth in 1978, these "findings of fact" are false as a matter of fact today—both generally and as applied to Dr. Singleton—for at least two reasons.

51. First, Congress soon reversed course on the very policy that prompted the re-enactment of North Carolina's CON regime in the first place.

52. In 1984, Congress restructured the Medicare and Medicaid reimbursement system to a fee-for-service model under which hospitals received a fixed amount for each service, regardless of the hospital's actual expenditures.

53. Because this eliminated the rationale for demanding that states adopt CON laws, Congress repealed the NHPRDA completely in 1986.

54. Second, in the real world, North Carolina's CON requirement—both generally and as applied to Dr. Singleton—actually *increases* costs and *reduces* access to care.

55. In repealing the NHPRDA, Congress found no evidence that CON programs advanced their goal of lowering or even slowing the growth of healthcare costs. In fact, the evidence showed that CON programs were beginning to increase costs.

56. Congress also determined that CON programs were beginning to produce detrimental effects as local officials took myopic and parochial views of what kind of medical services a community "needed."

57. Since repealing the NHPRDA, the federal government has consistently reaffirmed its conclusion that CON laws raise costs and harm patients.

58. In 1988, for instance, a Staff Report of the Bureau of Economics in the Federal Trade Commission (FTC) concluded that CON programs harm consumers and raise healthcare costs by serving as a barrier to entry of new healthcare providers and by encouraging hospitals to avoid using more efficient (but CON-restricted) equipment and services in favor of less efficient (but CON-exempt) equipment and services.

59. In 2004, the FTC and United States Department of Justice (DOJ) issued a joint report reaffirming the 1988 study. "Based on 27 days of joint hearings held from February through October 2003, a [Federal Trade] Commission-sponsored workshop in September 2002, and independent research," the agencies concluded that

> States with Certificate of Need programs should reconsider whether these programs best serve their citizens' health care needs. The [FTC and DOJ] believe that, on balance, *CON programs are not successful in containing health care costs, and that they pose serious anticompetitive risks that usually outweigh their purported economic benefits.* Market incumbents can too easily use CON procedures to forestall competitors from entering an incumbent's market . . . . [T]he vast majority of single-specialty hospitals—a new form of competition that may benefit consumers—have opened in states that do not have CON programs. *Indeed, there is considerable evidence that CON programs can actually increase prices by fostering anticompetitive barriers to entry.* Other means of cost control appear to be more effective and pose less significant competitive concerns.

Dep't of Justice & Fed. Trade Comm'n, *Improving Health Care: A Dose of Competition* (July 2004), https://tinyurl.com/55svacr2 (last visited May 11, 2025) (emphasis added).

60. Since 1986, numerous additional studies have shown CON requirements to be associated with lower service quality and higher mortality rates, higher healthcare costs and spending, and reduced access to certain services.

61. Moreover, studies published within the past few years have shown that CON requirements are associated with reduced operating room availability, that the elimination of CON requirements does not reduce the prevalence or accessibility of hospitals in rural areas, and that the elimination of CON requirements *increases* access to operating room services.

62. Unsurprisingly, the federal government has never reauthorized CON laws, and at least 16 states have actually eliminated their CON laws with no evidence of any negative effects on patients.

63. Despite this, local lobbying efforts have kept some version of these CON laws in place in over two dozen states plus the District of Columbia. This is true of North Carolina as well, where the North Carolina Healthcare Association has lobbied for decades to keep the state's CON law in place.

64. Today, North Carolina's CON law regulates 25 different healthcare services and is among the most restrictive regimes in the country.

65. In 2015, the FTC sent a letter to the North Carolina House of Representatives in support of House Bill 200, which would have exempted multiple healthcare services (including ambulatory surgical facilities) from the CON law. Marina Lao, *FTC Staff Comment Regarding N.C. H.B. 200* (July 2015), https://tinyurl.com/55496etk (last visited May 11, 2025). The FTC supported the bill because CON laws: (1) "can prevent the efficient functioning of health care

markets"; (2) "can be prone to exploitation by incumbent firms seeking to thwart or delay entry by new competitors"; and (3) "appear to have generally failed to control health care costs."

66. The recent COVID-19 pandemic further demonstrates how North Carolina's CON law prevents the efficient functioning of healthcare markets. Due to the CON law's artificial restrictions on the supply of otherwise-lawful medical services and equipment, existing providers struggled to adequately respond to the crisis, and Governor Cooper was forced to issue executive orders temporarily suspending some of the CON law's restrictions so that providers could enter the market in order to save lives. *See* Executive Order No. 130 (April 8, 2020).

67. A recent amendment to the CON law further demonstrates the law's irrationality. The amendment—titled "An Act to Provide North Carolina Citizens with Greater Access to Healthcare Options," Sess. Law 2023-7 (codified at N.C. Gen. Stat. § 131E-176(21a))—removes the operating room CON requirement for ambulatory surgical centers (like the Center) located "in a county with a population greater than 125,000 according to the 2020 federal decennial census or any subsequent federal decennial census." Sess. Law 2023-7. Dr. Singleton does not qualify for the exemption because he works in Craven County, which had a population of 100,720 as of 2020. U.S. Census Bureau, *Craven County, North Carolina*, https://tinyurl.com/yc5xpy9p (last visited May 11, 2025). As of 2020, at least 55.1% of North Carolina's population lived in a county with a total population of more than 125,000—which means that a majority of all patients are located in a county where facilities materially similar to the Center are permitted to use their own operating rooms without having to obtain a CON. The fact that the legislature declared this sweeping *exemption* from the CON law to be a measure that provides *greater access* to healthcare

options shows that subjecting Dr. Singleton (and others similarly situated) the CON requirement is arbitrary, irrational, and harmful to the public health.

The CON Law Restricts Supply to Benefit Established Providers

68. To obtain a CON, applicants must prove their services will meet the criteria set forth under N.C. Gen. Stat. § 131E-183(a)(1), including that "[t]he proposed project [is] 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, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved."

69. The State Medical Facilities Plan (SMFP) is "an annual document" prepared by DHHS "that contains policies and methodologies used in determining need for new health care facilities and services in North Carolina." N.C. Div. of Health Serv. Regulation, *N.C. State Med. Facilities Pla*n, https://tinyurl.com/benaabtz (last visited May 11, 2025) (last visited May 11, 2025).

70. The SMFP divides the state into discrete "service areas" and projects whether there is a "need" for particular healthcare services in future years. *See, e.g.*, 2025 SMFP 49–54 (describing "the methodology to determine an OR need for a service area") (last visited May 11, 2025).

71. The SMFP's annual "need determinations" are largely based on the number of established providers in each "service area" and the volume of services they are performing.

72. If the state determines there are "enough" providers operating in a particular area, new providers are banned from obtaining a CON in that area—even if the services they would like to provide are safe, efficient, affordable, and actually needed by real patients.

73. New "need" determinations are rare, but when they do occur, aspiring providers are then forced to undertake an expensive, burdensome, and fundamentally anti-competitive application process.

74. There is a $5,000 non-refundable fee just to submit the application. N.C. Gen. Stat. § 131E-182(c). Applications submitted without the fee will not be considered. 10A N.C. Admin. Code 14C .0203(c)(1).

75. In addition to showing compliance with the SMFP, applicants must prove they meet the 14 other "review criteria" listed under N.C. Gen. Stat. § 131E-183(a), which includes showing that the proposed services are the "least costly or most effective" means of meeting the area's "need" and "will not result in unnecessary duplication of existing or approved health service capabilities or facilities."

76. The CON-application process is notoriously complex. Applying with any reasonable prospect of success requires considerable preparation and planning, including hiring an experienced team of consultants and economists to generate all of the data, projections, plans, and other information necessary to demonstrate compliance with the review criteria.

77. As a result, CON applications typically cost tens of thousands of dollars to prepare and can take many months to complete.

78. After a provider submits an application and the required fee, DHHS has 90 days to review the application. N.C. Gen. Stat. § 131E-185(a1).

79. If there are multiple applications for a CON in the same service area during the same review period, and approval of one could result in a denial of another, the applications are considered "competitive" and will be reviewed together. 10A N.C. Admin. Code 14C .0202(f).

80. In a competitive review, an applicant who satisfied all relevant criteria could be denied a CON solely because another applicant obtained the CON instead, thus obviating the "need" for the first applicant's services.

81. Once the review period begins, any person may file written comments opposing the application within 30 days. N.C. Gen. Stat. § 131E-185(a1)(1).

82. DHHS is also required to hold a public hearing on the applications within 20 days of the expiration of the comment period if, among other things, the review involves multiple applicants or any "affected party" (including any person who provides similar services) requests a hearing. N.C. Gen. Stat. §§ 131E-185(a1)(2), 131E-188(c).

83. DHHS must issue a decision on the applications by the end of the review period. N.C. Gen. Stat. § 131E-186(a). If the decision is that a CON should be issued, DHHS must issue the CON to the prevailing applicants within 35 days of that decision—unless an "affected person" (including any person who provides similar services) files a petition for a "contested case" hearing. *Id.* § 131E-187(c)(1).

84. A contested-case petition triggers an administrative process with the North Carolina Office of Administrative Hearings that closely resembles litigation: an administrative law judge or hearing officer is appointed, the parties conduct discovery, a hearing is held at which sworn testimony is taken and evidence is presented, and the judge or officer issues a final decision based on his findings. N.C. Gen. Stat. § 131E-188(a).

85. All told, the administrative portion of the contested-case process can take up to 270 days to resolve from the day the petition is filed. N.C. Gen. Stat. § 131E-188(a).

86. But even that is not necessarily the end of the process, because "[a]ny affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision." N.C. Gen. Stat. § 131E-188(b).

87. All appeals from final decisions in contested-case proceedings must be taken directly to the North Carolina Court of Appeals within 30 days of written notice of the decision. N.C. Gen. Stat. § 131E-188(b). Appeals are handled in accordance with the North Carolina Rules of Appellate Procedure, which means they might not reach final resolution until a decision by the North Carolina Supreme Court. *Id.*

88. Given the scarcity of new "need" determinations and the adversarial nature of these proceedings, qualified providers eager to offer new services to patients are forced to aggressively compete with one another—not in the marketplace, but in the CON-application process.

89. Indeed, competitive reviews and contested cases are extremely common, often require the assistance of experienced legal counsel to litigate effectively, and can take many years and hundreds of thousands of dollars to resolve.

90. As a result, the total cost of pursuing a CON application to completion often exceeds $400,000—with no guarantee that the applicant will actually obtain a CON.

91. For providers fortunate enough to obtain them, CONs have high economic value—both in terms of the investment made during the application process and the strong economic advantage that comes with holding exclusive legal rights to provide healthcare services an area.

92. Given these incentives, established providers frequently file written comments and petitions for contested-case hearings in an attempt to stonewall the introduction of new, competing healthcare services.

93. As established providers, these entities typically have the financial resources necessary to hire representatives, including experienced legal counsel, who can devote the time and money necessary to contest an application at every turn—thus increasing the overall cost and duration of the process for the parties involved.

94. The same advantages apply in the competitive-review process, where established providers are usually quick to apply for any new CONs and almost always prevail over aspiring market entrants.

95. In sum, North Carolina's CON law is fundamentally anticompetitive: Established providers are insulated from competition in their service areas; aspiring providers are prevented from participating in the healthcare market solely because other providers got there first; and when state planners project a "need" for a new service or facility—which they usually do not—incumbent providers are given every opportunity to thwart, undermine, and frustrate potential competitors' applications, while at the same time exerting their considerable economic advantage to obtain the new CON for themselves—and thus, retain their monopoly status.

The CON Law's Application to Dr. Singleton and the Center

96. North Carolina requires a CON to establish "a new health service facility" or "an operating room . . . in a licensed health service facility," or to "offer or develop" services in such facilities. N.C. Gen. Stat. §§ 131E-176(16)(a), (u), 131E-178(a); *see also* 10A N.C. Admin. Code

13C .0202(b) (conditioning licensure under the Ambulatory Surgical Facility Licensure Act on obtaining a CON).

97. "Operating room" means "[a] room used for the performance of surgical procedures requiring one or more incisions and that is required to comply with all applicable licensure codes and standards for an operating room." N.C. Gen. Stat. § 131E-176(18c).

98. "Health service facility" means, among other things, a "hospital" or an "ambulatory surgical facility." N.C. Gen. Stat. § 131E-176(9b).

99. "Ambulatory surgical program" (ASP), when referring to a surgical program operated within a physician's office, means "[a] formal program for providing on a same-day basis those surgical procedures which require local, regional, or general anesthesia and a period of post-operative observation to patients whose admission for more than 24 hours is determined, prior to surgery or gastrointestinal endoscopy, to be medically unnecessary." N.C. Gen. Stat. § 131E-176(1c).

100. There is, however, an exception to the CON law's ASP restrictions for "the performance of incidental, limited ambulatory surgical procedures" in a physician's office. N.C. Gen. Stat. § 131E-176(1b).

101. The upshot of these provisions is that Dr. Singleton is required to obtain a CON to run a "formal" surgery program at Singleton Vision Center.

102. But Dr. Singleton is categorically banned from doing so. The state has projected no "need" for a new surgical facility in the Craven/Jones/Pamlico service area (where the Center is located) through at least 2027. *See* 2025 SMFP, https://tinyurl.com/mtx24dsr, at 71

(table showing "Operating Room Need For 2027" for the Craven/Jones/Pamlico area is "0") (last visited May 11, 2025).

103. In fact, the state has not projected a "need" for a new surgical facility in the Craven/Jones/Pamlico service area for at least 15 years (which is as far back as DHHS's online records go).

104. In March 2015, Dr. Singleton hired attorneys who filed a petition with DHHS seeking an amendment to the SMFP's methodology for determining operating room need. His petition noted that, under the current methodology, there is "no realistic hope for efficient and effective independently owned and free-standing surgery centers in the future," and urged that the methodology be revised to facilitate the entry of more operating rooms into the market. But DHHS made no revisions.

105. The only provider in the Craven/Jones/Pamlico service area that owns a CON to provide surgical services (including outpatient eye surgeries) is CarolinaEast, a private hospital with a billion-dollar annual budget located about three miles from Singleton Vision Center.

106. CarolinaEast has strong ties to the North Carolina Healthcare Association—the organization that has, for decades, lobbied to keep the CON law in place in order to insulate its stakeholders from competition.

107. On information and belief, despite North Carolina's consistent population and economic growth over the past half-century, CarolinaEast is the only provider ever to possess a CON for surgical services in the Craven/Jones/Pamlico service area since Dr. Singleton started practicing medicine there.

108. The fact that the state has not projected a "need" for Dr. Singleton to run a "formal" surgery program at the Center does not mean that there are not real patients in the area who need and would benefit from such a program.

109. Instead, the sole reason the state projects no "need" for Dr. Singleton to run a "formal" surgery program at the Center is that CarolinaEast is already providing surgeries at its facility three miles down the road.

110. On information and belief, Defendants do not possess and cannot produce any evidence that preventing Dr. Singleton from running a "formal" surgery program at the Center actually increases access to safe, affordable surgeries in the Craven/Jones/Pamlico service area.

111. To the contrary, if Dr. Singleton were permitted to run a "formal" surgery program at the Center, the program would:

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

- Promote increased competition for outpatient eye surgeries in the Craven/Jones/Pamlico planning area and beyond, thereby reducing the cost of procedures for North Carolina patients and their insurance providers (public and private).

112. Indeed, there is real evidence the Center is already producing these results on a smaller scale, since Dr. Singleton is permitted to provide "incidental, limited ambulatory surgical procedures" at the Center without obtaining a CON. *See* N.C. Gen. Stat. § 131E-176(1b).

113. Although Dr. Singleton is forced, under the CON law, to perform the vast majority of his outpatient eye surgeries at CarolinaEast, he currently provides a small minority of his surgeries at the Center.

114. The small minority of Dr. Singleton's patients fortunate enough to obtain surgeries at the Center are billed thousands of dollars less per procedure than they would have been charged at CarolinaEast.

115. Several of these patients have told Dr. Singleton they would not otherwise have been able to afford an operation at CarolinaEast, and so would have either gone without necessary care or substantially delayed their procedures.

116. If Dr. Singleton is permitted to run a "formal" surgery program at the Center, more patients in the Craven/Jones/Pamlico service area will be able to obtain the outpatient eye surgeries they need at an affordable price.

117. If Dr. Singleton is not permitted to run a "formal" surgery program at the Center, many patients will be deprived of the affordable outpatient eye surgeries they need.

118. Again, Dr. Singleton is not currently permitted to do so. He cannot apply for a CON because the state has not projected a "need" for a new surgical facility in his service area through at least 2027.

119. Nor can Dr. Singleton simply violate the CON law, as violations are subject to strict penalties (from suspension of his license to assessment of a civil fine up to $20,000) and Defendants strictly enforce the law. *See* N.C. Gen. Stat. § 131E-190.

120. The CON process is not an adequate remedy for Dr. Singleton's injuries. The process is, instead, inadequate and futile for two main reasons.

121. First, Dr. Singleton seeks the freedom to run a "formal" surgery program using his own operating room free from the irrational and protectionist CON requirement. Forcing him to go through the CON process can't protect that freedom. Instead, it would deepen the harm by forcing him to comply with a requirement that he alleges is unconstitutional. *See Aston Park*, 282 N.C. at 552, 193 S.E.2d at 736 ("The statutory *requirement* of a certificate of need [is] beyond the authority of the Legislature under the Constitution of this State . . . .") (emphasis added).

122. Second, CarolinaEast has told Dr. Singleton that it will oppose any future CON application he files. As discussed above, such a battle could cost hundreds of thousands of dollars and take several years to resolve—money and time Dr. Singleton simply cannot afford to spend when his primary focus is on caring for his patients. Likewise, should CarolinaEast apply for any hypothetical future CON itself (as hospitals almost always do), Dr. Singleton would have no real hope of prevailing against CarolinaEast's vast resources. The ability to file a doomed application years from now (if ever), only for the chance to spend years and hundreds of thousands of dollars

battling against a future competitor in an administrative process, is not a remedy for the CON requirement. It's part of the injury.

123. This lawsuit is therefore Dr. Singleton's only realistic option for vindicating his right to use his own property to perform safe and affordable outpatient eye surgeries for patients who need them free from irrational and protectionist restrictions.

INJURY TO PLAINTIFFS

124. The CON law prevents Dr. Singleton from providing outpatient eye surgeries to all of his patients at the Center.

125. The CON law prevents Dr. Singleton from providing services at the Center that would allow him to better care for the health and welfare of all of his patients.

126. The CON law prevents Dr. Singleton from providing more affordable outpatient eye surgeries at the Center than those offered by nearby providers, such as CarolinaEast.

127. The CON law prevents Dr. Singleton from saving his patients and their insurance providers (public and private) thousands of dollars on outpatient eye surgeries.

128. The CON law prevents Dr. Singleton from running his ophthalmology practice in accordance with his medical and professional judgment.

129. The CON law prevents Dr. Singleton from expanding his ophthalmology practice and thereby from hiring more staff and serving more patients.

130. The CON law prevents Dr. Singleton from competing in North Carolina's market free from irrational and protectionist restrictions.

131. But for the CON law, Dr. Singleton would have suffered none of these injuries in the past and would suffer none of them in the future.

132. But for the CON law, Dr. Singleton would immediately apply for a license under the Ambulatory Surgical Facility Licensure Act.

133. But for the CON law, Dr. Singleton would immediately obtain a license under the Act and would begin providing outpatient eye surgeries to all of his patients at the Center in accordance with the North Carolina Medical Board's guidelines for office-based procedures, the parameters of the Center's AAAASF accreditation, and the applicable standard of care.

134. Unless the CON law is declared unconstitutional, both on its face and as applied to Plaintiff, and Defendants enjoined from enforcing it to that extent, Plaintiffs and those who are similarly situated will suffer continuing and irreparable harm.

CONSTITUTIONAL CLAIMS

Count I
(Art. I, §§ 1 & 19—Fruits of Labor & Law of Land)

135. Article I, Section 1 of the North Carolina Constitution declares: "that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."

136. Article I, Section 19 of the North Carolina declares: "No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land."

137. Both provisions protect Plaintiffs' economic liberty, meaning their fundamental right to earn an honest living and to pursue their chosen business free from arbitrary, irrational, and protectionist statues and regulations.

138. Both provisions impose the same constitutional test: They forbid restrictions on economic liberty unless those restrictions are reasonably necessary to protect the public health, safety, or welfare.

139. The CON law does not regulate the safety or quality of new healthcare services. And here, it does not regulate the safety or qualify of Plaintiffs' surgeries or their operating room —it merely forbids entry into the market based on the state's view of whether new services are "needed."

140. Whether the state determines that new healthcare services are "needed" bears no real, substantial, fair, or rational connection to ensuring that new services are safe and accessible.

141. Forcing new healthcare providers to obtain a CON, when those providers' new services are otherwise lawful (they comply with all other licensing and permitting requirements), is not reasonably necessary to protect the public. And here, forcing Plaintiffs to obtain a CON is not reasonably necessary to protect the public.

142. There is no evidence, and Defendants will be unable to produce any evidence, that the CON requirement lowers costs, increases access to care, or helps real patients in any way.

143. In fact, forcing new healthcare providers to obtain a CON raises costs, decreases access to care, and harms the very patients it's supposed to help. And here, forcing Plaintiffs to obtain a CON raises costs, decreases access to care, and harms the very patients it's supposed to help—especially patients in the Craven/Jones/Pamlico area who are forced to get eye surgeries at CarolinaEast and to pay far higher prices for those services.

144. The CON law's "findings of fact," both generally and as applied to Plaintiffs, are false. Allowing DHHS to forbid otherwise-lawful healthcare services unless DHHS predicts that

those services will be needed is not "reasonably necessary" to promote any valid state interest and "is in excess of the constitutional power of the Legislature." *Aston Park*, 282 N.C. at 548, 551, 193 S.E.2d at 733.

145. The fact that Governor Cooper felt compelled to partially suspend the CON law's requirements during the COVD-19 pandemic, allowing new healthcare providers to enter the market quickly in order to meet rising demand and to save lives, further demonstrates the CON law's irrationality. It shows that the premise of the CON law—that banning new services unless DHHS first predicts they will be needed will somehow increase access to care—is false, and that the law prevents qualified healthcare providers from meeting real and current market demands.

146. The fact that the legislature has eliminated the CON requirement for operating rooms in urban ambulatory surgical centers, in order "to Provide North Carolina Citizens with Greater Access to Healthcare Options," further demonstrates the CON law's irrationality. It shows that the CON requirement *reduces* access to care and that eliminating it would *increase* access to care.

147. The CON law's true purpose and real-world effect is to protect established healthcare providers from competition, and economic protectionism is not a legitimate basis for preventing Plaintiffs from using their own property to provide safe and affordable outpatient eye surgeries to patients who need them.

148. Therefore, the CON law violates Plaintiffs' economic liberty and right to earn a living under Art. I, §§ 1 and 19, both on its face and as applied.

Count II
(Art. I, § 32—Exclusive Privileges)

149. Article I, Section 32 of the North Carolina Constitution declares: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

150. This provision forbids the government from granting "exclusive . . . privileges," including exclusive rights to provide services in a market.

151. The CON law grants established providers an exclusive right to provide certain healthcare in their service areas.

152. In this case, the CON law has granted CarolinaEast—the only entity with a CON to run a surgical facility in the Craven/Jones/Pamlico area—an exclusive right have and use an operating room in that area.

153. And, because CarolinaEast is a private healthcare provider that serves private patients, CarolinaEast does not hold its exclusive privilege "in consideration of public services."

154. Therefore, the CON law violates Art. I, § 32, both on its face and as applied.

Count III
(Art. I, § 34—Anti-Monopoly)

155. Article I, Section 34 of the North Carolina Constitution declares: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

156. This provision forbids the government from granting "monopolies," which are exclusive rights to provide private services. It's a categorical ban on state-created monopolies.

157. The CON law grants established healthcare providers an exclusive right to provide private services in their service areas.

158. In this case, the CON law grants CarolinaEast an exclusive right to provide private operating room services in the Craven/Jones/Pamlico area.

159. In other words, Dr. Singleton is banned from entering the market because another private entity, CarolinaEast, got there first. That's a monopoly.

160. Therefore, the CON law violates Art. I, § 34, both on its face and as applied.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request relief as follows:

A. A declaratory judgment that the CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, violates Art. I, § 1 of the North Carolina Constitution both facially and as applied to Plaintiffs;

B. A declaratory judgment that the CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, violates Art. I, § 19 of the North Carolina Constitution both facially and as applied to Plaintiffs;

C. A declaratory judgment that the CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, violates Art. I, § 32 of the North Carolina Constitution both facially and as applied to Plaintiffs;

D. A declaratory judgment that the CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, violates Art. I, § 34 of the North Carolina Constitution both facially and as applied to Plaintiffs;

E. An order permanently enjoining Defendants from enforcing the CON law against Plaintiffs and all those who are similarly situated;

F. An award of $1 in nominal damages in recognition of the economic, professional, and constitutional injuries the CON law has caused Plaintiffs;

G. An award of attorneys' fees, costs, and expenses in this action; and

H. All further legal and equitable relief as the Court may deem just and proper.

June 16, 2025.

Respectfully submitted,

/s/ Joshua Windham

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2025, I served a copy of the foregoing document via email as follows:

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