STATE OF NORTH CAROLINA COUNTY OF WAKE	GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 05150
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 SANGVAL, North Carolina Secretary of Health and Human Services, in her official capacity; PHIL BERGER, President Pro Tempore of the North Carolina Senate, in his official capacity; and DESTIN HALL, Speaker of the North Carolina House of Representatives, in his official capacity, Defendants.	BRIEF OF THE JOHN LOCKE FOUNDATION AS *AMICUS CURIAE* IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The John Locke Foundation, as *Amicus Curiae*, hereby submits this brief in opposition to Defendants' Motion to Dismiss.

STATEMENT OF INTEREST

The John Locke Foundation was founded in 1990 as an independent, nonprofit think tank. We employ research, journalism, and outreach to promote our vision for North Carolina—of responsible citizens, strong families, and successful communities. We are committed to individual liberty and limited, constitutional government.

The John Locke Foundation has opposed North Carolina's Certificate of Need (CON) law for many years, not only because it violates fundamental rights protected by the North Carolina Constitution, but also because it directly harms patients and taxpayers by making

health care more expensive and less accessible. We therefore have an interest in presenting to this court the best and latest research pertaining to the questions presented in this case, including whether the CON law serves the public interest, whether it is reasonably related to a legitimate legislative purpose, and whether the exclusive privilege it grants to certain medical service providers violates the North Carolina Constitution. The research we will present concerns, among other things, the origin, meaning, and application of the relevant constitutional provisions, as well as the deleterious effects of the CON law on the economy and public health.

ARGUMENT

In their brief, Defendants argue that this case should be dismissed because "a careful review of the facts and well-settled case law shows Plaintiffs' claims are without merit." (Def.'s Br., 11.) This court should reject that argument for three reasons. First, it addresses a question that is not before the court at this stage in the proceedings and fails to address the one that is, namely, whether Plaintiffs have stated a claim upon which relief may be granted. Second, it fails to do what it claims to do, i.e., it fails to show that Plaintiffs' claims are without merit. Finally and above all, it proves too much. If this case can be dismissed on the basis of Defendants' own review of its own selection the facts and case law, judicial review is effectively gone, and so are the separation of powers and the right to a fair trial.

I. Defendants' argument for dismissal addresses the wrong question.

In his concurrence in *Dawson v. Allstate Ins. Co.*, Judge Wynn explains the proper scope of a 12(b)(6) enquiry:

> A motion to dismiss under ... 12(b)(6) generally tests the legal sufficiency of the complaint: Has the pleader given notice of such facts as will, if true, support a claim for relief under some legal theory? ... The motion does not present the merits, but only whether the merits may be reached. ... The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support

the claims. 106 N.C.App. 691, 693, 417 S.E.2d 841.

Defendants' brief does nothing to help this court test the legal sufficiency of the complaint because it does not even address the question before the court, i.e., have Plaintiffs "given notice of such facts as will, if true, support a claim for relief under some legal theory." Instead, it deals entirely with the question of whether Plaintiffs will ultimately prevail on the merits.

The brief's focus on the merits begins in the Introduction. After stating—*falsely*—that "Plaintiffs repeat the same arguments that *Hope* rejected." (Def.'s Br., 2) (referring to *Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 359, 693 S.E.2d 673, disc. review denied, 364 N.C. 614, 754 S.E.2d 166 (2010)), Defendants summarize their argument by saying, "Because *Hope* still controls, and because Plaintiffs have not shown that the CON Law is facially unconstitutional in any event, Plaintiffs' claims fail as a matter of law and should be dismissed." *Id.*

There are several things to note about those passages. The first is that, as explained below, *Hope* does not control, at least not in the sense of being binding precedent. *Supra*, 8-10. At best, it is relevant as a model of the kind of reasoning Defendants think this court should apply when considering the complaint on the merits. More importantly for present purposes, the question of whether Plaintiffs have shown that the CON law is facially unconstitutional is irrelevant at this stage in the proceedings. The only relevant question is whether Plaintiffs have given notice of such facts as will, if true, support a claim for relief under some legal theory. *See Dawson v. Allstate Ins. Co.*, 106 N.C.App. at 693, 417 S.E.2d 841. If they have, then they must be given an opportunity to show that CON Law is unconstitutional during the merits phase.

Rather than allow that to happen, however, Defendants ask this court to decide the case on the merits now. Why? Because Defendants' own "careful review of the facts and well-settled

case law shows Plaintiffs' claims are *without merit*," (Def.'s Br., 11.) (emphasis added)

To their credit, Defendants at least show their work in the Argument section of the brief. After their own review of their own selection of facts and case law, they conclude:

> Plaintiffs' claim that the CON Law ... violates the Fruits of Labor Clause of Article I, Section I of the North Carolina Constitution *is without merit*. (Def.'s Br., 16.) (emphasis added).
>
> Plaintiffs' claim that the CON Law ... violates the Law of the Land Clause of Article I, Section 19 of the North Carolina Constitution *is without merit*. (Def.'s Br., 19.) (emphasis added).
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> Plaintiffs' argument that the CON Law ... violates Article I, Section 32 of the North Carolina Constitution *is without merit*. (Def.'s Br., 20.) (emphasis added).
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> Plaintiffs' claim that the CON Law is ... unconstitutional in violation of Article I, Section 34 of the North Carolina Constitution *is without merit*. (Def.'s Br., 23.) (emphasis added)

It is, perhaps, unsurprising that Defendants prefer to avoid the question that is actually before the court and go straight to the merits, because Plaintiffs have very clearly "given notice of such facts as will, if true, support a claim for relief under a theory of law." They list those facts at length in their Amended Complaint, and they provide concise summary of some of the most salient in their Brief in Support of Motion for Partial Summary Judgement:

> Dr. Singleton is a licensed eye doctor and board-certified surgeon based in New Bern. He founded Singleton Vision Center, a full-service eye clinic, in 2004 to provide quality care at an affordable price. He provides all of his non-surgical eye care at his clinic. And, because his patients often need outpatient surgeries, he wants to provide those full-time at his clinic too. (Pl.'s Br. 3.)
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> Dr. Singleton's eye surgeries would be safe. His clinic has an operating room with all the equipment and staff needed to provide quality care. He's performed thousands of surgeries over his career and would follow the North Carolina Medical Board's guidelines. And his eye clinic is accredited by the American Association for Accreditation of Ambulatory Surgery Facilities, meaning it meets nationally accepted safety standards. (*Id.*)
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> Dr. Singleton's surgeries would also cost far less than the only other local option. CarolinaEast—a private hospital two miles down the road—charges over $6,000

> per procedure for its facility fee alone. Dr. Singleton can perform eye surgeries at his clinic for a fraction of that price. For example, he can perform a cataract surgery for under $1,800. Dr. Singleton wants to bring those savings to all of his patients. (*Id.*)
>
> But Dr. Singleton can't use his operating room without a certificate of need (CON). A CON is different from a facility license, which "ensure[s] safe and adequate treatment of . . . individuals in ambulatory surgical facilities." Far from ensuring safety, a CON reflects the Department of Health and Human Services' view that a new operating room is "needed" in the market. Dr. Singleton could—and happily would—get a facility license for his clinic. But he can't get one without a CON. (*Id.*, 4.)
>
> CONs are scarce. The Department pronounces operating room "need" once a year in the State Medical Facilities Plan. N.C. Gen. Stat. § 131E-183(a). The Plan breaks the state into "service areas" and sets "need" two years in advance. *E.g.*, 2025 SMFP, https://tinyurl.com/2f74sj6s, at 49. If the Plan declares no need for a new operating room, no CON will be available in that service area for at least two years. *See* N.C. Gen. Stat. § 131E-183(a)(1) (noting that a service area "need" projection "constitutes a determinative limitation on . . . operating rooms . . . that may be approved" in that area). No CON, no market entry. (*Id.*, 4.)
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> Dr. Singleton is in the Craven/Jones/Pamlico service area. Since Dr. Singleton opened his center in 2004, the Plan has *never* projected a need for a new operating room in his area. That was true even after he petitioned the Department to adjust the Plan's "need" methodology in 2015. And it's remained true every year since he filed this case. (*Id.*, 5.)
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> The only healthcare provider that has *ever* held an operating room CON in Dr. Singleton's area is CarolinaEast. And CarolinaEast—a large private hospital with a billion-dollar annual budget—has told Dr. Singleton that if a CON ever opens up, it will oppose his application. That's no small threat. Contested CON applications trigger an administrative process that looks like litigation, costs hundreds of thousands of dollars, and takes several years to resolve. Dr. Singleton (who has pro bono counsel in this case) does not have the resources to litigate against CarolinaEast in that process. (*Id.*, 5.)
>
> Nor, again, is that even an option. No CON is available in Dr. Singleton's service area. No CON has ever been available in his service area. And no CON will be available through at least 2028 (and likely far longer). The market—now and for years to come—is closed. (*Id.*, 5-6.)

According the Plaintiffs' legal theory, which emphasizes the plain meaning and historical understanding of constitutional text, those facts support their claim for relief under

several provisions of the North Carolina Constitution: Art. I., Sec. 32, which categorically forbids the granting of exclusive privileges except for public service, under Art. I, Sec. 34, which categorically forbids the granting of monopolies under any circumstances, and under Art. I., Secs. 1 and 19, which impliedly guarantees the right to earn a living by engaging in a lawful occupation.

Defendants do not challenge Plaintiffs' factual allegations, which would not be appropriate at the motion to dismiss stage, where we "treat the allegations in the complaint as true." *Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 426, 904 S.E.2d 720, 727. Nevertheless, they are argue that under a different legal theory, one that emphasizes the presumption of constitutionality and tiers of scrutiny doctrine, the Con law should nonetheless be upheld. That is an argument that Defendants can and no doubt will make at trial. But it does not, in any way, show that Plaintiffs have failed to state a claim for which relief may be granted.

This court should not be distracted by the Defendants' presumption of constitutionality arguments. Defendants claim "Ace Speedway says nothing, however, about how to apply its test when a plaintiff challenges the facial constitutionality" of a statute, Def's Br. at 13, and relies on this presumption of constitutionality to bolster its motion to dismiss arguments. However, this argument overlooks the cases that the Court cites in its analysis of the 12(b)(6) motion, *e.g.*, *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949), and *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957). In both cases, the challenged statutes were "adjudged void for repugnancy" to the Constitution. *Ballance*, 229 N.C. at 772, 51 S.E.2d at 736; *see Roller v. Allen*, 245 N.C. at 526, 96 S.E.2d at 859 ("Chapter 87, Article 3, is repugnant to Article I, Sections 1, 7, 17, and 31, Constitution of North Carolina, and, therefore, void.").

Because our Supreme Court declared the challenged statutes void, providing relief to parties beyond the plaintiffs in each case, the statutes were also facially void. *See Singleton v. N. Carolina Dep't of Health & Hum. Servs.*, 386 N.C. 597, 599, 906 S.E.2d 806, 808 (2024) (agreeing that if plaintiffs "prevail, the need for relief that extends beyond plaintiffs will likely arise here and will likely entail facial relief." *Singleton v. N. Carolina Dep't of Health & Hum. Servs.*, 386 N.C. 597, 599, 906 S.E.2d 806, 808 (2024) (cleaned up). Thus, the *Ace Speedway* Court relied on *Ballance* and *Roller v. Allen* to frame its 12(b)(6) analysis, because the distinction between facial and as-applied is immaterial for the purposes of this analysis.

As our Supreme Court's recent analysis in *Ace Speedway* shows, the presumption of constitutionality does not control at the 12(b)(6) stage—nor at any stage—because it is a rebuttable presumption. *See Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4, 413 S.E.2d 541, 543 (1992) ("The presumption of constitutionality is not, however, and should not be, conclusive.").

> [I]t is not only within the power, but ... it is the duty, of the courts in proper cases to declare an act of the Legislature unconstitutional, and this obligation arises from the duty imposed upon the courts to declare what the law is.
> The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.

Id., *quoting State v. Knight*, 169 N.C. 333, 351–52, 85 S.E. 418, 427 (1915) (emphasis added).

II. Defendants' have failed to show that Plaintiffs' claims are without merit.

As noted above, Defendants' claim that their own review of their own selection of facts and case law shows Plaintiffs' claims are without merit is irrelevant at this stage in the proceedings. Even if one were to accept, *arguendo*, that Defendants' review *is* relevant—it

would not provide a convincing reason to dismiss this case because Defendants have failed to do what they claim to have done. They have failed to show that Plaintiffs' claims are without merit.

A. Hope does not control.

In the Introduction to their brief, Defendants' provide a brief account of the procedural disposition and then say:

> [I]n 2010, the CON Law was upheld as constitutional. *Hope—A Women's Cancer Center v. State*, 203 N.C. App. 593, 693 S.E.2d 673 (2010), *disc. rev. denied, appeal dismissed*, 364 N.C. 614, 754 S.E.2d 166 (2010). Here, Plaintiffs repeat the same arguments that *Hope* rejected, but Plaintiffs confront an even higher bar by alleging the CON Law is unconstitutional on its face. In *Hope*, the North Carolina Court of Appeals held that the CON Law rests squarely within the ordinary police powers of the General Assembly. *Hope*, 203 N.C. App. at 603, 693 S.E.2d at 680. The Court upheld the constitutionality of the law, explaining how it furthers the government's interest in protecting public health. *Id.* (Def.'s Br. 2.)
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> Likewise, *Hope* decides the instant case. Couched in speculative assumptions, all of Plaintiffs' claims challenge the CON Law as a matter of policy. Because *Hope* still controls, and because Plaintiffs have not shown that the CON Law is facially unconstitutional in any event, Plaintiffs' claims fail as a matter of law and should be dismissed. (*Id.*)

All of that is plainly wrong. North Carolina's original CON law was enacted in 1971. 1971 N.C. Sess. Laws 1715. Soon after enactment, Aston Park Hospital challenged the law as a violation of the Exclusive Emoluments and Anti-Monopoly clauses. In 1973, the North Carolina Supreme Court found in the hospital's favor. It found that the CON law "establish[ed] a monopoly in the existing health care providers contrary to the provisions of Article I, 34 of the Constitution of North Carolina" and was "a grant to them of exclusive privileges forbidden by Article I, 32." *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551, 193 S.E. 2d 729, 736 (1973). The court has neither overturned nor disavowed *Aston Park*.

In 1977, the North Carolina General Assembly enacted a new CON law. 1971 N.C. Sess.

Laws 1715, 1715-17. While the new law differs from the old law in some particulars, it grants exactly the same kind of exclusive privileges to existing health care providers and establishes exactly the same kind of monopolies.

Like the plaintiff in *Aston Park*, Plaintiffs in the present case challenge the new CON law as a violation of the Exclusive Emoluments and Anti-Monopoly clauses. Because it is the first case to challenge on the basis of those clauses since *Aston Park*, one could argue that the Supreme Court's holding in that case governs as far as Plaintiffs' claims under those clauses are concerned. Even if one rejected that argument because *Aston Park* pertained to the old law rather than the new one, however, one could not plausibly argue that a decision by the Court of Appeals in *Hope*, a case involving a different challenge under a different constitutional provision, controls instead.

In the present case, Plaintiffs also challenge the new CON law as a violation of their right to the fruits of their own labor under Art. I, Sec. 1. and Art. I, Sec. 19. Neither the old nor the new CON law has previously been challenged on that basis, so this is a case of first impression as far as those clauses are concerned. It is true that the due process challenge in *Hope* also cited Art. I, Sec. 19. However, because the present case asserts a different right under Sec. 19 and cites Sec. 1 as basis for that right as well, *Hope* cannot control with regard to this part of Plaintiffs' claim either. Instead, our Supreme Court's analysis of the 12(b)(6) motion to dismiss for failure to assert a colorable constitutional claim under the fruits of their own labor provision in *Ace Speedway* controls. *See Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. at 424, 904 S.E.2d at 726, *citing Deminski*, 377 N.C. 406, 412, 858 S.E.2d 788 (2021) (explaining "whether a claim is 'colorable' focuses entirely on the allegations in the complaint. Those allegations are 'treated as true' and the Court examines whether the allegations, if proven, constitute a violation of a right protected by the North Carolina

Constitution. We therefore examine each of [plaintiff's] constitutional claims and assess whether the allegations assert colorable constitutional claims.")

B. *Hope* does not provide a model for how this case should be resolved on the merits.

Since *Hope* clearly does not *control* the present case, why would Defendants state that it does? The most charitable explanation is that what they really mean is that *Hope* provides a model for how this should ultimately be resolved on the merits. There are two reasons, however, why that is an untenable suggestion.

The first is that the rational basis standard applied by the Court of Appeals in *Hope* is the wrong standard to apply in the present case. The presumption of constitutionality (to which Defendants allude in their brief (Def.'s Br., 11)) and tiers of scrutiny doctrine (which they fail to mention) were adopted by the federal courts in the 1930s for the specific purpose of insulating economic regulations from challenges under the due process provisions of the federal constitution. They were imported in the 1970s by the courts in North Carolina and other states to accomplish the same thing for claims under state constitutions.[1]

Defendants' failure to mention the tiers of scrutiny doctrine is probably not an accident. In *Clark v. Sanger Clinic, P.A.*, the Court of Appeals explains how it works:

> [I]f the right infringed upon is a "fundamental" right, then the law will be viewed with strict scrutiny and the party seeking to apply the law must demonstrate a compelling state interest for the law to survive constitutional attack; if the right infringed upon is not a fundamental right then the party applying the law need only demonstrate that the statute is rationally related to a legitimate state interest. 142 N.C. Ct. App. 350, 357-8 (2001), 542 S.E.2d 668, 675 (2001).

When the Court of Appeals reviewed the plaintiff's due process claim in *Hope*, it applied

[1] Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L.J. 1 (2022).

the kind of minimal, rational basis scrutiny that tiers of scrutiny practice doctrine assigns to such claims. And instead of conducting its own review of the relevant facts to determine whether the rational basis test was satisfied, it deferred to the legislative findings that the General Assembly had appended to the current version of the law.

That approach will not suffice in the present case because, unlike the plaintiffs in *Hope*, Plaintiffs in the present case are not claiming that the CON law violates an unenumerated right to liberty under North Carolina's version of the federal due process clause. Instead, they are claiming the CON law violates well-defined rights that are explicitly protected by principles enumerated in the North Carolina Constitution and declared by it to be "great, general, and essential principles of liberty and free government." N.C. Const. art. I. That, in itself, ought to be enough to justify heightened scrutiny for Plaintiffs' claims under those principles. Lest there be any doubt, however, the historical record also shows that those principles are and always have been "fundamental principles as they have been understood by the traditions of our people and our law." *Joseph Lochner, Plff. in Err., v. People of the State of New York*, 198 U.S. 45, 76, 25 S.Ct. 539, 560 (1905) (J. Holmes Dissenting).[2]

Under the tiers of scrutiny doctrine, Plaintiffs' claims in the present case may not be

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[2] See, e.g., Jon Guze, *North Carolina's Anti-Monopoly Clause: Still Relevant After All These Years*, 2 Political Economy in the Carolinas 103 (2019) ("Given [the] intellectual and political context, there can be little doubt that the members of the Fifth Provincial Congress had government-granted monopolies specifically in mind when they added the anti-monopoly clause to the state constitution in 1776. By declaring that such monopolies ought not to be allowed, they meant to secure for themselves and their posterity the same right that *Darcy v. Allen*, the Statute of Monopolies, and the Glorious Revolution had secured for their cousins back in England: the right to earn an honest living by engaging in a lawful occupation.) See, also, Steven G. Calabresi and Larissa C Liebowitz, "Monopolies and the Constitution: A History of Crony Capitalism," 36 Harvard J.L. & Pub. Pol'y. 984 (2017) and Timothy Sandefur, *The Right to Earn a Living*, Cato Institute. (2010).

summarily dismissed based on the rational basis review that the Court of Appeals applied to a due process claim in *Hope*. They must instead be reviewed under a standard appropriate to principles and rights that North Carolinians have regarded as fundamental for more than 250 years.

There's another reason why *Hope* does not provide a model of how the present case should ultimately be resolved. Even if the rational basis test *were* applicable, it would not follow that the legislative findings appended to the CON law are *per se* evidence of a rational basis. Because facts and conditions change, a law found to be rational at one point in time may be found to be irrational later. *City of Winson-Salem v. S. Ry. Co.*, 248 N.C. 637, 642, 105 S.E.2d 37, 41 (1958); *City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. 454,457-58, 168 S.E.2d 389, 392 (1969). A great deal has changed since the CON law was enacted in 1977. Indeed, a great deal has changed since the Court of Appeals handed down its decision in *Hope* in 2010.

For example, as Plaintiffs note in their Amended Complaint, the underlying rationale for the CON law ceased to apply in the mid-1980s. While the hospital associations and other interested parties had their own reasons to support it, the 1978 CON law was initially predicated on two facts about federal health care law both of which were included in the original list of legislative findings: the fact that the cost-plus system used for Medicare and Medicaid reimbursements encouraged an over-provision of medical services, and the fact that—in a ham-fisted attempt to discourage over-provision—Congress had passed the National Health Planning and Resource Development Act (NHPRDA) which required states to adopt CON laws in order to receive federal funding. (Am. Compl., ¶¶ 46-49.) However, the adoption of a fixed fee-for-service system for Medicare and Medicaid reimbursement in 1984, and the repeal of NHPRDA in 1986, completely undermined the CON law's rationale. (*Id.* ¶¶ 51-57). When considering the

plaintiffs' due process claim in *Hope*, the Court of Appeals did not take notice of these changes, presumably because the plaintiffs did not enter them into the record. In the present case, Plaintiffs *have* called the court's attention to these changes, and it must, therefore, consider those changes as it conducts its own review.

Also requiring judicial notice and consideration is an abundance of new evidence showing the deleterious economic and public health effects of CON laws, much of which has only become available since the *Hope* decision in 2010. These studies thoroughly rebut the legislative findings that the Court of Appeals relied on in *Hope* and make a mockery of the suggestion that the CON law is rationally related to a legitimate public purpose.[3] Indeed, they show beyond a reasonable doubt that the CON law not only makes medical care more expensive and less accessible for North Carolinians, but it also puts North Carolinians' health in jeopardy and has almost certainly cost many North Carolinians their lives.[4]

Judicial deference does not mean abject, unquestioning servility, particularly with regard to facts. A *pro forma* listing of implausible legislative findings cannot permanently immunize legislation against judicial scrutiny, especially when, as in this case, fundamental constitutional rights and public health are at stake. As circumstances change, and as new factual evidence accumulates, the time must come when those changed circumstances and that new evidence become sufficient to overcome a presumption of constitutionality based solely on

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[3] See, e.g., James Bailey, *Certificate of Need in North Carolina: Cost, Access, Treatment*, Mercatus (2021) (Reviewing more than 30 recent studies.)

[4] See, e.g., Kevin Chiu, The impact of certificate of need laws on heart attack mortality, 79 Journal of Health Economics (2021) (finding, "CON regulations led to an increase in heart attack deaths, by 6%-10%, three years after the policy was enacted.") and Molly S. Myers & Kathleen M. Sheehan, *The Impact of Certificate of Need Laws on Emergency Department Wait Times*, 35 Journal of Private Enterprise 1 (2020) (finding "significant detriment to patient outcomes in terms of hospital cost and patient mortality" as well as increased ED wait times in CON law states).

decades-old legislative findings.

C. Additional mistakes.

Despite their insistence that "*Hope* controls," Defendants do not mention *Hope* in their discussion of Plaintiffs' Exclusive Emoluments and Anti-Monopoly Clause claims. Instead, they cite other cases in an attempt to show why those claims are "without merit."

With regard to exclusive emoluments, Defendants' cite *Lowe v. Tarble*, 312 N.C. 467, 323 S.E.2d 19 (1984), and *Town of Emerald Isle by and through Smith v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987). In those cases, however, the Supreme Court dealt with issues that are far removed from the issues raised in the present case. In *Lowe*, the issue was whether a law treating uninsured defendants differently from those with liability insurance constitutes an exclusive emolument granted to the latter. In *Emerald Isle*, the question was whether an act prohibiting motor vehicle access adjacent to public beach access facilities constituted an exclusive emolument granted to the owners of beachfront property in the vehicle-free area. In short, in both of those cases the issue was whether the state action in question was sufficiently analogous to what is ordinarily meant by an "exclusive emolument or privilege" for Section 32 to apply.

The exclusive right to provide medical services within a service area, however, *clearly* falls within the ordinary meaning of an "exclusive privilege." Plaintiffs' claim that North Carolina's CON law grants an exclusive privilege to those providers cannot, therefore, be dismissed as a matter of law based on the tenuously related precedents cited by Defendants. Plaintiffs' Exclusive Emoluments claim must be reviewed under a standard appropriate to a right that the North Carolina Constitution declares to be a "great, general, and essential" principle of liberty.

Regarding monopolies, Defendants cite *State v. Atlantic Ice and Coal Co.*, 210 N.C. 742, 747-48, 188 S.E.2d 412, 415 (1936), *American Motors Sales Corp. v. Peters*, 311 N.C. 311, 317 S.E.2d 351 (1984), *Madison Cablevision v. City of Morgantown*, 325 N.C. 693, 386 S.E.2d 200 (1989), and *Thrift v. Bd. of Comm'rs*, 122 N.C. 31, 30 S.E. 349 (1898). (Defs.' Br. 9-11.) Those holdings, however, are irrelevant because the monopolies alleged in those cases were different in kind from the monopoly alleged in *Aston Park* and in the present case.

In *Atlantic Ice and Coal* and *American Motors* Sales, the Court considered the question of whether, and how, the Anti-Monopoly Clause applies to businesses that have achieved monopoly power through success in the marketplace. In *Madison Cablevision* and *Thrift*, it considered whether, and how, the clause applies to businesses that provide utility services under contract to municipalities. These are interesting questions, and the fact that they arose at all demonstrates how much the meaning of the word "monopoly" has evolved over the years.[5] However, because the present case involves a different kind of monopoly, neither of those questions arises, and the definitions and standards that the Court applied in *Madison* and *Thrift* are irrelevant.

In 1776, when the Anti-Monopoly Clause was originally adopted as part of the state constitution, the word "monopoly" was understood to mean an exclusive grant by the state to one or more private parties "for the sole buying, selling, making, working, or using of any thing [sic]." The Anti-Monopoly Clause was originally added to the state constitution for the precise purpose of forbidding such monopolies. Despite the semantic changes that have occurred since 1776, "an exclusive privilege of engaging in a particular business or providing a particular

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service granted by a ruler or by the state" continues to be a standard meaning of the word "monopoly." Collins English Dictionary Online, www.collinsdictionary.com.

The North Carolina Supreme Court acknowledged all of this in *State v. Harris*:

> Monopoly, as originally defined, consisted in a grant by the sovereign of an exclusive privilege to do something which had theretofore been a matter of common right. The exclusion of others from such common right is still considered a prominent feature of monopoly, and the consequent loss to those excluded of opportunity to earn a livelihood for themselves and their dependents ... has been considered the prime reason for the public policy then adopted into the Constitution. *State v. Harris*, 216 N.C. 746, 761, 6 S.E.2d 854, 864 (1940).

III. The legal and practical consequences of dismissing Plaintiffs' complaint on the basis of Defendants' argument would be dire.

In their attempt to show that Plaintiffs' claims are "without merit," Defendants rely heavily on the presumption of constitutionality and an abridged version of tiers of scrutiny doctrine. As explained above, their mischaracterization of the latter undermines their argument on its own terms. However, there is another reason why it would be wrong to dismiss this case on the basis of their argument. By their nature, the presumption of constitutionality and tiers of scrutiny doctrine are tools for deciding cases at the merit stage. As explained above, they were introduced by the federal courts in the 1930s and by the North Carolina courts in the 1970s for the specific purpose of insulating economic regulations from challenges under the due process provisions of federal and state constitutions, and they work. Due process challengers seldom win, but they do win sometimes, and that's important. If the presumption of constitutionality and tiers of scrutiny doctrine meant such plaintiffs could never win, it would mean the end judicial review, not to mention the end of the separation of powers guaranteed by Art. I, Sec. 6 and the right to a fair trial guaranteed by Art. I, Secs. 18, 19, 23, and 24. The present case illustrates why.

Suppose Plaintiffs' claims can be dismissed without a hearing on the merits simply because the General Assembly elected to append a set of "legislative findings" to the CON law. If that were the case, it would mean that the General Assembly could permanently immunize *any* statute from judicial review under any section of the Constitution simply by appending a similar set of findings. That cannot be right. *See State v. Knight*, 169 N.C. at 351–52, 85 S.E. at 427 ("[I]t is the duty, of the courts in proper cases to declare an act of the Legislature unconstitutional, and this obligation arises from the duty imposed upon the courts to declare what the law is. The Constitution is the supreme law."). The fact that Defendants' argument entails such a dire result is in itself a compelling reason why it should be rejected.

CONCLUSION

As shown above—and contrary to what Defendants argue in their Brief—Plaintiffs have stated claims for which relief can be granted. Accordingly, Defendants' Motion to Dismiss should be denied.

This the 5th day of November, 2025.

/s/ Jonathan D. Guze
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The undersigned hereby certifies that a true and correct copy of Brief in Opposition to Defendants' Motion to Dismiss of the John Locke Foundation as *Amicus Curiae* was served on November 5, 2025 via email on the following:

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