IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LEE BIRCHANSKY; FOX EYE SURGERY, LLC; KORVER EAR NOSE AND THROAT, LLC; MICHAEL JENSEN; and MICHAEL DRIESEN, Plaintiffs, v. GERD W. CLABAUGH; REBECCA SWIFT; ROBERTA CHAMBERS; CONNIE SCHMETT; ROGER THOMAS; BRENDA PERRIN; and HAROLD MILLER, Defendants.	**No. 4:17-cv-00209-RGE-RAW** **ORDER RE: DEFENDANTS' MOTION FOR RECONSIDERATION**

I. INTRODUCTION

In February, the Court issued an order denying a motion to dismiss a constitutional challenge to Iowa's health facility licensing program. ECF No. 52. The Court found the allegations in the challengers' complaint plausibly alleged the program failed to satisfy rational basis scrutiny as set out by the Fourteenth Amendment's Due Process and Equal Protection Clauses. *Id*. Administrators of that program now request the Court reconsider its order on numerous grounds. ECF No. 54. The Court denies the Motion for Reconsideration.

II. BACKGROUND

The Court outlined the background of this case in its previous order. *See* ECF No. 52. Extensively recounting the relevant facts here is therefore unnecessary. A brief summary suffices.

As explained in full previously, Iowa regulates the administration of medical services by licensing health facilities through a certificate-of-need (CON) framework. Generally, Iowa law prohibits individuals from operating certain types of health facilities without first acquiring a CON from the Iowa Department of Public Health. Among the primary issues in this case is a feature of Iowa's CON framework that requires an individual without a CON to obtain one before opening a

new health facility, but permits a CON-holder to expand its facilities without obtaining a new CON.

Plaintiffs are doctors and patients who allege the disparate treatment of CON-holders and non-CON-holders under this framework violates their rights under the Equal Protection, Due Process, and Privileges & Immunities Clauses of the Fourteenth Amendment. *See* Pls.' First Am. Compl., ECF No. 32.[1] Plaintiffs seek to enjoin Defendants, who each play a role in administering the CON framework, from enforcing the requirement that Plaintiffs acquire a CON before opening outpatient surgical facilities. *Id.*

Defendants moved to dismiss Plaintiffs' amended complaint. ECF No. 35. The Court found that: 1) Plaintiffs sufficiently pleaded that the disparate treatment of CON-holders and non-CON-holders under Iowa's CON program was not conceivably related to a legitimate government purpose; and 2) Plaintiffs did not sufficiently plead a burden on a right protected by the Privileges & Immunities Clause. ECF No. 52 at 41–42. The Court thus granted Defendants' motion on the Privileges & Immunities Clause claim and denied it as to the other claims. *Id.* The parties agree the remaining equal protection and substantive due process claims are analyzed by applying the Fourteenth Amendment's rational basis scrutiny.

Defendants ask the Court to reconsider its dismissal order.

III. LEGAL STANDARD

The United States Court of Appeals for the Eighth Circuit "ha[s] determined that motions for reconsideration are nothing more than Rule 60(b) motions when directed at non-final orders." *Nelson v. Am. Home Assurance Co.*, 702 F.3d 1038, 1043 (8th Cir. 2012) (internal quotation marks

[1] Plaintiffs first filed a six-count complaint, alleging four claims under the United States Constitution and two claims under the Iowa Constitution. Compl., ECF No. 1. Defendants moved to dismiss the complaint. ECF No. 26. In response, Plaintiffs filed an amended complaint, dropping their claims under the Iowa Constitution and removing some defendants named in the original complaint. *See* ECF No. 32.

omitted) (quoting *Elder–Keep v. Aksamit*, 460 F.3d 979, 984 (8th Cir. 2006)). Federal Rule of Civil Procedure 60(b) in turn provides:

> On motion . . . the court may relieve a party . . . from a[n] . . . order . . . for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence . . . ;
> (3) fraud . . . ;
> (4) the judgment is void;
> (5) the judgment has been satisfied . . .; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). "Such a motion is to be granted only in exceptional circumstances requiring extraordinary relief." *Nelson*, 702 F.3d at 1043 (quoting *Minn. Supply Co. v. Raymond Corp.*, 472 F.3d 524, 534 (8th Cir. 2006)). Additionally, "[a] motion for reconsideration is not a vehicle to identify facts or legal arguments that could have been, but were not, raised at the time the relevant motion was pending." *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 923 (8th Cir. 2015); *see also Broadway v. Norris*, 193 F.3d 987, 990 (8th Cir. 1999) (concluding a motion for reconsideration "is not a vehicle for simple reargument on the merits").

IV. DISCUSSION

Defendants argue the Court should reconsider its ruling for two reasons. *See* ECF Nos. 54, 54-1. First, Defendants contend intervening Eighth Circuit authority in *Niang v. Carroll*, 879 F.3d 870 (8th Cir. 2018), modifies the rational basis analysis. ECF No. 54-1 at 2–5. Second, Defendants argue the order included errors of fact and law. *Id.* at 5–12.

The Court finds these arguments unpersuasive.

A. Intervening Authority

Defendants assert the Court should reconsider its decision in light of *Niang*, 879 F.3d 870. *See* ECF No. 54-1 at 2–5.

Though *Niang* was decided after Defendants filed their motion to dismiss, the Court's dismissal order addressed *Niang* at length. *See* ECF No. 52 at 25–26, 35–36. As the Court noted

in its order, *Niang* is distinguishable from this case on numerous grounds. *See id.* Chiefly, the *Niang* plaintiffs acknowledged there were health and safety justifications for the specific aspects of the occupational licensing requirement at issue. *Niang*, 879 F.3d at 873. The Court also addressed *Niang*'s posture at the district court level—and commented how, "[a]t summary judgment, the [*Niang*] district court put the licensing requirement's challengers to their proof by probing a substantial evidentiary record." ECF No. 52 at 35.

The Court finds no reason to reconsider its decision. *Niang* does not refashion the rational basis inquiry to require dismissal whenever the challenged statute's broad aims are possibly legitimate. Rather, *Niang* clarifies that equal protection and substantive due process challenges fail the rational basis test where plaintiffs cannot disprove legitimate purposes for a classification or burden at summary judgment. At the motion to dismiss stage, however, a complaint that plausibly counters the statute's conceivable legitimate justifications is still sufficient.

The Court found Plaintiffs' amended complaint challenges a classification by asserting the classification lacks a legitimate purpose. The amended complaint does so by detailing the disparate treatment of non-CON-holders. It plausibly alleges this disparate treatment is justified only by naked economic protectionism. Unlike the plaintiffs in *Niang*, Plaintiffs do not concede "[t]he assumptions underlying these rationales . . . are arguable." *Cf. Niang*, 879 F.3d at 873–74 (quoting *FCC v. Beach Commc'ns*, 508 U.S. 307, 320 (1993)). Plaintiffs allege the only conceivable rationale is illegitimate. As litigation progresses, these allegations may be proven true or false. At this stage, the Court must "accept [them] as true." *Kulkay v. Roy*, 847 F.3d 637, 640 (8th Cir. 2017). Because these allegations, if true, would show the CON requirement has no legitimate state

interest justifying its enforcement, Plaintiffs' amended complaint states a plausible claim for relief and cannot be dismissed.

B. Alleged Errors in Law and Fact

1. *Colon Health Centers* Analysis

Defendants contend the Court erred in its analysis of *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535 (4th Cir. 2013).[2] *See* ECF No. 54-1 at 5–6. Although distinguishing Iowa's exemption from Virginia's was supplemental to the Court's analysis of *Colon Health Centers*' holding, Defendants also argue "Virginia's CON statute . . . include[s] a capital expenditure exemption for existing medical facilities." *Id.* at 5.[3] This argument is directed at the Court's statement in the dismissal order: "Iowa's CON framework, [in] contrast [to Virginia's], exempts CON-holders from both limitations on replacement equipment *and* general limitations on construction." *See* ECF No. 52 at 33.

Though ancillary to the primary distinguishing characteristics of *Colon Health Centers*, the Court finds no reason to revise its conclusion Iowa exempts CON-holders from "general limitations on construction" while Virginia does not. Like Iowa, Virginia does not require a new CON for all capital expenditures. *Compare* Iowa Code § 135.61(18)(c) (permitting up to $1,500,000 in capital expenditures before an existing "institutional health facility" is redefined as a "[n]ew institutional health service" for which a CON is required), *with* Va. Code Ann. § 32.1–102.1 at "Project"(8). Defendants direct the Court to the Virginia provision subjecting a project to

[2] The Fourth Circuit has had two occasions to address *Colon Health Centers* at length: first in 2013, 733 F.3d 535; and then again in 2016, 813 F.3d 145. In their briefing on their motion to dismiss, Defendants drew the Court's attention to the 2016 opinion. ECF No. 38 at 19–20; *see also* ECF No. 52 at 22–23 & n.13. Defendants now cite the 2013 opinion. *See* ECF No. 54-1 at 4. Because Defendants rely on analogizing Iowa's CON program to Virginia's, both iterations of *Colon Health Centers* are distinguishable on essentially the same grounds.

[3] This, Defendants appear to suggest, makes Virginia's CON framework analogous enough to somehow render the contested Iowa framework constitutional by comparison. *See* ECF No. 54-1 at 5–6.

CON review if the project involves "[a]ny capital expenditure of $15 million or more . . . by or on behalf of a medical care facility." Va. Code Ann. § 32.1–102.1 at "Project"(8); *see id.* § 32.1–102.3 (explaining the requirements for obtaining a Virginia CON); *accord* ECF No. 54-1 at 5–6 n.3. Yet, Defendants confuse this sufficient condition for a necessary one. Virginia's $15 million capital expenditure exemption explicitly does not "modify or eliminate the reviewability of any project described in subdivisions 1 through 7 of this definition." Va. Code Ann. § 32.1–102.1 at "Project"(8). By its terms, Virginia's capital expenditure exemption is subsidiary to Subdivision 1, which subjects any "[e]stablishment of a medical care facility" to the same CON review. *Id.* at "Project"(1). Thus, Virginia's capital expenditure exemption does not appear to allow a CON-holder to construct new facilities through the capital expenditure exemption. *See* ECF No. 52 at 33.

Iowa's CON definitions also appear on their face to subject to CON review some instances of "construction, development or other establishment of a new institutional health facility." Iowa Code § 135.61(18)(a); *see also* Iowa Code § 135.63(1) (requiring CON for facilities defined in § 135.61(18)). Unlike Virginia's, Iowa's CON statute does not provide the priority of the construction-based CON review requirement relative to the capital expenditure-based CON review requirement. *Contra* Va. Code Ann. § 32.1–102.1 at "Project"(1). To the contrary, Plaintiffs adequately plead facts suggesting the capital expenditure exemption permits CON-holders to expand their facilities up to $1.5 million without acquiring a new CON, at least in practice. *See* ECF No. 32 ¶¶ 3, 143, 146–51, 159. Virginia's CON program is therefore distinguishable from Iowa's on this basis.

Even if Virginia also exempts CON-holders from general limitations on construction—which it appears it doesn't—the Court's analysis would remain undisturbed. The Court's order found "*Colon Health Centers* distinguishable on a number of grounds"; the functioning of the

capital expenditure exemptions being just one. ECF No. 52 at 33. These grounds included, predominately, the difference between "device-by-device litigation over what medical equipment the CON program might constitutionally cover," discussed in *Colon Health Ctrs.*, 813 F.3d at 159, and the inquiry at issue in this case: "whether the Constitution permits the legislature to grant CON-holders expansion privileges denied to non-holders," ECF No. 52 at 22–23. The Court determined the latter question—the crux of Plaintiffs' claims—was a narrower inquiry for which "[t]he rational basis analysis is well suited." *Id.* at 23. Because this case's posture differs from that of *Colon Health Centers*, the Court concluded "the 'array of legitimate public purposes: improving health care quality by discouraging the proliferation of underutilized facilities, enabling underserved and indigent populations to access necessary medical services, and encouraging cost-effective consumer spending' is less conceivably connected to Iowa's capital expenditure exemption." *Id.* at 33–34 (quoting *Colon Health Ctrs.*, 813 F.3d at 153).

The Court therefore declines to reconsider its *Colon Health Centers* analysis.

2. Other State Interests

Defendants raise five state interests—each related to the capital expenditure exemption—which they contend should prompt the Court's reconsideration of its order. The Court determines the first two, preventing duplication of services and ensuring access to comprehensive healthcare, are essentially reformulations of interests proffered in Defendants' motion to dismiss briefing. *See* ECF No. 38 at 22 (outlining these interests); ECF No. 52 at 31–32 (determining that these interests were adequately countered by Plaintiffs' amended complaint). Like their predecessors, the Court determines the two reformulated interests do not justify dismissing Plaintiffs' amended complaint. *See Broadway*, 193 F.3d at 990 (noting a motion for reconsideration "is not a vehicle for simple reargument on the merits").

The remaining three (respecting administrative resources, recognizing investments and

experience, and creating investment incentives) are new interests not raised in Defendants' motion to dismiss or associated briefing. *See* ECF No. 54-1 at 9–12. A motion for reconsideration does not give Defendants another bite at the apple "to identify facts or legal arguments that could have been, but were not, raised at the time the relevant motion was pending." *Julianello*, 791 F.3d at 923. At the motion to dismiss stage, Defendants have the burden to establish Plaintiffs failed to state a claim; they cannot skirt this burden by relying on arguments they raise only in asking for reconsideration. Defendants were aware of the claims in Plaintiffs' amended complaint, including, among others, the alleged lack of a rational basis for the capital expenditure exemption. *See, e.g.*, ECF No. 32 ¶ 234 ("There is no rational basis for exempting existing medical providers who spend less than $1.5 million in capital expenditures per year to build new facilities from the state's certificate-of-need requirement that would otherwise apply to medical entrepreneurs offering new services."). Defendants failed to raise the now-asserted arguments in response. This alone is an adequate reason to deny Defendants' motion for reconsideration as to the three newly-identified interests. *See Julianello*, 791 F.3d at 923.

Still, these new interests are adequately countered by the allegations in Plaintiffs' amended complaint.[4] As a result, to the extent the Court chooses to examine these interests, the Court determines they do not amount to errors requiring reconsideration of the prior order.

The Court addresses each newly argued interest in turn.

a. Respecting Administrative Resources

Defendants assert the CON requirement and its capital expenditure exemption serve to preserve administrative resources. ECF No. 54-1 at 9–10. "[T]he resources required for the

[4] The Court notes it has determined Plaintiffs' allegations plausibly allege that the CON requirement is unsupported by a legitimate government interest under the Rule 12(b)(6) analysis. This determination does not—and cannot—foreclose the possibility one or more of Defendants' proffered interests will prove itself conceivably related to the CON requirement in general, or the capital expenditure requirement in particular, in later phases of litigation.

Department and the Council to review each and every capital expenditure of each and every institutional health facility in the state, regardless of the dollar amount, would clearly be onerous," Defendants argue. *Id.* at 9. This is a new argument.

Plaintiffs respond, "the current distinction between CON-holders and non-CON-holders is completely arbitrary, and it serves only the interests of existing businesses at the expense of both entrepreneurs and consumers." ECF No. 55 at 10. This distinction, Plaintiffs argue, is akin to "[a] restriction that forced all individuals with single-syllable names to obtain a CON before opening an outpatient surgery facility, while exempting all others" insofar as both "would potentially decrease the number of applications." *Id.* at 9–10.

This newly-raised argument does not warrant reconsideration of the Court's dismissal order because it describes little more than the natural result of any limitation on expansion privileges. Left crucially unaddressed is the rationale for reducing the number of applications on the basis of CON-status.

b. Recognizing Investments and Experience of Existing Facilities

Defendants argue "[i]n allowing existing facilities to develop certain health services up to $1.5 million but preventing new facilities from doing so, the Legislature could have been acknowledging the fact that existing institutional health facilities have already navigated both the complex licensure frameworks to obtain facility licensure and the CON law to obtain a CON." ECF No. 54-1 at 10. This is a new argument.

Plaintiffs contend "none of the statutory factors for granting a CON have anything to do with investment." ECF No. 55 at 10 (citing Iowa Code § 135.64; ECF No. 32 ¶¶ 133–34). Nor, Plaintiffs argue, does "the CON requirement recognize[ ] experience." *Id.*; *see also* ECF No. 32 ¶¶ 119, 133–34, 144 (describing the factors considered by the CON framework).

In light of Plaintiffs' plausible allegations, Defendants' argument boils down to an

assertion the CON requirement is justified because CON-holders are experienced at getting CONs. Such a tautology cannot provide the rational basis for a statute. *See Williams v. Vermont*, 472 U.S. 14, 27 (1985) ("The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps."); *see also Nordlinger v. Hahn*, 505 U.S. 1, 34 (1992) (Stevens, J., dissenting) ("That a classification must find justification outside itself saves judicial review of such classifications from becoming an exercise in tautological reasoning."). This argument therefore does not warrant reconsideration of the dismissal order.

c. Creating Incentives for Existing Facilities to Invest

Finally, Defendants argue, "[t]he capital expenditure provision may facilitate hospital investment in the development of off-site infrastructure and health services." ECF No. 54-1 at 10. While Defendants acknowledge "[t]his incentive . . . favor[s] existing institutional health facilities," they argue it "is constitutionally permissible as a legitimate state interest" under *Kansas City Taxi Cab Drivers Association v. City of Kansas City, Missouri*, 742 F.3d 807, 809 (8th Cir. 2013). *Id.* The Court has previously examined the *Kansas City Taxi* case. *See* ECF No. 52 at 25–27 (discussing *Kansas City Taxi*).

Plaintiffs respond, "[i]f anything, an existing facility will be disincentivized to invest because it no longer needs to worry about competition from new facilities." ECF No. 55 at 11 (citing ECF No. 32 ¶ 78 ("Dr. Birchansky has asked local hospitals to adopt laser-assisted cataract surgery, even offering to buy the equipment and lease room in the hospitals. But the hospitals have refused to adopt this technology."")). Plaintiffs also argue, "even if special treatment to CON-holders creates an incentive, Iowa must have a rational basis for the classifications drawn while doling out such incentives." *Id.* "Arbitrarily favoring entrenched businesses, and providing incentives only to those favored businesses, is not a legitimate government interest when 'untethered from the common good.'" *Id.* (quoting ECF No. 52 at 28).

Statutes favoring existing firms can be constitutionally permissible. *See Kansas City Taxi*, 742 F.3d at 809. They are not, however, always constitutionally permissible. The Eighth Circuit's formulation in *Kansas City Taxi* bears out this reasoning: "While these provisions favor existing firms, they are constitutionally permissible" because the evidence at summary judgment showed the provisions "creat[ed] incentives to invest in infrastructure and increasing quality in the taxicab industry." *Id.* Plaintiffs' allegations plausibly assert those incentives do not exist here. *See, e.g.*, ECF No. 32 ¶¶ 78, 111–12. Accordingly, the Court finds no reason to reconsider its order in light of Defendants' new arguments.

V. CONCLUSION

Rational basis scrutiny instructs courts to consider myriad conceivable bases for a given state action. The Court determines Plaintiffs' amended complaint has countered the previously advanced bases for the statute, the reformulations of some of those bases, and the new bases advanced in this motion for reconsideration. There are no grounds for this Court to reconsider its order denying in part Defendants' motion to dismiss.

The Court therefore **DENIES** Defendants' Motion for Reconsideration, ECF No. 54.

IT IS SO ORDERED.

Dated this 24th day of April, 2018.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE