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 TO DISMISS**

I. INTRODUCTION

Now before the Court is Defendants' Motion to Dismiss Plaintiffs' Amended Complaint for lack of jurisdiction and for failure to state a claim. Defs.' Mot. Dismiss First Am. Compl., ECF No. 35. The matter came before the Court for hearing on November 17, 2017. *See* Hr'g Mins. Defs.' Mot. Dismiss, ECF No. 48. Attorneys Jeffrey Peterzalek and Heather Adams appeared on behalf of Defendants Gerd Clabaugh, Rebecca Swift, Roberta Chambers, Connie Schmett, Roger Thomas, Brenda Perrin, and Harold Miller. *Id.* Attorneys Robert McNamara and Joshua House appeared on behalf of Plaintiffs Lee Birchansky, Fox Eye Surgery, LLC, Korver Ear Nose and Throat, LLC, Michael Jensen, and Michael Driesen. *Id.*[1]

For the reasons set forth below, the Court grants Defendants' Motion to Dismiss Plaintiffs' Amended Complaint as to Count III for failure to state a claim, and denies it as to Counts I, II, and IV.

[1] There are two categories of Plaintiffs: 1) the Physician Plaintiffs, comprised of Lee Birchansky, Fox Eye Surgery, and Korver Ear Nose and Throat; and 2) the Patient Plaintiffs, comprised of Michael Jensen and Michael Driesen.

II. STATEMENT OF RELEVANT FACTS

The Court takes the following facts as true for the purposes of analyzing Defendants' Motion to Dismiss. *See Brown v. Medtronic, Inc.*, 628 F.3d 451, 459 (8th Cir. 2010).

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. At issue in this case is a feature of Iowa's CON framework that requires an individual to obtain a CON before opening a new health facility, but permits a CON-holder to expand its facilities without obtaining a new CON. Plaintiffs allege this component of the CON framework violates the Physician Plaintiffs' rights under the Equal Protection, Due Process, and Privileges & Immunities Clauses of the Fourteenth Amendment, and the Patient Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment.

In June 2017, Plaintiffs filed a six-count complaint seeking to enjoin enforcement of aspects of the CON framework, alleging four claims under the United States Constitution and two claims under the Iowa Constitution. Compl., ECF No. 1. Defendants filed a Motion to Dismiss the complaint. ECF No. 26. In response, Plaintiffs filed an amended complaint, dropping their claims under the Iowa Constitution and removing some of the defendants named in the original complaint. Pls.' First Am. Compl., ECF No. 32. In turn, Defendants filed a motion to dismiss the amended complaint. ECF No. 35. The Court addresses this motion now.

As of the amended complaint, this action has five plaintiffs. *See* ECF No. 32. Plaintiff Birchansky is an ophthalmologist. *Id.* ¶ 13. Birchansky is also the organizing member and CEO of Plaintiff Fox Eye Surgery, an Iowa limited liability company operating in Cedar Rapids, Iowa. *Id.* ¶¶ 15–16. Birchansky "intends to perform cataract and other outpatient eye surgeries in a fully equipped, custom-built surgery center [in Cedar Rapids] . . . [b]ut Iowa's [CON] requirement has

stymied his efforts to do so." *Id.* ¶17. Birchansky "would also like to open a new outpatient surgery center [in the Quad Cities region of Iowa] . . . [and] would need to apply for and obtain a [CON]." *Id.* ¶ 18. Birchansky has applied for a CON five times: the first four of Birchansky's applications were denied, and the fifth application is still pending final approval. Plaintiff Korver Ear Nose and Throat is an Iowa limited liability company operating in Orange City, Iowa. *Id.* ¶ 19. Korver "would like to convert the lower level of [its] facility into an outpatient surgery center . . . [b]ut it cannot do so without applying for and obtaining a [CON]." *Id.* ¶ 21.

Plaintiff Michael Jensen is a patient of Birchansky who "wants to receive future cataract or other outpatient eye surgeries from Dr. Birchansky at Fox Eye Surgery's center." *Id.* ¶¶ 22–23. Plaintiff Michael Driesen is a patient of Korver who "wants to receive future ENT surgeries from Korver[ ] at its proposed surgery center." *Id.* ¶¶ 24–25.

There are seven defendants, each sued in his or her official capacity. Defendant Clabaugh is the Director of the Iowa Department of Public Health and oversees the State Board of Health. *Id.* ¶ 28. Defendant Rebecca Swift is the Iowa Department of Public Health Administrator for the Health Facilities Council. *Id.* ¶ 33. Defendants Roberta Chambers, Connie Schmett, Roger Thomas, Brenda Perrin, and Harold Miller are members of the Iowa Department of Public Health's Health Facilities Council. *Id.* ¶¶ 34–38. Defendants each play a role in administering Iowa's CON framework. *See id.* ¶¶ 28–38.

Plaintiffs' claims challenge a feature of the CON framework allowing existing "institutional health facilit[ies]" to expand existing facilities or open new facilities without a CON, while requiring "new institutional health service[s] or changed institutional health service[s]" to obtain a CON. Iowa Code §§ 135.61, 135.63. The specific mechanism for this feature of the CON framework is a capital expenditure exemption permitting an existing "institutional health facility" to expend up to "[$1,500,000] within a twelve-month period" in "capital expenditure[s], lease[s],

or donation[s]" before being classified as a "[n]ew institutional health facility." Iowa Code § 135.61(18)(c). The process of obtaining a CON is cost-intensive and requires the applicant to satisfy numerous requirements. *See* Iowa Code § 135.63; *see also* ECF No. 32 ¶¶ 122–44 (describing the process); Defs.' Br. Supp. Mot. Dismiss 2–5, ECF No. 38.

Plaintiffs allege this disparate treatment of existing facilities and new facilities violates the rights of the Physician Plaintiffs under the Fourteenth Amendment's Due Process, Equal Protection, and Privileges & Immunities Clauses and the rights of the Patient Plaintiffs under the Fourteenth Amendment's Due Process Clause. ECF No. 32 ¶¶ 223–66. Plaintiffs seek "an entry of judgment declaring that Iowa's [CON] requirement for outpatient surgical facilities . . . is unconstitutional on its face and as applied to the extent it violates the Equal Protection Clause[,] . . . the Due Process Clause[,] . . . [and] the Privileges or Immunities Clause." *Id.* at 41–42. Plaintiffs request "an entry of a permanent injunction against defendants prohibiting the enforcement of these statutory provisions, administrative rules and regulations, and practices and policies." *Id.* at 42. Defendants seek to dismiss all of Plaintiffs' claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ECF No. 35.

III. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *accord Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). At this stage, the Court "accept[s] as true the material allegations in the complaint and present[s] the facts in the light most favorable to [the Plaintiffs]." *Kulkay v. Roy*, 847 F.3d 637, 640 (8th Cir. 2017); *see also Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

A plausible claim for relief "allows the court to draw the reasonable inference that the defendant[s are] liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Plaintiffs must "nudge[ ] their claims across the line from conceivable to plausible, [else] their complaint must be dismissed." *Twombly*, 550 U.S. at 570. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

IV. DISCUSSION

Neither party contests the claims in Plaintiffs' amended complaint constitute a "civil action[ ] arising under the Constitution," over which a federal district court typically "shall have original jurisdiction." 28 U.S.C. § 1331; *see also* 28 U.S.C. § 1343 (granting federal district courts original jurisdiction over claims brought to enforce constitutional rights). However, Defendants raise two doctrines under which they contend the Court cannot and should not exercise jurisdiction. The first doctrine, the *Rooker–Feldman* doctrine, forecloses a federal district court's jurisdiction over a case where the federal district court is asked to resolve an issue already decided in a prior state court proceeding—that is, where the federal district court is essentially adjudicating an appeal from the state court judgment. *See generally* 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4469.1 (2d ed. 2008 & Supp. 2017). The second doctrine, *Younger* abstention, requires a federal district court to decline exercising its jurisdiction in the presence of a pending state prosecution. *See generally id.* §§ 4251–55. The Court first addresses the *Rooker–Feldman* doctrine and then addresses *Younger* abstention. Finally, the Court analyzes Plaintiffs' standing to bring their claims before turning to the substantive counts Plaintiffs' amended complaint.

A. *Rooker–Feldman* Doctrine

Federal appellate jurisdiction over state court judgments resides solely with the Supreme Court. 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . ."). The *Rooker–Feldman* doctrine, an application of § 1257, prevents federal district courts from exercising subject-matter jurisdiction as *de facto* appellate courts over state court judgments. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) ("[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings."); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 415 (1923) ("If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; . . . [i]f the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding.").

The *Rooker–Feldman* doctrine presents challenges to federal district court jurisdiction where a plaintiff brings a new, federal action involving the same or similar facts underlying a prior state court judgment. While *Rooker–Feldman* bars direct federal district court review of a state court's final judgment, if plaintiffs "mount[ ] a *general* challenge to the constitutionality of [a statute,]" a district court retains "subject matter jurisdiction over [the plaintiffs'] complaints." *Feldman*, 460 U.S. at 483 (emphasis added). If, however, the general challenge contains "allegations[ ] inextricably intertwined with the [state court's] decisions," a federal district court is effectively reviewing a state court's final judgment and, therefore, lacks subject matter jurisdiction. *Feldman*, 460 U.S. at 486–87; *but see Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292 (2005) ("[N]either *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court."); *May v. Morgan Cty., Ga.*, 878

F.3d 1001, 1004 (11th Cir. 2017) (per curiam) ("The doctrine's boundaries are not always clear, but they are clearly narrow.").

In *Exxon*, the Supreme Court "confined [*Rooker–Feldman*] to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon*, 544 U.S. at 284. After the Supreme Court's decision in *Exxon*, the Eighth Circuit has narrowly cabined the "inextricably intertwined" test to direct challenges of underlying state-court decisions. *See Banks v. Slay*, 789 F.3d 919, 922 (8th Cir. 2015) (determining *Rooker–Feldman* removes district court jurisdiction only where "state-court losers [are] complaining of injuries caused by state-court judgments" (quoting *Exxon*, 544 U.S. at 284)); *Edwards v. City of Jonesboro*, 645 F.3d 1014, 1018 (8th Cir. 2011) ("[Plaintiff]'s claims . . . complain not of injuries caused by the state-court judgment, but of injuries caused by the invasion of [Plaintiff]'s land by methane emanating from the City's landfill. *Rooker–Feldman* thus does not apply to those claims."); *Riehm v. Engelking*, 538 F.3d 952, 965 (8th Cir. 2008) (declining to apply *Rooker–Feldman* and determining a § 1983 claim was "independent" where, in part, "the [Plaintiffs] do not seek to overturn the [state] ex parte order by this action"); *cf. Driesen v. Smith*, No. C13–4037–MWB, 2014 WL 24234, at *10 (N.D. Iowa Jan. 2, 2014) (applying *Rooker–Feldman* where the "[c]omplaint is nothing more than a collective appeal . . . [since] each 'cause of action' in the Complaint challenges the legality of the default judgment obtained against [the losing party in state court]").[2] The Eleventh Circuit has recently

[2] Defendants rely on the "inextricably intertwined" test as established in *Lemonds v. St. Louis County*. *See* ECF No. 38 at 13 (citing *Lemonds v. St. Louis Cty.*, 222 F.3d 488, 492–93 (8th Cir. 2000)). However, the Eighth Circuit has since reasoned *Lemonds* was superseded by *Exxon*. *See Shelby Cty. Health Care Corp. v. S. Farm Bureau Cas. Ins.*, 855 F.3d 836, 840–41 (8th Cir. 2017) (noting *Exxon*'s effect on *Lemonds* and limiting *Rooker–Feldman*'s jurisdiction bar as to non-parties; "moreover, [plaintiff] does not seek to reverse the order of the Arkansas probate court");

provided a succinct formulation of the doctrine consistent with the Eighth Circuit's post-*Exxon* reasoning: "[a] claim that at its heart challenges the state court decision itself—and not the statute or law which underlies that decision—falls within the [*Rooker–Feldman*] doctrine." *May*, 878 F.3d at 1005.

With this backdrop, jurisdiction is inappropriate if Plaintiffs seek only review of a state court judgment. If, however, Plaintiffs' current challenge to the CON framework transcends in some way the issues they previously litigated in state court, their claims are better characterized as "a general challenge to the constitutionality" of the framework. *Feldman*, 460 U.S. at 483. To determine whether *Rooker–Feldman* is a bar to this Court's subject matter jurisdiction, the Court therefore considers two prior state court judgments pertaining to Birchansky's third and fourth CON applications, respectively.[3]

The first relevant state court decision pertained to Birchansky's third CON application. Defendants contend, "Birchansky argued in his third CON application and related appeals that the Council and the CON law impermissibly favor hospitals." ECF No. 38 at 13 (citing *Birchansky Real Estate, L.C. v. Iowa Dep't of Pub. Health*, 737 N.W.2d 134, 140–41 (Iowa 2007)).

The Court finds the Iowa Supreme Court decision as to the third CON only addressed "[w]hether Fox Eye's Proposal Required a CON" and "[w]hether the [Iowa] Department[of Public Health]'s Decision to Deny Fox Eye's CON Application was Unreasonable." *Birchansky Real Estate*, 737 N.W.2d at 139–41. The Iowa Supreme Court did not decide the case on substantive due process or equal protection grounds under the Fourteenth Amendment to the United States

contra Driesen, 2014 WL 24234, at *9–10; ECF No. 38 at 13. For this reason, the Court's analysis follows the more recent *Shelby County Health Care* analysis.

[3] The two state court decisions are electronically available and have been provided to the Court. To the extent necessary, the Court takes judicial notice of their contents. The Court has not been made aware of any state court judgments pertaining to Birchansky's first and second CON applications.

Constitution or on comparable grounds under the Iowa Constitution. Rather, the Iowa Supreme Court reviewed only whether the Iowa Department of Public Health correctly applied the relevant statute and regulations. *Id.* Because those grounds differ from the claims Plaintiffs now bring, Plaintiffs' present claim "complain[s] not of injuries caused by the state-court judgment." *Edwards*, 645 F.3d at 1018; *cf. May*, 878 F.3d at 1005 (determining plaintiff's claim was barred by *Rooker–Feldman* "because the crux of it was addressed in the first civil [state] case"). Instead, in the present action, Plaintiffs present constitutional challenges unresolved by the Iowa Supreme Court's decision.

Similar reasoning applies to the second Iowa state court judgment, which pertained to Birchansky's fourth CON application. Defendants contend, "Fox Eye argued in its fourth CON application and related appeals that the Council and the CON framework treated its application differently from that of existing hospitals." ECF No. 38 at 13 (citing *Fox Eye Surgery, LLC v. Iowa Dep't of Pub. Health*, No. 09–1676, 2010 WL 3324944, at *3 (Iowa Ct. App. Aug. 25, 2010)).

The decision of the Iowa Court of Appeals regarding Birchansky's fourth CON addressed only whether the council's decision was "unreasonable, arbitrary, or capricious" or "[in]consistent with prior practice and precedents." *Fox Eye Surgery*, 2010 WL 3324944, at *2. Like the decision in *Birchansky Real Estate*, the *Fox Eye Surgery* decision addresses exclusively the statutory framework and the adequacy of agency adjudication under the Iowa Administrative Procedures Act. *Id.* at *2–3. The decision of the Iowa Court of Appeals leaves unresolved constitutional claims like those in the complaint now before this Court. Because the Iowa Court of Appeals did not resolve those claims, Plaintiffs are not now "complaining of injuries caused by" the Iowa Court of Appeals' decision. *Exxon*, 544 U.S. at 284.

For these reasons, Plaintiffs do not seek to litigate "precisely the issue that the state court decided" in prior cases to which any plaintiff was a party. *Cf. May*, 878 F.3d at 1006. Thus,

Plaintiffs are not "complaining of injuries caused by state-court judgments rendered before [this Court's] proceedings commenced and inviting . . . rejection of those judgments." *Exxon*, 544 U.S. at 284. The *Rooker–Feldman* doctrine is therefore inapplicable, and the Court has jurisdiction.

B. *Younger* Abstention

The Supreme Court has determined federal injunctive relief is "improper when a prosecution . . . is pending in state court at the time the federal suit is initiated." *Younger v. Harris*, 401 U.S. 37, 40–41 & n.2 (1971). "Where *Younger* abstention is otherwise appropriate, the district court generally must dismiss the action, not stay it pending final resolution of the state-court proceedings." *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1251 (8th Cir. 2012). State civil proceedings are entitled to the same abstention where: 1) there is an ongoing proceeding judicial in nature; 2) the proceeding "implicate[s] important state interests;" and 3) there is "an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *accord Plouffe v. Ligon*, 606 F.3d 890, 892 (8th Cir. 2010). The Supreme Court has more recently clarified federal courts are to apply *Younger* only in the presence of "particular state civil proceedings that are akin to criminal prosecutions." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013).[4]

Defendants contend the Court should abstain from exercising jurisdiction in this case because the CON application process constitutes an "ongoing state administrative proceeding[ ] judicial in nature for purposes of a *Younge*r analysis." ECF No. 38 at 10. Defendants specifically assert abstention is appropriate because Birchansky and Fox Eye have a pending CON application.

[4] Neither party argues—and the Court finds no reason to conclude—the CON-application is a "state criminal prosecution," or a "civil proceeding[ ] involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367–69 (1989) (outlining types of proceedings entitled to *Younger* abstention). Accordingly, the Court addresses only whether the CON application process is "akin to [a] criminal prosecution." *Sprint*, 134 S. Ct. at 588.

Though Birchansky and Fox Eye have been conditionally approved for a CON, Defendants contend *Younger* remains appropriate because the application remains "currently pending in front of the State Health Facilities Council." *Id.*[5]

Defendants rely on dicta from a 1997 Eighth Circuit opinion, *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, for the proposition formal review of a CON application may constitute a judicial proceeding warranting abstention under *Younger*. ECF No. 38 at 10 (citing *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042 (8th Cir. 1997)). In a footnote in *Atchison*, the Eighth Circuit noted "at some point, the CON process may become sufficiently coercive and ongoing and judicial in nature so as to require abstention by the federal courts. For example, once the 'formal review' of an accepted application is underway, the argument in favor of abstention becomes much more persuasive." *Atchison*, 126 F.3d at 1047 n.3. In light of the Supreme Court's more recent clarification of the applicability of *Younger* abstention to pending administrative proceedings, however, the Court determines *Atchison*'s footnote is inapplicable to this case. *See Sprint*, 134 S. Ct. at 588. In *Sprint*, the Supreme Court reversed an Eighth Circuit decision affirming a district court order abstaining from adjudicating a case in the presence of a pending state administrative decision. In so doing, the Supreme Court found *Younger* abstention in deference to an ongoing state-court review of an Iowa Utilities Board decision inappropriate. *See id.* at 588–90; *see also id.* at 588 ("Abstention is not in order simply because a

[5] "Following a public hearing on July 19, 2017, the Council approved Dr. Birchansky's fifth CON application to establish an outpatient surgical facility in Cedar Rapids." ECF No. 38 at 5. Nonetheless, Birchansky and Fox Eye's CON application still has numerous additional hurdles until it is finally and definitively approved. *See id.* at 7 (providing Birchansky and Fox Eye's application is still "subject to appeal by any of the affected persons who appeared in opposition to Dr. Birchansky's application"); *see also* Iowa Code §§ 135.66, 135.70; *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 827–30 (Iowa 2002) (describing interested-party appeal in CON applications).

pending state-court proceeding involves the same subject matter."). *Sprint* made clear only administrative proceedings "akin to criminal proceedings" warrant *Younger* abstention. *Id.* at 588.

In their reply, Defendants rely on two post-*Sprint* district court orders addressing *Younger* abstention in the civil administrative enforcement setting. Defs.' Reply Mot. Dismiss 2, ECF No. 44 (citing *Dickten Masch Plastics, LLC v. Williams*, 199 F. Supp. 3d 1207 (S.D. Iowa 2016) and *B.L. v. Mahtomedi Sch. Dist.*, No. 17–1193 ADM/SER, 2017 WL 1497855 (D. Minn. April 26, 2017)). At the outset, neither case based its holding on abstention grounds. Nor did either case concern an ongoing proceeding of the kind presented in this case. In *Dickten*, the underlying state proceeding involved a disability discrimination investigation. *Dickten*, 199 F. Supp. 3d at 1211–13. In *Mahtomedi*, the underlying state proceeding was based on a school expulsion for possession and display of a BB-gun. *Mahtomedi*, 2017 WL 1497855, at *1. The underlying state proceedings in *Dickten* and *Mahtomedi* also entailed detailed investigations pertaining to discrete conduct attributable to the defendant, presented the possibility of punitive sanctions, and could have been brought as criminal cases. The stage of the CON application process at which Birchansky and Fox Eye currently find themselves does not involve the same investigative, punitive, and quasi-criminal characteristics as the proceedings in *Dickten* and *Mahtomedi*. Rather, Birchansky and Fox Eye's application is working its way through a licensing scheme—an administrative process with little relation to any sort of criminal proceeding.

As in *Sprint*, Birchansky and Fox Eye are involved in an ongoing state administrative proceeding (the CON application) lacking a clear parallel to a criminal prosecution. Indeed, because the CON framework is essentially a licensing scheme, it is even further from the sort of criminal proceeding that paradigmatically triggers *Younger*. Licensing is a public law mechanism in which a government grants qualifying persons certain privileges, typically pertaining, as here, to some economic activity. *See License* (1), Black's Law Dictionary (10th ed. 2014) ("A privilege

granted by a state or city upon the payment of a fee, the recipient of the privilege then being authorized to do some act or series of acts that would otherwise be impermissible."). In so doing, a government might impose sanctions on persons acting without a requisite license. Thus, under some circumstances, a sanction under a licensing scheme may resemble a criminal prosecution. On the other hand, a government's routine investigation of an applicant's submitted materials rarely resembles a criminal prosecution. Birchansky's fifth CON application is in neither a sanctions proceeding nor an application process akin to a criminal prosecution. To the contrary, all indicators suggest Birchansky is merely pursuing a public law privilege to engage in certain economic conduct—a category from which *Younger* and its progeny do not require federal courts to abstain exercising concurrent federal jurisdiction.[6] Consequently, the Court will not abstain from exercising jurisdiction over the case under *Younger*.

Because the Court has determined the CON application process falls on the *Sprint* side of *Younger*, the Court does not resolve Defendants' contentions regarding whether "administration of a state's CON statute is clearly an important state interest" or whether "the state proceedings afford Plaintiffs an adequate opportunity to raise their constitutional challenges." ECF No. 38 at 11.

C. Standing

Next, Defendants contend Plaintiffs lack standing to bring this suit. To establish standing, "[t]he plaintiff[s] must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. The plaintiff[s], as the party invoking federal jurisdiction, bear[ ] the burden of

[6] Even if a pending CON application proceeding is properly characterized as the type over which *Younger* suggests declining jurisdiction, abstention may not be warranted because Birchansky's CON application may no longer be pending. The Court notes the conditional approval of Birchansky's fifth CON application may be enough to terminate the pending nature of the proceeding such that the Court can proceed without *Younger* concerns.

establishing these elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal citations omitted). To establish an injury in fact, a plaintiff must show he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations omitted); *accord Spokeo*, 136 S. Ct. at 1548. "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014) ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law."); *see generally id.* at 2341–46.

The Eighth Circuit has reasoned "'where one plaintiff establishes standing to sue, the standing of other plaintiffs is immaterial' to jurisdiction." *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006) (quoting *Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir. 1992)); *see also Bowen v. Kendrick*, 487 U.S. 589, 620 n.15 (1988) ("Because we find that the taxpayer appellees have standing, we need not consider the standing of the clergy or the American Jewish Congress."). Nonetheless, because the Patient Plaintiffs have a separate and discrete claim,[7] the Court analyzes standing for all plaintiffs individually.

The Physician Plaintiffs have standing to pursue their claims. Courts have found plaintiffs have standing when seeking "prospective injunctive relief against enforcement of an occupational certification procedure that is allegedly unconstitutional." *Munie v. Koster*,

[7] Count IV of the complaint is pursued only by the Patient Plaintiffs.

No. 4:10CV01096 AGF, 2011 WL 839608, at *3 (E.D. Mo. Mar. 7, 2011) (citing *Merrifield v. Lockyer*, 547 F.3d 978, 980 (9th Cir. 2008)); *see also Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002). In so doing, courts acknowledge regulated professionals suffer sufficient injury to establish standing because the licensing scheme limits them from performing certain activities related to their profession. *See Merrifield*, 547 F.3d at 980 n.1 ("[The plaintiff] has standing because he cannot engage in his trade unless he first satisfies the current licensing requirement or receives an exemption." (citing *Lujan*, 504 U.S. at 560–61)). The Court determines the CON requirement presents the same dynamic: medical professionals reasonably likely to provide services in their own facilities are prevented from doing so due to the CON requirement; they therefore suffer a sufficient injury to establish standing. Accordingly, those who can demonstrate they would build or expand a health facility but are prohibited from doing so by the CON requirement have established sufficient injury in fact. Challenging the CON requirement, in turn, establishes traceability and redressability. Even so, the Court believes both the Physician Plaintiffs and the Patient Plaintiffs would have standing under more individualized theories. The Court proceeds with addressing each plaintiff in turn.

Birchansky had to expend at least a modicum of time and financial resources to pursue his most recent CON application—time and financial resources he would not have had to expend in the absence of the CON requirement he now challenges. These costs of pursuing a CON are "concrete and particularized." *Lujan*, 504 U.S. at 560. Further, he could avoid future costs of the same ilk if enforcement of the CON requirement is enjoined. To be sure, it is possible Birchansky's claims may become moot if his CON is finally approved. *See* ECF No. 38 at 12 n.4 ("Plaintiffs' claims may be moot if none of the affected parties seek judicial review of the Council's decision,

and Defendants reserve the right to assert mootness as appropriate.").[8] Even so, Birchansky has not yet become dispossessed of a legally cognizable injury. At present, Birchansky's CON application is only provisionally approved by the Defendants and is subject to appeal by existing businesses and other affected parties. As such, the CON framework continues to impose costs and restraints upon Birchansky. Because it is the entity through which Birchansky administers his professional services, Fox Eye has an injury in fact under the same theory. Accordingly, Birchansky and Fox Eye have standing specific to their own circumstances to challenge the constitutionality of the CON framework.

In contrast to Birchansky and Fox Eye, Korver has never submitted a CON application. Defendants contend Korver "has never submitted a letter of intent to the Department, has never applied for a CON, has never received a denial from the Council regarding a CON application, has never appeared before the Council as an affected person, and has never been the subject of potential or actual enforcement action against it." *Id.* at 15 (citing ECF No. 32 ¶¶ 89–98). As a consequence, Defendants essentially contend Korver's claims are not ripe.[9] The Court finds to the contrary. Korver has demonstrated an intent to convert the lower level of its facility into a health facility—an intention reasonably grounded in the work its organizing member conducts as an otolaryngologist. *See* ECF No. 32 ¶¶ 89–98. Korver is on notice it cannot convert its facility into

[8] The Court notes its reasoning regarding the standing of regulated professionals would likely still apply even if Birchansky's fifth CON is finally approved. However, the Court need not resolve any hypothetical future mootness of Birchansky's claims at this stage.

[9] The Court notes the overlap of Defendants' arguments with regards to *Rooker–Feldman*, *Younger*, standing, ripeness, and mootness, if accepted, would likely make it practically impossible to bring any claim challenging Iowa's CON requirement in federal district court. In Defendants' framework, an individual who has not yet applied for a CON does not present a ripe claim; an individual who has applied for but has not yet received a final decision on his CON application has entered a proceeding requiring abstention under *Younger*; an individual who has applied for and been finally denied a CON has had his claims sufficiently adjudicated so as to preclude jurisdiction under *Rooker–Feldman*; and, finally, an individual who has applied for and been finally granted a CON presents a moot claim.

a health facility without obtaining a CON. To attempt to obtain a CON, Korver would have to expend time and financial resources. If Korver constructs a health facility without a CON, it is subject to sanctions. *See* Iowa Code § 135.73; Iowa Admin. Code r. 641-202.15(135); *see also Susan B. Anthony List*, 134 S. Ct. at 2345–46 (noting threat of sanctions may create a sufficient injury to establish standing); *Babbitt*, 442 U.S. at 298–99 (same). In the meantime, Korver sustains the injury of lost potential clients and the opportunity cost of unused space in its facility. *See generally* ECF No. 32 ¶¶ 89–98. Accordingly, Korver would have standing separate from Birchansky and Fox Eye to challenge the CON requirement.

Because they are not regulated professionals who can demonstrate they would build or expand a health facility but for the CON requirement, the standing analysis for the Patient Plaintiffs differs in kind but not result. At the outset, Plaintiffs acknowledge "[e]ven in the absence of Patient Plaintiffs [as parties], the same claims could be litigated by the Physician Plaintiffs." Pls.' Br. Resist. Defs.' Mot. Dismiss Am. Compl. 15, ECF No. 41. Nonetheless, Plaintiffs contend standing is separately established for the Patient Plaintiffs. Jensen is a patient of Birchansky who "wants to receive future cataract or other outpatient eye surgeries from Dr. Birchansky at Fox Eye Surgery's center." ECF No. 32 ¶¶ 22–23. Driesen has received sinus surgery from Korver and "wishes to receive future ENT surgeries from Dr. Korver." *Id.* ¶¶ 213, 215. Thus, Plaintiffs contend the Patient Plaintiffs each derive their standing by a desire to receive medical services in the hypothetical future health facilities of the Physician Plaintiffs. Because the CON requirement stops the Physician Plaintiffs from building or expanding health facilities, Plaintiffs contend, the Patient Plaintiffs suffer an injury in fact. ECF No. 41 at 14–15. By way of demonstrating this injury, Plaintiffs assert the Patient Plaintiffs would pay less for medical services should the Physician Plaintiffs be allowed to build or expand their health facilities. ECF No. 32 ¶¶ 211–12, 215–17. The Court finds these contentions establish standing for the Patient Plaintiffs.

The Patient Plaintiffs' injuries are made concrete in large part by their relationships with the Physician Plaintiffs. Jensen has an existing relationship with Birchansky and Fox Eye. For instance, "[b]etween 2002 and 2003, when Fox Eye Surgery's proposed outpatient surgery center was operational and affiliated with St. Luke's Hospital, patient plaintiff Jensen underwent two corneal replacements in that facility." *Id.* ¶ 204. In 2016, Birchansky performed cataract surgery on Jensen at another medical facility. *Id.* ¶ 205. Importantly, "Jensen's corneal replacements, glaucoma, and prior cataract surgery all indicate that he will need another cataract surgery in the near future" and he "wishes to receive future cataract surgeries from Dr. Birchansky in Fox Eye Surgery's outpatient surgery center." *Id.* ¶¶ 207–08. Plaintiffs contend "[t]he total cost for Dr. Birchansky's cataract procedure at Fox Eye Surgery's outpatient surgery center would be $975 for Medicare patients and $1,950 for non-Medicare patients," while the cost at other facilities would be at least $3,500. *See id.* ¶¶ 211–12. Similarly, Driesen has an existing relationship with Korver. The cost of services Driesen may need administered to his children could be reduced by "$3,000 to $4,000" if Korver could avoid the hospital facility fees associated with existing medical facilities. *See id.* ¶¶ 215–17. The ongoing nature of these medical relationships, as well as the potential cost to the Patient Plaintiffs of the status quo, grant them sufficient injury in fact to establish standing. The Patient Plaintiffs can also establish traceability and redressability as they can trace their injury to the CON requirement and would have their injuries redressed by the Court enjoining the requirement at issue here.

Defendants also contend (and Plaintiffs concede) "Jensen's claims will clearly be moot if Dr. Birchansky's CON approval is not appealed and he begins offering outpatient cataract surgery at the location of Plaintiff Jensen's choosing." ECF No. 38 at 16 n.6; *see also* ECF No. 41 at 8 n.4 ("Plaintiffs concede that Jensen's claim becomes moot if, at the conclusion of existing business' appeal of Dr. Birchansky's successful CON application, the Cedar Rapids facility is allowed to

open."). The Court does not resolve mootness now because Birchansky's CON application has not yet been finally approved, his facility has not been built, and the Patient Plaintiffs' alleged injuries have not dissipated.

Having determined the existence of this Court's jurisdiction, the appropriateness of exercising jurisdiction in this case, and the standing of each of the Plaintiffs, the Court proceeds to consider whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

D. Specific Counts

1. Physician Plaintiffs' Equal Protection & Substantive Due Process Claims

The Fourteenth Amendment to the United States Constitution provides, a "[s]tate [shall not] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. When interpreting these clauses, the Supreme Court applies three possible levels of scrutiny. *See generally City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–42 (1985) (describing the application of strict scrutiny, intermediate scrutiny, and rational basis scrutiny under the Fourteenth Amendment).

Both parties agree rational basis review applies to Plaintiffs' claim under the Equal Protection Clause. ECF No. 38 at 16–17; ECF No. 41 at 16;[10] *see Hughes v. City of Cedar Rapids,*

[10] Though Defendants concede rational basis analysis applies to both claims, elsewhere Defendants appear to contest whether Plaintiffs have alleged disparate treatment required to sustain an Equal Protection claim. *See* ECF No. 38 at 22 ("[T]he law treats similarly situated entities similarly by authorizing all entities which have obtained a CON to expend up to 1.5 million without obtaining an additional CON to do so."). Plaintiffs contend their amended complaint adequately alleges the Physician Plaintiffs are treated differently than similarly situated individuals by focusing the inquiry on CON-holder status. *See* ECF No. 32 ¶¶ 147, 233. The Court determines Plaintiffs have adequately pleaded disparate treatment sufficient to sustain an equal protection claim here.

840 F.3d 987, 996 (8th Cir. 2016) ("When no fundamental right or suspect class is at issue, a challenged law must pass the rational basis test."); *Minn. Senior Fed'n, Metro. Region v. United States*, 273 F.3d 805, 808 (8th Cir. 2001) (explaining; when an "economic or social welfare program is challenged on equal protection grounds, and no suspect class or fundamental constitutional right is implicated, the proper standard of judicial review is rational basis"); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."); *Carter v. Arkansas*, 392 F.3d 965, 968 (8th Cir. 2004) ("[A] district court may conduct a rational basis review on a motion to dismiss."). For a classification to survive rational basis scrutiny in the equal protection context, "there [must be] a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (internal citations omitted).

In challenging a statute under the rational basis test, "[a] statute is presumed constitutional . . . and '[t]he burden is on the one attacking the legislative arrangement to negat[e] every conceivable basis which might support it.'" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (third alteration in original) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Rational basis scrutiny also applies in a substantive due process analysis where plaintiffs challenge non-fundamental economic rights. *See Klein v. McGowan*, 198 F.3d 705, 710 (8th Cir.

Plaintiffs have done so by focusing on the capital expenditure exemption to which only existing facilities are entitled.

1999) (determining a plaintiff must demonstrate irrationality of challenged government action in a substantive due process challenge not implicating fundamental rights).[11]

As to Plaintiffs' equal protection and substantive due process claims, the Court first addresses the parties' differing positions on the specificity required by a rational basis analysis. Second, the Court considers Plaintiffs' argument economic protectionism standing alone is not a legitimate state interest. Finally, the Court addresses the sufficiency of Plaintiffs' pleadings.

a. Granularity of the Rational Basis Analysis

At the outset, Plaintiffs and Defendants offer conflicting visions of the level of granularity with which the Court should address the CON framework. *Compare* ECF No. 41 at 24 ("Plaintiffs' Complaint challenges the specific classifications made by Iowa's CON requirement, for which there must be independent rational bases."), *with* ECF No. 44 at 4 ("The Plaintiffs here are attempting to draw this Court very deep in the weeds indeed in demanding it parse whether separate legitimate state interests are furthered by the [CON requirement for new outpatient facilities.]"). This dispute can be resolved with relative ease by noting two characteristics of the rational basis analysis.

In the case's current posture, the Court need not determine whether there exists rational bases for each statutory provision in the CON framework. Rather, the Court must determine whether there is a rational basis for the challenged statutory classification. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative *classification* so long as it bears a rational relation to some

[11] Because the parties cite mainly equal protection cases in support of their positions, the Court proceeds with the analysis under an equal protection lens. *See, e.g.*, *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) ("[B]ecause a substantive due process analysis proceeds along the same lines as an equal protection analysis, our equal protection discussion sufficiently addresses both claims.").

legitimate end." (emphasis added)).[12] A classification may be born from any number of individual provisions in a statute, and may be defined by reference to the conduct permitted or proscribed by those provisions. The basis for any component provision can thus be derived from the broader aims of the framework—or from its own, independent justification. Whatever the source of the classification, it must rationally relate to a legitimate state interest.

A statutory scheme and its component parts can only be understood in context. Because the rational basis inquiry requires a means-end fit, any given provision is merely a piece of the scheme as a whole. The smaller the piece, the less it individually needs to contribute. Plaintiffs challenge whether the differing treatment of CON-holders and non-CON-holders with respect to building and expanding health facilities has a rational relationship to a legitimate state interest. It either does or it does not; the questions the rational basis test asks scale with the relative importance of each provision in the scheme.

On the granularity question, Defendants direct the Court's attention to *Colon Health Centers of America, LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016). In *Colon Health Centers*, the Fourth Circuit reasoned focusing on the constitutionality of limitations on the use of certain medical devices "draws us deep into the weeds. Were we to allow device-by-device litigation over what medical equipment the CON program might constitutionally cover and what it might not, litigation would become the main arena and the undermining of legislation would have no end." *Id.* at 159.

[12] The Court notes this is one potential path of divergence between Plaintiffs' equal protection and substantive due process claims. A substantive due process challenge need not specifically concern a classification; the Due Process Clause's "substantive component . . . forbids the government to infringe certain 'fundamental' liberty interests *at all*." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original). Nonetheless, because "[b]oth theories utilize the rational basis analysis," a classification presents symmetrical equal protection and substantive due process concerns. *Knapp v. Hanson*, 183 F.3d 786, 790 (8th Cir. 1999); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n.12 (1981).

Colon Health Centers is distinguishable from the present case. First, the Fourth Circuit addressed related but distinct Commerce Clause challenges to Virginia's CON program. *Id.* at 148.[13] To the extent application of the rational basis test differs depending on the anchoring constitutional clause—as at least one court has reasoned—the particular contours of the Fourth Circuit's reasoning may lose their shape in this case. *See Powers v. Harris*, 379 F.3d 1208, 1219–20 (10th Cir. 2004) (considering differences between the rational basis analysis under the Contracts, Commerce, Equal Protection, and Supremacy Clauses of the Constitution). Thus, *Colon Health Centers* (a dormant commerce clause case) might provide a different analytical framework than that required in the present case. Second (and more importantly to the granularity question), the Fourth Circuit hesitated to be drawn "deep into the weeds" by "device-by-device litigation over what medical *equipment* the CON program might constitutionally cover." *See Colon Health Ctrs.*, 813 F.3d at 159 (emphasis added). In contrast, Plaintiffs challenge whether the Constitution permits the legislature to grant CON-holders expansion privileges denied to non-holders. Here, the Court is not required to probe the rational bases for hundreds of different device limitations; rather, the Court is asked to assess whether Plaintiffs have sufficiently challenged a specific classification. Such an inquiry poses less risk "litigation would become the main arena [so that] the undermining of legislation would have no end." *Contra id.* at 159. The rational basis analysis is well suited to address this question.

The Court's inquiry is framed with each of these granularity considerations in mind. However, the Court determines narrow focus of Plaintiffs' challenge in relation to the CON framework at large does not render the complaint otherwise defective.

[13] The Fourth Circuit heard and resolved Fourteenth Amendment rational basis challenges in an earlier iteration of the case. *See Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535 (4th Cir. 2013). Because Defendants refer to the 2016 opinion, 813 F.3d 145, the Court addresses the analysis in that opinion. Unless otherwise noted, the Court refers to the 2016 *Colon Health Centers* opinion in this order.

b. Economic Protectionism as a State Interest

The next question the Court addresses in regards to the Physician Plaintiffs' Equal Protection and Substantive Due Process claims is whether economic protection, standing alone, constitutes a legitimate state interest sufficient to satisfy a rational basis inquiry.[14] For the reasons set forth below, the Court determines it does not.

Courts are divided as to whether "mere," "naked," or "bare" economic protectionism[15] is a legitimate state interest. *Compare St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose, but economic protection, that is favoritism, may well be supported by a post hoc perceived rationale as in *Williamson*—without which it is aptly described as a naked transfer of wealth." (footnote omitted)), *Merrifield*, 547 F.3d at 991 n.15 ("We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."), *and Craigmiles*, 312 F.3d at 224 (noting with approval "[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose."), *with Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015) ("[E]conomic favoritism is rational for purposes of our review of state action under the

[14] At the hearing, Defendants demurred as to whether or not naked economic protectionism constitutes a legitimate state interest. Nonetheless, Defendants' briefs touch on the issue. *See, e.g.*, ECF No. 38 at 22 (arguing "treating new applicants differently than existing health care facilities is rationally related to . . . controlling the negative financial impact of new facilities on existing facilities"); ECF No. 44 at 3–5 (contending Iowa's CON requirement is supported by legitimate interests). Because analysis of this issue is necessary to determine the legal sufficiency of Plaintiffs' complaint, the Court addresses the question in detail now.

[15] The Court understands each of these terms to mean essentially the same thing: economic protectionism for the sake of economic protectionism. Some courts also use formulations like "economic favoritism" and "intrastate economic protectionism" to refer to the equivalent concepts. The Court uses the term "naked economic protectionism" as it most accurately conveys the solitary nature of the interest, that is, the interest stands alone as the only conceivable end of the statute.

Fourteenth Amendment."), *and Powers*, 379 F.3d at 1221 ("[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest."). Plaintiffs "concede that [Plaintiffs] lose if that minority rule [finding protectionism a legitimate state interest] is applied here." ECF No. 41 at 18.

While the Eighth Circuit has not squarely addressed the issue, its reasoning in *Kansas City Taxi Cab Drivers Association, LLC v. City of Kansas City*, 742 F.3d 807 (8th Cir. 2013), suggests naked economic protectionism is insufficient to survive rational basis scrutiny. In *Kansas City Taxi*, the Eighth Circuit focused on "the context of taxicab regulation" and determined a challenged taxicab-permitting ordinance was "rationally related to a number of legitimate government purposes." *Id.* at 810–11. In so doing, the court affirmed a district court order granting summary judgment in favor of the city promulgating the ordinance, noting "[t]he district court identified other purposes: creating incentives to invest in infrastructure and increasing quality in the taxicab industry." *Id.* at 810; *see id.* at 811. Given these alternative purposes advanced in favor of the ordinance, the Eighth Circuit did not directly address the question the Court must now resolve.

Though *Kansas City Taxi* did not determine whether naked economic protectionism constitutes a legitimate state interest, the Eighth Circuit identified cases on both sides of the circuit split. *Id*. at 810. In so doing, the Eighth Circuit appeared to follow the Fifth Circuit's reasoning in another taxicab case: "even if the City is motivated in part by economic protectionism, there is no real dispute that promoting full-service taxi operations is a legitimate government purpose under the rational basis test." *Id.* (quoting *Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011)); *see also Niang v. Carroll*, 879 F.3d 870, 873 (8th Cir. 2018) ("As the braiders acknowledge, the license requirement furthers legitimate government interests in health and safety."). The Eighth Circuit in *Kansas City Taxi* also quoted the Fifth Circuit's broader reasoning: while "*Craigmiles* and other cases confirm that naked economic

preferences are impermissible to the extent that they harm consumers[, t]he record here provides no reason to believe that consumers will suffer harm under the Ordinance." *Id.* (quoting *Greater Hous. Small Taxicab*, 660 F.3d at 240). The Eighth Circuit's extensive quotation of the Fifth Circuit's conceptual framework suggests an agreement with the Fifth Circuit's determination naked economic protectionism, stripped of any other legitimate government purpose, does not constitute a legitimate state interest for the purposes of a rational basis analysis. *See St. Joseph Abbey*, 712 F.3d at 222–23; *id.* at 223 & n.40, 41 ("Notably, [in *Greater Houston Small Taxicab*,] we approved of the *Craigmiles* court's reasoning, as it 'confirm[ed] that naked economic preferences are impermissible to the extent that they harm consumers.'" (second alteration in original) (quoting *Greater Hous. Small Taxicab*, 660 F.3d at 240)). In a recent opinion relying on *Kansas City Taxi*, the Eighth Circuit described *Craigmiles* and *St. Joseph Abbey* as cases where "the government did not have a legitimate interest." *Niang*, 879 F.3d at 874.

Considering the facts and state interests at play in *Kansas City Taxi*, the Court concludes *Kansas City Taxi* is best read as supporting the proposition economic protectionism is a permissible state interest only when coupled with other legitimate state interests. Because "[t]he district court identified other purposes" for the ordinance, economic protectionism did not and could not render the ordinance constitutionally deficient. *Kansas City Taxi*, 742 F.3d at 810. That is, the presence of economic protectionism did not absolve the *Kansas City Taxi* plaintiffs of the responsibility to refute other possible bases for the statute. It follows from this reasoning economic protectionism may therefore be a *means* to accomplish some other state interest. Alternatively (and equivalently for these purposes), it follows economic protectionism may be an ancillary end—so long as it is coupled with some legitimate interest. The Fifth Circuit, whose analysis of the topic was extensively quoted in *Kansas City Taxi*, has come to the same determination: "the [Supreme Court] cases indicate that protecting or favoring a particular intrastate industry is not an *illegitimate*

interest when protection of the industry can be linked to advancement of the public interest or general welfare." *St. Joseph Abbey*, 712 F.3d at 222 (emphasis in original).[16]

This conclusion is consistent with Supreme Court precedent regarding the aims of the rational basis test under the Equal Protection and Due Process clauses. In related contexts, the Supreme Court has reasoned the rational basis test guards against "the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens . . . may be unavoidable when a State legislates to safeguard the health and safety of its people." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978) (analyzing dormant Commerce Clause issues under the rational basis test). "The [rational basis test's] requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserve Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983) (analyzing Contract Clause issues under the rational basis test). Outside the economic context, the Supreme Court has also used the rational basis test to invalidate laws animated by the "bare [legislative] desire to harm a politically unpopular group." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *see also United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013); *Lawrence v. Texas*, 539 U.S. 558, 582–84 (2003) (O'Connor, J., concurring); *Romer*, 517 U.S. at 633; *City of Cleburne*, 473 U.S. at 435. As with the other forms of equal protection scrutiny, the rational basis test is "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sunstein, *Naked Preferences & the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984).

[16] The Court's conclusion is equally consistent with this reasoning: though economic protectionism does not automatically taint a statute, if a plaintiff can counter all other conceivable state interests and plausibly allege the sole statutory end is naked economic protectionism, a statute may be subject to invalidation under the rational basis test.

To be sure, many forms of economic protectionism are not naked—they either serve some legitimate state interest or exist in conjunction with other interests. The Ninth Circuit succinctly addressed this distinction:

> We do not disagree that there might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review. However, economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.

Merrifield, 547 F.3d at 991 n.15. Economic protectionism is one mechanism regularly used to accomplish the aims of government. Indeed, many legitimate government actions could be conceivably characterized as insulating in some manner one class of individuals from market forces. *See generally* Richard A. Posner, *Economic Analysis of Law* 1–35 (9th ed. 2014). Employed as a means, economic protectionism imposes costs on some in exchange for a corresponding public benefit. This instrumental view of economic protectionism is buttressed by the determination "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. As such, any conceivable "post hoc perceived rationale" could justify economic protectionism. *St. Joseph Abbey*, 712 F.3d at 223; *see also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 490–91 (1955). For these reasons, economic protectionism is firmly established as a permissible *means* to accomplish a legitimate state interest, even where it might also have been intended as an end.

As a sole statutory end, however, the Court concludes naked economic protection is untethered from the common good, putting it beyond the realm of legitimate state action. *See* Sunstein, *supra*, at 1692–95. The Court determines this end, standing alone, is proscribed by the rational basis test. Accordingly, the Court determines Plaintiffs' claims can survive a motion to dismiss if the complaint plausibly pleads the only conceivable goal of the challenged statute is naked economic protectionism.

The opposite conclusion would too narrowly cabin the rational basis test—a result inconsistent with the Eighth Circuit's affirmation "rational basis review is not toothless." *Kansas City Taxi*, 742 F.3d at 810 (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). If naked preferences are permissible ends under the rational basis test, it is hard to conceive what ends, if any, the test would proscribe.[17] Through such a lens, only the truly illogical government action—for example, the rare statute completely lacking in a logical relationship between the means employed and the end sought—would be impermissible under the test. So limited, the Court believes rational basis scrutiny would lose much of its already-confined vitality.

To be sure, other tests exist to protect against other forms of naked preferences. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (applying strict scrutiny to alienage classification); *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964) (applying strict scrutiny to racial classification); *see also Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982) (applying intermediate scrutiny to gender classification); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (applying intermediate scrutiny to legitimacy classification); *see generally City of Cleburne*, 473 U.S. at 439–42 (describing different forms of scrutiny). These tests address with greater scrutiny the forms of discrimination and disparate treatment the Constitution identifies as particularly pernicious. They do so by proscribing more forcefully certain ends and probing more deeply legislative means. The rational basis test supplements other forms of scrutiny by addressing those naked preferences which fall outside the ambit of the more particularized tests.

[17] Some courts attempt to categorize the permissibility of certain genres of naked preferences under the rational basis test. For instance, the Tenth Circuit has reasoned naked preferences on economic issues may be treated differently from naked preferences on social issues. *Powers*, 379 F.3d at 1224 ("Regardless, the Court itself has never applied *Cleburne*-style rational-basis review to economic issues."). The Supreme Court has not yet drawn such a line. Nor does this Court see a reason to distinguish between the character of the various naked preferences subject to rational basis scrutiny. The Court determines, even if economic issues are subject to a weaker form of rational basis scrutiny, the test still proscribes naked economic protectionism.

In applying the rational basis test, there may be "difficulty in distinguishing between a protectionist purpose and a more 'legitimate' public purpose in any particular case." *Sensational Smiles*, 793 F.3d at 287. Yet, this difficulty is not confined to the economic context—legitimate ends of social legislation may also be difficult to distinguish from illegitimate ones. Where multiple plausible purposes exist, though, the statute must be presumed constitutional. *See, e.g.*, *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 370 (1988) (reiterating the rational basis test's presumption of validity as to legislative classifications); *see also United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (determining, when legislative judgment is debatable, a statute must be upheld if "any state of facts either known or which could reasonably be assumed affords support for it"). Only in those cases where the statute's challengers can counter every conceivable purpose of the statute and plausibly allege a naked economic or social preference does the rational basis test foreclose dismissing the action. Accordingly, the Court is persuaded proscribing naked economic protectionism in this context is both consistent with the Fourteenth Amendment's directives and judicially manageable as to distinguishing legislative ends.

Finally, as other courts have noted: "[a]lthough economic rights are at stake," the Court is "not basing [its] decision today on [its] personal approach to economics, but on the Equal Protection Clause's requirement that similarly situated persons must be treated equally." *Merrifield*, 547 F.3d at 992. "No sophisticated economic analysis is required . . . . [The Court is] not imposing [its] view of a well-functioning market on the people of" Iowa. *Craigmiles*, 312 F.3d at 229. Rather, the Court's analysis focuses on whether the statute in question favors one group over another for the sole reason the former possesses more political power than the latter.

Eighth Circuit precedent is consistent in determining naked economic protectionism is an insufficient state interest to survive rational basis scrutiny. Such a determination resonates with

long-standing Supreme Court precedent, the purposes of the rational basis inquiry, and decisions by other circuits. Accordingly, the Court determines naked economic protectionism is an illegitimate state interest for the purposes of a rational basis analysis under the Equal Protection and Due Process clauses.

c. Sufficiency of Plaintiffs' Pleadings

Given the Court's conclusions above, to survive a motion to dismiss on the Physician Plaintiffs' equal protection and due process claims, Plaintiffs must plausibly allege Iowa's CON framework "privilege[s] certain businessmen over others at the expense of consumers" and "is not animated by a legitimate governmental purpose and cannot survive[ ] rational basis review." *Craigmiles*, 312 F.3d at 229. At this stage, the Court need only determine whether Plaintiffs have plausibly alleged facts which, if true, entitle them to relief. As a consequence, the Court focuses its inquiry on the theory of liability most forcefully articulated in Plaintiffs' complaint: the lack of a rational basis for the $1.5 million capital expenditure exemption. *See* Iowa Code § 135.61(18)(c). The Court first considers Defendants' proffered rationales for the CON requirement (including for the capital expenditure exemption), then considers other possible bases for the CON requirement and its capital expenditure exemption. Because the Court finds Plaintiffs have plausibly alleged the capital expenditure exemption lacks a rational basis for the reasons set forth below, the Court denies Defendants' motion to dismiss as to Plaintiffs' claims under the Equal Protection and Due Process Clauses.

Defendants identify a number of bases for "treat[ing] existing health care facilities differently than independent health care providers." ECF No. 38 at 22.

> For example, treating new applicants differently than existing health care facilities is rationally related to controlling health care costs by preventing duplication of services, and is related to ensuring access to existing health care services like comprehensive hospital services by controlling the negative financial impact of new facilities on existing facilities.

Id. Though a state "has no obligation to produce evidence to sustain the rationality of a statutory classification," the Court believes these rationales for the CON requirement are the most readily conceivable. *Heller*, 509 U.S. at 320. Plaintiffs must therefore negate these bases. *See id.* (quoting *Lehnhausen*, 410 U.S. at 364).

Plaintiffs allege the CON requirement both lacks a "legitimate end to pair with the CON requirement's protectionism" and "causes harm to consumers." ECF No. 41 at 18; *see also* ECF No. 32 ¶¶ 4, 118, 236, 237, 243, 245, 262. Plaintiffs rebut Defendants' argument Iowa's CON framework controls healthcare costs by reducing duplication of services:

> Iowa's certificate-of-need scheme does not control costs, spending, or the construction of medical facilities. Existing providers who already have outpatient surgery centers may build and open (or buy and reopen) an unlimited number of new outpatient surgery centers without applying for a certificate of need, provided that they operate within the same county and that opening the facility or facilities costs less than $1.5 million per year.

ECF No. 32 ¶ 143; *see also* ECF No. 41 at 24–25. Plaintiffs also allege the CON requirement does not preserve patient access. ECF No. 32 ¶¶ 143–44; *see* ECF No. 41 at 25–26. Plaintiffs thereby allege the CON requirement is not rationally related to the advancement of the proffered aims (controlling healthcare costs or preserving patient access). *See id.* ¶¶ 243, 262. Plaintiffs have also alleged the CON requirement lacks any other conceivable basis. *See id.* ¶¶ 235–36.

In response, Defendants rely on *Atchison* for the proposition CON laws are generally "a valid means of furthering a legitimate state interest." 126 F.3d at 1048; *see* ECF No. 38 at 18. Two factors caution application of *Atchison*'s broad reasoning to the facts in this case. First, the Eighth Circuit addressed whether the CON framework, standing alone, "merely has the incidental effect of making it more difficult or more expensive to procure an abortion and does not otherwise impose an undue burden on one's ability to obtain an abortion." *Atchison*, 126 F.3d at 1049 (citing *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 874 (1992)). Second, the Eighth

Circuit's full reasoning is broader than Defendants suggest. The *Atchison* court determined "CON laws *in general* have been recognized as a valid means of furthering a legitimate state interest." *Id.* at 1048 (emphasis added). Accordingly, whether the disparate treatment of CON-holders for the purposes of building or expanding health facilities is a legitimate state interest is a question left unresolved by *Atchison*. Thus, the question remains whether Plaintiffs have adequately alleged this particular aspect of the CON framework lacks otherwise legitimate state interests.

Defendants also rely on *Colon Health Centers* for the proposition "the Fourth Circuit soundly rejected constitutional challenges to Virginia's CON program, recognizing a number of legitimate state interests advanced by Virginia's CON framework." ECF No. 38 at 19; *see Colon Health Ctrs.*, 813 F.3d 145. Unlike *Atchison*, *Colon Health Centers* addresses a CON framework's particular provisions and their corresponding rationales. Even so, the Court finds *Colon Health Centers* distinguishable on a number of grounds—many of which the Court has addressed earlier in this order. *See supra* Section IV(d)(1)(a). An additional point of departure between *Colon Health Centers* and the present case warrants mention here. While the Virginia CON framework at issue in *Colon Health Centers* exempted CON-holders from limitations on capital expenditures for the "[r]eplacement of existing equipment," it did not exempt CON-holders from other limitations on capital expenditures. Va. Code Ann. § 32.1–102.1(7); *see Colon Health Ctrs.*, 813 F.3d at 149–50; *contra* Iowa Code § 135.61(18)(c). Rather than exempt CON-holders from other capital expenditure limitations, the Virginia CON framework classifies "augmenting existing operations without a certificate of need [as] a Class 1 misdemeanor." *Colon Health Ctrs.*, 813 F.3d at 150 (citing Va. Code Ann. § 32.1–27.1). Iowa's CON framework, by contrast, exempts CON-holders from both limitations on replacement equipment *and* general limitations on construction. *See* Iowa Code § 135.61(18)(g)–(j); *see also id.* § 135.61(18)(c). Thus, 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. *Cf. Colon Health Ctrs.*, 813 F.3d at 153, 156–57.

The parties also spar over *Gallagher v. City of Clayton*, 699 F.3d 1013 (8th Cir. 2012); *Carter v. Arkansas*, 392 F.3d 965 (8th Cir. 2004); and *Knapp v. Hanson*, 183 F.3d 786 (8th Cir. 1999). *See* ECF No. 38 at 23, 25; ECF No. 41 at 20–22. In each case, the Eighth Circuit affirmed a district court order dismissing an inadequately pleaded complaint. In *Gallagher*, the Eighth Circuit affirmed a district court order dismissing claims challenging a secondhand smoke ordinance where the plaintiff alleged a ban on minimally harmful outdoor smoke violated his rights under the Fourteenth Amendment. *See* 699 F.3d at 1019–20; *see also id.* at 1020 ("We need not determine whether outdoor secondhand smoke exposure actually causes harm. Because the City reasonably could believe this to be true, the Ordinance survives rational basis review."). Similarly, in *Carter*, the Eighth Circuit affirmed a district court order dismissing claims challenging school district health insurance contributions where "it was rational for the state legislature to require the employers of public school employees and state employees to bear responsibility for health care contributions for their respective employees and that the state could contribute more than a local public school district for employee health insurance." 392 F.3d at 969. Finally, in *Knapp*, the Eighth Circuit affirmed a district court order dismissing claims challenging a seniority pay scheme where "[a] rational relationship exists between the state's goal of maintaining an experienced Highway Patrol workforce and offering longevity pay to those members of the Patrol who serve at least five years." 183 F.3d at 789. In each case, the plaintiffs did not or could not counter the conceivable bases for the challenged government action.

In contrast to *Gallagher*, *Carter*, and *Knapp*, "here, Plaintiffs do not dispute the wisdom of any particular policy objective. They do not, for example, argue that controlling healthcare costs

is a bad idea. Instead, they allege as a factual matter that Iowa's particular CON requirement has no rational relationship to controlling costs." ECF No. 41 at 21; *see* ECF No. 32 ¶ 143. The Court determines Plaintiffs' complaint thereby avoids the inadequacies addressed in *Gallagher*, *Carter*, and *Knapp*.

The Eighth Circuit has recently addressed the rational basis test in the occupational licensing context. *See Niang*, 879 F.3d at 873–74. In *Niang*, the Eighth Circuit affirmed a district court order granting summary judgment in favor of Missouri licensing board officials, thereby upholding a licensing requirement for African-style hair braiders on health and safety grounds. *Id.* The case before this Court is distinguishable from *Niang* in a handful of crucial respects. First, the district court order appealed in *Niang* resolved the challenge to Missouri's licensing requirement on summary judgment. *Id.* at 872–73; *see Niang v. Carroll*, No. 4:14 CV 1100 JMB, 2016 WL 5076170 (E.D. Mo. Sept. 20, 2016). At summary judgment, the district court put the licensing requirement's challengers to their proof by probing a substantial evidentiary record. *See Niang*, 2016 WL 5076170, at *14–19. By contrast, this Court is asked to resolve a motion to dismiss—whereupon Plaintiffs must only plausibly allege the absence of a "reasonably conceivable state of facts that could provide a rational basis" for the regulation. *Beach Commc'ns*, 508 U.S. at 313; *see also Iqbal*, 556 U.S. at 678.

Second, the statute's challengers in *Niang* conceded "the license requirement furthers legitimate government interests in health and safety." *Niang*, 879 F.3d at 873. The Eighth Circuit distinguished such a challenge from allegations "the government did not have a legitimate interest," as in *Craigmiles* and *St. Joseph Abbey*. *Niang*, 879 F.3d at 874. Here, Plaintiffs contend the challenged statute lacks a "legitimate end to pair with the CON requirement's protectionism" and assert "the CON requirement causes harm to consumers." ECF No. 41 at 18 (internal citations omitted); *see* ECF No. 32 ¶¶ 237, 245; *see also* ECF No. 32 ¶¶ 4, 118, 236, 243, 262. Because the

Court must take these allegations as true at the motion to dismiss stage, Plaintiffs thereby satisfy their burden to plausibly rebut the rational bases for the statute.

Finally, *Niang* involved a challenge to an occupational licensing regime. 879 F.3d at 872–73. For the reasons addressed below, the CON framework challenged in this case, though similar in some respects to an occupational licensing requirement, presents different possible rationales. Accordingly, the Court proceeds to address the presence or absence of conceivable bases for the capital expenditure exemption.

While Plaintiffs must "negat[e] every conceivable basis which might support" the CON requirement, they need not negate every *possible* basis. *Heller*, 509 U.S. at 320 (quoting *Lehnhausen*, 410 U.S. at 364); *see also Beach Commc'ns*, 508 U.S. at 313 (reasoning courts must uphold statutes "if there is any *reasonably conceivable* state of facts that could provide a rational basis" (emphasis added)). Plaintiffs need not negate a basis upon which the legislature could not conceivably have relied. The Court has found Plaintiffs have identified and countered the conceivable bases for the CON requirement. Even so, the Court considers other possible bases for the CON requirement, and finds each is not reasonably conceivable here.

Occupational licensing cases provide the richest source of possible bases for the CON requirement. *See Niang*, 879 F.3d at 872–74; *Sensational Smiles*, 793 F.3d at 283–84; *Powers*, 379 F.3d at 1211–12; *see also St. Joseph Abbey*, 712 F.3d at 217–18; *Merrifield*, 547 F.3d at 981–82; *Craigmiles*, 312 F.3d at 222. Nonetheless, none of these possible bases are reasonably conceivable here.[18] The CON requirement differs in three important respects from the occupational licensing regimes challenged on similar grounds: 1) the CON requirement treats differently individuals of functionally the same educational and professional background; 2) the CON requirement has a

[18] Even in occupational licensing cases, some courts have implicitly determined some of these possible bases are not conceivable such that the plaintiff must counter them. *See St. Joseph Abbey*, 712 F.3d at 217–18; *Merrifield*, 547 F.3d at 981–82; *Craigmiles*, 312 F.3d at 222.

more distant relationship to the administration of services; and 3) the CON requirement does not act to guarantee reliance interests. These differences inhibit using occupational licensing rationales to justify the capital expenditure exemption in this case. In so doing, each of these differences also amplify the means-end incongruity Plaintiffs identify in Iowa's CON requirement.

As to the first difference, the CON requirement does not discriminate in a manner conceivably pertaining to the regulated individuals' capacity to administer services. In settings where government action treats licensed professionals differently from unlicensed professionals—by, say, allowing only licensed dentists to perform teeth whitening—it is conceivable the legislature "could well have concluded that higher costs for [the regulated service] . . . would subsidize lower costs for more essential [professional] services that only licensed [professionals] can provide." *Sensational Smiles*, 793 F.3d at 287.[19] That is, it is possible the legislature could conceivably believe it needed to designate an overinclusive spectrum of services requiring a license in order to support more essential services provided by the licensed professionals. Here, however, it is unclear how or why the CON requirement's dual-track construction expenditure rule would subsidize any "more essential [professional] services." *Id.* On the contrary, the CON framework essentially silos the provision of medical services into different types of facilities, each requiring a separate CON. Large providers can seek and receive multiple different certificates of need. Yet, nothing in the requirement could conceivably serve to subsidize other essential services. Allowing one group of individuals (CON-holders) to expand outpatient medical facilities without acquiring a new CON while prohibiting another group (everyone else) from doing the same does not subsidize other, more important services administered by the first group. Rather, it allows the

[19] Because the Second Circuit determined "a simple preference for dentists over teeth-whiteners would suffice," it hypothesized this potential rationale merely in addressing alternative bases for its conclusion. *See Sensational Smiles*, 793 F.3d at 287. Nonetheless, because such a rationale could possibly be conceivable bases for Iowa's CON requirement, the Court addresses the argument here.

first group to expand its provisions of all services permitted under its CON. Accordingly, the legislature could not conceivably have been attempting to prioritize the administration of any particular services.

Second, because the CON requirement chiefly regulates *facilities*—rather than *services*—it is harder to conceive of the statute's means-end fit with permissible state interests. It is rather straightforward to conceive how, in erecting service limitations, legislatures might employ protectionist means to achieve otherwise legitimate aims. For instance, a legislature could conceivably believe imposing stricter competency requirements on doctors would improve the quality of doctors in the jurisdiction—even though it insulates those who qualify from competition by those who do not. Regulation of facilities is harder to justify on these grounds, especially when the challenged provision is completely disconnected from any specific quality-of-service requirements.

Third, the reliance interests sometimes used to justify occupational licensing schemes or other forms of disparate treatment are not present here. *See Sensational Smiles*, 793 F.3d at 289 (Droney, J., concurring in part and concurring in judgment); *Powers*, 379 F.3d at 1226 (Tymkovich, J., concurring); *see also Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 109 (2003); *Nordlinger*, 505 U.S. at 6, 12–13; *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976).[20] Because Defendants have not proffered reliance interests as a justification and the Court

[20] "A reliance interest is created when an individual justifiably acts under the assumption that an existing legal condition will persist; thus reliance interests are most often implicated when the government provides some benefit and then acts to eliminate the benefit." *Nordlinger*, 505 U.S. at 38 (Stevens, J., dissenting) (citing *Dukes*, 427 U.S. at 297). It would be peculiar if the CON framework—which requires consideration of "[t]he contribution of the proposed institutional health service in meeting the needs of the medically underserved," "the needs of the population served," and sixteen other related factors before a CON is granted—protected those reliance interests by completely ignoring the considerations central to receiving the CON. *See* Iowa Code § 135.64(1)(a)–(r). Accordingly, Plaintiffs need not specifically address why a CON—a certificate-of-*need*—would contain a built-in exemption allowing construction without any reference to the need for which the CON was granted.

has no other cause to believe such interests are conceivably advanced here, Plaintiffs need not specifically address whether the reliance interests justify the capital expenditure exemption at this stage.

One final possible basis bears brief mention. It is possible allowing CON-holders to spend up to $1.5 million annually to expand their facilities might serve to facilitate repairs or minor construction on existing facilities. This basis might be fairly characterized as an accommodation for limited expansion pending modification of a CON. Four facts render this possible basis inconceivable here. First, the amount a CON-holder can expend each year—$1.5 million—is far too large to conceivably relate to minor expenditures pertaining to repairs or construction. Second, the statute separately provides a $500,000 cap for changes in health services provided. *See* Iowa Code § 135.61(18)(e)–(f) (new and deleted health services); Iowa Admin. Code r. 641-202.1(135). Third, new equipment, replacement equipment, and mobile health services are all subject to their *own* $1.5 million annual expenditure caps. *See* Iowa Code § 135.61(18)(g)–(j), (l). Finally, Birchansky himself has experience with this expenditure exemption permitting substantially more than repairs or minor construction. *See* ECF No. 32 ¶¶ 158–162. For five years, Birchansky partnered with a CON-holder, St. Luke's Hospital,

> to create a surgery center next to his office location . . . . Because the surgery center would operate as an off-campus department of the hospital that already offered the service (and therefore would be considered an extension of St. Luke's hospital that fell below the $1.5 million threshold for capital expenditures) no [CON] was required.

Id. ¶¶ 158–59. Thus, CON-holders can and do use the capital expenditure exemption for more than repairs or minor construction. Indeed, CON-holders use the capital expenditure exemption to expand capacity and lease the resulting space to non-CON-holders. *See, e.g.*, *id.* ¶¶ 159–60, 162. Accordingly, the capital expenditure exemption for CON-holders in Iowa Code Section

135.61(18)(c) cannot be conceivably justified as merely accommodating minor expansion during CON modification or providing flexibility in the day-to-day administration of a CON facility.

Finally, to the extent the CON capital expenditure exemption advances any conceivable interests imbedded in the CON framework as a whole, the Court determines Plaintiffs have sufficiently countered such a relationship on similar grounds.

Plaintiffs have plausibly countered the reasonably conceivable bases for the CON requirement as a whole and the capital expenditure exemption in particular. In doing so, Plaintiffs have plausibly alleged the CON requirement plays a different role: naked economic protectionism. The Court has considered the reasonably conceivable policy justifications and has determined Plaintiffs have adequately countered each. The Court has additionally considered a number of possible policy justifications and found each insufficient to otherwise sustain the capital expenditure exemption. To the extent other aims might be conceivable, Plaintiffs have adequately pleaded the CON requirement does not conceivably advance those aims. Each of these allegations is consistent with the pleaded facts in the complaint and rise above "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. Accordingly, Plaintiffs have sufficiently pleaded their due process and equal protection counts. Defendants' motion to dismiss is therefore denied as to Counts I and II of the Amended Complaint.

2. Patient Plaintiffs' Substantive Due Process Claim

Patient Plaintiffs allege a violation of the Due Process Clause of the Fourteenth Amendment. Both parties agree this claim presents the same rational basis analysis discussed with regards to Counts I and II. *See* ECF No. 38 at 24–25; ECF No. 41 at 16. Because the Court has determined the Physician Plaintiffs' equal protection and substantive due process claims survive a motion to dismiss, and the Patient Plaintiffs have standing to bring this claim, the Court denies Defendants' motion to dismiss as to Patient Plaintiffs' substantive due process claim.

3. Physician Plaintiffs' Privileges & Immunities Claim

The Fourteenth Amendment provides, "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. The *Slaughter-House Cases*, 83 U.S. 36 (1872), limit application of the Privileges & Immunities Clause to rights "which ow[e] their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. Essentially, a claim under the Privileges & Immunities Clause requires a "claim depend[ing] on the right of travel." *Merrifield*, 547 F.3d at 984; *accord Young v. Ricketts*, 825 F.3d 487, 495 (8th Cir. 2016).

Plaintiffs "do not dispute that the Supreme Court's decision in the *Slaughter-House Cases* forecloses this [Privileges & Immunities] claim." ECF No. 41 at 26. Rather, Plaintiffs "seek to preserve this argument for further appellate review." *Id.*

Because Plaintiffs do not plausibly allege violation of any rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws" recognized as such under Supreme Court precedent, the Court dismisses the Physician Plaintiffs' Privileges & Immunities claim.

V. CONCLUSION

The Court determines the *Rooker–Feldman* doctrine does not bar this Court's jurisdiction over this case. The Court also determines *Younger* abstention is inappropriate. The Court additionally determines each plaintiff has standing to pursue claims against Iowa's CON framework. Accordingly, the Court concludes it can appropriately exercise jurisdiction over the claims in this complaint.

As to each count, the Court finds Plaintiffs have plausibly alleged violations of Physician Plaintiffs' rights under the Equal Protection and Due Process Clause of the Fourteenth Amendment, and violations of Patient Plaintiffs' rights under the Due Process Clause of the

Fourteenth Amendment. The Court finds Plaintiffs have not plausibly alleged violations of Physician Plaintiffs' rights under the Privileges & Immunities Clause of the Fourteenth Amendment.

As such, **IT IS SO ORDERED** that Defendants' Motion to Dismiss, ECF No. 35, is **GRANTED** as to Count III and **DENIED** as to Counts I, II, and IV of Plaintiffs' Amended Complaint, ECF No. 32.

Dated this 12th day of February, 2018.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE