STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

18 CVS 09498

GAJENDRA SINGH, M.D., and FORSYTH IMAGING CENTER, LLC,

Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROY COOPER, Governor of the State of North Carolina, in his official capacity; MANDY COHEN, North Carolina Secretary of Health and Human Services, in her official capacity; PHIL BERGER, President Pro Tempore of the North Carolina Senate, in his official capacity; and TIM MOORE, Speaker of the North Carolina House of Representatives, in his official capacity,

Defendants,

and

NCHA, INC. d/b/a THE NORTH CAROLINA HEALTHCARE ASSOCIATION; THE NORTH CAROLINA HEALTH CARE FACILITIES ASSOCIATION; THE NC CHAPTER OF THE AMERICAN COLLEGE OF RADIOLOGY; THE NORTH CAROLINA SENIOR LIVING ASSOCIATION; BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC.; CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a ATRIUM HEALTH; UNIVERSITY HEALTH SYSTEMS OF

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

EASTERN CAROLINA, INC. d/b/a VIDANT HEALTH; CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. d/b/a CAPE FEAR VALLEY HEALTH SYSTEM; THE ASSOCIATION FOR HOME AND HOSPICE CARE OF NORTH CAROLINA; and THE NORTH CAROLINA AMBULATORY SURGICAL CENTER ASSOCIATION,	)
Amici Curiae.	)

NOW COME Defendants, by and through undersigned counsel, and hereby submit their Brief in Support of Defendants' Motion to Dismiss, pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. In support hereof, Defendants show the court the following:

STATEMENT OF THE CASE

On July 30, 2018, Gajendra Singh, M.D. ("Singh"), and Forsyth Imaging Center, LLC ("Forsyth Imaging") (collectively, "Plaintiffs"), commenced this action asserting constitutional challenges to the Certificate of Need ("CON") law, N.C. Gen. Stat. § 131E-175, *et seq*. Each of Plaintiffs' four claims allege the CON law violates the North Carolina Constitution "both on its face and as applied." (Complaint, ¶¶ 178, 187, 195, 203). On October 4, 2018, Defendants filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Thereafter, various healthcare entities moved to intervene on behalf of Defendants and were allowed by the court to participate as *amici curiae*. Defendants now submit this memorandum of law in support of their Motion to Dismiss.

STATEMENT OF THE FACTS

Dr. Singh is a licensed surgeon who founded Forsyth Imaging to provide diagnostic scans—including magnetic resonance imaging ("MRI") scans—to patients at cheaper rates than the current providers in the Forsyth County area. (Complaint, ¶¶ 1-3). However, North Carolina's CON law prohibits Dr. Singh and Forsyth Imaging from acquiring an MRI scanner without first obtaining a CON. As a result, Plaintiffs allege, among other things, that North Carolina's CON law violates Article I, Sections 19, 32, and 34 of the North Carolina Constitution. (*Id.* at ¶¶ 4, 173-204).

ARGUMENT

Plaintiffs allege that because North Carolina's CON law requires that they first obtain a CON before acquiring an MRI scanner, the law on its face and "as-applied" violates Article I, Sections 19, 32, and 34 of the North Carolina Constitution. However, a careful review of the well-settled case law shows Plaintiffs' claims are without merit and should be dismissed.

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion[,] the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). When a party asserts an "as-applied" constitutional challenge, he must allege facts that show "how a statute was applied in the particular context in which plaintiff acted or proposed to act." *Frye v. City of Kannapolis*, 109 F.Supp.2d 436, 439 (M.D.N.C. 1999).

To dispose of this case, the court need look no further than *Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 693 S.E.2d 673, *disc. review denied*, 364 N.C. 614, 754 S.E.2d 166 (2010). In *Hope*, the plaintiffs asserted similar constitutional challenges to the CON law. The

trial court dismissed the plaintiffs' claims and the Court of Appeals unanimously affirmed the trial court's dismissal. Here, Plaintiffs invite the court to revisit the constitutionality of the CON law on similar grounds, but reach a different conclusion. Similar to *Hope*, however, the instant case should likewise be dismissed.

I. THE CERTIFICATE OF NEED LAW.

North Carolina's CON law was originally enacted in 1971. *See* 1971 N.C. Sess. Laws 1715. In 1973, the law was challenged in *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973). In *Aston Park*, the Supreme Court of North Carolina invalidated the CON law on the basis that it violated the plaintiff's substantive due process rights. *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735. In striking down the law, the Court held that there existed "no reasonable relation between the denial of the right of a person...to construct and operate upon his...own property, with his...own funds, an adequately staffed and equipped hospital and the promotion of the public health." *Id.*

In 1977, the General Assembly re-enacted an amended version of the CON law. Unlike the original law nullified in *Aston Park*, the amended version contained detailed legislative findings of fact that set forth the purpose of the law. These new legislative findings cured "the constitutional infirmity identified in *Aston Park*[,]" thus rendering "the holding in *Aston Park* [] moot." *See Hope*, 203 N.C. App. at 607, 693 S.E.2d at 683; *see also State ex rel. Utilities Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 275, 435 S.E.2d 553, 558 (1993).

Since that time, the General Assembly has gone to great lengths to ensure that a CON is only issued for a new institutional health service in a geographical area that has a need for the service. Under the direction of the North Carolina State Health Coordinating Council ("SHCC"), the Department of Health and Human Services ("the Department") prepares the State Medical

Facilities Plan ("SMFP"). N.C. Gen. Stat. §§ 131E-176(25), -177(1) and (4). The primary objective of the SMFP is to provide individuals, institutions, state and local government agencies, and community leadership with policies and projections of need to guide local planning for specific health care facilities and services. The SMFP, which is approved annually by the Governor, contains the summaries of the supply and utilization of each type of facility or service subject to CON review, as well as the methodologies employed to project the need for each facility or service, if any, in each geographical area.

The current CON law consists of fifteen (15) statutory review criteria with which an applicant must be found conforming before a CON for the proposed project will be issued. N.C. Gen. Stat. § 131E-183(a). In addition, an applicant must also conform to the "performance standards," which are rules adopted by the Department that generally set forth the required current and projected utilization of the particular type of service being proposed by the applicant. N.C. Gen. Stat. § 131E-183(b). If an applicant is found to be nonconforming with any one of the fifteen applicable statutory review criteria or the performance standards, the applicant cannot receive a CON. *Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 549, 659 S.E.2d 456, 466 (2008) ("[e]ach CON application must conform to all applicable review criteria or the CON will not be granted.").

II. PLAINTIFFS LACK STANDING TO BRING THIS CASE.

At the outset, Plaintiffs have failed to establish that they have standing to bring this case and, therefore, Plaintiffs' case should be dismissed. "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v.*

Commercial Courier Express, Inc., 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). "Standing is properly challenged by a 12(b)(1) motion to dismiss, or a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted." *Fairfield Harbour Property Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011).

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Hope*, 203 N.C. App. at 607, 693 S.E.2d at 683 (citing *Prop. Rights Advocacy Grp. v. Town of Long Beach*, 173 N.C. App. 180, 182, 617 S.E.2d 715, 717, *disc. review denied*, 360 N.C. 177, 626 S.E.2d 649 (2005), *aff'd per curiam*, 360 N.C. 474, 628 S.E.2d 768 (2006)). "Standing to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or is likely to suffer, a direct injury as a result of the law's enforcement." *Id.* (citing *Maines v. City of Greensboro*, 300 N.C. 126, 130-31, 265 S.E.2d 155, 158 (1980)). Similarly, when a party challenges a statute's constitutionality on an as applied basis, they must allege facts as to "how a statute was applied in the particular context in which plaintiff acted or proposed to act." *Id.* at 608, 693 S.E.2d at 683 (citing *Frye*, *supra*, 109 F.Supp.2d at 439).

In *Hope*, the plaintiffs alleged that the CON law and the Administrative Procedure Act combined to unconstitutionally deny them access to the courts to challenge the denial of a CON. The Court of Appeals held that because the plaintiffs had not applied for a CON or filed a petition for a contested case hearing, the plaintiffs had not shown how these statutes were "applied in the particular context in which plaintiff[s] acted or proposed to act," and, therefore, the plaintiffs failed to establish that they had standing to challenge the constitutionality of the statutes.

In the instant case, Plaintiffs have not applied for a CON to acquire an MRI scanner. The 2019 SMFP contains a need determination for one (1) fixed MRI scanner in Forsyth County.

Plaintiffs, like all other interested applicants, are free to apply for a CON to acquire a fixed MRI scanner to be located in Forsyth County. However, as in *Hope*, because Plaintiffs have not applied for a CON, they are unable to show how the CON law was "applied in the particular context in which [they] acted or proposed to act." *Frye*, 109 F.Supp.2d at 439. Therefore, Plaintiffs have not established standing to challenge the CON law. *See In re Perkins*, 60 N.C. App. 592, 594, 299 S.E.2d 675, 677 (1983) (finding respondent had no standing to challenge the constitutionality of a statute when he had failed to show that he ha[d] been adversely affected by the...statutes as applied"). Accordingly, Plaintiffs' case should be dismissed.

III. PLAINTIFFS CANNOT SHOW THE CON LAW IS UNCONSTITUTIONAL.

Assuming *arguendo* Plaintiffs have standing to bring this case, each of Plaintiffs' claims fails on the merits. Plaintiffs assert that the CON law, both on its face and as applied, (1) grants a monopoly to certain health care providers in violation of Article I, Section 34 of the North Carolina Constitution; (2) grants to certain health care providers an exclusive emolument in violation of Article I, Section 32 of the North Carolina Constitution; (3) violates Plaintiffs' substantive due process rights in violation of Article I, Section 19 of the North Carolina Constitution; and (4) violates Plaintiffs' right to equal protection of the laws in violation of Article I, Section 19 of the North Carolina Constitution. (Complaint, ¶¶ 173-204). Plaintiffs' claims, however, are unsustainable.

A. The CON law does not violate the Anti-Monopoly Clause of the North Carolina Constitution.

In Count I of their Complaint, Plaintiffs allege that the CON law violates Article I, Section 34 of the North Carolina Constitution. (Complaint, ¶¶ 173-179). Specifically, Plaintiffs allege that the CON law grants certain MRI providers a monopoly by conferring on them a special

privilege, and that the CON law protects them from competition. (Complaint, ¶¶ 175-176). A review of North Carolina case law establishes that Plaintiffs' claims are without merit.

Article I, Section 34 states that: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." The North Carolina Supreme Court has a long history of cases analyzing this section, which is helpful to resolve the issue here. "A monopoly results from ownership or control of so large a portion of the market for a certain commodity that competition is stifled, freedom of commerce is restricted, and control of prices ensues. It denotes an organization or entity so magnified that it suppresses competition and acquires a dominance in the market. The result is public harm through the control of prices of a given commodity." *State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 747-48, 188 S.E.2d 412, 415 (1936).

In *American Motors Sales Corp. v. Peters*, 311 N.C. 311, 317 S.E.2d 351 (1984), the Supreme Court noted that while all monopolies restrain trade, not every restraint of trade leads to a monopoly in a particular market. *Id.* at 316, 317 S.E.2d at 355-56. Following that premise, the Court set forth the distinctive characteristics of a monopoly: (1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted, and (4) the monopolist controls prices. *Id.* at 316, 317 S.E.2d at 356. In conducting its analysis, the Supreme Court went on to state:

> "In order to monopolize, one must control a consumer's access to new goods by being the only reasonably available source of those goods. A consumer must be without reasonable recourse to elude the monopolizer's reach. Logically, then, the market encompasses geographically at least all areas within reasonable proximity of potential customers."

Id. Following this standard, Plaintiffs must show that the general public has access to only one MRI provider, and does not have access to any other MRI provider. Plaintiffs have admitted that

this is not the case as there are several established MRI providers in the area.[1] (Complaint, ¶ 50). Moreover, because there are multiple MRI providers, there is no single operator controlling prices for those services. Plaintiffs have alleged a "statewide" average of MRI prices for North Carolina hospitals (Complaint, ¶ 27), but cannot establish that all persons in Forsyth County, where Plaintiffs wish to establish their imaging center, pay one price and one price only.

Finally, competition is not stifled. As Plaintiffs admit, every year the SMFP contains projections and areas of need, and if there is a need, the SMFP will contain a need determination for additional scanners.[2] (Complaint, ¶¶ 100, 106). And as stated above, there are already multiple MRI providers in the Forsyth County area. Thus, while competition may not be as full and as free as Plaintiffs want, it is by no means eliminated. More than a mere adverse effect on competition must arise before a restraint of trade becomes monopolistic. *American Motor Sales Corp.*, 311 N.C. at 317, 317 S.E.2d at 356.

The North Carolina Supreme Court has held that "where a city grants a nonexclusive right or franchise to another 'person or set of persons,' it is not a grant of a monopoly within the meaning of the general constitutional prohibition against monopolies." *Madison Cablevision, Inc. v. City of Morgantown*, 325 N.C. 634, 654, 386 S.E.2d 200, 212 (1989) (citing *Thrift v. Elizabeth City*, 122 N.C. 31, 30 S.E. 349 (1898)). The same logic applies here. The State, via the Department and the CON law, has awarded a nonexclusive right or franchise to various MRI providers in the state. There are multiple MRI providers in Forsyth County alone and the Department may

[1] As of the date of the filing of Plaintiff's Complaint, there were seventeen (17) fixed MRI scanners in Forsyth County that were owned by three (3) different providers. There were also eight (8) mobile MRI scanners—owned by six (6) different providers—that provided MRI services in Forsyth County. *See* 2018 SMFP, pp. 150-51.

[2] The 2019 SMFP contains a need determination for one (1) fixed MRI scanner in Forsyth County. *See* 2019 SMFP, p. 172.

determine that more MRI scanners are needed. Under these facts, there are no legitimate arguments that the CON law violates Article I, Section 34 of the North Carolina Constitution. Therefore, Count I of Plaintiffs' Complaint should be dismissed.

B. The CON law does not violate the Exclusive Emoluments Clause of the North Carolina Constitution.

In Count II of their Complaint, Plaintiffs allege that the CON law violates Article I, Section 32 of the North Carolina Constitution. (Complaint, ¶¶ 180-188). Plaintiffs' allegations with regard to this section are virtually identical to the arguments contained in Count I, specifically that the CON law grants certain MRI providers exclusive privilege to provide MRI services, and that the CON law protects them from competition. (Complaint, ¶¶ 182-183). A review of North Carolina case law establishes that Plaintiffs' claims are without merit.

Article I, Section 32 states that: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." North Carolina case law, however, establishes that not every classification which favors a particular group of persons is an "exclusive or separate emolument or privilege" within the meaning of the constitutional prohibition. *Lowe v. Tarble*, 312 N.C. 467, 470, 323 S.E.2d 19, 21 (1984).

"A statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, section 32, if: (1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest." *Town of Emerald Isle by and through Smith v. State*, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987); *see also Lowe, supra*, 312 N.C. at 470-471, 323 S.E.2d at 21-22.

Thus, to the extent that an argument could be made that the CON law creates a group of MRI providers who enjoy a privilege, it still does not rise to the level to violate Article I, Section 32. First, MRI providers, though paid, provide a service for the public. Second, and more importantly, North Carolina courts have determined that the state legislature intended to promote the general welfare rather than benefit the individual by granting these CONs to this group. "The ultimate purpose in enacting the CON law was to protect the health and welfare of North Carolina citizens by providing affordable access to necessary health care." *Hope*, *supra*, 203 N.C. App. at 603, 693 S.E.2d at 680.

Finally, the North Carolina Supreme Court has stated that the purpose of Article I, Section 32 was to prevent the community from surrendering its power to another person or set of persons by grant of exclusive or separate emoluments or privileges. Thus, it is not retention of powers—but alienation of powers—that is prohibited. *Madison Cablevision, Inc.*, *supra*, 325 N.C. at 655, 386 S.E.2d at 212. Here, the Legislature, through the CON law and the SMFP, is retaining its powers, not alienating them. Under these facts, there are no legitimate arguments that the CON law violates Article I, Section 32 of the North Carolina Constitution. Therefore, Count II of Plaintiffs' Complaint should be dismissed.

C. The CON law does not violate Plaintiffs' substantive due process rights.

In Count III of their Complaint, Plaintiffs assert that the requirement that they must first obtain a CON to acquire an MRI scanner violates their substantive due process rights. (Complaint, ¶¶ 189-196). Specifically, Plaintiffs argue that the CON law violates the "law of the land" clause of the North Carolina Constitution and has neither a "real," "substantial," nor "rational relationship to protecting the health or safety of North Carolina patients." (Complaint, ¶ 194). As shown below, Plaintiffs' argument lacks merit.

Article I, Section 19 of the North Carolina Constitution provides, "No person shall be...deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. "The law of the land...serves to limit the state's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare." *Poor Richard's Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988).

Where the right allegedly infringed upon is not a fundamental right, the rational basis test applies. *See Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 357-358, 542 S.E.2d 668, 673, *disc. review denied*, 353 N.C. 450, 548 S.E.2d 524 (2001). The rational basis standard of review applies to the regulation of economic enterprises and has been applied to claims relating to the application of the CON law. *See Good Hope Hosp., Inc. v. N.C. Dep't of Health and Human Services*, 174 N.C. App. 266, 274-75, 620 S.E.2d 873, 881 (2005) (applying rational basis test to claim by plaintiffs alleging DHHS's failure to exempt proposed facility from CON law violated the constitution). Under the rational basis test, the law must be upheld "if it bears some rational relationship to a conceivable legitimate interest of government." *Clark*, 142 N.C. App. at 358, 542 S.E.2d at 674 (internal citations omitted). "Statutes subjected to this level of scrutiny come before the [c]ourt with a presumption of validity." *Id.*

In applying this standard, it is clear that the CON law does not violate Plaintiffs' substantive due process rights. The General Assembly's primary purpose in enacting the CON law was to protect the health and general welfare of the citizens of North Carolina. N.C. Gen. Stat. § 131E-175(7) ("[T]he general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria."). This purpose is clearly a legitimate governmental interest. *Hope*,

203 N.C. App. at 603, 693 S.E.2d at 681; *see also Affordable Care, Inc. v. N.C. State Bd. of Dental Examiners*, 153 N.C. App. 527, 571 S.E.2d 52 (2002). Therefore, in enacting the CON law, the General Assembly has satisfied the first prong of the rational basis test.

In order to achieve its goal of protecting the health and general welfare of the citizens of North Carolina, the General Assembly has defined certain categories of health care services as "new institutional health services." N.C. Gen. Stat. § 131E-176(16). In addition, certain types of medical equipment, including MRI scanners, are also defined as new institutional health services. N.C. Gen. Stat. § 131E-176(16)(f1)(7). To offer or develop a new institutional health service, a person must first obtain a CON from the Department. N.C. Gen. Stat. § 131E-178. At the outset, the new institutional health service must be consistent with the need determinations established in the SMFP. N.C. Gen. Stat. § 131E-183(a)(1).

The General Assembly has concluded that the determination of a "need" for various health services is required because (1) the effects of free market competition is limited in health care such that government regulation is necessary to control costs, utilization, and distribution of new health service facilities; (2) the increasing costs of health care services threatens the health and welfare of the citizens of North Carolina; (3) "geographical maldistribution" and, thus, "less than equal access" of health care facilities and services would result if left to the market place; and (4) the proliferation of unnecessary health services would result in costly duplication, which, in turn, would place "an enormous economic burden on the public." N.C. Gen. Stat. §§ 131E-175(1)-(3), (4), (6)-(7).

It is rational that the General Assembly believes its interest in ensuring quality, affordable health care services to the citizens of North Carolina will be achieved by allowing the approval of new institutional health services in areas only upon a determination that the need for such services

exists in those areas. *Hope*, 203 N.C. App. at 605, 693 S.E.2d at 681. This forms the basis of the fundamental premise of the CON law. Therefore, in enacting the CON law, the General Assembly satisfies the second prong of the rational basis test. Plaintiffs' argument that the purpose of the CON requirement as it relates to MRI scanners is to protect existing providers from competition is simply unfounded. (Complaint, ¶¶ 3, 192). Quite the contrary, an applicant for a CON must "demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed." N.C. Gen. Stat. § 131E-183(18a).

Plaintiffs have failed to rebut the presumption of the constitutionality of the CON law. Given that the General Assembly has a legitimate interest in protecting the health and general welfare of the citizens of North Carolina, its enactment of the CON law to ensure that equal access to quality, affordable health care services will be delivered by only allowing the approval of new institutional health services in areas where the need for such services exists is rationally related to said interest. As such, the CON law—as it pertains to MRI scanners and otherwise—does not violate Plaintiffs' substantive due process rights. Accordingly, here, as in *Hope*, Count III of Plaintiffs' claim should be dismissed.

D. The CON law does not violate Plaintiffs' equal protection rights.

In Count IV of their Complaint, Plaintiffs contend that the CON law violates their equal protection rights. (Complaint, ¶¶ 197-204). Specifically, Plaintiffs argue that the CON law "draws an arbitrary and irrational distinction between providers who already own an MRI scanner...and providers who do not." (Complaint, ¶ 199). Again, Plaintiffs' argument is without merit.

Article I, Section 19 of the North Carolina Constitution provides, "No person shall be denied the equal protection of the laws." N.C. Const. art. I, § 19. To state an equal protection

claim, plaintiffs must allege that (1) they have been treated differently from others similarly situated and (2) the unequal treatment is the result of intentional or purposeful discrimination. *See Good Hope Hosp., Inc.*, 174 N.C. App. at 274, 620 S.E.2d at 880 (citing *Veney v. Wyche*, 293 F.3d 726, 730-31 (4th Cir. 2002)). "To state an equal protection claim, [plaintiffs] must plead sufficient facts to satisfy each requirement." *Id.* at 274, 620 S.E.2d at 880-81.

As previously stated, where the right allegedly infringed upon is not a fundamental right, the rational basis test applies. *See Clark, supra*, 142 N.C. App. at 357-358, 542 S.E.2d at 673. The rational basis standard of review has been applied to claims—as in the instant case—relating to the application of the CON law. *Good Hope Hosp., Inc.*, 174 N.C. App. at 274-75, 620 S.E.2d at 881. Under the rational basis test, the law must be upheld "if it bears some rational relationship to a conceivable legitimate interest of government." *Clark*, 142 N.C. App. at 358, 542 S.E.2d at 674 (internal citations omitted). "Statutes subjected to this level of scrutiny come before the [c]ourt with a presumption of validity." *Id.*

It has already been established that the General Assembly's interest in protecting the health and general welfare of the citizens of North Carolina is a legitimate governmental interest. (Sec. V, *supra*, p. 12). In the instant case, Plaintiffs argue that the CON law treats providers that rent an MRI scanner differently than those who own an MRI scanner. (Complaint, ¶ 199). However, Plaintiffs' argument is premised upon a misapplication of the CON law.

The CON law prohibits persons from engaging in the following activities without first obtaining a CON: (1) offering or developing a new institutional health service; (2) making an acquisition by donation, lease, transfer or comparable arrangement if the acquisition would have been a new institutional health service if it had been made by purchase; or (3) incurring an obligation for a capital expenditure which is a new institutional health service. N.C. Gen. Stat. §§

131E-178(a)-(c). Since an MRI scanner is defined as a new institutional health service, *see* N.C. Gen. Stat. § 131E-176(16)(f1)(7), the acquisition of an MRI scanner is subject to the CON law. First, N.C. Gen. Stat. § 131E-178 does not address the rental of an MRI scanner and, therefore, does not draw a distinction between persons who contract with mobile MRI providers to rent scanners and persons who own MRI scanners. Second, and more importantly, the CON law applies equally to every person who seeks to acquire an MRI scanner. Any person who seeks to offer, develop, acquire, or incur a capital expenditure for an MRI scanner must first obtain a CON unless its proposal is exempt from CON review. *See* N.C. Gen. Stat. § 131E-184. The CON law does not treat Plaintiffs differently than any other person who seeks to acquire an MRI scanner. Therefore, Plaintiffs' argument that the CON law violates their equal protection rights fails as a matter of law.

Here again, Plaintiffs have failed to rebut the presumption of the constitutionality of the CON law. Given that the General Assembly has a legitimate interest in protecting the health and general welfare of the citizens of North Carolina, its enactment of the CON law to ensure that equal access to quality, affordable health care services will be delivered by only allowing the approval of new institutional health services in areas where the need for such services exists passes constitutional muster. As such, the CON law—as it pertains to MRI scanners and otherwise—does not violate Plaintiffs' equal protection rights. Accordingly, here, as in *Hope*, Count IV of Plaintiffs' claim should be dismissed.

CONCLUSION

Based on the foregoing, Plaintiffs' have failed to show that they have standing to bring this case. In addition, Plaintiffs' facial and "as applied" challenges to North Carolina's CON law fail as a matter of law. Accordingly, Plaintiffs' case should be dismissed in its entirety.

This the 9th day of August, 2019.

JOSHUA H. STEIN
ATTORNEY GENERAL

Derek L. Hunter
Assistant Attorney General
N.C. State Bar No. 36835
(919) 716-6886 (Phone)
(919) 716-6756 (Fax)
dhunter@ncdoj.gov

John H. Schaeffer
Assistant Attorney General
N.C. State Bar No. 51965
(919) 716-6843 (Phone)
(919) 716-6758 (Fax)
jschaeffer@ncdoj.gov

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Counsel for Defendants North Carolina Department of Health and Human Services, Governor Roy Cooper, Secretary Mandy Cohen, Senator Phil Berger, and Representative Tim Moore

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** was duly served upon the other parties by depositing a copy of the same in the United States Mail, first-class postage prepaid, and addressed as follows:

John E. Branch, III, Esquire
SHANAHAN MCDOUGAL, PLLC
128 E. Hargett Street, Suite 300
Raleigh, North Carolina 27601

Joshua A. Windham, Esquire
Renée D. Flaherty, Esquire
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
Counsel for Plaintiffs Gajendra Singh, M.D. and Forsyth Imaging Center, LLC

Gary S. Qualls, Esquire
Susan K. Hackney, Esquire
Steven G. Pine, Esquire
K&L GATES, LLP
430 Davis Drive, Suite 400
Morrisville, North Carolina 27560
Counsel for Amici The Charlotte-Mecklenburg Hospital Authority d/b/a Atrium Health, University Health Systems of Eastern Carolina, Inc. d/b/a Vidant Health, and Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System

Marcus C. Hewitt, Esquire
Troy D. Shelton, Esquire
FOX ROTHSCHILD, LLP
434 Fayetteville Street, Suite 2800
Raleigh, North Carolina 27601
Counsel for Amicus Bio-Medical Applications of North Carolina, Inc.

S. Todd Hemphill, Esquire
Kenneth L. Burgess, Esquire
POYNER SPRUILL, LLP
Post Office Box 1801
Raleigh, North Carolina 27602-1801
Counsel for Amici NCHA, Inc. d/b/a The North Carolina Healthcare Association, The North Carolina Healthcare Facilities Association, The NC Chapter of the American College of Radiology, and the North Carolina Senior Living Association

Robb A. Leandro, Esquire
Matthew W. Wolfe, Esquire
PARKER POE ADAMS & BERNSTEIN, LLP
301 Fayetteville Street, Suite 1400
Raleigh, North Carolina 27601
Counsel for Amici The Association for Home and Hospice Care of North Carolina and the North Carolina Ambulatory Surgical Center Association

This the 9th day of August, 2019.

Derek L. Hunter
Assistant Attorney General