STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9498

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.

PLAINTIFFS' RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

This case is a constitutional challenge to North Carolina's certificate-of-need (CON) law, which grants a monopoly on new medical services, facilities, and equipment to certain providers. Plaintiffs Dr. Gajendra Singh and his business, Forsyth Imaging Center, LLC, wish to purchase a fixed magnetic resonance imaging (MRI) scanner to provide affordable MRI scans for patients in need. But the CON law forbids Plaintiffs from acquiring an MRI scanner—not because they are unable to safely operate it—but because several nearby providers already own one. Plaintiffs seek declaratory and injunctive relief against Defendants' enforcement of the CON law.

Plaintiffs bring four claims. First, Plaintiffs allege that the CON law violates their substantive-due-process right to provide safe, affordable medical care because it fails to protect (and more, actually *harms*) North Carolina patients. Compl. ¶¶ 189–96. Second, Plaintiffs allege that the CON law grants certain private medical providers an unconstitutional monopoly. Compl. ¶¶ 173–79. Third, Plaintiffs allege that the CON law grants those same providers unconstitutional special privileges. Compl. ¶¶ 180–88. Last, Plaintiffs allege that the CON law violates their equal-protection rights by drawing an arbitrary distinction between providers who already own an MRI scanner and providers who do not. Compl. ¶¶ 197–204.

These claims are not only colorable—which is all they must be to survive a motion to dismiss—they are meritorious. After all, the North Carolina Supreme Court struck down a previous version of the CON law under the very same constitutional provisions and for the same reasons that Plaintiffs now raise. *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 550–51, 193 S.E.2d 729, 735 (1973).

Still, Defendants move to dismiss because they claim this case is not justiciable and Plaintiffs will lose on the merits. Defendants first argue that Plaintiffs should have applied for a

CON before filing this case. But Plaintiffs need not suffer through an unconstitutional process—and sustain the very injury they seek to avoid—just to challenge that process. Defendants next argue that this case is controlled by the Court of Appeals' decision in *Hope—A Women's Cancer Center, P.A. v. State*, 203 N.C. App. 593, 693 S.E.2d 673 (2010). But three of Plaintiffs' four claims were never raised in *Hope*, and the one similar claim is distinguishable by the allegations in Plaintiffs' Complaint. Simply put, *Hope* is inapposite and *Aston Park* controls.

Of course, this Court does not need to decide the merits to hold that Plaintiffs' claims should go forward. At this early stage, it is enough that the law and the plausible allegations in Plaintiffs' Complaint support their request for relief—as here they do. Accordingly, this case should proceed to the merits and Defendants' motion to dismiss must be denied.

FACTS AND PROCEDURAL HISTORY

Plaintiffs have alleged that North Carolina's CON law prevents them from providing safe, affordable MRI scans to patients in need. Plaintiffs have also alleged that this lawsuit is the only way to vindicate their right to provide those scans; that the CON law fails to protect the health and safety of North Carolina patients; and that the CON law's factual findings are false. For these reasons, Plaintiffs filed this lawsuit challenging the CON law both facially and as applied to them.

I. THE CON LAW PREVENTS PLAINTIFFS FROM PROVIDING SAFE, AFFORDABLE MRI SCANS TO PATIENTS IN NEED.

Dr. Gajendra Singh is a licensed surgeon and the founder of Forsyth Imaging Center, LLC (the Center). Compl. ¶¶ 1, 8. Dr. Singh founded the Center to provide affordable imaging services at transparent prices for patients who need them. Compl. ¶¶ 1, 8, 9. So far, Dr. Singh has managed to acquire most of the diagnostic equipment necessary to provide these much-needed

scans, but the CON law prevents him from purchasing what is often the most crucial and expensive tool patients need: an MRI scanner. Compl. ¶¶ 1, 10.

When Plaintiffs filed this case, the Center was providing scans on a rented mobile MRI scanner two days per week.[1] Compl. ¶¶ 11, 31, 46. Patients who were able to visit the Center during this two-day window obtained "safe, quality, affordable MRI scans to which they would not otherwise have had access." Compl. ¶ 144. But Plaintiffs were forced to turn away numerous patients who—though they needed access to affordable MRI scans—were unable to schedule an appointment during the Center's limited time with the mobile scanner. Compl. ¶ 47. This artificial constraint on Plaintiffs' ability to offer MRI scans has seriously curtailed the Center's ability to fulfill its mission and recover costs. Compl. ¶¶ 48–49.

If Plaintiffs were legally permitted to do so, Plaintiffs would immediately purchase a fixed MRI scanner and start providing scans full-time. Compl. ¶¶ 10, 50, 133. Dr. Singh could purchase a fixed scanner—which he would own outright and could use for years—for less than it would cost him to rent a mobile scanner for a single year. Compl. ¶ 153. Owning a fixed MRI scanner would allow the Center to offer scans seven days per week—including to patients the Center had to turn away—and to continue keeping the Center's prices as low as possible for patients. Compl. ¶¶ 38, 49.

But the CON law makes this illegal. North Carolina bans licensed medical providers from purchasing an MRI scanner unless they first obtain a "certificate of need" from the state. Compl. ¶¶ 2, 83–90. Every year, state planners in Raleigh project how many new MRI scanners are "needed" in "service areas" throughout the state based on factors like the number of scanners

[1] Plaintiffs have since stopped renting the mobile scanner because the high costs were unsustainable. This development (which is not reflected in the Complaint) has not affected Plaintiffs' desire to purchase an MRI scanner. *See* Compl. ¶¶ 133–34.

already operating in each area and the number of procedures those scanners performed. Compl. ¶¶ 2, 98–107. Because the planners had not projected a "need" for a new MRI scanner in Forsyth County when this case was filed, Dr. Singh was banned from purchasing one. Compl. ¶¶ 136–39, 163–64. Indeed, Dr. Singh even met with representatives from the North Carolina Department of Health and Human Services before filing this case, who confirmed that he was unable to apply in 2018. Compl. ¶ 163.

II. THIS LAWSUIT IS THE ONLY WAY TO VINDICATE PLAINTIFFS' RIGHTS.

Defendants are correct that—for the first time in a decade—the 2019 State Medical Facilities Plan (SMFP) briefly[2] reflected a need for a new MRI scanner in Forsyth County. *See* Defs.' Br. 6. But Plaintiffs have specifically alleged that the CON process cannot grant them the relief they seek. Compl. ¶¶ 169–172.

First, Plaintiffs allege that the CON requirement is unconstitutional in several respects. Compl. ¶¶ 173–204. Thus, any process that involves applying for a CON would require Plaintiffs to concede the very right they filed this case to vindicate: "the freedom to purchase a fixed MRI scanner *today*, not merely the ability to one day file an enormously expensive application for permission to do so." Compl. ¶ 171.

Moreover, as detailed in the Complaint, the CON application process is prohibitively burdensome. Compl. ¶¶ 91–125, 167–69. The total cost of pursuing an MRI-CON application to completion often exceeds $400,000, with no guarantee (and for small providers like Dr. Singh, little hope) that the applicant will obtain a CON. Compl. ¶¶ 125, 169. But as Plaintiffs have

[2] Plaintiffs note that the proposed 2020 SMFP (published in July 2019) again reflects "no need" for a new MRI scanner in Forsyth County. *See* Pls.' Ex. A at 424 (Proposed 2020 State Medical Facilities Plan).

alleged, "Dr. Singh cannot afford to spend half a million dollars—which is more than he has spent on the entire Center—simply *applying* for a CON." Compl. ¶ 169; *accord* Compl. ¶ 167.

This lawsuit therefore provides Plaintiffs' only realistic option at vindicating their right to provide safe, affordable MRI scans to the many patients in Forsyth County who need their services. Compl. ¶ 172.

III. THE CON LAW DOES NOT PROTECT THE HEALTH OR SAFETY OF NORTH CAROLINA PATIENTS AND THE LAW'S FACTUAL FINDINGS ARE FALSE.

The CON law bans licensed medical providers from offering or developing certain new medical services, equipment, or facilities (called "institutional health services") without first obtaining a CON from the North Carolina Department of Health and Human Services. N.C. Gen. Stat. § 131E-178(a); Compl. ¶ 52. Plaintiffs are not the first medical providers in North Carolina to challenge this sort of ban. In 1973, a hospital challenged the state's previous CON law under Article I, Sections 19, 32, and 34 of the North Carolina Constitution. *Aston Park*, 282 N.C. at 546, 193 S.E.2d at 733; Compl. ¶ 59. The North Carolina Supreme Court found that the CON law, which banned new medical facilities allegedly to promote the public health, granted an unconstitutional monopoly and special privileges to established providers and failed to achieve its purported ends. *Id.* at 549–52, 193 S.E.2d at 734–36; Compl. ¶¶ 61–62. But *Aston Park* would not mark the end of North Carolina's CON law.

Around the time *Aston Park* was decided, the U.S. Congress was grappling with a related policy problem: Because Medicare and Medicaid reimbursed medical providers for services based on actual expenditures, providers could recoup funds even when those expenditures were inefficient, resulting in price inflation. Compl. ¶ 63. Congress saw CON requirements as a potential means of holding providers accountable for inefficient expenditures by requiring them to demonstrate that new medical services and capital expenditures were "needed" by the

community. Compl. ¶ 64. The American Hospital Association seized on this opportunity by lobbying Congress to pass a law requiring states to enact CON requirements. The result was the National Health Planning and Resources Development Act of 1974, which required states to adopt CON laws in order to receive federal health subsidies. Compl. ¶ 65.

In 1978—despite the Supreme Court's holding in *Aston Park*—North Carolina re-enacted a substantially identical CON regime in response to the federal mandate. *See* N.C. Gen. Stat. §§ 131E-175, *et seq.*; Compl. ¶ 66. The chief update to the 1978 CON law was a series of legislative "findings of fact" which claimed, among other things, that the law was enacted in response to the same reimbursement-related concern that inspired the federal mandate and that a CON requirement was "necessary" to control prices and promote access to care. N.C. Gen. Stat. § 131E-175; Compl. ¶ 67.

Whatever their truth in 1978, these "findings of fact" are false today. Compl. ¶¶ 68–72. In 1986, Congress repealed the federal CON mandate after concluding that CON laws fail to control costs while imposing significant anti-competitive barriers. Compl. ¶¶ 71, 73–74. Since then, the federal government and numerous studies have consistently reaffirmed Congress's conclusion that CON laws raise costs, stifle competition, and harm patients. Compl. ¶¶ 75–79. Unsurprisingly, the federal government has never reauthorized CON laws, and 16 states have actually eliminated their CON regimes with no evidence of any negative effects on patients. Compl. ¶ 80. Despite this, local lobbying efforts have kept some version of these CON requirements in place in 34 states plus the District of Columbia. This is true of North Carolina as well, where the North Carolina Healthcare Association (one of Defendants' *Amici* here) has

lobbied for decades[3] to keep the state's outdated CON regime in place. Compl. ¶ 81. Today, North Carolina's CON law regulates 25 different medical services and ranks among the most restrictive regimes in the country. Compl. ¶ 82.

IV. PLAINTIFFS FILED THIS LAWSUIT CHALLENGING THE CONSTITUTIONALITY OF THE CON LAW AND DEFENDANTS MOVED TO DISMISS.

On July 30, 2018, Plaintiffs filed this lawsuit challenging the constitutionality of the CON law. Compl. ¶¶ 1–5. Plaintiffs allege that the CON law violates their right to be free from unconstitutional monopolies and special privileges, and their rights to substantive due process and equal protection, under Article I, Sections 19, 32, and 34 of the North Carolina Constitution. Compl. ¶¶ 173–204. For each claim, Plaintiffs allege that the CON law is unconstitutional both on its face and as applied to them. Compl. ¶¶ 178, 187, 195, 203.

On October 4, 2018, Defendants moved to dismiss under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure on the ground that Plaintiffs lack standing, have failed to exhaust administrative remedies, and have failed to state a claim. Defs.' Mot. Dismiss 1–2. While facial constitutional challenges to state statutes must ultimately be resolved by a three-judge panel of the Wake County Superior Court, this Court retains jurisdiction over Plaintiffs' as-applied claims and may resolve the entirety of Defendants' motion to dismiss. *See* Order Den. Mot. to Bifurcate 2. Below, Plaintiffs explain why Defendants' motion to dismiss must be denied.[4]

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[3] The North Carolina Healthcare Association even filed a brief (under its former name) in support of the CON law struck down in *Aston Park*. Compl. ¶ 60 & n.1.

[4] This Court has also granted permission for several groups of *amici curiae* to file briefs regarding the constitutionality of the CON law, including briefs in support or opposition to Defendants' motion to dismiss. Accordingly, Plaintiffs will also respond to Defendants' *Amici* to the extent they raise arguments unique from those offered by Defendants.

LEGAL STANDARDS

"Jurisdiction in North Carolina depends on the existence of a justiciable case or controversy." *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001). When considering motions to dismiss under North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6), the allegations of the complaint are taken as true. *Seguro-Suarez ex rel. Connette v. Key Risk Ins. Co.*, 819 S.E.2d 741, 747 (N.C. Ct. App. 2018).

Dismissal under Rule 12(b)(6) is not appropriate unless "the complaint fail[s] to state a claim upon which relief can be granted." *Krawiec v. Manly*, 370 N.C. 602, 606, 811 S.E.2d 542, 546 (2018). "[A] complaint fails [to state a claim] when: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Id.*

This is a "low bar." *Wray v. City of Greensboro*, 370 N.C. 41, 50, 802 S.E.2d 894, 900 (2017). Complaints are to be "liberally construed, and [a] trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008). So construed, "few [complaints] fail to survive a motion to dismiss." *Wray*, 370 N.C. at 46, 802 S.E.2d at 898.

ARGUMENT

Defendants' motion to dismiss must fail. First, this case is justiciable. Plaintiffs do not need to apply for a CON in order to bring a constitutional challenge to the law. Second, it is not "beyond doubt" that Plaintiffs can prove "no set of facts" to support their claims. *Cooper*, 362

N.C. at 444; 666 S.E.2d at 116. Plaintiffs bring the same claims that prevailed in *Aston Park*, and like those claims, Plaintiffs' claims should be resolved on their merits.

I. THIS CASE IS JUSTICIABLE.

Defendants' arguments under Rule 12(b)(1) all rest on the same mistaken premise: that Plaintiffs must apply for a CON and be rejected before they can challenge the CON law. This is incorrect. Plaintiffs have standing, they need not exhaust administrative remedies, and their claims are ripe.

A. Plaintiffs Have Standing.

Defendants argue that Plaintiffs lack standing to challenge the CON law. Defs.' Br. 5–7. This argument fails because Plaintiffs are directly affected by the CON law and there is an actual controversy between the parties about whether the law is constitutional. This is sufficient for standing under North Carolina law.

First, Plaintiffs' constitutional rights are "affected" by the CON law. N.C. Gen. Stat. § 1-254; *see Town of Emerald Isle ex rel. Smith v. State*, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987) (recognizing Declaratory Judgment Act as appropriate vehicle for challenging statutes alleged to violate constitutional rights), *declined to follow on other grounds by Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 184–85, 357 S.E.2d 415, 426 (2003). Plaintiffs seek to acquire an MRI scanner immediately "to provide safe, quality, affordable MRI scans for patients who need them." Compl. ¶ 1. The CON law prevents Plaintiffs from doing so, both by flatly banning them from acquiring an MRI scanner unless the state first projects a "need" for one and by subjecting them to a prohibitively expensive and protracted application process that they cannot afford. Compl. ¶¶ 2, 133–72. In short, the CON law "affects" Plaintiffs because it is the

only thing preventing them from acquiring an MRI scanner and providing quality care to patients who need it. Compl. ¶¶ 2–3, 49–50, 133–34.

Second, Plaintiffs have shown that there is a controversy. Under the Declaratory Judgment Act, a plaintiff has no burden to prove that an "actual wrong [has] been committed." *Emerald Isle*, 320 N.C. at 646, 360 S.E.2d at 760 (citations omitted). Rather, a plaintiff need only show that there is "no uncertainty that the loss will occur or that the asserted right will be invaded." *Id.* (citation omitted). That standard is met here. Plaintiffs are subject to the CON law and Defendants are bound to enforce it. *See* Compl. ¶¶ 133–72 (explaining how the law applies to Plaintiffs), 163 (alleging that Dr. Singh met with representatives from the North Carolina Department of Health and Human Services to confirm same). But Plaintiffs claim that law is unconstitutional and Defendants disagree. *Compare* Compl. ¶¶ 173–204 (setting forth constitutional claims), *with* Defs.' Br. 7–16 (disputing claims). This is sufficient for standing. *Cf. Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 213, 443 S.E.2d 716, 724 (1994) (hospitals subject to new regulation had standing to challenge its validity before regulation actually took effect).

Defendants do not contest any of this. Instead, they argue that Plaintiffs do not have standing because the plaintiffs in *Hope* did not have standing. Defs.' Br. 6–7. But Defendants mischaracterize *Hope*. The plaintiffs in *Hope* brought two types of claims: a procedural claim under Article I, Section 18 "that the procedures which the General Assembly has provided for review of CON decisions are inadequate," and a substantive claim under Article I, Section 19. 203 N.C. App. at 602, 608, 693 S.E.2d at 679–80, 683. The Court of Appeals held that the plaintiffs lacked standing to bring their procedural claim because they had not sought review of any particular CON determination, *id.* at 608, 693 S.E.2d at 683, but the court resolved their

substantive claim on the merits, *id.* at 602–03, 693 S.E.2d at 679–80. Since Plaintiffs here bring only substantive constitutional claims, this Court likewise should resolve their claims on the merits.

B. Plaintiffs Need Not Exhaust Administrative Remedies.

Defendants' *Amici* contend that Plaintiffs have failed to exhaust administrative remedies. Defs.' *Amici*'s Br. 10–11. This argument also fails. Exhaustion is not required where the only existing remedies would be "futile" or "inadequate." *Abrons Family Practice & Urgent Care, PA v. N.C. Dep't of Health & Human Servs.*, 370 N.C. 443, 451, 810 S.E.2d 224, 231 (2018). Here, Plaintiffs seek a declaration that the CON law is unconstitutional. North Carolina courts have long held that exhaustion is futile in such cases because administrative agencies have no authority to declare state statutes unconstitutional. Moreover, Plaintiffs have alleged that the only other relevant procedure, applying for a CON and appealing any denial, would be inadequate because (among other things) that process imposes many of the harms Plaintiffs seek to avoid. Because Plaintiffs' only existing "remedy" would be futile or inadequate, exhaustion is not required and Defendants' motion to dismiss must be denied.

1. Exhaustion is not required because asking Defendants to declare the CON law unconstitutional would be futile.

Plaintiffs are not required to exhaust "futile" procedures. *Abrons*, 370 N.C. at 451, 810 S.E.2d at 231. It is "well-settled . . . that a statute's constitutionality shall be determined by the judiciary, not an administrative [agency]." *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998). Thus, North Carolina courts have long recognized the futility of administrative remedies in constitutional challenges to state statutes. *See, e.g.*, *Swan Beach Corolla, LLC v. Cty. of Currituck*, 234 N.C. App. 617, 623, 760 S.E.2d 302, 308 (2014) (noting that administrative agencies "do not have the authority to adjudicate constitutional claims");

Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 134 N.C. App. 217, 224, 517 S.E.2d 406, 412 (1999) ("Where an aggrieved party challenges the constitutionality of a regulation or statute, administrative remedies are deemed to be inadequate and exhaustion thereof is not required."). That principle applies here. *See Hosp. Grp. of W. N.C., Inc. v. N.C. Dep't of Human Res.*, 76 N.C. App. 265, 268, 332 S.E.2d 748, 750–51 (1985) (declining to determine constitutionality of the CON law in administrative appeal because "a party who seeks to challenge the constitutionality of [the CON law] must bring an action pursuant to . . . the Declaratory Judgment Act").

2. *Exhaustion is also not required because the CON application process cannot provide the relief Plaintiffs seek.*

Nor are Plaintiffs required to exhaust "inadequate" remedies. *Abrons*, 370 N.C. at 451, 810 S.E.2d at 231; *see also Charlotte Mecklenburg Hosp. Auth.*, 336 N.C. at 209, 443 S.E.2d at 722 (administrative remedies must be "effective"). Here, Plaintiffs have alleged that Defendants' proposed "remedy"—applying for a CON and appealing any denial—would be inadequate in two respects.

First, Plaintiffs correctly alleged that no CON was even available when this case was filed. By statute, the State Medical Facilities Plan imposes a "determinative limitation" on the provision of CON-regulated services. N.C. Gen. Stat. § 131E-183(a)(1); *see also* Compl. ¶ 103 ("[A]n applicant . . . will . . . not qualify for a CON if the SMFP does not project a need for their services."). In 2018, the SMFP reflected "no need" for a new fixed MRI scanner in Forsyth County. Compl. ¶ 136. In fact, the SMFP had not projected a "need" for a new scanner there since 2010. Compl. ¶ 170. Thus, Plaintiffs had no viable way to apply for a CON before filing suit. Compl. ¶ 164. The Proposed 2020 SMFP also projects no need for an MRI scanner in Forsyth County. *See* Ex. A at 424.

Second, Plaintiffs alleged that applying for a CON would require conceding the very right they filed this case to vindicate: "the freedom to purchase a fixed MRI scanner today" *without* having "to file an enormously expensive application for permission to do so." Compl. ¶ 171 (emphasis omitted). Indeed, Plaintiffs' Complaint attacks the CON requirement as unconstitutional in several respects. Compl. ¶¶ 171–204. Requiring Plaintiffs to "spend almost half a million dollars and multiple years" applying for a CON just to challenge that requirement would be inadequate. Compl. ¶ 171; *cf. Charlotte Mecklenburg Hosp. Auth.*, 336 N.C. at 209, 443 S.E.2d at 722 (hospitals were not required to submit an application for fee approval to challenge the fee rule itself).

In short, there is no "effective" remedy for Plaintiffs to exhaust and Defendants' motion to dismiss must therefore be denied.[5]

C. Plaintiffs' Claims Are Ripe.

Plaintiffs' claims are ripe for adjudication. In arguing otherwise, Defendants' *Amici* cite no state law and recapitulate their unconvincing exhaustion argument. *See* Defs.' *Amici*'s Br. 11–12. In North Carolina, "[a]n action for declaratory judgment is ripe for adjudication when there is an actual or real existing controversy between parties having adverse interests in the matter in

[5] Defendants' *Amici*'s reliance on *Good Hope Hospital, Inc. v. North Carolina Department of Health & Human Services*, is misplaced. *See* Defs.' *Amici*'s Br. 11. There, a hospital brought a DJA action claiming that an agency decision denying the hospital an exemption from the CON law violated its federal procedural-due-process and equal-protection rights. *Good Hope*, 174 N.C. App. 266, 268–70, 620 S.E.2d 873, 877–88 (2005). The court dismissed the procedural-due-process claim because the hospital failed to exhaust an exclusive administrative procedure for appealing the decision. *Id.* at 271, 620 S.E.2d at 879. But the court went on to address the equal-protection claim because substantive constitutional claims are justiciable "regardless of whether administrative remedies have been exhausted." *Id.* at 272, 620 S.E.2d at 879. Here, all of Plaintiffs' claims are substantive and therefore do not require exhaustion. Moreover, Plaintiffs are not contesting any particular CON denial or exemption, which means they have no exclusive administrative remedy to pursue.

dispute." *S & M Brands, Inc. v. Stein*, No. 17 CVS 6894, 2018 WL 1631591, at *8 (N.C. Super. Apr. 2, 2018) (unpublished) (quotes omitted). Plaintiffs have already explained at *supra* 10 why this case presents an actual controversy.

Still, Defendants' *Amici* argue that Plaintiffs' claims are "speculative" because they have not sought adjustment of the SMFP or applied for a CON and "assume—without any support or even argument—that a petition or application would be rejected." Defs.' *Amici*'s Br. at 12. But again, *Amici* mischaracterize Plaintiffs' injury: Plaintiffs challenge having to apply for a CON *at all* because they claim the CON requirement *itself* is unconstitutional. Compl. ¶¶ 173–204. Moreover, Plaintiffs *could not have* applied for a CON when this case was filed, since the 2018 SMFP reflected no "need" for a new MRI scanner (Compl. ¶ 164); they *could not afford* to apply for one in 2019 (Compl. ¶ 167); and they *cannot* apply for one in 2020, since the proposed SMFP again reflects no "need" for a new scanner (Ex. A at 424). Thus, Plaintiffs' claims are ripe and Defendants' *Amici*'s arguments are without merit.

II. *ASTON PARK* CONTROLS AND PLAINTIFFS BRING THE SAME CLAIMS THAT PREVAILED THERE.

Defendants' motion to dismiss for failure to state a claim must fail because *Aston Park* controls this case and Plaintiffs bring the same claims that prevailed there. *Aston Park* shows that those claims are not only colorable—they are meritorious.

A. *Aston Park* Controls This Case.

In 1973, the Supreme Court struck down North Carolina's previous CON law because the state cannot

> forbid the construction, with private funds and suitable materials, upon private property suitably located, of a well planned hospital which is to be adequately equipped and staffed with a sufficient number of well trained personnel in all categories, the sole reason for such prohibition being that, in the opinion of the

> [state], there are now in the area hospitals with bed capacity sufficient to meet the needs of the population.

Aston Park, 282 N.C. at 548, 193 S.E.2d at 733. Today's CON law does the same: It "forbids" Plaintiffs from purchasing "with private funds" an "adequately equipped" MRI scanner for the "sole reason" that "in the opinion of the [state]" there are a sufficient number of MRI scanners "to meet the needs of the population." *Id. Aston Park* squarely controls this case.

Defendants argue that *Aston Park* is no longer good law and that this case is controlled by the Court of Appeals' 2010 decision in *Hope*. *See* Defs.' Br. 3. Following *Aston Park*, the General Assembly re-enacted the CON law with a series of "findings of fact." *See* N.C. Gen. Stat. § 131E-175. In *Hope*, two medical providers challenged the law, raising non-delegation, court-access, and substantive-due-process claims under Article I, Sections 6, 18, and 19, and Article II, Section 1 of the North Carolina Constitution. 203 N.C. App. at 597–609, 693 S.E.2d at 676–84. The Court of Appeals upheld the CON law on the pleadings, reasoning that the General Assembly's "findings" rendered *Aston Park* "moot." *Hope*, 203 N.C. App. at 607, S.E.2d at 682–83.

Hope does not control here for two reasons. First, *Hope* involved largely different claims than Plaintiffs bring here. Unlike the *Hope* plaintiffs, Plaintiffs bring anti-monopoly, exclusive-emoluments, and equal-protection challenges under Article I, Sections 19, 32, and 34 of the North Carolina Constitution. Thus, Plaintiffs bring *three* claims that the *Hope* court never even addressed.

Second, while Plaintiffs do bring a substantive-due-process claim, *Hope*'s treatment of that claim is easily distinguishable by Plaintiffs' factual allegations. The Supreme Court has held that legislative declarations are "not conclusive." *Foster v. N.C. Med. Care Comm'n*, 283 N.C. 110, 125, 195 S.E.2d 517, 527 (1973); *see also, e.g.*, *State v. Grady*, 831 S.E.2d 542, 566 (2019)

(rejecting notion that the Court must "defer to the General Assembly's legislative findings . . . despite the absence of any record evidence supporting the State's position"); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 862 (1940) ("The Legislature cannot, by preamble or fact finding declaration . . . withdraw [laws] from judicial review.").

In *Hope*, the Court of Appeals assumed that the legislature's recitations were true because the plaintiffs' complaint failed to make even a *single* allegation to the contrary. But here, Plaintiffs have made extensive allegations disputing the CON law's findings. *See* Compl. ¶¶ 68 ("Whatever their truth in 1978, these 'findings of fact' are false as a matter of fact today . . . ."); 69–79, 133–72 (alleging that the CON law stifles innovation, limits patient choice, increases prices, and reduces access to care). On a motion to dismiss, the Court must credit Plaintiffs' allegations. *Krawiec*, 370 N.C. at 604, 811 S.E.2d at 546.

In sum, *Hope* is inapposite and *Aston Park* controls this case. Plaintiffs bring the same claims that prevailed there, and those claims should be heard on the merits.

B. Plaintiffs Have Stated a Substantive-Due-Process Claim Under *Aston Park*.

Article I, Section 19 of the North Carolina Constitution protects the "fundamental right to earn a livelihood," *King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (quotes and citation omitted), which includes the right to provide safe medical services to patients who need it, *see Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735. It does so by "limit[ing] the state's police power to actions which have a real or substantial relation" to the public health, safety, or welfare. *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988); *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735.

While Section 19 is "like" the Due Process Clause of the Fourteenth Amendment, it is not identical. *See Poor Richard's*, 322 N.C. at 64–68, 366 S.E.2d at 699–701 (applying provisions

differently). Under certain circumstances, Section 19 provides *greater* protection than the Due Process Clause. *See Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985) ("[W]e reserve the right to grant relief against unreasonable and arbitrary state statutes under [Section 19] in circumstances under which no relief might be granted by the [Due Process Clause]." (citing *Aston Park*, 282 N.C. 542, 193 S.E.2d 729)).

The Supreme Court has applied greater protection under Section 19 where a law goes beyond "regulat[ing] a business or occupation . . . to exclud[ing] persons from engaging in it." *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735 (quotes omitted). In such cases, "the police power is severely curtailed" and Section 19 requires "a substantially greater likelihood of benefit to the public [for the law] to survive." *Id.* at 550, 193 S.E.2d at 735 (quotes omitted).

Aston Park is illustrative. There, North Carolina's previous CON law banned medical providers from developing new facilities unless they first proved the facilities were "necessary . . . in the area to be served." *Id.* at 545, 193 S.E.2d at 732. Thus, Section 19's heightened test applied. The government argued that banning "excess hospital construction" was necessary to "encourage the necessary and adequate development of health and medical care facilities . . . in a manner which is orderly, timely, economical, and without unnecessary duplication." *Id.* at 544, 548, 193 S.E.2d at 731, 734. But the Supreme Court was not convinced.

Applying Section 19's heightened test, the Court found that the CON law failed to serve the public health or safety because it banned providers from offering quality care based solely on a determination that their services were "unnecessary." *Id.* at 547–50, 193 S.E.2d at 733–35. Next, the Court found nothing in the record to support the state's claim that "[c]ompulsory curtailment of facilities for the care of the sick is a reasonable choice of a remedy for a shortage of [services]." *Id.* at 549, 193 S.E.2d at 734. To the contrary, the Court observed that basic

economics suggests that open competition increases options, fosters innovation, and lowers prices—all of which expand access to care. *Id.* Finally, the Court explained that Section 19 does not allow the state to ban a provider from offering quality services just to "protect existing hospitals from competition." *Id.* at 552, 193 S.E.2d at 736.

The present CON law is indistinguishable from the one struck down in *Aston Park*. Now, as then, the CON law purports to protect the "lives, health, and property" of the public by banning new medical services unless the state first projects a "need" for them. N.C. Gen. Stat. §§ 131E-175(7), -183(a)(1). Thus, the same constitutional test applies. As in *Aston Park*, Plaintiffs have alleged that banning them (and most other providers) from acquiring equipment with their own funds to offer safe, affordable care has nothing to do with protecting the public health—and actually *reduces* access to care. Compl. ¶¶ 133–72, 191–95. And as in *Aston Park*, Plaintiffs have alleged that the CON law's central purpose in excluding them (and most other providers) from the market is to protect established providers from competition. Compl. ¶¶ 2–3, 132–71, 192–95. This is enough to state a claim that the CON law violates Section 19.

C. Plaintiffs Have Stated an Anti-Monopoly Claim Under *Aston Park*.

In *Aston Park*, the Supreme Court struck down the state's previous CON law under the Anti-Monopoly Clause because it banned—rather than regulated—private medical services to protect established providers from competition. 282 N.C. at 551, 193 S.E.2d at 735–36. Plaintiffs have stated a viable anti-monopoly claim for the same reason: the present CON law bans Plaintiffs from obtaining an MRI scanner—regardless of the safety or quality of the scans they hope to offer—solely to protect local MRI providers from competition.

Neither Defendants nor their *Amici* seriously attempt to distinguish *Aston Park*. Instead, Defendants' *Amici* argue that Plaintiffs' anti-monopoly claim is subject only to rational-basis

review under *American Motors Sales Corp. v. Peters*, 311 N.C. 311, 317 S.E.2d 351 (1984), and that Plaintiffs' claim must therefore be dismissed under *Hope*. Defs.' *Amici*'s Br. 18–19.[6] As explained below, these arguments are without merit and Defendants' motion to dismiss must be denied.

1. The CON law violates the Anti-Monopoly Clause because it bans, rather than regulates, private medical services.

The North Carolina Constitution is unequivocal: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." N.C. Const. art. I, § 34; *see also Harris*, 216 N.C. 746, 6 S.E.2d at 864 (Section 34 "does not analyze—it condemns"). Since the founding, the Supreme Court has defined a "monopoly" as "a grant by the sovereign of an exclusive privilege to do something which had theretofore been a matter of common right." *Id.* The freedom to provide safe, quality medical services is such a right. *See Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735.

The Supreme Court has drawn a bright line, under Section 34, between laws that merely "regulate" an industry and those that "exclude persons from engaging in it." *Id.* at 551, 193 S.E.2d at 735 (quoting *Harris*, 216 N.C. 746, 6 S.E.2d at 863)). In *Town of Clinton v. Standard Oil*, for example, the Court struck down a law that capped the number of gas stations permitted in a particular district because

> [t]he present ordinance does not regulate, but keeps alive, the six gasoline places inside the [district] where gasoline is sold, and prohibits defendant from carrying on a like legitimate business in the same limits. It discriminates against defendant, and gives a monopoly to those now carrying on the business in the district. It is no regulation; it is a prohibition.

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[6] Defendants' *Amici* also argue that Plaintiffs' anti-monopoly claim fails because *Aston Park*'s analysis focused more on the plaintiff's substantive-due-process claim. Defs.' *Amici*'s Br. 18. But this argument makes little sense, as *Aston Park*'s anti-monopoly holding does not lose force in proportion to the number of paragraphs the Supreme Court devoted to it relative to other parts of the Court's opinion.

193 N.C. 432, 137 S.E. 183, 184 (1927); *accord Shuford v. Town of Waynesville*, 214 N.C. 135, 198 S.E. 585, 588 (1938).

The same principle controlled in *Aston Park*. There, the Court made clear that the case was not about whether the state could require medical providers to meet reasonable professional qualifications, structural requirements, or sanitary conditions, *Aston Park*, 282 N.C. at 546–47, 193 S.E.2d at 732–33, but whether the state could

> forbid the construction, with private funds and suitable materials, upon private property suitably located, of a well planned hospital which is to be adequately equipped and staffed with a sufficient number of well trained personnel in all categories, the sole reason for such prohibition being that, in the opinion of the [state], there are now in the area hospitals with bed capacity sufficient to meet the needs of the population.

Id. at 548, 193 S.E.2d at 733. The Court concluded that "[s]uch requirement establishes a monopoly in the existing hospitals contrary to the provisions of Article I, § 34 of the Constitution of North Carolina," and struck it down. *Id.* at 551, 193 S.E.2d at 736.

Aston Park controls this case. Plaintiffs have alleged they would like to purchase a fixed MRI scanner to provide safe, affordable scans for patients in need. Compl. ¶¶ 1, 10, 49, 133, 141, 172. Plaintiffs have also alleged that they could comply with all relevant safety regulations and could provide MRI scans of identical quality to (and at lower cost than) those of established providers. Compl. ¶¶ 33, 141–50. But just like the law struck down in *Aston Park*, the CON law bans Plaintiffs from providing this service simply because nearby providers already own MRI scanners. Compl. ¶¶ 2–3, 10, 50, 132–71, 175–77.[7] In so doing, the law does not regulate to ensure Plaintiffs' MRI scans are safe and effective, *Aston Park*, 282 N.C. at 547, 193 S.E.2d at

[7] Defendants' *Amici* appear to agree with this characterization of the law. *See* Mot. Intervene by NCHA, Inc. *et al.* at 9, 12 (stating that "the statute . . . protects the interests of existing health care providers" in "avoiding the detrimental effects of unregulated, unpredictable and unplanned growth in health care facilities and services on their . . . pecuniary interests").

733, but rather "prohibits [them] from carrying on a like legitimate business in the same [area]" as existing providers. *Town of Clinton*, 193 N.C. 432, 137 S.E. at 184. That violates Section 34.

2. American Motors Sales *is distinguishable.*

Rather than apply the Supreme Court's analysis from *Aston Park*—a binding CON case involving virtually identical issues—Defendants and their *Amici* ask the Court to dismiss this case on the authority of *American Motors Sales Corp. v. Peters*, 311 N.C. 311, 317 S.E.2d 351 (1984). Defs.' Br. 8–9; Defs.' *Amici*'s Br. 21–22. But that case not only distinguishes *Aston Park*—it *reaffirms* it.

In *American Motors Sales*, the Supreme Court held that a law forbidding car manufacturers from granting franchises near dealers offering cars of the same make did not violate the Anti-Monopoly Clause. 311 N.C. at 313, 317 S.E.2d at 354. Unlike most laws struck down under Section 34, however, the law in *American Motors Sales* imposed only "vertical rather than horizontal restraint[s] on the automobile industry." *Id.* at 321, 317 S.E.2d at 358. According to the Court, the difference is that

> [a] vertical restraint runs from the manufacturer down through the distributer, ending ultimately with the retailer. Horizontal restraints, on the other hand, run between dealers and dealers or retailers and retailers, all operating on the same level. Horizontal restraints run contrary to the public interest because they stifle competition, whereas vertical restraints leave to the public the benefit of competition at a particular level of the marketing process.

Id. at 318, 317 S.E.2d at 357.

This difference is dispositive. Indeed, the *American Motors Sales* Court *reaffirmed* that the CON law struck down in *Aston Park* was an unconstitutional "horizontal" restraint. *Id.* The present CON law imposes a virtually identical barrier to Plaintiffs' ability to provide MRI services: it "runs between [MRI providers] all operating on the same level" (i.e., providing the same services in the same geographical area). *See*

Compl. ¶¶ 100–07. Thus, Plaintiffs' challenge falls under the rubric of binding cases like *Aston Park* and *Town of Clinton*, and Defendants' motion to dismiss must therefore be denied.

D. Plaintiffs Have Stated an Exclusive-Emoluments Claim Under *Aston Park*.

The Supreme Court held that the CON law struck down in *Aston Park* granted "exclusive privileges" to private hospitals in violation of North Carolina's Exclusive-Emoluments Clause. 282 N.C. at 551, 193 S.E.2d at 736. Because the present CON law grants identical privileges to private MRI providers—but denies them to others like Plaintiffs—Plaintiffs have stated a colorable exclusive-emoluments claim and Defendants' motion to dismiss must be denied.

Article I, Section 32 of the North Carolina Constitution forbids the government from granting "exclusive or separate emoluments or privileges from the community but in consideration of public services." There is no question that North Carolina's CON law—which permits established medical providers to offer services but forbids aspiring providers like Plaintiffs from doing so—grants privileges within the meaning of Section 32. *See Aston Park*, 282 N.C. at 551, 193 S.E.2d at 736 (CON law empowering state to forbid new hospitals based on "determination of need" granted "exclusive privileges" to existing hospitals).[8]

Since the CON law grants special privileges, the only real question is whether these privileges are granted "in consideration of public services." *See Leete v. Cty. of Warren*, 341 N.C. 116, 118, 462 S.E.2d 476, 478 (1995) (noting that Section 32 "by its definition" requires

[8] Prior to *Aston Park*, the Supreme Court had repeatedly held that the freedom to provide a particular service becomes "exclusive or separate" when granted to some but forbidden to others. *See, e.g.*, *Roller v. Allen*, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957) (tiling services); *Harris*, 216 N.C. 746, 6 S.E.2d at 859 (dry-cleaning services); *State v. Warren*, 211 N.C. 75, 189 S.E. 108, 111 (1937) (real-estate services). *Aston Park* simply extended that principle to medical services.

such consideration). Defendants argue that medical providers offering "a service for the public" are providing "public services" within the meaning of Section 32. Defs.' Br. 11.[9] But here again, *Aston Park* controls. The Supreme Court held point-blank that the previous CON law granted privileges "*forbidden by*" Section 32. *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 736 (emphasis added). The Court held so despite the law's stated "public policy" of "encourag[ing] the necessary and adequate development of health and medical care facilities . . . in a manner which is orderly, timely, economical, and without unnecessary duplication of services." *Id.* at 544, 193 S.E.2d at 731.

The *Aston Park* Court's refusal to hold that private hospitals provide "public services" under Section 32 is in keeping with a long line of cases applying that provision to government entities or agents. *See, e.g.*, *Madison Cablevision, Inc.*, 325 N.C. at 655, 386 S.E.2d at 212 (municipal cable utility held franchise in consideration of public services); *Harrill v. Teachers' & State Emp. Ret. Sys.*, 271 N.C. 357, 360, 156 S.E.2d 702, 706 (1967) (same for state employees granted retirement benefits). Defendants overlook this simple distinction.

Indeed, just a few months after *Aston Park*, the Court reiterated that private medical providers are not "public" services and cannot be made so by legislative fiat. *See Foster*, 283 N.C. at 127–28, 195 S.E.2d at 528–29 (striking down law directing taxpayer dollars to public and private hospitals under Article V, Section 2(1) of the North Carolina Constitution). There, the Court reasoned that while private hospitals supply a "meritorious, charitable" service that "the State, itself, may lawfully [provide]," facilities that are "privately operated, managed, and

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[9] Defendants also ask the Court to dismiss because they claim Section 32 prohibits only "alienation of [government] powers." Defs.' Br. 11. Defendants mischaracterize the law. While alienation of powers is *one* way a law can violate Section 32, *see Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 655, 386 S.E.2d 200, 212 (1989), *Aston Park* shows that it is not the *only* way. *See also supra* n.8.

controlled" are definitionally private. *Id.* at 127, 195 S.E.2d at 528–29. So too for the private MRI providers granted an exclusive privilege to operate under the CON law.

E. Plaintiffs Have Stated an Equal-Protection Claim.

Article I, Section 19 of the North Carolina Constitution guarantees that "[n]o person shall be denied the equal protection of the laws." To satisfy this provision, a legislative classification must have "a proper governmental purpose," and "the means chosen to effect that purpose [must be] reasonable." *Poor Richard's*, 322 N.C. at 64, 366 S.E.2d at 699. Plaintiffs allege that the CON law fails both prongs of this test.

First, Plaintiffs allege that the true purpose of the CON law is to protect established medical providers from competition. Compl. ¶ 192. *Aston Park* affirms that this purpose is illegitimate. 282 N.C. at 552, 193 S.E.2d at 736.

Second, even if the CON law *was* enacted to protect the public health and safety, Plaintiffs have alleged that the law does not, *in fact*, achieve that purpose. *See Poor Richard's*, 322 N.C. at 66, 366 S.E.2d at 700 (classifications cannot be presumed to achieve their stated purpose "if the evidence is to the contrary, or if facts judicially known or proved, compel otherwise") (quotes omitted); *accord State v. Grady*, 831 S.E.2d 542, 566 (2019). In particular, Plaintiffs have alleged that the CON law draws an arbitrary distinction between MRI providers who already possess a CON and those who do not. Compl. ¶¶ 198–203. In 1993, the General Assembly amended the law to require a CON before providers may obtain an MRI scanner or provide such scans. Compl. ¶¶ 83, 88(a). But there is one major exception to this requirement: while a CON is required to *own* an MRI scanner, a CON is not required to *rent* a mobile scanner so long as the scanner is moved weekly and the state approves the service site. Compl. ¶ 89.

The real-world effect of this exception is that providers offering identical MRI services are treated differently.[10] In 2018, Plaintiffs were unable to apply for a CON because the state had not projected a "need" for a new MRI scanner in Forsyth County. Compl. ¶ 135–39. Yet Plaintiffs were permitted to provide a limited number of scans—scans indistinguishable from those offered by nearby MRI providers—so long as they rented a scanner (at a cost of thousands of dollars per day) and used it only on weekends. Compl. ¶¶ 142–43. Patients who were able to visit on weekends received much-needed care and benefitted from Plaintiffs' affordable prices. Compl. ¶¶ 144–50. Patients who were unable to visit on weekends were either forced to go without care or pay higher prices elsewhere for the scans they needed. Compl. ¶ 148.

There is no justification for this disparate treatment. As Plaintiffs' case demonstrates, whether a provider has managed to obtain a CON has no bearing on their ability to provide safe, affordable MRI scans that patients need. Compl. ¶¶ 151, 199–203. Yet the law forbids providers like Plaintiffs from purchasing an MRI scanner and expanding access to care simply because other, nearby providers already own one. Compl. ¶¶ 152–56, 199–201.

Defendants and their *Amici* argue that *Hope* forecloses Plaintiffs' equal-protection claim.[11] Defs.' Br. 16; Defs.' *Amici*'s Br. 13–17. But *Hope* did not involve an equal-protection

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[10] Defendants argue that Plaintiffs' equal-protection claim fails because "the CON law applies equally to every person who seeks to acquire an MRI scanner." Defs.' Br. 16 (emphasis omitted). This mischaracterizes Plaintiffs' claim, which is based on the distinction between providers who already own an MRI scanner (who may provide MRI services in a cost-effective manner), and providers who do not (who may only provide MRI services after spending hundreds of thousands of dollars applying for a CON or renting a mobile scanner at an exorbitant rate). Compl. ¶ 199.

[11] Defendants' *Amici* cite two cases for the proposition that "[t]he Court of Appeals has already rejected equal protection challenges to the CON law." Defs.' *Amici*'s Br. 14 (citing *Good Hope*, 174 N.C. App. at 275, 620 S.E.2d at 881; and *Charter Pines Hosp., Inc. v. N.C. Dep't of Human Res.*, 83 N.C. App. 161, 174, 349 S.E.2d 639, 647 (1986)). But those cases involved equal-protection challenges to administrative decisions denying CONs or CON exemptions. *Good Hope*, 174 N.C. at 273, 620 S.E.2d at 880; *Charter Pines*, 83 N.C. App. at 166 & 174, 349

claim. Still, Defendants' *Amici* argue that *Hope* "implicitly" foreclosed Plaintiffs' equal-protection claim when it rejected the *Hope* plaintiffs' substantive-due-process claim. Defs.' *Amici*'s Br. 13–14. That is incorrect. As explained at *supra* 6–7 & 15–16, Plaintiffs have alleged that the "findings of fact" relied upon in *Hope* (which the plaintiffs in that case failed to challenge) are false. Those findings cannot save the CON law at the motion-to-dismiss stage, and after they are proven false in discovery, they will not save it on the merits, either. Plaintiffs' equal-protection claim should proceed.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss.

This the 30th day of September, 2019.

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S.E.2d at 643 & 647. Neither case involved a substantive challenge to the CON law *itself*, which is what Plaintiffs bring here. *Good Hope* and *Charter Pines* are inapposite.

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