STATE OF NORTH CAROLINA
COUNTY OF WAKE

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Jay Singleton, D.O., and Singleton Vision Center, P.A.,

Plaintiffs,

v.

North Carolina Department of Health and Human Services; Josh Stein, Governor of the State of North Carolina, in his official capacity; Devdutta Sangvai, North Carolina Secretary of Health and Human Services, in his official capacity; Phil Berger, President Pro Tempore of the North Carolina Senate, in his official capacity; and Destin Hall, Speaker of the North Carolina House of Representatives, in his official capacity,

Defendants.

No. 20 CVS 05150

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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QUESTIONS PRESENTED

North Carolina's certificate of need (CON) law bans healthcare providers from entering the market without a CON. Unlike a professional or facility license, a CON does not regulate health or safety. Instead, whether a provider can obtain a CON turns entirely on whether a state agency projects a "need" for more services—a decision that depends, at root, on whether there are already providers serving that region. Put differently: Whether a *new* provider can enter the market depends on whether *old* providers got there first. Plaintiff Dr. Singleton is a case in point. He wants to perform surgeries in his own operating room at far better prices than those offered at the only other nearby option: CarolinaEast hospital. But the CON law bans Plaintiff from doing that—precisely *because* CarolinaEast got there first and the state has never declared a "need" for new services.

The questions presented are:

1. Does the CON law violate Art. I, § 32 of the North Carolina Constitution on its face because it grants "exclusive or separate emoluments or privileges" not "in consideration of public services"?

2. Does the CON law violate Art. I, § 34 of the North Carolina Constitution on its face because it grants "monopolies," which "are contrary to the genius of a free state and shall not be allowed"?

INTRODUCTION

Art. I, §§ 32 and 34 of the North Carolina Constitution forbid "exclusive privileges" and "monopolies." This motion presents a pure legal question: Does the CON law grant these forbidden things? The law's predecessor did, and that's why it was struck down. *See In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 551, 193 S.E.2d 729, 736 (1973) (first CON law granted "exclusive privileges forbidden by Article I, § 32" and "establishes a monopoly in the existing hospitals contrary to . . . Article I, § 34"). Today's CON law works the same way and it thus deserves the same fate. In the end, whatever one thinks of the CON law as a policy matter, there are simply some lines the legislature can't cross. *See Trs. of UNC v. Foy*, 5 N.C. 58, 83 (1805) (holding that courts have a duty to keep constitutional "rights . . . beyond the control of the Legislature").

The CON law crosses lines drawn by the plain text of Art. I, §§ 32 and 34. Both provisions forbid the state from granting exclusive rights to provide private services. That reading flows, not from any atextual rationality analysis, but from a faithful application of the controlling "text-history-precedent" standard. (Section I, below). And it resolves this case: Because the CON law grants exclusive rights to provide private healthcare services, it's "forbidden." *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 736. (Section II). That just leaves the issue of remedy. Courts have a duty to eliminate threats to state constitutional rights. *Corum v. UNC ex rel. Bd. of Governors*, 330 N.C. 761, 783–84, 413 S.E.2d 276, 290 (1992). There is only one

way to eliminate the threat here: Declare the CON law facially unconstitutional and enjoin its enforcement. (Section III). The Court should grant the motion.

UNDISPUTED FACTS

Dr. Singleton is a licensed eye doctor and board-certified surgeon based in New Bern. Am. Compl. ¶ 10.[1] He founded Singleton Vision Center, a full-service eye clinic, in 2004 to provide quality care at an affordable price. *Id.* ¶¶ 11–12, 18–19. He provides all of his non-surgical eye care at his clinic. *Id.* ¶ 21. And, because his patients often need outpatient surgeries, he wants to provide those full-time at his clinic too. *Id.* ¶¶ 21–22.

Dr. Singleton's eye surgeries would be safe. *Id.* ¶¶ 25–27. His clinic has an operating room with all the equipment and staff needed to provide quality care. *Id.* ¶¶ 12, 27. He's performed thousands of surgeries over his career and would follow the North Carolina Medical Board's guidelines. *Id.* ¶¶ 26–27, 30–31. And his eye clinic is accredited by the American Association for Accreditation of Ambulatory Surgery Facilities, meaning it meets nationally accepted safety standards. *Id.* ¶ 28.

Dr. Singleton's surgeries would also cost far less than the only other local option. *Id.* ¶¶ 12, 23. CarolinaEast—a private hospital two miles down the road—

[1] All facts cited in this brief are supported by Dr. Singleton's affidavit, attached as Exhibit A to his motion for partial summary judgment, which certifies that all factual allegations in the amended complaint "personal to me, to Singleton Vision Center, and to the impact of North Carolina's certificate of need law . . . on our clients, are true and correct to the best of my knowledge." Singleton Aff. ¶ 5. For ease of reference, Dr. Singleton will cite directly to his amended complaint.

charges over $6,000 per procedure for its facility fee alone. *Id.* ¶ 24. Dr. Singleton can perform eye surgeries at his clinic for a fraction of that price. For example, he can perform a cataract surgery for under $1,800. *Id.* ¶¶ 1, 23–24, 31. Dr. Singleton wants to bring those savings to all of his patients. *Id.* ¶¶ 31–32.

But Dr. Singleton can't use his operating room without a certificate of need (CON). N.C. Gen. Stat. §§ 131E-176(16)(a), (u), -178(a). A CON is different from a facility license, which "ensure[s] safe and adequate treatment of . . . individuals in ambulatory surgical facilities." *Id.* § 131E-145. Far from ensuring safety, a CON reflects the Department of Health and Human Services' view that a new operating room is "needed" in the market. *Id.* §§ 131E-178(a), -183(a), -190(a). Dr. Singleton could—and happily would—get a facility license for his clinic. Am. Compl. ¶¶ 28–29. But he can't get one without a CON. 10A N.C. Admin. Code 13C.0202(b).

CONs are scarce. The Department pronounces operating room "need" once a year in the State Medical Facilities Plan. N.C. Gen. Stat. § 131E-183(a). The Plan breaks the state into "service areas" and sets "need" two years in advance. *E.g.*, 2025 SMFP, https://tinyurl.com/2f74sj6s, at 49. If the Plan declares no need for a new operating room, no CON will be available in that service area for at least two years. *See* N.C. Gen. Stat. § 131E-183(a)(1) (noting that a service area "need" projection "constitutes a determinative limitation on . . . operating rooms . . . that may be approved" in that area). No CON, no market entry.

Dr. Singleton is in the Craven/Jones/Pamlico service area. Am. Compl. ¶ 102. Since Dr. Singleton opened his center in 2004, the Plan has *never* projected a need for a new operating room in his area. *Id.* ¶ 103. That was true even after he petitioned the Department to adjust the Plan's "need" methodology in 2015. *Id.* ¶ 104. And it's remained true every year since he filed this case:

2021 Plan? → No need in 2023 (https://tinyurl.com/54y5zbas, 70)

2022 Plan? → No need in 2024 (https://tinyurl.com/mvfm5m2c, 71)

2023 Plan? → No need in 2025 (https://tinyurl.com/234wvu8m, 68)

2024 Plan? → No need in 2026 (https://tinyurl.com/56karyhy, 69)

2025 Plan? → No need in 2027 (https://tinyurl.com/2f74sj6s, 71)

2026 Plan? → No need in 2028 (https://tinyurl.com/fer9f3n8, 66)

The only healthcare provider that has *ever* held an operating room CON in Dr. Singleton's area is CarolinaEast. Am. Compl. ¶¶ 105–07. And CarolinaEast—a large private hospital with a billion-dollar annual budget—has told Dr. Singleton that if a CON ever opens up, it will oppose his application. *Id.* ¶¶ 105, 122. That's no small threat. Contested CON applications trigger an administrative process that looks like litigation, costs hundreds of thousands of dollars, and takes several years to resolve. *Id.* ¶¶ 76–95. Dr. Singleton (who has pro bono counsel in this case) does not have the resources to litigate against CarolinaEast in that process. *Id.* ¶ 122.

Nor, again, is that even an option. No CON is available in Dr. Singleton's service area. No CON has ever been available in his service area. And no CON will

be available through at least 2028 (and likely far longer). The market—now and for years to come—is closed. *Id.* ¶¶ 102–03, 118.

*

Before turning to the merits, Dr. Singleton notes that the omission of any evidence here regarding CON law's broader efficacy or rationality is intentional. The reason he filed this *partial* motion for summary judgment before discovery is that the two constitutional claims on which he moves—Art. I, § 32 (anti-exclusive privileges) and Art. I, § 34 (anti-monopoly)—present purely legal questions that require no factual development to resolve. *See* Scheduling Order (Oct. 13, 2025) (agreeing). By contrast, Dr. Singleton's other claims—Art. I, § 1 (fruits of labor) and Art. I, § 19 (law of the land)—require "a dispassionate inquiry based on facts and evidence." *Howell v. Cooper*, 919 S.E.2d 212, 220–21 (N.C. 2025). Should the panel ultimately conclude, for any reason, that Dr. Singleton's claims under Art. I, §§ 32 and 34 in fact require a developed record, he requests a chance to build that record. Again, though, that should not be necessary. The original meanings of Art. I, §§ 32 and 34 present purely legal questions that this Court can resolve today.

LEGAL STANDARD

Summary judgment "will be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.'" *Lowe v. Bradford*, 305 N.C. 366, 368–69, 289 S.E.2d

363, 365–66 (1982) (citing N.C. Gen. Stat. § 1A-1, Rule 56(c)). "The purpose of the rule is to eliminate formal trials where only questions of law are involved." *Id.* at 369, 289 S.E.2d at 366. "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Id.* The facts are construed "in a light favorable to the non-moving party." *Marker v. Erixon*, 123 N.C. App. 383, 391, 473 S.E.2d 421, 426 (1996). Ultimately, though, "[w]hen a case involves a controversy on a question of law on indisputable facts, summary judgment is appropriate." *Id.*

ARGUMENT

The CON law violates Art. I, §§ 32 and 34. To properly assess the law's validity, the Court must "understand[] the meaning of the constitutional provision at issue." *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 213, 886 S.E.2d 16, 33 (2023). That task "begins with the text," looks to "the available historical record in an effort to isolate the provision's meaning at the time of its ratification," and "seek[s] guidance from any on-point precedents." *Id.* (cleaned up). Applying that method here, three conclusions follow: Art. I, §§ 32 and 34 bar the state from granting *exclusive* rights to provide *private* services. (Section I, below). The CON law violates these provisions because—under both binding precedent (*Aston Park*) and original meaning—a CON is an exclusive right to provide private healthcare. (Section II). And, because North Carolina courts have a duty to eliminate threats to state constitutional rights, Dr. Singleton is entitled to facial relief. (Section III).

I. Art. I, §§ 32 and 34 forbid exclusive rights to provide private services.

Art. I, §§ 32 and 34 forbid the government from granting exclusive rights to provide private services. (Part A). There is only one exception in the constitutional text: The "services" must be "public" in nature—meaning they must be provided *by* the government *for* the people. (Part B). Art. I, §§ 32 and 34 thus do not trigger a rationality test. The government can't grant exclusive rights for private services just because it thinks they are a good idea.[2] (Part C). An exclusive right either falls within the textual "public services" exception, or it cannot stand.

A. The state can't grant exclusive rights.

Art. I, §§ 32 and 34 have the same textual starting point: They ban the state from granting exclusive rights. Art. I, § 32 bans "exclusive or separate emoluments or privileges." Art. I, § 34 declares that "monopolies . . . shall not be allowed." In 1776, when this text was first adopted, an "exclusive . . . privilege[]" was any right not available to others. 2 S. Johnson, *A Dictionary of the English Language* (4th ed. 1773), https://tinyurl.com/2yc3p2rd (exclusive), https://tinyurl.com/58u3erhz (privilege). And a "monopoly" was an exclusive right to sell a good or service. *Id.*, https://tinyurl.com/bdzcx38e (monopoly).

[2] Dr. Singleton's complaint alleges that the CON law is not even arguably good policy—it's completely irrational and harmful to the very patients it claims to help. Am. Compl. ¶¶ 3–4, 50–67, 110–17, 135–48. But that's not an issue the Court needs to resolve here. Instead, as Dr. Singleton will explain in his response to Defendants' Rule 12(b)(6) motion, his well-pleaded factual allegations about the CON law's irrationality are the reason this case must proceed to discovery on his Art. I, §§ 1 and 19 claims.

These provisions share a common aim. By banning exclusive privileges and monopolies, North Carolina's framers sought to preserve the right to "compete equally for . . . economic advantage." John Orth, *Unconstitutional Emoluments*, 97 N.C. L. Rev. 1727, 1729–30 (2019). As one sitting Justice has written, "the Crown sold monopoly rights to favored businesses" that, before the revolution, "covered virtually every area of commerce imaginable." Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L. Rev. 1, 13 (2022). The framers sought "to prevent the State from awarding these sorts of monopoly rights in the future." *Id.* at 14.

B. Public services are the only exception.

But the framers' concerns about exclusive market privileges were limited to *private* services. There is no evidence that the framers also sought to ban the state from providing its own *public* services. The text makes that crystal clear: Although exclusive privileges (including monopolies) are generally banned, there is a narrow exception for privileges granted "in consideration of public services." N.C. Const. art. I, § 32. History and precedent confirm that this phrase means services offered *by* the government *for* the people.

Start with history. Contemporaneous dictionaries do not reveal a definition of the phrase "public services." But a seminal text on political economy, published the same year Art. I, §§ 32 and 34 were adopted, uses "public services" exactly as Dr. Singleton reads it. *See, e.g.*, Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), https://tinyurl.com/5n7mrs9j, at Book III, Ch. II

("public services to which the yeomanry were bound, were not less arbitrary than the private ones," and included a duty "[t]o make and maintain the high roads"); Book IV, Preface ("the science of a statesman or legislator" demands "revenue sufficient for the public services"); Book V, Ch. I, Pt. II (referring to "court[s]" and "judge[s]" as "[p]ublic services"). Services were "public" when they were bound up with the work of government.

Precedent confirms as much. The North Carolina Supreme Court has held that payments for public school teachers and military veterans, *Hinton v. Lacy*, 193 N.C. 496, 173 S.E.2d 669, 674 (1927); *Harrill v. Tchrs.' & State Emps.' Ret. Sys.*, 271 N.C. 357, 360–61, 156 S.E.2d 702, 706 (1967), a franchise to run a public ferry, *In re Spease Ferry*, 138 N.C. 219, 50 S.E. 625, 626 (1905), and a franchise to provide cable services on a city's behalf, *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 654, 386 S.E.2d 200, 212 (1989), were all granted "in consideration of public services." Which makes sense. Art. I, §§ 32 and 34 were never meant to bar the government from providing services to the public, whether directly or through contractors. They were meant to forbid exclusive rights to provide *private* services.

C. There is no basis for a rationality test.

Since the founding, the North Carolina Supreme Court has largely applied Art. I, §§ 32 and 34 as written. After all, courts generally "presume that the words of a statute or constitutional provision mean what they say." *State v. Kelliher*, 381 N.C. 558, 579, 873 S.E.2d 366, 382 (2022). Here, the text imposes "a categorical

prohibition on *something* the framers viewed as unacceptable for society." Dietz, *supra*, at 18. Again, that *something* amounts to a simple rule: No exclusive rights to provide private services—period.

The Court has applied that rule to a wide range of services,[3] including, as discussed below, the hospital services in *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 736 (prior CON law violated Art. I, §§ 32 and 34). *Town of Clinton v. Standard Oil Co.* offers a perfect example. There, the Court struck down a law that capped the number of gas stations allowed in a district. The law was invalid because it

> does not regulate, but keeps alive, the six gasoline places inside the fire limits 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.

193 N.C. 432, 137 S.E. 183, 184 (1927). If the law had merely set health and safety standards that any gas station could meet, it would have been constitutional.[4] But instead, the law let six gas stations in and shut everybody else out. That was illegal.

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[3] *See, e.g.*, *Simonton v. Lanier*, 71 N.C. 498, 503 (1874) (banking); *Thrift v. Bd. of Comm'rs of Elizabeth City*, 122 N.C. 31, 30, 30 S.E. 349, 351 (1898) (waterworks); *State v. Fowler*, 193 N.C. 290, 136 S.E. 709, 711 (1927) (alcohol); *Town of Clinton v. Standard Oil Co.*, 193 N.C. 432, 137 S.E. 183, 184 (1927) (gas stations); *State v. Sasseen*, 206 N.C. 644, 175 S.E. 142, 144 (1934) (taxis); *State v. Warren*, 211 N.C. 75, 189 S.E. 108, 111 (1937) (real estate); *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 94, 84 S.E. 390, 400 (1954) (gambling).

[4] Indeed, applying the same rule from *Town of Clinton*, the Court has held that occupational licensing laws typically do not create monopolies because, rather than capping the number of people allowed in a market, they merely set competency standards for entry. *See, e.g.*, *State v. Call*, 121 N.C. 643, 28 S.E. 517, 517 (1897) (no monopoly under medical licensing law because "[t]he door stands open to all"); *State v. Warren*, 252 N.C. 690, 697, 114 S.E.2d 660, 666–67 (1960) (no monopoly under real-estate licensing law because "[t]he door is open to all").

Defendants, though, have pushed a different test. Last year, they urged the North Carolina Supreme Court to adopt a test akin to rational-basis review, under which an exclusive privilege or monopoly must be upheld whenever it "promotes the general welfare." Defs.' Br. (2024 WL 145288) *80, *87. That is not the law. Rationality review stems from early 20th century federal due process law. No real shock, then, "[t]here is little to support the notion that the framers contemplated this sort of rationality standard." Dietz, *supra*, at 18. Just the reverse. All historical evidence makes it "more likely" that the framers "understood there were some rational grounds for awarding monopolies, but believed them on-balance to be so repugnant that the constitution should prohibit them entirely." *Id.* Defendants, in five years of litigating this case, have never offered any contrary evidence.

Instead, Defendants merely cherry-pick three cases from a single 27-year period that, they claim, demand a "general welfare" test. *See* Defs.' Br. (2024 WL 145288) *81 (citing *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967), *Town of Emerald Isle ex rel. Smith v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987), and *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 446 S.E.2d 332 (1994)). But these cases are inapposite. None of them involved laws remotely similar to the CON law challenged here. *Knight* was about jury duty, *Emerald Isle* was about beach traffic, and *Carolina Utilities* was about gas subsidies. None of that has anything to do with this case. Nor is there any reason to think that the Court,

by applying a "general welfare" test in those cases, was silently overruling the test it has used to strike down economic privileges since the founding.

II. The CON law grants exclusive rights to provide private healthcare.

With the correct legal test in hand, this case is straightforward. The North Carolina Supreme Court held in *Aston Park* that a healthcare CON law—the direct precursor to today's CON law—violated Art. I, §§ 32 and 34. *Aston Park* controls. (Part A). Moreover, even if *Aston Park* had never been decided, today's CON law would still be unconstitutional because it does precisely what Art. I, §§ 32 and 34 prohibit: It grants *exclusive* rights (Part B) to provide *private* healthcare (Part C). Dr. Singleton is entitled to judgment as a matter of law.

A. *Aston Park* controls.

This case is on all fours with *Aston Park*. There, the state's original CON law forbade new hospitals from opening whenever a state agency found that there were a "sufficient" number of hospitals in the market. *Aston Park*, 282 N.C. at 548, 552, 193 S.E.2d at 733, 736. The existing hospitals were not state facilities or utilities. *Id.* at 550, 193 S.E.2d at 734–35. They were private entities providing private services. Forbidding new hospitals from competing thus "establishe[d] a monopoly in the existing hospitals contrary to . . . Article I, § 34 . . . and [was] a grant to them of exclusive privileges forbidden by Article I, § 32." *Id.* at 551, 193 S.E.2d at 736.

There is no meaningful difference between today's CON law and the one struck down in *Aston Park*. Today's law, like its dead ancestor, excludes everybody who wants to provide certain healthcare services from the market unless they have a CON. *See* N.C. Gen. Stat. §§ 131E-176(16)(a), (u), -178(a). Today's law, like the dead one, makes it impossible to obtain a CON unless a state agency declares that new services are "needed" in a region. *See id.* § 131E-183(a)(1) (explaining that a "need" projection "constitutes a determinative limitation on the provision of any health service . . . that may be approved"); *see also id.* §§ 131E-178(a), -190(a). And today's law, like the dead one, grants its exclusive privileges to private healthcare providers—like CarolinaEast hospital, the only entity that has *ever* owned a CON in Dr. Singleton's area. Am. Compl. ¶¶ 105, 107, 152.

The legislature had no right to exhume a law that *Aston Park* held violates Art. I, §§ 32 and 34. Defendants have, in the past, attempted to justify that choice by pointing to the Court of Appeals's statement that the legislative findings added as a preamble to the CON law render "the holding in *Aston Park* [] moot." Defs.' Br. Supp. MTD 8 (Sept. 30, 2020) (quoting *Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 607, 693 S.E.2d 673, 683 (2010)). But Defendants are wrong thrice over. They are wrong because *Hope* did not even involve claims under Art. I, §§ 32 or 34. They are wrong because the prior CON law contained similar prefatory text about how it was "necessary" to secure an "orderly, timely, [and] economical" healthcare market—yet the law was still unconstitutional. *Aston Park*,

282 N.C. at 544, 193 S.E.2d at 731; *cf. Redev. Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 611, 114 S.E.2d 668, 700 (1960) ("legislative findings . . . have no magical quality to make valid that which is invalid").

And Defendants are especially wrong today because the North Carolina Supreme Court has made clear—in this case—that *Aston Park* remains good law:

> The complaint contains allegations that, if proven, could render the Certificate of Need law unconstitutional in all its applications. *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551–52, 193 S.E.2d 729 (1973).

Singleton v. N.C. Dep't of Health & Hum. Servs., 386 N.C. 597, 599, 906 S.E.2d 806, 808 (2024) (per curiam). *Aston Park* controls.

B. CONs grant exclusive rights.

Even if *Aston Park* had never been decided, though, ordinary Art. I, §§ 32 and 34 principles resolve this case. The CON law, by definition, grants "exclusive . . . privileges" and "monopolies" because it grants CON-holders the sole right to provide healthcare services in a region. Just look at Dr. Singleton. He's a licensed doctor who owns an operating room that meets all health and safety requirements for facility licensure. Am. Compl. ¶¶ 12, 25–31. But he can't use his own operating room because he does not have a CON. Only one entity—CarolinaEast hospital—owns a CON, and the very fact that CarolinaEast owns that CON is the *reason* why the state projects no "need" for a new operating room in the area:

Table 6B: Projected Operating Room Need for 2027

A	B	C	D	E	F	G	H	I	J	K	L	M	N
Service Area	License	Facility	Inpatient Cases	Final Inpatient Case Time	Ambulatory Cases	Final Ambulatory Case Time	Total Adjusted Estimated Surgical Hours	Growth Factor	Projected Surgical Hours for 2027	Projected Surgical ORs Required in 2027	Adjusted Planning Inventory	Projected OR Deficit/ Surplus (Surplus shows as a "-")	Service Area Need
Chatham Total													**0**
Cherokee	H0239	Erlanger Murphy Medical Center^/^^/†/†††	166	132.1	2,003	92.2	3,443	3.07	3,549	2.37	4	-1.63	
Cherokee/Clay Total													**0**
Chowan	H0063	ECU Health Chowan Hospital†/†††	325	66.0	626	39.6	771	0.69	776	0.52	3	-2.48	
Chowan Total													**0**
Cleveland	AS0062	Atrium Health Surgery Center Shelby	0	0.0	1,638	44.0	1,201	2.29	1,229	0.94	4	-3.06	
Cleveland	H0024	Atrium Health Cleveland^/^^/†††	1,139	132.1	3,855	92.2	8,432	2.29	8,625	5.75	8	-2.25	
Atrium Health Total										***6.69***	***12***	***-5.31***	
Cleveland	AS0049	Eye Surgery Center of Shelby	0	0.0	2,612	30.0	1,306	2.29	1,336	1.02	2	-0.98	
Cleveland Total													**0**
Columbus	H0045	Columbus Regional Healthcare System	768	99.5	2,657	53.5	3,643	-0.33	3,643	2.43	5	-2.57	
Columbus Total													**0**
Craven	H0201	CarolinaEast Medical Center	2,569	111.0	12,099	47.4	14,319	1.70	14,562	9.71	17	-7.29	
Craven/Jones/Pamlico Total													**0**
Cumberland	H0213	Cape Fear Valley Medical Center	5,374	165.0	6,468	116.0	27,283	0.64	27,457	15.65	17	-1.35	
Cumberland	H0275	Highsmith-Rainey Specialty Hospital††††	19	96.0	2,027	64.0	2,193	0.64	2,206	1.47	2	-0.53	
Cape Fear Valley Health System Total										***17.12***	***19***	***-1.88***	
Cumberland	AS0006	Fayetteville Ambulatory Surgery Center^^/†††	0	0.0	7,942	52.6	6,962	0.64	7,006	5.34	11	-5.66	
Cumberland	AS0159	Valleygate Dental Surgery Center††††	0	0.0	1,819	77.1	2,338	0.64	2,353	1.79	1	0.79	
Cumberland		Valleygate Dental Surgery Center Coast	0	0.0	0	0.0	0		0	0.00	1	-1.00	
Cumberland		2024 Need Determination	0	0.0	0	0.0	0		0	0.00	1	-1.00	
Cumberland Total													**0**

2025 SMFP, https://tinyurl.com/2f74sj6s, at 71 (red box added). That's a classic exclusive right. *See, e.g.*, *Town of Clinton*, 193 N.C. 432, 137 S.E. at 184 (monopoly where only six gas stations were allowed to operate in a district).

Last year, Defendants argued that the CON law does not grant "exclusive" rights because the state assesses "need" annually, so it is always *possible* that a new CON will *someday* exist. *See* Defs.' Br. (2024 WL 145288) *76–77. This argument lacks merit. For one, the Supreme Court has already rejected it. *See Burden v. Town of Ahoskie*, 198 N.C. 92, 150 S.E. 808, 810 (1929) (rejecting argument that "there would be no monopoly" when gas stations' special operating privilege expired in eight months because the "sole question for determination is whether the plaintiff is entitled to the relief requested upon the record as now presented"). For another, Defendants' reading defies the plain text. Art. I, § 34 prohibits *both* "perpetuities

and monopolies," and the Court has long held that "[a] monopoly need not be a perpetuity." *Thrift v. Bd. of Comm'rs of Elizabeth City*, 122 N.C. 31, 30 S.E. 349, 351 (1898). Defendants' atextual reading fails.

C. CONs allow private services.

Because CONs grant exclusive rights, the final question is whether those rights are held "in consideration of public services." N.C. Const. art. I, § 32. They are not. *Aston Park*, of course, resolved that question when it held that the CON-holding hospitals held privileges "forbidden by" Art. I, §§ 32 and 34. 282 N.C. at 551, 193 S.E.2d at 736. But even setting that aside, the Court made the same point just two years later when it explained, in a taxation case, that "privately operated, managed and controlled" hospitals do not—as a matter of law—provide "public" services. *Foster v. N.C. Med. Care Comm'n*, 283 N.C. 110, 125–27, 195 S.E.2d 517, 527–29 (1973). Simply put, CON-holders are nothing like the teachers, veterans, public ferries, or city cable providers the Court has held fall within the "public services" exception. CON-holders are, instead, private entities pursuing private aims—entities like CarolinaEast in Dr. Singleton's area. Am. Compl. ¶¶ 105, 158. The "public services" exception cannot save the CON law.

III. Only facial relief can remedy the CON law's constitutional harms.

That leaves the question of remedy. When a plaintiff proves a "violation of rights guaranteed by the Declaration of Rights," it becomes "a matter for the trial [court] to craft the necessary relief." *Corum v. UNC ex rel. Bd. of Governors*, 330

N.C. 761, 783–84, 413 S.E.2d 276, 290 (1992). On the one hand, the Court bears a "responsibility to protect the state constitutional rights of the citizens." *Id.* at 783, 413 S.E.2d at 290. On the other hand, out of a respect for the other branches, the Court must craft "the least intrusive remedy available and necessary to right the wrong." *Id*. at 784, 413 S.E.2d at 291.

Last year, the North Carolina Supreme Court "agree[d]" that, if the CON law violates Art. I, §§ 32 and 34, facial relief against the law would be appropriate. *Singleton*, 386 N.C. at 599, 906 S.E.2d at 808 (citing *Aston Park*, 282 N.C. at 551–52, 193 S.E.2d at 729). *Aston Park* shows why. That case involved a dispute over a single hospital in a single region (Asheville). Yet, when the dust settled, the Court did not limit its holding to that one hospital or region. Instead, the Court held that "the statutory requirement of a certificate of need"—across the board—violated Art. I, §§ 32 and 34. *Aston Park*, 282 N.C. at 552, 193 S.E.2d at 736. The Court did so because the law threatened North Carolinians' "right to engage in a business, otherwise lawful," free from unconstitutional monopolies and exclusive privileges. *Id.* at 551–52, 193 S.E.2d at 735–36.

Following *Singleton* and *Aston Park*, the least intrusive remedy necessary to right the constitutional wrong here will entail facial relief. That could take one of two forms: At the very least, the Court should declare that the CON law violates Art. I, §§ 32 and 34 and enjoin its enforcement against Dr. Singleton and "all individuals in the same category" as him, *State v. Grady*, 372 N.C. 509, 522, 831

S.E.2d 542, 553 (2019)—namely: aspiring operating room service providers who are fenced out of their regional markets by private CON-holders in their service areas. Or, if the Court holds that the CON law cannot constitutionally be applied in any context—even against services that Dr. Singleton does not seek to provide, *see* N.C. Gen. Stat. § 131E-176 (listing other CON-regulated services)—then the Court should declare that the CON law violates Art. I, §§ 32 and 34 and enjoin its enforcement against all North Carolinians. Either order would afford Dr. Singleton complete relief.

CONCLUSION

Dr. Singleton's motion for partial summary judgment should be granted.

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CERTIFICATE OF SERVICE

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