No. _____ TENTH DISTRICT

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**SUPREME COURT OF NORTH CAROLINA**

**********

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

Plaintiffs,

v.

North Carolina Department of Health and Human Services; Roy Cooper, Governor of the State of North Carolina, in his official capacity; Kody H. Kinsley, 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 Tim Moore, Speaker of the North Carolina House of Representatives, in his official capacity,

Defendants.

From Wake County
No. COA21-558

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**NOTICE OF APPEAL OR, IN THE ALTERNATIVE, PETITION FOR DISCRETIONARY REVIEW**

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**NOTICE OF APPEAL OR, IN THE ALTERNATIVE, PETITION FOR DISCRETIONARY REVIEW**

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**TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA**

Plaintiffs-Appellants Jay Singleton, D.O., and Singleton Vision Center, P.A., (collectively, "Dr. Singleton") appeal to the North Carolina Supreme Court from the Court of Appeals' 21 June 2022 judgment dismissing Dr. Singleton's challenge to the state's certificate of need (CON) law, N.C. Gen. Stat. §§ 131E-175 *et seq.*, under Art. I, §§ 19, 32, and 34 of the North Carolina Constitution. This case presents three issues and several substantial constitutional questions:

> Issue 1: Whether the CON law, as applied, violates the law of the land clause (Art. I, § 19) of the North Carolina Constitution. This issue raises substantial questions about the importance of economic liberty, what test applies in substantive challenges under the clause, and whether facts matter under that test. *See infra* pp 14–23.
>
> Issue 2: Whether the CON law, as applied, violates the anti-special privileges clause (Art. I, § 32) of the North Carolina Constitution. This issue raises a substantial question about how the clause applies to special economic privileges. *See infra* pp 23–29.
>
> Issue 3: Whether the CON law, as applied, violates the anti-monopoly clause (Art. I, § 34) of the North Carolina Constitution. This issues raises a substantial question about how the clause applies when the government grants an exclusive right to provide a service. *See infra* pp 29–34.

All three issues were raised in Dr. Singleton's complaint (R pp 31–34, ¶¶ 130–52), ruled on by the Superior Court (R pp 58–59), and either wrongly decided or mischaracterized by the Court of Appeals (App pp 1–19).

If the Court agrees that the three issues listed above raise substantial constitutional questions, Dr. Singleton intends to present those issues in his brief for review. In addition, he would present briefing on whether the Court of Appeals properly treated his anti-special privileges and anti-monopoly claims—but not his law of the land claim—as "procedural due process" claims that require exhaustion under N.C. R. Civ. P. 12(b)(1). (App p 9, ¶ 20).

In the event the Court concludes that any of the constitutional questions listed above are not substantial, Dr. Singleton respectfully requests that the Court certify them for discretionary review for the reasons discussed below.

**INTRODUCTION**

A few decades ago, this Court struck down the state's original CON law under the North Carolina Constitution. *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973). The Court held that the CON law—which barred a hospital from building a new facility because there were already a "sufficient" number of hospitals in the area—violated the law of the land (Art. I, § 19) and granted existing hospitals exclusive privileges (Art. I, § 32) and monopolies (Art. I, § 34) "forbidden by" the Constitution. *Id.* at 548, 551, 193 S.E.2d at 733, 735–36.

Yet somehow, the legislature re-enacted a substantially similar CON law just five years later. *See* N.C. Gen. Stat. §§ 131E-175 *et seq*. Somehow, the Court of Appeals—which has "no authority to overrule" this Court, *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (cleaned up)—declared *Aston Park* "moot." *Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 607, 693 S.E.2d 673, 683 (2010). And somehow, there is now confusion about *Aston Park*'s "continuing validity." *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 376 N.C. 63, 94, 852 S.E.2d 146, 167 n.9 (2020).

The time has come for this Court to put that confusion to rest. This case alleges that the current CON law, as applied to Dr. Singleton, violates the same three provisions the original CON law violated in *Aston Park*. (R pp 31–34, ¶¶ 130–52 (alleging that CON law violates Art. I, §§ 19, 32, and 34)). The Superior Court held that Dr. Singleton failed to state any claims under N.C. R. Civ. P. 12(b)(6). The Court of Appeals affirmed as to Dr. Singleton's law of the land claim—and outright refused to reach the substance of his other two claims, dismissing them as "procedural due process" claims that require exhaustion under N.C. R. Civ. P. 12(b)(1).

This Court's review is proper for two basic reasons. First, Dr. Singleton has a right to appeal because this case presents substantial constitutional questions—about how Art. I, §§ 19, 32, and 34 apply to economic laws, and about *Aston Park*'s status—that only this Court can resolve. *See* N.C. Gen. Stat. § 7A-30(1). Second, and in the alternative, this case independently meets all three criteria for discretionary review: the CON law's constitutionality is a matter of grave public interest; how Art. I, §§ 19, 32, and 34 apply to economic laws is important to the state's jurisprudence; and the Court of Appeals' decision conflicts with *Aston Park*. *See* N.C. Gen. Stat. § 7A-31(c). The Court should grant review so that it can address these important constitutional questions.

## PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Before turning to the reasons why review is proper, Dr. Singleton recounts the procedural history and factual background "necessary for understanding the basis of the petition." *See* N.C. R. App. P., App'x D.

### I. Procedural History

Dr. Singleton filed this case on 23 April 2020 alleging that the CON law, as applied, violates Art. I, §§ 19, 32, and 34 of the North Carolina Constitution. (R p 4). Defendants moved to dismiss under N.C. R. Civ. P. 12(b)(6) and 12(b)(1) on 29

June 2020 and 31 July 2020, respectively. (R pp 51, 54). The Superior Court denied the 12(b)(1) motion but granted the 12(b)(6) motion on 9 June 2021. (R p 59). Dr. Singleton appealed the 12(b)(6) dismissal on 9 July 2021. (R p 60). Defendants did not cross-appeal.

The Court of Appeals heard argument on 22 March 2022 and dismissed the case on 21 June 2022. (App pp 1–19). Regarding Art. I, § 19, the court held that exhaustion was not required under Rule 12(b)(1) because Dr. Singleton had brought a "substantive" challenge to the CON law, but the court affirmed the trial court's dismissal under Rule 12(b)(6). (App pp 9, 19, ¶¶ 21, 51). Regarding Art. I, §§ 32 and 34, the court refused to reach the substance of these claims because it construed them as "procedural due process" claims that require exhaustion under Rule 12(b)(1). (App p 9, ¶ 20).

Dr. Singleton petitioned for rehearing on 25 July 2022, which tolled the deadline for filing a notice of appeal or petition for discretionary review. N.C. R. App. P. 14(a), 15(b). He argued that his Art. I, §§ 32 and 34 claims—just like his Art. I, § 19 claim—are substantive, and that he never brought a procedural due process claim. The Court of Appeals denied the petition on 29 July 2022. (App pp 20–21). Dr. Singleton then timely filed this notice of appeal or, in the alternative,

petition for discretionary review with the Court of Appeals and this Court on 15 August 2022.

## II. Factual Background

The key facts in this case are simple. Dr. Singleton owns an operating room that he could use to expand patients' access to safe, affordable eye surgeries. But the CON law says that only operating rooms with a CON can be used. And Dr. Singleton cannot even apply for a CON unless the state first declares a "need" for a new operating room in his area—which it has not done in well over a decade. In fact, the only entity in Dr. Singleton's area to *ever* own an operating room CON is CarolinaEast, a hospital located two miles down the road. Dr. Singleton could provide eye surgeries at his facility for thousands of dollars less than those same procedures cost at CarolinaEast. But the CON law bars him from doing so. As a result, patients suffer while CarolinaEast profits.

### A. Dr. Singleton could use his operating room to expand patients' access to safe, affordable eye surgeries.

Dr. Singleton is a licensed physician and board-certified ophthalmologist based in New Bern, North Carolina. (R p 11, ¶ 9). He founded Singleton Vision Center in 2004 to provide high-quality eye care at an affordable price. (R pp 12–13, ¶¶ 10, 17–18). He performs all of his non-operative services there. (R p 14,

¶ 20). And, because outpatient eye surgeries are a major part of his practice—he has performed over 30,000 procedures in his career—he would like to perform eye surgeries full-time at his facility, too. (R p 14, ¶¶ 20–25).

There is no question Dr. Singleton could safely operate on patients at his facility. It has an operating room with all the equipment, staff, and resources necessary to perform eye surgeries consistent with a high standard of care. (R pp 12, 15, ¶¶ 11, 29). And the facility is accredited by the American Association for Accreditation of Ambulatory Surgery Facilities, which certifies that it meets nationally recognized safety standards. (R p 15, ¶ 27). Safety is simply not an issue in this case.

Better still, using his own operating room would save Dr. Singleton's patients thousands of dollars per procedure over what they would otherwise pay at the only nearby hospital, CarolinaEast. (R pp 9, 14–15, ¶¶ 1, 22, 30). For example, Dr. Singleton can perform a cataract surgery at his facility for under $1,800 total—facility and surgery fee included—while CarolinaEast charges almost $6,000 for its facility fee alone. (R p 14, ¶ 23). Dr. Singleton wants to eliminate these unnecessary costs. (R pp 9, 15, ¶¶ 1, 30–31). But, as explained below, the CON law bars him from doing so.

### B. The CON law bars Dr. Singleton from using his operating room to provide safe, affordable eye surgeries.

Dr. Singleton cannot use his operating room to expand access to care unless he first obtains a CON. N.C. Gen. Stat. §§ 131E-176(16)(a), (u), -178(a). But CONs are not readily available. Instead, their availability depends on whether the state declares a "need" for new services in a given area. *Id.* §§ 131E-178(a), -183(a), -190(a).

The state declares need annually in the State Medical Facilities Plan (SMFP). *Id.* § 131E-183(a). Operating room need is declared two years in advance. *See, e.g.*, 2022 SMFP, https://tinyurl.com/3vn9sja7, at 49, 69–82 ("Table 6B: Projected Operating Room Need for 2024"). So, if the SMFP declares no need for a new operating room in a given area, nobody in that area can get a CON for at least two years. *See* N.C. Gen. Stat. § 131E-183(a)(1) (SMFP need determination "constitutes a determinative limitation on . . . operating rooms . . . that may be approved"); 2022 SMFP at 9 (SMFP need determinations "delineate the number of . . . operating rooms . . . that may be applied for and approved").

Dr. Singleton's facility is in the Craven/Jones/Pamlico area. (R p 27, ¶ 99). The only entity that has *ever* owned a CON in this area is CarolinaEast, a private hospital with a billion-dollar annual budget located two miles down the road

from Dr. Singleton. (R p 27, ¶ 101). That's hardly surprising, given that the state has not declared a need for a new operating room in the Craven/Jones/Pamlico area in well over a decade. (R p 27, ¶¶ 99–100). Nor will that change any time soon. The 2021 SMFP declares no need for a new operating room in the area through 2023. 2021 SMFP, https://tinyurl.com/mxrxk95b, at 70. The 2022 SMFP declares no need in the area through 2024. 2022 SMFP at 71. And the proposed 2023 SMFP declares no need through 2025. Proposed 2023 SMFP, https://tinyurl.com/4hd356k9, at 68.

As it stands, then, Dr. Singleton cannot even apply for a CON until at least 2024—and likely well beyond that. (*See* R pp 27, 29, ¶¶ 99, 114 (alleging, when suit was filed in 2020, that Dr. Singleton was "categorically banned" from getting a CON through at least 2022)). The market is closed.

### C. Barring Dr. Singleton from using his operating room to provide safe, affordable eye surgeries does not benefit real patients in any way. It merely protects CarolinaEast from competition.

Dr. Singleton repeatedly alleged that excluding him from the Craven/Jones/Pamlico market does not benefit real patients in any way. Notably, he alleged that:

- He can safely provide eye surgeries at his facility because he is an experienced, licensed surgeon and his facility meets all relevant health and safety standards. (R pp 12, 14–15, 28, ¶¶ 11, 24–30, 107).

- There is a real need for more affordable eye surgeries in the Craven/Jones/Pamlico area and he can meet that need by providing surgeries at his facility at a fraction of the price charged by CarolinaEast—the sole entity in the area with a CON. (R pp 22, 27, 29–30, ¶¶ 69, 104, 112–13, 123).

- Barring him from performing eye surgeries at his facility "has nothing to do with protecting the health or safety of real patients" and is "without any real-world benefits to patient health or safety." (R pp 10–11, ¶¶ 3–4).

- There is no evidence that barring him from performing eye surgeries at his facility "actually increases access to safe, affordable surgeries in the Craven/Jones/Pamlico service area" or "serves any other legitimate governmental purpose." (R pp 28, 33–34, ¶¶ 106, 148–49).

Granted, the CON law makes some contrary assertions. After this Court struck down the first CON law in *Aston Park*, the state re-enacted the CON law in 1978 with broad "findings of fact" about how it was supposedly necessary to

control prices and promote access to care. (R pp 17–19, ¶¶ 40–52 (citing, in part, N.C. Gen. Stat. § 131E-175)). But Dr. Singleton squarely alleged that, "[w]hatever their truth in 1978, these 'findings of fact' are false as a matter of fact today." (R p 18, ¶ 49). He made over a dozen allegations to that effect. (R pp 18–21, ¶¶ 50–64). And then, for good measure, he alleged that the CON law's findings are false for him too. (R pp 28, 33, ¶¶ 106, 147–48).

If excluding Dr. Singleton from the market does not benefit real patients, what *does* it do? The obvious: It "protect[s] established healthcare providers"—namely, CarolinaEast—"from competition." (R p 34, ¶ 150). As discussed below, this case presents important questions about whether that is a legitimate use of government power.

## ARGUMENT

This Court's review is proper for two basic reasons. First, Dr. Singleton has a right to appeal because this case presents substantial constitutional questions—about how Art. I, §§ 19, 32, and 34 apply to economic laws, and about *Aston Park*'s status—that only this Court can resolve. *See* N.C. Gen. Stat. § 7A-30(1). Second, and in the alternative, this case independently meets all three criteria for discretionary review: the CON law's constitutionality is a matter of significant

public interest; how Art. I, §§ 19, 32, and 34 apply to economic laws is important to the state's jurisprudence; and the Court of Appeals' decision conflicts with *Aston Park*. *See* N.C. Gen. Stat. § 7A-31(c). The Court should grant review so that it can address these important constitutional questions.

## I. This case involves substantial questions under the North Carolina Constitution.

A party has a right to appeal any Court of Appeals decision in a case "[w]hich directly involves a substantial question arising under the Constitution . . . of this State[.]" N.C. Gen. Stat. § 7A-30(1). This Court has not fully explained what constitutes a substantial constitutional question. Justice Robert Orr, *What Exactly Is a "Substantial Constitutional Question" for Purposes of Appeal to the North Carolina Supreme Court?*, 33 Campbell L. Rev. 211, 216 (2011). But two things are clear. The Courts Commission that drafted N.C. Gen. Stat. § 7A-30(1) intended that "cases involving constitutional interpretations should, by statute, have direct access to the supreme court." *Id.* at 212–14. And the questions raised cannot have "already been the subject of a conclusive judicial determination." *State v. Colson*, 274 N.C. 295, 303, 163 S.E.2d 376, 382 (1968). Dr. Singleton's claims check both boxes because they present unresolved questions about how Art. I, §§ 19, 32, and 34 apply to economic laws.

### A. There are unresolved questions about how Art. I, § 19 applies in substantive challenges to economic laws.

This Court cannot seem to decide how to treat substantive challenges to economic laws under the law of the land clause. There is confusion over how important economic liberty is, what constitutional test applies, and how that test relates to the federal rational-basis test. And, as a result, there is confusion over a question at the core of this case: whether plaintiffs can use facts to rebut economic laws' presumption of constitutionality. Below, Dr. Singleton surveys the confusion and shows that this case is an ideal vehicle for resolving it.

#### 1. There is confusion over how important economic liberty is, what constitutional test applies, and how that test relates to the federal rational-basis test.

The first source of confusion is that this Court has said different things about how important economic liberty is. Sometimes, the Court treats it as non-fundamental. *See, e.g.*, *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998); *Duggins v. N.C. State Bd. of Certified Pub. Acct. Exam'rs*, 294 N.C. 120, 129–31, 240 S.E.2d 406, 412–13 (1978). Other times, the Court treats economic liberty as a "fundamental right." *King v. Town of Chapel Hill*, 367 N.C. 400, 408–09, 758 S.E.2d 364, 371 (2014) (citing *Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d

851, 854 (1957); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 863 (1940) ("[T]he right to earn a living must be regarded as inalienable.")).[1]

The second source of confusion concerns the test that economic laws must meet. Sometimes, the Court merely requires that a law be "rationally related" to the public welfare. *See, e.g.*, *Meads*, 349 N.C. at 672–74, 509 S.E.2d at 176–77; *Duggins*, 294 N.C. at 130, 240 S.E.2d at 413. Other times, the Court requires more: "a real or substantial relation," *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988); that the law be "'reasonably necessary,'" *Aston Park*, 282 N.C. 542, 551, 193 S.E.2d 729, 735 (1973) (quoting *State v. Ballance*, 229 N.C. 764, 769–70, 51 S.E.2d 731, 735 (1949)); or that it further the public welfare in a "plain, appreciable, and appropriate manner," *State v. Williams*, 146 N.C. 618, 61 S.E. 61, 64 (1908) (cleaned up).

Still more confusing, the Court has held that the test demands greater scrutiny when laws exclude people from entering the market:

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[1] *King* cited the fruits of their labor clause (Art. I, § 1), which imposes "the same requirement" as the law of the land clause (Art. I, § 19) in challenges to economic laws. *Treants Enters., Inc. v. Onslow County*, 320 N.C. 776, 778, 360 S.E.2d 783, 785 (1987); *see, e.g.*, *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 698–99 (1988) (applying clauses together); *Roller*, 245 N.C. at 518–19, 96 S.E.2d at 854 (same); *Harris*, 216 N.C. at 759, 6 S.E.2d at 863 (same).

> [T]he power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. . . . When this field has been reached, the police power is severely curtailed. . . . [and] such a deprivation of . . . liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive [an] attack based upon Article I, § 19 of the Constitution of North Carolina.

*Aston Park*, 282 N.C. at 550–51, 193 S.E.2d at 735 (quoting, in part, *Harris*, 216 N.C. at 758, 6 S.E.2d at 863). But the Court has not discussed this principle—much less explained how it works—since.

The third source of confusion is the relationship between the law of the land clause and the federal due process clause. Sometimes, the Court treats the provisions as "synonymous," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004), and holds that the "inquiry under both . . . is the same[,]" *Meads*, 349 N.C. at 671, 509 S.E.2d at 175. Other times, the Court holds that federal due process cases "do not control an interpretation . . . of the law of the land clause," *McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990), and the Court even "grant[s] relief against unreasonable and arbitrary" economic laws "in circumstances under which no relief might be granted by the [federal] due process clause," *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985) (citing *Aston Park*, 282 N.C. 542, 193 S.E.2d 729, as an example).

### 2. There is confusion over whether plaintiffs can use facts to rebut the presumption of constitutionality.

This Court's disparate takes on the importance of economic liberty, what test applies under the law of the land clause, and how that test relates to the federal rational-basis test have produced further confusion on a question at the core of this case: whether plaintiffs can use facts to rebut the presumption of constitutionality.

When this Court treats economic rights as unimportant and applies the federal rational-basis test, it holds that facts don't matter. *See, e.g.*, *Meads*, 349 N.C. at 672, 509 S.E.2d at 176 (asking whether licensing rule was "so irrational that no reasonable conception could justify it"); *Rhyne*, 358 N.C. at 182, 594 S.E.2d at 16 (asking whether legislature "could have believed" damages cap was rational); *In re Moore's Sterilization*, 289 N.C. 95, 103–04, 221 S.E.2d 307, 312–13 (1976) (imagining ways in which forced sterilization of mentally handicapped persons "may be" rational).

*Rhyne* embodies this facts-don't-matter approach. The plaintiffs had been injured by K-Mart employees and challenged a damages cap under the law of the land clause. *Rhyne*, 358 N.C. at 164, 180, 594 S.E.2d at 5, 15. The plaintiffs used evidence to argue that there was no real need for a damages cap. *Id.* at 181, 594

S.E.2d at 16. But this Court held that arguing from evidence "misapprehends the law regarding the rational basis standard of review," which asks only what "the General Assembly could have believed" about the law at the time it was enacted. *Id.* at 181–82, 594 S.E.2d at 16–17.[2]

But this Court treats facts differently when it views economic rights as important and applies a stronger test. *See, e.g.*, *Harris*, 216 N.C. 746, 6 S.E.2d at 866 (applying "real or substantial" test and holding that plaintiffs can overcome "[a]ny presumptions or burdens which may exist . . . when the facts are laid bare to the Court"); *Aston Park*, 282 N.C. at 547–52, 193 S.E.2d at 733–36 (applying same test and relying on lack of evidence in the "record" supporting original CON law); *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 479–81, 206 S.E.2d 141, 149–51 (1974) (striking down law restricting retailers who had not contracted with manufacturers from selling watches at prices lower than those desired by manufacturers because there was "no persuasive evidence that [the law], as applied to non-signers of 'fair trade' agreements, is necessary").

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[2] That the fact-free approach is essentially toothless may explain this Court's recent holding that "[r]ational basis review . . . does not adequately protect" another important right: the right to a sound basic education. *King ex rel. Harvey-Barrow v. Beaufort Cnty. Bd. of Educ.*, 364 N.C. 368, 377, 704 S.E.2d 259, 264–65 (2010).

This Court's decision in *City of Winston-Salem v. Southern Railway Co.*, 248 N.C. 637, 105 S.E.2d 37 (1958), embodies the facts-do-matter approach. There, an ordinance required a railroad to rebuild a trestle—supposedly to meet future traffic demands. *Id.* at 639–40, 105 S.E.2d at 38–40. The railroad challenged the ordinance under the law of the land clause, offering "voluminous evidence" that "changed economic conditions" had rendered the ordinance "unreasonable and oppressive." *Id.* at 639–55, 105 S.E.2d at 38–50. Instead of ignoring the evidence, this Court held that "the validity of [a] police regulation *primarily depends* on whether under *all the surrounding circumstances and the particular facts of the case* the regulation . . . is reasonably calculated to accomplish a purpose falling within the legitimate scope of the police power." *Id.* at 642, 105 S.E.2d at 41 (emphasis added). Based on the railroad's evidence, the Court struck down the ordinance as applied. *Id.* at 655–56, 105 S.E.2d at 50–51.

**3. This case is an ideal vehicle for resolving the confusion over whether plaintiffs can use facts to rebut the presumption of constitutionality.**

This case presents the Court with an ideal opportunity to resolve the confusion over whether facts matter because it involves circumstances under which facts typically *do* matter: as-applied challenges and Rule 12(b)(6) motions.

As-applied challenges turn on "facts" about the "statute's operation, as applied to [the] plaintiff." *Britt v. State*, 363 N.C. 546, 550, 681 S.E.2d 320, 323 (2009) (law barring plaintiff from possessing guns failed rational-basis test); *S. Ry. Co.*, 248 N.C. at 656, 105 S.E.2d at 50 (as-applied challenge to ordinance requiring railroad to rebuild trestle turned on the "facts of this case"). And under Rule 12(b)(6), a plaintiff's factual allegations must be "treated as true" and "liberally construed." *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010) (cleaned up).

Following these principles, the Court of Appeals should have credited the following allegations in Dr. Singleton's complaint:

- He can safely provide eye surgeries at his facility because he is an experienced, licensed surgeon and his facility meets all relevant health and safety standards. (R pp 12, 14–15, 28, ¶¶ 11, 24–30, 107).

- There is a real need for more affordable eye surgeries in the Craven/Jones/Pamlico area and he can meet that need by providing surgeries at his facility at a fraction of the price charged by CarolinaEast—the sole entity in the area with a CON. (R pp 22, 27, 29–30, ¶¶ 69, 104, 112–13, 123).

- Barring him from performing eye surgeries at his facility "has nothing to do with protecting the health or safety of real patients" and is "without any real-world benefits to patient health or safety." (R pp 10–11, ¶¶ 3–4).

- There is no evidence that barring him from performing eye surgeries at his facility "actually increases access to safe, affordable surgeries in the Craven/Jones/Pamlico service area" (R pp 28, 33, ¶¶ 106, 148) or "serves any other legitimate governmental purpose." (R p 34, ¶ 149).

Indeed, that is precisely how a *different* Court of Appeals panel handled a similar case just a few weeks later. *See Kinsley v. Ace Speedway Racing, Ltd.*, 2022-NCCOA-524, ¶¶ 22, 29 (rejecting 12(b)(6) motion in challenge to COVID-19 executive order under Art. I, § 19 because plaintiff's factual allegations showed that, as applied to its business, the order was unnecessary). Yet the panel that dismissed *this* case did not discuss Dr. Singleton's allegations. Instead, it simply deferred to the CON law's "findings of fact" about how the law is necessary to control costs and increase access to care. (App pp 13–14, ¶ 33 (citing N.C. Gen. Stat. § 131E-183(a))).[3]

Of course, Dr. Singleton squarely alleged that "[w]hatever their truth in 1978, these 'findings of fact' are false as a matter of fact today." (R p 18, ¶ 49). He made over a dozen allegations to that effect. (R pp 18–21, ¶¶ 50–64). And, since this is an as-applied challenge, he also alleged that the CON law's findings are

[3] The Court of Appeals cited the wrong provision. The CON law's findings are set forth in Section 131E-175, not Section 131E-183.

false as applied to him. (R pp 28, 33, ¶¶ 106, 147–48). But the Court of Appeals ignored these allegations, too.

There is only one way the court could have credited the CON law's findings over Dr. Singleton's allegations. It had to believe that plaintiffs *cannot use evidence* to refute legislative findings. That not only conflicts with the court's approach a few weeks later in *Kinsley*—it conflicts with this Court's precedents. *See Harris*, 216 N.C. 746, 6 S.E.2d at 862 (holding, in challenge to licensing law, that legislature "cannot, by preamble or fact finding determination . . . withdraw the legislation from judicial review"); *see also Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 294, 749 S.E.2d 429, 433 (2012) ("legislative findings and declaration of policy have no magical quality to make valid that which is invalid" (cleaned up)); *State v. Grady*, 372 N.C. 509, 541, 831 S.E.2d 542, 566 (2019) (legislative findings are presumed true unless "the evidence is to the contrary, or if facts judicially known or proved, compel otherwise" (cleaned up)).

But that's just the problem. For every case where this Court has said that economic liberty is important, or that a more rigorous test applies, or that facts matter under that test, the Court has cases saying the exact opposite. So it's no wonder the Court of Appeals has—in just the past couple months alone—taken

squarely opposing approaches to factual allegations in economic liberty cases. Until the deeper confusion in this Court's cases is resolved, there will continue to be substantial questions about how Art. I, § 19 applies to economic laws.

### B. There is a substantial question about how Art. I, § 32 applies when the government grants special economic privileges.

The next substantial question concerns Art. I, § 32, which reads: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." Until the mid-20th century, this Court followed the clause's text and purpose and struck down economic privileges not granted in exchange for public services. After the U.S. Supreme Court invented the rational-basis test, however, that test slowly started to muddy the analysis. As a result, there is now an open question about how Art. I, § 32 applies when the government grants special economic privileges.

#### 1. Until the mid-20th century, this Court followed the text and purpose of Art. I, § 32.

The special privileges clause was part of the Declaration of Rights of 1776. John V. Orth, *Unconstitutional Emoluments: The Emoluments Clauses of the North Carolina Constitution*, 97 N.C. L. Rev. 1727, 1729–30 (2019). The framers adopted it to reject the "monarchical practice" of granting privileges to favored classes and

to establish a system where "free men . . . would compete equally for political and economic advantage." *Id.* at 1729–30 & n.16; *State v. Felton*, 239 N.C. 575, 587, 80 S.E.2d 625, 634 (1954) (recognizing that the clause embodies a "fundamental democratic principle: 'Equal rights and opportunities to all, special privileges to none.'").

Thus, 19th and early 20th century "courts commonly invoked [the clause] to invalidate state laws that granted special privileges to favored businesses or interest groups." Judge Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L. Rev. 1, 8–9 (2022); *Brumley v. Baxter*, 225 N.C. 691, 698, 36 S.E.2d 281, 286 (1945) (collecting cases). Rather than apply the rational-basis test—which did not exist—this Court simply asked whether laws (1) "confer[red] special privileges" (2) "not in consideration of public service[s]." *Brumley*, 225 N.C. at 698, 36 S.E.2d at 286.

Step 1 was easy enough. At the founding, "privileges" meant rights—including the right to provide a service. *See* 1 W. Blackstone, *Commentaries on the Laws of England* 129 (1765) (describing "rights and liberties" of Englishmen as "civil privileges"); *Sheepshanks v. Jones*, 9 N.C. (2 Hawks) 211, 212 (1822) (referring interchangeably to "rights and privileges"); *State v. Bean*, 91 N.C. 554,

557–58 (1884) (referring to the "privilege of exercising a trade or calling within the town"); *see also* Dietz, *supra*, at 8 (explaining that emoluments and privileges "together . . . broadly encompass all forms of rights or benefits that one could receive").

Step 2 was less obvious, but this Court charted a clear path. It held that "public services" were those "rendered" to the public on the government's behalf. *Id.* at 9 (quoting *Simonton v. Lanier*, 71 N.C. 498, 503 (1874)). That meant the government could, for example, compensate public servants or grant franchises to provide city services. *See, e.g.*, *Hinton v. Lacy*, 193 N.C. 496, 173 S.E.2d 669, 674 (1927) (upholding veterans' loans because "[t]he service was public"); *Harrill v. Tchrs.' & State Emps.' Ret. Sys.*, 271 N.C. 357, 360–61, 156 S.E.2d 702, 706 (1967) (upholding teachers' benefits as "compensation for public services previously rendered"); *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 654, 386 S.E.2d 200, 212 (1989) (upholding franchise to provide cable services because "[f]ranchises granted to public service companies come directly within the words and meaning of the [public services] exception").

But the government could not dole out exclusive privileges to provide *private* services. *See, e.g.*, *Simonton*, 71 N.C. at 502 (rejecting a "private bank['s]"

exclusive privilege to charge a higher interest rate); *State v. Fowler*, 193 N.C. 290, 136 S.E. 709, 711 (1927) (rejecting special privilege to make, sell, and possess spirits); *State v. Sasseen*, 206 N.C. 644, 175 S.E. 142, 144 (1934) (rejecting special privilege to provide taxicab services); *State v. Warren*, 211 N.C. 75, 189 S.E. 108, 111 (1937) (rejecting special privilege to provide real-estate services); *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 94, 84 S.E.2d 390, 400 (1954) (rejecting special privilege to conduct gambling business).

*Aston Park* followed this traditional approach. After holding that the original CON law violated the law of the land clause, the Court separately held that the law granted existing hospitals "exclusive privileges forbidden by Article I, § 32." *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 736. The hospitals were not state facilities or utilities. *See id.* at 550, 193 S.E.2d at 374–35. They were private entities providing private services. *See Foster v. N.C. Med. Care Comm'n*, 283 N.C. 110, 125–27, 195 S.E.2d 517, 527–29 (1973) (holding, three months later, that using tax dollars to fund hospitals that are "privately operated, managed, and controlled" serves only private interests). So their privileges—an exclusive right to operate in certain areas—were "forbidden."

**2. The rational-basis test muddied the analysis in a way that this Court has failed to resolve.**

Around the time *Aston Park* was decided, the Court's approach to Art. I, § 32 was starting to "shift." Dietz, *supra*, at 10. The culprit was the rational-basis test. The U.S. Supreme Court invented that test for federal due process cases in 1938. *United States v. Carolene Prods., Co.*, 304 U.S. 144, 152 (1938). But then, in 1967, this Court applied it for the first time under Art. I, § 32—even though Art. I, § 32 bore no textual similarities to the federal due process clause and predated *Carolene Products* by over 150 years. *See State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

*Knight* was a challenge to a law exempting certain people from jury duty. The Court held that Art. I, § 32 (then Art. I, § 7) "does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare . . . and if there is reasonable basis for the Legislature to conclude that the granting of the exemption would be in the public interest." *Id.* at 108, 152 S.E.2d at 184. Then, just like under the rational-basis test, the Court upheld the law because the legislature had "reasonable cause" to think it would benefit the public. *Id.* at 108–09, 152 S.E.2d at 184–85.

For a time, the shift toward the rational-basis test was confined to *Knight*'s context: cases challenging exemptions from general laws. *See Lowe v. Tarble*, 312 N.C. 467, 470–71, 323 S.E.2d 19, 21–22 (1984) (applying test in challenge to law exempting certain people from having to pay prejudgment interest); *Town of Emerald Isle ex rel. Smith v. State*, 320 N.C. 640, 652–54, 360 S.E.2d 756, 763–64 (1987) (applying test in challenge to law exempting certain beachfront property owners from having to allow through traffic).

But in 1994, the Court applied the rational-basis test in a new context: a challenge to a law allowing the state to reimburse utilities for extending gas lines to underserved areas. *See State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 677, 466 S.E.2d 332, 344 (1994). And then, to make matters more confusing, the Court pivoted back to its traditional approach the very next year. *See Leete v. County of Warren*, 341 N.C. 116, 118–23, 462 S.E.2d 476, 478–80 (1995) (holding that Art. I, § 32 "by its definition . . . precludes exclusive or separate emoluments except 'in consideration of public services'" and that severance pay for county manager was not granted in exchange for "services rendered").

*Leete* was this Court's last word on Art. I, § 32. It said nothing about the rational-basis test. Which suggests that the traditional approach that controlled in *Aston Park* should control here. Yet the 27-year period from *Knight* to *Carolina Utility* muddied the waters, injecting uncertainty over whether the rational-basis test applies. And in the additional 27-year period since *Leete*, this Court has not clarified matters. The result is a substantial question about how Art. I, § 32 applies to special economic privileges.

### C. There is a substantial question about how Art. I, § 34 applies when the government grants an exclusive right to provide a service.

The last substantial question concerns Art. I, § 34, which declares that "[p]erpetuities and monopolies are contrary to the genius of free state and shall not be allowed." The Court has traditionally honored the clause's purpose by striking down laws that granted an exclusive right to provide a service. *Aston Park* was such a case. But in 1984, the Court suggested that *Aston Park* was really just a rational-basis case, which has raised substantial questions about *Aston Park*'s "continuing validity," *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 376 N.C. 63, 94, 852 S.E.2d 146, 167 n.9, and about how Art. I, § 34 applies when the government grants an exclusive right to provide a service.

### 1. This Court has traditionally identified monopolies by asking if the challenged law grants an exclusive right to provide a service.

The anti-monopoly clause, like the special privileges clause, was adopted in 1776. Dietz, *supra*, at 13. It was "a response to the crippling effects of English mercantilism on the colonists," including the Crown's practice of granting "monopoly rights to favored businesses [which] covered virtually every area of commerce imaginable." *Id.* at 13–14 (citing, in part, Joshua C. Tate, *Perpetuities and the Genius of a Free State*, 67 Vand. L. Rev. 1823, 1833–34 (2014), and Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 938, 1007–08, 1073–74 (2013)); *see also* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 223 (2003) (similar).

Given this history, there was no confusion over what "monopoly" meant at the founding. It was "a grant by the sovereign of an exclusive privilege to do something which had theretofore been a matter of common right." *Harris*, 216 N.C. 746, 6 S.E.2d at 864; *see also* Sandefur, *supra*, at 218–19 ("monopoly meant a company insulated from competition by a special legal privilege which barred others from competing"). The framers believed that even if "there were some

rational grounds for awarding monopolies," monopolies were "so repugnant that the constitution should prohibit them entirely." Dietz, *supra*, at 18; *see also* Sandefur, *supra*, at 223 (similar). So they wrote a categorical clause declaring that "monopolies . . . shall not be allowed." Period.

Until the late 20th century, this Court honored the clause's purpose by striking down laws that granted an exclusive right to provide a service. *See, e.g.*, *Thrift v. Bd. of Comm'rs of Elizabeth City*, 122 N.C. 31, 30 S.E. 349, 351 (1898) (striking down "ordinance granting the exclusive privilege to construct and maintain waterworks within the corporate limits of the town"); *Town of Clinton v. Standard Oil Co.*, 193 N.C. 432, 137 S.E. 183, 184 (1927) (striking down ordinance granting six gas stations an exclusive right to operate in a district); *Shuford v. Town of Waynesville*, 214 N.C. 135, 198 S.E. 585, 588 (1938) (similar); *Sasseen*, 206 N.C. 644, 175 S.E. at 144 (striking down law that "turn[ed] the [taxi] business over to a privileged class").

*Town of Clinton* is a good example. There, the Court struck down an ordinance that capped the number of gas stations that could operate in a district, explaining:

> The 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.

*Town of Clinton*, 193 N.C. 432, 137 S.E. at 184.

Contrast that with two cases holding that licensing laws did not create monopolies because they left the market open to anybody who could meet a set of objective criteria. *See State v. Warren*, 252 N.C. 690, 697, 114 S.E.2d 660, 666–67 (1960) (real-estate licensing did not create monopoly because "[t]he door is open to all who possess the requisite competency, good character and can pass the examination which is exacted of all applicants alike"); *State v. Call*, 121 N.C. 643, 28 S.E. 517, 517 (1897) (medical licensing law did not create monopoly because "[t]he door stands open to all who possess the requisite age and good character, and can stand the examination"). These cases took the same approach as *Town of Clinton* but reached different results because the laws did not grant exclusive rights.

*Aston Park* followed the same logic. The Court held that the original CON law, which barred new hospitals in a given area when a state agency declared that there were already a "sufficient" number, granted "exclusive privileges" to

existing hospitals. *Aston Park*, 282 N.C. at 548, 551, 193 S.E.2d at 733, 736. Like in *Town of Clinton*, the CON law "exclude[d]" new hospitals from the market "in order to protect existing hospitals from competition otherwise legitimate." *Id.* at 552, 193 S.E.2d at 736. That "establishe[d] a monopoly in the existing hospitals," *id.* at 551, 193 S.E.2d at 736, plain and simple.

**2. This Court created confusion when it reframed *Aston Park* as a rational-basis case.**

The Court reframed *Aston Park*'s anti-monopoly holding in *American Motors Sales Corp. v. Peters*, 311 N.C. 311, 317 S.E.2d 351 (1984). There, the Court held that a law restricting "intra-brand competition" among car dealerships franchised by the same manufacturer did not violate Art. I, § 34. *Id.* at 317–22, 317 S.E.2d at 356–59. The Court distinguished *Aston Park* because it supposedly "turned on the absence of a rational relationship between the required certificate of need and any public good." *Id.* at 320, 317 S.E.2d at 358.

But *Aston Park* did not actually say that. True, *Aston Park* held that the CON law violated the law of the land clause. But nothing in the opinion ties the Court's anti-monopoly holding to its rationality analysis. And that makes sense, given that earlier cases like *Town of Clinton* did not apply the rational-basis test when resolving anti-monopoly claims, and that "[t]here is little to support the

notion that the framers contemplated this sort of rationality standard." Dietz, *supra*, at 18.

Still, the damage was done. Because the Court of Appeals has since upheld the CON law under Art. I, § 19, *Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 607, 693 S.E.2d 673, 683 (2010), litigants have argued "that *Aston Park* has no continuing validity" under Art. I, § 34. *DiCesare*, 376 N.C. at 94, 852 S.E.2d at 167 n.9 (cleaned up). This Court, meanwhile, has "refrain[ed] from commenting." *Id*.[4] The result is an open question that only this Court can resolve: Was *Aston Park* really just a rational-basis case? And if so, what does that mean for the long line of anti-monopoly cases predating *Aston Park* that never applied the rational-basis test?

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[4] None of the anti-monopoly cases the Court has decided since *Aston Park* have involved materially similar facts. *See Am. Motors Sales*, 311 N.C. at 320, 317 S.E.2d at 358 (upholding law imposing "vertical restraint" on "intra-brand competition" and distinguishing *Aston Park* as involving "a horizontal restraint . . . [on] services at the same level across the state"); *Madison Cablevision, Inc.*, 325 N.C. at 654, 386 S.E.2d at 211 (upholding franchise to provide city cable services where, unlike in *Aston Park*, the city did "not foreclose[] for any period the possibility that franchises might be granted to other applicants"); *DiCesare*, 376 N.C. at 94, 852 S.E.2d at 167 n.9 (upholding term in public hospital authority's contracts barring insurers from "steering" patients to lower-cost providers and holding that "the facts at issue in this case are materially different from those at issue in *Aston Park*").

* * *

This case presents substantial constitutional questions about how Art. I, §§ 19, 32, and 34 apply to economic laws. There is rampant confusion over how important economic liberty is, what test applies under Art. I, § 19, and whether facts matter under that test. There are unresolved questions about how courts are supposed to evaluate economic privileges under Art. I, §§ 32 and 34. And there is uncertainty over *Aston Park*'s "continuing validity." *DiCesare*, 376 N.C. at 94, 852 S.E.2d at 167 n.9. The Court should allow Dr. Singleton's appeal and address these important constitutional questions head-on.

## II. In the alternative, this case independently meets all three criteria for discretionary review.

If the Court finds that any of the constitutional questions discussed above are not substantial, the Court can still certify them for discretionary review if (1) "[t]he subject matter of the appeal has significant public interest," (2) "[t]he cause involves legal principles of major significance to the jurisprudence of the State," or (3) "[t]he decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court." N.C. Gen. Stat. § 7A-31(c). This case independently meets all three criteria—largely for the reasons discussed above. Dr. Singleton offers a few additional reasons below.

*First*, the CON law's constitutionality is of significant public interest. The legislature has deemed the law crucial to "the general welfare and protection of lives, health, and property of the people of this State." N.C. Gen. Stat. § 131E-175(7). Dr. Singleton has alleged the opposite: that the CON law, as applied, "is without any real-world benefits to patient health or safety" (R pp 10–11, 28, 33, ¶¶ 3–4, 106, 148) and serves only to "protect established healthcare providers from competition" (R p 34, ¶ 150). Whoever is right, everybody agrees that this case will affect patients' access to healthcare.

Moreover, whether the CON law restricts Dr. Singleton's liberty purely to protect hospitals from competition goes to whether the law is a valid use of the police power. *See State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 735 (1949) (police power must promote "the good of the citizens as a whole rather than the interests of a particular class"). That is an issue of paramount public interest. *See Harris*, 216 N.C. 746, 6 S.E.2d at 862 (few issues are "comparable with the importance of the social interest involved in the maintenance of personal liberty guaranteed by the Constitution").

*Second*, Art. I, §§ 19, 32, and 34 are deeply important to North Carolina's jurisprudence. As part of the Declaration of Rights, they are "the supreme law of

the State." *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 291–92 (1992). They stand for "fundamental democratic principle[s]." *Felton*, 239 N.C. at 587, 80 S.E.2d at 634; *see also Harris*, 216 N.C. 746, 6 S.E.2d at 865 (explaining that the clauses "have a key position in our political set-up"). And, as the Constitution itself notes, "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. If the proper application of Art. I, §§ 19, 32, and 34 is not important to the state's jurisprudence, it's hard to see what would be.

*Third*, the Court of Appeals' decision conflicts with *Aston Park* on all three of Dr. Singleton's claims. On Art. I, § 19: *Aston Park* struck down the first CON law because there was no evidence that barring new facilities would increase access to care. *Aston Park*, 282 N.C. at 549, 193 S.E.2d at 734. Dr. Singleton alleged the same thing about the CON law's application to him. (R pp 10–11, 28, 33, ¶¶ 3–4, 106, 148). But the Court of Appeals ignored his allegations and held that *Aston Park* did not apply. (App p 17, ¶ 43 (citing *Hope*, 203 N.C. App. at 607, 693 S.E.2d at 683)). That is a conflict.

On Art. I, §§ 32 and 34: *Aston Park* held that the CON law "establishes a monopoly in the existing hospitals contrary to the provisions of Article I, § 34 of

the Constitution of North Carolina and is a grant to them of exclusive privileges forbidden by Article I, § 32." *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 736. Dr. Singleton alleged that the law grants CarolinaEast—the sole CON-holder in his area—an unconstitutional monopoly and special privileges for the same reasons. (R pp 31–33, ¶¶ 130–43). Yet the Court of Appeals did not even acknowledge that Dr. Singleton had brought the same claims as those raised in *Aston Park*. Instead, it treated his anti-monopoly and anti-special privileges claims as "procedural due process" claims. (App p 9, ¶ 20). That, too, is a conflict.

## CONCLUSION

The Court should review this appeal as of right because this case involves substantial constitutional questions under N.C. Gen. Stat. § 7A-30(1). In the alternative, the Court should certify any issues that it does not deem substantial for review because this case separately meets all three criteria for discretionary review under N.C. Gen. Stat. § 7A-31(c).

Respectfully submitted this 15th day of August, 2022.

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## CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing brief complies with the length and typeface requirements of Rule 28(j) of the North Carolina Rules of Appellate Procedure. The brief, excluding the cover page, index, table of cases and authorities, certificate of service, and appendix, contains less than 8,750 words.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 15th day of August, 2022, a copy of the foregoing brief was served upon all parties to this matter by electronic mail and by United States Postal Service in a first-class postage-prepaid envelope properly addressed as follows:

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## CONTENTS OF APPENDIX

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-412

No. COA21-558

Filed 21 June 2022

Wake County, No. 20 CVS 05150

JAY SINGLETON, D.O., and SINGLETON VISION CENTER, P.A., 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.

Appeal by plaintiffs from order entered 11 June 2021 by Judge Michael O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 22 March 2022.

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*Law Office of B. Tyler Brooks, PLLC, by B. Tyler Brooks and Lusby Law, PA, by Christopher R. Lusby for amicus curiae Certificate of Need Scholars.*

*Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Kenneth L. Burgess, Matthew F. Fisher, and Iain M. Stauffer for amici curiae NCHA, Inc. d/b/a North Carolina Healthcare Association, North Carolina Healthcare Facilities Association, North Carolina Chapter of the American College of Radiology, Inc., and North Carolina Senior Living Association.*

*Parker, Poe, Adams, & Bernstein LLP, by Robert A. Leandro for amici curiae Association for Home and Hospice Care of North Carolina and North Carolina Ambulatory Surgical Center.*

*John Locke Foundation, by Jonathan D. Guze, for amicus intervenor John Locke Foundation.*

TYSON, Judge.

¶ 1 Jay Singleton, D.O. and Singleton Vision Center, P.A. (collectively "Plaintiffs") appeal from an order entered, which granted the motion to dismiss by the North Carolina Department of Health and Human Services ("DHHS"); Roy Cooper, in his capacity as Governor of the State of North Carolina; Mandy H. Cohen, in her capacity as Secretary of the North Carolina Department of Health and Human Services; Phillip E. Berger, in his capacity as President *Pro Tempore* of the North Carolina Senate; and, Timothy K. Moore, in his capacity as Speaker of the North Carolina House of Representatives (collectively "Defendants"). We dismiss in part and affirm in part.

## I. Background

¶ 2 Jay Singleton, D.O. ("Dr. Singleton") is a board-certified ophthalmologist, licensed as a medical doctor by the North Carolina Medical Board, and practices in New Bern. Dr. Singleton founded Singleton Vision Center, P.A. (the "Center") in 2014 and serves as its President and Principal. The Center is a full-service ophthalmology clinic, which provides routine vision checkups, treatments for infections, and surgery.

¶ 3 Dr. Singleton provides all non-operative patient care and treatments at the Center. Dr. Singleton performs the majority of his outpatient surgeries at Carolina East Medical Center ("Carolina East") in New Bern. Carolina East is the only licensed provider with an operating room certificate of need located in the tri-county planning area of Craven, Jones, and Pamlico Counties. This current single need determination has not been revised for over ten years since 2012.

¶ 4 To perform surgeries at the Center, Dr. Singleton must obtain both a facility license under the Ambulatory Surgical Facility Licensure Act, N.C. Gen. Stat. § 131E-145 *et seq*. (2021) and a Certificate of Need ("CON") under N.C. Gen. Stat. § 131E-175 *et seq*. (2021). DHHS makes determinations of operating room needs each year in the State Medical Facilities Plan to become effective two years later.

¶ 5 The 2021 State Medical Facilities Plan states there is "no need" for new operating room capacity in the Craven, Jones, and Pamlico Counties planning area. The tri-county planning area encompasses an area of approximately 1,814 square

miles. Representatives of Carolina East informed Plaintiffs they will oppose any application they submit for an additional operating room CON within the tri-county area.

¶ 6 Plaintiffs filed suit on 22 April 2020, alleging the CON law as applied to them violates the North Carolina Constitution. Plaintiffs sought an injunction preventing Defendants from enforcing the CON law, a declaration the CON law is unconstitutional as applied to them, and to recover nominal damages.

¶ 7 Defendants filed motions to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) on 29 June 2020 and 31 July 2020. Following a hearing, the trial court denied Defendants' Rule 12(b)(1) motion and allowed Defendants' Rule 12(b)(6) motion on 11 June 2021. Plaintiffs appeal the trial court's order granting Defendants' Rule 12(b)(6) motion. Defendants failed to cross-appeal the denial of their 12(b)(1) motion.

## II. Jurisdiction

¶ 8 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021). "[T]he issue of subject matter jurisdiction may be raised at any time, even on appeal." *Huntley v. Howard Lisk Co., Inc.*, 154 N.C. App. 698, 700, 573 S.E.2d 233, 235 (2002).

### A. Failure to Appeal

¶ 9 Defendants argue the trial court lacked subject matter jurisdiction because

Plaintiffs failed to exhaust or even attempt to invoke statutory and administrative remedies available to them. This argument was incorporated into Defendants' Rule 12(b)(1) motion to dismiss, which the trial court denied. Defendants were not required to take a cross-appeal of the trial court's order dismissing the case under Rule 12(b)(6) in order to raise arguments under Rule 12(b)(1). Defendants' subject matter jurisdiction arguments fall under N.C. R. App. P. 28(c): "Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment . . . from which appeal has been taken." N.C. R. App. P. 28(c) (2021).

¶ 10 In addition to Rule 28(c), "there are two types of rules governing the manner in which legal claims are pursued in court: jurisdictional rules, which affect a court's power to hear the dispute, and procedural rules, which ensure that the legal system adjudicates the claim in an orderly way." *Tillet v. Town of Kill Devil Hills*, 257 N.C. App. 223, 225, 809 S.E.2d 145, 147 (2017) (citation omitted). This Court further held: "jurisdictional requirements cannot be waived or excused by the court." *Id.* (citation omitted).

¶ 11 "Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *Feldman v. Feldman* 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953). Our Supreme Court has long held: "A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment, or otherwise."

*Anderson v. Atkinson*, 235 N.C. 300, 301, 69 S.E.2d 603, 604 (1952).

¶ 12 Our Supreme Court further stated: "A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted." *State ex rel. Hanson v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952) (citations omitted). "Where a plaintiff has failed to exhaust its administrative remedies, its action brought in the trial court may be dismissed for lack of subject matter jurisdiction." V*anwijk v. Prof'l Nursing Servs.*, 213 N.C. App. 407, 410, 713 S.E.2d 766, 768 (2011) (citation omitted).

¶ 13 "So long as the statutory procedures provide effective judicial review of an agency action, courts will require a party to exhaust those remedies." *Flowers v. Blackbeard Sailing Club*, 115 N.C. App. 349, 352, 444 S.E.2d 636, 638 (1994).

¶ 14 Our Supreme Court has also held:

> As a general rule, *where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts. This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose.* In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. *Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process.* An earlier intercession may be both wasteful and unwarranted. To permit the interruption and cessation of

> proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies.

*Presnell v. Pell*, 298 N.C. 715, 721-22, 260 S.E.2d 611, 615 (1979) (internal citations and quotation marks omitted) (emphasis supplied).

¶ 15 Plaintiffs acknowledge they could have applied for a CON and have sought and challenged any administrative review to invoke or ripen their constitutional procedural due process claims. *See* N.C. Gen. Stat. § 131E-175 *et seq*. Plaintiffs failed to file an application for a CON or to seek or exhaust any administrative remedy from DHHS prior to filing the action at bar. *Id.* Plaintiff has not shown the inadequacy of statutorily available administrative remedies to review and adjudicate his claims to sustain a deprivation of procedural due process. *Id.*; *see Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 272, 620 S.E.2d 873, 879 (2005).

¶ 16 The procedural due process violation:

> is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by the statute[.]

*Edward Valves, Inc. v. Wake Cty.*, 343 N.C. 426, 434, 471 S.E.2d 342, 347 (1996)

(citing *Zinermon v. Burch*, 494 U.S. 113, 125-26, 108 L. Ed. 2d 100, 114 (1990)).

¶ 17 Plaintiffs seek to excuse their failure to seek any administrative review and remedy and assert, "a party who seeks to challenge the constitutionality of [the CON law] must bring an action pursuant to . . . the Declaratory Judgment Act" citing *Hospital Group of Western N.C. v. N.C. Dep't of Human Resources*, 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985). However, Plaintiffs omit the sentence preceding the quoted language, which qualifies: "By amending G.S. 131E-188(b), the Legislature has opted to bypass the superior court in a *contested certificate of need case*, and review of a *final agency decision* is properly in this Court." *Id.* (emphasis supplied). No "contested certificate of need case" was ever brought before DHHS, and no "final agency decision" has been entered. *Id.*

¶ 18 Plaintiffs further baldly assert they are not required to seek and exhaust administrative remedies because the statutory and administrative remedies are inadequate, and the administrative agencies do not have jurisdiction to hear their constitutional claims, nor to grant declaratory or injunctive relief. The focus of Plaintiffs' complaint sought a permanent injunction, preventing enforcement of the CON law against Plaintiffs. *See id.*

¶ 19 The remedy Plaintiffs admittedly and essentially seek is for a fact-finding administrative record and decision thereon to be cast aside and a CON to be summarily issued to them by the Court. This we cannot do. *Presnell*, 298 N.C. at

721, 260 S.E.2d at 615 ("where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts"). "Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its [procedural due] process. An earlier intercession may be both wasteful and unwarranted." *Id.* at 721-22, 260 S.E.2d at 615. Had Plaintiffs sought any administrative review or the procedures were shown to be inadequate, their claim would be ripe for the superior court to exercise jurisdiction over their procedural claims.

¶ 20 Plaintiffs' procedural due process constitutional challenges under both Article I, Section 32 ("No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.") and Article I, Section 34 ("Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.") of the North Carolina Constitution are properly dismissed under Rule 12(b)(1). N.C. Const. art I, §§ 32, 34.

**B. Article I, Section 19**

¶ 21 Plaintiffs also asserted a substantive due process claim under Article I, Section 19 of the North Carolina Constitution. Contrary to the State's adamant assertions otherwise, Plaintiffs correctly assert this substantive violation may be brought in a declaratory judgment claim in superior court, "regardless of whether administrative

remedies have been exhausted." *Good Hope Hosp.,* 174 N.C. App. at 272, 620 S.E.2d at 879 (Holding a "[v]iolation of a substantive constitutional right may be the subject of a § 1983 claim, *regardless of whether administrative remedies have been exhausted*, because the violation is complete when the prohibited action is taken.") (citation omitted) (emphasis supplied).

¶ 22 This Court possesses jurisdiction to review the superior court's ruling over Plaintiffs' substantive due process as applied claims under Article I, Section 19 of the North Carolina Constitution. *See id.*

## III. Issues

¶ 23 Plaintiffs argue the trial court erred by granting Defendants' Rule 12(b)(6) motion.

## IV. Defendants' Rule 12(b)(6) Motion

¶ 24 Plaintiffs assert the CON statutes, N.C. Gen. Stat. § 131E-175 *et seq*., violates Article I, § 19 of the North Carolina Constitution. Plaintiffs' allegations properly assert an as-applied challenge to N.C. Gen. Stat. § 131E-175 *et seq*. "An as-applied challenge represents a party's "protest against how a statute was applied in the particular context in which [the party] acted or proposed to act." *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (citation omitted), *aff'd*, 369 N.C. 722, 799 S.E.2d 611 (2017). "An as-applied challenge contests whether the statute can be constitutionally applied to a

particular defendant, even if the statute is otherwise generally enforceable." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015) (citation omitted), *rev'd and remanded on other grounds*, ____U.S. ____, 198 L. Ed. 2d 273 (2017).

**A. Standard of Review**

¶ 25 This Court's standard of review of a Rule 12(b)(6) motion and ruling is well established. "A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (citation and quotation marks omitted). "When considering a [Rule] 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citation and quotation marks omitted).

¶ 26 "On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation and internal quotation marks omitted) (ellipses in original).

¶ 27 This Court "consider[s] the allegations in the complaint [as] true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if [the] plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* (citation omitted).

**B. Article I, Section 19**

¶ 28 The North Carolina Constitution's Law of the Land Clause, provides, *inter alia*: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner 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 Clause has been held to be the equivalent of the Fourteenth Amendment's Due Process Clause in the Constitution of the United States. *See State v. Collins*, 169 N.C. 323, 324, 84 S.E. 1049, 1050 (1915).

¶ 29 "[A] decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though not controlling, authority for interpretation of the Law of the Land Clause." *Evans v. Cowan*, 132 N.C. App. 1, 6, 510 S.E.2d 170, 174 (1999) (citation omitted). Our Supreme Court has expressly "reserved the right to grant Section 19 relief against unreasonable and arbitrary state statutes in circumstances where relief might not be attainable under the Fourteenth Amendment to the United States Constitution." *In re Meads*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998) (citation omitted).

¶ 30 Our Supreme Court held: "The law of the land, like due process of law, 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) (internal quotation marks omitted).

Contrary to Plaintiffs' counsel's adamant assertions, for almost twenty years, this Court has held "economic rules and regulations do not affect a fundamental right for purposes of due process[.]" *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 537, 571 S.E.2d 52, 60 (2002) (citations omitted).

¶ 31 In *Hope—A Women's Cancer Ctr., P.A. v. State of N.C.*, 203 N.C. App. 593, 603, 693 S.E.2d 673, 680 (2010), this Court articulated a "rational basis" analysis when examining due process challenges to the CON law, which are claimed to be an invalid exercise of the State's police power. Our Court held: "(1) whether there exists a legitimate governmental purpose for the creation of the CON law[;] and[,] (2) whether the means undertaken in the CON law are reasonable in relation to this purpose." *Id.* (citations omitted).

¶ 32 Our Supreme Court held the protections under Article I, Section 19 "have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Poor Richard's*, 322 N.C. at 64, 366 S.E.2d at 699.

¶ 33 In enacting the CON law, the General Assembly made voluminous findings of fact, including: "[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." N.C. Gen.

Stat. § 131E-183(a) (2021). This Court previously held this legislative finding is "a legitimate government purpose." *See Hope—A Women's Cancer Ctr., P.A.*, 203 N.C. App. at 603, 693 S.E.2d at 680 (citation omitted).

¶ 34 In *Hope—A Women's Cancer Ctr., P.A.*, this Court examined a facial challenge to the CON law under Article I, Section 19 and held:

> the General Assembly determined that approving the creation or use of new institutional health care services based in part on the need of such service was necessary in order to ensure that all citizens throughout the State had equal access to health care services at a reasonable price, a situation that would not occur if such regulation were not in place.

*Id.* at 604, 693 S.E.2d at 681.

¶ 35 This Court reasoned that affordable access to necessary health care by North Carolinians "is a legitimate goal, and it is a reasonable belief that this goal would be achieved by allowing approval of new institutional health services only when a need for such services had been determined." *Id.* at 605, 693 S.E.2d at 681. This Court held the CON law prohibiting a provider from expanding services in their practice did not facially violate a provider's due process rights under Article I, Section 19. *Id.* at 606, 693 S.E.2d at 682.

¶ 36 Defendants assert this Court's analysis here is controlled by *Hope—A Women's Cancer Ctr., P.A.* While *Hope* is instructive, contrary to the State's and Defendants' assertions, this Court's prior holding foreclosing *a facial challenge* does not foreclose

a future *as-applied challenge*, nor does that decision control our analysis of Plaintiffs' claims in the complaint.

¶ 37 "A facial challenge is an attack on a statute itself as opposed to a particular application" to an individual litigant. *City of Los Angeles v. Patel*, 576 U.S. 409, 414, 192 L. Ed. 2d 435, 443 (2015). "In a facial challenge, the presumption is that the law is constitutional, and a court may not strike it down if it may be upheld on any reasonable ground." *Affordable Care, Inc. v. N.C. State Bd. Of Dental Exam'rs*, 153 N.C. App. 527, 539, 571 S.E.2d 52, 61 (2002).

¶ 38 Facial challenges are "the most difficult challenge to mount" successfully. *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). To mount a successful facial challenge, "a plaintiff must establish that a law is unconstitutional in *all of its applications*." *Patel*, 576 U.S. at 418, 192 L. Ed. 2d at 445 (citation and internal quotation marks omitted) (emphasis supplied).

¶ 39 In contrast, an as-applied challenge attacks "only the decision that applied the ordinance to his or her property, not the ordinance in general." *Town of Beech Mountain*, 247 N.C. App. at 475, 786 S.E.2d at 356. Contrary to the State's assertions at oral argument, a future as-applied challenge to a statute is not foreclosed and a litigant is not bound by the Court's holding in a prior facial challenge. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). An as-applied challenge asserts that a law, which is otherwise constitutional and enforceable, may be

unconstitutional in its application to a particular challenger on a particular set of facts. *Id.*

¶ 40 Plaintiffs and *amicus* assert our Supreme Court's analysis from *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 551, 193 S.E.2d 729, 735 (1973) is controlling instead of *Hope—A Women's Cancer Ctr., P.A.*, 203 N.C. App. 593, 693 S.E.2d 673. In *Aston Park*, our Supreme Court invalidated a prior codification of the CON law because it violated the plaintiff-provider's substantive due process rights. *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735. The prior CON statute prohibited the issuance of a CON unless it was "necessary to provide new or additional impatient facilities in the area to be served." *Id.* at 545, 193 S.E.2d at 732 (internal quotation marks omitted).

¶ 41 The General Assembly had made limited findings of fact at that time concerning how this prohibition promoted the public welfare. *Id.* at 544, 193 S.E.2d at 731. This Court held no evidence tended to show or suggest market forces and competition would not "lower prices, [create] better service and more efficient management" for healthcare to sustain the prohibition. *Id.* at 549, 193 S.E.2d at 734.

¶ 42 This earlier codification has been amended, enlarged and re-codified to include additional legislative findings to show how the CON law affects the public welfare. The General Assembly has specifically found and emphasized "[t]hat if left to the marketplace to allocate health service facilities and health care services, geographical

maldistribution of these facilities and services would occur." N.C. Gen. Stat. § 131E-175(3).

¶ 43 Plaintiffs' asserted deficiencies, which were identified by this Court in *Aston Park,* are no longer present in the current CON law. *Hope—A Women's Cancer Ctr., P.A.*, 203 N.C. App. at 607, 693 S.E.2d at 682 (internal citations and quotation marks omitted). These additional legislative findings do not mean triable issues and challenges are foreclosed, as they may arise and continue to exist in a future plaintiff's as-applied challenge to the CON statute.

¶ 44 While counsel for Defendants clearly and correctly admitted the CON statutes are restrictive, anti-competitive, and create monopolistic policies and powers to the holder, and Plaintiffs correctly assert the CON process is costly and fraught with gross delays, and service needs are not kept current, those challenges can also be asserted before the General Assembly, Commissions, and against the agency where a factual record can be built.

¶ 45 At least twelve sister states, including New Hampshire, California, Utah, Pennsylvania, and Texas, have re-examined the anti-competitive, monopolistic, and bureaucratic burdens of their CON statutes' health care allocations, and the scarcity created by and delays inherit in that system, and have abolished the entire CON system within their states. National Conference of State Legislatures, *Certificate of Need (CON) State Laws*, https://www.ncsl.org/research/health/con-certificate-of-

need-state-laws.aspx (last visited May 15, 2022).

¶ 46 Plaintiffs' complaint has also not asserted a violation of North Carolina's unfair and deceptive trade practices or right to work statutes located in Chapter 75 or Chapter 95 of our General Statutes. *See* N.C. Gen. Stat. § 75.1.1 *et seq.*; N.C. Gen. Stat. § 95-78 (2021) ("The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion.").

¶ 47 Plaintiffs also failed to assert it had sought re-classification of certain surgical and treatment procedures under its medical or other licenses and certifications, which can be safely done at its Center and clinic, without the need for a CON operating room. *See North Carolina State Bd. of Dental Exam'rs v. FTC* 574 U. S. 494, 514, 191 L. Ed. 2d 35, 54 (2015) (State dental board cannot confine teeth whitening to licensed dental offices.).

¶ 48 Advances in lesser and non-invasive procedures and technological treatments develop rapidly and have reduced or eliminated the need for a traditional operating theater and allowed for ambulatory clinical environments for patients. Yael Kopleman, MD, Raymond J. Lanzafame, MD, MBA & Doron Kopelman, MD, *Trends in Evolving Technologies in the Operating Room of the Future*, Journal of the Society of Laparoendoscopic Surgeons vol. 17,2 (2013).

¶ 49 We express no opinion on the potential viability, if any, of claims not alleged

in this complaint. The trial court correctly held Plaintiffs' substantive due process allegations, even taken as true and in the light most favorable to them, failed to state a claim upon which relief can be granted. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2021). Plaintiffs' argument is overruled.

## V. Conclusion

¶ 50 Absence of subject matter jurisdiction may be raised at any time, this Court possesses no jurisdiction over Plaintiffs' procedural challenges, as alleged and analyzed above. Plaintiffs' appeal is dismissed in part.

¶ 51 Plaintiffs' as-applied challenges in their complaint, taken as true and in the light most favorable to them, fail to state any legally valid cause of action. The trial court did not err in granting Defendants' Rule 12(b)(6) motion to dismiss.

¶ 52 Considering the allegations in the complaint, as applied to Plaintiffs, the CON law does not violate Plaintiffs' rights under the Law of the Land Clause. N.C. Const. art I, § 19. The order of the trial court is affirmed, without prejudice for Plaintiffs to assert claims before DHHS, or otherwise. *It is so ordered.*

DISMISSED IN PART AND AFFIRMED IN PART.

Judges HAMPSON and CARPENTER concur.

# North Carolina Court of Appeals

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**No. 21-558**

**JAY SINGLETON, D.O., and SINGLETON VISION CENTER, P.A.,**
**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.**

From Wake
( 20CVS5150 )

## O R D E R

The following order was entered:

The petition filed in this cause on the 25 July 2022 and designated 'Plaintiff-Appellants' Petition for Rehearing' is denied.

By order of the Court this the 29th of July 2022.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 29th day of July 2022.

Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:
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Ms. Renee D. Flaherty, Attorney at Law

Mr. Benton Grey Sawrey, Attorney at Law, For Singleton, Jay (D.O.), et al
Mr. Derek L. Hunter, Assistant Attorney General, For North Carolina Department of Health and Human Services, et al
Mr. John H. Schaeffer, Assistant Attorney General
Mr. B. Tyler Brooks, Attorney at Law, For CON Scholars Thomas Stratmann, et al
Mr. Jonathan D. Guze, Attorney at Law, For John Locke Foundation
Ms. Christina Sandefur, Attorney at Law, For Goldwater Institute
Mr. Kenneth L. Burgess, Attorney at Law, For NCHA, Inc., et al
Mr. Matthew A. Fisher, Attorney at Law
Mr. Iain M. Stauffer, Attorney at Law
Mr. Marcus C. Hewitt, Attorney at Law, For Bio-Medical Applications Of North Carolina, Inc.
Mr. Troy D. Shelton, Attorney at Law
Mr. Gary S. Qualls, Attorney at Law, For Charlotte-Mecklenburg Hospital Authority, et al
Ms. Susan K. Hackney, Attorney at Law
Mr. Steven G. Pine, Attorney at Law
Mr. Matthew W. Wolfe, Attorney at Law, For Association for Home and Hospice Care of North Carolina
Mr. Robert A. Leandro, Attorney at Law
Mr. B. Tyler Brooks, Attorney at Law
Mr. Nicholas S. Brod, Assistant Solicitor General
Hon. Frank Blair Williams, Clerk of Superior Court