

STATE OF NORTH CAROLINA

File No. _____

Wake _____ County

In The General Court Of Justice
☐ District ☒ Superior Court Division**Name Of Plaintiff**

Jay Singleton, D.O. and Singleton Vision Center, PA

Address

3515 Trent Road, Suite 9

City, State, Zip

New Bern, NC 28560

VERSUS**Name Of Defendant(s)**

North Carolina Department of Health and Human Services, et al.

Date Original Summons Issued _____

Date(s) Subsequent Summons(es) Issued _____

CIVIL SUMMONS☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3 and 4

To Each Of The Defendant(s) Named Below:**Name And Address Of Defendant 1**North Carolina Department of Health and Human Services
c/o Office of Legal Affairs, Lisa Corbett - General Counsel
2001 Mail Service Center
Raleigh NC 27699-2001**Name And Address Of Defendant 2**

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

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A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)John E. Branch, III
Shanahan Law Group, PLLC
128 E. Hargett Street, Suite 300
Raleigh NC 27601**Date Issued****Time**☐ AM ☐ PM**Signature**☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court☐ **ENDORSEMENT (ASSESS FEE)**

This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement**Time**☐ AM ☐ PM**Signature**☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

NOTE TO PARTIES: Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is \$25,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.

(Over)

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County

In The General Court Of Justice

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Name Of Plaintiff

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Address

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VERSUS

Name Of Defendant(s)

North Carolina Department of Health and Human Services, et al.

CIVIL SUMMONS
☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3 and 4

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1

Governor Roy Cooper
c/o Office of the Governor, William C. McKinney, General Counsel
116 W. Jones Street
Raleigh, NC 27603-8001

Name And Address Of Defendant 2



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You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)

John E. Branch, III
Shanahan Law Group, PLLC
128 E. Hargett Street, Suite 300
Raleigh NC 27601

Date Issued

Time

☐ AM ☐ PM

Signature

☐ Deputy CSC☐ Assistant CSC☐ Clerk Of Superior Court☐ ENDORSEMENT (ASSESS FEE)

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Wake _____ County

In The General Court Of Justice
☐ District ☒ Superior Court Division**Name Of Plaintiff**

Jay Singleton, D.O. and Singleton Vision Center, PA

Address

3515 Trent Road, Suite 9

City, State, Zip

New Bern, NC 28560

VERSUS**Name Of Defendant(s)**

North Carolina Department of Health and Human Services, et al.

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CIVIL SUMMONS☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3 and 4

To Each Of The Defendant(s) Named Below:**Name And Address Of Defendant 1**Mandy Cohen, North Carolina Secretary of Health and Human
Services, in her official capacity
2001 Mail Service Center
Raleigh NC 27699-2001**Name And Address Of Defendant 2**

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

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You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)John E. Branch, III
Shanahan Law Group, PLLC
128 E. Hargett Street, Suite 300
Raleigh NC 27601

Date Issued _____

Time _____

☐ AM ☐ PM

Signature _____

☐ Deputy CSC☐ Assistant CSC☐ Clerk Of Superior Court☐ **ENDORSEMENT (ASSESS FEE)**

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File No.

Wake

County

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☐ District ☒ Superior Court Division

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Address

3515 Trent Road, Suite 9

City, State, Zip

New Bern, NC 28560

VERSUS

Name Of Defendant(s)

North Carolina Department of Health and Human Services, et al.

CIVIL SUMMONS
☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3 and 4

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1

Senator Phil Berger, President Pro Tempore of the North Carolina Senate, in his official capacity
N.C. Senate, 16 W. Jones Street, Room 2007
Raleigh NC 27601-2808

Name And Address Of Defendant 2



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2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)

John E. Branch, III
Shanahan Law Group, PLLC
128 E. Hargett Street, Suite 300
Raleigh NC 27601

Date Issued

Time

☐ AM ☐ PM

Signature

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court☐ ENDORSEMENT (ASSESS FEE)

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STATE OF NORTH CAROLINA

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Wake _____ County

In The General Court Of Justice
☐ District ☒ Superior Court Division**Name Of Plaintiff**

Jay Singleton, D.O. and Singleton Vision Center, PA

Address

3515 Trent Road, Suite 9

City, State, Zip

New Bern, NC 28560

VERSUS**Name Of Defendant(s)**

North Carolina Department of Health and Human Services, et al.

Date Original Summons Issued**Date(s) Subsequent Summons(es) Issued****CIVIL SUMMONS**☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3 and 4

To Each Of The Defendant(s) Named Below:**Name And Address Of Defendant 1**Tim Moore, Speaker of the North Carolina House of
Representatives, in his official capacity
Legislative Office, 16 W. Jones Street, Room 2304
Raleigh NC 27601-1096**Name And Address Of Defendant 2**

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

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2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)John E. Branch, III
Shanahan Law Group, PLLC
128 E. Hargett Street, Suite 300
Raleigh NC 27601**Date Issued****Time**☐ AM ☐ PM**Signature**☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court☐ ENDORSEMENT (ASSESS FEE)

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(Over)

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS _____

JAY SINGLETON, D.O., and SINGLETON
VISION CENTER, PA,

Plaintiffs,

vs.

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.

COMPLAINT
FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

INTRODUCTION

1. This state constitutional challenge seeks to vindicate the right of Dr. Jay Singleton, a licensed physician and board-certified ophthalmologist, to perform affordable outpatient eye surgeries for patients who need them. Dr. Singleton owns Singleton Vision Center, a full-service eye clinic in New Bern, North Carolina. For years, Dr. Singleton has wanted to perform life-changing eye surgeries for all of his patients at Singleton Vision Center, which is fully equipped for the procedures his patients need. Performing surgeries at his clinic would save Dr. Singleton's patients and their insurance providers thousands of dollars over the cost of obtaining those procedures at nearby hospitals. But despite these obvious benefits, Dr. Singleton is largely banned from doing so.

2. The barrier Dr. Singleton faces is purely legal. North Carolina bans licensed physicians from running “formal” surgical facilities unless they first obtain a “certificate of need” (CON) from the state. Each year, central planners in Raleigh project how many surgical facilities the state will “need” in two years’ time based on factors like the number of facilities already in existence and the number of procedures they conducted. The more established facilities there are, the less likely it is that a new one will be “needed”—or so the theory goes. Because the planners have projected no “need” for a new surgical facility in Dr. Singleton’s area through at least 2022 (and for at least the previous decade), Dr. Singleton is banned from running a “formal” surgical facility at his clinic.

3. North Carolina’s CON law has nothing to do with protecting the health or safety of real patients. Indeed, North Carolina already allows Dr. Singleton to perform an “incidental” number of surgeries at his clinic without obtaining a CON. There is no question these surgeries are performed safely and affordably on patients who need them, and the same would be true if Dr. Singleton could offer these surgeries for all of his patients. Moreover, the state separately licenses surgical facilities to regulate for safety and quality, and there is no question Dr. Singleton could meet those licensing requirements if the CON law did not forbid him from applying for a license in the first place.

4. In truth, banning Dr. Singleton from offering surgeries to all patients at his clinic serves one purpose only: protecting established providers from competition. That is unconstitutional. The North Carolina Constitution prohibits monopolies and special privileges and protects Dr. Singleton’s right to provide safe, affordable eye surgeries to patients who need them free from arbitrary, irrational, and protectionist legislation. Because the purpose and effect of North Carolina’s CON law is to protect established providers from competition—without any real-

world benefits to patient health or safety—Defendants must be enjoined from enforcing the law against Dr. Singleton and Singleton Vision Center.

JURISDICTION AND VENUE

5. Plaintiffs bring this lawsuit under Article I, Sections 19, 32, and 34 of the North Carolina Constitution and North Carolina’s Declaratory Judgments Act, N.C. Gen. Stat. §§ 1-253, *et seq.* Plaintiffs also have an independent cause of action for violations of their constitutional rights under Article I, Section 18 of the North Carolina Constitution.

6. Plaintiffs seek declaratory and injunctive relief against enforcement of North Carolina’s CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, and Defendants’ policies and practices enforcing it, which violate Plaintiffs’ rights to provide affordable outpatient eye surgeries to patients who need them free from unconstitutional monopolies, exclusive privileges, and arbitrary, irrational, and protectionist legislation under the North Carolina Constitution.

7. This Court has jurisdiction under N.C. Gen. Stat. § 7A-245(a) because this is a suit for declaratory and injunctive relief against the enforcement and validity of certain statutes and regulations, and for the enforcement and declaration of multiple state constitutional rights.

8. Venue lies in this Court under N.C. Gen. Stat. § 1-82 because multiple Defendants reside in Wake County.

PARTIES

9. Plaintiff Jay Singleton, D.O., is a licensed physician and board-certified ophthalmologist who practices in New Bern, North Carolina. He is the owner and Chief Executive Officer of Singleton Vision Center, PA.

10. Plaintiff Singleton Vision Center, PA (“the Center”), is a North Carolina professional corporation and full-service eye clinic that serves patients in New Bern and the surrounding area. The Center is located at 3515 Trent Road, Suite 14, New Bern, North Carolina.

11. The Center currently has all the equipment, staff, and resources necessary to perform eye surgeries (e.g., cataract, glaucoma, intraocular lens) safely and affordably. Dr. Singleton would like to use the Center to perform these surgeries on all of his patients. But Plaintiffs are forbidden under the CON law from running a “formal” surgery facility and are limited to performing an “incidental” number of surgeries.

12. Defendant North Carolina Department of Health and Human Services (“the Department”) is the executive agency charged with administering and enforcing the CON law. N.C. Gen. Stat. § 131E-177. The Department is empowered to assess civil penalties against or revoke the license of any person who violates the CON law. *Id.* § 131E-190. The Department is based in Wake County.

13. Defendant Mandy Cohen is sued in her official capacity as North Carolina’s Secretary of Health and Human Services (“the Secretary”). The Secretary has “final decision-making authority” over the Department’s administration of the CON law and may seek injunctive relief against any person who violates it. N.C. Gen. Stat. § 131E-177, -190(h). On information and belief, Defendant Cohen resides in Wake County.

14. Defendant Roy Cooper is sued in his official capacity as North Carolina’s Governor (“the Governor”). The Governor supervises the activities of the Department and holds final authority to approve or amend the State Medical Facilities Plan, which pre-determines the “need” for certain new healthcare services (including surgical facilities) in North Carolina. N.C. Gen. Stat.

§§ 131E-175, -176(25), 143B-6. On information and belief, Defendant Cooper resides in Wake County.

15. Defendant Phil Berger is sued in his official capacity as the President Pro Tempore of the North Carolina Senate. *See* N.C. R. Civ. P. 19(d). On information and belief, Defendant Berger resides in Rockingham County.

16. Defendant Tim Moore is sued in his official capacity as the Speaker of the North Carolina House of Representatives. *See* N.C. R. Civ. P. 19(d). On information and belief, Defendant Moore resides in Cleveland County.

FACTUAL ALLEGATIONS

Dr. Singleton Wants to Provide Safe, Affordable Surgeries at the Center

17. Dr. Jay Singleton went into medicine to earn a living by helping others. He chose ophthalmology because of the life-changing power of vision correction and eye surgery, and his mission is to provide the best possible care for his patients at a price they can afford.

18. Dr. Singleton received his medical degree from West Virginia School of Osteopathic Medicine in 1999, completed his ophthalmology residency at the University of Louisville in 2003, and was licensed to practice in North Carolina in 2004. That same year, Dr. Singleton opened Singleton Vision Center in New Bern, North Carolina.

19. As an ophthalmologist, Dr. Singleton is qualified to provide comprehensive eye care—everything from routine checkups (e.g., vision tests, eye examinations) to treatment for infections or disorders (e.g., conjunctivitis, macular degeneration) to surgery (e.g., cataract, glaucoma, intraocular lens).

20. Dr. Singleton provides all of his non-operative ophthalmology services at the Center, but he is legally required to perform the vast majority of the eye surgeries his patients need at CarolinaEast, the local hospital where he maintains surgery privileges.

21. Dr. Singleton believes this system is needlessly inconvenient and expensive for his patients and their insurance providers (public and private), and would like to start providing outpatient eye surgeries, full time, to all of his patients at the Center.

22. Performing outpatient eye surgeries full-time at the Center would save Dr. Singleton's patients and their insurance providers (public and private) thousands of dollars over the price they would otherwise pay at a hospital.

23. For example, Dr. Singleton can perform a cataract surgery at the Center for under \$1,800 total (facility and surgery fee included), while CarolinaEast charges almost \$6,000 for its facility fee alone.

24. Performing outpatient eye surgeries at the Center is also just as safe (if not safer) than performing them at a hospital.¹

25. Dr. Singleton has performed over 30,000 cataract and other outpatient eye surgeries competently over the course of his career.

26. After starting the Center, Dr. Singleton spent years acquiring the equipment, conducting the renovations, and setting up the operating and recovery rooms necessary to perform high-quality surgeries at the Center.

¹ This is especially true as of the filing of this complaint, when the state's hospitals are filled with patients seeking treatment for COVID-19.

27. The Center is accredited by the American Association for Accreditation of Ambulatory Surgery Facilities (AAAASF)—a private organization that certifies that a facility meets nationally recognized safety standards.

28. The Center also meets the facility and operational standards necessary to obtain a license under the Ambulatory Surgical Facility Licensure Act. *See* 10A N.C. Admin. Code 13C .0202(a) (“An ambulatory surgical facility shall be deemed to meet the licensure requirements if the ambulatory surgery facility is accredited by . . . AAAASF.”); *see also* N.C. Gen. Stat. § 131E-145 (licensure under the Act “ensure[s] safe and adequate treatment of . . . individuals in ambulatory surgical facilities”).

29. Moreover, Dr. Singleton follows the North Carolina Medical Board’s guidelines for office-based procedures. *See* Position Statement on Office-Based Procedures, https://www.ncmedboard.org/resources-information/professional-resources/laws-rules-position-statements/position-statements/office-based_procedures (last visited April 2, 2020).

30. In short, performing outpatient eye surgeries at the Center is perfectly safe, consistent with the standard of care, and would save patients and their insurance providers (public and private) thousands of dollars per procedure.

31. Yet as explained below, North Carolina bans Dr. Singleton from running a “formal” surgical facility—and therefore from extending these benefits to the vast majority of his patients.

The CON Law Bans Dr. Singleton from Providing Safe, Affordable Surgeries at the Center

The History of North Carolina’s CON Law

32. The barrier Dr. Singleton faces is called a “certificate of need” (CON) law.

33. At its core, North Carolina's CON law operates by banning healthcare providers from offering or developing any "new institutional health service" without first obtaining a CON from the state's Department of Health and Human Services. N.C. Gen. Stat. § 131E-178(a).

34. A CON is a written order granting a healthcare provider permission to proceed with a new institutional health service. N.C. Gen. Stat. § 131E-176(3).

35. "Only those new institutional health services which are found by the Department to be needed . . . and granted certificates of need shall be offered or developed within the State." N.C. Gen. Stat. § 131E-190(a).

36. North Carolina's CON law has its origins in a national movement during the mid-1960s by state and local governments to allocate federal funding in a way that would ensure the financial viability of taxpayer-funded hospitals.

37. The theory was that government planners could control healthcare costs by restricting supply and dividing the provision of healthcare services into discrete geographical regions. But the effect was that CON requirements insulated established providers from new competition.

38. Hospitals were quick to recognize that they would benefit financially from the prevalence of state CON requirements. In 1968, the American Hospital Association began a nationwide lobbying campaign to pass state CON laws, and even drafted model legislation to that end.

39. By 1972, twenty states had enacted CON regimes at the American Hospital Association's behest. North Carolina was among these states, enacting its first CON law in 1971. Act of July 27, 1971, ch. 1164, 1971 N.C. Sess. Laws 1715.

40. But in 1973, that law was challenged under Article I, Sections 19, 32, and 34 of the North Carolina Constitution. *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 546 (1973).

41. In order to protect the fruits of its lobbying campaign, the American Hospital Association (through its state subsidiary, the North Carolina Hospital Association²) filed a brief in defense of the law. *See Aston Park*, 282 N.C. at 544.

42. The North Carolina Supreme Court framed the case as follows:

In the present case, the [Medical Care] Commission claims and the statute purports to confer upon it the authority to forbid the construction, with private funds and suitable materials, upon private property suitably located, of a well planned hospital which is to be adequately equipped and staffed with a sufficient number of well trained personnel in all categories, the sole reason for such prohibition being that, in the opinion of the Commission, there are now in the area hospitals with bed capacity sufficient to meet the needs of the population. Aston Park, which desires so to engage in the business of caring for sick, injured and infirm people, contends that this is in excess of the constitutional power of the Legislature. We agree.

Aston Park, 282 N.C. at 548.

43. The Court ultimately struck down the 1971 law on anti-monopoly, exclusive-
emoluments, and substantive-due-process grounds. *Aston Park*, 282 N.C. at 551–52. But *Aston Park* would not mark the end of North Carolina’s CON law.

44. Around the time *Aston Park* was decided, the U.S. Congress was grappling with a related policy problem: Because Medicare and Medicaid reimbursed healthcare providers for services based on actual expenditures, providers could recoup funds even when those expenditures were inefficient, resulting in price inflation.

² As of 2018, the North Carolina Hospital Association is now called the North Carolina Healthcare Association but remains a subsidiary of the American Hospital Association.

45. Congress saw CON requirements as a potential means of holding providers accountable for inefficient expenditures by requiring them to demonstrate that new medical services and capital expenditures were “needed” by the community.

46. The American Hospital Association seized on this opportunity by lobbying Congress to pass a law requiring states to enact CON requirements. The result was the National Health Planning and Resources Development Act of 1974 (NHPDA), which required states to adopt CON laws in order to receive federal healthcare subsidies and guaranteed funding for the administration of state CON laws that met certain federal guidelines.

47. In 1978—despite the Supreme Court’s holding in *Aston Park*—North Carolina re-enacted its CON regime specifically in response to the NHPDA. N.C. Gen. Stat. §§ 131E-175, *et seq.*

48. Indeed, the chief update to North Carolina’s 1978 CON law was a series of legislative “findings of fact” which claimed, among other things, that the law was enacted in response to the same reimbursement-related concern that inspired the NHPDA and that a CON requirement was “necessary” to control prices and promote access to care. N.C. Gen. Stat. § 131E-175.

49. Whatever their truth in 1978, these “findings of fact” are false as a matter of fact today for at least two reasons.

50. First, Congress soon reversed course on the very policy that prompted the re-enactment of North Carolina’s CON regime in the first place.

51. In 1984, Congress restructured the Medicare and Medicaid reimbursement system to a fee-for-service model under which hospitals received a fixed amount for each service, regardless of the hospital’s actual expenditures.

52. Because this eliminated the rationale for demanding that states adopt CON laws, Congress repealed the NHPDA completely in 1986.

53. Second, research indicates that CON requirements actually *increase* costs and *reduce* access to care, both of which contributed to Congress' reversal.

54. In repealing the NHPDA, Congress found no evidence that CON programs advanced their goal of lowering or even slowing the growth of healthcare costs. In fact, the evidence showed that CON programs were beginning to increase costs.

55. Congress also determined that CON programs were beginning to produce detrimental effects as local officials took myopic and parochial views of what kind of medical services a community "needed."

56. Since repealing the NHPDA, the federal government has consistently reaffirmed its conclusion that CON laws raise costs and harm patients.

57. In 1988, for instance, a Staff Report of the Bureau of Economics in the Federal Trade Commission (FTC) concluded that CON programs harm consumers and raise healthcare costs by serving as a barrier to entry of new healthcare providers and by encouraging hospitals to avoid using more efficient (but CON-restricted) equipment and services in favor of less efficient (but CON-exempt) equipment and services.

58. In 2004, the FTC and United States Department of Justice (DOJ) issued a joint report reaffirming the 1988 study. "Based on 27 days of joint hearings held from February through October 2003, a [Federal Trade] Commission-sponsored workshop in September 2002, and independent research," the agencies concluded that

States with Certificate of Need programs should reconsider whether these programs best serve their citizens' health care needs. The [FTC and DOJ] believe that, on balance, **CON programs are not successful in containing health care costs, and that they pose serious anticompetitive risks that usually outweigh their**

purported economic benefits. Market incumbents can too easily use CON procedures to forestall competitors from entering an incumbent's market . . . [T]he vast majority of single-specialty hospitals—a new form of competition that may benefit consumers—have opened in states that do not have CON programs. **Indeed, there is considerable evidence that CON programs can actually increase prices by fostering anticompetitive barriers to entry.** Other means of cost control appear to be more effective and pose less significant competitive concerns.

Antitrust Div., Dept. of Justice & Fed. Trade Comm'n, Executive Summary (2004), <https://www.justice.gov/atr/executive-summary> (last visited April 3, 2020) (emphasis added).

59. Since 1986, numerous additional studies have shown CON requirements to be associated with lower service quality and higher mortality rates, higher healthcare costs and spending, and reduced access to certain services.

60. Unsurprisingly, the federal government has never reauthorized CON laws, and 16 states have actually eliminated their CON laws with no evidence of any negative effects on patients.

61. Despite this, local lobbying efforts have kept some version of these CON requirements in place in 34 states plus the District of Columbia. This is true of North Carolina as well, where the North Carolina Healthcare Association has lobbied for decades to keep the state's outdated CON law in place.

62. Today, North Carolina's CON law regulates 25 different healthcare services and is among the most restrictive regimes in the country.

63. In 2015, the FTC sent a letter to the North Carolina House of Representatives in support of House Bill 200, which would have exempted multiple healthcare services (including ambulatory surgical facilities) from the CON law. Letter from Marina Lao, Office of Policy Planning Dir., Fed. Trade Comm'n, et al., to Marilyn W. Avila, Representative, N.C. House of Representatives, Federal Trade Commission Staff Comment Regarding North Carolina House Bill

200 (July 10, 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-concurring-comment-commissioner-wright-regarding-north-carolina-house-bill-200/150113nconadv.pdf (last visited April 3, 2020). Among the FTC’s reasons for supporting the bill were that CON laws: (1) “can prevent the efficient functioning of health care markets”; (2) “can be prone to exploitation by incumbent firms seeking to thwart or delay entry by new competitors”; and (3) “appear to have generally failed to control health care costs.”

64. The recent COVID-19 pandemic demonstrates how North Carolina’s CON law prevents the efficient functioning of healthcare markets. Due to the CON law’s artificial restrictions on the supply of medical services and equipment, existing providers have struggled to adequately respond to the crisis, and Governor Cooper has been forced to issue executive orders temporarily relaxing the CON law’s restrictions so that new providers can enter the market in order to save lives.

The CON Law Restricts Supply to Benefit Established Providers

65. To obtain a CON, applicants must prove their services will meet the criteria set forth under N.C. Gen. Stat. § 131E-183(a), including that “[t]he proposed project [is] consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.”

66. The State Medical Facilities Plan (SMFP) is “an annual document” prepared by the Department “that contains policies and methodologies used in determining need for new health care facilities and services in North Carolina. N.C. Div. of Health Serv. Regulation, North Carolina

State Medical Facilities Plan, <https://www2.ncdhhs.gov/DHSR/ncsmfp/index.html> (last visited April 3, 2020).

67. The SMFP divides the state into discrete “service areas” and projects whether particular healthcare services and facilities will be “needed” in future years. *See* 2020 SMFP, <https://info.ncdhhs.gov/dhsr/ncsmfp/2020/2020smfp.pdf> (last visited April 3, 2020).

68. The SMFP’s annual “need determinations” are largely based on the number of established providers in each “service area” and the volume of services they are performing.

69. If the state determines there are “enough” providers operating in a particular area, new providers are banned from obtaining a CON in that area—even if the services they would like to provide are safe, efficient, affordable, and actually needed by real patients.

70. New “need” determinations are rare, but when they do occur, aspiring providers are then forced to undertake an expensive, burdensome, and fundamentally anti-competitive application process.

71. There is a \$5,000 non-refundable fee just to submit the application. N.C. Gen. Stat. § 131E-182(c). Applications submitted without the fee will not be considered. 10A N.C. Admin. Code 14C .0203(c)(1).

72. In addition to showing compliance with the SMFP, applicants must prove they meet the 14 other “review criteria” listed under N.C. Gen. Stat. § 131E-183(a), which includes showing that the proposed services are the “least costly and most effective” means of meeting the area’s “need” and “will not result in unnecessary duplication of existing or approved health service capabilities or facilities.”

73. The CON-application process is notoriously complex. Applying with any reasonable prospect of success requires considerable preparation and planning, including hiring an

experienced team of consultants and economists to generate all of the data, projections, plans, and other information necessary to demonstrate compliance with the review criteria.

74. As a result, CON applications typically cost tens of thousands of dollars to prepare and can take many months to complete.

75. After a provider has submitted an application and the required fee, the Department has 90 days to review the application. N.C. Gen. Stat. § 131E-185(a1).

76. If there are multiple applications for a CON in the same service area during the same review period, and approval of one could result in a denial of another, the applications are considered “competitive” and will be reviewed together. 10A N.C. Admin. Code 14C .0202(f).

77. In a competitive review, an applicant who satisfied all relevant criteria could be denied a CON solely because another applicant obtained the CON instead, thus obviating the “need” for the first applicant’s services. N.C. Gen. Stat. § 131E-183(a)(1).

78. Once the review period begins, any person may file written comments opposing the application within 30 days. N.C. Gen. Stat. § 131E-185(a1)(1).

79. The Department is also required to hold a public hearing on the applications within 20 days of the expiration of the comment period if, among other thing, the review involves multiple applicants or any “affected party” (including any person who provides similar services) requests a hearing. N.C. Gen. Stat. §§ 131E-185(a1)(2), 131E-188(c).

80. The Department must issue a decision on the applications by the end of the review period. N.C. Gen. Stat. § 131E-186(a). If the decision was that a CON should be issued, the Department must issue the CON to the prevailing applicants within 35 days of that decision—unless an “affected person” (including any person who provides similar services) files a petition for a “contested case” hearing. *Id.* § 131E-187(c)(1).

81. A contested-case petition triggers an administrative process with the North Carolina Office of Administrative Hearings that closely resembles litigation: an administrative law judge or hearing officer is appointed, the parties conduct discovery, a hearing is held at which sworn testimony is taken and evidence is presented, and the judge or officer issues a final decision based on his findings. N.C. Gen. Stat. § 131E-188(a).

82. All told, the administrative portion of the contested-case process can take up to 270 days to resolve from the day the petition is filed. N.C. Gen. Stat. § 131E-188(a).

83. But even that is not necessarily the end of the process, because “[a]ny affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision.” N.C. Gen. Stat. § 131E-188(b).

84. All appeals from final decisions in contested-case proceedings must be taken directly to the North Carolina Court of Appeals within 30 days of written notice of the decision. N.C. Gen. Stat. § 131E-188(b). Appeals are handled in accordance with the North Carolina Rules of Appellate Procedure, which means they might not reach final resolution until a decision by the Supreme Court of North Carolina. *Id.*

85. Given the scarcity of new “need” determinations and the adversarial nature of these proceedings, qualified providers eager to offer new services to patients are forced to aggressively compete with one another—not in the marketplace, but in the CON-application process.

86. Indeed, competitive reviews and contested cases are extremely common, often require the assistance of experienced legal counsel to litigate effectively, and can take many years and hundreds of thousands of dollars to resolve.

87. As a result, the total cost of pursuing a CON application to completion often exceeds \$400,000—with no guarantee that the applicant will actually obtain a CON.

88. For providers fortunate enough to obtain them, CONs are extremely valuable—both in terms of the investment providers make during the application process and the tremendous economic advantage that comes with holding exclusive legal rights to provide certain healthcare services in their areas.

89. Given these incentives, established providers frequently file written comments and petitions for contested-case hearings in an attempt to stonewall the introduction of new, competing healthcare services.

90. As established providers, these entities typically have the financial resources necessary to hire representatives, including experienced legal counsel, who can devote the time and money necessary to contest an application at every turn—thus increasing the overall cost and duration of the process for the parties involved.

91. The same advantages apply in the competitive-review process, where established providers are usually quick to apply for any new CONs and almost always prevail over aspiring market entrants.

92. In sum, North Carolina’s CON law is fundamentally anticompetitive: Established providers are insulated from competition in their service areas; aspiring providers are prevented from participating in the healthcare market solely because other providers got there first; and when state planners project a “need” for a new service or facility (which they usually do not), incumbents are given every opportunity to thwart, undermine, and frustrate their potential competitors’ applications, while at the same time exerting their considerable economic advantage to obtain the new CON for themselves—and thus, retain their monopoly status.

The CON Law's Application to Dr. Singleton and the Center

93. North Carolina requires a CON to establish “a new health service facility” or “an operating room . . . in a licensed health service facility,” or to “offer or develop” services in such facilities. N.C. Gen. Stat. §§ 131E-176(16)(a), (u), 131E-178(a); *see also* 10A N.C. Admin. Code 13C .0202(b) (conditioning licensure under the Ambulatory Surgical Facility Licensure Act on obtaining a CON).

94. “Operating room” means “[a] room used for the performance of surgical procedures requiring one or more incisions and that is required to comply with all applicable licensure codes and standards for an operating room.” N.C. Gen. Stat. § 131E-176(18c).

95. “Health service facility” means, among other things, a “hospital” or an “ambulatory surgical facility.” N.C. Gen. Stat. § 131E-176(9b).

96. “Ambulatory surgical facility” (ASF), when referring to a surgical facility operated within a physician’s office, means “[a] formal program for providing on a same-day basis those surgical procedures which require local, regional, or general anesthesia and a period of post-operative observation to patients whose admission for more than 24 hours is determined, prior to surgery or gastrointestinal endoscopy, to be medically unnecessary.”

97. However, there are two exceptions to the CON law’s ASF restrictions. First, a CON is not required for “the performance of incidental, limited ambulatory surgical procedures” in a physician’s office. N.C. Gen. Stat. § 131E-175(1b). Second, the SMFP’s “need determinations” do not apply to “[a] person who provides gastrointestinal endoscopy procedures in one or more gastrointestinal endoscopy rooms” in an ambulatory surgical facility. *Id.* § 131E-178(a).

98. The upshot of these provisions is that Dr. Singleton is required to obtain a CON to run a “formal” surgery program at Singleton Vision Center.

99. But Dr. Singleton is categorically banned from doing so. The state has projected no “need” for a new surgical facility in the Craven/Jones/Pamlico service area (where the Center is located) through at least 2022. *See* 2020 SMFP 72.

100. In fact, the state has not projected a “need” for a new surgical facility in the Craven/Jones/Pamlico service area for at least a decade (which is as far back as the Department’s online records go).

101. The only provider in the Craven/Jones/Pamlico service area that owns a CON to provide surgical services (including outpatient eye surgeries) is CarolinaEast, a private hospital with a billion-dollar annual budget located about two miles from Singleton Vision Center.

102. CarolinaEast has strong ties to the North Carolina Healthcare Association—the organization that has, for decades, lobbied to keep the CON law in place in order to insulate its stakeholders from competition.

103. On information and belief, despite North Carolina’s consistent population and economic growth over the past half-century, CarolinaEast is the only provider ever to possess a CON for surgical services in the Craven/Jones/Pamlico service area.

104. The fact that the state has not projected a “need” for Dr. Singleton to run a “formal” surgery program at the Center does not mean that there are not real patients in the area who need and would benefit from such a program.

105. Instead, the sole reason the state projects no “need” for Dr. Singleton to run a “formal” surgery program at the Center is that CarolinaEast is already providing surgeries at its facility two miles down the road.

106. On information and belief, Defendants do not possess and cannot produce any evidence that preventing Dr. Singleton from running a “formal” surgery program at the Center actually increases access to safe, affordable surgeries in the Craven/Jones/Pamlico service area.

107. To the contrary, if Dr. Singleton was permitted to run a “formal” surgery program at the Center, the program would:

- Provide high-quality outpatient eye surgeries consistent with the standard of care;
- Be used to provide more affordable outpatient eye surgeries than those offered by established providers (i.e., CarolinaEast) in the area;
- Be open to all of Dr. Singleton’s patients and the broader public, including low-income, minority, handicapped, elderly, and other underserved patients;
- Be the Center’s least costly and most effective means of providing the services;
- Be adequately financed and staffed for as long as the Center operated it;
- Be fully compliant with all relevant local, state, and federal laws and regulations (besides the CON law, which this lawsuit is challenging);
- Promote increased competition for outpatient eye surgeries in the Craven/Jones/Pamlico planning area and beyond, thereby reducing the cost of procedures for North Carolina patients and their insurance providers (public and private).

108. Indeed, there is real evidence the Center is already producing these results on a smaller scale, since Dr. Singleton is permitted to provide “incidental, limited ambulatory surgical procedures” at the Center without obtaining a CON. *See* N.C. Gen. Stat. § 131E-175(1b).

109. While Dr. Singleton is forced, under the CON law, to perform the vast majority of his outpatient eye surgeries at CarolinaEast, he currently provides a small minority of his surgeries at the Center.

110. The small minority of Dr. Singleton's patients fortunate enough to obtain surgeries at the Center are billed thousands of dollars less per procedure than they would have been charged at CarolinaEast.

111. Several of these patients have told Dr. Singleton they would not otherwise have been able to afford an operation at CarolinaEast, and so would have either gone without necessary care or substantially delayed their procedures.

112. If Dr. Singleton is permitted to run a "formal" surgery program at the Center, more patients in the Craven/Jones/Pamlico service area will be able to obtain the outpatient eye surgeries they need at an affordable price.

113. If Dr. Singleton is not permitted to run a "formal" surgery program at the Center, many patients will be deprived of the affordable outpatient eye surgeries they need.

114. Again, Dr. Singleton is not currently permitted to do so. He cannot apply for a CON because the state has not projected a "need" for a new surgical facility in his service area through at least 2022.

115. Nor can Dr. Singleton simply violate the CON law, as violations are subject to strict penalties (from suspension of his license to assessment of a civil fine up to \$20,000) and Defendants strictly enforce the law. *See* N.C. Gen. Stat. § 131E-190.

116. Nor would a new "need" determination years from now remedy Dr. Singleton's injury, for several reasons.

117. First, what Dr. Singleton seeks is the freedom to run a “formal” surgery program *today*—not merely the ability to one day file an enormously expensive application for permission to do so.

118. Second, CarolinaEast has told Dr. Singleton that it will oppose any future CON application he files. As discussed above, such a battle could cost hundreds of thousands of dollars and take several years to resolve—money and time Dr. Singleton simply cannot afford to spend when his primary focus is on caring for his patients.

119. Third, should CarolinaEast apply for the CON itself (as hospitals almost always do), Dr. Singleton would have virtually no hope of prevailing given CarolinaEast’s vast resources. The ability to file a doomed application at some point in the future is not a remedy.

120. This lawsuit is therefore Dr. Singleton’s only realistic option for vindicating his right to provide safe, affordable outpatient eye surgeries to the many patients who need them.

INJURY TO PLAINTIFFS

121. The CON law prevents Dr. Singleton from providing outpatient eye surgeries to all of his patients at the Center.

122. The CON law prevents Dr. Singleton from providing services at the Center that would allow him to better care for the health and welfare of all of his patients.

123. The CON law prevents Dr. Singleton from providing more affordable outpatient eye surgeries at the Center than those offered by nearby providers, like CarolinaEast.

124. The CON law prevents Dr. Singleton from saving his patients and their insurance providers (public and private) thousands of dollars on outpatient eye surgeries.

125. The CON law prevents Dr. Singleton from running his ophthalmology practice in accordance with his medical and professional judgment.

126. The CON law prevents Dr. Singleton from expanding his ophthalmology practice and thereby from hiring more staff and serving more patients.

127. But for the CON law, Dr. Singleton would have suffered none of these injuries in the past and would suffer none of them in the future.

128. But for the CON law, Dr. Singleton would immediately apply for a license under the Ambulatory Surgical Facility Licensure Act.

129. But for the CON law, Dr. Singleton would immediately obtain a license under the Act and would begin providing outpatient eye surgeries to all of his patients at the Center in accordance with the North Carolina Medical Board's guidelines for office-based procedures, the parameters of the Center's AAAASF accreditation, and the applicable standard of care.

AS-APPLIED CONSTITUTIONAL CLAIMS

Count I

(Article I, Section 34: Anti-Monopoly Clause)

130. Article I, Section 34 of the North Carolina Constitution declares: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

131. The CON law grants established surgical facilities in the Craven/Jones/Pamlico service area an exclusive privilege to operate a surgical facility while flatly prohibiting Plaintiffs from running a "formal" surgery program.

132. The CON law does not regulate the safety or quality of Plaintiffs' outpatient eye surgeries.

133. Rather, the purpose and effect of the CON law is to protect established healthcare providers from competition, and economic protectionism is not a legitimate basis for preventing Plaintiffs from providing safe, affordable outpatient eye surgeries to patients who need them.

134. Therefore, the CON law grants established surgical facilities in the Craven/Jones/Pamlico service area a monopoly in violation of Article I, Section 34 of the North Carolina Constitution.

135. As a result, unless Defendants are enjoined from enforcing the CON law against Plaintiffs, Plaintiffs will suffer continuing and irreparable harm.

Count II
(Article I, Section 32: Exclusive-Emoluments Clause)

136. Article I, Section 32 of the North Carolina Constitution declares: “No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.”

137. The CON law grants established surgical facilities in the Craven/Jones/Pamlico service area an exclusive privilege to operate a surgical facility while flatly prohibiting Plaintiffs from running a “formal” surgery program.

138. The CON law does not regulate the safety or quality of Plaintiffs’ outpatient eye surgeries.

139. Rather, the purpose and effect of the CON law is to protect established healthcare providers from competition, and economic protectionism is not a legitimate basis for preventing Plaintiffs from providing safe, affordable outpatient eye surgeries to patients who need them.

140. A CON granted to a private healthcare provider is not a license or a contract to provide “public services,” and private CON holders are not state agents or employees.

141. CarolinaEast, the only entity with a CON to run a surgical facility in the Craven/Jones/Pamlico planning area, is a private healthcare provider that serves private patients.

142. Therefore, the CON law grants established surgical facilities an exclusive privilege not in consideration of public services in violation of Article I, Section 32 of the North Carolina Constitution.

143. As a result, unless Defendants are enjoined from enforcing the CON law against Plaintiffs, Plaintiffs will suffer continuing and irreparable harm.

Count III
(Article I, Section 19: Substantive Due Process)

144. Article I, Section 19 of the North Carolina Constitution protects Plaintiffs' substantive-due-process right to provide safe, affordable healthcare services free from arbitrary, irrational, and protectionist legislation by declaring: "No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land."

145. The CON law grants established surgical facilities in the Craven/Jones/Pamlico service area an exclusive privilege to operate a surgical facility while flatly prohibiting Plaintiffs from running a "formal" surgery program.

146. The CON law does not regulate the safety or quality of Plaintiffs' outpatient eye surgeries.

147. Contrary to the General Assembly's decades-old "findings of fact" in support of the CON law, *see* N.C. Gen. Stat. § 131E-175, preventing Plaintiffs from providing safe, affordable outpatient eye surgeries to patients who need them lacks a real, substantial, or even a rational relationship to protecting the health or safety of North Carolina patients.

148. On information and belief, Defendants do not possess and cannot produce any evidence that preventing Dr. Singleton from running a "formal" surgery program at the Center actually increases access to safe, affordable surgeries in the Craven/Jones/Pamlico service area.

149. On information and belief, Defendants do not possess and cannot produce any evidence that preventing Dr. Singleton from running a “formal” surgery program at the Center serves any other legitimate governmental purpose.

150. Instead, the purpose and effect of the CON law is to protect established healthcare providers from competition, and economic protectionism is not a legitimate basis for preventing Plaintiffs from providing safe, affordable outpatient eye surgeries to patients who need them

151. Therefore, the CON law violates Plaintiffs’ substantive-due-process right to provide safe, affordable outpatient eye surgeries to patients who need them in violation of Article I, Section 19 of the North Carolina Constitution.

152. Unless Defendants are enjoined from enforcing the CON law against Plaintiffs, Plaintiffs will suffer continuing and irreparable harm.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request relief as follows:

A. A declaratory judgment that the CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, violates Article I, Section 34 of the North Carolina Constitution as applied to Plaintiffs;

B. A declaratory judgment that the CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, violates Article I, Section 32 of the North Carolina Constitution as applied to Plaintiffs;

C. A declaratory judgment that the CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, violates Article I, Section 19 of the North Carolina Constitution as applied to Plaintiffs;


D. A permanent injunction enjoining Defendants from enforcing the CON law against Plaintiffs;

E. For an award of \$1 in nominal damages in recognition of the economic, professional, and constitutional injuries Defendants have caused to Plaintiffs;


- F. An award of attorneys' fees, costs, and expenses in this action; and
- G. All further legal and equitable relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED this 22nd day of April, 2020.

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