No. 260PA22 TENTH DISTRICT

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SUPREME COURT OF NORTH CAROLINA

****

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

Plaintiffs-Appellants,

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-Appellees.

From Wake County
No. COA21-558

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SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLANTS

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Defendants-Appellees.

From Wake County
No. COA21-558

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SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLANTS

****

SUPPLEMENTAL QUESTIONS

The Court has ordered the parties to brief two supplemental questions: (1) whether plaintiffs were required to exhaust administrative remedies in light of *Askew v. City of Kinston*, 902 S.E.2d 722 (N.C. 2024); and (2) whether plaintiffs' constitutional claims, based on the facts in the complaint, are facial, as-applied, or both, and how the answer impacts the Court's review of the decisions below.

INTRODUCTION

The answers to both supplemental questions flow from the principles set forth in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). There, the Court held that plaintiffs can sue state officials directly under the state Constitution "for violation of rights guaranteed by the Declaration of Rights." *Id.* at 783, 413 S.E.2d at 290. *Corum* claims have two "critical limitations." *Id.* at 784, 413 S.E.2d at 291. First, they arise when state law supplies no "adequate redress" for the violation of a state constitutional right. *Id.* at 782–84, 413 S.E.2d at 289–91. Second, courts must craft "the least intrusive remedy available and necessary to right the wrong." *Id.* at 784, 413 S.E.2d at 291. Applying these principles here, the answers to both supplemental questions—and thus the Court's path to resolving the constitutional issues on which it granted review—are clear.

Supplemental question one: Dr. Singleton was not required to exhaust the CON *process* in order to challenge the CON *requirement*. An agency's inability to afford "meaningful redress" for a constitutional harm is a "substantive rather than

jurisdictional" element of *Corum* claims. *Askew*, 902 S.E.2d at 724. That element is met here. An administrative process can't redress a harm that the process, itself, inflicts. *Id.* at 730, 733–35. Because "[t]he statutory requirement of a certificate of need" violates the law of the land, exclusive privilege, and anti-monopoly clauses, *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 551–52, 193 S.E.2d 729, 736 (1973), forcing Dr. Singleton to expend vast resources seeking a CON would inflict the very injury he filed this case to avoid. *Corum* does not require—and the Constitution does not allow—that absurd result.

Supplemental question two: *Corum* informs the facial/as-applied question too. The proper remedy for a *Corum* claim is "the least intrusive remedy available and necessary to right the [constitutional] wrong." 330 N.C. at 784, 413 S.E.2d at 291. Dr. Singleton's claims will require at least as-applied relief from the CON law; there is no other way to cure his injuries. And, given state courts' "responsibility to protect the state constitutional rights of the citizens," *id.* at 783, 413 S.E.2d at 290, his claims will likely also require facial relief for others subject to the law. *See Aston Park*, 282 N.C. at 551, 193 S.E.2d at 736 (resolving dispute over one hospital by striking down prior CON law in its entirety). That said, questions of remedy are best left to the merits. *See Corum*, 330 N.C. at 784, 413 S.E.2d at 290 (holding that it would be "inappropriate" to craft a remedy for a *Corum* claim before the record is "fully developed"). Accordingly, the best path forward is to clarify the standard

for each of Dr. Singleton's claims, reverse the Rule 12(b) dismissals, and allow the trial court to decide what remedies are needed to right the CON law's wrongs.

ARGUMENT

I. Dr. Singleton's *Corum* claims did not require exhaustion in light of *Askew*.

The first supplemental question asks whether, in light of *Askew v. City of Kinston*, 902 S.E.2d 722 (N.C. 2024), Dr. Singleton was required to exhaust the CON *process* before he could challenge the validity of the CON *requirement*. He was not. Dr. Singleton brought *Corum* claims directly under the state Constitution. (Part A). *Askew* held that courts' subject-matter jurisdiction to hear *Corum* claims does not turn on whether the plaintiff has exhausted administrative remedies. (Part B). Rather, the inability to obtain adequate agency relief is a substantive element of *Corum* claims. And that element is met here: Because Dr. Singleton challenges the CON *requirement*, forcing him to slog through the CON *process* can't cure—it can only worsen—his injuries. (Part C). Free from exhaustion issues, the Court should decide the important constitutional questions on which it granted review.

A. Dr. Singleton brought *Corum* claims challenging the CON law.

Recall Dr. Singleton's distinct claims. *See Askew*, 902 S.E.2d at 729 (holding courts must examine the "contours" of each claim). He alleges that the CON law, at least as applied to him, violates the law of the land, exclusive privilege, and anti-monopoly clauses (Art. I, §§ 19, 32, 34). (R pp 10–11, 31–34, ¶¶ 2–6, ¶¶ 130–52). It

violates the "law of the land," he argues, because forcing him to get a CON before he can use his own operating room—which he alleges will be safe and affordable—is not reasonably necessary to protect the public. Singleton's Br. 4, 12–29. And the CON law grants "monopolies" and "exclusive . . . privileges," he argues, because it grants CarolinaEast an exclusive right to run a private operating room in his area. Singleton's Br. 4–5, 30–41.

These are the same claims that prevailed in *Aston Park*. There, Aston Park owned a hospital in Asheville and wanted to build a new one. 282 N.C. at 542–43, 193 S.E.2d at 730–31. But to do that, a statute required a CON, which an agency had denied in favor of another private hospital. *Id.* So Aston Park sought judicial review, challenging both the *legislature's power* to require a CON under the law of the land, exclusive privilege, and anti-monopoly clauses, and the *agency's denial* of its application under the equal protection clause. *Id.* at 544–46, 552, 193 S.E.2d at 731–32, 736. This Court resolved the first three claims by holding "[t]he statutory requirement of a certificate of need [was] beyond the authority of the Legislature under the Constitution." *Id.* at 552, 193 S.E.2d at 736. Then, having struck down the CON requirement, the Court declined to reach Aston Park's challenge to the "denial of its application." *Id.* Because the CON *requirement* was unconstitutional, questions about the agency's CON *decisions* were moot.

Substantively, this case is on all fours with *Aston Park*. The difference, to the extent there is one, is one of timing. Aston Park was forced to suffer through

the CON process only to learn, on the back end, that the legislature never had the power to require a CON in the first place. Dr. Singleton should not have to suffer the same fate. *See Askew*, 902 S.E.2d at 734 (noting plaintiffs "will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over" (quoting *Axon Enter. v. FTC*, 598 U.S. 175, 192 (2023)). He therefore seeks declaratory and injunctive relief against the CON law. (R p 34, Prayer ¶¶ A–D). And he seeks "an award of $1 in nominal damages in recognition of the economic, professional, and constitutional injuries" the CON law has caused him. (R p 34, Prayer ¶ E).[1]

Dr. Singleton's claims are what this Court has termed "*Corum* claims." *Askew*, 902 S.E.2d at 724. *Corum* held that plaintiffs can sue state officials directly under the state Constitution "for violation of rights guaranteed by the Declaration of Rights." 330 N.C. at 783, 413 S.E.2d at 290. When there is no "adequate state remedy" for violation of a state constitutional right—a condition met here, *see* Part C *infra*—"the common law, which provides a remedy for every wrong, will furnish the appropriate action." *Id.* at 782, 413 S.E.2d at 289. Knowing this, Dr. Singleton sued "under" Art. I, §§ 19, 32, and 34. (R p 11, ¶ 5). He also invoked his right to a remedy for "violations of [state] constitutional rights under Article I, Section 18."

[1] *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021) ("This case asks whether an award of nominal damages by itself can redress a past [constitutional] injury. We hold that it can.").

(R p 11, ¶ 5); *Washington v. Cline*, 385 N.C. 824, 827, 898 S.E.2d 667, 670 (2024) (*Corum* claims flow from Art. I, § 18's promise of a "remedy" for every "injury").

Dr. Singleton's requested declaratory, injunctive, and monetary relief, in turn, tracks what *Corum* plaintiffs often seek. *See, e.g.*, *Askew*, 902 S.E.2d at 734 (reversing dismissal of suit seeking declaratory and injunctive relief and damages to vindicate right to be free from discriminatory condemnation process); *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 414, 858 S.E.2d 788, 794–95 (2021) (reversing dismissal of suit seeking injunction and damages to vindicate right to sound basic education); *Tully v. City of Wilmington*, 370 N.C. 527, 531, 810 S.E.2d 208, 212 (2018) (reversing dismissal of suit seeking declaratory judgment and damages to vindicate right to earn a living). By every measure, this is a *Corum* case.

B. Subject-matter jurisdiction over *Corum* claims does not turn on whether the plaintiff exhausted administrative remedies.

Because Dr. Singleton brought *Corum* claims, exhaustion was not required. *Askew* made that clear. The exhaustion requirement derives from "a distinct class of cases—those dealing with routine administrative grievances reviewable through statutory channels." *Askew*, 902 S.E.2d at 730–31. In that "realm, jurisdiction over agency disputes turns on whether a party channeled their claim through prescribed administrative avenues." *Id.* at 731 (citing *Presnell v. Pell*, 298 N.C. 715, 722, 260 S.E.2d 611, 615 (1979)). The State asks the Court to copy that framework and paste

it here. *See* State's Br. 26, 31–32, 35, 39 (citing *Presnell*). But *Askew* "reject[ed] that approach." 902 S.E.2d at 724.

Askew held that "[e]xhaustion of administrative remedies does not dictate jurisdiction over *Corum* claims." *Id.* That's because "the judiciary's power to hear *Corum* claims," unlike its statutory power to review agency disputes, "flows from the authority granted to it by the Constitution." *Id.* at 732 (cleaned up). In other words, "*Corum* claims are not administrative grievances," so courts can resolve them regardless of "whether the plaintiff first depleted administrative relief." *Id.* at 731–32. The State's view that Dr. Singleton had to deplete the "administrative process for resolving CON-related disputes" before he could challenge the CON law in court (State's Br. 27), can't survive *Askew*.

C. Dr. Singleton's *Corum* claims are viable because the CON process can't adequately redress his constitutional injuries.

That said, *Corum* claims have a substantive element that rhymes with the State's exhaustion argument: They arise when there is no "adequate state law remedy for [the] plaintiffs' discrete constitutional challenges." *Askew*, 902 S.E.2d at 735. The State argues Dr. Singleton had an adequate remedy: Despite the fact that there has *never* been a CON available in his area (R p 27, ¶¶ 99–100), and he thus "could not apply for a CON" before he sued (State's Br. 23), the State says he could have petitioned DHHS to change its mind and make a CON available in the future. "And if plaintiffs' petition were successful," the State tells us, "they

could then apply for a CON." State's Br. 34–39. But this argument doesn't work either. As Dr. Singleton has explained at every stage of this case, the ability to one day apply for a CON is not a remedy for the unconstitutional CON requirement.[2]

Askew helps Dr. Singleton here too. To be adequate, an agency's process must allow the plaintiff to "meaningfully air [his] constitutional claim" in court and "secure substantive redress for [his] injuries." *Askew*, 902 S.E.2d at 734. The process must "fit" the constitutional harm. *Id.* In turn, a process is deficient when it "doom[s] *Corum* claims to echo into a bureaucratic void." *Id.* Most notably here, forcing a plaintiff to slog through a process when the "constitutional harm [lies] in the administrative process itself" can't redress—it can only inflict—the injury. *Id.* (citing *Axon*, 598 U.S. at 192).

Askew and the cases it cited confirm that an agency process can't cure an injury when the process *is* the injury. Forcing property owners to appeal a city's blight designations would not "redress the alleged race-based discrimination at the threshold." *Askew*, 902 S.E.2d at 730. Forcing a mom to appeal a school's failure to prevent bullying to an indifferent board "would prolong the cycle of deliberate indifference." *Id.* at 734 (citing *Deminski*, 377 N.C. at 415, 858 S.E.2d at 795). And

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[2] (R pp 29–30, ¶¶ 116–18 (alleging the ability to one day apply for a CON would not "remedy Dr. Singleton's injury")); Reply Br. 29 ("Dr. Singleton does not want a CON. He wants freedom from the unconstitutional CON requirement—something the CON process can't grant."); Oral Arg. 4:50–6:20, 21:57–22:37, 1:03:14–1:04:33 (counsel making same point).

forcing hospitals to seek approval for fees beyond those listed on a fee schedule is not an "adequate remedy" if the "rules and regulations" setting that schedule are invalid. *Charlotte-Mecklenburg Hospital Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 209–10, 443 S.E.2d 716, 722–23 (1994); Reply Br. 30; Oral Arg. 4:45–6:01 (counsel citing *Charlotte-Mecklenburg Hospital*).[3]

The point is, when the constitutional harm is in the "journey" of a process "rather than the destination," the process is inadequate. *Askew*, 902 S.E.2d at 730. That's what *Aston Park* was all about—an unconstitutional journey. It struck down the "requirement of a certificate of need," so there was no reason to decide Aston Park's challenge to the "denial of its application." *Aston Park*, 282 N.C. at 552, 193 S.E.2d at 736. Forcing Dr. Singleton to take the same journey as Aston Park—the process of trying to get a CON—would inflict the very injury this Court held Aston Park should never have had to suffer. That's why Dr. Singleton cited *Aston Park* in his complaint: He wanted to make clear that the CON *requirement* violates Art. I, §§ 19, 32, and 34. (R pp 17–18, ¶¶ 40–43, 47).

[3] This is how it works in challenges to licensing laws, too. Forcing a party to seek a license is not an adequate remedy for a claim that the licensing requirement is irrational. *See, e.g.*, *Poor Richard's v. Stone*, 322 N.C. 61, 63, 366 S.E.2d 697, 698 (1988) (law of the land challenge to military-dealer licensing requirement resolved on merits); *Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1102 (Pa. 2020) (decision below held that property manager did not need to seek real-estate broker's license before she could challenge licensing requirement).

To repeat why: Forcing Dr. Singleton to spend years and tens of thousands of dollars trying to break up CarolinaEast's monopoly is not a "remedy" when our Constitution says that "monopolies . . . shall not be allowed." Art. I, § 34. Forcing Dr. Singleton to spend those vast resources trying to join CarolinaEast as a CON-holder is not a "remedy" when our Constitution forbids "exclusive . . . privileges" for private services. Art. I, § 32. Forcing Dr. Singleton to waste so much time and money trying to show that his services are "needed"—both in the petition process and in any application for a CON—is not a "remedy" when the CON requirement exceeds the police power, and thus, "the law of the land." Art. I, § 19. Because the CON *requirement* is unconstitutional, the CON *process* is not a "journey" he can be legally required to take. *Askew*, 902 S.E.2d at 730.

II. Dr. Singleton's *Corum* claims will require as-applied relief and will likely also warrant facial relief.

The next supplemental question is whether Dr. Singleton's claims, based on the facts alleged, are facial, as-applied, or both. The answer, at this early stage, is both. *Corum* requires courts to craft "the least intrusive remedy available and necessary to right the [constitutional] wrong." 330 N.C. at 784, 413 S.E.2d at 291. Dr. Singleton's allegations about how the CON law violates Art. I, §§ 19, 32, and 34 will require at least as-applied relief. (Part A). And, because state courts have a duty to protect state constitutional rights, his claims will likely also require facial relief for others subject to the law. (Part B). That said, *Corum* held that questions

of remedy are best left to the merits. (Part C). The proper course here, then, is to clarify the constitutional test for each claim, reverse the Rule 12(b) dismissals, and allow the trial court to craft the remedies needed to right the CON law's wrongs.

A. Dr. Singleton's claims will at least require as-applied relief.

The line between facial and as-applied claims "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *State v. Grady*, 372 N.C. 509, 546, 831 S.E.2d 542, 569 (2019) (quoting *Citizens United v. FEC*, 558 U.S. 310, 331 (2010)). While the line is often "amorphous," *Bucklew v. Precythe*, 587 U.S. 119, 139 (2019) (cite omitted), as-applied claims typically attack a statute on "the particular circumstances of the party before the court," whereas facial claims challenge a statute "in all of its applications." *Grady*, 372 N.C. at 547, 831 S.E.2d at 570 (cleaned up). Because Dr. Singleton's complaint alleges that the CON law violates the law of the land, special privilege, and anti-monopoly clauses on at least his own facts, his *Corum* claims will require at least as-applied relief.

Dr. Singleton argues that the CON law violates the law of the land clause because forcing him to get a CON is not "reasonably necessary" to protect the public. Singleton's Br. 4, 12–29 (quoting *Aston Park* 282 N.C. at 551, 193 S.E.2d at 735); (R pp 33–34, ¶¶ 144–52). He alleged that, as in *Aston Park*, he's a licensed physician and the operating room at his clinic meets all relevant health and safety standards—including those under the Ambulatory Surgical Facility Licensure Act. (R pp 11–15, ¶¶ 9–10, 17–19, 26–30). He alleged that, as in *Aston Park*, he would

use his operating room to provide more affordable surgeries than CarolinaEast—a private hospital down the road and the only CON-holder in his area for decades. (R pp 14–15, ¶¶ 20–23, 30). And he alleged that, as in *Aston Park*, the CON law's only real impact in the Craven/Jones/Pamlico area is to reduce patients' access to care so that CarolinaEast can profit. (R pp 26–29, ¶¶ 93–113).

Dr. Singleton further argues the CON law violates the exclusive privilege and anti-monopoly clauses because it grants CarolinaEast an exclusive right to provide private operating room services—which is "forbidden." Singleton's Br. 4–5, 30–41 (quoting *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 736); (R pp 31–33, ¶¶ 130–43). He alleged that today, and every day since at least 2004, CarolinaEast has been the sole operating room CON-holder in the Craven/Jones/Pamlico area; no new CON has *ever* been available. (R p 27, ¶¶ 99–103). And he alleged that, like the incumbent hospitals in *Aston Park*, CarolinaEast provides private services and thus does not fall within the "public services" exception to the Constitution's ban on exclusive rights. (R p 32, ¶¶ 140–41).

To obtain relief for these constitutional violations, Dr. Singleton followed this Court's guidance that *Corum* offers "the least intrusive remedy available and necessary to right the wrong." 330 N.C. at 784, 413 S.E.2d at 291. *Aston Park* held that the harm flows from "the statutory requirement of a certificate of need." 282 N.C. at 552, 193 S.E.2d at 736. In turn, Dr. Singleton wants to "apply for a license under the Ambulatory Surgical Facility Licensure Act" *without* a CON. (R pp 30–

31 ¶¶ 117, 128–29). The relief he requests—as-applied declaratory and injunctive relief from the CON law and $1 in damages (R p 34, Prayer ¶¶ A–E)—reflects that aim. If he wins on the merits, these as-applied remedies will cure his injuries.

B. Dr. Singleton's claims will likely also warrant facial relief.

But *Corum* doesn't just require "the least intrusive remedy available." 330 N.C. at 784, 413 S.E.2d at 291. It also requires the remedy "necessary to right the [constitutional] wrong." *Id. Corum*, after all, held that North Carolina courts have "the responsibility to protect the state constitutional rights of the citizens." *Id.* at 783, 413 S.E.2d at 290. Typically, that duty is met by curing the plaintiff's injury. *See, e.g.*, *Britt v. State*, 363 N.C. 546, 549, 681 S.E.2d 320, 322 (2009) (striking down statute that banned felons from possessing firearms as applied to plaintiff). But sometimes, a court's duty to protect constitutional rights requires more: relief for others who, by force of logic, stand in the plaintiff's shoes because they suffer the same constitutional harm. *See, e.g.*, *Grady*, 372 N.C. at 522, 831 S.E.2d at 553 (striking down statute that required lifetime GPS tracking of criminal offenders as applied to defendant and "all individuals in the same category").

The need for relief that extends beyond Dr. Singleton will likely arise here. Indeed, that's precisely what happened in *Aston Park*. That case involved a dispute over one hospital in a single healthcare market (Asheville). And yet, when the dust settled, this Court did not limit its holding to that one hospital. Instead, the Court held that "the statutory requirement of a certificate of need"—in its entirety—

violated Art. I, §§ 19, 32, and 34. *Aston Park*, 282 N.C. at 552, 193 S.E.2d at 736. The Court did so because the CON law threatened North Carolinians' "right to engage in a business, otherwise lawful," with a power that no state agency should be allowed to wield: "authority to exclude Aston Park from this field of service in order to protect existing hospitals from competition otherwise legitimate." *Id.* at 551–52, 193 S.E.2d at 735–36; *see also id.* at 548, 193 S.E.2d at 733 (same principle).

In this respect, the CON law at issue here is materially identical to the one struck down in *Aston Park*. As Dr. Singleton explained in his complaint, the whole point of the CON law is that it forbids otherwise-lawful healthcare providers and facilities—like Dr. Singleton and his vision center—from entering a market unless DHHS believes they are "needed." (R pp 10, 21–22, ¶¶ 2, 65–72). And "need," in this system, is "based on the number of established providers in each 'service area' and the volume of services they are performing." (R p 22, ¶ 68). If DHHS projects that no new services are "needed" in the coming year(s)—the norm—a provider can't apply for a CON "even if the services they would like to provide are safe, efficient, affordable, and actually needed by real patients." (R p 22, ¶ 69). If DHHS projects that new services *are* "needed"—the exception—a provider must spend years and tens of thousands of dollars battling with market incumbents over that CON and struggling to prove he would "not result in unnecessary duplication of existing" services. (R p 22, ¶ 72). Either way, the CON law conditions aspiring

providers' ability to enter the market on whether "other providers got there first." (R p 25, ¶ 92).

That "fundamentally anticompetitive" power (*id.*) violates Art. I, §§ 19, 32, and 34 as much for Dr. Singleton as it does for others who seek to provide lawful healthcare services. If, as Dr. Singleton alleges, forcing him to get a CON violates Art. I, § 19 because it's not reasonably necessary to protect public health (R pp 33–34, ¶¶ 144–52)—if the battle for a CON does not make real patients any better off—that will be true for others as well. If, as Dr. Singleton alleges, granting CarolinaEast a CON violates Art. I, §§ 32 and 34 because those provisions forbid exclusive rights to provide private services (R pp 31–33, ¶¶ 130–43)—if the state simply lacks the power to grant CONs—that will be true for others as well. Even setting aside *Aston Park*, this Court has a long and proud tradition of issuing facial relief against laws that violate the fundamental right to earn a living even when it could have chosen narrower remedies.[4] Likewise here, *Corum*'s mandate to craft relief that will right the CON law's wrongs will likely entail facial relief.

Two final points drive home the potential need for facial relief:

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[4] *See, e.g.*, *King v. Town of Chapel Hill*, 367 N.C. 400, 413, 758 S.E.2d 364, 374 (2014) (striking down city fee schedule for towing); *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 481, 206 S.E.2d 141, 151 (1974) (law restricting watch prices unconstitutional as applied to both defendant retailer and all others who fell within same statutory category); *Cheek v. City of Charlotte*, 273 N.C. 293, 299, 160 S.E.2d 18, 23 (1968) (striking down city massage regulations).

First, this Court has held that the longer the legislature shirks its duty to protect state constitutional rights, and the more widespread violations of those rights are, the broader the Court's remedial powers will be. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 436–58, 879 S.E.2d 193, 225–38 (2022) (Court had broad power to remedy longstanding statewide violations of right to a sound basic education). This case falls in the same camp. In the 50 years since *Aston Park* was decided, the legislature has adopted a materially identical law—one that requires a CON based on "need"—and the Court of Appeals has called *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). Somehow, lawmakers and lower courts have managed to reimpose a legal regime that *Aston Park* squarely rejected. Such widespread and protracted violations of Art. I, §§ 19, 32, and 34 will surely warrant relief to match.

Second, a recent legislative change has put the operating room CON rule—the one at issue here—right in the crosshairs of another precedent that will likely warrant facial relief: *State v. Warren*, 211 N.C. 75, 189 S.E. 108 (1937). There, the Court held that a law requiring a real-estate license only in some counties violated the law of the land. *Id.*, 189 S.E. at 111. Since "[t]he sale of real estate is a business applicable to the whole state," it violated basic uniformity principles to impose a special county-based burden. *Id*. Last year's law exempting "urban" ambulatory surgical facilities from the CON requirement, Sess. Law 2023-7 (codified at N.C. Gen. Stat. § 131E-176(21a))—flouts *Warren* because it leaves providers in "rural"

counties with a special burden. *Warren* predicted that if the Court were ever faced with a county-based burden on "physicians . . . we would unhesitatingly say that the act was unconstitutional." 211 N.C. 75, 189 S.E. at 111. That case has come—and it will likely require relief for all those who remain shackled by the CON law based solely on where they happen to work.

In sum, *Corum* requires "the least intrusive remedy available and necessary to right the [constitutional] wrong." 330 N.C. at 784, 413 S.E.2d at 291. That will, at a minimum, require as-applied relief for Dr. Singleton. Because North Carolina courts have a duty to protect all citizens' rights, however, *Corum* will likely require facial relief to right the CON law's protracted statewide wrongs. The reasons that prompted this Court to strike down the "requirement of a certificate of need" in *Aston Park* are reasons that apply equally to Dr. Singleton and all others who seek to provide otherwise-lawful services. Last year's law exempting "urban" providers from the CON requirement, moreover, saddles "rural" providers with exactly the sort of county-based burden *Warren* said the Court would "unhesitatingly" strike down. That decision, like any applying *Aston Park*, would likely require facial relief for others who stand in Dr. Singleton's shoes.

C. The Court should clarify the constitutional tests, reverse, and leave questions of remedy for the merits.

The Court's order also asks how the facial/as-applied question informs its review of the decisions below. For several reasons, it has no impact. The facial/as-

applied "distinction . . . goes to the breath of the remedy employed by the Court, not what must be pleaded in a complaint." *Grady*, 372 N.C. at 546, 831 S.E.2d at 569 (quoting *Citizens United*, 558 U.S. at 331). And that makes sense. At the Rule 12(b) stage, this Court asks "whether the allegations of the complaint are sufficient to state a claim." *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022). Because the facial/as-applied distinction "does not speak at all to the substantive rule of law necessary to establish a constitutional violation," *Bucklew*, 587 U.S. at 138, it has no impact on whether Dr. Singleton stated valid claims.

The Court's focus, then, should be on clarifying the substantive tests that govern Dr. Singleton's claims under Art. I, §§ 19, 32, and 34. Those are the legal questions on which he sought, and this Court granted, review. And those are the questions both the trial court (without an opinion) and the Court of Appeals (in a confused opinion) got wrong. The Court of Appeals, recall, refused to follow *Aston Park*, applied a fact-free "rational basis" test rather than a fact-based "reasonably necessary" test under the law of the land clause, and recast the exclusive privilege and anti-monopoly and claims as "procedural due process" claims. *See Singleton v. DHHS*, 284 N.C. App. 104, 108–17, 874 S.E.2d 669, 677–78 (2023). All of that was error and warrants reversal. Singleton's Br. 12–42 (explaining why).

Besides clarifying important questions of state law, focusing on the tests that govern Dr. Singleton's claims, rather than the full scope of relief to which he may be entitled, honors both the three-judge panel system and *Corum*. The panel

system ensures prompt Rule 12(b) decisions—and the clarity they bring—while leaving questions of remedy for the merits. Where, as here, a plaintiff challenges the constitutionality of a statute in superior court and there is a Rule 12(b) motion, "the original court shall rule on the motion" *unless* that motion "is based solely upon Rule 12(b)(6)," in which case the original court "may" transfer the case to a panel. N.C. R. Civ. P. 42(b)(4). That's what happened here: The State moved to dismiss under Rule 12(b)(6) *and* Rule 12(b)(1), so Judge O'Foghludha decided the motion. (R pp 58–59). If this Court were to reverse, the panel system would then require the superior court to decide whether "all other matters in the action have been resolved" *before* transferring the case to a panel for "determination as to the facial validity of [the] act." N.C. R. Civ. P. 42(b)(4); N.C. Gen. Stat. § 1-81.1(a1). This sequence tracks *Corum*'s rule that it would be "inappropriate for this Court to attempt to establish the redress recoverable in the event plaintiff is successful" before the record is "fully developed." 330 N.C. at 784, 413 S.E.2d at 290–91.

Accordingly, the answer to the facial/as-applied question does not impact the Court's review at this stage. All the Court need do—indeed, all *Corum* says it *can* do—is resolve the constitutional questions on which it granted review, reverse the Rule 12(b) dismissals, and allow the trial court to decide the nature and scope of relief to which Dr. Singleton may be entitled on the merits.

CONCLUSION

The answers to both supplemental questions clear the way for this Court to reach the substance of Dr. Singleton's claims. And when it does, the Court should hold that he stated valid ones for all the reasons in his prior briefs, and reverse.

Respectfully submitted this 13th day of August, 2024.

Electronically submitted
Joshua Windham (N.C. Bar No. 51071)
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
T: (703) 682-9320
E: jwindham@ij.org

I certify that the attorneys below have authorized me to list their names as if they had personally signed.

Renée Flaherty* (D.C. Bar No. 1011453)
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
T: (703) 682-9320
E: rflaherty@ij.org
*Admitted pro hac vice

Daniel Gibson (N.C. Bar No. 49222)
DAVIS, HARTMAN, & WRIGHT
209 Pollock Street
New Bern, NC 28560
T: (984) 345-3078
E: rdg@dhwlegal.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that today the above document was served on counsel by e-mail as follows:

For Defendants-Appellees:

N.C. DEPARTMENT OF JUSTICE
Nicholas Brod (N.C. Bar No. 47598)
Ryan Park (N.C. Bar No. 52521)
Derek Hunter (N.C. Bar No. 36835)
John Schaeffer (N.C. Bar No. 51965)
P.O. Box 629
Raleigh, NC 27602
nbrod@ncdoj.gov, rpark@ncdoj.gov,
dhunter@ncdoj.gov, jschaeffer@ncdoj.gov

Electronically submitted
Joshua Windham
Attorney for Plaintiff