STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

GAJENDRA SINGH, M.D., & FORSYTH IMAGING CENTER, LLC,

Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH & HUMAN SERVICES; ROY COOPER, Governor of the State of North Carolina, in his official capacity; MANDY COHEN, North Carolina Secretary of Health & Human Services, in her official capacity; PHIL BERGER, President Pro Tempore of the North Carolina Senate, in his official capacity; & TIM MOORE, Speaker of the North Carolina House of Representatives, in his official capacity,

Defendants.

BRIEF OF *AMICUS CURIAE* THE GOLDWATER INSTITUTE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTEREST OF *AMICUS CURIAE*

The Goldwater Institute ("GI") was established in 1988 as a nonpartisan public policy foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, and policy briefings. Through its Scharf–Norton Center for Constitutional Litigation, GI litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

Among GI's principal goals is defending the vital principle of economic liberty, and the independent protection for this and other rights in state constitutions. GI has litigated and appeared as *amicus curiae* in many state courts to promote the enforcement of state constitutional protections over and above those provided by the federal constitution. *See, e.g., State v. Hernandez,* 417 P.3d 207 (Ariz. 2018); *Lathrop v. Deal,* 801 S.E.2d 867 (Ga. 2017); *Ladd, et al. v. Real Estate Commission, et al.,* No. 33 MAP 2018, Pa. Sup. Ct. (pending). GI attorneys represented the

appellants in *Women's Surgical Ctr., LLC v. Berry*, 806 S.E.2d 606 (Ga. 2017), challenging the constitutionality of Georgia's certificate of need law. GI scholars have also written extensively about certificate of need laws, *see, e.g.*, Mark Flatten, *CON Job: Certificate of Need Laws Used to Delay, Deny Expansion of Mental Health Options,* Goldwater Institute (Sept. 25, 2018)[1]; Timothy Sandefur, *The Permission Society* 104-33 (2016).

The Goldwater Institute believes its legal and policy expertise will benefit this Court in its consideration of this case.

INTRODUCTION

Under North Carolina's Certificate of Need (CON) law, licensed healthcare providers like Dr. Gajendra Singh (Plaintiff) are prohibited from offering any "new institutional health service"—including "[t]he acquisition by purchase, donation, lease, transfer, or comparable arrangement of … [a] magnetic resonance imaging scanner"—without permission from the state Department of Health and Human Services. N.C. Gen. Stat. §§ 131E-178(a); 131E-176(16)(f1)(7). Because existing providers (Dr. Singh's would-be competitors) possess MRI machines, the state did not find that a new MRI scanner would be needed in Forsyth County, where Dr. Singh's business is located. 2018 State Med. Facilities Plan (SMFP) 165. Thus, Dr. Singh is barred by state law from purchasing this critical diagnostic equipment for his practice—not because this would harm public health or because he is unqualified or incompetent, but solely to prevent legitimate economic competition against existing providers.

Because Plaintiffs have standing to challenge the constitutionality of North Carolina's CON law—and because the law is a restraint on competition, on the right to earn a living, and on

[1] https://goldwaterinstitute.org/wp-content/uploads/2018/09/Mark-CON-paper-web.pdf.

consumer choice, this Court should deny Defendants' Motion to Dismiss and consider the merits of this vital issue.

I. Plaintiffs have standing to challenge the constitutionality of the CON law.

As a threshold matter, Plaintiffs need not apply for a CON to challenge the constitutionality of the law. *State v. Frinks*, 19 N.C. App. 271, 276, 198 S.E.2d 570, 573 (1973), aff'd, 284 N.C. 472, 201 S.E.2d 858 (1974). Plaintiffs do not seek a CON or dispute the denial of a CON; instead, they bring facial and as-applied constitutional challenges to the very existence of the CON process. Where a plaintiff alleges that a permit or licensing statute is "void on its face," the plaintiff "is entitled to contest its validity" without first seeking a permit. *Id.* (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452–53 (1938)); *see also Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1228 (10th Cir. 2005) ("Applying for and being denied a license or an exemption is not a condition precedent to bringing a facial challenge to an unconstitutional law."); *Kaahumanu v. Hawaii*, 682 F.3d 789, 796 (9th Cir. 2012) ("Plaintiffs who challenge a permitting system are not required to show that they have applied for, or have been denied, a permit."); *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958) ("failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude [judicial] review.").

Defendants' enforcement of the CON laws deprives Plaintiff of his right to serve his patients with appropriate medical technology, and deprives patients of access to needed medical services, with the result of protecting existing medical providers from economic competition. This is not only unconstitutional—it is bad for public health. It affects the health and welfare of countless North Carolinians, and this Court should consider this important case.

In urging this Court to dismiss, Defendants incorrectly rely upon *Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 693 S.E.2d 673 (2010). But *Hope* was an as-applied

challenge filed by a party that had sought and been denied a CON. And that party brought procedural challenges (i.e., that the CON law, coupled with the Administrative Procedures Act, deprived them of meaningful access to the courts). *Id.* at 608, 693 S.E.2d at 683. Here, Plaintiffs are challenging the facial *constitutionality* of the CON law. "While claims for violation of *procedural* due process may be subject to exhaustion requirements, substantive constitutional claims are not." *Swan Beach Corolla, L.L.C. v. Cnty. of Currituck*, 234 N.C. App. 617, 629, 760 S.E.2d 302, 312 (2014) (internal citation omitted).

Furthermore, for purposes of North Carolina's CON law, "need" is predetermined by the State Medical Facilities Plan, before an applicant ever even applies for a CON. *See* N.C. Gen. Stat. § 131E-183(a)(1) (the Plan is 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."). Thus, applying for a CON before challenging the system would be futile and is unnecessary because "the question of 'need' … would never be reached if [the CON law] is either unconstitutional or inapplicable." *Gulf Pines Mem'l Park, Inc. v. Oaklawn Mem'l Park, Inc.*, 361 So.2d 695, 699 (Fla. 1978).

II. North Carolina's CON law violates the state's Anti-Monopoly Clause.

The North Carolina Constitution's Anti-Monopoly Clause states: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." N.C. Const. art. 1, § 34. Yet through anticompetitive restrictions on the right to purchase medical equipment and offer medical services, North Carolina's CON law creates just what the Constitution forbids: "a substantial barrier to entry by new competitors and to expansion by existing ones," whereby other firms are given "little chance … to spur competition." *F.T.C. v. Univ. Health, Inc.*, 938 F.2d 1206, 1219 (11th Cir. 1991).

Although the North Carolina legislature claimed the purpose of the CON law is to control prices and increase access to care, N.C. Gen. Stat. §§ 131E-175, *et seq.*, studies by federal agencies, academic empirical research, and investigative reports have all shown that CON laws are designed and function to reduce competition, which in turn *increases* costs and *reduces* accessibility. At the very least, Plaintiffs should be entitled to make their case to show that North Carolina's laws are no different.

In 1974, Congress enacted the "National Health Planning and Resources Development Act" ("NHPRDA"), which offered federal funding to states that adopted CON laws. Soon thereafter, it became apparent that this experiment in government-imposed-cost-control failed. CON laws did not limit the cost of healthcare. Rather, the U.S. Federal Trade Commission (FTC) and the Department of Justice (DOJ), found that eliminating competition from the healthcare industry with CON laws merely drove up costs, reduced quality, and limited the availability of needed services. *See* Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice to the Virginia Certificate of Public Need Work Group (October 26, 2015).[2] Congress therefore repealed NHPRDA in 1986, and many states abandoned their CON requirements as counterproductive. *See* Matthew D. Mitchell & Christopher Koopman, *40 Years of Certificate-of-Need Laws Across America,* Mercatus Center (Sept. 27, 2016).[3]

North Carolina's CON law essentially forbids medical professionals from serving their patients if the State pre-determines that existing providers are sufficient to meet an area's needs, with input from and appeal rights by "affected part[ies]." In other words, the applicant's would-be

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[2] https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-virginia-certificate-public-need-work-group/151026ftc-dojstmtva_copn-1.pdf.

[3] https://www.mercatus.org/publications/corporate-welfare/40-years-certificate-need-laws-across-america.

competitors get to influence and sway the government regulators to limit competition by new actors. N.C. Gen. Stat. §§ l31E-185(a1)(2); 13lE-lS8(c). This is the very definition of a monopoly—forbidden by the North Carolina Constitution. CON laws like these do not protect public safety and welfare, but instead allow existing medical providers to block Plaintiffs from offering more and better services to the public. Existing providers do not want new competition. They are happy to have the government act as their enforcer to preclude any and all such competitors from encroaching on their turf. To wit, one court called CON laws a "Competitor's Veto." *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014).

Numerous courts have observed that CON laws are inherently anticompetitive. *See, e.g., F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 235 (2013) ("Georgia, particularly through its certificate of need requirement, does limit competition in the market for hospital services in some respects."); *F.T.C. v. Hosp. Bd. of Dir., Lee Cnty.*, 38 F.3d 1184, 1192 (11th Cir. 1994) (Florida's CON laws "make[] it more difficult for any new hospital to enter the market or for any existing hospital to obtain the state's authorization to construct new hospital facilities."); *Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1393, 1398 (5th Cir. 1996) ("suppression of competition was the foreseeable result of [Mississippi's CON laws]" and the laws "clearly contemplated anticompetitive conduct").

Indeed, North Carolina's first CON law, enacted in 1971, was struck down by the North Carolina Supreme Court for violating the anti-monopoly clause, among other things. *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551-52, 193 S.E.2d 729, 736 (1973). Yet five years later, the State enacted another, substantially similar CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, to take advantage of federal subsidies. That law (the subject of this lawsuit)

remains on the books today—despite the fact that the federal government long ago abandoned its support for CON laws, and continues to repudiate the justifications offered by Defendants.

The FTC and DOJ reject Defendants' claims that "competition is not stifled" through CON laws. Mot. to Dismiss at 9. In 2004, the FTC and DOJ jointly published an extensive study on the effects of CON laws and concluded their primary beneficiaries are not patients, but entrenched special interests—existing medical providers in communities—who use the system to protect themselves from competition. *Improving Healthcare: A Dose of Competition,* Report by the Federal Trade Commission and the Department of Justice (July 2004).[4] A decade later, these agencies again found that the primary beneficiaries of CON laws are existing providers, who effectively use them to have the government block competitors from encroaching on their markets. Far from promoting competition, FTC commissioner Maureen Ohlhausen said in a 2015 analysis, "CON laws insulate politically powerful incumbents from market forces." Maureen K. Ohlhausen, *Certificate of Need Laws: A Prescription for Higher Costs*, 30 Antitrust 50, 52 (Fall 2015).[5]

Academic studies back these findings. An exhaustive study published in 2016 by the Mercatus Center at George Mason University found that in states with CON laws, the cost of healthcare is higher, the quality is lower, and access is scarcer. Thomas Stratmann and David Wille, *Certificate-of-Need Laws and Hospital Quality*, Mercatus (Sept. 2016).[6] Even the American Medical Association, once a supporter of CON laws, has concluded that they "have failed to achieve their intended goal of containing costs," restrict patient choice, and do nothing to improve the quality of healthcare. Testimony of the American Medical Association before the Committee

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[4] http://bit.ly/2uApKcy.
[5] https://www.ftc.gov/system/files/documents/public_statements/896453/1512fall15-ohlhausenc.pdf.
[6] http://bit.ly/2NrLxKk.

on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, *The State of Competition in the Health Care Marketplace: The Patient Protection and Affordable Care Act's Impact on Competition* (Sept. 10, 2015) at 17-18.[7]

Copious examples illustrate how CON laws operate to protect entrenched businesses at the expense of applicants—and the public health. For example, in 2015, two existing mental health care providers in Iowa used that state's CON law to block a private company's application for a certificate of need to build a 72-bed inpatient mental health facility, without subsidies or assistance from taxpayers. Flatten, *supra* at 4-5.[8] Just two years prior, those same existing providers had published a study warning that the area's "mental health care system is in crisis," that existing services were "insufficient," and that "[t]he needs of the sickest and the poorest of our community are not being met." *Id.* at 5. Yet when faced with the possibility of competition entering the market to serve those needs, they managed to stall a final decision on a certificate of need application for a new psychiatric hospital for more than *two years*. *Id.*

In Oregon, a company seeking to build a privately-funded 100-bed inpatient psychiatric hospital near Portland had to battle existing mental health providers and state bureaucrats for years under that state's CON laws – to no avail. *Id.* at 10–11. Oregon consistently ranks at or near the bottom among states in terms of access to mental health facilities and services. *Id.* at 11. Indeed, under an agreement with the DOJ, Oregon was required to take steps to alleviate emergency room boarding of mental health patients. *Id.* Yet opposition from the existing providers led the Oregon

[7] https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/washington/competition-statement-house-judiciary-committee-09-sept2015_1.pdf.
[8] https://goldwaterinstitute.org/wp-content/uploads/2018/09/Mark-CON-paper-web.pdf.

Health Authority to deny the new hospital's CON application, in part because competition from the new hospital would "have a negative financial impact on [existing] providers." *Id.*

In Johnson City, Tennessee, a private company sought to open a methadone treatment center in 2013 to help treat addiction to heroin and other opioids. *Id.* at 12. Tennessee has one of the nation's highest rates of opioid abuse, and treatment options in the area where the company sought to open were virtually nonexistent. The nearest methadone treatment center in the state was more than 100 miles away, and the closest one was across the state line in North Carolina, more than 50 miles away. *Id.* Yet existing healthcare companies in the region opposed the application. So the Tennessee Health Services Development Agency rejected it, declaring "need has not been clearly established." *Id.* Three years later, the same companies that opposed the CON application announced plans to open their own methadone clinic, raising the same justifications used by their would-be competitor when it sought a certificate of need. *Id.* The Tennessee Health Services and Development Agency, which rejected the prior proposal as unneeded three years earlier, unanimously approved the certificate for the existing providers a mere three months after it was filed. *Id.* at 13.

As these examples illustrate, because they are intrinsically monopolistic, CON laws block competition in the healthcare market and prevent the provision of much-needed medical treatments. Plaintiffs should have the opportunity to present similar evidence about North Carolina's system in support of their constitutional claim.

CONCLUSION

As Americans struggle with rising health care costs, the time is right for this Court to enforce North Carolina's Constitution and stop politically-well-connected businesses from blocking the competition that lowers prices and improves services in every other area of the

economy. Plaintiffs should have the freedom to run their practice in the way that best serves their community—without having to essentially get their own competitors' permission, by way of the State government enforcer no less, to offer better, less expensive care. North Carolina's Constitution protects their right to do that. At the very least, Plaintiffs should have their day in court to defend their rights—and the public health.

Respectfully submitted this 30th day of September 2019.

W. ELLIS BOYLE
KNOTT & BOYLE, PLLC
(N.C. Bar # 33826)
4800 Six Forks Road, Suite 100
Raleigh, North Carolina 27609
(919) 783-5900
ellis@knottboyle.com

Christina Sandefur by EJ

CHRISTINA SANDEFUR
GOLDWATER INSTITUTE
(*Pro hac vice* applications pending)
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for amicus curiae Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on September 30, 2019, on the following by United States mail, first-class postage pre-paid and email:

Joshua A. Windham
Renee D. Flaherty
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
jwindham@ij.org
rflaherty@ij.org
Counsel for Plaintiffs Gajendra Singh, MD. and Forsyth Imaging Center, LLC

Derek L. Hunter
Assistant Attorney General
John H. Schaeffer
Assistant Attorney General
NC DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602
dhunter@ncdoj.gov
jschaeffer@ncdoj.gov
Counsel for Defendants North Carolina Department of Health and Human Services, Roy Cooper, Mandy Cohen, Phil Berger and Tim Moore

John E. Branch III
128 E. Hargett Street, Suite 300
Raleigh, NC 27601
jbranch@shanahanmcdougal.com
Shanahan McDougal, PLLC
Counsel for Plaintiffs Gajendra Singh, MD. and Forsyth Imaging Center, LLC

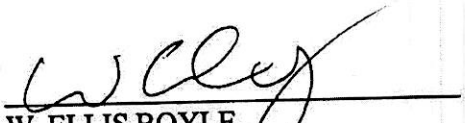
Matthew W. Wolfe
Robb A. Leandro
301 Fayetteville Street, Suite 1400
Raleigh, NC 27601
mattwolfe@parkerpoe.com
robbleandro@parkerpoe.com
Counsel for The Association for Home and Hospice Care of N.C. and the N.C. Ambulatory Surgical Center Assoc.

S. Todd Hemphill
Kenneth L. Burgess
POYNER SPRUILL LLP
301 Fayetteville Street, Suite 190
P.O. Box 1801
Raleigh, NC 27602
Themphill@Poynerspruill.com
Attorneys for NCHA, Inc. d/b/a The N.C. Healthcare Assoc., The N.C. Health Care Facilities Assoc., The NC Chpt. Of the Am. College of Radiology, and the N.C. Senior Living Assoc.

Marcus C. Hewitt
Troy D. Shelton
FOX ROTHSDCHILD LLP
434 Fayetteville St., Suite 2800
Raleigh, NC 27601
mhewitt@foxrothschild.com
tshelton@foxrothschild.com
Counsel for Bio-Medical Applications of N.C., Inc.

Gary S. Qualls
Susan K. Hackney
Steve G. Pine

K&L GATES LLP
430 Davis Drive, Suite 400
Morrisville, NC 27560
Gary.qualls@klgates.com
Susan.hackney@klgates.com
Steve.pine@klgates.com



W. ELLIS BOYLE
KNOTT & BOYLE, PLLC
(N.C. Bar # 33826)
4800 Six Forks Road, Suite 100
Raleigh, North Carolina 27609
(919) 783-5900
ellis@knottboyle.com