Case No. S17A1317

IN THE SUPREME COURT OF GEORGIA

WOMEN'S SURGICAL CENTER, LLC, et al.,

Appellants,

v.

CLYDE L. REESE, III, et al.,

Appellees.

Fulton County Superior Court, Case No. 2015-CV-262659

APPELLEES' BRIEF

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INTRODUCTION

In the case before the Court, the plaintiffs challenge the constitutionality of Georgia's longstanding health-planning regime—the Certificate of Need ("CON") program enacted by the General Assembly in 1979. The policy underpinning the CON program is to "ensure that health care services and facilities are developed in an orderly and economical manner and are made available to all citizens." O.C.G.A. § 31-6-1. These are legitimate legislative purposes, and the United States Court of Appeals for the Fourth Circuit acknowledged them as such in a case involving a relevantly identical constitutional challenge to Virginia's CON program. *See Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 548 (4th Cir. 2013).

The plaintiffs here assert, under various clauses of the state and federal constitutions that (1) the CON program is unconstitutional because it acts as a restraint of trade; (2) the General Assembly acted without a rational basis when it enacted the CON program because the program is allegedly ineffective; and (3) freedom from economic regulation is a privilege and immunity of state citizenship, even though it has never been recognized as such. None of the constitutional provisions on which plaintiffs base their claims prohibit or even restrict the General Assembly from enacting regulatory restrictions like the CON program.

Below, the Superior Court found plaintiffs' constitutional challenges to be meritless and correctly granted the State's motion for summary judgment.

First, the Superior Court correctly granted the State summary judgment on plaintiffs' claim that the CON program is unconstitutional because it acts as a restraint of trade—plaintiffs' claim under the Anti-Competitive Contracts Clause of the Georgia Constitution. This Clause prohibits the General Assembly from authorizing anti-competitive contracts or agreements. The plain language of the Clause reveals that it does not apply to the CON laws because the CON laws do not authorize any contracts or agreements, much less anti-competitive ones. But even if the Clause did apply to the CON laws, the CON laws would still be constitutional, as the Clause only prohibits unreasonable restraints of trade and the CON program is not unreasonable.

Second, the Superior Court correctly granted the State summary judgment on plaintiffs' state and federal due process claims—plaintiffs' assertion that the General Assembly acted without a rational basis when it enacted the CON program because the program is allegedly ineffective. The traditional rational basis test applies to both plaintiffs' state and federal due process claims, not the "affected with a public interest" test, as plaintiffs contend. The "affected with a public interest" test does not apply because that test only applies to legislative price controls. The CON laws do not engage in price fixing or controls. When the

traditional rational basis test is applied—as it should be—the CON laws easily pass the review as they are rationally related to the legitimate purpose of making health care affordable and accessible. Indeed, the Fourth Circuit—*in affirming an order granting a motion to dismiss*—has held that CON programs serve the "legitimate purposes" of "ensuring geographically convenient access to healthcare for [state] residents at a reasonable cost." *Colon Health*, 733 F.3d at 548.

Third, the Superior Court correctly granted the State summary judgment on plaintiffs' state privileges and immunities claim—plaintiffs' assertion that freedom from economic regulation is a privilege and immunity of state citizenship. As an initial matter, plaintiffs' claims of errors relating to this claim should not be reviewed by this Court because they are unsupported by argument. But even if the Court does address these claims of error, plaintiffs have acknowledged that the state Privileges and Immunities Clause has never been construed in the way they advocate here. Freedom from economic regulation is plainly not a right, privilege, or immunity arising from state citizenship, and the Clause has never been construed to protect citizens from such regulation.

For these reasons, and for the reasons set forth below, this Court should affirm the Superior Court's summary judgment order holding that the plaintiffs' claims are meritless.

STATEMENT OF JURISDICTION

This Court has exclusive jurisdiction over this appeal because the underlying case involves "the construction of . . . the Constitution of the State of Georgia [and] of the United States" and the "constitutionality of a law . . . has been drawn in question." Ga. Const. Art. VI, § VI, Para. II (1).

The Superior Court entered its order granting the State summary judgment on the Surgical Center Plaintiffs' constitutional claims on October 31, 2016. (R-1283-1291). This order was directly appealable as a final judgment pursuant to O.C.G.A. § 5-6-34(a)(1). The Surgical Center Plaintiffs filed a timely appeal of the Superior Court's summary judgment order on November 28, 2016 (R-1-3), and the State filed a timely cross-appeal on November 30, 2016 (R-1-3).

STATEMENT OF FACTS

A. The Legislative History of Georgia's Certificate of Need ("CON") Program

Georgia's CON laws were enacted after decades of experimentation by the federal government and various state governments with health-planning reforms intended to address the consequences of market failures in the health care field. President Harry S. Truman led the way. In 1945, he proposed that "the Congress adopt a comprehensive and modern health program for the Nation." *See* The Public Papers of the Presidents of the United States—Harry S. Truman, No. 192, *Special Message to the Congress Recommending a Comprehensive Health*

Program (Nov. 19, 1945). His proposal followed the release of statistics that revealed "widespread physical and mental incapacity" among those registering for possible military service, which the President attributed to, among other things, "the high cost of individual medical care" and "[i]nequalities in the distribution of medical personnel and . . . hospitals and other health care facilities." *Id.*

In 1946, Congress responded to President Truman's proposal by enacting the first modern health-planning legislation, the Hospital Survey and Construction Act, Pub. L. No. 79-725, 60 Stat. 1041 (1946), which is commonly called the Hill-Burton Act. The Hill-Burton Act was intended "to assist the Several States" in developing plans for the construction of facilities "for furnishing adequate hospital, clinic, and similar services to all their people." Hill-Burton Act, Pub. L. No. 79-725, § 601, 60 Stat. at 1041.

The Hill-Burton Act was followed by other federal health-planning reforms intended to address the high cost and unequal distribution of health care. In 1966, Congress authorized grants to assist the states "in comprehensive and continuing planning for their current and future health needs." *See* Comprehensive Health Planning and Service Amendments, Pub. L. No. 89-749, § 314(a)(1), 80 Stat. 1180, 1181 (1966). In 1972, Congress made federal cost reimbursement payments contingent on state-level planning efforts intended to avoid "unnecessary capital expenditures." *See* Social Security Amendments, Pub. L. No. 92-603, § 221, 86

Stat. 1329, 1386 (1972). And in 1974, it made federal funds otherwise available to the states contingent on state-level adoption of CON programs, by which each state—to address the "increasing cost of health care" and "maldistribution of health care facilities"—was to ensure that "only those services, facilities, and organizations found to be needed [were] offered or developed in the State." *See* National Health Planning and Resources Development Act (NHPRDA), Pub. L. No. 93-641, §§ 2-3, 88 Stat. 2225, 2226, 2246 (1975).

The states, for their part, not only responded to federal health-planning legislation, but also experimented independently. In fact, before Congress expressly endorsed and encouraged CON programs in 1974, at least 24 states had already adopted a CON program, with New York leading the way by adopting the Nation's first CON program in 1964. (R-817, 1044, 1167). Georgia's CON program was enacted in 1979. By 1980, *i.e.*, only five years after Congress made federal funds otherwise available to the states contingent on state-level adoption of CON programs, every state except Louisiana had enacted a CON program. (R-795, 816-817, 829). Georgia is one of 36 states that currently maintain some form of CON program. (R-562, 602, 1043).

B. Policy Rationales Supporting Georgia's CON Program

Georgia's CON program is intended to "ensure that health care services and facilities are developed in an orderly and economical manner and are made

available to all citizens." O.C.G.A. § 31-6-1. This interest is consistent with the intent of the NHPRDA, which was enacted to address the high cost and unequal distribution of health care—that is, to make health care affordable and accessible. *Cf.* NHPRDA, 88 Stat. at 2226, 2246 (incentivizing state-level health-planning reforms to address the "increasing cost of health care" and "maldistribution of health care facilities").

The CON program and its public policy underpinnings are intended to address ills that result from the unique characteristics of the market for health care services. The health care market differs from markets for most other goods and services because consumers of health care services, *i.e.* patients, generally pay only a small portion of costs out of pocket and they are limited in their ability to choose providers based on quality of services. (R-1181). As a result, there is less competition based on price and quality in the market for health care services than in other markets. *Id.* The market for health care services is also unique because of a phenomenon known as "supplier-induced demand" or "Roemer's Law." (R-1181-1182). Supplier-induced demand means that available health care resources tend to be used even if there is not a clinical need for them. *Id.*

As the State's health planning expert, Daniel J. Sullivan, noted, CON programs are designed to address the negative effects of limited competition and supplier-induced demand:

> The results of supplier-induced demand combined with limited competition based on price or quality are duplication of services and rising costs. Providers have an incentive to simply provide more services or provide more expensive services than may be needed for a particular illness or condition. CON programs attempt to address these issues by requiring providers of new services to demonstrate genuine need for the services in the relevant planning area.

(R-1182).

But CON programs are not implemented solely to address rising costs and duplication of services in the health care industry. They are also designed to improve patient outcomes by ensuring minimum volumes for providers of certain services. For certain health care services, like complex surgeries, there is strong evidence of a correlation between the volume of services performed and the quality of those services. (R-1182-1183). In other words, health care providers get better with experience. By requiring new providers to demonstrate need for particular services in particular planning areas, CON programs help ensure that existing providers maintain sufficient volumes of patients to allow for optimal patient outcomes. (R-1190-1191). For instance, Georgia's CON program relies on minimum volume standards to support the approval of certain services and facilities. *See, e.g.*, GA. COMP. R. & REGS. 111-2-2-.09(1)(o); 111-2-2-.22(3)(a)(1)(iv). Absent such standards, services would likely be spread out among a large number of low-volume providers, with potential negative consequences for patients. (R-1191).

Contrary to the Surgical Center Plaintiffs' assertions, the CON laws address quality and safety.[1] For instance, one of the review considerations evaluates whether the proposed service "fosters improvements or innovations in the financing or delivery of health services, promotes health care quality assurance or cost effectiveness, or fosters competition that is shown to result in lower patient costs without a loss of the quality of care." O.C.G.A. § 31-6-42(a)(13). *See also* O.C.G.A. § 31-6-42(a)(6) (evaluating whether the cost and methods of a proposed construction project "are reasonable and adequate for quality health care") and O.C.G.A. § 31-6-42(a)(15) (evaluating whether the proposed service "meets the department's minimum quality standards, including, but not limited to, standards relating to accreditation, minimum volumes, quality improvements, assurance practices, and utilization review procedures").

There is also evidence that CON programs can preserve access to health care services, particularly for rural and indigent populations. (R-1191-1198). Georgia's CON program aims to achieve this goal in two ways. First, it requires certain service providers to maintain indigent and charity care commitments as a condition of CON approval. *See, e.g.*, O.C.G.A. § 31-6-40.1(c); GA. COMP. R. & REGS. 111-2-2-.09(1)(g). Without these requirements, many providers would have little incentive to treat uninsured or indigent patients. (R-1195). Second,

[1] Also contrary to the Surgical Center Plaintiffs' assertions, the State did not admit that the CON laws have nothing to do with public health and safety.

Georgia's CON program allows for "cost-shifting" and "cross-subsidization" by rural and safety-net hospitals, in part, by requiring new providers to demonstrate a lack of existing alternatives to their proposed services, so that new providers will not merely siphon patients from existing providers. *See* O.C.G.A. § 31-6-42(a)(3). Further explanation of the CON review process and relevant procedural facts are covered in the State's Cross-Appellants' Opening Brief. (CAOB-3-8).

C. The Superior Court's Summary Judgment Order

The Superior Court granted the State summary judgment on all of the Surgical Center Plaintiffs' constitutional claims. (R-1283-1291).

The Surgical Center Plaintiffs' Anti-Competitive Contracts Clause claim. The Superior Court concluded that the Anti-Competitive Contracts Clause of the Georgia Constitution does not apply to the CON laws because the CON laws do not authorize any contracts or agreements. (R-1285). The Superior Court concluded that the Surgical Center Plaintiffs were required to show that the CON laws authorize contracts or agreements that may have the effect of or are intended to have the effect of encouraging monopoly or defeating or lessening competition for the Clause to apply, and that the Surgical Center Plaintiffs' proffered showing—that the CON program reduces competition—was insufficient. *Id.*

The Surgical Center Plaintiffs' due process claims. The Superior Court concluded that the CON program passes rational basis review because a statute

will be upheld so long as there is any reasonably conceivable state of facts that could provide a rational basis, regardless of how ineffective the statute might actually be. (R-1286). The Superior Court found that both the State's and the Surgical Center Plaintiffs' experts acknowledged the legitimate public policy goals underlying CON programs. (R-1287). The Superior Court also found that the affidavits of the experts demonstrated an ongoing debate about the effectiveness of Georgia's CON program, and this ongoing debate was, by itself, enough to demonstrate that the program is rational. *Id.*

The Superior Court concluded that it was simply not enough for the Surgical Center Plaintiffs to cast doubt on the wisdom or effectiveness of the CON laws. (R-1286-1287). Indeed, at the summary judgment hearing, the Superior Court noted "whatever effect and ancillary collateral effect [the CON program] may have on competition does not basically abrogate the substantial interest and rational basis that the State has shown in the scheme that is . . . established here." (T-173). The Superior Court also concluded that it was not permitted to sit as a "superlegislature" to weigh the wisdom of the CON laws (R-1286), stating at the hearing "[t]hat's not a job I don't think for this Court to undertake." (T-174).

The Surgical Center Plaintiffs' state privileges and immunities claim. With respect to the Surgical Center Plaintiffs' claim under the Privileges and Immunities Clause of the Georgia Constitution, the Superior Court concluded that

freedom from state-granted monopolies is not a right, privilege, or immunity arising from state citizenship. (R-1288). The Superior Court also noted that the Surgical Center Plaintiffs had conceded that Georgia courts have not applied the Privileges and Immunities Clause in the way they advocated—to protect citizens from state-granted monopolies. *Id.*

The Surgical Center Plaintiffs' federal privileges or immunities claim. The Superior Court concluded that the Surgical Center Plaintiffs' claim under the federal Privileges or Immunities Clause is presently foreclosed by the *Slaughter-House Cases*, 83 U.S. 36 (1873). (R-1288).

STANDARD OF REVIEW

This Court reviews the grant of a motion for summary judgment *de novo*. *Cowart v. Widener*, 287 Ga. 622, 624 (2010).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY GRANTED THE STATE SUMMARY JUDGMENT ON THE SURGICAL CENTER PLAINTIFFS' ANTI-COMPETITIVE CONTRACTS CLAUSE CLAIM.

A. The CON laws do not authorize anti-competitive contracts or agreements.

The Superior Court correctly concluded that the Anti-Competitive Contracts Clause[2] does not apply to the CON laws because the CON laws do not authorize

[2] The Surgical Center Plaintiffs' name for the Clause—"Anti-Monopoly Clause"— is a misnomer. As early as 1945, the clause was preceded by a catchline that referenced its specific focus on contracts: "Contracts to Defeat Competition." Ga. Const. 1945, Art. IV, § IV, Para. I.

any anti-competitive contracts. (R-1284-1285). The Anti-Competitive Contracts Clause provides the "General Assembly shall not have the power to authorize any ***contract or agreement*** which may have the effect of or which is intended to have the effect of encouraging a monopoly . . . [or] defeating or lessening competition" and that any such contract or agreement is "unlawful and void." Ga. Const. Art. III, § VI, Para. V(c)(1) (emphasis added). This language is clear, unambiguous, and plainly limited: It only prohibits the General Assembly from authorizing any anti-competitive ***contract or agreement***.

A brief history of the Anti-Competitive Contracts Clause confirms the above understanding of the Clause. The Anti-Competitive Contracts Clause first appeared in the state Constitution of 1877. *See* Ga. Const. 1877 Art. IV, § II, Para. IV. As early as 1900, this Court observed that the Clause "was simply declaratory" of the "common-law doctrine that contracts or agreements producing monopoly or lessening or defeating competition were void." *State v. Cent. of Georgia Ry.*, 109 Ga. 716, 728 (1900). And as recently as 1989, this Court again stated that the Clause "is an embodiment of the common-law rule which prohibited contracts in general restraint of trade" and that it is "limited expressly to contracts and agreements." *Exec. Town & Country Servs. v. Young*, 258 Ga. 860, 863 (1989).

Below, the Surgical Center Plaintiffs urged the Superior Court to read into the Clause a broad prohibition against "enacting statutes that encourage or facilitate monopolies or restrict competition." (R-15; *see also* R-958). The Surgical Center Plaintiffs now ask this Court to read the same broad prohibition into the Clause. (*See* AOB-8 ("While the legislature may have the best intentions, anticompetitive means are forbidden in Georgia whatever the purpose.")). This would be a profound amendment to the Clause: It would become a clause that broadly prohibits the General Assembly from regulating commerce. Such a reading of the Anti-Competitive Contracts Clause would transform a restriction on the authorization of anti-competitive contracts into a broad limitation of the General Assembly's power to regulate commerce within the state. This Court should reject the Surgical Center Plaintiffs' reading, as courts must "honor the plain and unambiguous meaning of a constitutional provision" and not "read into" an unambiguous constitutional provision words "which would add to or change its meaning." *Georgia Dep't of Nat. Res. v. Ctr. for a Sustainable Coast*, 294 Ga. 593, 598 (2014) (citation and quotation marks omitted).

Below, the Surgical Center Plaintiffs did not even allege that the CON laws authorize any contracts or agreements. (*See* R-15-16). In fact, the Surgical Center Plaintiffs denied that they were required to point to any contract or agreement for their claim under the Clause. (*See* R-188 ("[T]here is no basis in law for [the

State's] assertion that the Anti-Monopoly Clause is 'limited expressly to contracts and agreements.'"). In their opening brief, the Surgical Center Plaintiffs argue in passing that the CON laws mandate anti-competitive contracts. (AOB-9). But the Surgical Center Plaintiffs do not support this argument with any citation to authority; this is unsurprising, as there is no such mandate in the CON laws. *Id.* The Surgical Center Plaintiffs instead focus their attention on the argument they have consistently made in support of their claim under the Clause—that the CON laws reduce competition. (*See* AOB-14-22). But a showing that the CON laws reduce competition is insufficient to support a claim under the Clause. The Surgical Center Plaintiffs must show that the CON laws authorize anti-competitive contracts or agreements.

B. The cases cited by the Surgical Center Plaintiffs confirm that the Clause applies only to contracts and agreements.

Unable to point to a contract or agreement, the Surgical Center Plaintiffs try to shift the Court's focus to a case involving a different and unrelated statute that did, in fact, authorize franchise agreements (and thus met the requirement under the Clause)— *Georgia Franchise Practices Commission v. Massey-Ferguson, Inc.*, 244 Ga. 800 (1979). *Massey-Ferguson* addressed a prior version of the Anti-Competitive Contracts Clause as it pertained to two subsections of the Motor Vehicle, Farm Machinery and Construction Equipment Franchise Practices Act (the "Franchise Practices Act"), Ga. Code Ann. Ch. 84-66 (1979). And as the

name implies, the Franchise Practices Act related to franchises, which were defined in the Act as "agreement[s] or contract[s]." 84-6603(q). The provisions at issue in *Massey-Ferguson* related to, among other things, franchise agreements between manufacturers and dealers under which dealers were granted exclusive sales areas. *See* 84-6603(s) (defining "relevant market area" as "the geographical area identified as the dealer's sales area which is identified in the franchise"); 84-6610(c)(5). The Franchise Practices Act authorized such agreements by, for example, prohibiting franchisors from entering into franchise agreements with multiple dealers in the same market area, except after a hearing on protests by existing dealers. *See* 84-6603(s); 84-6610(c)(5); *see also* Ga. Code Ann. § 84-6610(f)(10) (1976).

To establish that this case is like *Massey-Ferguson*, the Surgical Center Plaintiffs would have to show the CON program authorizes monopolistic contracts or agreements between providers of new institutional health services in Georgia. There is no evidence, and indeed the Surgical Center Plaintiffs did not even allege, that such contracts exist.

The Surgical Center Plaintiffs also argue that this case is like *Executive Town & Country Services v. Young*, 258 Ga. 860, 863 (1989)—a case where the Clause was implicated. (AOB-12). But contrary to the Surgical Center Plaintiffs' assertion, this Court did not apply the Clause in *Executive Town & Country*

because there were no contracts or agreements involved and the Clause is "limited expressly to contracts and agreements." *Exec. Town & Country Servs.*, 258 Ga. at 863. Similarly, the Clause is not implicated here.

C. Even if the Anti-Competitive Contracts Clause applied to the CON laws, the CON laws would still be constitutional.

Even if the Anti-Competitive Contracts Clause could be construed to extend to statutory enactments not dealing with contracts or agreements, the CON laws would still be constitutional because they are reasonable and were "adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people...." *See Ken Stanton Music v. Board of Ed. of City of Rome*, 227 Ga. 393, 396 (1971) (internal citation omitted). Contrary to the Surgical Center Plaintiffs' assertions, the Anti-Competitive Contracts Clause is not a blanket prohibition against all restraints of trade, even those created by contract or agreement. *Id.* at 397. Rather, courts follow a "rule of reason," under which the General Assembly may encourage restraints "which do not *unreasonably* chill competition, based upon *the legislature's evaluation* of the public interest." *Ferrero v. Assoc. Materials*, 923 F.2d 1441, 1447-48 (11th Cir. 1991) (emphasis added).

Here, the legislature has enacted a CON review-and-approval process that is limited and applies only to a defined category of "new institutional health services." O.C.G.A. § 31-6-40(a). The Department regularly grants CON

applications, so even those services that are subject to the CON review-and-approval process are not completely barred. (*See* R-577-578, 602, 1096, 1098-1099). Further, the CON program would not be an unreasonable restraint of trade because the General Assembly could reasonably conclude that a review-and-approval process for new institutional health services helps to ensure access to quality health care services and control health care costs. *See supra* at 6-10 ["Policy Rationales Supporting Georgia's CON Program"]. Consequently, even if this Court finds the Anti-Competitive Contracts Clause applicable to the CON program under the premise that the program is a statutory restraint of trade, the CON program would nevertheless be constitutional because the program would not be an unreasonable restraint of trade. But more importantly, this Court should not even apply the Clause to the CON program because the program does not authorize any contracts or agreements.

II. THE SUPERIOR COURT CORRECTLY GRANTED THE STATE SUMMARY JUDGMENT ON THE SURGICAL CENTER PLAINTIFFS' DUE PROCESS CLAIMS.

A. The CON laws are rationally related to the legitimate purpose of making health care affordable and accessible.

Unless a suspect class or fundamental right is implicated, a substantive due process claim asserting economic liberties is subject only to rational basis review.[3] *See, e.g., Advanced Disposal Servs. Middle Georgia v. Deep S. Sanitation*, 296 Ga.

[3] Though the Surgical Center Plaintiffs complain about the "protest and hearing procedures" of the CON program (*See* AOB-30), they did not bring a procedural due process challenge.

103, 105-106 (2014); *Fresenius Med. Care Holdings v. Tucker*, 704 F.3d 935, 945 (11th Cir. 2013). A statute must be upheld under rational basis review if it is reasonably related to a legitimate governmental interest. *Advanced Disposal*, 296 Ga. at 106; *Fresenius Med.*, 704 F.3d at 945. And, important here, rational basis review does not require empirical support for the efficacy of a statute if "any plausible or arguable reason" supports the statute's relationship to a legitimate governmental interest, because a court may not "sit as a superlegislature to weigh the wisdom of legislation." *Advanced Disposal*, 296 Ga. at 105, 107 (citation and quotation marks omitted). Indeed, a statute will be upheld "so long as there is any reasonably conceivable state of facts that could provide a rational basis," regardless of "how ineffective the law might actually be." *Fresenius Med.*, 704 F.3d at 945 (citation and quotation marks omitted); *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (noting that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").

The Superior Court correctly concluded that the CON laws pass the rational basis test. (R-1287). Georgia's CON program clearly satisfies the rational basis test because it is clearly rationally related to the legitimate public purpose of making health care affordable and accessible, and the Surgical Center Plaintiffs failed to make the requisite showing—that the General Assembly could not have

possibly believed that the CON laws would make health care more affordable and accessible. In fact, the Surgical Center Plaintiffs did not even allege that this was the case.

Georgia's CON program easily satisfies rational basis review. To succeed on their rational basis claim, the Surgical Center Plaintiffs need to show that the Georgia General Assembly could not have possibly believed that the CON laws would make health care more affordable and accessible. Put another way, the Surgical Center Plaintiffs need to show that the purported reasons for the enactment of the CON laws "could not reasonably be conceived to be true" by the General Assembly. *Fresenius Med.*, 704 F.3d at 945. It is not enough for the Surgical Center Plaintiffs to cast doubt on the wisdom of the laws, or to show that they are ineffective. *Id.*

The CON program is intended "to ensure that health care services and facilities are developed in an orderly and economical manner and are made available to all citizens." O.C.G.A. § 31-6-1. Those are legitimate state interests. *See Gliemmo v. Cousineau,* 287 Ga. 7, 11 (2010) (holding that "promoting the availability of quality health care services" is a legitimate state interest); *Deen v. Egleston*, 597 F.3d 1223, 1231 (11th Cir. 2010) (holding that ensuring access to affordable health care is a legitimate legislative objective). In fact, the United States Court of Appeals for the Fourth Circuit has held that CON programs serve

the "legitimate purposes" of "ensuring geographically convenient access to healthcare for [state] residents at a reasonable cost." *Colon Health*, 733 F.3d at 548. As recently as February 2015, Georgia's Rural Hospital Stabilization Committee recommended that CON programs be maintained in order to protect Georgia's "fragile rural hospital infrastructure." (R-1195).

Important here, the Surgical Center Plaintiffs did not even argue or allege that the State's interest is illegitimate or pretextual. Rather, they only allege that "[e]conomic protectionism is not a legitimate state interest." (R-17). Thus, the Surgical Center Plaintiffs fail to address the legitimacy of the actual legislative objectives, and instead, merely criticize the legitimacy of a concept that is not a stated purpose of the CON program. That will not do. Even the Surgical Center Plaintiffs' expert, Dr. Thomas Stratmann, acknowledged the underlying purposes of CON programs like Georgia's, noting they "were intended to achieve a number of public policy goals, including controlling costs, increasing charity care, and providing access to medical services" and that they "supposedly protect access to health care for consumers, particularly in rural areas." (R-1043, 1046).

It is reasonable for the General Assembly to believe that the CON program's review-and-approval policy effectively prevents "unnecessary duplication of services" thereby making health care "cost effective" and "compatible with the . . . needs of the various areas and populations of the state." O.C.G.A. § 31-6-1. At

one point in the nation's history, the federal government and 49 state governments shared that belief. (*See*, *supra* at 6). And, presently, the State of Georgia, 35 other states, and the District of Columbia share that belief. (*See id.*).

There are good reasons to require new institutional health services to obtain a CON. (*See*, *supra* at 6-10). The principles of competition do not apply to the provision of health care services as they do in other markets because there is limited competition between providers over price and quality. (R-1181). This lack of competition combined with the presence of supplier-induced demand leads to unnecessary duplication of services and rising health care costs. (R-1182). CON programs like Georgia's address these concerns by requiring new providers to demonstrate, among other things, a genuine need for the services they intend to offer. *See* O.C.G.A. § 31-6-42(a). Further, allowing unfettered access to health care markets by smaller providers such as the Surgical Center Plaintiffs' ambulatory surgical center could have a detrimental impact on rural and safety-net hospitals because such providers siphon off profitable patients that are critical to a hospital's financial viability. (R-1196-1197). Finally, there is strong evidence of a correlation between hospital volumes and patient outcomes, supporting the need for a review process that ensures that providers maintain minimum volumes. (R-1191).

Interestingly, the Surgical Center Plaintiffs do not even allege or argue that the CON program fails the test for rational basis review—that is, that there is no "plausible or arguable reason" (*Advanced Disposal*, 296 Ga. at 105 (citation and quotation marks omitted)) that supports the CON program's relationship to the legitimate governmental interest of making health care affordable and accessible. (*See* R-8,16-18). Instead they argue that the CON program is irrational because it may be ineffective. For instance, in his report, the Surgical Center Plaintiffs' expert, Dr. Thomas Stratmann, details his "conclusions about the ***effects*** of the CON laws." (R-1045 (emphasis added)). But the effectiveness of the program is the exact issue a court cannot decide. *See Fresenius Med.*, 704 F.3d at 945 (a statute will be upheld "so long as there is any reasonably conceivable state of facts that could provide a rational basis," regardless of "how ineffective the law might actually be" (citation and quotation marks omitted)).

But even on the question of effectiveness, the Surgical Center Plaintiffs' claims fail. There is an ongoing debate about the effectiveness of CON programs. (R-1180). The Surgical Center Plaintiffs' own expert report (R-1042-1053) is evidence of this ongoing debate. The ongoing debate about the effectiveness of Georgia's CON program demonstrated in the record is enough to demonstrate that the program is rational. The mere fact that this debate exists dooms the Surgical Center Plaintiffs' claims as this Court and the Eleventh Circuit have each said that

the "'existence of viable, ongoing debate'" is enough to demonstrate that a statute is rational. *Deen v. Stevens*, 287 Ga. 597, 605-606 (2010) (quoting *Deen v. Egleston*, 597 F.3d at 1233); *see Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981) (holding that a party cannot prevail on a rational basis challenge "so long as it is evident from all the considerations presented to the legislature, and those of which we may take judicial notice, that the question is at least debatable" (citation, alteration marks, and quotation marks omitted)). The Surgical Center Plaintiffs simply did not offer any evidence to show that the CON program is not rationally related to the legitimate government purpose of making health care accessible and affordable. In fact, the evidence that the Surgical Center Plaintiffs offered demonstrates that Georgia's CON program is rational. (*See* R-1042-1053). Because it is reasonably conceivable that the CON laws would make health care more affordable and accessible, the CON laws pass the rational basis test and do not deprive the Surgical Center Plaintiffs of their rights to substantive due process.

B. CON laws, like Georgia's, have received favorable treatment from courts.

Contrary to the Surgical Center Plaintiffs' implications, CON laws have received favorable treatment from courts. For example, the United States Court of Appeals for the Eighth Circuit has observed that "CON laws in general have been recognized as a valid means of furthering a legitimate state interest." *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1048 (8th Cir. 1997)

(citing *Madarang v. Bermudes*, 889 F.2d 251 (9th Cir. 1989), as "recognizing [the] importance of CON laws in furthering the state's legitimate interest in preventing the establishment of unneeded health care facilities"; *Women's Community Health Center v. Texas Health Facilities Commission*, 685 F.2d 974 (5th Cir. 1982), as "recognizing [the] importance of CON laws in insuring health care services are made available to all citizens in [an] orderly economical manner"; and *Metropolitan Hospital v. Thornburgh*, 667 F. Supp. 208 (E.D. Penn 1987), as recognizing "CON is important in establishing orderly and economical distribution of health care resources.").

The United States Court of Appeals for the Fourth Circuit recently rejected a relevantly identical constitutional challenge to Virginia's CON program in *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535 (4th Cir. 2013). In *Colon Health*, the Fourth Circuit reviewed a district court's dismissal of a due process challenge to Virginia's CON program. Like the Surgical Center Plaintiffs, the medical providers bringing the challenge claimed the CON program irrationally burdened their right to earn a living and "fail[ed] to advance any state purpose other than bald economic protectionism." 733 F.3d at 548; *see also* (R-17). In response to these claims, Virginia pointed to a variety of purposes served by its CON program, including ensuring geographically convenient access to health care for residents at a reasonable cost. *Id.* In reviewing the due process challenge, the

court there determined that the CON program was subject to a rational basis review. *Id.* The Fourth Circuit ultimately affirmed the district court's dismissal of the medical providers' due process claim, holding the "cursory, unsubstantiated assertion that the statute fails to advance this purpose or any other is insufficient to merit further factual inquiry. . . . [the medical providers] have failed to state a plausible due process entitlement to relief." *Id.*

The Surgical Center Plaintiffs also argue that "[n]umerous courts have observed that CON laws are inherently anticompetitive." (AOB-16). But this is simply not the case. For instance, in *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991), the United States Court of Appeals for the Eleventh Circuit was faced with—and rejected—the argument that

> Georgia's certificate of need law, which regulates the creation of new hospitals and the expansion of existing hospitals based on the health-care needs of local communities, evinces a state policy favoring the displacement of unfettered competition among hospitals for health-care services. . . . [and] the clearly foreseeable result of this state law is the suppression of all competition in the hospital industry.

FTC v. Univ. Health, Inc., 938 F.2d at 1213, n.13. The Eleventh Circuit deemed this argument "meritless." *Id.* The Eleventh Circuit's rejection of the "suppression of all competition" argument was cited favorably by the United States Supreme Court in another one of the cases cited by the Surgical Center Plaintiffs, *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1016 (2013).

The cases cited by the Surgical Center Plaintiffs to imply that CON programs, like Georgia's, have received unfavorable treatment from courts involve laws that are fundamentally different from Georgia's CON program. For instance, the Surgical Center Plaintiffs repeatedly point to *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014), as a case that is relevant here because the court in that case "struck down a very similar CON law." (*See, e.g.*, AOB-29). But the CON laws in *Bruner* applied to people and companies involved in the moving business. *Bruner*, 997 F. Supp. 2d at 693. Those laws, among other things, allowed existing moving companies to "veto" new potential competitors from entering the moving business "for any reason at all." *Id.* at 700.

C. The "affected with a public interest" test does not apply because the CON laws do not engage in price fixing or controls.

The Surgical Center Plaintiffs contend that the proper test for their claim under the Due Process Clause of the Georgia Constitution is the "affected with a public interest test." (AOB-23). But this Court has held that test "applies only to price controls enacted by the legislature." *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 256-57 (1982). In this case, the Superior Court correctly determined that there is no evidence that the CON laws engage in price fixing or controls. (R-1285). Though the Surgical Center Plaintiffs claim this finding was in error, they do not point to a single CON law that fixes or controls prices. (*See* R-22-28). As

the Surgical Center Plaintiffs have failed to show that the CON laws engage in price fixing or controls, the "affected with a public interest" test does not apply.

III. THE SUPERIOR COURT CORRECTLY GRANTED THE STATE SUMMARY JUDGMENT ON THE SURGICAL CENTER PLAINTIFFS' STATE PRIVILEGES AND IMMUNITIES CLAIM.

A. The Surgical Center Plaintiffs abandoned their claims of error on their state privileges and immunities claim.

The Surgical Center Plaintiffs have not presented any argument to support their claims of error concerning their state privileges and immunities claim (Enumerated Errors 1 and 3). Consequently, the Surgical Center Plaintiffs have abandoned these claims of error, as this Court does not review errors unsupported by argument. *See* Supreme Court Rule 22. In their third enumerated error, the Surgical Center Plaintiffs argue that the Superior Court erred "in ruling that the Privileges and Immunities Clause (cit.) is not intended to protect citizens from state-granted monopolies." (AOB-6). The Surgical Center Plaintiffs also argue in their first enumerated error that the Superior Court erred in granting summary judgment to the State and denying summary judgment to the Surgical Center Plaintiffs on Count 2 of their Complaint—the state privileges and immunities claim. (*Id.*). Aside from these enumerations of error, however, the Surgical Center Plaintiffs only address their state privileges and immunities claim in one sentence of a footnote. (AOB-22, FN 9 (asserting the Georgia Privileges and Immunities Clause "has been held to protect citizens from the arbitrary denial of constitutional

rights.")). This is hardly enough to allow this Court to address the Surgical Center Plaintiffs' state privileges and immunities claim in any meaningful way. *See* Supreme Court Rule 22; *Head v. Hill*, 277 Ga. 255, 269 (2003) (finding claims "so lacking in specific argument that they are incapable of being meaningfully discussed" to be abandoned). Consequently, the Court should deem these errors to be abandoned.

B. Even if the Surgical Center Plaintiffs have not abandoned their claims of error, freedom from economic regulation is plainly not a right, privilege or immunity arising from state citizenship.

Even if the Court does not deem the errors to be abandoned, the Superior Court correctly granted the State summary judgment on the Surgical Center Plaintiffs' state privileges and immunities claim. (R-1288). The Privileges and Immunities Clause of the Georgia Constitution places an obligation on the General Assembly "to enact such laws as will protect [citizens] in the full enjoyment of the rights, privileges, and immunities due to such [state] citizenship." Ga. Const. Art. I, § I, Para. VII. While the Surgical Center Plaintiffs argue that the Superior Court erred in ruling that the Clause "is not intended to protect citizens from state-granted monopolies" (AOB-6), they conceded below that the Clause has never been applied in this way. (R-188, 1288). Freedom from economic regulation (what the Surgical Center Plaintiffs call "state-granted monopolies") is plainly not a right, privilege, or immunity arising from state citizenship. *See*

O.C.G.A. § 1-2-6(a) (listing rights of state citizenship); therefore, the Superior Court correctly granted summary judgment to the State on this claim.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Superior Court's order granting the State's motion for summary judgment and denying the Surgical Center Plaintiffs' motion for summary judgment.

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CERTIFICATE OF SERVICE

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