Case No. S17X1318

IN THE SUPREME COURT OF GEORGIA

CLYDE L. REESE, III, in his individual capacity and in his official capacity as Commissioner of the Georgia Department of Community Health, and RACHEL L. KING, in her individual capacity and in her official capacity as Health Planning Director of the Georgia Department of Community Health,

Cross-Appellants,

v.

WOMEN'S SURGICAL CENTER, LLC, d/b/a Georgia Advanced Surgery Center for Women, DR. HUGO D. RIBOT, JR., M.D. and DR. MALCOLM BARFIELD, D.O.,

Cross-Appellees.

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

CROSS-APPELLEES' RESPONSIVE BRIEF

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INTRODUCTION

Defendants' Opening Brief in their Cross-Appeal repeats arguments that have been summarily rejected both in the Superior Court and in an Interlocutory Petition to this Court. Defendants have done nothing to address the numerous shortcomings Plaintiffs have repeatedly identified. This Court should again reject Defendants' arguments.

PLAINTIFFS' PAST AND PRESENT INJURY

The undisputed evidence shows that (1) Plaintiffs have concrete plans to open their surgery center to all qualified doctors and to add a second operating room, R-982–83 ¶¶ 22, 33, and (2) that they would violate the CON laws if they did either and would be subject to ruinous fines. Ga. Comp. R. & Regs. 111-2-2-.05(2)(b); OCGA § 31-6-45(c). Plaintiffs' rights under the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment and GA. CONST. art. III, § VI; art. I, § I, ¶ VII; and art. I, § I, ¶ I are, therefore, adversely affected by the CON laws. Plaintiffs are suffering an injury now, attributable directly and only to Defendants' ongoing enforcement of those laws. The full extent of those injuries is explained in Plaintiffs' Opening Brief.

ARGUMENT

I. Defendants' Ongoing Enforcement of the CON Laws Creates a Justiciable Controversy.

Defendants' argument that the Declaratory Judgment Act does not authorize this action is wrong: "An action for declaratory judgment is available to test the

validity of an alleged unconstitutional law, in order that a person desiring to practice his vocation may know whether he may proceed in disregard of the requirements of the law, or whether he must refuse to accept employment regulated by the law until he can comply with its provisions." *Jenkins v. Manry*, 216 Ga. 538, 540–41, 118 S.E.2d 91, 93–94 (1961).

Plaintiffs occupy the same position as the plaintiff in *Jenkins*, who sued to challenge the constitutionality of a licensing requirement for plumbers. Like Plaintiffs here, *Jenkins* had "not violated the statute which he seeks to have declared unconstitutional, and has not, therefore, made himself liable for the penal provisions of the statute," but "he desires to perform this work and earn the compensation therefor." *Id*. at 540, 118 S.E.2d at 93. This Court held that he could bring a pre-enforcement "action for declaratory judgment … to test the validity of an alleged unconstitutional law." *Id*. at 540–41, 118 S.E.2d at 93–94. That is exactly what Plaintiffs did here.

There is nothing abstract about this dispute. Plaintiffs have specific plans to contract with other doctors to use the surgery center and to add an operating room; Defendants' enforcement of the CON laws prevents both. R-982–83 ¶¶ 22, 33. Plaintiffs face two very real options: (1) enter into illegal contracts with other surgeons to use the surgery center in violation of the CON laws, suffer ruinous fines, and then challenge Defendants' authority in a prosecution action; or (2) bring this prospective action to challenge Defendants' authority before they are

prosecuted. Georgia courts favor the second course, as evidenced by this Court's action striking down anti-competitive laws similar to the CON laws in *Georgia Franchise Practices Comm'n v. Massey-Ferguson* even though "the Commission had no complaints against any of the licensees" at the time of the case. 244 Ga. 800, 800, 262 S.E.2d 106, 107 (1979).

Drs. Ribot and Barfield are suffering—and will continue to suffer—a real, ongoing injury because Defendants' enforcement of the CON laws prevents them from opening their surgery center to all qualified doctors and adding a second operating room. This dispute over the constitutionality of the CON laws therefore presents a "case[] of actual controversy" appropriate for declaratory and injunctive relief. OCGA § 9-4-2(a).

This Court "construe[s] the declaratory judgment statute liberally … in situations presenting an 'actual controversy' where interested parties are asserting adverse claims upon a state of facts wherein a legal judgment is sought that would control or direct future action." *Black v. Bland Farms, LLC*, 332 Ga. App. 653, 659, 774 S.E.2d 722, 727 (2015), *cert. denied* (Oct. 5, 2015) (quoting *In re Doe*, 262 Ga. 389, 390, 418 S.E.2d 3, 5 (1992)). '"In order to challenge a statute or an administrative action taken pursuant to a statute, the plaintiff must normally show that it has interests or rights which are or *will be affected* by the statute or the action."' *Id*. at 659–60, 774 S.E.2d 727 (quoting *Atlanta Taxicab Co. v. City of Atlanta*, 281 Ga. 342, 345, 638 S.E.2d 307, 312 (2006)) (emphasis in original).

This is a controversy that justifies the making of a declaration because it includes "'a right claimed by one party and denied by the other, and not merely a question as to the abstract meaning or validity of a statute.'" *Pangle v. Gossett*, 261 Ga. 307, 308, 404 S.E.2d 561, 563 (1991) (quoting *Cook v. Sikes*, 210 Ga. 722, 726, 82 S.E.2d 641, 644 (1954)). The "ends of justice require that the declaration should be made" to resolve substantial doubt about the constitutionality of the CON laws, OCGA § 9-4-2(b), making this an appropriate case for prospective relief. *Total Vending Serv., Inc. v. Gwinnett Cnty.*, 153 Ga. App. 109, 111, 264 S.E.2d 574, 575–76 (1980) ("Absent a determination of the validity of the 1962 statute, appellant is uncertain and insecure with respect to its present plans …. This petition, therefore, states a claim for declaratory relief.").

Defendants acknowledge none of this; instead, they continue to rely on cases laid to rest after the Superior Court denied their Motion to Dismiss and this Court summarily denied their Petition for Interlocutory Review and their Motion for Reconsideration. These cases added nothing to the discussion then and they remain inapposite now.

In *Baker v. City of Marietta*, the trial court resolved the actual controversy on procedural and statutory grounds "and thereby lost jurisdiction to enter a declaratory judgment that the statutes were unconstitutional." 271 Ga. 210, 213, 518 S.E.2d 879, 882 (1999); Defs.' Opening Br. at 1, 10, 11. In other words, "[w]hen the trial court turned its attention to the petition for declaratory judgment,

it had already resolved the controversy ….” *Baker* at 214, 518 S.E.2d at 883; *see also Pangle*, 261 Ga. at 308, 404 S.E.2d at 563 (“There is no party to the declaratory judgment action that seeks to uphold the constitutionality of the statute under attack.”). Unlike the parties in *Baker*, the parties here have an unresolved dispute about Plaintiffs’ freedom to contract with other doctors to use the surgery center and to add a second operating room. “Absent a determination of the validity of the [CON laws], [Plaintiffs are] uncertain and insecure with respect to [their] present plans … [Plaintiffs], therefore, state[] a claim for declaratory relief.” *Total Vending Serv.*, 153 Ga. App. at 111, 264 S.E.2d at 575, 575–76.

Leitch v. Fleming dismissed a district attorney’s lawsuit against magistrate judges seeking guidance about “the proper evidentiary standards for establishing probable cause at preliminary hearings.” 291 Ga. 669, 669, 732 S.E.2d 401, 402 (2012); Defs.’ Opening Br. at 10. Declaratory judgment was inappropriate because “a judge acting in an official capacity in a criminal case is not an adverse party,” and the case involved a criminal rather than a civil dispute. *Leitch* at 670, 732 S.E.2d at 403. Conversely, this *is* a civil case and the parties here *are* adverse.

Defendants also incorrectly assert that the filing of this action created the controversy. Defs.’ Opening Br. at 11 (citing *Miller v. Southern Heritage Ins. Co.*, 215 Ga. App. 173, 174, 450 S.E.2d 432, 434 (1994), overruled on other grounds by *Hurst v. Grange Mut. Cas. Co.*, 266 Ga. 712, 470 S.E.2d 659 (1996)). In *Miller*, an insurance company sought a declaration that a payment it had already

made was not required by law or contract. *Id*. at 173, 450 S.E.2d at 433. That request for a declaration created the dispute because the company was not seeking to recover the payment; it simply wanted an advisory opinion. *Id*. at 174, 450 S.E.2d at 434. Unlike *Miller*, this case arises because of Defendants' enforcement of the CON laws, which is the only thing preventing Plaintiffs from opening their surgery center to all qualified doctors and adding a second operating room. There is no dispute that Defendants do in fact regularly enforce the CON laws and that Plaintiffs would be penalized for violating them. The controversy is therefore of Defendants' making, not Plaintiffs', and a declaratory judgment will resolve the dispute.

Defendants' reliance on *Dep't of Transp. v. Peach Hill Props., Inc.*, 280 Ga. 624, 631 S.E.2d 660 (2006) (*Peach Hill II*), and *Chambers of Ga., Inc. v. Dep't of Natural Res.*, 232 Ga. App. 632, 632, 502 S.E.2d 553, 554 (1998), is similarly misplaced because they again ignore the facts and holdings of those case. *See* Defs.' Opening Br. at 11–12. Plaintiffs are challenging the requirement of seeking a CON, but *Peach Hill II* was not challenging the existence of a permit process—in fact, Peach Hill Properties had sued to create the process in *Peach Hill I*. *Georgia Dep't of Transp. v. Peach Hill Props., Inc.*, 278 Ga. 198, 201, 599 S.E.2d 167, 169 (2004) (*Peach Hill I*). The only dispute between the parties in *Peach Hill II* was over the particulars of the process by which the Georgia DOT would submit a landfill application for the federal government's approval—not the

constitutionality of requiring a permit in the first instance. Had the plaintiff succeeded in *Peach Hill II*, it would have reapplied to the Georgia DOT. *Id.* Here, by contrast, Drs. Ribot and Barfield dispute the constitutionality of the CON requirement and do not wish to apply to the agency; they seek an order freeing them from that unconstitutional requirement. And the defendant in *Peach Hill II*—Georgia DOT—had no authority to punish the plaintiff for proceeding without a permit, unlike Defendants here, who can impose ruinous fines for noncompliance. Ga. Comp. R. & Regs. 111-2-2-.05(2)(b); *see Paskar v. City of New York*, 3 F. Supp. 3d 129, 137 (S.D.N.Y. 2014) (holding that only the federal government is empowered to enforce the federal regulatory scheme at the heart of the *Peach Hill* cases). The only dispute between the parties in *Peach Hill II* was over the particulars of the permit process—not the constitutionality of requiring a permit, or a CON, in the first instance.

Likewise, the plaintiff in *Chambers* "in effect, ask[ed] this Court to rule in the abstract as to issues it anticipates will arise should it file a new application." 232 Ga. App. at 634, 502 S.E.2d at 555. Had the court ruled for Chambers, it would have reapplied for a permit. But here, Plaintiffs' claim is that requiring a CON application in the first place is unconstitutional; they have no need for an "advisory opinion so [they] can test the strength of [Defendants'] anticipated future defenses." *Id.* There is no next administrative step in this case; if Plaintiffs are successful, they will immediately allow other qualified doctors to use the

surgery center and add a second operating room. R-982–83 ¶¶ 22, 33.

This case is, therefore, closer to the recent *Bland Farms* case, where the plaintiff brought a declaratory judgment action challenging an Agriculture Commission rule that had immediate impact on its right to conduct business as a shipper of onions, and for which noncompliance would result in civil penalties. The government made the same jurisdictional arguments it makes in this case. The court rejected those arguments since, unlike the plaintiff in *Peach Hill II*, Bland Farms was "challenging the adoption of a rule it is automatically affected by." *Bland Farms*, 332 Ga. App. at 660, 774 S.E.2d at 727–28. The court noted that whereas there was no concrete dispute in *Peach Hill II*, Bland Farms was "an interested party claiming a right to ship onions pursuant to a statute—a right it claims is impeded by a newly enacted regulation. If Bland Farms fails to comply with the new regulation, the Commissioner has statutory authority to impose civil and criminal penalties." *Id.*

Defendants' enforcement of the CON laws to inhibit new healthcare services in Georgia is identical to the Commissioner's authority to prevent shipment of onions in *Bland Farms*. Like Bland Farms, Plaintiffs here face substantial civil penalties if they were to open GASC to all qualified surgeons without complying with the CON laws. R-986 ¶ 61; Ga. Comp. R. & Regs. 111-2-2-.05(2)(b); OCGA § 31-6-45(c). The fact that Plaintiffs' past CON application was denied proves the likelihood of future enforcement and shows that "the facts

are complete and … the [plaintiff's] interest is not merely academic, hypothetical, or colorable, but actual." *Bland Farms*, 332 Ga. App. at 660, 774 S.E.2d at 728; *see also Total Vending Serv.*, 153 Ga. App. at 110, 264 S.E.2d at 575.[1] Defendants admit that Plaintiffs must seek a CON before allowing all qualified surgeons to use GASC or adding a second operating room. Whether the requirement to seek a CON is unconstitutional is a live dispute with immediate, real consequences for Plaintiffs, doctors with whom they wish to contract, and their patients.

Defendants are correct that "Plaintiffs are challenging the very existence and constitutionality of the CON program." Defs.' Opening Br. at 11. However, they continue to ignore that "[a]n action for declaratory judgment is available to test the validity of an alleged unconstitutional law …." *Jenkins*, 216 Ga. at 540–41, 118 S.E.2d at 93; *see also Total Vending Serv.*, 153 Ga. App. at 110, 264 S.E.2d at 575; *Bland Farms*, 332 Ga. App. at 659, 774 S.E.2d at 727.

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[1] It is worth emphasizing this point, because Defendants have repeatedly tried to characterize this case as an effort to re-litigate the merits of the Plaintiffs' prior CON application. It is not. Defendants' denial of Plaintiffs' prior CON application is relevant here to establish standing: to show that the Defendants do regularly enforce the CON laws, and to show that Plaintiffs would violate the law if they proceed with their plans without obtaining a CON. This case seeks prospective relief, not a review of any past practice. *Cf. Wooley v. Maynard*, 430 U.S. 705, 711 (1977) (plaintiff's past prosecutions were used solely to show likelihood of injury in case seeking prospective injunctive relief); *GeorgiaCarry.org v. Atlanta Botanical Garden, Inc.*, 299 Ga. 26, 30, 785 S.E.2d 874, 878 (2016).

II. Plaintiffs Have Standing Because They are Suffering an Injury in Fact Each Day the CON Laws are Enforced.

In the same way that Defendants' ongoing enforcement of the CON laws creates an actual and justiciable controversy, that ongoing enforcement creates an injury in fact. As explained in Plaintiffs' Response to Defendants' Petition for Interlocutory Review at 11 (*Reese v. Women's Surgical Ctr.*, No. S16I0883, Ga. Sup. Ct. (Feb. 22, 2016)), Plaintiffs need not "violate the law which [they] think[] unconstitutional, and suffer a criminal prosecution, in order to test [its] validity." *Jenkins*, 216 Ga. at 540–41, 118 S.E.2d at 93–94; *see also Bland Farms*, 332 Ga. App. at 659, 774 S.E.2d at 727; *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 691 (E.D. Ky. 2014) ("It is undisputed that the plaintiffs have not submitted a 'completed' application for a Certificate [of public convenience and necessity] … Although the plaintiffs may never actually have their application denied … defendants admit that the plaintiffs are subject to fines in the future if they continue to operate without a Certificate."); *City of Chicago v. Atchison, Topeka, & Santa Fe Ry. Co.*, 357 U.S. 77, 89 (1958) (Company challenging CON requirement "was not obligated to apply for a certificate … before bringing this action.").

Defendants' argument that Plaintiffs have suffered no injury is based (as it was in their Interlocutory Petition) on *Manlove v. Unified Gov't of Athens-Clarke Cnty.*, 285 Ga. 637, 680 S.E.2d 405 (2009). Defs.' Opening Br. at 13–14; Defs.' Mot. for Reconsideration at 6–7, *Reese*, No. S16I0883. The problem for the

plaintiffs in *Manlove* was that it was unclear if their music would be loud enough in the future to violate a noise ordinance, so their injury was speculative. 285 Ga. at 638, 680 S.E.2d at 405–6. But in this case, Plaintiffs are *currently suffering* an injury because of Defendants' ongoing enforcement of the CON laws. There is no question that if Plaintiffs opened their surgery center to all qualified doctors—as they have immediate plans to do—they would violate the CON laws and be subject to ruinous fines. Ga. Comp. R. & Regs. 111-2-2-.05(2)(b); OCGA § 31-6-45(c). Unlike *Manlove*, there is no speculation about whether Plaintiffs' planned conduct violates the law; all parties agree that it does. R-982 ¶¶ 21, 22. The question is whether those laws are unconstitutional.

This case is similar to *GeorgiaCarry.org v. Atlanta Botanical Garden, Inc.*, where the plaintiff was told he could not carry a gun at the Botanical Garden and then sought "a determination of whether licensed individuals may carry a weapon on the grounds of the Garden in accordance with OCGA § 16–11–127(c)." 299 Ga. at 30, 785 S.E.2d at 878 (citing *Total Vending*, 153 Ga.App. at 111, 264 S.E.2d at 575). Likewise, here, Plaintiffs have been told repeatedly that they may not contract with other qualified doctors to use their surgery center or add a second operating room without first receiving a CON. R-1027–29; R-1055–73. They seek "a determination of whether" the requirement of applying for a CON is "in accordance with" the Georgia and U.S. Constitutions. 299 Ga. at 30, 785 S.E.2d at 878. In both cases, "there is no allegation … that criminal conduct has

been accomplished" and the relief sought "is simply a declaration of rights and requires no action on the part of the [government] or anyone else." *Id*. "Accordingly, Appellants' request for declaratory relief was not impermissible …." *Id*. at 30–31, 785 S.E.2d at 878. Nor is declaratory relief impermissible here.[2]

Plaintiffs are suffering an injury because of Defendants' ongoing enforcement of the CON laws. This is not a case where a third party must take an action to bring Plaintiffs within the prohibitions of the challenged laws. *Cf. Parker v. Leeuwenburg*, No. S16A1505, 2017 WL 875104, at *3 (Ga. Mar. 6, 2017) ("OCGA § 17-6-90 (a) does not regulate Appellants' conduct"); *Frances Wood Wilson Found. v. Bell*, 223 Ga. 588, 589, 157 S.E.2d 287, 289 (1967) (Plaintiffs must be "within the class of those persons whose rights are adversely affected by the statute."). The relief they seek—declaring the CON laws unconstitutional and enjoining enforcement to the extent they prevent Plaintiffs from adding an operating room or contracting with other qualified doctors to use their facility—will redress their injuries. *See Granite State Outdoor Adver., Inc. v. City of Roswell*, 283 Ga. 417, 418, 658 S.E.2d 587, 588 (2008). Plaintiffs have standing.

III. Plaintiffs Were Not Required to Exhaust Administrative Remedies.

Defendants concede that exhaustion is only relevant "[t]o the extent that the Surgical Center Plaintiffs are in fact challenging the denial of their CON

[2] Likewise for coextensive injunctive relief. *GeorgiaCarry.org*, 299 Ga. at 32, 785 S.E.2d at 879.

application ….” Defs.’ Opening Br. at 15–16. Plaintiffs are not challenging the denial of their CON application, as Defendants also concede, and so the parties agree that exhaustion is irrelevant. *Id*. at 15; Pls.’s Opening Br. at 5–6 (“This case does not appeal Defendants’ denial of Plaintiffs’ CON application. … The issue is not whether Defendants properly applied the CON laws when denying Plaintiffs’ application, but the constitutionality of requiring such an application in the first place.”).

Even if exhaustion were relevant, this Court “has recognized that the exhaustion doctrine does not apply where the defect urged by the complaining party goes to the jurisdiction or power of the (involved) agency ....” *Georgia Dep’t of Cmty. Health v. Georgia Soc’y of Ambulatory Surgery Ctrs.*, 290 Ga. 628, 630, 724 S.E.2d 386, 390 (2012) (quotation omitted). Plaintiffs’ claim is that the CON laws are “void, and not that [the denial of their CON application] … is deficient from mere errors in passing on the merits”; therefore exhaustion would not be required in any event. *Cravey v. Southeastern Underwriters Ass’n*, 214 Ga. 450, 457, 105 S.E.2d 497, 503 (1958); *cf. GSW, Inc. v. Dep’t of Natural Res.*, 254 Ga. App. 283, 285, 562 S.E.2d 253, 255 (2002) (review of an administrative decision, not constitutionality of the enabling statute); *Department of Pub. Safety v. Foreman*, 130 Ga. App. 71, 71, 202 S.E.2d 196, 197 (1973) (same).

This Court has stated plainly that a party may challenge the *constitutionality* of a law without first seeking administrative relief: “There is, however, no

exhaustion requirement when, as in the present case, the property owner challenges the constitutionality of an ordinance on its face." *King v. City of Bainbridge*, 272 Ga. 427, 427, 531 S.E.2d 350, 351 (2000) (citing *OS Adver. Co. v. Rubin*, 263 Ga. 761, 763, 438 S.E.2d 907, 909 (1994)). This makes sense because "[t]he rationale for requiring exhaustion of administrative remedies is that resort to the administrative process will permit the agency to apply its expertise, protect the agency's autonomy, allow a more efficient resolution, and result in the uniform application of matters within the agency's jurisdiction." *Ambulatory Surgery Ctrs.*, 290 Ga. at 629, 724 S.E.2d at 389 (citation omitted).

None of those considerations apply when a plaintiff challenges the constitutionality of the statute creating an agency. *Public Utils. Comm'n v. United States*, 355 U.S. 534, 540 (1958). Deciding the constitutionality of a law is emphatically a judicial question. *Harper v. Burgess*, 225 Ga. 420, 422, 169 S.E.2d 297, 299 (1969) (An action for declaratory judgment is "an available remedy to test the constitutionality of a statute in a case where an actual controversy exists with respect thereto."). A declaratory judgment action is the proper means of resolving this dispute.

CONCLUSION

Defendants have lost these arguments already and have done nothing in their Opening Brief to acknowledge the numerous shortcomings Plaintiffs have repeatedly identified. This Court should dismiss the Cross Appeal.

DATED: May 8, 2017

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CERTIFICATE OF SERVICE

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