Case No. S16I0883

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,

Petitioners,

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.,

Respondents.

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

RESPONSE TO PETITION FOR INTERLOCUTORY REVIEW

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INTRODUCTION

Plaintiffs Dr. Hugo D. Ribot, Jr., M.D. and Dr. Malcolm Barfield, D.O. co-own Plaintiff Women's Surgical Center, LLC d/b/a Georgia Advanced Surgery Center for Women, an outpatient surgery center in Cartersville. Other surgeons have requested to operate there, and in October 2014, Plaintiffs decided to expand and allow other surgeons to use their facility. More doctors and more operating rooms mean better access to care, lower costs to patients, and more charity care.

Georgia's certificate of need ("CON") laws, O.C.G.A. § 31-6-1 *et seq*. and Ga. Comp. R. & Regs. 111-2-2-.01 *et seq.*, however, forbid Plaintiffs from opening their doors to more doctors and patients unless they essentially get permission from their own competitors. In a detailed 119-paragraph complaint, Plaintiffs alleged that these CON laws impose enormous financial costs and delays on anyone who seeks to provide certain medical services without first obtaining a CON, which requires the approval of existing, competing medical providers. Georgia's CON laws therefore constitute what one court has called a "Competitor's Veto":[1] an arbitrary prohibition on Plaintiff's liberty to provide safe and competent healthcare services, not to promote any public benefit, but exclusively for the illegitimate purpose of preventing economic competition. These allegations, if proven, entitle Plaintiffs to relief.[2]

Plaintiffs' constitutional claims seek *prospective relief for ongoing injuries*.

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[1] *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014).

[2] Contrary to Defendants' insinuation, Pet. at 12, Plaintiffs' attorneys are not parties to this action; nor is the Goldwater Institute. *Cf.* Sup. Ct. R. 29.

This is not—as Defendants sometimes suggest—an appeal of the denial of a CON application. Plaintiffs do not seek redress for any past injuries, or any change in the administrative process relating to CONs, nor do they wish to reapply for a CON. This is a facial and as-applied constitutional challenge to the very existence of the CON approval process itself. Plaintiffs have adequately pled claims for relief, and are entitled to have those claims adjudicated on a full factual record.

FACTUAL BACKGROUND

I. Plaintiffs' Past and Present Injuries.

Georgia Advanced Surgery Center for Women ("GASC") is a comfortable, easily accessible alternative to the often cold and overwhelming environment of most hospitals. Petitioners' Appendix ("App.") at 2-3 ¶¶ 5-14, 17. GASC specializes in minimally invasive laparoscopic surgery. *Id.* at 2 ¶¶ 6-9. Since opening in 2010, hundreds of minimally invasive outpatient procedures have been performed at GASC—all with same-day patient discharge and zero incidences of transfusion, post-operative infection, wound complication, or readmission. *Id.* ¶ 9. Hysterectomy, diagnostic laparoscopy, cystoscopy, surgery for pregnancy complications, and other procedures that once required large abdominal incisions, days of hospitalization, and weeks of painful recovery can be performed at GASC in a single day. GASC has been recognized for its rigorous safety standards, and commitment to outstanding patient outcomes. *Id.* ¶ 7. GASC is in direct competition with hospital-based operating rooms, but its prices are thousands less for the same (or better) care. *Id.* at 11 ¶ 86. Plaintiffs intend to expand and allow

other doctors to use GASC. *Id.* at 8-9 ¶¶ 59, 63, 68.

However, Plaintiffs are legally forbidden from doing so without a CON. *Id.* at 5 ¶ 28; O.C.G.A. § 31-6-40. Operating without a CON is punishable by ruinous fines of "$5,000.00 per day up to thirty (30) days, $10,000.00 per day from thirty-one (31) days through sixty (60) days, and $25,000.00 per day after sixty (60) days." App. at 5 ¶ 32; Ga. Comp. R. & Regs. 111-2-2-.05(2)(b). Defendants are empowered to enforce those substantial penalties for non-compliance through offensive legal action. App. at 3, 5 ¶¶ 18, 19, 32; O.C.G.A. § 31-6-45.

GASC currently operates under a "Letter of Non-Reviewability," a narrow CON exemption that allows only Dr. Ribot, Dr. Barfield, and their full-time employees to use GASC. App. at 7-8 ¶¶ 51–57. No other surgeons can use GASC. *Id*. Contracting with other surgeons to use GASC when Dr. Ribot and Dr. Barfield are busy would help cover the facility's costs, give more patients access to a state-of-the-art surgery center, and provide more opportunities for charity care, *Id.* at 8 ¶¶ 60–61, allowing GASC to serve a greater number of needy patients, but for Defendants' enforcement of the CON laws. *Id.* at 34, Table 2.[3]

In November 2014, Plaintiffs applied with Defendants for a single-specialty CON. *Id.* at 9 ¶ 73. Having a single-specialty CON would allow other OB/GYN surgeons to operate at GASC, enabling the surgery center to provide more care to indigent and uninsured patients. *Id.* ¶ 74. In order to obtain a single-specialty CON,

[3] Currently, 18.5 percent of GASC patients are indigent (5.5%), charity (0.1%), Medicare (6.6%), and Medicaid patients (6.3%). App. at 23, Table D.

Plaintiffs were required to apply for permission to add a second operating room to their facility. *Id.* at 8 ¶ 64; Ga. Comp. R. & Regs. 111-2-2-.40(3)(a)(3). Still, a single-specialty CON would give Plaintiffs only a half-measure of the freedom they seek, because it still would not allow Plaintiffs to open GASC to *all* qualified surgeons—only to other OB/GYNs. App. at 8 ¶ 59. Had they applied for permission to open GASC to *all* qualified surgeons—not just other OB/GYNs—the CON laws would have required them to have three operating rooms. Ga. Comp. R. & Regs. 111-2-2-.40(3)(a)(3).

Plaintiffs' application for a single-specialty CON cost $1,000 and required hiring a consultant who spent 200 hours and charged tens of thousands of dollars. App. at 10 ¶¶ 75–78. In order to receive a CON, an applicant must demonstrate that "[t]he population residing in the area served, or to be served, by the new institutional health service has a need for such services," "[e]xisting alternatives for providing services in the service area" are unavailable, and "[t]he proposed new institutional health service has a positive relationship to the existing health care delivery system in the service area." *Id.* at 6 ¶ 39; O.C.G.A. § 31-6-42(a)(2), (3), (8); Ga. Comp. R. & Regs. 111-2-2-.09(1)(b), (c), (h).

Aside from these requirements the CON laws also allow established hospitals to object to any applicant, App. at 6 ¶ 40; O.C.G.A. § 31-6-43(h); Ga. Comp. R. & Regs. 111-2-2-.07(1)(h), and when such an objection is filed, the applicant is *not* "allowed to speak in rebuttal of the opposition remarks at the opposition meeting." App. at 6 ¶ 43; Ga. Comp. R. & Regs. 111-2-2-.07(1)(h)(1).

While objections must be "substantive, " no evidence is required. *Id*. When Plaintiffs applied for a single-specialty CON, three hospitals objected. According to the hospitals, there was no need for more competition. App. at 11 ¶¶ 85–86.

Defendants denied Plaintiffs' single-specialty CON application in March 2015. *Id.* at 10 ¶ 79. The application was denied, not because Plaintiffs were unqualified or dishonest, or because granting the CON posed any threat to public health and safety—there was no suggestion that GASC was incapable of serving more doctors and patients safely. Defendants' sole basis for rejecting Plaintiffs' application was that because GASC was not already being used at capacity, there was no need to allow additional surgeons to use the facility. *Id.* ¶¶ 79–83. However, Defendants' rationale makes no sense—if additional surgeons can use the facility only after it is operating at capacity, there would never be room to allow additional surgeons to use the facility. Defendants assert that allowing more doctors to use GASC "would not have a positive impact on the health care delivery system in the service area." *Id.* at 10 ¶ 83; *Id.* at 36. The existing health care delivery system, of course, consists of Plaintiffs' competitors. *Id.* at 10 ¶ 84.

To emphasize: Plaintiffs are *not* seeking to reverse Defendants' decision with regard to their CON application, or to issue a single-specialty CON or adjust the rules so that Plaintiffs could reapply for a single-specialty CON (or any CON for that matter) in the future. *Id.* at 14–15. Plaintiffs' previous CON application is referenced only as a background fact: to demonstrate how Georgia's CON laws work in practice, that Plaintiffs have been injured by those laws in the past, and

that their injury is caused by Defendants' enforcement of those laws. But for Defendants' enforcement of the CON laws, Plaintiffs could proceed with their plans to open their surgery center to all qualified doctors and their patients. *Id.* at 8-9 ¶¶ 59, 63, 68. Plaintiffs' injury, which they are suffering now and will continue to suffer unless enjoined by the courts, stems from the fact that the CON laws subject them to massive penalties if they operate their surgery center in the way that best serves their community. The issue here is not whether Defendants properly applied the CON laws in the past when denying Plaintiffs' application, but the constitutionality of requiring such an application in the first place.

II. The History of Certificate of Need Laws.

CON laws are an artifact of a bygone era. In 1974, Congress passed the National Health Planning and Resource Development Act ("NHPRDA"), which required States to enact CON laws by 1980, or forfeit federal funding. *Id.* at 4 ¶ 22; *Yakima Valley Mem'l Hosp. v. Washington State Dept. of Health*, 654 F.3d 919, 924 (9th Cir. 2011). Just in time, Georgia imposed CON laws in 1979. App. at 4 ¶ 24; O.C.G.A. § 31-6-40.

At the time NHPRDA was enacted, the fee-for-service method of reimbursement ("FFS") guaranteed reimbursement for charges, and health providers lacked incentive to lower prices. Federal Trade Commission & Department of Justice, *Improving Health Care: A Dose of Competition*, 2004 WL 1685795, *9. NHPRDA's CON mandate was intended to "discourage supply-created demand that would take advantage of the cost-based fee-for-service

reimbursement system." Mike J. Wyatt, *Leveling the Healing Field: Specialty Hospital Legal Reform as Cure for an Ailing Health Care System*, 46 Washburn L.J. 547, 557 (2007). But in 1983, Congress did away with FFS, addressing rising health care costs with "a more competitive, market-like environment for hospital reimbursement by Medicare." FTC, *Improving Health Care, supra,* at *9–10.

The factual basis for restricting supply disappeared after the 1983 reforms to FFS.[4] Congress repealed NHPRDA in 1986 due to a lack of evidence that restricting competition would somehow lower prices and increase access to care. App. at 4 ¶ 23. Far from "allowing the states to choose their own policies without federal influence for or against CON programs," Pet. at 11, the U.S. government has steadily fought these anticompetitive laws since 1988. App. at 4 ¶¶ 26–27.

On June 30, 2015, Plaintiffs filed this civil rights action against Defendants in their official and individual capacities, requesting declaratory and injunctive relief. On August 20, 2015, Defendants moved to dismiss. The Georgia Alliance of Community Hospitals was denied leave to intervene, but the Superior Court entertained the Alliance's amicus brief and heard argument from Amicus. After extensive briefing and oral argument, the Superior Court denied the Defendants' Motion and granted a Certificate of Immediate Review. Defendants' then filed the instant Petition for Interlocutory Review.

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[4] *Leary v. United States*, 395 U.S. 6, 38 n.68 (1969) (a statute is subject to constitutional attack if legislative facts upon which statute was based no longer exist).

ARGUMENT

I. Defendants' Petition Fails to Meet the Standard of Review.

Since this Petition seeks review of an order denying a motion to dismiss, the issues decided below are only dispositive of the case if the court's order was erroneous. *See* Sup. Ct. R. 31(1)–(2). The order denying the Motion was correct. While this case involves the denial of significant constitutional rights, and Plaintiffs do not dispute that the establishment of a precedent would be desirable, Sup. Ct. R. 31(3), the precedent should be set by a decision on the merits.

This Court reviews the denial of a motion to dismiss de novo. *Atlanta Women's Health Grp. v. Clemons*, 287 Ga. App. 426, 426 (2007). When reviewing a motion to dismiss for failure to state a claim or for lack of subject-matter jurisdiction, this Court construes all pleadings in favor of Plaintiffs, and all doubts regarding the pleadings must be resolved in Plaintiffs' favor. *Austin v. Clark*, 294 Ga. 773, 775 (2014); *Bd. of Regents of Univ. Sys. of Ga. v. Brooks*, 324 Ga. App. 15, 15–16, n.2 (2013); *see also Dep't of Transp. v. Dupree*, 256 Ga. App. 668, 671–72 (2002).

Motions to dismiss must be denied unless it is certain Plaintiffs would not be entitled to any relief "under any state of facts which could be proved." *Austin,* 294 Ga. at 775. (citation omitted) "[A] motion to dismiss should not be granted unless the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." *Ewing v. City of Atlanta*, 281 Ga. 652, 653 (2007) (citations omitted).

Defendants argue that Plaintiffs' claims should be dismissed pursuant to O.C.G.A § 9-11-12(b)(6); they actually ask this Court to reach the merits of Plaintiffs' claims prematurely. Pet. at 15–24. That would be improper. *Ewing*, 281 Ga. at 653. In order to reach the merits of Plaintiffs' claims, Defendants would have this Court flip the 12(b)(6) standard on its head, ignoring Plaintiffs' well-pled allegations, and accepting as true Defendants' unsubstantiated opinions about the purpose and effect of the CON laws. Defendants' entire defense is to recite the purpose section of the CON statute, and assert in conclusory fashion that the statute serves an important governmental interest. Pet. at 17–18.[5] Defendants' arguments are premature as a matter of law. *Ewing*, 281 Ga. at 653. Applying the 12(b) standard, the Superior Court correctly denied the Motion to Dismiss. This Court should deny the Petition.

II. Plaintiffs Present an Actual Controversy Appropriate for Declaratory Judgment.

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

Plaintiffs are suffering—and will continue to suffer—a real, ongoing injury because Defendants' enforcement of Georgia's unconstitutional CON laws prevents them from opening their surgery center to all qualified doctors. App. At 95; App. at 8-9 ¶¶ 59, 63, 68. This dispute over the constitutionality of the CON

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[5] This Court is not "bound by the statements of public purpose found in the acts of the legislature." *Gen. GMC Trucks, Inc. v. Gen. Motors Corp., GMC Truck & Coach Div.,* 239 Ga. 373, 378 (1977).

laws presents a "case[] of actual controversy" appropriate for declaratory and injunctive relief. O.C.G.A.. § 9-4-2(a). Moreover, the "ends of justice require that the declaration should be made" to resolve substantial doubt about the constitutionality of the CON laws, O.C.G.A. § 9-4-2(b), making this an appropriate case for prospective relief. *Total Vending Serv., Inc. v. Gwinnett Cnty.*, 153 Ga. App. 109, 110 (1980) ("An action for declaratory judgment is an available remedy to test the validity and enforceability of a statute where an actual controversy exists with respect thereto.").[6]

There is nothing abstract about this dispute. Plaintiffs face two very real options: (1) allow other surgeons to use GASC without obtaining a CON, suffer ruinous fines, and challenge Defendants' authority in an enforcement action against them; or (2) bring this action to challenge Defendants' authority before exposing themselves to prosecution. This Court favors the second course.[7] *Id.*

This Court "construe[s] the declaratory judgment statute liberally. . . . in situations presenting an 'actual controversy' where interested parties are asserting

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[6] *Cf.* Pet. at 25, 26, 28 (citing *Baker v. City of Marietta*, 271 Ga. 210, 214 (1999) ("When the trial court turned its attention to the petition for declaratory judgment, it had already resolved the controversy between the county and the city . . . .")); Pet. Amicus at 21 (citing *Pangle v. Gossett*, 261 Ga. 307, 308 (1991) ("There is no party to the declaratory judgment action that seeks to uphold the constitutionality of the statute under attack.")).

[7] Indeed, this Court decided declaratory judgment claims in *Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 244 Ga. 800 (1979), even though "all parties . . . had applied for and had become licensed . . . and the Commission had no complaints against any of the licensees." *Id*. at 800. *Massey-Ferguson* is discussed *infra* Part III.

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 (2015), *cert. denied* (Oct. 5, 2015) (quoting *In re Doe*, 262 Ga. 389, 390 (1992)). Moreover, "[i]n 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 (quoting *Atlanta Taxicab Co. v. City of Atlanta*, 281 Ga. 342, 345 (2006)) (emphasis in original).

Aside from violating the CON laws, this case is the only means Plaintiffs have to make their dispute with Defendants about the constitutionality of requiring a CON application more concrete. Plaintiffs need not "violate the law which [they] think[] unconstitutional, and suffer a criminal prosecution, in order to test [its] validity." *Jenkins v. Manry*, 216 Ga. 538, 540–41 (1961); *see also Bruner v. Zawacki*, 2013 WL 684177, at **3-*4 (E.D. Ky. Feb. 25, 2013) ("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.").

In the Superior Court, Amicus explained how a judgment in this case "would

control or direct future action." *Bland Farms*, 332 Ga. App. at 659. Amicus conceded that: "[w]ithout the CON law, nothing would prevent physicians and entrepreneurs from establishing new freestanding [surgery centers] . . . ." Amicus Br. at 5. Indeed, if not for the challenged laws, Plaintiffs would open their surgery center to all qualified doctors and their patients. App. at 5, 8, 9 ¶¶ 32, 59, 63, 68. And, as Amicus observed, Defendants are empowered to impose severe punishment for non-compliance. Amicus Br. at 7 (citing O.C.G.A. § 31-6-45); *see also* App. at 3, 5 ¶¶ 18, 19, 32; Ga. Comp. R. & Regs. 111-2-2-.05(2)(b). There is no dispute that the Defendants will enforce the CON laws against Plaintiffs—they have already rejected Plaintiffs' application for a single-specialty CON. App. at 10-11 ¶¶ 79, 85–86.

Plaintiffs occupy the same procedural position as the plaintiff in *Jenkins*, 216 Ga. 538, who sued to challenge the constitutionality of a plumber's license. Like Plaintiffs here, he 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. 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.

Defendants contend that *Dep't of Transp. v. Peach Hill Props., Inc.*, 280 Ga. 624 (2006) (*Peach Hill II*), "is on all fours" with this case, Pet. at 27, but that case is fundamentally different. *Peach Hill II* was not challenging the existence of the

permit process—in fact plaintiff had sued to create it. *Georgia Dep't of Transp. v. Peach Hill Props., Inc.*, 278 Ga. 198, 201 (2004) (*Peach Hill I*). In the first *Peach Hill* decision, this Court required the defendants to adopt a new administrative rule for reviewing landfill applications. *Id*. After the defendant adopted a rule, the plaintiff tried to challenge it by "fil[ing] an amended petition for declaratory judgment and mandamus under the previous case number." *Peach Hill II*, 280 Ga. at 625. This Court ruled such a procedure improper. The previous case had ended, and consequently there was "no *pending* case or controversy." *Id*. at 626. Here, by contrast, the controversy is plain: Plaintiffs are challenging the existence of the permit process itself—which was obviously not true in *Peach Hill II*. Had the plaintiff succeeded in *Peach Hill II*, it would have reapplied to the agency. *Id.* Here, there is no next administrative step; if Plaintiffs are successful they will immediately contract with other qualified doctors to use GASC.

To the extent that *Peach Hill I* and *II* are relevant, they actually support Plaintiffs' position. *Peach II* found that there was no "clear and definite . . . policy" under the new rule, *id.*, and therefore any effort to determine how the Department would act in the future was purely speculative. Here, Plaintiffs claims are closer to those in *Peach Hill I*: It is this general policy statement that the appellee challenged in superior court, rather than its decision to deny the appellee's request. *See Peach Hill I*, 278 Ga. at 200; *cf. Cox v. Acad. of Lithonia, Inc.*, 280 Ga. App. 626, 627 (2006) ("Conversely, here, the Academy sought review of an administrative decision, not a policy adopted in connection therewith, and

therefore, was required to follow the discretionary appeal procedures.”).

In the present case, Defendants are implementing a clear and definite policy; the CON laws are plain on their face, and it is clear how they operate. There is no uncertainty or abstraction; Plaintiffs applied for a CON, and Defendants denied it and there are substantial penalties if Plaintiffs open GASC to all qualified surgeons. As the U.S. Supreme Court has observed, “[p]ast exposure to illegal conduct” can help establish “a present case or controversy regarding [prospective] injunctive relief” when it is accompanied—as it is here—by evidence of “continuing, present adverse effects” of a challenged law. *O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). Thus, *Peach Hill I* and *II* make clear that declaratory judgment action is appropriate here.[8]

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. As

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[8] Nor does *Chambers of Ga., Inc. v. Dep’t of Natural Res.*, 232 Ga. App. 632, 632 (1998), the case upon which *Peach Hill II* relied, lead to a different result. *See* Pet. at 26–28 (citing *Chambers*). Chambers challenged one of the requirements for a solid waste handling permit, but did not challenge the statute requiring the permit. *Id*. Had the court ruled for Chambers, it would have reapplied for a permit. “Chambers, in effect, asks this Court to rule in the abstract as to issues it anticipates will arise should it file a new application.” *Id*. at 634. But here, Plaintiffs have no intention of seeking a CON and no need for an “advisory opinion so [they] can test the strength of [Defendants’] anticipated future defenses.” *Id.*

in this case, the government claimed that Bland Farms lacked standing. The court rejected that argument, since unlike the *Peach Hill II* plaintiff, Bland Farms was "challenging the adoption of a rule it is automatically affected by." *Bland Farms*, 332 Ga. App. at 660. The court noted that whereas there was no concrete dispute in *Peach Hill II*—the plaintiff had "challeng[ed] the adoption of a rule that it [was] not affected by"—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."[9] 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. App. at 5 ¶ 32; Ga. Comp. R. & Regs. 111-2-2-.05(2)(b); O.C.G.A. § 31-6-45. The fact that Plaintiff's 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,

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[9] On the contrary, if Peach Hill had built a landfill without the Georgia DOT's permission, Peach Hill would have violated federal law, but Georgia DOT would have had no authority to penalize Peach Hill's illegal landfill. *See Paskar v. City of New York*, 3 F. Supp. 3d 129, 136–37 (S.D.N.Y. 2014) ("the Act directs the Secretary of Transportation to issue orders and/or regulations concerning air safety. . . . If the statute has been violated, the remedy would be against the Transportation Secretary, not the City.").

but actual." *Bland Farms*, 332 Ga. App. at 660. Amicus is correct that Plaintiffs understand the regulation, know what it requires, and "would simply like the option of non-compliance." Pet. Amicus at 19 (reciting without citation the very argument rejected in *Bland Farms*). That is precisely why a declaratory judgment action is the appropriate means of resolving this dispute.

Defendants admit that they are enforcing the CON laws, thereby preventing Plaintiffs from allowing all qualified surgeons to use GASC. Whether those laws are unconstitutional is a live dispute with immediate, real consequences for Plaintiffs, doctors with whom they wish to contract, and their patients.

B. There is No Sovereign or Official Immunity for Unconstitutional Actions.

While this Court's decision in *Georgia Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 600 (2014), changed sovereign immunity in this State, the change is irrelevant to the claims here. *Sustainable Coast* established "a bright line rule that only the Constitution itself or a specific waiver by the General Assembly can abrogate sovereign immunity." *Id*. at 602. This Court therefore expressly declined to alter the rule that sovereign immunity cannot abrogate other provisions of the Constitution. *Id*. Relatedly, official immunity cannot apply to individual capacity claims if the government official is alleged to have acted without lawful authority. *Id*. at 603.

This Court has made clear that "sovereign immunity may also, in certain circumstances, be waived by our Constitution, itself." *Olvera v. Univ. Sys. of Ga.'s*

Bd. of Regents, 2016 WL 369382 at *2 n.1 (Ga. Feb. 1, 2016); *Sustainable Coast*, 294 Ga. at 600. The substantive protections of the Georgia Constitution necessarily limit sovereign immunity. *Id*. *Sustainable Coast* identified the Georgia Constitution's just compensation clause as one such substantive provision: "the Constitution itself requires just compensation for takings and cannot, therefore, be understood to afford immunity in such cases." 294 Ga. at 600. This Court has already applied the Due Process and Anti-Monopoly provisions of the Georgia Constitution against the State in declaratory judgment actions. *See infra*, Part III. And, unlike *Olvera*, Plaintiffs' action here "regards [not] the proper interpretation of terminology in a policy manual, [but] its very constitutionality." 2016 WL 369382 at *2 n.3. Accordingly, Defendants cannot claim sovereign immunity protects their unconstitutional actions.

Nor can Defendants, sued in both their official and individual capacities, hide behind official immunity. Sovereign immunity does not apply when, as here, "citizens aggrieved by the unlawful conduct of public officers . . . seek relief against such officers in their individual capacities." *Sustainable Coast*, 294 Ga. at 603 (citing *IBM v. Evans*, 265 Ga. 215, 220–22 (1995) (Benham, P.J., concurring in part and dissenting in part)); *Olvera,* 2016 WL 369382 at *3. Nor does official immunity apply "[w]here an officer acts contrary to and derogatory of the express purpose and intent of the state, [because] his acts are illegal and unauthorized and a suit for injunctive relief against him is not an action against the state." *IBM*, 265 Ga. at 220 (Benham, P.J., concurring in part and dissenting in part). Contrary to the

focus of Defendants' arguments, Pet. at 29–30, exceptions to official immunity for negligence or malice are irrelevant here because official immunity never applied in the first place. *See IBM*, 265 Ga. at 220–222 (Benham, P.J.) ("*Should*, on remand, the trial court determine that the commissioner *acted with lawful authority* and within the scope of his official power, the trial court *would then* be required to determine whether the commissioner was entitled to" official immunity. (emphasis added)). Official immunity does not apply here because Defendants are sued in their official and individual capacities for exceeding their lawful authority under the Georgia and United States Constitution.

Georgia's immunity rule tracks the well-established federal rule that unconstitutional actions are not insulated from suit, because "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949); *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984) ("It is well-established that sovereign immunity does not bar suits for specific relief against government officials where the challenged actions of the officials are alleged to be unconstitutional or beyond statutory authority.").

Plaintiffs' Complaint includes well-pled allegations, accepted as true for the purposes of the motion to dismiss, that Defendants' actions enforcing the CON laws violate the Georgia and United States Constitutions. App. at 11-14 ¶¶ 89–119. *Brooks*, 324 Ga. App. at 15–16 n.2; *Dupree*, 256 Ga. App. at 672 ("Where the determination of subject matter jurisdiction and waiver of sovereign immunity so

factually intertwined with determination of the merits of the case, it is not error for the trial court to defer final determination of such issues until trial, and such deferral would constitute the better practice to avoid the merits of the case.”). Accordingly, Plaintiffs’ allegations that Defendants are acting “contrary to and derogatory of the express purpose and intent of the state” defeat Defendants’ immunity arguments. *IBM*, 265 Ga. at 220 (Benham, P.J.).[10]

C. Plaintiffs Were Not Required to Exhaust Administrative Remedies.

Defendants now admit that exhaustion is irrelevant to Plaintiffs’ state constitutional claims. *Compare* Pet. at 27 n.8 *with* M. to Dismiss at 7–9. Plaintiffs agree. Resp. to M. to Dismiss at 2. Amicus, however, still argues that exhaustion was required here. Pet. Amicus at 22. This Court should reject that argument since it “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 . . . .” *Ga. Dep’t of Cmty. Health v. Ga. Soc’y of Ambulatory Surgery Ctrs.*, 290 Ga. 628, 630 (2012) (quotation omitted). Plaintiffs’ claim is that the CON laws

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[10] Defendants do not acknowledge—but cannot dispute—that sovereign immunity is only significant to state law claims, and cannot bar Plaintiffs’ federal constitutional claims. *See Clark*, 750 F.2d at 102. Nor is Defendants’ citation to out-of-state authorities that did not even address the question relevant. Pet. at 29 n.9 (citing *McKenna v. Julian*, 763 N.W.2d 384, 390–92 (Neb. 2009) (“Thus, we need not determine whether the [relevant] . . . provisions of the Nebraska Constitution are self-executing, because that question is not determinative of the outcome of this case. . . . [T]he claims for . . . relief are encompassed by the protections of the [Nebraska Tort Claims Act].”)).

are "void, and not that the [Defendants' previous] order is deficient from mere errors in passing on the merits," therefore exhaustion is not required. *Cravey v. Southeastern Underwriters Assn.*, 214 Ga. 450, 457 (1958).

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 (2000) (quotation omitted). 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 (citation omitted). None of those considerations applies when a plaintiff challenges the constitutionality of the statute creating an agency. *Pub. Utilities 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 (1969).

Amicus relies only on authorities addressing entirely different situations. If Plaintiffs were alleging that their single-specialty CON was improperly denied, the

cases Defendants cite would have some relevance.[11] But Plaintiffs do not ask this Court to make any change to the "procedural requirements of [that statute]," *Ambulatory Surgery Ctrs.*, 290 Ga. at 631 (citation omitted), they ask this Court to declare the statute unconstitutional. Going through the administrative process would only exacerbate the ongoing injury caused by the CON laws, "during which interval considerable damage would be incurred by" Plaintiffs. *Cravey*, 214 Ga. at 457. Plaintiffs are challenging Defendants' constitutional authority to require a CON application in the first place. *See Ambulatory Surgery Ctrs.*, 290 Ga. at 630. Plaintiffs seek "a determination that the ordinance prescribing that process even applies in the first place." *City of Atlanta v. Hotels.com, L.P.*, 285 Ga. 231, 233 (2009). It would be absurd to go through the administrative channels to attack the very existence of the administrative channels. *Id.*; *King*, 272 Ga. at 427; *see also*

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[11] Despite what Amicus claims, this not a case challenging *how* an administrative regulation has been applied in the past. *See* Pet. Amicus at 23 (citing *GSW, Inc. v. Dep't of Nat. Res.*, 254 Ga. App. 283, 285 (2002) (APA appeal about application of DNR Rule 391-3-4-.04(1))). Plaintiffs are not involved in an administrative process right now, differentiating this case from *George v. Dep't of Natural Res.*, 250 Ga. 491, 492 (1983), *Ledford v. Dep't of Transp.*, 253 Ga. 717, 717–18 (1985), and *Perkins v. Dep't of Med. Assistance*, 252 Ga. App. 35, 36 (2001). *See* Pet. Amicus at 17, 22–23. With an application still pending before the Environmental Protection Division, the *George* plaintiffs sought a declaratory judgment and an injunction to prevent further action with regard to the pending permit application. 250 Ga. at 492. The court dismissed the case to prevent "the possible disruption of administrative procedures" that would result if courts were to "enjoin administrative proceedings already in progress" and interfere with "decisions about to be made by administrative tribunals." *Id.* at 492. There is no parallel proceeding here, and no administrative process to disrupt.

Atchison, Topeka, & Santa Fe Ry. Co., 357 U.S. at 89. A declaratory judgment action is the proper means of resolving this dispute.

III. Plaintiffs Have Stated Claims for Relief Under the Georgia Constitution.

A. The Anti-Monopoly Clause Embodies a Broad State Policy Against Defeating or Lessening Competition.

The Georgia Constitution forbids the General Assembly from enacting laws that encourage or facilitate monopolies or restrict competition. *See, e.g., Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 244 Ga. 800, 802 (1979); *GMC Trucks*, 239 Ga. at 377; App. at 11 ¶ 90. The CON laws are designed to reduce competition and Plaintiffs allege that they have that effect. *Id.* at 4, 10-12 ¶¶ 25–27, 82–84, 89–98. Plaintiffs are entitled to prove those allegations and this Court must assume that Plaintiffs can, even if it seems "that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Ewing*, 281 Ga. at 653.

Defendants argue that Plaintiffs' claims under the Anti-Monopoly Clause, GA. CONST. art. 3, § 6, ¶ V, should be dismissed because the Clause is "'limited expressly to contracts and agreements.'" Pet. at 21–22 (quoting *Exec. Town & Country Servs., Inc. v. Young*, 258 Ga. 860, 863 (1989)). Simply quoting this Court's full statement defeats this argument: "While the above principles are limited expressly to contracts and agreements, *they nevertheless illustrate the state policy against 'defeating or lessening competition, or encouraging a monopoly*.'" *Id.* (emphasis added). The CON laws violate that "state policy" because they stifle

competition without protecting public health or safety. App. at 11 ¶¶ 91–94.

Defendants implicitly concede the point when they acknowledge: "[*Massey-Ferguson*] is an example of the Anti-Competitive Contracts Clause[[12]] properly applied." Pet. at 23. This is a fatal admission, because the Franchise Practices Act struck down in *Massey-Ferguson* functioned in much the same way, and for exactly the same purpose, as do the CON laws. That Act carved the State into sales areas and allowed any licensed dealership to protest the grant or continuance of a license to another dealer in its geographical area. 1979 Ga. Laws 1628–29. If a manufacturer wanted to establish a new franchise, it had to first give notice to the Franchise Practices Commission and the other dealers in the area, who could protest the new competitor. *Id.* at 1632. The Commission would then hold a hearing where existing dealers could lodge their objections. *Id.* Manufacturers needed Commission approval before opening new dealerships. *Id.*

The CON laws mirror the *Massey-Ferguson* competitor's veto process step for step: carving the State into discrete areas, allowing businesses to object to competitors on their turf, requiring costly hearings where businesses can object to new competition, and requiring the State's approval before, for example, a surgery center can contract with new doctors to provide services. App. at 10 ¶¶ 82–84.

[12] "Anti-Monopoly Clause" is the preferred term regarding constitutional provisions like GA. CONST. art. 3, § 6, ¶ V. *See, e.g.,* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 1079 (2013). Undersigned counsel is unable to find Defendants' label in any primary or secondary source.

Both *Massey-Ferguson* and this case involve laws that protect existing businesses from competition by stopping a competitor from entering into new contracts, and give established players veto power over new competitors. Just like the law challenged in *Massey-Ferguson*, the CON laws are designed to "permit the establishment of a market allocation among [medical providers] and thereby prevent any competition between [medical providers] in the sale of the same [healthcare services]." 244 Ga. at 801; App. at 10 ¶¶ 82–84. In *Massey-Ferguson*, a declaratory action was brought challenging the constitutionality of anticompetitive limits on the right to do business—and this Court held that by "dividing sales areas among the franchised dealers and protecting them from competition, [the Franchise Practices Act was] properly declared to violate the Georgia Constitution." 244 Ga. at 802. The similarities between the Franchise Practices Act and the CON laws should compel the same outcome in this case as in *Massey-Ferguson*, after the motion to dismiss stage.

B. Due Process Clause Also Embodies a Broad State Policy Against Defeating or Lessening Competition.

Massey-Ferguson noted that the law struck down in that case was "very similar to and of the same purpose" as the law struck down under the Due Process Clause in *GMC Trucks*, 239 Ga. 373. *Massey-Ferguson*, 244 Ga. at 801–02. Hence, the same statute struck down under the Anti-Monopoly Clause also violated the Due Process Clause. *Id*.

In *GMC Trucks*, this Court held that a statute that allowed the State to stop

manufacturers from expanding their dealer networks violated due process. Nearly identical reasoning applies here. That law allowed the state to "deny, suspend or revoke a license where a manufacturer seeks to grant another franchise in the same community or territory as an existing dealer . . . unless the manufacturer can show that the dealer is not providing adequate representation or that a new dealer can be added without reducing the existing dealer's business." 239 Ga. at 377. In the same way, the CON laws allow Defendants to deny a CON to otherwise-qualified healthcare providers if "an assessment of the aggregate utilization rate of existing services" does not, in the Department's view, demonstrate a "need" for additional services, or when new healthcare services will not result in "a positive relationship to the existing health care delivery system in the service area." App. at 9-10 ¶¶ 70, 82–83; Ga. Comp. R. & Regs. 111-2-2-.40(3)(a). In the same way manufacturers were forbidden to contract with dealerships if the State determined there was "adequate representation," the CON laws prevent Plaintiffs from contracting with doctors to operate in their surgery center if Defendants determine "[e]xisting alternatives for providing services in the service area" are available. App. at 6 ¶ 39; O.C.G.A. § 31-6-42(a)(3); Ga. Comp. R. & Regs. 111-2-2-.09(1)(c).

These cases show there is no basis for Defendants' claim that the Georgia Constitution tolerates all "statutory or regulatory restraints of trade." Pet. at 20. Rather, a law shown to "regulate an industry not affected with a public interest . . . [and] restrict[] competition" with no corresponding benefit to public health and safety is unconstitutional, regardless of contrary legislative conclusions. *Massey-*

Ferguson, 244 Ga. at 802; *GMC Trucks*, 239 Ga. at 378 (Georgia courts are not "bound by the statements of public purpose found in the acts of the legislature.").

This Court has long held that "[t]he right to make a living is among the greatest of human rights, and, when lawfully pursued, cannot be denied." *Schlesinger v. City of Atlanta*, 161 Ga. 148, 159 (1925). Accordingly, this Court has "examine[d] closely" any governmental limitations on the "free exercise of business activities." *Porter v. City of Atlanta*, 259 Ga. 526, 528 (1989).

Laws designed to limit competition must meet two conditions: (1) the regulated business is "affected with a public interest"; and (2) the regulation is rationally related to that end. *Bramley v. State*, 187 Ga. 826, 835 (1939).[13]

The first prong requires that the regulated business "must be so applied to the public as to authorize the conclusion that it has been devoted to a public use and thereby its use, in effect, granted to the public." *Batton-Jackson Oil Co. v. Reeves*, 255 Ga. 480, 482 (1986). The CON laws cannot be justified by claiming the market for healthcare is "important," "affect[s] the health of the people," or "that it [i]s important to keep an adequate and constant supply at a price fair to both producer and consumer." *Harris v. Duncan*, 208 Ga. 561, 564 (1951). Nor is

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[13] Defendants' reference to *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 256 (1982), is out of place. *See* Pet. at 16 n.5. That case involved a regulation of movie distributors, not an anticompetitive law. By contrast, the CON laws are designed to restrict competition and bar licensed practitioners from providing health care services for reasons that "have [no] rational connection with the applicant's fitness or capacity to practice." *Schware v. Bd. of Examiners*, 353 U.S. 232, 239 (1957). Like the anticompetitive laws struck down in *Massey-Ferguson*, and *GMC Trucks*, the CON laws are subject to the "affected with a public interest" test.

it enough for Defendants or the General Assembly to express "a feeling of concern in regard to its maintenance." *Id*. Such declarations are not controlling on the courts. *GMC Trucks*, 239 Ga. at 378. Laws that "regulate an industry not affected with a public interest," and "restrict[] competition" "violate the due process clause." *Massey–Ferguson*, 244 Ga. at 802. The CON laws flunk the first prong.[14]

If the analysis reached the second prong, restrictions on economic activities are "not presumptively reasonable, but must be demonstrably reasonable after the affected interests are balanced." *Porter*, 259 Ga. at 528. The government must prove that the law "realistically serves a legitimate public purpose, and it employs means that are reasonably necessary to achieve that purpose, without unduly oppressing the individuals regulated." *Advanced Disposal Servs. Middle Ga., LLC v. Deep S. Sanitation, LLC*, 296 Ga. 103, 105 (2014)(citation omitted). Moreover, this Court must look closely at any challenged regulation to ensure that it serves a public, as opposed to a private, purpose. *See Strickland v. Ports Petroleum Co*., 256 Ga. 669, 670 (1987).

However, this is exactly the sort of factual inquiry that is forbidden at the motion to dismiss stage. *Austin*, 294 Ga. at 775. Plaintiffs allege that the CON laws

[14] This Court has emphasized that the "affected with a public interest" inquiry is more protective of individual freedom than is the "rational basis" test federal courts apply. *See, e.g., U.S. Anchor Mfg. v. Rule Indus.*, 264 Ga. 295, 299 (1994) ("[T]he right to contract . . . is a property right protected by the due-process clause of our Constitution, and unless it is a business 'affected with a public interest,' the General Assembly is without authority to abridge that right. [N]o matter what other states or the Supreme Court of the United States may or may not have decided.") (citations and internal quotations omitted).

are intended to, and in fact do, reduce competition in order to favor established medical providers over new or expanding providers like Plaintiffs. App. at 4, 10-11 ¶¶ 25–27, 82–84, 89–98. Specifically, Plaintiffs allege that the CON laws are focused not on health or safety—indeed, even fully safe and competent practitioners can be denied the freedom to expand their facilities or allow others to use them. Rather, the CON laws focus on the economic health of competitors. *Id*. Those allegations support the trial court's denial of the motion to dismiss, and, if true, entitle Plaintiffs to relief.[15] [16]

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[15] Likewise, several state's privileges and immunities clauses "prohibit[] . . . state government grants of exclusive privileges [that] functioned in much the same way as did the antimonopoly provisions." Calabresi & Leibowitz, *supra* at 1079. Georgia's Privileges and Immunities Clause has been held to protect citizens from the arbitrary denial of constitutional rights. *See Hudson v. Jennings*, 134 Ga. 373 (1910); *Massell v. Leathers*, 229 Ga. 503, 505 (1972) (Gunter, J., dissenting); *City of Atlanta v. Hill*, 238 Ga. 413, 414 (1977) (overturning *Massell*).

[16] The state's ability to regulate the market to protect the public welfare did not unravel after *Massey-Ferguson* (or any of the other cases cited above decided decades prior). Likewise there is no reason to believe that a judgment for Plaintiffs in this case will imperil "scores of statutorily created regulatory programs," as Amicus claims. Pet. Amicus at 3. Amicus's only example of a law that might be affected by a ruling for Plaintiffs is the Georgia Territorial Electric Service Act, but that example is inapposite, because the State regulates the electric utility market to *decrease* the tendency toward monopolization, *City of Calhoun v. N. Georgia Elec. Membership Corp.*, 233 Ga. 759, 766–68 (1975) ("The regulation of utilities is now ordinarily based on the theory of regulated monopoly rather than competition"), whereas CON laws exist solely to *create* monopolies that would not otherwise exist.

IV. Plaintiffs Have Stated a Claim for Relief Under the United States Constitution.

Plaintiffs do not dispute that their federal Due Process claim is subject to rational-basis review. And although rational-basis review is deferential, it is not "toothless." *Logan v. Zimmerman Brush, Co.*, 455 U.S. 422, 439 (1982) (Blackmun, J., concurring); *Brown v. N.C. DMV*, 166 F.3d 698, 706 (4th Cir. 1999) ("It is true, of course, that even rational basis review places limitations on states."); *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000) ("Rational basis review is not a rubber stamp of all legislative action . . . ."). The rational basis test is not an impossible burden, and this Court should reject Defendants' attempt to deprive Plaintiffs of their opportunity to support their claims. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (citations omitted)); *see also Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1273–74 (S.D. Cal. 1997) (denying motion to dismiss rational-basis challenge to hairbraiding regulations).

Plaintiffs do *not* allege "that the CON program is irrational because it is ineffective." Pet. at 19. They allege that the CON laws are irrational because they achieve, and can *only* achieve, simple economic protection, which cannot be a

legitimate basis for government action. App. at 4, 10-12 ¶¶ 25–27, 82–84, 91–96. Many federal courts have struck down legislation for that reason—even under the rational-basis test.[17] Plaintiffs recognize that they face a heavy burden in proving their case. But they are entitled to try. For now, it is sufficient that their complaint alleges specific facts that plausibly support their claims.[18]

CONCLUSION

For the foregoing reasons, the petition should be denied and the case remanded for factual development; if this Court grants the petition, further briefing on the merits would be appropriate. *See* Sup. Ct. R. 45.

Respectfully submitted this 3rd day of March, 2016**:**

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[17] *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 225 (5th Cir. 2013) (casket-sales regulations); *Craigmiles v. Giles*, 312 F.3d 220, 224, 228–29 (6th Cir. 2002) (same); *Merrifield v. Lockyer*, 547 F.3d 978, 991–92 & n.15 (9th Cir. 2008) (pest-handling rules); *Bruner*, 997 F. Supp.2d at 701 (moving company CON); *Santos v. City of Houston*, 852 F. Supp. 601, 607–09 (S.D. Tex. 1994) (anti-jitney law); *but see Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (economic protection held to be a legitimate government interest); *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015) (same).

[18] Plaintiffs concede their cause of action under the Privileges or Immunities Clause of the Fourteenth Amendment is foreclosed by the *Slaughter-House Cases*, 83 U.S. 36 (1872), a decision that recently was sharply criticized by five members of the Supreme Court. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028–3031 (2010); *see also id.* at 3058–3077 (Thomas, J., concurring). Plaintiffs reserve that issue to present in the proper forum.

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CERTIFICATE OF SERVICE

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