STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 05150
JAY SINGLETON, D.O., and SINGLETON VISION CENTER, P.A., Plaintiffs, v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROY COOPER, Governor of the State of North Carolina, in his official capacity; MANDY COHEN, North Carolina Secretary of Health and Human Services, in her official capacity; PHIL BERGER, President Pro Tempore of the North Carolina Senate, in his official capacity; and TIM MOORE, Speaker of the North Carolina House of Representatives, in his official capacity, Defendants.	BRIEF OF THE JOHN LOCKE FOUNDATION IN OPPOSISTION TO DEFENDANTS' MOTION TO DISMISS

The John Locke Foundation, as *Amicus Curiae*, hereby submits this brief in opposition to Defendants' Motion to Dismiss.

STATEMENT OF INTEREST

The John Locke Foundation was founded in 1990 as an independent, nonprofit think tank. We employ research, journalism, and outreach to promote our vision for North Carolina—of responsible citizens, strong families, and successful communities. We are committed to individual liberty and limited, constitutional government.

The John Locke Foundation has opposed North Carolina's Certificate of Need (CON) law for many years, not only because it is unconstitutional and violates the rights of North Carolinians, but also because it directly harms patients and taxpayers by making health care more expensive

and less accessible. We therefore have an interest in presenting to this court the best and latest research pertaining to the questions presented in this case, including whether the CON law serves the public interest, whether it is rationally related to a legitimate legislative purpose, and whether the exclusive privilege it grants to a small number of medical service providers violates the North Carolina Constitution. The research we will present concerns, among other things, the origin, meaning, and application of the Constitution's Anti-Monopoly Clause, and the deleterious effect of CON laws on the economy and on public health.

ARGUMENT

In their Motion to Dismiss, Defendants make two arguments. They begin by arguing that "this court lacks subject matter jurisdiction because Plaintiffs have failed to exhaust their administrative remedies," and they go on to argue that Plaintiffs' constitutional claims all "fail as a matter of law." (Defs.' Br. 3, 7.) As explained below, the purported administrative remedies cited by Defendants are not, in fact, remedies at all. They are insurmountable barriers to competition, and, as such, they are themselves part of the reason why the CON law is unconstitutional. As for Plaintiffs' constitutional claims, each is supported by law, and each states a claim for which relief may be granted. Plaintiffs have suffered—and, unless the requested relief is granted, will continue to suffer—substantial and irreparable injury as a direct result of the enforcement of North Carolina's CON law.

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS CASE

Defendants suggest this court lacks subject matter jurisdiction because "Plaintiffs have failed to exhaust their administrative remedies." (Def's. Br. 3.) They go on to describe in detail the administrative hoops Plaintiffs would have to jump through in order to have standing according to their theory. These hoops include attempting to persuade the North Carolina Department of Health

and Human Services (DHHS) to change its policies, including the method it uses to make determinations of need, by submitting comments and petitions and making the case for those changes in person at multiple public hearings each year. They also include applying for a CON even though the Department has declared that no additional CONs are available and then contesting the inevitable denial, first through the Office of Administrative Hearings [AOC], and then through the courts.

The Defendants acknowledge, however, that "[e]xhaustion of administrative remedies is not required when the only remedies available from the agency are shown to be inadequate," (*Id.*) and that admission is fatal to their argument. As Plaintiffs explain, far from providing an adequate remedy to the entry barriers imposed by the CON law, the processes described by Defendants are themselves very effective barriers to entry. (Compl. ¶¶ 71-92.) The administrative portion of the contested-case process alone can take up to 270 days, and that would hardly be the end of the matter. Because any affected party may insist on judicial review, even if the Plaintiffs were to receive a favorable decision from the AOC, they would be forced to engage in a lengthy and costly legal battle with adversaries that included, not just DHHS, but also the large corporate healthcare providers that benefit from the existing CON regime, and, compared to Plaintiffs, all those adversaries would possess far greater financial and legal resources. "As a result," Plaintiffs observe, "The total cost of pursuing a CON application to completion often exceeds $400,000—with no guarantee that the applicant will actually obtain a CON." (*Id.* ¶ 87.)

The absurdity of these requirements as they apply to Dr. Singleton is particularly striking. Dr. Singleton is a trained and licensed eye surgeon, and he has already performed approximately 30,000 outpatient eye surgeries. (*Id.* ¶¶ 18, 25.) The operating and recovery rooms at his Vision Center in New Bern, NC. are fully equipped. (*Id.* ¶ 26.) The Vision Center is accredited by the

American Association for Accreditation of Ambulatory Surgery Facilities, and it meets all the applicable licensing standards under state law and follows the State Medical Boards guidelines. (*Id.* ¶¶ 27-29.) Even without a CON, the law allows Dr. Singleton to provide outpatient eye surgery at the Vision Center on a limited basis, and he has been safely doing so for years. (*Id.* ¶ 108.) When he performs outpatient surgery at the center, the total cost is far lower than when he is forced to perform those same procedures at a hospital. (*Id.* ¶ 109.)

Dr. Singleton could and extend those benefits to many more patients, and he would very much like to do so, but the CON law forbids it. Why? Clearly, it does nothing to protect public safety, and, just as clearly, it actually harms the economic interest of patients, insurers, and tax payers The only beneficiaries are the hospitals that are protected by the CON law from having to compete with low-cost providers like Dr. Singleton. In his Complaint Dr. Singleton argues that that kind of economic protectionism is specifically forbidden by North Carolina's Constitution. It would be an absurd result if the very protective features that make the CON law unconstitutional could be used to insulate the law from constitutional challenge.

A small, independent provider of low-cost medical services like Dr. Singleton cannot afford to devote years of effort and hundreds of thousands of dollars fighting with large, well-heeled health care corporations for the privilege of performing more of the services the State of North Carolina has already acknowledged he can perform safely and economically on a limited basis, and the fact that the CON erects such an absurd and unfair financial barrier is part of what makes it unconstitutional. Denying Plaintiffs standing to complain about that barrier because they have not bankrupted themselves trying to surmount it would mean that only large, well-heeled health care conglomerates could afford to defend their constitutional rights. That cannot be what the exhaustion of remedies doctrine requires.

II. PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE SUPPORTED BY LAW.

Regarding the legal sufficiency of the Complaint under Rule 12(b)(6), Defendants begin their argument by stating, "To dispose of this case, the court need look no further than *Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 359, 693 S.E.2d 673, disc. review denied, 364 N.C. 614, 754 S.E.2d 166 (2010)." (Def's. Br. 7.) After claiming that, "In *Hope* the plaintiffs asserted similar constitutional challenges to the CON law," they go on to note that in *Hope* "the trial court dismissed the plaintiffs' claims and the Court of Appeals unanimously affirmed the court's dismissal," (*Id.*) and they suggest that, because the present case is so "[s]imilar to *Hope*," Plaintiffs' claims should "likewise be dismissed." (*Id.*)

In fact, however, the present case is not very similar to *Hope*, and if this court should look anywhere for dispositive authority in the present case, it should look, instead, to *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551, 193 S.E. 2d 729, 736 (1973). In *Aston Park* the plaintiffs asserted constitutional challenges to a previous CON law that were identical to the challenges asserted by Plaintiffs in the present case, and in *Aston Park* the Supreme Court found that those challenges were valid and struck down the law. The Court of Appeals finding in Hope could, at most, be relevant to only one of these challenges, and its relevance even for that one is doubtful.

Defendants attempt to brush aside the Supreme Court's holding in *Aston Park*. Citing the Court of Appeals' opinion in *Hope*, they claim "the detailed legislative findings" that were included in the amended version of the CON law enacted in 1977 "cured the constitutional infirmity identified in *Aston Park*" and "rendered the holding in *Aston Park* moot," (Def's. Br. 8.) That claim, however, is false, as a quick comparison of the three cases reveals.

In *Aston Park* the Supreme Court considered challenges to the CON law under three

Sections of Art. I of the North Carolina Constitution: Section 34, which forbids the creation of monopolies; Section 32, which forbids exclusive emoluments; and Section 19, which secures the right to due process of law. In *Hope*, on the other hand, the plaintiffs raised a rather different set of constitutional challenges. Like the *Aston Park* plaintiffs, they alleged the CON law violated their right due process, but instead of raising challenges under Sections 34 and 32, they claimed the CON law violated the separation of powers under Section 6 and their right of access to the courts under Section 18. The constitutional challenges raised by Plaintiffs in the present case resemble those raised in *Aston Park* much more than they do the challenged raised in *Hope*. Unlike the *Hope* plaintiffs, Plaintiffs do not raise any challenges under Sections 6 and 18 at all. Instead, they allege that the law violates the very same three provisions that were at issue in *Aston Park*: the Anti-Monopoly Cause of Section 34, the Exclusive Emoluments Clause of Section 32, and the right to due process under Section 19.

As far as Plaintiffs' Anti-Monopoly Clause and Exclusive Emoluments Clause claims in the present case are concerned, the Court of Appeals holding in *Hope* is irrelevant to because the Court of Appeals had not occasions to consider such claims in that case. Instead, as explained in detail below, the Supreme Court's holding in *Aston Park* must govern. Moreover, while the Court of Appeals *did* consider a due process claim in *Hope*, changed circumstances and new evidence undermine the rationale for treating court's finding in *Hope* as governing authority with regard to Plaintiffs' due process claim under Section 19.

A. Plaintiffs' Anti-Monopoly Clause claim does not fail as a matter of law.

North Carolina's original CON law was enacted in 1971. 1971 N.C. Sess. Laws 1715. In 1973, the N.C. Supreme Court found that the law "establish[ed] a monopoly in the existing health care providers contrary to the provisions of Article I, 34 of the Constitution of North Carolina." *In*

re Certificate of Need for Aston Park Hosp., Inc., 282 N.C. 542, 551, 193 S.E. 2d 729, 736 (1973). The current CON law establishes exactly the same kind of monopoly in existing health care providers, and, since the present case is the first to challenge the current law on the basis of the Anti-Monopoly Clause since the *Aston Park* decision was handed down, the Supreme Court's holding in that case governs.

Despite the fact that it is directly on point and has never been overturned, Defendants do not mention *Aston Park* in their discussion of Plaintiffs' Anti-Monopoly Clause claim. They do not mention the Court of Appeals' decision in *Hope* either, presumably because, as noted above, the *Hope* plaintiffs did not raise an Anti-Monopoly Clause challenge and the Court of Appeals did not consider the issue. Instead, Defendants cite *State v. Atlantic Ice and Coal Co.*, 210 N.C. 742, 747-48, 188 S.E.2d 412, 415 (1936), *American Motors Sales Corp. v. Peters*, 311 N.C. 311, 317 S.E.2d 351 (1984), and *Madison Cablevision, Inc. v. Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989). (Defs.' Br. 9-11.) In the context of the present case, however, those holdings are irrelevant because the monopolies alleged in those cases were different in kind from the monopoly alleged in *Aston Park* and in the present case.

In *Atlantic Ice and Coal* and *American Motor Sales*, the Court considered the question of whether, and how, the Anti-Monopoly Clause applies to businesses that have achieved monopoly power through success in the market place. In *Madison Cablevision* it considered the question of whether, and how, the clause applies to a city's decision to operate its own cable television service. These are interesting questions, and the fact that they arose at all demonstrates how much the meaning of the word "monopoly" has evolved over the years. However, neither of those questions arises in the present case, and the definitions and standards that the Court applied in those cases are therefore irrelevant.

In 1776, when the Anti-Monopoly Clause was originally adopted as part of the state constitution, the word "monopoly" was understood to mean an exclusive grant by the state to one or more private parties "for the sole buying, selling, making, working, or using of any thing."[1] The Anti-Monopoly Clause was originally added to the state constitution for the precise purpose of forbidding such monopolies, and, despite the semantic changes that have occurred since 1776, "an exclusive privilege of engaging in a particular business or providing a particular service granted by a ruler or by the state" continues to be a standard meaning of the word "monopoly," and the Anti-Monopoly Clause continues to forbid the state from granting such privileges.[2]

The North Carolina Supreme Court acknowledge all of this in *State v. Harris*:

> Monopoly, as originally defined, consisted in a grant by the sovereign of an exclusive privilege to do something which had theretofore been a matter of common right. The exclusion of others from such common right is still considered a prominent feature of monopoly, and the consequent loss to those excluded of opportunity to earn a livelihood for themselves and their dependents ... has been considered the prime reason for the public policy then adopted into the Constitution. *State v. Harris*, 216 N.C. 746, 761, 6 S.E.2d 854, 864 (1940).

Defendants might wish to argue that, despite the straightforward applicability of the Anti-Monopoly Clause, the legislative findings appended to the new CON law are sufficient grounds for dismissing Plaintiffs' Anti-Monopoly Clause claim. However, that argument fails for a number of reasons,[3] including this: as Defendants themselves acknowledge, the rational basis test only applies where "the right allegedly infringed upon is not a fundamental right." (Defs.' Br. 13.) In the Anglo-American legal tradition, the right to earn a living by engaging in a lawful occupation is, and has always been, regarded as fundamental.[4] Plaintiffs' attempt to defend that

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[1] Jon Guze, *North Carolina's Anti-Monopoly Clause: Still Relevant After All These Years*, 2 POLITICAL ECONOMY IN THE CAROLINAS. 102 (2019) at 103 (quoting Edward Coke, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1644) at 181.

[2] *Id.* See, also, Steven G. Calabresi & Larissa Leibowiz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL.. 984 (2013).

[3] See, *infra* at 11.

[4] Timothy Sandefur, *The Right to Earn a Living*, CATO INSTITUTE. (2010).

right under the North Carolina Constitution cannot be summarily dismissed on the basis of the Court of Appeals' rational basis review in *Hope*. This court must conduct its own review under a standard appropriate for a fundamental right.

B. Plaintiffs' Exclusive Emoluments Clause does not fail as a matter of law.

All of the arguments provided in the preceding discussion of Plaintiffs' Anti-Monopoly Clause claim also apply to their claim under the Exclusive Emoluments Clause. In addition to finding that the CON requirement established "a monopoly in the existing hospitals contrary to Article I, 34 of the Constitution of North Carolina," in *Aston Park* the Supreme Court also found that that the CON requirement was "a grant to them of exclusive privileges forbidden by Article I, 32." *Aston Park, supra*, 282 N.C. at 551, 193 S.E. 2d at 736. The new CON law grants exactly the same kind of exclusive privileges, and, since the present case is the first to challenge the current law on the basis of the Exclusive Emoluments Clause since the *Aston Park* decision was handed down, the Supreme Court's holding in that case governs.

As with Plaintiffs' Anti-Monopoly Clause claim, Defendants do not deal with the Supreme Court's *Aston Park* holding in their discussion of the Exclusive Emoluments claim, nor do they cite the Court of Appeals' decision in *Hope*. Instead, they cite *Lowe v. Tarble*, 312 N.C. 467, 323 S.E.2d 19 (1984), and *Town of Emerald Isle by and through Smith v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987). However, in these cases the Supreme Court dealt with issues that are far removed from the issues raised in the present case. In *Lowe*, the issue was whether a law treating uninsured defendants differently from those with liability insurance effective was tantamount to granting an exclusive emolument to the latter. In *Emerald Isle*, the question was whether an act prohibiting motor vehicle access adjacent to public beach access facilities constituted an exclusive emolument granted to the owners of beachfront property in the vehicle-

free area. In short, in both of those cases the issue was whether the state action in question was sufficiently analogous to what is ordinarily meant by an "exclusive emolument" for Section 32 to apply.

Granting a small number of corporate healthcare providers the exclusive right to provide medical services, on the other hand, clearly falls within the ordinary meaning of "exclusive emolument." Plaintiffs claim that North Carolina's CON law grants an exclusive emolument to those providers cannot, therefore, be dismissed as a matter of law on the basis of the tenuously related precedents cited by Defendants. *Aston Park* is the governing precedent, and, under *Aston Park*, Plaintiffs have unquestionably stated a claim for which relief may be granted.

C. Plaintiffs' due process claim does not fail as a matter of law.

While the plaintiffs in *Hope* did not challenge the CON law on the basis of the Anti-Monopoly or Exclusive Emoluments Clauses, they did claim it violated their right to due process under Article I, § 19. When the Court of Appeals considered that claim, it found that the legislative findings appended to the CON law were sufficient on their face to meet the rational basis standard of review that, it held, is appropriate for due process claims. *Hope*, *supra*, 203 N.C. App. at 605, 673 S.E.2d at 681. Defendants argue that the court's rational basis analysis in *Hope* should suffice to dispose of Plaintiffs' due process claim in the present case, (Defs.' Br., 14.) but that argument fails for two reasons.

First, as Plaintiffs note in their Complaint, the underlying rationale for the CON law ceased to apply in the mid-1980s. While the hospital associations and other interested parties had their own reasons to support it, the 1978 CON law was initially predicated on two facts about federal health care law both of which were included in the original list of legislative findings: the fact that the cost-plus system used for Medicare and Medicaid reimbursements encouraged an over-

provision of medical services, and the fact that—in a ham-fisted attempt to discourage over-provision—Congress had passed the National Health Planning and Resource Development Act (NHPRDA) which required states to adopt CON laws in order receive federal funding. (Compl., ¶¶ 44-48.) However, the adoption of a fixed fee-for-service system for Medicare and Medicaid reimbursement in 1984, and the repeal of NHPRDA in 1986, completely undermined the CON law's rationale, and those two findings were removed from the statute in 1987. (*Id.* ¶¶ 49-52). In *Hope*, the Court of Appeals did not take notice of these changes, presumably because the defendants did not enter them into the record. In the present case, however, Plaintiffs *have* called the court's attention to these changes, and it must, therefore, take those changes into consideration as it conducts its own analysis.

Also requiring judicial notice and consideration is an abundance of new evidence showing the deleterious economic and public health effects of CON laws, much of which has only become available since *Hope* was decided in 2010. For the court's convenience, citations to and summaries of the studies that make up this new evidence are provided in an Appendix. As the court will see, these studies thoroughly rebut the legislative findings that the Court of Appeals relied on in *Hope* and make a mockery of the suggestion that the CON law is rationally related to a legitimate public purpose.

Defendants would no doubt urge the court to ignore this evidence and simply defer to the legislature's unsupported assertion that limiting the number of medical service providers is an effective and necessary way to reduce the cost and improve the availability of medical care. However, judicial deference does not mean abject, unquestioning servility. A pro forma listing of implausible legislative findings cannot permanently immunize legislation against judicial scrutiny, especially when, as in this case, fundamental constitutional rights and public health are

at stake. As circumstances change, and as new factual evidence accumulates, the time must come when those changed circumstances and that new evidence become sufficient to overcome a presumption of constitutionality based solely on decades-old legislative findings. In the case of North Carolina's Certificate of Need law, that time is now.

CONCLUSION

As shown above—and contrary to what Defendants argue in their Brief—this court *does* have subject matter jurisdiction in this case, and Plaintiffs' challenges to North Carolina's CON law *do not* fail as a matter of law. Accordingly, Defendants' Motion to Dismiss should be denied in its entirety.

This the 30th day of November, 2019.

JOHN LOCKE FOUNDATION

By: _____

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APPENDIX

CON LAW STUDIES: 2010-2019

Susan L. Averett, Sabrina Terrizzi, and Yang Wang, *Taking the CON out of Pennsylvania: Did Hip and Knee Replacement Patients Benefit?,* (IZA Inst. of Labor Econ., Discussion Paper No. 10917, July 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029787 (finding no adverse effects on cost or quality when CON laws expired in PA).

James Bailey, *Does "Excess Supply" Drive Excess Health Spending? The Case of Certificate-of-Need Laws,* 33(4) JOURNAL OF PRIVATE ENTE. 91, (2018), available at http://journal.apee.org/index.php?title=2018_Journal_of_Private_Enterprise_Vol_33_No_4_Winter_parte5 (finding that supply restrictions lead to price increases even in relatively price inelastic markets like healthcare).

Matthew C. Baker and Thomas Stratmann, *Are Certificate-of-Need Laws Barriers to Entry? How They Affect Access to MRI, CT, and PET Scans,* MERCATUS CENTER (GEORGE MASON UNIV.), Jan. 2016, available at https://www.mercatus.org/system/files/Stratmann-CON-Barriers-to-Entry.pdf (documenting that patients in CON states utilize fewer imaging services, are more likely to travel across state-lines for services due to higher costs or restricted access to care).

Matthew C. Baker and Thomas Stratmann, *Barriers to Entry in the Health Care Markets: Winners and Losers from Certificate-of-Need Laws,* MERCATUS CENTER (GEORGE MASON UNIV.), 2017, available at https://www.mercatus.org/system/files/stratmann-barriers-to-entry-con-wp-mercatus-v1.pdf (states with CON laws "demonstrate less market entry and lower market penetration of nonhospital and new hospital providers than do states that do not have those laws.").

Joel C. Cantor et al., *Effects of Regulation and Competition on Health Care Disparities,* 34 (1), J. HEALTH POL. POL'Y & L. 63-91, (2009), available at https://read.dukeupress.edu/jhppl/article-abstract/34/1/63/63740/Effects-of-Regulation-and-Competition-on-Health?redirectedFrom=fulltext (increased hospital capacity through CON reform led to a large reduction in racial disparity).

Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured,* 2-38 (Nat'l Bureau of Econ. Research, Working Paper No. 21815, 2015), available at https://www.nber.org/papers/w21815.pdf ("Prices at monopoly hospitals are 12 percent higher than those in markets with four or more rivals.").

Scott Eastman, Christopher Koopman, and Thomas Stratmann, *Certificate-of-Need Laws and North Carolina: Rural Health Care, Medical Imagining, and Access,* MERCATUS CENTER (GEORGE MASON UNIV.), May 2016, available at https://www.mercatus.org/system/files/Koopman-CON-Rural-North-Carolina-MOP-

v1.pdf (applying empirical data to NC to demonstrate reduced access to care [particularly in rural communities] and increased out-of-state travel for health services).

Mohamad Elbarasse, Christopher Koopman, and Thomas Stratmann, *Certificate-of-Need Laws; Implications for Georgia,* MERCATUS CENTER (GEORGE MASON UNIV.), Mar. 2015, available at https://www.mercatus.org/system/files/Koopman-Certificate-of-NeedGA-MOP.pdf (in Georgia, "these programs could mean approximately 13,227 fewer hospital beds, between 20 and 40 fewer hospitals offering magnetic resonance imaging (MRI) services, and between 50 and 71 fewer hospitals offering computed tomography (CT) scans.").

Omar Galarraga et al., *The Impact of Certificate-of-Need Laws on Nursing Home and Home Health Care Expenditures,* 73 (1) MED CARE RES. REV. 85-105, (2016), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4916841/ (noting CON states experienced faster Medicare and Medicaid spending growth on nursing homes than non-CON states).

David Grabowski, *Nursing Home Certificate-of-Need Laws Should be Repealed,* HEALTH AFFAIRS, Jun. 9, 2017, https://www.healthaffairs.org/do/10.1377/hblog20170609.060529/full/ (CON laws stifle innovation for "...a sector badly in need of modernization.").

Christopher Koopman and Thomas Stratmann, *Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community Hospitals,* MERCATUS CENTER (GEORGE MASON UNIV.), Feb. 2016, available at https://www.mercatus.org/system/files/Stratmann-Rural-Health-Care-v1.pdf (indicating CON states have 30% fewer rural hospital, and 13% fewer rural ambulatory surgical centers, per capita).

Matthew D. Mitchell, *Do Certificate-of-Need Laws Limit Spending?,* MERCATUS CENTER (GEORGE MASON UNIV.), Sept. 2016, available at https://www.mercatus.org/system/files/mercatus-mitchell-con-healthcare-spending-v1a.pdf (summarizing four decades of empirical data and economic reasoning that shows CON has failed to lower costs, and if anything, raises them).

Matthew D. Mitchell, *The Health Care Laws You Should be Paying Attention to (and Probably Aren't),* MERCATUS CENTER (GEORGE MASON UNIV.), Nov. 30, 2016, available at https://www.mercatus.org/%5Bnode%3A%5D/commentary/health-care-laws-you-should-be-paying-attention-and-probably-arent (review of 20 academic studies reveals no evidence CON laws reduce spending, and the majority associated them with higher expenditures).

Maureen K. Ohlhausen, *Certificate-of-Need Laws: A Prescription for Higher Costs,* 30 (1) ANTITRUST (AM. BAR. ASS'N), Fall 2015, available at https://www.ftc.gov/system/files/documents/public_statements/896453/1512fall15-ohlhausenc.pdf (about cross-subsiding indigent care - "Because the cost of CON laws is never disclosed or even evaluated, this informal and imprecise funding mechanism violates fundamental norms of good government.").

Katherine Restrepo, *The Case Against CON: A Law that Prevents Healthcare Innovation,* 468 JOHN LOCKE FOUNDATION (Jun. 3, 2015), available at https://www.johnlocke.org/research/the-case-against-con-a-law-that-prevents-health-care-innovation/ (lifting restrictions on gastroenterology in 2005 produced $224 million in Medicare savings over six years). (operating room demand has been supplemented with procedure rooms, skewing perception of their demand and thus "need"). (high out-patient traffic in rural counties could be served by opening ambulatory surgical centers, currently restricted under CON).

Jordan Roberts, *Reforming North Carolina's Certificate-of-Need Laws,* JOHN LOCKE FOUNDATION, Apr. 12, 2019 https://www.johnlocke.org/update/reforming-north-carolinas-con-laws/ (diagnostic centers, ambulatory surgical centers among CON restricted services that would pose cheaper alternatives to hospitals).

Timothy Sandefur, *CON Job,* 34 (2) REGULATION 42, (2011), available at https://www.questia.com/magazine/1G1-261729721/con-job-state-certificate-of-necessity-laws-protect (highlighting explicit and implicit costs resulting from CON law enforcement).

Jon Sanders, *Certified: The Need to Repeal CON,* 445 JOHN LOCKE FOUNDATION (Oct. 25, 2013), available at https://www.johnlocke.org/app/uploads/2016/06/Spotlight445CON.pdf (NC has some of the most restrictive CON laws in the country, only 23 out of 100 counties have more than one hospital and 17 still don't have any).

Darpana Sheth and Thomas Stratmann, *Health Care Cartels Limit Americans' Options,* MERCATUS CENTER (GEORGE MASON UNIV.), Oct. 14, 2014, available at https://www.mercatus.org/expert_commentary/health-care-cartels-limit-americans-options (maintaining CON limits access to innovative and life-saving medical advancements such as virtual colonoscopies).

Thomas Stratmann, *The Failure of Alaska's Certificate-of-Need Laws,* MERCATUS CENTER (GEORGE MASON UNIV.), Apr. 7, 2017, available at https://www.mercatus.org/publications/corporate-welfare/failure-alaska's-certificate-need-laws (using empirical data, shows Alaskans have reduced access to healthcare and imaging services because of CON).

Thomas Stratmann and Jacob W. Russ, *Do Certificate-of-Need Laws Increase Indigent Care?,* (Mercatus Center at George Mason Univ., Working Paper No. 14-20, 2014), available at https://www.mercatus.org/system/files/Stratmann-Certificate-of-Need.pdf (CON states requiring charitable care offerings do not have higher rates of uncompensated care compared to Non-CON states).

Thomas Stratmann and David Wille, *Certificate-of-Need Laws and Hospital Quality,* MERCATUS CENTER (GEORGE MASON UNIV.), Sept. 2016, available at https://www.mercatus.org/system/files/mercatus-stratmann-wille-con-hospital-quality-v1.pdf ("We find that nearly all the quality measures [8 out of 9] are statistically significantly worse in CON states than in non-CON states.").

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Consent Motion to Intervene as *Amicus Curiae* by the John Locke Foundation was served on November 30th, 2020, on the following by United States mail, first-class postage pre-paid and email:

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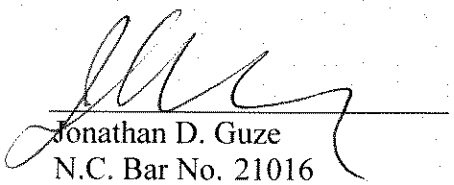
By: 

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