18CV009498

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED

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

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

Plaintiffs,

vs.

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.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This civil rights lawsuit seeks to vindicate the right of Dr. Gajendra Singh, a licensed surgeon and the founder of Forsyth Imaging Center, to provide safe, quality, affordable MRI scans for patients who need them. Through both his surgical practice and personal experience, Dr. Singh discovered that patients in his geographic area were struggling to afford the often exorbitant cost of diagnostic scans charged by local providers—and more, that patients were finding it almost impossible to determine their out-of-pocket costs upfront. Dr. Singh founded Forsyth Imaging Center in 2017 to offer patients a way to obtain scans at cheaper, more transparent rates than local providers were willing to offer. So far, Dr. Singh has successfully

acquired most of the diagnostic equipment needed to provide these much-needed scans—including an X-ray machine, two ultrasound machines, and a computerized tomography (CT) scanner—but he has been prevented by the State of North Carolina from purchasing what is often the most crucial and expensive tool patients need: a magnetic resonance imaging (MRI) scanner.

2. The barrier that stands between Dr. Singh and expanding access to care is purely legal. North Carolina bans licensed health-care providers from purchasing an MRI scanner unless they first obtain a "certificate of need" (CON) from the state. Every year, central planners in Raleigh project how many new MRI scanners are "needed" in the state, based on factors like the number of scanners already in operation and the number of procedures those scanners performed. The more established MRI providers there are, the less likely it is that a new scanner will be "needed"—or so the theory goes. Because the planners did not project a "need" for a new MRI scanner in Forsyth County in 2018, Dr. Singh is categorically banned from purchasing one. And even if there was a "need," Dr. Singh would be unable to afford the burdensome, expensive application process.

3. Under North Carolina's CON law, the only reason Dr. Singh cannot purchase an MRI scanner is that certain established providers in Forsyth County already have them. That is unconstitutional. The North Carolina Constitution expressly prohibits monopolies and special privileges, demands that laws be applied even-handedly, and protects Dr. Singh's right to participate in the health-care market free from arbitrary, irrational, and protectionist legislation. Because the purpose and effect of North Carolina's MRI-CON requirement is to protect incumbent providers from competition—without any concomitant benefits to patient health or

safety—Defendants must be enjoined from enforcing the law against Dr. Singh and Forsyth Imaging Center.

JURISDICTION AND VENUE

4. Plaintiffs bring this lawsuit pursuant to Article I, Sections 19, 32, and 34 of the North Carolina Constitution, and North Carolina's Declaratory Judgments Act, N.C. Gen. Stat. §§ 1-253, *et seq*. Plaintiffs also have an independent cause of action for violations of their constitutional rights under Article I, Section 18 of the North Carolina Constitution.

5. Plaintiffs seek declaratory and injunctive relief against enforcement of the state's CON law, N.C. Gen. Stat. §§ 131E-175, *et seq.*; the CON law's implementing rules and regulations, 10A N.C. Admin. Code 14C .0101, *et seq.*; and the policies and practices of the North Carolina Department of Health and Human Services, the North Carolina Secretary of Health and Human Services, the North Carolina Governor, and their officers or agents; all of which violate Plaintiffs' right to provide safe, quality, affordable MRI scans free from unconstitutional monopolies, exclusive emoluments, and arbitrary, irrational, and protectionist legislation and regulation under the North Carolina Constitution.

6. This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-245(a) because this is a suit for declaratory and injunctive relief against the enforcement and validity of certain statutes and regulations, and for the enforcement and declaration of multiple state constitutional rights. This Court also has jurisdiction pursuant to *id.* § 1-267.1(b1), which provides that any "facial challenge to the validity of an act of the General Assembly filed in the Superior Court of Wake County . . . shall be assigned by the senior resident Superior Court Judge of Wake County to a three-judge panel."

7. Venue lies in this Court pursuant to *id.* § 1-82 because some of the Defendants reside in Wake County, North Carolina.

PARTIES

8. Plaintiff Gajendra Singh, M.D. ("Dr. Singh"), is a board-certified surgeon licensed to practice in the State of North Carolina. Dr. Singh is a United States citizen and a resident of Forsyth County, North Carolina. He is the founder and Chief Executive Officer of Plaintiff Forsyth Imaging Center, LLC.

9. Plaintiff Forsyth Imaging Center, LLC ("the Center"), is a North Carolina limited-liability company. The Center provides safe, quality, affordable diagnostic-imaging services to patients in Winston-Salem and the surrounding areas. Its registered office is located at 3001 Maplewood Avenue, Suite 302, Winston-Salem, North Carolina.

10. Currently, the Center either owns, or is leasing with an option to purchase, most of the equipment necessary to provide comprehensive diagnostic-imaging services, including an X-ray machine, two ultrasound machines, and a CT scanner. Dr. Singh would like to complete the Center by purchasing a fixed MRI scanner, but the CON law stands in his way.

11. To compensate, the Center is currently renting a mobile MRI scanner two days per week. The exact terms of Dr. Singh's contract are confidential, but on information and belief, the average cost of renting a mobile MRI scanner in North Carolina is approximately $2,600 to $3,000 per day, plus administrative costs. This arrangement is both constraining and unnecessarily expensive.

12. Defendant North Carolina Department of Health and Human Services ("the Department") is the executive agency charged with administering and enforcing North Carolina's CON law. N.C. Gen. Stat. § 131E-177. Its duties include, but are not limited to,

promulgating administrative rules and regulations implementing the CON law, *id.*, granting or denying CONs, *id.* § 131E-177(6), and assessing civil penalties against or revoking the license of any person who violates the CON law. *Id.* § 131E-190(e), (f). The Department is based in Wake County, North Carolina.

13. Defendant Mandy Cohen is sued in her official capacity as North Carolina's Secretary of Health and Human Services ("the Secretary"). The Secretary is the "head of the Department," N.C. Gen. Stat. § 143B-139, has "final decision-making authority" over the Department's administration of the CON law, *id.* § 131E-177, and is empowered to bring a civil action for injunctive relief against any person who violates the CON law. *Id.* § 131E-190(h). On information and belief, Defendant Cohen is a resident of Wake County, North Carolina.

14. Defendant Roy Cooper is sued in his official capacity as North Carolina's Governor ("the Governor"). As "Chief Executive Officer" of the state, the Governor supervises the administration and activities of the Department and Secretary, *id.* §§ 143B-4, 143B-6(2), and holds final authority to approve or amend the State Medical Facilities Plan, which pre-determines the "need" for certain new health-care services—including MRI scanners—in North Carolina. *Id.* §§ 131E-175, 131E-176(25). On information and belief, Defendant Cooper is a resident of Wake County, North Carolina.

15. Defendant Phil Berger is sued in his official capacity as the President Pro Tempore of the North Carolina Senate. *See* N.C. R. Civ. P. 19(d) (requiring the "President Pro Tempore of the Senate . . . [to] be joined as [a] defendant[] in any civil action challenging the validity of a North Carolina statute . . . under State or federal law"). On information and belief, Defendant Berger is a resident of Rockingham County, North Carolina.

16. Defendant Tim Moore is sued in his official capacity as the Speaker of the North Carolina House of Representatives. *See id.* (requiring the "Speaker of the House of Representatives . . . [to] be joined as [a] defendant[] in any civil action challenging the validity of a North Carolina statute . . . under State or federal law"). On information and belief, Defendant Moore is a resident of Cleveland County.

FACTUAL ALLEGATIONS

Dr. Singh Wants to Provide Safe, Quality, Affordable MRI Scans to Patients in Need

17. Dr. Gajendra Singh is an Indian-born general surgeon whose life's mission is to provide and expand access to high-quality medical care for patients in need.

18. Dr. Singh received his medical degree in 1995 from Sawai Man Singh Medical College in Jaipur, India. After spending two years in general practice, Dr. Singh completed a residency in general surgery at Jawahar Lal Nehru Medical College in Amjer, India. He practiced general surgery briefly before moving to the United States in 2002.

19. Between 2002 and 2011, Dr. Singh built his credentials as a surgeon by working as a surgical assistant at Holy Cross Hospital and Illinois Masonic Hospital in Chicago; through fellowships in abdominal transplant surgery at the University of Iowa in Iowa City, Iowa, and the University of Rochester in Rochester, New York; and through a residency in general surgery at St. Louis University in St. Louis, Missouri.

20. In 2011, Dr. Singh was licensed to practice in North Carolina and moved to Winston-Salem to work as a general and hepatobiliary (liver) surgeon for Novant Health, Inc. ("Novant"), a medical corporation that operates an integrated system of hospitals across the state including, but not limited to, Novant Health Forsyth Medical Center, Novant Health Medical

Park Hospital, Novant Health Kernersville Medical Center, and Novant Health Clemmons Medical Center.

21. In 2012, Dr. Singh left Novant to establish his own surgical practice, Forsyth Surgical Associates, which he still operates. His goal was to establish a patient-centered practice that would prioritize patient well-being over short-term profits and allow him to fulfill his personal mission of providing high-quality care for patients in need.

22. In addition to his compassion, Dr. Singh is also an excellent surgeon. He is certified by the American Board of Surgery, holds a fellowship with the American College of Surgeons, has received multiple awards for his proficiency in the field, and is well-regarded in Winston-Salem and the surrounding areas by patients and peers alike.

23. Despite leaving Novant, Dr. Singh retains hospital privileges there and regularly performs surgeries at the aforementioned locations. His surgical practice is focused primarily on abdominal surgeries, from organ removal and repair to complex cancer procedures.

24. As part of his surgical practice, Dr. Singh sometimes requires patients to obtain diagnostic scans for purposes of preliminary diagnosis or further medical evaluation. These can include X-rays, echocardiograms, ultrasounds, CT scans, and MRI scans, depending on the circumstances.

25. MRI scans, in particular, are often crucial tools in the diagnostic process. This is because MRI scanners—which combine magnetic fields and radio waves to measure the location of hydrogen atoms stored in abundance throughout the body—can provide detailed images of certain organs and tissues that other scanners cannot. Moreover, unlike X-ray machines and CT scanners, MRI scanners do not emit ionizing radiation, which can be harmful to patients over time.

26. At Forsyth Surgical Associates, Dr. Singh has encountered an increasing number of patients who reported struggling with the high cost of diagnostic-imaging services and a lack of transparency in pricing offered by nearby providers.

27. MRI scans, in particular, were reportedly among the most difficult scans for patients to afford. This makes sense for a few reasons. First, North Carolina's median household income is just over $50,000. Second, the median household income in Winston-Salem barely tops $40,000. Third, the average MRI scan at a North Carolina hospital costs almost $2,000, which makes North Carolina one of the most expensive places in the country to get an MRI scan.

28. To make matters worse, patients also informed Dr. Singh that it was almost impossible to determine the out-of-pocket cost of an MRI scan upfront. Sometimes, providers and insurance companies simply refused to provide a straightforward estimate; other times, they offered conflicting figures; and even on the rare occasions when patients were able to determine the cost of the scan itself, they were often surprised to receive multiple, bank-breaking bills months later for incidental services like the radiologist's reading fee or the dye used in the procedure.

29. Hearing these complaints, Dr. Singh decided to do something to improve the situation. He opened Forsyth Imaging Center in the fall of 2017 to provide safe, quality, affordable imaging services in Forsyth County.

30. Forsyth Imaging Center is a full-service diagnostic-imaging facility equipped with an X-ray machine (seven days per week), two ultrasound machines (seven days per week), a CT scanner (seven days per week), and a mobile MRI scanner (two days per week).

31. Dr. Singh purchased the ultrasound machines outright, leases both the X-ray scanner and the CT scanner with an option to purchase, and rents the mobile MRI scanner two days per week.

32. To date, Dr. Singh has spent less than $500,000 on all the diagnostic equipment, marketing, and additional overhead necessary to establish the Center as a dependable provider of diagnostic-imaging services in Forsyth County.

33. The Center and its staff are fully compliant with all relevant local, state, and federal laws.

34. While Forsyth Imaging Center is a for-profit corporation, Dr. Singh founded the company for charitable purposes. The Center offers patients three distinct benefits: affordability, transparency, and flexibility.

35. To promote affordability, the Center charges prices far below what other providers in the surrounding area are willing to offer: $70 for X-rays, $199-249 for most ultrasounds, $299 for echocardiograms, $400-600 for CT scans, and $500-700 for most MRI scans. And if patients produce a written quote for a lower price from another provider, the Center publicly guarantees that it will not only match that price, but give patients an extra $50 off.

36. To promote transparency, the Center posts all of its prices online so that patients know in advance exactly how much they are going to be charged. *See* Price List, Forsyth Imaging, http://forsythimaging.com/price-list.html (last visited July 24, 2018). And unlike most providers in the surrounding area, who send patients multiple bills for the same scan, the Center always charges patients a single fee, upfront, regardless of the procedure.

37. To promote flexibility, patients are free to pay using cash or insurance as they like. The Center also offers 0% financing through CareCredit.

38. Dr. Singh's goal is to keep prices as low as possible for patients—even if he could otherwise make more money by raising them—so long as the Center earns enough revenue to pay its basic operating expenses.

39. Since opening, the Center's patient-centered approach has yielded a steady increase in procedure volume and favorable reviews from both patients and the local community.

40. One of the ways Dr. Singh (who is not a radiologist) is able to keep prices low is by contracting with North Carolina-licensed radiologists at a third-party company who, due to the charitable nature of Dr. Singh's work, read the Center's scans remotely at a reduced rate.

41. But despite this favorable arrangement, striking the delicate balance between keeping prices low and earning enough baseline revenue to keep the Center running has still been challenging.

42. The Center's chief difficulty has been performing *enough* scans to recover costs—a difficulty exacerbated by North Carolina's outdated health-care regulations.

43. On this score, the Center has benefitted tremendously from its ability to offer scans seven days per week on its X-ray machine, ultrasound machines, and CT scanner.

44. Because the Center can offer scans 100% of the time (during operating hours) on these scanners, the Center has never had to turn away a patient who needed an affordable X-ray, ultrasound, or CT scan simply because the Center had limited access to the necessary equipment.

45. But as Dr. Singh's price schedule suggests, a consistent number of MRI scans is critical to the Center's ability to recover costs, long-term.

46. Currently, the Center can only offer scans on its rented mobile MRI scanner two days per week, which is just under 30% of the time the Center is actually open.

47. As a result, the Center has had to turn away numerous patients who needed an affordable MRI scan—which the Center was willing and able to offer—but who were unable to schedule an appointment during the Center's limited time with the mobile MRI scanner.

48. This artificial constraint on Dr. Singh's ability to offer MRI scans has seriously curtailed the Center's ability to recover costs.

49. Thus, Dr. Singh would like to purchase a fixed MRI scanner to complete the Center and ensure its financial viability. This would allow the Center to offer MRI scans seven days per week—including to patients the Center is currently turning away—and to continue keeping the Center's prices as low as possible for patients.

50. But to this day, Dr. Singh has been unable to purchase a fixed MRI scanner to complete the Center. This constraint is purely legal: As explained below, North Carolina law forbids Dr. Singh from acquiring a new fixed MRI scanner solely because certain established providers in his area already own them.

The History of North Carolina's CON Regime

51. The barrier Dr. Singh faces is called a "certificate of need" (CON) law.

52. At its core, North Carolina's CON regime operates by banning licensed health-care providers from offering or developing any "new institutional health service" without first obtaining a CON from the state's Department of Health and Human Services. N.C. Gen. Stat. § 131E-178(a).

53. A CON is a written order granting a health-care provider permission to proceed with a new institutional health service. *Id.* § 131E-176(3).

54. "Only those new institutional health services which are found by the Department to be needed . . . and granted certificates of need shall be offered or developed within the State." *Id.* § 131E-190(a).

55. North Carolina's CON law has its origins in a national movement during the mid-1960s by state and local governments to allocate federal funding in a way that would ensure the financial viability of taxpayer-funded hospitals.

56. The theory was that government planners could control health-care costs by restricting supply and dividing the provision of health-care services into discrete geographical regions. But the effect was that CON requirements effectively insulated established providers from new competition.

57. Hospitals were quick to recognize that they would benefit financially from the prevalence of state CON requirements. In 1968, the American Hospital Association began a nationwide lobbying campaign to pass state CON laws, and even drafted model legislation to that end.

58. By 1972, twenty states had enacted CON regimes at the American Hospital Association's behest. North Carolina was among these states, enacting its first CON law in 1971. Act of July 27, 1971, ch. 1164, 1971 N.C. Sess. Laws 1715.

59. But in 1973, that law was challenged under Article I, Sections 19, 32, and 34 of the North Carolina Constitution. *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 546 (1973).

60. In order to protect the fruits of its lobbying campaign, the American Hospital Association (through its state subsidiary, the North Carolina Hospital Association[1]) filed a brief in defense of the law. *See id.* at 544.

61. The North Carolina Supreme Court framed the case as follows:

> In the present case, the [Medical Care] Commission claims and the statute purports to confer upon it the authority to forbid the construction, with private funds and suitable materials, upon private property suitably located, of a well planned hospital which is to be adequately equipped and staffed with a sufficient number of well trained personnel in all categories, the sole reason for such prohibition being that, in the opinion of the Commission, there are now in the area hospitals with bed capacity sufficient to meet the needs of the population. Aston Park, which desires so to engage in the business of caring for sick, injured and infirm people, contends that this is in excess of the constitutional power of the Legislature. We agree.

Id. at 548.

62. The Court ultimately struck down the 1971 law on anti-monopoly, exclusive-emoluments, and substantive-due-process grounds. *Id.* at 551–52. But *Aston Park* would not mark the end of North Carolina's CON law.

63. Around the time *Aston Park* was decided, the U.S. Congress was grappling with a related policy problem: Because Medicare and Medicaid reimbursed health-care providers for services based on actual expenditures, providers could recoup funds even when those expenditures were inefficient, resulting in price inflation.

64. Congress saw CON requirements as a potential means of holding providers accountable for inefficient expenditures by requiring them to demonstrate that new medical services and capital expenditures were "needed" by the community.

---

[1] As of 2018, the North Carolina Hospital Association is now called the North Carolina Healthcare Association, but remains a subsidiary of the American Hospital Association.

65. The American Hospital Association seized on this opportunity by lobbying Congress to pass a law requiring states to enact CON requirements. The result was the National Health Planning and Resources Development Act of 1974 (NHPRDA), which required states to adopt CON laws in order to receive federal health-care subsidies and guaranteed funding for the administration of state CON laws that met certain federal guidelines.

66. In 1978—despite the Supreme Court's holding in *Aston Park*—North Carolina re-enacted its CON regime specifically in response to the NHRPDA. N.C. Gen. Stat. §§ 131E-175, *et seq*.

67. Indeed, the chief update to North Carolina's 1978 CON law was a series of legislative "findings of fact" which claimed, among other things, that the law was enacted in response to the same reimbursement-related concern that inspired the NHPRDA and that a CON requirement was "necessary" to control prices and promote access to care. *Id.* § 131E-175.

68. Whatever their truth in 1978, these "findings of fact" are false as a matter of fact today for at least two reasons.

69. First, Congress soon reversed course on the very policy that prompted the re-enactment of North Carolina's CON regime in the first place.

70. In 1984, Congress restructured the Medicare and Medicaid reimbursement system to a fee-for-service model under which hospitals received a fixed amount for each service, regardless of the hospital's actual expenditures.

71. Because this eliminated the rationale for demanding that states adopt CON laws, Congress repealed the NHPRDA completely in 1986.

72. Second, CON requirements actually *increase* costs and *reduce* access to care, both of which contributed to Congress' reversal.

73. In repealing the NHPRDA, Congress found no evidence that CON programs advanced their goal of lowering or even slowing the growth of health-care costs. In fact, the evidence showed that CON programs were beginning to increase costs.

74. Congress also determined that CON programs were beginning to produce detrimental effects as local officials took myopic and parochial views of what kind of medical services a community "needed."

75. Since repealing the NHPRDA, the federal government has consistently reaffirmed its conclusion that CON laws raise costs and harm patients.

76. In 1988, for instance, a Staff Report of the Bureau of Economics in the Federal Trade Commission (FTC) concluded that CON programs harm consumers and raise health-care costs by serving as a barrier to entry of new health-care providers and by encouraging hospitals to avoid using more efficient (but CON-restricted) equipment and services in favor of less efficient (but CON-exempt) equipment and services.

77. In 2004, the FTC and United States Department of Justice (DOJ) issued a joint report reaffirming the 1988 study. "Based on 27 days of joint hearings held from February through October 2003, a [Federal Trade] Commission-sponsored workshop in September 2002, and independent research," the agencies concluded that

> States with Certificate of Need programs should reconsider whether these programs best serve their citizens' health care needs. The [FTC and DOJ] believe that, on balance, **CON programs are not successful in containing health care costs, and that they pose serious anticompetitive risks that usually outweigh their purported economic benefits.** Market incumbents can too easily use CON procedures to forestall competitors from entering an incumbent's market . . . . [T]he vast majority of single-specialty hospitals—a new form of competition that may benefit consumers—have opened in states that do not have CON programs. **Indeed, there is considerable evidence that CON programs can actually increase prices by fostering anticompetitive barriers to entry.** Other means of cost control appear to be more effective and pose less significant competitive concerns.

Antitrust Div., Dept. of Justice & Fed. Trade Comm'n, Executive Summary (2004), https://www.justice.gov/atr/executive-summary (emphasis added).

78. And in 2015, the FTC sent a letter to the North Carolina House of Representatives in support of House Bill 200, which would have exempted multiple health-care services—including diagnostic-imaging centers—from North Carolina's CON regime. Letter from Marina Lao, Office of Policy Planning Dir., Fed. Trade Comm'n, et al., to Marilyn W. Avila, Representative, N.C. House of Representatives, Federal Trade Commission Staff Comment Regarding North Carolina House Bill 200 (July 10, 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-concurring-comment-commissioner-wright-regarding-north-carolina-house-bill-200/150113ncconadv.pdf. Among the FTC's reasons for supporting the bill were that CON laws: (1) "can prevent the efficient functioning of health care markets"; (2) "can be prone to exploitation by incumbent firms seeking to thwart or delay entry by new competitors"; and (3) "appear to have generally failed to control health care costs." *Id.*

79. Since 1986, numerous additional studies have shown CON requirements to be associated with lower service quality and higher mortality rates, higher health-care costs and spending, and reduced access to certain services.

80. Unsurprisingly, the federal government has never reauthorized CON laws, and 16 states have actually eliminated their CON regimes with no evidence of any negative effects on patients.

81. Despite this, local lobbying efforts have kept some version of these CON requirements in place in 34 states plus the District of Columbia. This is true of North Carolina as well, where the North Carolina Healthcare Association has lobbied for decades to keep the state's outdated CON regime in place.

82. Today, North Carolina's CON law regulates 25 different health-care services and ranks among the most restrictive regimes in the country.

North Carolina's Anti-Competitive MRI-CON Regime

83. One of the particular services North Carolina's CON regime regulates is magnetic resonance imaging (MRI) scanners. In 1993, the General Assembly expanded the definition of "new institutional health services" to include "[t]he acquisition by purchase, donation, lease, transfer, or comparable arrangement of . . . [a] Magnetic resonance imaging scanner." N.C. Gen. Stat. § 131E-176(16)(f1)(7).

84. An MRI scanner is "medical imaging equipment that uses nuclear magnetic resonance." *Id.* § 131E-176(14m). The CON law divides MRI scanners into two categories: "fixed" and "mobile." Div. of Health Serv. Regulation, N.C. Dept. of Health & Human Servs., 2018 State Medical Facilities Plan [hereinafter 2018 SMFP] 141–42 (Jan. 2018), https://www2.ncdhhs.gov/DHSR/ncsmfp/2018/2018smfp.pdf.

85. A mobile MRI scanner is "an MRI scanner and transporting equipment which is moved at least weekly to provide services at two or more campuses or physical locations." 10A N.C. Admin. Code 14C .2701(11). A fixed MRI scanner, by contrast, is "an MRI scanner that is not a mobile MRI scanner." *Id.* 14C .2701(7).

86. When a private MRI provider obtains a CON, the provider receives state permission to provide private MRI services, but does not thereby become a government agent or employee.

87. It is illegal for a health-care provider to perform, offer, or advertise fixed MRI scans, or to acquire or make arrangements to finance the acquisition of a fixed MRI scanner,

without first obtaining a CON. N.C. Gen. Stat. § 131E-176(7), (18); *id.* § 131E-178(a); *id.* § 131E-190(a), (b).

88. There are three major exceptions to the MRI-CON requirement:

a. First, MRI scanners that were in use prior to the 1993 amendment were granted immunity from the CON requirement. Act of March 18, 1993, ch. 7, § 12, 1993 N.C. Sess. Laws. 5 (S.B. 10). Today, such scanners are considered "grandfathered" in. 2018 SMFP 146–62.

b. Second, a provider need not obtain a CON if the provider requires an MRI scanner for certain emergency, incidental, or non-health-related purposes, or to replace an MRI scanner if the replacement costs are under $2,000,000. N.C. Gen. Stat. § 131E-184(a); *see also, e.g.*, 2018 SMFP 23 ("Policy TE-3").

c. Third, a hospital seeking to replace a main-campus MRI scanner for which it already has a CON need not obtain an additional CON even if the cost of the replacement exceeds $2,000,000. N.C. Gen. Stat. § 131E-184(f).

89. There is also a "loophole" of sorts for mobile MRI scanners. While a CON is required to *own* a mobile MRI scanner (unless one of the aforementioned exceptions applies), a CON is not required to *rent* a mobile MRI scanner, as long as that scanner is moved at least once per week and the Department approves the service site.

90. Violations of the CON law are subject to strict penalties, including the withholding of federal and state reimbursements, an injunction against further violations, and suspension or even revocation of the provider's license. *Id.* § 131E-190(d), (e), (h). The Department is also empowered to assess a civil fine of up to $20,000 on any person who

knowingly violates the law. *Id.* § 131E-190(f). On information and belief, Defendants strictly enforce the law.

The Process of Applying for an MRI CON Is Both Burdensome and Expensive

91. To obtain an MRI CON, a provider must first prepare and submit a detailed application with the Department. N.C. Gen. Stat. § 131E-182(b); 10A N.C. Admin. Code 14C .0203(a). The first question is which type of CON application(s) to file.

92. On information and belief, a fixed MRI scanner can cost anywhere from just over $100,000 to as much as $3,000,000, depending on the quality, condition, and use-history of the scanner.

93. This price range creates a potential for overlap between the MRI-CON requirement and certain other CON requirements. *See* N.C. Gen. Stat. § 131E-176(7a), (9b), (16)(a) (requiring a CON for a "diagnostic center" where the total cost of all diagnostic equipment used by the facility costing at least $10,000 exceeds $500,000); *id.* § 131E-176(14o), (16)(p) (requiring a CON for the acquisition of "major medical equipment" costing over $750,000).

94. However, the Department currently allows providers whose proposed acquisition of an MRI scanner would also trigger these additional CON requirements to file a single application under "Category H: Medical Equipment." 2018 SMFP 17; *see also* N.C. Gen. Stat. § 131E-182(a); 10A N.C. Admin. Code 14C. 0202(c).

95. There is a $5,000 non-refundable fee just for submitting an application. N.C. Gen. Stat. § 131E-182(c); 10A N.C. Admin. Code 14C .0203(b). For projects involving a proposed capital expenditure of over $1,000,000, the fee increases by an amount of .3% of the excess.

N.C. Gen. Stat. § 131E-182(c). Applications submitted without the fee will not be considered. 10A N.C. Admin. Code 14C .0203(c)(1).

96. To be eligible for a CON, the applicant must show:

a. That the proposed project is consistent with the policies and need determinations of the SMFP. N.C. Gen. Stat. § 131E-183(a)(1).

b. That the project will serve a population in need of the proposed services—and that low-income, minority, handicapped, and other underserved residents, in particular, will likely have access to the services. *Id.* § 131E-183(a)(3).

c. That the project constitutes the least costly and most effective alternative means of meeting that need. *Id.* § 131E-183(a)(4).

d. That the provider will have access to adequate financing for the duration of the project, and that reasonable projections of costs and charges indicate both immediate and long-term financial feasibility. *Id.* § 131E-183(a)(5).

e. That the project "will not result in the unnecessary duplication of existing or approved health service capabilities or facilities." *Id.* 131E-183(a)(6).

f. That the project will be supported by adequate resources and staff. *Id.* 131E-183(a)(7).

g. That the project will offer or facilitate "the provision of the necessary ancillary and support services," and the proposed services will be "coordinated with the existing health care system." *Id.* § 131E-183(a)(8).

h. That, if the project would provide a substantial portion of its services to individuals residing outside the relevant health service area, those services are warranted by "special needs and circumstances." *Id.* § 131E-183(a)(9).

i. That the project meets the special needs of "health maintenance organizations," where applicable. *Id.* § 131E-183(a)(10).

j. That, if the project involves construction, the proposed plan is the most reasonable alternative (in terms of cost, design, and means), will not unduly increase costs (either of the proposed services, or of services offered by other providers), and incorporates energy-saving features (where applicable). *Id.* § 131E-183(a)(12).

k. That the project will serve the health-related needs of the elderly and of medically underserved groups—especially those identified in the SMFP as warranting priority. *Id.* § 131E-183(a)(13).

l. That the project will accommodate the clinical needs of health-professional training programs in the area, where applicable. *Id.* § 131E-183(a)(14).

m. The expected effects of the proposed services on competition in the service area, including how any enhanced competition will have a positive impact on the cost, quality, and access to services; or in the alternative, that the application is for a service upon which competition will not have a favorable impact. *Id.* § 131E-183(a)(18a).

n. That, if the applicant has provided health services in the past, the applicant has a history of providing quality care. *Id.* § 131E-183(a)(20).

97. The Department also requires MRI providers to: show that the proposed scanner would perform a certain number of scans during its third year in operation (depending on the service area); set forth the methodology used to make that projection; and prove detailed documentation on the assumptions and data supporting that methodology. 10A N.C. Admin.

Code 14C .2703(a); *see also* N.C. Gen. Stat. § 131E-182(b) (requiring compliance with any service-specific standards promulgated by the Department).

The State Medical Facilities Plan Predetermines "Need"

98. The SMFP is

> an annual document that contains policies and methodologies used in determining need for new health care facilities and services in North Carolina. The plan also contains background information on the North Carolina State Health Coordinating Council (SHCC), on the annual planning cycle, and general policies related to implementing the planning cycle.

N.C. Div. of Health Serv. Regulation, North Carolina State Medical Facilities Plan, https://www2.ncdhhs.gov/DHSR/ncsmfp/index.html.

99. The SMFP is prepared by the Department in coordination with the State Health Coordinating Council, and becomes final upon approval by the Governor. N.C. Gen. Stat. § 131E-176(25). Once signed, the SMFP cannot be amended except to correct errors or respond to legislative changes, legislative appropriations, or judicial decisions. 2018 SMFP 7.

100. Every year, the SMFP announces "projections of need to guide local planning for specific health care facilities and services." *Id.* at 1. For MRI scanners, the SMFP divides the state up into a series of county-based "service areas," and projected need determinations are made for each service area. *See id.* at 142.

101. According to the Department, its projections are based on the methodologies set forth in the SMFP.

102. While framed as "guid[ance]," the need determinations set forth in the SMFP in fact impose a "**determinative limitation** on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved." N.C. Gen. Stat. § 131E-183(a)(1) (emphasis added).

103. Thus, an applicant who demonstrates compliance with all other statutory review criteria will still not qualify for a CON if the SMFP does not project a need for their services. *Id.*

104. The Department's "projections of need" for fixed MRI scanners in any given service area turn, at root, on the number of approved scanners already operating (or counted as operating) in that area—including the number of scanners "grandfathered" in or otherwise exempted from the CON requirement.

105. If the Department finds that "enough" fixed MRI scanners are already operating in a service area, the SMFP will reflect no need for additional scanners in that service area that year.

106. As a practical matter, this means that providers interested in applying for a CON are forced to wait until the SMFP is promulgated each year to learn whether state planners have projected a need for their services (i.e., to learn whether a CON will even be available).

107. Despite North Carolina's consistent population and economic growth over the past half-century, new need determinations for fixed MRI scanners are rare. In fact, the Department has never projected a need for a new fixed MRI scanner in the majority of service areas.

CON Applications Are Extremely Competitive

108. Given the extensive review criteria, compiling an MRI-CON application with any reasonable prospect of success requires considerable preparation and planning, including hiring an experienced team of consultants and economists to generate all of the data, projections, plans, and other information necessary to demonstrate compliance.

109. As a result, MRI-CON applications typically cost around $40,000 (depending on the circumstances) to prepare and can take many months to complete.

110. But this is just the start of the process, one that will involve much more time and many thousands more dollars in costs. After a provider has submitted a completed application and fee, the Department then has 90 days to review the application. N.C. Gen. Stat. § 131E-185(a1). The Department may also seek a 60-day extension with proper notice to the applicant. *Id.* § 131E-185(c).

111. If there are multiple applicants for a CON in the same service area during the same review period, and approval of one could result in a denial of another, the applications are considered "competitive" and will be reviewed together. 10A N.C. Admin. Code 14C .0202(f).

112. The competitive-review process is designed to resolve situations where the number of CON applicants exceeds the number of new MRI scanners "needed" under the SMFP.

113. In a competitive review, an applicant seeking to provide MRI scans—whose application satisfied all other relevant criteria—could be denied a CON solely because a second applicant obtained the CON instead, thus obviating the "need" for the first applicant's services. N.C. Gen. Stat. § 131E-183(a)(1).

114. Once the review period begins, any person may file written comments and exhibits concerning the application(s) within 30 days. *Id.* § 131E-185(a1)(1). These comments and exhibits may dispute the representations made in an application, contest a project's compliance with the applicable review criteria, or both. *Id.* § 131E-185(a1)(1)(b), (c).

115. The Department is also required to hold a public hearing on the application(s) within 20 days of the expiration of the comment period if: the review involves multiple applicants; the applicant proposes to spend at least $5,000,000; any "affected party" (including any person who provides similar services) requests a hearing; or the Department determines a hearing to be in the public interest. *Id.* §§ 131E-185(a1)(2), 131E-188(c).

116. If a public hearing is held, applicants may respond to written comments regarding their applications, persons other than applicants may provide comments on the applications under review, and Department representatives may question applicants regarding the content of their applications. *Id.* § 131E-185(a1)(2).

117. The Department must render a final decision on the application(s) by the end of the review period. *Id.* § 131E-186(a). The Department must also provide written notice to the applicant(s) of that decision, including an explanation of the review criteria considered and the findings and conclusions upon which the decision was based, within five business days. *Id.* § 131E-186(b).

118. If the decision was that a CON should be issued, the Department must issue the CON to the prevailing applicant(s) within 35 days of that decision—unless an "affected person" (including any person who provides similar services) files a petition for a contested-case hearing. *Id.* § 131E-187(c)(1).

119. A contested-case petition triggers an administrative process with the North Carolina Office of Administrative Hearings that closely resembles litigation: an administrative law judge or hearing officer is appointed; the parties conduct discovery; a hearing is held at which sworn testimony is taken and evidence is presented; and the judge or officer issues a final decision based on his findings. *Id.* § 131E-188(a).

120. All told, the administrative portion of the contested-case process can take up to 270 days to resolve from the day the petition is filed. *Id.*

121. But even that is not necessarily the end of the process, because "[a]ny affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision." *Id.* § 131E-188(b).

122. All appeals from final decisions in contested-case proceedings must be taken directly to the North Carolina Court of Appeals within 30 days of written notice of the decision. *Id.* Appeals are handled in accordance with the North Carolina Rules of Appellate Procedure, which means they might not reach final resolution until a decision by the Supreme Court of North Carolina. *Id.*

123. Given the scarcity of new need determinations for fixed MRI scanners and the adversarial nature of these proceedings, qualified providers eager to offer new services to patients are forced to aggressively compete with one another—not in the marketplace, but in the CON-application process.

124. Indeed, competitive reviews and contested cases are extremely common, often require the assistance of experienced legal counsel to litigate effectively, and can take many years to resolve.

125. As a result, the total cost of pursuing an MRI-CON application to completion often exceeds $400,000—with no guarantee that the applicant will actually obtain a CON.

126. For providers fortunate enough to obtain them, CONs for MRI scanners are extremely valuable—both in terms of the investment providers make during the application process and the tremendous economic advantage that comes with holding exclusive legal rights to own and operate such scanners in their service areas.

127. Given these incentives, incumbent MRI providers frequently file written comments and petitions for contested-case hearings in an attempt to stonewall the introduction of new, competing MRI scanners.

128. This is true of fixed-MRI providers—including large, well-funded hospitals and other incumbent providers—who often seek to block new MRI scanners in their service areas.

129. It is also true of mobile-MRI providers—especially the corporations that own most of the mobile-MRI scanners in the state—who often seek to block new fixed-MRI scanners that would undermine their business model of renting out scanners at exorbitant rates.

130. As established MRI providers, these entities typically have the financial resources necessary to hire representatives, including experienced legal counsel, who can devote the time and money necessary to contest an application at every turn—thus increasing the overall cost and duration of the process for the parties involved.

131. The same advantages apply in the competitive-review process, where established MRI providers are usually quick to apply for any new CONs and almost always prevail over aspiring market entrants.

132. In sum, North Carolina's MRI-CON regime is fundamentally anticompetitive: Established providers are insulated from competition in their service areas; aspiring providers are prevented from participating in the health-care market solely because other providers got there first; and when state planners project a "need" for a new fixed MRI scanner (which they usually do not), incumbents are given every opportunity to thwart, undermine, and frustrate their potential competitors' applications, while at the same time exerting their considerable economic advantage to obtain the new CON for themselves—and thus, retain their monopoly status.

North Carolina's Anti-Competitive MRI-CON Requirement Prevents Dr. Singh from Providing Safe, Quality, Affordable MRI Scans to Patients in Need

133. Dr. Singh would like to acquire a fixed MRI scanner so that Forsyth Imaging Center can provide safe, quality, affordable MRI scans to patients in need.

134. Were it legal to do so, Dr. Singh could purchase (or lease with an option to purchase) a refurbished fixed MRI scanner for under $750,000.

135. But it is not legal to do so. Under North Carolina's CON regime, Dr. Singh is forbidden from performing, offering, or advertising fixed MRI scans, or from acquiring or making arrangements to acquire a fixed MRI scanner, without first obtaining a CON.

136. The ban is categorical. CON applicants must demonstrate compliance with the State Medical Facilities Plan, and the 2018 SMFP projects no "need" for a new fixed MRI scanner in Forsyth County. *See* 2018 SMFP 165 (announcing "no need for additional fixed MRI scanners anywhere else in the state" beyond a single scanner in Union County).

137. The 2018 SMFP projects no "need" for a new fixed MRI scanner despite the fact that Dr. Singh and the Center's staff have spoken with numerous patients in Forsyth County who would like to obtain an MRI scan—a scan they *need*—at his affordable rate.

138. Thus, as Dr. Singh's situation illustrates, the fact that the 2018 SMFP projects no "need" for an additional fixed MRI scanner in Forsyth County does not mean that there are not real patients who need those services or real providers willing to render them.

139. Instead, the reason the 2018 SMFP projects no "need" for an additional fixed MRI scanner in Forsyth County is that, according to the methodology set forth in the SMFP, there are already "enough" existing providers of MRI services in the area.

140. On information and belief, contrary to the General Assembly's decades-old "findings of facts," *see* N.C. Gen. Stat. § 131E-175, Defendants possess no evidence that preventing Dr. Singh from purchasing a fixed MRI scanner actually increases access to safe, quality, affordable MRI scans in Forsyth County.

141. To the contrary, if Dr. Singh were permitted to purchase a fixed MRI scanner, the scanner would:

a. Be used to provide safe, quality, affordable MRI scans seven days per week;

b. Be used to provide MRI scans to patients who need them, including low-income, minority, handicapped, elderly, and other underserved residents;

c. Be Forsyth Imaging Center's least costly and most effective means of providing MRI scans;

d. Be adequately financed and staffed for as long as the Center operated it;

e. Be fully compliant with all relevant local, state, and federal laws and regulations (besides North Carolina's CON regime, which this lawsuit is challenging);

f. Be used to provide cheaper MRI services than those offered by established providers in Forsyth County;

g. Promote increased competition between MRI providers in Forsyth County, thereby reducing the overall cost of MRI scans for patients there.

142. In fact, there is real evidence that the Center is already producing these results on a more limited scale. In order to compensate for the inability to acquire a fixed MRI scanner, Dr. Singh has been forced to rent a mobile MRI scanner for a mere two days per week. The exact terms of Dr. Singh's contract are confidential, but on information and belief, the average cost of renting a mobile MRI scanner is approximately $2,600 to $3,000 per day, plus administrative costs.

143. Dr. Singh is permitted to provide these scans because the company he rents from owns the CON on that mobile scanner, the scanner is moved at least once per week, and the Department has approved the Center as a mobile-MRI site.

144. Since Dr. Singh began renting the mobile MRI scanner in the spring of 2018, the Center has provided a limited number of patients with safe, quality, affordable MRI scans to which they would not otherwise have had access.

145. On information and belief, these patients had an easier time affording MRI scans at the Center due to the fact that the Center's scans cost less than half the amount charged by nearby providers.

146. On information and belief, these patients also had an easier time ascertaining the actual, out-of-pocket cost of MRI scans at the Center due to the Center's uniquely transparent approach to pricing.

147. On information and belief, if Dr. Singh were permitted to purchase a fixed MRI scanner and to offer scans seven days per week, more patients in Forsyth County would have access to the safe, quality, affordable MRI scans they need.

148. If Dr. Singh is not permitted to purchase a fixed MRI scanner, the opposite will occur. Patients in Forsyth County will be deprived of the safe, quality, affordable MRI scans they need, and would otherwise be able to obtain, at the Center.

149. In short, Dr. Singh is currently permitted to provide a limited number of MRI scans—as long as those scans are provided at great financial expense on an approved mobile scanner that he *rents* two days per week—and patients benefit from these scans.

150. But Dr. Singh is not permitted to provide a greater number of identical MRI scans on a fixed MRI scanner that he *owns*—and to save money in the process—even though patients would also benefit from these scans.

151. On information and belief, Defendants possess no evidence that a provider who merely rents an MRI scanner is better positioned or more likely to provide safe, quality, affordable scans than a provider who owns one.

152. Even if Dr. Singh were permitted to rent a mobile MRI scanner seven days per week, 350 days per year, at $3,000 per day, that would cost him over a million dollars over the course of a full year.

153. Dr. Singh could purchase a fixed MRI scanner for himself—a scanner he would own outright and could use for years—for less than it would cost him to rent a mobile MRI scanner for a single year.

154. The freedom to purchase a fixed MRI scanner could therefore save Dr. Singh hundreds of thousands of dollars over the course of years.

155. But banning Dr. Singh from doing so could ultimately prevent the Center from recovering enough of its costs to keep prices low for patients.

156. This protects incumbent providers from competition—which is exactly what the CON law was designed to do.

157. Indeed, according to the 2018 SMFP, there are 17 approved fixed MRI scanners in Forsyth County, all of which are owned by two major hospitals: Novant (which owns 10 scanners, or 59% of the total) and Wake Forest Baptist Medical Center (which owns seven scanners, or 41% of the total). 2018 SMFP 150.

158. On information and belief, Novant and Wake Forest Baptist Medical Center are both private entities with an annual operating budget of multiple billions of dollars.

159. Thus, the only entities currently permitted to own and operate a fixed MRI scanner in Forsyth County are two private, multi-billion-dollar hospitals.

160. On information and belief, both Novant and Wake Forest Baptist Medical Center have strong ties to the North Carolina Healthcare Association, and many of their corporate officers are either members or among the leadership of that organization.

161. The North Carolina Healthcare Association has, for decades, lobbied to keep North Carolina's CON regime in place and consistently opposed proposed legislative efforts to reform the law.

162. On information and belief, this is because the North Carolina Healthcare Association's stakeholders depend on the CON law—as Novant and Wake Forest Baptist Medical Center do with MRI scanners in Forsyth County—to insulate them from competition.

163. Before opening the Center in 2017, Dr. Singh met with Celia Inman, a Project Analyst with the Certificate of Need Section of the Department of Health and Human Services' Division of Health Service Regulation. This meeting confirmed Dr. Singh's understanding that he would be required to obtain a CON to purchase a fixed MRI scanner in Forsyth County, but that unless the SMFP reflected a need for such a scanner, he would not qualify for a CON.

164. Because the 2018 SMFP does not project a need for a new fixed MRI scanner in Forsyth County, Dr. Singh is not even allowed to apply for a CON in 2018.

165. The proposed 2019 SMFP, published in July 2018, does suggest a potential need for a new fixed MRI scanner in Forsyth County. *See* Div. of Health Serv. Regulation, N.C. Dept. of Health & Human Servs., Proposed 2019 State Medical Facilities Plan 170, https://www2.ncdhhs.gov/DHSR/ncsmfp/2019/proposed2019smfp.pdf.

166. But there is no guarantee that this new need determination will actually appear in the final 2019 SMFP when it is published in January 2019. *See id.* at 28 ("Policy GEN-2: Changes in Need Determinations").

167. Even if the need determination *does* appear in the final 2019 SMFP, however, Dr. Singh still could not afford to apply for a CON.

168. Simply submitting an application would cost Dr. Singh approximately $45,000 ($5,000 for the non-refundable application fee, and about $40,000 to compile a successful MRI-CON application). And because CON applications are almost always highly competitive, it would likely cost Dr. Singh an additional $400,000 to litigate his CON application through to the end—bringing the total cost close to half a million dollars.

169. Dr. Singh cannot afford to spend half a million dollars—which is more than he has spent on the entire Center—simply *applying* for a CON. Moreover, the chances of Dr. Singh obtaining a CON at the end of the application process are slim. A new need determination in Forsyth County would attract applications from well-funded players in the North Carolina health-care industry, and any application from Dr. Singh would be inevitably contested by established providers like Novant, Wake Forest Baptist Medical Center, and the various mobile-MRI companies that have a financial interest in blocking competition from new entities owning fixed MRI scanners.

170. Moreover, the last time there was a need determination for an MRI scanner in Forsyth County was in 2010. That CON (which ultimately went to Novant) was not formally awarded until late 2013—over three years after the initial need determination was made.

171. In short, even a new need determination in Forsyth County would not grant Dr. Singh the relief he seeks, because (a) what he seeks is the freedom to purchase a fixed MRI scanner *today*, not merely the ability to one day file an enormously expensive application for permission to do so; (b) a new need determination would invariably attract opposition from incumbent providers and other, well-funded players in the North Carolina health-care industry,

over whom Dr. Singh would have effectively no chance at obtaining the CON; and (c) Dr. Singh cannot afford to spend almost half a million dollars and multiple years litigating an MRI-CON application with no guarantee—and little hope—of success.

172. This lawsuit therefore provides Dr. Singh's only realistic option at vindicating his right to provide safe, quality, affordable MRI scans to the many patients in Forsyth County who need his services.

CONSTITUTIONAL VIOLATIONS

Count I
(Article I, Section 34: North Carolina's Anti-Monopoly Clause)

173. All preceding allegations are incorporated as if fully set forth herein.

174. Article I, Section 34 of the North Carolina Constitution declares: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

175. North Carolina's MRI-CON requirement grants certain providers a monopoly by conferring an exclusive privilege to provide MRI services in their service areas and flatly prohibiting all other providers from doing so.

176. The purpose of the MRI-CON requirement is to protect incumbent MRI providers from competition, and protectionism is not a legitimate basis for preventing Plaintiffs from providing safe, quality, affordable MRI scans to patients who need them.

177. The effect of the MRI-CON requirement is to prevent Plaintiffs from acquiring a fixed MRI scanner to provide safe, quality, affordable MRI scans to patients who need them, solely because incumbent providers got there first.

178. Therefore, the MRI-CON requirement, both on its face and as applied, grants certain health-care providers a monopoly in violation Article I, Section 34 of the North Carolina Constitution.

179. Unless Defendants are enjoined from enforcing the MRI-CON requirement, Plaintiffs will suffer continuing and irreparable harm.

Count II
(Article I, Section 32: North Carolina's Exclusive-Emoluments Clause)

180. All preceding allegations are incorporated as if fully set forth herein.

181. Article I, Section 32 of the North Carolina Constitution declares: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

182. North Carolina's MRI-CON requirement grants certain providers an exclusive privilege to provide MRI services in their areas, while flatly prohibiting all other providers from doing so.

183. The purpose of the MRI-CON requirement is to protect incumbent MRI providers from competition, and protectionism is not a legitimate basis for preventing Plaintiffs from providing safe, quality, affordable MRI scans to patients who need them.

184. The effect of the MRI-CON requirement is to prevent Plaintiffs from acquiring a fixed MRI scanner to provide safe, quality, affordable MRI scans to patients who need them, solely because incumbent providers got there first.

185. A CON granted to a private health-care provider is not a license or a contract to provide "public services," and private CON-holders are not state agents or employees.

186. The two hospitals that hold all the fixed-MRI CONs in Forsyth County—Novant and Wake Forest Baptist Medical Center—are private health-care providers.

187. Therefore, the MRI-CON requirement, both on its face and as applied, grants certain health-care providers an exclusive emolument from the community in violation of Article I, Section 32 of the North Carolina Constitution.

188. Unless Defendants are enjoined from enforcing the MRI-CON requirement, Plaintiffs will suffer continuing and irreparable harm.

Count III
(Article I, Section 19: North Carolina's Law of the Land Clause—Substantive Due Process)

189. All preceding allegations are incorporated as if fully set forth herein.

190. Article I, Section 19 of the North Carolina Constitution protects Plaintiffs' substantive-due-process right to participate in the health-care market free from arbitrary, irrational, and protectionist legislation by declaring: "No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land."

191. North Carolina's MRI-CON requirement grants certain providers an exclusive privilege to provide MRI services in their service areas, while flatly prohibiting all other providers from doing so.

192. The purpose of the MRI-CON requirement is to protect incumbent MRI providers from competition, and protectionism is not a legitimate basis for preventing Plaintiffs from providing safe, quality, affordable MRI scans to patients who need them.

193. The effect of the MRI-CON requirement is to prevent Plaintiffs from acquiring a fixed MRI scanner to provide safe, quality, affordable MRI scans to patients who need them, solely because incumbent providers got there first.

194. Contrary to the General Assembly's decades-old "findings of fact" in support of the CON law, *see* N.C. Gen. Stat. § 131E-175, the MRI-CON requirement lacks a real and substantial (or even a rational) relationship to protecting the health or safety of North Carolina patients.

195. Therefore, the MRI-CON requirement, both on its face and as applied, violates Plaintiffs' substantive-due-process right to participate in the health-care market free from

arbitrary, irrational, and protectionist legislation, in violation of Article I, Section 19 of the North Carolina Constitution.

196. Unless Defendants are enjoined from enforcing the MRI-CON requirement, Plaintiffs will suffer continuing and irreparable harm.

Count IV
(Article I, Section 19: North Carolina's Law of the Land Clause—Equal Protection)

197. All preceding allegations are incorporated as if fully set forth herein.

198. Article I, Section 19 of the North Carolina Constitution protects Plaintiffs' right to equal protection of the laws by declaring: "No person shall be denied the equal protection of the laws . . . ."

199. The MRI-CON requirement draws an arbitrary and irrational distinction between providers who already own an MRI scanner (who may provide MRI services in a cost-effective manner), and providers who do not (who may only provide MRI services after spending hundreds of thousands of dollars on the CON-application process or by renting an MRI scanner at an exorbitant rate).

200. Under the MRI-CON requirement, whether a provider is permitted to own an MRI scanner does not turn on the provider's ability to provide safe, quality, affordable MRI scans.

201. Thus, Plaintiffs are permitted to have an MRI scanner on their property (at times), and to provide a small number of safe, quality, affordable MRI scans to patients who need them on a rented scanner (which is less cost-effective and limits access to care), but Plaintiffs are *not* permitted to purchase an MRI scanner to provide a greater number of identical scans (which would be more cost-effective and expand access to care).

202. Whether a provider owns their MRI scanner has no real or substantial (or even a rational) relationship to the provider's ability to provide safe, quality, affordable scans—and thus, no relationship to protecting the health or safety or North Carolina patients.

203. Therefore, the MRI-CON requirement, both on its face and as applied, violates Plaintiffs' right to equal protection of the laws in violation of Article I, Section 19 of the North Carolina Constitution.

204. Unless Defendants are enjoined from enforcing the MRI-CON requirement, Plaintiffs will suffer continuing and irreparable harm.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request relief as follows:

A. A declaratory judgment that North Carolina's certificate-of-need law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, and its implementing regulations, 10A N.C. Admin. Code 14C .0100, *et seq.*, both on their face and as applied, violate Article I, Section 34 of the North Carolina Constitution;

B. A declaratory judgment that North Carolina's certificate-of-need law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, and its implementing regulations, 10A N.C. Admin. Code 14C .0100, *et seq.*, both on their face and as applied, violate Article I, Section 32 of the North Carolina Constitution;

C. A declaratory judgment that North Carolina's certificate-of-need law, N.C. Gen. Stat. §§ 131E-175, *et seq.*, and its implementing regulations, 10A N.C. Admin. Code 14C .0100, *et seq.*, both on their face and as applied, violate Article I, Section 19 of the North Carolina Constitution;

D. A permanent injunction enjoining Defendants and their officers, employees, or agents from implementing, applying, or taking any action whatsoever pursuant to North Carolina's certificate-of-need law and regulations;

E. An award of attorneys' fees, costs, and expenses in this action; and

F. All further legal and equitable relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED this 30th day of July, 2018.

John E. Branch III
N.C. Bar No. 32598
Shanahan McDougal, PLLC
128 E. Hargett Street, Suite 300
Raleigh, NC 27601
Telephone: (919) 856-9494
Email: jbranch@shanahanmcdougal.com

Local Counsel for Plaintiffs

Joshua A. Windham (N.C. Bar No. 51071)
Renée D. Flaherty (D.C. Bar No. 1011453)*
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321
Email: jwindham@ij.org; rflaherty@ij.org

Attorneys for Plaintiffs
*application for admission *pro hac vice* to be filed