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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Docket No. 2011-ALJ-07-0575-CC
Appellate Case No. 2015-000056

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ..... Respondents,

Of Whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is..... Appellant.

INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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STATEMENT OF ISSUES[1]

Does the Administrative Law Court's ("ALC") application of the Certificate of Need ("CON") Act, South Carolina Health Plan, and project review criteria survive a dormant Commerce Clause challenge, where (a) it does not discriminate against interstate commerce, and (b) it does not impose a burden on interstate commerce?

ARGUMENT

The Commerce Clause expressly grants to Congress the power to "regulate Commerce ... among the several States." U.S. Const., Art. I, § 8, cl. 3. Courts have consistently held that this express grant of power contains negative implications that prohibit unjustified State actions which discriminate against or unduly burden interstate commerce. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). The principle is grounded in the belief that "[t]he mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States" and it prohibits states from "enact[ing] laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." *Granholm v. Heald,* 544 U.S. 460, 472 (2005). However, the dormant Commerce Clause "does not elevate free trade above all other values." *Maine v. Taylor*, 477 U.S. 131, 151 (1986). A State still "retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Id.*

Analysis of a dormant Commerce Clause claim involves two tiers, depending on the type of allegation involved. The first tier applies "where a state law discriminates facially, in its practical effect, or in its purpose" against interstate commerce. *Envtl. Tech. Council v. Sierra Club,* 98 F.3d 774, 785 (4th Cir.1996). Under the first tier review,

[1] The Department takes no position on the remaining issues raised in Appellant's brief.

"'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (internal quotations omitted).

The second tier of dormant Commerce Clause analysis is commonly called the *Pike* test. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The *Pike* analysis requires courts to consider "whether the state laws unjustifiably ... burden the interstate flow of articles of commerce." *Brown v. Hovatter,* 561 F.3d 357, 363 (4th Cir. 2009) (internal quotation marks omitted). In this second tier analysis, the regulatory measure at issue "will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142.

"The burden to show discrimination rests on the party challenging the validity of the statute[.]" *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). The party claiming discrimination has the burden to put on evidence of a discriminatory effect on interstate commerce that is "significantly probative, not merely colorable." *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 40 (1st Cir. 2005) (internal quotation marks omitted). The claimant must demonstrate that the challenged statute, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 335 (4th Cir. 2001).

I. The ALC's Application of the CON Law Does Not Discriminate Against Interstate Commerce.

Under the dormant Commerce Clause, a state law that discriminates against interstate commerce on its face, or in its practical effect or purpose, "is virtually per se invalid," "[u]nless discrimination is demonstrably justified by a factor unrelated to economic protectionism." *McBurney v. Young*, 667 F.3d 454, 468 (4th Cir. 2012) (internal

quotations omitted). A statute discriminates against interstate commerce when it provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472 (internal quotations omitted). A law is not discriminatory when it treats companies exactly the same. *United Haulers Ass'n, Inc.*, 550 U.S. at 342

Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") does not argue that the CON laws are facially discriminatory. Carolinas contends, however, the ALC applied the CON laws to purposefully and effectively discriminate against out-off-state competitors in order to protect an in-state provider of healthcare services.

The purposes of the CON Act are to promote cost containment, prevent unnecessarily duplication of health care facilities and services, guide the establishment of health care facilities and services which will best serve public needs, and ensure that high quality services are provided in health care facilities in the State. S.C. Code Ann. § 44-7-120. To serve these purposes, the CON Act requires a person to obtain a CON from the Department prior to constructing or otherwise establishing a new health care facility. *Id.*; *see also* S.C. Code Ann. § 44-7-160(1). In the case of competing applications, the Department must award a CON, if appropriate, on the basis of which, if any, most fully complies with the requirements, goals, and purposes of the CON Act, the South Carolina Health Plan, and applicable project review criteria. S.C. Code Ann. § 44-7-210(B).

The ALC determined that overall, Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center's ("Piedmont") application more fully complies with the purposes of CON, the South Carolina Health Plan, and project

review criteria. As noted in the Amended Final Order and Decision, the ALC concluded that construction of a 100 bed hospital in Fort Mill utilizing the 64 bed need indicated in the South Carolina Health Plan and redeploying 36 beds from Piedmont's Rock Hill facility, in addition to Piedmont's capacity to expand to 250 beds at its proposed Fort Mill facility in the future, demonstrated "that it would be better positioned to meet the needs of the rapidly growing Fort Mill area" than Carolinas' proposed 64-bed facility, which "would be too small to fully meet the demand." (Amended Final Order and Decision, p. 45). The ALC also concluded Carolinas' "practices in York County limit access for indigent, Medicaid, and even Medicare patients," and Piedmont therefore better met the project review criterion providing that a proposed facility should not restrict admissions. (Amended Final Order and Decision, p. 46). The ALC found the "practices of physicians affiliated with CHS via CPN would limit non-emergency access to" Carolinas' proposed facility and concluded Piedmont's application better met the project review criterion regarding availability of care for indigent residents in the county. (Amended Final Order and Decision, p. 47).

The ALC cited numerous letters from physicians and testimony of three physicians at trial to support its conclusion that "the ability of existing York County healthcare providers to serve residents of the county would be jeopardized by the operation of" Carolinas' proposed project; as such, the ALC concluded Piedmont's project would better functionally balance the distribution of health services to the York County population, another project review criterion. (Amended Final Order and Decision, p. 48). Considering adverse impact, the ALC cited multiple evidence in the record to support its finding that Carolinas' project did not meet the project review criterion requiring consideration of the

project's impact on the current and projected occupancy rates at existing facilities or services. (Amended Final Order and Decision, pp. 48-49). Finally, the ALC concluded Piedmont's project to be better designed for expansion than Carolinas' project, thereby better meeting the project review criterion regarding fostering economies of scale. (Amended Final Order and Decision, p. 50).

Such findings and conclusions by the ALC demonstrate the ALC's application of the CON laws and its purpose in choosing Piedmont's application over Carolinas' application was grounded in multiple non-discriminatory criteria. The ALC's decision therefore withstands scrutiny under the discrimination tier analysis.

II. The ALC's Application of the CON Law Does Not Burden Interstate Commerce.

If there is no discrimination against interstate commerce, courts will examine whether state laws "unjustifiably ... burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93, 98 (1994). If a state law "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

The dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (internal quotations omitted). Thus, a statute does not discriminate against interstate commerce merely because it adversely affects the ability of some out-of-state entities to compete. *Id.* at 133 ("For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power

to engage in economic regulation would be effectively destroyed."). Rather, the test is whether the effect of the statute is to "benefit in-state economic interests by burdening out-of-state competitors." *Kentucky Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (internal quotations omitted).

The dormant Commerce Clause "does not, of course, invalidate all restrictions on commerce." *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 669 (1981). "[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Id.* (internal quotations and citations omitted).

Applying the *Pike* balancing test, any burden on interstate commerce must be weighed against the State's fundamental power to regulate to protect public health, safety, and welfare. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443-44 (1960) ("In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, *** never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.").

The purposes of the CON Act, as noted above, include ensuring that high quality services are provided in health care facilities in the State and guiding the distribution of health care facilities and services to best serve public needs. *See* S.C. Code Ann. § 44-7-120. The standards set forth for establishing new hospitals in the South Carolina Health Plan and the applicable project review criteria are aimed at meeting these purposes. As

discussed above, the ALC applied the CON laws in this matter to achieve the statutory purposes.

The standards and project review criteria apply equally to in-state CON applicants and out-of-state CON applicants. There is no special barrier to out-of-state CON applicants for a new hospital in York County. Any incidental burden on commerce resulting from application of the CON requirements applies equally to resident and nonresident applicants, and therefore does not burden interstate commerce. *See Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013) (Remanding appellant's challenge to Virginia's CON laws to the district court to apply the *Pike* balancing test and instructing that "[t]he fulcrum of this inquiry will be whether the certificate requirement erects a special barrier to market entry by non-domestic entities. As noted, the district court should not confine its focus to the effect on appellants alone, but should instead survey the burden imposed on interstate commerce generally."). *See also Yakima Valley Memorial Hospital v. Washington Department of Health*, 731 F.3d 843 (9th Cir. 2013) (applying the reasoning from *Exxon Corp.* to hold that Washington's Certificate of Need law, imposing non-discriminatory qualifications for approval of a hospital's elective percutaneous coronary interventions (PCI) program, did not burden interstate commerce).

The ALC's application of the CON laws does not have a discriminatory effect on interstate commerce, and any burden on interstate commerce does not outweigh its putative local benefits. It therefore survives scrutiny under the *Pike* balancing test.

CONCLUSION

For the foregoing reasons, the ALC's decision does not violate the dormant Commerce Clause. The Department takes no position on Appellant's remaining issues on appeal.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

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Of Whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is..... Appellant.

PROOF OF SERVICE

I, Glee Henderson, with the South Carolina Department of Health and Environmental Control, do hereby certify that I have on this **2nd day of June, 2015**, served a copy of ***INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL*** upon all parties and counsel of record in the above-captioned case, via Electronic Mail and United States Mail, First Class, postage prepaid, addressed as follows:

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SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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Date: June 2, 2015