THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

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 ..... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 23, 2017.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that Carolinas failed to preserve its dormant Commerce Clause argument for appellate review?

2. Whether the Administrative Law Court violated the dormant Commerce Clause by granting the Certificate of Need to Piedmont for the purpose of protecting an incumbent hospital and reducing the amount of South Carolina patients receiving care out of state?

3. Whether the Court of Appeals erred in denying Carolinas relief from the appeal bond when it is unconstitutional under the South Carolina and United States Constitutions?

STATEMENT OF THE CASE

This case began over twelve years ago, in March 2005, when Petitioner The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas"), Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ("Piedmont"), and a third applicant[1], Presbyterian Healthcare ("Presbyterian"), filed certificate of need ("CON") applications with the South Carolina Department of Health and Environmental Control ("DHEC") pursuant to the 2004-2005 State Health Plan ("2004-2005 Plan" or "State Health Plan") to construct and operate a general acute care hospital in Fort Mill, York County, South Carolina ("Fort Mill CON"). (R. p. 75). Carolinas, a North Carolina-based hospital system, proposed to construct and operate Carolinas Medical Center-Fort Mill, a 64-bed general acute care hospital, consistent with the bed need recognized in the 2004-2005 Plan. (*Id.*) Piedmont initially proposed a 64-bed hospital but later amended its application by seeking to transfer 36 beds from its existing hospital in Rock Hill, Piedmont Medical Center, to its proposed new facility, the

[1] A fourth applicant also applied for a 64-bed hospital but did not file a contested case when its application was denied.

Fort Mill Medical Center, and thereby construct and operate a 100-bed hospital. (R. pp. 75-76). Piedmont's hospital in Rock Hill is the sole hospital in York County. (R. p. 3069).

On May 30, 2006, DHEC denied the Fort Mill CON applications of Carolinas and Presbyterian and issued the CON to Piedmont. (R. p. 76). At the time, Piedmont argued and DHEC agreed that only an existing hospital in a county was entitled to apply for a CON to build a new hospital in the county. (R. pp. 1-28). On June 12, 2006, Carolinas and Presbyterian filed a contested case (the "First Contested Case") to challenge DHEC's decision with the South Carolina Administrative Law Court ("ALC").

In September 2009, Judge Matthews presided over a three week hearing in the First Contested Case. After Carolinas and Presbyterian concluded their cases, Judge Matthews granted their Motions for Summary Judgment on the grounds that DHEC had erroneously adopted Piedmont's legal argument that only Piedmont, as the existing hospital in York County, was eligible to apply for a new hospital in York County. (R. p. 10). As a result, Judge Matthews remanded the Fort Mill CON applications to DHEC for further review consistent with her instructions to determine "which of the applications, if any, most fully complies with the requirements, goals, and purposes of this article and the State Health Plan, Project Review Criteria, and the regulations adopted by [DHEC]." (R. p. 27).[2]

After DHEC regained jurisdiction over the Fort Mill CON matter, it reviewed the updated CON applications submitted on October 4, 2010, by Carolinas, Presbyterian, and Piedmont under the CON Act (S.C. Code Ann. § 44-7-160, *et seq.*), the 2004-2005 Plan, and the applicable Project

[2] Piedmont appealed Judge Matthews' Order, and Carolinas and Presbyterian cross-appealed. The consolidated appeals went first to the South Carolina Court of Appeals, which referred them for disposition to the South Carolina Supreme Court. In a decision dated April 8, 2010, the South Carolina Supreme Court dismissed the appeal and remanded to DHEC because Judge Matthews's Order was not a "final decision" immediately appealable under S.C. Code Ann. § 1-23-610, which limits appellate review to final decisions of the ALC. (R. pp. 29-33).

Review Criteria (S.C. Regs. 61-15 § 802.1, *et seq.*). (R. p. 77). On September 9, 2011, DHEC awarded the CON to Carolinas and denied a CON to Piedmont and Presbyterian. (R. pp. 2173-2185, 3030-3044). DHEC's findings supported the following conclusions: (1) Carolinas most fully complies with the Project Review Criteria; (2) Carolinas best justified the implementation of its project because of its current significant level of market share and utilization in Northern York County; (3) Carolinas' project is financially feasible; and (4) Carolinas' project would increase accessibility and availability of services by shifting its current market share to a facility in South Carolina, resulting in less adverse impact to existing facilities. (*Id.*)

On November 15, 2011, Presbyterian and Piedmont requested a contested case with the ALC to review DHEC's award of the CON to Carolinas (the "Second Contested Case").[3] The Second Contested Case was assigned to Judge S. Phillip Lenski and progressed through a hearing on the merits conducted over fifteen days in March and April of 2013. Approximately a year after the hearing, the ALC issued a Final Order dated March 31, 2014, reversing DHEC's decision, issuing the CON to Piedmont instead, and denying the CON to Carolinas (the "Final Order"). (R. pp. 34-72).

On April 9, 2014, Carolinas filed a Motion to Alter or Amend the Final Order ("Motion to Reconsider"). (R. pp. 227-249). In the Motion to Reconsider, Carolinas argued, among other issues, that the ALC's Final Order violated the dormant Commerce Clause because it ordered DHEC to award the CON to Piedmont to protect Piedmont from competition from an out-of-state hospital system and to reverse outmigration of patients from South Carolina to North Carolina, thereby interfering with and burdening interstate commerce. (*Id.*) In the First Contested Case, Presbyterian and Carolinas argued that an interpretation of the CON Act and State Health Plan that

[3] Presbyterian subsequently withdrew from the Second Contested Case.

excluded out-of-state health care providers violated the dormant Commerce Clause, and Carolinas presented that argument to the ALC at the conclusion of the Second Contested Case by proffer. (App. pp. 387-1498).

On May 2, 2014, the ALC vacated the Final Order. (R. p. 73). Over seven months later, on December 15, 2014, the ALC issued the Amended Final Order, maintaining its previous ruling reversing DHEC's decision, granting the CON to Piedmont, and denying the CON to Carolinas. (R. pp. 125-126). In the Amended Final Order, the ALC expressly ruled upon and rejected Carolinas' as-applied challenge to the ALC's ruling under the dormant Commerce Clause. (R. p. 75). Nevertheless, the ALC maintained that its purpose and rationale for awarding the CON to Piedmont was to protect Piedmont from perceived adverse effects of competition from an out-of-state hospital and to reduce the number of South Carolinians who voluntarily seek healthcare from Carolinas at its North Carolina hospitals. (R. pp. 121-122, 124-125).

On January 14, 2015, Carolinas filed its Notice of Appeal of the Amended Final Order with the South Carolina Court of Appeals. Subsequently, Carolinas filed a cash bond pursuant to S.C. Code Ann. § 44-7-220(B) with the Clerk of the Court of Appeals in the sum of one million five hundred thousand dollars, which is the maximum amount payable under that statute. On March 17, 2015, Carolinas filed a Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of Appeals Process ("Motion for Relief and Petition for Supersedeas"). (App. pp. 1-84). On March 27, 2015, in accordance with the Court's Order of March 19, 2015, Carolinas filed a Supplemental Brief and Amendment of Motion for Relief and Petition for Supersedeas ("Supplemental Brief"). (App. pp. 85-106). In the Motion for Relief and Petition for Supersedeas and Supplemental Brief, Carolinas argued that the bond required by § 44-7-220(B) violated the Equal Protection Clause and separation of powers doctrine and unconstitutionally burdened the

right to judicial review. The Court of Appeals filed an Order on September 8, 2015, denying Carolinas' Motion for Relief and Petition for Supersedeas. (App. pp. 356-361).

Carolinas' appeal challenged the ALC's grant of the CON to Piedmont on the ground, among others, that it violated the dormant Commerce Clause. Piedmont and DHEC opposed Carolinas' as applied dormant Commerce Clause challenge on its merits, but neither party argued that the issue had not been preserved for appeal. As such, no party raised issue preservation in their briefs submitted to the Court of Appeals or included information related to issue preservation in the Record on Appeal.

The Court of Appeals held oral argument on Carolinas' appeal on November 8, 2016.[4] During oral argument, the Court of Appeals, *sua sponte*, questioned for the first time whether Carolinas had preserved its as-applied dormant Commerce Clause challenge on appeal, despite the fact that no party had previously raised issue preservation during the appeal.

On January 11, 2017, the Court of Appeals filed Opinion No. 2017-UP-013 (the "Opinion"), which affirmed the Amended Final Order of the ALC, ordering DHEC to issue a CON to Piedmont. In affirming the ALC's Amended Final Order, the Court of Appeals made three rulings: (1) Carolinas' dormant Commerce Clause argument was not preserved for appellate review; (2) Carolinas' bed transfer provision argument was not preserved for appellate review; and (3) the ALC's Amended Final Order was rationally based on the standards in all of the pertinent Project Review Criteria and was, therefore, not arbitrary and capricious.

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[4] After briefing was completed, the Court of Appeals attempted to refer this appeal to the Supreme Court. In a letter dated April 14, 2016, the Supreme Court declined to certify the appeal as requested by the Court of Appeals. The parties were not provided with a copy of the Court of Appeals' request to the Supreme Court to certify this appeal and only became aware that the Court of Appeals had made such a request when the Supreme Court issued its letter declining to certify the appeal.

On January 26, 2017, Carolinas filed a Petition for Rehearing as to the Court's rulings in the Opinion regarding the preservation of Carolinas' dormant Commerce Clause argument and the application of the arbitrary and capricious standard based on the Court's misapprehension and misapplication of the arguments Carolinas raised, the applicable law, and the Record on Appeal. Also, on January 26, 2017, Carolinas filed a Motion to Supplement the Record on Appeal in support of Carolinas' argument set forth in its Petition for Rehearing relating to the preservation of its dormant Commerce Clause argument. On March 23, 2017, the Court of Appeals denied Carolinas' Petition for Rehearing and Motion to Supplement the Record on Appeal.

The issues before this Court concern the Court of Appeals' rulings in its Order filed September 8, 2015, on Carolinas' request for relief from the bond requirement, and on the Court of Appeals' rulings in the Opinion regarding the dormant Commerce Clause.

STANDARD OF REVIEW

Rule 242 of the South Carolina Appellate Court Rules sets forth certain circumstances which weigh in favor of this Court issuing a writ of certiorari to review a decision of the Court of Appeals. Among those circumstances are novel questions of law, dissent in the decision of the Court of Appeals, conflict with a prior decision of the Supreme Court, the presence of substantial constitutional issues, and where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR; *State v. Lyles*, 381 S.C. 442, 443-44, 673 S.E.2d 811, 812 (2009) (outlining reasons for granting certiorari and standards for this Court to grant the same). Rule 242(b), SCACR, makes clear that the Court is not limited by the stated reasons within the rule as those reasons do not fully measure this Court's discretion or power to grant review of a case.

ARGUMENT

I. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE NOVEL QUESTIONS OF LAW REGARDING WHETHER CAROLINAS PRESERVED ITS CONSTITUTIONAL ARGUMENT THAT THE ALC VIOLATED THE DORMANT COMMERCE CLAUSE IN GRANTING THE CON TO PIEDMONT.

A. The Court should review the decision of the Court of Appeals because its application of issue preservation rules conflicts with the ripeness doctrine.

This case presents the novel question of whether an appellant challenging the constitutionality of the ALC's reversal of an administrative agency licensing decision in a contested case under the Administrative Procedures Act must raise such constitutional issue during the contested case prior to the ALC's final decision in order to preserve the issue for appeal. In the decision below, the Court of Appeals effectively ruled that a party must preserve its ability to appeal the ALC's unconstitutional decision by arguing prior to the final order of the ALC that the ALC's adoption of the opposing party's position would violate the constitution. The ruling by the Court of Appeals has no supporting judicial precedent and conflicts with well-established authority that as applied challenges in the administrative context must be ripe before they can be asserted.

In *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 108-09, 705 S.E.2d 28, 38-39 (2011), the South Carolina Supreme Court clarified that the ALC, as part of the executive branch, cannot pass on the constitutional validity of a statute or regulation but may hear "as applied" constitutional challenges to statutes and regulations. *Travelscape* involved a party challenging the constitutionality of the agency's application of the statute or regulation in question in a contested case before the ALC. *Id* at 96, 705 S.E.2d at 31-32. In that case, the Court made clear that all "preservation and exhaustion of remedies rules apply before the ALC" in cases where the ALC has jurisdiction to hear an as applied constitutional challenge. *Id* at 109, 705 S.E.2d at 39.

Travelscape, however, does not address the issue in this case, which is whether and when an as applied challenge must be raised for issue preservation purposes when the challenge arises from the ALC's decision, rather than the administrative agency's decision. Unlike the appeal in *Travelscape*, Carolinas' appeal does not arise from a contested case involving an as applied challenge to an agency's application of statutes or regulations. Here, Piedmont – not Carolinas – initiated the contested case, and neither party challenged DHEC's granting of the CON to Carolinas as violative of the United States Constitution under the dormant Commerce Clause or otherwise. Because Carolinas obviously supported DHEC's decision, it had no reason or basis to argue that DHEC applied the CON Act and implementing regulations in an unconstitutional manner. Instead, the alleged constitutional violation did not occur until the ALC reversed the underlying agency decision.

Nevertheless, the Court of Appeals' decision below would have required Carolinas to affirmatively present an anticipatory defense to the ALC that "Piedmont's positions on adverse impact and outmigration, if adopted by the ALC, would violate the Dormant Commerce Clause." (App. pp. 362-367). Thus, the rule adopted by the Court of Appeals requires a party defending an agency decision in a contested case to make an as applied challenge to a hypothetical decision of the ALC prior to such decision being ripe for challenge.

The Court of Appeals decision puts the proverbial cart before the horse by requiring a litigant to lodge an anticipatory challenge to an ALC's decision despite the fact that no constitutional issue has been presented to the ALC. In other words, the Court of Appeals requires a prevailing party at the agency level to raise an as applied constitutional challenge before there has been an unconstitutional application of the applicable statute or regulation. This approach conflicts with well-established authority requiring that as applied constitutional challenges be ripe

before they can be asserted. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (recognizing the ripeness doctrine applies to administrative determinations).

Generally, a "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). In the administrative context, the ripeness doctrine is "designed to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies" and to "shield agencies from judicial interaction until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1356 (11th Cir. 2013).

The Court of Appeals' decision below upends the ripeness doctrine by requiring a party to engage the ALC in abstract arguments about the hypothetical application of the statutes and regulations in question despite the fact that that the administrative agency avoided an unconstitutional application thereof. Due to the conflict between the Court of Appeals' application of issue preservation rules and the ripeness doctrine, the Court should review the decision of the lower court.

B. The Court should review the Court of Appeals' Opinion because its application of issue preservation rules conflicts with the Court's well established issue preservation rules.

The Court should also issue a writ of certiorari to review the decision below because the Court of Appeals failed to resolve all doubt regarding whether Carolinas' dormant Commerce Clause argument was preserved in favor of preservation. The ruling is at odds with the principle that any doubts as to whether an appellant has preserved an argument should be resolved in favor of finding the argument preserved, *see State v. Jenkins*, 408 S.C. 560, 568 n.7, 759 S.E.2d 759, 763 n.7 (Ct. App. 2014) (resolving doubt about issue preservation in favor of appellant) (citing *Atl.*

Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012)) (recognizing "it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful"), and the South Carolina Supreme Court's more expansive interpretation of Rule 59, SCRCP. As the Supreme Court stated in *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004):

> [O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. . . . [C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, ... If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review.

Id. at 24-25, 602 S.E.2d at 780-81 (citations omitted).

The Court of Appeals' decision conflicts with the principle articulated in *Elam* that issues and arguments are preserved for appellate review when they are raised to and ruled upon by the trial judge. *Id.* at 23, 602 S.E.2d at 779-80. After Carolinas reasserted its dormant Commerce Clause argument in the Motion to Reconsider, the ALC expressly ruled upon and rejected that argument in the Amended Final Order, thereby preserving the issue for appeal. The liberal application of issue preservation rules found under *Elam* and other cases is even more applicable in this case because Carolinas was <u>defending</u> DHEC's agency decision, which found in favor of Carolinas, and Carolinas' position was such that it was not arguing that DHEC's underlying agency decision was unconstitutional. *See In re Estate Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (providing when a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issues for appeal).

In addition, Carolinas, prior to submitting the Motion to Reconsider, raised objections and arguments relating to its dormant Commerce Clause challenge during the hearing in the Second Contested Case and in its post-hearing proffer.[5] (App. pp. 387-1498). Because no party had argued that the dormant Commerce Clause argument had not been preserved, Carolinas did not include matter in the Record on Appeal evidencing these attempts to raise the issue. After the Court of Appeals ruled, *sua sponte*, that the dormant Commerce Clause issue had not been preserved, Carolinas filed the Petition for Rehearing and Carolinas' Motion to Supplement the Record on Appeal to demonstrate that the issue had been raised at the trial court level.

Rather than consider the supplemental materials, the Court of Appeals refused to permit Carolinas to supplement the record. In so doing, the Court of Appeals ruled that Carolinas had fair notice that the Court of Appeals could enforce error preservation *sua sponte* and should have included materials in the record indicating that the issue had been presented to the trial court. (App. pp. 1504-1506). This ruling of the Court of Appeals cannot be squared with Rule 209(b)-(c), SCACR, which prohibits parties from designating matters to be included in the record on appeal which are not relevant to the appeal. The Court of Appeals' approach unfairly forces parties to guess whether the appellate court will address matters not raised by the parties in the briefs. Accordingly, the Court should resolve the apparent conflict between the Court of Appeals' determination that the record on appeal must contain all material which could be addressed by the

[5] In the Opinion, the Court of Appeals ruled that Carolinas' attempt to preserve the issue was ineffective because the dormant Commerce Clause arguments raised in the proffer were different than those raised in the Motion to Reconsider and on appeal. This ruling was in error because it is inconsistent with federal law governing the manner in which constitutional challenges can be presented and preserved. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (providing once a constitutional claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below); *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) (holding although SCDOT did not phrase its objection in the exact terms used in issues on appeal, it was sufficient to preserve it for appellate review).

appellate courts, *sua sponte*, or whether the record must be limited to only those materials which are relevant to the issues raised on appeal by the parties, as required by Rule 209, SCACR.

Because Carolinas had previously raised the dormant Commerce Clause challenge at the hearing and in its proffer, the ALC had expressly ruled upon that challenge, and federal law does not limit the manner in which constitutional arguments can be raised on appeal once they have been properly presented to the trial court, the Court should grant Carolinas' Petition for Writ of Certiorari to address whether the Court of Appeals wrongfully resolved any doubts against issue preservation.

II. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE NOVEL QUESTIONS OF LAW AND SUBSTANTIAL CONSTITUTIONAL ISSUES REGARDING WHETHER THE ALC VIOLATED THE DORMANT COMMERCE CLAUSE IN GRANTING THE CON TO PIEDMONT.

Carolinas' appeal raises important constitutional issues as to whether the ALC's issuance of the CON to Piedmont violated the dormant Commerce Clause. As argued to the Court of Appeals, the purpose and effect of the ALC decision is to discriminate against interstate commerce in health care by attempting to protect an incumbent provider from out-of-state competition and prevent or reduce patients from traveling to North Carolina to receive health care. Thus, this appeal raises important and complex constitutional issues that need resolution for DHEC and health care providers to address the future health care needs of the state.

The Court of Appeals avoided these questions by incorrectly ruling, *sua sponte*, that Carolinas' dormant Commerce Clause challenge had not been preserved for appeal.[6] Because of the public importance of the constitutional issues raised by Carolinas' appeal, the Court should

[6] It is noteworthy that the Court of Appeals initially attempted to certify this appeal to the Supreme Court.

grant Carolinas' Petition for Writ of Certiorari and resolve these issues for the benefit of DHEC, health care providers, and the public.

III. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE NOVEL QUESTIONS OF LAW AND SUBSTANTIAL CONSTITUTIONAL ISSUES REGARDING WHETHER REQUIRING AN APPEAL BOND FOR A CON APPEAL IS UNCONSTITUTIONAL UNDER THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS.

S.C. Code Ann. § 44-7-220(B) required Carolinas to post a $1.5 million dollar bond to perfect its appeal of the ALC's denial of the CON. In its Motion for Relief and Petition for Supersedeas and in its Supplemental Brief, Carolinas sought relief from the appeal bond because it is unconstitutional under the South Carolina and United States Constitutions.

A. The bond requirement of S.C. Code Ann. § 44-7-220(B) is unconstitutional as a violation of the Equal Protection Clause.

This case presents a novel and substantial constitutional issue regarding whether the appellate bond required pursuant to S.C. Code Ann. § 44-7-220(B) is unconstitutional as a violation of the Equal Protection Clause. In the decision below, the Court of Appeals ruled that there is a rational basis for the statute requiring a forfeiture of the appellate bond to a respondent if the ALC's decision is upheld because this forfeiture requirement is related to a legitimate government interest of compensating a party whose CON had been approved by the ALC and who incurred delay costs as a result of the appeal. This ruling by the Court of Appeals has no supporting judicial precedent and is in conflict with other state and federal courts who have held that similar statutory bond penalties violate the Equal Protection Clauses.

In *Lindsey v. Normet*, 405 U.S. 56, 79 (1971), the United States Supreme Court invalidated an Oregon law that imposed a double bond on tenants bringing an appeal under the state's Forcible Entry and Wrongful Detainer ("FED") statute. Under that statute, a tenant appealing an adverse decision was required to post a bond for twice the amount of rent during the pendency of the

appeal, which was automatically forfeited to the landlord without proof of actual damage. *Id.* at 74-76. The purpose of the double bond requirement was to deter frivolous appeals. *Id.* at 76.

The Supreme Court ruled that the double bond requirement was unconstitutional under the Equal Protection Clause because no other appellant was subject to the automatic assessment of unproved damages:

> The impact on FED appellants is unavoidable: if the lower court decision is affirmed, the entire double bond is forfeited; recovery is not limited to costs incurred by the appellee, rent owed, or damage suffered. No other appellant is subject to automatic assessment of unproved damages. We discern nothing in the special purposes of the FED statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination.

Id. at 78. Thus, the Court held that double bond requirement was discriminatory, arbitrary, and irrational and, therefore, in violation of the Equal Protection Clause. *Id.* at 79.

Relying on *Lindsey*, other courts have declared appeal bonds and penalties to be unconstitutional under the Equal Protection Clause because of their discriminatory effect on unsuccessful appellants. For example, in *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 857 (9th Cir. 1976), the Ninth Circuit Court of Appeals invalidated a double-bond requirement under the federal Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499g(c). Although the court recognized that the statute was intended to deter frivolous appeals, it refused to uphold the requirement, observing that "*Lindsey* expressly held that there is no rational relationship between this admittedly legitimate purpose and a double bond requirement." *O'Day*, 536 F.2d at 860.

In *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 421 (Ky. 2005), the Kentucky Supreme Court ruled that the appeal penalty imposed on money judgment appellants violated the Equal Protection Clause under *Lindsey*. The court held that the penalty was

discriminatory because it only applied to a small number of appellants without advancing the purported state interest of deterring frivolous appeals: "And, because it applies to such a narrow class. . . it violates *Lindsey's* command that an appeal right 'cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.'" *Elk Horn*, 163 S.W.3d at 421 (quoting *Lindsey*, 405 U.S. at 77).

Lindsey and its progeny instruct that the bond requirement under § 44-7-220(B) violates the Equal Protection Clauses of the South Carolina and United States Constitutions. The statute imposes an appeal bond on one narrow class of appellants. Unlike nearly every other appellant, an unsuccessful CON applicant must post a substantial appeal bond to obtain judicial review of a lower decision. And although the appeal bond can be so substantial that it will deter frivolous appeals, it will similarly deter non-frivolous appeals. Moreover, the amount of bond is not rationally tied to any injury suffered by a successful respondent as a result of the appeal because such respondent is automatically awarded the entire amount of the bond regardless of whether it suffered an injury.[7] As a result, the bond requirement is not rationally related to any legitimate state interest, and even if it is, it would nevertheless be unconstitutional because it arbitrarily and irrationally imposes a penalty on unsuccessful CON appellants. Therefore, the Court should review of the Court of Appeals' decision because the bond requirement violates the Equal Protection Clauses and is invalid.

B. The bond requirement of S.C. Code Ann. § 44-7-220(B) is unconstitutional as a violation of the separation of powers doctrine.

This case presents a novel and substantial constitutional issue regarding whether the legislature's enactment of the bond requirement for CON appeals under S.C. Code Ann. § 44-7-

[7] Significantly, no stay arises from Carolinas' appeal of the ALC's decision, and Piedmont is permitted to proceed with construction of the new hospital while this appeal is pending. It is possible that Piedmont could suffer no monetary damage as a result of the appeal and receive a windfall if it is awarded the bond.

220(B) constitutes an unconstitutional violation of the separation of powers doctrine by making rules of the court for the perfection of an appeal from an administrative decision and for an appeal bond, which is the exclusive domain of the judicial branch. In the decision below, the Court of Appeals ruled that the CON appeal bond requirement does not infringe on the constitutional mandate of separation of powers. This ruling has no supporting judicial precedent and is in conflict with other jurisdictions who have declared similar statutory appellate procedures to be constitutionally infirm under the separation of powers doctrine emanating from their respective state constitutions.[8]

The most notable decision voiding a similar bond or penalty requirement is found in *Elk Horn* which is discussed above. *Id.* at 421. In addition to declaring the penalty requirement unconstitutional under the Equal Protection Clauses of the United States and Kentucky Constitutions, the Kentucky Supreme Court also ruled that it violated Kentucky's separation of powers doctrine. *Id.* at 421-24.

In *Elk Horn*, the court noted that the Kentucky Constitution delegates exclusively to the Kentucky Supreme Court the authority to adopt rules of practice and procedure governing the state's courts and that a constitutional violation of separation of powers occurs when the legislature promulgates rules of practice and procedure for the Kentucky courts. *Id.* at 422-23. Recognizing it had established rules to deter frivolous discretionary appeals, the Kentucky Supreme Court found that the penalty imposed on an unsuccessful appellant under the statute involved in that case "deters discretionary review motions – both frivolous and meritorious – and it thereby limits or

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[8] In addition to the cases discussed below, several jurisdictions have recognized that their judiciaries have the inherent authority to promulgate rules of practice and procedure before their courts under the separation of powers doctrine. *See Sands v. Albert Pike Motor Hotel*, 245 Ark. 755, 434 S.W.2d 288 (1968); *Holliman v. State*, 175 Ga. 232, 165 S.E. 11 (1932); *People ex rel. Stamos v. Jones*, 40 Ill. 2d 62, 237 N.E.2d 495 (1968); *Waite v. Burgess*, 69 Nev. 230, 245 P.2d 994 (1952); *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922); *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Crim. App. 1990); *In re Grady*, 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

restricts the Kentucky Supreme Court in exercising its jurisdiction to review cases from lower courts." *Id.* at 424. Accordingly, the *Elk Horn* court held that the statutory appeal penalty invaded the Kentucky Supreme Court's exclusive power to prescribe its own rules for exercising appellate jurisdiction. *Id.*

Similarly, the Illinois Court of Appeals invalidated a statutory method for perfecting an appeal from an administrative decision that conflicted with the Illinois Supreme Court's rules for appellate procedure under the separation of powers doctrine in *Consumers Gas Co. v. Illinois Commerce Com.*, 144 Ill. App. 3d 229, 235-36, 493 N.E.2d 1148, 1151-52 (1986). In that case, a public utility sought appellate review of the Illinois Commerce Commission's administrative decision denying its application for a rate increase. *Id.* at 231, 493 N.E.2d at 1149. The statutory scheme enacted by the legislature for appealing decisions of the commission conflicted with the Illinois Supreme Court's procedure for pursuing direct appellate review. *Id.* at 233, 493 N.E.2d at 1150. In deciding which appellate procedure governed the appeal, the court invoked the separation of powers doctrine to declare "judicial administration" to be one of the judiciary's "inherent powers worthy of protection against legislative encroachment." *Id.* at 236, 493 N.E.2d at 1152. According to the court, the separation of powers doctrine "prohibited [the legislature] from establishing procedures for obtaining an appeal bond from an administrative decision where a supreme court rule is already in place for that purpose." *Id.* at 237, 493 N.E.2d at 1153.

Like the statutes invalidated in *Elk Horn* and *Consumers Gas*, the CON bond requirement violates the separation of powers doctrine by encroaching upon the judicial department's exclusive authority to promulgate rules of appellate practice and procedure. Just as the Kentucky and Illinois Constitutions vest the authority to establish rules and procedure exclusively in their respective supreme courts, the South Carolina Constitution vests the same authority in the South Carolina

Supreme Court. *See* S.C. Const. art. 1, § 8 and art. V, § 4; *see also Rutherford v. Rutherford*, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992) (invalidating a statute that limited the Supreme Court's appellate scope of review in family court cases because the judiciary – not the legislature – has the authority to make rules for the court's practice and procedure). Pursuant to such power, the South Carolina Supreme Court has promulgated rules of procedure for the perfection of an appeal from an administrative decision[9] and for the issuance of an appeal bond to protect a prevailing litigant from injury resulting from the delay of an appeal in appropriate circumstances[10], which are similar to the rules of court adopted by the Kentucky and Illinois Supreme Courts that superseded the statutory procedures in *Elk Horn* and *Consumers Gas*.

The mandatory provisions of § 44-7-220(B) limit the courts' inherent authority to determine the terms and conditions of the bond imposed on a CON appellant. Also, this bond requirement, if not satisfied, conflicts with the existing Supreme Court rules for perfecting an appeal from an administrative decision by depriving the appellate courts' of jurisdiction over CON appeals. Therefore, the Court should grant a writ of certiorari to review whether the CON bond requirement violates of the separation of powers doctrine.

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[9] Rule 203(b)(6), (d)(2), and (e)(2), SCACR, prescribe the method for a party to appeal a CON decision from the ALC. The procedure and manner for perfecting an appeal from the ALC under Rule 203 do not require an appellant to file a bond for the Court of Appeals to exercise jurisdiction over a CON appeal.

[10] The Supreme Court has established the procedure governing appeal bonds in Rule 241, SCACR. Rule 241 provides as a general rule that a notice of appeal automatically stays matters decided in the decision on appeal with certain exceptions, including appeals from an administrative tribunal. Under Rule 241(c), a party may move for a lifting of the automatic stay, or in cases subject to an exception of the automatic stay requirement, move for the imposition of supersedeas, and the appellate court may condition the granting of supersedeas or lifting of the automatic stay upon the filing of a bond as it deems appropriate. Thus, Rule 241(c) grants the appellate courts considerable discretion in determining whether an appeal bond is appropriate and, if so, what the terms, conditions, and amount of such bond should be.

C. *The Bond Requirement of S.C. Code Ann. § 44-7-220(B) unconstitutionally burdens the right to judicial review.*

The bond requirement under S.C. Code Ann. § 44-7-220(B) raises novel and substantial constitutional issues regarding a CON appellant's due process rights. Article I, § 22 of the South Carolina Constitution guarantees a person appealing from an administrative or quasi-administrative agency the right to judicial review without limitation in all instances. Section 44-7-220(B) interferes with that right by requiring a substantial appeal bond as a pre-condition to any judicial review of a CON decision involving a competing applicant by the ALC. The bond requirement, thus, effectively prevents an unsuccessful CON applicant from appealing an adverse decision if it cannot afford the bond or does not want to risk the forfeiture of the bond – regardless of the merits of the prospective appeal. In other words, § 44-7-220(B) deters the exercise of the right to judicial review guaranteed by Article I, § 22 of the South Carolina Constitution. Under § 44-7-220(B), there is no right to judicial review; rather, judicial review is a legislatively created privilege available only to those who are able and willing to purchase it. Therefore, the Court should grant review of the Court of Appeals' decision because the subject bond requirement constitutes an unconstitutional infringement on the right to judicial review guaranteed by Article I, § 22 of the South Carolina Constitution and should be invalidated accordingly. *See Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (declaring constitutionally invalid fees and costs requirements that interfered with access to state judicial system).

CONCLUSION

For the reasons stated, Carolinas respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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April 21, 2017

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

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 ..... Petitioner.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondents in the foregoing matter with a copy of the foregoing ***PETITION FOR WRIT OF CERTIORARI and APPENDIX*** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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