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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

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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.

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**PETITION FOR REHEARING**

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Pursuant to Rules 221(a) and 240, SCACR, Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") files this Petition for Rehearing as to Opinion No. 5568 of the Court filed on June 6, 2018.

## STATEMENT OF THE CASE

Carolinas filed its Notice of Appeal of the Amended Final Order of the Administrative Law Court ("ALC") with this Court on January 14, 2015. On January 11, 2017, the Court filed Opinion No. 2017-UP-013, which affirmed the Amended Final Order of the ALC, ordering Respondent South Carolina Department of Health and Environmental Control ("DHEC") to issue a Certificate of Need ("CON") to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont"). In affirming the ALC's Amended Final Order, the Court made three rulings with respect to the findings made by the ALC: (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.

Carolinas petitioned the South Carolina Supreme Court for writ of certiorari to review the Court's decision in Opinion No. 2017-UP-013. On April 25, 2018, the Supreme Court granted Carolinas' Petition for Writ of Certiorari, reversed the Court of Appeals' finding that the dormant Commerce Clause issue was not preserved for appellate review, and remanded the case to the Court of Appeals to issue a ruling on whether the decision of the ALC violated the dormant Commerce Clause.

On June 6, 2018, the Court issued Opinion No. 5568, affirming the ALC's ruling below and concluding that the ALC's application of the CON Act and Project Review Criteria did not violate the dormant Commerce Clause. Carolinas now moves this Court for a rehearing on the Court's ruling in Opinion No. 5568.

## REHEARING STANDARD

The scope of review for deciding a petition for rehearing is limited to whether the Court "overlooked or misapprehended" a point in reaching its decision. Rule 221, SCACR. Rule 221, SCACR, states: "[a] petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." In order to prevail on a petition for rehearing, a party must demonstrate that the Court overlooked or misapprehended its argument. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) .

## ARGUMENT

### I. The Court failed to analyze the dormant Commerce Clause challenge under strict scrutiny.

In affirming the decision of the ALC, the Court mistakenly employs the incorrect analysis for determining whether the ALC's decision violated the dormant Commerce Clause. As recognized by the Court, a two-tiered analysis is utilized under the dormant Commerce Clause to determine whether state action is impermissibly discriminatory or unduly burdensome on interstate commerce:

> The first tier of analysis is also referred to as "strict scrutiny analysis[.]" *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013) (quoting *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 334 (4th Cir. 2001)). "[A] 'less strict scrutiny' applies under the undue burden tier." *Id.* at 545 (quoting *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005)). "The putative benefits of a challenged law are evaluated under the rational basis test, . . . though 'speculative' benefits will not pass

> muster[.]" *Id.* (quoting *Medigen of Ky., Inc. v. Pub. Serv. Comm'n*, 985 F.2d 164, 167 (4th Cir. 1993)).

*Amisub v. S.C. Dep't of Health & Envtl. Control*, Op. No. 5568, p. 7 (S.C. Ct. App. filed June 6, 2018) (Shearhouse Adv. Sh. No. 24 at 38). Despite recognizing the two-tiered analysis, the Court incorrectly utilizes only the undue burden tier and eschews its obligation to review the ALC's decision with strict scrutiny as required under the discrimination tier.

As the Court states, under the first tier, "a virtually *per se* rule of invalidity," applies when a state law discriminates facially, in its practical effect, or in its purpose. *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). In order for a law to survive such scrutiny, the state must prove that the discriminatory law "is demonstrably justified by a valid factor unrelated to economic protectionism," *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988), and that there are no "nondiscriminatory alternatives adequate to preserve the local interests at stake," *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)). Thus, the first tier, strict scrutiny analysis employs a burden shifting framework.

In its decision, the Court acknowledges that the ALC's application of the CON Act and Project Review Criteria had a discriminatory effect.[1] As a result, it should have

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[1] *See Amisub*, Op. No. 5568 at p. 14 ("We acknowledge that the proper application of these criteria may have the effect of protecting competing providers who already have a presence in the service area, regardless of whether these providers represent in-state or out-of-state interests."); *Id.* at p. 20 ("To the extent that the proper application of these criteria may have a discriminatory effect, Carolinas has failed to carry its burden of 'proving that the burdens placed on interstate commerce outweigh the . . . local benefits' of these criteria. *Colon Health*, 813 F.3d at 157 (quoting *LensCrafters*, 403 F.3d at 805)."); *Id.* at p. 21 ("To the extent that the proper application of the Project Review Criteria may have a discriminatory effect, "[c]ourts are afforded some latitude to determine for themselves the practical impact of a state law, but in doing so they must not cripple the States' 'authority under their general

engaged in the strict scrutiny burden shifting analysis and required Respondents to prove that the CON Act and Project Review Criteria served a legitimate local interest and that there were no nondiscriminatory alternatives available to preserve that interest. Instead, the Court incorrectly maintains the burden on Carolinas to prove that the burdens of the CON Act and Project Review Criteria placed on interstate commerce outweigh their local benefits.[2] By imposing this burden on Carolinas, the Court clearly applies only the rational basis undue burden tier and not the strict scrutiny tier, which is in error.

The Court's failure to conduct the strict scrutiny analysis is demonstrated most clearly by the absence of any discussion relating to whether nondiscriminatory alternatives were available to serve the putative local interests recognized by the Court. In affirming the ALC's rationale, the Court articulates various local interests advanced by the ALC's application of the CON Act and Project Review Criteria, such as reducing patient travel time and continuing provision of specialty services. However, after identifying these local interests, the Court concludes its analysis without assessing whether such interests could be served through other nondiscriminatory measures. And by failing to conduct the final part of the strict scrutiny test, the Court misapplies the dormant Commerce Clause analysis.

Rather than completing the proper strict scrutiny analysis, the Court repeatedly invokes one sentence from the United States Supreme Court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), to conclude that the ALC's application of the CON Act and Project

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police powers to regulate matters of legitimate local concern.'" *Colon Health*, 813 F.3d at 152 (quoting *Taylor*, 477 U.S. at 138).").

[2] *See Amisub*, Op. No. 5568 at p. 20 ("To the extent that the proper application of these criteria may have a discriminatory effect, Carolinas has failed to carry its burden of "'proving that the burdens placed on interstate commerce outweigh' the . . . local benefits" of these criteria. *Colon Health*, 813 F.3d at 157 (quoting *LensCrafters*, 403 F.3d at 805)").

Review Criteria did not violate the dormant Commerce Clause. Specifically, the Court, quoting *Taylor*, states on multiple occasions in its decision that "[a]s long as a State does not needlessly obstruct interstate trade . . ., it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Amisub*, Op. No. 5568 at pp. 6, 14, & 17. According to the Court, the ALC's stated purpose of reducing outmigration of patients from York County into North Carolina and other areas was not violative of the dormant Commerce Clause because it was not "needless". *Amisub*, Op. No. 5568 at p. 17.

The Court's reliance on one statement from *Taylor*, divorced from the other considerations of the Supreme Court, oversimplifies the dormant Commerce Clause analysis. In *Taylor*, the United States Supreme Court ruled that a Maine law prohibiting the importation of live baitfish from other states did not violate the dormant Commerce Clause, but it did so only after conducting the full strict scrutiny analysis and determining that the local purposes of the prohibition "could not adequately be served by available nondiscriminatory alternatives." *Taylor*, 477 U.S. at 151. Significantly, the Supreme Court found the evidentiary record developed at the trial court level "amply" supported this conclusion. *Id.* As such, the Supreme Court deferred to the district court's determination that the State of Maine had proven a lack of nondiscriminatory alternatives.

*Taylor* demonstrates that the dormant Commerce Clause strict scrutiny test requires analysis of whether nondiscriminatory alternatives exist to serve the legitimate local purposes of discriminatory state action. Contrary to the Supreme Court in *Taylor*, though, this Court fails to assess whether other nondiscriminatory alternatives were available to serve the purported legitimate local interests. If it does so, the Court should necessarily

concluded that, based on the record before it, no nondiscriminatory alternatives were available because the ALC refused to identify any such alternatives.[3] And as a result, the Court incorrectly concludes that the ALC's decision did not violate the dormant Commerce Clause.

## II. Carolinas' reply brief did not raise new issues.

The Court also errs by refusing to consider certain arguments made by Carolinas in its reply brief. According to the Court, Carolinas did not raise in its main appellate brief the argument that the there was not sufficient evidence to justify the ALC's purported purpose of maintaining certain healthcare services in York County under the strict scrutiny analysis. Therefore, the Court does not consider this argument. However, the Court misapprehends the nature of Carolinas' arguments made in the reply brief, which were directly in rebuttal to Piedmont's arguments in its initial brief and an elaboration of its larger argument that the ALC did not engage in the proper analysis required under the dormant Commerce Clause.

In its main appellate brief, Carolinas argued that the dormant Commerce Clause requires a two-tiered analysis: (1) the strict scrutiny discrimination test and (2) the rational basis undue burden test. Carolinas further argued in its main appellate brief that the ALC dismissed Carolinas' dormant Commerce Clause challenge in conclusory fashion with a mere footnote without conducting any analysis under the applicable legal standard, i.e. the two-tiered analysis. Because the ALC did not conduct any analysis under the strict scrutiny discrimination test, it did not make any conclusions regarding whether its application of

[3] As explained in more detail in Section II below and in Carolinas' previous appellate briefs, the ALC dismissed Carolinas' dormant Commerce Clause challenge in a one-paragraph footnote, which contained no analysis under the discrimination or undue burden tests.

the CON Act and Project Review Criteria served a legitimate local interest or whether such interest could be adequately served through nondiscriminatory alternatives. As such, Carolinas could not address these elements of the discrimination test beyond noting that the ALC did not conduct the proper analysis.

In its main appellate brief, Piedmont was faced with the ALC's lack of analysis under the discrimination test. As a result, Piedmont attempted to correct the ALC's failure to engage in such analysis by arguing that the ALC's ruling served legitimate state purposes connected to the CON Act as required to survive constitutional muster under the discrimination tier. Piedmont also argued that "those purposes could not be served as well by other available means" and then suggested that it was Carolinas' burden to demonstrate that other nondiscriminatory alternatives existed to serve those purposes, which is incorrect.

Piedmont's main appellate brief identified for the first time the local interests which were supposedly served by the ALC's discriminatory application of the CON Act and Project Review Criteria and argued that Carolinas had not shown that nondiscriminatory alternatives existed. In its reply brief, Carolinas directly rebutted Piedmont's arguments by demonstrating how the ALC's decision did not serve any legitimate local purpose and that the ALC had failed to consider reasonable nondiscriminatory alternatives to its discriminatory application of the CON Act and Project Review Criteria. These arguments in the reply brief, which this Court refuses to consider, are directly responsive to Piedmont's arguments and entirely consistent with Carolinas' previous argument that the ALC failed to conduct the appropriate dormant Commerce Clause analysis.

In applying the rule prohibiting an appellant from raising an argument in a reply brief that presents a new issue, the Court overlooks the fact that Piedmont had raised the issues of legitimate local interest and nondiscriminatory alternatives in its initial brief. Although South Carolina courts have not explained how a "new issue" is determined under this rule, decisions from other jurisdictions show that a new issue does not include rebuttal arguments made in reply to the respondent or arguments elaborating on previously raised issues. *See, e.g., Guadagni v. N.Y.C Transit Auth.*, 387 Fed.App'x. 124, 125-26 (2nd Cir. 2010) ("[R]eply papers may properly address new material issues raised in the opposition papers so as to avoid giving unfair advantage to the answering party.") (quoting *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 226-27 (2nd Cir. 2000)); *Am. Indian Model Sch. v. Oakland Unified Sch. Dist.*, 227 Cal. App. 4th 258, 275-76, 173 Cal. Rptr. 3d 544, 558 (2014) ("An issue is new if it does more than elaborate on issues raised in the opening brief or rebut arguments made by the respondent in respondent's brief."); *Spring v. Wick*, 2014 Ohio 2879, ¶ 13 (Ohio Ct. App. 11th App. Dist. 2014) (providing reply briefs are to be used "to rebut arguments raised in an appellee's brief"); *State v. Tucker*, 145 N.H. 723, 725, 765 A.2d 1058, 1061 (2001) (stating that an argument in rebuttal to a responding brief "is appropriate for a reply brief").[4] The rule as applied in other jurisdictions appears to be consistent with the import of the language used to state the rule in this case, which only prohibits new issues – as distinguished from new arguments – from being raised in a reply brief.

[4] Additionally, courts should be reluctant to disregard separate arguments in support of a single constitutional claim. *See Yee v. Escondido*, 503 U.S. 519, 534-35 (1992) (rejecting contention that new argument in support of a constitutional claim was not preserved because parties are generally permitted to frame constitutional questions as they desire).

Because Carolinas' arguments directly rebut Piedmont's arguments that the ALC's application of the CON Act and Project Review Criteria satisfied the strict scrutiny test as well as elaborate on the argument made in its initial brief that the ALC did not conduct the appropriate dormant Commerce Clause analysis, they do not raise any new issues. As a result, these arguments should be considered by the Court.

## III. The ALC's decision discriminatorily interfered with interstate commerce, regardless of Piedmont's relationship with out-of-state corporate affiliates and Carolinas' in-state business activities.

In affirming the ALC's decision, the Court also misapprehends the import of the ALC's stated purpose of limiting patients who would receive care at Carolinas' hospitals in North Carolina. The Court disregards Carolinas' argument that the ALC discriminatorily sought to limit the number of York County residents who would seek hospital care in North Carolina by stating:

> As to Carolinas' argument that the ALC's application of the community need criteria "seeks to limit out-of-state and out-of-county interests from accessing the local market," we disagree. Carolinas' characterization of Piedmont as an "in-state" or local interest is disingenuous. Both parties own multiple hospitals in multiple states, including South Carolina.

*Amisub*, Op. No. 5568 at p. 19. In so doing, the Court misconstrues the applicable dormant Commerce Clause jurisprudence as well as South Carolina law that generally prevents courts from disregarding corporate entities.

First, Carolinas' existing physician network in York County and small ownership interest in another hospital in Charleston, South Carolina, has little – if any – relevance to the dormant Commerce Clause analysis in this case. Carolinas' business activities in South Carolina do not negate the fact that the stated purpose of the ALC's decision was to reduce the number of patients engaging in interstate commerce by obtaining healthcare in North

Carolina. *See, e.g.*, Am. Final Order, Conclusions of Law ¶ 45 ("This Court concludes that the establishment of FMMC will best serve the needs by reducing outmigration of York County residents to hospitals beyond York County."); (R. p. 124). Put simply, Carolinas desires to expand its business activities in York County, and the ALC restricted Carolinas' ability to do so on the alleged basis that its new hospital would potentially result in more York County patients being referred to North Carolina hospitals. This is *per se* discriminatory, and Carolinas' existing business activities in South Carolina do not alter that conclusion.

The Eleventh Circuit Court of Appeals decision in *Florida Transp. Servs. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012), illustrates this point aptly. In that case, Florida Transportation Services ("FTS"), a stevedoring firm, challenged Miami-Dade County's stevedoring licensing ordinance under the dormant Commerce Clause. The county argued that FTS lacked standing under the dormant Commerce Clause because FTS was a resident of Florida and performed stevedoring services in a neighboring county. The Eleventh Circuit rejected this argument, declaring that FTS's residency in Florida did not preclude it from making a dormant Commerce Clause challenge because "the courts have reached the merits of numerous dormant Commerce Clause cases involving in-state parties, and an entire body of dormant Commerce Clause jurisprudence reflects the disposition of such cases on the merits." *Id.* at 1256 (citations omitted). In addition, the *Florida Transp. Servs.* court recognized that "the dormant Commerce Clause may bar municipal laws that protect local economic interests and squelch outside competition, even where in-state and out-of-state companies are affected." *Id.* (citations omitted). Yet despite citing *Florida Transp. Servs.* in its opinion, the Court mistakenly relied on Carolinas' business activities

in South Carolina to justify as nondiscriminatory the ALC's attempt to restrict the flow of patients in interstate commerce.

Second, in its attempt to minimize the discriminatory nature of the ALC's decision, the Court disregards Piedmont's corporate form in disregard of South Carolina law. Under applicable law, a corporation is an entity that is separate and distinct from its officers and stockholders, and courts should be reluctant to disregard the integrity of the corporate entity. *Hunting v. Elders*, 359 S.C. 217, 223-24, 597 S.E.2d 803, 806 (Ct. App. 2004). Nevertheless, the Court disregards these principles and considers Piedmont's relationship with its parent corporation and affiliated hospitals in other states to reject Piedmont's status as an in-state or local interest.

According to the Court, the fact that Piedmont is a subsidiary of an out-of-state company, which owns hospitals in other states, renders Carolinas' argument that Piedmont is an "in-state" or local interest as disingenuous. However, the Court overlooks that it was Piedmont – not Carolinas – which utilized a litigation strategy of depicting Piedmont as the local provider under siege from Carolinas, which Piedmont's attorney referred to as a "big, rich, powerful, aggressive hospital system right over the state line." (R. p. 295). According to Piedmont, Carolinas "has been taking patients, paying patients out of the Fort Mill area over into North Carolina and providing them, steering them for hospital services." (R. p. 296). Thus, Piedmont focused on its presence in York County and Carolinas' status as a North Carolina provider to convince the ALC to award the CON to Piedmont. The ALC obviously adopted Piedmont's arguments by expressly seeking to keep York County patients in-state at Piedmont and out of North Carolina. *See, e.g.,* Final Order, Conclusions of Law ¶ 43 ("This Court concludes that the establishment of FMMC will best serve the

needs by reducing outmigration of York County residents **to North Carolina hospital**.") (emphasis added); (R. p. 71). Therefore, Carolinas' argument that Piedmont is an in-state or local interest is legally correct and accurately reflects Piedmont's and the ALC's characterization of Piedmont as a local provider needing protection from competition from an out-of-state healthcare system.

## CONCLUSION

For the aforementioned reasons, Carolinas requests that the Court order a rehearing as prayed above, reverse the Court's decision in Opinion No. 5568 filed on June 6, 2018, and reverse the ALC's Amended Final Order.

Respectfully submitted,



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June 21, 2018

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS



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
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South Carolina Department of Health and Environmental Control
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Medical Center-Fort Mill ..... Respondents,

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

## PROOF OF SERVICE

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of the foregoing ***Petition for Rehearing*** by U.S. Mail, addressed as follows:

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June 21, 2018
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June 21, 2018

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

**Re:** ***Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center v. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill***
**Appellate Case No. 2015-000056**
**Lower Court Docket No. 11-ALJ-07-0575-CC**
**MVA File No. 040057.000003**

Dear Ms. Kitchings:

I have enclosed for filing an original and seven (7) copies of Appellant's Petition for Rehearing and Proof of Service in the above-referenced matter, along with our firm check no. 35042 in the amount of $25.00 for the requisite filing fee.

Please file the original and return a date-stamped copy of each to me via the bearer of this letter.

Thank you for your assistance in this matter.

Sincerely,

MOORE & VAN ALLEN, PLLC

E. Brandon Gaskins

EBG/meh
Enclosures: as stated.



cc: Daniel J. Westbrook, Esquire (*w/enclosures*)
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