THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Phillip S. 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 .....Appellant.

RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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I. INTRODUCTION

Respondent South Carolina Department of Health and Environmental Control ("Department") submits this Return to the Petition for Rehearing filed by Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Carolinas"). Carolinas seeks review of the Court of Appeals' Opinion No. 5568, filed June 6, 2018, finding no dormant Commerce Clause violation and affirming the Amended Final Order of the Administrative Law Court ("ALC"). Carolinas did not challenge the law itself, only the ALC's application of the law to the facts. The Court of Appeals properly found the ALC applied the law correctly and without a discriminatory purpose. The Court of Appeals applied the appropriate test in its dormant Commerce Clause analysis based on its finding of no discrimination. Carolinas' Petition for Rehearing should be denied.

II. ARGUMENTS

A. The Court appropriately analyzed the dormant Commerce Clause challenge.

After reciting a concise primer on the dormant Commerce Clause, the Court of Appeals correctly applied the two-tiered analysis to Carolinas' challenge. Carolinas confuses this Court's answer to the first question of the analysis – i.e., did the ALC's application of the Certificate of Need ("CON") Act, Health Plan, and project review criteria "discriminate[] facially, in its practical effect, or in its purposes" against interstate commerce. *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996). In correctly answering that question, the Court found in the negative.

Specifically, the Court found the ALC's application of the CON Act and project review criteria was "proper," "thoughtful and correct," and "without any discriminatory purpose." *See Amisub*, Op. No. 5568 at pp. 5, 14, 20, and 21. Further, the Court "disagree[d]" with Carolinas'

argument that the ALC's application of the Need criteria (2(a), 2(b), 2(C), and 2(e)) discriminates against interstate commerce. *Id.* at p. 19. Carolinas erroneously relies upon the Court's heavily *qualified* discussion of the potential effects that proper application of the project review criteria *may* have on interstate commerce.[1]

In correctly concluding the ALC's application of the CON Act, Health Plan, and project review criteria did not discriminate facially, in its practical effect, or in its purposes, the Court appropriately moved to the second tier of the dormant Commerce Clause analysis – i.e., whether the ALC's application "unjustifiably . . . burden[s] 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). Under this tier, where application of a 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 v. Bruce Church*, 397 U.S. 137, 142 (1970). Further, "[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 citizen." *Main v. Taylor*, 477 U.S. 131, 151 (1986).

The Court correctly found that any potential incidental effects of the ALC's evenhanded application of applicable law was not "clearly excessive in relation to the putative local benefits." *See Pike*, 397 at 142. In pointing out the various putative local benefits, the Court recognized the ALC's identification of the various purposes and goals of the CON Act, Health Plan, and project review criteria as they related to the competing applications, which included:

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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***.") (emphasis added); *Id.* at p. 20 ("***To the extent that the proper application*** of these criteria ***may have a discriminatory effect*** . . . .") (emphasis added); and *id.* at p. 21 ("***To the extent that the proper application*** of the Project Review Criteria ***may have a discriminatory effect*** . . . .") (emphasis added).

"balancing the distribution of health system resources"; taking account of "the needs of citizens in the western part of York County"; "'guid[ing] the establishment of health facilities and services [that] will best serve public needs"; "promot[ing] cost containment"; considering "patient travel time, which obviously can affect health outcomes in an emergency"; "reducing the volume necessary for Piedmont's continued provision of its specialty services"; determining "Piedmont's proposed facility was better designed for expansion"; and, in sum, "looking at the big picture for all of York County, i.e., how to preserve the quality of care and the larger complement of services Piedmont's existing facility provides to York County residents who do not live in the more affluent northern part of the county." *Amisub*, Op. No. 5568 at pp. 13, 14, 17, 18, 20 and 21. Accordingly, the Court's analysis was consistent with the dormant Commerce Clause jurisprudence.

B. The untimely raised issues were disposed of by the Court.

In a footnote, the Court identifies arguments raised by Carolinas for the first time in its reply brief. While it is established that "an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief," *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001), the Court considered these untimely arguments anyways. In doing so, the Court rejected the arguments as "unfounded" and cited testimony in the record that demonstrate Carolinas' project would reduce Piedmont's marketshare, thereby reducing the volume necessary for continued provision of specialty services.

C. The Court's consideration of the parties' in-state and out-of-state interests was proper and in accordance with the established dormant Commerce Clause analysis.

The Court remarks that Carolinas' characterization of Piedmont as an in-state interest was disingenuous and acknowledges both parties own hospitals in multiple states, including South

Carolina. *Amisub*, Op. No. 5568 at p. 19. Carolinas argues its existing physician network in York County and its ownership in a hospital in Charleston have little to no relevance to the dormant Commerce Clause analysis. Further, Carolinas complains that the Court disregarded the parties' corporate forms in violation of South Carolina law. The Court's consideration of the involved parties' interests was entirely appropriate.

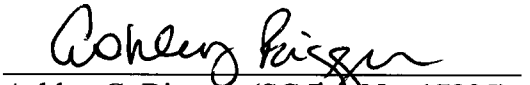
Carolinas' as-applied challenge to the ALC's application of CON Act, Health Plan, and project review criteria necessarily involves a review of the parties' interests. In the end, the Court determined the ALC's application of the applicable law was even-handed and proper. The ALC applied the CON Act, Health Plan, and project review criteria equally to Piedmont and Carolinas, regardless of the parties' localities. There was no special barrier to out-of-state CON applicants. Ultimately, the ALC denied Carolinas' CON application and approved Piedmont's based upon Piedmont more fully complying with the CON Act, Health Plan, and project review criteria.

III. CONCLUSION

The Court of Appeals correctly found no discrimination and no dormant Commerce Clause violation. The Department respectfully requests the Court deny the Petition for Rehearing.

(SIGNATURE PAGE TO FOLLOW)

Respectfully submitted,



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August 6, 2018
Columbia, South Carolina

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IN THE SUPREME COURT

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

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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 certify that I have, on this 6th day of August 2018, served the Respondent South Carolina Department of Health and Environmental Control's Return to Appellant's Petition for Rehearing on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid and addressed as follows:

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August 6, 2018
Columbia, South Carolina

dhec
Healthy People. Healthy Communities.

August 6, 2018

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

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OGC# 21301.1

Dear Ms. Kitchings:

In connection with the above-referenced matter, please find enclosed the original and seven (7) copies of the **Respondent South Carolina Department of Health and Environmental Control's Return to Petition for Rehearing** and **Proof of Service**. By copy of this letter, we are hereby serving counsel of record with a copy of the enclosed.

With kindest regards, I am

Very truly yours,

Rita D. DeCarlis

Rita D. DeCarlis

/rdd
Enclosures
cc: Douglas M. Muller, Esquire
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