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. 2018-001701
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.

RESPONDENT AMISUB OF SOUTH CAROLINA, INC.'S RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ("Piedmont") submits this Return to the Petition for Writ of Certiorari filed by the Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Carolinas" or "CHS").

INTRODUCTION

Residents of York County have waited over thirteen years for a new hospital, ever since the 2004-05 South Carolina Health Plan identified a need for additional hospital beds in the county. During these thirteen-plus years, York County residents have waited through two agency reviews, two Administrative Law Court ("ALC") trials, and now two certiorari petitions filed by Carolinas, but there is still no new hospital.

Carolinas' appeal does not challenge the law and does not challenge the facts. It challenges only the ALC's application of the law to the ALC's own factual findings, which are uncontested. Carolinas' argument rests on its mischaracterization of the ALC's purpose, which was not to protect a local hospital's economic interests from out-of-state competition but to protect the *public* – especially the medically underserved – by preserving local access to specialized, high-quality hospital and medical services. The ALC's purpose is evident from its unchallenged findings of fact and is consistent with the express purposes of the unchallenged State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110, et seq. (the "CON Act").

Carolinas' argument rests also on its misunderstanding of constitutional law. While the Dormant Commerce Clause is, generally speaking, an important area of law, there is nothing novel or substantial about the limited, as-applied challenge Carolinas has raised. The Court of Appeals correctly found that the ALC's application of South Carolina CON law was consistent

with that law's requirements, purposes, and intended effects. App. at 1583-84. The Court of Appeals then correctly found that the ALC applied South Carolina law without the purpose or effect of discriminating against interstate commerce. App. at 1593, 1599, 1600. Finally, the Court of Appeals correctly found that the ALC's application of state law did not unduly burden interstate commerce, applying the undue burden test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). App. at 1594, 1599, 1600.

For all these reasons, set forth more fully below, this Court should deny certiorari, affirm the Court of Appeals' decision, and end York County's nearly fourteen-year wait for a new hospital.

QUESTIONS PRESENTED

I. Should the Court grant certiorari in this as-applied challenge when the ALC applied uncontested state law as it is written, in light of uncontested findings of fact, and in a manner consistent with the law's purposes and intended effects?

II. Should this Court grant certiorari on this Dormant Commerce Clause claim, when the ALC ruling affects interstate commerce to no greater degree than it affects intrastate commerce, and therefore is, under settled law, not discriminatory?

III. Should this Court grant certiorari when the ALC ruling serves the purposes of the CON Act better than they could be served by any other available means?

IV. Should this Court grant certiorari when any incidental effect the ALC ruling has on interstate commerce is outweighed by the putative local benefits?

STATEMENT OF THE CASE

The 2004-05 South Carolina Health Plan (the "State Health Plan" or "Plan") identified a need for 64 additional acute care hospital beds in York County. In 2005, the South Carolina Department of Health and Environmental Control ("DHEC") received four competing applications for a Certificate of Need ("CON") to build a hospital in or near the town of Fort Mill. The four applicants were Piedmont, Carolinas, Presbyterian Healthcare System ("Presbyterian"), and Hospital Partners of America, Inc. ("HPA"). Carolinas, Presbyterian, and

HPA each filed competing applications to build a 64-bed hospital, while Piedmont filed an application for a hospital of 100 beds, to be called Fort Mill Medical Center ("FMMC").[1] In 2006, DHEC approved Piedmont's application and denied the others. Carolinas and Presbyterian filed separate contested case actions in the South Carolina Administrative Law Court ("ALC"), which were later consolidated.

A final hearing was held before the Honorable Carolyn C. Matthews from September 9 to September 25, 2009. On December 9, 2009, Judge Matthews issued an Order ruling that DHEC had erroneously interpreted the Plan to allow only existing providers to obtain a CON. R. at 26-27. Judge Matthews remanded the matter to DHEC to determine which, if any, of the applicants were entitled to the CON. R. at 27.

On September 9, 2011, following a second administrative review, DHEC issued a staff decision approving Carolinas' application and denying the applications of Piedmont and Presbyterian, both of whom sought DHEC Board review. After the Board declined review, Piedmont and Presbyterian filed contested case actions in the ALC. The cases were consolidated after being assigned to the Honorable S. Phillip Lenski. During the course of litigation, Presbyterian withdrew from the case. Judge Lenski presided over a final hearing with the remaining parties from April 8 to May 7, 2013. R. at 74.

On March 31, 2014, the ALC issued a Final Order awarding the CON to Piedmont, but it vacated the order on May 2, 2014. R. at 34, 73. On December 15, 2014, the ALC issued an Amended Final Order, again approving Piedmont's application and denying Carolinas'. R. at 74.

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[1] Piedmont Medical Center, located in Rock Hill, is the only acute care hospital in York County. It is not a legal entity, but a "d/b/a" of Amisub of South Carolina, Inc. FMMC would not be a separate legal entity, but simply another Amisub "d/b/a." R. at 361, lines 10-23. Piedmont's application proposed to transfer 36 of its existing beds to FMMC, in addition to applying for the 64 new beds authorized by the Plan, giving FMMC a total of 100 beds.

On January 14, 2015, Carolinas filed a Notice of Appeal. On April 15, 2015, the South Carolina Supreme Court declined to certify the appeal for review. On January 11, 2017, the Court of Appeals issued a Per Curiam Order denying the appeal on grounds that Carolinas had failed to preserve its Dormant Commerce Clause argument, but not addressing the merits of the claim. App. at 362.

In April 2017, Carolinas filed its first Petition for Writ of Certiorari with the South Carolina Supreme Court. App. at 1507. In April 2018, this Court reversed the Court of Appeals' decision and remanded for a ruling on the merits of the Dormant Commerce Clause claim. App. at 1529. On June 6, 2018, the Court of Appeals issued an opinion affirming the ALC decision. App. at 1601. On August 22, 2018, the Court of Appeals withdrew its June 6 opinion and issued a new one, again affirming the ALC and finding no violation by the ALC of the Dormant Commerce Clause. App. at 1580.

ARGUMENT

I. The ALC Applied Uncontested State Law as it is Written, in Light of Uncontested Findings of Fact, Consistent with the Purposes and Intended Effects of the CON Act.

A. South Carolina CON Law

The CON Act requires a person or health care facility to obtain a CON before undertaking the construction or establishment of a new health care facility, including a hospital. S.C. Code Ann. §§ 44-7-130(10) & 160(1). The purposes of the CON Act are to: (a) promote cost containment; (b) prevent unnecessary duplication of health care facilities and services; (c) guide the establishment of health facilities and services which will best serve public needs; and (d) ensure that high quality services are provided in health facilities in this State. S.C. Code Ann. § 44-7-120.

The CON Act authorizes DHEC to administer the CON program in South Carolina, and requires DHEC to publish, at least every other year, a State Health Plan. S.C. Code Ann. §§ 44-7-140 & 180(A), (B). DHEC regulations set forth project review criteria applicable to CON applications. S.C. Code Ann. Reg. 61-15 § 802. In the case of competing applications, DHEC may award the CON only to the applicant that most fully complies with the requirements, goals, and purposes of the CON Act, the State Health Plan, and regulatory criteria. S.C. Code Ann. § 44-7-210(B).

The principle of adverse impact runs throughout the CON Act, the State Health Plan, and the regulatory criteria. The CON Act requires DHEC to include in each State Health Plan a finding as to whether the "benefits of improved accessibility" created by proposed facilities or services "outweigh the adverse effects caused by the duplication of any existing facility" or service. S.C. Code Ann. § 44-7-180(B)(4). The 2004-2005 South Carolina Health Plan made such a finding, noting that "the benefits of improved accessibility will be equally weighted with the adverse effects of duplication in evaluating Certificate of Need applications for [acute care hospital] beds." 2004-05 State Health Plan at II-9.

In addition to the State Health Plan, the regulatory criteria also reflect the emphasis the General Assembly and DHEC Board have placed on the need to thoroughly assess the potential adverse impact of new projects. App. at 1589-94.

The emphasis on adverse impact is consistent with the purposes of the CON Act and the basic principles of health planning. Piedmont's expert health planner, Daniel J. Sullivan, testified at trial that "the two key factors in any health planning decision are what's the benefit that's going to derive to the community and what's the negative impact on ***existing services in the community*** that would result from approving it." R. at 1154 (Tr. at 1213:16-1214:7)

(emphasis added). The principle behind the health planning concept of adverse impact is not, therefore, primarily protection of local providers, but protection of the local health care system and the public.

Mr. Sullivan testified that approval of Carolinas' proposed hospital in Fort Mill, Carolinas Medical Center-Fort Mill ("CMC-FM"), would be detrimental to Piedmont, but, more importantly, it would be "detrimental to the quality and availability of healthcare services to York County residents." R. at 1145 (Tr. at 1180:3-6). Judge Lenski agreed:

> One of the principal differences between the applicants is that the approval of CMC-FM would have the effect of causing the erosion of quality of care at Piedmont and among specialists practicing there as a result of the diminution in the volume of patients and the degradation of the payor mix of the patients who would continue to be seen at Piedmont. Consequently, there would be no hospital in York County providing many of the high quality and tertiary services that Piedmont has added. Alternatively, the establishment of FMMC will ensure that high quality services continue to be provided and added within York County.

R. at 125, Conclusion of Law ("CL") 47; *see* R. at 1151 (Tr. at 1201:14-1212:6) (testimony of Mr. Sullivan).

B. <u>The ALC Applied State Law as it is Written.</u>

The ALC approved Piedmont's application and denied Carolinas' following a de novo trial[2] and after concluding that Piedmont more fully complied with the requirements, goals, and purposes of the CON Act, State Health Plan, and regulatory criteria. *See* S.C. Code Ann. § 44-7-210(B). Carolinas does not contend that the CON Act, State Health Plan, or regulatory criteria, as they are written, violate the Dormant Commerce Clause. It contends that the ALC

[2] When presiding over a contested case, the ALC reviews factual issues de novo. *Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573, 577, 579, 595 S.E.2d 857, 853, 854 (Ct. App. 2004).

violated the Dormant Commerce Clause by misapplying state law, particularly the regulatory criteria.

The ALC concluded that Piedmont satisfied ten criteria better than Carolinas. R. at 117-124. The Court of Appeals analyzed in detail the ALC's conclusions that Piedmont better satisfied Criteria 16(c), 22, 23(a), 2(a), 2(b), 2(c), 2(e), and 17. App. at 1589-1600.[3] The Court of Appeals' opinion then demonstrated how the ALC based its conclusions on the express language of each criterion, considered in light of the ALC's own uncontested findings of fact. *Id.*

C. Unchallenged Findings of Fact Support the ALC Decision.

Factual findings by the ALC must be upheld if supported by substantial evidence. *Marlboro Park*, 358 S.C. at 577, 595 S.E.2d at 853. Carolinas does not contend that the ALC's factual findings are not supported by substantial evidence. As a result, the ALC's Findings of Fact are the law of the case. *Dreher v. S.C. Dep't of Health and Envtl. Control*, 399 S.C. 259, 262-63, 730 S.E.2d 922, 924 (Ct. App. 2012), *aff'd as modified*, 412 S.C. 244, 772, S.E.2d 505 (2015); *Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct. App. 1987) ("Where no exception is taken to findings of fact or conclusions of law, they become the 'law of the case'").

As noted above, the Court of Appeals' opinion provides a detailed analysis of the ALC's evaluation of the level of compliance of each competing application with several criteria at issue. In this analysis, the Court of Appeals repeatedly underscores how the ALC's factual

[3] The Court of Appeals did not discuss Criteria 3(d) or 3(f), which the ALC also determined that Piedmont better satisfied. It is worth noting, however, that the ALC concluded Piedmont better met Criteria 3(d) and 3(f) based on factual findings that Carolinas and its physicians restricted the treatment of Medicaid and indigent patients. R. at 105-110, 119-120.

findings support its conclusions. *See, e.g.*, App. at 1591 (approval of Carolinas would result in loss of specialized services in York County); at 1592, 1593 n.7 and accompanying text (Piedmont's proposed hospital would provide greater accessibility, especially to the medically underserved); at 1596 (approval of Carolinas would erode quality of care in the county).

D. The ALC Applied South Carolina CON Law in a Manner Consistent with the Purposes and Intended Effects of the CON Act.

Among the ALC's unchallenged Findings of Fact are these:

1. "In addition to standard community hospital services, Piedmont ... provides specialized services not usually offered by a hospital of its size, including open heart surgery, specialized women's and pediatric services, neurosurgery, behavioral health, and others." R. at 78, Findings of Fact ("FF") 1.

2. The proposed CMC-FM would be a "smaller acute care hospital that will service a different acuity level of patients than Piedmont's larger, tertiary hospital." R. at 80, FF 9. Carolinas-employed physicians would refer patients needing specialized services to Carolinas-owned facilities outside of York County. R. at 96, FF 49-50.

3. If CMC-FM were approved, "outmigration of complex specialty services would not only continue, but also would likely accelerate ... Piedmont's specialty programs, which require certain minimum volume levels to maintain quality, and proficiency, as well as economic viability, would be jeopardized." R. at 96, FF 50.

4. "To maintain services to medically underserved groups and to sustain profitability, a hospital must have a strong base of managed care and commercial patients ... The construction of CMC-FM would further erode Piedmont's payor mix ... jeopardizing [its] ability to care for medically underserved individuals and maintain their current level of services..." R. at 97, FF 52-53.

5. As a result of payor mix erosion from approval of CMC-FM, "the quality of care at Piedmont would suffer and the ability to recruit new physicians would be impaired." R. at 98, FF 56.

6. CMC-FM's admissions of medically underserved patients would be restricted due to practices of Carolinas' primary care gatekeepers. R. at 110, FF 99.

7. Lower patient utilization would increase Piedmont's costs. R. at 99, FF 58.

The ALC's purposes and intended effect of its ruling are consistent with the purposes of the CON Act, in particular:

1. Guiding the establishment of health facilities and services which will best service ***public needs***;

2. Ensuring that ***high-quality*** services are provided in health facilities in this State; and

3. Promoting cost containment.

See S.C. Code Ann. § 44-7-120 (emphasis added).

As the Court of Appeals emphasized, the ALC was motivated primarily by the CON Act's concerns of public need and quality of care:

> While Carolinas would have the court believe the ALC was simply looking out for Piedmont's bottom line, the ALC was 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's residents who do not live in the more affluent northern part of the county. These objections are consistent with the Project Review Criteria, which Carolinas has not challenged, and serve as an additional justification for the goal of reducing outmigration.

App. at 1598; s*ee* R. at 124-25, CL 46 (ALC concludes that Piedmont's proposal would better serve public needs and maintain quality of care). The ALC's purpose and intended effect was not to protect Piedmont from competition, but to protect public access to high-quality local services.

II. The ALC's Application of South Carolina CON Law Did Not Discriminate Against Interstate Commerce.

A. Overview of the Discrimination and Undue Burden Tests

Courts apply a two-tiered analysis of dormant Commerce Clause claims. *Yamaha Motor Corp. v. Jim's Motorcycles, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005). The first tier focuses on

discrimination. *Id.* The Supreme Court has specifically defined "discrimination" for the purposes of Dormant Commerce Clause analysis: "'Discrimination' simply means the differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535, 542-43 (4th Cir. 2013) ("*Hazel I*") (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). "In conducting the discrimination inquiry, a court should focus on discrimination against ***interstate commerce*** – not merely discrimination against the specific parties before it." *Hazel I*, 733 F.3d at 543 (emphasis in original), *citing Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978). A statute may discriminate facially, in its practical effect, or in its purpose. *Hazel I*, 733 F.3d at 543. In order to prove discriminatory effect, a plaintiff must demonstrate that the challenged law "would negatively impact interstate commerce to a greater degree than intrastate commerce." *Id.* Discriminatory laws that amount to "simple economic protectionism" are subject to "a virtually *per se* rule of invalidity." *Yamaha* at 567. Discriminatory laws will be upheld, however, when the state demonstrates "both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Id.* (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)).

The second analytical tier focuses on undue burden. *Yamaha*, 401 F.3d at 567. A deferential, "rational basis" review applies. *Id.* at 569; *Colon Health Centers of America, LLC v. Hazel, 2014 WL 5430973* at *5 (E.D. Va. 2014). The undue burden test is set forth in *Pike v. Bruce Church, Inc.*: "Where the statute regulates even-handedly 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." 397 U.S. 137, 142 (1970). "If a legitimate local purpose is found, then the question becomes one of degree," which "will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

The Supreme Court has cautioned that the Dormant Commerce Clause inquiry should be undertaken by "eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994). Both the discrimination and undue burden tests are "fact-based." *Hazel I*, 733 F.3d at 546.

B. Under Both Tests, Courts Give Deference to State Laws Involving Matters of Health and Safety.

The Court of Appeals correctly noted that, under the discrimination test, courts give a degree of deference to state laws involving matters of public health and safety. App. at 1586 and cases cited therein. This is not a novel issue, but settled law. *Maine v. Taylor*, 477 U.S. at 151 (in applying the discrimination test, "[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"). *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978) (in applying the undue burden test, "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people"); *Yakima Valley Mem. Hosp. v. Washington State Dep't of Health*, 2012 WL 2720874 at *3-*4 (E.D. Wash. 2014) ("when evaluating state health and safety regulations, courts 'must give deference to the State's choice to protect its citizens in [a certain] way' when evaluating the putative local benefits of the law") (quoting *Nat'l Ass'n of Optometrists and Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009)).

C. The Court of Appeals Correctly Concluded that the ALC's Application of State Law Did Not Erect any Special Barriers to Market Entry.

The State Health Plan specifically required the ALC to weigh CMC-FM's adverse effects relating to duplication of services against any benefits it would bring of increased access. 2004-05 S.C. Health Plan at II-9. The ALC found, however, that CMC-FM would decrease, not increase, access to certain important medical services for residents of York County, particularly those in rural and underserved communities. R. at 96-99, FF 47-60; R. at 110, FF 99. Regulatory Criteria 16(c), 22, and 23(a) specifically required the ALC to consider CMC-FM's impact on cost, the distribution of medical services, and patient volume. The ALC found that CMC-FM's impact on all these areas would be adverse and significant. R. at 121-22, CL 32-36. The ALC applied the state law as it is written and courts give greater deference to states in the regulation of health and medical services. *See Yakima*, 2012 WL at *3-*4.

In analyzing whether the ALC's application of state CON law discriminates against interstate commerce, the "fulcrum" of the inquiry should be whether the ALC's Order "erects a special barrier to market entry by non-domestic entities." *Hazel I*, 733 F.3d at 546. The relevant focus is not on Carolinas or any particular CON applicant, but on "interstate commerce" generally. *Id.* at 543, *citing Exxon Corp.*, 437 U.S. at 127 (1978).

The ALC's order erects no special barriers to entry in the York County market. Carolinas could have been awarded the CON if it had convinced the ALC it would: (a) provide specialty, tertiary services at CMC-FM; (b) ensure that Piedmont would be able to continue to provide those specialty services; or perhaps even (c) agree to enter into a contract with the county similar to Piedmont's. *See* R. at 82-83, FF 12-14 (describing Piedmont's "impressive," long-term contract with York County, under which York County citizens derive

"innumerable benefits"). Carolinas made no effort, however, to convince the court of (a) or (c). As for (b), Carolinas attempted to convince the ALC that CMC-FM would cause no impact on Piedmont because it would serve only patients Carolinas shifted to CMC-FM from other Carolinas facilities. R. at 87, FF 28. The ALC's unchallenged factual finding, however, was that such a shift simply would not occur. R. at 87-90, FF 29-36.

Had there been a third competing applicant, its application would have been reviewed in the same manner. Regardless of its location, headquarters, or state of incorporation, the third applicant also would not have been approved if its adverse impact, due to increased outmigration from the county or for any other reason, outweighed any benefits of accessibility. *See* S.C. Health Plan, II-9. This would be true even if the third applicant were a large, South Carolina-based hospital system, as Piedmont expert (and former DHEC CON Director) Joel Grice testified:

> Q: Mr. Grice, if it were instead of Carolinas, if it were Palmetto Health System that were proposing to build a hospital in Fort Mill and to shift patients needing complex care to Columbia instead of to Charlotte, would your analysis about the effect on Piedmont be any different?
>
> A: No, sir.
>
> Q: Why not?
>
> A: Because here again, you have another provider from another area outside of that region that would be taking the patients away. Removing patients from the county and they would be getting – let's say Palmetto here in Columbia had a satellite up there, they would be referring their tertiary patients down to Columbia to Palmetto Health.
>
> Q: So, is your principal concern that Carolinas is located outside of state or that it's located outside of York County and that is the basis for the opinion you saw from 3(a)?
>
> A: It's outside of York County.

R. at 1094:14-1095:10. *See* App. at 1597 n.10. A major in-state hospital system would therefore be affected no differently by the law than Carolinas. *See Minnesota v. Clover Leaf Creamery,* 449 U.S. 456, 473, n. 17 (1981) (upholding state law against a Dormant Commerce Clause challenge, in part because "[t]he existence of major in-state interests adversely affected by [a state law] is a powerful safeguard against legislative abuse").

To assume another scenario, suppose the State Health Plan identified a need for 64 additional hospital beds in a county adjacent to York County. Two applicants submit competing CON applications to build a hospital, one applicant being the only hospital located in the county and the second applicant being Piedmont. If the evidence proved that Piedmont's project would result in the diminishment or discontinuance of high quality specialty services in the county, Piedmont's application would likely be denied.

In other words, the CON laws, as written and as applied in this case, affect in-state and out-of-state entities the same. In a Dormant Commerce Clause analysis, "[d]iscrimination simply means differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the latter." *Hazel I,* 733 F.3d at 542-43. As illustrated above, there was no differential treatment in this case between in-state and out-of-state providers. There certainly is no evidence, despite Carolinas' bald assertions, of a discriminatory purpose by Judge Lenski. And in order to prove discriminatory effect, Carolinas would have to demonstrate that the ALC's application of state CON law "would negatively impact interstate commerce to a greater degree than intrastate commerce." *Id.* at 543.

As the Court of Appeals recognized, it is also significant that Piedmont and Carolinas hardly fit the stereotypes of insider and outsider. Piedmont is a subsidiary of Tenet Healthcare Corporation, a Texas-based company that owns 49 hospitals in ten states. Carolinas owns and

manages a hospital in South Carolina and employs 70-90 physicians in York County. App. at 1582. In other words, both Tenet and Carolinas are based outside of South Carolina but have existing facilities in the state. R. at 1582.

D. Incumbency Bias Is Not a Surrogate for a Negative Impact on Interstate Commerce.

Carolinas argues that the ALC decision reflects a bias in favor of Piedmont, the existing local provider. Carolinas' "incumbency bias" argument is not a novel or unsettled issue of law. The Court of Appeals properly rejected it, relying on recent precedent involving facts very similar to the instant case. R. at 1593, *citing Colon Health Ctrs. of America, LLC v. Hazel* ("*Hazel II*"), 813 F.3d 145, 152 (4th Cir. 2016).

In *Hazel II*, the Fourth Circuit affirmed a summary judgment ruling that upheld Virginia's CON law against a Dormant Commerce Clause challenge, both to the law's purpose and as it was applied. The appellants argued, as Carolinas does in this appeal, that state CON law, as applied, discriminated "in favor of incumbent health care providers at the expense of new, predominantly out-of-state firms." 733 F.3d at 154. The Fourth Circuit rejected this argument as a matter of law, quoting from its 2013 decision involving the same parties and issue: "[I]ncumbency bias in this context is not a surrogate for the 'negative [ ] impact [on] interstate commerce' with which the dormant Commerce Clause is concerned." *Hazel II*, 813 F.3d at 154 (quoting *Hazel I,* 733 F.3d at 543). "Incumbency is not the focus of the Dormant Commerce Clause." *Hazel II*, 813 F.3d at 154.

As described above, both the discrimination test and the undue burden test under the Dormant Commerce Clause are fact-intensive. For this reason, "incumbency bias" cases cited by Carolinas about waste disposal, interstate trucking, slaughterhouses, retail pharmacy

services, stevedore permits, or milk processing give little guidance in resolving whether the ALC's order unlawfully discriminates against or unduly burdens interstate commerce. Not one of the cases cited by Carolinas involves a situation like the present one, in which, except for the challenged law, important local healthcare services would be significantly reduced or eliminated, to the particular disadvantage of medically underserved patients. *See* R. at 96-97, FF 49-53; at 124-25, CL 46-47; App. at 293-96.

III. South Carolina CON Laws, as Written and as Applied, Serve a Legitimate Local Purpose That Could Not Be Served as Well by Available Nondiscriminatory Means.

Even if a state law does discriminate against interstate commerce, it will be upheld against a Dormant Commerce Clause challenge if it serves a legitimate local purpose that could not be served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. at 138.

In *Maine v. Taylor*, the Supreme Court ruled that a state statute did not violate the Dormant Commerce Clause, even though it clearly discriminated against interstate commerce. Deferring to factual findings by the district court, the Supreme Court ruled that the statute was supported by a legitimate purpose. *Id.* at 142-43, 151. Again relying on the lower court's fact findings, the Supreme Court upheld the statute, based on its finding that the legitimate purpose behind the state law could not be served as well by available nondiscriminatory means. *Id.* at 143, 146-47, 151.

South Carolina CON laws, as written and as applied in this case, serve legitimate state purposes: cost containment, prevention of unnecessary duplication, meeting public needs, and quality control. S.C. Code Ann. § 44-7-120. Under the unchallenged facts of this case, those purposes could not have been served as well by other available means. Indeed, Carolinas does

not suggest that any alternatives to the law exist that would adequately meet the stated purpose of the ALC's ruling: to ensure the continued provision of needed services within reach of all York County residents.

IV. The Court of Appeals Correctly Applied the Undue Burden Test, Concluding that Any Incidental Effect the ALC's Ruling Has on Interstate Commerce is Outweighed by Putative Local Benefits.

As discussed above, South Carolina CON laws, as applied in this case, do not discriminate against interstate commerce. Any effect on interstate commerce is incidental. As a result, the challenged order must 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. Rather than demonstrate any burden on interstate commerce, Carolinas has demonstrated that the ALC's ruling burdens only Carolinas, by denying its application in one particular instance. Such a limited "burden" on a single out-of-state entity cannot outweigh the significant benefit sought by the CON law and the ALC Order: protecting York County residents from the diminishment and elimination of accessible medical services.

In *Yakima*, the court granted summary judgment for defendants in an as-applied challenge to a state CON law requiring annual minimum volume for certain catheterization procedures. The court noted the special deference given state health and safety regulations. 2012 WL at *5. The court also observed that the *Pike* test is not concerned with *actual* benefits, but "putative" ones. *Id.* at *11, at *5 n.6 (defining "putative" as "supposed" and noting that use of the word in *Pike* "further signals that courts are to give deference to the asserted benefits of states' public-safety laws"), *citing Nat'l Ass'n of Optometrists*, 567 F.3d at 527.

In the present case, the putative local benefits include the perpetuation of high quality, specialized healthcare services within York County. In relation to these benefits, any incidental burden on interstate commerce cannot reasonably be viewed as "clearly excessive." In fact, Carolinas has not demonstrated that any burden on interstate commerce will result, only that one company – Carolinas itself – will not be allowed to refer all or nearly all patients requiring specialized services and covered by private insurance out of the county. *See Exxon*, 437 U.S. at 127 (holding that a court should focus on interstate commerce – not merely "the specific parties before it"). For all these reasons, the Court of Appeals correctly determined that the ALC's application of state law did not unduly burden interstate commerce. App. at 1594, 1599, 1600.[4]

CONCLUSION

The law is neither novel nor unsettled with respect to Carolinas' as-applied challenge. In *Hazel I* and *Hazel II*, the Fourth Circuit recently addressed a challenge to Virginia CON law very similar to the instant case. In the case at hand, the ALC properly applied unchallenged state law to unchallenged findings of fact. The ALC's purpose was to protect public access to important local services, consistent with the purposes of the CON Act.

The ALC's ruling affected interstate commerce to no greater extent than it did intrastate commerce, so it was not discriminatory. Even if it had been (which is denied), it was supported by legitimate purposes that could not be served as well by other available, nondiscriminatory means.

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[4] Although one of Carolinas' "Questions Presented" in its Petition asks whether the Court of Appeals properly applied the *Pike* test, the Petition does not offer any argument or citation to authority. Issues raised but not briefed are considered abandoned. *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005).

The Court of Appeals correctly concluded that any burden the ALC Order placed on interstate commerce was not clearly excessive to its putative local benefits.

For these reasons, Piedmont respectfully requests that the Court deny the Petition for Writ of Certiorari.

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Columbia, South Carolina

October 30, 2018

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. 2018-001701
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 **RETURN TO PETITION FOR WRIT OF CERTIORARI** by hand delivery to the following addresses:

Counsel Served: Trudy H. Robertson, Esq.
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October 30, 2018

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October 30, 2018

Via Hand Delivery
The Honorable Daniel E. Shearhouse
Clerk of Court
The South Carolina Supreme Court
1231 Gervais 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. 2018-001701
Lower Court Docket No. 11-ALJ-07-0575-CC
Our File No. 005946/01509

Dear Mr. Shearhouse:

Enclosed for filing in the above-referenced matter are the original and 7 copies of Respondent Amisub of South Carolina, Inc.'s Return to Petition for Writ of Certiorari and Certificate of Service. Please return a clocked-in copy of same via our courier. By copy of this letter, we are hereby serving counsel on record and the Clerk of the Court of Appeals with a copy of the same.

Very truly yours,

Daniel J. Westbrook

DJW:kh
Enclosures
cc: The Honorable Jenny Abbott Kitchings, Clerk of Court of Appeals
E. Brandon Gaskins, Esquire
Trudy H. Robertson, Esquire
Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire

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October 30, 2018

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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. 2018-001701
Lower Court Docket No. 11-ALJ-05-0575-CC
Our File No. 005946/01509

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are 2 copies of Respondent Amisub of South Carolina, Inc.'s Return to Petition for Writ of Certiorari and Certificate of Service. Please return a clocked-in copy of same via our courier. By copy of this letter to counsel of record, we are hereby serving them with a copy of the same.

Very truly yours,

Daniel J. Westbrook

DJW/kh
Enclosures
cc: Trudy H. Robertson, Esq.
E. Brandon Gaskins, Esq.
Ashley C. Biggers, Esq.
Vito M. Wicevic, Esq.