

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Phillip S. Lenski, Administrative Law Judge

S.C. SUPREME COURT

Appellate Case No. 2018-001701

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 the

Petitioner.

**RESPONDENT SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL CONTROL'S
RETURN TO PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

- I. Should the Court grant a Petition for Writ of Certiorari where the dormant commerce clause argument does not involve a facial challenge to state law and where the petitioner did not challenge whether the factual findings were supported by substantial evidence in the record?
- II. Should the Court grant a writ of certiorari to review the Court of Appeals' decision where it applied a proper legal analysis of the dormant commerce clause argument raised on appeal and found no discrimination?

STATEMENT OF THE CASE

The subject of this case originated with the 2005 submission of competing Certificate of Need ("CON") applications by Petitioner The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") and Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont"), along with two other entities¹, to Respondent South Carolina Department of Health and Environmental Control ("Department") to construct a new hospital in York County based on a projected need in the *2004-2005 South Carolina Health Plan* ("2004-2005 Plan") for sixty-four (64) additional hospital beds in the county. The Department issued its initial decisions on May 30, 2006, granting Piedmont's application and denying the three other competing applications. A contested case hearing was held at the South Carolina Administrative Law Court ("ALC") in September of 2009. At the conclusion of the case presentations of the two parties challenging the Department's original decision, the ALC granted partial summary judgment and remanded the case to the Department with instructions to treat all remaining applicants as equally complying with the 2004-2005 Plan standards and to conduct a new, comparative review to determine which applicant best met each project review criterion. The three applicants party to the contested case at that time all filed notices of appeal of

¹ Of the four original competing applicants, one chose not to contest the Department's first decision and the other withdrew its challenge to the Department's second decision prior to the second contested case hearing.

the ALC's order of remand. On April 8, 2010, this Court issued an order certifying the appeals for review, but dismissing the appeals on the basis that an interlocutory order issued by the ALC is not immediately appealable pursuant to S.C. Code Ann. § 1-23-610.

On remand from the ALC, the parties submitted updated information on their applications to the Department, and the Department conducted a comparative review as instructed by the ALC. The Department issued new decisions on September 9, 2011, in favor of Carolinas. A second contested case hearing was held at the ALC in April and May of 2013. The ALC issued a thirty-nine (39) page Final Decision and Order on March 31, 2014, finding that Piedmont's CON application most fully complied with the 2004-2005 Plan, project review criteria, and the purposes of CON. Upon a motion for reconsideration filed by Carolinas, the ALC issued an order vacating its March 31, 2014, decision and informing the parties that it would be filing a new decision. The ALC issued a fifty-three (53) page Amended Final Order and Decision on December 15, 2014, addressing issues raised in the motion for reconsideration but still concluding that Piedmont's application should be granted.

Piedmont filed a Notice of Appeal of the ALC's Amended Final Order and Decision on January 14, 2015. Following submission of appellate briefs, this Court sent a letter to the Court of Appeals notifying it that the Court was declining to certify the appeal for review as suggested by the Court of Appeals. The Court of Appeals heard oral arguments on November 8, 2016, and issued an unpublished opinion on January 11, 2017, affirming the ALC's decision. Following a motion for reconsideration and a motion to supplement the record on appeal filed by Carolinas, both of which were denied by the Court of Appeals, Carolinas filed a petition for a writ of certiorari with the Supreme Court on April 21, 2017. This Court issued an opinion on April 25, 2018, denying in part and granting in part the petition, reversing the Court of Appeals' ruling that

Carolinas' dormant commerce clause argument was not preserved for appellate review, and remanding the matter to the Court of Appeals for a decision on the merits regarding the dormant commerce clause issue. In its order, this Court recognized the length of time this matter has been pending due to litigation and therefore ordered the Court of Appeals to expedite its consideration of the case.

On remand from this Court, the Court of Appeals issued a new opinion on August 22, 2018, addressing and rejecting Carolinas' argument that the ALC's application of the CON laws in this matter violated the dormant commerce clause. Carolinas filed a petition for rehearing, which the Court of Appeals denied. Carolinas now requests once again that this Court grant certiorari to review the decision of the Court of Appeals, further drawing out this protracted litigation and further delaying the construction of a new hospital in York County.

ARGUMENT

- I. **No special or important reasons exist for granting a writ of certiorari to review as an-applied dormant commerce clause argument involving no challenge to the law itself and no challenge to the evidentiary support in the record for the lower court's findings.**

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. While not an exhaustive list, Rule 242 sets forth criteria relevant to the Court's exercise of its discretion to grant certiorari to review a decision of the Court of Appeals.

This appeal does not involve a novel question of law, a conflict with a prior decision of this Court, a substantial constitutional issue, or other grounds warranting review by the Court. Carolinas does not challenge the CON law on its face as violative of the dormant commerce clause, but rather the ALC's application of project review criteria and purposes of CON.

Carolinas did not raise an issue on appeal as to whether substantial evidence in the record supported the ALC's decision. The ALC cited numerous facts, supported by the record and devoid of discriminatory intent or effect, in concluding that Piedmont's application more fully complied with project review criteria and the purposes of CON than did Carolinas' application. For instance, the ALC concluded that Carolinas' practices in York County, including the practices of its affiliated physicians, limit access for indigent, Medicaid, and even Medicare patients, and would limit non-emergency access to Carolinas' proposed hospital. It therefore found Piedmont better met project review criteria related to availability of care for indigent residents and not restricting admissions. The ALC cited physician testimony to support its findings that awarding the CON to Carolinas rather than Piedmont would jeopardize the ability of existing York County healthcare providers to serve residents of the county, and that Piedmont's proposed new hospital would provide a better functional balance to the distribution of health services to the York County population. These unchallenged findings are not based upon a discriminatory intent, but rather based on project review criteria routinely applied in CON cases regardless of whether one or more competing applicants is an in-state or an out-of-state entity. There is no unique or special reason for the Court to grant a writ of certiorari based on the facts of this case.

II. The Court of Appeals conducted a proper legal analysis under the dormant Commerce Clause framework, and no special or important reasons exist to review its decision.

Analysis of a dormant Commerce Clause claim involves two tiers, depending on the type of allegation involved. The first tier applies "where a state law discriminates facially, in its practical effect, or in its purpose" against interstate commerce. *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir.1996). Under the first tier review, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and

burdens the latter.” *United Haulers Ass'n v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (internal quotations omitted).

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

The dormant Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.” *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (internal quotations omitted). Thus, a statute does not discriminate against interstate commerce merely because it adversely affects the ability of some out-of-state entities to compete. *Id.* at 133 (“For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States’ power to engage in economic regulation would be effectively destroyed.”). Rather, the test is whether the effect of the statute is to “benefit in-state economic interests by burdening out-of-state competitors.” *Kentucky Dep’t of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (internal quotations omitted).

The Court of Appeals appropriately 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. The Court of Appeals disagreed with Carolinas’ argument that the ALC’s application of the Need criteria discriminated against interstate commerce. *Id.* at p. 19.

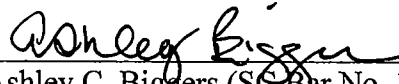
In correctly concluding the ALC's application of the CON Act, Health Plan, and project review criteria did not discriminate facially, in its practical effect, or in its purposes, the Court appropriately moved to the second tier of the analysis and found that any potential incidental effects of the ALC's 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 of Appeals 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: "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 of Appeals' analysis was consistent with the dormant commerce clause jurisprudence.

CONCLUSION

The Court of Appeals applied the proper legal analysis and correctly concluded that the ALC's application of the unchallenged CON law to the unappealed findings of fact did not result in a dormant commerce clause violation. The Petitioner does not present any special or important reasons warranting a grant of certiorari on the limited issue remaining in this long-standing case

which has already undergone multiple stages of judicial review. The petition should therefore be denied.

Respectfully submitted,



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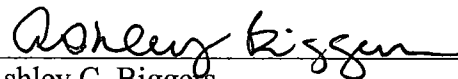
Of whom the Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, isPetitioner.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Petitioner and counsel for Respondent in the foregoing matter with a copy of the foregoing Respondent South Carolina Department of Health and Environmental Control's Return to Petitioner's Petition for Writ of Certiorari by depositing same in the United States Mail and addressed as follows:

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