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.

PETITIONER'S REPLY TO RESPONDENT AMISUB'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In its Return to the Petition for Writ of Certiorari, Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ("Piedmont")[1] rightfully states that the residents of northern York County have been waiting over thirteen years for a new hospital. During those thirteen years, Carolinas has become the preferred hospital and healthcare provider among patients in Northern York County. If the Court denies the Petition and fails to correct the errors of the ALC's and Court of Appeal's decisions below, the thirteen year wait may end with the approval of the CON to Piedmont, which has become the disfavored provider. Thus, the denial of the Petition may finally end the matter, but it will come at the expense of patient choice based on the misconceived, discriminatory, and unconstitutional notion that patients should not be referred to an out-of-state or out-of-county provider.

Given the significance of the CON to the people of York County, it is more important to get the correct result rather than to avoid consideration of the case to achieve mere finality. Therefore, the Court should grant certiorari to consider the important, novel issues presented by this case.

ARGUMENT

I. PIEDMONT'S INCORRECT DEFENSE OF THE ALC'S DECISION ON ITS MERITS DOES NOT JUSTIFY THE DENIAL OF CERTIORARI.

Instead of directly responding to Carolinas' arguments in favor of certiorari, Piedmont focuses its arguments on the purported correctness of the ALC's and Court of Appeal's decisions below by connecting the public interests served by the ALC's decision to the goals of the CON

[1] While Carolinas has not addressed DHEC's Return in this Reply, it states substantially the same arguments as Piedmont. Inexplicably, DHEC now supports the reversal of DHEC's own decision to award the CON to Carolinas, despite offering argument, witnesses and evidence in favor of Carolinas throughout the Second Contested Case hearing.

Act. According to Piedmont, the purpose of the ALC's award of the CON to Piedmont was "to protect the public . . . by preserving local access to specialized, high-quality hospital and medical services." Thus, Piedmont argues, the ALC's decision is entitled to deference and is not discriminatory under the dormant Commerce Clause.

The flaw in this argument is its implicit assumption that the ALC's stated legitimate purpose of protecting the public necessarily precludes a finding of discriminatory purpose or effect. This is mistaken because the two scenarios are not mutually exclusive. In fact, dormant Commerce Clause jurisprudence reveals that a state or local government will always attempt to justify a discriminatory law or application of the law by cloaking it with a legitimate local purpose. Because of the ubiquitous nature of that defense, courts must apply strict scrutiny under the dormant Commerce Clause to determine if a discriminatory law is the only available means of promoting the local interest. If this high burden cannot be met, then even the most laudable local interests will not save the challenged discrimination from constitutional infirmity. *See Medigen of Kentucky v. Public Service Comm'n of W. Va.*, 985 F.2d 164, 167 (4th Cir. 1993) (ruling that state's "goal of providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose").

In this case, the ALC undoubtedly couched its award of the CON to Piedmont in terms of promoting the public interest. However, the ALC defined the public interest in a manner that discriminates against interstate commerce. According to the ALC, it is in the public interest for certain hospital and medical services to be provided in York County through Piedmont and existing providers even if Carolinas and other providers can provide those same services with higher quality across the state line in North Carolina. Yet the ALC made no findings that residents of York County could not readily access these services in the Charlotte area. Thus, it is the

geographic location of where hospital and medical services are delivered which dictated the ALC's definition of public interest, which renders it *per se* discriminatory.[2]

Regardless of the ALC's purpose, the effect of its decision is also discriminatory because it will reduce interstate commerce by reducing the amount of South Carolina patients who receive services in North Carolina. This fact is inescapable because the ALC expressly concluded that awarding the CON to Piedmont will "reduc[e] the outmigration of York County residents to hospitals beyond York County." (R. p. 124.)

In this regard, the ALC's denial of the CON to Carolinas is similar to the denial of a milk processing facility in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). In that case, the New York Commissioner of Agriculture denied a milk distributor a license for additional distribution facilities out of fear that the distributor would divert milk from other distributors in the vicinity and deprive local markets of needed milk supply. *Id.* at 540. The United States Supreme Court found this rationale to be constitutionally infirm under the dormant Commerce Clause because it would prevent an out-of-state distributor from accessing the local market. *Id.*

Although the instant case involves the delivery of hospital and medical services and not the distribution of milk,[3] the ALC's rationale is similar to the impermissible motive of the

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[2] Significantly, the 2004-2005 South Carolina State Health Plan that was applied by the ALC states: "It is recognized that due to factors which may include availability, accessibility, personal or physician preferences, insurance and managed care contracts or coverage, or other reimbursement issues, patients may seek and receive treatment outside the county or inventory region in which they reside and/or outside of the state. Therefore, service areas may specifically cross inventory regions and/or state boundaries." (2004-2005 South Carolina State Health Plan, p. II-2) (emphasis added). The reality is that many York County residents seek healthcare from Carolinas and other providers in the Charlotte metropolitan area. Yet the ALC took a narrow view of the public interest and refused to consider the benefits and access provided by North Carolina hospitals.

[3] Piedmont argues that the dormant Commerce Clause cases relied upon by Carolinas do not involve healthcare services and, therefore, provide little guidance. However, the various industries from which these cases arose demonstrate that the principles that have evolved in

Commissioner of Agriculture in *H.P. Hood & Sons*. Just as the distributor in that case was denied a facility for fear of diversion of supplies from the local market, the ALC denied Carolinas the CON based on fear that Carolinas would divert patients away from York County and Piedmont. And just as the Commissioner's rationale in *H.P. Hood & Sons* effectively deprived the distributor of accessing the local market for needed supplies, the ALC's rationale similarly limits Carolinas' ability to access York County patients through is proposed hospital because Carolinas may divert those patients to its North Carolina hospitals. As a result, the ALC's decision to deny the CON to Carolinas because Carolinas will divert patients from York County to North Carolina violates the dormant Commerce Clause.

In addition, Piedmont unconvincingly argues that the ALC's purpose of curbing outmigration is not discriminatory because it does not erect a barrier to market entry by non-local providers. In support of this argument, Piedmont claims that Carolinas could have been awarded the CON had it convinced the ALC that 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." This argument, however, actually proves the discriminatory nature of the ALC's decision.

According to Piedmont's argument, for Carolinas to be awarded the CON, it must either agree to engage in more commerce in South Carolina by offering specialty, tertiary services at CMC-FM or by referring its patients for specialty services to Piedmont's South Carolina hospital rather than to its hospitals in North Carolina. This rationale is unconstitutionally discriminatory because it conditions the CON on doing certain business in South Carolina or York County and

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dormant Commerce Clause jurisprudence are generally applicable principles that apply to any industry. As an example, *H.P. Hood & Sons* involves milk distribution, but courts have continued to apply that decision in dormant Commerce Clause litigation involving a myriad of industries.

punishes a non-local provider for referring that business out-of-state or out-of-county. As a result, the ALC's decision creates a special barrier to market entry by non-local providers because they are barred from the York County hospital market for the simple reason that they engage in interstate commerce by referring patients for specialty services outside of the market.

Because the ALC's decision has a discriminatory purpose and effect, it cannot be upheld unless there are no available non-discriminatory alternatives to support the public interests which Piedmonts claims are served by the ALC's denial of the CON to Carolinas. Contrary to Piedmont's suggestion, Carolinas does not have the burden of proving the unavailability of non-discriminatory alternatives. *See Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (ruling that burden falls on the state to demonstrate the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake). This burden falls to Respondents, and they have failed to meet it. Therefore, Piedmont's arguments based on the merits of the ALC's decision do not justify the denial of certiorari.

II. PIEDMONT HAS CONTINUOUSLY ARGUED THAT CAROLINAS' STATUS AS A NORTH CAROLINA PROVIDER PRECLUDES ITS AWARD OF THE CON, AND ITS PRESENT ARGUMENT THAT CAROLINAS HAS BEEN TREATED THE SAME AS ANY IN-STATE PROVIDER IS BELIED BY THE FACTS AND PROCEDURAL HISTORY.

In defending the ALC's and Court of Appeal's decisions, Piedmont advances various hypothetical situations to argue that there is no dormant Commerce Clause violation because the ALC's application of the CON law and Project Review Criteria would affect in-state and out-of-state hospitals the same. That argument is incorrect as a matter of law and of fact.

First, Piedmont's argument based on hypotheticals in which in-state hospitals would have been similarly negatively affected by the ALC's reasoning is legally incorrect. It disregards the dormant Commerce Clause's prohibition on regulatory schemes that protect local interests against competition from non-local interests, regardless of whether such competitors are in-state or out-

of-state. This well-established principle of dormant Commerce Clause jurisprudence has been previously explained by Carolinas in its Petition and prior briefs. (*See* Appx. pp. 235-239, 1543-1546; Pet. Writ Certiorari pp. 14-16.) Nevertheless, Piedmont persists in arguing that there is no dormant Commerce Clause violation because the anti-competitive effects of ALC's application of the Project Review Criteria would be felt equally by in-state hospitals, despite over 120 years of established law demonstrating that the argument is legally unsound. *See Brimmer v. Rebmen*, 138 U.S. 78, 82-83 (1891) (ruling that discriminatory statute that affected in-state and out-of-state interests alike violated dormant Commerce Clause).

Second, Piedmont's supposition that the ALC's application of the CON Act and Project Review Criteria would affect in-state hospitals no differently than out-of-state hospitals is belied by the particular facts and procedural history of this case. In particular, Piedmont chooses to ignore its intentional litigation strategy of depicting Carolinas as a foreign invader coming down from North Carolina to poach York County patients. The nature of Carolinas' as-applied challenge dictates that these factors must be considered.

Most egregiously, Piedmont contends that Piedmont and Carolinas are functionally equivalent to each other because they are each part of a larger, out-of-state hospital system that happens to have a presence in South Carolina. This argument directly contradicts Piedmont's litigation strategy in the Second Contested Case, in which it relentlessly attacked Carolinas' status as an out-of-state provider lurking just over the border. Piedmont implemented this strategy immediately during opening statements when its counsel alluded to a Lord Byron poem to equate Carolinas to a foreign invader:

> [The poem] starts out, the Assyrian came down like the wolf on the fold, and his cohorts were gleaming in purple and gold. Now, [Carolinas] is a big, rich, powerful, aggressive hospital system *right over the state line*. And the fold that they are eyeing, the prize that

> they are eyeing is the Fort Mill area. For years, [Carolinas] has been taking patients, paying patients out of the Fort Mill over into North Carolina and providing them, steering them for hospital services.

(R. p. 295, line 20 – p. 296, line 5) (emphasis added). This theme continued throughout the contested case hearing, with Piedmont repeatedly referring to Carolinas as a "North Carolina" entity taking patients away from Piedmont, including the following:

- Piedmont alleged that Carolinas was engaged in an aggressive strategy of "having [its] physicians steer patients to CHS facilities *over the state line in North Carolina.*" (R. p. 287, lines 8-10) (emphasis added);

- According to Piedmont's attorney, Carolinas' proposed hospital will "feed[] patients to the larger facilities in CMC-Pineville that provide more complex services and to the specialized physicians that are employed by CHS *in North Carolina.*" (R. p. 294, lines 7-13) (emphasis added);

- Piedmont warned the ALC that Carolinas "will thrive *across the border in North Carolina*" if its hospital was approved (R. p. 294, line 22 – p. 295, line 7) (emphasis added);

- Piedmont's expert explained that the purpose of establishing FMMC is "to ensure that those future patients *aren't being transferred to North Carolina or out of state for other services.*" (R. p. 678, lines 8-25) (emphasis added);

- One Piedmont witness testified that he was opposed to Carolinas' proposed hospital because "I'm very selfish and that's part of the reason I'm here is, we've seen this erosion over the border and [Carolinas is] a big healthcare system." (R. p. 452, line 23 – p. 453, line2) (emphasis added);

- The same Piedmont witness complained that "it makes no sense" to send South Carolina Medicaid spending "over the border." (R. p. 457, lines 8-9.)

In fact, Piedmont's lawyers and witnesses made hundreds of references to "North Carolina," "Charlotte," "out-of-state," "border," or the "state line" throughout the contested case hearing.

The import of Piedmont's argument is that an out-of-state entity should not be allowed to compete with a smaller, local provider for patients and that the local hospital should be protected by the ALC's far-reaching and broad adverse impact findings. This approach ultimately persuaded the ALC to include multiple references to Carolinas as a "North Carolina" provider in its initial Order. The ALC also found specifically that Piedmont's loss of patients coincided with a growing number of York County residents receiving hospital services at Carolinas' hospitals across the border in North Carolina, and he concluded "that the establishment of FMMC will best serve the public needs by reducing outmigration of York County residents to *North Carolina hospitals*." (R. pp. 42-44, 71) (emphasis added). When confronted with Carolinas' dormant Commerce Clause argument, the ALC later deleted the prior references of outmigration of patients to "North Carolina" and substituted them with references to outmigration outside of or beyond "York County." (*Compare* R. p. 68, ¶ 32 and p. 71, ¶ 43 with R. p. 121, ¶ 34 and R. 124-125, ¶ 46.)

Piedmont complains that this case has proceeded for thirteen years, but it fails to acknowledge that it has lasted for so long primarily because of Piedmont's substantial efforts to convince DHEC that only an existing hospital in a county could be awarded a new hospital. When this argument eventually failed to withstand judicial scrutiny in the First Contested Case, Piedmont sought in the Second Contested Case to present itself as a small, local hospital under siege from the large, out-of-state hospital system lurking over the state border, and Piedmont convinced the ALC to adopt this argument. Now that Piedmont understands the fundamental flaw of this strategy from the standpoint of a dormant Commerce Clause analysis, it has reversed its prior position by attempting to portray itself as part of a large, out-of-state hospital system, and

therefore, really no different than Carolinas. The Court should not be deceived by this characterization, which is directly contradicted by Piedmont's own arguments during the trial.

III. THE ISSUES PRESENTED ARE NOVEL AND UNIQUE TO THIS PARTICULAR CASE.

In arguing that the constitutional issues presented by this case are not novel or unsettled, Piedmont identifies only **one** decision, *Colon Health Ctrs. of America, LLC v. Hazel*, 813 F.3d 145, 152 (4th Cir. 2016) ("*Hazel II*"), to support this contention. Contrary to Piedmont's argument, *Hazel II* does not control the issues presented here. A single federal appellate court decision regarding an unrelated CON scheme in another state can hardly establish well-settled law over Carolinas as-applied challenge to a discrete ALC decision involving unique, competing CON applications.

Hazel II has only superficial similarities to this case insofar as they both involve dormant Commerce Clause challenges to a state CON regulatory scheme. However, there are substantial differences between the cases which preclude *Hazel II* from controlling the issues presented by Carolinas' appeal. Unlike this case, *Hazel II* did not arise from a denial of a CON. Instead, the plaintiffs in that case, who were medical imaging providers and not hospital systems, preemptively challenged Virginia's entire CON law without filing an application for a CON. According to the plaintiffs in *Hazel II*, the entire Virginia CON law is unconstitutional under the dormant Commerce Clause because it systematically advantages in-state providers at the expense of new, out-of-state providers. *Id.* at 153. More importantly, *Hazel II* did not involve, much less turn, on issues of interstate migration of patients as this case does.

Unlike the plaintiffs in *Hazel II*, Carolinas neither challenges the entire South Carolina CON law as unconstitutional nor alleges that the CON law provides a systemic advantage to in-state providers generally. Instead, it challenges the ALC's specific application of the Project

Review Criteria to deny Carolinas a CON because Carolinas refers York County patients to its North Carolina hospitals. Carolinas also argues that Piedmont, as an existing in-state provider, was allowed the advantage of transferring beds to construct a larger hospital, which Carolinas, as an out-of-state provider, cannot do. The Fourth Circuit did not decide these issues in *Hazel II*. Therefore, Piedmont's claim that the appeal does not involve novel issues because *Hazell II* was recently decided is simply wrong.

Furthermore, Piedmont's argument that *Hazel II* controls because Carolinas' appeal is an "incumbency bias" case is similarly incorrect. Although it is true that the *Hazel II* court states that incumbency bias is not a surrogate for negative impact on interstate commerce, Carolinas' appeal is not solely an incumbency bias case. Rather, Carolinas primarily bases its dormant Commerce Clause challenge on the ALC's denial of the CON to Carolinas to purposefully reduce interstate commerce and increase intrastate commerce by reducing outmigration of patients from York County to North Carolina. Thus, Carolinas does not claim merely that the ALC was biased in favor of the incumbent provider, Piedmont. It argues that the ALC favored Piedmont because of a discriminatory bias against interstate commerce related to the referral of patients to another state.

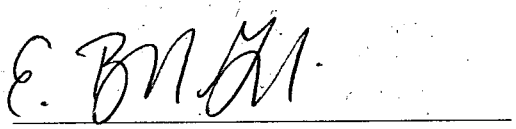
In sum, unlike the plaintiffs in *Hazel II*, Carolinas does not seek to dismantle South Carolina's entire CON regulatory scheme. Instead, it seeks a non-discriminatory application of the CON law and Project Review Criteria to its proposal to build a hospital in an area where it is the preferred healthcare provider. From the beginning of this case until now, Carolinas has been deprived of that constitutional right. Initially, DHEC rejected Carolinas ability to construct a hospital in Fort Mill on the legally incorrect basis that Carolinas was not an existing hospital provider in York County. After the ALC corrected that error in the First Contested Case,

Piedmont made Carolinas' status as a North Carolina provider which referred patients to its North Carolina hospitals the linchpin of its entire case before the ALC. The ALC adopted Piedmont's arguments and ultimately denied the CON to Carolinas for the express purpose of reducing the amount of patients referred to North Carolina hospitals. At every turn, Carolinas' status as a North Carolina hospital system has been used against it. Although it has taken thirteen years to get here, this Court has the ability to correct an injustice and to ensure a fair playing field by granting certiorari and correcting the unconstitutional application of the CON law and Project Review Criteria by the courts below.

CONCLUSION

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

Respectfully submitted,



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VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
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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

Dear Mr. Shearouse:

With regard to the above-referenced action, enclosed for filing please find the original and seven (7) copies of **Petitioner's Reply to Respondent Amisub's Return to Petition for Writ of Certiorari,** together with the original and one copy of the **Proof of Service**. Please file the originals and return a file stamped copy of the Reply and Proof of Service to our courier for return to me.

By copy of this letter, we are serving the Court of Appeals and Respondents' attorneys with a copy of the Reply.

Thank you for your assistance with this matter. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Moore & Van Allen PLLC

E. Brandon Gaskins

EBG/ws

Enclosures

cc (w/encl.): The Honorable Jenny Abbott Kitchings, Clerk of Court of Appeals
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