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.

PETITION FOR WRIT OF CERTIORARI

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone

Attorneys for Petitioner The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

TABLE OF CONTENTS

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 22, 2018.

QUESTIONS PRESENTED

1. Whether the Administrative Law Court violated the dormant Commerce Clause by granting the Certificate of Need to Piedmont for the purpose of protecting an incumbent hospital and reducing the number of South Carolina patients receiving care out of state?

2. Whether the Court of Appeals incorrectly found that the Administrative Law Court's application of the Certificate of Need Act and Project Review Criteria did not have a discriminatory purpose and effect, and therefore failed to conduct the necessary strict scrutiny analysis in its review of the Administrative Law Court's decision?

3. Whether the Court of Appeals failed to conduct the proper analysis under *Pike v. Bruce Church* by failing to consider the burdens imposed on interstate commerce by the Administrative Law Court's decision?

STATEMENT OF THE CASE

This case began over thirteen years ago in March 2005 when Petitioner The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas"), Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ("Piedmont"), and a third applicant[1], Presbyterian Healthcare ("Presbyterian"), filed certificate of need ("CON") applications with the South Carolina Department of Health and Environmental Control ("DHEC") pursuant to the 2004-2005 State Health Plan (the "2004-2005 Plan" or "State Health Plan") to construct and operate a general acute care hospital in Fort Mill, York County, South Carolina (the "Fort Mill CON"). (R. pp. 75-76.) Carolinas, a North Carolina-based hospital system, proposed to construct and operate Carolinas Medical Center-Fort Mill, a 64-bed general acute care hospital, consistent with the bed need recognized in the 2004-2005 Plan.

[1] A fourth applicant also applied for a 64-bed hospital but did not file a contested case when its application was denied.

(*Id.*) Piedmont initially proposed a 64-bed hospital but later amended its application by seeking to transfer 36 beds from Piedmont Medical Center, its existing hospital in Rock Hill, to its proposed new facility, the Fort Mill Medical Center ("FMMC"), and thereby construct and operate a 100-bed hospital. (*Id.*)

Carolinas' decision to seek the CON for a new hospital in Fort Mill arose from its growing business among residents in that area, despite not having a hospital in York County. Although Piedmont Medical Center is the only hospital in York County, Carolinas' hospitals in North Carolina have become the preferred hospitals among northern York County residents. (R. pp. 2132-2133, 3069.) By 2009, Carolinas enjoyed a majority market share among northern York County residents; whereas, Piedmont's market share had declined to below 30% among the same residents. (*Id.*) In fact, Piedmont's utilization among all York County residents has declined significantly. In 2005, Piedmont's market share of York County patients who received inpatient hospital services was 64%. (R. p. 84.) By 2011, that utilization rate had declined to 55%. (*Id.*) Over 80% of Piedmont's loss in York County patient volume during this time was absorbed by Carolinas' hospitals in North Carolina. (*Id.*)

On May 30, 2006, DHEC denied the Fort Mill CON applications of Carolinas and Presbyterian and issued the CON to Piedmont. (R. p. 76.) At the time, Piedmont argued and DHEC agreed that only an existing hospital in a county was entitled to apply for a CON to build a new hospital in that county. (R. pp. 1-28.) On June 12, 2006, Carolinas and Presbyterian filed for a contested case (the "First Contested Case") with the South Carolina Administrative Law Court ("ALC") to challenge DHEC's decision.

In September 2009, Judge Matthews presided over a three week hearing in the First Contested Case. After Carolinas and Presbyterian concluded their cases, Judge Matthews granted

their motions for summary judgment on the grounds that DHEC had erroneously adopted Piedmont's legal argument that only Piedmont, as the existing hospital in York County, was eligible to apply for a new hospital in York County. (R. pp. 1-28.) As a result, Judge Matthews remanded the Fort Mill CON applications to DHEC for further review consistent with her instructions to determine "which of the applications, if any, most fully complies with the requirements, goals, and purposes of this article and the State Health Plan, Project Review Criteria, and the regulations adopted by [DHEC]." (*Id.*)[2]

After DHEC regained jurisdiction over the Fort Mill CON matter, it reviewed the updated CON applications submitted on October 4, 2010, by Carolinas, Presbyterian, and Piedmont under the CON Act (S.C. Code Ann. § 44-7-160, *et seq.*), the 2004-2005 Plan, and the applicable Project Review Criteria (S.C. Code Ann. Regs. 61-15 § 802.1, *et seq.*). (R. p. 77.) On September 9, 2011, DHEC awarded the CON to Carolinas and denied a CON to Piedmont and Presbyterian. (R. pp. 77, 2173-2185, 3030-3044.) DHEC's findings supported the following conclusions: (1) Carolinas most fully complied with the Project Review Criteria; (2) Carolinas best justified the implementation of its project because of its current significant level of market share and utilization in northern York County; (3) Carolinas' project is financially feasible; and (4) Carolinas' project would increase accessibility and availability of services by shifting its current market share to a facility in South Carolina, resulting in less adverse impact to existing facilities. (*Id.*)

[2] Piedmont appealed Judge Matthews's Order, and Carolinas and Presbyterian cross-appealed. The consolidated appeals went first to the South Carolina Court of Appeals, which referred them for disposition to the South Carolina Supreme Court. In a decision dated April 8, 2010, this Court dismissed the appeal and remanded to DHEC because Judge Matthews's Order was not a "final decision" immediately appealable under S.C. Code Ann. § 1-23-610. (R. pp. 29-33.)

On November 15, 2011, Presbyterian and Piedmont requested a contested case with the ALC to review DHEC's award of the CON to Carolinas (the "Second Contested Case").[3] The Second Contested Case was assigned to Judge S. Phillip Lenski and progressed through a hearing on the merits conducted over fifteen days in March and April of 2013. In presenting its case, Piedmont utilized a litigation strategy of depicting itself 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, lines 22-24.) According to Piedmont,

> For years, [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. The presence of [Carolinas' proposed hospital] will only escalate that process. The only way to halt outmigration and to give Piedmont the ability, the opportunity to provide high-quality services to all of York County is to allow it to build the Fort Mill Medical Center.

(R. p. 296, lines 1-10.) Thus, Piedmont directly 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.

Approximately a year after the hearing, the ALC issued a final order dated March 31, 2014, which reversed DHEC's decision and granted the CON to Piedmont instead of Carolinas (the "Final Order"). (R. pp. 34-72.) In the Final Order, the ALC made numerous findings of fact detailing Piedmont's loss of market share among York County patients beginning in 2005. (R. pp. 41-48.) The ALC also found that Piedmont's loss coincided with a growing number of York County residents receiving hospital services at Carolinas' hospitals across the border in North Carolina. (R. pp. 42-43.) According to the ALC, Piedmont made FMMC the "centerpiece" of its plan to combat lost market share and "reduc[e] outmigration of patients from the Fort Mill Area" to North Carolina hospitals. (R. pp. 43-44.) Ultimately, the ALC adopted Piedmont's arguments

[3] Presbyterian subsequently withdrew from the Second Contested Case.

and concluded "that the establishment of the FMMC will best serve the public needs by reducing outmigration of York County residents to North Carolina hospitals." (R. p. 71.)

On April 9, 2014, Carolinas filed a Motion to Alter or Amend the Final Order ("Motion to Reconsider"). (R. pp. 227-249.) In the Motion to Reconsider, Carolinas argued, among other things, that the ALC's Final Order violated the dormant Commerce Clause because it granted the CON to Piedmont to protect Piedmont from competition from an out-of-state hospital system and to reverse outmigration of patients from South Carolina to North Carolina, thereby interfering with and burdening interstate commerce. (*Id.*)

On May 2, 2014, the ALC vacated the Final Order. (R. p. 73.) Over seven months later, on December 15, 2014, the ALC issued the Amended Final Order, which reinstated its previous ruling reversing DHEC's decision and granting the CON to Piedmont. (R. pp. 74-126.) In the Amended Final Order, the ALC rejected Carolinas' as-applied challenge under the dormant Commerce Clause in a mere footnote. (R. p. 75.) Nevertheless, the ALC maintained that its purpose and rationale for awarding the CON to Piedmont was to protect Piedmont from perceived adverse effects of competition from an out-of-state hospital and to reduce "outmigration" of patients from York County. (R. pp. 121-122, 124-125.) However, in an apparent attempt to disguise the discriminatory purpose of its ruling, the ALC deleted references of outmigration of patients to "North Carolina" and substituted them with references of 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.)

On January 14, 2015, Carolinas filed its Notice of Appeal of the Amended Final Order with the South Carolina Court of Appeals. Carolinas' appeal challenges the ALC's grant of the CON to Piedmont on the ground, among others, that it violated the dormant Commerce Clause.

Initially, the Court of Appeals attempted to certify the appeal to this Court, but this request was denied on April 14, 2016. Thereafter, the Court of Appeals held oral argument on Carolinas' appeal on November 8, 2016. During oral argument, the Court of Appeals, *sua sponte*, questioned whether Carolinas had preserved its as-applied dormant Commerce Clause challenge on appeal, even though no party had previously raised issue preservation during the appeal.

On January 11, 2017, the Court of Appeals filed Opinion No. 2017-UP-013 (the "First Opinion"), which affirmed the Amended Final Order of the ALC and the award of the CON to Piedmont. (App. pp. 362-367.) In affirming the ALC, the Court of Appeals ruled that Carolinas' dormant Commerce Clause argument was not preserved for appellate review. (*Id.*)

On April 21, 2017, Carolinas filed a Petition for Writ of Certiorari with this Court seeking review of the Court of Appeals' ruling that Carolinas' dormant Commerce Clause argument had not been preserved for appeal. (App. pp. 1507-1528.) On April 25, 2018, this Court issued Opinion No. 27792, which reversed the Court of Appeals' finding that the dormant Commerce Clause issue had not been preserved for appellate review and remanded the case for a ruling on the merits. (App. pp. 1529-1533.)

The Court of Appeals issued its decision affirming the ALC and rejecting Carolinas' dormant Commerce Clause challenge on June 6, 2018 (the "Second Opinion"). (App. pp. 1601-1622.) According to the Court of Appeals, the ALC's ruling did not violate the dormant Commerce Clause because there was "no discriminatory purpose" behind the ALC's application of the Project Review Criteria. (App. p. 1621.) However, the Court of Appeals acknowledged on multiple occasions that the application of these criteria could have a discriminatory or negative effect on interstate commerce and favor incumbent providers. For example, the Court of Appeals stated:

> We acknowledge that the proper application of [Project Review Criteria 16(c), 22, and 23] may have the effect of protecting

> competing providers who already *have a presence* in the service area . . . .
>
> Even if the reduction of outmigration negatively affects interstate trade when the service area happens to border another state . . . .
>
> To the extent that the proper application of these [Project Review] criteria may have a discriminatory effect, Carolinas has failed to carry its burden of "proving that the burdens on interstate commerce outweigh" the local benefits. . . .
>
> To the extent that the proper application of the Project Review Criteria may have a discriminatory effect, "courts are afforded some latitude to determine for themselves the practical impact of a state law . . . .

(App. pp. 1614, 1616, 1620-1621.) Despite the possibility of such discriminatory effects and protectionism, the Court of Appeals nevertheless ruled that Carolinas had failed to prove the burden on interstate commerce outweighed the local benefits of the Project Review Criteria. Thus, the Court of Appeals only conducted one of the two tests required under the two-tiered analysis for dormant Commerce Clause challenges. *See Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005) (articulating that a two-tier analytical framework has been established for determining whether a state or local law or regulation is invalid under the dormant Commerce Clause: (1) a discrimination tier, and (2) an undue burden tier).

On June 21, 2018, Carolinas filed with the Court of Appeals its Petition for Rehearing, which argued, in part, that the Court of Appeals had failed to conduct a strict scrutiny analysis in resolving whether the ALC had violated the dormant Commerce Clause as required under *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) and other cases applying a *per se* rule of invalidity to laws having a discriminatory purpose or effect. (App. pp. 1549-1558.) According to Carolinas, by finding that the ALC's application of the Project Review Criteria had a possible

discriminatory effect, the Court of Appeals was required to apply strict scrutiny and erred by failing to do so. (*Id.*)

On August 22, 2018, the Court of Appeals withdrew its previous opinion and substituted it with a new opinion (the "Third Opinion"). (App. pp. 1580-1600.) Although the Court of Appeals reached the same result in the Third Opinion by again rejecting the dormant Commerce Clause challenge, it modified its prior decision in multiple ways in response to the arguments raised by Carolinas in its Petition for Rehearing. Most significantly, the Court of Appeals deleted and modified its statements from the Second Opinion acknowledging the potential discriminatory effects of the ALC's ruling and application of the Project Review Criteria, including all statements excerpted above. (App. pp. 1549-1558.) Moreover, it added express conclusions that the ALC's application of the Project Review Criteria would not have a discriminatory effect. (App. pp. 1598-1599.) As a result of the Court of Appeals' modifications finding no discriminatory effect, it avoided the obligation of conducting a strict scrutiny analysis.

STANDARD OF REVIEW

Rule 242 of the South Carolina Appellate Court Rules sets forth certain circumstances which weigh in favor of this Court issuing a writ of certiorari to review a decision of the Court of Appeals. Among those circumstances are novel questions of law, the presence of substantial constitutional issues, and where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR; *State v. Lyles*, 381 S.C. 442, 443-44, 673 S.E.2d 811, 812 (2009) (outlining reasons for granting certiorari and standards for this Court to grant the same). Rule 242(b), SCACR, makes clear that the Court is not limited by the stated reasons within the rule as those reasons do not fully measure this Court's discretion or power to grant review of a case.

ARGUMENT

I. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE NOVEL QUESTION OF WHETHER THE ALC VIOLATED THE DORMANT COMMERCE CLAUSE IN GRANTING THE CON TO PIEDMONT FOR THE PURPOSE OF REDUCING INTERSTATE COMMERCE.

Certiorari is justified in this case because the constitutional issues presented are novel. Neither the Supreme Court nor the Court of Appeals has previously addressed the state's CON hospital licensure scheme under the dormant Commerce Clause. In fact, this Court appears to have only addressed dormant Commerce Clause challenges in two reported opinions, *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), and *City of Charleston v. Geico*, 334 S.C. 67, 512 S.E.2d 504 (1999). Most recently, in *Travelscape*, the Court clarified for the first time that the administrative law courts "are empowered to hear as applied [constitutional] challenges to statutes and regulations." *Id.* at 109, 705 S.E.2d at 39.

Because *Travelscape* recognizes the ALC's ability to hear as-applied constitutional challenges, including those under the dormant Commerce Clause, it is reasonable to expect that more challenges will be lodged before the ALC in the future. Therefore, the Court's resolution of the questions presented here will inform the ALC, future litigants, and policy makers as to the proper constitutional standards to apply in resolving disputes, adopting statutes, and promulgating regulations, especially those involved with the CON regulatory scheme.

Moreover, the novelty of the questions presented in this case is not particular to the courts of South Carolina. Rather, this case presents novel issues that have also not been addressed by courts of other jurisdictions. Specifically, the case *sub judice* involves an administrative law court – rather than a regulatory or enforcement agency – applying a regulatory licensing scheme to produce the intended effect of reducing interstate commerce. This case is different than other dormant Commerce Clause cases involving challenges to CON laws for hospitals and medical

facilities and services because this case arises from the specific denial of a application rather than an attack on the CON scheme itself, as was asserted in *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 731 F.3d 843 (9th Cir. 2013), and *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016).

And whereas other courts have invalidated CON and licensing laws and regulations relating to other industries and businesses, such as retail pharmacies, hazardous waste disposal, and stevedoring, those cases do not involve hospitals and medical facilities. *See, e.g., Fla. Transp. Servs. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012) (invalidating stevedoring licensing ordinance); *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005) (invalidating certificate of need regulatory scheme for retail pharmacies); *Medigen, Inc. v. Public Serv. Comm'n*, 985 F.2d 164 (4th Cir. 1993) (invalidating certificate of convenience and necessity law for transporters of infectious medical waste). Historically in dormant Commerce Clause jurisprudence, healthcare providers have not enjoyed a special status which would allow states to protect in-state hospitals from competition or impose burdens on out-of-state competitors. *Cf. General Motors Corp. v. Tracy*, 519 U.S. 278, 307 n.15 (1997) (noting that "if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal"); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949) (holding that a "state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition"). Yet the Court of Appeals applied a deferential standard in reviewing the ALC's decision because the regulatory scheme in question involves "states' decisions regarding health and safety." (App. pp. 1586-1587, citing *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 526 (9th Cir. 2009), and

Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 398 (9th Cir. 1995)). Thus, this case includes the novel question of whether licensure laws relating to hospitals in particular require heightened deference under the dormant Commerce Clause.

II. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER THE ALC IMPROPERLY INTERFERED WITH THE INTERSTATE HEALTHCARE MARKET TO THE DETRIMENT OF SOUTH CAROLINA CONSUMERS AND NORTH CAROLINA PROVIDERS.

The questions presented here are not only novel; they are significant.[4] The constitutional issues raised under the dormant Commerce Clause is fundamentally a question of whether the law may be applied to limit competition in the healthcare market and interfere with patient choice among competing hospital providers. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) ("Our negative Commerce Clause jurisprudence grew out of the notion that Constitution implicitly established a national free market . . . ."). In this regard, the importance of this case is not unique to the litigants. Rather, it extends to the residents of York County and the surrounding areas, who will ultimately be impacted by this case's effect on the quality and availability of healthcare in their area. And the significance of this case and the lower courts' efforts to redirect and reverse patient choices among hospital providers cannot be understated because delivery of patient care by hospitals involves issues of life and death.

As outlined in the ALC's Amended Final Order, patients in York County, especially within the northern part of the county surrounding Fort Mill, decreased their use of Piedmont Medical Center and increased their use of Carolinas' hospitals across the border in North Carolina. (R. pp. 84-86, 118.) In fact, the outmigration of patients from York County to North Carolina hospitals

[4] It is noteworthy that the Court of Appeals initially attempted to certify this appeal to the Supreme Court.

was the central issue of the contested case hearing, as evidenced by the numerous factual findings of the ALC and abundant evidence in the record. Furthermore, the desire of reducing the outmigration of patients from York County to North Carolina hospitals was the primary factor motivating the ALC's decision to grant the CON to Piedmont. (R. pp. 124-125.)

According to the ALC, the change in utilization patterns and increase in outmigration was related to Carolinas' business strategy to expand its presence of employed physicians in York County. (R. pp. 84-86.) Absent from the ALC's and the Court of Appeal's decisions, however, is any recognition that Carolinas' increased utilization among York County patients is the result of voluntary choices made by market participants who for various reasons prefer Carolinas' healthcare network over Piedmont's network, even if Carolinas' healthcare services are delivered in North Carolina instead of South Carolina. Thus, the ALC and Court of Appeals disregarded patient choice and substituted their preferences for patients to receive hospital services from the existing provider in South Carolina over a competing hospital system in North Carolina.

In so doing, the courts below engaged in or approved of discrimination that is proscribed by the dormant Commerce Clause. As the United States Supreme Court has stated:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulation exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, 336 U.S. at 539. The decisions below contravene these bedrock principles. Specifically, the ALC, with the approval of the Court of Appeals, granted the CON to the local, incumbent hospital for the purpose and effect of reducing the number of South Carolina consumers

seeking services in another state and of limiting North Carolina hospitals' and physicians' access to healthcare consumers in South Carolina.

By purposefully applying the law to influence patient decisions over where they receive healthcare and hospital services, the ALC engaged in unconstitutional discrimination to hinder patient choice. However, patients – not government employees and judges – are in the best position to determine where they receive care for life threatening illnesses, delivery of newborn children, and other healthcare services to improve or maintain the quality of life for themselves and their families. Given the seriousness of this case's impact on future choices in the healthcare market in York County, the Court should grant this Petition to ensure that the ALC's issuance of the CON in this case was not infected by impermissible considerations under the United States Constitution and that York County patients' freedom of choice is respected.

III. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO PROVIDE IMPORTANT GUIDANCE TO FUTURE LITIGANTS AND DECISION MAKERS REGARDING SUBSTANTIAL CONSTITUTIONAL QUESTIONS UNDER THE DORMANT COMMERCE CLAUSE.

While this case is clearly important to the litigants and residents of York County, the ALC's and Court of Appeals' application of the law will also affect hospital and healthcare consumers across the state, thereby further impacting interstate commerce. In affirming the ALC's decision, the Court of Appeals concluded that the goal of reducing patient outmigration reflects a legitimate concern regarding patient travel time. (App. p. 1596.) However, the issue of outmigration is not unique to York County or service areas bordering another state. Rather, as the Court of Appeals stated, outmigration data is commonly considered in the CON application process to demonstrate need for an additional provider or service in a particular services area. (App. p. 1595.) And according to the Court of Appeals, "outmigration from one service area to another usually occurs intrastate." (*Id.*) Thus, the ALC's and Court of Appeals' recognition of reducing outmigration as

a legitimate goal to favor an incumbent provider in the CON process will likely lead to that goal being pursued by DHEC, CON applicants, or other affected parties and competitors in future CON applications – regardless of the applicants' proximity to the state's border.

The Court of Appeals' decision below states the proper analysis of outmigration must focus on participation in the South Carolina market rather than the flow of patients in interstate commerce. (App. p. 1596.) Significantly, though, the limitations imposed by the dormant Commerce Clause apply with the same force to efforts to reduce intrastate outmigration as they do to efforts to reduce interstate outmigration.

Long-standing dormant Commerce Clause jurisprudence unequivocally establishes that a discriminatory regulatory scheme is no less unconstitutional because it discriminates against in-state interests as well as out-of-state interests. This principle is firmly entrenched in dormant Commerce Clause jurisprudence, as it was first articulated by the United States Supreme Court over a century ago in *Brimmer v. Rebmen*, 138 U.S. 78 (1891). In that case, the Supreme Court concluded that a Virginia statute, which imposed special inspection fees from animals slaughtered over 100 miles from the place of sale, violated the dormant Commerce Clause. The Court explained:

> Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia; for, a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.

Id. at 82-83 (internal quotations omitted).

The Supreme Court reaffirmed this principle several decades later in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). In that case, the Supreme Court invalidated, under the dormant Commerce Clause, a city ordinance that required all milk sold in Madison, Wisconsin, to be

pasteurized, processed, and bottled at a city-approved plant within five miles of Madison. *Id.* at 350. The Supreme Court concluded that the ordinance discriminated against interstate commerce because it "erect[ed] an economic barrier protecting a major local industry against competition from without the State . . . ." *Id.* at 354. In declaring the ordinance unconstitutional, the Supreme Court rejected the argument that the ordinance was not discriminatory because it applied to in-state milk distributors as well as out-of-state distributors. According to the Supreme Court, it was "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354 n.4. *See also Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 361-62 (1992) (relying on *Brimmer* and *Dean Milk* to hold that waste disposal ordinance violated dormant Commerce Clause despite its equal treatment of out-of-state and in-state waste); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) (ruling that waste "ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition"); *Walgreen*, 405 F.3d at 58 (invaliding discriminatory certificate of need program that applied equally to all newcomers to protect existing pharmacies in the local markets, regardless of whether the newcomers were from in-state or out-of-state); *Fla. Transp. Servs. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1258-59 (11th Cir. 2012) (finding a dormant Commerce Clause violation when permitting decision affected in-state Florida corporation that operated in a neighboring county).

Therefore, the controlling factor under the dormant Commerce Clause analysis is not whether the challenged law or regulation applies equally to in-state and out-of-state interests or activity but whether it protects local interests against competition from non-local interests. Based on this well-established principle, the future application of the Project Review Criteria in favor of the local, incumbent provider to prevent a non-local provider from building a new hospital or

facility in a particular service area to reduce *intrastate* outmigration from that service area would be similarly impermissible under the dormant Commerce Clause. And because *intrastate* outmigration is commonly raised in the CON process, the Court's resolution of the issues in this case will provide important guidance to DHEC, the ALC, CON applicants, and other healthcare providers in the future.

IV. THE COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS' DECISION IS INCORRECT AND INCONSISTENT WITH APPLICABLE FEDERAL LAW FOR DETERMINING WHETHER A LAW OR REGULATION HAS A DISCRIMINATORY PURPOSE OR EFFECT.

Certiorari is also warranted because the Court of Appeals' decision is incorrect. The Court of Appeals incorrectly concluded that the ALC's application of the CON Act and the Project Review Criteria did not have a discriminatory purpose or effect. As a result of this mistake, the Court of Appeals avoided conducting the mandatory strict scrutiny analysis that well-established federal precedent requires under the dormant Commerce Clause.

Under the first tier of the two-tiered analysis that applies in challenges under the dormant Commerce Clause, a virtual *per se* rule of invalidity applies where a state law discriminates facially, in its practical effect, or its purpose. *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 334 (4th Cir. 2001). This tier is also referred to as "strict scrutiny analysis." *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013).

Carolinas argued to the Court of Appeals that strict scrutiny applies in this case because the ALC's decision had a discriminatory purpose and effect as it was expressly designed to and will result in less patients engaging in interstate commerce. After first acknowledging the potential discriminatory effect of the ALC's application of the Project Review Criteria in the Second Opinion, the Court of Appeals ultimately rejected Carolinas' argument in the Third Opinion, thereby avoiding the strict scrutiny analysis.

In so doing, the Court of Appeals incorrectly applied the standard for determining discriminatory purpose or effect. To show discriminatory effect, the challenging party is "only required to show how [the challenged law], if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce." *Waste Mgmt. Holdings*, 252 F.3d at 335. A discriminatory effect can also be shown if the law "prohibit[s] the flow of interstate [services], place[s] added costs upon them, or distinguish[es] between in-state and out-of-state companies in the retail market." *Exxon Corp. v. Md.*, 437 U.S. 117, 126 (1978).

Under this standard, the ALC's application of the Project Review Criteria will have a discriminatory effect on interstate commerce. The ALC expressly found that Piedmont's proposed hospital "will best serve the needs by reducing the outmigration of York County residents to hospitals beyond York County, and . . . will help stem outmigration and maintain quality of care, while approval of [Carolinas' application] will escalate outmigration . . . ." (R. pp. 124-125.) *Ipso facto*, reducing outmigration from South Carolina to North Carolina will have a negative impact on interstate commerce and a positive impact on intrastate commerce because healthcare spending will be reduced in North Carolina and increase in South Carolina. This is the very definition of a discriminatory effect under *Waste Management Holdings*.

Moreover, the ALC effectively punished Carolinas for having physicians within its network who refer patients to its hospitals in North Carolina rather than to Piedmont's existing hospital in South Carolina. The ALC also based its decision to deny Carolinas' CON application on the belief that granting the CON to Carolinas would further escalate outmigration to North Carolina hospitals. Thus, the ALC distinguished the two applicants based on whether their affiliated physicians refer patients to hospitals in North Carolina or Piedmont's hospital in South Carolina, which is a geographic distinction demonstrating discriminatory effect under *Exxon*. And because the

discriminatory effect will fulfill the express purpose of the ALC's decision, the ALC also applied the Project Review Criteria with a discriminatory purpose.

Despite the Court of Appeals' conclusory statements that the ALC's application of the Project Review Criteria does not have a discriminatory purpose or effect, its Second Opinion issued shortly after this Court's remand directly acknowledges on multiple occasions the potential discriminatory effects of the Project Review Criteria. It was only when Carolinas' Petition for Rehearing identified these statements as requiring a strict scrutiny analysis that the Court of Appeals modified its ruling to delete its prior statements regarding discriminatory effects.[5]

While the Court of Appeals revised its findings regarding discriminatory effects in response to Carolinas' Petition for Rehearing in a manner that allowed it to avoid the strict scrutiny analysis that this case requires, the conclusion that the ALC's decision discriminates against interstate commerce in purpose and effect is inescapable. The ALC based its decision on the belief that granting the CON to Carolinas would result in more patients being referred to North Carolina hospitals and that granting the CON to Piedmont would result in more patients being referred to a South Carolina hospital. This justification is *per se* discriminatory. As a result, this Court should

[5] The Court of Appeals also implicitly acknowledges the discriminatory effect of allowing Piedmont the benefit of transferring beds from its underutilized hospital in Rock Hill to the proposed FMMC, which supported the ALC's conclusion that the Piedmont's proposed facility would be more efficient and suitable to the needs of the growing population of northern York County. (App. p. 1598-1599.) As an operator of North Carolina hospitals, Carolinas was not lawfully allowed to transfer beds from its hospitals in North Carolina to South Carolina as Piedmont was allowed to do. Thus, the Project Review Criteria had the discriminatory effect of distinguishing between Piedmont and Carolinas based on their geographic presence. Nevertheless, the Court of Appeals refused to conduct the strict scrutiny analysis by concluding that the ALC's consideration of the bed transfer issues did not constitute "reversible error." (App. p. 1598.) Carolinas is not aware of any precedent that would permit a reviewing court to avoid a strict scrutiny analysis by merely dismissing discriminatory effect as insubstantial.

grant certiorari to do what the Court of Appeals avoided, which is apply strict scrutiny to the ALC's decision.

CONCLUSION

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

Respectfully submitted,

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Petitioner The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

October 1, 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 ***PETITION FOR WRIT OF CERTIORARI and APPENDIX*** by depositing same in the United States Mail by hand delivery, addressed as follows:

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley & Scarborough, L.L.P.
1320 Main Street, 17th Floor
Columbia, SC 29201

Attorneys for Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
DHEC, Office of the General Counsel
2600 Bull Street
Columbia, SC 29201

Attorneys for Respondent South Carolina Department of Health and Environmental Control

October 1, 2018

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone

Attorneys for Petitioner The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill