IN THE SUPREME COURT
STATE OF GEORGIA

WOMEN'S SURGICAL CENTER, LLC d/b/a GEORGIA ADVANCED SURGERY CENTER FOR WOMEN; DR. HUGO D. RIBOT, JR., M.D.; DR. MALCOLM BARFIELD, D.O.,	Case Nos. S17A1317 S17X1318
Appellants/Cross-Appellees,	
v.	Superior Court of Fulton County Civil Action File No. 2015CV262659
CLYDE L. REESE, III, in his individual capacity and in his official capacity as Commissioner of the Georgia Department of Community Health; RACHEL L. KING, in her individual capacity and in her official capacity as Health Planning Director, Georgia Department of Community Health,	
Appellees/Cross-Appellants.	

BRIEF OF AMICUS CURIAE, GEORGIA ALLIANCE OF COMMUNITY HOSPITALS, INC., IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

PARKER, HUDSON, RAINER & DOBBS LLP

303 Peachtree Street, N.E.
Suite 3600
Atlanta, Georgia 30308
PHONE: (404) 523-5300
FAX: (404) 522-8409
jparker@phrd.com
jrainer@phrd.com

By: John H. Parker, Jr.
Georgia Bar No. 562450
J. Marbury Rainer
Georgia Bar No. 592225

Attorneys for Georgia Alliance of Community Hospitals, Inc.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. INTEREST OF AMICUS CURIAE 1

III. ARGUMENT AND CITATION OF AUTHORITIES 3

A. The Constitutionality of the Georgia CON Law Is Supported by Established Judicial Principles. 3

B. Appellants' Reliance on the Alleged Anticompetitive Nature of the Georgia CON Law as the Basis for its Invalidation Is Contrary to Well-Established Law. 6

1. Appellants Mischaracterize the CON Law as Strictly Anticompetitive. 6

2. Federal Antitrust Regulators' Opposition to State CON Laws as Allegedly Anticompetitive Is Irrelevant. 8

C. Compelling Public Policy Considerations Support the Georgia CON Law. 11

1. Cherry-Picking by Freestanding ASCs 11

2. The CON Law's Legitimate Stated Purposes 13

D. CON Laws Have Withstood Judicial Scrutiny. 15

E. As an Additional Ground for Affirming Summary Judgment for Appellees, Appellants Failed To Present an Actual Controversy Necessary for Declaratory Judgment. 18

1. Background of Appellants' Denied, Unappealed CON Application..........19

2. No Basis for Declaratory Judgment 20

IV. CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Albany Surgical, P.C. v. Dep't of Cmty. Health, 278 Ga. 366 (2004) 4, 5

Albany Surgical, P.C. v. Dep't of Cmty. Health, 257 Ga. App. 636 (2002) 13

Baker v. City of Marietta, 271 Ga. 210 (1999) 28

Baranan v. State Bd. of Nursing Home Adm'rs., 143 Ga. App. 605 (1977) 7

Belk v. Westbrooks, 266 Ga. 628 (1996) 5

Black v. Bland Farms, LLC, 332 Ga. App. 653 (2015) 26

Bradfield v. Hosp. Auth. of Muscogee Cnty., 226 Ga. 575 (1970) 7

Bruner v. Zawacki, 997 F. Supp. 692 (E.D. Ky. 2014) 17

Chambers of Ga., Inc. v. Dep't of Natural Res., 232 Ga. App. 632 (1998) ..... passim

City of Calhoun v. N. Ga. Elec. Membership Corp., 233 Ga. 759 (1975) 4

Colon Health Ctrs. of Am., LLC v. Hazel, 733 F.3d 535 (4th Cir. 2013) 15, 16

Colon Health Ctrs. of Am., LLC v. Hazel, 813 F.3d 145 (4th Cir. 2016) 16

Colon Health Ctrs. of Am., LLC v. Hazel, No. 1:12-cv-615, 2012 WL 4105063 (E.D. Va. Sept. 14, 2012) 16, 17

DeJarnette v. Hosp. Auth. of Albany, 195 Ga. 189 (1942) 7

DeKalb Cnty. v. Perdue, 286 Ga. 793 (2010) 4

Dep't of Transp. v. Peach Hill Prop., Inc., 280 Ga. 624 (2006) .... passim

Dev. Auth. of DeKalb Cnty. v. State of Ga., 286 Ga. 36 (2009) 4

Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013) 8

Fed. Trade Comm'n v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991) 8, 9

Georgia-Pacific, LLC v. Fields, 298 Ga. 499 (2013) 18

Higdon v. City of Senoia, 273 Ga. 83 (2000) 21

Howard v. State, 222 Ga. 525 (1966) 5

Hughes v. Cobb Cnty., 264 Ga. 128 (1994) 13

Ledford v. Dep't of Transp., 253 Ga. 717 (1985) 22

Mount Royal Towers, Inc. v. Ala. Bd. of Health, 388 So. 2d 1209 (Ala. 1980) 17

N. Fulton Med. Ctr. v. Stephenson, 269 Ga. 540 (1998) 7, 8

Old S. Duck Tours v. Mayor & Aldermen of City of Savannah, 272 Ga. 869 (2000) 4

Pangle v. Gossett, 261 Ga. 307 (1991) 27

Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042 (8th Cir. 1997) 16

Royal Crown Prop., LLC v. Regions Bank, 306 Ga. App. 568 (2010) 13

Terrell Cnty. v. Albany/Dougherty Hosp. Auth., 256 Ga. 627 (1987) 21

Statutes

O.C.G.A. § 12-8-24 25

O.C.G.A. § 12-8-25.4 21

O.C.G.A. § 12-8-30.6 25

O.C.G.A. § 31-6-1 .... 1, 2, 7

O.C.G.A. § 31-6-21 6

O.C.G.A. § 31-6-21.1 5

O.C.G.A. § 31-6-42 .... 7, 18

O.C.G.A. § 31-6-44 20

O.C.G.A. § 31-6-44.1 20

O.C.G.A. § 31-6-46 6

O.C.G.A. § 31-6-47 19

O.C.G.A. § 31-6-70 .... 1, 6

O.C.G.A. § 9-4-2 20

Rules

Ga. Comp. R. & Regs. 111-2-1 *et seq.* 1

Other Authorities

Brief of Scholars of Economics and Scholars of Law and Economics as Amici Curiae Supporting Appellants, *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535 (2013) (No. 14-2283) 16

Certificate of Public Need (COPN) Work Group, the Virginia Department of Health, https://www.vdh.virginia.gov/Administration/COPN.htm 15

Concurring Statement of Commissioner Julie Brill on the Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice to the Virginia Certificate of Public Need Work Group (Oct. 23, 2015), https://www.ftc.gov/public-statements/2015/10/concurring-statement-commissioner-julie-brill-joint-statement-federal 10

Dissenting Statement of Commissioner Julie Brill on the Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice on Certificate-of-Need Laws and South Carolina House Bill 3250 (Jan. 8, 2016), https://www.ftc.gov/public-statements/2016/01/dissenting-statement-commissioner-julie-brill-joint-statement-federal 10, 11

Statement of the Federal Trade Commission—In the Matter of Phoebe Putney Health System, Inc., et al., Docket No. 9348 (Mar. 31, 2015), https://www.ftc.gov/public-statements/2015/03/statement-federal-trade-commission-matter-phoebe-putney-health-system-inc. 8

I. INTRODUCTION

The Georgia Alliance of Community Hospitals, Inc. (the "Alliance"), as amicus curiae, submits this brief in support of Appellees/Cross-Appellants, who are officials in the Georgia Department of Community Health ("DCH" or the "Department"). Appellants/Cross-Appellees Women's Surgical Center, LLC d/b/a Georgia Advanced Surgery Center for Women ("GASC") and its owners, Hugo Ribot, M.D. and Malcolm Barfield, D.O., ask this Court to reverse the trial court's October 31, 2016 order granting summary judgment to Appellees on Appellants' constitutional challenges to the Georgia Certificate of Need ("CON") law, *i.e.*, O.C.G.A. §§ 31-6-1 through 31-6-70, and regulations thereunder, Ga. Comp. R. & Regs. 111-2-1 *et seq.*

The Alliance submits that the trial court correctly granted Appellees' motion for summary judgment on all five constitutional challenges raised in Appellants' declaratory judgment action. Moreover, this Court may affirm the trial court's grant of summary judgment because declaratory judgment was not appropriate here.

II. INTEREST OF AMICUS CURIAE

The Alliance, a Georgia nonprofit corporation, is an industry association comprised of approximately 75 nonprofit community hospitals and health systems, urban and rural, large and small, located throughout the State of Georgia. The

Alliance is dedicated to furthering the ability of community hospitals to fulfill their primary mission of serving their local communities. To that end, the Alliance represents its members in efforts to promote sound health care policy, laws, and regulations affecting Georgia's community hospitals. The Alliance has long advocated in support of the CON law and the statutory requirement of mandatory review of new institutional health services and facilities, including, *inter alia*, the establishment of a freestanding ambulatory surgery center ("ASC") owned by more than a single physician group practice, such as the one Appellants previously sought in their CON application denied in March 2015.

The legislative policy of the CON program, expressed in O.C.G.A. § 31-6-1, includes ensuring that quality health care services and facilities are developed in an orderly and economic manner and made financially available and geographically accessible to all citizens. CON review serves to promote quality care in a cost-effective manner that avoids unnecessary duplication of existing services and is compatible with the needs of the various areas and populations of the State. The legislature has declared that only those health care services found by DCH to be in the "public interest" shall be provided. *Id.* The Alliance supports these legislative policies.

The Alliance submits this brief because its member hospitals and the communities they serve will be adversely affected if Appellants were to succeed in

having the CON law overturned. Furthermore, certain member hospitals of the Alliance, Floyd Medical Center (Rome) and WellStar Kennestone Hospital (Marietta), which offer outpatient surgical services in the same service area as Appellants' ASC, are directly affected by Appellants' attempt to invalidate the CON law through their declaratory judgment action. Throughout the CON application and appeal process prescribed in the CON statute, each competing and aggrieved health care facility, including members of the Alliance, has the right as a competing facility to oppose a CON applicant's proposal for a new institutional health service. Alliance members Floyd Medical Center and WellStar Kennestone Hospital timely opposed Appellant GASC's 2014 CON application to expand the scope of its existing ASC beyond the ownership of Appellants' physician group practice during the DCH review process. That CON application was denied by DCH in March 2015, and it was not appealed by Appellants under prescribed CON statutory appeal procedures.

III. ARGUMENT AND CITATION OF AUTHORITIES

A. The Constitutionality of the Georgia CON Law Is Supported by Established Judicial Principles.

Appellants have not met their burden of overcoming the strong presumption that the CON law is a valid, constitutional act of the Georgia legislature aimed at protecting the health and welfare of the citizens of this State through the orderly and economical development of health care services and facilities. *See Albany*

Surgical, P.C. v. Dep't of Cmty. Health, 278 Ga. 366, 368 (2004) ("[T]he constitutionality of a statute is presumed, and . . . all doubts must be resolved in favor of its validity."); *Old S. Duck Tours v. Mayor & Aldermen of City of Savannah*, 272 Ga. 869, 871 (2000) (reviewing court has a duty to construe the legislation so as to uphold its constitutionality).

As this Court has observed:

> At the outset we recognize that all presumptions are in favor of the constitutionality of an act of the legislature . . . , and that "before an Act of the legislature can be declared unconstitutional, the conflict between it and the fundamental law must be clear and palpable and this [C]ourt must be 'clearly satisfied of its unconstitutionality.' " . . . . Moreover, because statutes are "presumed to be constitutional until the contrary appears, . . . the burden is on the party alleging a statute to be unconstitutional to prove it." . . . .

Dev. Auth. of DeKalb Cnty. v. State of Ga., 286 Ga. 36, 38 (2009) (citations omitted). *See also DeKalb Cnty. v. Perdue*, 286 Ga. 793, 798 (2010) ("In determining constitutional questions, like others, the courts are not permitted to concern themselves with the wisdom of an act." . . . .); *City of Calhoun v. N. Ga. Elec. Membership Corp.*, 233 Ga. 759, 770 (1975) (A claim that a statute is "contrary to the public interest . . . *does not* rise to the level of a constitutional attack which can be considered on its merits." (emphasis added)).

The presumption of constitutionality is only strengthened by the longevity of the Georgia CON law, which was initially enacted in its original form in 1979. *See*

Belk v. Westbrooks, 266 Ga. 628, 629 (1996) (holding that a statute's 40-year longevity was "itself an indicator" that the statute was constitutional).

Moreover, Appellants attack as unconstitutional the entirety of the Georgia CON statute and the Department rules promulgated thereunder. "Where, as here, the constitutionality of a legislative act as a whole is questioned, it is well settled by numerous decisions of this court that **such an omnibus attack will necessarily fail unless the act is invalid in every part** for some reason alleged." *Howard v. State,* 222 Ga. 525, 526 (1966) (emphasis added). Appellants have not made such a showing.

First, this Court rejected a constitutional challenge to certain DCH regulations governing the issuance of CONs for ASCs (the "ASC Rule") that was based on the argument that O.C.G.A. § 31-6-21.1, which establishes procedures for promulgating such regulations, violates the separation of powers doctrine. *Albany Surgical*, *supra*, 278 Ga. at 366-68. This Court held that both the ASC Rule and O.C.G.A. § 31-6-21.1 are constitutional. *Id.* Because this Court has already ruled on the constitutionality of portions of the CON statute and regulations, Appellants' omnibus attack must necessarily fail.

Furthermore, while Appellants attack the constitutionality of the entire CON law for the reason that the required approval of a new institutional health service is allegedly anticompetitive, not all of the provisions of the CON law involve CON

application review and approval requirements. In addition to provisions regarding CON regulatory review and approval of a variety of new institutional health services and facilities, the CON statute requires DCH to conduct the health planning activities of the state and to develop a State Health Plan. O.C.G.A. §§ 31-6-21(b)(1)-(2). The statute also requires annual reporting from DCH to legislative health care committees, including information on access to health care services and issues regarding federal laws and regulations influencing Medicaid, Medicare, insurance, tax laws, and long-term health care; and it requires annual reports from both CON-approved and CON-exempt health care facilities for statewide health planning and consumer transparency purposes. O.C.G.A. §§ 31-6-46, 31-6-70. Appellants have offered no reason why those provisions are unconstitutional.

B. Appellants' Reliance on the Alleged Anticompetitive Nature of the Georgia CON Law as the Basis for its Invalidation Is Contrary to Well-Established Law.

1. Appellants Mischaracterize the CON Law as Strictly Anticompetitive.

Appellants erroneously represent to this Court that the CON law "exist[s] to limit competition" and that "anticompetitive means are forbidden in Georgia whatever the purpose." (Appellants' Br. at 8, 10). As an initial matter, Appellants' characterization of the CON law as strictly anticompetitive is inaccurate and misleading. The CON law prescribes a multi-level review process to determine

whether an applicant's proposal is consistent with the State Health Plan, promotes financial accessibility (*i.e.*, makes health care available to indigent, charity, and Medicaid populations), fosters innovation and quality, and satisfies other policy considerations not focused on competition. The legislative purpose of the CON Act, stated in O.C.G.A. § 31-6-1, is not to restrain competition. Moreover, the CON statute actually requires the Department to consider, in its review of a CON application, whether the proposed project "**fosters competition** that is shown to result in lower patient costs without a loss of the quality of care." O.C.G.A. § 31-6-42(a)(13) (emphasis added). On its face, that is not an anticompetitive consideration.

Georgia has long sanctioned the regulation of institutional health services and facilities. *See, e.g.*, *Bradfield v. Hosp. Auth. of Muscogee Cnty.*, 226 Ga. 575, 585 (1970) ("[T]he operation of a hospital, even a privately-owned one, is in the public interest. Promotion of the public health constitutes a public purpose . . . ."); *DeJarnette v. Hosp. Auth. of Albany*, 195 Ga. 189, 198 (1942) ("Care of the poor . . . is a public responsibility, relating to society in general, and may directly affect the peace, health, morals, and security of the public at large."); *Baranan v. State Bd. of Nursing Home Adm'rs.*, 143 Ga. App. 605, 606 (1977) (noting that the nursing home business has been regulated by the General Assembly because it is so closely related to the public interest); *N. Fulton Med. Ctr. v. Stephenson*, 269 Ga. 540

(1998) (invalidating a rule purportedly authorizing the relocation of an ASC without full CON review and approval as being contrary to the CON statute). Clearly, the General Assembly in its enactment and amendments of the CON law could reasonably believe that certain regulatory requirements for the provision of institutional health care services would advance legitimate public health planning policies.

2. Federal Antitrust Regulators' Opposition to State CON Laws as Allegedly Anticompetitive Is Irrelevant.

Appellants' reliance on federal antitrust policies and decisions to bolster their anticompetitive argument is irrelevant and misguided. (Appellants' Br. at 16-17). The decision in *Federal Trade Comm'n v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013), originated from the FTC's attempt, on federal antitrust grounds, to block a health system's acquisition of a local hospital, and addressed the application of state action immunity from the federal antitrust laws.[1] *Federal Trade Comm'n v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991), which held that the FTC was entitled to a preliminary injunction to prevent a proposed hospital acquisition based on its prima facie showing that the transaction would

[1] Appellants also fail to note the ultimate outcome in *Phoebe Putney Health System, Inc*. The merits of the FTC's administrative complaint against the acquisition were never litigated. As acknowledged by the FTC in its published settlement of the antitrust challenge, the Georgia CON law precluded the relief it sought, namely, a divestiture of the hospital. *See Statement of the Federal Trade Commission—In the Matter of Phoebe Putney Health System, Inc., et al.*, Docket No. 9348 (Mar. 31, 2015), https://www.ftc.gov/public-statements/2015/03/statement-federal-trade-commission-matter-phoebe-putney-health-system-inc. Thus, the FTC itself acknowledged the validity of Georgia's CON law in settling the litigation.

violate the Clayton Antitrust Act, is likewise inapposite. Even if the federal antitrust laws were somehow relevant to an analysis of the constitutionality of Georgia's CON law, the Eleventh Circuit noted that "Georgia has not clearly articulated a policy to displace all competition by hospitals." *University Health*, 938 F.2d at 1213 n.13. Neither decision represents a judicial pronouncement of the "inherently anticompetitive" effects of Georgia's CON law, as Appellants incorrectly argue.

Appellants also point to a 2004 joint report by the FTC and the Department of Justice as evidence of the federal government's opposition to CON programs on the grounds that they are anticompetitive. (Appellants' Br. at 19-20 & n.7).[2] The longstanding opposition of federal antitrust agencies to all state CON laws is wholly irrelevant.

Furthermore, an FTC Commissioner has pointed out that FTC/DOJ opposition to CON laws based on the argument that they are anticompetitive is not sufficient reason alone for eliminating CON laws. In connection with Virginia's recent review of its CON program, FTC Commissioner Julie Brill issued a separate statement pointing out that the federal antitrust enforcement agencies do not take into account important public policy considerations outside the scope of the

[2] Appellants erroneously characterize that 2004 report as a "study." (Appellants' Br. at 19). The report was not an empirical study, but rather a restatement of the FTC's arguments against CON programs with little analytical or factual basis to support them. (V. 4, R-627, 635).

agencies' regulatory focus on competition and the antitrust laws. The federal agencies lack the information and experience "to opine on non-competition-related public policy goals" of the CON laws, including promoting access to care, "providing charity care, establishing standards for providing services, preventing unqualified entities from providing certain services, and assessing quality by monitoring outcomes." Nor do they consider the effects that eliminating CON laws would have on safety-net hospitals. *Concurring Statement of Commissioner Julie Brill on the Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice to the Virginia Certificate of Public Need Work Group* (Oct. 23, 2015), https://www.ftc.gov/public-statements/2015/10/concurring-statement-commissioner-julie-brill-joint-statement-federal.

FTC Commissioner Brill expressed the same concerns in response to an unsuccessful 2016 bill proposing repeal of South Carolina's CON law, adding that:

> Health care policy makers at the state level are faced with difficult issues separate and apart from . . . competition . . . . These include the critically important issue of preserving access to care for the needy, and doing so in a complex market, involving informational asymmetries among patients, providers, and payors. In this context, it is important to understand that competition will not move resources from those than can afford health care to those that cannot.

Dissenting Statement of Commissioner Julie Brill on the Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of

Justice on Certificate-of-Need Laws and South Carolina House Bill 3250 (Jan. 8, 2016), https://www.ftc.gov/public-statements/2016/01/dissenting-statement-commissioner-julie-brill-joint-statement-federal.

C. Compelling Public Policy Considerations Support the Georgia CON Law.

The public policy considerations cited by FTC Commissioner Brill are salient in this case. Georgia communities depend most on health care services that providers have the least financial incentive to offer. Elimination of Georgia's CON program would harm patients, providers, and payors by increasing costs and decreasing the availability and quality of health care for all Georgia citizens, regardless of economic resources.

1. Cherry-Picking by Freestanding ASCs

Striking down the CON law would have far-reaching negative implications for safety-net and rural hospitals across the state. Without the CON law, nothing would prevent multiple groups of physicians and non-physician entrepreneurs from establishing new freestanding ASCs near community hospitals. Community hospitals must provide essential and unprofitable emergency room services to all patients in need, and also offer many other needed but unprofitable services such as trauma care, intensive care units, physician residency training programs, neonatal intensive care, burn care, and free cancer screenings. Freestanding ASCs offer none of these services, yet cherry-pick profitable patients with less costly

complications and with commercial insurance, taking away community hospitals' revenue streams and leaving such hospitals responsible for virtually all of the communities' uncompensated indigent and charity care. This cherry-picking jeopardizes the hospitals' ability to provide high quality but unprofitable health care services, large volumes of uncompensated care, and indispensable emergency and trauma services upon which their communities depend. (*See* V. 4, R-600).

No doubt that Appellant GASC would only increase its pattern of cherry-picking without CON restraint on its expansion to add other physician group owners. Appellants assert that 5.6% of GASC's patients are indigent or charity (Appellants' Br. at 4 n.2), but that was based on the claim that GASC served a total of 61 indigent and charity patients from 2010 to 2014. (V. 2, R-26). GASC reported to DCH in its most recent, certified Annual Freestanding Ambulatory Surgery Center Survey for 2015 (Parts F and G) that it treated only eight indigent and charity patients and provided only 2.58% uncompensated indigent or charity care that year.[3] In stark contrast, it was shown in the prior CON case involving GASC's denied CON application that a nearby hospital in Rome, Floyd Medical Center, provided $73 million in uncompensated indigent and charity care in one year, amounting to more than 15.0% of the total adjusted gross revenue of that facility. (V. 3, R-373).

---

[3] All Annual Freestanding Ambulatory Surgery Center Surveys are available on the DCH website at http://dch.georgia.gov/health-planning-databases.

The Court of Appeals has recognized the issue of cherry-picking: "[I]f a general surgery practice was permitted exemption from a CON, then surgeons would set up many [ASCs] that would duplicate hospital surgical suites, taking away centers of profit by paying patients and leaving indigent surgical patients to the hospitals." *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 637 (2002). The CON law prevents unbridled cherry-picking by new institutional health services.

2. The CON Law's Legitimate Stated Purposes

Contrary to Appellants' claim, CON health planning policy goes far beyond purely anticompetitive, economic concerns. The frivolous claim that that is the reason for the CON law was set forth in an affidavit filed by Appellants' purported expert, Thomas Stratmann. Unlike Stratmann, who is an economist with no background in health planning, Appellees' expert, Daniel Sullivan, is a health planning and healthcare finance expert with extensive experience in CON matters. (V. 4, R-595-96). In its order granting summary judgment to Appellees, the trial court gave credence to Appellees' expert affidavit.[4] Moreover, the trial court pointed out that both parties' experts, including Stratmann himself, "acknowledged

---

[4] It is well established that appellate courts do not re-weigh the evidence or make credibility determinations. *Hughes v. Cobb Cnty.*, 264 Ga. 128, 130 (1994); *see Royal Crown Prop., LLC v. Regions Bank*, 306 Ga. App. 568, 571 (2010) ("The trial court, as the trier of fact, was entitled to find [an expert's] testimony credible and to accept his opinion over that of [the other party's] expert").

the legitimate public policy goals underlying CON programs such as Georgia's." (V. 6, R-1287). Unlike Stratmann's, Sullivan's affidavit cites to and includes numerous published empirical studies supporting the effectiveness of CON laws. (*See* V. 4, R-595-938).

Sullivan presented evidence that "CON programs like Georgia's are effective to achieve their stated purposes of ensuring access to quality health care services and controlling health care costs." (V. 4, R-597). CON laws improve quality of care by ensuring minimum volumes for providers of certain services, as shown by the strong evidence of a correlation between the volume of services performed and positive patient outcomes, particularly for surgeries. (V. 4, R-599-600, 607-08). There is also evidence that CON programs can reduce the cost of services and increase provider cost-efficiency, as well as preserve access to health care services, particularly for rural and indigent populations. (V. 4, R-604-06, 608-15).

The Georgia General Assembly has amended Georgia's CON law on several occasions since its initial enactment in 1979, and since the federal health planning law expired in 1986, most recently in 2008 after extensive study by the State Commission of the Efficacy of the Certificate of Need Program. Of the 36 states that currently have CON laws, several have continued their CON programs after conducting the same kind of policy review by statewide committees, including Connecticut, Delaware, Illinois, Kentucky, New York, South Carolina, and

Virginia. *See Certificate of Public Need (COPN) Work Group*, the Virginia Department of Health, https://www.vdh.virginia.gov/Administration/COPN.htm (last visited Apr. 26, 2017) (linking to CON reports from other states). In fact, Virginia's Certificate of Public Need ("COPN") Work Group, formed by legislative mandate in 2015 to conduct a comprehensive review of that state's COPN program, considered numerous submissions in preparing its report and recommendations to the legislature, including two unpublished papers of Appellants' expert witness, Stratmann, which failed to persuade the Work Group to recommend elimination of that state's COPN law. *See id.*

D. CON Laws Have Withstood Judicial Scrutiny.

Appellants have not cited to a single case in which a state's CON law was held unconstitutional. Indeed, conspicuously absent from Appellants' initial brief and their trial court filings is any mention of *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535 (4th Cir. 2013), the most recent rejection of a constitutional challenge to a state's CON law based on the same federal constitutional claims that Appellants have raised here.

In *Colon Health*, the Fourth Circuit upheld Virginia's COPN law against a due process challenge on the basis of the legitimate purposes served by the statute, including that it "ensur[es] geographically convenient access to healthcare for

Virginia residents at a reasonable cost." *Id.* at 548.[5] The Fourth Circuit expressly rejected the argument, similarly advanced by Appellants here, that the Virginia COPN program "fail[ed] to advance any state purpose other than bald economic protectionism." *Id.*; *cf. Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1048 (8th Cir. 1997) (reciting that CON laws in general have been recognized as a valid means of furthering a legitimate state interest, and collecting cases). Notably, Appellants' expert Stratmann, along with others, unsuccessfully filed an amici curiae brief in the Fourth Circuit raising many of the same arguments rejected by the trial court here. Brief of Scholars of Economics and Scholars of Law and Economics as Amici Curiae Supporting Appellants, *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535 (2013) (No. 14-2283).

In dismissing the due process claims in *Colon Health*, the district court reasoned that there was a "legitimate governmental interest in reducing the cost of medical services and ensuring its broad availability." Thus, the plaintiffs' arguments about the negative effects of CON laws and the benefits of allowing them to perform medical services were "entirely beside the point." *Colon Health*

[5] The Fourth Circuit affirmed the Virginia district court's decision granting a motion to dismiss challenges to Virginia's COPN law under the Due Process Clause and the Privileges and Immunities Clause for failure to state a claim, but remanded a claim under the Dormant Commerce Clause for further consideration. *Colon Health*, 733 F.3d at 540. Appellants here did not raise a Commerce Clause challenge. Additionally, the Commerce Clause challenge in *Colon Health* was denied by the district court on remand, and that denial was affirmed on appeal. *See Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016).

Ctrs. of Am., LLC v. Hazel, No. 1:12-cv-615, 2012 WL 4105063, at *6 (E.D. Va. Sept. 14, 2012).

The Alabama Supreme Court has reached the same conclusion as the Fourth Circuit, holding that "there is no indication that elimination of surplus hospital beds in a community through licensing and CON laws is not logically calculated to reduce medical costs caused by duplication of services." *Mount Royal Towers, Inc. v. Ala. Bd. of Health*, 388 So. 2d 1209, 1215 (Ala. 1980).

Appellants' reliance on *Bruner v. Zawacki*, 997 F. Supp. 692 (E.D. Ky. 2014), a Kentucky district court case, is misplaced. (Appellants' Br. at 29-30). *Bruner* was not a health planning CON case and did not, as Appellants wrongly contend, strike down "a very similar CON law." Rather, *Bruner* involved the requirement that moving companies obtain a Household Goods Certificate from the Kentucky Transportation Cabinet to offer moving services. 997 F. Supp. at 693. The court determined that, as the statute is applied to the moving service industry, "an existing moving company can essentially 'veto' competitors from entering the moving business **for any reason at all**, completely unrelated to safety or societal costs. The Cabinet undertakes **no review** regarding excess entry into the moving business." *Id.* at 700 (emphasis added).

Unlike the Kentucky statute at issue in *Bruner*, DCH's decisions to issue or deny a CON for a new institutional health service in Georgia are based on

mandatory review and application of 17 statutory considerations, each of which relates back to the CON law's goals of promoting the health and welfare of Georgia citizens through sound health planning. *See* O.C.G.A. § 31-6-42(a) (considerations include, *inter alia*, consistency with goals of the State Health Plan; area population need for the service; absence of existing, less costly alternatives in the service area; negative impact on existing providers; financial feasibility; financial accessibility of the proposed service to indigent, Medicaid, and other underserved residents; assurance of compliance with DCH quality care standards and of cost effectiveness; and availability of necessary health care personnel).

E. As an Additional Ground for Affirming Summary Judgment for Appellees, Appellants Failed To Present an Actual Controversy Necessary for Declaratory Judgment.[6]

The trial court's grant of summary judgment for Appellees should also be affirmed because there is no basis for Appellants' declaratory judgment action. A grant of summary judgment must be affirmed if it is right for any reason. *Georgia-Pacific, LLC v. Fields*, 298 Ga. 499, 504 (2013).

[6] Prior to the parties' cross motions for summary judgment, Appellees moved to dismiss the complaint on several grounds, including Appellants' failure to establish an actual controversy in which declaratory judgment may be rendered. The trial court denied Appellees' motion to dismiss, and this Court denied Appellees' petition for interlocutory appeal of that trial court order. Thus, this Court has not previously addressed the declaratory judgment issue in this litigation.

1. Background of Appellants' Denied, Unappealed CON Application

Appellant GASC is a physician group practice (Drs. Ribot and Barfield), office-based single specialty ASC specializing in OB/GYN surgical procedures. GASC's ASC facility is located in Cartersville, Bartow County, Georgia. In 2009, GASC obtained a Letter of Nonreviewability ("LNR") from DCH, exempting GASC from CON requirements to establish its ASC facility. *See* O.C.G.A. § 31-6-47(a)(18)(A)(ii) (authorizing a single physician group practice to secure an LNR for an office-based single specialty ASC with two or fewer operating rooms ("ORs")). GASC's 2009 LNR request sought authorization for two ORs, and DCH granted GASC an LNR for a two-OR ASC facility on March 19, 2009. (V. 2, R-21). However, Appellants chose to build out only one OR in their ASC, and that is why it is currently a one-OR facility.

In 2014, GASC then filed a CON application seeking DCH review and approval to convert its existing LNR-authorized ASC to a CON-approved facility, because CON approval would allow Appellants to sell and expand the ownership of the ASC to include other physician group practices.[7] (V. 2, R-12). The

[7] GASC's CON application also sought approval to add a second OR. (V. 2, R-12). Appellants continue to misrepresent that the CON law forbids them from adding a second operating room. (Appellants' Br. at 3). GASC could (and still can) secure an LNR at any time to add a second OR under the CON exemption prescribed in O.C.G.A. § 31-6-47(a)(18)(A)(ii), just as it did with its 2009 LNR. CON approval for a second OR would not be required so long as GASC continues to operate the facility as a physician group practice, office-based single specialty ASC.

Department denied that application on March 27, 2015. (V. 2, R-24-42). The Department's decision became final effective on the date of issuance as GASC elected not to pursue the available administrative appeal and judicial review procedures authorized in the CON statute.[8]

Appellants do not have a CON application pending before DCH or on appeal. Instead, they filed their complaint for declaratory judgment and injunctive relief on June 30, 2015, seeking a judicial determination as to the constitutionality of the entire CON law. (V. 2, R-5-19).

2. No Basis for Declaratory Judgment

Appellants' complaint is foreclosed by the statutory requirement that they present an actual controversy necessary for declaratory judgment, which is lacking here. *See* O.C.G.A. § 9-4-2 (providing that superior courts may declare the rights of parties only in "cases of actual controversy" or when "the ends of justice require that the declaration should be made"). "Actual controversy" means there are "interested parties asserting adverse claims on an accrued set of facts." *Chambers of Ga., Inc. v. Dep't of Natural Res.*, 232 Ga. App. 632, 634 (1998). To establish a

[8] A CON applicant is entitled to an administrative appeal of the Department's initial decision and to a full evidentiary hearing on a record created before an independent hearing officer from the CON Appeal Panel. O.C.G.A. § 31-6-44(d)-(e). The hearing officer's order may then be appealed to the Commissioner of the Department, whose decision becomes the final agency decision subject to judicial review under the Georgia Administrative Procedure Act. O.C.G.A. § 31-6-44(i), (m). **On judicial review, the denied applicant is expressly authorized to challenge the constitutionality of the Department's final decision if the constitutional claims were raised and preserved at the agency level.** O.C.G.A. § 31-6-44.1(a)(1) (emphasis added).

controversy, a plaintiff must show the presence of a **concrete** issue involving "a definite assertion of legal rights, and a positive legal duty with respect thereto, **which are denied by the adverse party.**" *Higdon v. City of Senoia*, 273 Ga. 83, 85 (2000) (emphasis added). A court should not "decide the constitutionality of an act of the legislature where the attack is made by a party whose rights have not been affected." *Terrell Cnty. v. Albany/Dougherty Hosp. Auth.*, 256 Ga. 627, 628 (1987).

The decisions of this Court and the Georgia Court of Appeals in *Department of Transportation v. Peach Hill Properties, Inc.*, 280 Ga. 624 (2006), and *Chambers of Georgia, Inc. v. Department of Natural Resources*, 232 Ga. App. 632 (1998) (cert. denied), respectively, are particularly instructive.

In *Chambers*, a waste management company applied for a solid waste handling permit to expand a landfill. 232 Ga. App. at 632. The Department of Natural Resources denied the application because the proposed landfill expansion was prohibited by O.C.G.A. § 12-8-25.4, which placed limitations on the number of solid waste facilities permitted in any given geographic area. *Id.* The plaintiff did not pursue an administrative appeal of the application denial, and instead filed an action for declaratory judgment and injunctive relief, alleging that O.C.G.A. § 12-8-25.4 was unconstitutional on its face and as applied to the planned landfill expansion. *Id.* at 632-33. The plaintiff also argued that any further administrative

review was unnecessary and futile because the agency was required to deny the application in accordance with the allegedly unconstitutional statute. *Id.* at 633.

The Court of Appeals held that declaratory judgment was unavailable because no pending case or controversy existed at the time the *Chambers* plaintiff sought a declaration of unconstitutionality. *Id.* at 633. The permit application proceeding became final, adversely to the plaintiff, after it elected not to exhaust administrative remedies, which would have kept the actual controversy alive. *Id.* at 633-34. No new case or controversy was currently pending because the plaintiff chose to seek a declaratory judgment rather than initiate a new permit application. *Id.* at 634.

The Court of Appeals made clear that the plaintiff should have raised its constitutional challenge in connection with the original permit application: "Although the constitutionality of the statute could not be adjudicated during an administrative hearing, this proceeding would provide the proper forum for raising the constitutional objection at the earliest opportunity, *keeping the actual controversy pending*, and ultimately providing an avenue for judicial review of the constitutional issue." *Id.* at 633 (emphasis added); *see Ledford v. Dep't of Transp.*, 253 Ga. 717, 717 (1985) (Georgia courts will not "grant declaratory relief concerning a constitutional question which could be raised on appeal from the administrative decision.").

More recently, this Court adopted the reasoning of *Chambers* with approval in *Peach Hill*, *supra*. In *Peach Hill*, the plaintiff landowner sought a declaratory judgment as to the validity of an agency rule regulating the construction of solid waste landfills near airports, but had not applied for an exemption under the challenged rule. 280 Ga. at 625. This Court reversed the trial court's decision striking down parts of the rule, and held that no pending case or controversy existed. *Id.* at 625-26. This Court quoted extensively from the *Chambers* opinion, concluding that the Court of Appeals' analysis equally applied to Peach Hill's declaratory judgment action:

> After DOT adopted Rule 672-9-.05 and Peach Hill filed the amended petition for declaratory judgment,
>
>> no *pending* case or controversy existed. . . . A new case or controversy is not currently pending because [Peach Hill] . . . elected to seek declaratory judgment rather than initiate a new application . . . . **Additionally, the rights of the parties have accrued and the positions of the parties regarding the constitutionality and the applicability of [the DOT rule] are firmly established.** Thus . . . , [Peach Hill] is not walking in the dark as to what future position to take. [Cit.] . . . . [Peach Hill], in effect, asks this Court to rule in the abstract as to issues it anticipates will arise should it file a new application. In the absence of a case or actual controversy currently pending **and because [Peach Hill's] position as to the constitutionality of the [rule] is already fixed,** what [Peach Hill] seeks is our advisory opinion so it can test the strength of [DOT]'s anticipated future defenses. . . . **[Regardless of whether Peach Hill] was required . . . to exhaust its administrative remedies[,] . . . declaratory judgment was not here appropriate.** [Cit.]

> *Chambers of Ga. v. Dept. of Natural Resources*, 232 Ga. App. 632, 633-634, 502 S.E.2d 553 (1998). If Peach Hill does choose to file an exemption application under the new rule, and DOT either denies the application or fails to give it prompt and fair consideration, then an action for declaratory judgment may be appropriate at that time.

Peach Hill, 280 Ga. at 626-27 (emphasis added).

As in *Peach Hill* and *Chambers*, no pending case or controversy existed at the time Appellants brought their constitutional challenges to the CON law in June 2015 in the instant litigation. Appellants elected not to appeal DCH's March 2015 denial of their CON application. Such an appeal would have been the necessary and proper vehicle to raise their constitutional objections in the first instance. Appellants' failure to raise and preserve their constitutional arguments at the agency level extinguished the actual controversy and precludes judicial review of those issues at this time. Appellants are free to file another CON application to initiate a new controversy in which a superior court may entertain their constitutional challenges upon judicial review, provided that they are properly preserved. But Appellants have declared their intent not to do so.

Furthermore, as this Court declared in *Peach Hill*, "the rights of the parties [in the prior administrative proceeding] have accrued and the positions of the parties regarding the constitutionality of the [CON law] are firmly established." *Peach Hill*, 280 Ga. at 626. *Peach Hill* and *Chambers* held that the state agency in those cases had "accrued rights" as a party in a prior administrative proceeding as

to the constitutionality of a statute or rule challenged in a subsequent declaratory judgment action by a plaintiff which was also a party to the prior administrative proceeding and that could have, but failed to, challenge the statute or rule on constitutional grounds. The Appellee Department officials and the Department are parties with such accrued rights based on their participation in the prior CON proceeding involving Appellants' denied CON application, in which Appellants failed to challenge the CON law on constitutional grounds.

Appellants' cursory effort to distinguish *Peach Hill* and *Chambers* is unconvincing. They contended below that, unlike the plaintiff in *Peach Hill*, they are challenging the existence of the permit process, whereas the *Peach Hill* plaintiff would have reapplied to the agency had it succeeded. (V. 5, R-16-17). Appellants have also insisted that, unlike the plaintiff in *Chambers*, they do not intend to seek a CON in the future, and thus have no need for an advisory opinion to test the strength of DCH's anticipated defenses. (V. 2, R-300; V. 5, R-17). However, Appellants' desire to avoid the CON review and appeal process does not establish a pending actual controversy. The *Chambers* plaintiff also contended that administrative review was futile; it too would have violated the challenged statute if it had proceeded to expand its facility without a permit. *See* O.C.G.A. §§ 12-8-24 (permits required for solid waste handling), 12-8-30.6 (violators subject to civil penalties). But a declaratory judgment was nonetheless unavailable. Unless and

until Appellants here can present their constitutional challenges in the context of an actual, pending controversy, their disagreement with the sound public policy of this state must be directed to the legislature and not to the courts.

Appellants' reliance below on *Black v. Bland Farms, LLC*, 332 Ga. App. 653 (2015), is similarly misplaced. (V. 2, R-300-01). *Bland Farms* involved a challenge to the adoption of a new Vidalia onion packing regulation as contrary to the governing statute. The plaintiff in *Bland Farms* was entitled to seek a declaratory judgment because it had **no available administrative process** by which to challenge the regulation. In contrast, Appellants in the instant case could have raised and preserved their challenges to the CON law during the administrative process prescribed in the CON statute, but chose not to do so. In fact, the Court of Appeals distinguished the type of case—such as *Peach Hill*—where there was a regulatory process to "seek[] an exemption under the rule." *Bland Farms*, 332 Ga. App. at 660. The plaintiff in *Peach Hill* had failed to seek such an exemption, and thus was "one step removed" from the *Bland Farms* plaintiff. *Id.* So, too, are Appellants here.

Appellants claim that what they raise now is a "facial and as-applied constitutional challenge to the very existence of the CON approval process"—not an attack on DCH's denial of Appellants' application for a CON-approved ASC. (Appellants' Br. at 2-3). But that only underscores the absence of a pending, actual

dispute, based on an accrued set of facts, in which declaratory judgment can be rendered. *Cf. Pangle v. Gossett*, 261 Ga. 307, 308 (1991) (concluding that an actual controversy requires that one party claim a legal right **presently denied** by the adverse party).

Appellants continue to emphasize that the denial of their previous CON application is "referenced only as a background fact" and is irrelevant to the basis for their alleged constitutional injuries. (*See* Appellants' Br. at 5-6). By their own admission, then, such past events predating the complaint cannot serve as a basis for the requisite controversy. Because Appellants cannot rely on the instant underlying action—and have repudiated the relevance of **any** facts which may have at one time in the past supported the existence of a controversy—there is no actual controversy arising from Appellants' declaratory judgment action. It is not surprising that Appellants disclaim any reliance on the prior CON proceeding. Those prior facts show that Appellants' complaint is precluded as a matter of law by *Peach Hill* for failure to present an actual or justiciable controversy in which declaratory judgment can be rendered.

Finally, Appellants' argument that they were not required to exhaust their administrative remedies is not only meritless, as discussed in Cross-Appellants' initial brief, but conflates an exception to the general rule requiring administrative exhaustion with the "case or controversy" prerequisite for declaratory relief under

Georgia law. *See Peach Hill,* 280 Ga. at 626 (stating that plaintiff's reasons for failing to exhaust administrative remedies were irrelevant, as administrative exhaustion is not "pertinent to the existence vel non of a justiciable controversy"); *Chambers*, 232 Ga. App. at 634 (expressly declining to decide whether plaintiff was required to exhaust administrative remedies). Thus, even if exhaustion were not required as an absolute matter, declaratory relief is simply unavailable where, as here, there is no actual controversy presented by the facts of the case.

In short, Appellants ask the trial court to do precisely what it lacks authority to do, namely, declare the CON law unconstitutional in the abstract. Such a ruling would be merely advisory. *See Baker v. City of Marietta*, 271 Ga. 210, 214 (1999); *Chambers*, 232 Ga. App. at 634 ("Not even in a declaratory judgment action is the court permitted to render an advisory opinion.").

IV. CONCLUSION

For the foregoing reasons, the Alliance urges this Court to affirm the trial court's grant of summary judgment to Appellees/Cross-Appellants.

Respectfully submitted this 8th day of May, 2017.

PARKER, HUDSON, RAINER & DOBBS LLP

303 Peachtree Street, N.E.
Suite 3600
Atlanta, Georgia 30308
PHONE: (404) 523-5300
FAX: (404) 522-8409
jparker@phrd.com
jrainer@phrd.com

By: *_/s/ John H. Parker, Jr._*
John H. Parker, Jr.
Georgia Bar No. 562450
J. Marbury Rainer
Georgia Bar No. 592225

Attorneys for Georgia Alliance of
Community Hospitals, Inc.

CERTIFICATE OF SERVICE

The undersigned attorney for amicus curiae the Georgia Alliance of Community Hospitals, Inc. certifies that a true and correct copy of the **BRIEF OF AMICUS CURIAE, GEORGIA ALLIANCE OF COMMUNITY HOSPITALS, INC., IN SUPPORT OF APPELLEES/CROSS-APPELLANTS** has been served upon counsel for all parties by e-mail and by U.S. Mail, with sufficient postage, addressed to:

Glenn A. Delk, Esq.
The Law Office of Glenn Delk
1170 Angelo Court
Atlanta, Georgia 30319
delk.glenn@gmail.com

Christopher M. Carr, Esq.
Isaac Byrd, Esq.
Daniel Walsh, Esq.
Monica A. Sullivan, Esq.
Forrest G. Pearce, Esq.
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334
msullivan@law.ga.gov

James Manley, Esq.
Veronica Thorson, Esq.
Goldwater Institute
500 E. Coronado Road
Phoenix, Arizona 85004
litigation@goldwaterinstitute.org

This 8th day of May, 2017.

/s/ John H. Parker, Jr.
John H. Parker, Jr.
Georgia Bar No. 562450