IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-IA-00211-SCT

BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING AND UNIVERSITY OF MISSISSIPPI MEDICAL CENTER	APPELLANTS
V.	
JACKSON HMA, LLC, MISSISSIPPI BAPTIST MEDICAL CENTER, INC. AND ST. DOMINIC JACKSON MEMORIAL HOSPITAL	APPELLEES

Consolidated with NO. 2011-IA-00196-SCT

JACKSON HMA, LLC, MISSISSIPPI BAPTIST MEDICAL CENTER, INC. AND ST. DOMINIC-JACKSON MEMORIAL HOSPITAL	APPELLANTS
V.	
MISSISSIPPI STATE DEPARTMENT OF HEALTH, MISSISSIPPI STATE BOARD OF HEALTH, THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER AND BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING	APPELLEES

APPEAL FROM: THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

REPLY BRIEF OF APPELLANTS BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING AND UNIVERSITY OF MISSISSIPPI MEDICAL CENTER

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The Hospitals/Appellees' Brief offers more of the same – intemperate rhetoric and masterful hyperbole. When all of that is stripped away, two things are clear: 1) that the language of the CON Law reasonably can be interpreted not to include UMMC within its requirements (so that there is no conflict with § 213-A); and 2) if the Court nevertheless interprets the statutes to require CON applications by UMMC, then those statutes (as applied to UMMC) usurp the constitutionally-granted authority of the IHL Board to "manage and control" the State's public universities.

An underlying theme of the Hospitals' brief must be dispelled up front: UMMC has never been compelled by law to participate in the CON program, so it is not arguing for an "exception." In 2000 the Attorney General's Office opined that UMMC was *not* subject to the CON Laws, citing the very enabling statutes that UMMC and IHL rely on here:

> It is our opinion that Section 37-115-21, et seq. establishes the University Medical Center and its teaching hospital *independently* of the Certificate of Need statutes found at Section 41-7-171, et seq. *It is our opinion that the University of Mississippi Medical Center is not subject to the certificate of need provisions of Section 41-7-191.*

R. 19, R.E. 26 (Miss. Att'y Gen. Op., 2000-0326, 2000 WL 1207461, *Conerly* (July 14, 2000) (emphasis supplied)). When the Attorney General withdrew this opinion a few months later, he did not express a changed view about the interpretation of the statutes, but instead noted that UMMC had elected to continue submitting CON applications to the MSDH.[1] *See* R. 21 (Miss.

[1] The Hospitals attached to their brief a letter, representing that it is the letter referenced in the September 2000 Attorney General's opinion. This document is not part of the record and was not presented to the Chancery Court for consideration. *See* R.E. 326-434. Clever placement of the letter immediately following the Attorney General's opinion in the Hospitals' "Appendix" could lead one to conclude that the letter prints from Westlaw as a part of the Attorney General's Opinion; it does not. The letter is the subject of a separate Motion to Strike. Even if the Court considers the letter in deciding the legal issues presented here, that letter merely reconfirms the voluntary nature of UMMC's participation in the CON program. In any event, a state entity cannot by letter create a statutory duty where none exists.

Att'y Gen. Op., 2000-0572, 2000 WL 1511919, *Conerly* (September 20, 2000). As recently as February 2010, the State Health Officer Dr. Mary Currier reaffirmed to the Attorney General the cooperative relationship between the University of Mississippi Medical Center ("UMMC") and the Mississippi State Department of Health ("MSDH" and "Department of Health"), noting that "UMMC has voluntarily participated in the in the CON program to ensure that the projects proposed by the teaching hospital are in keeping and comply with the State Health Plan." R. 300 (Ltr. From M. Currier to J. Hood (February 3, 2010)).

UMMC's continued voluntary participation did not and could not magically make the CON statues apply to UMMC.[2] As the Attorney General confirmed, "the Department of Health has always considered UMMC to be exempt from the CON Laws." R. 22, R.E. 29 (Miss. Att'y Gen. Op., 2010-00076, 2010 WL 2795635, *Currier* (June 9, 2010)). No one, including the Hospitals (who are not shy about challenging each other's capital expenditures and equipment purchases),[3] has ever opposed one of UMMC's submissions until now.[4]

After more than 30 years of silence three Jackson hospitals now want this Court to rewrite the CON Laws so that they apply to UMMC and they want to use those laws to try to undo IHL Board decisions – just like they routinely try to stop each others' capital expenditures. The Hospitals now join the sad history of those who have attempted to interfere in the educational agenda of Mississippi's State Institutions of Higher Learning, a history that lead to

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[2] *See Dye v. State ex rel. Hale*, 507 So. 2d 332, 340 (Miss. 1987) (rejecting Lt. Governor's argument that State senators' vote for certain rules constituted a waiver of their right later to challenge the constitutionality of those rules).

[3] The Hospitals have proven themselves quite adept at litigating their rights under the CON Laws. *See* R. 735-763 (copies of recent complaints filed by the Hospitals in Hinds County Chancery Court).

[4] *See* R. 300 (Ltr. From M. Currier to J. Hood (February 3, 2010) ("Throughout the years, no CON application submitted by UMMC to the Department has been formally opposed by any 'affected person' as defined in §41-7-173(e). . . .").

the adoption of a constitutional amendment and subsequently forced this Court to intervene on at least two occasions to preserve the express will of the people.

ARGUMENTS

I. THE CON LAWS CONFLICT WITH THE IHL BOARD'S CONSTITUTIONAL AUTHORITY TO MANAGE AND CONTROL UMMC

In a display of "on-message" rhetoric that would make even the most dogmatic press secretary blush, the Hospitals repeatedly charge that UMMC and the IHL Board should not be considered "above the law."[5] This sensationalism aside, the issue is not now nor has it ever been whether the IHL Board and UMMC are subject to laws that generally apply to all state agencies and do not impermissibly encroach on the IHL Board's substantive authority. Instead, the question that the Hospitals have forced with their lawsuit is whether a law designed to control certain health care costs can be used by private hospitals to second-guess the IHL Board's constitutional authority to make educational decisions. Clear precedent and established constitutional principles do not allow another state agency effectively to determine higher education policy, nor private interests such as these Hospitals to interfere with the management and control of UMMC.

A. This Court's Decisions In *Allain* and *Ray* Are the Keys to Resolving the Present Conflict

Incredibly, the Hospitals persist in arguing that the IHL Board's decisions about capital expenditures at UMMC are no different than the decisions made by the boards of "every other private hospital. . . . " Hospitals' Br. 9. They could not be more wrong. Unlike the boards of "every other private hospital in the state," the IHL Board was created by the constitution with one charge: to manage and control higher education in Mississippi. To allow the Legislature to

[5] *See* Hospitals' Br. 6, 8, 9, 11, 13, 15, and 19. The Hospitals' reply brief filed in Cause No. 2011-I-A-00211 – SCT on October 5, 2011 is referred in this brief as "Hospitals' Br." The brief filed by the IHL Board and UMMC on August 25, 2011 in this same cause is referred to as "Br.".

diminish those powers by treating the IHL Board like "every other private hospital" board would be an "affront to our Constitution." *Board of Trustees of State Institutions of Higher Learning v. Ray*, 809 So.2d 627, 637 (Miss. 2002).

The plain terms of Section 213-A show that the IHL Board is not just any hospital board:

> The state institutions of higher learning in Mississippi, to-wit: University of Mississippi, Mississippi State University of Agriculture and Applied Science, Mississippi University for Women, University of Southern Mississippi, Delta State University, Alcorn State University, Jackson State University, Mississippi Valley State University, and any others which may be organized or established by the State of Mississippi, *shall be under the management and control of a board of trustees to be known as the Board of Trustees of State Institutions of Higher Learning.*

Miss. Const. Art. 8, § 213-A (emphasis supplied). In *State ex rel. Allain v. Board of Trustees of State Institutions of Higher Learning,* 387 So.2d 89, 91 (Miss. 1980), this court found that the Legislature could not allow the State Building Commission to control the IHL Board's decision to build the Gulf Coast Research Laboratory because "[t]he statutes giving powers and duties to the Building Commission do not override the powers created by the constitution." *Allain*, 387 So. 2d at 93. Likewise, in *Ray* this Court held that the Legislature could not give the State Board for Community and Junior Colleges ("SBCJC") the power to "veto" an IHL Board decision to offer freshman and sophomore courses on the Gulf Coast. *Ray*, 809 So. 2d at 637. The Hospitals' claim that *Ray* was confined to this "narrow issue," however, is wishful thinking. This Court made it abundantly clear that a larger issue was also at stake:

> While we recognize that the legislature possesses the power to take away by statute what has been given by statute, the same can not be said for that created by the Constitution. To allow this would be an affront to our Constitution.

Id. at 637 (¶ 25).

The Hospitals contend that unlike the statutes at issue in *Allain* and *Ray* there is no "express conflict" between the IHL Board's constitutional authority and the CON Laws.

Hospitals' Br. 14. In reality, however, imposing CON requirements on UMMC would not only give a statutory agency ultimate control over decisions entrusted by the constitution to the IHL Board, but also would allow any party "aggrieved" by the Department of Health's decision to seek judicial review. *See, e.g., St. Dominic –Madison County Medical Center v. Madison County Medical Center*, 928 So. 2d 822 (Miss. 2006) (hospital's challenge of Department's approval of relocation of competing hospital's beds from Hinds to Madison County). As shown in the first IHL Board /UMMC brief, the practical effect is to give the Hospitals a ready-made avenue to tie up for years before administrative tribunals and court every purchase of major medical equipment and capital expenditures planned by UMMC. *See* Br. 16-19.[6]

The parallels between the IHL Board's decision to authorize the purchase of radiosurgery equipment with UMMC's self-generated funds[7] and the IHL Board's decisions to construct a research laboratory and offer certain courses at USM's Gulf Coast campus at issue in *Allain* and *Ray* are self-evident. Taking into consideration the history of Section 213-A, its plain terms, and precedent established by this Court, it is clear that neither governors, legislatures, state agencies, or private companies have the authority to interfere with the IHL Board's management and control over UMMC and other State Institutions of Higher Learning. Requiring UMMC to obtain CONs for capital expenditures would sanction the very second-guessing of the IHL Board's educational decisions that Section 213-A was adopted to prevent.

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[6] *See also St. Dominic-Jackson Memorial Hosp. v. Miss. State Dep't. of Health*, 728 So.2d 81, 82 (Miss. 1998) (seven years between application and final decision); *St. Dominic-Madison County Medical Center v. Madison County Medical Center*, 928 So.2d 822 (Miss. 2006) (four years from application to decision); *Grant Center Hosp. of Miss., Inc. v. Health Group of Jackson, Miss, Inc.*, 528 So.2d 804, 807 (Miss. 1988) (six years).

[7] UMMC's Determination of Reviewability provides that the Elekta Synergy S purchase contract "will be funded by patient revenue." R. 34, R.E. 41.

The Hospitals cite *Van Slyke v. Board of Trustees of State Institutions of Higher Learning*, 613 So. 2d 872 (Miss. 1993) for the proposition that this Court has considered and rejected the IHL Board's' autonomy in decisions concerning the state's institutions of higher learning. The Hospitals do not explain that Van Slyke challenged the constitutionality of the Board itself, labeling the Board as an "autonomous or fourth branch of government. *Van Slyke*, 613 So. 2d at 877. The Court did not address the question of Board autonomy generally, but simply affirmed that the Board is part of the executive branch, not a "fourth branch" of government. *Id.* The Court discussed the IHL Board's powers only to the extent that it recognized the broad grant of power in § 213-A and the enabling statutes. *Id.* at 879.

The *Van Slyke* opinion does note, however, that the "purview" of the Board is much greater than the "hiring and firing of personnel" as the Hospitals argue. Those recognized by the Court there include: admission standards, programs, institutional mission assignments, and even questions of the continued operation of all eight public universities. *Id.* at 880.

B. The CON Laws, Even If They Are Considered Among the State's Police Powers, Are Still Subject to Constitutional Constraints

The Hospitals also attempt to avoid the plain language of the Mississippi Constitution by arguing that the CON Laws are among the state's police powers and thus somehow trump the Constitution. Hospitals' Br. 16-20. Simply labeling the CON Laws as "police powers," a term of art that refers to those powers "conferred upon or reserved to the states . . . through the Tenth Amendment," bestows no special status on these statutes. *Great South Fair v. City of Petal*, 548 So. 2d 1289, 1291 (Miss. 1989). Even if the CON Laws could be termed police powers, their enforcement is not free from constitutional constraints. *Id.* (held: zoning ordinance limiting operation of fairs constituted unauthorized use of police power by city violating First Amendment). As this Court has noted, police powers can only "be exercised in accordance with

corresponding public necessity *and in consideration of any constitutional or statutory limitation on such power.*" *State v. Michigan Wisconsin Pipeline Co.*, 360 So.2d 684, 690 (Miss. 1978) (citing *Chicago, B.&Q. R. Co. v. Illinois ex rel. Grimwood*, 200 U.S. 561 (1906) (defining police powers as "reasonable police regulations that do not violate the *Constitution of the state* or the Constitution of the United States.") (emphasis supplied).[8] In this respect, the CON Laws are no different than the Building Commission and SBCJC statutes at issue in *Allain* and *Ray*.

The Attorney General opinion they rely upon deals with the authority of Mississippi institutions of higher learning to offer gaming courses. Miss. Att'y Gen. Op., 2004-0203, 2004 WL 1379992, *Nunnelee* (May 12, 2004). The Attorney General based his decision, in part, on his conclusion that our state's anti-gambling laws are a valid expression of the legislature's "police power to regulate public morals, health and welfare." 2004 WL 1379992, *2. As the Attorney General noted however, Mississippi's laws regulating gaming activities are criminal in nature and laws prohibiting the teaching of gaming in public schools is just one aspect of the Legislature's "strict regulation" of gambling activities. *Id.* at *1 (citing Miss. Code Ann. §§ 97-33-17, 19-3-79). Likewise, for over 150 years civil actions to enforce any form of gambling debt or contract have been considered void. *See Grand Casino Tunica v. Shindler*, 772 So. 2d 1036, 1038 (¶10) (Miss. 2000). The CON Laws have no such historical pedigree.

Mississippi's CON Laws are descended from a now-repealed federal statute, the National Health Planning and Resource Development Act, which required that each state establish statewide health coordinating councils. *Grant Center Hosp. of Miss., Inc. v. Health Group of Jackson, Miss., Inc.*, 528 So. 2d 804, 806 (Miss. 1988) (citing 42 U.S.C. § 300k *et seq.*). The

[8] *See also Stone v. Mississippi,* 101 U.S. 814, 817–818 (1879) (The "police power" was the authority of state governments, with regard to contractual arrangements, which did not violate the federal Impairment of Contracts Clause); *Lochner v. New York,* 198 U.S. 45, 53–54 (1905) (same).

federal act also required states to administer a CON program, conceived as "'the basic component in an overall effort to control the unnecessary capital expenditures which contribute so greatly to the total national health bill.'" *Id.* (quoting *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 385-86 (1981)).

The Mississippi Legislature enacted the Mississippi Health Care Commission Law of 1979 to comply with this federal act. *Grant*, 528 So. 2d at 806. This law, codified at Section 41-7-171 *et seq.*, empowered Mississippi's new commission to implement the federally-mandated CON regulatory process. *Id*; *see also* 1979 Miss. Laws Ch. 451, § 1. It was not until 1983 that the Legislature incorporated another federal requirement into the law: decisions to issue CONs must comply with a formal state health plan. *Grant*, 528 So. 2d at 806 (citing Miss. Code Ann. § 41-7-193(1)). Three years later the Legislature transferred the Commission's CON responsibilities to the MSDH. *Id.* (citing 1986 Miss. Laws, Ch. 437, § 35).

Even though the federal law that required states to implement CON programs was eventually repealed by Congress, Mississippi's program remains in effect and reflects the general purpose of all CON laws: "to discourage unnecessary investment in health care facilities and to channel investment so as to preserve and improve the quality of institutional health care." *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1400 (5th Cir. 1996). The MSDH's CON regulatory manual confirms that the purpose of the program is "to balance the growth of health facilities and services with the need for those services." R. 625, R.E. 246. Seen from this perspective the CON Laws bear no similarity to Mississippi's anti-gambling laws.

The IHL Board's authority to manage and control the educational agenda for our State Institutions of Higher Learning was firmly established by the citizens through their adoption of Section 213-A of the Mississippi Constitution more than 30 years before the CON Laws were

enacted.[9] As the *Allain* and *Ray* decisions illustrate, a statutory encroachment on this constitutional authority must yield, whether it be within the ambit of those powers considered police powers, or otherwise.

C. The CON Laws Are Not Comparable to the Open Meetings Act

The Hospitals once again seek refuge in *Board of Trustees of State Institutions of Higher Learning v. Miss. Publishers Corp.*, 478 So. 2d 269 (Miss. 1985), contending that the CON Laws are laws of general application just like the Open Meetings Act.[10] *See* Hospitals' Br. 20-24. The Open Meetings Act addresses the decision-making *process* only and thus is "no intrusion into the decision-making *power* of the Board." *Miss. Publishers Corp.*, 478 So. 2d at 276 (emphasis supplied). The CON Laws, in contrast, bear a much stronger resemblance to the "blatant power grab" (the Hospitals' words) by the SBCJC that the *Ray* court struck down seven years after *Mississippi Publishers*.

The recognized purpose of the CON Laws is to "control" capital expenditures. In the case of UMMC, that power to "control" capital expenditures already is vested by the Constitution in the IHL Board. Interpreting the CON Laws to apply to UMMC would subject every single IHL Board vote on a capital expenditure, purchase of major medical equipment, relocation of a facility, change in bed compliment, or the offering of any one of at least 14 different health services to potential veto by the Department of Health *and* protracted challenge by anyone claiming to be an affected party. R. 646, R.E. 271 (CON Manual, Ch. 2); *see also* Miss. Code Ann. §§ 41-7-191(activities and services subject to CON Laws; 41-7-197 (administrative challenges by affected parties); 41-7-201 (judicial appeals).

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[9] Article 8, § 213-A was adopted by the Legislature in 1942 and approved by the voters in 1944. *See* 1942 Miss. Laws Ch. 342; 1944 Miss. Laws Ch. 344.

[10] Miss. Code Ann. § 25-41-1, *et seq.*

The Open Meetings Act affords the Hospitals' leaders the opportunity to attend IHL Board meetings and voice their concerns about capital expenditures like any other person. If they feel the Board is acting imprudently with respect to UMMC, they can lobby the Governor for a change in the Board's composition. But it should be abundantly clear by now that the Hospitals are not fighting for openness in government, or the right to participate in the debate, or the availability of a quality medical education in our state. Instead, they want to use a statutory scheme with no educational interest whatsoever to interfere with the IHL Board's decisions about UMMC – not because those decisions are bad for UMMC or higher education generally, but because those decisions might adversely affect the Hospitals' bottom lines.

For a preview of how the Hospitals want to use the CON Laws, one need look no further than the affidavit from a physicist presented to the Chancery Court in which the declarant argues that equipment could have been simply added on to UMMC's existing linear accelerators as a "much more cost effective alternative. . . ." R. 362. The Hospitals could have come to the IHL Board's open meeting to present the same argument. What they chose to do, instead, is file this lawsuit in hopes they can use the administrative hearing/appeals features of the CON Law to protract the process and substitute their considerations for those of the IHL Board – like Jackson HMA did in 2000 when it appealed the Department of Health's decision to allow St. Dominic to acquire and install its second linear accelerator. R. 739. Giving private hospitals a challenge to the IHL Board's decisions about the state's only teaching hospital, using the CON Laws standards rather than any relevant educational criteria, would allow them to impose their competitive business model on higher education in Mississippi.

The Hospitals also argue that the exceptions in the CON Laws are not "materially broader" than those of the Open Meetings Act, thus making them also laws of "general application." Hospitals' Br. 24. However, the few exceptions in the Act clearly represent

statements of broader public policy, exempting a relatively few governmental entities whose work by its very nature must be conducted to some extent outside public view. *See* Miss. Code Ann. § 25-41-3 (excluding jury deliberations, military and law enforcement operations, etc. from the definition of "public body"). By contrast, the CON Laws' exemptions are numerous, serving mostly special situations like bed transfers in Panola County, new nursing home beds in Amite County, an acute care hospital in Kemper County, and "a life care retirement facility, in any county bordering on the Gulf of Mexico in which is located a National Aeronautics and Space Administration facility. . . ." Miss. Code Ann. § 41-7-191(2)(a); *see generally* § 41-7-191(2)-(18) (exceptions listed). While each of these situations may represent a well-considered and deserved respite from the law, there is obviously no comparison between a highly-malleable law with more than 40 local exemptions and one that applies to almost all executive branch agencies and certain committees of the Legislature.

D. Section 213-A Was Implemented to Insulate the IHL Board From Politics As Usual

The Hospitals do not even attempt to refute the fact, well-documented in the Appellants' principal brief, that the CON statutes are among the most highly-politicized of regulatory statutes. *See* Br. 19-22. The Hospitals' heroic defense of the State Health Officer and the Department of Health's integrity in the conduct of the CON review process from charges of "politics" would be admirable if, in fact, anyone had accused them of such. *See Id.* The unbiased integrity of this state agency, the one the Attorney General acknowledges "has always considered UMMC to be exempt from the CON Laws," has never been in doubt. R. 22; R.E. 29 (2010 WL 2795635 at *1). The Hospitals' attempted misdirection only serves to emphasize in the context of the present case why the IHL Board's constitutional management and control of UMMC should be insulated as much as possible from the daily tug and pull of politics.

In 2000 the Attorney General's Office concluded that UMMC was not subject to the CON Laws:

> It is our opinion that Section 37-115-21, et seq. establishes the University Medical Center and its teaching hospital independently of the Certificate of Need statutes found at Section 41-7-171, et seq. *It is our opinion that the University of Mississippi Medical Center is not subject to the certificate of need provisions of Section 41-7-191.*

R. 19, R.E. 26 (Miss. Att'y Gen. Op. *Conerly* (July 14, 2000)) (emphasis supplied). Ten years later the Attorney General again opined that UMMC was not subject to the CON Laws:

> We direct your attention to our prior opinion to Dr. Wallace Conerly, a copy of which is included, wherein we opined that the teaching hospital at UMMC is not subject to the requirements of the Certificate of Need laws. MS AG Op., Conerly (July 14, 2000). *It continues to be our opinion that the teaching hospital at UMMC is not subject to the CON laws, and does not have to request and obtain a CON for services and equipment at the teaching hospital, since 37-115-25 makes clear that 'there shall be' a teaching hospital, which shall include all necessary services and equipment.*

R. 16, R.E. 24 (Miss. Att'y Gen. Op., *Currier* at 2 (February 26, 2010 (emphasis supplied)). Following the issuance of the February 2010 opinion the Hospitals jointly wrote a letter to the Attorney General in which they argued that "UMMC is and always has been subject to the CON Law" (which had to have been news to the Attorney General and the MSDH) and urged him to "reconsider and withdraw your February 26, 2010 opinion . . . ." R. 770, 773. The Attorney General eventually withdrew the February opinion, substituting it with an opinion in which he concluded that "the CON statutes apply generally to state-owned facilities including UMMC." R. 22, R.E. 29 (Miss. Att'y Gen. Op., *Currier* (June 9, 2010)). The Attorney General did not opine on the Constitutionality of the statutes as applied to UMMC.

The Hospitals are not happy with the Attorney General's latest opinion either. They contend that the Department of Health has no authority to take UMMC's educational needs into consideration in the CON process. *See* Hospitals' Br. 29-30.

There is nothing necessarily untoward about this state of affairs. Each of the participants in this political tableau would be perfectly within its rights to attempt to influence the outcome. Attorney Generals are free to change their opinions, legislators routinely amend statutes, and interested parties are free to lobby for the result that suits their interests. But when it comes to the management and control of the educational agendas for our State Institutions of Higher Learning, history teaches that treating them like "political footballs," as this Court has termed it, can have negative and long-lasting effects on those institutions. *Allain*, 387 So. 2d at 91. To insulate them as much as possible from politics the Legislature and the people of our state put the University of Mississippi and the seven other Institutions of Higher Learning under the management and control of the IHL Board. On at least two prior occasions this Court has preserved the viability of this constitutional amendment. Unfortunately, the Hospitals' back-door challenge to this principle now requires that its importance be reaffirmed.

II. THE CON LAWS DO NOT REQUIRE UMMC TO OBTAIN CONS

The very serious constitutional implications arise only if the CON Laws, by their terms, apply to UMMC. The inescapable conclusion is that the CON Laws do not and were never intended to apply to UMMC, a conclusion reinforced when the legislative purpose behind the CON statutes is taken into consideration.

A. The MSDH Has Never Interpreted the CON Law to Apply to UMMC

The Hospitals begin by arguing that the MSDH has "conceded" that the CON Laws apply to UMMC, and that this "interpretation" is entitled to great weight. Hospitals' Br. 29. But, before the Attorney General's June 2010 opinion, the MSDH had never interpreted the CON Laws to require UMMC to obtain CONs. At most, the agency followed the Attorney General's June Opinion in passing on UMMC's Determination of Reviewability, and has followed that

position in its briefing here.[11] R. 38, R.E. 45. The Attorney General recognized that the MSDH "has always considered UMMC to be exempt from the CON Laws." R. 22; R.E. 29 (2010 WL 2795635 at *1). The Attorney General's opinion that there is no "express exemption" for UMMC in the CON Laws is not binding upon the Court, nor is it entitled to any deference. *See Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 509 (Miss. 2007). Thus, there is no concession on the part of the MSDH to which this Court should or could defer.

B. The Plain Language of the CON Laws Does Not Include UMMC

This Court reviews questions of statutory interpretation *de novo*. *See Gilmer v. State*, 955 So. 2d 829, 833 (Miss. 2007); *see also McLamb v. State,* 456 So. 2d 743, 745 (Miss.1984) (Court conducts a *de novo* review of issues of statutory interpretation). This is true for all questions of law, even in the context of agency action. *See Blackwell v. Miss. Bd. of Animal Health*, 784 So. 2d 996, 1000 (¶ 9) (Miss. Ct. App. 2001). In determining the meaning of a statute the first question that must be answered is whether the provision at issue is ambiguous. If unambiguous, this Court "applies the plain meaning of the statute and refrains from the use of statutory construction principles." *Tillis v. State*, 43 So. 3d 1127, 1131 (¶ 9) (Miss. 2010) (quoting *Gilmer*, 955 So. 2d at 833). The CON Law unambiguously defines those entities that come within the CON requirements; under the plain language of the statute, UMMC does not.

1. UMMC's Teaching Hospital Is Not Included Within the CON Definition of Health Care Facility

The CON Laws' definition of a "health care facility" specifically enumerates the different entities within its reach, including "psychiatric hospitals," "chemical dependency hospitals," "long-term care hospitals," and just plain "hospitals." Miss. Code Ann. § 41-7-173(h). If every

[11] In following the Attorney General's opinion the MSDH was following a practice that insulates directors of state agencies from personal liability. *See* Miss. Code Ann. § 7-5-25 (no civil or criminal liability for following Attorney General opinion in good faith).

entity that could be described broadly as "hospital" fell within that term, then the Legislature would have no reason to specifically enumerate particular types of "hospital" facilities. The Legislature's decision to identify these other types of "hospitals" by name must be ascribed some meaning. *See Barbour v. Hood*, 974 So. 2d 232, 241-42 (¶ 19) (Miss. 2008) (legislature's definition of "year" as 365-days in statute controls over "general definition" of term as "calendar year" in separate subsection). The term "teaching hospital" appears nowhere in this list or elsewhere in this statutory definition.

"Teaching hospital" is the specific term the Legislature used to define UMMC's "hospital" facility when it was first authorized as part of the four-year medical school:

> There shall be built, equipped and operated as a part of the medical school, a ***teaching hospital*** of the size of not less than three-hundred-fifty-bed capacity, together with all ancillary buildings and physical facilities needful or proper for the establishment, operation and maintenance of such a hospital as a part of a fully accredited four-year medical school, including, clinical and outpatient services and all types of services deemed to be necessary or desirable as a part of the functioning of such a ***teaching hospital***. Said ***teaching hospital*** shall be known as the University Hospital.

Miss. Code Ann. § 37-115-25(1) (emphasis supplied) (1950 Miss. Laws, Ch. 378, § 3).

UMMC and the IHL Board noted in their original brief that the use of this distinctive nomenclature is consistent with federal law, which utilizes a separate definition for a "teaching hospital." Br. 25 n.26 (citing 42 C.F.R. § 415.152). The Hospitals helpfully note in their response that even the Medicare reimbursement statutes recognize teaching hospitals are "different," and provide a reimbursement rate that takes into account the additional costs incurred because those institutions are educating medical professionals. *See* Hospitals' Br. 33.[12]

[12] The statute at issue is now codified at 42 U.S.C. § 1395ww(d)(5)(B) and provides that the Secretary of HHS shall provide for an additional Medicare payment for "hospitals with indirect costs of medical education. . . ."

The Hospitals concede that "UMMC's ultimate goal [is] educating physicians, which it can accomplish only by providing medical services." Hospitals' Br. 35. They nevertheless argue that UMMC is just a "hospital . . . engaged in educational activities." Hospitals' Br. 33. This completely ignores the legislative declaration that UMMC is "a part of the medical school." *See* Miss. Code Ann. § 37-115-25(1). As this Court has observed, "[t]he State has a strong interest in maintaining such a practical and educational environment, meeting the needs of both the physicians and the patients." *Sullivan v. Washington,* 768 So. 2d 881, 885 (¶19) (Miss. 2000).

The Hospitals argue that *Sullivan* and *Watts*, two cases that highlight UMMC's singular position in Mississippi, somehow demonstrate that the definitions contained within the CON Laws (which are not even mentioned in those decisions) capture UMMC. More specifically, the Hospitals argue that because the Mississippi Tort Claims Act includes state-owned hospitals (and all other instrumentalities of the State) within the definition of "State," then UMMC must be a "hospital" for purposes of every other statute, including the CON Laws. The Hospitals go so far as to suggest that UMMC enjoys tort immunity only because it is a "hospital," and not because it is a state-owned institution. The hitch in that reasoning is unmistakable.

But even "hospital" has a particular meaning for purposes of the CON Laws: an institution "*primarily* engaged in providing [care] to inpatients . . . ." Miss. Code Ann. § 41-7-173(h)(i) (emphasis supplied). UMMC's *raison d'etre* is to educate medical professionals.

The Hospitals continue to assign particular significance to that part of UMMC's teaching and service mission that provides care to the State's indigent population, even characterizing it as "contrary" to the teaching purpose.[13] Hospitals' Br. 32. The Hospitals do not explain the

[13] *See* Miss. Code Ann. § 37-115-27 ("All University of Mississippi Medical Center locations shall provide in the aggregate not less than fifty percent (50%) of their services to indigent persons including qualified beneficiaries of the State Medicaid Program."); *see also* Miss. Code Ann. § 37-115-31 ("There

contradiction. Medical students must have observational and practical learning opportunities with actual patients to master their profession – whether those patients are rich or poor is irrelevant.[14] Nor does serving the poorest of our State while educating future medical professionals undermine the IHL Board's management and control of UMMC. Finally, the Hospitals ignore another "mandate" identified in *Watts*: to establish "all types of services deemed necessary or desirable as a part of the functioning of such a teaching hospital." *Watts v. Tsang*, 828 So.2d 785, 793 (Miss. 2002).

2. UMMC's Medical Equipment Is Used for Teaching

The Hospitals' efforts to make the CON Laws apply solely because UMMC is an instrumentality of the State (something UMMC has never disputed) are equally unavailing. It goes something like this: "person" as used in the CON Laws includes instrumentalities of the State, and UMMC is an instrumentality of State, ergo UMMC is required to obtain CONs for capital expenditures. The missing link here is that even someone or something considered a "person" under the CON Laws still must be a "person" to whom the CON Laws otherwise apply. The introductory paragraph of Section 41-7-191(1) actually states: "No person shall engage in any of the following activities *without obtaining the required certificate of need.*" *Id.* (emphasis supplied). Thus, the question is not whether UMMC is a "person" but whether a CON is "required" in the first place.

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shall be a reasonable volume of free work; however, said volume shall never be less than one-half of its bed capacity for indigent patients . . . .").

[14]If UMMC was subject to the CON Laws, then UMMC could not increase its bed capacity necessary to comply with Miss. Code Ann. §37-115-27 at times when the CON "need" criteria for the service area is not met. *Compare* Miss. Code Ann. §37-115-27 (requiring UMMC to provide not less than 50% of its services to indigent persons) with Miss. Code Ann. § 41-7-191(1)(c) (CON approval required for "Any change in the existing bed complement of any health care facility. . . .").

UMMC already has demonstrated that it is not covered by the CON Laws because its teaching hospital is not a "healthcare facility" (as used in those statutes) but rather an essential component of UMMC's medical school curriculum. As Dr. James Keeton, UMMC's Vice Chancellor for Health Affairs (and Dean of the Medical School) so aptly stated: "Our reason for existence is education." R. 273. For the same reasons, UMMC acquired the Elekta Synergy S primarily for educational and research purposes, and not "*for the provision of medical services* . . ." Miss. Code Ann. § 41-7-191(f) (emphasis supplied).

The Hospitals argue that this provision applies because the Elekta Synergy S will be used "for" medical treatment. Hospitals' Br. 34. Of course it will –medical students and fellows are educated by observing, diagnosing, and treating medical conditions under the tutelage and supervision of the faculty physicians. That medical residents and fellows and their instructors will use this radiation oncology equipment to treat patients only underscores UMMC's reason for purchasing it:

> UMMC has deemed this project necessary or desirable for the operation of the medical school *in furtherance of our education mission* by enhancing opportunities for the education of our undergraduate and graduate medical education students on leading edge technology including stereotactic radiosurgery. In addition the Synergy S will provide for the ability to train Residents and Fellows in the cost-effective management of procedurally complex cases.
>
> UMMC has deemed this project necessary or desirable for the operation of the medical school *in furtherance of its research mission* as a necessary component of UMMC legislatively funded establishment ot a comprehensive approach to cancer treatment initiated in 2002. As part of that initiative UMMC is seeking NCI Cancer Center designation by the National Cancer Institute. A primary requirement for such designation is the quality and quantity of research that is being conducted to support the educational and service activities for cancer care. The Synergy S will allow us to significantly expand our cancer research capabilities in fulfillment of this initiative.

R. 30, R.E. 36 (UMMC Determination of Reviewability) (emphasis supplied).

There is no genuine issue that UMMC has purchased the Elekta Synergy S to further its teaching mission, not simply to provide medical services as regular inpatient hospitals do. UMMC's purchase is entirely consistent with the Legislature's direction (in the *Watts* Court's words, "mandate") that the school provide "clinical and outpatient services and all types of services deemed to be necessary or desirable *as a part of the functioning of such a teaching hospital.*" Miss. Code Ann. § 37-115-25(1) (emphasis supplied).

C. The CON Laws Were Not Intended to Apply to Educational Institutions

After arguing vigorously before the trial court that "a very important rule of statutory construction" is that "the more specific statute, the CON Law trumps the more general statute" the Hospitals now claim that "there is no direct conflict at all between § 37-115-25 [creating UMMC] and the CON Law, so that it would be *improper* to resort to canons of statutory construction." Tr. 73, 74; Hospitals' Br. 38 (emphasis supplied). According to the Hospitals new position, the statutes can be read together because the CON Laws provide an element they believe is missing from the UMMC statutes – a definition of "need." The premise is not just faulty, but untenable.

There is no missing definition. The "needs" of UMMC are to be determined in accordance with "the recommended standards of the Council on Medical Education and hospitals of the American Medical Association and the council of the Association of American Medical Colleges." Miss. Code Ann. § 37-115-23. Any claim that the CON Laws were meant to define "need" for UMMC is puzzling, given that the CON Laws were not even passed until nearly 30 years after UMMC was created. Finally, as the Hospitals now concede, the CON Law "has nothing to do with education." [15] The idea that a statutory scheme having "nothing to do with

[15] "Contestants are happy to agree with UMMC that the CON Laws' purpose has nothing to do with education. . . ." Hospitals' Br. 29.

education" could nevertheless define the "needs" of an educational institution like UMMC defies credulity.

This Court has long considered the "intent and purpose of the Legislature" when construing statutes. *Alexander v. Graves*, 173 So. 417, 419 (Miss. 1937). Legislative intent "although often elusive to the perception of unaided vision, remains nevertheless the pole star of guidance. . . ." *USF& G v. Conservatorship of Melson*, 809 So. 2d 647, 660 (¶ 58) (Miss. 2002) (quoting *Quitman County v. Turner*, 18 So. 2d 122, 124 (Miss. 1944). In interpreting the UMMC Laws and CON Laws, "this Court's primary objective is to employ that interpretation which best suits the legislature's true intent or meaning." *Gilmer*, 955 So. 2d at 833 (citing *Clark v. State ex. rel Mississippi State Med. Ass'n,* 381 So. 2d 1046, 1048 (Miss.1980)). The history and distinct purpose of the laws creating UMMC and authorizing the IHL Board to manage and control the Institutions of Higher Learning highlight the error in the Hospitals' arguments that the CON laws control.

The University of Mississippi's medical school originated as a two-year program on the Oxford campus. Laura D. S. Harrell, *Medical Services in Mississippi 1890-1970,* printed in II A HISTORY OF MISSISSIPPI 540-42 (R.A. McLemore ed. 1973).[16] For decades the school struggled to maintain accreditation, and was placed on probation by accrediting agencies following the "Bilbo purge" of 1930. Richard Aubrey McLemore, *Higher Education in the Twentieth Century*, printed in II A HISTORY OF MISSISSIPPI 430-36, 540 (R.A. McLemore ed. 1973).

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[16] Dr. McLemore's work has been recognized by this Court as an authoritative historical reference. *See, e.g., Cinque Bambini Partnership v. State*, 491 So. 2d 508, 518 n.7 (Miss. 1986). *See also* Janis Quinn, PROMISES KEPT, THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER 9 (2005); *see also* Lucie Robertson Bridgeforth, MEDICAL EDUCATION IN MISSISSIPPI 45 (1984).

In 1950 the Legislature formally created the institution known today as UMMC. 1950 Miss. Laws, Ch. 378. The legislation specified that the medical school would include teaching hospital, and that together they should function as one institution:

> The said medical school and teaching hospital shall be built and equipped together, in connection with each other, or as nearly together or connected as may promote the most efficient operation of both of them in proper coordination with one another.

Id. at § 4 (codified as Section 37-115-27).

The Legislature's creation of a four-year medical school and teaching hospital to address the shortage of physicians stands in stark contrast to its adoption of CON Laws to control healthcare costs, nearly 30 years later. *See* discussion *supra* at pp. 7-8. This historical backdrop reveals just how different in purpose the CON Laws and the UMMC implementing statutes really are.

The difference between these laws, in practice, is also quite dramatic. For example, if the CON Laws applied to UMMC it would matter not one whit whether accreditation standards required new therapeutic radiation equipment on which UMMC's students could train; the only question would be whether the State Health Plan's need criterion could be met. In which case, if UMMC could not demonstrate that all existing machines in the service area have averaged 8,000 treatments per year it could not purchase this equipment. R. 149, R.E. 145 (State Health Plan, Ch. 5, Sect. 109.02); *see, e.g., Miss. State Dep Of Health v. Mississippi Baptist-DeSoto Memorial Hosp.*, 984 So. 2d 967 (Miss. 2008) (lower court denial of CON for MRI for failure to meet State Health Plan requirement of 1,700 procedures reversed and rendered).

The Hospitals do not even contest this point, arguing instead that if UMMC cannot show "need" pursuant to the State Health Plan then it must mean that it does not have enough patients to fulfill its "legitimate teaching purpose." Hospitals' Br. 11. With this argument the Hospitals'

broader agenda, a general attack on the operation of UMMC, is once again confirmed. Putting UMMC's educational fate in the hands of a state agency that has no mission in higher education,[17] administering a law that has no educational purpose, and subjecting those decisions to challenge by private companies is entirely contrary to the UMMC implementing laws.

The Hospitals also contend that the UMMC implementing statutes are no different than those that give the governing bodies of community hospitals authority to manage the affairs of their facilities. Hospitals' Br. 39; *see* Miss. Code Ann. § 41-13-15 (board authority for community hospitals). If any of these community hospitals had been designated by the Legislature as a teaching hospital, placed under the management and control of a constitutionally constituted board, their directors appointed by the Governor to lengthy terms, or directed by the Legislature to equip their teaching hospital in accordance with the recommended standards of the Council on Medical Education and the Association of American Medical Colleges, the Hospitals might have a point. A community hospital is none of those things. *See* Miss. Code Ann. § 41-13-10(c).[18] For the same reason the Hospitals' argument that the IHL Board's authority over UMMC is no different than that of a private board cannot be taken seriously. *See, e.g.,* Hospitals' Br. 9 ("the same way that every other private hospital in the state has some entity in charge of its spending."); 19 (IHL Board has "no more powers than are held by the managing boards of Contestant's hospitals. . . .").

This Court employs a thorough analysis in those cases in which it is important to determine what effect, if any, to give to statutes that potentially conflict with earlier enactments.

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[17] Miss. Code Ann. § 41-3-15 (powers and authority of State Board of Health and Department of Health).

[18] " 'Community hospital' shall mean any hospital, nursing home and/or related health facilities or programs, including without limitation, ambulatory surgical facilities, intermediate care facilities, after-hours clinics, home health agencies and rehabilitation facilities, established and acquired by boards of trustees or by one or more owners which is governed, operated and maintained by a board of trustees." Miss. Code Ann. § 41-13-10(c).

See, e.g., Carl Ronnie Daricek Living Trust v. Hancock County Board of Supervisors, 34 So. 3d 587 (Miss. 2010). The importance of the present issue lends itself to just such a careful analysis. As shown previously, the IHL implementing statutes are quite specific in their mandate that the IHL Board shall control all equipment, supplies, lands, building, real and personal property, and capital outlays for UMMC and other Institutions of Higher Learning. Miss. Code Ann. § 37-101-15. Section 37-101-15(b) states that the IHL Board "shall have general supervision of . . . all matters incident to the proper functioning of the institutions." As a department of the University of Mississippi, UMMC comes under the sole "management and control" of the IHL Board. Miss. Code Ann. § 37-101-1. The Legislature also made it clear that the UMMC should have "all needed equipment and supplies for the proper operation and maintenance of such medical school and hospital." Miss. Code Ann. § 37-115-25(1). As the IHL Board and UMMC demonstrated in their original brief, the CON Laws did not repeal nor did they supersede the UMMC and IHL Board implementing statutes. Br. 28-32. When compared to the CON Laws, which vest authority in the Department of Health to apply need formulas (devoid of educational purpose), it is apparent that these statutes are simply apples and oranges. Effect can be given to both by holding that the CON Laws do not apply to UMMC.

CONCLUSION

UMMC is a teaching hospital, the only teaching hospital in Mississippi. The CON requirements, and specifically the CON Laws' articulation of "need," do not apply to institutions of higher learning engaged specifically in medical education. But if this Court should interpret those requirements to apply to UMMC, then MSDH -- and to a large degree, these private Hospitals – the ability to "veto" IHL Board decisions about the direction of medical education at UMMC.

This Court already has held that putting such power in the hands of another state agency (much less private interests) would be "an affront to our Constitution."

The Order of the Chancery Court denying UMMC and IHL Board's Motion to Dismiss, or in the Alternative, for Summary Judgment, should be reversed, and the Hospitals' Complaint dismissed. Alternatively, the Court should enter judgment in favor of UMMC and IHL finding that the CON requirements do not apply to UMMC.

This the 11th day of November, 2011.

Respectfully submitted,

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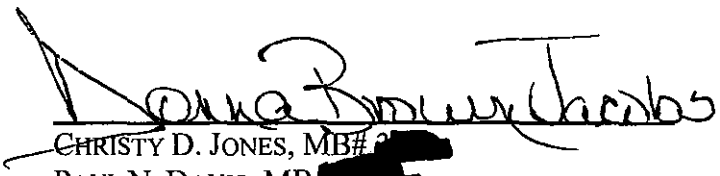

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SO CERTIFIED, this the 14 day of November, 2011.

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