THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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Case No. 2017-ALJ-17-0418-CC
Appellate Case No. 2020-000999

Synovus Bank ..... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

RESPONDENT'S RETURN IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE AN AMICUS BRIEF OF FIRST CITIZENS BANK & TRUST COMPANY

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Columbia, South Carolina
March 23, 2023

THE STATE OF SOUTH CAROLINA
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Pursuant to Rules 213 and 240(e) of the South Carolina Appellate Court Rules (SCACR), Respondent South Carolina Department of Revenue (Department) respectfully submits this return in opposition to the Motion for Leave to File an *Amicus Curiae* Brief of First Citizens Bank & Trust Company (First Citizens) filed on March 13, 2023 (Motion).

PROCEDURAL POSTURE

This is an appeal from a final decision of the South Carolina Administrative Law Court (ALC). Appellant Synovus Bank (Appellant) filed amended bank tax returns claiming net operating loss (NOL) carryforward deductions for tax years 2011 through 2014. The Department issued its final agency decision on October 17, 2017, in which it disallowed the NOL carryforwards because Chapter 11 of Title 12 (the Bank Tax) does not authorize banks to claim NOLs. Appellant sought ALC review. A contested case hearing was conducted on October 17, 2019. The ALC entered an Amended Final Order on June 22, 2020, which upheld the Department's Determination.

Appellant filed its Notice of Appeal on July 17, 2020. The appeal was fully briefed and ready for consideration after Appellant and the Department filed their final briefs on February 16, 2021 and March 5, 2021, respectively. On January 10, 2023, the Clerk of Court notified the parties that the case may be considered during May 2023.

Now, shortly before this case may be considered by the Court, First Citizens, who is represented by the same law firm that is representing Appellant in this appeal, apparently unsatisfied with Appellant's briefs that were filed over two years ago, seeks to file an additional brief in support of Appellant's position as an *amicus curiae* pursuant to Rule 213, SCACR. The Department opposes this Motion because the last-minute arrival of *amicus curiae* should be considered untimely, *amicus curiae* is not a friend of the court but an interested party and biased advocate for Appellant, and the *amicus* brief merely reargues points already raised by Appellant and does not provide any unique information or perspective that will assist the Court.

LEGAL STANDARD FOR GRANTING LEAVE TO FILE AN *AMICUS* BRIEF

"A brief of an amicus curiae (literally "friend of the court") may be filed only after obtaining leave of the appellate court via motion or at the appellate court's request." Jean Hoefer Toal, et al., Appellate Practice in South Carolina 439 (3d ed. 2016). Rule 213, SCACR, requires the motion requesting leave to file the *amicus* brief to identify the interest of the applicant and state the reasons why the brief of an *amicus curiae* is desirable. The determination of whether to grant leave to file an *amicus* brief is within this Court's discretion. *See Cook v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 179, 184, 420 S.E.2d 847, 850 (1992); *see also Northern Sec. Co. v. United States,* 191 U.S. 555, 24 S.Ct. 119 (1903) ("[I]t is within our discretion to allow [amicus brief] in any case when justified by the circumstances.").

There is no inherent right to file an *amicus curiae* brief; it is a matter of judicial grace. *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d

1177, 1178 (D. Nev. 1999). "The orthodox view of amicus curiae was, and is, that of an impartial friend of the court—not an adversary party in interest in the litigation." *United States v. State of Mich.*, 940 F.2d 143, 164–65 (6th Cir. 1991) (emphasis in original). However, as federal courts have noted, the "vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse." *Ryan v. Commodity Futures Trading Com'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). "When the party seeking to appear as *amicus curiae* is perceived to be an interested party or an advocate of one of the parties to the litigation, leave to appear as *amicus curiae* should be denied." *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.* 149 F.R.D. 65, 82 (D.N.J. 1993).

Thus, an *amicus* brief should only be permitted if the "proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice." *State of Mich.*, 940 F.2d at 165; *see also Ryan*, 125 F.3d at 1063 (identifying limited circumstances when *amicus* should be allowed, including "when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide").

ARGUMENT

1. The Court should deny the Motion because the *amicus curiae* brief is a biased attempt to duplicate the arguments already made in Appellant's brief, and it does not present unique information or perspective.

a. The *amicus* brief is inherently incredible.

Rule 213, SCACR requires the motion for leave to file an amicus brief to "identify the interest of the applicant." An *amicus curiae* is intended to be a friend of the court, not a friend of the party. *See Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) (describing an *amicus curiae* brief as a "'friend of the court' as distinguished from an advocate before the court"). First Citizens is not an impartial friend of the court—it is an interested advocate who is represented by a partner in the same law firm (and the

same Columbia practice group) as counsel for Appellant.[1] This common representation is strong indicia that First Citizens' brief lacks the impartiality and credibility required of a proper *amicus*.

The federal appellate and United States Supreme Court rules both require *amicus* briefs to contain statements regarding whether counsel for a party authored the brief in whole or in part and whether counsel or a party financially contributed to fund the preparation of the brief. *See* Sup. Ct. R. 37.6; Fed. R. App. P. 29(A)(4)(E). These federal disclosure rules are specifically designed to allow the court to evaluate and assess the credibility of the *amicus curiae*. Although Rule 213, SCACR does not specifically require this level of disclosure, the Court should still take the opportunity to consider the true "interest of the applicant" and deny the Motion because First Citizens is an interested, partisan advocate for Appellant. *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) (finding leave to appear as *amicus curiae* should be denied where it is "perceived to be an interested party or to be an advocate of one of the parties to the litigation"); *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir. 1986) ("Where a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as *amicus curiae*.").

b. The *amicus* brief only regurgitates arguments already made by Appellant.

First Citizens offers two reasons why the *amicus* brief is desirable: First Citizens has a similar tax credit claim, and its brief will provide a historical context to the term at issue ("entire net income") in this appeal. The fact First Citizens has its own case against the Department pending at the ALC is not a sufficient reason to grant its Motion. *See Barfield v. Bolotte*, 185 So. 3d 781, 784 (La. App. 1 Cir. 12/23/15) (denying leave to file amicus curiae brief by law firm who represented clients with similar

[1] Mr. Reames is a member of Nexsen Pruet and practices in Columbia in the areas of tax law and state and local taxation, among other things. *See* https://www.nexsenpruet.com/professionals-rick-reames, (last accessed on Mar. 17, 2023). Appellant is represented by Mr. Maybank, who is also a member of Nexsen Pruet and also practices in Columbia in the same practice group as Mr. Reames. *See* https://www.nexsenpruet.com/professionals-burnie-maybank, (last accessed on Mar. 17, 2023).

tax credit claims currently pending before the board of tax appeals). And although First Citizens claims its brief does not "repeat views presented by [Appellant]," (Motion at 2), that is exactly what the brief does.

For example, the stated thesis of the *amicus* brief is to analyze the meaning of entire net income "in its historical context" in order to clarify the "application of the term to banks operating in South Carolina." (Motion at 2). But this is not novel insight or perspective—it is precisely what Appellant argued in its briefs two years ago. At least nineteen pages of Appellant's Initial Brief (Initial Brief) are dedicated to analyzing the historical context of the meaning of entire net income: as "established in 1918 and 1924 and subsequently confirmed in 1926" (Initial Br. at 12–15); and as interpreted and applied from 1926 to 1937 (*id.* at 15–18); from 1937 to 1976 (*id.* at 18–21); from 1976 to 1980 (*id.* at 21); from 1980 to 1985 (*id.* at 21–23); from 1985 to 1996 (*id.* at 23–27); and from 1996 to 2005 (*id.* at 27–31). It is hard to imagine a more historical analysis than Appellant's decade-by-decade survey.

Moreover, the crux of First Citizens' "historical context" analysis is the contention that "entire net income" as used in 1937 (when the Legislature first enacted the Bank Tax) has a "judicially-determined legal meaning." (Amicus Br. at 11). This entire analysis is premised on *Crescent Mfg. Co. v. Tax Comm'n*, 129 S.C. 480, 124 S.E.2d 761 (1924), which First Citizens claims is the key to unlocking the judicially determined meaning of "entire net income." This is not unique information or perspective—it too is a recycled argument that Appellant spent four pages of its Initial Brief explaining. (Initial Br. at 12–15). In fact, although counsel for Appellant (Nexsen Pruet) and counsel for First Citizens (Nexsen Pruet) do not express the argument in verbatim terms, the very similar verbiage undoubtedly bears the family resemblance:

> **Appellant**: "The term 'entire net income' was used by the General Assembly for over a decade before the Legislature employed it as the tax based for taxing banks in 1937. . . [it] has been judicially defined for the South Carolina Legislature since at least 1924." (Initial Br. at 11-12)

First Citizens: "When Act 349 of 1937 first applied the term 'entire net income' to banks, the term had a decade-old legal meaning established in 1924." (Amicus Br. at 10)

Appellant: "Thus, the term 'entire net income' did not mean 'book income' in 1926. 'Entire net Income' was an income tax concept wholly devoid of a financial or 'book income' concept. It was 'gross income' (a defined term) minus 'deductions' (a defined term that included *all expenses*) to arrive at 'entire net income.'" (Initial Br. at 15) (at the conclusion of its discussion of the *Crescent Mfg.* case)

First Citizens: "Thus, due to *Crescent Mfg.* in 1924, 'entire net income' in 1937 had an uncomplicated, judicially-determined legal meaning unrelated to 'book income' or financial accounting. 'Entire net income' means all of a taxpayer's tax accounting net income irrespective of where the income is earned or the deductions are incurred." (Amicus Br. at 11)

Appellant: "If 'entire net income' is based on taxable income, conformity to the IRC provides an undisputable application of an NOL carryforward deduction through the General Assembly's adoption of 26 U.S.C. §172." (Initial Br. at 10)

First Citizens: "[B]y relying on the tax accounting of income and the tax accounting of deductions as statutorily established in what is now Chapter 6 of Title 12, banks (entities, just as are corporate taxpayers, taxable on 'entire net income') are eligible to receive the NOL carryforward deduction permitted by S.C. Code § 12-6-1130(4) and IRC § 172."

As these excerpts illustrate, the argument First Citizens seeks to offer is indistinguishable from the argument already advanced in Appellant's briefs. The Court should deny a motion for leave to file an *amicus* brief that merely reiterates a party's arguments—especially when those prior arguments were made by *amicus'* counsel's law partner. *Voices for Choices*, 339 F.3d at 544 (finding it is appropriate to "deny permission to file an amicus brief that essentially duplicates a party's brief"); *see also* Wright & Miller, Fed. Prac. & Proc. § 397 ("[A]n amicus ought to add something distinctive to the presentation of the issues, rather than serving as a mere conduit for the views of one of the parties."); 3B C.J.S. Amicus Curiae § 1 (2020) ("An amicus is one who, not as party but just as any stranger might, gives information for the assistance of the court on some matter of law in regard to which the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts.").

c. The *amicus* brief relies on an irrelevant case (*Crescent Mfg.*) and a logical fallacy.

The *amicus* brief contends the ALC erred in concluding that "entire net income" means "book income." (Amicus Br. at 8–9). To illustrate the ALC's alleged "failure," First Citizens points to *Crescent Mfg.* as evidence that the definition of "entire net income" in 1937 was completely unrelated to "book income." (Amicus Br. at 9, 11). Unfortunately, First Citizens overstates the holding of *Crescent Mfg.* and ignores critical statutory language (and subsequent amendments) that essentially render *Crescent Mfg.* irrelevant to the issues in this appeal.

First, *Crescent Mfg.* was a 1924 case that dealt with the application of the state Income Tax Act of 1922. *See Crescent Mfg.*, 129 S.C. at 480, 124 S.E. at 762. However, by the time the Legislature had enacted a separate bank tax on the "entire net income" of banks in 1937, the 1922 Act had been "fully and completely repealed" and replaced by the Income Tax Act of 1926. *See Roper v. S.C. Tax Comm'n*, 231 S.C. 587, 597, 99 S.E.2d 377, 382 (1957). Importantly, the 1926 Act fundamentally changed how a corporation's net income should be computed. *See* 1927 S.C. Acts 1, §§ 3, 7–9 (requiring "net income" to be computed on the corporation's gross income in accordance with the accounting method it employed in keeping its books); *see also* Department's Final Br. at 5, 31–33). Thus, to the extent *Crescent Mfg.* offers any historical context, its holding and any relevant dicta were effectively mooted when the statute it was applying was repealed and replaced by the Legislature just two years after the case was decided.

Second, the issue in *Crescent Mfg.* was whether the net income upon which a domestic corporation should be taxed included income the corporation earned outside South Carolina or only the income it derived from operating within the state. *Crescent Mfg.*, 129 S.C. at 480, 124 S.E. at 762. In other words, does the income tax apply to a corporation's South Carolina income, or everywhere income? This is a completely different question from how net income is computed, and whether it is

synonymous with the corporation's book income (based on the accounting method it employs) or its federal taxable income (based on federal tax rules and the Internal Revenue Code).

Nevertheless, First Citizens insists that *Crescent Mfg.* stands for the proposition that "entire net income" means "all of a taxpayer's tax accounting income and all of a taxpayer's tax accounting deductions." (Amicus Br. at 10–11). This is simply wrong. The term "tax accounting" is nowhere in the opinion. The Court never refers to "tax accounting deductions." In fact, other than twice mentioning the term "entire net income" in passing, the opinion never remotely addresses whether "entire net income" means tax accounting or book income/financial accounting. The case is entirely silent about the definition of "entire net income" with respect to the issues that are germane to this appeal.

Although the *amicus* brief accuses the ALC of using faulty logic, in reality it is First Citizens who commits the logical fallacy of begging the question. A primary dispute in this appeal is whether "entire net income" is best interpreted to mean book income or tax accounting income. Appellant asserts the latter: that "entire net income" as used in the Bank Tax (Chapter 11 of Title 12) is not based on "book income" but should mean the same thing as "taxable income" in the Corporate Income Tax (Chapter 6 of Title 12). (Appellant Initial Br. at 10). In advancing this same argument, First Citizens builds its entire brief around *Crescent Mfg.*, characterizes *Crescent Mfg.*'s holding as establishing "entire net income" to be a "tax accounting term" based on words and concepts that are completely absent from the case, and then claims the case supports the ultimate conclusion that "entire net income" must have "the meaning already in use in the corporate income tax statutes." (Amicus Br. at 15). This is a textbook example of assuming the conclusion.

Because the *amicus* brief's entire argument is premised on a logical fallacy built on the mischaracterization of a 100 year old case interpreting an Act that was subsequently repealed and completely replaced, it offers no useful information to the Court and should be rejected.

2. The untimeliness of the proposed *amicus curiae* unfairly prejudices the Department.

If the Court grants First Citizens' Motion, it will essentially give Appellant two bites at the apple. Appellant has already filed an initial brief (which was fifty pages long) and a reply brief (which was twenty-five pages long), both of which are the maximum page limits allowed for principal and reply briefs. *See* SCACR Rule 208(b)(5). First Citizens' proposed amicus brief is seventeen pages long. By permitting a proposed *amicus curiae*—represented by the same firm that represents Appellant—to file yet another brief in this matter would effectively condone what appears to be an impermissible "end run around court-imposed limitations on the length of parties' briefs." *Voices for Choices*, 339 F.3d at 544.

The timing of First Citizens' Motion further underscores this point. As evidenced from the relevant dates discussed above and in the Motion, First Citizens has been aware of the Department's stated legal position in this controversy for over five years (since Appellant commenced this action at the ALC in November 2017). Moreover, First Citizens has been aware of the Department's position as it relates specifically to First Citizens since the Department first denied First Citizens' refund claim in February 2021, which is precisely the same time that Appellant and the Department completed briefing this appeal. If the arguments raised by First Citizens in the proposed *amicus* brief are so important as to assist the Court "by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs," *id.* at 545, First Citizens should have filed this Motion two years ago. Instead, First Citizens waited until the eleventh hour—on the eve of the Court's consideration—to file its *amicus* brief. If nothing else, the timing raises questions about whether the *amicus* brief is truly being interposed for the substantive purpose of assisting the Court or to gain a tactical advantage.

At bottom, First Citizens' last-minute *amicus* is nothing more than a vehicle to clean up the arguments already made in Appellant's briefs. This places the Department at a clear disadvantage, and

will require the Department to expend additional time and resources to review and respond to the *amicus* brief. *Id.* at 544 (suggesting policy reasons to deny improper *amicus* briefs including that "judges have heavy caseloads and therefore need to minimize extraneous reading" and "the time and other resources required for the preparation and study of, and response to, amicus briefs"). The Court should discourage such an approach and deny the Motion.

CONCLUSION

For the reasons explained above, First Citizens' proposed *amicus* brief does not contain information that is timely, useful, or otherwise necessary to the administration of justice. Because the brief merely reiterates Appellant' own arguments and interests—which Appellant presented in its briefs over two years ago—the Department respectfully requests the Court deny First Citizens Bank & Trust Company's Motion for Leave to File an Amicus Curiae Brief in this case. *See* U.S. Sup. Ct. R. 37.1 (noting that an *amicus curiae* brief should identify "relevant matter not already brought to its attention by the parties" and if it fails to serve this purpose it "burdens the Court, and its filing is not favored").

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Attorney for the South Carolina Department of Revenue

March 23, 2023

Amber Hogan

From: Amber Hogan
Sent: Thursday, March 23, 2023 3:07 PM
To: ashley.cuttino@odnss.com; lewis.smoak@ogletree.com; Maybank, Burnet R. III; rreames@nexsenpruet.com; Saleeby, Andrew W.; RStevens@nexsenpruet.com
Cc: Jason Luther
Subject: Synovus Bank v. SCDOR, Appellate Case No. 2020-00099
Attachments: 2023.03.23 Respondent's Return in Opp to Mtn to File Amicus of FCBTC.pdf

Good afternoon,

Attached please find the Respondent's Return in Opposition to the Motion for Leave to File an Amicus Brief for First Citizens Bank & Trust Company, which I hereby serve upon you in the above-referenced matter. I am electronically filing the same with the Court of Appeals this afternoon.

If you have any questions please do not hesitate to give me a call.

Have a great afternoon!

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Mar 23 2023
SC Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
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Case No. 2017-ALJ-17-0418-CC
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Synovus Bank ..... Appellant,

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South Carolina Department of Revenue, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Return in Opposition to the Motion for Leave to file an Amicus Brief of First Citizens Bank & Trust Company via electronic mail at the electronic address provided in the Attorney Information System, on March 23, 2023, at the following address(es):

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Columbia, South Carolina
March 23, 2023

STATE OF SOUTH CAROLINA
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March 23, 2023

TRANSMITTAL VIA E-MAIL
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Re: Synovus Bank v. South Carolina Department of Revenue
Appellate Case No.: 2020-000999

Dear Ms. Kitchings:

Attached for filing please find the Respondent's Return in Opposition to the Motion for Leave to File an *Amicus Brief* of First Citizens Bank & Trust Company in the above-referenced matter. In accordance with Rule 262(a)(3) of the South Carolina Appellate Court Rules and Supreme Court Order 2021-08-25-02 section (b), the attached filing is being made to the email address of the Court of Appeals. As also permitted by the Court, no other copies, whether paper or electronic, are being provided, although I am happy to do so at the Court's request.

By copy of this letter I am serving counsel for Appellant and counsel for the *amicus* via email as permitted by Supreme Court Order 2021-08-25-02 section (d)(1).

If you have any questions or need anything further from me please do not hesitate to contact me at 803-898-5785 or Jason.Luther@dor.sc.gov.

With my regards, I am

Sincerely,

s/ Jason P. Luther

Jason P. Luther, Esquire
Chief Legal Officer

JPL/anh
cc: Ashley P. Cuttino, Esquire (*all via e-mail only*)
Lewis T. Smoak, Esquire
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