THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby
Master-in-Equity

Appellate Case No. 2023-000017

South Carolina Board of Financial Institutions ..... Appellant,

v.

CDM Corporation, Inc., and Guardian Fiduciary Services, LLC..... Respondents.

RESPONDENTS' RESPONSE TO AMICUS BRIEF

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Respondents respectfully respond to the Attorney General's Amicus Brief filed on behalf of the Board. That amicus filing does nothing to undercut Judge Crosby's ruling below, nor does it rehabilitate the Board's failed attempt to rewrite the limited scope of its own regulatory authority, as discussed below.

ARGUMENT

I. Because South Carolina Code § 34-21-10 is not ambiguous, the Court need not—and cannot—defer to the Board's twisted reading of the statute.

The Attorney General's amicus brief provides a detailed summary of South Carolina case law regarding the application and scope of cases regarding when courts may show deference to an agency's interpretation of the law. Most importantly, though, the amicus filing readily reinforces the dispositive point on this issue: the entire notion of deferring to an agency's reading of the law does not apply where, as here, a statute is unambiguous. (Amicus Br. at 3–4.)

The South Carolina Supreme Court has been clear on this threshold issue. *See, e.g.*, *Kiawah Dev. Partners, II v. S.C. DHEC,* 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014) ("First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court ***must*** utilize the clear meaning of the statute or regulation.") (emphasis added). Only after first finding ambiguity may the court move to the second step and potentially give some deference to an agency's interpretation—"assuming the interpretation is worthy of deference." *Id.* at 33, 766 S.E.2d at 717.

This rule of statutory interpretation is rooted in the State's constitutional structure. In South Carolina, the General Assembly alone writes the law, and the Judiciary alone interprets the law. If courts reflexively allowed agency *ipsi dixit* to become law, the executive branch could override legislative judgment or displace a court's reading of the law by simply speaking up. The Constitution forbids such a breach of the legislative and judicial functions by the executive. *See*

S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.").

Accordingly, to the extent deference to an agency is ever appropriate, it certainly has no place in this case, as the relevant statutory language is unambiguous. South Carolina Code § 34-21-10 grants the Board authority to regulate entities that are engaged in "trust business." The circuit court rightly held this term means exactly what it says: "a business involved with the administration of trusts." (R. p. ___; Order at 5.) That should be the end of the analysis, and the notion of deference plays no role here.

What's more, the Attorney General's office actually agrees that this phrase means exactly what the circuit court said it means. In a 1996 opinion authored by the current South Carolina Solicitor General, the Attorney General's office concluded that a "trust business" means "taking, accepting, administering and executing ***trusts***," and explained that this was the "common and ordinary" reading of the term. 1996 S.C. AG LEXIS 25, at *4, 7 (Feb. 9, 1996) (emphasis added).[1] That opinion surveyed courts nationally that have reached this exact same understanding. *See id.* at *4–5 (citing *Carney v. Sam Houston Underwriters*, 272 S.W.2d 942, 946 (Tex. Civ. App. 1954), for the proposition that "the ordinary conception of a ***trust company*** as being one authorized to ***take and administer trusts***") (emphasis added); *id.* at *5 ("In *Goss and Hamlyn Howe v. State*, 285 P.2d 428, 431 (Okla. 1955), the Court cited Webster's *New International Dictionary* (2d ed. Unabridged) defining a ***'trust company'*** as 'any corporation found for the purpose of acting as ***trustee***.'") (emphasis added).

[1] The Board relies on this same opinion on Page 17 of its opening brief.

Even now, in its amicus brief, the Attorney General's office does not assert that the language of Section 34-21-10 is ambiguous, and instead suggests without explanation that it could be "arguably ambiguous." (Amicus Br. at 6.) But "arguable" ambiguity is not enough to sidestep the plain language of a statute and give deference to agency interpretation. *See Carolina, Clinchfield & Ohio Ry. of S.C. v. S.C. Tax Comm'n*, 197 S.C. 529, 541, 15 S.E.2d 764, 769 (1941) ("And the doctrine giving effect to executive construction is usually and properly restricted to cases in which the meaning of the statute is really doubtful.").

Nor is it unusual for a court to find a statute is unambiguous and reject an agency's contrary construction. South Carolina jurisprudence is filled with instances where courts have turned away an agency's misinterpretation of a clear statute. *See, e.g.*, *Media Gen. Commc'ns, Inc. v. S.C. DOR,* 388 S.C. 138, 149–50, 694 S.E.2d 525, 530–31 (2010) ("We find the ALC was not required to defer to the Department's interpretation in this instance because it was contrary to the plain language of the statute."); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation."); *Jack's Custom Cycles, Inc. v. S.C. DOR,* 439 S.C. 35, ___, 885 S.E.2d 433, 440–42 (Ct. App. 2023), *reh'g denied* (Apr. 26, 2023) (rejecting the Department of Revenue's "long-standing interpretation" of a tax statute because the agency's interpretation was contrary to "the plain language of the statute"); *State v. Sweat,* 379 S.C. 367, 384, 665 S.E.2d 645, 655 (Ct. App. 2008) ("In this case, the State is not entitled to any deference in its interpretation because the plain language of [the statute] refutes the State's position. The circuit court was not bound to accept the State's interpretation of the statute. This Court is free to read

the statute based on its plain language without deference to the State's position."), *aff'd as modified in unrelated part*, 386 S.C. 339, 688 S.E.2d 569 (2010); *Richland County Sch. Dist. Two v. S.C. DOE*, 335 S.C. 491, 497–98, 517 S.E.2d 444, 448 (Ct. App. 1999) ("We find SCDE's argument disingenuous. . . . Despite the deference normally afforded an administrative agency's statutory construction, the plain meaning of the proviso's language provides a compelling reason to reject SCDE's interpretation of [the statute at issue].").[2]

Because the statute at issue here is not ambiguous—even the Attorney General agrees with the circuit court's reading of it—there is no role for the so-called "deference doctrine." The circuit court rightly declined to cede its responsibility to declare what the law means to the executive branch, and its ruling should be affirmed accordingly.

II. The Board's actual "longstanding" interpretation of the statutory phrase "trust business" is consistent with the circuit court's plain-meaning construction of the term.

Respectfully, the Attorney General's amicus brief also misstates the Board's historic treatment of what makes a company a "trust business" for purposes of Section 34-21-10. On Page 6, the amicus brief states that "the Board has a longstanding practice of defining 'trust business' as used in S.C. Code Ann. § 34-21-10 to include a broad range of fiduciary activities and roles." Not so.

In its briefs to this Court, the Board has cited only three items of "evidence" in support of this supposed "longstanding practice":

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[2] This string cite could contain more and more cases, but the point is obvious: The frequency with which South Carolina's courts find that state agencies have wrongly construed unambiguous statutes undercuts any purported utility of the "deference doctrine." *See generally Joseph v. S.C. LLR*, 417 S.C. 436, 461, 790 S.E.2d 763, 777 (2016) (Kittredge, J., concurring) ("In South Carolina, to preserve some semblance of the separation of powers we once held sacred, an administrative agency may not make law without legislative oversight and approval.").

Affidavit from Commissioner Green. The current Banking Commissioner submitted an affidavit below, in which he cites a consent order with a company called J. Earle Financial that agreed it was "conducting trust business." (R. p. ___; Aff. Green ¶ 7.) That consent order was entered on April 28, 2020, fewer than six months before this lawsuit was filed. And the fact that J. Earle Financial agreed to be regulated by the Board does not somehow alter the plain language of Section 34-21-10.

Affidavit from Mr. Hinds. The Board also cites an affidavit from counsel from Colonial Trust Company, which is regulated by the Board as a "trust business." (R. p. ___; Aff. Hinds ¶ 2.) The unremarkable fact that Colonial ***Trust Company*** is engaged in "trust business" and is therefore subject to regulation by the Board has no relevance to the legal issue presented here.

Internal Agency "Policy Statement." In June 2022—nearly two years after it filed this lawsuit, and barely two months before it filed for summary judgment in this case—the Board issued a "Policy Statement" regarding the term "trust business." (R. p. ___; Board "Policy Statement.") It did not attempt to promulgate this "statement" as a regulation, rendering without any legal effect. *See Joseph*, 417 S.C. at 453, 790 S.E.2d at 772 ("[W]e hold that the Board's adoption of the 2011 Position Statement violates the requirements of the APA.").

Worse yet, the "Policy Statement" hedges as to what actually constitutes a "trust business." (*See* R. p. ___; "Policy Statement" at 2 ("This guidance does not constitute a comprehensive list of activities which constitute trust business. The Board strongly advises entities to contact the Office of the Commission of Banking with questions regarding whether specific activities constitute conducting trust business.").) This mid-litigation, self-serving "statement"—which treats the term "trust business" as if it has no knowable boundaries—cannot possibly be considered a "longstanding practice" that merits judicial deference.

* * * * *

In short, the Board has not identified a credible evidentiary basis to support its proposed application of the "deference doctrine," even assuming *arguendo* there is any ambiguity in the statute. To the contrary, in 2011, the Banking Commissioner assured CDM and Guardian that providing their various fiduciary services ***did not*** bring them within the Board's "trust business" jurisdiction. (R. p. ___; Aff. Mantell ¶ 12.) CDM and Guardian operated with this understanding of the law for nearly a decade before the Board did a complete about-face and sued these entities for the very actions the agency had previously indicated did not constitute operating a "trust business." (R. p. ___; *id.* ¶ 13.)

Accordingly, to the limited extent the Board's prior position on the issue could possibly inform the Court's analysis here, the Board's actual "longstanding practice" was to leave CDM and Guardian to be overseen by the Probate Court and the common law, not by an executive agency. The Attorney General's amicus brief fails to account for these facts in the record, but they confirm that the circuit court's construction of the term "trust business" should be affirmed.

CONCLUSION

South Carolina law is clear. If, and only if, a statute is ambiguous may a court then consider giving any weight to an agency's interpretation. But the language of Section 34-21-10 is unambiguous, and the usual and customary meaning of the term must be applied. *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994). Because the law leaves no room for agency interpretation or "deference" where, as here, a statute is unambiguous, the Board is not entitled to invoke the "deference doctrine" to rewrite the meaning of "trust business."

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Respondents, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by emailing a copy of the same to the following address(es):

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