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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Supreme Court

ALC Case No. 18-ALJ-0443-/cc
Appellate Case No. 2021-000219

Colonial Pipeline Company ..... Petitioner,

v.

South Carolina Department of Revenue, Abbeville County, Anderson County, Greenville County, Aiken County, Laurens County, and York County..... Respondents.

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Colonial Pipeline Company ("Petitioner" or "Colonial") petitions the Court to issue a writ of certiorari to review the decision of the Court of Appeals styled *Colonial Pipeline Company, Respondent v. South Carolina Department of Revenue, Abbeville County, Anderson County, Greenville County, Aiken County, Laurens County, and York County, Appellants*, Op. No 6072 (July 17, 2024). The decision reversed the Administrative Law Court's decision and ruled in favor of the Department of Revenue and counties. For the reasons stated below, the petition should be granted, and the decision of the Court of Appeals should be reversed.

CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was timely filed on July 31, 2024 and denied by the Court of Appeals on August 19, 2024.

QUESTIONS PRESENTED FOR REVIEW

STATEMENT OF THE CASE

The matter arises from Colonial's challenge to the South Carolina Department of Revenue's ("DOR" or "Department") determination that Colonial is not entitled to a property tax exemption for three types of pollution control devices for the tax years 2017 and 2018. In 2017, Colonial sought a determination that its pipe coatings, cathodic protection, and automatic shut-off valves are exempt from property tax under the pollution control exemptions found in S.C. Const. Art. X, § 3(h) and S.C. Code Ann. § 12-37-220(A)(8); (collectively, the "Exemption"). The constitutional provision exempts from property tax "all facilities of *industrial plants* which are designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air or noise pollution." S.C. Const. Art X, § 3(h) (emphasis added). Section 12-37-220(A)(8) similarly exempts "[a]ll facilities or equipment of *industrial plants* which are designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air or noise pollution, both internal and external, required by the state or federal government and used in the conduct of their business." (emphasis added). Neither the constitutional provision nor the statute defines "industrial plant."

DOR submitted Colonial's 2018 exemption application to the South Carolina Department of Health and Environmental Control ("DHEC") for investigation into whether the pipeline enhancements identified by Colonial qualified as pollution control equipment. DHEC replied to DOR on August 27, 2018, stating that the pipe coatings, cathodic protection, and automatic shut-off valves at issue did qualify as pollution control equipment. Despite this guidance, on November 19, 2018, DOR found, nevertheless, that Colonial was not entitled to the Exemption because the property claimed by Colonial is not facilities or equipment *of an industrial plant*. Colonial subsequently claimed the same pipeline enhancements as pollution control property for 2019 and, again, requested the Exemption. DOR also denied this 2019 application.

On December 5, 2018, Colonial requested the Administrative Law Court ("ALC") hold a contested case hearing to challenge this determination by DOR. Colonial argued that its industrial facility was an "industrial plant" under the applicable statute and constitutional provisions. Abbeville County, Anderson County, Greenville County, Aiken County, Laurens County, and York County (collectively, the "Counties") were subsequently permitted to intervene in the proceeding.

A hearing on the merits was held August 4-5, 2020 before Chief Administrative Law Judge Ralph King Anderson, III. The ALC issued a Final Order on December 1, 2020. R. p. 0047. Subsequently, Colonial, the Counties and the Department timely filed Motions for Reconsideration. In response to the issues raised in the Motions for Reconsideration, the ALC rescinded its original Final Order on January 4, 2021, and issued an Amended Final Order on February 9, 2021. R. p. 0081. The ALC found in its Amended Final Order that the pipeline components in dispute are: (1) facilities and equipment of an industrial plant; (2) designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution; (3) required by state and federal government; and (4) used in the conduct of Colonial's business. Therefore, the ALC determined that the pipe coatings, cathodic protection, and automatic shut-off valves met the qualifications to receive the pollution control exemption.

In response to the Amended Final Order, the Counties and DOR timely filed notices of appeal. On appeal, the Court of Appeals reversed the ALC decision and essentially held that "industrial plants" were limited to "manufacturers," and that non-manufacturing companies were not included in the exemption.

SUMMARY OF GROUNDS FOR CERTIORARI

SCACR Rule 242 lists circumstances that weigh in favor of this Court issuing a writ of certiorari. Among the reasons listed in the Rule are "where there are novel questions of law" at issue. SCACR Rule 242(b)(1).

The pollution control exemption in this case is found in both the South Carolina Constitution, S.C. Const. Art. X, §3(h), and in statute, S.C. Code Ann. § 12-37-220(A)(8). They read essentially the same. Neither the Constitution nor the statute define "industrial plant." Further, (1) there is no South Carolina caselaw (Supreme Court, Court of Appeals or ALC) defining "industrial plant" in this context[1], (2) the Department has issued no policy documents (e.g. Revenue Rulings, etc.) on this issue, and (3) the Department has no long-standing agency interpretation on this issue.[2] Seemingly, this issue has never arisen before in South Carolina, and thus, this case presents a novel question of law. As the ALC Order notes on page 16 (ROA 0096):

> There are no statutes or regulations defining "industrial plant" for the purpose of section 12-37-220(A)(8). In fact, it is difficult to find a definition of "industrial plant" in any statutory law in South Carolina. Moreover, the Department has never formally interpreted the meaning of the phrase "industrial plant." Indeed, Taylor Ingram, the Department's Utility Coordinator who reviewed Colonial's exemption request, could not articulate what the term "industrial plant" means or how it would apply to the property at issue.

SCACR Rule 242(b)(3) should also be considered because the Court of Appeals ruling here is "in conflict with [] prior decision[s] of the Supreme Court" regarding long-standing statutory construction principles. The Court of Appeals disregarded unwavering precedent in this State that

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[1] South Carolina courts, as explained below, have referenced "industrial plants" in earlier decisions, but none have defined it.

[2] Of note, the ALC held in footnote 14 of the Amended Final order (pg. 15, ROA 0095) that: "Because the Department's interpretation of 'industrial plant' has changed during this case, the Department cannot show its interpretation is a long-standing administrative policy worthy of deference." As such, there are also no Chevron deference-type issues in this case.

courts should not insert terms to restrict a statute's application or read statutes in such a way that is contrary to legislative intent. That is exactly what the Court of Appeals did here. Instead of applying the plain language of the Exemption and relying on a plain meaning of the term "industrial plant," the Court of Appeals limited the Exemption to only "manufacturers" – a term that appears nowhere in the language of the Exemption.

SCACR Rule 242(b)(4) provides another applicable factor that weighs in favor of this Court issuing a writ of certiorari because "substantial constitutional issues are directly involved" in this case. Specifically, the pollution control exemption is a protection afforded by the South Carolina Constitution, and these types of exemptions are generally intended to provide a tax incentive that encourages the adoption of pollution control technologies for the beneficial public purpose of reducing or eliminating environmental pollution. *See, e.g.*, *Chemical Waste Management v. State*, 512 So. 2d 115, 117 (Ala. Civ. App. 1987) ("[T]he principal reason for the legislature's enactment of the tax exemption [] is to ease the new and sometimes high cost of the addition of pollution control property and equipment . . . . The goal of the exemption is to encourage all businesses to control pollution and to assist them in their compliance with mandatory environmental regulations."); *see also State Bd. of Equal. v. Tenneco Oil Co.*, 694 P.2d 97, 100 (Wyo. 1985). The Court of Appeals' ruling, however, in essence limits this important Constitutional exemption to only manufacturers. A sweeping ruling like that of the Court of Appeals, which effectively eliminates a Constitutional protection for many South Carolina industries and businesses, involves "substantial constitutional issues," justifying certiorari in this case.

In addition, though not explicitly identified as a factor in SCACR Rule 242, the Court of Appeals ruling has far reaching implications beyond just the interpretation of S.C. Const. Art. X, §3(h) and S.C. Code Ann. § 12-37-220(A)(8). As detailed further herein, there are serious potential

non-tax consequences associated with limiting the definition of "industrial plant" to only manufacturers. For this additional reason, certiorari is warranted.

All these factors, together and individually, weigh in favor of this Court granting a writ of certiorari in the instant case.

ARGUMENT

1. The Court Should Grant Certiorari Because The Court of Appeals Erred In Holding That Colonial's Facility Was Not An Industrial Plant.

The Exemption has four requirements: (1) the equipment for which the exemption is claimed constitutes "facilities or equipment of industrial plants;" (2) the equipment is designed for the "elimination, mitigation [or] prevention . . . of water [or] air [] pollution;" (3) the equipment is required by state or federal law; and (4) the equipment is "used in the conduct of [the taxpayer's] business." The ALC found that all four requirements were met, and the Court of Appeals' decision dealt solely with the "industrial plant" requirement. All sides concede that the Exemption is limited to "industrial plants," and that there are no statutory or regulatory definitions of "industrial plant."

The question before the Court of Appeals was: Is a transportation facility composed of 515 miles of pipelines, 2 tank farms with 44 tanks, one delivery facility next to a truck offloading site, 3 main line booster stations, and 32 full time employees that (1) transports 185,000 barrels of gasoline, diesel, jet fuel and kerosene a day through South Carolina, (2) operates pumps, motors, valves, manifolds, injection equipment, oil and water separators, measuring equipment, control systems, and other industrial infrastructure; (3) processes and sells transmix, and (4) perform various other industrial and production activities, , an "industrial plant?" The clear answer is yes.

The following pertinent facts, all of which were undisputed, demonstrate that Colonial's combined facilities in South Carolina constitutes an "industrial plant."

Colonial's Business. Colonial is a pipeline company that transports refined petroleum, jet fuel, gasoline, diesel, heating oil, and kerosene (collectively, "Refined Petroleum Products"). Tr. p. 95, line 22-p. 96, line 7; R. p. 1536. Colonial receives these Refined Petroleum Products from approximately 30 refineries in the Gulf Coast region of the United States and has approximately 250 customers who ship through its pipelines. ALC Amended Final Order, Findings of Fact (hereinafter "Findings of Fact") at pp. 5-6; Tr. 121: 1-19; R. pp. 0085-86, 1562. Colonial transports over 255 million barrels of Refined Petroleum Products per day nationally, of which 185,000 barrels per day are delivered into South Carolina for distribution within the state. Findings of Fact, pp. 5-6; R. p. 0085-86.

Colonial's Assets. Colonial's operations in South Carolina are comprised of 515 miles of pipeline, two tank farms (Belton and Spartanburg), three main line booster stations, and one delivery facility, spanning eleven counties in the State. Tr. p. 98, line 19-p. 99, line 22; R. p. 1539. Colonial's two main 36"-40" pipelines in South Carolina, Line 1 and Line 2, that run from Pasadena, Texas to Greensboro, North Carolina. Tr. p. 101, lines 20-21; R. p. 1542. The pipelines are all 3 to 6 feet underground, except where they surface in pump stations and tank farms. Findings of Fact, pp. 5-6; Tr. p. 98, line 11-p. 102, line 22; R. pp. 1539-43.

Colonial's Belton and Spartanburg tank farms each have a complex system of pumps, motors, valves, manifolds, injection equipment, control systems, and other industrial infrastructure necessary to move and manage product. The two tank farms receive petroleum products from Lines 1 and 2 into tankage, and then that product is delivered out from that tankage to multiple delivery lines to customers. The tank farms are comprised of multiple tanks – 20 in Belton and 22 in Spartanburg, including gasoline tanks, distillate tanks, transmix tanks, and utility tanks. Findings

of Fact, p. 7; R. p. 0087. All the tank farms also have sting systems (described below) that remove water off the tank.

In addition to the tank farms, every 50 to 60 miles along its mainlines, Colonial operates a booster station (3 total in South Carolina) that increases pressure in the pipeline system to allow for the movement of product through the pipeline. Tr. p. 108, lines 22-25; R. p. 1549; Findings of Fact, p. 7; R. p. 87. Each booster station has fifteen 20,000 horsepower pumps, together with three to four 5,000 horsepower pumps. Tr. p. 108, line 22-p. 109, line 15; R. pp. 1549-50. To ensure safety and quality control, Colonial also constantly measures gravity, pressure, and temperature of the products it transports and checks for leaks using various measuring and monitoring equipment. Tr. p. 141, lines 8-18; R. p. 1582Tr. p. 108, lines 22.25; R. p. 1549.

Processing and Sales of Transmix. Because Colonial transports multiple Refined Petroleum Products back-to-back through the pipeline, some mixing of those different products occurs, which results in a product called "transmix." Tr. p. 127, lines 14-19; R. p. 1568. Transmix does not meet the Refined Petroleum Product specifications for a product that can be sold for use. However, Colonial can re-process transmix into a once-again saleable Refined Petroleum Product. Stipulation Nos. 3 and 4; Findings of Fact, p. 6; R. pp. 0082, 0086. This is a very controlled process by which Colonial isolates the product and then blends it into a sellable product. Line 1 generates 15,000 barrels of transmix per five-day shipment; Line 2 generates 10,000-15,000 barrels per five-day shipment; and Line 29 generates 500 barrels per shipment. Tr. p. 131, line 21-p. 132, line 10; R. pp. 1572-73.

Other Industrial and Production Activities. In managing product in the pipeline, Colonial often adds Drag Reducing Agents (DRA) during transit, Tr. p. 156, lines 6-7; R. p. 1597, which reduces the amount of friction loss. Stipulation No. 2. In South Carolina, Colonial adds over

a million gallons of DRA at the pump stations and on Colonial's line 29. DRA is injected into the pipeline from multiple additive tanks with injection pumps and measuring equipment. Findings of Fact, p. 7; Tr. p. 151, line 20-p. 152, line 5; R. pp. 1592-93.

Colonial must also remove water that accumulates in and around the transported product through a process called "sting." Colonial filters and removes "sting water" daily at the Belton and Spartanburg facilities through the use of oil and water separators. Tr. p. 156, line 20-p. 158, line 19; R. pp. 1597-99.

Colonial further regrades fuel in South Carolina. "Regrade" is a process by which Colonial "change[s] a label of the product, the product's grade." Examples include regrading regular or premium gasoline. Tr. p. 188, line 9-p.189, line 12; R. pp. 1629-30.

Colonial also provides product storage services for third parties at its Belton and Spartanburg facilities. Stipulations 11 and 14; Tr. p. 110, lines 1-20; R. pp. 2463, 1551.

Colonial Personnel. Colonial requires a substantial and continuous team of operators and technicians on a full-time basis (and an equal number of independent contractors) to oversee operations, run its facilities, make repairs, and respond to issues as needed. The pipelines are constantly monitored 24/7/365 by employees at Colonial's facilities in South Carolina as well as its central pipeline control center, located in Alpharetta, Georgia. Findings of Fact, p. 7; Tr. p. 114, lines 8-18; p. 241, lines 1-11; R. pp. 0087, 1555, 1682.

With the backdrop of these undisputed facts, the Department concedes that Colonial's operations and facilities are "industrial." *See* Amended Final Order at p. 15 and Motions Hearing, January 6, 2020, Tr. p. 37, lines 13-23; R. pp. 0095, 1363. Accordingly, the sole issue before the Court of Appeals was whether Colonial's combined facility that transports and delivers Refined Petroleum Products, operates a litany of industrial equipment and infrastructure, processes and

sells transmix, and performs a range of other industrial and production-related activities, constitutes a "plant." Significantly, the Department's witness, Taylor Ingram, who was in control of granting exemptions, did not dispute that Colonial operated an "industrial plant." *See* Testimony of Taylor Ingram, Tr. p. 323, lines 18-25; R. p. 1764. In fact, Mr. Ingram granted the Exemption to Colonial for other pollution control equipment during the same tax years at issue,[3] thus recognizing that the Colonial facility qualified as an industrial plant. Despite this and the undisputed facts detailed above, the Court of Appeals erroneously found that Colonial was not an "industrial plant."

Colonial is not aware of any South Carolina case that defines "industrial plant," and as such, the issue in this case is a novel question of law. That term, however, is cited in several South Carolina cases that are instructive. *See Mayfield v. Southern Ry. Co.*, 85 S.C. 165 (1910) (industrial plant consisted of gin house, seed house, and gins and other machinery); *Magill v. Southern Ry. Co.*, 95 S.C. 306 (1913) (brick mill); and *Allison v. Ideal Laundry & Cleaners*, 215 S.C. 344 (1949) (cannery and glass factory). Notably, several of the facilities in these cases do not appear to be manufacturers yet were found to be industrial plants, contrary to the Court of Appeals ruling.

Additionally, while Title 31, Chapter 24 of the S.C. Code does not use the exact term "industrial plant," it does use the term "industrial facility," which is also instructive. This statute prohibits nuisance lawsuits against industrial facilities related to manufacturing *and* industrial uses of real property, thus recognizing the terms "manufacturing" and "industrial" are not synonymous. Further, Section 31-24-110 provides the following definitions of what constitutes an "industrial facility," and those definitions explicitly *include* transportation and warehouse facilities:

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[3] Specifically, in 2017 and 2018, the Department granted the Exemption for wastewater/storm water pollution control, secondary containment, and tank floating roofs (but denied the application for pipe coatings, cathodic protection and automatic shut-off valves as DHEC had not then ruled they qualified as pollution control exemption devices).

(A) "Manufacturing sector" means establishments engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products, including, but not limited to, plants, factories, or mills, and characteristically use power-driven machines and materials-handling equipment.

(B) "Transportation and warehousing sector" means industries providing transportation of passengers and cargo, warehousing and storage for goods, scenic and sightseeing transportation, and support activities related to modes of transportation by air, rail, water, road, and pipeline.

(C) "Manufacturing or industrial facility" means any facility that operates in a manufacturing sector or transportation and warehousing sector, including, but not limited to, any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment used for manufacturing, processing, distribution, warehousing, and technology intensive operations. . . .

Under this Act, an "industrial facility" includes those "providing transportation of . . . cargo," *specifically including* "pipeline[s]." These definitions further support a finding that Colonial qualifies as an "industrial plant" under the Exemption.[4] Yet, the Court of Appeals erroneously found that because Colonial was not a "manufacturer" it could not be an "industrial plant." As detailed further herein, that finding violated and conflicts with well-established precedent regarding statutory construction.

2. <u>This Court Should Grant Certiorari Because The Court Of Appeals Erred In Holding That A "Plant" Is Limited To Manufacturers.</u>

As stated above, the DOR concedes that Colonial's operations were industrial. The Court of Appeals erred in holding that *only* a "manufacturer" can constitute an industrial plant. Given that this issue presents a novel question of law, implicates substantial constitutional issues, and conflicts with Supreme Court precedent regarding statutory construction, this Court should grant certiorari to review the Court of Appeals' erroneous ruling.

Importantly, the General Assembly does not agree that industrial plants are limited only to manufacturers. When the General Assembly intends to limit application of a statute to only

[4] In light of Colonial's undisputed activities in South Carolina, Colonial also likely satisfies the "industrial facility" requirement under the "manufacturing sector" definition in Section 31-24-110 too.

manufacturing activities, it says as much. By way of example, the pollution control sales tax exemption found in S.C. Code Ann. §12-36-2120(17), exempts pollution control "machines used in *manufacturing*, processing, recycling, compounding, mining and quarrying." (emphasis added). By contrast, the property tax pollution control exemption exempts "all facilities or equipment of industrial plants," with no manufacturing (or other) limitation. In ruling that Colonial qualified as an industrial plant, the ALC acknowledged this exact notion:

> First, the language of the exemption statute itself signifies the exemption is not limited to manufacturers. In relevant part, section 12-37-220(A)(8) instructs DHEC to investigate "the property of any manufacturer or company." (emphasis added). In construing a statute, we presume that no word is superfluous or without meaning. *Sweat,* 379 S.C. at 377, 665 S.E.2d at 651 ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." (citation omitted)). Therefore, the words "or company" must refer to a company that is separate and distinct from a "manufacturer" or the terms would be redundant.

Amended Final Order at p. 16; R. p. 97.

And, indeed, the language of the Exemption is not limited to manufacturers. In relevant part, the exemption statute instructs DHEC to investigate "the property of any manufacturer *or company.*" S.C. Code Ann. § 12-37-220(A)(8) (emphasis added). If the General Assembly had wished to limit the Exemption to manufacturers, then it certainly knows how to do so – *i.e.*, it could have omitted the word "company" entirely and just referred to "any manufacturer," or it could have used narrower, more specific terminology than "company" similar to the language it has used in other tax statutes. *See* S.C. Code Ann. § 12-43-220(a)(1) (classifying and assessing ad valorem property taxation of "[a]ll real and personal property owned by or leased to manufacturers and utilities and used by the manufacturer or utility in the conduct of the business"); and S.C. Code Ann. § 12-36-2120(9) (exempting, for example, the gross proceeds of sales, or sales price of "coal, or coke or other fuel sold to manufacturers, electric power companies, and transportation companies" for certain enumerated uses).

The Court of Appeals very recently acknowledged these principles in *Synovus Bank v. SCDOR,* Op. No. 6076, 2024 WL 3588329 (July 31, 2024):

> If the General Assembly meant to apply corporate tax modifications from Article 9 to the bank tax, it could have easily done so like it did in section 12-6-540. *See Consumer Advoc. for State v. S.C. Dep't of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012) ("The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy." (alteration in original) (quoting *Kinard v. Moore,* 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951))). This court sits as an "interpreter[,] not legislator[]" and it is not within our power to override the legislature by incorporating modifications to the bank tax when the legislature has authorized no such action. *Bentley v. Spartanburg Cnty.*, 398 S.C. 418, 426, 730 S.E.2d 296, 301 (2012); *see also Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992))).

Yet, in the instant case, the Court of Appeals disregarded this established Supreme Court precedent and erred in limiting the application of the Exemption to only "manufacturers." The plain language of S.C. Code Ann. § 12-37-220(A)(8) establishes that the General Assembly intended the statute to apply more broadly, and as the Court of Appeals recognized in *Synovus*, the court cannot override the intent of the legislature by incorporating modifications that the legislature has not authorized. The Court of Appeals ruling squarely conflicts with prior Supreme Court decisions.

The Court of Appeals recently dealt with an identical issue in *South Carolina Public Interest Foundation v. City of Columbia*, 431 S.C. 164, 847 S.E.2d 257 (2020). At issue was whether college residential apartment complexes met the definition of an "industrial *or business park*" contained in S.C. Const. Art. VIII §13(D) and § 4-1-170(A). Appellants claimed that the word "industrial" controlled and that commercial residential apartments were residential rather

than industrial. In holding that this economic development incentive included commercial apartments, the Court of Appeals stated

> "This appeal centers on the meaning of "industrial or business" in the application of the statute. Appellants contend the student dormitories are residential and do not fall within the definition of "industrial or business." We hold these dormitories are commercial enterprises that fall within the definition of "business."
>
> When a statute is unambiguous we must apply the same as it is written See, e.g., *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Whe[n] the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.")
>
> "Whe[n] a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning."...*Black's Law Dictionary* defines "business" as [a] commercial enterprise carried on for profit." *Business, Black's Law Dictionary* (11th ed. 2019). *The American Heritage College Dictionary* defines "business" as a "[c]ommerical, industrial, or professional dealings" and as a "[c]ommerical enterprise or establishment." *Business, The American Heritage College Dictionary* (3d ed. 1997).

3. <u>This Court Should Grant Certiorari Because The Court of Appeals Misconstrued 42 U.S.C. § 6326(5) To Limit Industrial Plants To Manufacturers.</u>

The Court of Appeals held that 42 U.S.C. § 6326(5) "provides a plain and ordinary meaning for the term 'industrial plant' in that it contemplates some production or output." This statute defines "industrial plant" as "any fixed equipment or facility which is used in connection with, or as part of, any process or system for industrial production *or output*." 42 U.S.C. § 6326(5) (emphasis added.)[5] Under this analysis, the question becomes whether Colonial operations have any "output." They do, (massive amounts) and the Court of Appeals erred in failing to consider such output in relation to its interpretation of 42 U.S.C. § 6326(5).

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[5] This Code section comes from the Federal State Energy Security Plans, which provides federal financial assistance for the development of state energy and security plans to secure the energy infrastructure of the state against physical and cybersecurity threats. *See* 42 U.S.C. § 6326.

Regarding "output" Colonial transports over 255 million barrels of Refined Petroleum Products per day nationally, of which 185,000 barrels *per day* are delivered into South Carolina for distribution within the state. One barrel contains 42 gallons, which means Colonial transports just under 8 million gallons of Refined Petroleum Products into South Carolina *per day*. Simply put, this is a massive amount of "output." In addition, Colonial's operations also include other production-related activities such as reprocessing of transmix, injection of DRA, and regrading of product. The Court of Appeals seemingly never considered these undisputed facts in its "output" analysis, which was error.

To the extent unrelated federal law is relevant, see C.F.R. § 1910.106 Flammable liquids. The CFR's section on flammable liquids includes language using the term "industrial plant." While the term is not directly defined within the regulation, the section notes that "industrial plants" include areas "[w]here flammable liquids are handled or used only in unit physical operations such as mixing, drying, evaporating, filtering, distillation, and similar operations which do not involve chemical reaction." *See* 29 C.F.R. § 1910.106. Colonial ships some 8 million gallons of flammable liquid per day. It certainly meets CFR § 1910.106's definition of "industrial plant."

4. This Court Should Grant Certiorari Because The Court Of Appeals Sets Dangerous Precedent In Holding That "Industrial Plant" In Limited To Manufacturers

In addressing a novel question of law with substantial constitution implications, the Court of Appeal's decision held that a large oil distribution facility is not an "industrial plant" because industrial plants are limited only to "manufacturers." While the term "industrial plants" may appear only one time in the tax code, "industrial" and perhaps "industrial plants" appear numerous other places in state law, local ordinances, and contracts. Obvious examples include environmental, zoning, local business license taxes, and insurance contracts.

One environmental example is the federal Clean Water Act, which is primarily enforced by the former DHEC. Under the Environmental Protection Agency's (EPA) Industrial Stormwater Rule, the term "associated with industrial activity" covers discharges "from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14).

Neither Congress nor the EPA has defined "industrial plant" in the Clean Water Act. Under the Court of Appeals' ruling, the successor to DHEC (South Carolina Department of Environmental Services), which has the responsibility to enforce the Clean Water Act in South Carolina, is going to be faced with a new defense in environmental actions brought against any entity that is not a traditional manufacturer. Specifically, defendants to Clean Water Act enforcement actions will now argue that they are not a manufacturer, and according to the Court of Appeals' decision they are not an "industrial plant" and thus not subject to the Clean Water Act. The battle will now start with SIC (now NAICS) codes that define "manufacturers." Non-manufacturers cited for violation of the Clean Water Act will respond that their NAICS code do not include them as a manufacturer, and thus under the *Colonial Pipeline* decision, they are not subject to the Clean Water Act. See the U.S. Supreme Court decision, *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013), which cites (but, alas does not define) industrial plant at length in its Clean Water Act decision.

As another example, zoning ordinances routinely cite – either allowing or barring – industrial activity and some may use the term "industrial plant." Under the Court of Appeals' decision, anyone not a manufacturer will now argue it can locate in areas within which local zoning ordinances prohibit industrial activity. (Again, the fight will start with NAICS codes). In one zoning case, *Momeier v. John McAlister, Inc.*, 203 S.C. 353, 27 S.E. 504 (1943), at issue was

whether a funeral home violated zoning ordinances in an area zoned residential and commercial. The concurring opinion states that "large numbers of normal citizens in many States are convinced that the maintenance of business enterprises, of whatever nature they may be, whether funeral homes or foundries, grocery stores or cafes, *industrial plants* or mercantile establishments, should be in districts removed from those occupied by the homeowners of the nation." (emphasis added.) The narrow definition of "industrial plants" promulgated by the Court of Appeals' decision will have direct adverse impacts on these types of zoning disputes.

The holding will also impact the insurance industry, among others. Insurance policies routinely exclude industrial activity and some may reference industrial plants. An insured who is not a traditional manufacturer based on its NAICS code will argue the exclusion does not apply to its industrial activity, again creating more potential strife in areas beyond just taxation.

In summary, ruling that an industrial plant only includes manufacturers goes far beyond the pollution control exemption and creates adverse impacts on a myriad of other industries, laws, regulations, and local ordinances.

5. This Court Should Grant Certiorari Because The Court Of Appeals Erred In Reversing The ALC Decision In That The ALC's Decision That Colonial's Facility Was An Industrial Plant Was A Finding Of Fact.

The ALC, after reviewing the considerable testimony and the Department's admission that Colonial's operation was "industrial," held as a finding of fact that Colonial's facilities constituted an industrial plant. *See* Pages 18-21, ROA 0098-0101. There was no evidence – not a single witness testified – it was not an industrial plant, and the Department by granting partial exemptions the prior two years had previously held it was an industrial plant. Clearly, the ALC's factual determination was not an abuse of discretion.

In *Trident Medical Center, LLC v. SC DHEC*, 412 S.C. 341, 772 S.E.2d 177, 181 (2015) the Court of Appeals stated: "An abuse of discretion occurs when the ruling is based on an error

of law or a factual conclusion that is without evidentiary support. Further, this court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact." (citations omitted). In *Charleston County Assessor v. University Ventures, LLC*, 421 S.C. 194, 805 S.E.2d 216, 223 (2017) the Court of Appeals further stated: "In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the de novo contested case proceeding. The Rules of Procedure for the Administrative Law Judge Division require that the AL[C] make independent findings of fact in contested case hearings. When the evidence conflicts on an issue, the [c]ourt's substantial evidence standard of review defers to the findings of the fact-finder." (citations omitted). In *The Original Blue Ribbon Taxi Corp v. SC DMV*, 380 S.C. 600, 670 S.E.2d 674, 676-77 (2008), the Court of Appeals stated: "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the Administrative Law Court and is more than a mere scintilla of evidence. The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." (citations omitted). Lastly, in *DIRECTTV Inc. v. SC DOR*, 421 S.C. 59, 804 S.E.2d 633, 643 (2018) the Court of Appeals stated: "ALC serves as the sole finder of fact in the de novo contested case proceeding. The Rules of Procedure for the Administrative Law Judge Division require that the AL[C] make independent findings of fact in contested case hearings, and the [APA] clearly contemplates that the AL[C] will make [its] own findings of fact in a contested case hearing. When conflicting evidence on an issue exists, the appellate court defers to the findings of the fact-finder in accordance with the substantial evidence standard of review." (citations omitted).

There was no conflicting evidence that Colonial's significant operation was not an industrial plant. To that end, by granting the exemption for certain pollution control equipment,

the Department twice held Colonial did qualify as an industrial plant. Furthermore, not a single witness testified that Colonial's facilities were not an industrial plant. As such, the ALC made a correct finding of fact that Colonial was an industrial plant. That finding of fact cannot be disturbed on appeal, particularly where those facts are clearly supported by the evidence, and the Court of Appeals erred in doing so. *See Trident Medical Center*, 772 S.E.2d at 181 ("[The Court of Appeals] may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact.").

CONCLUSION

The Court of Appeals in its Order stated: "We agree that the legislative purpose of the pollution control exemption is presumably to compensate those who are required to install equipment to prevent or minimize pollution." Exactly. There was no dispute that the equipment at issue was required by state and federal law to prevent or minimize pollution. There was no dispute that Colonial meets all the requirements of the constitutional and statutory pollution control provisions. Yet, the Court of Appeals erroneous limited "industrial plants" to *only* manufacturers, and in turn, thwarted the constitutional and legislative intent to incentivize adoption of pollution control technologies for the beneficial public purpose of reducing or eliminating environmental pollution.

For the above reasons, consistent with SCACR Rule 242(b)(1), (3), and (4), Colonial asks that this Court grant its Petition for Writ of Certiorari to review the decision by the Court of Appeals.

{signature page to follow}

September 18, 2024

s/ Burnet R. Maybank, III

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THE STATE OF SOUTH CAROLINA

In The Supreme Court

ALC Case No. 18-ALJ-0443-/cc
Appellate Case No. 2021-000219

Colonial Pipeline Company ..... Petitioner.

v.

South Carolina Department of Revenue, Abbeville County, Anderson County, Greenville County, Aiken County, Laurens County, and York County..... Respondents.

PROOF OF SERVICE

I certify that I have served **Petitioner's Writ of Certiorari** on Respondents by sending a copy of said documents to Appellants' counsel via e-mail on September 18, 2024, as follows:

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September 18, 2024