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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Honorable Ralph King Anderson, III, Chief Judge

Case No. 2017-ALJ-1709418-CC
Appellate Case No. 2020-000999

Opinion No. 6076 (S.C. Ct. App. Filed July 31, 2024)

Synovus Bank ....Petitioner,

v.

South Carolina Department of Revenue .... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Synovus Bank ("Petitioner" or "Synovus") petitions the Court to issue a writ of certiorari to review the decision of the Court of Appeals styled *Synovus Bank, Appellant v. South Carolina Dep't of Revenue, Respondent*, Op. No 6076 (July 31, 2024). For the reasons stated below, the petition should be granted, and the decision of the Court of Appeals should be reversed.

CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was timely filed on August 28, 2024, and denied by the Court of Appeals on September 5, 2024.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that the Bank Tax does not allow a Net Operating Loss ("NOL") Carryforward deduction?

    A. Did the Court of Appeals err in holding that Title 12 conformity with the Internal Revenue Code excludes the Bank Tax?

    B. Did the Court of Appeals err by not considering the significance of the National Bank Act, 12 U.S.C. § 548, which allowed the use of NOL carryforwards in computing the Bank Tax base in order to avoid discrimination against banks as compared to other corporate taxpayers?

    C. Did the Court of Appeals err in its holding that the Bank Tax does not allow an NOL carryforward because the Bank Tax is labeled as a franchise tax even though the Bank Tax is based on net income?

2. Did the Court of Appeals err by upholding the order the Administrative Law Court ("ALC") allowing a third party to issue guidance on how the Bank Tax should be calculated, which is an unconstitutional delegation of the taxing authority and not ruling on the equal protection and due process violations raised by Synovus.

    A. Did the Court of Appeals err by upholding a result created by the ALC order that violates due process and not addressing the constitutional violation?

    B. Did the Court of Appeals err by upholding the ALC order creating an equal protection problem and not addressing the constitutional violation?

C. If book income is the basis of the Bank Tax, did the Court of Appeals approve an unconstitutional delegation of powers to a third party for instruction on how the bank tax is calculated?

3. Did the Court of Appeals err in giving great deference to the DOR post-*Chevron*?

4. Did the Court of Appeals err in construing "entire net income" against the Taxpayer based on the standard for a tax deduction when the true issue on appeal involves the construction of an imposition statute which must be resolved in favor of the Taxpayer?

STATEMENT OF THE CASE

This matter arises from Synovus' challenge to the South Carolina Department of Revenue ("Department" of "DOR") determination that a net operating loss ("NOL") carryfoward is not applicable to banks in South Carolina because the Bank Tax is based on "book income" (an accounting term of art), not taxable income. Motion Hr'g, Oct. 17, 2019, Tr. 131:22-132:5.

1. Relevant Petitioner History

On February 28, 1995, Synovus Financial Corp. acquired NBSC Corporation, the parent company of National Bank of South Carolina (NBSC). Pet'r. Mot. Summ. J. Ex. 1, Stip. ¶ 10; R. p. 416. Subsequently, on May 6, 2010, NBSC was merged into Columbus Bank & Trust Company and was renamed Synovus Bank. *Id.*, Stip. ¶ 6; R. p. 416. Each entity is (or was) organized as a corporation. *Id.*, Stip. ¶ 6. All operated as a bank in South Carolina during the relevant timeframe.

As a result of the economic downturn suffered by many banks during the years in question, Synovus' allowable tax deductions exceeded its taxable income resulting in net operating losses. Synovus timely filed Bank Tax returns with the DOR for tax years 2011, 2012, and 2013. *Id.*, Stip. ¶ 13, R. p. 416. For each of those tax years, Synovus subsequently filed an amended tax return. *Id.,* Stip. ¶¶ 13-22; R. pp. 416-17. The amended returns included NOL carryforward deductions producing tax refund claims for 2011-2013. *Id.,* Stip. ¶¶ 18, 20, 23-25; R. pp. 417-18. Synovus also filed an original 2014 tax return that included its NOL carryforwards. *Id.*, Stip. ¶¶ 22, 25; R. p. 417-418.

For tax years 2012, 2013 and 2014, the DOR granted the refunds. *Id.*, Stip. ¶¶ 23-25; R. p. 418. Despite initially approving the refunds, the DOR made a subsequent decision to audit tax years 2012, 2013 and 2014. Following the audit, the DOR reversed its prior decision. During the audit, the DOR concluded NOL carryforwards are not allowed in computing a bank's tax liability. *Id.*, Stip. ¶ 26; R. p. 418. Following the audit, the DOR issued a Determination rejecting Synovus' refund claims. Synovus disagreed with the DOR's Determination and timely requested a contested case hearing before the ALC. *Id.*, Stip. ¶ 27; R. p. 418. This appeal stems from the ALC's Amended Final Order which was upheld by the Court of Appeals.

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). This case involves multiple questions of law.

First and foremost, the South Carolina Bank Tax was first passed in 1937. Since that time, there has not been a *single* court opinion interpreting the Bank Tax. Specifically, as applicable to this appeal, prior to this case: no court has ever opined on the meaning of the Bank Tax's basis "entire net income"; no court has ever opined on how the Bank Tax should be calculated; no court has ever opined on the application of the 1926 National Bank Tax issued by Congress (allowing states to tax national banks) and its subsequent savings clause to the South Carolina Bank Tax; no court has opined on the impact of annual federal tax conformity to the Bank Tax; no court has opined if an Attorney General's opinion has the authority to call the Bank Tax a "franchise tax" and if that nomenclature results in the use of "book income" instead of taxable income; no court has ever opined on the impact of the DOR's reliance on a third party – Financial Accounting Standards Board ("FASB") – and its guidance on how to calculate financial statements under

Generally Accepted Accounting Principles ("GAAP"); and finally, no court has opined on the level of deference South Carolina Courts should give state agencies, like the DOR, post-*Chevron*. Seemingly, issues surrounding the Bank Tax and its basis of taxation have never arisen outside of agency review. As a result, the issues raised in this writ of certiorari are novel questions of law.

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 imposition statutes are interpreted in favor of the taxpayer and applied all statutory construction principles in favor of the DOR, including the very basic fact that since 1937 the Bank Tax has at all times been referred to by the Legislature and is titled as an "Income Tax on Banks." Principles of statutory construction were also ignored in the lower court's determination that conformity of Title 12 to the Internal Revenue Code ("IRC") excludes the Bank Tax despite the clear application of conformity to "*all* taxes in this *Title.*"

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. The Court of Appeals ignored the constitutional issue created as a result of the ALC order. The ALC order adopted by the Court of Appeals did not properly define "entire net income" or give clear instruction to the taxpayer on how to calculate entire net income, creating both an equal protection and due process problem. Further the Court of Appeals' adoption of the ALC order affirms the DOR reliance on a third party, the FASB, to provide guidance and rules for GAAP accounting to calculate its taxes. The adopted ALC order goes further, directing publicly traded companies to only apply a portion of GAAP (the income sheet) to determine its South Carolina Bank Tax, not all of GAAP (which currently requires an income sheet, balance statement,

statement of shareholder equity and the cash flow statement). Reliance on GAAP and the FASB for Bank Tax calculation rules is an unconstitutional delegation of the taxing authority, which sits solely in the hands of the Legislature. All the above involve "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 the Bank Tax. As detailed further herein, there are serious potential non-tax consequences associated with the level of deference to a state agency applied in this matter – especially in a post-*Chevron* world. Further, this matter has direct impact on not just Synovus, but the entire banking industry in South Carolina. For these additional reasons, certiorari is warranted.

ARGUMENT

This case required both the DOR and Courts to make mulitple novel decisions related to the definition of the basis ("entire net income") of the Bank Tax, the calculation methods used by banks in relation to the Bank Tax, and the non-application of IRC deductions for banks, but available to other businesses, post Title 12 IRC conformity. These are issues of key importance to the banking industry in South Carolina, not just Synovus. The core issue in this case is the very basis of the Bank Tax and how that basis should be calculated. These are questions never before raised in the 85+ year history of the Bank Tax.

The ALC and Court of Appeals gave undue deference to the DOR in their orders and ignored the legislative history of the Bank Tax, state corporate income tax and mandated application of the 1926 National Bank Tax savings clause that requires national banks be treated in a manner that is not discriminatory as compared to other businesses. Great deference was given to the DOR despite the ALC finding "the Department has no formal ruling or publication

interpreting the meaning or calculation of 'entire net income'." Am. Final Order at p. 15; R. p. 19. Further, the ALC order, which was affirmed by the Court of Appeals also raised (and in fact created) constitutional issues – not addressed by the Court of Appeals.

1. Brief History of the South Carolina Bank Tax

The South Carolina General Assembly enacted South Carolina's first general corporate income tax in 1926. The tax was based on a taxpayer's "entire net income." S.C. Code Ann. § 2451 (1932). Under the 1918 Revenue Act, the term "entire net income" included ***all expenses and deductions*** taken from year to year until "the ***entire net income*** ha[d] been accounted for." *See* Am. Final Ord. at p. 28; R. p. 32 (quoting Revenue Act of 1918) (emphasis added).

Prior to 1926, states did not have the power to tax national banks. In 1926, Congress passed the National Bank Act, 12 U.S.C. § 548, as the federal law that exclusively governed states' ability to tax national banks. Congress enacted the National Bank Tax to ensure non-discriminatory taxation of banks as compared to other businesses. The National Bank Act allowed *only* four mutually-exclusive methods for states to tax banks. Among the permitted forms of taxation was a tax based on or measured by "entire net income." *Id.* The National Bank Act's legislative history made clear that Congress intended that general businesses and banks must be similarly treated.

In 1937, the Legislature passed a tax specific to banks (the "Bank Tax"). At all times since its inception, the Bank Tax has been described by the Legislature as an "*income tax"* on banks. The basis upon which the bank tax was imposed in 1937 was identical to the then existing corporate income tax - "entire net income." 1937 S.C. Acts § 563(2). The term "entire net income" in the Bank Tax has not changed since its inception. *See* S.C. Code §12-11-10 *et al*. Thus, the only way that a bank has ever determined the starting point of its liability under the bank tax is through application of the adopted provisions of the corporate income tax code, which long defined "net income" as "the gross income of a taxpayer less the deductions allowed by this [the corporate

income tax] chapter." *See* 1932 S.C. § 2443; 1942 S.C. Code § 2443; S.C. Code Ann. § 65-255 (1962); S.C. Code Ann. § 12-7-600 (1976).

In 1948, an Attorney General opinion was issued that labeled the Bank Tax a "franchise tax." *See* 1947-48 Op. S.L. Att'y Gen. 294 (March 12, 1948); R. p. 428. The opinion, which was not legally binding, gave no definition of "franchise tax" or the term "entire net income."

In 1985, the Legislature formally conformed the State Tax Code to the IRC. Both the corporate income tax and Bank Tax statutes continued to use the term "entire net income" as the tax basis. The Legislature has passed tax conformity legislation every year since 1985. Conformity is accomplished through two statutes: one conforming the State's Tax Code to the entire IRC and another decoupling certain aspects of state taxing authority from the IRC.

In 2005, the General Assembly again passed conforming legislation adopting the entire IRC. *See* S.C. Code § 12-6-40. In the same year, the General Assembly affirmatively modified the prior language of the Decoupling Statute clarifying any ambiguity as to the application of conformity to the Bank Tax and other tax sections. Post-2005, the decoupling language was altered and now states "For purposes of *this title* and *all other titles that provide for taxes administered by the department*, except as otherwise specifically provided, ..." The legislature did not ignore banks in the decoupling statute. Certain IRC sections related to banks are specifically decoupled. The Bank Tax, however, is not an enumerated section decoupled from the IRC. *See* S.C. Code § 12-6-50 (emphasis added). This "Title" is, of course, Title 12, which contains the Bank Tax and the Bank Tax is administered by the DOR.

The Bank Tax today is virtually identical to the original Bank Tax passed in 1937. The entire Bank Tax contains only 6 sections and 523 words. In taxing "entire net income" of banks, neither the 1937 Bank Tax nor any subsequent Bank Tax section or regulation has ever defined

"entire net income" for banks. Further, in taxing "entire net income" of a bank, the ALC factually found "the Department has no formal ruling or publication interpreting the meaning or calculation of 'entire net income'" in regards to the Bank Tax. Am. Final Order at p. 26; R. p. 30.

2. Definition of Net Operating Loss Carryforward

The Court of Appeals defined a Net Operating Loss Carryforward as follows:

> In tax accounting, applying a net operating loss to a later tax year is called a "carryforward." The applicable section of the Internal Revenue Code provides:
>
> The entire amount of the net operating loss for any taxable year . . . shall be carried to the earliest of the taxable years to which . . . such loss may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried.

Synovus Bank v. S.C. Dep't of Revenue, No. 2020-000999, Slip. Op. at 3 (S.C. Ct. App. July 31, 2024) (citing 26 U.S.C.A. § 172(b)(2) (West)).

3. History of the Modern Net Operating Loss in South Carolina

In 1955, South Carolina amended the income tax code allowing a deduction for taxpayers that "established a new business or industry" in the state. *See* 1955 (49) 437, § 6 (adding S.C. Code § 65-259(13)). In 1979, the Legislature amended the NOL deduction to include "*all* taxpayers." *See* 1976 S.C. Code Ann. § 12-7-700(12A) (Supp. 1979). In 1985, the General Assembly repealed the standalone South Carolina NOL section when it adopted conformity to the federal tax code, instead relying on IRC § 172 for the allowance of an NOL carryforward.

4. Did the Court of Appeals Err in Holding that the Bank Tax Does Not Allow a NOL Carryforward Deduction?

A. Did the Court of Appeals Err in Holding that Title 12 Conformity with the Internal Revenue Code Excludes the Bank Tax?

To the extent there was historical confusion over the tax basis for the Bank Tax, that issue was rectified by the Legislature through modern conformity with the IRC. Every year since 1985,

the Legislature has adopted the entire IRC in a conformity statute; every year it then excludes specific IRC sections in a Decoupling Statute. Following the 1985 IRC conformity, in 1988, the Legislature took affirmative action to repeal all taxing regulations impacted by conformity, including the Bank Tax regulations. S.C. Tax Comm'n Letter 88-14, at 1-3 (June 10, 1988); R. pp. 437-39. The Court of Appeals erred in its determination that "from the time the General Assembly began conforming the state income tax code with the federal tax code, it was evident conformity did not apply to banks for bank tax purposes." *Synovus Bank*, No. 2020-000999, Slip. Op. at 11. If conformity did not apply to the Bank Tax, there would have been no reason for the Legislature to take the affirmative action of repealing its own regulations. How else would a bank taxpayer know how to calculate "entire net income?" *See* S.C. Code Ann. § 12-11-40.

To the extent any ambiguity remained, in typical fashion, the 2005 General Assembly's Conformity Act adopted the entire IRC except for certain IRC provisions specified in the Decoupling Statute. In 2005, the General Assembly significantly changed the language of the prior Decoupling Statute to make clear it included and applied to *all of Title 12*:

> SECTION 12-6-50. Internal Revenue Code sections specifically not adopted by State.
>
> *For purposes of this title and all other titles that provide for taxes administered by the department*, except as otherwise specifically provided, the following Internal Revenue Code Sections are specifically not adopted by this State: . . . .

S.C. Code Ann. § 12-6-50 (emphasis added).

This exact language has been repeatedly included in the Decoupling Statute each year since 2005. The Bank Tax is *not* listed in the enumerated sections that have been decoupled from the IRC each year since 1985 (or 2005). That does not mean the Legislature ignores banks during annual conformity. In fact, certain sections of the IRC that apply to banks ***are*** decoupled. *See* S.C.

Code Ann. § 12-6-50 (9) ("Sections 581, 582, and 585 through 596 relating to certain aspects of taxation of banking institutions" are decoupled).[1] The change in language in 2005 only underscored conformity's application to *all of Title 12* and all other "*taxes administered by the Department*," (emphasis added) including the Bank Tax found in Title 12, Chapter 11.[2]

When Title 12 and its relevant Chapters are reviewed in their entirety, the intent of the Legislature is clear – banks are (and have always been) subject to conformity. Bank Tax conformity is also consistent with the overall tax scheme found in Title 12, state taxing history and prior DOR determinations.[3]

> The canon of construction "expressio unius est exclusio alterius" or "inclusio unius est exclusio alterius" holds that "to express or include one thing implies the exclusion of another, or of the alternative."

BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

If the Legislature did not intend for modern conformity to apply to the Bank Tax, it would have made clear that the IRC does not apply to the banks by having the 2005 enactment of Section 12-6-50 state: "For purposes of this Title, except for the bank tax in Chapter 11" or list the Bank Tax in one of the excluded enumerated sections of the Decoupling Statute. It did not do so. Instead,

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[1] *See also* S.C. Code Ann. § 12-6-50(20) (In 2018, the Legislature began decoupling FDIC premiums. If conformity did not apply to banks, decoupling of FDIC premiums would not be required.).

[2] Section 12-6-50 has been amended many times. The language "taxes administrated by the department" has remained consistent.

[3] SC PLR 95-10 (Aug. 28, 1995) (ruling that "the principles embodied in the Internal Revenue Code sections … which apply to corporations taxed under Chapter 7, Title 12 of the Code should apply to transactions involving banks taxed under Chapter 11, Title 12 of the South Carolina Code of Laws."); *see also* I-D-30 (Aug. 1, 1962); I-D-200 (Aug. 4, 1975) (same); I-D-189 (Jan. 24, 1975) (applying the income tax code for overall method of cash/accrual accounting for purposes of the bank tax); I-D-118 (Feb. 28, 1967) (ruling that for purposes of the South Carolina bank tax, bad debt is deducted in the same manner as for purposes of the corporate income tax); I-D-30 (Aug. 1, 1962) (same).

the Legislature directly addressed banking industry taxation by decoupling certain IRC bank-related sections and repealing existing bank tax regulations. The Legislature deliberately chose to apply the IRC to banks, including the applicability of NOL carryforward deductions pursuant to IRC § 172. This Court should take certiorari to correct the error of the Court of Appeals in its handling conformity with the IRC to the Bank Tax.

B. Did the Court of Appeals Err by Not Considering the Significance of the National Bank Act, 12 U.S.C. § 548, which Allowed the Use of NOL Carryforwards in Computing the Bank Tax Base in Order to Avoid Discrimination Against Banks as Compared to Other Corporate Taxpayers?

This is a case in which historical context matters. Prior to the Bank Tax the state corporate income tax was based on "entire net income." In 1937, when the Bank Tax was passed, it was also based on "entire net income." These were defined and understood terms at the time of the inception of the Bank Tax. As early as at least 1918, the term "entire net income" included all expenses and deductions taken from year to year until "the entire net income ha[d] been accounted for." (quoting Revenue Act of 1918).

The 1926 National Bank Act, 12 U.S.C. § 548 was the federal law that originally granted states the ability to tax national banks. It also affirmatively prohibited states from discriminating against banks as compared to other businesses. The National Bank Act provided *only* four methods for states to tax banks. Among the permitted forms of taxation was a tax based on or measured by "entire net income." *See First Nat'l Bank v. Oklahoma Tax Comm'n*, 185 Okla. 98, 90 P.2d 438 (Okla. 1939) (emphasis added) (In case of a tax on or measured by net income, the taxing State may, include "*the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits"*). The National Bank Act's legislative history makes clear that Congress

intended that general businesses and banks were "similarly treated by the taxing State." *See, e.g.,* H. Rep. No. 526, 69th Cong., 1st Sess. 2 (1926).

To comply with federal law, since its origin, the Bank Tax also had to be applied and interpreted in a manner that did not discriminate against banks. This remained true in 1948 when the Attorney General issued its opinion calling the Bank Tax a franchise tax and was true in 1955 and 1979 when the Legislature amended the corporate tax to allow NOL carryforwards in calculating "entire net income" for purposes of the corporate income tax. The application continues to apply to modern day conformity and its allowance of an NOL carryforward via IRC § 172. As a result, as of at least 1955, modern day NOL carryforwards also became available to banks – just like other businesses.

The Court of Appeals erred in determining the NOL carryforward provision as "a new and separate corporate tax deduction" that was specifically authorized by the Legislature and unrelated to the Bank Tax. *See Synovus Bank*, No. 2020-000999, Slip. Op. at 5-6. The Court's conclusion that banks cannot utilize NOL carryforwards in computing their "entire net income" while a general business can, is inherently discriminatory. The Legislature was aware, or is presumed to have been aware, of the National Bank Act and, most certainly, it did not intend to enact an illegal tax given the clear Congressional directive. *See* Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 51:6 (7th ed.); *See, e.g., Bailey v. State*, 424 S.E.2d 503, 508 (S.C. 1992) (reasoning that the South Carolina Supreme Court "has long recognized that legislative acts are to be construed in favor of constitutionality and will be presumed constitutional absent a showing to the contrary."); *Henderson v. Evans*, 232 S.E.2d 331, 333-34 (S.C. 1977) ("Constitutional construction of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation.").

The legislative history of the Bank Tax leaves little doubt that the tax must be interpreted in concert with the income tax code, including the application of NOL carryforwards. Stated differently, the National Bank Act essentially required *rolling conformity* between the Bank Tax and income tax if a discriminatory outcome would otherwise occur. This is especially true considering the Bank Tax has remained essentially unchanged since its inception and contains no express guidance on how to calculate the Bank Tax. When the Legislature originally enacted the Bank Tax, it did not provide any definition or means of computing "entire net income." Instead, the Legislature purposefully tied the Bank Tax base to the income tax code because it was required to by the National Bank Act. The Legislature explicitly adopted *all* the provisions of the income tax code for purposes of defining the Bank Tax – not just those the DOR agrees with. *See* Code of Laws of S.C. 1937 (40) 565, § 4 (stating all the provisions of the income tax "are hereby adopted and made a part of this Section for the enforcement and administration of this Act"). *See also* footnote 3.

Thus, the only way that a bank has ever determined the starting point of its liability under the Bank Tax is through application of the adopted provisions of the income tax code, which long ago defined "net income" as "the gross income of a taxpayer less the deductions allowed by this [the corporate income tax] chapter." *See* 1932 S.C. Code § 2443; 1942 S.C. Code § 2443; S.C. Code Ann, § 65-255 (1962); S.C. Code Ann. § 12-7-600 (1976). It is also consistent with the holding of the Court of Appeals stating:

> The current tax code requires that taxpayers use the same method of accounting for state taxes as it does when it calculates its federal taxes.

S.C. Code Ann. § 12-6-4420(A) (2014).

The federal taxes of Synovus are based on the IRC. This is a point the DOR has acknowledged by making the starting point for a bank to complete its South Carolina bank tax form its *federal taxable income*. Motion Hr'g Oct. 17, 2019, Tr. P. 192; R. p. 301. The DOR then improperly, and without any authority, requires the reduction of any applied NOL carryforward from its federal taxable income.

Where the Court (and DOR) erred was in placing undue emphasis on the 1948 Attorney General opinion interpreting the bank tax as a franchise tax. A franchise tax was allowed under the National Bank Act as long as it did not discriminate against banks.[4] The problem is the disallowance of NOL carryforwards *does* discriminate against banks. *See* Am. Final Order at p. 35; R. p. 39 (pursuant to the order of the ALC, a conclusion that an NOL is not allowed "*appears to result in a less equitable outcome for banks than corporations.*") (emphasis added).

In 1969, Congress amended the National Bank Act, 12 USC § 548 (Revised Statutes 5219), to only prohibit a national bank from being treated differently than a state bank. This amendment was not effective until 1972. However, Congress's 1969 amendment to the National Bank Act included a *savings clause*. Pub. L. 91-156, 91 Congress, § 3, 83 Stat. 434, 435 (1969). As stated above, South Carolina was not alone in imposing a Bank Tax. Courts have consistently found that when a tax on banks has not been amended after 1972, the statute must continue to be interpreted to conform to the National Bank Act.[5]

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[4] In a seminal case also involving a franchise tax, the California Supreme Court, relying on the Supreme Court's decision in *Tradesman Nat. Bank of Oklahoma City v. Oklahoma Tax Comm'n*, 309 U.S. 560 (1940), emphasized that in determining whether a state tax on national banks according to or measured by net income violates the limitation, consideration must be given to the state tax structure as a whole, not merely to taxes of the kind imposed upon those banks. The state tax on them is valid so long as the resulting burden does not exceed the burden to which others are subject. *Security-First Nat. Bank of Los Angeles v. Franchise Tax Bd*., 55 Cal.2d 407, 414 (1961).

[5] *See Siegelman v. Chase Manhattan Bank (USA), Nat. Ass'n*, 575 So. 2d 1041 (Ala. 1991) (holding national banks could not be subject to the state's 1935 financial institutions excise tax because of

At no time since 1972 has the Legislature taken any action related to the Bank Tax that would impact the savings clause – other than – as Synovus argues – the conformity of Title 12 to the IRC, including the Bank Tax. As a result, what is essentially rolling conformity with the income tax has continued. This includes a determination that IRC §172 does not apply to banks based on conformity and/or the savings clause of the National Bank Act.

Either argument results with the same end – an NOL carryforward is applicable to banks in South Carolina. This was not the conclusion of the lower Courts and was in error. As a result, this Court should take certiorari and reverse the order of the Court of Appeals.

C. Did the Court of Appeals Err in Its Holding that the Bank Tax Does Not Allow an NOL Carryforward Because the Bank Tax is Labeled a Franchise Tax Even Though the Bank Tax Is Based on Net Income?

The Court of Appeals held:

> At the time of bank tax's enactment, and for several years thereafter, both the bank tax and the corporate income tax were based on entire net income.
>
> *See* Code of Laws of S.C. § 65-402 (Supp. 1937) (bank tax); *see also* Code of Laws of S.C. § 2676(2) (1942) (bank tax); Code of Laws of S.C. § 2440 (1942) (corporate income tax).

See Synovus Bank, No. 2020-000999, Slip. Op. at 4.

The citations to the record by the Court of Appeals include references to the 1937 and 1942 bank and income tax code sections. The current Bank Tax still uses the term "entire net income."

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12 U.S.C. § 548. Even after Congress amended § 548, no corresponding amendment was made to Alabama's financial institutions excise tax. Thus, Chase Manhattan Bank, a national bank, continued to not be subject to the financial institutions excise tax because the 1935 tax was constrained by the National Bank Act and there was no subsequent amendment expanding the tax beyond the scope allowable in 1935); *McNamara v. First Commerce Corp.*, 392 So. 2d 467 (La. Ct. App. 1981) (On rehearing, the Louisiana Court of Appeals similarly concluded that Louisiana's exclusion of national banks from its tax on income in 1935 remained in effect even after the subsequent amendment to 12 U.S.C. § 548, allowing Louisiana to tax national banks.)

See S.C. Ann. § 12-11-20. Thus, the Court of Appeals' order raises the question – if the income and Bank Tax were equivalent in 1937 and 1942, what act of the Legislature occurred that changed the tax basis of the Bank Tax after 1942? The correct answer is nothing. The Legislature has taken no action to change the Bank Tax since 1937 – other than federal conformity.

A review of the Court of Appeals and ALC orders make clear great deference was given to the DOR and its reliance on the 1948 Attorney General opinion that called the Bank Tax a franchise tax. *See Synovus Bank*, No. 2020-000999, Slip. Op. at 7. The issue here is not that the Bank Tax is *called* a franchise tax.[6] The nomenclature does not matter. It is the extrapolation of what franchise tax means and how that meaning has been misapplied to distort the term "entire net income" that is the issue. Initial reliance on the Attorney General opinions and any agency decision cited after its issuance was improper. The Attorney General has no taxing authority and an the opinion has never had binding weight. Further, the Attorney General's opinion did not define "entire net income," did not define "franchise tax" and did not use the word "book income."

Even today, there are no instructions to banks on how to calculate "entire net income" despite current regulations that call the bank tax a "franchise tax" – a term that is still undefined. *See* S.C. Code Ann. Regs. 117-1500(2003). Instead, for decades, in the absence of agency guidance, *accountants* interpreted the term "franchise tax" to mean the Bank Tax should be based

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[6] Under the National Bank Act, a bank tax could be a franchise tax as long as the impact was not discriminatory. South Carolina was not alone in passing a bank tax during this era. In *Flint v. Stone Tracy Co.* (220 U. S. 107), the U.S. Supreme Court held the National Bank Act was "broad enough to permit a State that imposes corporate excise *or franchise taxes* which are not based on income to apply the net income method to national banking associations, *provided the burden of tax is no higher than that imposed upon other corporations generally under such excise or franchise tax*." (emphasis added). However, if the Court of Appeals' decision is correct, the Bank Tax was preempted many years ago based on innumerable changes in the corporate tax code that were not made in the Bank Tax (unless Synovus is correct and the two tax codes have aways acted together harmoniously with rolling conformity – including modern conformity with the IRC).

on "book income." The problem is that "book income" is not a true financial accounting principle. It is a financial term of art. Further, it discounts completely that modern accounting practices are not the same as accounting practices in 1937, 1942 or 1948.

Thus, the question for this Court is did the Court of Appeals err in determining that because the Bank Tax is called a franchise tax – an undefined term for the last 76 years since it was first used by the Attorney General – does that mean the Bank Tax is not based on taxable income, that conformity does not apply and that the disallowance of a NOL carryforward is not a result that discriminates against banks? Synovus asks the Court to take certiorari to address these issues.

5. Did the Court of Appeal Err by Upholding the ALC Order Allowing a Third Party to Issue Guidance on How the Bank Tax Should be Calculated, Which Is an Unconstitutional Delegation of the Taxing Authority and by Not Ruling on the Equal Protection and Due Process Violations Raised by.

A. If Book Income Is the Basis of the Bank Tax, Did the Court of Appeals Approve an Unconstitutional Delegation of Powers to a Third Party for Instruction on How the Bank Tax Is Calculated?

The Court of Appeals relies on the 1962 individual and corporate tax code*, not the Bank Tax*, in determining that "a taxpayer should compute net income 'in accordance with the method of accounting regularly employed' in keeping the taxpayer's books." *Synovus Bank,* No. 2020-000999, Slip. Op. at 11. The Court then goes on to state that because Synovus uses GAAP accounting, as required of all publicly traded companies, GAAP is the appropriate method to calculate the Bank Tax. This ruling creates two significant problems not addressed by the Court of Appeals order.

First, in modern day accounting, "book income" is generally considered slang for accounting methods determined through the GAAP. GAAP is promulgated by the Financial Accounting Standards Board (FASB). *Id.* at p. 11. The FASB is the independent, private-sector, not-for-profit organization that establishes financial accounting and reporting standards for public

and private companies and not-for-profit organizations that follow GAAP. Am. Final Order at pp. 3, 24; R. pp. 7, 28. As acknowledged by the DOR's expert, GAAP does not provide rules. Instead, GAAP "requires interpretation when it's applied." Motion Hr'g Oct. 17, 2019, Tr. 231:12-16; R. p. 340. Certainly, the result in this case cannot be that it is appropriate for accountants to "interpret" the basis of the bank tax as they see fit.

In contrast, the IRC is a product of the legislative process adopted through conformity by Legislature. As admitted by the DOR's expert at the ALC trial, the Legislature has *never* formally adopted GAAP as the basis of bank tax or as the means by which the basis of the bank tax should be determined. Motion Hr'g Oct. 17, 2019, Tr. 220:8-222:23; R. pp. 329-32. Further, GAAP does not define or even contain the words "book income" or "entire net income." Am. Final Order at p. 25; R. p. 29.

If the Court of Appeals' order is correct that financial income equates to book income and book income equates to GAAP, then the FASB, *not* the General Assembly, is currently determining how "entire net income" is defined and calculated under the Bank Tax each time it changes its promulgations. South Carolina's Constitution prevents the delegation of the legislative taxing power. Here, the improper delegation is to the FASB. *See Eastern Fed. Corp. v. Wasson* 281 S.C. 450, 316 S.E.2d 373 (1984) (the South Carolina Supreme Court struck down a statute providing for a license tax of 20% on movies rated "X" by the Motion Picture Association of America (MPAA) since imposing such a tax was an unconstitutional delegation of legislative power to the MPAA in violation of Article III § 1, of South Carolina Constitution). Thus, this Court should accept certiorari to determine if reliance on the FASB (and GAAP) for how to calculate the bank tax is an unconstitutional delegation of the Legislature's taxing authority.

Second, if the Court of Appeals is correct that reliance on GAAP is allowable, an error has still occurred. The lower courts did not fully adopt GAAP accounting as the definition of "entire net income" showing a key misunderstanding of how GAAP accounting works.

GAAP requires the use of multiple financial statements in conjunction with each other: the income statement, balance sheet, statement of shareholder equity and the cash flow statement. Motion Hr'g Oct. 17, 2019, Tr. 232:1-10; R. p. 341. However, despite admitting all four documents are needed to determine "entire net income," the DOR's expert unilaterally concluded that only the income statement is applied to the Bank Tax. Motion Hr'g Oct. 17, 2019, Tr. 232:11-19; R. p. 341. This conclusion, which was adopted by the Court of Appeals, makes no common sense. No authority and no guidance from the Legislature establishes only the income statement equals "entire net income."

Based on modern day accounting principles, losses are "booked" in the year incurred on the income statement. Motion Hr'g Oct. 17, 2019, Tr. 86:23-88:4; R. pp. 195-98. Obviously, a corporation cannot reduce their taxable income below zero, so the excess loss that was incurred becomes a deferred tax asset "booked" on the balance sheet. This is a basic GAAP principal. Motion Hr'g Oct. 17, 2019, Tr. 86:23-91:11; R. pp. 195-200. In the next year in which the corporation has profits, the excess losses are moved from the balance sheet and are taken after the net income is determined in the income statement. Am. Final Order at p. 33; R. p. 37. Under the current decision, the Court has eliminated the deferred tax asset allowable under GAAP.

This Court should accept certiorari to determine if reliance on the FASB is an unconstitutional delegation of the taxing authority and if not, has the Legislature affirmed that only the income statement from GAAP is applicable to the Bank Tax.

B. Did the Court of Appeals Err by Upholding a Result Created by the ALC Order that Violates Due Process and Not Addressing the Constitutional Violation?

Definiteness is required to meet the minimum standard of due process. *Huber v. S.C. State Bd. of Physical Therapy Examiners*, 316 S.C. 24, 26–27, 446 S.E.2d 433, 435 (1994) ("[w]hen the persons affected by the law constitute a select group with a specialized understanding of the subject being regulated, the degree of definiteness required to satisfy due process is measured by the common understanding and knowledge of the group."). The ALC factually found:

> While the testimony of these experts indicates that the actions of the Department's staff have led some practitioners to *perceive* the Department's interpretation of the bank tax as based on book income or financial net income, *the fact remains that the Department has not issued any formal guidance on how it calculates or interprets "entire net income*" beyond S.C. Regulation 117-1500.1.

Am. Final Order at pp. 25-26; R. pp. 29-30 (emphasis added).

Further, the ALC found "*the Department has no formal ruling or publication interpreting the meaning or calculation of 'entire net income'*." *Id.* at 26; R. p. 30 (emphasis added). The Court of Appeals' order failed to provide any clarity on the meaning of "entire net income" or the DOR's assertion "book income" is to be used. At most, the Court of Appeals affirmed the Bank Tax is called a "franchise tax" – an undefined term by the Courts, Legislature or DOR. Accordingly, the Court of Appeals and ALC failed to produce a required conclusion of law regarding its holdings on "book income" and the reasonableness of "entire net income" as a proxy. A failure to act for the 85+ year history of the Bank Tax violates Synovus' due process rights of definiteness, especially when a state agency with authority to issue regulations fails to issue regulations on the most fundamental issue of taxation: the definition of how to calculate the tax basis.

Likewise, arbitrary actions by governmental agencies violate due process. *Worsley Co., Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) ("[s]ubstantive due

process protects a person from being deprived of life, liberty or property for arbitrary reasons."). Substantive due process is violated if governmental demands impose duties "overly vague." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 19, 577 S.E.2d 190, 199 (S.C. 2003) (where actions must "at a minimum, [have] a rational basis, and [are] not arbitrary or overly vague.")

This Court should accept certiorari to determine if the ambiguity in the definition of the term "entire net income" is a due process violation.

C. Did the Court of Appeals Err by Upholding the ALC Order Creating an Equal Protection Problem and Not Addressing the Constitutional Violation?

Synovus is publicly traded and is required to follow GAAP. For entities such as Synovus, GAAP requires accrual-based accounting. Am. Final Order at p. 4; R. p. 8. The current bank tax regulations allow a bank taxpayer to use *cash based or accrual-based accounting*. Further, there are multiple accrual-based accounting methods other than GAAP. *Id.* at 3, 9; R. pp. 7, 13. Cash based accounting does not and cannot use GAAP accounting. *Id.* at 4; R. p. 8. As a GAAP tax filer, the ALC found "[Synovus'] 'book income' is equivalent to its 'net income.'" *Id.* at 39; R. p. 43. In doing so, the Court made a broad finding in footnote 34 holding "'book income' represents the revenues minus losses based upon *whatever accounting method is used*, which may be GAAP." *Id.* at 39, n. 34; R. p. 43 (emphasis added). The ruling of the ALC and affirmed by the Court of Appeals has serious ramifications. The difference in accounting methods can be substantial. An accrual-based, publicly traded bank operating under GAAP accounting (with no ability to use an NOL carryforward) will see a different bank tax result from a non-GAAP, cash-based, filer.

Likewise, an equal protection issue arises in the application of losses suffered by *a bank* in South Carolina as a result of mortgage defaults (which is the primary basis for Synovus' losses at issue) versus that of a *mortgage broker* that processes mortgages on homes in South Carolina but has no physical location in South Carolina. As admitted by the DOR's expert, losses incurred under

these identical scenarios result in different outcomes for taxpayers if an NOL carryforward is not allowed for the bank. Motion Hr'g Oct. 17, 2019, Tr. 213:21-23; R. p. 322. Such results violate equal protection. *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 451, 790 S.E.2d 763, 771 (2016) ("Under the rational basis test, the Court must determine: (1) whether the law treats similarly situated entities differently; (2) if so, whether the legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose.").

Synovus asks this Court to accept certiorari to address these equal protection issue created by the adoption of the order of the ALC but not addressed by the Court of Appeals in its order.

6. Did the Court of Appeals Err in Giving Great Deference to the DOR Post-*Chevron*?

To the extent the lower courts gave great deference to the DOR's position (*Synovus Bank,* No. 2020-000999, Slip. Op. at 7-10) all such deference is improper. As laid out clearly in the ALC opinion, the DOR has essentially ignored the Bank Tax and, when an issue did arise, it most often looked to either the state income tax code *or* the IRC for guidance.[7] The ALC went so far as to factually find:

- "entire net income" is not cogently defined for purposes of the Bank Tax;
- "While the testimony of these experts indicates that the actions of the Department's staff have led some practitioners to perceive the Department's interpretation of the bank tax as based on book income or financial net income, the fact remains that the Department has not issued any formal guidance on how it calculates or interprets "entire net income" beyond S.C. Regulation 117-1500.1";
- At the ALC hearing "into this matter, the Department modified its interpretation of how to specifically calculate "entire net income";

[7] *See* Footnote 3.

- "the evidence did not show the Department has a long-standing statutory interpretation of how to calculate "entire net income. Indeed, its current interpretation is nascent";
- For "the Department's interpretation to be longstanding, it must also be sufficiently known to the legislature such that the legislature can be deemed to have acquiesced to the Department's interpretation … Here, the Department has no formal ruling or publication interpreting the meaning or calculation of "entire net income."

Am. Final Order at pp. 25-27; R. pp. 29-31.

In a case such as this, where the agency at issue has failed to promulgate the proper regulations or policy documents, agency deference should no longer be considered – especially post-*Chevron*. *See Joseph v. S.C. Dep't of Labor, Licensing and Regulation*, 790 S.E.2d 763, 417 S.C. 426 (2016) (filed September 7, 2016) (identifying the dangers of non-regulation rule-making by administrative agencies).

Further, South Carolina's deference doctrine was adopted from United States Supreme Court precedent, *Kiawah Dev. Partners v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). However, under the United States Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the deference doctrine outlined in *Chevron* is no longer valid, and agencies are no longer entitled to deference from a reviewing court. The United States Supreme Court has instructed courts to apply the "best interpretation" of a statute without giving deference to the agencies tasked with applying statutes and promulgating regulations. As a result, the South Carolina deference standard applied to lower courts is no longer valid. Under *Loper*, the DOR is not entitled to deference.

The inconsistent application of the Bank Tax basis by the DOR from 1937 forward is omnipresent in this dispute. This Court should accept certiorari to clarify agency deference in

South Carolina post-*Chevron* and to correct the Court of Appeals error in providing an enormous degree of deference to the DOR in this case.

7. Did the Court of Appeals Err in Construing "Entire Net Income" Against the Taxpayer Based on the Standard for a Tax Deduction when the True Issue on Appeal Involves the Construction of an Imposition Statute which Must Be Resolved in Favor of the Taxpayer?

The Court of Appeals erred when it applied a deduction standard instead of an imposition statute standard when determining the definition of "entire net income." The issue before the Court is whether the phrase "entire net income," as contained in the bank tax imposition statute, must be construed consistently between the Bank Tax, state income tax, IRC and National Bank Act. South Carolina courts have unequivocally held that tax imposition statutes must be construed in favor of the taxpayer. *See* Pet'r Final Br., p. 7; *Hayden v. S.C. Tax Comm'n*, 183 S.C. 38, 46-47,190 S.E. 249, 251 (1937).

Instead, the Court of Appeals dismissed modern conformity and failed to consider the significance of historical and rolling conformity by focusing on the narrow question of whether the six (6) sections of the Bank Tax statute explicitly codify an NOL carryforward. That was an error. The Court of Appeals erred when it started at the end of the inquiry, instead of the beginning – *essentially placing the cart before the horse*. Whether NOL carryforwards are to be considered in determining "entire net income" should be considered under the imposition standard not the deduction standard.

Regardless, to the extent this case is viewed through the lens of a deduction statute, the deduction is clear and unambiguous. It is found in (1) the very definition of "entire net income" from the origins of the bank tax, (2) rolling conformity with the state income tax code and (3) through conformity with the IRC, which specifically allows for NOL carryforward deductions. *See* IRC § 172.

The Court erred in applying the statutory construction principle applicable to deduction statutes, and instead should have applied construction principles applicable to imposition statutes, which require that such statutes must be construed in favor of the taxpayer. This Court should accept certiorari to correct this error and to clarify the definition of "entire net income" for the banking industry. Without doing so, the banking industry is left in the same position it is in now – with no court order or agency policy instructing how banks must calculate their taxes.

CONCLUSION

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

Dated this 4th day of October 2024.

Respectfully submitted,

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