THE STATE OF SOUTH CAROLINA

In The Supreme Court

Appeal From the Administrative Law Court

Ralph King Anderson, III, Administrative Law Judge

Opinion No. 6072 (S.C. Ct. App. Filed July 17, 2024)

Supreme Court Case No. 2024-001570

Colonial Pipeline Company ..... Petitioner,

v.

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

PETITIONER COLONIAL PIPELINE COMPANY'S REPLY TO RESPONDENT'S RETURNS TO PETITION FOR A WRIT OF CERTIORARI

Burnet R. Maybank, III, SC Bar No. 3699
ADAMS AND REESE, LLP
1221 Main Street, Suite 1200 (29201)
Columbia, South Carolina 29201
Telephone: (803) 254-4190
Burnie.maybank@arlaw.com

Attorneys for Petitioner Colonial Pipeline Company

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INTRODUCTION

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Colonial Pipeline Company ("Petitioner" or "Colonial") petitioned 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. Respondents filed returns to Colonial's Petition, and this Return addresses the issues they raised.

SUMMARY OF GROUNDS FOR CERTIORARI

In its Petition, Colonial raised four independent grounds supporting this Court issuing a writ of certiorari: (1) a novel question of law; (2) conflict with prior Supreme Court precedent regarding statutory construction principles; (3) involvement of substantial constitutional issues; and (4) far-reaching implications of the Court of Appeals' decision. As detailed below, to the extent Respondents even addressed each of these grounds, they all fail.

ARGUMENT

1. Respondent's Arguments Against Certiorari Fail

Notably, Respondent failed to meaningfully respond to a key ground for certiorari – that this matter involves a substantial constitutional issue. Likely because Respondent cannot dispute this ground. The pollution control exemption undoubtedly involves a protection afforded by the South Carolina constitution. Under the Court of Appeals' ruling, Colonial (and other non-manufacturers) were denied that protection. 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." This basis for certiorari is further evidenced by the fact that the Court of Appeals holding thwarts the constitutional intent to incentivize adoption of pollution control technologies for the beneficial public purpose of reducing or elimination environmental pollution. This ground alone supports the grant of certiorari.

Regarding a novel question of law, Respondent's arguments miss the point – it simply argue that the Court of Appeals' decision was correct. But the fact remains that the term "industrial plant" has never been defined in any South Carolina case law, DOR policy documents or DOR long-standing agency interpretation. Respondent does not dispute this. Instead, Respondent argues that interpretation of an undefined term is "not unusual." Be that as it may, the fact remains that the interpretation of the term "industrial plant" has never been ruled upon in South Carolina, and thus is a novel question of law.

Respondent further argues against certiorari on the basis that the Court of Appeals employed various principles of statutory construction in interpreting the term "industrial plant." But what Respondent misses is that the Court of Appeals ruling actually conflicts with standard statutory construction principles established by the South Carolina Supreme Court – namely, that courts should not insert terms to restrict a statute's applications or read statutes in such a way that is contrary to legislative intent. By limiting the term "industrial plant" to only manufacturers that produce something (notably, also ignoring the output component of manufacturing) the Court of Appeals inserted a term that restricted application of the Exemption contrary to constitutional and legislative intent. Respondent's argument that the ALC's interpretation constitutes an "expansion" of the statue is a red herring. To the contrary, the ALC's interpretation is more consistent with the plain language of the Exemption and legislative intent, both of which indicate the Exemption applies more broadly than just to production manufacturers.

2. Did the Court of Appeals Incorrectly Limit Pollution Control Exemption to Manufacturers Who Only Engage in Production

Respondent's main argument is that Colonial has mistakenly characterized the Court of Appeal's ruling as limiting the pollution control exemption to manufacturers. They focus particularly on one sentence in the Court of Appeal's opinion: "In our view, this statutory definition [42 USC 6326 (5) dealing with energy conservation] provides a plain and ordinary meaning for the term 'industrial plant' in that it contemplates some production or output." 443 S.C. at 461. But, even applying the definition above, Respondent, and the Court of Appeals, wholly disregard the phrase "or output," which in the case of Colonial, is satisfied.

To that end, dictionary definitions of "output" are not limited only to the production of goods, but also include services, like the delivery of gasoline to other businesses to be sold directly to consumers:

> Output is a quantity of goods *or services* produced in a specific time period (for instance, a year). For a business producing one good, output could simply be the number of units of that good produced in each time period, such as a month or a year. The business's output could also be approximated by the revenues from sales of the product, adjusted for price changes (inflation). For an industry, output is a measure of all the goods *and services* produced in a given time period by businesses in that industry and sold either to consumers or to businesses outside that industry. For example, output can be the number of tons of sugar or boxes of cookies produced in a year by a business or industry. These products can be measured in terms of dollar value so that different outputs—such as tons of sugar and boxes of cookies—can be combined using the same unit of measurement. Output can be consumed directly or sold to other businesses for use in producing other output. For example, sugar can be consumed or can be used for further production in making cookies. [https://www.bls.gov/k12/productivity-101/content/what-is-productivity/what-is-output.htm] (emphasis added).

Another definition also recognizes that output can be a service, and is not merely limited to the physical production of goods:

> Output is the amount that is produced by a person, machine, factory, country, etc.: The amount of goods and *services*, or waste products, that are produced by a particular economy, industry, company, or worker: [https://dictionary.cambridge.org/us/dictionary/english/output#google_vignette] (emphasis added).

As for the definition of industrial plant, those likewise support that the term should not be limited to only manufacturers and that Colonial's business qualifies under the Exemption (recalling that the DOR has conceded that Colonial's business is "industrial") :

> a place where an *industrial or manufacturing* process takes place; the land, buildings, and equipment of an organization the college's physical plant [Britannica.com] (emphasis added)

and

> "buildings for carrying on *industrial labor*" [https://www.vocabulary.com/dictionary/industrial plant] (emphasis added).

Colonial outputs and produces tremendous quantities of fuel, transmix, and sting daily. The fundamental question remains: 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) performs various other industrial and production activities, an "industrial plant?" The clear answer is yes. The ALC was correct in determining that Colonial's activities in South Carolina met the definition of "industrial plant," and the Court of Appeals erred in reversing that decision by improperly limiting the term "industrial plant" to only those business engaged in production, which is contrary to legislative intent.

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).[1] Under this analysis, the question becomes whether Colonial's substantial 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). 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*. The transportation of these large amounts of fuel for distribution in South Carolina necessarily is "output." In addition, Colonial's operations also include other production-related activities such as reprocessing of transmix, injection of DRA, and regrading of product, which are not merely *de minimus*, as Respondent suggests – they are an integral part of Colonial's business. The Court of Appeals seemingly never considered these undisputed facts in its "output" analysis, which was error.

In ruling that Colonial qualified as an industrial plant, the ALC properly acknowledged that the Exemption is not limited to classic manufacturers:

> 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.

[1] This legislation is contained in Chapter 77, Energy Conservation, Subchapter II Improving Energy Efficiency. It primarily deals with "appliances," including "room air-conditioner, refrigerator-freezer or dishwasher" and includes "energy audits" to identify energy and cost savings likely to be realized through installation of energy conservation measures. It provides funding to states that adopt energy plans. It is not a tax statute at the state or federal level, but was promulgated to encourage energy conservation measure, thus bringing into question whether this statutory definition is even proper guidance for the definition of "industrial plant."

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, as the Court of Appeals suggest, the term was limited only to manufacturers, then the words "or company" are superfluous. That cannot be the case under standard statutory construction principles, and to rule otherwise, like the Court of Appeals did here, is erroneous.

Importantly, the recent ruling in *South Carolina Public Interest Foundation v. City of Columbia,* 431 S.C. 164, 847 S.E.2d 257 (2020) exemplifies this *exact* issue. The definition at issue in that case was "industrial *or business park"* contained in S.C. Const. Art. VIII §13(D) and § 40(A). In determining whether commercial apartments met that definition, the Court of Appeals appropriately evaluated *both* terms: "industrial" and "business park," thus giving import to *all* language in the statute, not just selective terms. Here, the Court of Appeals failed to follow this precedent and give meaning to *all* terms in the statute. That was erroneous.

3. TNS Mills and Greige Mills

Respondent repeatedly cites *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 503 S.E. 2d 471 (1998) and the inclusion of greige mills in statutory language as support for their position that only manufacturers are entitled to the pollution control exemption. The opinion notes that "assigning a separate value to a greige mill's pollution control equipment is difficult." To remedy the problem the South Carolina Textile Manufacturers Association (SCTMA) negotiated a settlement with the Department whereby the Department would reduce the assessed value of greige mills by 20%. The Court noted that "TNS was not a member of the SCTMA, and the

Department *reproachably did not publish the policy* so TNS was unaware of the 20% compromise. The Department assessed TNS's greige mills at 100% of their value throughout the late 1980s." (Emp added). So, the statutory enactment was simply the General Assembly reproaching the Department by publishing their 20% secret rule. With this backdrop, this case has very limited value in determining whether the Court of Appeals improperly limited the Exemption to only manufacturers engaged in production.

4. New Cases

Respondent argues that Petitioner has cited new cases. In seeking certiorari, Petitioner has cited substantial authority that the Court of Appeals decision was not only novel and involved constitutional issues, but was also wrong. Obviously, Petitioner could not make such arguments before the decision was issued. But the key issue here—whether Colonial's substantial facilities constitute an industrial plant has always been the same.

5. Sweeping Impact

Respondent also tries to minimize the impact of the Court of Appeals decision in non-tax matters such as zoning, business licenses, environmental, and insurance. But, the reality is that this ruling is not merely limited to tax matters. The Court of Appeals decision defining a widely-used term like "industrial plant" here, is certainly going to impact other matters, such as Clean Water Act enforcement actions against huge transportation companies and local zoning matters. This Court simply cannot ignore the sweeping impact that the Court of Appeals decision will have in other matters.

Conclusion

Respondent does not meaningfully assert that this case does not involve a novel question of law or that it does not involve a substantial constitutional issue. It merely argues that this Court should deny certiorari because the Court of Appeal's decision was correct.

It bears repeating that the DOR conceded that Colonial's operation was industrial and granted the exemption for four classes of pollution control equipment for several years. The Court of Appeal's decision was therefore limited to construing the word "plant." The decision found, based upon a definition in federal energy conservation legislation that a plant was limited to manufacturers who engage in production, notwithstanding that the General Assembly knows how to limit tax statutes to manufacturers when that is indeed their policy. Here, in the exact statute at issue, the General Assembly references both "manufacturers *or companies*, " thus unequivocally showing that it did not intend to limit the Exemption to only manufacturers, much less only manufacturers that engage in production. This Court should grant certiorari to remedy the erroneous ruling of the Court of Appeals, which involves a novel issue of law, conflicts with prior Supreme Court precedent regarding statutory construction principles, involves substantial constitutional issues, and has far-reaching implications beyond just one tax exemption.

December 4, 2024

s/ Burnet R. Maybank, III

Burnet R. Maybank, III, SC Bar No. 3699
ADAMS AND REESE, LLP
1221 Main Street, Suite 1200 (29201)
Columbia, South Carolina 29201
Telephone: (803) 254-4190
Burnie.maybank@arlaw.com

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PROOF OF SERVICE

I certify that I have served **Petitioner Colonial Pipeline Company's Reply to Respondent's Returns to Petition for a Writ of Certiorari** on Respondents by sending a copy of said documents to Appellants' counsel via e-mail on December 4, 2024, as follows:

Michael E. Kozlarek, Esq.
michael@kingkozlarek.com

Kimila L. Wooten, Esq.
wooten@conlaw.com

Walter H. Cartin, Esq.
waltcartin@parkerpoe.com

Jeffrey E. Phillips, Esq.
evanphillips@parkerpoe.com

Joshua M. T. Felder, Esq.
madisonfelder@parkerpoe.com

Jason Luther, Esq.
jason.luther@dor.sc.gov

Marcus Antley, III, Esq.
marcus.antley@dor.sc.gov

s/ Burnet R. Maybank, III
Burnet R. Maybank, III

December 4, 2024