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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby
Master-in-Equity

Court of Appeals Opinion 2025-UP-169
(filed May 28, 2025, rehearing and motion to publish denied July 3, 2025)

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

South Carolina Code § 34-21-10 gives the South Carolina Board of Financial Institutions (the "Bank Board") authority to regulate companies engaged in a "trust business." The circuit court held that this two-word phrase means "a business involved with the administration of trusts." (R. p. 8.) The Attorney General also endorsed this limited scope of the agency's authority. (R. p. 220.)

Nevertheless, the Bank Board asked the Court of Appeals to broadly construe the phrase "trust business" to give the agency regulatory authority over all entities that provides any type of fiduciary services, not just "trusts," including all such fiduciaries who are appointed by the Probate Court to provide services to South Carolina's most vulnerable citizens: guardians, conservators, personal representatives, agents, and those providing power-of-attorney services, to name just five.

The Court of Appeals agreed with the agency and expansively construed the phrase "trust business" to now include "all institutional fiduciaries," including but not limited to those appointed to serve as a "personal representative, conservator, guardian, or agent." (Op. at 7, 11.)

Did the Court of Appeals err when it expanded the Bank Board's jurisdiction by construing the phrase "trust business" to mean "all institutional fiduciaries," including but not limited to guardians, conservators, personal representatives, agents, and any other provision of a fiduciary service that is directed by the Probate Court?

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[1] This statement is found in Justice Kittredge's concurrence in *Joseph*, but the lead opinion—authored by Justice Toal and joined by Justice Hearn—agreed. *See* 417 S.C. at 455 n.3, 790 S.E.2d at 773 n.3 ("We embrace completely the excellent comprehensive analysis of administrative agency rulemaking set forth in sections I, II, and III of Justice Kittredge's concurring opinion."). Undoubtedly, this statement reflects the position of both the Court and the Constitution.

INTRODUCTION

Until the initiation of this lawsuit, companies that provide non-trustee fiduciary services—like the Petitioners, CDM Corporation and Guardian Fiduciary Services—functioned at the appointment of and under the oversight of the Probate Court. That court routinely appoints Petitioners (and companies like them) to provide fiduciary services for vulnerable South Carolinians who do not have a family member or friend willing to provide those services. For instance, when a "guardian" is needed for a "ward" in a remote part of South Carolina who otherwise has no one to look after his or her interests, the Probate Court calls upon Petitioners to fill that gap, and then it supervises the Petitioners as they perform their fiduciary function.

Years ago, the Bank Board confirmed to the Petitioners' principal that their provision of these fiduciary services did not amount to a "trust business" subject to the agency's jurisdiction. (R. p. 200.) And it was right to do so, as the Legislature created the Bank Board only to "supervise all banks and building and loan associations," not guardians or conservators. S.C. Code Ann. § 34-1-60. Within that, the General Assembly gave the agency authority over companies who operate a "trust business," *id.* § 34-21-10, which it generally described as companies that invest in and maintain "common trust funds," *id.* §§ 34-21-210 to -430. That has nothing to do with providing fiduciary services that help the daily management of the lives of vulnerable South Carolinians.

But for reasons unknown, the Bank Board changed its position, initiated this lawsuit to expand through judicial decree its jurisdictional scope from the limitations provided by the Legislature, and then issued a self-serving "Policy Statement" during litigation that it trumpeted as supporting an expansive (and boundless) view of its jurisdiction. The circuit court rightly rejected those efforts and construed the two-word phrase "trust business" to mean exactly what it says: "a business involved with the administration of trusts." (R. p. 8.)

The Court of Appeals reversed the circuit court's plain-language reading and held that the agency's jurisdiction covers any company providing any fiduciary service anywhere in South Carolina, regardless of whether the provision of that service is at the appointment and direction of the Probate Court. Predictably, the Court of Appeals' decision created immediate turmoil across the Probate Court system, as the stream of vulnerable South Carolinians needing such fiduciary services never stops, but the Bank Board doesn't even have a way for companies other than Banks, Credit Unions, Savings Associations, and Savings Banks (none of which describes the Petitioners) to apply for "trust powers." State of South Carolina Board of Financial Institutions, *Applications Manual* at 6 ("Trust Powers"), *available at* Applications Manual 6.2.2025.pdf.[2]

Respectfully, the Court should grant certiorari review of this case and reverse the Court of Appeals' expansive construction of the phrase "trust business." The Court of Appeals' decision has severe consequences not only for the Petitioners and companies like them, but to the entire Probate Court system and to some of the state's most vulnerable citizens who count on the Petitioners to assist in their time of need. This case readily meets the Court's "special and important reasons" standard for issuing a writ of certiorari. Rule 242(b), SCACR.

At bottom, whether the Bank Board's jurisdiction should be expanded to cover any company that provides any fiduciary service, and not simply limited to companies engaged in "trust business," is a decision that only the General Assembly can make. The Court of Appeals' improper judicial expansion of the agency's authority should not stand.

[2] The agency's applications manual also recognizes that Section 34-21-10 applies to Banks or "Out-of-State Non-Depository Trust Companies," not to providers like Petitioners that do not provide trust services. *Application Manual* at 6–7. This all but concedes the overreach of the Court of Appeals' reading of the phrase "trust business" in Section 34-21-10.

STATEMENT OF THE CASE

The South Carolina Probate Code contains a comprehensive set of laws for administering and protecting the "affairs of decedents, missing persons, protected persons, minors, and incapacitated persons." S.C. Code Ann. § 62-1-102(b)(1). The General Assembly also established a specialized court—the Probate Court—to exercise "exclusive original jurisdiction over all subject matter" related to issues governed by the Probate Code. *Id.* § 62-1-302(a).

Probate courts have broad powers to appoint fiduciaries to assist and protect those persons who fall within their jurisdiction, including, for example, "guardians," *id.* § 62-1-201(15); "conservators," *id.* § 62-1-201(6); and "personal representatives," *id.* § 62-1-201(33). But often, the people needing the protections afforded by the Probate Code do not have a family member or friend available with the resources, skills, or even willingness to serve in a court-appointed fiduciary capacity.

The Petitioners—CDM Corporation, Inc., and Guardian Fiduciary Services, LLC—fill this critical gap. They provide a suite of fiduciary services to elderly, disabled, or otherwise compromised individuals of South Carolina: guardianship, conservatorship, personal representative, and power-of-attorney services. (R. p. 199; Mantell Aff. ¶ 4.) CDM and Guardian are often called when vulnerable individuals—including, for instance, a patient in a coma, a severely drug-addicted minor, or a mentally-ill person—have no one else to protect their interests. (R. p. 200; *id*. ¶¶ 8–9.) Nearly all of CDM and Guardian's clients are referred by licensed South Carolina attorneys, and the companies are then formally appointed to serve by judges of the South Carolina Probate Court. (R. p. 199; *id*. ¶ 5.)

Because of the critical role fiduciaries play under the Probate Code, South Carolina's probate judges routinely utilize companies like CDM and Guardian to serve as non-trustee

fiduciaries for "vulnerable persons with limited financial means, persons suffering from physical or mental disabilities, or for those persons whom have no relative or family member that is willing, capable or qualified to serve." (R. p. 211; Judge Carter Aff. ¶ 12.)

On October 26, 2020, the Bank Board filed this action in circuit court in Georgetown County, in which it sought a declaration that CDM and Guardian's non-trustee fiduciary services rendered them an "unlawful trust business," along with an injunction prohibiting them from "serving as conservator, guardian, attorney-in-fact in accordance with a power of attorney, personal representative or executor, and trustee of a trust, as well as holding themselves out as providing these services." (R. pp. 15–23; Compl. ¶¶ 24–39.)

The Petitioners counterclaimed, seeking a declaratory judgment that the statutory term "trust business" means exactly that—that is, a "business" involved in the administration of "trusts"—and that their service in other non-trustee fiduciary roles did not constitute "trust business" subject to the Board's authority. (R. pp. 24–35; Ans. & Countercl. ¶¶ 25–37).

On consent motion by the parties, Judge Culbertson referred the case to Judge Crosby, the Georgetown County Master-in-Equity, for resolution. (R. p. 1; Consent Order of Reference). On August 22, 2022, the parties filed competing motions for summary judgment. (R. pp. 42–181; Bank Board's Motion for Summary Judgment and Accompanying Exhibits; R. pp. 182–221; Petitioners' Motion for Summary Judgment and Accompanying Exhibits.)

The circuit court decided the motions without a hearing, finding that the statute means precisely what CDM and Guardian argued. The circuit court held that the term "trust business" regulated by the Bank Board must involve administration of a "trust," and that CDM and Guardian's service as guardian, conservator, personal representative, executor, or attorney-in-fact did not constitute a "trust business." (R. pp. 4–12.)

The circuit court's decision matched the Bank Board's historic understanding of its limited authority. (R. p. 200; Mantell Aff. ¶ 12.) It matched what the Attorney General historically advised the public and the agency itself. (R. p. 220; 1996 S.C. AG LEXIS 25, at *7 (Feb. 9, 1996).) And it matched the overall structure of Title 21 of the State Bank Code, which is aimed at regulating companies that invest in "common trust funds."

The Board sought reconsideration of the circuit court's decision on November 14, 2022. (R. p. 261; Motion for Partial Reconsideration.) The circuit court denied that motion on December 20, 2022. (R. p. 13; Order Denying Plaintiff's Motion for Partial Reconsideration.)

The Board timely appealed, and the Court of Appeals reversed in an unpublished opinion in which it held that "trust business" means "***all*** institutional fiduciaries fall within BOFI's regulatory authority." (Op. at 7 (emphasis supplied by the Court of Appeals).)

The Petitioners timely sought rehearing, while the Board sought to have the Court of Appeals publish its decision. The Court of Appeals denied both rehearing and the publication request on July 3, 2025. This petition follows.

ARGUMENT

I. The Court of Appeals improperly ignored the plain meaning of the statutory phrase "trust business" to expand the Bank Board's jurisdiction.

This case should begin and end with the plain language of the statute limiting the Bank Board's authority to regulate certain businesses. The South Carolina Banking Code provides that "[n]o corporation, partnership, or other person shall conduct a ***trust business*** in this State without first making a written application to the State Board of Bank Control and receiving written approval from the Board." S.C. Code Ann. § 34-21-10 (emphasis added).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Rainey v. Hailey*, 404 S.C. 320, 324, 745 S.E.2d 81, 82 (2013). Where the statute's

language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and a court has no right to impose another meaning. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute").

This ironclad rule of law controls here. The circuit court held that the term "trust business" means exactly what these two words say: "a business involved with the administration of trusts." (R. p. 8.) This is what both the Bank Board and the Attorney General had always understood this term to mean. (R. pp. 200, 220.) The circuit court's ruling is unimpeachable based on the statute's own words, and it should have been readily affirmed.

Rather than engage in this simple, straightforward "plain language" analysis, the Court of Appeals deemed the circuit court's reading "colorable" but then rejected it after a tortured seven-page explanation that the phrase "trust business" must mean something far greater than "the business" of "trusts." (Op. at 5–11.)

Standing alone, the Court of Appeals' resort to numerous analytical tools to rewrite and expand the phrase "trust business" is error and should be reversed. *See City of Camden v. Brassell*, 326 S.C. 556, 560, 486 S.E.2d 492, 494–95 (Ct. App. 1997) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."). That error is more evident when considered against standard rules of statutory construction.

II. Every norm of statutory construction rejects the Court of Appeals' expansion of the agency's jurisdiction.

After wrongly disregarding the plain-meaning rule in favor of other tools of statutory interpretation, the Court of Appeals overlooked and failed to account for the most basic norms of statutory construction, all of which reinforce the circuit court's reading of the law.

Usual and Customary Meaning. The General Assembly did not define the specific phrase "trust business" in the Bank Code. Where the Legislature does not define a statutory term, courts must interpret the term according to its "usual and customary meaning." *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994).

Here, the "usual and customary" definition of a "trust business" is a business involved with the administration of trusts, just as the circuit court held below; this is hornbook law. *See, e.g.*, 9 C.J.S. *Banks and Banking* § 650 ("It has been said that the primary and ordinary conception of a ***trust company*** is a corporation or institution organized to ***take and administer trusts***, rather than carry on the ordinary functions of banking.") (emphasis added); 1996 S.C. AG LEXIS 25, at *4–5 (Feb. 9, 1996) (surveying courts nationally that have reached this exact same understanding).

Cannot Add to a Statute. The statutory phrase controlling this case is "trust business." It is a simple two-word phrase that, as noted above, traditionally means being in the business of administering trusts. In rejecting this straightforward understanding of the term, the Court of Appeals held that this phrase is inclusive of "all" fiduciary roles. (Op. at 7.) In short, according to the Court of Appeals' decision, the word "trust" doesn't just mean "trust," but also includes personal representative ***and*** guardian ***and*** conservator ***and*** agent pursuant to a power of attorney ***and*** all other fiduciary roles.

Respectfully, a court has no authority to add to or alter the plain language of a statute. *See, e.g.*, *Ballard v. Newberry County*, 432 S.C. 526, 532, 854 S.E.2d 848, 851 (Ct. App. 2021) ("We are not at liberty to add to the statutory law or subtract from it."). The General Assembly did not vest the Board with jurisdiction to govern "personal representatives" and "guardians" and "conservators" and "agents pursuant to a power of attorney" and "other fiduciary roles." Instead, it gave the Board limited authority to regulate companies who administer "trusts."

Inclusion of "Trusts" Means Exclusion of Other Types of Fiduciaries. As a corollary, if the General Assembly had intended to give the Board broad authority to regulate any entity that provides any possible fiduciary services, it certainly could have said so. In fact, it has legislated heavily regarding other types of fiduciaries throughout the State Code. *See, e.g.*, S.C. Code Ann. §§ 62-5-201 to -310, *id.* §§ 62-5-701 to -716 (addressing guardians); *id.* §§ 62-5-401 to –431 (addressing conservators); *id.* §§ 62-5-501 to –518 (addressing agents acting through a healthcare power of attorney). But the General Assembly did not identify any type of fiduciary beyond "trusts" when shaping the scope of the Board's authority.

When a statute specifically includes one item, courts construe the law to necessarily exclude all other items that the legislature did not include. *See Hodges*, 341 S.C. at 86, 533 S.E.2d at 582 ("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.'" (quoting Black's Law Dictionary 602 (7th ed. 1999))).

The Legislature even wrote this principle directly into the Bank Code. South Carolina Code § 34-21-20 authorizes the Board to examine and regulate "trust companies, and fiduciary corporations authorized to conduct trust business." By listing separately (1) trust companies and (2) fiduciary corporations, the General Assembly explicitly recognized that not all "fiduciary corporations" are engaged in "trust business."

This confirms not only that fiduciary corporations may operate and engage in business other than "trust business," but also makes clear that the General Assembly only intended to grant the Bank Board regulatory authority over "trust companies" and fiduciary corporations engaged in "trust business"—not "***all*** institutional fiduciaries," irrespective of the fiduciary roles they actually perform, as the Court of Appeals held. (Op. at 7 (emphasis supplied by the Court of

Appeals).) Accordingly, the Court of Appeals' reading of "trust business" is not only inconsistent with the statute itself, but it actually manufactures a contradiction within the Bank Code. A judicial construction that creates an internal conflict within a statute cannot be allowed to stand.

Statute as a Whole. Instead of giving the words "trust business" their plain-language meaning, the Court of Appeals isolated the last sentence of Section 34-21-10 from the rest of the entire statutory scheme and placed disproportionate and out-of-context weight on that single sentence to give the phrase "trust business" an expansive construction. (Op. at 5–8.) That sentence says only that the statutory scheme regulating companies that invest in common trust funds and a statutory provision grandfathering in companies engaged in "trust business" as of January 1, 1972, do not somehow create an impediment for "a natural person or a national bank association having a principal place of business in this State from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity." S.C. Code Ann. § 34-21-10.

The Court of Appeals' analysis runs contrary to several rules of statutory construction. First, words and phrases within a statute must not be finely sliced, but instead must be read "as a whole and in a manner consistent and in harmony with its purpose." *Smith v. S.C. Ins. Co*., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002). But the Court of Appels did just that. It isolated the last sentence of Section 34-21-10 from (1) the rest of that same section, which limits the Board's authority to companies involved in a "trust business"; (2) the rest of Chapter 21, which makes clear that the Board's jurisdiction is designed to reach companies that invest in "common trust funds"; and (3) the rest of the South Carolina Code as a whole, which repeatedly distinguishes between "trustees" and all other types of fiduciaries.

Second, the Court of Appeals appeared to misunderstand the purpose of Section 34-21-10's final sentence. It was added through a 1972 amendment to Section 34-21-10, and it was not designed to expand the definition of "trust business" to all types of fiduciaries. Instead, this final sentence served to harmonize South Carolina law with the federal legislation passed before it, as Petitioners explained during oral argument before the Court of Appeals. The last sentence of Section 34-21-10 tracks the language of 12 U.S.C. § 92a, which provides that national banks have the same fiduciary authority allowed at the state and local level, which can include trustee, executor, administrator, guardian, and "any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act." 12 U.S.C. § 92a. The final sentence of Section 34-21-10 was never intended to expand the meaning of "trust business" or the Bank Board's jurisdiction; rather, it simply harmonizes state law with federal law to provide that nothing within Section 34-21-10 is intended to contradict 12 U.S.C. § 92a. And because this final sentence serves the function of melding state law with federal law, understanding this sentence in its proper context does not render it "surplusage," as the Court of Appeals incorrectly suggested. (Op. at 8.)

Third, the very sentence upon which the Court of Appeals based its analysis distinguishes "trustee" from all other types of fiduciary roles. But the only fiduciary role over which the General Assembly gave the Bank Board jurisdiction is for "trust business." As noted above, when a statute specifically includes one item, the statute necessarily excludes all other items that the Legislature did not include. *Hodges*, 341 S.C. at 86, 533 S.E.2d at 582. Likewise, when a statute uses only one word—here, "trust"—a court cannot rewrite the statute to add words—here, "any institutional fiduciary, whether serving as a trustee, personal representative, guardian, conservator, or agent" (Op. at 11). *Ballard*, 432 S.C. at 532, 854 S.E.2d at 851.

Fourth, the Court of Appeals looked to Article 3 within Chapter 21 to reinforce its conclusion, but that article fully supports the Petitioners' overarching point: the statute as a whole makes obvious that the Bank Board's regulatory authority over "trust business" is limited to companies who invest in "common trust funds." Common trust funds, as set forth in Article 3 (and its federal corollary at 26 U.S.C. § 584), are creatures of statute. The purpose of Article 3 is to regulate banks and "trust institutions" investing ***trust money*** in a ***common trust fund***—which has nothing to do with Petitioners or the fiduciary services they provide. In other words, the definitions within Article 3 are simply inapplicable to institutions, like the Petitioners, that do not invest trust money into a common trust fund.

* * * * *

The Court of Appeals' analysis of the phrase "trust business" improperly skips the plain-language analysis required by law in favor of a statutory construction that runs afoul of numerous principles of statutory construction—all of which confirm that the circuit court rightly held that this simple phrase means "a business involved with the administration of trusts." (R. p. 8.)

III. The Court of Appeals' decision improperly expands the Bank Board's jurisdiction without legislative authorization.

In addition to violating the foundational rule of law that statutes must be enforced as they are written and settled norms of statutory construction, the Court of Appeals' opinion violates another fundamental point: agencies are creatures of statute, and their power is limited by the General Assembly alone. By giving the Bank Board more authority than the Legislature allowed, the Court of Appeals has committed a core separation-of-powers violation that should be remedied by this Court.

It is settled law that an executive agency only has the powers the Legislature gives it through its delegating statute. *See, e.g.*, *Med. Soc'y v. MUSC*, 334 S.C. 270, 275, 513 S.E.2d 352,

355 (1999) (holding that the MUSC Board of Trustees did not have "the power to dispose of real or personal property" because "[a]n agency created by statute has only the authority granted it by the legislature," and there was no such authority expressly stated in the State Code). The Court is "bound to strictly construe the terms of the statute and to rely on the General Assembly to amend the statute where necessary." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 441, 581 S.E.2d 836, 838 (2003).

Here, the General Assembly granted the Board authority to regulate "trust business"—nothing more. The Court of Appeals nevertheless relied on (1) "a nationwide compact between states" onto which the Board signed in June 2018, which expansively defined "trust business" for purposes of that agreement; and (2) a self-serving, mid-litigation "Policy Statement" issued by the Board. (Op. at 4, 7.) But neither the Board's "Policy Statement" nor its decision to sign an agreement with other states—which does not appear to have been endorsed by the General Assembly—has any bearing on the powers delegated by the General Assembly to the agency.

First, the Board's so-called "Policy Statement" has no legal effect. The Board issued this statement during litigation before the circuit court, and it then relied upon the "Policy Statement" as if it was legal authority that binds the Judiciary. (R. p. 100; Board's "Policy Statement," cited on Pages 21–23 of the Board's Opening Appellate Brief.) As matter of law, as an agency cannot use the rulemaking process to alter—or, as here, expand—its statutory authority.[3] *See, e.g.*, *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 499, 685 S.E.2d 600, 608–09 (2009) (striking a regulation of the State Ethics Commission to the extent it was more restrictive than the statutes

[3] To be clear, the "Policy Statement" was not even promulgated as part of a rulemaking process under the Administrative Procedures Act. It was simply issued by the agency during litigation before the circuit court and then treated by the agency as if it should be given controlling authority. But as the authorities cited in the text make clear, even an actual regulation that is properly promulgated through the rulemaking process cannot alter or expand an agency's authority that is set by statute.

that governed what agency materials could be made public); *Soc'y of Prof'l Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) (striking as "invalid and repugnant to FOIA" a DHEC regulation that attempted to limit the class of persons who could obtain a death certificate and reiterating that "[a]mending FOIA to restrict the class of persons to whom DHEC must furnish death certificates is a legislative function," not something that can be done by an agency itself).

Moreover, the United States Supreme Court eliminated any possible relevance of this "Policy Statement" through its recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which struck notions of so-called "*Chevron* deference" owed to agencies from the litigation process. *See Colonial Pipeline Co. v. S.C. DOR*, 443 S.C. 448, 458–59, 905 S.E.2d 129, 134–35 (Ct. App. 2024), *reh'g denied* (Aug. 19, 2024) ("We are cognizant of the recent United States Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which overruled precedent requiring a reviewing court "to defer to 'permissible' agency [interpretations of the statutes those agencies administered,]" even when a reviewing court might read the statute differently, if "'the statute [was] silent or ambiguous with respect to the specific issue' at hand.").

Second, a compact entered by the Board alone has zero impact on its scope of authority and regulatory power. Justice Kittredge was clear in his warning against this exact type of agency-led jurisdictional expansion: "In South Carolina, to preserve some semblance of the separation of powers we once held sacred, an administrative agency may not make law without legislative oversight and approval." *Joseph v. S.C. LLR*, 417 S.C. 436, 461, 790 S.E.2d 763, 777 (2016) (Kittredge, J., concurring). He further observed: "'[S]urely one thing no agency can do is apply the wrong law to citizens who come before it, especially when the right law would appear to support the citizen and not the agency. . . . An agency decision . . . that loses track of its own

controlling regulations and applies the wrong rules in order to penalize private citizens can never stand." *Id*. at 461, 790 S.E.2d at 776 (quoting *Caring Hearts Pers. Home Servs., Inc. v. Burwell,* 824 F.3d 968, 977 (10th Cir. 2016)) (cleaned up).

So, too, here. The Bank Board's out-of-court conduct to expand its own jurisdiction appears to have prompted the Court of Appeals to endorse an expansive view of the agency's authority that far exceeds the "trust business"-only limitation placed on it by the General Assembly. (*See* Op. at 11 ("Based on the foregoing, the term 'trust business' necessarily encompasses fiduciary services provided by not only the trustee of a trust but also a personal representative, conservator, guardian, or agent.").) By improperly expanding the Board's jurisdiction through the Judiciary and outside the legislative process, the Court of Appeals' decision is inconsistent with basic separation of powers and is the exact "fourth branch of government" overreach Justice Kittredge warned against in *Joseph*. The Court should review and vacate the ruling accordingly.

IV. The Court of Appeals' decision unjustifiably upsets the current regulatory structure in place and leaves vulnerable South Carolinians at risk.

The Court of Appeals concluded its decision by explaining that all fiduciaries should be regulated by Bank Board, even if the Probate Court is involved with the fiduciary's appointment. In so doing, the Court of Appeal dismantled a key tool of the Probate Court to appoint fiduciary companies to serve South Carolinians in need, and it enjoined that court from utilizing companies like the Petitioners to serve as non-trustee fiduciaries to vulnerable persons with limited financial means, persons suffering from physical or mental disabilities, or for those with no relative or family member that is willing, capable or qualified to serve.

Instead, to serve in "any" fiduciary role, a fiduciary company would need to make a written application (including a $15,000 application fee), receive written approval from the Bank Board, and then pay an annual $19,000 "supervisory fee." To justify this shift, the Board argued, and the

Court of Appeals agreed, that in the absence of the Bank Board's constant oversight and regulation, there is no other source of oversight of non-trustee fiduciaries. This is wrong for several reasons.

First, it is simply inaccurate to suggest that fiduciary companies like the Petitioners, or anyone else performing fiduciary services unrelated to trusts, can slip through the cracks, unregulated. When the Probate Court appoints a person or company to serve as a guardian, or a conservator, or a personal representative, it retains jurisdiction over that appointee and has full authority to monitor and penalize the appointee should it breach its fiduciary responsibilities. *See* S.C. Code Ann. § 62-1-112 ("The inherent power of the court to impose penalties for contempt extends to all filing requirements, proceedings, judgments, and orders of the court.").[4] Moreover, the common law recognizes a private cause of action for breaching a fiduciary duty. *See generally Bennett v. Estate of King*, 436 S.C. 614, 626–27, 875 S.E.2d 46, 52–53 (2022) (analyzing a claim for breach of fiduciary duty that arose in the context of a personal representative's conduct after being appointed by the Probate Court, and listing numerous cases where a breach had been affirmed).

But more importantly, this decision reopens a critical gap, leaving South Carolinians in need of help, but with no one willing or able to provide it. The Court of Appeals' expansive definition of "trust business" forecloses fiduciary companies' ability to serve as a fiduciary unless approved by and under the supervision of the Board—a state agency that is unqualified and unequipped to regulate the fiduciary services provided by non-trustee fiduciary companies. As noted in the Introduction, the Bank Board ***doesn't even have an option for non-trustee fiduciary***

[4] To be clear, the Petitioners do not contend that the Board and the Probate Court can never have concurrent oversight. Whether the Board and the Probate Court can have concurrent jurisdiction over non-trustee fiduciaries is a decision is for the Legislature to make, but there is no basis for judicially expanding the Board's regulatory power beyond "trust businesses" investing in a "common trust fund," as currently provided by the General Assembly

companies to apply to be a "trust business." The Board's "Applications Manual"—which was last updated on June 2, 2025, after the Court of Appeals issued its opinion—says that only Banks, Credit Unions, Savings Associations, and Savings Banks can apply for "trust powers." *Applications Manual* at 6 ("Trust Powers"), *available at* Applications Manual 6.2.2025.pdf. The Application Manual further recognizes that Section 34-21-10 applies to Banks or "Out-of-State Non-Depository Trust Companies," not to companies that do not provide trust services. *Id.* at 6–7.

In the agency's own words: "The mission of the Board of Financial Institutions is to protect the citizens of South Carolina by preserving a sound financial industry through effective and efficient regulatory oversight of ***financial institutions*** in order to strengthen consumer confidence, assure reliable access to ***financial services***, and encourage economic growth." Board of Financial Institutions Mission Statement (emphasis added). This mission has nothing to do with helping wards, or the vulnerable, or the incapacitated, but the Board's jurisdictional overreach and the Court of Appeals' opinion endorsing it handicaps the Probate Court's ability to serve those citizens who most desperately need the services that Petitioners and companies like them provide.

Simply put, the Board of Financial Institutions is just that—an agency charged with regulating ***financial institutions***. It has no expertise on matters concerning the health and wellbeing of vulnerable or incapacitated South Carolina citizens, and the Court of Appeals' order giving the agency that authority (and handicapping the Probate Court's ability to address such issues) should be reviewed by this Court and vacated.

CONCLUSION

The General Assembly vested the Bank Board with narrow regulatory authority over companies engaged in "trust business." The Petitioners are not engaged in "trust business." They provide fiduciary services to elderly, disabled, or otherwise compromised individuals of South

Carolina to ensure their physical, emotional, and medical needs are protected, specifically in situations where there is no one else to serve in that role (issues about which the Bank Board has absolutely no expertise or experience).

There is no doubt the General Assembly repeatedly distinguishes between "trusts" and other types of fiduciaries: it lists different non-trustee fiduciaries in Section 34-21-10; it acknowledges that some "fiduciary corporations" are not engaged in "trust business" in Section 34-21-20; and it specifically carves all other types of fiduciaries out of the definition of "trust" elsewhere in state law, such as Section 62-1-201(49). Had the General Assembly wished for the Bank Board to regulate all companies providing fiduciary services, it would have announced that intention by giving the Bank Board authority over all fiduciaries, not just those engaged in "trust business." But it didn't, and the Court of Appeals erred when it construed the phrase "trust business" far beyond its plain meaning to include "all institutional fiduciaries."

For the reasons set forth above, the Petitioners respectfully request the Court grant this petition, vacate the Court of Appeals' decision, and issue an order reinstating the circuit court's straightforward, plain-language construction of the phrase "trust business."

Signature Page Attached

Respectfully submitted,

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