THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From the South Carolina Administrative Law Court

S. Phillip Lenski, Administrative Law Judge

Docket No. 24-ALJ-17-0391-IJ

Appellate Case No. 2025-001745

South Carolina Department of Revenue,

Respondent,

v.

Market Hall, LLC, d/b/a Soda City Market,

Appellant.

REPLY BRIEF OF APPELLANT

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The Department's brief recasts this appeal as a procedural default followed by an ordinary tax-compliance request. It is neither. Market Hall timely appealed a final order enforcing a coercive administrative summons. The issues are legal, were presented to and decided by the Administrative Law Court, and are fit for appellate review.

On the merits, the Department's own framing confirms Market Hall's point: the Second Revised Summons is not directed to a known taxpayer liability, a particular return, a specific suspected violation, or even an identified noncompliant vendor. It is a blanket demand for a market operator's vendor database so the Department may build a "master list" for general future compliance checks. That is not the limited summons enforcement the ALC described.

The Department asks this Court to hold that because the Department administers tax laws, it may compel a private third party to disclose an entire customer/vendor database whenever doing so would be convenient. The summons statutes do not say that. Powell does not say that. Article I, Section 10 does not permit that. The order should be reversed and the Second Revised Summons quashed.

I. This Court Has Jurisdiction Because Market Hall Timely Appealed a Final ALC Order and Rule 29 Cannot Be Transformed Into a Jurisdictional Trap Where the ALC Fully Ruled on the Issues Presented

The Department's threshold argument depends on converting Rule 29, SCALC, into an absolute jurisdictional prerequisite that overrides the statutory right to judicial review under S.C. Code Ann. § 1-23-610. That argument should be rejected for three independent reasons.

First**,** Market Hall appealed from a final ALC order within the statutory time for appeal. Section 1-23-610 supplies the statutory mechanism for judicial review of final ALC decisions. The Department does not dispute that Market Hall filed a notice of appeal from the ALC's final enforcement order. Nor does the Department identify any prejudice caused by the absence of a reconsideration motion. Its position is instead categorical: even where the ALC actually decided the questions presented, and even where the appeal was timely noticed, the Court lacks jurisdiction unless the losing party first asks the same tribunal to reconsider. Nothing in § 1-23-610 imposes that jurisdictional condition. S.C. Code Ann. § 1-23-610.

South Carolina law is clear that "[f]or judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right." S.C. Code Ann. § 1-23-610. Market Hall complied with this statutory mandate.

Second**,** Rule 29 should be read, if possible, in harmony with the statute—not as a rule that nullifies a timely statutory appeal. The Department relies on general authorities holding that appellate deadlines and procedural requirements matter. Market Hall does not dispute that proposition. But similarly in cases involving failure to comply with an appeal deadline, do not answer the question here: whether a party that timely appeals a final ALC order loses appellate review because it did not file a reconsideration motion raising legal issues already ruled upon.

Treating Rule 29 as jurisdictional in that circumstance would elevate a reconsideration mechanism above the statute authorizing review. This Court has consistently held that the Administrative Procedures Act governs appellate review. <u>Books-A-Million, Inc. v. S.C. Dep't of Revenue</u>, 430 S.C. 388, 844 S.E.2d 399 (Ct. App. 2020). The APA provides that review "must be confined to the record" and that the court may reverse or modify if the decision is "in violation of constitutional or statutory provisions," "in excess of the statutory authority of the agency," "affected by other error of law," or other enumerated grounds. S.C. Code Ann. § 1-23-610. None of these grounds requires a preliminary motion for reconsideration as a condition of appellate jurisdiction.

Moreover, this Court recognizes that motions for reconsideration serve primarily an issue-preservation function. Home Med. Sys. v. S.C. Dep't of Revenue, 382 S.C. 556, 677 S.E.2d 582 (2009). In Home Med. Sys. v. S.C. Dep't of Revenue, this Court expressly held that Rule 59(e)-type motions are permitted in ALC proceedings and explained that "there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." *Id.* Critically, however, the Court noted that such motions are "often required for issue preservation purposes"—not as an absolute jurisdictional bar. *Id.*

Third**,** the preservation purpose of reconsideration is not implicated here. A motion for reconsideration serves an important purpose when an issue was not ruled upon, was overlooked, or requires clarification before appellate review. But Market Hall's appellate issues arise from the ALC's express enforcement ruling: the ALC held the Department had statutory authority, that no pending investigation or suspected violation was required, that the information was relevant to a legitimate purpose, that the summons was not overbroad or unduly burdensome, and that Article I, Section 10 did not bar enforcement. Those rulings are the issues on appeal. A party should not be required to file a redundant motion asking the ALC to reconsider issues it already decided as the price of appellate jurisdiction.

This Court has recognized that Rule 29(D) motions are governed by Rule 60(b) standards when addressing reconsideration of final ALC orders. Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). In Mictronics, Inc. v. S.C. Dep't of Revenue, this Court held that "the motion to reopen falls under Rule 29(D), SCRALJD," and applied Rule

60(b)(1) standards to determine whether relief from a final order was appropriate. *Id.* The Court emphasized that no South Carolina case had discussed Rule 60(b)(1) standards as applied to Rule 29(D), suggesting that the reconsideration mechanism is not an absolute prerequisite but rather a vehicle for addressing specific grounds for relief. *Id.*

The Department's approach would also create an asymmetry inconsistent with orderly appellate review. The ALC order compelled Market Hall to produce information within thirty days and threatened contempt for continued noncompliance. Market Hall timely sought review. The Court reinstated the appeal after the initial procedural dispute. The Department's renewed jurisdictional argument, if accepted, would leave a party subject to compelled disclosure of allegedly protected information without appellate review of the legal basis for disclosure. That result is particularly inappropriate where the order authorizes disclosure of information that, once produced, cannot be meaningfully clawed back.

Nor does the Department's non-waiver point resolve the question. Market Hall recognizes that true subject-matter jurisdiction cannot be created by consent. But labeling Rule 29 "jurisdictional" does not make it so in every application. The Court should hold that the timely appeal from the final ALC enforcement order is properly before it and proceed to the merits.

II. The Department's Brief Confirms the Second Revised Summons Is Not Tied to a Particular Tax Liability, Taxpayer, Return, or Suspected Violation

The Department's merits argument is built on breadth. It says it administers sales and use tax laws; vendors at markets may be subject to those laws; therefore, the Department may compel Market Hall to produce vendor applications for an entire period so the Department can compare the list against its records. That reasoning proves too much.

The summons statutes authorize the Department to summon records "relating to" matters the Department has authority to investigate or determine. S.C. Code Ann. §§ 12-4-330, 12-54-

110. The phrase "relating to" cannot be read to eliminate any limiting principle. If the Department's view is accepted, any business that deals with retailers, contractors, customers, tenants, exhibitors, or vendors could be compelled to disclose its entire database because some person in that database might owe taxes or might lack a required license. That is not an investigation; it is data acquisition.

The record confirms the distinction. The Department issued one summons directed to a specific vendor, Bubblelicious/Elevation Catering. Market Hall complied with that targeted summons because it related to a particular identified matter. The dispute concerns the second summons—the broad demand for vendor applications and related information for all vendors during the January through July 2024 period. The Department's own witness and counsel described the purpose as building a "master list" for general compliance checks at large festivals and markets. That may be administratively convenient, but convenience is not the same thing as a summons tied to a particular matter the Department is authorized to investigate or determine.

<u>Powell</u> requires more than the assertion of a generalized agency mission. The government must show that "the investigation will be conducted pursuant to a legitimate purpose," that the "inquiry may be relevant to the purpose," that the information is not already in the agency's possession, and that required administrative steps have been followed. <u>United States v. Powell</u>, 379 U.S. 48 (1964).

The Department attempts to satisfy <u>Powell</u> by defining the "purpose" at the highest level of generality: tax compliance. But if "tax compliance" alone is enough, the legitimate-purpose and relevance requirements collapse into the Department's general statutory mission. <u>Powell</u> does not require probable cause. Market Hall has never argued otherwise. But the absence of a probable-cause requirement does not mean there is no nexus requirement. <u>Powell</u> preserves an adversary hearing and permits a summoned party to challenge the summons on appropriate grounds, including abuse of process or lack of good faith.

South Carolina courts apply the Powell framework when reviewing administrative summonses. Richland Cty. v. S.C. Dep't of Revenue, 422 S.C. 292, 811 S.E.2d 758 (2018), S.C. Dep't of Revenue & Raymond Alford v. Torrencewood Soc. Club, 399 S.C. 267, 731 S.E.2d 330 (Ct. App. 2012). The Department's broad statutory authority does not immunize summonses from judicial review for good faith, relevance, and legitimate purpose. In Richland Cty. v. S.C. Dep't of Revenue, the South Carolina Supreme Court emphasized that the Department's actions must be "squarely within DOR's statutory duties" and that an agency's exercise of discretion is subject to review to ensure it is not exercised "arbitrarily, capriciously, or in a wantonly injurious manner." *Id.*

The ALC erred by treating the absence of a suspected violation as legally irrelevant. The absence of a known violation may not always defeat a summons. But here, it matters because the Department identified no limiting investigation at all. It did not identify a taxpayer whose liability was being determined; a return whose correctness was being checked; a vendor suspected of noncompliance; a transaction under review; or a defined audit. It identified only a desire to build a master list. The Court should not equate a list-building project with a summons enforcement investigation.

The Department invokes the language of routine compliance, but the record shows this summons is not routine in the legally relevant sense. The Department testified that most promoters provide information voluntarily and that refusals are rare. Voluntary cooperation by others does not define the scope of compulsory power. The question before this Court is not whether the Department may ask for vendor lists. It is whether, after a private party objects, the

State may invoke judicial process to compel disclosure of the entire vendor application database without identifying a particular investigative matter. The answer should be no.

This Court's standard of review reinforces the need for reversal. Under the Administrative Procedures Act, the Court may reverse where the ALC's decision is "in violation of constitutional or statutory provisions," "in excess of the statutory authority of the agency," or "affected by other error of law." S.C. Code Ann. § 1-23-610. Legal questions, including statutory interpretation and constitutional claims, are reviewed de novo. Davis v. S.C. Dep't of Corr., 444 S.C. 138, 906 S.E.2d 569 (2024), Mitul Enters., L.P. v. Beaufort Cty. Assessor, 410 S.C. 430, 764 S.E.2d 720 (Ct. App. 2014). As this Court held in Davis v. S.C. Dep't of Corr., "[d]etermining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Id.*

The Court may not substitute its judgment for the ALC's as to weight of evidence on factual questions, but it may "reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." Torrence v. S.C. Dep't of Corr., 433 S.C. 633, 861 S.E.2d 36 (Ct. App. 2021). Here, the legal errors are dispositive: the Department exceeded its statutory authority, failed the Powell good-faith test, and violated Article I, Section 10.

III. The Department's "Routine Compliance" Rationale Does Not Satisfy Powell, the Summons Statutes, or Article I, Section 10

The Department argues that vendor information is not sensitive because vendors often publicize business names, websites, or contact information. That argument misstates both the summons and the privacy interest. The Second Revised Summons is not limited to information already made public by vendors. It seeks vendor application records and related data held by

Market Hall, including owner names, vendor names, email addresses, phone numbers, production addresses, website links, vendor categories, South Carolina retail license numbers, and frequency of participation. The Department's argument treats each field in isolation and then characterizes the whole database as non-sensitive. But the compelled production of an organized vendor file is different from observing publicly displayed vendor booths or reviewing publicly available websites. The State is compelling a private market operator to turn over a curated database of vendor relationships and operational information.

That difference matters under Article I, Section 10. South Carolina's Constitution expressly protects against unreasonable invasions of privacy. The ALC reasoned, and the Department repeats, that because the General Assembly authorized tax summonses, a properly issued summons is not an unreasonable invasion of privacy. But that begs the question. Market Hall's argument is that this summons was not properly issued and enforced because it is overbroad, untethered to a specific investigative matter, and not narrowly tailored to the Department's stated purpose. Legislative authorization to issue summonses does not immunize every summons from constitutional review.

The constitutional inquiry requires balancing the State's interest against the individual's privacy right. South Carolina courts recognize that Article I, Section 10 protects against unreasonable invasions of privacy, not all privacy intrusions. The question is whether the particular intrusion is reasonable given the governmental interest and the means employed. Here, the Department seeks a comprehensive vendor database without identifying a specific tax deficiency, return discrepancy, or noncompliant vendor. The breadth of the demand, combined with the absence of a particularized justification, renders the invasion unreasonable.

The Department also contends that Market Hall cannot argue both that some information is publicly available and that the compiled application information is private or proprietary. There is no inconsistency. A business can acknowledge that some vendor information may be found through public sources while also objecting to compelled production of its complete internal vendor application records. The constitutional and statutory concern is not that the Department may learn a vendor's public-facing name. The concern is compelled disclosure of a private compilation held by a third party, without the Department first tying the demand to a concrete investigative matter or tailoring it to information not otherwise available.

The Department's brief likewise minimizes overbreadth by saying it would accept a spreadsheet. But the form of production does not cure the breadth of the demand. A demand for an entire database is not narrowed because the government is willing to receive it in spreadsheet form. The relevant question is what information is compelled and why—not whether export is technically easy.

Nor does Powell allow the Department to avoid tailoring. Powell's relevance requirement is broad, but it is not meaningless. Relevance must be measured against an identified legitimate purpose. Here, the Department's purpose is not to investigate a particular matter but to create a master list for future checks. Under that formulation, every vendor application is deemed relevant because every vendor could theoretically be checked. That is precisely the problem. A relevance standard that reaches every person in a category because the agency regulates some activity within that category is no limiting standard at all.

The Department's reliance on general federal statements about administrative investigatory power, including language from Morton Salt, does not require affirmance. United States v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357 (1950). Administrative agencies may investigate, and they need not wait until they can prove a violation. But they still must act within statutory bounds and may not use court enforcement to conduct an unreasonable or overbroad search. Powell itself preserves judicial review to prevent abuse of the court's process. This Court should apply that safeguard here. United States v. Powell, 379 U.S. 48, 85 S. Ct. 248 (1964)

South Carolina courts defer to an agency's interpretation of statutes entrusted to its administration, unless it is 'arbitrary, capricious, or manifestly contrary to the statute. Torrence v. S.C. Dep't of Corr., 433 S.C. 633, 861 S.E.2d 36 (Ct. App. 2021). The Department's interpretation—that "relating to any matters which the department has authority to investigate or determine" authorizes blanket demands for third-party databases whenever the agency administers a regulatory regime—is not entitled to deference because it eliminates the statutory limitation entirely. This Court reviews statutory interpretation de novo and must reject agency constructions that conflict with plain statutory language or legislative intent. Davis v. S.C. Dep't of Corr., 444 S.C. 138, 906 S.E.2d 569 (2024), Mitul Enters., L.P. v. Beaufort Cty. Assessor, 410 S.C. 430, 764 S.E.2d 720 (Ct. App. 2014).

IV. The Department's Burden Argument Misses the Constitutional and Statutory Objection

The Department repeatedly emphasizes that Market Hall could produce the information easily. The ALC likewise relied on testimony that the information was stored in Google Docs and could be sent with a few clicks. But ease of production is not the same as lawfulness of compulsion. Market Hall's principal objection is not that exporting records is physically difficult. It is that the State may not compel the production of a private vendor database through an overbroad summons lacking the required nexus to a specific matter the Department is investigating or determining.

A subpoena or summons can be easy to comply with and still be unlawful. The Department's burden argument therefore answers an argument Market Hall is not making. The "amazingly easy" testimony also should be read in context. Market Hall acknowledged the mechanics of sending information; it did not concede the Department had the right to compel it. Indeed, the point of the testimony was the opposite: Market Hall refused to surrender proprietary information merely because a government agency demanded it, while complying with the separate summons tied to an identified vendor matter. That distinction reinforces Market Hall's good faith. Market Hall is not resisting tax enforcement generally. It is resisting a blanket demand untethered to a specific investigation.

The Department also suggests Market Hall's objection would impair tax administration. It would not. The Department remains free to conduct on-site compliance checks, ask vendors directly for license information, use public records, request information voluntarily, and issue targeted summonses when connected to a particular investigative matter. Market Hall's position does not disable enforcement. It preserves the line between targeted investigation and compelled disclosure of a third party's complete vendor database for general list-building.

This distinction is critical under both Powell and South Carolina law. The summons statutes grant the Department authority to investigate specific matters, not to conduct roving data-acquisition projects. S.C. Code Ann. § 12-4-330 authorizes the Department to "summon witnesses to appear and give testimony and to produce records, books, papers, and documents relating to any matters which the department has authority to investigate or determine." S.C. Code Ann. § 12-4-330. The statute contemplates a defined matter under investigation or determination, not a generalized compliance sweep.

Similarly, S.C. Code Ann. § 12-54-110 permits the Department to summon persons required to make returns, persons who deliver erroneous returns, persons who refuse to allow examination of books and records, or "another person it considers proper." S.C. Code Ann. § 12-54-110. But the "another person it considers proper" provision must be read in context with the preceding categories and the overall statutory scheme. The statute does not grant unlimited authority to summon any third party for any information that might someday prove useful in a hypothetical future investigation.

V. The Stay Issue Does Not Save the Order; At Minimum, It Reinforces That Enforcement Should Not Proceed While Appellate Review Is Pending

The Department argues it did not waive jurisdictional arguments by consenting to a stay. Market Hall's core request for reversal does not depend on waiver. The Court can and should reverse because the Second Revised Summons exceeds the permissible scope of compulsory summons enforcement.

That said, the procedural history remains relevant to the equities and practical posture of the appeal. The Department consented to staying enforcement while appellate review proceeded. That position recognized the practical reality that compelled disclosure would largely moot Market Hall's challenge. Once the vendor database is produced, the privacy and proprietary interests at stake cannot be fully restored. The Department's stay position therefore supports, at minimum, deciding the merits rather than dismissing on a redundant procedural step.

The Department's judicial-estoppel response also misses the point. Market Hall does not ask this Court to hold that consenting to a stay permanently bars the Department from defending the ALC order. Market Hall asks the Court to recognize that the Department's own conduct confirms this is the kind of enforcement order that should receive appellate review before compelled disclosure occurs.

Under S.C. Code Ann. § 1-23-610(A)(2), "[e]xcept as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision. Upon motion, the administrative law judge may grant, or the court of appeals may order, a stay upon appropriate terms." S.C. Code Ann. § 1-23-610. The statute contemplates that stays may be appropriate to preserve appellate rights and prevent irreparable harm pending review. The Department's consent to the stay acknowledges that appellate review should proceed without mooting the dispute through compelled production.

CONCLUSION

The Department's reply to Market Hall's appeal confirms the central defect in the ALC's order: the Second Revised Summons is a blanket demand for Market Hall's vendor application database so the Department can build a master list for general compliance checks. The Department identified no specific taxpayer liability, no particular return, no suspected violation, and no defined investigative matter requiring wholesale production of Market Hall's private vendor records.

Market Hall timely appealed the final enforcement order. The issues are legal, were decided by the ALC, and are properly before this Court. On the merits, the order should be reversed because the summons exceeds the Department's statutory authority, fails the good-faith and relevance limitations recognized in Powell, and constitutes an unreasonable invasion of privacy under Article I, Section 10 of the South Carolina Constitution.

For these reasons, Appellant Market Hall, LLC d/b/a Soda City Market respectfully requests that this Court reverse the Administrative Law Court's Order Enforcing Summons and quash the Department's Second Revised Summons.

Respectfully submitted,

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