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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Samuel L. Johnson, Administrative Law Judge

Appellate Case No. 2026-000947

South Carolina Department of Insurance, Respondent,

v.

Joyce Freeman, Appellant.

REPLY BRIEF OF APPELLANT

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Appellant Joyce Freeman respectfully submits this reply in support of her appeal from the Administrative Law Court in this case.

I. The Department Misconstrues the Purpose and Operation of the Payment Agreements Described in S.C. Code Ann. § 38-53-170(e).

Underlying the Department's brief is a fundamental misreading of S.C. Code Ann. § 38-53-170(e) and an essential misunderstanding of Appellant's argument. The Department reads Appellant's formulation of the statute to mean that, if Appellant's interpretation is right, the only thing that the Legislature would have accomplished in its 2023 amendments to § 38-53-170(e) is to raise the minimum fee for a bond from $25 to $100. *See* Resp't Br. at 11. This is wrong.

Appellant agrees, of course, that the Legislature's amendments to § 38-53-170(e) raised the minimum premium for a bond from $25 to $100 or ten percent of the bond, whichever is greater. Appellant further agrees that the Legislature's primary purpose in raising the minimum premium for a bond was "to deter offenders from committing additional crimes while out on bond," Resp't Br. at 16, or from otherwise violating the conditions of their bond. Where the parties depart is in their interpretation of how the Legislature chose to accomplish this goal.

In Appellant's view, the statute contains two methods for ensuring that criminal defendants meet this new, increased minimum premium payment obligation—the first is contained in the first paragraph of § 38-53-170(e), and it provides simply that the minimum premium must be "charged and collected by the bondsman before the execution of the bond." That is the base requirement and operation of the statute, and for many criminal defendants, that is the end of the transaction. Where the bond amount is such that the defendant is able to pay 10% of the face amount of the bond immediately, or where the bondsman does not wish to enter into a payment agreement with the defendant for whatever reason,[1] the defendant is obligated to pay the entire minimum premium up front before the execution of the bond.

The second paragraph of § 38-53-170(e) does not change the amount that a defendant must pay as a minimum premium in order to obtain a bond. This is evident by the fact that the second paragraph does not contain a different premium amount applicable to the payment agreement—it rather provides that the defendant must "make a minimum down payment of one hundred dollars" in order to obtain a payment agreement, the clear import of this requirement being that the defendant must make a minimum down payment of one hundred dollars on the 10% of the face amount of the bond that he owes. *See down payment*, BLACK'S LAW DICTIONARY at 1361 (12th ed. 2024) ("The portion of a purchase price paid in cash (or its equivalent) at the time the sale agreement is executed."). That is, the term "down payment" implies that there is some additional amount to be paid under the agreement, and absent some different amount called for in the second paragraph of § 38-53-170(e), the only amount that this language can possibly refer to is the 10% of the face amount of the bond required as a minimum fee in the preceding paragraph. *See Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) ("In construing statutory language, the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect.") (citing *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998)). Otherwise, the Legislature would have included a different minimum premium amount applicable to the payment agreements described in the second paragraph.

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[1] The statute provides that the bondsman "*is permitted* to enter into a payment agreement," not that she must. § 38-53-170(e) (emphasis added). Thus, the statute provides a measure of discretion on the part of the bondsman whether she wishes to enter into a payment agreement with the defendant, which discretion adds an important hurdle to obtaining a payment agreement in the first instance.

Reading these two paragraphs together as the Court must, the second paragraph of § 38-53-170(e) thus embodies the second method by which the defendant can satisfy his obligation to pay 10% of the face amount of the bond—he may enter into a payment agreement with the bondsman to pay the balance over a period of time not to exceed eighteen months. But before he is given the privilege of this extended payment agreement, he must meet a number of important criteria. First, the bondsman must determine that she wishes to enter into a payment agreement with the defendant. This is an important threshold because, much like a banker evaluating the creditworthiness of a potential debtor, the bondsman must decide whether this defendant is likely to uphold the terms of the payment agreement, or whether she will have to go through the time and expense of sending runners after the defendant should he default on the agreement, not to mention the financial exposure to herself if the defendant violates the terms of his bond. Second, he must pay $100 as a down payment—an act meant to signify that the defendant has both the means and the inclination to pay what he owes.[2] Third, he must affirmatively agree to pay the balance of the 10% minimum premium upon terms that "may not be altered" and must be memorialized in a statement of bondsman that is then attached to the bond proceeding form, thus becoming part of the record in the defendant's criminal case. Only when he meets these criteria is the defendant afforded the opportunity to pay what he owes over time rather than all at once before his bond is executed.

But that is not the end of the transaction. Signifying the seriousness with which the Legislature imposed its increased minimum payment requirement, the second paragraph of § 38-

[2] Included as a related term in the definition of "down payment" is the term "earnest money," which is defined as "[a] deposit paid (often in escrow) by a prospective buyer . . . to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults." *See earnest money*, BLACK'S LAW DICTIONARY at 641 (12th ed. 2024).

53-170(e) provides harsh consequences if the defendant fails in his obligations under the payment agreement:

> If the payment has not been made for two consecutive months, the bondsman must send a certified notice to the last known address of the principal and indemnitor demanding payment be made within ten days to bring the agreement current. If no payment is received by the end of the notice period, the bondsman must surrender the principal to the proper detention facility for holding and file a motion to be relieved as provided in Section 38-53-50(A) or (B), at which time the agreement must be accelerated, and the balance paid in full, before or at the motion hearing for the principal to be rereleased on bond.

This statutory language is very nearly absent from the Department's discussion of the operation of the payment agreement provision, and it changes the character of it entirely. Not only does the statute require the defendant to pay the full amount of the 10% minimum premium—it provides that if he fails to do so, he goes to jail. And not only that, but he is required to remain in jail until the full amount of the accelerated balance is paid. If the Legislature's purpose in increasing the minimum payment for a bond was to deter criminal defendants from re-offending (Appellant agrees that it was), what better way to accomplish that goal than providing for the swift incarceration of defendants who fail to meet that payment obligation? The penalty for violating the payment agreement is itself a stronger deterrent to criminality than the increased premium payment the Legislature required by its amendments.

Thus, the Department's argument that Appellant's reading of the statute would defeat the Legislature's purpose in increasing the minimum premium payment for a bond is a red herring. At no point has Appellant argued that the Legislature merely increased the minimum payment for a bond from \$25 to \$100. And at no point has Appellant argued that the 10% minimum payment does not have to be collected from the defendant as a condition of the bond. Appellant rather argues that the payment agreement provisions of § 38-53-170(e) merely give the defendant *more time* to meet this obligation, together with a decisive method for ensuring his compliance should he fail in that obligation. The Department's argument that Appellant's formulation of the statute would mean that "the statutory minimum fee would not be a precondition to the execution of the bond" is simply incorrect—it most certainly is, and the defendant must agree to pay that amount by way of an executed payment agreement—which agreement is attached to his bond proceeding form—under pain of swift imprisonment should he fail to do so.

Appellant will reiterate here that it would make no sense for the Legislature to include the penalty of imprisonment for violating the payment agreement provisions of § 38-53-170(e) if its intention were not to put some teeth on its new requirement that a defendant pay a minimum of 10% of the face amount of the bond. If it were true as the Department argues that the payment agreements envisioned by the statute apply only to the additional 5% that a bondsman may charge as a premium—that is, the delta between the 10% minimum and the 15% maximum allowed by the statute—that would mean that a bondsman could elect of his own accord to charge the defendant more for a bond than he is required to charge, and then have that obligation secured by the body of the defendant himself. To borrow from an earlier analogy, the bankers of the world would lust at the opportunity to have their loans secured by human flesh, but this State has long forbidden this method of collecting private debts. *See* S.C. Const. art. I § 19 ("No person shall be imprisoned for debt except in cases of fraud.").[3]

The Department's argument that the State has sufficient interest in ensuring that bondsmen get their additional 5% premium to guarantee that obligation by imprisonment of the debtor does not follow from the language of the statute. If the Legislature truly intended to imprison people for failing to pay this additional portion of the bond premium, it would have made the minimum

[3] This right is enshrined within the Declaration of Rights in Article I of our Constitution, situated between the guarantee of habeas corpus (art. I § 18) and the right to keep and bear arms (art. I § 20).

premium for the bond 15% instead of 10%. Otherwise, criminal defendants who had otherwise been released on bond would be jailed not because they have broken any law, but because the bondsman elected in his own discretion to charge them a higher fee for the bond, which elective portion of the fee they failed to pay. It would do nothing—as the Department put it—to stop the "revolving door" of criminals reoffending while out on bond.

Rather, the only thing the Department's interpretation would accomplish is to keep more impoverished people in jail. As the Attorney General aptly found, the Legislature's manifest purpose in enacting the payment agreement provisions of § 38-53-170(e) was to "balanc[e] its desire to increase and standardize premiums with defendants' ability to pay those premiums and ensur[e] compliance with defendants' constitutional rights." *The Honorable B. Lee Miller*, Op. S.C. Att'y Gen., 2024 WL 3186557, at *3 (July 17, 2024). The Department's interpretation defeats that purpose by making a criminal defendant's eligibility for a bond—one that he has already been granted—dependent solely upon his ability to immediately pay ten percent of the face amount of that bond. Rather than deterring criminals from reoffending, the Department's interpretation would have the effect only of keeping in jail those defendants who lack sufficient resources to meet this obligation upon demand. And it would unnecessarily place this statute in conflict with the right to bail guaranteed by the South Carolina Constitution, which outcome this Court must avoid if possible. *See* S.C. Const. art. I § 15 (guaranteeing the right to bail and ensuring that "[e]xcessive bail shall not be required, nor shall excessive fines be imposed."); *see also City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) ("In determining whether a statute complies with the South Carolina Constitution, the Court will, if possible, construe the statute so as to render it valid.") (quoting *Moseley v. Welch*, 209 S.C. 19, 26–27, 39 S.E.2d 133, 137 (1946)). Respectfully, the Department's unconstitutional interpretation cannot have been what the

Legislature intended, and the Court should reject the Department's position on the operation of the payment agreements provided for in § 38-53-170(e).

II. The Department Misconstrues the Language of S.C. Code Ann. § 38-53-170(e), and in Particular the Meaning and Effect of the Word "However."

Appellant, obviously, agrees with the Department that the first paragraph of § 38-53-170(e) requires that the minimum premium amount of $100 or 10% of the bond must be "charged and collected by the bondsman prior to the execution of the bond," and Appellant has never disputed that this requirement must be adhered to in the absence of a payment agreement between the bondsman and the criminal defendant. Appellant's argument is rather that the word "however" followed by a comma in the paragraph immediately following this requirement evidences a plain intention on the part of the Legislature to create an exception to the requirement that the full amount of the minimum premium must be collected prior to the execution of the bond. The word "however" in this context cannot logically mean anything else.

The Department does not appear to dispute—and the ALC agreed—that when the word "however" is used the way it is in § 38-53-170(e), it means "but" or "in spite of that" or "on the other hand." *See However*, def. 2, Merriam-Webster's Dictionary (online edition 2026; *available at* https://www.merriam-webster.com/dictionary/however) ("in spite of that : on the other hand"); *see id* (providing as an example in usage: "would like to go; *however*, I think I'd better not"); *see* **R. pp. ___** (Amended Summary Judgment Order at 13) ("The Court concludes that the term "However" as used at the beginning of the second paragraph of Section 38-53-170(e) means 'in spite of that,' which is how [Freeman] also defines the use of the word in this case."). Thus, there can be no reasonable question that the Legislature's use of the word "however" in the second paragraph of § 38-53-170(e) was meant to create an exception to *something* in the first paragraph. Given that the thing being described in the second paragraph of the statute is a mechanism to pay some amount of money over a period of time not to exceed 18 months, the only reasonable reading of § 38-53-170(e) is that the word "however" was meant to create an exception to the requirement that the full minimum premium be collected "prior to the execution of the bond." That is the only requirement for payment contained in the first paragraph of § 38-53-170(e) that must be completed at a particular time, and thus the only thing that could possibly be modified by an agreement to remit payment to the bondsman over a period of 18 months. Put another way, if the payment agreement is itself an exception to something in the first paragraph of the statute, the only thing it could logically be an exception to is the temporal requirement that the full amount of the premium be collected prior to the execution of the bond.

The Department bends over backwards to argue that the word "however" means something else in the context of § 38-53-170(e). It specifically references the ALC's determination that the word "however" in the context of § 38-53-170(e) means "despite the language in the preceding paragraph that could be read to suggest otherwise—collection of the entire bond premium before bond execution is not required where the entire premium exceeds the minimum" and "despite the preceding paragraph's prohibition on a bondsman accepting 'anything of value' from the bond's principal after execution of the bond, the collection of additional premium (in excess of the statutory minimum) is permissible—if such collection occurs pursuant to a payment agreement meeting the requirements of the statute." Resp't Br. at 9 (quoting Am. Summ. Judg. Order at 14).

The problem with this formulation is that nothing in the first paragraph of § 38-53-170(e) prohibits the bondsman from "accepting anything of value from the bond's principal after execution of the bond"—it rather prohibits the bondsman from "accept[ing] anything of value from the principal *except the premium*." § 38-53-170(e) (emphasis added). That is the core "unlawful act" that this statute has always prohibited, even in prior versions of the statute. *See* **R. pp. ___**, (S.C. Code Ann. § 38-53-170 (enacted by 1998 Act No. 425, § 2)).[4] The only thing that is required to be obtained from the defendant *prior to* the execution of the bond in the first paragraph of § 38-53-170(e) is the minimum premium, which is "one hundred dollars or ten percent of the bond, whichever is greater." *Id.* This is evident from reading the first sentence of § 38-53-170(e) as a whole:

> No bondsman or runner may: . . . .
>
> (e) accept anything of value from a principal except the premium, which may not exceed fifteen percent of the face amount of the bond, with a minimum fee of one hundred dollars or ten percent of the bond, whichever is greater, that must be charged and collected by the bondsman before the execution of the bond.

Id. The phrase "whichever is greater" is set off by commas and modifies the language immediately preceding it in order to clarify that the minimum premium is the greater of $100 or 10% of the bond. When this phrase is removed from this sentence, it reads: "accept anything of value from a principal except the premium, which may not exceed fifteen percent of the face amount of the bond, with a minimum fee of one hundred dollars or ten percent of the bond that must be charged and collected by the bondsman before the execution of the bond." Thus, the only thing that must be "charged and collected by the bondsman before the execution of the bond" is "a minimum fee of one hundred dollars or ten percent of the bond." Nothing in the first paragraph of § 38-53-170(e) suggests that anything other than this minimum premium amount must be charged and collected

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[4] Indeed, the prior version of this statute employed the word "however" followed by a comma to note that a bondsman, while he is not permitted to accept anything of value from the principal except the premium, may accept collateral security from the principal to secure the bond. *See id.* Thus, the word "however" in the prior version of the statute operated as an exception to the requirements of the first sentence of § 38-53-170(e), just as it does in the current version of the statute. In the current version, the word "however" is followed both by the new payment agreement provisions as well as the provisions about accepting collateral security from the principal, indicating that both are intended to modify the requirements contained in the first sentence of § 38-53-170(e) prohibiting the bondsman from accepting anything of value except the premium, and requiring the bondsman to collect the minimum premium prior to the execution of the bond.

prior to the execution of the bond. Thus, there is nothing for the payment agreement provisions in the second paragraph of § 38-53-170(e) to modify except the requirement that the minimum fee be collected prior to the execution of the bond. The ALC's finding to the contrary is belied by the plain language of the statute itself.

Fallacious, too, is the Department's argument that, if the Legislature intended for the payment agreements to operate as an exception to the prior-collection requirement, it would have used the word "except." Respectfully, the English language is diverse and offers an author many options of words to say what he means. Here, the Legislature used the word "however," which in the context of this statute—where it begins a new paragraph and is followed by a comma—means the same thing as "except." *See However*, def. 2, <u>Merriam-Webster's Dictionary</u>; *see also The Honorable B. Lee Miller*, 2024 WL 3186557, at *2 ("But, the Legislature appears to have modified this [prior collection] requirement by also including the language allowing a bondsman to enter into a payment agreement with the principal starting with the use of the term 'However"—a term of contradiction."). And the prior version of this statute used the word "however" in precisely the same manner—to create an exception to the language immediately preceding it. *See* **R. pp. ___**, (S.C. Code Ann. § 38-53-170 (enacted by 1998 Act No. 425, § 2)). The Department's attempt to restrict the Legislature to but one word in all of English to say what it means falls flat.[5]

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[5] Contrary to the Department's arguments, other portions of Chapter 53 of Title 38 use the word "however" in the same manner that it is used in § 38-53-170(e)—as an exception to the language preceding it. *See, e.g.*, S.C. Code Ann. § 38-53-102 ("Notwithstanding any other provision of law, the department must suspend for a period of five years the license of a bail bondsman, his associates, affiliates, or runners who refer defendants to attorneys. *However*, nothing contained in this section shall be construed to prohibit a bail bondsman, his associates, affiliates, or runners from indicating to a defendant that he should contact an attorney for professional assistance, as long as the bail bondsman, his associates, affiliates, or runners do not mention or in any other manner suggest or indicate a particular attorney or law firm by name.") (emphasis added).

Ultimately, Appellant submits that this is a case where the simplest answer is the correct one. If the Legislature truly intended to have this detailed and comprehensive payment agreement procedure apply only to a residual and optional amount of the bond premium, it would have explicitly said that because that would otherwise be an illogical and non-obvious way for the Legislature to structure the bond premium transaction. *See The Honorable B. Lee Miller*, 2024 WL 3186557, at *2 ("[W]e are at a loss as to why the Legislature would find it necessary to give permission for a payment agreement for an amount that the bondsman is not required to charge in the first place."). By not specifically saying in the second paragraph of § 38-53-170(e) what the payment agreements apply to, the Legislature implores us to read the statute in the most obvious, commonsense way that we can. *See S.C. Dep't of Consumer Affs. v. Cash Ctr. of S.C., LLC*, 435 S.C. 192, 202, 865 S.E.2d 789, 794 (Ct. App. 2021) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.") (quoting *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013)). And the most obvious reading of § 38-53-170(e) is that the payment agreements apply to and modify the requirement that the minimum premium amount be collected prior to the execution of the bond. The Court should reject the Department's and the ALC's interpretations because they are contradicted by the plain language of the statute.

Appellant notes finally that the Attorney General—who is statutorily obligated to provide opinions on South Carolina law to state officers upon request[6]—conducted a thorough review of this statute, taking into account both its plain language and legislative history, and determined to read the statute in precisely the same way that Appellant reads it now. The Department suggests that the Court simply disregard this well-reasoned opinion because "the Attorney General did not

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[6] *See* S.C. Code Ann. § 1-7-110.

wrestle with the statutory mandatory minimum fee requirement in paragraph 1 of section 38-53-170(e).” Resp’t Br. at 16. In fact, “wrestling” with this requirement was the entire point of the Attorney General’s opinion—he had received an inquiry from a Municipal Judge in Greenwood who read the statute the same way that Appellant does, but the Greenwood Clerk of Court read it the way that the Department does, and the judge asked the Attorney General to resolve the dispute. *See The Honorable B. Lee Miller*, 2024 WL 3186557, at *1. Resolve it the Attorney General did and, while he later—upon specific request from the Department—elected to defer to the Department’s reading of § 38-53-170, he was careful to note that “[o]ur interpretation of Section 38-53-170(e) remains unchanged.” *See* **R. pp. ___** (*Gwendolyn McGriff, Esquire*, Op. S.C. Att’y Gen. (July 31, 2025)). That ought to have been a sign to the Department that it had gone astray in its interpretation of this statute.

Appellant acknowledges that the Attorney General’s opinion is unquestionably not binding on this Court. Yet, it is quite persuasive in its careful and thoughtful dissection of this statute, and it is even more persuasive when one considers that—unlike the Department, which does not regularly participate in criminal bond proceedings—the Attorney General’s Office might be presumed to know a thing or two about how bail bond transactions work. *See The Honorable B. Lee Miller*, 2024 WL 3186557, at *2 (observing that reading the statute the way the Department reads it now “could lead to an absurd result”) (citing *Lancaster Cnty. Bar Ass’n v. S.C. Comm’n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008)). Appellant has thus offered the Attorney General’s opinion for the Court’s consideration to the extent the Court finds it helpful in resolving the precise same question now before it, and the Court should decline the Department’s invitation to simply disregard it as the Department did in its briefing.

III. The Department's Interpretation Is Not Entitled to Any Deference; Rather, S.C. Code Ann. § 38-53-170(e) Must Be Strictly Construed in Appellant's Favor.

The Department persists in arguing that it is entitled to some form of deference to its interpretation of S.C. Code Ann. § 38-53-170(e), though what level of deference it seeks is not clear from its briefing. The Department acknowledges the overruling of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) on the federal level by *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and further acknowledges this Court's recognition of that fundamental shift in administrative law in *Colonial Pipeline Co. v. S.C. Department of Revenue*, where the Court observed that it was "cognizant" of this ruling and resolved the question before it "mindful" of those principles. 443 S.C. 448, 458–59, 905 S.E.2d 129, 134–35 (Ct. App. 2024). Accordingly, the Department on page 18 of its brief appears to seek deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), which pre-*Chevron* level of deference is discussed both in *Loper Bright* and *Colonial Pipeline*. *See id.*; *Loper Bright*, 603 U.S. at 388.

But whatever level of deference the Department seeks in this case is irrelevant because, as Appellant observed in her initial brief, S.C. Code Ann. § 38-53-170(e) is a penal statute that must be strictly construed in Appellant's favor. *See S.C. Dep't of Revenue v. Collins Ent. Corp.*, 340 S.C. 77, 79, 530 S.E.2d 635, 636 (2000) (providing that penal laws "are to be expounded strictly against the offender and liberally in his favor") (quoting *State ex rel. Moody v. Stem*, 213 S.C. 465, 50 S.E.2d 175, 176 (1948)). Any deference that might otherwise be afforded to an agency's interpretation of a statute it administers is overridden by the rule of lenity when a statute is penal in nature. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S.Ct. 789, 790 (2020) (Gorsuch, J.) (respecting denial of certiorari and noting that "the law before us carries the possibility of criminal sanctions" and "whatever else one thinks about *Chevron*, it has no role to play when liberty is at stake"); *United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."). Thus, the Court need not grapple with what level or kind of administrative deference is appropriate in this case because none is appropriate.

The Department argues, without elaboration, that "section 38-53-170(e) is not a penal statute." Resp't Br. at 19. It most certainly is. Section 38-53-170 is entitled "Unlawful acts" and S.C. Code Ann. § 38-53-340 provides in turn that "[a] person violating any of the provisions of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for not more than thirty days, or both." And, while Appellant was not arrested or charged with a crime in connection with these proceedings, she was fined by the Department and threatened with the revocation of her license, which are themselves punishments levied by the State for the purported violation of this statute. *See* **R. pp. __** (August 18, 2025 Administrative Order Imposing Fine). Black's Law Dictionary defines "penal" as "[o]f, relating to, or being a penalty or punishment, esp. for a crime" and references two treatises to help explain the concept:

> The general rule is that penal statutes are to be construed strictly. By the word "penal" in this connection is meant not only such statutes as in terms impose a fine, or corporal punishment, or forfeiture as a consequence of violating laws, but also all acts which impose by way of punishment damages beyond compensation for the benefit of the injured party, or which impose any special burden, or take away or impair any privilege or right. Willaim M. Lile et al., *Brief Making and the Use of Law Books* 344 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914).
>
> The word *penal* connotes some form of punishment imposed on an individual by the authority of the state. Where the primary purpose of a statute is expressly enforceable by fine, imprisonment, or similar punishment the statute is always construed as penal. 3 Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 59.01, at 1 (4th ed. 1986).

See penal, BLACK'S LAW DICTIONARY at 1361 (12th ed. 2024). Because the violation of § 38-53-170(e) carries with it fines and incarceration, and because Appellant was in fact fined by the

Department pursuant to this statute, there can be no question that the statute is penal in nature. And even if Appellant had not been fined in this case, the outcome would be the same because "it is immaterial, for the purpose of the application of the rule of strict construction whether the proceedings for the enforcement of the penal law, be criminal or civil." *Collins*, 340 S.C. at 79, 530 S.E.2d at 636 (quoting *Moody*, 213 S.C. at 50 S.E.2d 176); *Rorrer v. P.J. Club, Inc.*, 347 S.C. 560, 566, 556 S.E.2d 726, 729 (Ct. App. 2001) (same). Any way one construes § 38-53-170, it is a penal statute and no deference may be afforded to the Department's interpretation thereof.

The Department also misconstrues the operation of the rule of lenity. The Department argues that, "as the ALC found, even if ambiguous, the correct interpretation of section 38-53-170(e) can be gleaned by looking at the General Assembly's intent and considering the context of paragraph 2 as following paragraph 1." Resp't Br. at 20. If that were the way the rule of lenity worked, it would have no raison d'être. The very purpose of the rule of lenity is to resolve any ambiguity in the statute in favor of the alleged offender. *See Berry v. State*, 381 S.C. 630, 633, 675 S.E.2d 425, 426 (2009) ("[I]n construing a criminal statute, we are guided by the rule of lenity—the principle that *any ambiguity* must be resolved in favor of the accused." (emphasis added)) (citing *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991)); *State v. Miles*, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017) (explaining that a "court should rely on lenity only if, after seizing every thing from which aid can be derived, *it is left with an ambiguous statute*" (emphasis added; internal alterations and quotations omitted)) (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971)).

Here, the ALC found over and over again that this statute is ambiguous. **R. pp. ___** (Am. Summ. Judg. Order at 11) ("[T]he Court concludes that the use of 'However' in the second paragraph renders the meaning of the subsection as a whole ambiguous."); **R. pp. ___** (*id.* at 21) (finding at the conclusion of its order that § 38-53-170(e) is "certainly ambiguous" and observing that "reasonable and intelligent minds—including those of a municipal judge, the clerk of court in Greenwood, the SCAG's office, and the Department—have disagreed over its meaning"))[7]; **R. p. ___** (Reconsideration Order at 9) (discussing the subsequent legislative history of § 38-53-170(e) and noting that "[s]uch clarification would be warranted given that the current statutory language is ambiguous and has consequently resulted in differing interpretations among state agencies, a municipal judge and his clerk of court, and this Court and Respondent."). Under the rule of lenity, the ambiguity that the ALC repeatedly found should have been resolved in Appellant's favor. Instead, the ALC determined in its original Summary Judgment Order to resolve that ambiguity in favor of the Department, at least in part pursuant to *Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) and like cases espousing this State's doctrine of deference to state agencies. *See* **R. p. ___** (Feb. 13, 2026 Summ. Judg. Order at 17). When presented with the rule of lenity in Appellant's motion for reconsideration, the ALC backtracked and removed its discussion of deference to the Department, *see* **R. p. ___** (Reconsideration Order at 10), but still failed to construe any of the ambiguity that it had found in the statute in Appellant's favor in its Amended Summary Judgment Order. This was error.

The Department asserts once more that the Court should disregard the rule of lenity as it interprets this statute because Appellant raised this rule of construction for the first time in her motion to reconsider. Resp't Br. at 19. Appellant addressed this issue in her initial brief, but to reiterate, the purpose of issue preservation is "to give the trial court a fair opportunity to rule" and

[7] The ALC offered this conclusion as a reason to reduce the amount of the fine imposed on Ms. Freeman, demonstrating that the ALC continued to find § 38-53-170(e) ambiguous even after its interpretation of the statute. *Id.*

to "ensure that both parties are aware of the nature of the objection such that they may present their best arguments addressing *that* objection." *Moses v. State*, 442 S.C. 263, 269, 898 S.E.2d 174, 177 (Ct. App. 2024) (internal quotations omitted) (quoting *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023)). Federal courts view issue preservation in a similar manner: "although it is well settled that an issue presented for the first time in a motion pursuant to Federal Rule of Civil Procedure 59(e) generally is not timely raised, such an issue is subject to appellate review if the district court exercises its discretion to consider the issue on the merits." *Dyson v. Dist. of Columbia*, 710 F.3d 415, 419 (D.C. Cir. 2013) (internal citations and alterations omitted) (quoting *Dist. of Columbia v. Doe*, 611 F.3d 888, 896 (D.C. Cir. 2010)).

Here, while the ALC found that Appellant's invocation of the rule of lenity was untimely, it went on to consider the issue fully—after the Department filed a fulsome response to Appellant's motion on the issue—and went so far as to amend its final order in the case in response to this argument. *See* **R. p. ___** (Reconsideration Order at 10–13).[8] Thus, there is no prejudice to the Department, to the ALC, or to this Court in considering this legal doctrine in its interpretation of § 38-53-170(e) because it was fully briefed, argued, and decided at the trial court, which resolves the harm sought to be avoided by rules of issue preservation. *See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.").

Appellant will reiterate that issue preservation rules are applied "with a practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d

[8] Indeed, the ALC Rules expressly require that "[a] party *must* file a motion for reconsideration prior to filing a notice of appeal," thus signifying that the ALC's determination of this case was not final until it had resolved Appellant's motion to reconsider. *See* Rule 29(D), SCALC.

640, 644 (2011). Further, "an exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances." *State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012). Here, Appellant's challenge to the Department's interpretation of § 38-53-170(e) will have implications far beyond the bounds of this case—rather than resolving one isolated dispute between a bondsman and the Department, the Court's interpretation of this statute will affect how criminal defendants obtain bail bonds throughout this State, because the Department has imposed its interpretation on bail bondsmen statewide. Thus, the Court's ruling will affect many more citizens of South Carolina than just Ms. Freeman, and the Court should have at its disposal all of the tools of statutory construction—including the rule of lenity—when it resolves this important question of statutory interpretation. *See Amazon Servs., LLC v. S.C. Dep't of Revenue*, 442 S.C. 313, 326, 898 S.E.2d 194, 200 (Ct. App. 2024) ("Questions of statutory interpretation are questions of law, which the appellate court is free to decide without any deference to the ALC.") (alterations omitted) (quoting *Rent-A-Ctr. E., Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 587, 824 S.E.2d 217, 219 (Ct. App. 2019)).

Finally, and in the event that the Court determines to afford any deference to the Department's interpretation—Appellant maintains that it should not—Appellant submits that even *Skidmore*-style deference is not appropriate in this case. In *Loper Bright*, the U.S. Supreme Court described the holding in *Skidmore* thus:

> [T]he Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon specialized experience," "constituted a body of experience and informed judgment to which courts and litigants could properly resort for guidance," even on legal questions. "The weight of such judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its

> reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Loper Bright, 603 U.S. at 388 (quoting *Skidmore*) (internal alternations and citations omitted). S.C. Code Ann. § 38-53-20 does commit to the Director of the Department of Insurance the responsibility for administering and enforcing Chapter 53; however, Respondent submits that *Skidmore* deference—which is the mode of agency deference left in place after *Loper Bright*[9]—is not appropriate here because the minimum-premium, payment-agreement structure created by the General Assembly in its 2023 amendments to Chapter 53 is a new framework with which the Department has no considerable or specialized experience or judgment. While the Department has for years regulated bail bondsmen, it is grappling with this new payment-agreement framework alongside everyone else, including the Attorney General[10] and the industry itself. It has no longstanding policy or procedure for regulating these kinds of agreements which might warrant any particular deference, nor any "consistency with earlier and later pronouncements" that might give weight to its interpretation. *Id.* at 388. And, "[o]f course, 'no agency deference is due to agency interpretations at odds with the plain language of the statute itself.'" *Genesis Health Care, Inc. v. Becerra*, 710 F. Supp. 3d 312, 324 (D.S.C. 2023) (quoting *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 267 (2005)); *see also CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) ("[W]e will reject an agency's interpretation if it conflicts with the statute's plain language."). For the reasons noted *supra* and in Appellant's prior briefing, the Department's interpretation is indeed at odds with the plain language of § 38-53-170(e). Thus, for all these

[9] *See Colonial Pipeline*, 443 S.C. at 458–59, 905 S.E.2d at 134–35 (acknowledging that the *Loper Bright* Court had left in place *Skidmore*-style deference).

[10] The Attorney General, on the other hand, does have considerable experience with bail bond transactions, and his office found that the interpretation the Department espouses now is both contrary to the Legislature's intentions and "could lead to an absurd result." *The Honorable B. Lee Miller*, 2024 WL 3186557, at *2.

reasons, Respondent submits that the Department's interpretation lacks the "power to persuade" envisioned by *Skidmore*.

CONCLUSION

For these reasons, Appellant respectfully submits that the Department's interpretation of S.C. Code Ann. § 38-53-170(e) is incorrect, and that the ALC's ruling in favor of it was error. Appellant therefore requests that the Court reverse the judgment of the ALC and vacate the fine imposed upon Ms. Freeman in this case.

Respectfully submitted,

*s/Andrew R. Hand*__________________
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