THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5454
Trial Court Case No. 2011-CP-08-2814

Todd Olds, ... Petitioner,

v

City of Goose Creek, ... Respondent.

Petitioner's Reply to City's Return on Petition for Writ of Certiorari

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March 9, 2017

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QUESTIONS PRESENTED

Did the Court of Appeals err in falling to adhere to the holding of the Supreme Court in *Azar v. City of Columbia,* 414 S.C. 307, 778 S.E.2d 315 (2015)?

Did the Court of Appeals fail to recognize that the City of Goose Creek Defines "Gross Income" and "Gross Receipts" separately—and correctly—but uses the terms interchangeably?

Did the Court of Appeals fail to apply § 5-7-30, S. C. Code, ann.?

Did the Court of Appeals err in failing to apply the rules of statutory construction?

Did the Court of Appeals err in finding no evidence of prejudice to the Petitioner when the record shows numerous instances of discrimination?

Did the Court of Appeals apply the correct standard of review?

As allowed by Rule 242(g), *S. C. Appellate Court Rules*, Petitioner replies to the City of Goose Creek as follows:

I City's Allegation That Petitioner Raises Different Issues On Appeal

The City overlooks the procedural requirement that directs a petition for *certiorari* to address the errors contained in the Opinion under review. See Rule 242(b), "Considerations Governing Review." Thus the petitioner is directed to identify the errors contained in Opinion

No. 5454. As the briefs to the Court of Appeals are part of the Appendix, it serves no purpose to restate those issues. Rather, the petition for certiorari must identify the erroneous conclusions contained in Opinion No. 5454, and the Rules direct a petitioner to address those: "The Supreme Court, or any two (2) justices theory, may in its discretion, on motion of any party to the case or on its own motion, issue a writ of *certiorari* **to review a final decision of the Court of Appeals**." (emphasis added)

II The City misapprehends Petitioner's Reliance On *Azar v. City Of Columbia,* 414 S.C. 307, 778 S.E.2d 315 (2015)

The City criticizes Petitioner's reliance on *Azar* as being untimely, when in fact, this Court handed down *Azar* as the parties were filing their final briefs with the Court of Appeals. In the case before the Court of Appeals, the Petitioner filed his Notice of Appeal on November 4, 2014. The Petitioner filed his Initial Brief on April 20, 2015, and his Initial Reply Brief on July 29, 2015, and his Record on Appeal and Final Briefs on August 25, 2015, and his Final Briefs on September 10, 2015. The day before petitioner filed his final briefs, this Court decided *Azar v. City of Columbia.* Almost immediately, on September 15, 2015, the Petitioner supplemented his Final Reply Brief by writing to the Clerk of the Court of Appeals as follows: "In accordance with Rule 208(b)(7) 'Supplemental Citations,' I wish to insert an additional citation in the last paragraph of page 10 of appellant's Reply Brief. The citation is: *Azar v. City of Columbia*, ___S.C. ___, ____S.E.2d ___(Opinion No 27573, filed September 9, 2015)." Petitioner believed then and believes now that *Azar* is a controlling case and that Opinion No. 5454 is in conflict with it by holding that municipalities can interpret "gross

income" any way they see fit rather than following the legislatively sanctioned process. This was the same issue raised in *Azar*, the only difference being a dispute over the interpretation of the word "imposed" there as opposed to "gross income" here. In fact, the Court of Appeals did not mention *Azar*, choosing instead to rely on a case from 1922, which in turn cites a case from the 19th Century, long before the Business License Tax statute existed.

III The City Misidentifies The Legal Issue Raised By This Appeal

The salient legal issue raised by this case is both straightforward and simple. In the Opinion under review, the Court of Appeals holds: "The term 'gross income' does not carry the same definite and inflexible meaning under all circumstances and wherever used." (Opinion in ¶ 20) This statement is not supported by facts, not supported by law, and not supported by the expert tax advice, which the Court of Appeals ignored. Logically, the Court of Appeals' statement refutes itself.[fn.1] Putting aside the conclusion that the Court of Appeals' holding is in conflict with *Azar*, which stands for the legal proposition that prohibits municipalities manipulating definitions to increase revenue, the Court of Appeals erred by failing to apprehend that the Goose Creek ordinance **requires** that the definition of "gross income" not be "flexible," and requires that it conform to the I.R.S. definition because the ordinance **requires** that they be the same. (One could say that the Goose Creek ordinance anticipated *Azar* by requiring such uniformity.) The Court of Appeals' erroneous statement that definitions need not be uniform refutes itself because of the absurdity of a tax collection

1 If a definition is "not inflexible," then it is flexible. And if it is flexible, then it lacks limits. If it lacks limits, it is potentially infinite, and as any mathematician knows, infinity and zero are mathematically interchangeable.

system premised upon shifting definitions of gross income that do not match from return to return. The City attempts to cast doubt on the petitioner's correct statement of law by mischaracterizing it to create a straw man. According to the City, Petitioner is advancing a claim of "strict construction." (Respondent's Return at page 6-7) In fact, Petitioner is advancing the undisputed proposition of law that the rules of statutory construction require the words be interpreted in their "plain and ordinary" meaning, or, as Opinion Number 5454 says: "A statute as a whole must receive a practical, reasonable, and fair interpretation consistent with the purpose, design, and policy of the lawmakers." (Opinion at ¶ 14) Neither the City of Goose Creek nor the Court of Appeals explains how the meaning of "gross income" can be so changeable in a taxation scheme that requires uniformity.

Finally, the best refutation of the Court of Appeals' holding is to contrast the Court's erroneous statement with the City of Goose Creek's own definition, which requires uniformity:

Opinion No. 5454

"The term 'gross income' does not carry the same definite and inflexible meaning under all circumstances and wherever used. Its meaning depends upon the subject under consideration, the connection in which it was used, and the results intended to be accomplished." *Bogan v. Bogan*, 298 S.C. 139, 142-43, 378 S.E.2d 606, 608 (Ct. App. 1989) (¶ 20 of Opinion 5454)

Goose Creek Ordinance §110.001

(C) The Business License Inspector, upon approval of the Finance Director, may disclose gross income of licenses to the Internal Revenue Service, South Carolina Department of Revenue and other municipal or county offices for the purpose of assisting tax assessments, tax collections and enforcement. The disclosures shall be for internal, confidential and official use of these governmental agencies . . . (This ordinance is quoted *verbatim* in the Court of Appeals' Opinion No. 5454 in the 18th paragraph.)

The comparison of the Opinion under review with the ordinance being reviewed illuminates two obvious and irrefutable propositions. First, it is obvious that the purpose of comparison is to be sure that the taxpayer is reporting uniform figures to each governmental entity. It is absurd to think that the purpose of the ordinance is to allow the revenue collection agencies to compare unequal reporting. Second, It is just as obvious that while the definition of any word can be "flexible," the human contract requires there to be a consensus about what words mean in order to allow language to exist. Lewis Carroll brilliantly parodied words that have "inflexible" meanings in *Through the Looking Glass*. (Quoted on page 15 of Petitioner's Petition for *Certiorari*.) If the meanings of words are "inflexible," then what means "stop" in Charleston might mean "yield" in Myrtle Beach. Just as "five is the successor of four" in Charleston County, "five must be the successor of four" in Berkeley County because that is what the words mean. (To be sure, numbers can be just as "inflexible" as words; compare "five" with "fifth.") Likewise, if "gross income" means one thing in Goose Creek and another thing in the State Department of Revenue, then we have reached a level of absurdity rejected by logic, abhorred by law, and forbidden by the specific definitions contained with Goose Creek's Business License ordinance. It is likewise obvious that, as required by the laws regulating the computation of tax, "gross income" must mean the same thing in Goose Creek as it does in Washington D.C. because the ordinance—as quoted by the Court of Appeals in Opinion 5454!—requires that they be the same because the Business License Inspector "may disclose gross income of licenses to the Internal Revenue Service!" Thus, for the term, gross income, to not be defined the same would require the taxpayer to ignore the City of Goose Creek's Business License ordinance and be condemned to a lifetime of

unbalanced accounting. The Goose Creek ordinance **compels** that the definition of gross income be the same as may be seen by reference to nothing more than its ordinance quoted above. Unless Goose Creek's Business License Inspector is the master of the meaning of words, the two definitions must necessarily coincide by definition of the Goose Creek Ordinance. Professor Gutting explained these accounting procedures in perfect detail, yet the trial court, the Court of Appeals, and the City transform her accounting opinion into a legal opinion by sleight of hand.

IV The City Changes Its Position On Appeal

This entire case is perplexing to petitioner for two reasons. First, at the trial level, the City of Goose Creek **agreed** with petitioner that § 61, I.R.C. governs the definition of "gross income." See Appendix, Vol. II, page 224-225:

> . . . Furthermore, the City's definition of gross income is in accord with the Internal Revenue Code ("IRC"). IRC Section 61 defines gross income. IRC Section 61(a) states that "[e]xcept as otherwise provided in this subtitle, gross income means all income from whatever source derived." (Emphasis added), which is consistent with the broad definition of "total revenue" used by the City's Ordinance.
> Brief of City of Goose Creek

Even more astonishing, is the City's reliance on the Municipal Association, which filed an Amicus Brief in this case. The Municipal Association's Handbook instructs the municipalities to collect taxes in the precise manner identified by the petitioner. According to the Municipal Association's published guidelines, "gross income" for the business license is tax is the same thing as "gross income" reported to the I.R.S. See Vol. II, pages 147, 159,

and 160 of the Appendix (*Municipal Association Handbook*):

> (a) **Gross Income**. SC Code Sec. 5-7-30 authorizes each municipality to levy a business license tax measured by gross income. No other basis is authorized, except for certain businesses.
> (page 147)
>
> **Gross Income Defined**
> Gross income may be defined by the license ordinance and generally means all revenue received from the business operation without any deductions for such things as cost of goods, overhead, salaries or costs of sale. It should conform to the gross figure reported on the business' federal income tax return. Section 61(a) of the Internal revenue Code defines gross income as "all income from whatever source derived."
> (page 159)

On page 160, the Municipal Association informs its members that many business license ordinances, such as Goose Creek's, allow the municipality to verify the figure by reference to the taxpayer's federal tax returns, so, obviously, the figures must be consistent:

> Many license ordinances provide for using federal and state income tax returns to verify gross income reported for license purposes. . . . **The amount of gross receipts on which a business license tax may be levied is the amount of actual gross income to the owner.**
> (page 160, emphasis added)

Thus, the Court of Appeals' Opinion is controlled by a palpable error of law.

V. Two Wrongs Do Not Make A Right

The City spends considerable effort alleging—without proof—that "25 other municipalities collect taxes the same way as Goose Creek." (City's Return at page 10.) Leaving aside the observation that there is no proof in this record that other municipalities do this, even if it were true, it would make no difference, especially because there are 269

municipalities in South Carolina. If it did, then any defendant might mount a defense to any tort or any crime by alleging that other people did the same thing. The appeal to other wrongdoing has never been accepted by a court as a defense to a wrongful act. ("A person is guilty of the fallacy two wrongs make a right, also called the *tu quoque* fallacy, when he answers a charge of wrong doing, not by showing that not wrong was committed, but rather by claiming that others do the same thing. The erroneous rational behind this fallacy is that if 'they' do it, so can we.")[fn.2] The issue before this Court is whether the Court of Appeals is or is not correct that "gross income" can mean "sales price" to Goose Creek and "gain" to everyone else.

VI The Court Of Appeals Did Not Apply The Correct Standard of Review

A. An Analysis Of The Goose Creek Business License Ordinance Supplies The Definition

This case reached the Court of Appeals from an appeal of the grant of summary judgment. While the Court of Appeals recited the correct standard of review, it did not apply it. First, it excluded Professor Gutting's expert **accounting** evidence. All universities and colleges award both bachelor and advanced degrees in accounting. The Certified Public Accounting exam is generally regarded as more difficult than the Bar exam. Webster defines "accounting" as "the system of recording and summarizing business and financial transactions in books and analyzing, verifying and reporting the results." The Court of Appeals dismisses Professor Gutting's evidence without much analysis: "As to Professor Gutting's affidavit, the circuit court properly disregarded the affidavit because it was nothing

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2 Howard Kahane, *Logic and Philosophy* (Wadsworth Pub. Co., 1973), Page 236

more than a legal argument. See *Dawkins v. Fields*. . ." In *Dawkins* a law professor filed an affidavit attesting to reasons why he thought summary judgment should not be granted. Naturally, the Court rejected this testimony. Here, Professor Gutting explained how a tax return should be prepared, and the reliance on tax experts in matters of taxation is so routine as to not require further comment.

B. The Petitioner Produced More Than A Genuine Issue of Fact Of City Misconduct

As to the petitioner's claims of wrongdoing, the evidence against the City of Goose Creek is far beyond creating a genuine issue of material fact. The invasion of petitioner's property by Goose Creek officials without a warrant is astonishing. The locking of his water meter is equally astonishing. The use of a tax audit following on the heels of an unrelated dispute is also astonishing. The City's answer to all this evidence is to argue that *Village of Willowbrook v. Olech* is not good law any longer: "*Willowbrook* would later be eviscerated by a series of holdings starting in 2008 with *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008)." City's Return at page 18. In fact, *Engquist* says the opposite: "Olech did recognize that a class-of-one equal protection claim can in some circumstances be sustained. Its recognition of that theory, however, was not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle to the facts in that case: The government singled Olech out with regard to is regulation of property, and the cases upon which the Court relied concerned property assessment an taxation schemes that were

applied in a singular way to particular citizens." Such is the case here.

Rather than attacking the viability of a unanimously decided Supreme Court cited over 2000 times, the City obfuscates the point. The petitioner's claims against the City create a genuine issue of material fact. Second, because *Willowbrook* is a unanimous Supreme Court opinion that courts have cited over 2,130 times as authoritative, it is fruitless to argue about is viability. *Engquist* is, if anything, a reaffirmation of *Willowbrook*, holding only that an at-will employee could not use *Willowbrook* in support of a claim of discrimination in what she contended was an unlawful firing. The point is not whether *Willowbrook* is or is not good law; rather, the point is that the petitioner provided sufficient evidence of Goose Creek's misconduct to survive being thrown out of court on summary judgment. The Court of Appeals sidestepped all these issues by ignoring them: "First, we note Olds does not clearly identify the causes of action to which this issue applies. His stated issue on appeal refers to his constitutional rights; however, in his argument, Olds also discusses some of this other claims that are not based on a violation of any constitutional right." (Opinion 5454, ¶ 26) The Court of Appeals reduces its function to a formalistic search for magic words, when the purpose of appellate review is to search the record as a whole to determine if there is evidence that creates a genuine issue of material fact:

"Legal labels characterizing a claim cannot, standing alone, determine whether it fails to meet [the standard for notice pleading pursuant to *Federal Rule of Civil Procedure* 8(a)(2)]." Our sister circuits have reached the same conclusion regarding whether precise or specific works must be present to sufficiently state a cause of action. See, *e.g., Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310 (6th Cir. 2009) ("Courts may look to—they must look to—the substance of a complaint's allegations . . . .. Otherwise, [statutory] enforcement would [be] reduce[d] to a formalistic search through the pages of the complaint for magic words. . . ."); *United States v. Davis*, 261 F.3d 1, 45 n. 40 (1st Cir. 2001) ("[Plaintiff] need not have used the magic word 'declaratory judgment' in its pleading to put the defendants on notice that its claims could be resolved with a grant of declaratory relief.")

Stevenson, v. City of Seat Pleasant, Maryland, 743 F.3d 411 (4th Cir. 2014)

This record contains an abundance of evidence that the City of Goose Creek singled the petitioner out for disparate treatment and misused its governmental authority to punish him for standing up for his right to be treated in accordance with the law.

Conclusion

This is undeniably a simple case. The City of Goose Creek's Business License Ordinance is drafted in conformity with the limitations of § 5-7-30, S. C. Code. As Professor Gutting explained, the proper amount of gross income that a taxpayer must report to a municipality is the same gross income he or she reports to the Department of Revenue. Why the Court of Appeals rejected Professor Gutting's expert accounting opinion is a mystery. Accountants have been experts in the science of tax collecting for as long as there have been taxes. Universities bestow bachelor and advanced degrees in accounting, and it is a statement rarely challenged that tax reporting is so complex that it requires an expert. This record paints a portrait of a municipality that went to great lengths to oppress one if its own citizens. The Court of Appeals erred in not adhering to this Court's pronouncement in *Azar* that municipalities are not permitted to bend the rules to benefit themselves. As Chief Justice Marshall noted the power to tax is the power to destroy, and short of cases involving police brutality, there is not a more oppressive form of government overreach than a local government's misuse of its taxing authority to harass a citizen. At least in *Azar*, the City of Columbia could make an appeal to the greater good for its misapplication of tax law, but here, it is unvarnished cruelty. Whether this Court evaluates this Petition for Certiorari under

the principles of *stare decisus*, the existence of a genuine issue of material fact under summary judgment standard, the application of the rules of statutory construction, or improper exclusion of evidence, Opinion Number 5454 is controlled by errors of law, and this Court should grant *certiorari* to review this Opinion.

Respectfully submitted,

March 13, 2017

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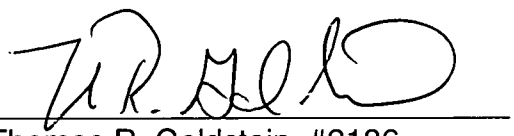
PROOF OF SERVICE

I certify that I have served the Reply to the Respondent's Return to Petition for Certiorari on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on March 13, 2017, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492.

March 13, 2017



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