

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

S.C. SUPREME COURT

Appellate Case No. 2017-000297
Opinion No.: 5454
Case No. 2011-CP-08-2814

Todd Olds..... Petitioner,

vs.

City of Goose Creek Respondent,

RETURN TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

The appellant objects to the application of the Municipal Association to file an Amicus Brief on the grounds of judicial economy, misrepresentation, judicial estoppel, irrelevance, sharp practice, and timeliness.

JUDICIAL ECONOMY/SEPARATION OF POWERS

Municipal Association previously filed an amicus brief with the Court of Appeals on May 17, 2016, Appendix, Vol. I, pages 134-147. The Municipal Association set forth its arguments in that document, and its proposal to add a second brief arguing the same position is a waste of judicial resources and threatens the separation of powers. As a lobbying organization for legislative and

executive officers of municipalities, the Association's participation raises the specter of overreaching the separation of powers. In denying an application to file an amicus brief in the Seventh Circuit Court of Appeals, Judge Richard Posner identified both the factors and the principles he considered applicable to such requests:

This court has held that whether to allow the filing of an amicus curiae brief is a matter of "judicial grace." *National Organization for Women, Inc. v. Scheidler*, 223 F.3d, 615, 616 (7th Cir. 2000) The judges of this court will therefore not grant rote permission to file such a brief, and in particular, they will deny permission to file an amicus brief that essentially duplicates a party's brief. *Id.* at 617. The reasons for the policy are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process. *Id.* at 616.

All this said, comity might seem to be a compelling reason to allow the filing of an amicus curiae brief by the leaders of a state legislature in an appeal concerning the validity of a statute of their state; and there is no doubt that a union has an interest in the regulatory regime for an employer of its members. It might be argued therefore that I should not trouble myself to determine whether the proposed amicus curiae briefs fill gaps in or otherwise productively supplement the parties' briefs. No doubt many courts would reason so, or would prefer to ignore amicus curiae briefs than to screen them. But in my view the argument from comity bespeaks a misunderstanding of the difference between the legislative and the judicial processes. The legislative process is democratic, and so legislators have an entirely legitimate interest in determining how interest groups and influential constituents view a proposed statute. Statutes pass because there is more political muscle behind than in front of them, not because they are "wise" or "just," though they may be. The judicial process, in contrast, though "political" in a sense when judges are asked to decide cases that conventional legal materials, such as statutory and constitutional texts and binding precedent, leave undetermined, so that some mixture of judges' values, temperament, ideology, experiences, and even emotions is likely to determine the outcome, is not democratic in the sense of basing decision on the voting or campaign-financing power of constituents and interest groups. An appeal should therefore not resemble a congressional hearing.

The fact that powerful public officials or business or labor organizations support or oppose an appeal is a datum that is irrelevant to judicial decision making, except in a few cases, of which this not one, in which the position of a nonparty has legal significance. And even in those cases the position can usually be conveyed by a letter or affidavit more concisely and authoritatively than by a brief.

Voices for Choices v. Illinois Bell Telephone Co., 339 F.3d 542 (2003)

As argued more fully below, the Municipal Association’s attempt to interject its lobbying efforts in this case is precisely the type of advocacy that “bespeaks a misunderstanding of the difference between the legislative and the judicial process.”

MISREPRESENTATION OF STANDING/JUDICIAL ESTOPPEL

In its application for leave to file a second amicus brief, the Municipal Association casts itself as “a nonpartisan, non-profit association of the States’ incorporated cities and towns with 270-member municipalities.” (Motion at page 1) This description is misleading. The Municipal Association is a registered lobbying organization with eight registered lobbyists. According to its reports, it spent over \$211,380 in 2016 and \$187,000.00 in 2017, in lobbying efforts, some of which included lobbying the General Assembly to amend § 5-7-30 from authorizing a business license tax on “gross income” to authorizing a business license tax on “gross receipts.” See Municipal Association February 18, 2016, Press Release: “the task force of business license and finance officials from 15 towns met on Wednesday to continue work on the details of the proposed *Business License Tax Standardization Act*.” This “Standardization Act” would have changed the tax from one imposed on “gross income” to one imposed on “gross receipts.” House Bill H.3650 introduced February 17, 2017, redefines gross income thus: “For purposes of this section, 'adjusted gross income' means gross receipts, if reported on a cash basis, or gross revenues, if reported on an accrual basis, from the performance of services and from the sale, lease, or rental of goods or other property in the ordinary course of business, and with no reduction for the cost of goods sold or other business expenses.” It also contained a provision to prohibit the Municipal Association—or any other

political group—from collecting business license taxes and insurance taxes. Reba Campbell, Executive Director of the Municipal Association, speaking on behalf of the Association, voiced the Association’s objection to the bill because it prohibited the Municipal Association from collecting taxes on behalf of its members: “Giving the Secretary of State the job of issuing business licenses and collecting fees violates the state Constitution, which gives the cities authority to work together to perform government functions, such as having the municipal association collect and disburse business license taxes to members.” *Columbia Business Report*, “Municipal Association cites flaws in uniform business license bill,” (February 28, 2017) Because the Municipal Association filed its amicus brief at the 11th hour in the Court of Appeals and seeks to do the same here, it prevented Petitioner from having any opportunity to examine the Municipal Association’s activities. The public information available on the Association’s activities and its reports on lobbying activities depict an organization that is highly partisan, advocating for increased legislative authority, one of the factors identified by the Seventh Circuit in *Voices for Choices* as the reason to prohibit such briefs. The Municipal Association’s participation breaches the traditional separation of powers and is an inroad on the judicial branch’s independence. Having failed to convince the General Assembly that it should change “gross income” to “gross receipts,” it should not be allowed to assert the contrary legal position to the Supreme Court. Its proposed brief is nothing more than a second bite at the apple to achieve its failed objective in the General Assembly.

Further, its lobbying efforts seek to expand the powers of municipalities and aggregate their collective power. To the extent the Municipal Association protects and expands its members’ tax revenues, the Municipal Association would receive a direct financial benefit. Thus, when the Municipal Association asserts to this Court that its interest in the case is to represent “the collective

interests of municipalities,” its interest is more likely motivated by an effort to maximize its own collections.

RELEVANCE

The Court should deny the Municipal Association’s request for a second amicus brief because the Municipal Association’s shifting legal positions are irrelevant. The Municipal Association ignores that this Court directed the parties to brief a single issue; to wit, whether the City of Goose Creek is applying its ordinance to a single taxpayer in accordance with the terms of its ordinance. The Municipal Association’s efforts to shift the inquiry to an analysis of the statewide process under § 5-7-30 or engage in a philosophical debate about whether a tax computed on “gross income” is an excise tax may be interesting in an academic setting, but it does nothing to advance an answer to the question posed by this Court.

The Municipal Association provides its *South Carolina Municipal Association Handbook for Municipalities* to its members, which sets forth the Association’s published statement to its members:

State Laws Authorizing Business License Taxes

Municipalities

(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 business.

South Carolina Municipal Association Handbook, Appendix, Vol. II, page 330

In the same Handbook, the Municipal Association further explains:

Gross Income Defined

Gross income may be defined by the license ordinance and generally means all revenue receive form the business operation without any deduction 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.”

Appendix, Vol. II, page 474

This Court should not allow the Association to abandon its published position because it now sees an opportunity to adopt a different and contradictory *ad hoc* legal position to persuade this Court to make a political decision on a legal issue. The issue in this case is not one of either “interpretation” or an issue that “will have a significant and lasting statewide impact on local business license ordinances enacted by member municipalities” (Motion at page 2) because that is not the question the Court asked the parties to brief. The question this Court asked the parties to brief is a question of whether Goose Creek misapplied its ordinance as it is written to the taxpayer. As to the first, there is no “interpretation” of gross income, especially where the ordinance under review carefully defines “gross income” and “gross receipts.” The reason this case exists is because Goose Creek uses the separate terms interchangeably despite defining them separately. Gross income is universally and uniformly reported on all tax forms, and the forms themselves guide a taxpayer to make sure the correct figure is reported. Moreover, as this Court recognized in formulating the question it wants briefed, Goose Creek’s ordinance defines it and requires that it conform to the “gross income” reported to the I.R.S. and the Department of Revenue. The inquiry should end there because this calculation is so straightforward and so uniform, and so obvious as to defy contradiction. Second, the Municipal Association has been involved in this case since 2012, when Petitioner originally contacted the Association for guidance, and it replied that Petitioner’s position is correct. (See this e-mail exchange between the Petitioner and the Association quoted below at page 8.) Neither the Municipal Association nor its member cities asked for leave to intervene as a party, presumably because all the members, except Goose Creek, do not overtax their citizens in the manner of Goose

Creek. Without evidence to the contrary, this Court can assume that the Municipal Association's members obey the law and apply the tax in conformity with § 5-7-30, S. Carolina Code, ann., in conformity with I.R.S. § 61 and the Treasury Regulations thereunder, in conformity with South Carolina Code § 12-6-60, S. Carolina Code, ann., and in conformity with the Municipal Association's *Handbook for Municipalities*. The Municipal Association's 11th hour motion is nothing more than an opportunity to lobby this Court the same way it lobbied the General Assembly. To the extent the Municipal Association argues the "statewide consequence" of over taxation if other members are doing it, the City of Goose Creek fully advanced this argument of too big to punish, which comes close to an assertion that Petitioner is too small to challenge.

The common ground in this case is that everyone agrees that municipalities have no inherent power to tax income except as allowed by the General Assembly, and the General Assembly expressed its grant of power in § 5-7-30, S. Carolina Code. There is no ambiguity in the state statute, and this Court asked the parties to brief a single question: whether Goose Creek failed to apply properly its own ordinance, and in so doing, disadvantaged a single taxpayer. Thus, there is no "statewide importance," as the Municipal Association asserts, because this Court limited the briefing to the application of Goose Creek's municipal ordinance. (There is irony that Goose Creek's ordinance is drawn on the Municipal Association's "model ordinance," which carefully defines "gross income," and "gross receipts.") The issue here is not one of "statewide importance," but rather the prejudice to the Petitioner because Goose Creek singled him out for retaliation and tortured its municipal ordinance to disadvantage him. When Goose Creek selected Petitioner's returns for audit, Goose Creek substituted "gross receipts" for "gross income" to calculate appellant's business license tax even though its own ordinance requires the use of "gross income." It is implausible that

the Municipal Association supports this practice.

As mentioned briefly above, at the beginning of this dispute, the Petitioner communicated with the Municipal Association, and at every point of contact, the Municipal Association confirmed in writing that Petitioner's legal position is correct. None of these communications are in evidence in the record because the Municipal Association, even though it has known about this case for over six years, laid in wait until the eleventh hour when it sprung its proposed second amicus brief. On November 7, 2012, after appellant laid out his concerns to the Municipal Association, Mellissa M. Carter, the Association's Research & Legislative Liaison, wrote appellant: "Thank you for following up on our conversation. You have stated my understanding correctly. If you have any further questions please give either Warren [Harley, Governmental Affairs Liaison] or me a call." The subject of this November 7, 2012, correspondence is "Business License Calculation," in which the Petitioner laid out the following example for Ms. Carter: "The example you [Mellissa Carter] shared was if you pay \$200,000. And sell for \$300,000, the license fee should be calculated on \$100,000 gain, not the sale price \$300,000." (November 1, 2012, e-mail Olds to Mellissa McCullough Carter,)

On October 31, 2012, Municipal Association's Governmental Affairs Liaison, Warren Harley wrote to appellant: "For the purpose of determining gross income our business license guide references Section 61(a) of the IRS code. Your business license is calculated on the amount you show as your gross income on your tax return." If the Municipal Association is going to portray itself to this Court as somehow above the fray, it is going to have to explain to this Court why its *Municipal Handbook* and responses to Petitioners inquiries and assertions to the General Assembly are the exact opposite.

SHARP PRACTICE

The Court should deny Municipal Association's second request to enter the case at the eleventh hour as a product of sharp practice. To allow the Municipal Association to attempt to influence the decision in this case at such a late date with no opportunity to the petitioner to conduct discovery condones sharp practice. This is especially true where, as demonstrated above, the Municipal Association reversed course at a late date after taking the opposite legal position before the General Assembly. On May 17, 2016, the Municipal Association filed its first amicus brief with the Court of Appeals, and before that, the Municipal Association has been aware of this litigation since 2012, yet the Municipal Association made no effort to enter the case. The Municipal Association never explains or even addresses how its *Handbook* and how its written responses to Petitioner, both in conformity with Petitioner's legal position, are no longer controlling. In light of the numerous prior public expressions on the issue at variance with the new position, the Association also never explains "why a brief of an amicus curiae is desirable." Rule 213, *South Carolina Rule of Appellate Court Rules*, especially where the question before the Court involves the application of a municipal ordinance to a single taxpayer. In light of Rule 213, and the factors identified by the Seventh Circuit, it is significant that the Municipal Association's proposed second brief cites 4 new cases not included in the first brief it filed with the Court of Appeals. (It is significant that *Bogan v. Bogan*, 298 S.C. 139, 378 S.E.2d 606 (Ct. App. 1989), on which the Court of Appeals and the Municipal Association relied so heavily, is now absent!) Otherwise, the Association relies upon the same seven cases it identified for the Court of Appeals to which the Petitioner previously replied. (Appendix, Vol. I, pages 151-168).

Because of the Municipal Association's shifting legal positions, it should be estopped from

asserting here a position contrary to its written responses to Petitioner's inquires and its representations to the General Assembly. The Municipal Associations strategic timing is calculated to prejudice appellant's opportunity to respond, and this Court should not reward the Municipal Association for asserting conflicting positions and for lying in wait to become involved in a case at such a late hour, where its brief to the Court of Appeals is already in the Appendix.

In *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015), a group of citizens sued, alleging that the governing statutes do not allow the creation of a "slush fund" by the expedient of manipulating the definitions. Just as here, the circuit court granted summary judgment for the City. This Court reversed the grant of summary judgement holding: "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Here, the Municipal Association tortures "gross income" into dual meanings without explaining why the City of Goose Creek went to so much trouble as to define them separately. When collecting an income tax, "gross income" means "gross income," but when Goose Creek collects a business license tax, the words "gross income" morph to mean "gross receipts." The Supreme Court dealt with shifting definitions in *Azar* as well: "Simply put, the statutes do not allow these revenues to be treated as a slush fund."

Here, the Municipal Association seeks to create a slush fund for its 270 clients and presumably itself, and the appellant is being denied any opportunity to challenge the Municipal Association's eleventh-hour change of heart, its motive for change, its bias and financial interest in the outcome, or the basis for its opinion, which is inconsistent with every previous expression by the Association.

MISREPRESENTATIONS OF THE STANDARD OF REVIEW

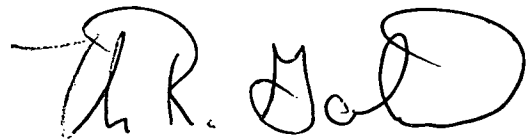
At no time in its proposed second amicus brief does the Municipal Association address the fact that this appeal is an appeal from a grant of summary judgment. The Municipal Association does not acknowledge or address that the lower court ended the case on summary judgment or discuss the standard for review from an entry of summary judgment. The Municipal Association ignores the Court's obligation to construe the facts and the reasonable inferences drawn from them in the appellant's favor. The Municipal Association misrepresents the fact that its published *Handbook* for Municipalities and its multiple written correspondence to the appellant on the legal issue in this case is the opposite of what it now states to this Court. It ignores the fact that it lobbied the Legislature to change the statute under review to allow for a business license tax on "gross receipts." The Association already filed one amicus brief in this case, and there is no reason to allow a second.

CONCLUSION

The Municipal Association's late attempted entry into this case ignores the facts of the Record on Appeal and attempts to influence the analysis of the case by interjecting a consideration of a statewide policy that this Court instructed the parties not to brief. The Association's involvement arguably has more to do with the Association itself—and its efforts to influence pending legislation—than the City of Goose Creek, its ordinance, and the case before the Court. (See Municipal Association February 18, 2016, Press Release quoted above at page 3:

The Municipal Association of South Carolina has been working since last year to . . . draft a bill to make the license process more streamlined across all cities and towns . . . business license taxes in all cities will be calculated using the same definition of gross income.

The Association's interest ignores Petitioner's reliance on Goose Creek's Code of Ordinance. The Association attempts to broaden the issue rather than limit the discussion to the issue before the Court, which is whether Petitioner correctly reported his "gross income" as defined by the City's Business License Ordinance. Even the Municipal Association asserts on page 2 of its amicus brief that "municipalities have broad authority to enact ordinances," and that "South Carolina jurisprudence has long established that municipalities have authority to define the terms to levy a business license tax if those definitions are consistent with state and federal law." This case involves the application of a single municipal ordinance against a single taxpayer. The Municipal Association conflates this case with its own political interests and lobbying efforts, and in doing so, prejudices the appellant. The Court should deny the Municipal Association's request to file a second amicus brief.



May 3, 2018

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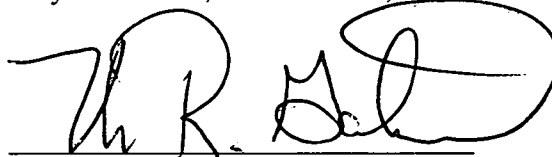
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PROOF OF SERVICE

I certify that I have served the Return to Motion for Leave of Court to file an Amicus Curiae Brief on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on May 3, 2018, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492 and to the Municipal Association by depositing a copy of it addressed to its attorney of record, Mary D. LaFave, Crow Lafave, LLC., P. O. Box 1149, Columbia, S. C. 29202.

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