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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

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Appellate Case No. 2019-001706

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Amazon Services, LLC, .....Appellant,

v.

South Carolina Department of Revenue, .....Respondent.

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**The Department of Revenue's Response to the *Amicus Curiae* Brief of  
Tax Law Professors Tessa R. Davis and Clinton G. Wallace**

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## Summary of Argument

Respondent South Carolina Department of Revenue (Department) files the within response to the *Amicus Curiae* Brief of Tax Law Professors Tessa R. Davis and Clinton G. Wallace (Professors' Brief) at the request and direction of the Court made via its January 25, 2023, letter to the parties. As set forth in the Department's Brief to this Court, the Department contends that this appeal presents a straightforward application of the plain language of the unambiguous South Carolina Sales and Use Tax Act (Act) to Appellant Amazon Services, LLC's (Amazon) business model, actions, and undisputed sales in South Carolina occurring on the Amazon.com website that it owns and operates. Application of the Act to these sales demonstrates that Amazon is the retailer or seller of, and is in the business of selling, tangible personal property at retail, which obligates it to collect and remit sales tax to the State of South Carolina. Substantial evidence in the record supports the Administrative Law Court's (ALC) findings of fact and conclusions of law in that regard for the reasons set forth in the Department's brief.

The Professors' Brief provides additional relevant background, history, and color to the questions before the Court. The Department submits that these additional citations of authority, explanations of the history and import of the physical nexus rule, and the analysis of the impact of Amazon's attempt to avoid the application of the Act to its operation of the Amazon.com website for retail sales occurring in South Carolina are both relevant and helpful to the Court's consideration of the appeal. Consequently, the Department agrees with and echoes the additional supportive arguments advanced in the Professors' Brief.

## ARGUMENT

Professors Davis and Wallace provide three primary arguments, discussed in brief below, in support of the Department's position in this appeal and for affirming the decision of the ALC. Each argument provides relevant background and support for the Department's positions.

**I. The Professors' Brief argues that Amazon became obligated to collect and remit sales tax under the Act in 2011 by virtue of its establishment of a physical nexus to the State, subject to the five-year moratorium enacted by the General Assembly as a part of the incentive package specifically lobbied for by Amazon when it decided to locate a distribution facility in Lexington County.**

The Professors' Brief provides an accurate and in-depth analysis of the history of the physical nexus requirement in existence in 2016. This argument supports the Department's position that Amazon became obligated to collect and remit sales tax to the State of South Carolina upon its location of a distribution facility in the State in 2011; *i.e.*, physical nexus was established. That obligation was tolled for a period five years of upon the General Assembly's passage of S.C. Code Ann. § 12-36-2691, which provided that, upon the establishment of a qualifying<sup>1</sup> distribution facility in South Carolina during the limited period of December 31, 2010 to January 1, 2013, a company's physical presence in the State would "not [be] considered in determining whether the person has a physical presence in South Carolina sufficient to establish nexus with South Carolina for sales and use tax purposes." The evidence of record establishes that Amazon sought and lobbied for this "special nexus provision" as a part of the incentive package offered by the State to entice Amazon to locate its facility in Lexington County.<sup>2</sup> Thus, upon the moratorium's expiration on

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<sup>1</sup> The legislation contained certain milestones related to capital investment and job creation required of a company seeking to avail itself of the moratorium. *See* S.C. Code Ann. § 12-36-2691(C).

<sup>2</sup> S.C. Code Ann. § 12-36-2690 was enacted in 2005 as part of the Jobs Creation Act. *See* 2005 S.C. Act No. 157. The Act provided that owning or utilizing a distribution facility within

January 1, 2016, Amazon’s physical nexus subjected and obligated it to collect and remit sales tax to the State. Moreover, this relevant history demonstrates Amazon was on notice of its sales tax obligations in 2011, availed itself of the benefit of its bargained-for five-year reprieve from that obligation, and does not have a good faith argument for its attempted avoidance of that obligation during the relevant period in question in this appeal. Further, Professors Davis’s and Wallace’s description of an on/off switch for physical nexus provides an apt analogy for the structural and historical foundations of the Department’s application of the Act to Amazon, providing additional background that undercuts Amazon’s contentions of surprise and retroactive application of the Act. It further centers and brings back into focus the limited question before the Court: whether Amazon is the retailer or seller of tangible personal property. For those reasons, the Professors’ Brief provides additional support for the ALC’s finding that Amazon is obligated to collect and remit sales tax on transactions occurring on its Amazon.com website.

**II. The Professors’ Brief argues that the physical nexus rule in place under the *Bellas Hess* and *Quill* decisions of the Supreme Court, which controlled in 2011 when Amazon located its first distribution facility in South Carolina and when the five-year moratorium expired in 2016, along with the broad language of the Act, confirms that Amazon cannot circumvent its obligations to collect and remit sales tax to the State through the employment of contractual and agency arrangements with its affiliates.**

In citing and explaining the context of binding Supreme Court precedent regarding the history of the physical nexus requirement under *National Bellas Hess, Incorporated v. Department*

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South Carolina was not determinative as to whether a person had physical presence nexus in South Carolina for sales tax purposes. Section 12-6-60 included similar language regarding distribution facilities with respect to nexus for South Carolina corporate income tax and license fee purposes. Both section 12-6-60 and 12-36-2690 created exceptions to the general rule; both sections were also repealed for tax years beginning after June 9, 2010. See South Carolina Sales and Use Tax Manual (2010 edition), Ch. 13 p. 3. Therefore, every person (like Amazon) who owned or utilized a distribution facility (where shipments of tangible personal property are processed for delivery to customers), knew the exemption ended and they would be effectively “turning on” the switch for physical presence sales tax nexus after June 9, 2010, unless they could obtain additional legislation to renew and extend the safe harbor provision.

*of Revenue of State of Illinois*, 386 U.S. 753 (1967) and *Quill Corporation v. North Dakota By & Through Heitkamp*, 504 U.S. 298 (1992), as well as the skepticism applied to a company's ability to avoid tax obligations through the employment of contractual and agency arrangements, *see Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), the Professors' Brief accurately and persuasively makes the case that Amazon's contractual and agency relationships with its affiliates do not change the fact that it is the retailer or seller of tangible personal property under the Act. These points are underscored by the broad definitional language enacted by the General Assembly that brings Amazon's business model under the ambit of those considered under South Carolina law to have an obligation to collect and remit sales tax. Here again, Professors Davis's and Wallace's identification of a "substance over form" policy undergirding the purpose of the Act provides additional support for the ALC's finding that Amazon is obligated to collect and remit sales tax on transactions occurring on its Amazon.com website.

**III. The Professors' Brief argues that Amazon's avoidance of its obligation to collect and remit sales tax to the State would be tantamount to an extension of a subsidy to it that was not intended by the General Assembly and at the expense of local business who were complying with the law.**

Finally, the Professors' Brief provides a persuasive commentary and analysis regarding the detrimental secondary and downstream effects of Amazon's attempt to improperly extend its bargained-for competitive advantage over existing South Carolina retailers who have been and are abiding by the Act's sales tax and remittance obligations. It is beyond the purview of the Department to comment on or question the policy questions which gave rise to the moratorium passed by the General Assembly to attract Amazon to locate a distribution facility in South Carolina. However, the Department's charge is to ensure that the Act is applied equally and fairly to all persons who fall under its reach. Starting on January 1, 2016, sales occurring on Amazon.com gave rise under the broad definition of a seller/retailer to a determination that Amazon is in the

business of selling tangible personal property in South Carolina and is thereby obligated to collect and remit sales tax.<sup>3</sup> Amazon was on express notice of that obligation in 2011, received the benefit of the moratorium for a five-year period, disclosed its potential obligation to collect and remit sales tax to its investors in 2015 (as pointed out in the Professors’ Brief), yet it chose to avoid that obligation to the State of South Carolina for the period in question and beyond. Accordingly, the discussion included in the Professors’ Brief regarding the implications of that purposeful decision is relevant to the context and policy considerations implicated by the limited question before the Court and provides additional support for the ALC’s finding that Amazon is obligated to collect and remit sales tax on transactions occurring on its Amazon.com website.

### **Conclusion**

For the reasons set forth above, the Department submits that the arguments advanced by the Professors’ Brief in support of the Department and the ALC’s conclusions are both relevant and helpful to the Court’s consideration of the appeal.

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<sup>3</sup> The language of section 12-36-2691 (the special nexus legislation that Amazon lobbied for and received in 2011) underscores this point. While the moratorium was in place, a person—like Amazon—who “makes a sale through the person’s Internet website” was required to notify the “purchaser in a confirmation email that the purchaser may owe South Carolina use tax on the total sales price of the transaction . . . .” See S.C. Code Ann. § 12-36-2691(E)(1). This requirement ended on January 1, 2016, because those internet sales made on Amazon’s website were now subject to sales tax—rather than use tax—by virtue of Amazon being a retailer that had established nexus with South Carolina for sales and use tax purposes in 2011. See S.C. Code Ann. § 12-36-2691(D)(1).

Respectfully submitted,

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