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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Trial Court Case No. 17-ALJ-17-0238-CC

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

v.

South Carolina Department of Revenue, ... Respondent.

Appellant's Petition for Rehearing

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Amazon Services LLC ("Amazon Services") petitions for rehearing of this Court's January 24, 2024 opinion, affirming the Administrative Law Court's ("ALC's") ruling in favor of the South Carolina Department of Revenue. *Amazon Servs., LLC v. S.C. Dep't of Revenue*, No. 2019-001706, 2024 WL 252952 (S.C. Ct. App. Jan. 24, 2024). This Court should grant rehearing and issue a revised opinion in favor of Amazon Services reversing the decision of the ALC.

INTRODUCTION

This Court held that the 2016 version of the South Carolina Sales and Use Tax Act unambiguously obligated Amazon Services to collect and remit sales tax from sales conducted on its online marketplace between third-party sellers and consumers. In so ruling, this Court misapplied and fundamentally altered the law in South Carolina concerning statutory construction in tax matters, ignored the longstanding rule entitling the taxpayer to the benefit of any reasonable construction of a tax statute, misunderstood the record, and overlooked important issues of federal and South Carolina constitutional law. Rehearing is warranted.

This Court's conclusion that the 2016 Tax Act unambiguously covers Amazon Services as a seller or one engaged in the business of selling third-party products is conclusory, disregards well-established principles of statutory interpretation, and ignores the record. *See* 2024 WL 252952, at *6. In particular, although the Department of Revenue conceded that it could not prevail unless Amazon Services's interpretation was both incorrect and unreasonable, this Court concluded, without support, that the statute was unambiguous and made no effort to explain why Amazon Services's interpretation was unreasonable.

Amazon Services relied on and articulated a straightforward interpretation of the text of the Act, in light of facts that this Court did not and could not dispute. Indeed, as Amazon Services argued, its interpretation was the most reasonable interpretation of the text. Yet this

Court failed even to discuss Amazon Services's alternative construction and the facts supporting it. Amazon Services cited undisputed evidence that it received payment from third-party sellers for services provided to them, not consideration in exchange for the sale of tangible personal property—evidence both the ALC and this Court ignored. Moreover, Amazon Services cited evidence that both the ALC and the Department of Revenue had acknowledged the reasonableness of Amazon Services's interpretation, that the Department had admitted to the legislature that changes to the law were needed to "close" a "gap" so that "nobody has to guess" about the collection obligations of marketplace facilitators, and that the legislature itself had amended the Act to impose sales tax collection and remittance obligations on marketplace facilitators. Such a change makes no sense if the Act were, as this Court found, "unambiguous" before that change. This Court erroneously treated this evidence as irrelevant as a matter of law. This Court even acknowledged that it had construed the 2016 Tax Act "broadly," tacitly conceding that some narrower interpretation was available. Yet this Court inexplicably declined to adopt the narrower construction even though the Supreme Court's decision in *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012), requires doing so. This Court similarly misconstrued other provisions of the Act, all of which can readily be harmonized with Amazon Services's reasonable reading of the Act. Instead, this Court read the various provisions of the Act piecemeal, contrary to settled rules of statutory construction.

The rule favoring a taxpayer who reasonably interpreted a tax statute is longstanding in South Carolina and throughout U.S. law, and is rooted in an understanding of the importance of regulatory certainty and fairness in assigning tax liability. Taxpayers need certainty. Without legal certainty, especially with respect to a tax that is collected from a customer, retailers lose the

opportunity to collect the tax and become unfairly subject to interest and penalties. This Court's ruling, if not modified, will significantly undermine the important protections that rule provides, especially to business planning necessary for economic growth and prosperity. If a Court can so readily refuse to engage and ignore a taxpayer's reasonable explanation for how it construed a tax statute, then the rule loses all its value, reliance is undermined, and the taxing authority's enforcement power can be wielded against disfavored taxpayers who reasonably believed they were complying with the law.

Having all but eviscerated the policies behind the rule supporting taxpayers who reasonably interpret tax statutes, this Court also misapprehended federal and South Carolina constitutional law. Holding Amazon Services liable for sales tax on third-party sales in early 2016 violated the Due Process Clause's fair notice guarantee because nothing about the statute's pre-2019 language or the Department's practices signaled to marketplace facilitators that they were liable for collecting and remitting sales tax on third-party sales. Likewise, the ruling violates the constitutional guarantee of equal protection, as even the Department conceded that Amazon Services, alone, would experience retroactive application of the Tax Act. This Court's reasoning grants extraordinary power of arbitrary tax enforcement to the taxing authority in South Carolina.

For each of these reasons, this Court should grant Amazon Services's petition for rehearing and issue a revised opinion reversing the ALC's order.

STATEMENT OF THE FACTS

A. The Amazon.com Marketplace.

This case concerns only sales of products offered by third-party sellers on the Amazon.com marketplace operated by Amazon Services. Amazon-related retail companies compete with those third-party sellers in the marketplace. (Tr., R.184, 228-29.)

Third parties who sell in the Amazon.com marketplace agree to the terms of the Amazon Services Business Solutions Agreement ("BSA"). (Tr., R.200; Ex. 3, R.846-93.) The BSA is a comprehensive agreement among Amazon Services and the third-party seller, and two other Amazon-related service providers: Amazon Payments, Inc. (a payment processing company) and Amazon Fulfillment Services, Inc. (which provides warehousing and shipping services). Each of these entities serves a different role and performs different functions. Amazon Payments is a payment processing company, and processes the flows of funds for the transaction. Amazon Fulfillment provides warehousing and shipping services. A seller in the Amazon Marketplace need not use Amazon Fulfillment's services, but must use Amazon Payments. And both Amazon Payments and Amazon Fulfillment offer their services to sellers *beyond* the Amazon.com marketplace.

Amazon Services, Amazon Payments, Amazon Fulfillment, and the various Amazon subsidiaries that sell products are distinct corporate entities. The Department has never argued to the contrary, nor did it present any evidence that would justify attributing the acts of one Amazon subsidiary to any other Amazon subsidiary.

Third-party sellers set the prices of their products they offer in the marketplace, and decide how many units are available and whether to offer warranties or guarantees. (Tr., R.206-07, 211, 219-22, 430-31, 448-50, 472-73.) The BSA contains only one pricing restriction: third-party sellers must provide customers in the Amazon.com marketplace the lowest price they offer for that product anywhere else. (Tr., R.214, 557; Ex. 3, R.863-64.)

Third-party sellers set their shipping terms and fulfill (*i.e.*, deliver) their orders to customers. (Tr., R.232-33, 236-37, 431, 448-49, 546-48.) They decide what shipping company to hire, and whether to pass the cost of shipping onto customers. As noted above, they can, but need

not, use Amazon Fulfillment to handle fulfillment with the set of services referred to as Fulfillment by Amazon ("FBA"). If a third-party seller chooses the FBA service, it sends its inventory to a fulfillment center, where Amazon Fulfillment stores the products on behalf of the third-party seller. (Tr., R.238-39.) Amazon Fulfillment does not own the inventory in its possession; third-party sellers do. (Tr., R.239, 463-65, 540-41; Ex. 3, R.880-81.) The seller maintains control over its product until it is shipped; the seller may even cancel a transaction up until that point. (Tr., R.468-69, 547.)

B. Customers Pay Third-Party Sellers for Products, and Third-Party Sellers Pay Amazon Services (and Other Amazon Companies) for Services.

When a customer purchases a product from any seller in the marketplace, payment is processed through Amazon Payments. The amount paid by the customer is the price of the product. Sales tax and shipping charges also may be assessed, if applicable, but they are separately indicated. (*See, e.g.*, Ex. 122, R.963.)

The sales proceeds flow from the customer's account into an Amazon Payments account, where they are held for the benefit of the seller until they are disbursed. (Tr., R.242-43, 245, 250; Ex. 3, R.892-93.) Amazon Services never receives or holds the sales proceeds; Amazon Payments does temporarily, but expressly for the benefit of the seller. (Tr., R.265-66, 284-85, 375; R.892-93.) That is, the customer and third-party seller use Amazon Payments to facilitate payment by the customer to the third-party seller for the product.

Pursuant to the BSA, the third-party seller compensates the various Amazon service providers it used to facilitate its sale out of the funds received from the customer over the Amazon Payment system. (Tr., R.242, 265-66; Ex. 3, R.846-47, 864-65, 872, 883, 892-93.) Amazon Payments collects a fee for its service, and, if Amazon Fulfillment has been selected by the third-party seller, it, too, receives a fee for its service. Likewise, Amazon Services charges

various fees to sellers. (Tr., R.263-66; Ex. 16, R.897-903 (fee schedule).) Contrary to the suggestion of this Court and the ALC, none of those fees bears a direct relationship to the profit margin of a particular product, and no Amazon entity knows whether any particular third-party sale was profitable. (Tr., R.410-12, 479-80.) Amazon Services is no more profiting from the *sale* of the product to the buyer than is Amazon Payments or Amazon Fulfillment, or, if the seller does not use the FBA service, whatever shipper the seller has chosen. All of these service providers derive profit *exclusively* from the third-party seller who receives the benefit of those entities' services in connection with the third party's sales.

Amazon Services also offers a tax calculation service to third-party sellers who choose to pay to become "professional sellers." (Ex. 23, R.905; Ex. 16, R.897; Tr., R.382-86.) This service carries an additional fee. (Tr., R.264-65, 382-86; Ex. 23, R.904-07 (tax collection service terms); Ex. 122, R.966.) Through that service, Amazon Services calculates and adds to the customer's purchase price the sales tax on the transaction, which Amazon Payments deducts from Amazon Services's fee before disbursing the amount to the third-party seller. (Ex. 23, R.905; Ex. 16, R.897; Tr., R.264-65, R.382-86.) The sales tax added to the price of the product at the time of sale is not deducted; that amount is sent onto the third-party seller. Like any other seller who collects sales tax at the time of sale, third-party sellers in the Amazon.com marketplace must forward that amount to the relevant taxing authority. (Tr., R.384-86.)

C. This Court Affirms the ALC's Decision in Favor of the Department, Though Not the Entirety of the ALC's Rationale.

The ALC ruled in September 2019. Before it ruled, as this Court is aware, the Department urged the legislature to adopt amendments to the Sales and Use Tax Act that would impose sales tax collection obligations on a "marketplace facilitator" (a new defined term in the Act) for sales made by third-party sellers in its marketplace. The ALC ultimately ruled that, with

respect to third-party sales even before the law was changed, Amazon Services was "in the business of selling tangible personal property at retail" and is therefore liable for sales taxes on those sales. (Op., R.46.) The ALC's ruling relied repeatedly on a small number of legal and factual assertions, some of which this Court has rejected.

To justify its ruling, the ALC invented two novel tax law concepts. First, the ALC focused on what it called the "point of sale" and what the ALC believed Amazon Services controlled about the so-called "point of sale." (*See id.* at R.7, 9-10, 25-27, 33-36, 38-39, 43, 46, 48.) But the ALC cited no legal authority for this concept, and this Court declined to endorse it. 2024 WL 252952, at *8. Second, the ALC repeatedly attributed to Amazon Services actions taken at the "point of sale" by other Amazon companies, in particular Amazon Payments. (*See, e.g.*, Op., R.25 (asserting that Amazon Services "processes the customer's payment," "accepts the customer's consideration," and "remits the proceeds from the sale to the owner"); *id.* at R.26 (asserting that Amazon Services "encumber[s] the customer's [credit] card").) Once again, this Court rejected that novel concept as a basis for its ruling. 2024 WL 252952, at *7.

The ALC also relied heavily on the Supreme Court's decision in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011). (*See* Op., R.23-30, 33-41, 44-46.) The ALC observed that both this case and *Travelscape* involve transactions through a website run by the putative taxpayer, but ignored that *Travelscape* did not involve a marketplace. (*Id.* at R.25.) Yet again, this Court disagreed with the ALC. It determined that *Travelscape* provided only "limited guidance" in this case. 2024 WL 252952, at *7.

This Court agreed with the ALC on the essential question of statutory construction. It acknowledged, as had the ALC, that for the Department to prevail, Amazon Services's interpretation of the statute had to be both incorrect and unreasonable. (Op., R.16.) But this Court

never concluded that Amazon Services's position was unreasonable. In fact, it never discussed Amazon Services's various bases for reading the Act to exclude marketplace facilitators before the Act was amended in 2019. And it never said any of Amazon Services's arguments were unreasonable. Instead, it simply declared, without analysis, that the statute is unambiguous. 2024 WL 252952, at *6.

This Court also specifically declared evidence of the reasonableness of Amazon Services's view legally irrelevant. The ALC had said that the law as applied to third-party sales was "not clear" (Tr., R.603-04), the Department repeatedly admitted to the legislature that changes to the statute were needed to eliminate an ambiguity regarding marketplace facilitators (*i.e.*, to "close[] the gap" so that "nobody has to guess") (Ex. 194, R.1263 at 6:13-15, 8:40-50), and the legislative oversight committee had reported that the law had to be changed to cover internet marketplace facilitators (Ex. 192, R.1256). Yet this Court ruled that these statements are entirely irrelevant. 2024 WL 252952, at *6.

Having ruled that the 2016 statute unambiguously applied to third-party sales, this Court, following the ALC, rejected Amazon Services's constitutional claims. *Id.* at *10-11.

STANDARD OF REVIEW

A petition for rehearing "aid[s] the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 172, 167 S.E. 234, 238 (1933). Where, as here, the Court overlooks the record or applicable law or misapprehends arguments, a petition for rehearing is appropriate. *See, e.g., Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 492 n.4, 763 S.E.2d 19, 21 n.4 (2014); *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); S.C. App. Ct. R. 221(a). These standards are met here.

ARGUMENT

I. The Court of Appeals Upended Longstanding Rules of Statutory Construction in Tax Cases.

This Court held that the plain language of the Sales and Use Tax Act in 2016 unambiguously included Amazon Services as a "seller" of, or person "engaged in the business of selling," third-party products. 2024 WL 252952, at *6-10. The Court reached that conclusion *without* any textual analysis of the Act itself. Rather, it quoted the Act and found that the Act is unambiguous as to whether Amazon Services is a "seller" or engaged in the "business of selling" within the meaning of the Act. *See id.* at *6 (stating that "we hold the Act is unambiguous"), *7 (citing section 12-36-910(A)), *10 (citing sections 12-36-70 and 12-36-100). While this Court stated flatly that the relevant provisions of the statute are unambiguous, presenting no "substantial doubt" as to the Tax Act's applicability to Amazon Services's activities, *id.* at *6 (citing *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 870, 873 (2012)), the Court later acknowledged that it had read the statute "broadly," because, in its view, the Supreme Court's decision in *Travelscape*[1] required it to do so. Respectfully, if a statute needs to be broadly interpreted to reach a taxpayer, then it necessarily must be at least reasonable to read that same statute narrowly to exclude the taxpayer; logically, there can be no broad reading of a statute unless a comparatively narrow alternative exists. Amazon Services submits that this Court's reading of *Travelscape* is mistaken, and that the rationale of this Court's ruling is at odds with itself.

More generally, this Court has not engaged with Amazon Services's arguments for concluding that the 2016 Act did not reach marketplace facilitators like Amazon Services with

[1] *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011).

respect to third-party sales, and has ignored or misunderstood the facts that support Amazon Services's statutory construction. Because this Court has not engaged with the arguments and facts that support Amazon Services's construction, this Court has not confronted whether that construction was *un*reasonable. That leaves the core issue in this appeal overlooked because, as this Court acknowledged, if Amazon Services's interpretation is reasonable, it must prevail. *See* 2024 WL 252952, at *5.

A. The 2016 Sales and Use Tax Act's Plain Language Did Not Require Amazon Services to Collect and Remit Sales Tax for Third-Party Sales.

Amazon Services relied on and articulated a reasonable interpretation of the text of the 2016 Act that excludes it from responsibility to collect and remit sales tax for third-party sales. Indeed, it presented a textual analysis explaining why the *best* reading of the Act supports Amazon Services. This Court's decision does not grapple with Amazon Services's interpretation.

1. Amazon Services Was Not the Seller of Third-Party Products on Its Marketplace in 2016.

The statute defines "sale" as "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property *for* a consideration." S.C. Code Ann. § 12-36-100 (emphasis added). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). So, under the law in effect at the time of the transactions at issue here, Amazon Services did not conduct any "sale" if it did not receive consideration "for" transferring personal property. And if it was not conducting any "sale," it was not "engaged in the business of selling" within the meaning of the statute. *See* S.C. Code Regs. 117-300.1 (requiring retailers to obtain a license to do business if they "mak[e] sales of tangible personal property . . . in this state").

The evidence, recited above, established that, when a customer orders a product on the Amazon.com website from a third-party seller, the funds the customer provides for that product—what the BSA calls the "sales proceeds"—are sent to Amazon Payments (not Amazon Services) and those funds belong to the seller. Under the BSA, the sales proceeds are held in an account with Amazon Payments. (Ex. 3, R.892.) Amazon Services *never* holds the sales proceeds and does not receive compensation for the transfer of the tangible personal property that is the subject of the sale. Amazon Payments does temporarily hold the sales proceeds, but only *for the benefit* of the third-party seller. (*Id.* at R.892-93.) And just because Amazon Payments temporarily has possession of the sales proceeds does not mean that even Amazon Payments has received compensation *for* the transfer of the tangible personal property that is the subject of the sale. The customer does not provide consideration *for the product* to Amazon Payments (or Amazon Services); the customer provides consideration to the third-party seller, and the seller has hired Amazon Payments to process the transaction. This Court said only that Amazon Payments has "control" over the funds until they are remitted, 2024 WL 252952, at *8; this Court did not, because it could not, say that the funds were the property of Amazon Payments, much less Amazon Services. And it never explained why Amazon Payments or Amazon Services received compensation *for* the transfer of tangible personal property.

In this sense, the flow of funds is no different than *any* credit card commercial transaction. The credit card processing company receives funds, but it is not paid *for the product*. A third-party seller who sells on its own website might use Amazon Payments or one of its competitors as a payment processor. (*See* Tr., R.248.) That website might be maintained by a contractor the seller hired to build and host the site. (*See* Tr., R.508-09 (discussing website host alternative).) Neither the host nor the payment processor incur sales tax liability because every

sale on that website quite obviously is made *by the third-party seller*, not by a payment processor or the website host. Those companies provide *services* to the seller and receive consideration for those services. That remains true even if the consideration those companies receive is tied to the volume of sales the seller makes. Only the seller receives consideration for selling tangible personal property. So it is with third-party sales on the Amazon.com marketplace.

This Court concluded that the trial court correctly treated Amazon Services and Amazon Payments as a "group or combination acting as a unit." 2024 WL 252952, at *7 (citation omitted). Its sole evidence for this conclusion is that the BSA at times refers to Amazon Payments and Amazon Services (and Amazon Fulfillment) as "we" for certain purposes. This Court did not, because it could not, present any basis for piercing the corporate veil. It also did not, because it could not, offer *any* other reason to treat Amazon Services's argument as "form-over-substance." 2024 WL 252952, at *7. It cited no case where distinct but related corporate entities could be so easily combined for *any* purpose, much less for tax liability purposes. In truth, the distinction between corporate entities is one of the most elemental in the law, and it cannot and should not be so lightly cast aside. *See Mid-S. Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597-98, 649 S.E.2d 135, 140-41 (Ct. App. 2007) (courts "disregard the corporate entity" only when the party seeking to pierce the veil has proven "injustice or fundamental unfairness"); *see also, e.g.*, *S.C. Dep't of Revenue v. Anonymous Co. A*, 401 S.C. 513, 515-21, 678 S.E.2d 255, 256-59 (2009) (rejecting argument that two corporations should be treated as one person for purposes of applying sales tax statute).

In the end, this Court's rationale fails even to say that Amazon Services could not have *reasonably* concluded that its distinct corporate form would be respected. It also fails to say that Amazon Services could not have reasonably concluded that, even if Amazon Payments and

Amazon Services should be treated as one entity, *neither* of them received payment *for* the purchased product given that the money held temporarily by Amazon Payments is held for the benefit of the third-party seller. The evidence is undisputed that the money from the customer was the seller's to disburse, and a portion was disbursed to Amazon Services at the seller's direction (pursuant to the terms of the BSA to which the seller agreed). Amazon Payments has no right to do anything with sales proceeds other than what sellers direct. (*See* Ex. 3, R.892-93.) As this Court elsewhere acknowledged, Amazon Services *is* "a service provider … with respect to its relationship to the *third-party seller*." 2024 WL 252952, at *8 (emphasis added).

Put simply, there is no testimony, exhibit, or other evidence that shows Amazon Services receives consideration in exchange *for* the transfer of tangible personal property, and this Court cited none. In this way, this Court misapprehended the law in determining that the third-party transactions were sales to which Amazon Services was a party. *See* 2024 WL 252952, at *8.

This Court's tangentially related concern that third-party sellers are prevented from collecting sales tax is unfounded. *See* 2024 WL 252952, at *8 n.9. Amazon Services allows all third-party sellers to, for a fee of $39.99 per month, enroll in its tax calculation service, through which Amazon Services calculates and withholds taxes from each transaction. (Ex. 23, R.904-07.) Amazon Services later disburses the withheld tax to the merchant to then remit to the state. (*Id.*) And the record shows that some third-party sellers took advantage of this service. (Tr., R.257, 385.) In any event, administrative convenience is not a legitimate basis for retroactively imposing a collection duty on conduct not covered by the statute. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900-01 (1988).

2. Amazon Services Was Not "in the Business of Selling" Third Parties' Products in 2016.

For similar textual reasons, Amazon Services reasonably concluded that it was not "in the business of selling" third-party products. Just as Amazon Services has not engaged in conduct meeting the definition of "sale" with regard to third-party transactions in its marketplace, likewise Amazon Services is not "in the business of selling" with respect to those sales. S.C. Code Ann. § 12-36-910(A).

Under section 12-36-20, "business" includes "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect." This Court emphasized the language "direct or indirect" when quoting the statute, 2024 WL 252952, at *5, and ruled that an entity is covered by the definition of "business of selling" when it is paid "a per-item fee . . . based upon a percentage of the item's sales price and the category of the item sold," *id.* at *8. As Amazon Services explained to both the ALC and this Court, the breadth of this understanding of the phrase "in the business of selling" is extraordinary and unprecedented, and could result in multiple parties being considered "the seller" for sales tax collection purposes.

Amazon Services (1) does not choose what items third-party sellers make available to customers in the marketplace and at what price, (2) does not determine the number of products to make available to customers in the marketplace nor own or exercise control over any inventory third-party sellers make available to customers in the marketplace, (3) does not receive payment from buyers for the products, and (4) does not transfer ownership of products to the buyers. This Court did not dispute (or discuss) any of these facts. Prior to the ALC's ruling and now this Court's, no court or tax regulator had said that a marketplace—a business that engages in *none* of these selling activities—was "in the business of selling" property it did not own.

No court or regulator had stretched a statute this far for good reason. The standard contains no principled stopping point. Numerous industries *serve* those who sell and thus achieve a "profit" by "indirect means" from the sale of property owned by others. Payment processors, credit card companies, banks, delivery companies, advertisers, and more *all* receive fees connected with sales by others. Neither this Court nor the ALC ever explained what language in the statute supported making the mechanism by which such a fee is calculated the distinguishing factor between service providers who *are* responsible for collecting and remitting sales tax and those who are *not*. This Court did not even discuss the breadth of the principle it adopted, much less explain how to constrain it, and why it was unreasonable for a taxpayer to read the text more narrowly, especially in light of the absence of any authority for this Court's view.

Another clear sign that Amazon Services's view is reasonable is how it avoids the inexplicable consequences of this Court's view. If Amazon Services is the seller of third-party products, then it is constantly offering the *same* product at different prices. (Tr., R.228-29.) And if Amazon Services is the seller of third-party products, then Amazon Services is often *competing* with other Amazon companies selling the same products. None of this makes any sense.

B. This Court Misread Controlling Supreme Court Decisions and Has Construed the Supreme Court's Own Decisions as in Conflict with Each Other.

For all the reasons discussed above, the plain language of the statute, in light of the undisputed facts and settled South Carolina law, supports Amazon Services and does not render Amazon Services's understanding of the 2016 Act unreasonable. Beyond that, however, this Court's ruling significantly misreads key Supreme Court tax rulings in a manner that undermines basic tax law. When those decisions are properly construed and applied, they fully support Amazon Services and warrant reversing the ALC's ruling.

1. The Court Misread Alltel Communications in Concluding There Was No Substantial Doubt That the Tax Act's Definitions Covered Amazon Services's Third-Party Sales.

This Court applied an unjustifiably narrow reading of *Alltel Communications* in finding that there could be no substantial doubt as to Amazon Services's obligations under the 2016 Sales and Use Tax Act to collect and remit sales tax on third-party sales. It is well-settled in South Carolina that where "the language relied upon to bring a particular person within a tax law is ambiguous *or* is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." *Alltel Commc'ns, Inc.*, 399 S.C. at 321, 731 S.E.2d at 873 (emphasis added) (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936)); *see also Hadden v. S.C. Tax Comm'n*, 183 S.C. 38, 190 S.E. 249 (1937); *Columbia Ry., Gas & Elec. Co. v. Carter*, 127 S.C. 473, 121 S.E. 377 (1924). This critical presumption is a bulwark against the natural tendency for governments to expand the reach of their taxing authority, and ensures that taxpayers are given fair notice so that they may structure their affairs accordingly. *See, e.g.*, *Pacolet Mfg. Co. v. Query*, 174 S.C. 359, 364, 177 S.E. 653, 655 (1934).

Alltel Communications requires that this Court grant the petition for rehearing and issue a revised opinion in Amazon Services's favor. In *Alltel Communications*, the Department assessed a tax deficiency, arguing that cellular service providers were "telephone companies" under the statute. The Court of Appeals, like the ALC here (Tr., R.603-04), acknowledged that the law "was not 'absolutely clear,'"[2] but it rejected the taxpayers' argument that such lack of clarity

[2] This Court held "the ALC was not bound by this statement because the ALC made this observation during the hearing but made no such finding in the written order." 2024 WL 252952, at *7. Even if the statement does not carry controlling effect, it at least illustrates the reasonableness of Amazon Services's view. No matter when the ALC offered the observation,

resolved the case in their favor. *Alltel Commc'ns*, 399 S.C. at 318, 731 S.E.2d at 872. The Supreme Court applied the "settled" rule that any substantial doubt is resolved in favor of the taxpayer, and held that the statute was ambiguous as applied to the wireless service providers and reversed the Department's determination and Court of Appeals' decision. *Id.*

This Court distinguished *Alltel Communications* on the ground that here, unlike in *Alltel Communications*, the statute defines the "relevant terms." 2024 WL 252952, at *6. Respectfully, this evades *Alltel Communications* rather than applies it. It is true that the 2016 Act defines "seller" and "business." S.C. Code Ann. §§ 12-36-70, -20. But the question *Alltel Communications* required this Court to ask is not whether *some* term is defined in the statute, but whether there is a term (or terms) in the statute that unambiguously imposes a duty on the allegedly taxable activity or entity. That no terms covered marketplace facilitators like Amazon Services is precisely why, in 2019, the statutory definition of "seller" was *amended* to *add* "marketplace facilitator[s], as defined in" a *new* Section 12-36-71.

If anything, there was less room for doubt in *Alltel Communications* that cellular service providers would be considered "telephone companies." Here, *none* of the Tax Act's terms suggested that Amazon Services, an online marketplace facilitator who never receives payment at all from customers, much less consideration in exchange *for* tangible personal property, would constitute a "seller" in the context of third-party sales. Amazon Services's construction of the 2016 Act is at least as reasonable as Alltel's construction of the statute relevant to its tax obligations.

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unless the ALC was speaking unreasonably during the hearing, it supports Amazon Services's view.

2. This Court Misread Travelscape to Require a "Broad" Reading of a Tax Statute.

This Court determined that the Supreme Court's decision in *Travelscape* provided only "limited guidance" in this case, but the "guidance" this Court derived was incorrect and undermines well-settled tax law in South Carolina. In particular, this Court concluded that "[t]he import of the *Travelscape* decision with respect to this case is that our supreme court interpreted [the applicable tax statute] broadly," 2024 WL 252952, at *7, so likewise this Court should construe the 2016 Act "broadly."

Respectfully, this Court's reading of *Travelscape* is unsupported by the decision and places the Supreme Court's authorities in tax cases at odds with each other. The words "broad" and "broadly" do not appear in the opinion once. To read the opinion as if it supports "broad" constructions of tax statutes places it directly at odds with the settled rule that a taxpayer receives the benefit of reasonable interpretations of tax statutes in its favor. It would contradict *Alltel Communications* and the numerous cases that have stated this important principle of tax code construction for decades. *See Alltel Commc'ns*, 399 S.C. at 318, 731 S.E.2d at 872 (citing *Cooper River Bridge*); *Cooper River Bridge*, 182 S.C. 72, 188 S.E. 508 (collecting cases dating back to 1924). And it contradicts the related principle that, in the context of "statutes levying taxes, the literal meaning of the words employed is most important, for such statutes are *not to be extended by implication* beyond the clear import of the language used." *Cooper River Bridge*, 182 S.C. at 72, 188 S.E. at 510 (emphasis added).

Moreover, nothing in the facts of *Travelscape* required the Supreme Court to adopt a rule of broad construction of tax statutes. *Travelscape* dealt with a business model materially different from the marketplace Amazon Services operates. Travelscape was an internet merchant that, unlike Amazon Services, set prices and was paid by customers for the right to access hotel

rooms. *See Travelscape, LLC*, 391 S.C. at 95-96, 99-102, 703 S.E.2d at 31, 33-35. Travelscape thus comfortably fell within the scope of the relevant statute; it was paid to "furnish" hotel rooms. *Travelscape* remains useful here but only to the extent it provides a clear contrast between taxpayers that are paid *for* taxable items and those, like Amazon Services, that do not.

C. The Court Overlooked the Ample Evidence That Amazon Services's Interpretation of the Statute Was Reasonable.

This Court overlooked or disregarded the overwhelming evidence that Amazon Services provided a reasonable interpretation that "excluded" Amazon Services from the statute, and that there was thus "substantial doubt" that the statute imposed collection obligations on Amazon Services with respect to third-party sales. *Alltel Commc'ns*, 399 S.C. at 321, 731 S.E.2d at 873.

1. The Legislature's Decision to Add "Marketplace Facilitators" to the Sales and Use Tax Act Confirms the Reasonableness of Amazon Services's Interpretation.

In finding no substantial doubt that the 2016 Tax Act required Amazon Services to collect and remit sales tax for third-party sales conducted on its marketplace, this Court disregarded the facially obvious purpose of the 2019 amendments to the Tax Act—to include marketplace facilitators as a new kind of taxpayer obligated to remit sales tax to the state. The Director of the Department of Revenue told the Legislative Oversight Committee that there was an "emerging issue" about whether online marketplaces were required to remit sales taxes on third-party sales, noting that "Amazon is a prime example." (Ex. 213, R.1524-25; *see also* Ex. 202, R.1290.) The Director told the Committee that there needed to be legislative "change" to "ensure that online marketplace retailers collect/remit sales tax." (Ex. 213, R.1525; *see also* Ex. 202, R.1290.) And the Director admitted that the proposed legislation was necessary to "close[] the gap" so that "nobody has to guess" who owes taxes on third-party sales. (Ex. 194, R.1263 at 6:13-15, 8:40-50.)

The Legislative Oversight Committee summarized the legislative changes that had been recommended by the Department. (*See* Ex. 192, R.1251-62.) The Committee noted that the Department had recommended changes "to ensure that online third-party sales will be subject to tax." (Ex. 192, R.1256.) The Department had "report[ed] that this statutory change would allow it to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors through the marketplace sites." (*Id.*) "Without this ability," the Committee continued, the Department "would have the right to collect sales tax directly from some third-party sellers, but it predicts that the significant administrative burden of collecting from so many individuals and companies would result in a large percentage of these taxes going uncollected." (*Id.*) Singling out Amazon, the Committee noted "that, *if there had been a law like this in 2016*, Amazon's additional sales tax liability for that year would have been $57 million." (*Id.* (emphasis added).)[3] The obvious implication from this statement by the Committee was that the 2016 law *excluded* liability on the part of Amazon.

The legislature ultimately changed several provisions of the Sales and Use Tax Act to reach the business model at issue here. *See* 2019 S.C. Act No. 21 (effective Apr. 26, 2019). "When the Legislature adopts an amendment to a statute, [there is] a presumption that the Legislature intended to change the existing law." *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008); *Key Corp. Capital, Inc. v. Cnty. of Beaufort*, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2007); *N. River Ins. Co. v. Gibson*, 244 S.C. 393, 398, 137 S.E.2d 264, 266 (1964). To hold otherwise would imply that the amendment was "essentially [] a futile act," an implication courts typically avoid. *Key Corp. Capital*,, 373 S.C. at 61, 644 S.E.2d at 678; *see*

[3] The $57 million figure reflects the annualized deficiency for 2016 sought by the Department in this case.

also Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002); *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). The significant changes to the statute at issue here fully support the "presumption" that the law has been changed. At a minimum, they indicate conclusively that the previous law was unclear with respect to its reach.

But this Court reached the opposite conclusion, finding that the 2019 amendments to the Tax Act rebutted the presumption and fit the rare case of amendments merely intended to "clarify" what the law already meant. *See* 2024 WL 252952, at *6. First, this Court stated that because—in its view—the language of the statute unambiguously required Amazon Services to remit the sales tax, it did not need to consider any other source, including the legislative changes and statements, to aid its interpretation. *Id.* But that misunderstands the multiple reasons why this evidence was properly submitted and considered by the ALC. To be sure, Amazon Services continues to believe that all of this evidence supports the accuracy of its interpretation of the 2016 Act. But beyond that, it *at a minimum* demonstrates the *reasonableness* of Amazon Services's view. This Court erred in refusing even to consider the repeated statements of taxing authorities that the statute was at best unclear (taxpayers must "guess") as to the obligations it imposed on a marketplace facilitator like Amazon Services.

Further, if changes were intended only to clarify the pre-existing law, the need for clarification in a tax case—where *Alltel Communications* affords taxpayers favor in the face of any lack of clarity in the operative statute—would reveal only that the version in effect during the first quarter of 2016 was ambiguous, and thus Amazon Services should *still* prevail. *See* 399 S.C. at 320-21, 731 S.E.2d at 873.

In truth, the 2019 changes were made specifically and expressly to extend the duty to collect sales tax on third-party sales to online marketplace facilitators like Amazon Services. The changes include new and critical terms, including "marketplace facilitator," that expand the statute's reach. The statute had never before said or been interpreted to mean that merely "facilitating" sales would trigger sales-tax obligations. Nor had the statute ever before said or been interpreted to mean that the combination of "allowing the listing" of products and "processing payments" for products by "arrangement with a third party" would carry sales-tax obligations. *See* S.C. Code Ann. § 12-36-71(A)(1)(2019). The new definition also provided that, for purposes of these new activities that combine to create sales-tax obligations, "a marketplace facilitator includes any *related entities* assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace." *Id.* § 12-36-71(C) (2019) (emphasis added). Never before had the sales-tax statute said or suggested that the conduct of distinct but related corporate entities could create sales-tax obligations.

This Court pointed to prefatory language in the enacting legislation stating that the amendments "shall not be construed as a statement concerning the applicability of the South Carolina Sales and Use Tax Act to any sales and use tax liability in matters currently in litigation or being audited." *See* 2024 WL 252952, at *6 (quoting 2019 S.C. Act No. 21 § 5 (effective Apr. 26, 2019)). But such a prefatory statement attached to legislation cannot eviscerate the presumption that amendments to legislation reflect a change, and certainly cannot render *unreasonable* any view that the prior version of the statute was materially different from the amended version. Such a rule would provide a dangerous opportunity for legislatures to evade the longstanding principle against retroactive application of changes in statutes, a principle with special force in tax cases. *See State v. Brown*, 402 S.C. 119, 127, 740 S.E.2d 493, 496-97 (2013)

("A statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt."); *S.C. Dep't of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000) (same); *accord Pacolet Mfg.*, 174 S.C. at 364, 177 S.E. at 655. The prefatory language therefore merely reinforces the point that changes in the law would apply only prospectively. Moreover, it makes no sense to rely on prefatory language in the enacting legislation on one hand, while declaring irrelevant the Department's sworn statements about the purpose and effect of the legislation on the other hand.

The same is true as to the title of the amendments, which declares that they "further inform marketplace facilitators of their requirements." 2019 S.C. Act No. 21 (effective Apr. 26, 2019). Respectfully, the text of the pre-2019 statute does not refer to marketplace facilitators in name or substance. Thus, the language "further inform" in the 2019 amendment, at best for the Department, shows that the prior version of the statute was sufficiently unclear regarding the obligations of marketplace facilitators as to require elaboration. If it was clear what marketplace facilitators had to do, no "further" information would have been needed.

2. The Department's Statements to the Legislature and Its Prior Practice Confirm the Reasonableness of Amazon Services's Interpretation.

The Department effectively conceded that the 2016 version of the Sales and Use Tax Act is ambiguous when its Director addressed the General Assembly while this litigation was pending. In sworn public testimony given at various times during 2018, the Department's Director repeatedly (and accurately) stated that "[t]here is no law related to taxation of third party sales," and he urged the legislature to change the statute. (Ex. 205, R.1381; Ex. 203, R.1342; Ex. 207, R.1506.) The Director testified that the proposed legislation would "close[] the gap" so that "nobody has to guess" who owes taxes on third-party sales. (Ex. 194, R.1263 at 6:13-15, 8:40-50.) That there was a "gap" in the 2016 version of the statute that required a

taxpayer like Amazon Services to "guess" whether it owed the tax is the precise concern that the rule giving taxpayers the benefit of the doubt is designed to guard against. *See Gould v. Gould*, 245 U.S. 151, 153 (1917) (collecting cases). And the fact that the head of the Department of Revenue admitted there was a "gap" and that Amazon Services had to "guess" should be dispositive under *Alltel Communications*.

Not only did the Department admit that the law (at best) left Amazon Services to "guess" whether it was obliged to collect and remit sales tax on third-party sales, but the Department's practice suggested that the best "guess" was that Amazon Services should not. The Department was receiving sales-tax payments from third-party sellers for sales on Amazon.com to customers in South Carolina. Indeed, Amazon Services offered to collect and remit *to the third-party seller* applicable sales tax owed on third-party sales. (Tr., R.382-86; Ex. 23, R.904-07 (tax collection service terms).) The third-party seller, not any Amazon entity, then remitted the sales tax to the State. (Tr., R.385-86.) As of 2016, the Department had issued no guidance suggesting that such a process was wrong because Amazon Services, and not the third-party seller, was the responsible seller for sales-tax purchases. Instead, the Department collected the payments without telling Amazon Services (or the third-party sellers) that Amazon Services was liable for the tax. It was surely reasonable for marketplace facilitators to infer from this practice that the Department agreed that the third-party seller bore South Carolina's sales-tax obligations.

Rather than consider the import of this evidence, this Court, as it did with the 2019 amendments, concluded that it need not consider the statements of the legislature because such evidence would only aid in interpreting an ambiguous statute, and it had already concluded that the 2016 Tax Act was unambiguous. For the reasons expressed above, this Court overlooked

how this evidence supports Amazon Services's reasonable, alternative interpretation of the statute.

3. The Department's Treatment of Remote Sellers Confirms the Reasonableness of Amazon Services's Interpretation.

The Department's treatment of remote sellers—*i.e.*, retailers without a physical presence in South Carolina—provides yet more evidence that Amazon Services's interpretation of the statute was reasonable.[4] In September 2018, the Department issued S.C. Revenue Ruling 18-14 (Ex. 137, R.993-98), which set forth the Department's official position on the sales-tax responsibilities of remote sellers in the wake of the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). In the Revenue Ruling, the Department took the position that, for purposes of calculating a remote seller's "gross revenue" from sales in South Carolina (licensing and sales-tax obligations are triggered when surpassing a threshold of "gross revenue" for sales in South Carolina), third-party sellers are the sellers of their products sold in an online marketplace. (Ex. 137, R.995-96.) This ruling underscores that it was *reasonable*, in 2016, to treat third-party sellers as the sellers of their products sold on internet marketplaces.

Even if, as this Court concluded, the Department could read the statute in 2018 (the same version applicable in 2016) as allowing it to treat *both* the third-party seller and the online marketplace operator as "sellers" of the same product, that would not undermine the

[4] Amazon Services recognizes that this Court found this issue unpreserved because the ALC did not address it. 2024 WL 252952, at *9. Amazon Services raised it before the ALC. (Amazon Services's Summary of Hearing and Proposed Findings of Fact and Conclusions of Law at page 60, filed April 5, 2019.) Though the ALC did not specifically address it in its order, this argument served to bolster Amazon Services's larger point that its interpretation of the statute excluding it from obligation to remit third-party sales tax was reasonable—an issue which the ALC's order addresses, thereby addressing the revenue ruling argument as well, albeit indirectly.

reasonableness of Amazon Services's view that only third-party sellers are "sellers" of their products for all sales-tax purposes. Having decided to treat third-party sellers as "sellers" for purposes of triggering licensing and sales-tax obligations, the Department surely could have *reasonably* concluded that third-party sellers are sellers of their products for *all* sales-tax obligations. And had the Department in the Revenue Ruling treated third-party sellers as the sellers for all purposes, a court surely would have deferred to the Department's judgment precisely because it would have been *reasonable. See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 33-34, 766 S.E.2d 707, 717-18 (2014) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 439-40, 581 S.E.2d 836, 838 (2003)).

4. The Decisions of Other Jurisdictions Confirm the Reasonableness of Amazon Services's Interpretation.

Finally, the sheer novelty of the Department's approach confirms the reasonableness of Amazon Services's interpretation. The Department conceded "[n]o other state has attempted to pursue this legal theory against online retailers like Amazon." (Ex. 205, R.1356.) There are now 44 states (besides South Carolina) that have passed "marketplace facilitator" laws,[5] and in none of those other jurisdictions did a taxing agency or court ever conclude that Amazon Services—or

[5] *See, e.g.*, Alabama (2018 H.B. 470), Arizona (2019 H.B. 2757), Arkansas (2019 H.B. 576), California (2019 A.B. 147, 2019 S.B. 92), Colorado (H.B. 19-1240), Connecticut (2018 S.B. 417), District of Columbia (2018 B22-1070), Hawaii (2019 S.B. 396), Idaho (2019 S.B. 259), Illinois (2019 S.B. 689), Indiana (2019 HEA 1001), Iowa (2018 S.F. 2417), Kentucky (2019 H.B. 354), Maine (2019 H.P. 1064), Maryland (2019 H.B. 1301), Massachusetts (2019 H.4000), Minnesota (2017 H.F. 1, 2019 H.F. 5), Nebraska (2019 L.B. 284), Nevada (2019 A.B. 445), New Jersey (2018 A4496), New Mexico (2019 H.B. 6), New York (2019 S. 1509 Part G), North Dakota (2019 S.B. 2338), Ohio (2019 H.B. 166), Oklahoma (2018 H.B. 1019XX), Pennsylvania (2017 Act 43, 2019 H.B. 262), Rhode Island (2017 H. 5175A, 2019 S. 251), South Dakota (2018 SB2), Texas (2019 S.B. 1525), Utah (2019 S.B. 168), Vermont (2019 H. 536), Virginia (2019 H. 1722), Washington (2017 H.B. 2163, 2019 S.B. 5581), West Virginia (2019 H.B. 2813), Wisconsin (2019 A.B. 251), and Wyoming (2019 S.B. 69).

any marketplace facilitator—was liable for sales tax on third-party sales before those changes were enacted. Amazon Services reasonably expected that South Carolina would not make itself such an outlier.[6]

In addition, a number of courts from states with recently-enacted marketplace facilitator laws have issued opinions that squarely disagree with this Court's conclusion here. *See Normand v. Wal-Mart.com USA, LLC*, 340 So.3d 615, 626 (La. 2020); *Orthotic Shop, Inc. v. Washington Dep't of Revenue*, No. 39321-6-III, 2024 WL 236875, at *7 (Wash. Ct. App. Jan. 23, 2024). As the Washington Court of Appeals recently explained, on virtually identical facts, "If the legislature thought that the law before [the marketplace-facilitator amendment] required marketplace facilitators such as Amazon to collect taxes, it would have faced no need to enact the new provisions." *Orthotic Shop*, 2024 WL 236875, at *7; *see also id.* *6 (concluding that

[6] This Court stated that Amazon Services "failed to identify" any states that "had statutes substantially similar to sections 12-36-20, 12-36-70, and 12-36-910(A) in effect prior to the enactment of the marketplace facilitator laws." 2024 WL 252952, at *9. Not so. (*See* AS Reply Br. at 23-24 (citing, for example, *Cincinnati Reds, L.L.C. v. Testa*, 122 N.E.3d 1178, 1183 (Ohio 2018) ("Sale is defined . . . to include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, . . . but this definition applies only if those transactions are for a consideration." (brackets, citations, and internal quotation marks omitted)); *Comptroller of Treasury v. J/Port, Inc.*, 967 A.2d 253, 262 (Md. Ct. Spec. App. 2009) ("The term sale is further defined . . . as a transaction for a consideration whereby . . . title or possession of property is transferred or is to be transferred absolutely or conditionally by any means . . . ." (brackets, citations, and internal quotation marks omitted)).) In addition, this Court found *Normand v. Wal-Mart.com USA, LLC* distinguishable simply because "the statutes at issue there do not contain the same language as the statutes at issue here." 2024 WL 252952, at *9. Respectfully, that presents a distinction without a difference. It is true that the Louisiana statute imposes a sales tax on any "dealer," as in "[e]very person who sells at retail, or who offers for sale at retail, . . . to be used or consumed in the taxing jurisdiction, tangible personal property," La. Stat. Ann. § 47:301(4)(b), while South Carolina's statute imposes a sales tax on "every person engaged . . . in the business of selling tangible personal property at retail," S.C. Code Ann. § 12-36-910(A) (2014). But these immaterial differences in wording do not undermine the critical point, which the Louisiana Supreme Court recognized, that there is a clear distinction between being a "seller" or "retailer" and a "facilitator" of third-party sales. *See Normand*, 340 So.3d at 626 ("Clearly, an online marketplace is not a party to the underlying sales transaction between the third party retailers and their customers, but rather a facilitator of the sale.").

third-party sellers, not Amazon, "sold to buyers" and explaining that "[t]his conclusion accords with the merchants' descriptions of their business activities and the contractual agreements between the merchants and Amazon to sell goods on Amazon's site"). And when other state courts interpret "practically identical" language in their taxing statutes, "[t]he construction accorded that language, as applied to facts substantially identical with those of this case, by the courts of those states is . . . entitled to great weight." *Fuller v. S.C. Tax Comm'n*, 128 S.C. 14, 121 S.E. 478, 483 (1924). That no other taxing jurisdiction has concluded that pre-existing statutes imposed sales tax obligations on marketplace facilitators, and that legislative amendment was required, surely supports the reasonableness of Amazon Services's view.

D. The ALC's Alternative Rationales, Rejected by This Court, Do Not Support Affirmance.

1. The "Point of Sale" Concept Does Not Support the ALC's Ruling.

This Court disregarded the ALC's "point of sale" concept as merely "illustrative," but unnecessary for reaching its conclusion. 2024 WL 252952, at *6. To the extent this Court's statements acknowledge that the concept cannot support the ALC's conclusion, Amazon Services agrees.

The ALC acknowledged that the phrase has no footing in the statute. (Op., R.25-26.) This unprecedented legal concept is completely foreign to South Carolina sales-tax law, and yet was a cornerstone of the ALC's decision.

Because no South Carolina authority discusses the "point of sale" in the context of South Carolina sales-tax law, the ALC had no established framework it could apply to Amazon Services's business to determine whether what it deemed "control" over the "point of sale" made Amazon Services the seller of third-party sellers' products. The vagueness of the concept alone supports the view that it cannot be the basis of Amazon Services's sales tax obligations here. In

any event, the ALC's new "point of sale" doctrine confuses the business of running a marketplace with the business of selling.

It is true that third-party sellers agree that Amazon Services will provide order information to customers, and third-party sellers agree to accept and process cancellations, returns, and refunds in accordance with the BSA and the applicable Amazon refund policies. (*See, e.g.*, Op., R.4-6, 8, 13, 25-27.) But none of these rules, either individually or taken together, supports the notion that Amazon Services is the *seller* of the third-party goods. Instead, these rules construct the marketplace in which the actual sellers of third-party goods can effectively and efficiently sell their products.

Worse, not only is the "point of sale" concept novel, but the ALC badly misunderstood what Amazon Services controls at the so-called "point of sale." According to the ALC, "the most important consideration is who is accepting money in exchange for the product at the point of sale." (Op., R.38.) As explained above, *see supra* at 7, 9-15, the ALC wrongly asserted that "Amazon Services is the party who is present at the point of sale and who accepts consideration in exchange for the transfer of the product." (*Id.* at R.39.) Indeed, as the ALC itself acknowledged elsewhere, "Amazon Services clearly does not accept the money . . . because that function is carried out by Amazon Payments." (*Id.* at R.30.)

2. The "Consignment Analogy" Does Not Support the ALC's Ruling.

The Sales and Use Tax Act provides that the "gross proceeds of sales" include "the proceeds from the sale of property sold on consignment by the taxpayer." S.C. Code Ann. § 12-36-90(1) (2011). The ALC found that Amazon Services is not in fact a consignee of goods sold by third-party sellers. Yet the ALC took another novel turn when it reasoned that Amazon Services is enough *like* a "consignee" of third-party sellers' property—asserting that it has a "consignment-type relationship" with third-party sellers—to warrant imposing sales-tax

collection and remittance obligations on it. (Op., R.46.) This Court apparently rejected this rationale as well. *See* 2024 WL 252952, at *8. That was correct.

A consignment sale requires an agency relationship between the consignee (*i.e.*, the retailer) and consignor (*i.e.*, the owner of the property). *See Greenwood Mfg. Co. v. Worley*, 222 S.C. 156, 161, 71 S.E.2d 889, 891 (1952) ("if it is a consignment, title does not pass, being merely an agency for the purpose of the sale") (citing 77 C.J.S. Sales § 270 at p. 1072)). The BSA expressly disclaims any such agency relationship. (Ex. 3, R.851.)

In addition, undisputed testimony at trial explained how a consignment relationship is structured. The testimony left no doubt that the relationship between Amazon Services and third-party sellers is materially different from a consignment relationship, which typically leaves the consignee in control of inventory and price. (Tr., R.300-01.) As discussed above, Amazon Services does not control the inventory, and does not decide what to sell or set the price. *See supra* at 4-5, 14. Third-party sellers control all of that, and may, in their discretion, change how many units to sell, adjust the price, or even cancel orders at any point before title to their products shifts to their customers. (Tr., R.466-69, 531-32.)

Given the lack of similarity between consignment sales and third-party sales on Amazon.com, it is not surprising that courts in other jurisdictions have rejected the argument that marketplace operators should be considered or treated as consignees. *See Stiner v. Amazon.com, Inc.*, 120 N.E.3d 885, 892 (Ohio Ct. App. 2019) (distinguishing Amazon marketplace from consignee); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197, at *8-12 (D.N.J. July 24, 2018) (Amazon marketplace not a broker who exercised control over product by taking title to it; instead, it resembled broker who never exercised control and was thus not a "seller"); *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App'x 879, 887-88 (Fed. Cir. 2017)

(rejecting argument that Amazon.com, Inc. was engaged in consignment sales when listing products sold by third-party sellers on its website). This Court should not break new ground.

II. The Court of Appeals' Decision Holding Amazon Services Liable under the Sales and Use Tax Act for Sales Tax on Third-Party Sales in 2016 Violates the South Carolina and Federal Constitutions.

A. Applying the Sales Tax to Amazon Services's Marketplace Facilitation Services Violates the Due Process Guarantee of Fair Notice.

This Court misapprehended applicable law in concluding that the application of the 2016 Tax Act to Amazon Services presented no violation of the constitutional guarantee of due process. The Department's attempt to collect sales taxes from Amazon Services for third-party sales during the first quarter of 2016 violates the South Carolina and federal constitutional guarantees of due process. U.S. Const. amend. XIV, § 1; *accord Huber v. S.C. State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 26-28, 446 S.E.2d 433, 435 (1994). "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "[R]egulated parties should know what is required of them so [that] they may act accordingly," and "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* A law or regulation that "fails to provide a person of ordinary intelligence fair notice of what is prohibited [or required], or is so standardless that it authorizes or encourages seriously discriminatory enforcement" violates this constitutional guarantee. *Id.* (citation omitted).

The Department's attempt to impose the sales tax on Amazon Services for third-party sales in the first quarter of 2016 effectively seeks to subject Amazon Services—and only Amazon Services, not other marketplace facilitators—to the 2019 amendments, adopted years after the tax period at issue here, and violates the constitutional requirement of fair notice. As

discussed above, during the first quarter of 2016, the law was silent as to any sales-tax obligation on online marketplace facilitators for third-party sales. The Department itself acknowledged that under then-existing law "[t]here [was] no law related to taxation of third-party sales" and that taxpayers had to "guess" who owed sales tax for third-party sales on online marketplaces. (*See, e.g.*, Ex. 194, R.1263 at 6:13-15, 8:40-50; Ex. 203, R.1342; Ex. 205, R.1381; Ex. 207, R.1506.) The Department had not attempted to collect sales tax from Amazon Services or any other marketplace facilitator for third-party sales during the more than 15-year period that Amazon Services had been operating its marketplace. It was not until 2018 that the Department announced a sudden policy change when it issued for the first time any guidance related to the taxation of third-party sales on online marketplaces (in the form of S.C. Revenue Ruling 18-4). That is why the Department advocated for—in the Department's own words—"legislative change." (Ex. 202, R.1290.) And that is also why the legislature adopted a comprehensive set of amendments specifically crafted to impose this duty on online marketplace facilitators. *See supra* at 19-23.

This Court's attempt to distinguish *Fox Television* from this case presents a circular argument. This Court found *Fox Television* "inapplicable" because unlike in that case, here, "no evidence shows the Department attempted to retroactively apply the new law or policies to Amazon Services's conduct. Rather, the Department applied the sales tax law that was in place at the time." 2024 WL 252952, at *10. This Court's distinction rests entirely upon the flawed assumption that applying the 2016 Tax Act would inherently not be retroactive because it had already applied to Amazon Services. As discussed in detail above, Amazon Services rejects that determination.

This Court's argument regarding the moratorium also lacks merit. The moratorium exempted out-of-state retailers who built distribution facilities in South Carolina from collecting or remitting sales tax for a period of time for *all* sales. Amazon Services and other Amazon affiliates understood they had the responsibility to collect sales tax on sales of *their* products as retailers once the moratorium expired, and it is undisputed that they did so. The moratorium provided no notice to Amazon Services that the Department would suddenly claim in 2016 that it was responsible for collecting and remitting sales tax on *third-party* products.

B. Retroactively Applying the 2019 Amendments to Amazon Services, and Amazon Services Alone, Violates the Guarantee of Equal Protection.

Applying the Department's novel interpretation of the Sales and Use Tax Act against Amazon Services also violates the South Carolina and federal constitutional guarantees of equal protection. U.S. Const. amend. XIV, § 1; *accord* S.C. Const., art. I, § 3. "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995); *see also TNS Mills*, 331 S.C. at 626, 503 S.E.2d at 479.

The equal-protection guarantee requires the Department to apply its (doubtful) interpretation of the law equally to all other online marketplace facilitators (*e.g.*, eBay). Indeed, given the breadth of the legal standard the ALC invented to resolve this case, *see supra* at 11-12, 14-15, 28-29, equal protection would likely require the Department to apply the interpretation to brick-and-mortar marketplaces like malls, as well as payment processors, credit card companies, banks, delivery companies, and advertisers, all of whom benefit, directly or indirectly, from the sale of products owned by others. The record clearly demonstrates that the Department has singled out Amazon for retroactive enforcement of its extraordinary interpretation.

This Court dismissed this argument on the ground that "Amazon Services failed to present any evidence specifically identifying other online marketplaces and showing such marketplaces were similarly situated persons" who "received disparate treatment." 2024 WL 252952, at *11. But the 2019 changes to the Sales and Use Tax Act apply to all online marketplaces, and the Director swore under oath that *only* Amazon Services has been forced by the ALC's ruling to collect sales taxes on third-party sales before those 2019 changes took effect. (Ex. 194, R.1263 at 7:02-18.) When evaluating agency action, courts "cannot ignore the disconnect between the decision made and the explanation given. [A court's] review is deferential, but [it is] not required to exhibit a naiveté from which ordinary citizens are free." *See Dep't of Commerce v. New York,* 139 S. Ct. 2551, 2575 (2019) (citation and internal quotation marks omitted). It is clear that the Department, through this litigation, is attempting to apply the 2019 changes retroactively to only one taxpayer. That attempt violates the equal-protection guarantee, and this Court disregarded settled constitutional law principles in concluding differently. The Court should therefore grant rehearing and issue a revised opinion finding the 2016 Tax Act unconstitutional as applied to Amazon Services on equal protection grounds.

CONCLUSION

For the foregoing reasons, Amazon Services respectfully asks that this Court grant its petition for rehearing and issue a revised opinion consistent with the relief Amazon Services requested in its appellate briefing and in this petition.

Charleston, South Carolina
February 8, 2024

By: s/ Bryson M. Geer

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2019-001706

Case No. 17-ALJ-17-0238-CC

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

v.

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

PROOF OF SERVICE

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A copy of the e-mail serving these documents is attached hereto.

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February 8, 2024

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Attachments: Amazon's Petition for Rehearing Court of Appeals (Filed pdf) - 4880-4922-2308 1.pdf; Amazon - Ltr to SCCA w. Appellant's Petition for Rehearing - 4876-6138-0004 1.pdf; Amazon Proof of Service- Petition for Rehearing (19-1706) - 4868-3890-2948 2.pdf; Amazon Proof of Service- Petition for Rehearing (19-1706) - 4868-3890-2948 2.pdf

All: Please find attached for service upon you in the above matter Amazon Services LLC's Petition for Rehearing, Proof of Service, and correspondence with the Court. We will be filing it momentarily and will copy you on that as well.

Best,

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RE: Amazon Services, LLC v. South Carolina Department of Revenue
Appellate Case No. 2019-001706

Dear Ms. Kitchings:

Attached please find for filing in the above-referenced case Appellant Amazon Services LLC's Petition for Rehearing. Pursuant to the Court's standing order 2021-08-25-03, we are not sending additional copies. However, please let us know if additional copies are needed.

We have previously served this filing on all counsel of record via e-mail. A proof of service to that effect is also attached. Our check for the filing fee in the amount of $50.00 will be delivered to the Court.

Thank you for your assistance.

With kind regards,

Bryson M. Geer

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