RECEIVED
Mar 01 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Amazon Services, LLC, ...Appellant,

v.

South Carolina Department of Revenue, ...Respondent.

RETURN TO PETITION FOR REHEARING

In its Published Opinion No. 6047, filed January 24, 2024 ("Opinion"), this Court thoughtfully and thoroughly considered and rejected the many procedural and substantive issues presented by Appellant Amazon Services, LLC ("Amazon") in its appeal of the decision of the Administrative Law Court ("ALC") resulting from a *de novo* contested case merits trial ("Order"). The Order, affirmed by the Opinion, upheld the determination and assessment ("Determination") of Respondent South Carolina Department of Revenue ("Department") against Amazon for unremitted sales and use tax under the South Carolina Sales and Use Tax Act ("Act")[1] as the retailer/seller of tangible personal property for sales occurring on its website, Amazon.com. Pursuant to Rule 221 of the South Carolina Appellate Court Rules ("SCACR"), the Court's February 9, 2021, letter requesting a return to the petition for rehearing ("Petition"), and the

[1] S.C. Code Ann. § 12-36-5 *et seq.*

Court's February 15, 2024, order granting an extension of time to file the same, the Department respectfully submits this return in opposition to the Petition.

In order to prevail on a petition for rehearing, a party must state with particularity the points of its argument that the Court is alleged to have overlooked or misapprehended, rather than merely voice its disagreement with the conclusions reached by the Court in interpreting controlling statutes and case law or applying the facts of a case to same. Rule 221(a), SCACR. Apparently rejecting that standard, the Petition simply restates Amazon's arguments on appeal, *compare* Final Brief of Appellant Table of Contents *with* Petition Table of Contents, effectively arguing that, given the conclusions of the Opinion, the Court *must have* overlooked or misapprehended the import of Amazon's arguments. While brimming with certitude, often hyperbolic, and generally dismissive of the Determination and the Order and Opinion affirming same, the Petition does not identify any issue that the Court overlooked, instead equating Amazon's disagreement as to the Opinion's holdings with the Court's misapprehension of the issues. Because Amazon fails to meet its burden under Rule 221(a), and its restated arguments on the merits are incorrect in any event, rehearing of the Opinion is not warranted and the Court should deny the Petition.

STANDARD FOR REHEARING

Rule 221(a), SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law or fact to petition the Court for rehearing. The petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court," Rule 221(a), SCACR, so as "to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light, Co.*, 168 S.C. 163, __, 167 S.E. 234, 238 (1933). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the

appellate court a second time." *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citation omitted). In sum, the losing party may not be granted rehearing just because it disagrees with the Court's decision; rather, the losing party must point out overlooked or misapprehended points of law or fact. The Petition does not meet this standard.

ARGUMENT

I. The Petition's mischaracterizations of the holdings of the Opinion and the Order, Amazon's burden of proof in this case, and the Department's consistent positions with respect to Amazon's liability for sales tax, serve as the hollow foundation for its arguments in the Appeal generally, and the Petition specifically.

As a starting point to this return, the Department feels compelled to briefly address several of the mischaracterizations[2] of the record and holdings advanced by Amazon in the Petition to confuse the issues on appeal and in an apparent effort to paint the Opinion as an outlier. Throughout the life of this case, starting with the contested case before the ALC, progressing through the briefing and argument of this appeal, and continuing in the Petition, Amazon has projected a misreading of South Carolina law and precedent in an effort to flip – and thereby lower – the burden of proof in its favor. Principal of those efforts is Amazon's misleading contention that, to prevail, it need only conjure a "reasonable" argument as to why its activities fall outside the scope of the Act. The Petition is replete with examples of this misdirection. *See, e.g.*, Petition at 1 ("In particular, although the Department of Revenue conceded[3] that it could not prevail unless Amazon

[2] In seeking to concisely respond to the primary topics raised in the Petition, the Department does not intend on addressing each of the many mischaracterizations of the record, the Order, the Opinion, and South Carolina law regarding the underlying dispute and the merits of the claims advanced by Amazon in the Petition. In not identifying or rebutting every such occurrence, the Department expressly does not admit or acknowledge the truth or accuracy of any such statement, assertion, or argument by Amazon, and the Department specifically denies and contests any claim not specifically addressed herein.

[3] Amazon tellingly provides no citation for this alleged concession by the Department and none exists. This appears to be common practice for the Petition with respect to attributed positions

Services's interpretation was both incorrect and unreasonable, this Court concluded, without support,[4] that the statute was unambiguous and made no effort to explain why Amazon Services's interpretation was unreasonable."); Petition 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.)"[5]); Petition at 10 ("[A]s] this Court acknowledged, if Amazon Services's interpretation is reasonable, it must prevail. *See* 2024 WL 252952, at *5"[6]).

In sum, this consistent thread throughout the Petition amounts to a fundamental misrepresentation of the standard governing these tax disputes and Amazon's burden of proof in this case. Because the Determination found that Amazon's business model subjected it to the 2016 version of the Act as a retailer/seller of tangible personal property at retail and required it to remit sales tax for retail sales occurring on Amazon.com, South Carolina law and precedent dictated that *Amazon* had the absolute burden of proof in the underlying contested case. That burden required

---

of the Department and holdings of the Court, while, where citation to paraphrased attributions are provided in the Petition, the attributed statements or holdings are often not supported by reference to the source text.

[4] The Petition dismissively refers to holdings of this Court as "conclusory," *see* Petition at 1, and "without support," *id.*, apparently misapprehending the distinction between arguments of parties advanced without legal citation or support, *e.g. Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding a party's argument advanced through statements with no argument or supporting authority conclusory and abandoned), and a Court's legal construction of controlling statutes which are, by definition, *conclusions* of law.

[5] The Petition provides no citation for this Court's alleged "acknowledg[ment]," while reference to the Petition's citation of the ALC's alleged acknowledgment – **(R. p. 16)** Order at 16 – similarly reveals no such holding or acknowledgment.

[6] Here, the Petition provides a citation for this Court's alleged "acknowledg[ment];" however, reference to the Petition's citation reveals no such holding or acknowledgment beyond quotation of *Alltel Communications v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012), while ignoring the immediately following citation of *Paschal v. State Election Commission*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995), which forbids a court from resorting to a party's "reasonable" contrary interpretation in the face of an unambiguous statute.

Amazon to prove by a preponderance of the evidence that the Department's position was incorrect,[7] or that the 2016 Act was ambiguous, rendering it reasonably susceptible to an interpretation that would exclude its conduct. *See, e.g.*, *DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 804 S.E.2d 633 (Ct. App. 2017) (confirming that the party opposing or challenging the Department's determination bears the burden of proof). In fact, the issue of which party bore the burden of proof was explicitly litigated in the contested case before the ALC. Below, Amazon attempted to flip its burden to the Department, similar to what it presents in the Petition, in favor of a requirement that the Department bear the burden of proving that Amazon's argument was both incorrect and unreasonable. The ALC correctly rejected Amazon's attempt to shift the burden of proof, stating succinctly in the Order:

> Because Amazon Services is challenging a Department Determination, Amazon Services has the burden of proof to show by a preponderance of the evidence that the Department's Determination was incorrect. *Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that generally, the complaining party bears the burden of proof).

(R. p. 15) Order at 15.[8]

Yet, Amazon did not appeal from this holding of the ALC, rendering it the law of this case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."). Consequently, Amazon's

[7] Sales tax is imposed on the gross proceeds of sales, *see* S.C. Code Ann. § 12-36-910(A), and the General Assembly has specifically announced the burden of proof in disputes arising from the imposition of sales tax on gross proceeds of sales is on the identified seller. *See* S.C. Code Ann. § 12-36-950 ("It is presumed that all gross proceeds are subject to the tax until the contrary is established. The burden of proof that the sale of tangible personal property is not a sale at retail is on the seller.").

[8] Moreover, Amazon's trial counsel acknowledged the Court's ruling and its burden during the trial. **(R. p. 777)** (Tr. 636) ("We understand the Court's ruling on the burden of proof. And while we disagree respectfully with that ruling for the purposes of this proceeding, this trial, we have embraced that burden. The Court ruled that we bear the burden to show by a preponderance of the evidence that we do not owe the taxes and penalties demanded by the Department.").

repeated attempts to misconstrue which party bears the burden of proof flies in the face of these established procedures and the law of this case for the sole purpose of confusing the issues on appeal and in this Petition.

Similarly, to prevail in this appeal, Amazon bears the absolute burden of demonstrating that the ALC's factual conclusions are unsupported by substantial evidence, or that the ALC's legal conclusions are affected by an error of law or in violation of the Constitution or statutory provisions, subject to this Court's *de novo* review of the questions of statutory interpretation. Thus, the Petition's repeated mischaracterization of the standard as being one that shifts the inquiry into the sufficiency of proof required "for the Department to prevail" is legally unsound and contrary to the law of the case. Here, Amazon has the burden of proving by a preponderance of the evidence that the Department was incorrect in its assessment of Amazon's activities under the Act by demonstrating that: 1) substantial evidence does not support the ALC's finding that its business model falls under the plain language of the Act; 2) the Act is ambiguous on its face or in its application to Amazon's business model; or 3) the Act is reasonably susceptible to an interpretation that excludes Amazon's business model from application.

Amazon neither met its burden below nor satisfied it in this appeal. As provided below, this Court correctly found, relying on the plain language and prior interpretations of the Act, that the provisions of the Act sought to be applied by the Department are not ambiguous and that the Order's finding that Amazon's business model falls squarely under the activities subject to regulation under the Act is supported by substantial evidence, rendering Amazon's attempted parsing of the Act in the context of its comprehensive retail sale platform on Amazon.com unreasonable.

II. This Court correctly found that the Act is not ambiguous and *Alltel* does not compel the result advanced by Amazon.

The Opinion correctly interpreted the applicable provisions of the Act, as well as prior case law interpreting same, in reaching its *de novo* conclusion that the Act is neither ambiguous nor reasonably susceptible to an interpretation giving rise to substantial doubt as to its applicability to Amazon. Opinion at 8-13. While critical of the Court's conclusion, and dismissive of its analysis, the Petition does not advance any basis, beyond extra-statutory statements made in the context of the Act's subsequent amendment, to support an argument that the Act is ambiguous, much less a ground that was overlooked or misapprehended by the Court. Amazon has therefore not met its burden here and rehearing is not warranted on this point.

a. The Act is not ambiguous.

Both the ALC and this Court conducted *de novo* reviews of the applicable provisions of the Act, finding them to be unambiguous. The Petition is dismissive of this Court's analysis and conclusions, asserting alternatively that it was "conclusory," "without support," *see* Petition at 1, and "*without* any textual analysis of the Act itself." *id.* at 9 (emphasis in original). Amazon's arguments are glib and unavailing, particularly where it offers no "textual analysis of the Act itself," despite having the burden in this appeal. Regardless, the Opinion's analysis of the Act is straightforward and consistent with the Court's obligation to interpret the Act in light of "the purpose of the whole statute" and "the policy of the law." *Enos v. Doe*, 380 S.C. 295, 305, 669 S.E.2d 619, 623 (Ct. App. 2008); *see also Crescent Mfg. Co. v. Tax Comm'n,* 129 S.C. 480, __, 124 S.E. 761, 765 (1924) ("That rule of strict construction of . . . tax statutes is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose, and does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, etc.") (internal quotation marks and citations omitted);

McClanahan v. Richland Cnty. Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). Further, the Opinion correctly relied upon prior reported constructions of these same statutory provisions, wherein this Court recently held that the operative sales tax provisions of the Act were unambiguous, thus leaving the ALC and this Court "in no position to apply rules of statutory interpretation" or construe the unambiguous provisions in the taxpayers' favor. *Rent-A-Ctr. E., Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 589, 824 S.E.2d 217, 221 (Ct. App. 2019) (interpreting S.C. Code Ann. § 12-36-910); *see also Books-A-Million, Inc. v. S.C. Dep't of Revenue*, 430 S.C. 388, 399, 844 S.E.2d 399, 405 (Ct. App. 2020) (interpreting S.C. Code Ann. §§ 12-36-90 and -910, noting that the petitioner had "failed to point to any ambiguity in either section" and holding that "we find the language of the statutes is not ambiguous, and the ALC's reading of the statutes was correct and consistent with the intent of the legislature."), *aff'd*, 437 S.C. 640, 880 S.E.2d 476 (2022).

For its part, and despite its burden, Amazon does not contend that any specific section or term of the Act is ambiguous.[9] That foundational step to an ambiguity analysis is notably missing. Instead, as discussed below, Amazon's ambiguity argument consists entirely of pointing to statements of Department officials and the General Assembly in the context of amendments to the Act and well after the audit, assessment, and the Determination, despite the Department's exclusive reliance on the plain language of the 2016 version of the Act. At bottom, Amazon's

[9] In fact, Amazon contends that S.C. Code Ann. § 12-36-100, defining a "sale," is unambiguous and should be strictly construed. Petition at 10 (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("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.")).

argument is that its interpretation is reasonable based on the facts of this case and its business model (or, at least, how it characterizes those facts and its business model), necessarily portending an ambiguity. The Department disagrees, *see* discussion, *infra*, but Amazon's argument is not an "ambiguity" or "strict construction" argument; it is just a traditional application-of-the-law-to-facts argument. However, the mere fact that the parties disagree about the application of a statute to the facts does not mean that the statute is ambiguous or must be construed in favor of the taxpayer—it just means that one of the parties is wrong. *See Bank of Am. NT & SA v. 203 N. Lasalle Street P'ship*, 526 U.S. 434, 461 (1999) (Thomas, J. concurring) ("A mere disagreement among litigants over the meaning of the statute does not prove ambiguity; it usually means that one of the litigants is simply wrong"); *see also* **(R. p. 45)** Order at 45 ("[A]lthough the application of specific statutes to a set of facts may not be initially clear, this does not mean that the statutes are ambiguous such that the case must be resolved in the taxpayer's favor. Rather, the existence of an ambiguity must be determined by reading the statutory scheme as a whole in light of the pertinent facts of the case.")).

Ultimately, this Court's analysis of the Act and holding that the applicable provisions are not ambiguous is well-founded, and Amazon's failure to meet its burden of demonstrating otherwise supports the denial of the Petition.

b. Statements of the Department's Director and the General Assembly in the context of the 2019 amendments to the Act do not render the 2016 version of the Act ambiguous.

As referenced above, rather than identify a textual basis for the finding of an ambiguity, Amazon contends that a few statements of Department officials made in the context of proposed legislation, and well after the period at issue and the initiation of this contested case, are admissions that the Act is ambiguous. But such a tact stands the Court's ambiguity analysis on its head.

Extraneous evidence can only be looked to *after* an ambiguity in the plain language of the statute is found. It cannot be used to manufacture an ambiguity in the first instance. *See Hodges*, 341 S.C. at 87, 533 S.E.2d at 582 ("If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute.") (citing *Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956)); *id*. ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.") (citing *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970)).

Moreover, Amazon's contention was correctly – and flatly – rejected by the ALC and this Court. **(R. pp. 17-18)** Order at 17-18; Opinion at 20 ("[A]ny statements the Department's director made in 2018 during hearings before the legislature are irrelevant to the Department's 2016 audit and our consideration of the law as it existed at the time of such audit.") (citing *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991); *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995)). Simply put, statutory interpretation is a question of law reserved for the courts that is not changed by any statements made by governmental officials or even agencies. *Jeter v. S.C. Dep't of Transp.*, 633 S.E.2d 143, 146, 369 S.C. 433, 438 (2006) ("The issue of interpretation of a statute is a question of law for the court."). Accordingly, statements by Department officials were appropriately deemed irrelevant to determining the meaning of the Act.

Regardless of those statements and their relevance, the Department's position as to whether Amazon is a retailer/seller under the Act has been unfailingly consistent. **(R. pp. 999-1014)** (Ex. 171, Determination). Amazon points to a few statements by the Department Director made approximately two years after the period at issue in the context of the 2019 "marketplace

facilitator" amendments to the Act, and claims these were "admissions" for purposes of this case. However, read in context, those statements reflect only an assessment of the new legislation that would quickly resolve any *future* dispute between the Department and Amazon – or other similar taxpayers – for future periods, without the need for protracted litigation. Further, a fair representation of the genesis of the "marketplace facilitator" amendments cannot be made absent reference to the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). *Wayfair* upended nearly 50 years of tax policy based on a business's nexus to a state. Prior to *Wayfair*, if a company had a physical presence in South Carolina, the Act applied to it; if it did not have a physical presence in the State, it did not. Because Amazon established nexus in 2011, *see* discussion *infra*, *Wayfair* had no direct impact on its subjection to the Act, but there were many other internet retailers who did not have nexus to the State. Accordingly, the true purposes of the "marketplace facilitator" amendments to the Act was to: (1) update the Act to reflect modern jargon regarding internet sales; (2) clarify the law in a post-physical-nexus environment; and (3) level the playing field for all online marketplaces, regardless of whether they had physical nexus or not.

None of those reasons renders the 2016 version of the Act ambiguous. Indeed, Amazon completely ignores the fact that the proposed (and now enacted) legislation applies not just to Amazon but rather to a broad range of entities that could be classified as "marketplace facilitators," many with business models substantially different than Amazon's. The Department's efforts to assist the General Assembly in clarifying the law to address the post-*Wayfair* landscape, new technological advancements, and to ensure all so-called "marketplace facilitators" could not exempt themselves from the requirements of the Act, do not amount to any admission with respect to the application of the then-existing provisions of the Act to Amazon's specific business. For all

of these reasons, Amazon's selective use of these statements do not provide evidence of an ambiguity in the Act, the ALC and this Court were correct to reject same, and rehearing is not warranted on this basis.

c. Amazon's position is not reasonable, and its subjective belief that it should be excluded from the Act does not override the application of unambiguous statutory provisions to its business model.

Amazon's reasonableness argument hinges entirely on the Supreme Court's opinion in *Alltel Communications v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012). But Amazon misconstrues the framework established by *Alltel*, and its subjective belief that it was not subject to the Act may not supersede the plain language of the statute. Ultimately, it is Amazon that misapprehends the import of *Alltel*, not the ALC or this Court; therefore, rehearing is not warranted.

At its core, Amazon's argument is that *Alltel* stands for the proposition that, if a taxpayer can invoke a reasonable interpretation of the Act that would exclude its business model/conduct from the Act's application, that creates an ambiguity – or substantial doubt – in the Act and the taxpayer wins. But in *Alltel*, the Supreme Court equated substantial doubt regarding the application of the statute to Alltel with an ambiguity. *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 ("The existence of an ambiguity in section 12–20–100 raises substantial doubt regarding the sections application to [Alltel]."). The ambiguity in that case related to whether Alltel, as a cell phone provider, qualified as a "telephone company" under the statute and according to the stipulations of fact entered into by the parties during the contested case proceeding,[10] requiring it to remit certain

[10] The parties stipulated that "[t]elephones and telephone companies transmit intelligence over a vast network of wires located in public rights of way and in easements over private property," "[Alltel] do[es] not have facilities located in public rights of way," and [Alltel] provide[s] wireless voice and data communications services [using] radio communication towers

license fees to the Department. Finding an ambiguity, the *Alltel* court never reached the question of whether Alltel's position was "reasonable," necessarily inferring that substantial doubt was present based on the existence of the ambiguity.

For all the reasons discussed above and those articulated in the Order and the Opinion, the Act is not ambiguous. And Amazon's interpretation of the Act is not reasonable in light of the prior case law interpreting the applicable provisions of the Act. This Court's review of the Act is *de novo*, but it has recently reviewed the Act generally, and S.C. Code Ann. § 12-36-910 specifically, finding them to be unambiguous in the *Rent-a-Center* and *Books-a-Million* cases. *Rent-A-Ctr.*, 425 S.C. at 589, 824 S.E.2d at 221 (S.C. Code Ann. § 12-36-910 "is unambiguous [and] the ALC was in no position to apply rules of statutory interpretation."); *Books-A-Million*, 430 S.C. at 399, 844 S.E.2d at 405 ("[W]e find the language of the statutes is not ambiguous, and the ALC's reading of the statutes was correct and consistent with the intent of the legislature."). Again, the fact that there is a disagreement as to whether a taxpayer is subject to the Act, does not mean that the Act is ambiguous; like any other case, that is simply an application of the law to the unique set of facts that make up the dispute. In fact, the Act has been construed countless times by the Courts of this State. Not one time has a court found the provisions at issue in this case to be ambiguous. And not one time has a Court determined that a taxpayer's subjective belief that the Act should not apply to it, renders the Act ambiguous.

Further, even if an inquiry into the reasonableness of Amazon's claims were warranted, which it is not given the lack of an ambiguity, Amazon's position is not reasonable in view of the prior case law interpreting the Act. And, while substantial doubt – *i.e.*, an ambiguity – *may* be

---

or facilities owned or leased by [Alltel] or licensed to [Alltel]." *Alltel*, 399 S.C. at 318, 731 S.E.2d at 871.

resolved in favor of the taxpayer, that principle is subject to several meaningful restrictions. The principle relied on by Amazon first appears in the case of *Fuller v. S.C. Tax Commission*, 128 S.C. 14, 121 S.E. 478 (1924). In *Fuller*, the Supreme Court placed defined guardrails on its application that undercut the position taken by Amazon in this case. In particular, "where the language incorporated into a statute is identical or substantially identical with that appearing in similar statutes … which have received judicial construction and interpretation … [it should be construed] in accordance with the construction given it" in prior cases. *Id.*, 128 S.C. at __, 121 S.E. at 481 (evaluating decisions in foreign jurisdictions applying identical or similar language).

Here, the provisions of the Act applied by the Department against Amazon have been interpreted *by courts of this state* and are appropriately construed consistent with the *Rent-a-Center*, *Books-a-Million*, and *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 95, 705 S.E.2d 28, 31 (2011), as the Opinion correctly does. In particular, while *Travelscape* construed S.C. Code Ann. § 12-36-920, this Court properly interpreted its guidance as dictating a broad reading[11] of the identical "imposed on *every person* engaged or continuing within this State *in the business of*" language that appears in both Sections of the same Chapter. *Compare* S.C. Code Ann. §§ 12-36-910(A) *and* 12-36-920(E) (emphasis supplied). Both *Travelscape* and the Opinion note and rely upon the definition of "business" in S.C. Code Ann. § 12-36-20, which is broadly defined as "*all* activities, with the object of gain, profit, benefit, or advantage, *either direct or indirect*." (Emphasis in Opinion at 9, 14, and 17, and supplied). At base, Amazon's *business* is operating a website that sells tangible personal property, and the evidence demonstrates that Amazon's profit for operating the website is derived from fees that are directly deducted from the gross proceeds of sales occurring on the website. These facts mirror those in *Travelscape*. And unlike *Alltel*, where

[11] *See* discussion, *infra*.

the Supreme Court was not guided by a prior construction – or stipulation – of the definition of a telephone company, here, Amazon's construction of the Act is not reasonable in light of the prior constructions of identical language to that appearing in S.C. Code Ann. § 12-36-910(A) by the courts of this state.

In sum, Amazon misconstrues *Alltel* as requiring a finding in its favor if it can advance a "reasonable" interpretation of the Act that creates substantial doubt as to its applicability to Amazon. However, the Act is not ambiguous, obviating the existence of substantial doubt, and Amazon's construction of the Act is not reasonable in light of this State's prior interpretations of the Act. Here again, rehearing is not warranted.

d. Amazon's argument regarding remote sellers is unpreserved, but wrong in any event.

As the Petition acknowledges, the Opinion correctly found Amazon's argument regarding the Department's treatment of remote sellers unpreserved for review. Opinion at 16. Rather than dispute this preservation ruling, or point to the record for the proposition that the issue was raised to and ruled upon by the ALC, Amazon simply restates its argument from prior briefing. Accordingly, rehearing on this point is certainly not warranted.

Even if it were preserved, Amazon misconstrues the Department's Revenue Ruling 18-14, and the Opinion correctly rejects the merits of Amazon's contentions in this regard. Opinion at 16 ("Revenue Ruling 18-14 does not support Amazon Services' position."). Amazon's suggestion that, by issuing guidance after the *Wayfair* decision regarding the determination of whether a person or entity has "nexus" with South Carolina, somehow acts as an admission that Amazon's interpretation of the Tax Act is reasonable, widely misses the mark. Revenue Ruling 18-14, issued prior to the 2019 amendment of the Act, expressly states that online "marketplaces" – the category within which Amazon falls – are the "sellers" or "retailers" under the Act required to remit sales

and use tax, not the third-party merchants that may list their products on the marketplaces. Opinion at 16 (quoting from S.C. Rev. Rul. 18-14). Far from an admission against interest, this is a confirmation that the Department's pre-amendment interpretation of the Act is the same that it sought to apply against Amazon in the Determination. Regardless, the analysis of whether a person or entity has "nexus" with a state is separate and apart from the analysis of whether that person or entity has an obligation to remit sales and use tax related to a specific transaction.

In order for a state to subject a person or entity to its taxing jurisdiction, there must be "nexus" (*i.e.*, a sufficient connection) between an activity, property, or transaction of that person or entity and the state. In light of *Wayfair*, many states, including South Carolina, established "economic nexus" thresholds to determine whether that state will exercise its taxing jurisdiction over a specific person or entity based on the overall amount of economic activity and connection that person or entity has with a state. In South Carolina, like other states, that threshold is met if the person or entity derives "gross revenue" greater than $100,000 from services or sales of products "transferred electronically" into South Carolina, regardless of whether the transfer is subject to South Carolina sales and use tax. *See* S.C. Rev. Rul. 18-14.

In other words, the South Carolina nexus threshold is determined by both a person or entity's direct sales into the state, as well as the transfer of its services or products into the state through other means. For example, a person may directly transfer goods into South Carolina by selling goods on its own website. For these transactions, that person is the retailer/seller for purposes of the Act. That same person also might transfer its goods into the state through listing the products on Amazon.com. Because that person has "transferred" goods into the state, those transfers are counted for "nexus" purposes. But that does not mean that the person was the retailer/seller for purposes of remitting sales and use taxes, which is an altogether different inquiry.

Because this issue was not preserved by Amazon for this Court's appellate review, and because Amazon misapprehends the import of Revenue Ruling 18-14 in any event, rehearing on this point is not warranted.

e. Rulings by courts in other jurisdictions evaluating statutes that are materially different than the Act are irrelevant and not controlling.

Similarly unavailing is the Petition's assertion that no taxing agency or court in any other state has interpreted their own state's tax statutes to treat Amazon as the entity required to remit sales and use tax. Petition at 26-28. What another state has done or not done with respect to its own tax laws has no bearing on the interpretation of the Act. Opinion at 17 ("[W]e are not persuaded by Amazon Services' reference to the tax laws of other jurisdictions."). As noted by the Court, Amazon does not identify a single state with statutory provisions similar to the Act.[12] Further, the absence of action by other states with respect to their own tax laws is wholly irrelevant to the Department's action in the Determination and this Court's interpretation of the Act. Nor does the lack of published guidance or court rulings about the application of these specific facts to this specific statute mean that the Act does not apply or that it is ambiguous.

Regardless, while Amazon asserts that there was no guidance specifically discussing the treatment of sales on Amazon.com or other online marketplaces prior to 2016, there was statutory authority and guidance from the Department regarding the treatment under the Act of similar transactions (*e.g.*, consignment sales). *See* S.C. Code Ann. § 12-36-90 (defining "gross proceeds of sales" as including "the proceeds from the sale of property sold on consignment"); **(R. pp. 737-**

[12] Amazon disputes this finding by the Court, pointing to argument first raised in its Reply Brief. Petition at 27 n.6. *But see ABB, Inc. v. Integrated Recycling Grp. of SC, LLC*, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (Ct. App. 2021) ("[A] party cannot raise an issue for the first time in an appellate reply brief.") (citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004); *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992) (holding an issue was waived when the appellant raised it for the first time in its reply brief)).

39; 1833) (Tr. 596-98) (former Department official describing publicly available information regarding sales tax treatment of consignment sales prior to 2016); Ex. 215, Ch. 23, p. 19. Further, as discussed in more depth *supra* and *infra*, in *Travelscape*, the Supreme Court applied nearly identical facts to nearly identical statutory provisions and held that the entity offering and accepting payment for goods owned by others on its website (*i.e.*, Travelscape) was required to remit the taxes, not the owners of the goods (*i.e.*, the hotels). Accordingly, contrary to Amazon's arguments, there was ample prior guidance and authority in this State demonstrating that Amazon was required to remit sales and use tax for the sales of goods on Amazon.com.

In sum, even if Amazon had – or could – identify a state with an identical statutory regime as South Carolina that reached a contrary result to that of the Determination, such evidence would not be controlling here. *See Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 208 n.9, 882 S.E.2d 770, 781 n.9 (2023) ("[W]e do not rely on the decisions from other states as binding"). Because it has not, and because the decisions of other state courts, applying different state law, have no bearing on this Court's analysis of Amazon's business model under the Act, this argument is futile and presents no basis for rehearing.

III. This Court correctly found that Amazon is in the business of selling tangible personal property at retail for admitted sales occurring on Amazon.com.

Having determined that the Act is not ambiguous, the Opinion correctly concluded that substantial evidence supports the ALC's finding that Amazon is engaged in the business of selling tangible personal property at retail on Amazon.com rendering it responsible for remitting sales tax under S.C. Code Ann. § 12-36-910(A).

a. Amazon's attempted parsing of the definition of sale is a red herring.

Amazon's primary argument that its business model falls outside the scope of the Act is based on its strained reading of the definition of a "sale" under S.C. Code Ann. § 12-36-100.

Amazon argues that it is not the retailer/seller if it does not receive consideration for sales of third-party merchant's property. And it argues that it does not receive consideration for the sales occurring on Amazon.com because it does not receive the gross proceeds of those sales, which are held for Amazon's and the third-party merchant's benefit by its affiliate, Amazon Payments. Petition at 10 ("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."). But this is a blatant misdirection that the Court correctly discerned and rejected.

As an initial matter, the concept of "conducting a sale" finds no basis within the definitions of the Act. The Act imposes the sales tax on the gross proceeds of sales of every person engaged in the State in the business of selling tangible personal property at retail. S.C. Code Ann. § 12-36-910(A). The Act specifically defines:

- "Business" (section 12-36-20) to include *all* activities with the object of gain, profit, benefit, or advantage, either direct or indirect;
- "Gross proceeds of sales" (section 12-36-90) to mean the value proceeding or accruing from the sale of tangible personal property;
- "Sale" and "purchase" (section 12-36-100) to mean *any* transfer or exchange of tangible personal property for consideration; and
- "Retailer" and "seller" (section 12-36-70) selling tangible personal property, whether owned by the person *or others*.

The General Assembly defined "sale" and "purchase" for the purpose of determining whether, as a prerequisite to the imposition of a sales tax, a sale or purchase occurred. It separately defined who qualifies as the "retailer" or "seller" of such sales. For purposes of a "sale," the Act requires "consideration" be exchanged. But in defining a "retailer" or "seller," the General Assembly did not require such person or entity to receive all (or even any) of the "consideration."

See S.C. Code Ann. § 12-36-70. In other words, while there must be an exchange of tangible personal property for consideration in order for there to be a sale, there is no statutory requirement that the consideration land in the wallet of the retailer – the retailer can be (as Amazon is here) the conduit for the consideration received for property owned by others. By arguing that it did not conduct a "sale" if it did not receive "consideration," Amazon is conflating the definition of sale with the definition of retailer/seller.

Here, there is no question – and Amazon concedes – that sales occur on Amazon.com. *See* App. Br. at 23 ("Everyone agrees that items sold to South Carolina customers [on Amazon.com] are 'tangible personal property' sold 'at retail' in South Carolina."); Petition at 3 ("This case concerns only *sales* of products offered by third-party sellers on the Amazon.com marketplace operated by Amazon Services.") (emphasis added); Petition at 5 ("When a customer *purchases* a product from any seller *in the marketplace* ….") (emphasis added); *id.* ("The *sales proceeds* flow from the customer's account ….") (emphasis added). Moreover, it is undisputed that Amazon is in the business of selling tangible personal property: it is registered in South Carolina as a retailer, and it remits sales tax for sales on Amazon.com of property that it or its affiliates own. **(R. p. 2)** Order at 2 and n.3. Having conceded what is otherwise self-evident from the evidence of record, *i.e.*, that sales occur on Amazon.com, the concept of directly receiving "consideration" on admitted sales is not controlling on the question of whether Amazon is a retailer/seller.

To be clear, however, Amazon does receive a portion of the consideration, *i.e.*, the gross proceeds of sales, from every sale occurring on Amazon.com, which necessarily factors into the Court's consideration of whether Amazon is in the business of selling tangible personal property at retail. *See* S.C. Code Ann. § 12-36-20 (defining business to include "all activities, with the object of gain, *profit*, benefit, or advantage, *either direct or indirect*.") (emphasis added). As this Court

correctly noted, the ALC found – in an unappealed finding – that Amazon receives consideration for the sales occurring on Amazon.com in the form of fees deducted directly from the gross proceeds of sale prior to transferring the balance to third-party merchants. Opinion at 6, 15; **(R. pp. 897-903)**. These are transaction-based fees and compensation that flow to Amazon for every sale that occurs on Amazon.com. **(R. p. 31)** Order at 31 ("[F]ees are charged on a 'transaction-by-transaction' basis").

Most notable is the "referral fee," which is a variable fee charged by Amazon calculated as a percentage of the gross proceeds of each sale according to Amazon's categorization of the type of product sold, which includes an evaluation of the product's typical margin. **(R. p. 114)** (citing Amazon's R. 30(b)(6) Dep. At 151-54 ("Different products have different margins. Typically, fashion products have high gross margins, electronics have low gross margins."). Thus, rather than a service or convenience fee associated with, for example, operating Amazon.com, or the opportunity cost of displaying, selling, and processing of payment for a product, the referral fee is tied directly to the sales price and proceeds of the sale. The referral fee percentages assigned by Amazon vary by product category, ranging from six percent (6%) on the low end, to forty-five percent (45%) on the high end, with a median of fifteen percent (15%). Opinion at 6. By structuring its profit as a transaction-based fee, Amazon ensures that it makes a profit on every sale occurring on Amazon.com.

Accordingly, while the receipt of consideration is not determinative of the question of whether Amazon is a retailer/seller, and Amazon's attempted parsing of the definition of "sales" is unavailing, Amazon does receive consideration for sales occurring on Amazon.com, and Amazon's arguments to the contrary do not present any reason for rehearing of the Opinion.

b. The Court's analysis of *Travelscape* was correct.

This Court found that the Supreme Court's opinion in *Travelscape* "provides only limited guidance" to this case. Opinion at 13. The Opinion further held that that "[t]he import of the *Travelscape* decision with respect to this case is that our supreme court interpreted section 12-36-920(E) of the Act broadly." Opinion at 14. While Amazon now challenges this finding of the Opinion as unsupported by *Travelscape* and "at odds with the settled rule that a taxpayer received the benefit of reasonable interpretations of tax statutes in its favor," Amazon's argument is unpreserved for this Court's review. Although this Court appropriately noted that the Supreme Court gave broad reading to S.C. Code Ann. §§ 12-36-20 and -920(E) in *Travelscape*, in fact, this express finding is replete within the Order of the ALC:

i. **(R. p. 20)** Order at 20 ("[T]he term "business" is broadly defined to mean "***all activities***, with the object of gain, profit, benefit, or advantage, ***either direct or indirect***." This broad application of who is engaged in the business of selling is also reflected in the definition of "retailer" or "seller," which includes, in relevant part, every person "selling or auctioning tangible personal property whether owned by the person **or others**.") (citation omitted; emphasis in original and supplied);
ii. **(R. p. 25)** Order at 25 ("[T]he tax imposition statute is interpreted broadly to incorporate all persons engaged in the business of furnishing/selling, whether directly or indirectly.") (emphasis added);
iii. **(R. p. 29)** Order at 29 n.28 ("[T]his determination is based upon a recognition of the broad application of section 12-36-910(A)");
iv. **(R. p. 33)** Order at 33 ("This determination reflects the broad application of the statutory phrase 'in the business of.'");
v. **(R. p. 45)** Order at 45 ("Indeed, the Supreme Court's decision in *Travelscape* highlights the broad application of the 'in the business of' language. Construing the statutes at issue here like the Supreme Court did in *Travelscape* and applying 'in the business of selling' in keeping with the broad statutory framework logically results in the conclusion that someone who facilitates or consummates a sale as a 'service provider' can be 'in the business of selling' for the purposes of the Sales and Use Tax Act.");
vi. **(R. p. 46)** Order at 46 ("I conclude, based upon the factual discussion above and the broad application of the statutes, that Amazon Services is in the business of selling tangible personal property at retail for the purposes of the Sales and Use Tax Act."); and
vii. **(R. p. 48)** Order at 48 ("Section 12-36-920(A) is written to broadly to impose sales tax on persons 'in the business of selling tangible personal property at retail'").

However, Amazon did not seek reconsideration of the issue before the ALC. *See Brown v. S.C. Dep't of Health & Env't Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the AL[C] are not preserved for appellate consideration."); *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 560-63, 677 S.E.2d 582, 584-86 (2009) (holding rule 59(e), SCRCP, motions to reconsider are permitted in ALC proceedings and often required for issue preservation purposes). Amazon's Appellant's Brief[13] noted that the ALC had "read *Travelscape* as adopting a broad rule," App. Br. at 19, and that the Department had similarly advanced a "broad interpretation of the 2016 statute," *id.* at 20. But Amazon did not expressly challenge the ALC's finding in that regard in its primary briefing to this Court. *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 121, 719 S.E.2d 282, 286–87 (Ct. App. 2011) (issue not raised on appeal is unpreserved and waived); *Chet Adams Co.*, 307 S.C. at 37, 413 S.E.2d at 829 (issue waived when the appellant raised it for the first time in its reply brief); *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("[A] party may not raise an issue for the first time in a petition for rehearing.") (citing *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.") (citation omitted)).

[13] Amazon's Reply Brief also noted the ALC's "indefensibly broad legal standard," Reply Br. at 1, and its position that "[t]he ALC's overbroad standard was based on a fundamental misreading of *Travelscape*," *id.* at 2, while later criticizing the ALC for not "abandon[ing] the overbroad standard," *id.* at 12, but it likewise did not expressly challenge the ALC's finding. Regardless, having failed to raise the issue in its primary brief, Amazon could not advance a new argument in reply. *ABB, Inc.*, 432 S.C. at 553, 854 S.E.2d at 175 ("[A] party cannot raise an issue for the first time in an appellate reply brief.") (citing *Chet Adams Co.*, 307 S.C. at 37, 413 S.E.2d at 829 (holding an issue was waived when the appellant raised it for the first time in its reply brief)).

Notwithstanding the propriety of Amazon advancing this argument for the first time in the Petition, on the substance of its arguments, Amazon's criticism of *Travelscape* as broadly construing S.C. Code Ann. § 12-36-920(E) is misplaced. As noted above, the Supreme Court evaluated the language "imposed on *every person* engaged or continuing within this State *in the business of*" that appears in Section 920(E) in the context of whether Travelscape was in the business of furnishing accommodations.[14] It further looked to the definition of a "business" appearing in Section 20, which is broadly defined as "*all* activities, with the object of gain, profit, benefit, or advantage, *either direct or indirect*." Because the imposition language of Section 910(A) is identical to that of Section 920(E) construed by the Supreme Court in *Travelscape*, reference to Section 20's definition of "business" was equally appropriate. Given that the tax is imposed on "*every* person," and "business" is defined as "*all* activities," this construction by the Supreme Court and this Court is hardly noteworthy, as it is difficult to conceive of broader terms than "every" and "all."

As this issue has been waived by Amazon, is otherwise not preserved for review, and Amazon's criticism conflicts with a plain reading of the Act, *Travelscape*, and the Opinion, rehearing is not warranted on this point.

[14] Further, Amazon's contention that the "in the business of" holding of the Order and the Opinion would open up the floodgates to the Department asserting sales tax obligations to a variety of other true service providers is pure hyperbole. Sales tax is assessed one time per sale against the entity the Department determines is the retailer/seller of the tangible personal property. "Payment processors, credit card companies, banks, delivery companies, advertisers, and more," all listed by Amazon, Petition at 15, are all "businesses" that may indirectly profit or benefit from the sale of tangible personal property; however, and critically, those entities are not in the business "of selling" tangible personal property. *See* **(R. p. 29)** Order at 29 n.28 ("[I]t it is … clear that the legislature did not intend to impose the sales tax on businesses whose sole purpose truly is payment processing and who are otherwise uninvolved in sales transactions. Such businesses clearly are not engaged in selling, even if they are making a profit off sales.").

c. The corporate distinctions of Amazon and its affiliates were not discarded.

Regarding Amazon's argument that the Order and the Opinion impermissibly pierce the corporate veil by combining the actions of separate corporate entities, the Department does not read either as requiring such a finding to determine whether Amazon is in the business of selling tangible personal property at retail. Nor has the Department ever relied upon a substance-over-form argument, or S.C. Code Ann. § 12-36-30, in evaluating Amazon's business model.

To be clear, the Department's position is that Amazon's actions, standing on their own, make it the retailer/seller of property sold on Amazon.com. Amazon owns and operates the Amazon.com website, strictly controlling its content. It solicits, interacts with customers – including suggesting search returns through a proprietary algorithm – and then accepts purchases in South Carolina through Amazon.com. It requires customers to provide *Amazon* with payment and shipping information, and then contracts with affiliate Amazon Payments to process, hold, and then remit back to Amazon a transaction-based portion of the gross proceeds of those sales. Customers do all of this without ever leaving Amazon.com. Amazon then sends the order and shipping confirmations. It handles returns. It limits interactions between customers and the third-party merchant to only occur through its messaging service on Amazon.com. All of this evidence points to one conclusion: Amazon is in the business of selling tangible personal property.

Amazon's focus on who initially receives the consideration for these products is a purposeful distraction from every other aspect of the process that Amazon directly controls. And given that Amazon does, in fact, receive consideration in the form of its transaction-based referral fee profit on every sale occurring on the website, the issue of which entity processes these payments is not determinative in light of the overwhelming control that Amazon exerts. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make

any difference, doesn't matter."). It is the Department's position that a company is not permitted to compartmentalize the functions that it provides to avoid sales tax obligations. That is really what is at the heart of the substance-over-form principle cited by the Opinion.

Stated differently, Amazon should not be able to dictate the tax consequences of retail sales occurring on Amazon.com through internal contracts and agency relationships. That would employ a myopic view to this issue, ignoring the forest for a single tree. But here, the substance-over-form principle is consistent with, but is not required, to reach the issues in this case. As this Court held, the plain language of the Act controls. Substance-over-form generally stands for the proposition that Courts look beyond the formalities of any contracts or relationships to get at the real crux of the activity in question. *E.g.*, *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960); *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978). That is what has occurred in this case. The Department focused on the substance of these sales transactions occurring on Amazon.com: Who operates the website? Who interacts with customers at the time the sales are consummated? Who accepts payment and shipping information from the customers that is utilized to consummate those sales? Who makes transaction-based profits on those sales? Meanwhile, Amazon wants to focus on the form: the contracts and agency relationships determining who does what; who owns the property; who sets the price; and who ships the products. The Department submits that the substance of these sales transactions control over the formalities of what is going on in the background.[15]

[15] The decision in *South Carolina Department of Revenue v. Anonymous Company A*, 01 S.C. 513, 515-21, 678 S.E.2d 255, 256-59 (2009) does not compel a different result. *Anonymous* stands for the proposition that two separate companies may not avail themselves of a single tax credit where they have separated the functions giving rise to the availability of the credit. It is another thing altogether to suggest, as Amazon does, that a company can shield itself from a determination that it is the retailer/seller of tangible personal property by segregating one aspect – the processing of payment – of what makes up a unified sale.

Because the Opinion found that Amazon, standing on its own, meets the definition of a retailer/seller of tangible personal property for sales occurring on Amazon.com, and merely held that the ALC did not err in construing the totality of the circumstances occurring with these sales, the veil of Amazon has not been pierced as a result of actions by its affiliate Amazon Payments, and rehearing on this point is not warranted.

d. Passage of the 2019 amendments to the Act did not mean that the 2016 version of the Act did not cover Amazon's business model.

Finally, reliance on the 2019 marketplace facilitator amendments to the Act does not give rise to an inference that the 2016 version of the Act did not cover Amazon's business model, or that the Act was ambiguous. The bill (S. 214) that eventually became the 2019 amendments was introduced and read *for the first time* on January 8, 2019—nearly three years after the Department's audit of Amazon following the expiration of its sales tax exemption, and eighteen months after the Department issued its final Determination finding Amazon owed sales tax under the 2016 version of the Act.[16] At the time of the contested case trial, the 2019 amendments were merely proposed legislation that were less than a month old, yet Amazon relied extensively on its content, as well as statements of the Department and the General Assembly in legislative hearings and briefings, to argue the reasonableness of its positions. *But see CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 80, 716 S.E.2d 877, 884 (2011) (describing "the problem of relying on unenacted legislation") (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)). Subsequent to the contested case hearing, but prior to the issuance of the Order, the General Assembly passed legislation amending the Act to specifically add marketplace facilitators to the statutory scheme. *See* 2019 S.C. Acts No. 21 (effective April 26, 2019). But even

[16] *See* South Carolina Legislature, S.214, *available at*: www.scstatehouse.gov/sess123_2019-2020/bills/214.htm.

the passage of the 2019 amendments does not render them relevant to a court's construction of the 2016 version of the Act. *See, e.g.*, *Whitner v. State*, 328 S.C. 1, 9, 492 S.E.2d 777, 781 (1997) ("Generally, the legislature's subsequent acts cast no light on the intent of the legislature which enacted the statute being construed . . . . Rather, this Court will look first to the *language* of the statute to discern legislative intent, because the language itself is the best guide to legislative intent." (internal quotation marks and citations omitted)).

As aptly noted by the ALC, "[j]ust because a new business structure is created does not mean that this new structure is immune from existing tax obligations or other legal obligations simply because the existing statutory scheme does not specifically incorporate the new business model." **(R. p. 49-50)** Order at 49-50; *see also Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) (holding that statutory amendments "may also be interpreted as clarifying original legislative intent."). Here, the "marketplace facilitator" legislation contained a specific provision that it "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 in audit." S.214, 123d Session, 2019-2020 S.C. Gen. Assemb., § 1(5). As this matter was in litigation at the time of the legislation, this provision forecloses either party from relying on the "marketplace facilitator" legislation in support of their position.

Moreover, it is evident that the General Assembly intended to clarify the law with respect to the broad category of "internet marketplaces" rather than change it. For instance, as part of its "Findings" in support of the legislation, the General Assembly stated:

> [T]he Internet marketplaces where a person sells tangible personal property at retail by listing or advertising, or allowing the listing or advertising of, another person's products on an online marketplace and collects or processes the payment from the customer are retailers required to remit the sales and use tax on such retail sales under the provisions of South Carolina sales and use tax law[.]

S.214, 123d Session, 2019-2020 S.C. Gen. Assemb., § 1(2). The General Assembly therefore considered entities operating like Amazon to be "retailers" under the Act *before* the enactment of the amendment. In its "Findings," the General Assembly also analogized entities operating internet marketplaces to traditional retailers selling tangible personal property of others or on consignment and made specific reference to "the *longstanding* requirement in the sales and use tax law that a retailer remit the tax on retail sales of tangible personal property owned by another person." *Id*. at § 1(2), (3) (emphasis added). And as part of its amendments, the General Assembly revised S.C. Code Ann. § 12-36-90(1) to add the following emphasized language to the definition of the "gross proceeds of sales": "the proceeds from the sale of property sold on consignment, *including property sold through a marketplace by a marketplace facilitator*." (emphasis added). Notably, the revised language says "including" rather than "and," thereby demonstrating that the General Assembly considers sales by a "marketplace facilitator" to be "consignment" sales for purposes of the Act. In short, the "marketplace facilitator" legislation—at least with respect to application to entities operating like Amazon—was a clarification to the existing law, not a change.[17]

Finally, even though statutory interpretation is a question of law reserved for the courts, Amazon severely misconstrues the statements of Department officials in the context of the proposed legislation as being indicative of the fact that the 2016 version of the Act does not apply to Amazon's business model. Petition at 19 (referring to a "gap" in law); at 13 ("there is no law related to taxation of third party sales"). Taken in the proper context, however, the record supports a finding that these statements are a reference to a lack of guidance regarding remote sellers –

[17] Further, as set forth above, a fair representation of the genesis of the "marketplace facilitator" amendments naturally flows the *Wayfair* decision. The purpose of the amendments to the Act was to: (1) update the Act to reflect modern jargon regarding internet sales; (2) clarify the law in a post-*Wayfair*/post-physical-nexus environment; and (3) level the playing field for all online marketplaces, regardless of whether they had physical nexus or not.

including online marketplaces – who lacked a physical nexus in South Carolina. As noted above, over fifty years of tax policy on nexus was upended by *Wayfair*. With the physical nexus distinction removed, clarification was required to treat all online marketplaces the same, regardless of whether they had a physical presence in South Carolina or not. Thus, the "gap" that has been relied upon by Amazon throughout this litigation is *not* a reference to a gap in the applicability of the Act to Amazon, who had a physical presence in the State starting in 2011, but rather to online marketplaces that lacked a physical presence in the State but were subject to the Act by virtue of *Wayfair*. Similarly, the "there is no law' reference was referring to the lack of clarity regarding third-party merchants and online marketplaces who lacked physical nexus to the State.

In sum, the 2019 amendments to the Act, both before and after their passage, had no bearing on the applicability of the Act to Amazon's business model. As the Department has always maintained, the only thing relevant to its Determination is the version of the Act that existed at the time of its audit. Having presented only restated arguments on this issue, rehearing is not warranted.

IV. Amazon misconstrues the Opinion's and the Order's respective references to the illustrative concepts of point of sale and consignment in evaluating Amazon's business model.

Amazon's Petition repeats its contention that the ALC's reference to the illustrative concepts of point of sale and consignment sales (in the course of discussing Amazon's business model within the confines of the Act) worked to impose "unprecedented" and "novel" standards to the ALC's analysis. Petition at 28-29. Far from demonstrating a point overlooked or misapprehended by the Court, this argument demonstrates (at best) Amazon's misapprehension of the ALC's analysis or (at worst) the employment of strategic straw men arguments. As this Court correctly recognized, these concepts were not controlling of the underlying question of Amazon's

liability as the retailer/seller of goods on Amazon.com; rather, "the ALC considered these concepts for purposes illustrating the practical aspects of sales occurring on the Marketplace in applying the facts of this case to the Act." Opinion at 15-16.

As a general response to both issues, rehearing on these points is neither requested by Amazon nor warranted. The Petition does not assert any error with respect to the Opinion on either the point of sale or consignment arguments, confining its argument to disagreements with the Order and the ALC's analysis, failing to even assert that any portion of the Opinion's discussion on these topics warrants rehearing, Petition at 28-31, and stating with respect to point of sale that, "[t]o the extent this Court's statements acknowledge that the concept cannot support the ALC's conclusion, Amazon Services *agrees*," Petition at 28. The Department disagrees that the Opinion goes so far as to state that the discussion of these concepts cannot support the ALC's conclusion, but given the Petition's lack of articulated ground for rehearing on these points, Amazon's caveated statement is irrelevant and appears to be advanced solely to preserve an argument for a forthcoming *certiorari* petition. To that end, the Petition's arguments on these topics consist entirely of selected verbatim restatements of Amazon's primary brief in this appeal, rather than appropriate arguments under Rule 221.

a. <u>The Order's discussion of the "point of sale" for retail sales occurring on Amazon.com is both illustrative and appropriate.</u>

In evaluating Amazon's business model under the Act, the ALC appropriately discussed the aspects of retail sales occurring on Amazon.com, including Amazon's involvement in and control of the point in time in which a sale occurs on the marketplace. Neither the Department nor the ALC has never used the term as an undefined, extra-statutory sword that resolves the question of Amazon's liability under the Act, as implied by Amazon, but rather as a fair description of "the point in time when a sale takes place and who is present at that point[, which] is an elementary

consideration in determining who is the seller." **(R. p. 26)** Order at 26. Here, it is a simple recognition and description of the undisputed facts in this case of the life cycle of sales occurring on Amazon.com:

i. An individual seeking to buy tangible personal property goes to Amazon.com, a website owned and operated by Amazon;
ii. The individual searches Amazon.com for tangible personal property that they are interested in purchasing;
iii. The individual can broaden or narrow the products returned by interacting directly with Amazon.com to refine their search, ultimately selecting a product and clicking on it;
iv. The individual is taken to a product-specific page, still on Amazon.com;
v. The product-specific page is created and maintained by Amazon, based on product information supplied by third-party merchants;
vi. The content is highly regulated by Amazon based on specific rules that are intended to normalize the retail experience;
vii. If the product is sold by more than one merchant, several additional controls are implemented by Amazon:
    a. First, the offer that is displayed initially is selected by Amazon pursuant to a proprietary algorithm known as the "buy box";[18]
    b. Second, if a product detail page already exists, new merchants are prohibited from creating their own listing page;
viii. From there, the individual can choose to either add it to a virtual cart on Amazon.com, or immediately purchase the product on Amazon.com via a "buy now" option; either way, the customer must choose to "proceed to checkout";
ix. At that time, the individual is *required* to create an Amazon account, including:
    a. The individual is required to choose a user name and password;
    b. The individual is required to provide *Amazon* with an email address, billing address, and shipping address;
    c. The individual is required to input and save their credit or debit card information with *Amazon*;
x. All of this occurs on Amazon.com and is an *Amazon* pre-requisite to making retail purchases on Amazon.com;
xi. After providing all of that information *to Amazon*, the customer[19] can purchase the product;
xii. The transaction occurs entirely on Amazon.com;

[18] The majority of all retail sales occurring on Amazon.com result from customers selecting the buy box offer. **(R. pp. 369-70)** (Tr. 228-29); **(R. p. 12)** Order at 12 n.17.

[19] Amazon refers to purchasers of products on Amazon.com as *its* "buyers" or "customers." **(R. p. 895)** (Ex. 14 ("Amazon places high importance on maintaining the trust of *our* millions of satisfied *buyers*." (emphasis added))); **(R. p. 914)** (Ex. 40 (requiring pricing parity "[t]o ensure that *our customers* have access to a large selection of Products at competitive prices" (emphasis added))); **(R. p. 894)** (Ex. 7 ("Customers trust that they will find low prices on Amazon.com.")).

xiii. The customer is not required to visit any third-party website to complete the purchase or have their payment processed;

xiv. If the customer purchases more than one product at a time, including from different merchants, Amazon processes the purchases in one transaction;

xv. At the time of purchase, Amazon, through a contractual relationship with its affiliate Amazon Payments, places a hold on the customer's card *provided to and stored by Amazon*;

xvi. The customer receives an automated email *from Amazon*:

a. The email only lists Amazon and states, "Thank you for shopping *with us*.";

xvii. When the tangible personal property is ready to ship, Amazon sends a shipment confirmation email:

a. The email only lists Amazon;

xviii. If multiple items are purchased, Amazon is permitted to combine separate orders and products in one box;

xix. Once the item(s) ship, Amazon Services, again through Amazon Payments, processes payment for the purchase on the customer's card *provided to and stored by Amazon*;

xx. The customer's bank or credit card statement lists Amazon.com or Amazon Marketplace as the entity charging the card;

xxi. If the customer wants to return the purchased product, they must do so through their Amazon.com account;

xxii. The refund on the customer's bank or credit card statement lists Amazon.com or Amazon Marketplace; and

xxiii. All communications between the customer and the merchant must occur through Amazon.com, and Amazon prohibits merchant/customer communications through other channels.

Accordingly, the ALC's description of the foregoing process as the point of sale was both logical and inherent within the provisions of the Act. As set forth above, Amazon is the only party directly interacting with customers, accepting payment and shipping information, issuing the sales confirmation and receipt, and otherwise performing the required sales-side aspects of the transaction at the point in time which sales occur on Amazon.com. The purpose of the Act is not just to impose a tax, but to ensure the remittance of the tax. Thus, a focus on the "point of sale"—*i.e.*, the point where offer, acceptance and exchange of payment information is received from a customer—in the determination of the "seller" or "retailer" for any given transaction is foundational to the application of the tax to any sale.

Regardless, as found by this Court, the ALC's illustrative recognition of the realities of sales occurring on Amazon.com was not controlling of its findings and, as admitted by Amazon, does not require rehearing.

b. The ALC's comparison of Amazon's business model to consignment sales is both illustrative and appropriate.

Likewise, the ALC appropriately analogized Amazon's business model to that of a traditional consignee in reaching its determination that Amazon is a retailer/seller under the Act. Given that the Opinion correctly recognized the ALC's use of consignment sales for the purpose of illustrating the practical aspects of sales occurring on Amazon.com, Opinion at 15-16, rather than as a controlling feature of its analysis and findings, similar to Amazon's point of sale arguments, this issue does not warrant rehearing.

To be clear, however, the Department maintains that the ALC's analysis is wholly consistent with the Act and case law evaluating retail sales under the Act. In that respect, Amazon's assertion that the ALC's use of consignment sales as a reference point for evaluating Amazon's business model under the Act was "novel" is patently incorrect. For example, S.C. Code Ann. § 12-36-90(1) defines "gross proceeds of sales" as "the value proceeding or accruing from the sale, lease, or rental of tangible personal property … includ[ing] … the proceeds from the sale of property sold on consignment by the taxpayer." As noted by the ALC, "[t]he inclusion of the proceeds from consignment sales is notable because our statutory scheme does not directly define or address consignment sales, yet the reference to consignment sales in section 12-36-90(1) makes it clear that our State recognizes them." (citing the Supreme Court's recognition of consignment sales in the Act in *Greenwood Manufacturing Company. v. Worley*, 222 S.C. 156, 160–61, 71 S.E.2d 889, 891 (1952)). **(R. p. 21)** Order at 21. Further, consignment sales are consistent with the statutory definition of a retailer/seller under S.C. Code Ann. § 12-36-70(1)(a), which includes

"every person … selling or auctioning tangible personal property whether owned by the person or others." *See also* S.C. Code Ann. Regs. 117-319 (imposing sales tax on warehousemen that sell goods on consignment, including transactions in which they act as brokers in the sale of goods not owned by them or in their possession at the time of the sale). Finally, the Department has long been on record, including prior to and during the applicable tax period, that it treats consignees as sellers for the purposes of sales tax liability. *See* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 23, Pg. 19 (2015) ("The retailer selling the items on consignment is the person responsible for remitting the tax on the consignment sale.").

In sum, analogizing sales occurring on Amazon.com to consignment sales was appropriate, as the similarities between Amazon's business model and a traditional consignment shop far outweigh any possible differences. Amazon offers products for sale that are owned by others; Amazon accepts payment information directly from customers for those products and causes payment to be initiated; Amazon provides a receipt to the customer for those products; Amazon directs the transfer of, or itself transfers, the products to the customers; and Amazon then pays the owner of the product, less its own fees. Amazon's assertion that the Business Solutions Agreement expressly disclaims an agency relationship is a distinction without a difference, as the ALC specifically found that, like a consignment relationship, Amazon acts as the third-party merchants' agent in the sale of products, **(R. p. 41)** Order at 41 ("[T]he "true nature" of the relationship between Amazon Services and Merchants is that Amazon Services acts as the Merchants' agent in selling their products, even if a formal agency relationship is not recognized by the parties."). Amazon did not appeal from this express finding, rendering its argument unpreserved and further demonstrating that Amazon is in the "business of selling."

Similarly unpersuasive is Amazon's alleged "undisputed testimony" of its company witness, Chris Poad, "explain[ing] how a consignment relationship is structured." Petition at 30. Mr. Poad was a fact witness, and his opinion on legal issues is irrelevant and carries no weight.[20] Moreover, the two distinctions raised by his testimony and in the Petition – inventory management and price-setting – are immaterial in light of the many similarities. *See* **(R. p. 23)** Order at 23 (no requirement that the seller transfer title to the property; person initially accepting payment for products is responsible for the sales tax, even if payment is passed along to a third-party); **(R. p. 31)** Order at 31 (acting as an agent for third-party merchants); **(R. p. 37)** Order at 37 (selling someone else's property is the crux of consignment sales); **(R. p. 39)** Order at 39 (consignee provides a service to the owner of a product that directly facilitates the sale of the product, retains a percentage of the sales price as a fee, and facilitates the processing of the sales transaction); **(R. p. 40)** Order at 40 (consignee can only sell what other people choose to allow him/her to sell).[21]

Ultimately, the question is not whether Amazon's business model differs materially from a traditional retail or consignment store. The dispositive question in this case is whether Amazon is *in the business* of selling goods of others. The fact that Amazon's operations are substantially similar to that of a traditional retail store or consignee only further demonstrates that the General Assembly intended to require companies operating like Amazon to collect and remit sales and use tax. Rehearing on this issue is not warranted.

[20] In any event, the ALC specifically found his testimony regarding the differences between consignment transactions and the transactions at issue to be "unpersuasive." **(R. p. 40)** Order at 40.

[21] Also irrelevant is Amazon's reliance on three out-of-state decisions (two of which were unpublished) in the contexts of products liability and copyright infringement to support its position that it is not a consignee. Petition at 30-31. Decisions of foreign jurisdictions construing other state statutes and irrelevant facts, including defective product or copyright infringement, have no bearing on whether Amazon is a retailer/seller under South Carolina law and the Act.

V. Amazon has not met its burden of demonstrating that application of the Act to Amazon's business model is violative of the Federal and South Carolina Constitutions.

Finally, the Opinion correctly disposed of Amazon's constitutional arguments based on a failure of proof on both the due process and equal protection claims and nothing raised by the Petition meets the standard for rehearing. In fact, the Petition's arguments on these topics, similar to Amazon's point of sale and consignment arguments, consist almost entirely of selected verbatim restatements of Amazon's primary brief in this appeal, rather than appropriate arguments under Rule 221.

a. No evidence of a due process violation.

At bottom, Amazon's due process argument is that the Department's assessment of sales and use tax for Amazon's sales from the first quarter of 2016 "effectively seeks to subject Amazon Services—and only Amazon Services, not other marketplace facilitators—to the 2019 amendments," which "violates the constitutional requirement of fair notice." Petition at 31. But Amazon's argument does not stand up under casual scrutiny and fails by simple reference to the undisputed timeline of this tax assessment. The audit underlying the Determination began in the second quarter of 2016, years before the 2019 amendments took shape or were passed. At no time has the Department argued or advocated for retroactive application of the 2019 amendments with respect to the period in question. The ALC found this fact expressly in the Order, a finding which Amazon did not challenge in this appeal. **(R. p. 49)** Order at 49 ("Nowhere has the Department cited to the pending legislation in an attempt to apply it to Amazon Services in this case."); *Atl. Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."). Accordingly, Amazon's retroactivity argument fails.

Beyond that failing, however, there has never been any doubt as to the standard – the plain language of the Act existing in the first quarter of 2016 – that the Department has sought to apply against Amazon's business model. Nor was the assessment a reversal in policy, or a change in the regulatory framework governing online retailers; rather, as the ALC correctly found, it was "an existing tax scheme being applied to a relatively new business model (the online marketplace)." **(R. p. 49)** Order at 49. Having effected an "exchange . . . of tangible personal property for a consideration," S.C. Code Ann. § 12-36-100, Amazon has placed itself squarely within the requirement to collect and remit sales and use tax to South Carolina, and this statutory framework was in place and known to Amazon well before the first quarter of 2016.

With no actual proof, Amazon again resorts to a facile straw man argument, arguing that the fact that "[t]he 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" demonstrates a "sudden change in policy" that failed to provide Amazon with fair notice of its tax obligations. Of course, Amazon does not acknowledge the controlling U.S. Supreme Court precedent that prohibited such collection until the court's 2018 *Wayfair* decision.

Amazon's avoidance of this prohibition and the impact of *Wayfair* in this context is, to be sure, strategic. In 2011, Amazon sought to locate a warehouse/distribution facility in Lexington County, South Carolina for the first time. Doing so would have also subjected Amazon to the Act's sales tax collection and remittance obligations for the first time, as a physical presence in the state was required to establish a substantial nexus with the state for tax purposes. *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (requiring, pursuant to the dormant commerce clause, a physical presence for a business to have a substantial nexus with a taxing state such that it would

be subject to that state's sales and use tax). Fully aware of this fact, Amazon lobbied the General Assembly to pass a reprieve as a part of the State's incentive package for locating a facility in South Carolina.

Amazon succeeded. In 2011, the General Assembly passed the Distribution Facility Sales Tax Exemption (the Moratorium) to encourage investment by Amazon in the State. *See* S.C. Code Ann. § 12-36-2691 (2014). The Moratorium was in place from 2011 through 2015, and exempted qualifying companies from remitting sales and use tax under the existing law on goods sold in South Carolina if those companies maintained a distribution facility in the State meeting certain criteria as defined in the statute. *Id*. Amazon was the principal beneficiary of this exemption. **(R. p. 1028)** (Ex. 178 at 9). In addition to providing a five-year reprieve, the Moratorium expressed the General Assembly's clear understanding that companies availing themselves of its safe harbor were the retailers/sellers of goods sold on their websites. In particular, Subsection (E)(1) directed that "[a] person to whom this section applies who makes a sale through the person's Internet website …" was required to provide certain notice to the purchaser of such goods. In sum, the Moratorium demonstrates that Amazon was fully apprised of its obligations under the Act in 2011, sought and enjoyed a reprieve for five years, and was on notice that its obligations resumed upon the expiration of the Moratorium on January 1, 2016.[22] As this Court correctly found, "no evidence shows the Department attempted to retroactively apply the [2019 amendment] or polices to Amazon Services' conduct. Rather, the Department applied the sales tax law that was in place at

[22] Amazon's notice should also be imputed by virtue of the Supreme Court's decision in *Travelscape*, issued in 2011, as well as Revenue Ruling 14-4, issued in 2014 (https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/RR14-4.pdf), and Department Information Letter 15-19 (https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/IL15-19.pdf), issued at the end of the Moratorium, all of which were consistent with the Department's position in this case.

the time." Opinion at 19. Having presented no issue that this Court overlooked or misapprehended, and failing to prove this claim in any event, rehearing is not warranted on this point.

b. No evidence of an equal protection violation.

Amazon's equal protection claim suffers from the same lack of proof and is equally unavailing. As this Court correctly found, affirming the identical finding of the ALC, "Amazon Services failed to present any evidence specifically identifying other online marketplaces and showing such marketplaces were similarly situated persons. Further, Amazon Services failed to present any evidence that any such similarly situated persons received disparate treatment." Opinion at 21; *see also* **(R. p. 51)** Order at 51 ("Amazon Services has failed to submit any evidence specifically identifying other online marketplaces *and* showing that these other online marketplaces are similarly situated.") (emphasis in original). Amazon again musters only a passing reference to one other online shopping website (eBay), Petition at 33, while failing to point to any evidence in the record setting forth the similarities between the business models of the two companies. More, Amazon's supposition that equal protection "would likely require" application of the Order to "brick-and mortar marketplaces like malls, as well as payment processors, credit card companies, banks, delivery companies, and advertisers" equally avoids a meaningful comparison between those activities and its own, while ironically missing the point that none of those standalone business types combine these discrete functions into one unified sales platform as does Amazon.

Further, "Amazon Services offered no evidence regarding whether the Department assessed sales and use tax on another online marketplace or why the Department failed to impose the tax on such a similarly situated business." **(R. p. 52)** Order at 52. Thus, as the ALC explained, "there is no evidence that the Department purposefully singled-out Amazon Services to

intentionally discriminate against them with the imposition of the tax." *Id.* Purposeful discrimination is a required showing for an equal protection claim. *See Whaley v. Dorchester Cnty. Zoning Bd. of Appeals*, 337 S.C. 568, 576, 524 S.E.2d 404, 408 (1999); *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 329 (4th Cir. 2005). Amazon's failure to make any such showing in this case is fatal to its claim, and this Court was correct to reject it.

Attempting to plow new ground in the Petition, Amazon also misrepresents the legislative testimony of the Department's Director, stating that "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 to effect." Petition at 34 (citing Ex. 194, R.1263 at 7:02-18) (emphasis in original and supplied). Amazon is wrong in multiple respects. First, the legislative testimony cited by Amazon occurred on October 23, 2018, nearly a year *before* the ALC's ruling on September 10, 2019; absent a DeLorean with a flux capacitor, the Director could not have made – and did not make – such a statement. Second, what the director actually said in his testimony, when asked by a legislator whether the 2019 amendments would be prospective, is that the 2019 amendment "will not be retroactive … the lawsuit is going to pull up some retroactive … specific to that one company." *Id.* But that statement is hardly a "smoking gun" as Amazon has portrayed. Instead, it merely recognizes the reality that, because the period in question for the Determination was the first quarter of 2016, "*the lawsuit*" necessarily involves liability for sales occurring in the past (as of the time of the testimony). Moreover, the fact that a lawsuit could only involve a judgment against a party, as opposed to any non-party, is self-evident, not a revelation.

In sum, there is no evidence that the Department sought to apply the 2019 amendments to Amazon in this case, and the record is devoid of any evidence that the Department treated Amazon

disparately from any other similarly situated persons. Rehearing is not warranted on this point either.

CONCLUSION

The Petition presents no basis for rehearing or reconsideration of the Opinion. Primarily, the Petition fails to identify any issue which this Court overlooked in reaching its unanimous decision; instead, it merely restates or repackages the arguments previously advanced by Amazon in prior briefing and argument to the Court. Careful review of the Opinion reveals that this Court appropriately considered and rejected these arguments, rendering the grounds advanced by Amazon unsuitable for consideration under this Court's standard for evaluating petitions for rehearing. Similarly, Amazon's arguments that the Opinion misapprehended its arguments, the facts developed during the trial, or applicable law governing the legal issues before the Court, merely disagrees with the conclusions reached by the panel regarding the applicability or persuasiveness of the arguments advanced, likewise rendering the grounds advanced by Amazon inappropriate for consideration under this Court's standard for evaluating petitions for rehearing. No basis exists upon which this Court should grant rehearing, and the Department respectfully submits that denial of the Petition is warranted and appropriate.

Respectfully submitted,

s/ Chad N. Johnston

BURR & FORMAN LLP
Tracey C. Green (Bar No. 9342)
Chad N. Johnston (Bar No. 73752)
John W. Roberts (Bar No. 78889)
1221 Main Street, Suite 1800
Columbia, SC 29201
(803) 799-9800
tgreen@burr.com
cjohnston@burr.com
jwroberts@burr.com

S.C. DEPARTMENT OF REVENUE
Jason P. Luther (Bar No. 78021)
Chief Legal Officer
P.O. Box 12265
Columbia, SC 29211-9979
803-898-5110 (Telephone)
803-896-0171 (Fax)
Jason.Luther@dor.sc.gov
courtorders@dor.sc.gov

THE ACQUAVIVA LAW FIRM, LLC
Lauren Acquaviva (Bar No. 100528)
1092 Johnnie Dodds Blvd., Suite 112
Mount Pleasant, SC 29464
843-216-7728 (Telephone)
843-614-6423 (Fax)
Lauren@vivalawsc.com

Attorneys for S.C. Department of Revenue

Columbia, South Carolina
March 1, 2024

RECEIVED
Mar 01 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Amazon Services, LLC, ...Appellant,

v.

South Carolina Department of Revenue, ...Respondent.

PROOF OF SERVICE

This is to certify that the undersigned, an attorney with the law firm of Burr & Forman LLP, has caused to be served this day one (1) copy of the **South Carolina Department of Revenue's Return to Petition for Rehearing** in the above-captioned matter on counsel of record via email and as set forth below:

Bryson M. Geer, Esquire
John C. von Lehe, Jr., Esquire
NELSON MULLINS RILEY & SCARBOROUGH LLP
151 Meeting Street, 6th Floor
Charleston, SC 29401
bryson.geer@nelsonmullins.com
john.vonlehe@nelsonmullins.com

Carter G. Phillips, Esquire
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
cphillips@sidley.com

Constantine L. Trela, Jr., Esquire
Robert N. Hochman, Esquire
Neil H. Conrad, Esquire
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
ctrela@sidley.com
rhochman@sidley.com
nconrad@sidley.com

Robert T. Bockman, Esquire
THE LAW CENTER
1525 Senate Street
Columbia, SC 29208
rtbockman@gmail.com

Madison Felder, Esq.
PARKER POE ADAMS & BERNSTEIN LLP
110 East Court Street, Ste. 200
Greenville, SC 29601
madisonfelder@parkerpoe.com

Kay M. Hobart, Esq.
PARKER POE ADAMS & BERNSTEIN LLP
301 Fayetteville Street, Ste. 1400
Raleigh, NC 27601
kayhobart@parkerpoe.com

M. Dawes Cooke, Jr., Esq.
Justin P. Novak, Esq.
John W. Fletcher, Esq.
BARNWELL WHALEY PATTERSON & HELMS, LLC
PO Drawer H
Charleston, SC 29402
mdc@barnwell-whaley.com
jnovak@barnwell-whaley.com
jfletcher@barnwell-whaley.com

R. Gregory Roberts, Esq.
THE ROBERTS LAW GROUP
PO Box 1160
White Plains NY 10602
groberts@multistatesalt.com

E. Raymond Moore III, Esq.
MURPHY & GRANTLAND, P.A.
PO Box 6648
Columbia, South Carolina 29260
ermoore@murphygrantland.com

A. Pilar Mata, Esq.
TAX EXECUTIVES INSTITUTE
1200 G Street NW, Suite 300
Washington, DC 20005
pmata@tei.org

Steve A. Matthews, Esq.
HAYNSWORTH SINKLER BOYD, P.A.
1201 Main Street, 22nd Floor
Columbia, SC 29201
smatthews@hsblawfirm.com

Jennifer B. Routh, Esquire
MCDERMOTT WILL & EMERY
500 North Capitol St NW 3
Washington DC 20001
jrouth@mwe.com

Samantha K. Trencs, Esq.
Eric S. Tresh, Esq.
Maria M. Todorova, Esq.
Chris R. Lee, Esq.
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street NW, Suite 700
Washington DC 20001
samtrencs@eversheds-sutherland.us
erictresh@eversheds-sutherland.com
mariatodorova@eversheds-sutherland.com
chrislee@eversheds-sutherland.com

A copy of the email serving counsel as stated above is attached hereto.

s/Chad N. Johnston
Chad N. Johnston (S.C. Bar No. 73752)

Columbia, South Carolina
March 1, 2024

Johnston, Chad

From: Johnston, Chad
Sent: Friday, March 1, 2024 3:57 PM
To: cphillips@sidley.com; ctrela@sidley.com; rhochman@sidley.com; nconrad@sidley.com; John Von Lehe; bryson.geer@nelsonmullins.com; Donna Mills
Cc: Jason Luther; courtorders@dor.sc.gov; lauren@vivalawsc.com; team@vivalawsc.com; Green, Tracey; Roberts, John; Laura Lee Andrews; rtbockman@gmail.com; madisonfelder@parkerpoe.com; kayhobart@parkerpoe.com; M. Dawes Cooke, Jr.; jnovak@barnwell-whaley.com; John W. Fletcher; groberts@multistatesalt.com; ermoore@murphygrantland.com; pmata@tei.org; smatthews@hsblawfirm.com; efile_smatthews@hsblawfirm.com; jrouth@mwe.com; samtrencs@eversheds-sutherland.us; erictresh@eversheds-sutherland.com; mariatodorova@eversheds-sutherland.com; chrislee@eversheds-sutherland.com
Subject: Amazon Services, LLC v. SCDOR; Appellate Case No. 2019-001706
Attachments: Doc#_53637869_v_1_2024-03-01 Johnston Ltr to COA (Return to Petition for Rehearing).PDF; Doc#_53639068_v_1_2024-03-01 SCDOR Return to Pet for Rehearing (TO FILE).PDF

Counsel,

Attached for service, please find correspondence transmitting the SC Department of Revenue's Return to Appellant Amazon Service's Petition for Rehearing. Same will be filed momentarily with the Court, copying all parties to this email.

Very best regards,
Chad

Chad N. Johnston
Partner

BURR FORMAN LLP

1221 Main St., Suite 1800
Columbia, South Carolina 29201

direct 803-753-3225
mobile 803-665-3147

cjohnston@burr.com
Web

BURR FORMAN LLP
results matter

Chad N. Johnston
cjohnston@burr.com
Direct Dial (803) 753-3225

1221 Main Street
Suite 1800
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

Office (803) 799-9800
Fax (803) 753-3278

BURR.COM

March 1, 2024

VIA ELECTRONIC FILING
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: *Amazon Services, LLC v. S.C. Dep't of Revenue,* Appellate Case No. 2019-001706

Dear Ms. Kitchings:

In accordance with Rules 221 and 262(a)(3) of the South Carolina Appellate Court Rules (SCACR), Supreme Court Order 2022-05-06-03, part (b)(2), this Court's letter dated February 9, 2024, and this Court's Order dated February 15, 2024, enclosed for filing, please find Respondent South Carolina Department of Revenue's **Return to Petition for Rehearing** in the above-referenced matter.

By copy of this letter, I am serving counsel for Appellant and counsel for the *amici* via email as permitted by Rule 262(c)(3), SCACR and Order 2022-05-06-03, part (d)(1), and attached is a proof of service to that effect.

If you should have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

Burr & Forman LLP

Chad N. Johnston

CNJ/lla
Enclosures

cc: Robert T. Bockman, Esquire

M. Dawes Cooke, Jr., Esquire
Neil H. Conrad, Esquire
Madison Felder, Esquire
John W. Fletcher, Esquire
Bryson M. Geer, Esquire
Kay M. Hobart, Esquire
Robert N. Hochman, Esquire
Chris R. Lee, Esquire
A. Pilar Mata, Esquire
Steve A. Matthews, Esquire
E. Raymond Moore III, Esquire
Justin P. Novak, Esquire
Carter G. Phillips, Esquire
R. Gregory Roberts, Esquire
Jennifer B. Routh, Esquire
Maria M. Todorova, Esquire
Constantine L. Trela, Jr., Esquire
Samantha K. Trencs, Esquire
Eric S. Tresh, Esquire
John C. von Lehe, Jr., Esquire
(*all via email*)