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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2019-001706

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

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

v.

South Carolina Department of Revenue, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Amazon Services LLC petitions this Court to issue a writ of certiorari to review the decision of the Court of Appeals styled *Amazon Services, LLC v. South Carolina Department of Revenue*, 442 S.C. 313, 898 S.E.2d 194 (Ct. App. Jan. 24, 2024). App. 2105-25. For the reasons set forth below, the Petition should be granted and the decision should be reversed.

CERTIFICATION REGARDING REHEARING

The undersigned certifies that a Petition for Rehearing (App. 2126) was timely filed on February 8, 2024, and ruled upon by the Court of Appeals on March 18, 2024 (App. 2224).

INTRODUCTION

The ruling of the Court of Appeals in this case significantly weakens a longstanding protection for taxpayers against the overzealous enforcement of the tax laws. To impose tax collection obligations in South Carolina, a tax statute must unambiguously apply to the taxpayer. This means that a taxpayer receives the benefit of any reasonable interpretation of a tax statute that excludes the taxpayer from such obligations. This protection is recognized across the country, is essential for sound financial and business planning, promotes legislative accountability for tax burdens on the public, and makes tax enforcement uniform and fair.

Amazon Services operates the Amazon.com website, a marketplace where different sellers offer products to consumers. Some of those sellers are affiliates of Amazon Services, but the vast majority of them are independent third-party sellers. Since 2016, Amazon Services has been required to collect and remit sales tax in South Carolina for all sales by Amazon-related companies in its marketplace. Amazon Services did so. The dispute in this case concerns *only* sales by third-party sellers. App. 190, 234-35.

Before this case, no tax ruling or court decision in South Carolina had ever imposed sales tax obligations on a marketplace operator like Amazon Services for sales by independent third

parties in the marketplace. Nonetheless, the Department of Revenue asserted, and an Administrative Law Court agreed, that Amazon Services was required to collect and remit tax for such third-party sales. The Court of Appeals affirmed, but in doing so adopted rules of law that in three critical respects shift power to state tax enforcement authorities to the detriment of all South Carolina taxpayers.

First, the Court of Appeals read this Court's decision in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), to require South Carolina courts to interpret tax statutes "broadly." App. 2118. Such an approach cannot be squared with this Court's past repeated rulings, in decisions both predating and postdating *Travelscape*, that a taxpayer receives the benefit of any reasonable interpretation of a tax law that favors the taxpayer. *See, e.g.*, *Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 188 S.E. 508, 509-10 (1936); *Alltel Commc'ns, Inc. v. S.C. Dep't of Rev.*, 399 S.C. 313, 318, 731 S.E.2d 869, 872 (2012). In truth, *Travelscape* did not adopt the rule the Court of Appeals applied to this case. This Court's review is warranted to correct this misreading of *Travelscape* and to restore the uniform and longstanding application of the rule favoring a taxpayer's reasonable interpretation of a tax statute.

Second, the Court of Appeals compounded its error by declaring the relevant tax statute "unambiguous" without considering whether Amazon Services's interpretation was reasonable. App. 2116. A question of statutory ambiguity in tax law cannot be made without evaluating the reasonableness of the taxpayer's view regarding how the statute applies to the taxpayer's conduct. As this Court has made clear, where "the language relied upon to bring a particular person within a tax law is ambiguous *or* is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in

his favor." *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 (citation omitted; emphasis added). A court applying a tax law must first review the statute's text. The court must then consider whether the taxpayer's explanation for why the law does not apply was reasonable. The Court of Appeals in this case never went beyond the first step. Most notably, the Court of Appeals held that a taxpayer may not cite a substantial and detailed amendment to a tax law to demonstrate that it reasonably believed that the prior law did not apply to its conduct. App. 2116. The Court of Appeals also refused to consider the Department's own public statements acknowledging that a change in the law was needed to eliminate a statutory ambiguity, and disregarded the approach of courts in numerous other states that have confronted the same issue under similar tax statutes. *Id*. at 2116, 2121.

Finally, the Court of Appeals also weakened federal and South Carolina constitutional protections for taxpayers. Holding Amazon Services liable for tax on third-party sales prior to the amendment to the tax law violated the Due Process Clause's fair notice guarantee because neither the statute nor any Department regulation or practice notified marketplace facilitators that they were liable for collecting and remitting sales tax on such third-party sales. Likewise, the ruling violates the constitutional guarantee of equal protection. The Department acknowledged that Amazon Services is the only marketplace that will be forced to pay tax on third-party sales under the old statute. This is precisely the kind of selective, inequitable, and discriminatory enforcement of tax law that the rule gutted by the Court of Appeals is designed to prevent.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in reading this Court's decision in *Travelscape* to require a broad interpretation of a tax statute, contrary to this Court's longstanding rule favoring a taxpayer's reasonable interpretation?

II. Did the Court of Appeals err in finding the statute "unambiguous" without properly considering Amazon Services's contrary and reasonable interpretation?

III. Did the Court of Appeals err in finding no due process or equal protection violation when it is undisputed that Amazon Services is the only marketplace facilitator being held liable for sales tax on third-party sales under the pre-2019 version of the Sales and Use Tax Act?

STATEMENT OF THE CASE

A. The Amazon.com Marketplace.

Third parties that sell on the Amazon.com marketplace agree to the terms of the Amazon Services Business Solutions Agreement ("BSA"). App. 206; Ex. 3, App. 864-911. The BSA is a comprehensive agreement among Amazon Services and the third-party seller, and two other Amazon-related service providers: Amazon Payments, Inc. and Amazon Fulfillment Services, Inc. Amazon Services, Amazon Payments, and Amazon Fulfillment are distinct corporate entities. The Department has never contended otherwise, nor did it present any evidence during the trial that would justify attributing the acts of one Amazon entity to any other. Each of these entities serves a different role and performs different functions. Amazon Payments is a regulated payment processing company; it processes the flow of funds for the transaction. Amazon Fulfillment provides warehousing and shipping services. Third-party sellers need not use Amazon Fulfillment's services, but must use Amazon Payments. Both Amazon Payments and Amazon Fulfillment provide their services to sellers outside the Amazon.com marketplace—*i.e.*, their services are not used only for transactions occurring on the Amazon.com marketplace.

Third-party sellers set the prices of their products, decide how many units are available, and determine whether to offer warranties or guarantees. App. 212-13, 217, 225-28, 436-37, 460-62, 484-85. The BSA contains only one pricing restriction: third-party sellers must provide customers in the Amazon.com marketplace the lowest price they offer for that product anywhere else. *Id.* at 220, 569; Ex. 3, App. 881-82.

Third-party sellers set their shipping terms and fulfill (*i.e.*, pack and ship) their orders to

customers. App. 238-39, 242-43, 437, 460-61, 558-60. They decide what shipping company to hire, and whether to pass the cost of shipping onto customers. They can, but need not, use Amazon Fulfillment to handle fulfillment with the set of services referred to as Fulfillment by Amazon. If a third-party seller chooses this option, the seller sends its inventory to a fulfillment center, where Amazon Fulfillment stores the products on behalf of the third-party seller. *Id.* at 244-45. Amazon Fulfillment never owns the third-party sellers' inventory; the sellers do. *Id.* at 245, 475-77, 552-53; Ex. 3, App. 898-99. The third-party seller maintains control over its product until it is shipped; the seller may even cancel a transaction up until that point. App. 480-81, 559.

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

When a customer purchases a product from any third-party seller on the marketplace, payment is processed through Amazon Payments. The amount paid by a customer is the price of the product. Sales tax and shipping charges also might be added, if applicable, but they are separately stated. *See, e.g.*, Ex. 122, App. 981.

The sales proceeds flow from a customer's account into an Amazon Payments account, where they are held for the benefit of the third-party seller until the proceeds are disbursed. App. 248-49, 251, 255-56; Ex. 3, App. 910-11. Amazon Services never receives nor holds the sales proceeds; Amazon Payments holds the proceeds temporarily, but expressly for the benefit of the third-party seller. App. 271-72, 290-91, 381; Ex. 3, App. 910-11. In all these respects, the customer and third-party seller enter into a sale transaction and use Amazon Payments merely to facilitate payment no differently than any other payment processor.

Pursuant to the BSA, the third-party seller pays for the various services it purchases from Amazon entities that help facilitate its sale. Those payments are drawn from the funds received

from the customer over the Amazon Payment system, with the balance remitted to the seller. App. 248, 271-72; Ex. 3, App. 864-65, 882-83, 890, 901, 910-11. Amazon Payments collects a fee for its service, and likewise for Amazon Fulfillment if it has been selected by the third-party seller. Amazon Services also charges various fees to third-party sellers. App. 269-72; Ex. 16, App. 915-21. Contrary to the suggestion of the Court of Appeals and the ALC, none of those fees bears a direct relationship to the profit margin of a particular product, and no Amazon entity knows whether any particular third-party sale was profitable. App. 416-18, 491-92.

Amazon Services also offers a tax calculation service to third-party sellers who choose to become "professional sellers." Ex. 23, App. 923; Ex. 16, App. 915; App. 388-92. Third-party sellers must pay a fee for this tax service. App. 270-71, 388-92; Ex. 23, App. 922-25 (tax collection service terms); Ex. 122, App. 984. Through that service, Amazon Services calculates and adds to a customer's purchase price the sales tax on the transaction. Ex. 23, App. 923; Ex. 16, App. 915; App. 270-71, 388-92. The sales tax added to the price of the product is sent on to the third-party seller. Like any other seller that collects sales tax at the time of sale, third-party sellers on the Amazon.com marketplace must forward that amount to the relevant taxing authority, including the South Carolina Department of Revenue. App. 390-92.

C. The Court of Appeals and ALC Decisions Each Adopt Novel Rules of Law That Gut the Rule Favoring Taxpayers' Right to Rely on a Reasonable Interpretation of the Law That Excludes Them.

While litigating this case, the Department urged the legislature to amend the Sales and Use Tax Act to address the issue then before the ALC. The Department proposed changing the definition of "seller" in the Act to add "marketplace facilitators." This new term described Amazon Services and others, and it imposed sales tax obligations on them for third-party sales in their marketplaces. The Department repeatedly admitted to the legislature that changes to the statute were needed to eliminate a statutory ambiguity (so that "nobody has to guess") and fill an

apparent statutory hole (to "close[] the gap"). Ex. 194, App. 1287 at 6:13-15, 8:40-50. Indeed, even the Legislative Oversight Committee reported that the law had to be changed in order to cover internet marketplace facilitators. Ex. 192, App. 1274 ("this statutory change would allow [DOR] to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors").

During trial, the ALC itself acknowledged that the pre-2019 law was "not clear" as applied to third-party sales on Amazon Services's marketplace. App. 614-16. Nonetheless, the ALC ultimately ruled that even before the statute was changed, Amazon Services was "in the business of selling tangible personal property at retail" with respect to third-party sales and was therefore responsible for sales taxes on those sales. *Id.* at 52.

To justify its ruling, the ALC invented two new tax law concepts. First, the ALC focused on what it called the "point of sale" and what the ALC believed Amazon Services controlled about the so-called "point of sale." *See id.* at 13, 15-16, 31-33, 39-42, 44-45, 49, 52, 54. But the ALC cited no authority for this concept, and the Court of Appeals declined to endorse it. *Id.* at 2119-20. Second, the ALC repeatedly attributed to Amazon Services actions taken at the "point of sale" by other Amazon companies, in particular Amazon Payments. *See*, *e.g.*, *id.* at 31 (asserting that Amazon Services "processes the customer's payment," "accepts the customer's consideration," and "remits the proceeds from the sale to the owner"). The Court of Appeals rejected that novel concept as well. *Id.* at 2119-20.

The ALC also relied heavily on this Court's decision in *Travelscape*. *See* App. 29-36, 39-47, 50-52. The ALC observed that both this case and *Travelscape* involve transactions through a website, but the ALC ignored that *Travelscape* did not involve a marketplace. *Id.* at 31. The Court of Appeals did not adopt the ALC's interpretation of *Travelscape*, concluding that the case

provided "only limited guidance." App. 2117. The guidance *Travelscape* provided, the Court of Appeals reasoned, was that this Court had interpreted a different provision of the Sales and Use Tax—Section 12-36-920(E)—"broadly." *Id.* at 2118. The Court of Appeals took that as a general rule regarding the construction of tax statutes, and likewise read the statute at issue here "broadly." *Id*.

According to the Court of Appeals, the old statute, read broadly, captured Amazon Services because Amazon Services received payment out of the proceeds of the sale. *Id.* at 2118. The Court of Appeals acknowledged that for the Department to prevail, Amazon Services's interpretation of the statute had to be unreasonable. *Id.* at 2114-15. But the Court of Appeals did not conclude that Amazon Services's position was unreasonable. In fact, it never even considered Amazon Services's interpretation of the statute and its application to its activities—*i.e.*, that the payment it received was not for selling property to the consumer but rather for the services it provided to the seller.

The Court of Appeals also declared certain developments legally irrelevant to the reasonableness of Amazon Services's view, including the Department's own acknowledgments that the statute was ambiguous and the stated reason for the 2019 amendment (to bring "marketplace facilitators" like Amazon Services under the statute). App. 2116. The amendment makes an entity responsible for sales tax collection in South Carolina by "facilitating" sales made by others. *See* 2019 S.C. Act No. 21 (eff. April 26, 2019) §§ 2-3 (amending S.C. Code Ann. § 12-36-71, -70). The new law also provides that, if an entity meets the "marketplace facilitator" definition set forth in subsection (1), "then that person is a marketplace facilitator *regardless* of whether the person receives compensation or other consideration in exchange for his services." *Id.* § 2 (emphasis added). None of this mattered, according to the Court of Appeals. App. 2116.

Having ruled that the 2016 statute unambiguously applied to third-party sales, the Court of Appeals, following the ALC, also rejected Amazon Services's constitutional claims. App. 2122-24.

ARGUMENT

I. The Court of Appeals' Decision Reads *Travelscape* to Change the Law Contrary to This Court's Decisions.

The Court of Appeals' decision rests on a misunderstanding of this Court's decision in *Travelscape*. The Court of Appeals wrongly derived from *Travelscape* a presumption that the Sales and Use Tax Act should be interpreted "broadly." App. 2118. But *Travelscape* does not say that. And such an interpretation is inconsistent with the longstanding principle that tax statutes must be narrowly construed in favor of the taxpayer. The Court of Appeals' decision places *Travelscape* at odds with other decisions of this Court, including the post-*Travelscape* ruling in *Alltel*. This Court should grant certiorari to correct this error and reaffirm that taxing statutes should be narrowly construed in favor of the taxpayer. *See* Rule 242(b), SCACR.

It is well-settled in South Carolina that where "the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 (quoting *Cooper River*, 182 S.C. 72, 188 S.E. at 509-10); *see also Hadden v. S.C. Tax Comm'n*, 183 S.C. 38, 190 S.E. 249, 251-52 (1937); *Columbia Ry., Gas & Elec. Co. v. Carter*, 127 S.C. 473, 121 S.E. 377, 380 (1924). This critical presumption is well-recognized across American jurisdictions. *See, e.g.*, *Gould v. Gould*, 245 U.S. 151, 153 (1917) ("In case of doubt [tax statutes] are construed most strongly against the government, and in favor of the citizen."); *Alan Wood Steel Co. v. Sch. Dist. of Phila.*, 229 A.2d 881, 885 (Pa. 1967) ("taxing statutes are subject to a strict construction"); *In re Aloha Motors,*

Inc., 536 P.2d 91, 94 (Haw. 1975) ("[I]f doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer."); *Debevoise & Plimpton v. N.Y. State Dep't of Tax'n & Fin.*, 609 N.E.2d 514, 516 (N.Y. 1993) ("[I]t is well established that it must be narrowly construed and that any doubts concerning its scope and application are to be resolved in favor of the taxpayer."); *Hiland Crude, LLC v. Dep't of Rev.*, 421 P.3d 275, 278 (Mont. 2018) ("Tax statutes are to be strictly construed against the taxing authority and in favor of the taxpayer." (brackets and internal quotation marks omitted)); *Acme Royalty Co. v. Dir. of Rev.*, 96 S.W.3d 72, 74 (Mo. 2002) ("Taxing statutes … are to be strictly construed in favor of the taxpayer and against the taxing authority when any ambiguity exists."). This rule is a bulwark against the natural tendency of governments to expand the reach of their taxing authority, and ensures that taxpayers are given fair notice so that they can structure their affairs accordingly.

There is no plausible way to square the reasoning of the Court of Appeals in this case with this Court's ruling in *Alltel*. In *Alltel*, the Department assessed a tax deficiency, arguing that cellular service providers were "telephone companies" under the statute. The Court of Appeals in *Alltel*, like the ALC here during trial (App. 615-16), acknowledged that the law "was not 'absolutely clear,'" but it rejected the taxpayers' argument that such lack of clarity resolved the case in their favor. *Alltel*, 399 S.C. at 318-19, 731 S.E.2d at 872. This Court reversed. It applied the "settled" rule that any substantial doubt is resolved in favor of the taxpayer, and held that the statute was ambiguous as applied to the wireless service providers. *Id.*

Here, the Court of Appeals stated that the ALC was not "bound" by its own characterization, offered during trial, that the law was not clear. App. 2117. But even if the ALC was not bound by that statement, the fact that the ALC had itself acknowledged the ambiguity suggests that it was at least reasonable to conclude that the statute was ambiguous. *See Alltel*,

399 S.C. at 321, 731 S.E.2d at 873 ("Petitioners point to the court of appeals' acknowledgement that application of section 12-20-100 to Petitioners was not 'absolutely clear as a matter of law.' … We agree."). The Court of Appeals further attempted to distinguish *Alltel* on the ground that, unlike in *Alltel*, the governing statute in this case defines the "relevant terms." App. 2115. This misreads *Alltel*. The 2016 Act defines "sale" and "seller" and "business." S.C. Code Ann. §§ 12-36-100, -70, -20. But the question *Alltel* required the Court of Appeals to answer is whether the terms of the statute *as a whole* "unambiguously" impose a duty on the allegedly taxable activity or entity. As discussed more fully below, had the Court of Appeals taken the step that *Alltel* requires and looked to how the statutory definitions might reasonably apply here, the Court of Appeals could not have concluded that the 2016 Act "unambiguously" encompassed Amazon Services's activities with respect to third-party sales. Indeed, that no terms covered marketplace facilitators like Amazon Services is precisely why the statute was amended in 2019 to add "marketplace facilitator" to the definition of "seller."

Rather than apply *Alltel* faithfully, the Court of Appeals eviscerated it. According to the Court of Appeals, *Travelscape* interpreted one provision (Section 12-36-920(E)),[1] of the Sales and Use Tax Act "broadly," so likewise the Court of Appeals interpreted a different provision of the 2016 version of the Sales and Use Tax Act "broadly" (Section 12-36-910(A)).[2] App. 2118. It is difficult to square this reasoning with *Alltel*. A "broad" construction of the statutory term "telephone company" would have included wireless telephone service providers in *Alltel*. But

[1] Section 12-36-920 imposes a sales tax on accommodations for transients. Subsection (E) provides: "The taxes imposed by this section are imposed on every person engaged or continuing within this State in the business of furnishing accommodations to transients for consideration." S.C. Code Ann. § 12-36-920(E).

[2] Section 12-36-910(A) provides: "A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A).

this Court did not adopt such a construction because it recognized that a narrower construction was reasonable.

The words "broad" and "broadly" do not appear in *Travelscape*. To read the opinion as if it generally requires "broad" constructions of tax statutes contradicts the settled rule that taxpayers should receive the benefit of reasonable interpretations of tax statutes. Adopting a broad construction of a statute necessarily rejects a narrower alternative. Imposing a broad interpretation on Amazon Services here contradicts *Alltel* and the numerous cases that have repeated this important principle of tax code construction for decades. *See Alltel*, 399 S.C. at 318, 731 S.E.2d at 872 (citing *Cooper River Bridge*); *Cooper River Bridge*, 182 S.C. 72, 188 S.E. at 509-10 (collecting cases dating back to 1924). And it contradicts the related principle that "statutes levying taxes … are *not to be extended by implication* beyond the clear import of the language used." *Cooper River Bridge*, 182 S.C. 72, 188 S.E. at 510 (emphasis added); *see also Hadden*, 183 S.C. 38, 190 S.E. at 252-53 (rejecting argument that language of tax statute should be read broadly where statute did not expressly cover income at issue).

Moreover, nothing in the facts of *Travelscape* required a rule of broad construction of tax statutes. *Travelscape* dealt with a business model materially different from a marketplace. Travelscape was an internet merchant that, unlike Amazon Services, set prices and was paid by customers for the right to access hotel rooms. *See Travelscape*, 391 S.C. at 95-96, 99-102, 705 S.E.2d at 31, 33-35. Travelscape thus comfortably fell within the scope of the relevant statute; its business involved being paid to "furnish" hotel rooms. *Travelscape* remains useful here, but only to the extent it provides a clear contrast between taxpayers that are unambiguously paid *for* taxable items and those, like Amazon Services, that are not.

II. The Court of Appeals' Failure to Consider the Reasonableness of Amazon Services's Interpretation Deprived Amazon Services of the Benefit of Substantial Doubt When Construing Tax Statutes.

The Court of Appeals did not consider Amazon Services's alternative construction of the language of the statute, and it expressly excluded from consideration significant indications from taxing authorities that the statute could reasonably be read not to reach a taxpayer like Amazon Services. It treated its reading of the statute as the beginning and end of the analysis. That approach eviscerates *Alltel* and the important tax-law principle it reflects: the law must constrain the tendency of the taxing authority to expand its reach by providing taxpayers the protection of reasonable interpretations of tax statutes. This Court should grant certiorari to restore that longstanding rule of law.

A. Amazon Services Offered a Reasonable Interpretation of the Statute's Language That Excluded Its Conduct.

Amazon Services presented a textual analysis explaining why the *best* reading of the Act supports its position. The statute defines "sale" as "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property *for* a consideration." S.C. Code Ann. § 12-36-100 (emphasis added). So, under the law in effect at the time of the transactions at issue here, Amazon Services did not conduct any "sale" if it did not receive consideration "for" transferring personal property. And if it was not conducting any "sale," it was not "engaged in the business of selling" within the meaning of the statute. *See* S.C. Code Regs. § 117-300.1 (requiring retailers to obtain a business license if they "mak[e] sales of tangible personal property … in this state").

When a customer orders a product on the Amazon.com website from a third-party seller, the funds the customer provides for that product—the "sales proceeds"—are sent to Amazon Payments (not Amazon Services) and those funds belong to the seller. Under the BSA, the sales proceeds are held in an account with Amazon Payments. Ex. 3, App. 910. Amazon Payments

temporarily holds the sales proceeds, but only *for the benefit* of the third-party seller. *Id.* at 910-11. Amazon Services *never* holds the sales proceeds and does not receive compensation for the transfer of the tangible personal property that is the subject of the sale. Moreover, the question the statute asks is who receives payment "for" the transfer of the tangible personal property that is the subject of the sale. S.C. Code Ann. § 12-36-100. The customer sends the proceeds *to the third-party seller* "for" the transfer of the property.

It is true that Amazon Services receives its payment out of the proceeds that a customer sends to the third-party seller. *Cf.* App. 2118. However, the Court of Appeals failed to acknowledge that such payment was not "for" the transfer of personal property to the consumer but rather "for" the services it provided to the seller. The Court of Appeals only concluded that Amazon Payments has "control" over the funds until they were remitted. *Id*. The Court of Appeals did not, because it could not, conclude that the funds were the property of Amazon Payments, much less Amazon Services. And, more importantly, the Court of Appeals did not, because it could not, deny that Amazon Services reasonably understood that the funds it received were compensation from the seller for its services and not from the consumer for the transfer of tangible personal property.

Adding to the reasonableness of Amazon Services's view, and also ignored by the Court of Appeals, is the undisputed fact that the flow of funds here is no different than for *any* credit card transaction. A credit card processing company always receives funds, but it is never paid *for the product.* A third-party seller who sells on its own website might use Amazon Payments or one of its competitors as a payment processor. *See* App. 254-55. That website might be maintained by a contractor the seller hired to build and host the site. *See id.* at 520-21. Neither the website host nor the payment processor incurs sales tax liability because every sale on that

website quite obviously is made *by the third-party seller*, not by a payment processor or the website host. Those companies provide *services* to sellers and receive consideration for those services. That remains true even if the consideration those companies receive is tied to the sellers' volume of sales. Only sellers receive consideration for selling tangible personal property.

That the Court of Appeals concluded that the ALC correctly treated Amazon Services and Amazon Payments as a "group or combination acting as a unit," App. 2117, was both erroneous and, more importantly, irrelevant. Its sole evidence for this conclusion is that the BSA at times refers to Amazon Payments and Amazon Services (and Amazon Fulfillment) as "we" for certain purposes. *See id.* The Court of Appeals did not, because it could not, present any basis for piercing the corporate veil. It also did not, because it could not, offer *any* other reason to treat Amazon Services's argument as "form-over-substance." *Id.* Amazon Services and Amazon Payments are distinct legal entities with distinct lines of business; the Department never even suggested any reason to conclude that their distinctness is a matter of form masking an underlying substantive unity. The Court of Appeals cited no case where distinct but related corporate entities could be so easily combined for *any* purpose, much less for sales tax liability purposes. The distinction between corporate entities is one of the most elemental in the law, and it cannot and should not be so lightly cast aside.[3] *See, e.g., Mid-S. Mgmt. Co. v. Sherwood Dev.*

[3] The Court of Appeals' tangentially related concern that third-party sellers are prevented from collecting sales tax is unfounded. App. 2119 n.9. Amazon Services allows all third-party sellers to, for a fee of $39.99 per month, enroll in its tax calculation service, through which Amazon Services calculates and withholds taxes from each transaction. Ex. 23, App. 922-25. Amazon Services later disburses the withheld tax to the merchant to then remit to the state. *Id.* The record shows that some third-party sellers took advantage of this service. App. 263, 391. In any event, administrative convenience is not a legitimate basis for retroactively imposing a collection duty on conduct not covered by the statute. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900-01 (1988). Indeed, the Department could have attempted to justify its treatment of Amazon Services by invoking the "efficient administration" provision of the statute, *see* S.C.

Corp., 374 S.C. 588, 597-98, 649 S.E.2d 135, 140-41 (Ct. App. 2007) (courts "disregard the corporate entity" only when the party seeking to pierce the veil has proven "injustice or fundamental unfairness"); *S.C. Dep't of Rev. v. Anonymous Co. A*, 401 S.C. 513, 515-21, 678 S.E.2d 255, 256-59 (2009) (rejecting argument that two corporations should be treated as one entity for purposes of applying sales tax statute). Indeed, maintaining the distinction between related corporate entities is critical; otherwise South Carolina law would exclude from taxation transactions between such related entities. That is not the law in South Carolina. *Edisto Fleets, Inc. v. S.C. Tax Comm'n*, 256 S.C. 350, 356, 182 S.E.2d 713, 715-16 (1971). The Court of Appeals most certainly never explained why Amazon Services could not have *reasonably* concluded that its distinct corporate form would be respected.

Regardless, the Court of Appeals failed to examine whether Amazon Services's interpretation was reasonable *even if* it was proper to collapse the distinctions among Amazon entities. Amazon Services's interpretation depends not on the distinction among Amazon entities, but on the distinctions between third-party sellers and *all* Amazon entities. Neither Amazon Payments nor Amazon Services nor some imagined combination of the two received payment *for* the purchased product given the undisputed fact that the money held temporarily by Amazon Payments is held for the benefit *of the third-party seller*. And neither Amazon Services nor Amazon Payments has any right to do anything with sales proceeds other than what third-party sellers direct; it is the sellers (through the BSA) who directed that some portion of the proceeds be used to satisfy their obligations to the relevant Amazon entities. *See* Ex. 3, App. 910-11. As the Court of Appeals elsewhere acknowledged, Amazon Services is "a service

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Code Ann. § 12-36-70, but it expressly chose not to. *See* App. 169 ("[W]e have … elected not to proceed with that theory.").

provider … with respect to its relationship to the third-party seller." App. 2119.

For similar textual reasons, Amazon Services reasonably concluded that it was not "in the business of selling" third-party products. S.C. Code Ann. § 12-36-910(A). Under section 12-36-20, "business" includes "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect." The Court of Appeals emphasized the language "direct or indirect" when quoting the statute, and ruled that an entity is covered by the definition of "business of selling" when it is paid "a per-item fee … based upon a percentage of the item's sales price and the category of the item sold." App. 2118. Even assuming that such a broad construction of the statute is textually possible, it is most certainly not compelled and far from the only reasonable way to read the statute. Textually, the business of selling necessarily requires the activity of selling, and the Court of Appeals never identified the activity that made Amazon Services's business selling.

Again, the mechanics of third-party sales in the Amazon Services marketplace were undisputed. Amazon Services (1) did not choose what items third-party sellers made available to customers in the marketplace and at what price, (2) did not determine the number of products to make available to customers in the marketplace nor own any inventory third-party sellers made available to customers in the marketplace, (3) did not receive payment from buyers for the products, and (4) did not transfer ownership of products to the buyers. The seller controlled all of these selling decisions. The Court of Appeals did not dispute (or discuss) any of these facts. Before this case, no court or tax regulator had said that a marketplace—a business that engages in *none* of these selling activities—was "in the business of selling" property it did not own.

No court or regulator had stretched the statute this far for good reason. The standard contains no principled stopping point. Numerous industries *serve* those who sell and thus achieve

a "profit" by "indirect means" from the sale of property owned by others. Payment processors, credit card companies, banks, delivery companies, advertisers, and more *all* receive fees connected with sales by others. The Court of Appeals did not even discuss the breadth of the principle it adopted, much less explain how to constrain it. The result is a rule that places extraordinary authority in the hands of the Department to penalize South Carolina businesses for failing to comply with sales tax "obligations" that many businesses reasonably believe do not apply to them. Only a court under the mistaken view that *Travelscape* requires a broad construction and application of taxing statutes could have adopted the view the Court of Appeals did here. And neither the Court of Appeals nor the ALC ever explained what made Amazon Services's failure to anticipate such an extravagant construction unreasonable.

B. The Legislature's Decision to Amend the Law to Add "Marketplace Facilitators" Confirms That Amazon Services's Interpretation of the Act Was Reasonable.

The amendment to the Sales and Use Tax Act confirms that there was substantial doubt that the 2016 Act required Amazon Services to collect and remit sales tax from South Carolina residents for third-party sales conducted on its marketplace. The Court of Appeals erred in refusing to recognize as much. The obvious purpose of the 2019 amendment was to expand the reach of the law to cover marketplace facilitators. *See* 2019 S.C. Act No. 21 (effective Apr. 26, 2019). The new term "marketplace facilitator" was added; never before had the statute said or been interpreted to mean that merely "facilitating" sales would trigger sales tax obligations. Nor had the statute ever before said or been interpreted to mean that the combination of "allowing the listing" of products and "processing payments" for products under an "arrangement with a third party" would carry sales tax obligations. *See* S.C. Code Ann. § 12-36-71(A)(1) (2019).

"When the Legislature adopts an amendment to a statute, [there is] a presumption that the Legislature intended to change the existing law." *See, e.g.*, *Duvall v. S.C. Budget & Control Bd.*,

377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008); *Key Corp. Cap., Inc. v. Cnty. of Beaufort*, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2007). To hold otherwise would imply that the amendment was "essentially [] a futile act," an implication courts typically avoid. *Key Corp. Cap.*, 373 S.C. at 61, 644 S.E.2d at 678. The legislature's significant changes to the Act fully support the conclusion that this "presumption" has not been overridden here. At a minimum, the changes indicate that the applicability of the previous version of the statute was at least ambiguous.

The Court of Appeals nevertheless reached the opposite conclusion, finding that the 2019 amendment to the Act rebutted the presumption and fit the rare case of amendments intended to only "clarify[]" what the law already meant. App. 2115-16. But an unambiguous law does not require clarification. And it remains the duty of the courts, regardless of any statement by the legislature, to determine whether the need for clarification left the taxpayer with a reasonable basis to conclude that it was previously excluded.

More importantly, the Court of Appeals chose simply not to consider the extent and substance of the changes enacted by the legislature. App. 2116 ("we need not consider … the amendments themselves in deciding this issue"). This was legal error, and a fundamental one at that. The extent of the changes required to clearly capture a taxpayer's activities cannot be *irrelevant* to the reasonableness of the taxpayer's construction of the prior statute. That the legislature must specify and define a variety of new conduct that is covered by the statute is at least reason to doubt that such conduct was previously included. Yet the Court of Appeals here ruled that the extensive and detailed changes in the marketplace facilitator amendment could be ignored.

C. The Department's Own Statements to the Legislature and Past Practice Confirm That Amazon Services's Interpretation of the Prior Law Was Reasonable.

The Court of Appeals also wrongly declared irrelevant the Director of the Department of

Revenue's own statements supporting the reasonableness of Amazon Services's view. App. 2116 ("we need not consider … the Department's statements"). The Director stated that "[t]here is no law related to taxation of third party sales," and he asked the legislature to "help" the Department collect sales tax on third-party sales from marketplace facilitators by changing the statute. Ex. 205, App. 1411; Ex. 203, App. 1372; Ex. 194, App. 1287 at 5:50-6:06; Ex. 207, App. 1536. The Director told the Legislative Oversight Committee that whether online marketplaces were required to remit sales taxes on third-party sales was an "emerging issue." Ex. 213, App. 1554-55; *see also* Ex. 202, App. 1320. The Director asked for a legislative "change" to "ensure that online marketplace retailers collect/remit sales tax." Ex. 213, App. 1555; *see also* Ex. 202, App. 1320. And the Director told the Committee that there was a "need [for] additional legislation" in order to "close[] the gap" so that "nobody has to guess" as to who must collect and remit taxes on third-party sales. Ex. 194, App. 1287 at 5:51-6:06, 6:13-15, 8:40-50.

These statements are relevant not because Amazon Services relied on them; they occurred well after the 2016 period at issue. These statements are relevant because they are objective indications that the Department itself viewed the application of the statute to Amazon Services's business model as ambiguous and that, accordingly, Amazon Services's interpretation was not idiosyncratic or baseless. The Director's statements reflect the considered view of an authority on the possible reasonable understandings of the statute. That he admitted the existence of a "gap" could have been treated as dispositive under *Alltel*. At a minimum, the Court of Appeals cannot be correct that these statements shed no light *at all* on the reasonableness of Amazon Services's interpretation.

Amazon Services's interpretation is also supported by the Department's past practices. The Department had been receiving sales tax payments from third-party sellers for sales on

Amazon.com. Indeed, Amazon Services offered to collect and remit *to the third-party seller* applicable sales tax owed on third-party sales. App. 388-92; Ex. 23, App. 922-25. As of 2016, the Department had not once suggested that this process was wrong or that Amazon Services, not the third-party seller, was responsible for collection. It is thus not only words after-the-fact from the Department, but its conduct during the period at issue, that lend support to Amazon Services's interpretation. *See Cooper River Bridge*, 182 S.C. 72, 188 S.E. at 511 (rejecting Tax Commission's argument that the phrase "or other form of public service" was broad enough to cover bridge companies and noting that Tax Commission had only recently changed its view).

D. The Decisions and Actions of Other Jurisdictions Confirm That Amazon Services's Interpretation of the Prior Law Was Reasonable.

Further confirming the reasonableness of Amazon Services's interpretation of the Act, every other state that imposes sales tax, along with the District of Columbia, has passed a "marketplace facilitator" law.[4] The Department's position stands alone. No taxing agency or court from those jurisdictions has concluded that Amazon Services—or any marketplace facilitator—was liable for sales tax on third-party sales before those changes were enacted. Amazon Services was reasonable in expecting that South Carolina would not differ.

The Court of Appeals incorrectly stated that Amazon Services "failed to identify" any

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

states that "had statutes substantially similar to sections 12-36-20, 12-36-70, and 12-36-910(A) in effect prior to the enactment of the marketplace facilitator laws." App. 2121. In truth, Amazon Services highlighted such substantially similar laws. *See* App. 2099-100 (citing, *e.g.*, *Cincinnati Reds, L.L.C. v. Testa*, 122 N.E.3d 1178, 1183 (Ohio 2018) ("Sale is defined … to include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, … but this definition applies only if those transactions are for a consideration." (cleaned up)); *Comptroller of Treasury v. J/Port, Inc.*, 967 A.2d 253, 262 (Md. Ct. Spec. App. 2009) ("The term sale is further defined … as a transaction for a consideration whereby … title or possession of property is transferred or is to be transferred absolutely or conditionally by any means … ." (cleaned up)).

Moreover, a number of other states' courts with recently-enacted marketplace facilitator laws have issued opinions that squarely disagree with the Court of Appeals, casting further doubt on its conclusion. *See Normand v. Wal-Mart.com USA, LLC*, 340 So. 3d 615, 626 (La. 2020) ("Clearly, an online marketplace is not a party to the underlying sales transaction between the third party retailers and their customers, but rather a facilitator of the sale."); *Orthotic Shop, Inc. v. Wash. Dep't of Rev.*, 544 P.3d 1072, 1077 (Wash. Ct. App. 2024) (concluding that third-party sellers, not Amazon, "sold to buyers" and explaining that "[t]his conclusion accords with the merchants' descriptions of their business activities and the contractual agreements between the merchants and Amazon to sell goods on Amazon's site"). As one court recently explained, "If the legislature thought that the law before [the marketplace facilitator amendment] required marketplace facilitators such as Amazon to collect taxes, it would have faced no need to enact the new provisions." *Orthotic Shop*, 544 P.3d at 1079.

When other state courts interpret "practically identical" language in their taxing statutes,

"[t]he construction accorded that language, as applied to facts substantially identical with those of this case, … is … entitled to great weight." *Fuller v. S.C. Tax Comm'n*, 128 S.C. 14, 121 S.E. 478, 483 (1924). That every state in the country that imposes a sales tax—many with statutes much like South Carolina's—has enacted marketplace facilitator legislation to extend sales tax remittance duties to Amazon Services and its peers demonstrates that legislative action was required to capture the novel business model that internet marketplaces reflect with respect to third-party sales. *Cf. id.* at 484 (invalidating tax assessment and noting that the Tax Commission failed to cite any "decisions from other states" upholding a similar tax assessment). Yet the Court of Appeals rejected wholesale the experience and judgment of every other taxing jurisdiction in the country. App. 2121.

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

The Court of Appeals also erred when it held that the Department's application of the Sales and Use Tax Act did not violate the due process and equal protection clauses. Amazon Services had no notice that it was responsible for collecting sales tax on third-party sales before the 2019 amendment. And Amazon Services is the only marketplace facilitator that has been forced to pay sales tax on third-party sales during the period before the 2019 amendment took effect. This Court should grant certiorari to address these constitutional violations.

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

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *accord Huber v. S.C. State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 26-28, 446 S.E.2d 433, 435 (1994). "[R]egulated parties should know

what is required of them so [that] they may act accordingly," and "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television*, 567 U.S. at 253. A law or regulation that "fails to provide a person of ordinary intelligence fair notice of what is prohibited [or required], or is so standardless that it authorizes or encourages seriously discriminatory enforcement" violates this constitutional guarantee. *Id.*

The Department's attempt to impose the sales tax collection obligation on Amazon Services for third-party sales in the first quarter of 2016 effectively subjects Amazon Services to the 2019 amendment, adopted years after the tax period at issue here, and violates the constitutional requirement of fair notice. The Court of Appeals' attempt to distinguish *Fox Television* is circular. The Court of Appeals found *Fox Television* "inapplicable" because unlike in that case, here, "no evidence shows the Department attempted to retroactively apply the new law or policies to Amazon Services's conduct. Rather, the Department applied the sales tax law that was in place at the time." App. 2122-23. The Court of Appeals' distinction rests entirely upon the assumption that the 2016 Act unambiguously imposed a duty on Amazon Services to collect sales tax for third-party sales. As discussed above, that assumption was wrong. Because the ruling conflicts with authority from the U.S. Supreme Court on a federal issue, this Court's review is warranted. *See* Rule 242(b)(5), SCACR.

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

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

Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam). The law generally demands that like cases be treated alike, but it is especially important to do so with respect to taxation lest the taxing authority distort competition and exercise *de facto* power to play favorites among taxpayers. *See Books-A-Million, Inc. v. S.C. Dep't of Rev.*, 437 S.C. 640, 658-59, 880 S.E.2d 476, 485-86 (2022) (Kittredge, J., dissenting).

The equal-protection guarantee requires the Department to apply its (doubtful) interpretation of the law equally to all other online marketplace facilitators (*e.g.*, eBay). The record demonstrates that the Department has singled out Amazon Services for retroactive enforcement of its extraordinary interpretation.

The Court of Appeals dismissed this argument because, in its view, Amazon Services had not presented evidence "specifically identifying other online marketplaces … [that] were similarly situated persons" who "received disparate treatment." App. 2124. But *it is undisputed* that the 2019 changes to the Sales and Use Tax Act apply to *all* marketplace facilitators and *only* Amazon Services has been forced to collect sales taxes on third-party sales before those changes took effect. Ex. 194, App. 1287 at 7:02-18; Ex. 192, App. 1274. This disparate treatment violates the equal-protection guarantee.

CONCLUSION

For the foregoing reasons, Amazon Services respectfully requests that this Court grant its Petition for a Writ of Certiorari and review the Court of Appeals' decision.

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