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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.

APPENDIX - VOLUME VII of VII

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Amazon Services, LLC, ... Appellant,

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INTRODUCTION

This case is about whether South Carolina could, prior to passage of new legislation in 2019, deem Appellant Amazon Services LLC (“Amazon Services”) the seller of the products offered and sold in the Amazon.com marketplace by independent third parties (so-called “third-party sales”). Amazon Services sets the rules for and operates the Amazon.com marketplace, and provides various services to the third-party sellers who choose to offer and sell products in the marketplace. It is a marketplace facilitator of sales. But Amazon Services does not decide what products are offered for sale, the prices of those products, or how much inventory third parties make available, and Amazon Services does not get paid for transferring title to third-party products sold in the marketplace.

Third-party sellers had for many years sold their products in the Amazon Services marketplace, and South Carolina had for many years been collecting sales tax from those sellers on sales to South Carolina customers. Then, suddenly, in 2016 the Department reversed course and declared that it would start treating Amazon Services as the seller. Even then, it continued to collect sales tax from the third-party sellers. Despite all of this, the Administrative Law Court (“ALC”) ruled that Amazon Services was the seller of third-party products in 2016.

The ALC’s ruling violates basic principles of statutory interpretation, misreads South Carolina Supreme Court precedent, establishes an expansive legal standard with no principled limit, relies on legal doctrines the ALC created out of whole cloth just for this case, and would impose sales-tax obligations on a marketplace business model that, in 2016, the law simply did not require. The ruling also blurs the different functions performed by different Amazon companies. In doing so, the ALC misstated who actually receives payment for third-party sales in the Amazon.com marketplace. The record is undisputed: only the third-party sellers receive consideration for third-party sales. There is no evidence, and certainly no substantial evidence,

for the ALC’s assertions that Amazon Services receives consideration for the products sold by third parties.

Prior to 2019, South Carolina’s sales tax statute did not require marketplace facilitators like Amazon Services to collect and remit sales tax for third-party sales. This Court can and should reverse because the ALC’s novel interpretation and application of the 2016 statute to Amazon Services’s marketplace business model is wrong. The most that can be said is that the 2016 statute was ambiguous as applied to marketplace facilitators. Even assuming it was ambiguous, the taxpayer’s reasonable interpretation still prevails. The evidence here overwhelmingly establishes that Amazon Services reasonably read the statute prior to 2019 not to require it to collect and remit tax on third-party sales.

In fact, while litigating this case, the Department itself elsewhere declared the statute ambiguous. In May 2018, the Department said the 2016 statute contained a “gap” with respect to online marketplaces and that meant marketplaces and sellers had “to guess” about whether they must collect and remit sales tax. In October 2018, just four months before the evidentiary hearing in this case, the Legislative Oversight Committee issued a report stating that *unless the statute were changed*, the Department could not force internet marketplaces, including “Amazon,” to collect and remit tax on third-party sales. The Committee observed that *if* the statutory changes it was considering had been in place in 2016, Amazon *would have been* responsible for the sales taxes at issue in this case.

These statements were not surprising; numerous states had already decided that, because marketplace facilitators are not sellers, the *only* way to impose sales-tax obligations on them was to change the law. And—at the Department’s request—that is what the South Carolina legislature did; the legislature changed the statute to cover internet marketplaces. Amazon

Services immediately began complying with the changed law, as it has done in states across the country that have enacted similar legislation.

That is how changes to tax law work. Here, South Carolina decided to expand its tax law by enacting legislation to cover marketplaces that the law previously did not cover. Such expansions apply prospectively only. The ALC's decision would capture *past* activity not covered by South Carolina's tax law when it took place. That is *not* how changes to tax law work.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether, under the Sales and Use Tax Act in effect during 2016, Amazon Services, an online marketplace operator, owed a duty to collect and remit sales tax on products sold on its marketplace by third parties.

2. Whether the statute in effect in 2016 could reasonably be read not to impose on online marketplace facilitators, such as Amazon Services, the obligation to collect and remit sales taxes for third-party sales such that the statute is ambiguous and must be construed against the Department.

3. Whether imposing a sales-tax obligation on Amazon Services for third-party sales during the relevant period violates the U.S. and South Carolina constitutional guarantees of fair notice or equal protection.

STATEMENT OF THE CASE

Amazon Services, the operator of the Amazon.com website, appeals a Final Order issued by the ALC holding that Amazon Services is liable for taxes on sales of products sold by independent third parties in the Amazon.com marketplace. The Department of Revenue conducted an audit beginning in September 2016 and, in June 2017, issued its Determination that Amazon Services owes approximately \$12.5 million in sales taxes, interest, and penalties for the

first quarter of 2016. (Ex. 171, R.999-1014.) Amazon Services requested a contested case hearing in accordance with S.C. Code Ann. § 12-60-460. (Amazon Services's Request July 21, 2017, R.1899-916.) A three-day evidentiary hearing was held February 4-6, 2019, and the ALC issued its Final Order on September 10, 2019. (Final Order September 10, 2019, R.1-54.) Amazon Services timely filed a notice of appeal on October 10, 2019.

STATEMENT OF THE FACTS

A. The Amazon.com Marketplace

Amazon.com, Inc. ("Amazon") was founded in 1994. (Tr., R.181.) An early online retailer, Amazon initially sold only books on the Amazon.com website. (Tr., R.181.) Amazon and its affiliates later expanded beyond books into other product categories like DVDs, music, and electronics. (Tr., R.181-82.) Amazon companies bought products from suppliers, owned that inventory, set the prices for the products sold on the website, and transferred title to the products they sold. (Tr., R.182.)

In 2000, Amazon.com became more than just an online retailer for Amazon companies. For the first time, Amazon.com also opened to third-party sellers and became a marketplace where *others* could sell. (Tr., R.182.) This change enabled independent third-party companies with their own product inventories to offer and sell their products directly to customers visiting the website. (Tr., R.182-83.)

Amazon realized that customers shopping online wanted broad product selection, low prices, a larger inventory that would increase the probability that desired products would be in stock, and fast and convenient delivery. (Tr., R.183.) With the Amazon.com website open to third-party sellers, customers would find a broader selection of products more quickly, and the competition among third-party sellers in the marketplace would produce lower prices, increase overall product availability, and encourage faster delivery options. (Tr., R.183-84.) At the same

time, sellers would find the marketplace desirable to the extent it attracted a large volume of potential customers who found shopping there easy and convenient.

As of the first quarter of 2016, the relevant time here, several Amazon subsidiaries made all of Amazon's own retail sales in the Amazon marketplace. (*See Op.*, R.2 & n.2.) Amazon's retail companies sell a broad range of products, in many cases *competing directly* with third-party sellers in Amazon Services's marketplace on price and other features, just as many third-party sellers compete with each other. (Tr., R.184, 228-29.) Other Amazon companies do not compete with third-party sellers, but rather service the needs of those selling on the site including helping to *attract* third-party sellers to the marketplace. (Tr., R.366-67.) Three of these Amazon companies merit special attention.

The first is Amazon Services, the taxpayer in this case. As noted above, Amazon Services operates the marketplace. (Tr., R.187.) Among other things, it offers tools to help third parties sell their products, including a customer-friendly interface, impressive search functionality, and the ability to advertise and market products to a wider potential customer base in the marketplace. Amazon Services also provides third-party sellers access to Seller Central, a website that helps sellers manage their businesses. (Tr., R.189.) Amazon Services establishes various rules for the conduct of business in the Amazon.com marketplace, many of which are discussed below. Those rules promote fair competition and a satisfying selling and buying experience. (Tr., R.211.) With one exception, Amazon Services—as the name suggests—is a service provider.¹

¹ Amazon Services sells memberships in Amazon Prime, and there is no dispute that Amazon Services has fully complied with its sales-tax obligations with respect to Prime memberships sold to South Carolina customers. (Tr., R.666-67, 683; Dep't's Proposed Final Order and Decision, R.1871.)

Amazon Payments, Inc. (“Amazon Payments”) is a payment processing company; it processes credit card transactions, collects money from the card-issuing bank, and transfers that money to the seller who sold the product. (Tr., R.189-90, 242-45, 250.) Today, as in the first quarter of 2016, all third parties that sell in the Amazon.com marketplace agree to use the payment processing services of Amazon Payments. (Tr., R.373-74.) In addition, Amazon Payments offers payment services to sellers more broadly; its business is not limited to sales made in the Amazon.com marketplace. (Tr., R.248.)

Amazon Fulfillment Services, Inc. (“Amazon Fulfillment”) provides warehousing and shipping services. (Tr., R.190-91.) Like Amazon Payments, Amazon Fulfillment offers its services generally to businesses, not only to those selling in the Amazon.com marketplace. (Tr., R.241-42, 539.) Unlike with Amazon Payments, those who sell in the marketplace need not agree to use Amazon Fulfillment’s services; they may elect to use Amazon Fulfillment and, for those that do, elect to stop at any time. (Tr., R.220-22, 234, 238, 241-42.)

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

B. How Products Are Sold in the Amazon.com Marketplace

1. The Selling Experience

Third parties who sell in the Amazon.com marketplace agree to the terms of the Amazon Services Business Solutions Agreement (“BSA”). (Tr., R.200; Ex. 3, R.846-93.) The BSA is a comprehensive agreement among Amazon Services, Amazon Payments, and the third-party seller. It structures the relationships among the parties to ensure a safe and reliable way of conducting business. (Tr., R.211-14.)

For example, the BSA reserves to Amazon Services the authority to determine the “format” in which sellers list their products. (Ex. 3, R.860.) As discussed in more detail below, this enables customers in the marketplace to efficiently gather and process the information sellers provide about their products, and it facilitates quick and easy comparisons between products. The BSA also prohibits false statements regarding products, and generally prohibits defamatory and obscene material. (*Id.*) These basic rules of commerce ensure a safe, reliable, and generally pleasant buying experience for customers in the marketplace. (*See, e.g.*, Tr., R.212-13.)

But Amazon Services has no role in determining the substance of how third-party sellers’ products are described. (Tr., R.205-06, 296-98.) Sellers create their own product descriptions. To list a product for sale in the Amazon.com marketplace, third-party sellers click “Add a Product” on their Seller Central account and select the relevant product category (*e.g.*, electronics, shoes, household items, etc.). (Tr., R.203-05.) They name the product, and enter the bar code, brand name, and other product details. (Tr., R.204-06, 430; Ex. 3, R.860.) Third-party sellers create titles and descriptions for their products, and may choose keywords to help attract customers. (Tr., R.447-50.) They can add photos or videos, as well as text and graphics explaining their business or brand. (Tr., R.204-06, 296, 447-50, 452-54; Ex. 3, R.860.)

Third-party sellers set the prices of their products, and decide how many units are available and whether to offer warranties or guarantees. (Tr., R.206-07, 211, 219-22, 430-31, 448-50, 472-73.) No Amazon subsidiary tells third-party sellers how to price their products, or how many units to make available in the marketplace. (Tr., R.207, 277-78, 458-59.) As a result, the same product may be available for sale to customers in the marketplace at a wide range of prices. (Tr., R.219-20, 228-29.) And sellers can respond to price movements from competitors; after sellers initially list the product, they can change the price at any time, even multiple times a

day. (Tr., R.207-08, 227, 239.) The BSA contains only one pricing restriction: third-party sellers must provide customers in the Amazon.com marketplace the lowest price they offer for that product anywhere else. (Tr., R.214, 557; Ex. 3, R.863-64.) This rule ensures the best experience for customers: customers want the assurance that the price in the marketplace is as good as anywhere else. (Tr., R.557.) Because third-party sellers generally price their products competitively on the Amazon.com marketplace, the BSA's pricing restriction is rarely triggered. (Tr., R.557-58.) Nothing in the BSA inhibits a third-party seller's ability to sell.

Third-party sellers set their shipping terms and fulfill (*i.e.*, deliver) their orders to customers. (Tr., R.232-33, 236-37, 431, 448-49, 546-48.) They decide what shipping company to hire, and whether to pass the cost of shipping onto customers. They can, but need not, use Amazon Fulfillment to handle fulfillment for them with the set of services referred to as Fulfillment by Amazon ("FBA"). Third-party sellers choose how to deliver their products on an item-by-item basis, and they may, and often do, change their fulfillment method at any time. (Tr., R.234, 459-60, 524-25, 537-38.) When third-party sellers use a carrier unaffiliated with Amazon, they agree to bear responsibility for any delivery issues. (Ex. 3, R.870.) Once again, this requirement maintains confidence among buyers in marketplace transactions. (Tr., R.525-26.)

If a third-party seller chooses the FBA service, it sends its inventory to a fulfillment center, where Amazon Fulfillment stores the products on behalf of the third-party seller. (Tr., R.238-39.) Amazon Fulfillment does not own the inventory in its possession; third-party sellers do. (Tr., R.239, 463-65, 540-41; Ex. 3, R.880-81.) Indeed, the seller may, at any time before a product is sold, have the product returned to it from the fulfillment center. (Tr., R.463-65, 468-69.) When customers place orders for goods offered by third-party sellers and fulfilled using the

FBA service, Amazon Fulfillment packs and ships the items on behalf of the third-party seller. (Tr., R.238-39, 400-01, 536-38.) But the seller maintains control over its product until it is shipped; the seller may even cancel a transaction up until that point. (Tr., R.468-69, 547.) Amazon Fulfillment provides additional services like product labeling, packaging, and re-packaging, and will dispose of or return items when directed by third-party sellers who have opted into the FBA service. (Tr., R.239, 541-45; Ex. 3, R.881.)

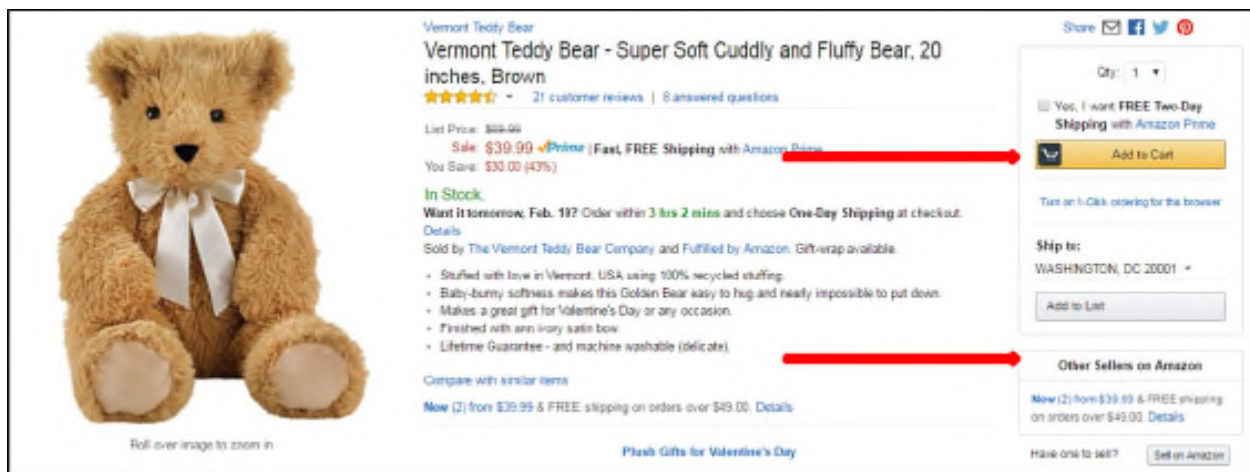
2. The Buying Experience

When a customer shops in the Amazon.com marketplace, the customer typically searches for a particular product by entering the name or description of the product in the website's search bar. When the customer clicks on a search result, the customer is directed to a webpage displaying the product. This Product Detail Page, as well as the website's search functionality, have been optimized to provide an easy and satisfying buying experience. As noted above, Amazon Services determines only the "format" of the Product Detail Page. (Tr., R.338-39.) When customers arrive at that page, they can readily find useful information like product images, a specific description of the product, and customer reviews. (Tr., R.204-06, 447-50.)

The Product Detail Page includes two other formatting features of note, both placed along the right side of the page. First, the Product Detail Page typically contains what is called the "Buy Box." (Tr., R.289-90.) The Buy Box features one seller that has been selected based on a proprietary algorithm that analyzes all seller offers for that particular item based on a number of factors, including price, the number of units in stock, the speed of delivery, and the rating customers have given to each seller. (Tr., R.290.) While the details of the algorithm were not presented in this litigation, it is publicly known that price is a predominant consideration. (Tr., R.289-91.) If the customer intends to buy from the seller who "won" the Buy Box, the customer can click on a button to place the seller's item in the customer's virtual shopping cart and then,

when the customer is ready to complete the order, click on another button to checkout. (Tr., R.231.)

The customer need not buy from the seller who “wins” the Buy Box. The Product Detail Page format makes it easy for customers to review options offered by other sellers. Directly under the Buy Box, customers will find the number of other sellers and a link to further information about those offers.



(Ex. 178, R.1031.) In this image, the red arrows show the option to select the product offered by the winner of the Buy Box with the “Add to Cart” button as well the option to view different offers by other sellers who did not win the Buy Box.

Clicking on the link to other sellers takes the customer to the Offer Listing Page. (Tr., R.218-19.) The Offer Listing Page shows all offers from all sellers offering that particular product. Each offer displays that seller’s price, the number of units it has in stock, and delivery options, among other information. (Tr., R.209, 218-19, 222, 226, 558; Ex. 210, R.1514-17.) Ultimately, the customer chooses from whom to buy, whether it is the winner of the Buy Box or some other seller.

During trial, Christopher Poad, a senior executive at Amazon.com, walked through a typical customer buying experience. He went to Amazon.com and searched for a particular

product—a pair of ASICS sneakers. (Tr., R.216.) He then followed the link on the Product Detail Page to the Offer Listing Page (reproduced below), which showed 21 different offers by 21 different sellers, each with varying fulfillment options and prices ranging from \$95 to \$189. (Ex. 210, R.1514-17; Tr., R.218-19.)

The screenshot displays the Amazon Offer Listing Page for a pair of ASICS sneakers. The page is organized into several columns: Price + Shipping, Condition, Delivery, Seller Information, and Buying Options. The offers are listed in a table with 11 rows, each representing a different seller. The prices range from \$95.00 to \$119.95. The page also includes filters for shipping (Prime, Free Shipping), condition (New), and delivery (Free Two-Day Shipping). A 'Buy Now' button is visible at the bottom right.

Price + Shipping	Condition	Delivery	Seller Information	Buying Options
\$95.00 + FREE Shipping + \$8.50 estimated tax	New	Arrives between February 9-13. Want it delivered Wednesday, February 13? Choose Standard Shipping at checkout. Shipping rates and return policy.	Running & Walking Center ★★★★★ 81% positive (157 total ratings)	Add to cart
\$95.00 + FREE Shipping + \$8.50 estimated tax	New	Arrives between February 9-13. Want it delivered Wednesday, February 13? Choose Standard Shipping at checkout. Shipping rates and return policy.	Eight Gram ★★★★★ 100% positive over the past 12 months (103 total ratings)	Add to cart
\$99.95 + Prime + \$10.09 estimated tax	New	FULFILLMENT BY AMAZON Free Two-Day Shipping: Get it Wednesday, February 5 order within 3hr 42min Shipping rates and return policy.	Zappos Retail, Inc. ★★★★★ 100% positive over the past 12 months (135,151 total ratings)	Add to cart
\$99.95 + Prime + \$10.09 estimated tax	New	FULFILLMENT BY AMAZON Free Two-Day Shipping: Get it Wednesday, February 5 order within 3hr 27min Shipping rates and return policy.	Sancus Procurement ★★★★★ 100% positive over the past 12 months (470 total ratings)	Add to cart
\$99.95 + Prime + \$10.09 estimated tax	New	FULFILLMENT BY AMAZON Free Two-Day Shipping: Get it Wednesday, February 5 order within 3hr 42min Shipping rates and return policy.	What's Hot ★★★★★ 100% positive over the past 12 months (18,671 total ratings)	Add to cart
\$99.95 + Prime + \$10.09 estimated tax	New	FULFILLMENT BY AMAZON Free Two-Day Shipping: Get it Wednesday, February 5 order within 3hr 42min Shipping rates and return policy.	Ona Stores ★★★★★ 100% positive over the past 12 months (122,617 total ratings)	Add to cart
\$99.95 + FREE Shipping + \$10.09 estimated tax	New	Arrives between February 9-13. Want it delivered Tuesday, February 12? Choose Standard Shipping at checkout. Shipping rates and return policy.	Peltz Shoes ★★★★★ 95% positive over the past 12 months (125,353 total ratings)	Add to cart
\$109.99 + FREE Shipping + \$11.11 estimated tax	New	Arrives between February 9-11. Want it delivered Monday, February 11? Choose Expedited Shipping at checkout. Shipping rates and return policy.	wooki ★★★★★ 96% positive over the past 12 months (649 total ratings)	Add to cart
\$117.11 + FREE Shipping + \$11.83 estimated tax	New	Arrives by Thu, Feb 7. Want it delivered Thursday, February 7? Choose Two-Day Shipping at checkout. Shipping rates and return policy.	Running Warehouse ★★★★★ 87% positive over the past 12 months (2,072 total ratings)	Add to cart
\$119.95 + FREE Shipping + \$12.11 estimated tax	New	Arrives between February 9-12. Want it delivered Tuesday, February 12? Choose Standard Shipping at checkout. Shipping rates and return policy.	Shoes & More ★★★★★ 92% positive over the past 12 months (2,491 total ratings)	Add to cart

(Ex. 210, R.1515 (excerpt).)

Mr. Poad’s demonstration showed how third-party sellers—and not Amazon Services—set their prices. As Mr. Poad testified, “if there was just one seller [Amazon Services], then it would be the same price” for every offering of that same pair of sneakers, but that is “not how the business works.” (Tr., R.219, 228-29.) As this sneaker example shows, “dynamic competition between sellers on every product all the time in real time drives prices down [and] broadens selection” for the consumer. (Tr., R.229.) And all of this information is easy to find

because customers can count on finding it in the same place whenever they visit a Product Detail Page.

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

When a customer purchases a product from any seller in the marketplace, payment is processed through Amazon Payments. Amazon Services requires third-party sellers to use Amazon Payments to make it easier for customers to pay when buying in the marketplace and to help police and deter fraud. (Tr., R.244, 246-49.) A hold is put on the customer's credit card (or other payment card) until the product ships. (Tr., R.242, 357-58.) Upon shipment, Amazon Payments directs the credit card network (or other financial service provider) to charge the customer. (Tr., R.242, 356-58.) The amount paid by the customer is the price of the product. Sales tax and shipping charges also may be assessed, if applicable, but they are separately indicated. (See, e.g., Ex. 122, R.963.)

Though the payment process takes place on the Amazon.com website, the customer pays only the seller.² The sales proceeds flow from the customer's account into an Amazon Payments account, where they are held for the benefit of the seller until disbursed. (Tr., R.242-43, 245, 250; Ex. 3, R.892-93.) Amazon Services does not receive or hold the sales proceeds and is not paid by the customer. (Tr., R.265-66, 284-85, 375.) As Matthew Revich, the owner of a third-party seller named Yedi Houseware Appliances explained, "I'm the seller of these products. It's my money." (Tr., R.477-78.)

² The name "Amazon" or an abbreviation for "Amazon Marketplace" typically appears on the customer's credit card statement (Tr., R.713; Op., R.13), but that does not change the fact that the entity receiving the sales proceeds is the third-party seller. (See Tr., R.265-66; Ex. 3, R.869 (the third-party seller is "always the seller of record").)

Amazon Payments automatically disburses sales proceeds every 14 days, but third-party sellers can request disbursement sooner. (Tr., R.245-48, 352-53.) Amazon Payments withholds third-party sellers' sales proceeds only in rare circumstances, like suspected fraud. (Tr., R.246-47.)

Pursuant to the BSA, when Amazon Payments disburses a third-party seller's sales proceeds, the amount of the disbursement will satisfy the seller's obligation to pay various Amazon subsidiaries for services they provided the seller in connection with its marketplace sales. (Tr., R.242, 265-66; Ex. 3, R.846-47, 864-65, 872, 883, 892-93.) Amazon Services, for example, charges various fees to sellers. (Tr., R.263-66; Ex. 16, R.897-903 (fee schedule).) None of those fees bears a direct relationship to the profit margin of a particular product, and no Amazon entity knows whether any particular third-party sale was profitable. (Tr., R.410-12, 479-80.) Amazon Payments subtracts Amazon Services's fees owed for the relevant period from the total sales proceeds ultimately forwarded to the seller. This is how the sellers pay Amazon Services for its services.

Amazon Services also offers to collect sales tax from customers for third-party sellers (with a minimum volume of sales); this service carries an additional fee. (Tr., R.264-65, 382-86; Ex. 23, R.904-07 (tax collection service terms); Ex. 122, R.966.) Where applicable, Amazon Payments deducts this fee as well from the sales proceeds. The sales tax added to the price of the product at the time of sale is not deducted; that amount is sent onto the seller. Like any other seller who collects sales tax at the time of sale, third-party sellers in the Amazon.com marketplace must forward that amount to the relevant taxing authority. (Tr., R.384-86.)

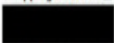
Third-party sellers also pay fees if they choose to use the FBA service. (Tr., R.264-65; Ex. 31, R.908-10 (description of FBA features and fees); Ex. 50, R.919-26 (2018 FBA fee

charges); Ex. 64, R.929-34 (same); Ex. 122, R.966 (example showing fee breakdown).) As with Amazon Services's fees, these amounts are deducted from the amount of sales proceeds delivered to third-party sellers, satisfying the sellers' obligation to pay Amazon Fulfillment.

An individual transaction is illustrated by the Transaction Detail Page below:

Transaction Details
Use this page to view details of this transaction.

Order Payment for Order 102-1134859-2933048 ([view details of this order](#))

Transaction date: Feb 25, 2016	
Shipping Address: 	Billing Country US
FORT MILL, SOUTH CAROLINA 29708-8433	
Product charges	
Comfy Clothiers 5 Metal Collar Extenders for Dress Shirts	Qty: 1 \$11.95
Other	
Product Tax:	\$0.84
Sales Proceeds	\$12.79
Amazon fees	
FBA Order Handling Fee:	-\$1.00
FBA Pick & Pack Fee:	-\$1.06
FBA Weight Handling Fee:	-\$0.50
Referral Fee on Item Price:	-\$1.79
Sales Tax Service Fee:	-\$0.02
Change to your seller account balance	\$8.42

(Ex. 122, R.966 (excerpt).) In this particular order, the seller paid Amazon Fulfillment's Order Handling, Pick & Pack, and Weight Handling fees. It also paid Amazon Services's Referral and Sales Tax Service fees.

4. Communication to the Customer About the Sale and the Product

Upon completing the purchase, the customer receives an order confirmation email from the Amazon.com website. (Tr., R.329; Ex. 122, R.947.) The email describes the product or products, provides an order confirmation number, states the applicable charges (including sales tax and shipping charges), and provides an expected delivery date. (Ex. 122, R.947.) The email

also includes a link to “View or manage order,” which takes the customer to his or her account on the Amazon.com website where the customer can view the name of the third-party seller. (Tr., R.421; Ex. 122, R.961 (noting that product was sold by “Deals on Call”).) Upon shipment, the customer receives a shipment confirmation email from Amazon.com, which contains the product summary, a summary of the applicable charges, and the expected arrival date. (Ex. 122, R.948.) This email also links to the “Order details,” where information about the third-party seller is readily accessible. (Ex. 122, R.948.)

Third-party sellers answer product-related questions, manage warranties and guarantees, and provide product care and support. (Tr., R.266-69; Ex. 3, R.871.) Amazon is responsible for issues relating to payment, credit card processing, debiting, or crediting. (Ex. 3, R.871.) The customer can address product-related questions to the seller through the buyer-seller messaging service on the Amazon.com website or call the third-party seller for customer service. (Tr., R.454.) If a dispute arises between the customer and seller that cannot be resolved, Amazon Services provides a rarely used backstop: its “A to Z Guarantee” provides a refund or some other benefit to the customer. (Tr., R.271-72.) Amazon Services provides both the channel for communication between seller and customer and the A to Z Guarantee to ensure a convenient, safe, and reliable buying experience for customers in its marketplace. (Tr., R.212-14, 271-72.)

Product returns are handled differently depending on whether the third-party seller has opted into the FBA service. Third-party sellers that fulfill their orders directly bear responsibility for processing cancellations, returns, and refunds, as well as handling recalls, nonconformities, and delivery errors. (Tr., R.531-34; Ex. 3, R.862.) For those that have opted into the FBA service, Amazon Fulfillment provides those services. (Tr., R.400-02.)

C. The Department's Audit and Determination

The Department began its audit in September 2016, more than 15 years after third parties began selling on Amazon.com. (Tr., R.670; Ex. 172, R.1015-17.) The Department admitted that, as of the first quarter of 2016, there was no rule, regulation, guidance, long-standing Department policy, or publication of any kind relating to the sales-tax implications of third-party sales in online marketplaces. (Tr., R.684.)

During its audit, the Department confirmed that Amazon.com LLC and other Amazon companies were collecting and remitting sales and use tax on items those companies sold to South Carolina customers—taxes that between January 2016 and September 2018 amounted to \$138 million. (Hunt Aff., R.1897 ¶ 6.) As to third-party sales, Amazon Services explained to the Department that the third parties are responsible for collecting and remitting sales and use tax because they, not Amazon Services, sell the products to customers. (Ex. 178, R.1020-250.) The Department disagreed and, in December 2016, issued a Proposed Notice of Assessment against Amazon Services. (Ex. 175, R.1018-19.)

In June 2017, after Amazon Services filed its timely protest (Ex. 178, R.1020-250), the Department issued its Determination, asserting that Amazon Services owes approximately \$12.5 million in sales and use taxes, interest, and penalties for the first quarter of 2016. (Ex. 171, R.1000.) The Department asserted that “the totality of the Taxpayer’s activities clearly demonstrates that the Taxpayer is in the ‘business of selling tangible personal property at retail.’” (*Id.* at 1006.) In considering the “totality of the Taxpayer’s activities,” the Department relied heavily on activities performed not by Amazon Services but rather by Amazon Payments and Amazon Fulfillment. For example, the Department contended that the “Taxpayer ... effects the actual transfer of the property,” and Taxpayer “accepts payment for said property and holds the funds in ‘escrow’ for later disbursement of a portion of the funds to third parties.” (*Id.* at 1006-

07.) The Department cited no evidence to support these claims. (*See id.*) The parties then proceeded to litigate before the ALC, which ultimately held a three-day evidentiary hearing.

D. The 2019 Changes to the Sales and Use Tax Act

Before trial, the Department sought legislative action to change the Sales and Use Tax Act to address the sales-tax obligations of online marketplace facilitators like Amazon Services. Throughout 2018, members of the Department made sworn statements to various legislative committees about the need to change the statute to reach the type of third-party sales at issue here. As the Director of the Department of Revenue candidly testified in May 2018, in the midst of this litigation, the proposed legislation would “close[] the gap” so that “nobody has to guess” about who owes sales taxes on third-party sales in online marketplaces. (Ex. 194, R.1263 at 6:13-15, 8:40-50.) In response to a question about whether the proposed marketplace legislation would be prospective only, the Director replied: “Absolutely, it will not be retroactive, right.” (*Id.* at 7:00-08.) Yet the Director also admitted that this lawsuit was, in effect, an effort to impose the proposed amended statute’s rule governing marketplace facilitators on Amazon Services, and Amazon Services only. As he stated at the time, this “lawsuit’s going to pull up some retroactivity . . . specific to that one company, I haven’t said their name.” (*Id.* at 7:10-18.; *see also* Ex. 214, R.1533.)

In October 2018, based on all of its fact gathering and independent analysis, the Legislative Oversight Committee issued a report which declared that, without “this statutory change,” the Department could not force internet marketplace facilitators like Amazon Services to collect and remit sales taxes on products sold by third-party sellers through their websites. (Ex. 192, R.1256.) Ultimately, the General Assembly passed the new legislation, and the changes became effective on April 26, 2019, after this case was tried, but before the ALC issued its ruling. *See* 2019 S.C. Act No. 21 (effective April 26, 2019).

The legislation created a new taxpayer, a “marketplace facilitator,” which it defined in Section 12-36-71, and it changed the definition of “retailer” and “seller” in the sales tax statute to add every person “operating as a marketplace facilitator.” S.C. Code Ann. § 12-36-70 (2019). A “marketplace facilitator” is “any person engaged in the business of facilitating a retail sale of tangible personal property by: (a) listing or advertising, or allowing the listing or advertising of, the products of another person in any marketplace where sales at retail occur; and (b) collecting or processing payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party.” S.C. Code Ann. § 12-36-71(A)(1) (2019). Importantly, the statute had never before said that merely “facilitating” sales would impose sales-tax obligations. Nor had the statute ever said that the combination of “allowing the listing” of products and “processing payments” for products by “arrangement with a third party” would impose sales-tax obligations. The new definition also provided that “a marketplace facilitator includes any related entities assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace.” S.C. Code Ann. § 12-36-71(C) (2019). Never before had the sales tax statute suggested that the conduct of distinct but related corporate entities could create sales-tax obligations.

Amazon Services has complied with the new requirements under the new statute.

E. The ALC’s Decision

The ALC ruled in September 2019. It held that, with respect to third-party sales in the first quarter of 2016, Amazon Services was “in the business of selling tangible personal property at retail” and is therefore liable for sales taxes on those sales. (Op., R.46.) The ALC’s ruling relied repeatedly on a small number of legal and factual assertions that cannot withstand scrutiny.

First, the ALC focused on what it called the “point of sale” and everything that the ALC believed Amazon Services controlled about the so-called “point of sale.” (*See id.* at R.7, 9-10, 25-27, 33-36, 38-39, 43, 46, 48.) But the ALC cited no legal authorities—no court decisions, tax regulations, etc.—that had ever discussed the “point of sale” when determining sales-tax obligations. The ALC also 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 R.25 (asserting that Amazon Services “processes the customer’s payment,” “accepts the customer’s consideration,” and “remits the proceeds from the sale to the owner”); *id.* at R.26 (asserting that Amazon Services “encumber[s] the customer’s [credit] card”).) For example, the ALC declared that “Amazon Services is the only party present at the point of sale accepting money from customers, and this creates an inference that they [*sic*] are in the business of selling.” (*Id.* at R.33.) But the ALC cited no evidence that Amazon Services, rather than third-party sellers who have contracted with Amazon Payments, “accept[s] money from customers.” (*See id.*)

Second, the ALC relied heavily on the Supreme Court’s decision in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011). (*See Op.*, R.23-30, 33-41, 44-46.) The ALC observed that both this case and *Travelscape* involve transactions through a website run by the putative taxpayer, but ignored that *Travelscape* did not involve a marketplace. (*Id.* at R.25.) Ultimately, the ALC read *Travelscape* as adopting a broad rule that covered Amazon Services’s business of running a marketplace: when a business engages in “activity . . . to achieve a profit, benefit, or advantage by either direct or indirect means from the sale of property owned by [it] or others,” that business is responsible for collecting and remitting sales tax under the law in effect in 2016. (*Id.* at R.23.) This standard, the ALC realized, would sweep in payment processors, like banks and credit card companies, so the ALC simply carved

them out. (*Id.* at R.29 n.28.) Those providing shipping services, too, fall within the ALC’s sweeping standard, as do advertisers. So the ALC simply deemed them excluded too. (*Id.* at R.28 n.27.)

Third, the ALC observed that the Department could not prevail just because the ALC agreed with the Department’s broad interpretation of the 2016 statute. For the Department to prevail, reading the statute more narrowly to exclude marketplace facilitators like Amazon Services would have to be unreasonable. (Op., R.16.) The ALC simply declared that Amazon Services’s position was “unreasonable” (*id.* at R.47), despite acknowledging that, at the time of the audit, “no specific statutory provision imposed the responsibility to collect sales or use tax on a ‘marketplace facilitator’” (*id.* at R.18). Also, as noted above, the Department had repeatedly told the legislature that changes to the statute were needed to eliminate an ambiguity regarding marketplace facilitators (*i.e.*, to “close[] the gap” so that “nobody has to guess”), and the legislative committee had reported that the law had to be changed to cover internet marketplace facilitators. Indeed, the Department had been for some time accepting sales tax revenue collected and remitted by third-party sellers for sales on Amazon.com to customers in South Carolina. The ALC never explained why it was unreasonable for Amazon Services to treat the Department’s acceptance of sales tax revenue from third-party sellers as a reliable indication that the Department understood that those third-party sellers were the responsible seller in South Carolina for sales tax purposes. That is especially true in the absence of any guidance to the contrary.

Having ruled that the 2016 statute unambiguously applied to third-party sales, the ALC rejected Amazon Services’s constitutional claims. (*Id.* at R.48-52.) This appeal followed.

STANDARD OF REVIEW

Appeals from the ALC are governed by the Administrative Procedures Act (“APA”). S.C. Code Ann. § 1-23-310 *et seq.* Under the APA, this Court may reverse, vacate, or modify the ALC’s decision if Amazon Services’s substantial rights have been prejudiced because the administrative decision was “(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” *CarMax Auto Superstores W. Coast, Inc. v. S.C. Dep’t of Revenue*, 397 S.C. 604, 608-09, 725 S.E.2d 711, 713 (Ct. App. 2012) (quoting S.C. Code Ann. § 1-23-380(5)), *aff’d as modified*, 411 S.C. 79, 767 S.E.2d 195 (2014). “As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence.” *MRI at Belfair, LLC v. S.C. Dep’t of Health & Env’tl. Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008). “An issue regarding statutory interpretation is a question of law,” which is reviewed *de novo*. *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005).

ARGUMENT

The distinction upon which the ALC foundered—between the business of operating a marketplace on the one hand and of selling goods in a marketplace on the other—has not historically troubled state sales tax administrators or courts. A successful retail shopping mall in Charleston will attract many customers and generate substantial revenue for the merchants who lease space there. Nobody has ever doubted that the independent sellers, not the mall operator, must collect and pay the sales taxes for purchases made in stores located in the mall, even though the mall’s business is to profit (through, for example, lease payments linked to sales volume)

from the transactions facilitated by its marketplace. In the language of the applicable South Carolina Sales and Use Tax statute, the operator of a marketplace does not “transfer, exchange, or barter . . . tangible personal property for a consideration,” and the operator of a marketplace is not “engaged . . . in the business of selling tangible personal property.” S.C. Code Ann. §§ 12-36-100, -910(A).

To be sure, the marketplace that Amazon Services operates lacks four walls and its patrons shop online. But like any marketplace, physical or online, it must attract buyers. A physical marketplace, like a retail shopping mall, needs, among other things, ample parking, wide, well-lit hallways, security, prominent signage, and a set of rules for those selling or buying at the mall. Similarly, Amazon Services’s marketplace must provide reliable information about products in a format buyers can readily understand, and it has to assure buyers, among other things, that their financial information is secure and that sellers will deliver on their promises. And it needs a set of rules that makes shopping easy, quick, and reliable for buyers. Amazon Services, working in conjunction with other Amazon companies, performs these same functions. But none of these functions, individually or collectively, means that Amazon Services transferred third-party sellers’ tangible goods for consideration or was engaged in the business of selling third-party sellers’ products.

South Carolina, like dozens of other states, has decided to *add* online marketplace operators like Amazon Services to the kinds of businesses required to collect and remit sales taxes. It changed its statute in various ways to implement that new policy *prospectively*.

The decision of the ALC, however, impermissibly attempts to reach back in time and sweep a marketplace business model into a sales tax statute that did not cover it. Doing so might be more convenient for the Department, as the ALC itself appeared to recognize at the outset of

the hearing. (See Tr., R.163.) But administrative convenience is not a legitimate basis for *retroactively* capturing conduct not clearly covered by a tax statute. See *Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900-01 (1988). So the ALC, reasoning backwards from its conclusion that Amazon Services *should* be subject to the sales tax, cast the language of the statute aside, created new and unbounded legal standards, misread *Travelscape*, and never even asked the controlling question: whether Amazon Services’s position that it was not subject to the 2016 statute was reasonable. This Court should reverse the decision of the ALC.

I. Amazon Services Operates an Online Marketplace and Does Not Sell Third-Party Sellers’ Products.

The application of the South Carolina Sales and Use Tax Act to third-party sales in the Amazon.com marketplace is, in certain respects, undisputed. The statute provides that a “sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged . . . in the business of selling tangible personal property at retail.” S.C. Code Ann. § 12-36-910(A). Everyone agrees that items sold to South Carolina customers in the marketplace are “tangible personal property” sold “at retail” in South Carolina. (See Dep’t’s Proposed Final Order & Decision, R.1871, 1884.) In addition, the term “gross proceeds of sale” means “the value proceeding or accruing from the sale, lease, or rental of tangible personal property.” S.C. Code Ann. § 12-36-90 (2011). Once again, everyone agrees that the prices third-party sellers charge for their products are the “gross proceeds” of the sales at issue here. (See Dep’t’s Proposed Final Order & Decision, R.1882.) So that is the tax base to which the sales tax is applied. Finally, it is agreed that, for those sellers who had the requisite connection to South Carolina, the seller is responsible for paying the tax to the State, even if the seller does not, at the

time of sale, collect the tax from the buyer.³ See S.C. Dep’t of Revenue, S.C. Sales and Use Tax Manual, Ch. 2, p. 2 (2015); S.C. Code Ann. § 12-36-940(B).⁴ The only question at issue here concerns *who* made the sales.

A. Under the 2016 Sales Tax, Amazon Services Is Not the Seller of Third-Party Products on Its Marketplace.

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). The words of a statute “must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” *Bryant*, 295 S.C. at 411, 368 S.E.2d at 900-01. “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). So, under the law in effect at the time of the transactions at issue here, Amazon Services did not conduct any “sale” if it did not receive consideration “for” transferring personal property. And if it was not conducting any “sale,” it was not “engaged in the business of selling” within

³ The U.S. Constitution requires a “substantial nexus” between an out-of-state taxpayer’s activity and the taxing jurisdiction before a tax may be applied to the out-of-state taxpayer’s activity. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In 2016, this “substantial nexus” requirement was satisfied in the retail sales context only if the remote seller had a physical presence in the taxing jurisdiction. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). This physical-presence requirement was overruled by *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092-99 (2018).

⁴ The sales tax is complemented by a use tax, which is “imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.” S.C. Code Ann. § 12-36-1310(A). Retail sellers who have the requisite connection to South Carolina are required to remit and collect the use tax. See S.C. Code Ann. § 12-36-1340 (1998).

the meaning of the statute. See S.C. Code Regs. 117-300.1 (requiring retailers to obtain a license to do business if they “mak[e] sales of tangible personal property . . . in this state”).

1. Amazon Services Receives Compensation Only for Services Provided to Sellers, and Those Services Are Not Subject to the Sales Tax.

The evidence established that, when a customer orders a product on the Amazon.com website from a third-party seller, the funds the customer provides for that product—what the BSA calls the “sales proceeds”—are sent to Amazon Payments (not Amazon Services) and those funds belong to the seller. Under the BSA, the sales proceeds are held in the third-party seller’s account with Amazon Payments. (Ex. 3, R.892.)

Uncontroverted trial testimony confirmed what the BSA provides regarding payment. When a buyer purchases an item from a third-party seller, Amazon Payments “charge[s] the customer’s credit card or payment card,” and the “funds . . . flow from the customer’s account to Amazon Payments.” (Tr., R.242.) Amazon Payments is “the conduit through which the funds from the customer get to the [third-party] seller.” (Tr., R.243; *see also* Tr., R.478 (describing payment process from a third-party seller’s perspective and concluding: “These are my products. I’m the seller of these products. It’s my money.”).) The seller can request disbursement of its money immediately, if it wants. (Tr., R.353.) The customer—that is, the party to the transaction surrendering consideration in exchange *for* the purchased product—does not pay Amazon Services for anything. There is no testimony, exhibit, or other evidence that shows Amazon Services receives consideration in exchange for the transfer of tangible personal property.

In fact, the evidence demonstrates conclusively the opposite. Sellers owe payments to Amazon Services for various services that Amazon Services provides to *them*. Those services are detailed in the record, and discussed above. See *supra* at 12-14. They include offering the sellers access to Seller Central, advertising services, and a safe and reliable interface for listing a

product. The compensation Amazon Services receives is not consideration for an exchange of tangible personal property; it is compensation for having provided services to sellers.

The third-party sellers have authorized Amazon Payments to satisfy their payment obligations to Amazon Services out of their product's sales proceeds. But the seller's agreement to pay a portion of sales proceeds to a service provider is beside the point. The evidence is undisputed that when Amazon Payments deducts those service fees from the sales proceeds and remits the fees to Amazon Services on behalf of the sellers, the seller's payment obligation to Amazon Services is satisfied. (*See* Ex. 3, R.872.) Thus, the money was the seller's to disburse, and a portion was disbursed to Amazon Services at the seller's direction. Amazon Payments has no right to do anything with sales proceeds other than what sellers direct. (*See* Ex. 3, R.892-93.) Only the sellers could have directed the payment of a portion of the sale proceeds to Amazon Services. The customers who purchased the products had no right to direct any payment to Amazon Services, no reason to do so, and did not do so. The customers paid the sellers and nobody else.

The ALC rejected this straightforward conclusion, repeatedly insisting that *Amazon Services* receives payment from the customer. (Op., R.8-9, 30-33, 39, 43, 47.) For example, the ALC stated: "Amazon Services accepts money from customers in exchange for the promise that the Merchant will transfer her product to the customer. Amazon Services receives the money and eventually remits a portion of the proceeds—minus its fees—from the sale to the Merchant on its bi-weekly disbursement schedule." (*Id.* at R.30.) But the ALC cited no evidence for the assertion that Amazon Services "accepts money from customers." And there is none. There is no evidence—much less substantial evidence—that Amazon Services "receives the money" or "remits" any money to merchants. It is clear that Amazon Services does neither.

It might be that the ALC attributed conduct of Amazon Payments to Amazon Services. But it never offered any legal justification for doing so. Amazon Services and Amazon Payments are distinct companies, in form and function. There was no suggestion that the corporate veil should be pierced, and no evidence that would justify doing so. *See Mid-S. Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597-98, 649 S.E.2d 135, 140-41 (Ct. App. 2007) (courts “disregard the corporate entity” only when the party seeking to pierce the veil has proven “injustice or fundamental unfairness”); *see also, e.g., S.C. Dep’t of Revenue v. Anonymous Co. A*, 401 S.C. 513, 515-21, 678 S.E.2d 255, 256-59 (2009) (rejecting argument that two corporations should be treated as one person for purposes of applying sales tax statute).

But even more fundamentally, conflating Amazon Services and Amazon Payments shows the ALC’s failure to appreciate the true nature of the transaction. The customer does not provide consideration to Amazon Payments (or Amazon Services); the customer provides consideration to the third-party seller, and the seller has hired Amazon Payments to process the transaction. A third-party seller who sells over its own website might use Amazon Payments as payment processor. (See Tr., R.248.) That website might be maintained by a contractor the seller hired to build and host the site. (See Tr., R.508-09 (discussing website host alternative).) Still, every sale on that website quite obviously is made *by the third-party seller*, not by Amazon Payments and not by the website host. Those companies provide *services* to the seller, and receive consideration for those services. That remains true even if the consideration those companies receive is tied to the volume of sales the seller makes. Only the seller receives consideration for selling tangible personal property. So it is with third-party sales on the Amazon.com marketplace.

The Supreme Court’s decision in *Travelscape* does not support the ALC’s conclusion because *Travelscape* dealt with a business model materially different from the marketplace Amazon Services operates.

In *Travelscape*, the website operator (Travelscape) was not a marketplace. Instead, Travelscape negotiated with hotels so that Travelscape could sell to customers the right to occupy the hotels’ rooms. Unlike Amazon Services, Travelscape was a price-setter: it determined the ultimate price customers would pay by (1) negotiating a rate it would pass on to hotels, and (2) adding a markup of its own that it would keep. *See Travelscape*, 391 S.C. at 95, 705 S.E.2d at 31. The actual price listed for the room—that is, the amount the customer actually paid as consideration for the right to occupy the room—was thus finally determined by Travelscape. *See id.* at 95-96, 705 S.E.2d at 31.⁵

Critically, the customer reserving the room paid Travelscape for it; the customer did not pay the hotel operator. It is not just that payment was initiated over Travelscape’s website (which is equally true of the Amazon.com marketplace). Rather, actual payment, the flow of money, went to Travelscape; the money *belonged to* Travelscape, not the hotel. *Id.* at 95-96, 705 S.E.2d at 31. The hotel at which the customer stayed sent an invoice to Travelscape after the customer checked out. Travelscape then paid the hotel what Travelscape had agreed to pay the hotel for the stay, an agreed rate that was negotiated before the customer reserved the room. *Id.*

⁵ Travelscape argued otherwise, but the Supreme Court rejected that argument. Travelscape argued that its service fee was not part of the gross proceeds the customer paid for the room. But the Supreme Court ruled that under the relevant statute, Travelscape’s fee was part of the gross proceeds customers paid for the room. *Travelscape*, 391 S.C. at 98, 705 S.E.2d at 33. (“Because the cost of services is specifically included in the definition of gross proceeds of sales, we find the fees retained by Travelscape for its services are taxable as gross proceeds.”).

The customer had nothing to do with paying the hotel. In short, Travelscape, not the hotel, sold the right of occupancy.

The ALC seemed to believe that identifying the party *receiving payment* is the most important factor in determining who is the seller. (See Op., R.25-26.) Even if true, that distinguishes this case from *Travelscape*. In *Travelscape*, a website operator was a retailer of hotel room reservations, and was paid by customers for providing them the right to stay in a hotel room. The Department read *Travelscape* the same way, citing *Travelscape* and arguing that “a sale occurs when one person provides another with payment for the right to take possession of property.” (Dep’t’s Memo. in Support of Mot. for Summary Judgment, R.103-04.) Here, Amazon Services is not a retailer of the personal property sold by the third parties and is not paid by customers for providing them personal property owned by the third parties. *Travelscape* thus supports reversing the ALC’s decision.⁶

2. The ALC’s Conclusion That Amazon Services Is “in the Business of Selling” Is Not Supported by Substantial Evidence and Is Wrong as a Matter of Law.

Just as Amazon Services has not engaged in conduct meeting the definition of “sale” with regard to third-party transactions in its marketplace, likewise Amazon Services is not “in the business of selling” with respect to those sales. S.C. Code Ann. § 12-36-910(A). The ALC’s contrary conclusion depends on an unprecedented expansion of the statute, and appears custom-designed to retroactively tax only Amazon Services. This Court should reject it.

⁶ *City of Charleston v. Hotels.com, LP*, 520 F. Supp. 2d 757 (D.S.C. 2007), is distinguishable on the same basis. See *id.* at 768 (hotel website operators “consummate[ed] the sale,” “collect[ed] the retail rate for the room and the tax,” and were “the only entity on the selling part of the transaction who [knew] the amount of the gross price paid by the consumer” (quoting submission by taxing jurisdiction)); accord *Travelscape*, 391 S.C. at 100, 705 S.E.2d at 34 (discussing *City of Charleston*: the court’s “inquiry was directed not at determining who was physically providing sleeping accommodations, but rather on who was accepting money in exchange for supplying the room”).

The ALC interpreted the phrase “in the business of selling” to impose the following legal standard: “The Court thus must determine whether the object of Amazon Services’ business activity is to achieve a profit, benefit, or advantage by either direct or indirect means from the sale of property owned by Amazon Services or others on its Marketplace.” (Op., R.23.) That standard is inconsistent with the undisputed facts that Amazon Services (1) does not choose what items third-party sellers make available to customers in the marketplace and at what price, (2) does not determine the number of products to make available to customers in the marketplace nor own or exercise control over any inventory third-party sellers make available to customers in the marketplace, (3) does not receive payment from buyers for the products, and (4) does not transfer ownership of products to the buyers. Prior to the ALC’s ruling, 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, and for good reason. The ALC’s expansive standard contains no principled stopping point. Numerous industries *serve* those who sell and thus, in the language of the ALC’s standard, have as their “object” achieving 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* fall within the uncontainable breadth of the ALC’s new standard. The ALC’s ruling tacitly observes as much because it recognizes that all of these industries that serve and support those who sell were not meant by the legislature to be included within the statute. (See Op., R.28 n.27, R.29 n.28.)

The ALC’s new standard would also encompass brick-and-mortar mall operators. Such mall operators collect rent for space in the mall and so they benefit, at least indirectly, from the sale of goods by others. Yet, unsurprisingly, neither the Department nor any court has ever

suggested that mall operators must collect and remit sales tax. So it appears that the ALC's new standard is designed to achieve a single purpose: to tax the act of providing marketplace services *only* over the internet, while exempting all other industries that fall within its broad terms.

This is policymaking in the form of statutory interpretation. It is an admission that what is driving the outcome is not, as the law requires, the meaning of the words the legislature has written into the statute. *See S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 20, 382 S.E.2d 11, 14 (Ct. App. 1989) ("Once the Legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy."). Another clear sign that this is judicial policymaking is how the ALC's conclusion produces inexplicable oddities. If Amazon Services is the seller of third-party products, then it is constantly offering the *same* product at different prices. (Tr., R.228-29.) And if Amazon Services is the seller of third-party products, then Amazon Services is often *competing* with other Amazon companies selling the same products. In addition to being factually incorrect, neither of these conclusions makes any sense.

The *ad hoc* exceptions that the ALC had to acknowledge to cabin its interpretation are found in no regulation issued by the Department to which the ALC could defer. To the contrary, the ALC noted that the regulations clearly and unqualifiedly provide that "receipts from services, when the services are the true object of the transaction" are *not* subject to the sales tax. (Op., R.28 n.27 (citing S.C. Code Regs. 117-308).) That regulation makes clear that mall operators and other service providers are not responsible for collecting and remitting sales tax, and it equally makes clear that Amazon Services, an internet marketplace operator and service provider, likewise is not responsible for collecting and remitting sales tax.

As with the definition of “sale,” the ALC misread the decision in *Travelscape* to support its misinterpretation of the phrase “in the business of selling.” Just as the relevant sales tax provision imposes obligations on those “engaged in the business” of selling, the hotel tax statute at issue in *Travelscape* imposed obligations on those “engaged in the business” of furnishing hotel accommodations. As discussed above, in *Travelscape*, the website operator itself provided the room reservation to the customer, and the customer paid the website operator the amount the website operator ultimately determined to charge for that room reservation. *See supra* at 27-29. What made the website operator subject to tax was the fact that it actually “provide[d] hotel reservations to transients for consideration.” *Travelscape*, 391 S.C. at 101, 705 S.E.2d at 34. It did not matter that the hotel “physically provide[d]” the room. *See id.* The website operator in *Travelscape* had been paid for providing the reservation, which the hotel would treat just the same as any other reservation made directly by phone or through the hotel’s own website. The decisive fact was that the website operator “accept[ed] money in exchange for supplying hotel rooms.” *Id.* at 101, 705 S.E.2d at 35. The website operator was thus “in the business” of furnishing rooms.

The ALC’s standard lops off critical limitations that the Supreme Court carefully included in *Travelscape*. *Travelscape* emphasized that the taxpayer was paid by the customer for the reservation being sold. That rationale does not capture marketplace operators, who do not receive payment for what is being sold. Amazon Services does not (1) negotiate an amount with third-party sellers that Amazon Services will pay them for products that Amazon Services then sells on Amazon.com, (2) determine the ultimate price shown to the customer after applying its own mark-up charge, (3) get paid itself by the customer for the product, (4) receive an invoice from the third-party seller after the product is shipped to the customer, or (5) pay the seller the

negotiated amount it had agreed to pay the seller. *Travelscape* thus provides no support for the unlimited and baseless expansion of the tax statute that the ALC developed for this case.

B. The ALC’s “Point of Sale” Construct Has No Basis in the Law.

With no textual support in the statute, regulation, or court decision interpreting the statute, the ALC’s decision created an entirely new concept to resolve this case. According to the ALC, Amazon Services is liable for sales tax on third-party sales because it “conducts the point of sale.” (Op., R.7; *see also id.* R.9-10, 25-27, 33-36, 38-39, 43, 46, 48.) The ALC acknowledged that this phrase has no footing in the statute. (*Id.* at R.25-26.) This unprecedented legal concept is completely foreign to South Carolina sales-tax law, and yet is a cornerstone of the ALC’s decision.

Because no South Carolina authority discusses the “point of sale” in the context of South Carolina sales-tax law, the ALC had no established framework it could apply to Amazon Services’s business to determine whether what it deemed “control” over the “point of sale” made Amazon Services the seller of third-party sellers’ products. The ALC repeatedly pointed to rules Amazon Services established in the BSA to maximize the efficiency and reliability of transactions for both buyers and sellers—rules that make the marketplace attractive. But that is what a *marketplace* does. That should not be confused with the selling that goes on *within* that marketplace. The ALC’s new “point of sale” doctrine confuses the business of running a marketplace with the business of selling.

It is true that third-party sellers agree that Amazon Services will provide order information to customers, and third-party sellers agree to accept and process cancellations, returns, and refunds in accordance with the BSA and the applicable Amazon refund policies. (*See, e.g.,* Op., R.4-6, 8, 13, 25-27.) Such policies help assure customers that transactions completed in the Amazon.com marketplace are reliable. (*See, e.g.,* Tr., R.212-14, 271-72.) The

same is true of third-party sellers' agreement not to contact customers with the intent to collect any amounts owed in connection with transactions. (See Op., R.4.) Customers want confidence that transactions completed in the marketplace are, in fact, complete. (Tr., R.211-14.) This rule also helps protect customers against fraud by unscrupulous sellers. (Tr., R.246-49.) That benefits not only customers but the numerous honest sellers who Amazon Services is eager to attract to sell in its marketplace. (Tr., R.366-67.) Third-party sellers also agree to use only those tools and methods Amazon Services designates for communications with users of the Amazon.com website. (Op., R.4.) But sellers can and sometimes do make other modes of communication available to customers who use the marketplace by including that information on the seller page that Amazon Services allows the seller to create. (Tr., R.223-24.) None of these rules, either individually or taken together, supports the notion that Amazon Services is the *seller* of the third-party goods. Instead, these rules construct the marketplace in which the actual sellers of third-party goods can effectively and efficiently sell their products. That Amazon Services exerts some control over how the marketplace operates does not make it the seller any more than does a mall operator's choice to insist that the building open at a certain time in the morning and close at a certain time at night.⁷

Worse, not only is the "point of sale" concept novel, but the ALC badly mischaracterized what Amazon Services controls at the so-called "point of sale." According to the ALC, "the most important consideration is who is accepting money in exchange for the product at the point

⁷ In any event, none of these policies inhibits third-party sellers' ability to sell. (See Tr., R.213-14, 244, 272, 280-81, 426, 552-53, 575-76.) The Department produced *no evidence* that *any* seller viewed the rules governing the Amazon.com marketplace as inhibiting its ability to sell. These are rules that third-party sellers *accept* when they voluntarily decide to sell in the marketplace. If the rules inhibited sellers' ability to sell, the marketplace would be *less* successful *as a marketplace*. Put simply, the business of operating a marketplace is not the same thing as the business of selling.

of sale.” (Op., R.38.) As noted above, the ALC wrongly asserted that “Amazon Services is the party who is present at the point of sale and who accepts consideration in exchange for the transfer of the product.” (*Id.* at R.39.) Indeed, as the ALC itself acknowledged elsewhere, “Amazon Services clearly does not accept the money . . . because that function is carried out by Amazon Payments.” (*Id.* at R.30.) The record is clear: Amazon Services does *not* accept money in exchange for the product—at the so-called “point of sale” or anywhere else. Third-party sellers accept money in exchange for the product, and they contract with Amazon Payments, not Amazon Services, to process those payments. *See supra* at 12-14.

C. Amazon Services Is Not a Consignee Responsible for Sales Tax on Third-Party Sales.

The Sales and Use Tax Act provides that the “gross proceeds of sales” include “the proceeds from the sale of property sold on consignment by the taxpayer.” S.C. Code Ann. § 12-36-90(1) (2011). The ALC found that Amazon Services is not in fact a consignee of goods sold by third-party sellers. Yet the ALC took another novel turn when it reasoned that Amazon Services is enough *like* a “consignee” of third-party sellers’ property—asserting that it has a “consignment-type relationship” with third-party sellers—to warrant imposing sales-tax collection and remittance obligations on it. (Op., R.46.) The ALC cited no South Carolina authority for attaching sales-tax obligations to “consignment-type relationships.”

To begin, the ALC was correct that Amazon Services is not a consignee of third-party sellers’ sales. A consignment sale requires an agency relationship between the consignee (*i.e.*, the retailer) and consignor (*i.e.*, the owner of the property). *See Greenwood Mfg. Co. v. Worley*, 222 S.C. 156, 161, 71 S.E.2d 889, 891 (1952) (“if it is a consignment, title does not pass, being merely an agency for the purpose of the sale”) (citing 77 C.J.S. Sales § 270 at p. 1072)); *see also* Jerome R. Hellerstein & Walter Hellerstein, II State Taxation: Sales and Use, Personal Income,

and Death and Gift Taxes and Intergovernmental Immunities (3d ed. 2000) § 13.01(2)(d). The BSA expressly disclaims any such agency relationship. (Ex. 3, R.851.)

In addition, undisputed testimony at trial explained how a consignment relationship is structured. The testimony left no doubt that the relationship between Amazon Services and third-party sellers is materially different from a consignment relationship.

In a consignment transaction the retailer [consignee] sets the price, in a third party sale the seller sets the price. In a consignment transaction the retailer [consignee] determines which products to sell, in a third party transaction the seller, the third party seller, decides which products to sell. In a consignment transaction the retailer [consignee] is the seller of record, in third party sale[s] the [third] party is the seller of record to the customer. In a consignment model . . . the retailer [consignee] determines how much cost—how much inventory to carry, even though it’s still owned by the supplier, in a third party sale the third party seller determines how many units of a product to sell.

(Tr., R.300-01.)

As discussed above, Amazon Services does not control the inventory, and does not decide what to sell or set the price. *See supra* at 7-9. Third-party sellers control all of that, and may, in their discretion, change how many units to sell, adjust the price, or even cancel orders at any point before title to their products shifts to their customers. (Tr., R.466-69, 531-32.)

The ALC’s reasons for imposing tax obligations on Amazon Services based on the supposed “consignment-type” relationship ignore all of these facts. Indeed, some of the ALC’s reasons are based on findings with no support in the record. For example, the third-party seller is not “prohibited from accepting payment from the customer.” (Op., R.46.) To the contrary, it *does* accept payment from the customer. *See supra* at 12-14. In addition, it is not true that only “Amazon” “provides a receipt for the products purchased.” Third-party sellers can and do include receipts with the products they ship. (See Ex. 3, R.861-62.)

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

II. Amazon Services’s Interpretation of the Statute Was Reasonable and That Alone Warrants Reversal.

For all the reasons discussed above, there is no basis in the statute, regulations, or case law to impose sales-tax obligations on Amazon Services for third-party sales in its marketplace in 2016. This Court can and should reverse the ALC’s ruling on that basis. But even if this Court does not believe that Amazon Services’s interpretation of the 2016 Sales and Use Tax Act is the *best* interpretation, it is *at least* a reasonable one. For that reason as well, this Court should reverse the ALC’s decision.

A. A Taxpayer Cannot Be Held Liable When a Reasonable Interpretation of the Statute Excludes the Taxpayer from Tax Obligations.

It is well settled in South Carolina that where “the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.” *Alltel Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm’n*, 182 S.C. 72, 76,

188 S.E. 508, 509-10 (1936)); *see also Hadden v. S.C. Tax Comm’n*, 183 S.C. 38, 190 S.E. 249 (1937); *Columbia Ry., Gas & Elec. v. Carter*, 127 S.C. 473, 121 S.E. 377 (1924). This critical presumption is a bulwark against the natural tendency for governments to expand the reach of their taxing authority, and ensures that taxpayers are given fair notice so that they may structure their affairs accordingly. *See, e.g., Pacolet Mfg. Co. v. Query*, 174 S.C. 359, 364, 177 S.E. 653, 655 (1934).

The ALC recognized the Department’s heavy burden to prove that Amazon Services’s interpretation of the statute was not just wrong but unreasonable. (Op., R.16.) But at no point as the ALC interpreted the language of the statute in the novel ways discussed above did the ALC ever explain why Amazon Services’s interpretation of the statute was unreasonable. As the ALC observed at trial, the law “is not clear” as applied to third-party sales on the Amazon.com marketplace. (Tr., R.603-04.) That fact should have been dispositive. Instead, it was simply not discussed in the ALC’s ruling.

Alltel Communications thus requires reversal of the ALC’s decision. There, the taxpayers were cellular service providers that provided wireless voice and data communication services using radio communication towers and facilities. *Alltel Commc’ns*, 399 S.C. at 316, 731 S.E.2d at 871. Section 12-20-100 imposed a heightened license fee on a “telephone company,” which the cellular service providers did not pay. *Id.* at 317, 731 S.E.2d at 871 (citing S.C. Code Ann. § 12-20-100(A)). The Department assessed a tax deficiency, arguing that cellular service providers were “telephone companies” under the statute. The Court of Appeals, like the ALC here, 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. *Id.* at 318, 731 S.E.2d at 872. On appeal to the Supreme Court, the cellular service providers argued that they should prevail in

light of the Court of Appeals’ acknowledgment that the statute “was not ‘absolutely clear.’” *Id.* at 321, 731 S.E.2d at 873.

The Supreme Court agreed. Applying the “settled” rule that any substantial doubt is resolved in favor of the taxpayer, the Supreme Court held that the statute was ambiguous as applied to the wireless service providers, and reversed the Department’s determination and Court of Appeals’ decision. *Id.* at 318, 731 S.E.2d at 872. The Supreme Court explained that “the absence of a statutory definition for ‘telephone company’ leaves the matter in doubt,” and such doubt must be resolved in favor of the taxpayers. *Id.* at 320 & n.3, 731 S.E.2d at 872 & n.3. The Court of Appeals’ acknowledgment that the law was “not ‘absolutely clear’” foreclosed the Department’s attempt to impose the tax on cellular service providers. *Id.* at 321, 731 S.E.2d at 873.

Here, as in *Alltel Communications*, there is no defined term or other express statutory indication that online marketplace operators are “sellers” or “retailers” within the meaning of the statute. And here, as in *Alltel Communications*, the ALC acknowledged during trial that “the tax law is not clear.” That should resolve the case.

B. There Is Ample Evidence That Amazon Services’s Interpretation of the Statute Was Reasonable.

Even without the ALC’s express acknowledgment that the issue was unclear, there is overwhelming evidence that reading the statute as not imposing sales-tax obligations on Amazon Services for sales by third parties is reasonable. The language of the 2016 statute does not impose sales tax on Amazon Services for sales by third parties. The Department told the legislature via sworn testimony that there was doubt that the statute could be applied to online marketplace facilitators like Amazon Services. The legislature specifically amended the statute in 2019 to provide the clarity that the Department admitted was missing. And numerous other

jurisdictions that considered the meaning of similar statutory language had refrained from applying their sales-tax statutes to online marketplace facilitators like Amazon Services until those statutes were similarly amended.

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

The Department effectively conceded that the 2016 version of the Sales and Use Tax Act is ambiguous when its Director addressed the General Assembly while this litigation was ongoing. In public testimony given at various times during 2018, the Department's Director repeatedly admitted that "[t]here is no law related to the taxation of third party sales," and he urged the legislature to change the statute. (Ex. 205, R.1381; Ex. 203, R.1342; Ex. 207, R.1506.) The Director testified that the proposed legislation would "close[] the gap" so that "nobody has to guess" who owes taxes on third-party sales. (Ex. 194, R.1263 at 6:13-15, 8:40-50.) That there was a "gap" in the 2016 version of the statute that required a taxpayer like Amazon Services to "guess" whether it owed the tax is the precise concern that the rule giving taxpayers the benefit of the doubt is designed to guard against. *See Gould v. Gould*, 245 U.S. 151, 153 (1917) (collecting cases).

Not only did the Department admit that the law (at best) left Amazon Services to "guess" whether it was obliged to collect and remit sales tax on third-party sales, but the Department's practice suggested that the best "guess" was that Amazon Services should not. The Department was receiving sales-tax payments from third-party sellers for sales on Amazon.com to customers in South Carolina. Indeed, Amazon Services offered to collect and remit *to the third-party seller* applicable sales tax owed on third-party sales (for third-party sellers whose sales volume topped a certain threshold). (Tr., R.382-86; Ex. 23, R.904-07 (tax collection service terms).) The third-party seller, not any Amazon entity, then remitted the sales tax to the State. (Tr., R.385-86.) As

of 2016, the Department had issued no guidance suggesting that such a process was wrong because Amazon Services, and not the third-party seller, was the responsible seller for sales-tax purchases. Instead, the Department collected the payments without telling Amazon Services (or the third-party sellers) that Amazon Services was liable for the tax. It was surely reasonable for marketplace facilitators to infer from this practice that the Department agreed that the third-party seller bore South Carolina's sales-tax obligations.

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

On June 18, 2018, the Director of the Department of Revenue told the Legislative Oversight Committee that there was an "emerging issue" about whether online marketplaces were required to remit sales taxes on third-party sales, noting that "Amazon is a prime example." (Ex. 213, R.1524-25; *see also* Ex. 202, R.1290.) The Director told the Committee that there needed to be legislative "change" to "ensure that online marketplace retailers collect/remit sales tax." (Ex. 213, R.1525; *see also* Ex. 202, R.1290.)

Several months later, in October 2018, the Legislative Oversight Committee summarized legislative changes that had been recommended by the Department. (*See* Ex. 192, R.1251-62.) The Committee noted that the Department had recommended changes "to ensure that online third-party sales will be subject to tax." (Ex. 192, R.1256.) The Department had "report[ed] that this statutory change would allow it to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors through the marketplace sites." (*Id.*) "Without this ability," the Committee continued, the Department "would have the right to collect sales tax directly from some third-party sellers, but it predicts that the significant administrative burden of collecting from so many individuals and companies would result in a large percentage of these taxes going uncollected." (*Id.*) Singling out Amazon, the Committee

noted “that, *if there had been a law like this in 2016*, Amazon’s additional sales tax liability for that year would have been \$57 million.” (*Id.* (emphasis added).)⁸

The legislature ultimately changed several provisions of the Sales and Use Tax Act to reach the business model at issue here. See 2019 S.C. Act No. 21 (effective April 26, 2019). “When the Legislature adopts an amendment to a statute, [there is] a presumption that the Legislature intended to change the existing law.” *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008); *Key Corp. Capital, Inc. v. Cty. of Beaufort*, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2007); *N. River Ins. Co. v. Gibson*, 244 S.C. 393, 398, 137 S.E.2d 264, 266 (1964). To hold otherwise would imply that the amendment was “essentially [] a futile act,” an implication courts typically avoid. *Key Corp. Capital*, 373 S.C. at 61, 644 S.E.2d at 678; see also *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002); *TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). The aggressive legislative surgery at issue here fully supports the “presumption” that the law has been changed. At a minimum, it indicates conclusively that the previous law was unclear with respect to its reach.

The 2019 changes were tailor-made to extend the duty to collect sales tax on third-party sales to online marketplace facilitators like Amazon Services. The legislature changed the definition of “retailer” and “seller” to include every person “operating as a marketplace facilitator.” S.C. Code Ann. § 12-36-70 (2019). The legislature added a specific, detailed definition of “marketplace facilitator” in Section 12-36-71. Under the new definition, a “marketplace facilitator” is “any person engaged in the business of facilitating a retail sale of

⁸ The \$57 million figure reflects the annualized deficiency for 2016 sought by the Department in this case.

tangible personal property by: (a) listing or advertising, or allowing the listing or advertising of, the products of another person in any marketplace where sales at retail occur; and (b) collecting or processing payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party.” S.C. Code Ann. § 12-36-71(A)(1) (2019). As discussed above, *supra* at 17-18, these changes include new and critical terms that expand the statute’s reach. The statute had never before said that merely “facilitating” sales would carry sales-tax obligations. Nor had the statute ever before said that the combination of “allowing the listing” of products and “processing payments” for products by “arrangement with a third party” would carry sales-tax obligations.

The new definition also provides that, for purposes of these new activities that combine to create sales-tax obligations, “a marketplace facilitator includes any *related entities* assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace.” *Id.* § 12-36-71(C) (2019) (emphasis added). Never before had the sales-tax statute suggested that the conduct of distinct but related corporate entities could create sales-tax obligations.

All of these changes cover online marketplaces as no provision of the statute, regulation, or court decision had done before. Yet the ALC rejected the significance of the 2019 changes entirely and all but ignored the numerous statements from the Department confirming the need to change the statute to impose sales-tax obligations on online marketplace facilitators for third-party sales. The court pointed instead to prefatory language in the enacting legislation stating that the amendments “shall not be construed as a statement concerning the applicability of the South Carolina Sales and Use Tax to any sales and use tax liability in matters currently in litigation or being audited.” (Op., R.18-19 n.24 (quoting 2019 S.C. Act No. 21 § 5 (effective

April 26, 2019).) According to the ALC, this language prevented it from “drawing any inferences” from the amendment. (*Id.*)

But the question is not whether the ALC should “draw any inferences” from the legislation. The question is whether there is any reason to override the legal presumption that amendments to a law changed the law. It cannot be that such a prefatory statement attached to legislation eviscerates that presumption. The statement, on its face, merely respects the separation of powers: the legislature made clear it would not interfere in the judicial task of resolving this legal dispute between the Department and Amazon Services about the statute in effect during the time period relevant to this case. The prefatory language merely reinforces the point that changes in the law would apply only prospectively. The legislature took care to ensure that the amendments would not have an impermissible retroactive effect.

Properly read, the prefatory statement underscores rather than undermines that the normal rules for adjudicating this case apply, including the presumption that amendments to a law change the law. *See Duvall*, 377 S.C. at 46, 659 S.E.2d at 130. The ALC set aside that presumption without any basis in law or fact, and in the face of all the evidence confirming the presumption with respect to this set of amendments.

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

The Department’s treatment of remote sellers—*i.e.*, retailers without a physical presence in South Carolina—provides yet more evidence that Amazon Services’s interpretation of the statute was reasonable. In September 2018, the Department issued S.C. Revenue Ruling 18-14 (Ex. 137, R.993-98), which set forth the Department’s official position on the sales-tax responsibilities of remote sellers in the wake of the U.S. Supreme Court’s decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). This was the first time that the Department had

ever issued any public guidance on the sales-tax implications of third-party sales in online marketplaces. (Tr., R.739-40, 744-45.) In the Revenue Ruling, the Department took the position that, for purposes of calculating a remote seller’s “gross revenue” from sales in South Carolina (licensing and sales-tax obligations are triggered when surpassing a threshold of “gross revenue” for sales in South Carolina), third-party sellers are the sellers of their products sold in an online marketplace. (Ex. 137, R.995-96.) This ruling underscores that it was *reasonable*, in 2016, to treat third-party sellers as the sellers of their products sold on internet marketplaces.

It is true that the 2018 Revenue Ruling also declared that those same sales should be excluded from the calculation of the seller’s total sales-tax liability, and should be treated instead as sales made by the online marketplace when the marketplace determined its sales-tax liability. (Ex. 137, R.995-96.) For the reasons explained above, Amazon Services believes that treatment of those sales was legally unsupported. But, even if the Department could read the statute in 2018 (the same version applicable in 2016) as allowing it to treat *both* the third-party seller and the online marketplace operator as “sellers” of the same product, that would not undermine the *reasonableness* of Amazon Services’s view that only third-party sellers are “sellers” of their products for all sales-tax purposes.

Having decided to treat third-party sellers as “sellers” for purposes of triggering licensing and sales-tax obligations, the Department surely could have *reasonably* concluded that third-party sellers are sellers of their products for *all* sales-tax obligations. After all, nothing in the language of the statute distinguishes between “seller” for purposes of the threshold requirement to trigger sales-tax responsibility and “seller” for purposes of calculating one’s total sales-tax liability, so that would be a more natural reading. That the Department chose otherwise does not undermine the reasonableness of that more natural approach. And had the Department in the

Revenue Ruling treated third-party sellers as the sellers for all purposes, a court surely would have deferred to the Department’s judgment precisely because it would have been *reasonable*. See *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Envtl. Control*, 411 S.C. 16, 33-34, 766 S.E.2d 707, 717-18 (2014) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 439-40, 581 S.E.2d 836, 838 (2003)). That reasonable interpretation of the statute is precisely Amazon Services’s interpretation of the statute.

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

Finally, the sheer novelty of the Department’s approach confirms the reasonableness of Amazon Services’s interpretation. The Department conceded at trial that “as of the first quarter of 2016, there was no rule, regulation, guidance, [or] publication of any kind . . . relating to the tax of third party sales on online marketplaces.” (Tr., R.684.) It agreed there had been “zero guidance, absolutely no guidance . . . that had been communicated or written down for the public’s benefit on the topic of third party sales and online marketplaces.” (*Id.*) And it has conceded that “[n]o other state has attempted to pursue this legal theory against online retailers like Amazon.” (Ex. 205, R.1356.) There are now at least 36 other states (besides South Carolina) that have passed “marketplace facilitator” laws,⁹ and in none of those other

⁹ Alabama (2018 H.B. 470), Arizona (2019 H.B. 2757), Arkansas (2019 H.B. 576), California (2019 A.B. 147, 2019 S.B. 92), Colorado (H.B. 19-1240), Connecticut (2018 S.B. 417), District of Columbia (2018 B22-1070), Hawaii (2019 S.B. 396), Idaho (2019 S.B. 259), Illinois (2019 S.B. 689), Indiana (2019 HEA 1001), Iowa (2018 S.F. 2417), Kentucky (2019 H.B. 354), Maine (2019 H.P. 1064), Maryland (2019 H.B. 1301), Massachusetts (2019 H.4000), Minnesota (2017 H.F. 1, 2019 H.F. 5), Nebraska (2019 L.B. 284), Nevada (2019 A.B. 445), New Jersey (2018 A4496), New Mexico (2019 H.B. 6), New York (2019 S. 1509 Part G), North Dakota (2019 S.B. 2338), Ohio (2019 H.B. 166), Oklahoma (2018 H.B. 1019XX), Pennsylvania (2017 Act 43, 2019 H.B. 262), Rhode Island (2017 H. 5175A, 2019 S. 251), South Dakota (2018 SB2), Texas (2019 S.B. 1525), Utah (2019 S.B. 168), Vermont (2019 H. 536), Virginia (2019 H. 1722), Washington

jurisdictions did a taxing agency or court ever conclude that Amazon Services—or any marketplace facilitator—was liable for sales tax on third-party sales before those changes were enacted. Amazon Services reasonably expected that South Carolina would not make itself such an outlier.

III. Applying the Sales Tax to Amazon Services’s Marketplace Facilitation Services Is Unconstitutional.

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

The Department’s attempt to collect sales taxes from Amazon Services for third-party sales during the first quarter of 2016 violates the South Carolina and federal constitutional guarantees of due process. U.S. Const. amend. XIV, § 1; *accord Huber v. S.C. State Bd. of Physical Therapy Exam’rs*, 316 S.C. 24, 26-28, 446 S.E.2d 433, 435 (1994). “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). “[R]egulated parties should know what is required of them so [that] they may act accordingly,” and “precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *Id.* A law or regulation that “fails to provide a person of ordinary intelligence fair notice of what is prohibited [or required], or is so standardless that it authorizes or encourages seriously discriminatory enforcement” violates this constitutional guarantee. *Id.* (citation omitted).

The Department’s attempt to impose the sales tax on Amazon Services for third-party sales in the first quarter of 2016 effectively seeks to subject Amazon Services to the 2019

(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).

amendments, adopted years after the tax period at issue here, and violates the constitutional requirement of fair notice. As discussed above, during the first quarter of 2016, the law was silent as to any sales-tax obligation on online marketplace facilitators for third-party sales. The Department itself acknowledged that under then-existing law “[t]here [was] no law related to taxation of third party sales” and that taxpayers had to “guess” who owed sales tax for third-party sales on online marketplaces. (See, e.g., Ex. 194, R.1263 at 6:13-15, 8:40-50; Ex. 203, R.1342; Ex. 205, R.1381; Ex. 207, R.1506.) The Department had not attempted to collect sales tax from Amazon Services or any other marketplace facilitator for third-party sales during the more than 15-year period that Amazon Services had been operating its marketplace. It was not until 2018 that the Department announced a sudden policy change when it issued for the first time any guidance related to the taxation of third-party sales on online marketplaces (in the form of S.C. Revenue Ruling 18-4). That is why the Department advocated for—in the Department’s own words—“legislative change.” (Ex. 202, R.1290.) And that is also why the legislature adopted a comprehensive set of amendments specifically crafted to impose this duty on online marketplace facilitators. See *supra* at 17-18, 41-44.

Fox Television shows why the Department’s attempt to give retroactive effect to the 2019 amendments must be rejected. There, the FCC had a history of enforcing a federal law banning “obscene, indecent, or profane language” only if the obscenity was pervasive and repeated rather than “isolated or fleeting.” 567 U.S. at 246. After isolated curse words and brief displays of nudity were broadcast on Fox and ABC, the FCC “clarified” its policy in a new order stating that isolated incidents could be indecent under federal law. *Id.* at 249. The FCC retroactively applied this “clarification” to impose fines on Fox’s and ABC’s previous broadcasts. *Id.*

The U.S. Supreme Court struck down the sanctions orders as a violation of the constitutional guarantee of fair notice. As the Court explained, the regulatory history leading up to the fines made “it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent.” *Id.* at 254. The FCC’s “lack of notice to Fox and ABC that its interpretation had changed . . . failed to provide a person of ordinary intelligence fair notice of what is prohibited.” *Id.* (brackets, citation, and internal quotation marks omitted).¹⁰ So too here.

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

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

The equal-protection guarantee requires the Department to apply its (doubtful) interpretation of the law equally to all other online marketplace facilitators (*e.g.*, eBay). Indeed, given the breadth of the legal standard the ALC invented to resolve this case, *see supra* at 29-33, equal protection would likely require the Department to apply the interpretation to brick-and-mortar marketplaces like malls, as well as payment processors, credit card companies, banks,

¹⁰ It did not matter that, years earlier, the FCC had issued a decision stating that televising nudity “might well raise a serious question of programming contrary to [federal law].” *Fox Television*, 567 U.S. at 256 (citation omitted). “An isolated and ambiguous statement from [an earlier] Commission decision,” the Court explained, “does not suffice for the fair notice required when the Government intends to impose over a \$1 million fine for allegedly impermissible speech.” *Id.* at 256-57.

delivery companies, and advertisers, all of whom benefit, directly or indirectly, from the sale of products owned by others. The record clearly demonstrates that the Department has singled out Amazon for retroactive enforcement of its extraordinary interpretation.

The Director of the Department of Revenue testified that only Amazon would be subject to the Department's selective approach to enforcement. In response to a question about whether the proposed legislation would be prospective only, the Director replied: "Absolutely, it will not be retroactive, right." (Ex. 194, R.1263 at 7:02-18.) The Director then admitted that this lawsuit is "going to pull up some retroactivity . . . specific to that one company, I haven't said their name." (*Id.*; *see also* Ex. 214, R.1533.) Singling out Amazon Services as the only marketplace facilitator forced to bear the retroactive effect of the Department's view is disparate treatment.

The ALC dismissed this argument on the hollow ground that Amazon Services "failed to submit any evidence specifically identifying other online marketplaces *and* showing that these other online marketplaces are similarly situated." (Op., R.51.) But the 2019 changes to the Sales and Use Tax Act apply to all online marketplaces, and the Director testified that *only* Amazon Services has been forced by the ALC's ruling to collect sales taxes on third-party sales before those 2019 changes took effect. When evaluating agency action, courts "cannot ignore the disconnect between the decision made and the explanation given. [A court's] review is deferential, but [it is] not required to exhibit a naiveté from which ordinary citizens are free." *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation and internal quotation marks omitted). It is clear that the Department, through this litigation, is attempting to apply the 2019 changes retroactively to only one taxpayer. That attempt violates the equal-protection guarantee and should be rejected.

CONCLUSION

The ALC's decision should be reversed.

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

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

Amazon Services, LLC, ... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

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The undersigned certifies that the foregoing Final Opening Brief of Appellant Amazon Services, LLC complies with Rule 211(b), SCACR.

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INTRODUCTION

Amazon Services, LLC (Appellant or Amazon) owns and operates the website Amazon.com (Website), which allows a customer to search for, select, and pay for—all on the Website—products that are shipped directly to the customer. The products offered for sale on Amazon.com are owned by Amazon, an Amazon affiliate, or third-parties who have contracted with Amazon. Regardless of who owns the product, customers follow the same purchasing process for all products sold on the Website and need to—and most often do—interact only with Amazon during that process. Customers find products using Amazon’s search function, which, through a proprietary algorithm developed by Amazon, directs customers to the specific offer for a product that Amazon has determined is best for its customers. Customers use an online shopping cart provided by Amazon in which to place each of the products selected for purchase, and they checkout with Amazon by entering their payment information directly onto and making payment through Amazon.com. In short, through its Website, Amazon offers goods to the public for sale and accepts payment in exchange for those goods.

The South Carolina Sales and Use Tax Act (the Tax Act) imposes a sales tax “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) (emphasis added), and defines a “retailer” or “seller” to include, in relevant part, every person “selling or auctioning tangible personal property *whether owned by the person or others*,” S.C. Code Ann. § 12-36-70(1)(a) (emphasis added). Because the substantial evidence of record demonstrates that Amazon falls within all of these provisions, the South Carolina Administrative Law Court (ALC) correctly ruled that Amazon is required to collect and remit sales and use tax for all products sold on Amazon.com—including those owned by third-parties—during the period at issue in this case.

But this is not an entirely new issue for the courts of this state. The Supreme Court has previously applied nearly identical statutory provisions to a substantially congruent factual scenario and held that the entity offering items owned by third-parties for sale on its website and accepting payment directly from customers for those items was responsible for collecting and remitting the taxes owed. *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011). In asking this Court to reverse the ALC, Amazon disregards most of the substantial evidence presented at trial demonstrating that, analogous to the taxpayer in *Travelscape*, it is in the “business of selling” and is the “retailer” or “seller” with respect to sales made on its Website. Amazon instead claims it is similar to a mall, never mind the fact that shopping at a mall differs significantly from shopping on Amazon.com, such as the fact that malls do not provide a single checkout point for all of their stores. In the end, the ALC applied clear precedent to the nearly identical factual scenario in this case. The Department urges this Court to do the same.

COUNTER STATEMENT OF THE ISSUES

1. Is Amazon required to collect and remit sales and use tax for all goods sold on its website, including those owned by third-parties, for which goods Amazon receives payment directly from the customers?
2. Does imposition upon Amazon of the obligation to collect and remit sales and use tax for goods sold on its website, including those owned by third-parties, comport with the U.S. Constitution and the South Carolina Constitution?

COUNTER STATEMENT OF THE CASE

In 2011, the South Carolina General Assembly passed the Distribution Facility Sales Tax Exemption (the Moratorium) primarily to encourage investment by Amazon in South Carolina. See S.C. Code Ann. § 12-36-2691 (2014). The Moratorium was in place from 2011 through 2015, and exempted 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). Prior to 2011, Amazon did not have a physical presence in South Carolina and, thus, had no obligation to collect and remit sales and use tax. **(Id.)**.

After the Moratorium expired and Amazon's obligation to collect and remit sales and use tax began, the Department ascertained that Amazon was not collecting sales and use tax for *all* of the sales taking place on its Website. **(R. pp. 668; 1003)** (Tr. 527; Ex. 171, Dep't Determination at 4). Upon further investigation, the Department learned that Amazon was remitting sales and use tax only for transactions involving goods owned by Amazon and its affiliates, but not for transactions involving goods owned by third-parties. **(Id.)**. Consequently, the Department audited Amazon's first quarter 2016 operations and, on June 21, 2017, issued its Determination assessing Amazon a total of \$12,490,502.15 in taxes, penalties, and interest for the period of January 1, 2016 through March 31, 2016. **(R. pp. 999-1014)** (Ex. 171, Dep't Determination). On July 21, 2017, Amazon filed its request for a contested case hearing with the ALC. **(R. pp. 1899-1916)** (Amazon Request for Contested Case). An evidentiary hearing was held on February 4-6, 2019, and on September 10, 2019 the ALC issued its Final Order affirming the Department's Determination. **(R. pp. 1-54)** (Final Order). Amazon filed its notice of appeal on October 10, 2019.

STATEMENT OF THE FACTS

Amazon owns and operates the Website. **(R. pp. 188, 303)** (Tr. 47, 162). The Website lists various items available for purchase, including items owned by third-parties. Amazon refers to purchasers of products on the Website 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.”)). The three primary persons and entities that list items for sale on the Website are: (1) Amazon;¹ (2) Amazon affiliates; and (3) unaffiliated third-parties (Third-Party Merchants). During the period at issue, Amazon voluntarily collected sales and use taxes for retail Website sales of goods owned by Amazon or its affiliates. **(R. p. 1003)** (Ex. 171, Dep’t Determination at 4). Amazon did not, however, collect or remit sales and use taxes for Website sales of goods owned by Third-Party Merchants.

1. Amazon.com Customer Experience

Generally, a Website sale starts with a customer searching for a product on Amazon.com. The search results populate on the screen, and then the customer will select—click on—the product the customer wishes to buy from the search results. **(R. p. 216)** (Tr. 75). The customer then is taken to a “product detail page” that displays the product’s attributes, including descriptions, images, and customer reviews.² **(R. pp. 217; 913)** (Tr. 76; Ex. 39). Amazon’s proprietary algorithm also determines what product—owned by either an Amazon affiliate or a Third-Party Merchant—will be the default product displayed on the product detail page. **(R. pp. 290-91)** (Tr. 149-50). Unless

¹ Amazon is registered in South Carolina as a “retailer” for purposes of the Tax Act and collects and remits sales tax related to its sale of “Amazon Prime” subscriptions to customers residing in South Carolina. **(R. pp. 320, 666-67)** (Tr. 179, 525-26). Amazon Prime subscriptions provide Amazon customers who purchase the subscription a variety of benefits that improve their shopping experience on Amazon.com, including free and discounted expedited shipping. **(R. p. 394)** (Tr. 253).

² Amazon requires that there only be one product detail page per product regardless of whether Amazon, an Amazon affiliate, or one or more Third-Party Merchants may list the product on the Website. Amazon explains this requirement is to “optimize the buying experience” for customers on Amazon.com. **(R. p. 913)** (Ex. 39). Accordingly, “[t]he creation of product detail pages is limited to products that do not already exist within Amazon’s catalog” and “[c]reating a product detail page for a product already in the Amazon catalog is prohibited” by Amazon. **(Id.)**. For new products, Amazon imposes content-specific and other detail-page creation policies upon Third-Party Merchants, as well as requirements for any images of the product. **(Id.)**; **(R. pp. 938-39)** (Ex. 83). Amazon also “uses complex image ranking technology to determine the best images to display” for each product and is not required to use the images uploaded by any Third-Party Merchant. **(R. p. 938)** (Ex. 83).

the customer clicks a small hyperlink on the product detail page for “Other Sellers on Amazon,” the customer will by default purchase the product from the algorithm-determined offeror.

Amazon refers to the default offeror as the “winner” of the “Buy Box.” (**R. p. 894**) (Ex. 7). Amazon’s algorithm uses price, shipping cost, and other variables to determine the winner of the Buy Box. (**R. pp. 290-91; 894**) (Tr. 149-50; Ex. 7). Amazon provides general information to Third-Party Merchants on how to “win” the Buy Box (*e.g.*, “price competitively”); however, Amazon considers the complete method and criteria for winning the Buy Box to be proprietary, and thus it is not publicly available, has not been disclosed by Amazon in this proceeding or elsewhere, and it varies by category and over time. (**R. pp. 367-68**) (Tr. 226-27). Amazon’s primary company witness testified that he believed the percentage of sales on the Website that go to the winner of the Buy Box is at least 50%, although he surprisingly was unable to testify as to a more precise percentage or even a range of percentages.³ (**R. pp. 369-70; 12**) (Tr. 228-29; Final Order at 12 n.17).

When customers wish to purchase a product, they either click the “Buy now” button, which immediately takes them to Amazon’s “Checkout” page or, if they wish to continue shopping, they place the product in the online “Cart.” (**R. pp. 231, 377**) (Tr. 90, 236). Customers can place multiple products from different Third-Party Merchants and Amazon affiliates in the Cart at once and can purchase them during the same transaction. (**R. pp. 323-24; 947-92**) (Tr. 182-83; Ex. 122). To make a purchase, customers must create a customer account on Amazon.com and enter, among other things, their shipping address and payment method. (**R. pp. 319-20; 323-24**) (Tr. 178-79,

³ The ALC found that much of the testimony of Amazon’s primary witness, Mr. Chris Poad, was not reliable or credible because, although he was presented to “methodically” explain the sale of Third-Party Merchant products on Amazon.com, his testimony consisted mainly of conjecture and was not supported by any statistical data. (**R. pp. 5, 11**) (Final Order at 5 n.10, 11 n.16).

182-83). Customers input their payment information (*e.g.*, credit card information) directly into the Amazon.com website operated by Amazon. **(R. p. 380)** (Tr. 239).

When customers finish shopping and are ready to pay, they click the “Proceed to checkout” button. **(R. p. 231)** (Tr. 90). Customers then are directed to Amazon’s Checkout page where they input or confirm their shipping address and payment method and also select a shipping or delivery option. Amazon accepts credit and debit cards, U.S.-based checking accounts, “Amazon Store Cards,” and Amazon gift cards, but not cash, check, or methods such as PayPal.⁴ **(R. pp. 212, 373)** (Tr. 71, 232). There is no pop-up window or other action that directs the customers to another website operated by some other third party or even another Amazon affiliate to make payment. Rather, all money paid by customers for purchases on Amazon.com is submitted directly to Amazon via the Website.⁵ On the Checkout page, Amazon provides an “Order Summary,” which identifies the total cost of the “Item(s)” selected for purchase, the cost for “Shipping & handling,” and the “Estimated tax to be collected” (if any). Notably, there are no per-transaction costs or service fees identified or separately charged by Amazon to the customer.

After customers input their payment and shipping information, they click the “Place your order” button. Customers receive a specific Amazon.com order number and order confirmation email from Amazon detailing their order. **(R. pp. 947-92)** (Ex. 122). In addition to the order details, the Amazon email confirmation states:

⁴ Customers cannot make payments directly to Third-Party Merchants, and the Third-Party Merchants are expressly prohibited by Amazon from requesting any payments from customers. **(R. p. 851)** (Ex. 3 at 6).

⁵ Amazon’s contract with Third-Party Merchants expressly provides that Amazon has the exclusive right to receive sales proceeds for sales taking place on the Website. **(R. pp. 860-61)** (Ex. 3 at 15-16 (“We will also receive all Sales Proceeds on your behalf for each of these transactions and will have exclusive rights to do so, and will remit them to you in accordance with these Selling on Amazon Service Terms.”)).

- “Thank you for shopping with us.”
- “We’ll send a confirmation when your item ships.”
- “We hope to see you again soon. **Amazon.com**”

(R. p. 947) (Ex. 122 (emphasis in original)).

Customers can access their Order Summary and the invoices for all of their orders through their Amazon.com customer account or by following the link in their confirmation email. **(Id.)**. Like the Checkout page Order Summary, the post-purchase Order Summary identifies the total cost of the “Item(s)” selected for purchase, the cost for “Shipping & handling,” and the “Estimated tax to be collected” (if any). **(R. p. 949)** (Ex. 122). Customers also can check the status of their order on the Order Summary page. **(Id.)**. The invoice prepared and provided by Amazon also includes the product costs, shipping and handling costs, and sales taxes (if any). **(Id.)**. Customers typically receive only one Amazon.com order number and one invoice from Amazon for a specific transaction, regardless of the number of items purchased and the number of Amazon affiliates or Third-Party Merchants involved. **(R. pp. 947-92; 330)** (Ex. 122; Tr. 189). A customer’s credit card statement will identify the transactions on Amazon.com with an abbreviation of the words “Amazon marketplace payments” in the merchant descriptor field. **(R. p. 713)** (Tr. 572). When a specific item ships, Amazon sends another email informing the customer of the shipment and providing the option to “Track your package.” **(R. p. 948)** (Ex. 122).

All of the above—a complete sales transaction on the Website—can and typically does occur without any personal contact or communication between a customer and the Third-Party Merchant. **(R. pp. 333-34; 34)** (Tr. 192-93; Final Order at 34 (finding that “the evidence clearly establishes that sales can be made, and often are made, without any interaction between customers and Merchants”))). If there is any contact prior to a purchase, it must be initiated by the customer by calling the Third-Party Merchant or using a feature on Amazon.com called “buyer/seller

messaging,” which permits customers to ask product-specific questions.⁶ (**R. p. 326**) (Tr. 185). However, Amazon prohibits Third-Party Merchants from having any direct communications with customers except for the limited purpose of providing product-specific information in response to a direct customer inquiry, completing orders (*e.g.*, confirming shipping addresses), or responding to customer service inquiries. (**R. pp. 851; 927-28; 335**) (Ex. 3 at 6; Ex. 58; Tr. 194).

2. Order Fulfillment

If a customer orders a product owned by a Third-Party Merchant, the order is shipped to the customer in one of two ways: Either the Third-Party Merchant ships the product itself or, for an additional fee imposed on the Third-Party Merchant, the Third-Party Merchant opts to use Fulfillment By Amazon (FBA) to ship the product.

A. Fulfillment by Third-Party Merchant

When a product owned by a Third-Party Merchant is purchased, Amazon sends the Third-Party Merchant an email notifying it of the sale. (**R. p. 328**) (Tr. 187). The Third-Party Merchant then ships the product to the customer and is required to notify Amazon (rather than notifying the customer) when the item ships.⁷ (**R. pp. 355-57; 861-62**) (Tr. 214-16; Ex. 3 at 16-17). Under the terms of the Business Solutions Agreement (BSA), (**R. pp. 846-93**) (Ex. 3), which is the agreement between Amazon and the Third-Party Merchants, Amazon then notifies the customer by email that the product has shipped. (**R. pp. 327-28; 862**) (Tr. 186-87; Ex. 3 at 17). Amazon strictly prohibits Third-Party Merchants from sending order confirmation emails to customers. (**R. p. 862**) (Ex. 3 at

⁶ Third-Party Merchants are not provided access to any potential customer’s email through “buyer/seller messaging,” but rather receive an encrypted version of the customer’s email along with the potential customer’s inquiry. (**R. p. 323**) (Tr. 182).

⁷ Amazon requires Third-Party Merchants to ship items within two business days of order notification. (**R. p. 943**) (Ex. 97).

17 (providing that a Third-Party Merchant will “except as expressly permitted by this Agreement, not send customers emails confirming orders or fulfillment of Your Products”)).

Once Amazon receives notice that the Third-Party Merchant has shipped the product, it processes the customer’s credit card. **(R. pp. 356-57)** (Tr. 215-16). Typically, this is done by its affiliate, Amazon Payments, Inc., although Amazon can, in its discretion, process the payments directly.⁸ **(R. pp. 853, 855; 313-14)** (Ex. 3 at 8, 10; Tr. 172-73). Amazon records the transaction in the Third-Party Merchant’s “Seller Account,” which is part of the “Seller Central” online portal where Third-Party Merchants can view the proceeds of sales along with the applicable fees paid to Amazon. **(R. pp. 892-93)** (Ex. 3 at 47-48). However, Amazon does not actually maintain separate bank or deposit accounts for each Third-Party Merchant, and in fact may combine the sales proceeds into a single account, and even invest them for Amazon’s own benefit. **(R. pp. 380-81; 892-93)** (Tr. 239-40; Ex. 3 at 47-48). Every two weeks, or more frequently if requested (but always at Amazon’s discretion), Amazon transfers the sales proceeds less its fees to the Third-Party Merchant’s bank account. **(R. p. 864)** (Ex. 3 at 19). However, Amazon expressly reserves the right to withhold payments from Third-Party Merchants until it is “confident that customers have received the products they ordered.” **(R. p. 915)** (Ex. 41).

Amazon determines which Third-Party Merchants are permitted to offer “Premium Shipping” options, including same-day, one-day, and two-day shipping. **(R. pp. 911-12)** (Ex. 38). To offer Premium Shipping, Third-Party Merchants must have been listing products on the Website for more than 90 days and must meet certain delivery performance requirements

⁸ Regardless of the entity that processes the payments, Appellant, as owner and operator of the Website, is always the entity that accepts the payment from the customer when the customer inputs his or her credit card information into Amazon.com. **(R. pp. 379-80)** (Tr. 238-39). The fact that Amazon may share that customer information with an affiliate for credit card processing purposes does not change the fact that Amazon, and not the Third-Party Merchant, accepts the payment.

established by Amazon. (*Id.*). If a Third-Party Merchant’s performance falls below established thresholds, Amazon may revoke the Third-Party Merchant’s eligibility to offer Premium Shipping. (*Id.*). Amazon also requires that the amount of all shipping and handling charges for orders fulfilled by Third-Party Merchants remain within the parameters set by Amazon. (**R. p. 861**) (Ex. 3 at 16). And for certain types of orders, such as for products offered by Third-Party Merchants on the “Individual selling plan” and for “BMVD Products,”⁹ Amazon sets “category-based shipping and handling charges,” which the Third-Party Merchants must “accept . . . as payment in full for [their] shipping and handling.” (*Id.*).

For sales in which the order is fulfilled by the Third-Party Merchant, the BSA provides that the Third-Party Merchants are responsible for responding to claims for certain shipping-related issues, including non-performance, non-delivery, mis-delivery, theft, or mistake. (**R. p. 862**) (Ex. 3 at 17). Third-Party Merchants are also required to handle returns and refunds, but all payments flowing from the Third-Party Merchant to the customer must go through Amazon. (*Id.*). Notwithstanding these requirements, Amazon also implements an “A-to-Z Guarantee Program,” which allows customers to submit claims related to sales involving Third-Party Merchants directly to Amazon for resolution. (**R. pp. 862-63**) (Ex. 3 at 17-18). Under this program, Amazon contacts the Third-Party Merchant about the complaint to confirm certain information about the transaction, and then determines in its sole discretion how to settle the claim with the customer, which may include reimbursement to the customer at the Third-Party Merchant’s expense. (*Id.*).

B. Fulfillment by Amazon

If a Third-Party Merchant opts to pay extra for FBA, Amazon stores, selects, packages,

⁹ “‘BMVD Product’ means any book, magazine or other publication, sound recording, video recording, and/or other media product in any format” (**R. p. 865**) (Ex. 3 at 20).

and ships the Third-Party Merchant's products when a sale is made. **(R. pp. 238-39)** (Tr. 97-98). The costs of this program include monthly storage fees, as well as transaction-based fulfillment fees. **(R. p. 883)** (Ex. 3 at 38). To start the process, Third-Party Merchants register each product for FBA, which is operated by another Amazon affiliate, Amazon Fulfillment Services (AFS). **(R. p. 878)** (Ex. 3 at 33). However, Third-Party Merchants do not have any contractual relationship with AFS. Rather, Third-Party Merchants contract for FBA services with the Appellant, Amazon Services, who in turn directs AFS to carry out those FBA services. Third-Party Merchants sign up for FBA through Amazon.com. **(R. p. 855)** (Ex. 3 at 10).

As part of FBA, Third-Party Merchants must initially pay to ship their products to an Amazon fulfillment center and also pay storage fees to Amazon. **(R. pp. 878-79)** (Ex. 3 at 33-34). Unless the Third-Party Merchant pays an extra fee for Amazon to restrict its distribution options, Amazon selects in its discretion the fulfillment center to which the Third-Party Merchant ships its product. **(R. pp. 398-400; 935-37)** (Tr. 257-59; Ex. 65). Otherwise, Third-Party Merchants have no control as to the fulfillment center(s) at which their products are stored. Third-Party Merchants agree that once Amazon receives their products, Amazon can commingle products of the same type. **(R. p. 880)** (Ex. 3 at 35). Third-Party Merchants may request their product units be returned to them, but must pay a per-item fee to Amazon to complete the return or must have Amazon dispose of the product. **(R. pp. 881; 940-41; 563-64)** (Ex. 3 at 36; Ex. 88; Tr. 422-23).

When a customer purchases a product subject to FBA, Amazon sends an automated email to AFS. AFS then selects which of the Third-Party Merchant's products to send to the customer, and then packages and ships the product to the customer. **(R. p. 400)** (Tr. 259). Amazon may combine products from different Third-Party Merchants or Amazon affiliates together into one shipment. **(R. p. 880)** (Ex. 3 at 35). Upon shipment, Amazon processes the customer's credit card

and the funds are distributed in the same manner as if a Third-Party Merchant shipped the item itself. **(R. pp. 357-58)** (Tr. 216-17). Importantly, under the BSA, Amazon has sole discretion regarding the resolution of *all* customer service issues relating to FBA products. **(R. p. 882)** (Ex. 3 at 37).

3. Amazon's Relationship with Third-Party Merchants

Amazon's relationship with the Third-Party Merchants who supply products for sale on the Website is delineated in the BSA, as well as numerous policy documents promulgated by Amazon that impose on the Third-Party Merchants various guidelines, terms and conditions, codes of conduct, and other requirements. The BSA is a single agreement with multiple subsections to which Appellant and other Amazon affiliates are parties, all of which are collectively referred to simply as "Amazon" in the BSA. **(R. p. 846)** (Ex. 3 at 1). The BSA contains general provisions covering the overall relationship between Amazon and the Third-Party Merchants, as well as more specific provisions governing particular parts of Amazon's sales platform, including "Selling on Amazon," "Fulfillment by Amazon," and "Transaction Processing."

To list products on the Website, a Third-Party Merchant must agree to the terms of the BSA. The BSA may be modified at any time by Amazon. **(R. p. 852)** (Ex. 3 at 7). However, Third-Party Merchants do not have the option of altering the terms of the BSA. **(R. p. 307)** (Tr. 166). Any modifications by Amazon also are deemed accepted by a Third-Party Merchant simply by them continuing to list products on the Website after Amazon posts the modification on Seller Central. **(R. p. 852)** (Ex. 3 at 7). The separate policy documents promulgated by Amazon may be modified by Amazon and become effective without notice to the Third-Party Merchants. **(Id.)**. Amazon may suspend or terminate the BSA with a Third-Party Merchant, and suspend or terminate

a Third-Party Merchant’s ability to list products on the Website, at any time and for any reason. **(R. pp. 847-48)** (Ex. 3 at 2-3).

The BSA includes many material limitations on how Third-Party Merchants participate in Website transactions. For example, with respect to product pricing, the BSA requires Third-Party Merchants to ensure that the price they set, as well as any other terms or conditions relating to the product they wish to list on the Website, “is at least as favorable to Amazon Site users as the most favorable terms upon which a product is offered or sold via [the Third-Party Merchant’s other] Sales Channels” **(R. p. 863)** (Ex. 3 at 18). Additionally, Third-Party Merchants must provide product information in the format required by Amazon. **(R. p. 860)** (Ex. 3 at 15). The BSA also provides that Amazon has the sole discretion to “determine the content, appearance, design, functionality, and all other aspects of [Amazon.com], including by redesigning, modifying, removing or restricting access to [the site], and by suspending, prohibiting or removing any listing.” **(R. p. 865)** (Ex. 3 at 20).

Amazon also controls the flow of funds between customers, Amazon, and Third-Party Merchants. Amazon requires that its affiliate, Amazon Payments, be used as the payment processor for all transactions on the Website. **(R. p. 892)** (Ex. 3 at 47). However, pursuant to the BSA, Amazon, not Amazon Payments, will “receive all Sales Proceeds on your behalf for each of these transactions and will have exclusive rights to do so, and will remit them to you in accordance with these Selling on Amazon Service Terms.” **(R. pp. 860-61)** (Ex. 3 at 15-16). As discussed above, all refunds to customers must be routed through Amazon as well. **(R. p. 862)** (Ex. 3 at 17).

Amazon also controls the frequency of fund transfers to Third-Party Merchants for the proceeds from the sale of their goods. Specifically, the BSA provides that proceeds—reduced by Amazon’s fees—will be remitted to the Third-Party Merchants, at Amazon’s sole discretion, on a

bi-weekly basis. **(R. p. 864)** (Ex. 3 at 19). Although a company witness testified that Third-Party Merchants may request more frequent distributions, the BSA states that Third-Party Merchants do “not have the ability to initiate or cause payments to be remitted to [them].” **(Id.)**. And Third-Party Merchants are not entitled to any earned interest on the proceeds held by Amazon. **(R. pp. 892-93)** (Ex. 3 at 47-48). Amazon also bears the risk of credit card fraud. **(R. p. 861)** (Ex. 3 at 16). However, Amazon, at its sole discretion, can withhold a transaction for investigation, refuse to process the transaction, restrict shipping, or stop or cancel a transaction, and Third-Party Merchants must stop or cancel an order when directed to do so by Amazon. **(Id.)**. For orders that are cancelled at the direction of Amazon, the Third-Party Merchant is required to remit the proceeds to Amazon so that Amazon in turn can issue the refund to the customer. **(R. pp. 861-62)** (Ex. 3 at 16-17).

Moreover, Amazon maintains strict control over the information of customers purchasing goods on the Marketplace. **(R. p. 851)** (Ex. 3 at 6). Third-Party Merchants are strictly prohibited from using Amazon’s customer information for any purpose other than those tasks that are necessary to fulfill the Third-Party Merchants’ duties related to the transaction on the Website. **(Id.)**. To the extent a Third-Party Merchant needs to initiate any communications with an Amazon customer, it is required to use tools on Amazon.com to communicate with that customer and may not use any other means or methods of communicating with that customer. **(Id.)**.

4. Amazon’s Compensation

Amazon is compensated for transactions on the Website through referral fees, applicable variable closing fees, the non-refundable monthly Selling on Amazon subscription fee, and other fees paid by Third-Party Merchants. **(R. pp. 359-61; 864; 897-903)** (Tr. 218-20; Ex. 3 at 19; Ex. 16). The referral fees are calculated as a percentage of the sales price of a product, and the

percentage amount varies based upon the type of product being sold, ranging from 45% of the total sale value for “Amazon Device Accessories” to 6% for personal computers. **(R. pp. 359-61; 864; 897-903)** (Tr. 218-20; Ex. 3 at 19; Ex. 16). These referral fee percentages are determined in part based on the typical or average profit margins of the different products. **(R. pp. 410-11)** (Tr. 269-70). Amazon therefore is compensated through transaction fees calculated based on the sales price of the product and not through flat service fees.

5. Sales and Use Tax Collection

No person or entity other than Amazon directly interfaces with the customer through the purchase transaction.¹⁰ Only Amazon accepts and processes customer payments, and Amazon is the only point of sale for all transactions on the Website. Thus, only Amazon has the ability to collect sales and use taxes arising from the purchase of tangible personal property on the Website.

During the period at issue, a “Professional” Third-Party Merchant could pay a fee and subscribe to Amazon’s “Tax Calculation Service.” **(R. pp. 904-07)** (Ex. 23).¹¹ Under this program, Amazon provides the “Professional” Third-Party Merchant a list of tax codes, the Third-Party Merchant matches the tax codes to its products and, when the products are sold, Amazon calculates and withholds taxes for the transaction. **(Id.)**. Amazon collects the tax from the customer and then disburses the tax to the Third-Party Merchant after taking its percentage-based fee. **(Id.)**. Even under this program, Amazon does not accept any responsibility for remitting the taxes, or ensuring that the taxes are remitted, to any taxing authority. **(Id.)**.

¹⁰ But Amazon contractually requires Third-Party Merchants to be responsible for collecting, reporting, and paying all taxes. **(R. p. 850)** (Ex. 3 at 5). As found by the ALC, Amazon’s policy is inconsistent with the way these transactions actually occur. **(R. p. 48)** (Final Order at 48).

¹¹ Amazon’s “Professional Selling Plan” requires Third-Party Merchants to pay a \$39.99 monthly subscription fee to Amazon. **(R. pp. 359-60; 897-903)** (Tr. 218-19; Ex. 16). Third-Party Merchants who do not subscribe to this plan are referred to as “Individual sellers,” and must pay a \$0.99 per-item fee for each item that is sold on the Website. **(Id.)**.

Notably, Amazon did not make available the tax collection service to non-professional Third-Party Merchants during the period at issue. (*Id.*) (offering tax collection option to “Marketplace Professional seller[s] or Amazon Webstore seller[s]” only). Again, the BSA specifically prohibits Third-Party Merchants from receiving any funds from a customer outside of Amazon’s payment process on the Website. Thus, during the period at issue, a non-professional Third-Party Merchant had no way to collect sales and use tax for sales transactions involving products listed by that Third-Party Merchant on the Website. In other words, despite claiming that Third-Party Merchants are the “sellers” responsible for collecting, reporting, and paying all taxes, Amazon’s own policies and procedures were designed in such a way that practically prevented those Third-Party Merchants from complying with any such tax obligation.

6. Comparable Transactions and Relationships

The ALC found that Amazon.com was akin to a traditional retail store or consignment shop, (**R. pp. 39, 46-47**) (Final Order at 39, 46-47), and that the Third-Party Merchants’ participation on Amazon.com most closely resembles that of a manufacturer, distributor, or wholesaler in the more traditional retail setting, or that of a consignor in a consignment scenario, (**R. pp. 10-11, 13, 35, 36, 42, 44**) (Final Order at 10-11, 13 n.20, 35 n.33, 36, 42, 44). While the evidence presented by Amazon showed that Third-Party Merchants may develop, manufacture, and source their products and may even develop the product packaging for such products as well as handle product-specific customer service questions, the ALC found this to be indicative of what a traditional manufacturer or wholesaler does, rather than a retailer. (*Id.*). On the other hand, the functions typically associated with a brick-and-mortar retail store—advertising and offering for sale multiple products, providing a “shopping cart” to customers to select those products, accepting payment for those products, and handling refunds and other non-product specific customer service

issues—all are handled by Amazon. Crucially, the ALC found that a customer’s purchase on Amazon.com can—and often does—occur only through interaction with Amazon and no one else, including any Third-Party Merchant. **(R. p. 34)** (Final Order at 34).

STANDARD OF REVIEW

This Court may reverse the ALC’s determination only if that decision was:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B); see *Travelscape*, 391 S.C. at 96-97, 705 S.E.2d at 32.

Judicial review of an ALC’s findings of fact is limited to determining if the findings are supported by “substantial evidence.” *MRI at Belfair, LLC v. S.C. Dep’t of Health & Envtl. Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008). “Substantial evidence is . . . evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the [ALC] reached” *Leventis v. S.C. Dep’t of Health & Envtl. Control*, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000). This Court also “may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact.” *Carmax Auto Superstores W. Coast, Inc. v. S.C. Dep’t of Revenue*, 411 S.C. 79, 85, 767 S.E.2d 195, 198 (2014).

ARGUMENT

- 1. Amazon owes sales and use tax with respect to all retail sales on Amazon.com because it is “in the business of selling” and is a “retailer” or “seller” under the plain language of the Tax Act.**

In South Carolina, 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). Complementing this tax is the use tax, which is “imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.” S.C. Code Ann. § 12-36-1310. The use tax must be collected by the seller “at the time of making the sales or, if the storage, use, or consumption is not then taxable, at the time the storage, use, or other consumption is taxable” and the seller must “give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected.” S.C. Code Ann. § 12-36-1350(A).

A “retailer” and “seller” includes, in relevant part, every person “selling or auctioning tangible personal property whether owned by the person or others.” S.C. Code Ann. § 12-36-70(1)(a). A “retail sale mean[s] all sales of tangible personal property except those defined as wholesale sales.” S.C. Code Ann. § 12-36-110. More generally, a “sale” or “purchase” is broadly defined to mean:

any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration including:

- (1) a transaction in which possession of tangible personal property is transferred but the seller retains title as security for payment, including installment and credit sales;
- (2) a rental, lease, or other form of agreement;
- (3) a license to use or consume; and
- (4) a transfer of title or possession, or both.

S.C. Code Ann. § 12-36-100.

A. All sales and purchases on Amazon.com are subject to sales and use tax.

There is no dispute that the transactions taking place on Amazon.com are taxable “sales” or “purchases” within the meaning of section 12-36-100. *See* Appellant’s Br. at 23. A customer accesses Amazon.com, searches for and selects a product or products, and then, in exchange for

monetary payment, immediately receives the right to receive, and, in a matter of days, actually does receive, the product or products. This is a “transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration,” and thus is a sale subject to South Carolina sales and use tax. S.C. Code Ann. § 12-36-100.

B. Amazon is required to collect and remit sales and use tax with respect to sales and purchases on the Website.

i. *The substantial evidence in the record demonstrates that Amazon is engaged in the business of selling and is a “retailer” or “seller” under the Tax Act.*

The ALC correctly determined that Amazon is “engaged . . . in the business of selling tangible personal property at retail” and is the “retailer” or “seller” with respect to all sales on Amazon.com. S.C. Code Ann. § 12-36-910(A); S.C. Code Ann. § 12-36-70(1)(a). Amazon is the exclusive owner and operator of Amazon.com, through which customers obtain tangible personal property in exchange for payment to Amazon on the Website. Customers select one or more products, purchase those products, and pay for those products through the Website. Amazon collects the payments directly from the customers and issues receipts to those customers for the products they purchased. All order and shipping confirmations are sent by Amazon, and Amazon restricts the communications that Third-Party Merchants can have with Amazon customers. In the order confirmation email received by the customer, Amazon thanks the customer for “shopping with us,” tells them Amazon “hope[s] to see [them] again soon,” and electronically signs the email, “Amazon.com.” (**R. p. 947**) (Ex. 122). In some cases, Amazon ships the ordered product directly to the customer from its distribution centers. In other cases, after an order is placed, Amazon directs the Third-Party Merchant to ship the product, requires that the Third-Party Merchant does so within two days of the order, and can withhold payment to the Third-Party Merchant until Amazon is confident the order was properly fulfilled. All refunds for any returned items also must go

through Amazon, and such refunds are almost completely at the discretion of Amazon. Throughout the purchasing process, customers can, and most commonly do, interface only with Amazon.

Amazon actively controls all aspects of the Website, including the content on Amazon.com and the flow of funds from the purchasers of products. Although Third-Party Merchants in some instances provide product descriptions and images, in many instances they cannot alter the existing descriptions and, ultimately, Amazon controls the format of these descriptions for purposes of the Website. Additionally, Amazon, in its discretion, can modify or remove product descriptions or images. Amazon also controls product pricing by requiring Third-Party Merchants to list products at prices “at least as favorable to” Amazon customers “as the most favorable terms upon which a product is offered or sold” by the Third-Party Merchants elsewhere and through the various fees charged to Third-Party Merchants, including transaction-based fees. Amazon actively guides the selling process through its proprietary algorithm, which selects and prominently displays the product offers that Amazon has determined are the best offers for Amazon customers (*i.e.*, that have won the “Buy Box”). Amazon’s control of the Website, which is the retail store, confirms that it is the seller of the goods.

Amazon does not simply operate a free and open space. Third-Party Merchants cannot list products at any price they wish and in any reasonable manner. Third-Party Merchants cannot ship goods in whatever manner they desire. And Third-Party Merchants cannot collect payment directly from the purchaser. Rather, Amazon takes an active role in determining how, which, and at what prices products are sold on its Website, which Amazon readily states that it does in order to cultivate the buying experience and trust of *its* buyers and *its* customers, and then ultimately accepts the payment for these products from its customers. Accordingly, as the ALC correctly

determined, Amazon is “engaged . . . in the business of selling tangible personal property at retail.” § 12-36-910(A).

Rather than addressing the factual aspects of its business model, Amazon simply proclaims it is not engaged in the business of selling because it self-identifies as a service provider and allegedly does not receive payments from customers or receive “consideration” for products owned by Third-Party Merchants that are sold on the Website. Appellant’s Br. at 24-26. But Amazon plainly receives payments from customers on the Website because it owns and operates Amazon.com and that is where customers present their payment information—in essence, swipe their credit card—to buy the purchased products. Amazon does not dispute this fact, but confuses the issue by claiming in conclusory fashion that “the customer pays only the [Third-Party Merchant].”¹² Appellant’s Br. at 12 (“Though the payment process takes place on the Amazon.com website, the customer pays only the seller.”). Amazon then combines this factual mischaracterization with two equally flawed legal premises: (1) whoever transfers title must be the seller and (2) whoever receives consideration must be the seller. However, as recognized by the ALC, neither of those assumptions is supported by the plain language of the Tax Act. **(R. pp. 22-23)** (Final Order at 22-23).

At bottom, Amazon’s argument is based on its effort to artificially separate the parts of a sale, never mind that all sales and payments occur through the Website. Amazon’s argument ultimately fails because it ignores the statutory definition of a “retailer” or “seller” as “includ[ing] every person . . . selling or auctioning tangible personal property *whether owned by the person or*

¹² Contrary to Appellant’s arguments, the ALC did not erroneously attribute conduct of Amazon Payments to Amazon Services. The fact that Amazon Payments must be used as the payment processor under the BSA does not change the fact that customers directly pay Amazon Services on the Website. Moreover, Amazon’s own BSA provides that Amazon Services also can provide payment processing services in certain situations.

others” S.C. Code Ann. § 12-36-70(1)(a) (emphasis added). Amazon’s contention that it cannot be the seller because it does not receive “consideration” for products also relies entirely on the fact that Amazon does not own or hold title to the products.¹³ In other words, under Amazon’s theory, it does not receive “consideration” in exchange for the goods because it is not the owner of the goods. But section 12-36-70(1)(a) expressly states that the “seller” or “retailer” need not be the owner of the goods.

Moreover, section 12-36-100 defines a “sale” or “purchase” as “any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration,” and then includes as one of several examples, “a transfer of title or possession, or both.” Other examples in the statute include: “a transaction in which possession of tangible personal property is transferred but the seller retains title as security for payment”; “a rental, lease, or other form of agreement”; and “a license to use or consume.” *Id.* All of these examples expand, rather than limit, the meaning of what might otherwise be considered a “transfer” or “exchange” of tangible personal property for a consideration, thereby demonstrating the General Assembly’s intent to define broadly a “sale” or “purchase,” and consequently, a “seller” or “retailer.”

Regardless, there is no dispute in this case whether a “sale” or “purchase,” or even more specifically a transfer of title to, and possession of, tangible personal property for consideration, occurs when a customer obtains goods by submitting payment on Amazon.com. Indeed, from the customers’ perspective—*i.e.*, the “purchase” side of the transaction—they are receiving title and possession in exchange for consideration. And customers provide that consideration for the right

¹³ Nevertheless, as found by the ALC, Amazon does receive consideration for products sold on the Website. (**R. pp. 31-32**) (Final Order at 31-32) In fact, “most of the fees are charged on a ‘transaction-by-transaction’ basis, and the ‘Referral Fee’ is imposed as a percentage of the gross price paid by the customer for the product.” (**R. p. 31**) (Final Order at 31).

to receive title and possession to *Amazon*. As the ALC correctly found, customers likely have no knowledge of the behind-the-scenes exchange of money between Amazon and the Third-Party Merchants. **(R. p. 31)** (Final Order at 31). Nor does that information matter to a customer’s purchase of goods. Customers are not paying Amazon for any services. Rather, they are paying Amazon for the right to receive tangible personal property, which is reflected on the invoices and order confirmations that Amazon provides to customers. **(Id.)**.

ii. *Application of the Supreme Court’s decision in Travelscape confirms Amazon is engaged in the business of selling.*

The *Travelscape* decision confirms the ALC’s conclusion that Amazon is in the business of selling tangible personal property at retail. In *Travelscape*, the Supreme Court held that an online travel company was required to collect and remit sales tax on the gross proceeds it received from providing hotel reservations to third-party hotels located in South Carolina. 391 S.C. at 110, 705 S.E.2d at 39. The facts and analysis of *Travelscape* are very similar to this case. There, the taxpayer, which did not own or operate any hotels, offered hotel reservations at third-party hotels through its website Expedia.com. A customer could book a hotel room through Expedia.com by entering a request and, after the customer submitted payment directly to the taxpayer’s website via credit card, the taxpayer issued the customer a confirmation of the room reservation, which gave the customer the right to occupy the room at the hotel selected for a particular time.

Travelscape argued that it was not responsible for paying the accommodations tax in South Carolina because it did not physically furnish hotel rooms to customers, and that the word “furnishing” as used in the Tax Act contemplated the physical provision of hotel rooms. *Id.* at 99-101, 33-35. The Supreme Court resolved this question as follows:

Travelscape is correct in pointing out that “furnish” as used in subsection (A) invokes the connotation of physically providing sleeping accommodations to customers. Indeed, the American Heritage Dictionary defines “furnish” as “to equip

with what is needed” and to “supply” or “give.” *Am. Heritage Dictionary* 540 (2d College Ed. 1982). Relying on *Powerex*, *Travelscape* argues the term “furnish” as used in subsection (E) should be read consonant with its use in subsection (A). We agree. As used in subsection (E), “furnish” does mean to physically provide sleeping accommodations. However, *Travelscape*’s argument ignores the antecedent language in (E) that it applies to all persons “engaged ... in the business of” furnishing accommodations. “*Business*” includes “all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.” S.C. Code Ann. § 12-36-20 (2000). Accordingly, we find the context of “furnish” as it appears in subsection (E) demonstrates that it encompasses the activities of entities such as *Travelscape* who, *whether directly or indirectly*, provide hotel reservations to transients for consideration. Contrary to the dissent’s view, we do not read the term “furnish” differently in subsection (E) than we do in (A). Instead, we interpret subsection (E) in such a manner as to give effect to all the language contained therein—particularly that the entity be “engaged ... in the business of” furnishing accommodations—rather than focusing on the term “furnish” in isolation. *While Travelscape does not physically provide accommodations, it is in the business of doing so.*

Id. at 101, 34 (emphases added). This same reasoning applies here. While Amazon may not own the third-party products sold on the Website and may not always physically ship the products to the customers, it is without question engaged in the “business” of selling those products.

Amazon attempts to distinguish *Travelscape* from this case and the transactions on Amazon.com. Specifically, Amazon appears to contend that the fact that *Travelscape* negotiated with the hotels the rates that would be offered on its website and then added its own markup for service fees is a material distinction between that case and this one. Appellant’s Br. at 27-28. But other than just saying so, Amazon does not explain how this is a material distinction. In fact, the ALC specifically addressed the striking similarities between the two business models:

Both provide an online platform where they facilitate the sale of other persons’ products. Both are the sole entity that interacts with the customer at the point of sale, processes the customer’s payment, accepts the customer’s consideration, takes a fee, and then remits the proceeds from the sale to the owner.

(R. p. 25) (Final Order at 25). Regardless, no language in *Travelscape* suggests the ruling was based on the terms of the specific contractual arrangement between *Travelscape* and the hotels.

And again, the behind-the-scenes exchange of money does not change the fact that, in *Travelscape* and here, the customer pays only the entity with which it interacts (Travelscape or Amazon) for the right to receive the product—a hotel room or tangible personal property.

Similarly, Amazon attempts to distinguish this case from *Travelscape* by arguing that when a customer paid for a hotel room on Expedia.com, the money that was received “belonged” to Travelscape, whereas in this case when a customer pays for a product on Amazon.com, the money received “belong[s]” to the Third-Party Merchant. Appellant’s Br. at 28. But, again, other than just declaring this to be the case, Amazon fails to explain how the payments received by Travelscape “belonged” to it, but the customer payments received by Amazon “belong” to the Third-Party Merchants. In both cases, the entity receiving payment directly from the customer was contractually obligated to pay the amount received—less its fees—to the owner of the product. And in both cases the price paid by the customer was the result of the combination of the amount set by the owner of the product and the fees charged by the entity offering the product for sale and collecting payment through its website. To claim there is a distinction between the two that renders the Supreme Court’s decision in *Travelscape* inapposite (or in favor of Amazon’s position) is, in the recent language of the U.S. Supreme Court in a similar context, artificial “line-drawing [that] does not make a lot of sense.” *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1522 (2019). No amount of conclusory wordplay or reliance on Amazon’s adhesion contract with Third-Party Merchants, which is inconsistent with the economic reality of the relationships between customers, Amazon, and Third-Party Merchants, can change the fact that Amazon is in the “business of selling” and is the “retailer” or “seller” for purposes of the Tax Act with respect to the taxable transactions at issue—*i.e.*, the purchase of goods by customers on Amazon.com.

Further, the immaterial distinction that Amazon contends distinguishes *Travelscape* does not even support its position. In *Travelscape*, customers were charged “service fees” by Travelscape in addition to the rate for the hotel room, which were shown on the invoices or receipts received by the customers. But here, a customer of Amazon.com only pays Amazon for the price of the product—it does not pay Amazon any “service” fees. Indeed, the invoices provided by Amazon only identify the product purchased, shipping costs, and applicable taxes (if any). (**R. pp. 947-92**) (Ex. 122). As the ALC found, this “creates an even greater inference” that Amazon is engaged in the business of selling Third-Party Merchant products and is not simply a service provider. (**R. p. 28**) (Final Order at 28). Simply put, *Travelscape* requires affirming the ALC’s decision.

iii. *The ALC did not apply an “unprecedented expansion” of the Tax Act.*

Amazon contends that the standard employed by the ALC to determine if Amazon was “in the business of selling” depends on an “unprecedented expansion of the statute” that would encompass brick-and-mortar mall operators, payment processors, banks, and advertisers. Appellant’s Br. at 30. However, the standard criticized by Amazon that was employed by the ALC in this case and by the Supreme Court in *Travelscape* is based directly on the plain language of the statute, which defines “business” as “all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.” S.C. Code Ann. § 12-36-20; (**R. pp. 23-25**) (Final Order at 23-25); *Travelscape*, 391 S.C. at 101, 705 S.E.2d at 34 (finding that the statutory language “engaged in the business of furnishing accommodations . . . encompasses the activities of entities such as Travelscape who, whether directly or indirectly, provide hotel reservations to transients for consideration.”). The ALC correctly found that “[b]ased on the facts of this case, the object of Amazon Services’ business activities is to achieve a profit or benefit, by either direct or indirect

means, from the sale of Merchant property on its [Website].” (**R. p. 39**) (Final Order at 39). The ALC also did not engage in “policymaking in the form of statutory interpretation,” Appellant’s Br. at 30, by applying the undisputed facts about the Website and transactions at issue—rather than Amazon’s generalizations and assumptions—to the plain language of the law.

Amazon criticizes the ALC’s conclusions by declaring that “no court or tax regulator had said that a marketplace . . . was ‘in the business of selling’ property it did not own.” Appellant’s Br. 30. This is a hollow argument, as Amazon does not cite to a single order of a “court or tax regulator” that previously considered whether a “marketplace,”¹⁴ let alone a company that operates a business model like Amazon’s, was in the “business of selling” under *South Carolina* law, which specifically defines a “retailer” or “seller” as someone who sells property owned by others. Moreover, the Tax Act expressly contemplates the sale of property owned by others as a transaction subject to sales and use tax.

Further, while the Tax Act’s application is broad, it is still applied based on the specific facts of each case. However, Amazon asks this Court to reverse the ALC based mostly on a hypothetical mall analogy and its self-characterization as a “service provider” operating a “marketplace.” But this avoids the ALC’s specific factual findings that Amazon.com operates similarly to a conventional retail store and nothing like a traditional mall. Indeed, Amazon presented no evidence below of any mall that operates in the same manner as Amazon. The Department knows of no mall that (1) provides a single “shopping cart” for customers to add products from multiple merchants; (2) has a single “checkout” for all products sold at the mall; (3)

¹⁴ Amazon’s self-characterization as a “marketplace” or “service provider” also is not controlling. See, e.g., *Duke Energy Corp. v. S.C. Dep’t of Revenue*, 410 S.C. 415, 421, 764 S.E.2d 712, 715-16 (Ct. App. 2014), *aff’d as modified on other grounds*, 415 S.C. 351, 782 S.E.2d 590 (2016) (Duke Energy’s characterization of itself as a service provider was not determinative of its treatment as a manufacturer for purposes of the state tax laws).

accepts and collects all customer payments; (4) prohibits merchants from accepting money directly from customers; (5) receives a percentage of the purchase price of each product sold by all merchants, which percentage is based on the profitability of that particular product; (6) restricts merchants' communications with customers; (7) requires that all refunds of any purchased products be processed through the mall rather than by the individual merchants; and (8) offers its own guarantee of the products sold at the mall. If there is such a mall, that mall also should have been collecting and remitting sales and use taxes during the period at issue.

Amazon not only failed to present evidence to the ALC showing that it operates like a mall, but also fails now to adequately address or challenge the ALC's findings that Amazon operates similarly to a traditional retail store, and that the Third-Party Merchants operate like traditional manufacturers or suppliers.¹⁵ (**R. pp. 35, 39, 42, 44, 46**) (Final Order at 35, 39, 42, 44, 46). Indeed, Amazon specifically ignores these findings when it lists the "selling activities" it claims it does not engage in to show it is not engaged in the "business of selling." Appellant's Br. at 29-30 (asserting that it does not set the price of the goods sold, exercise control over inventory, or transfer

¹⁵ Amazon also fails to adequately address the ALC's observation that "Amazon's attempt to segregate all that it does into discrete 'service' buckets creates an unreasonable interpretation of the [Tax Act]" because its "self-characterization as a service provider could be employed by any brick-and-mortar retail store or consignment shop to evade tax responsibility as a seller." (**R. p. 47**) (Final Order at 47). As aptly described by the ALC:

[Any brick-and-mortar retail store or consignment shop] could claim that instead of being engaged in the business of selling tangible personal property, they just provide an array of discrete, non-taxable services, charging the same types of "service" fees as Amazon Services even though, in reality, they are selling products. Separating the actions of a retail seller such as Target into discrete, non-taxable services would be absurd, and so it is here.

(*Id.*).

ownership).¹⁶ However, the ALC correctly found that inventory management and price-setting are typical functions of the product supplier and do not conclusively determine the entity that is the “retailer” or “seller.” (**R. pp. 40, 44**) (Final Order at 40, 44 & n.40). As discussed above, under the Tax Act, ownership of the goods also is not a prerequisite to be a “seller.”

Likewise, Amazon’s attacks on the ALC’s comparison of Amazon’s business model to that of a traditional consignee are baseless. For one, in contending that it does not operate like a consignee, Amazon relies almost entirely on the description by its company witness, Mr. Poad, of what he believes constitutes a consignment relationship.¹⁷ Appellant’s Br. at 35-36. But Mr. Poad is a fact witness. His opinion on legal issues is irrelevant and carries no weight. In any event, the ALC specifically found his testimony to be “unpersuasive.” (**R. p. 40**) (Final Order at 40).

Particularly, the distinctions raised by Mr. Poad and in Amazon’s brief between Amazon’s business model and a traditional consignee, to the extent they are even distinctions, are immaterial. (**Id.**). And, again, Amazon focuses only on a few cherry-picked “differences” related to inventory management and price-setting, but ignores all of the other similarities. The similarities between Amazon’s business model and a traditional consignment shop far outweigh any possible differences. Amazon offers for sale products owned by others; Amazon accepts payment directly from customers for those products; Amazon provides a receipt to the customer for those products;

¹⁶ Amazon also asserts that it “does not receive payment from buyers for the products.” Appellant’s Br. at 30. Once again, this assertion is erroneous and misleading because customers pay Amazon directly on the Website in exchange for the purchased products.

¹⁷ Amazon also relies 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. Appellant’s Br. at 36-37. But these decisions construing other statutes and other facts have no bearing on whether Amazon, based on the substantial evidence in the record in this case, is in the “business of selling” and is a “retailer” or “seller” for purposes of the Tax Act. Indeed, the analyses of whether someone can be held responsible for an allegedly defective product or copyright infringement under the laws of different jurisdictions are entirely different inquiries from whether that person is required to collect and remit sales and use tax under South Carolina law.

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.¹⁸

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. This is especially so considering that Amazon—not the Third-Party Merchants—exclusively controls the point of sale and accepts payment directly from the customers, and thus, is the only party to the transaction in a position to collect the sales and use tax.

iv. *ALC correctly focused on the “Point of Sale.”*

The ALC recognized that several principles can be distilled from *Travelscape* to guide the analysis of whether someone is engaged “in the business of selling tangible personal property at retail.” (**R. p. 25**) (Final Order at 25). Two of these principles are that “the person accepting money in exchange for a product is responsible for sales tax” and “the person who the customer interacts with at the point of sale is presumed to be the seller.” (**Id.**). Contrary to Amazon’s contention, this “point of sale” focus is not a new theory of sales and use taxation and is not “completely foreign to South Carolina sales-tax law.” Appellant’s Br. at 32-33. Of course, a sale has to occur at a point in the purchasing process, which necessarily is the point of sale. And a focus on the point of sale is not, as Amazon coarsely asserts, a new theory to pull Amazon under the ambit of the Tax Act.

¹⁸ The ALC also specifically found that, like a consignment relationship, Amazon acts as the Third-Party Merchants’ agent in the sale of products, notwithstanding the BSA disclaiming any such agency. (**R. p. 41**) (Final Order at 41). Amazon has not appealed this finding by the ALC, which further demonstrates that Amazon is in the “business of selling.”

See *Travelscape*, 391 S.C. at 102, 705 S.E.2d at 35 (“[T]he legislature intended to levy the tax not merely on those physically providing sleeping accommodations, but *on those entities, who were accepting money in exchange for supplying hotel rooms.*” (emphasis added)); Appellant’s Br. at 32 (“The decisive fact [in *Travelscape*] was that the website operator ‘accept[ed] money in exchange for supplying hotel rooms.’”).

Thus, a focus on the point of sale is logical and inherent in the pertinent provisions of the Tax Act. For instance, section 12-36-1350 requires the seller to collect the use tax from the purchaser “at the time of making the sales” and the seller must “give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected.”¹⁹ This demonstrates that the General Assembly intended that the “seller” would be the party directly interacting with and accepting payment from the customer, regardless of the entity having legal ownership of the goods. That cannot happen if the Third-Party Merchant is deemed the seller because, for all purchase transactions completed through the Website, Amazon is the only party that may accept payment, and is the only party that provides at the time of the sale a receipt for items purchased. Indeed,

¹⁹ The Sales and Use Tax Regulations also provide in pertinent part:

“When, however, warehousemen buy and sell property as a regular course of business of such sales, if not otherwise exempted, are subject to the sales tax, *including sales of goods held on consignment and including transactions in which the warehouseman acts as a broker selling goods not actually owned by him or in his possession at the time he accepts the order.*”

S.C. Code Regs. 117-319 (emphasis added); see *Home Med. Sys., Inc. v. S.C. Dep’t of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (“Regulations authorized by the Legislature have the force of law.”) (quoting *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995)). This regulation confirms not only the interpretation that neither ownership nor possession is necessary for someone to be a “retailer” or “seller” responsible for collecting and remitting sales tax, but also the that the focus of any inquiry in the sales and use tax context should be on the time and place at which the sale occurs. See S.C Code Regs. 117-319 (“ . . . at the time he accepts the order.”).

Amazon exclusively controls the point of sale and the functionality by which customers' payments are accepted and processed, and expressly prohibits Third-Party Merchants from sending order confirmations to customers. The purpose of the Tax Act is not just to impose a tax, but to ensure the collection and remittance of the tax. Thus, a focus on the "point of sale"—*i.e.*, the point where payment 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.

In addition to challenging the "point of sale" inquiry, Amazon also continues its absurd contention that Amazon does not "accept money" from the customers. Amazon selectively quotes the ALC as stating, "Amazon Services clearly does not accept the money . . . because that function is carried out by Amazon Payments." Appellant's Br. at 34. But what the ALC actually said was "Amazon Services clearly does not accept the money *as an 'intermediary' payment processor* because that function is carried out by Amazon Payments," and this was stated in addressing Amazon's argument that it only acted as a "conduit or intermediary for the consideration to pass through it from the customer to the Merchant." (**R. p. 30**) (Final Order at 30 (emphasis added)). In other words, the ALC was rejecting Amazon's argument that it only provided payment processing services; it was not addressing the undisputed fact that customers submit payment directly to the Appellant, Amazon Services, on the Website in exchange for the purchased products.

Amazon also attempts to downplay the myriad ways in which it engages in the business of making retail sales as simply operating a "marketplace." Appellant's Br. at 33-34. But Amazon.com is not a free and open space for Third-Party Merchants to list their products at whatever price they wish and accept payment using whatever method they prefer. Rather, Amazon has specifically imposed a set of rules and requirements to attract and benefit *Amazon's* customers. These requirements provide no benefit to Third-Party Merchants (*e.g.*, pricing and customer

communication restrictions). Regardless, Amazon’s level of control over the sales on the Website, including the use of its proprietary algorithm to select the winner of the “Buy Box,” evidences Amazon’s direct participation in the sale of goods on Amazon.com. Amazon’s control over the Website, combined with Amazon’s direct participation and control over the transactions occurring on the Website (as discussed above), demonstrate that Amazon is in the “business of selling” and is the “retailer” or “seller” with respect to sales on Amazon.com.

C. The Sales and Use Tax Act is not ambiguous or reasonably susceptible to an interpretation in favor of Amazon.

Notwithstanding the earlier acknowledgment in its brief that the Tax Act’s “language is plain and unambiguous,” Appellant’s Br. at 24, Amazon contends that the statute must be construed in its favor because the Tax Act “is ambiguous or is reasonably susceptible of an interpretation that will exclude [Amazon],” *id.* at 2, 37-39. But Amazon provides no real explanation as to what exactly about the Tax Act is ambiguous.²⁰ And in fact, the Tax Act is neither ambiguous nor *reasonably* susceptible to an interpretation that would exclude Amazon.

To begin, this Court very recently held that the Tax Act is “unambiguous”—a holding Amazon never addresses in its brief. See *Rent-A-Center East, Inc. v. S.C. Dep’t of Revenue*, 425 S.C. 582, 589, 824 S.E.2d 217, 221 (Ct. App. 2019). Additionally, in *Travelscape*, the Supreme

²⁰ Amazon’s claim that the Department had the “heavy burden to prove that Amazon’s interpretation of the statute was not just wrong but unreasonable,” Appellant’s Br. at 38, has absolutely no basis in the law. Because Amazon was challenging the Department’s Determination before the ALC, it had the burden of proof to show by a preponderance of the evidence that the Department’s application of the law to the facts of the case was incorrect. *Leventis v. S.C. Dep’t of Health & Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that as a general rule the complaining party bears the burden of proof). In other words, it was Amazon’s burden to prove that, based on the evidence presented, and considering the plain language and purposes of the Tax Act, its interpretation that it was *not* in the “business of selling” or a “retailer” or “seller” was correct. In this appeal, Amazon again bears the burden to show that it was a legal error for the ALC to hold based on the substantial evidence in the record that Amazon was in the “business of selling” and a “retailer” or “seller” under the Tax Act.

Court did not find any ambiguity in the almost identical provisions of the accommodations tax statute, nor did it strictly construe the statute in favor of the taxpayer when it applied the almost exact set of facts as this case to that statute. See **(R. p. 45)** (Final Order at 45 (“Notably, the Supreme Court engaged in statutory construction in its analysis in *Travelscape*—where it obviously was not clear at first glance whether the tax was imposed on *Travelscape*—yet the Supreme Court did not find the statutory scheme to be ambiguous or to require substantial doubt to be resolved in *Travelscape*’s favor.”) (citing *Travelscape*, 391 S.C. 89, 705 S.E.2d 28)).

At bottom, Amazon’s 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). But that is not an “ambiguity” or “strict construction” argument; it is just a traditional application-of-the-law-to-facts argument. And the fact that there is a disagreement about the application of a tax statute 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. *Bank of Am. NT & SA v. 203 N. Lasalle Street P’ship*, 526 U.S. 434, 461 (1999) (Thomas, J. concurring); see **(R. p. 45)** (Final 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.”)). Here, the ALC correctly concluded Amazon is wrong and its interpretation is unreasonable considering the plain language and purposes of the Tax Act.

As recognized by the ALC, the “rule of strict construction of penal laws and tax statutes is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose” *Crescent Mfg. Co. v. Tax Comm’n*, 129 S.C. 480, 492, 124 S.E. 761, 765

(1924) (citations omitted); (**R. p. 45**) (Final Order at 45). From the beginning, S.C. Code Ann. § 12-36-910(A) evidences the General Assembly’s intention that the Tax Act should be applied broadly, as it imposes a sales tax “upon every person engaged . . . in the *business* of selling tangible personal property.” (emphasis added). “Business” includes “*all activities*, with the object of gain, profit, benefit, or advantage, *either direct or indirect*.” S.C. Code Ann. § 12-36-20 (emphasis added)). Likewise, a “sale” or “purchase” is broadly defined to mean “*any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration*” and provides examples of such transfers that might not otherwise be considered a “sale” or “purchase.” S.C. Code Ann. § 12-36-100 (emphasis added). Moreover, and important here, the General Assembly defined in S.C. Code Ann. § 12-36-70(1)(a) a “retailer” or “seller” as every person “selling or auctioning tangible personal property *whether owned by the person or others*.” (emphasis added). And, finally, the use tax must be collected by the seller “*at the time of making the sales*” and the seller must then “give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected.” S.C. Code Ann. § 12-36-1350(A) (emphasis added). Based on substantial evidence in the record demonstrating Amazon’s business model and a “reasonable, sensible construction, having in view effectuation of the legislation purpose” of these statutory provisions, there can be no doubt that Amazon, rather than the Third-Party Merchants, is responsible for the sales and use tax owed for transactions on Amazon.com.

Through the relevant statutory provisions, the General Assembly expressly recognized that the obligation to collect and remit transaction-based taxes under the Tax Act applies to more than just the owners of the goods sold. § 12-36-70(1)(a). The General Assembly also evidenced its intention that the “seller” would be the person who interacts with the customer. § 12-36-1350(A). The relevant statutory provisions also require a focus on the transaction from the customer’s

perspective. § 12-36-100; *see Rent-A-Center*, 425 S.C. at 590, 824 S.E.2d. at 221 (“[T]he true object test focuses on factual questions; namely, whether *the customer’s purpose* for entering the transaction was to procure a good or a service.” (emphasis added)) (quoting *Boggero v. S.C. Dep’t of Revenue*, 414 S.C. 277, 285, 777 S.E.2d 842, 846 (Ct. App. 2015)); *Edisto Fleets, Inc. v. S.C. Tax Comm’n*, 182 S.E.2d 713, 715, 256 S.C. 350, 355 (1971) (“The terms ‘sale’ and ‘purchase’ are inextricably related and bound together and must be so construed”). Accordingly, based on a plain reading of the Tax Act consistent with its purpose of imposing and collecting sales and use taxes, Amazon’s operation of Amazon.com through which sales of goods owned by others are completed, and by which Amazon—and no one else—receives payment directly from, and gives a receipt directly to, customers makes it a “seller” or “retailer” engaged “in the business of selling” that is statutorily required to collect and remit sales and use tax for retail sales on the Website.²¹

- i. *The Department’s statements in the context of the proposed “marketplace facilitator” legislation are irrelevant to the interpretation of the statutory provisions in existence for the period at issue.*

Unable to identify any credible ambiguity in the provisions of the Tax Act, 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 Tax Act is ambiguous. This contention was flatly rejected by the ALC. (**R. pp. 17-18**) (Final Order at 17-18). Simply put, statutory interpretation is a question of law reserved for the courts that is

²¹ If a brick-and-mortar store followed Amazon’s business model, there would be no question that it would be responsible for collecting and remitting sales and use tax. The mere fact that the applicable law does not expressly address sales on the internet does not mean that internet sales are not sales, that those entities that direct them are not retailers, or that they are not engaged in the business of selling tangible personal property at retail. *See (R. pp. 18-19)* (Final Order at 18-19 (*citing, inter alia, Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (“While every statute’s *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.”) emphasis in original))). Indeed, the Supreme Court’s ruling in *Travelscape* confirmed that the broad provisions of the Tax Act apply to internet sales.

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.”); *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) (“An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.”). Accordingly, statements by Department officials are irrelevant to determining the meaning of the Tax Act.²² *Id.*

The Department’s position also has been the same all along: Amazon is a “seller” or “retailer” and is engaged in the business of selling tangible personal property pursuant to the Tax Act based on its specific business model. **(R. pp. 999-1014)** (Ex. 171, Dep’t 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 proposed “marketplace facilitator” legislation, 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. 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.” And many of these entities have business models that are very different than Amazon’s. The Department’s efforts to assist the General Assembly in clarifying the law to address new technological advancements and to ensure all so-called “marketplace facilitators” could not exempt themselves from the requirements of the

²² By not identifying any ambiguity in the statutory scheme that creates any substantial doubt as to whether Amazon is a “seller” or “retailer,” Amazon also is attempting without legal support to turn the traditional ambiguity analysis on its head by looking first to extraneous materials to attempt to prove the existence of an ambiguity in the statute, rather than the other way around.

Tax Act do not amount to any admission with respect to the application of the then-existing provisions of the Tax Act to Amazon's specific business.

ii. *Amazon's arguments about its sales tax collection practices prior to 2016 are inapposite.*

Amazon also erroneously asserts that it was reasonable for Amazon to infer that the Department's position was to treat Third-Party Merchants as the party required to collect and remit sales tax allegedly because, prior to 2016, Amazon made available to certain Third-Party Merchants the option of having Amazon collect sales and use tax on their behalf, and the Department never issued any guidance suggesting this process was wrong. Appellant's Br. at 40. First, this argument is improper and unpreserved as it was not raised to and ruled upon by the ALC, and Amazon did not present any evidence that it collected sales tax on behalf of Third-Party Merchants that was remitted to the Department prior to 2016. *Murphy v. Hagan*, 275 S.C. 334, 339, 271 S.E.2d 311, 313 (1980) (holding an appellate court will not hear issues not raised or preserved in a lower court proceeding). This also is a disingenuous argument by Amazon, as it is fully aware that, prior to 2016, the Moratorium exempted Amazon from collecting and remitting sales tax for all sales on the Website. **(R. p. 750)** (Tr. 609). Additionally, prior to the U.S. Supreme Court's 2018 decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), the Department was not permitted to collect sales and use tax from entities that did not have a physical presence in South Carolina. Amazon did not have a physical presence in South Carolina until it built its distribution facility in Lexington County in 2011. Accordingly, there was no "practice" of the Department prior to 2016 that would have suggested Amazon was not the appropriate party to collect and remit sales tax. Indeed, contrary to Amazon's argument, the very existence of the Moratorium, as well as the plain language of the Tax Act and the Supreme Court's 2011 decision in *Travelscape* regarding online retailers, provided clear direction to Amazon that it was

responsible to collect and remit sales and use tax for all customer purchases on Amazon.com when the Moratorium expired.

iii. *The enacted “Marketplace Facilitator” legislation does not support Amazon’s position.*

The enacted “Marketplace Facilitator” legislation also does not demonstrate that the statutory provisions at issue in this case are ambiguous or must be construed in favor of Amazon. *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)). In fact, the “Marketplace Facilitator” legislation contains 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.²³ It is absurd for Amazon to argue that the General Assembly intended to allow Amazon to assert in this case that there is a “presumption” that the General Assembly intended to change the law, yet that is what it does.

In any event, statutory amendments “may also be interpreted as clarifying original legislative intent.” *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008). Here, even if the Court looks beyond the General Assembly’s statement in the legislation,

²³ This provision also precludes Amazon’s effort to rely on the Department Director’s discussion of the proposed “Marketplace Facilitator” legislation before the General Assembly. That is, the Director’s statements to the General Assembly about the legislation also are barred from consideration.

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 Tax Act *before* the enactment of the “Marketplace Facilitator” legislation. 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 Tax 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.

- iv. *The treatment of “remote sellers” for purposes of determining “nexus” after the period at issue is irrelevant.*

Amazon incorrectly contends the Department has somehow admitted that Amazon’s interpretation of the Tax Act is reasonable by issuing guidance after the U.S. Supreme Court’s *Wayfair* decision in 2018 regarding the determination of whether a person or entity has “nexus” with South Carolina. Appellant’s Br. at 44-45. As an initial matter, Amazon failed to preserve this argument for appeal. “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to *and* ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (emphasis added); *Murphy*, 275 S.C. at 339, 271 S.E.2d at 313 (same). Here, Amazon’s contention that the Department’s issuance of guidance in 2018 related to the determination of whether a person or entity has “nexus” with the state demonstrates that Amazon’s position is reasonable was never addressed by the ALC in its Final Order. Amazon never sought reconsideration of the ALC’s Final Order on this issue or any other issue prior to filing its appeal, so this issue is not preserved. *Id.*

Nevertheless, as acknowledged by Amazon, the very Department guidance upon which Amazon relies (Revenue Ruling 18-14) expressly states that online “marketplaces”—the category within which Amazon falls—are the “sellers” or “retailers” under the Tax Act required to collect and remit sales and use tax, not the Third-Party Merchants that may list their products on the marketplaces. Far from an admission against interest, this is a confirmation that the Department’s position about Amazon has not changed. Regardless, the determination of whether a person or entity has “nexus” with a state is separate and apart from the determination of whether that person or entity has an obligation to collect and 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. Prior to the 2018 *Wayfair* decision, a person or entity’s physical presence in the state was required to establish this “nexus.” However, in *Wayfair*, the U.S. Supreme Court held that physical presence was not required and that nexus can be established through both “economic and virtual contacts” with a state. 138 S. Ct. at 2099. In light of *Wayfair*, many states, including South Carolina, have 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 “seller” or “retailer” for purposes of the Tax 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 “seller” or “retailer” for purposes of collecting and remitting sales and use taxes. That is a different inquiry altogether.

In short, Revenue Ruling 18-14 does not declare that Third-Party Merchants are the retailers with respect to transactions on the Website for purposes of the Tax Act as Amazon

suggests, and it certainly does not absolve Amazon of its liability as the retailer for these transactions. It simply concerns another issue entirely.

- v. *Amazon's reliance on decisions, or the absence thereof, from other states regarding different laws is unhelpful.*

Amazon claims that a lack of prior guidance in this state, as well as the fact that no taxing agency or court in any other state has interpreted their own state's tax statutes yet to treat Amazon as the entity required to collect and remit sales and use tax, demonstrates the reasonableness of its interpretation of the Tax Act. Appellant's Br. at 46. But, the simple lack of published guidance or court rulings about a specific application of facts to a statute does not mean that the statute does not apply or that it is ambiguous.

Regardless, while 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 Tax 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. 737-39; 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 above, 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 collect and 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 collect and remit sales and use tax for the sales of goods on Amazon.com.²⁴

Likewise, Amazon's reliance on the absence of any other state's taxing authority requiring Amazon to collect and remit sales and use taxes is unhelpful. What another state has done or not done with respect to its own tax laws has no bearing on the interpretation of the *South Carolina Tax Act*. Indeed, Amazon does not identify a single state with statutory provisions similar to the Tax Act. And despite titling this section of its brief "The Decisions of Other Jurisdictions Confirm the Reasonableness of Amazon Services Interpretation," Amazon does not cite to a single decision from another jurisdiction. The absence of action by other states with respect to their own tax laws is therefore irrelevant to the interpretation of the Tax Act and does not support Amazon's claim that its interpretation is reasonable.²⁵

2. Application of the Tax Act to Amazon's business does not violate the U.S. Constitution or the South Carolina Constitution.

A. Amazon's due process rights have not been violated.

Amazon argues that applying the Tax Act to Website sales violates both federal and South Carolina constitutional guarantees of due process. The crux of Amazon's argument is that the Department's assessment of sales and use tax for Amazon's sales from the first quarter of 2016

²⁴ Moreover, if Amazon believed that it could not reasonably determine whether it was subject to the Tax Act's requirements, it could have requested and obtained an advisory opinion from the Department's Policy Division. The Department's website and Revenue Procedure #09-3 contain readily accessible information detailing the procedure for obtaining such a written determination. There is no evidence that Amazon made such a request, presumably because it preferred not to know the Department's anticipated answer. Amazon is a sophisticated taxpayer, and it cannot now justify its failure to comply with South Carolina law by claiming there is a dearth of published guidance when Amazon had the ability to request such guidance—and chose not to.

²⁵ To be clear, Amazon's subjective belief as to what it allegedly "reasonably expected" would be the treatment of sales on the Website under the Tax Act also is completely irrelevant. Appellant's Br. at 46.

“effectively seeks to subject Amazon Services to the 2019 amendments,” which “violates the constitutional requirement of fair notice.” Appellant’s Br. at 47. In support, Amazon cites *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), in which the U.S. Supreme Court rejected the FCC’s attempt to retroactively apply a change in policy to two TV stations for airing content that previously would have been permissible. The Court held that the FCC’s actions violated the “void for vagueness” doctrine, which requires “first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *Id.* at 253. The Court further explained that “a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.” *Id.*

Here, there is no doubt about the regulatory standard to which Amazon is being held—it is simply the plain language of the Tax Act as it existed in the first quarter of 2016. The Department’s tax assessment against Amazon did not represent a reversal in policy, or a change in the regulatory framework governing online retailers, but rather an enforcement of the clear words of the statute, which require that anyone “engaged . . . in the business of selling tangible personal property at retail” must pay sales tax to the state. S.C. Code Ann. § 12-36-910(A). Certainly, Amazon disagrees that its online sales activities meet the standard set out in the Tax Act, but that does not mean that it is “unclear as to what fact must be proved.” *Fox Television Stations*, 567 U.S. at 253. 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.

Moreover, other facts demonstrate that Amazon was on notice in the first quarter of 2016 of its obligation to collect and remit sales and use tax for all of the sales taking place on its Website. To begin, Amazon lobbied for the passage of the 2011 Distribution Facility Sales Tax Exemption in connection with placing a large distribution center in Lexington County so that it could be exempt from collecting and remitting sales tax to South Carolina for a period of time. Thus, Amazon had carefully examined, and had devoted significant resources to mitigating, its tax obligations under South Carolina law prior to the first quarter of 2016, when the Moratorium ended. Also during the summer of 2011, the South Carolina Supreme Court issued the *Travelscape* decision, which directly addresses the tax obligations under South Carolina law of those who sell on the internet. So the idea that Amazon was taken by surprise by its obligation to collect and remit sales and use tax in South Carolina for its online retail sales is spurious.

Amazon's argument that the Department, by its tax assessment issued in December 2016, effectively seeks to have statutory amendments that were passed in 2019 applied to Amazon in this case, is a red herring. As the ALC observed in its order, at no point during these proceedings has the Department argued that the 2019 amendments should apply to make Amazon liable for sales and use tax in the first quarter of 2016. See **(R. p. 49)** (Final Order at 49). Rather, the Department's position has consistently been that the plain language of the Tax Act as it existed in 2016 applies to the retail sales taking place on Amazon's Website, and makes Amazon liable for sales and use tax for those transactions. At no time has the Department attempted to impose a new or different policy, rule, or regulation on Amazon, making this case plainly distinguishable from *Fox Television Stations*. There can be no question that Amazon was on notice of the provisions of

the Tax Act, and South Carolina cases interpreting the Tax Act, in 2016, and its position that its due process rights have been violated in this case is without merit.²⁶

B. Amazon's equal protection rights have not been violated.

Amazon also wrongly argues that the application of the Tax Act to its retail sales violates South Carolina and federal constitutional equal protection principles. “In order to establish an equal protection violation, a party must show that similarly situated persons received disparate treatment.” *TNS Mills*, 331 S.C. at 626, 503 S.E.2d at 479. “Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). “To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose.” *Id.* Further, “[a] violation is established only if the plaintiff can prove that the state intended to discriminate.” *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).

As the ALC observed, Amazon's threadbare equal protection argument suffers from several critical errors and omissions. To begin, Amazon does not assert that it is part of a suspect class, or that any fundamental right was abridged in this case, and thus implicitly concedes that the rational basis test is appropriate, though it never uses the words “rational basis” in its brief. While

²⁶ Here again, Amazon cites collateral, out-of-context statements in legislative audit submissions and by the Department's Director in 2018 in a vain attempt to demonstrate confusion about the application of the Tax Act to Amazon's retail sales. Besides the mischaracterization of these statements, the Department observes once more that statements by Department employees do not alter or amend state law. See *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 627, 503 S.E.2d 471, 480 (1998); *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995); *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991).

Amazon has failed to show disparate treatment in the first place, *see* discussion *infra*, the Department submits that its collection of statutorily-mandated sales and use tax meets the rational basis test in any event.

More importantly, however, Amazon failed to submit *any* evidence at trial identifying any other taxpayer that is similarly situated to Amazon such to enable the ALC to perform an equal protection analysis. **(R. p. 51)** (Final Order at 51). Even now, Amazon can muster only passing mention of another online shopping website, *see* Appellant’s Br. at 49 (“e.g., eBay”); however, it does so without offering any analysis about the similarities between its business model and eBay’s. The evidence at trial included extensive documents and testimony examining in careful detail the manner in which Amazon operates its Website, the control it exerts over transactions taking place on its Website, and all the many ways in which it directly participates in, and profits from, the online retail sales that are at issue in this case. The mere mention on appeal of another website whereupon goods are exchanged, without more, hardly satisfies to allow any helpful comparison to Amazon for the purpose of evaluating its equal protection argument.²⁷

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)** (Final 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*, 337 S.C. at 576,

²⁷ The Department assumes that Amazon’s statement that sales and use tax ought to be collected from “malls, as well as payment processors, credit card companies, banks, delivery companies, and advertisers,” Appellant’s Br. at 49, is hyperbole, because none of these business types combine these discrete functions into one unified sales platform as does Amazon.

524 S.E.2d at 408; *Sunrise Corp. of Myrtle Beach*, 420 F.3d at 329. Amazon’s failure to make any such showing in this case is fatal to its claim, and the ALC was correct to reject it.

In its brief, Amazon appears to hang its equal protection argument on a singular statement made by the Department’s Director during a legislative committee meeting years after the tax period at issue in this case that the “lawsuit’s going to pull up some retroactivity, . . . specific to that one company, I haven’t said their name.” Appellant’s Br. at 50. However, the Director’s statement was merely a reference to the fact of pending (and public) litigation between the Department and Amazon, not an affirmation of selective enforcement of then-existing provisions of the Tax Act against Amazon. It bears repeating that at no point in these proceedings has the Department argued that the 2019 amendments to the Tax Act should apply to Amazon’s retail sales in the first quarter of 2016. Rather, the Department’s position is that the manner in which Amazon operates its online sales platform makes it liable for sales and use tax under the provisions of the Tax Act that were in place well before that time. Amazon’s attempt to contort the Director’s words into some sort of admission for the purposes of this litigation is unavailing, and it was rightly rejected by the ALC.

Ultimately, Amazon failed to submit any evidence at trial demonstrating that it is similarly situated to other online “marketplaces,” that it was treated differently from those other entities, or that the Department engaged in purposeful discrimination against Amazon, all of which were required to substantiate its equal protection claim. Even if it had made these showings, it has failed to even attempt an argument that the Department’s actions lacked a rational relationship to a legitimate government purpose, which they plainly do. For these reasons, Amazon’s equal protection claim must fail as it did at the ALC.

CONCLUSION

For the reasons explained above, this Court should deny the appeal of Amazon and affirm the Final Order of the Administrative Law Court.

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June 11, 2020

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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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent South Carolina Department of Revenue complies with Rule 211(b), SCACR.

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INTRODUCTION

Amazon Services’s opening brief demonstrated that the ALC’s ruling—that Amazon Services is the seller of third-party products in its marketplace—violates basic principles of statutory interpretation, misreads South Carolina precedent, and rests on an indefensibly broad legal standard designed only for this case. The Department’s response fails to overcome these arguments, in large part because the Department ignores controlling South Carolina authority and all of the undisputed evidence that contradicts the ALC’s conclusion.

Amazon Services’s brief, relying on the plain language of the Sales and Use Tax Act (“Tax Act”), explained that Amazon Services did not conduct a “sale” if it did not receive consideration for transferring personal property. (AS Br. 24 (quoting S.C. Code Ann. § 12-36-100).) Like the ALC, the Department does not point to evidence that customers pay *Amazon Services* for transferring personal property from Amazon Services to those customers. Instead, it cites the undisputed (but legally irrelevant) fact that customers input their credit card information on Amazon Services’s website. (*See, e.g.*, DOR Br. 1.) The Department also acknowledges that Amazon Payments serves as the payment processor for those third-party sellers, and yet the Department continues to refer generically to “Amazon” as receiving payment. (*See, e.g., id.* at 1, 10, 15, 19.) In doing so, the Department once again disregards the settled law that prohibits attributing conduct of one entity to another. (AS Br. 27 (citing cases).) Ultimately, the Department, like the ALC, simply ignores undisputed facts presented at trial demonstrating that customers pay third-party sellers for products bought by those customers, and sellers pay Amazon Services for services rendered to those sellers.

Unable to defend the ALC’s flawed conclusion that Amazon Services is paid for selling third-party sellers’ products, the Department falls back on the ALC’s unfounded legal standard applicable only for this case: any business whose goal is to receive *any* profit, direct or *indirect*,

from sales of products is “in the business of selling.” (Op., R.23.) As Amazon Services showed in its opening brief (AS Br. 29-30), that standard is so broad that it would include shipping companies, payment processors, and others who clearly are *not* responsible for collecting sales tax. Because the fatal overbreadth of its new rule affords no principled way to distinguish these other businesses, the ALC simply declared that they were excluded. (*Id.* at 30-31; Op., R.28 n.27, 29 n.28.) That is a tacit admission by the ALC that its rule—which if affirmed by this Court would produce absurd results—lacks legal footing in any statute, regulation, or case law.

The ALC’s overbroad standard was based on a fundamental misreading of *Travelscape, LLC v. S.C. Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011). Amazon Services pointed to specific passages in *Travelscape* to explain how, unlike Amazon Services, the website operator in that case sold taxable items to customers. (AS Br. 27-29 (citing *Travelscape*, 391 S.C. at 95-96, 705 S.E.2d at 31).) The Department discusses *Travelscape* but ignores that the website operator there was a merchant of taxable room reservations—the website operator (not the hotels) set the price and was paid by customers for those room reservations. In Amazon Services’s marketplace, third-party sellers set the prices for their products and Amazon Services is paid by the third-party sellers and not by the customers who purchased from those sellers.

Given the undisputed evidence about its marketplace business model, Amazon Services was not required under the proper interpretation of the statute to collect sales tax for third-party sales. But even if this Court were to disagree, reversal still would be required because Amazon Services’s interpretation and application of the statute were reasonable. *See Alltel Communications, Inc. v. S.C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012). *Alltel* makes clear that when a taxpayer could reasonably conclude that the law, *as applied to it*, did not require it to collect a tax, the taxpayer cannot be liable for failing to collect that tax. 399

S.C. at 320-21, 731 S.E.2d at 873. The Department’s argument that a taxpayer does not prevail even if it reasonably concluded that the statute does not apply to it, if accepted, would be fundamentally inconsistent with *Alltel*, and perhaps that is why the Department never discusses or even cites that Supreme Court precedent in its response. Beyond pretending that *Alltel* does not exist, the Department openly asks this Court to ignore the undisputed fact that its own officials and members of the legislative committee publicly declared—in the middle of the ALC litigation—that not only was the 2016 statute unclear, but that there was a gap in the law when it came to third-party marketplace sales and the law had to be changed to make Amazon Services responsible for those taxes. Under *Alltel*, this Court must reverse even if it was merely unclear that the 2016 statute applied to Amazon Services, something the Department openly acknowledged.

The Department’s failure to acknowledge Amazon Services’s main arguments, the undisputed evidence, and controlling authority in favor of Amazon Services’s interpretation of the statute confirms that the Department’s interpretation is simply wrong. And those failures are sure signals that Amazon Services’s belief that the 2016 statute did not require it to collect sales tax on third-party sales was at least reasonable. On either ground, this Court should reverse.

ARGUMENT

The Department emphasizes that this Court reviews fact issues for substantial evidence. (DOR Br. 17.) But in this appeal there are no facts in dispute regarding any material issue, including how sellers offer products for sale in Amazon Services’s marketplace, how customers select what to buy, and how customers pay for and ultimately receive what they have chosen. This appeal is about the legal significance of the undisputed facts. And legal issues are reviewed *de novo*. See, e.g., *S.C. Dep’t of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260,

725 S.E.2d 480, 483 (2012) (“We will correct the decision of the ALC if it is affected by an error of law, and questions of law are reviewed *de novo*.” (citations omitted)).

I. The Department’s Response Ignores the Plain Language of the Tax Act, Relies on Legally Irrelevant Facts, and Rests on a Misreading of *Travelscape*.

A. The Department Ignores the Critical Fact That Amazon Services Is Paid for Services Provided to Third-Party Sellers and Not for Products Sold by Third Parties to Consumers.

The Department does not dispute that Amazon Services cannot be a seller if it does not make a “sale” within the meaning of Section 12-36-100. (*Compare* AS Br. 23-24, *with* DOR Br. 17-19.) Section 12-36-100 defines a “sale” or “purchase” 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 the Department cannot and does not dispute that “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.” (AS Br. 24.)

The undisputed evidence demonstrates as a matter of fact and law that Amazon Services does not receive consideration “for” transferring third-party products. (*See, e.g.*, AS Br. 1-2, 19, 24-29, 34-35.) Contrary to the Department’s accusation, this conclusion is not a result of Amazon Services “simply proclaim[ing]” that it is not the seller of third-party products. (DOR Br. 21.) It follows from the legally binding agreements and uncontroverted testimony explaining that customers pay third-party sellers for products. The BSA establishes that, when a customer orders a product in the Amazon.com marketplace from a third-party seller, the funds the customer provides for that product—*i.e.*, the “sales proceeds”—are sent through *Amazon Payments* (not Amazon Services) and belong to the third-party seller. (Ex. 3, R.892-93.) Amazon Payments remits those funds to the third-party seller and subtracts any fees the third-party seller owes to Amazon Services (or any other applicable Amazon affiliate) for services

provided to the third-party seller. (*Id.* at R.892.) The evidence at trial confirmed that what the BSA specifies is how the flow of funds actually works—Amazon Payments is merely “the conduit through which the funds from the customer get to the [third-party] seller.”¹ (Tr., R.243.) The consideration paid by the customer and held (temporarily) in an Amazon Payments account belongs to the third-party seller—not Amazon Services (or any other Amazon affiliate). (Tr., R.242, 265, 295, 478.) The customer never pays Amazon Services for anything.

The Department never disputes or even addresses any of the agreements and testimony detailing how payment actually operates, all of which demonstrate that Amazon Services does not receive consideration *for* the sale of third-party products.² Instead, it points to evidence, which Amazon Services does not dispute, that customers input their credit card information on the Amazon.com website before they can buy any products in the marketplace. (DOR Br. 9 n.8 (citing Tr., R.379-80), 21, 32.) As the Department would have it, because Amazon Services operates the website where the customer *inputs* and *stores* credit card information, Amazon Services should be legally deemed to *receive payment* for every product sold in the marketplace, *no matter what* the agreements defining the rights to customer funds say. The Department never defends that legal proposition, because there is no legal basis for it.

¹ The Department claims that the ALC “found that much of the testimony of Amazon’s primary witness, Mr. Chris Poad, was not reliable or credible.” (*See, e.g.*, DOR Br. 5 n.3 (citing Op., R.5 n.10, 11 n.16).) But the only two instances where the ALC criticized Mr. Poad’s testimony dealt with the specific percentage of purchases on the Amazon.com website that were made via the “Buy Box” (Op., R.5 n.10) and the customer’s perspective when making purchases on the Amazon.com marketplace (*id.* at 11 n.16). The legal issues in this appeal do not turn on those details, and the ALC never suggested otherwise. The Department offers no evidence or reason to doubt the accuracy of Mr. Poad’s testimony on any fact material to this appeal.

² As Amazon Services explained, the ALC never pointed to any evidence that Amazon Services receives consideration for third-party products. (AS Br. 1-2, 26.) Neither does the Department.

Inputting and storing credit card information is not the same as purchasing a product. There is no purchase by the customer, or sale by the third-party seller, without an exchange of “consideration” for the product. And there is no dispute that a customer does not choose to purchase a product in the Amazon.com marketplace until the customer selects one or more products and checks out. (AS Br. 9-10 (citing Tr., R.231).) That act is fundamentally different from when a customer merely enters into his or her account profile the credit card information that will be charged after the customer checks out. (Tr., R.319-20.) Indeed, the testimony cited by the Department (DOR Br. 9 n.8) makes Amazon Services’s point. The Department’s *lawyer* likened inputting credit card information into a customer’s profile on Amazon.com to handing a credit card to a merchant in a store. (Tr., R.378-79.) But the *witness* stated that the two situations are “completely different.” (Tr., R.379.) As the witness explained: “The third party seller is listing the product. The third party seller agrees with Amazon Payments, Inc. to process the credit card,” and a seller of products is different from Amazon Services, which runs a “multi-tenanted marketplace.” (Tr., R.379.) This testimony fully *confirms* what the BSA shows: Amazon Services does not get paid like a brick-and-mortar seller when a customer enters credit card information on the Amazon.com website. Entering that information on the website makes payment to a third-party seller *possible*, and it makes such payment possible through the Amazon Payments processing system. But you have to look elsewhere, to the BSA provisions the Department refuses to acknowledge, to determine, as a matter of law, who receives payment from the customer *when the customer makes a purchase*.

The Department compounds its legal error by using the defined term “Amazon” to mean “Amazon Services” (DOR Br. 1), and then consistently thereafter conflating the distinct roles of Amazon Payments and Amazon Services. The Department repeatedly declares that funds flow

through “Amazon” to support its view that Amazon Services receives payment from the customer. (*See, e.g., id.* at 15 (“Only Amazon accepts and processes customer payments ...”); *see also id.* at 1, 10, 19, 20, 21 n.12, 28 n.16, 29, 30, 36.) The Department ignores settled law that requires courts to respect corporate distinctions. (AS Br. 27 (citing *Mid-S. Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597-98, 649 S.E.2d 135, 140-41 (Ct. App. 2007); *S.C. Dep’t of Revenue v. Anonymous Co. A.*, 401 S.C. 513, 515-21, 678 S.E.2d 255, 256-59 (2009)).) Funds never flow through Amazon Services. The Department, like the ALC, has no basis for claiming otherwise, and so it simply conflates Amazon Payments and Amazon Services. Nor is there any legal basis to conclude that the funds customers send through the Amazon Payments system belong to Amazon Services rather than the third-party sellers. The Department’s assertion to the contrary is simply wrong.

With no legal authority or facts to defend its assertions, the Department turns, in a footnote, to mischaracterizing Amazon Services’s argument. The Department asserts that Amazon Services is trying to avoid tax liability by “segregat[ing]” the different elements of a sales transaction, and claims that this approach “could be employed by any brick-and-mortar retail store ... to evade tax responsibility as a seller.” (DOR Br. 28 n.15 (quoting Op., R.47).) But Amazon Services has never argued that a seller can avoid sales-tax obligations by employing a distinct payment processing company to process credit card payments. Brick-and-mortar stores *do* use third-party payment processors and nobody doubts that the stores still owe the sales tax. And that is because the payment processor does not, in the words of the statute, transfer or exchange “tangible personal property for a consideration.” S.C. Code Ann. § 12-36-100. The seller does those things, and the payment processor merely serves as the conduit for the seller’s receipt of the consideration. The BSA provisions and the testimony discussed above regarding

payment (evidence that the Department studiously ignores) identify *who* the customer is paying through the Amazon Payments processing system—that is, *who* is receiving consideration for an exchange of personal property. That inquiry is what the statute demands, not a description of where (physically or online) a credit card is presented.

Finally, the Department notes repeatedly that Amazon Services refers to itself as a “service provider” and argues that such a label is not controlling when determining who has sales-tax obligations. (See DOR Br. 21, 27 & n.14, 28 n.15.) But Amazon Services agrees that this is not a case about labels; it is about the substance of the sales transactions. And all of the evidence the Department ignores confirms that Amazon Services is paid *only* for services it provides to sellers, not for products customers buy from those sellers. (See AS Br. 12-14.) The price a customer pays for the product is set by the third-party seller, while the price the third-party seller pays to Amazon Services for its services is set by Amazon Services. (Tr., R.207 (“In all cases the products offered by third parties have their prices set by the seller.”); Tr., R.359-62 (describing fees charged by Amazon Services to third-party sellers).) The seller (not the customer) pays Amazon Services what the seller owes Amazon Services, and the seller agrees to use the proceeds it receives from the customer to do so. (Tr., R.242, 265-66; Ex. 3, R.846-47, 864-65, 872, 883, 892-93.) But that is no different than the fact that some part of the revenue a brick-and-mortar retailer collects from customers is used to pay rent.

In the end, the Department cites no authority (because there is none) supporting the legal proposition that Amazon Services receives payments for third-party sellers’ products. Like the ALC’s ruling, the Department’s position rests on legal error and a refusal to confront the undisputed evidence that defines the legal rights to payment at issue here. Amazon Services did not make any “sale” of third-party products that required it to collect tax under the 2016 statute.

B. The Department Fails to Recognize That the Taxpayer in *Travelscape* Set the Price for and Sold Taxable Items, and Thus *Travelscape* Does Not Support the ALC’s Decision.

The Department’s heavy reliance on *Travelscape* continues the Department’s strategy of choosing to ignore what it cannot explain. *Travelscape* involved an internet seller of taxable hotel reservations who used a “merchant model.” *Travelscape, LLC v. S.C. Dep’t of Revenue*, Docket No. 08-ALJ-1700076-CC, Final Order & Decision (Feb. 12, 2009), at 18 (ALC opinion). That seller did not operate an internet marketplace like Amazon Services.

In *Travelscape*, the Supreme Court explained that the applicable law taxed the sale of “hotel reservations” (not the physical room itself), and the website operator sold those taxable reservations to the customer for consideration. *Travelscape*, 391 S.C. at 101, 705 S.E.2d at 34 (holding that the term “furnish” in the tax statute “encompasses the activities of entities such as *Travelscape* who, whether directly or indirectly, provide hotel *reservations* to transients for consideration” (emphasis added)). *Travelscape* set the price for the reservations that it sold on its website. Like a retailer who purchased wholesale goods, *Travelscape* added its own charges on top of what *Travelscape* would pay the hotel operator to allow *Travelscape*’s customer to occupy the physical room. *Id.* at 95-96, 705 S.E.2d at 31. Critically, the customer paid *Travelscape*, and *Travelscape* paid the hotel what *Travelscape* had agreed to pay the hotel. The customer never agreed to pay the hotel anything. *Id.* This is precisely the opposite of how third-party sales work in the Amazon.com marketplace. Amazon Services highlighted all of these features of *Travelscape*’s merchant business model, and how they contrast with Amazon Services’ marketplace business model, in its opening brief. (AS Br. 27-29.)

The Department never acknowledges these differences, much less discusses how its reading of the case can be squared with them. Instead, the Department likens Amazon Services to *Travelscape* only by mischaracterizing how both operate their distinct businesses:

In both cases, the entity receiving payment directly from the customer was contractually obligated to pay the amount received—less its fees—to the owner of the product. And in both cases the price paid by the customer was the result of the combination of the amount set by the owner of the product and the fees charged by the entity offering the product for sale and collecting payment through its website.

(DOR Br. 25.)

But again, Amazon Services is *neither* “the entity receiving payment directly from the customer” *nor* “collecting payment through its website.” Travelscape, on the other hand, *did* receive payment directly from its customers. Travelscape also was *not* “obligated to pay the amount received less its fees.” It was obligated to pay the pre-negotiated amount it agreed to pay the hotel for the reservation Travelscape sold to the customer. 391 S.C. at 95-96, 705 S.E.2d at 31. By contrast, Amazon Services has *no* obligation to pay third-party sellers *anything*. Third-party sellers agree to pay Amazon Services certain fees in connection with selling through Amazon Services’s marketplace, not the other way around. (*See supra* at 4-5.)

Nor is it true that in either case the amount paid by the customer is “the combination of the amount set by the owner of the product and the fees charged by the entity offering the product for sale ... through its website.” In *Travelscape*, the website operator set the final price for the room reservation it was selling. It labeled its markup a “facilitation fee,” but the whole point of the Supreme Court’s ruling was that the markup was simply part of the price for the reservation and was therefore properly included in the amount subject to tax, *Travelscape*, 391 S.C. at 95-96, 98, 101-02, 705 S.E.2d at 31, 33-35, the same way a retailer adds a markup to the wholesale price of a product and that markup is properly included in the amount subject to tax. Amazon Services does *not* add its fees to some pre-negotiated price set by the third-party seller and then present the marked-up total to customers. It does not set the price customers pay; the third-party sellers do that.

The Department has not explained and cannot explain away these differences. And these differences are fundamental to the ruling in *Travelscape* and flow from the plain language of the statute. Customers do not pay Amazon Services consideration for the taxable items, *i.e.*, third-party goods priced by third-party sellers that are sold in its marketplace. But customers of Travelscape *did* pay Travelscape for the taxable items, *i.e.*, hotel reservations priced by Travelscape that were sold on its website.

In sum, *Travelscape* does not support the ALC’s decision.

C. The Department Misconstrues Amazon Services’s Rules Governing Conduct in Its Marketplace as Evidence That Amazon Services Was a “Seller” or “in the Business of Selling.”

Amazon Services explained that it exercises control over the Amazon.com marketplace, (see AS Br. 5-15, 22, 33-35) and that its rules are designed to promote a safe, reliable, and efficient marketplace for millions of buyers and third-party sellers. The Department repeats these details at length, apparently believing that these facts somehow make Amazon Services responsible for collecting and remitting sales tax for third-party sales under the Tax Act. (See, *e.g.*, DOR Br. 20 (“Amazon’s control of the Website, which is the retail store, confirms that it is the seller of the goods.”), 33 (“Amazon’s control over the Website, combined with Amazon’s direct participation and control over the transactions occurring on the Website ... , demonstrate that Amazon is in the ‘business of selling’ and is the ‘retailer’ or ‘seller’ with respect to sales on Amazon.com.”).) But there is nothing in the Tax Act—and the Department cites nothing in its brief—that makes a marketplace operator’s control over its marketplace relevant to determining who is responsible for collecting sales tax under the statute. The business of operating a marketplace is not the same as the business of selling goods in that marketplace.

The ALC thought otherwise, as Amazon Services explained (AS Br. 29-30), because the ALC adopted a legal standard that has no limiting principle: “whether the object of Amazon

Services’ business activity is to achieve a profit, benefit, or advantage by either direct or indirect means from the sale of property owned by Amazon Services or others on its Marketplace.” That standard would sweep in mall operators and many other industries that *serve* those who sell and thus have as their “object” achieving a “profit” by “indirect means from the sale of property owned by ... others,” including payment processors, credit card companies, banks, delivery companies, advertisers, and more. (*Id.*) The ALC saw the problem, but rather than abandon the overbroad standard, it simply carved out unprincipled exceptions by fiat. It declared those exceptions to its interpretation, without pointing to any statute or regulation, or any governing principle or logic, that would justify its *ad hoc* modifications. (*See Op.*, R.28 n.27, R.29 n.28.)

The ALC’s legal standard cannot survive scrutiny given its limitless expanse, so the Department ignores that the standard has no limit. The Department says simply that the ALC’s standard was based on *Travelscape* and “the plain language of the statute, which defines ‘business’ as ‘all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.’” (DOR Br. 26 (quoting S.C. Code Ann. § 12-36-20).) But, as discussed above, neither *Travelscape* nor the statute endorses what the ALC has done here. *Travelscape* involved an internet merchant who, unlike Amazon Services, set prices and was paid by customers for taxable items. *See Travelscape*, 391 S.C. at 95-96, 98, 101-02, 705 S.E.2d at 31, 33-35. And the Tax Act, by its plain language, limits sales-tax obligations to those who, unlike Amazon Services, exchange tangible personal property for a consideration. S.C. Code Ann. § 12-36-100.

The Department ignores not only the uncontrollably expansive nature of the ALC’s standard, but also its novelty. Amazon Services explained that no statute, regulation, or court decision supported treating Amazon Services as the seller because Amazon Services does *none* of the following: (1) choose what items third-party sellers make available to customers in the

marketplace or at what price, (2) determine the number of products to make available to customers in the marketplace or own or exercise control over any inventory third-party sellers make available to customers in the marketplace, (3) receive payment from buyers for the products, or (4) transfer ownership of products to the buyers. (AS Br. 1, 29-30.)³ Despite all of its emphasis on Amazon Services’s marketplace rules, the Department can point to no rule that controls how third-party sellers make these core selling decisions. The Department disputes neither the facts nor the unprecedented nature of the ALC’s ruling.

The absence of any statute, regulation, or court decision to support its conclusion led the ALC to make up a wholly new legal standard, rooted in what it referred to as control over the “point of sale,” to capture Amazon Services. The Department claims that “a focus on the point of sale is logical and inherent in the pertinent provisions of the Tax Act.” (DOR Br. 31.) But the only provision of the Tax Act the Department cites merely says sales tax should be collected “at the time of making the sales.” (DOR Br. 31 (quoting S.C. Code Ann. § 12-36-1350).) Once again, the Department ignores the absurdity of its position: under the Department’s view, Amazon Services, and nobody else, should have been collecting and remitting sales tax since 2016, even as the Department has been collecting sales-tax payments from those who sell through the Amazon Services marketplace, including third-party sellers. (AS Br. 1, 16.) The Department’s view is at odds with the elemental feature of tax law administration that treats only one entity as the responsible seller for sales tax purposes.⁴

³ Contrary to the Department’s mischaracterization of Amazon Services’s argument, Amazon Services does not argue that transfer of title alone relieves it of tax obligations. (*See, e.g.*, DOR Br. 21 (Amazon argues that “whoever transfers title must be the seller”), 22 (stating Amazon Services’s argument “relies entirely on the fact that Amazon does not own or hold title.”).)

⁴ The Department also refers to the fact that Amazon Services sends order confirmations to customers. (DOR Br. 31-32.) But the Department never points to any language in the Tax Act

The Department’s response adds a new gloss to the ALC’s unsupported legal standard, invoking what the Department calls the “customer’s perspective,” to justify rewriting the Tax Act to apply to Amazon Services. (DOR Br. 22-23.) But it is far too late for such new arguments. The Department introduced no evidence regarding whether customers correctly perceived that they were buying from third-party sellers, much less whether they thought they were buying from the only Amazon entity present in this litigation: Amazon Services. The Department’s argument here is pure conjecture. And in any event, nothing in the Tax Act makes the customer’s perspective relevant to determining whether Amazon Services owes a collection duty for third-party sales. That is for good reason: businesses need certainty when planning their financial and tax affairs. Having to speculate about how a customer might view a transaction is no substitute for the underlying legal and factual realities of transactions and the relationship between a marketplace facilitator and a third-party seller that customers often do not know or care about. The governing statutes, court rulings, and regulations focus on identifiable business and legal realities, not on amorphous concepts like varying customer perceptions. The Department’s persistent efforts to look *away* from those legal authorities is precisely why this Court should reverse the ALC’s ruling.

The Department is even willing to try to defend the ALC’s ruling with an argument it expressly abandoned before trial. The Department repeatedly suggests that the Tax Act should be construed to impose a collection duty on Amazon Services for third-party sales because it would make enforcement of the statute easier. (*See, e.g.*, DOR Br. 15 (“Thus, only Amazon has the ability to collect sales and use taxes arising from the purchase of tangible personal property

that makes Amazon Services responsible for collecting sales tax simply because it sends order confirmations through the Amazon.com website.

on the Website.”), 20 (“Third-Party Merchants cannot collect payment directly from the purchaser.”), 32 (“The purpose of the Tax Act is not just to impose a tax, but to ensure the collection and remittance of the tax.”).) The statute allows the Department, “when necessary for the efficient administration” of the Tax Act, to treat entities legally distinct from the actual retailer “as a retailer for purposes of this chapter,” S.C. Code Ann. § 12-36-70 (1996), but the Department expressly waived any such argument at trial. (Tr., R.163 (“For a number of reasons we have just elected not to proceed with that theory.”).) So this Court should not consider it. *See, e.g., Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004).

Moreover, the argument amounts to blatant policymaking. Amazon Services did not prevent third-party sellers from remitting sales tax; indeed, it offered tax collection services for all substantial sellers. And it is undisputed that South Carolina had been collecting sales tax from third-party sellers before the Department suddenly declared that it would start treating Amazon Services as the seller. (*See* AS Br. 1.) Administrative convenience is not a legitimate basis for retroactively imposing a collection duty on conduct not covered by the language of the statute. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900-01 (1988).

II. The Reasonableness of Amazon Services’s View of the Law Is Confirmed by the Department’s Failure to Respond to Amazon Services’s Main Arguments.

Time and again the Department has chosen to ignore or mischaracterize Amazon Services’s arguments and authorities rather than acknowledge them and explain why they are wrong. The failure of the Department to muster any response leaves no doubt that Amazon Services’s view of the statute was reasonable.

A. The Department’s Attempt to Rewrite the Well-Established Rule That Ambiguity Favors the Taxpayer Is Foreclosed by Supreme Court Precedent.

The Department argues that it need not show that Amazon Services’s interpretation of the statute was unreasonable. According to the Department, Amazon Services presents “just a

traditional application-of-the-law-to-facts argument” not capable of triggering the long-settled rule that an ambiguous tax statute must be construed in favor of the taxpayer. (DOR Br. 34.) The Supreme Court’s decision in *Alltel*, which Amazon Services explained requires reversal of the ALC’s ruling (AS Br. 37-39), forecloses this argument. The Department ignores the case entirely.⁵

In *Alltel*, the Supreme Court had to decide whether a cellular service provider should be taxed as a “telephone company” under S.C. Code Ann. § 12-20-100(A). The Supreme Court relied on the rule that in “the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt,” and made clear that the rule applies whenever there is “substantial doubt regarding the [statute’s] *application to*” the taxpayer. 399 S.C. at 321, 731 S.E.2d at 873 (citation and internal quotation marks omitted, emphasis added). The cellular provider prevailed not because the Supreme Court determined that the provider had proposed a reasonable definition of the statute in a vacuum. Indeed, the Supreme Court nowhere even discusses its views of the range of reasonable meanings of the phrase “telephone company.” The cellular provider won simply because it had a reasonable argument that the phrase “telephone company” did not apply to cellular service providers. *Id.*

This focus on application follows naturally from the well-established rule 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,

⁵ The Department cites no South Carolina authority on this issue of South Carolina law, and relies exclusively on a concurring opinion by a single Justice of the United States Supreme Court. (See DOR Br. 34.) But Justice Thomas’s concurrence in *Bank of America National Trust & Saving Association v. 203 North LaSalle Street Partnership* made only the straightforward observation that a statute is not ambiguous merely because the litigants disagree on its meaning. 526 U.S. 434, 461 (1999) (Thomas, J., concurring).

any substantial doubt being resolved in his favor.” *Id.* (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm’n*, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936)) (emphasis added). The question in tax cases is whether there is any substantial doubt that the language of the statute applies to the taxpayer—that is, whether there is a reasonable interpretation “that will exclude such person.” Accepting the Department’s position would not only contravene *Alltel*, but would eviscerate this important protection for taxpayers. Many tax statutes require case-specific judgments about how to apply statutory terms to particular taxpayers. If courts cannot examine the reasonableness of such applications, this safeguard all but vanishes.⁶

The Department’s failure to address *Alltel* is especially revealing, because the ALC itself recognized, contrary to what the Department says now, that the Department needed to demonstrate that Amazon Services’s interpretation of the statute was not just wrong but unreasonable. (Op., R.16, 47.) And, as Amazon Services pointed out in its brief, the ALC admitted that the law “is not clear” with respect to third-party sales on the Amazon.com marketplace. (Tr., R.603-04.) Under *Alltel*, that observation should have ended the case. 399 S.C. at 315-16, 320-21, 731 S.E.2d at 870, 873.

⁶ *Leventis v. S.C. Dep’t of Health & Envtl. Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000), cited by the Department (DOR Br. 33 n.20), is not to the contrary. *Leventis*, an environmental case involving a procedural due process claim, merely states that a moving party in an administrative hearing generally bears the burden of proof. 340 S.C. at 132-33, 530 S.E.2d at 651. The case did not address a tax issue and did not purport to overrule or modify the longstanding taxpayer-protection rule applicable here. Nor does *Rent-A-Center East, Inc. v. S.C. Dep’t of Revenue*, 425 S.C. 582, 589, 824 S.E.2d 217, 221 (Ct. App. 2019), support the Department’s position. (See DOR Br. 33.) There, this Court held that §§ 12-36-910(A) and 12-36-90 unambiguously imposed a tax on liability-waiver fees that were “fundamentally interconnected” with rental agreements for durable consumer goods. *Rent-A-Center East*, 425 S.C. at 585-86, 824 S.E.2d at 219. The case did not hold that the statute could never be examined to determine whether it is ambiguous as applied.

B. This Court Should Not Allow the Department to Walk Away From Its Mid-Litigation Sworn Statements Acknowledging That a Change in the Law Was Necessary to Tax Marketplace Facilitators Such as Amazon Services.

The Department does not deny that multiple government officials, including the Department's own Director, repeatedly admitted—sometimes under oath—that the applicable version of the Tax Act did not cover marketplace facilitators, like Amazon Services, and would not do so unless it was changed. (*See* AS Br. 39-44.) The Director himself expressly admitted that “[t]here is no law related to the taxation of third party sales,” he urged the legislature to make “legislative changes,” and he testified under oath that the proposed legislation would “close[] the gap” so that “nobody has to guess” who owes taxes on third-party sales. (Ex. 205, R.1381; Ex. 203, R.1342; Ex. 207, R.1506; Ex. 194, R.1263 at 6:13-15, 8:40-50.) The Department tries to downplay these significant admissions as just a “few statements” made after the tax period in question and after the start of this case (DOR Br. 36), and then observes that these statements do not change the rule that courts interpret statutes (*id.* at 36-37).

But the Department is wrong about the nature of the statements, and the timing of the statements only strengthens Amazon Services's position. Contrary to the Department's assertion, Department officials—including the Department's Director—*repeatedly* observed that the law prior to 2019 had to be changed to make internet marketplace operators responsible for sales tax on third-party sales. And the fact that the Department's many statements were made during the litigation—and precisely when the scope of the Tax Act was being hotly debated before the ALC and the legislature—makes them even more significant than if they had been made well before this case began. More importantly, the Department misses the point when it notes that courts construe statutes. Amazon Services has always agreed that courts interpret statutes. The question at issue is not who gets to ultimately interpret the law, but rather whether Amazon Services reasonably concluded in 2016 that it was not responsible for collecting and

remitting tax on third-party sales. The fact that *the Department itself* repeatedly acknowledged during the ALC litigation that the law was at best unclear confirms the reasonableness of Amazon Services’s interpretation. To that, the Department has no answer.

C. The “Marketplace Facilitator” Amendments Did in Fact Change the Law with Respect to Third-Party Sales, and at a Minimum Established That the 2016 Tax Act Was at Best Ambiguous as to Marketplace Facilitators.

The Department also struggles to explain away the comprehensive set of amendments enacted in 2019 that for the first time extended a sales-tax collection duty to marketplace facilitators like Amazon Services. The Department clings to the prefatory language that the amendments “shall not be construed as a statement concerning the applicability of the South Carolina Sales and Use Tax Act to any sales and use tax liability in matters currently in litigation or being audited.” (DOR Br. 39 (quoting S.214, 123d Session, 2019-2020 S.C. Gen. Assembly, § 1(5)).) According to the Department, this prefatory language “forecloses either party from relying on the ‘Marketplace Facilitator’ legislation in support of their position.” (*Id.*) In similar fashion, the Department claims that this Court is “barred” from considering the Director’s testimony about the proposed amendments before the General Assembly. (*Id.* at 39 n.23.) These extreme claims, unsupported by any legal authority, are meritless.

As Amazon Services explained, the prefatory language merely clarifies that changes in the law would apply only prospectively, and that the General Assembly was not attempting to interfere with the judicial task of resolving the legal dispute between the Department and Amazon Services about the statute in effect during the period relevant to this case. (AS Br. 43-44.) The prefatory language does not override the settled rule that, when the legislature adopts an amendment to a statute, there is a “presumption that the Legislature intended to change the existing law.” (AS Br. 42 (collecting cases).) And that presumption is well-supported here.

There can be no reasonable doubt the 2019 amendments changed the law with respect to third-party sales on online marketplaces. The 2016 version of the Tax Act had *expressly* identified other parties that were not sellers but who nonetheless were to be treated as sellers for sales-tax collection purposes. S.C. Code Ann. § 12-36-70 (1996). The 2019 amendments expressly added marketplace facilitators like Amazon Services to the group of non-sellers who would be treated as sellers for sales-tax collection purposes. To bring the new business model within the scope of the statute, the legislature implemented a comprehensive set of changes, across multiple provisions of the Tax Act. The amendments changed virtually every provision the Department has relied on in this litigation in its quest to hold Amazon Services liable for sales tax under the 2016 law, including (1) changing the definition of “retailer” and “seller” in § 12-36-70 to include every person “operating as a marketplace facilitator”; (2) adding a specific, detailed definition of “marketplace facilitator” in § 12-36-71; (3) changing “gross proceeds of sales” in § 12-36-90(1)(a) and “sales price” in § 12-36-130(1) to include “property sold through a marketplace by a marketplace facilitator”; and (4) expanding the list of those responsible for collecting sales tax in § 12-36-1340 to include any retail seller who “operates as a marketplace facilitator.” The amendments even provided (5) that “a marketplace facilitator includes any *related entities*,” such as Amazon Payments, “assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace.” S.C. Code Ann. § 12-36-71(C) (2019) (emphasis added). That so many changes were required to cover Amazon Services’s online marketplace business model proves conclusively that the previous version of the statute did not do so. As the Legislative Oversight Committee explained, without this “statutory change,” the Department would not be able “to

force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors through the marketplace sites.” (Ex. 192, R.1256.)

It is true, as the Department points out, that *Duvall v. S.C. Budget & Control Board*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008), recognizes that “statutory amendments ‘may also be interpreted as clarifying original legislative intent’” rather than changing the law. (DOR Br. 39.) But in *Duvall*, the legislative amendment actually said on its face that it was intended “to clarify the contribution requirements on unused annual leave and the use of such payments in calculating average final compensation.” 377 S.C. at 47, 659 S.E.2d at 130 (quoting 2005 Act No. 14, § 3) (emphasis added). There is no comparable language in the 2019 amendments here. And that is because the amendments changed rather than clarified the statute.

More fundamentally, the Department misses the crucial point that this is a tax case (unlike *Duvall*). Even if the 2019 amendments were “a clarification to the existing law, not a change” (DOR Br. 40), the fact that a clarification was needed defeats the Department’s case. The need for clarification reveals that the version in effect during the first quarter of 2016 was ambiguous with respect to third-party sales through Amazon Services’s marketplace. Amazon Services should therefore prevail. See *Alltel*, 399 S.C. at 320-21, 731 S.E.2d at 873.

D. The Department Misunderstands the “Remote Sellers” Argument and Has No Answer for It.

In September 2018, the Department issued S.C. Revenue Ruling 18-14 (Ex. 137, R.993-98), which set forth the Department’s official position on the sales-tax responsibilities of remote sellers in the wake of *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). In the Ruling, the Department said that third-party sellers are the “sellers” of their products sold in an online marketplace. (Ex. 137, R.995-96.) Given that the Department in 2018 decided to treat third-party sellers as “sellers” for purposes of the “gross revenue” provision, it was certainly

reasonable for Amazon Services in 2016 to conclude that third-party sellers are the “sellers” of their products for *all* sales-tax purposes.

The Department never even tries to explain why it would have been *unreasonable* to treat third parties as sellers for all sales-tax purposes. Certainly nothing in the language of the statute distinguishes between “seller” for purposes of calculating “gross revenue” and “seller” for all other sales-tax purposes. Once again, the Department’s refusal to confront Amazon Services’s arguments all but concedes that Amazon Services’s position was at least reasonable.

E. The Department Has No Response to Amazon Services’s Argument That It Reasonably Interpreted South Carolina’s 2016 Tax Act the Same Way Every Other State Has Interpreted Its Comparable Tax Law.

The Department does not dispute that there are dozens of states (besides South Carolina) that have passed “marketplace facilitator” laws, and in no other jurisdiction did a taxing agency or court ever conclude that Amazon Services was liable for sales tax on third-party sales before those changes were enacted. (AS Br. 46 & n.9.) Nor does it acknowledge the Supreme Court of Louisiana’s decision in *Normand v. Wal-Mart.com USA, LLC*, — So.3d —, 2020 WL 499760 (La. Jan. 29, 2020), which was decided after Amazon Services submitted its opening brief but *before* the Department submitted its response brief. *Normand* held that Wal-Mart.com, which also operates an online marketplace, is not liable for sales tax on third-party sales made in its marketplace, and specifically rejected many of the arguments the ALC adopted in this case.

In particular, the Supreme Court of Louisiana recognized the clear distinction between being a “seller” and a “facilitator” of third-party sales: “Relative to sales by third party retailers on Wal-Mart.com’s online marketplace, the actual participants to the sale are the third party retailers that actually sell the goods and the purchasers. 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.” *Normand*, 2020 WL 499760, at *8 (footnote omitted). The court

also agreed that reading the Louisiana sales-tax statute more broadly would sweep in a host of intermediaries that clearly should not be liable for the tax: “A contrary interpretation ... would authorize the imposition of liability for sales tax on any intermediary that aids or enables sellers to reach new customers although not selling anything (*i.e.*, payment processors, credit card companies, financial institutions, common carriers, advertisers, and broadcasters). Such an interpretation produces an absurd result” *Id.* at *13. The same defects in the ALC’s ruling, all of which the Department has failed to address, doomed the taxing authority’s position in Louisiana. They likewise undermine the Department’s position here.

The Department tries to distance itself from the uniformly contrary views of other states either by staying silent about them (see above) or by noting that “[w]hat another state has done or not done with respect to its own tax laws has no bearing on the interpretation of the South Carolina Tax Act.” (DOR Br. 44.) To be sure, South Carolina courts are the sole arbiters of South Carolina law. But there is no reason South Carolina courts should ignore such widespread treatment by taxing authorities across the country when assessing the *reasonableness* of a taxpayer’s interpretation of South Carolina law. There is nothing particularly unique about the wording of the relevant provisions of the Tax Act. Many states impose a sales tax on sales, where the sale is defined as a transfer or exchange of tangible personal property for a consideration. *See, 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.” (brackets, citations, and internal quotation marks omitted)); *Comptroller of Treasury v. J/Port, Inc.*, 967 A.2d 253, 262 (Md. Ct. Spec. App. 2009) (“The term sale is further defined ... as a transaction for a consideration whereby ... title or possession

of property is transferred or is to be transferred absolutely or conditionally by any means” (brackets, citations, and internal quotation marks omitted)). Other states’ consistent approach requiring a *legislative* amendment to their sales-tax statutes to cover marketplace facilitators like Amazon Services confirms the reasonableness of Amazon Services’s view that in South Carolina, too, Amazon Services was not required to collect and remit sales tax on third-party sales until South Carolina changed its law.

III. The Department’s Constitutional Arguments Are Meritless.

A. The Department’s Assertion That Amazon Services Had Fair Notice Fails in Light of the Department’s Novel Interpretation of the Statute and Its Sudden Change in Departmental Policy.

The Department argues that Amazon Services had fair notice of its tax liability in the first quarter of 2016 based “simply [on] the plain language of the Tax Act,” which was satisfied because Amazon Services “effected an ‘exchange ... of tangible personal property for a consideration.’” (DOR Br. 45 (quoting S.C. Code Ann. § 12-36-100).) But the Department does not deny that, in the first quarter of 2016, “[t]here [was] no law related to taxation of third party sales,” and it has admitted that taxpayers had to “guess” who owed sales tax for third-party sales on online marketplaces. (See, e.g., Ex. 194, R.1263 at 6:13-15, 8:40-50; Ex. 203, R.1342; Ex. 205, R.1381; Ex. 207, R.1506.) The Department also cannot point to a single other instance in which it—or any other taxing authority—attempted to hold a marketplace facilitator liable for sales tax on third-party sales where the marketplace facilitator did not set the price for the products, determine how much inventory to make available, receive payment for the products, or transfer title to the products.

The Department also claims that Amazon Services was on fair notice of its potential liability because it “lobbied for the passage of the 2011 Distribution Facility Sales Tax Exemption” and “had carefully examined ... its tax obligations under South Carolina law prior to

the first quarter of 2016.” (DOR Br. 46.) But this does not mean that Amazon Services had fair notice of its potential liability for sales tax *on third-party sales*. As the Department recognizes, the moratorium exempted out-of-state retailers who built distribution facilities in South Carolina from collecting or remitting sales tax for a period of time for *all* sales. (*Id.*) Amazon Services and other Amazon affiliates understood they had the responsibility to collect sales tax on sales of *their* products as retailers once the moratorium expired, and it is undisputed that they did so. The moratorium provided no notice to Amazon Services that the Department would suddenly claim in 2016 that it was responsible for collecting sales tax on *third-party* products.

B. The Department’s Response Confirms That Amazon Services Is the Only Marketplace Facilitator That Has Been Forced to Bear the Retroactivity of the Department’s Novel Interpretation.

The Department claims that Amazon Services cannot prove an equal protection violation because it “failed to submit any evidence at trial identifying any other taxpayer that is similarly situated to Amazon such to enable the ALC to perform an equal protection analysis.” (DOR Br. 48.) But the evidence is in the Department’s own admissions. The Department concedes that the 2019 legislation “applies not just to Amazon but rather to a broad range of entities that could be classified as ‘marketplace facilitators.’” (*Id.* at 37.) And the Director of the Department admitted that, by virtue of this litigation, only Amazon Services would be subject to “retroactivity.” (Ex. 194, R.1263 at 7:02-18.) Given these concessions, the Department cannot deny that it has singled out Amazon Services as the only marketplace facilitator forced to bear the retroactive effect of the Department’s interpretation of the Tax Act. That is classic disparate treatment.

CONCLUSION

The ALC’s decision should be reversed.

Charleston, South Carolina
June 11, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

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

Amazon Services, LLC, ... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing Final Reply Brief of Appellant Amazon Services, LLC complies with Rule 211(b), SCACR.

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June 11, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amazon Services, LLC, Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2019-001706

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 6047
Heard February 14, 2023 – Filed January 24, 2024

AFFIRMED

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VINSON, J.: In this contested case, Amazon Services, LLC (Amazon Services) appeals the decision of the Administrative Law Court (ALC) affirming the South

Carolina Department of Revenue's (the Department's) determination assessing it approximately \$12.5 million in taxes, penalties, and interest for the period of January 1, 2016, to March 31, 2016. Amazon Services argues that (1) as an online marketplace operator, it owed no duty to collect and remit sales tax on products sold on its marketplace by third parties under the Sales and Use Tax Act (the Act)¹ in effect during 2016; (2) the statute in effect in 2016 could reasonably be read not to impose the obligation to collect and remit sales tax for third-party sales upon online marketplace facilitators such that the statute is ambiguous and must be construed against the Department; and (3) imposing a sales tax obligation on it for third-party sales during the relevant period violates the United States and South Carolina constitutional guarantees of fair notice and equal protection. We affirm.

BACKGROUND

Amazon Services, a subsidiary of Amazon.com, Inc. (Amazon), operates the Amazon.com website (the Marketplace). Amazon Services is registered in South Carolina as a retailer for the purposes of the Act. Amazon's business model includes the retail sale of products through the Marketplace. There are three primary sources of products listed for sale on the Marketplace: Amazon, Amazon affiliates,² and third-party sellers.

In 2011, the legislature passed the Distribution Facility Sales Tax Exemption (the Moratorium), primarily to encourage Amazon's investment in South Carolina. *See* § 12-36-2691. The Moratorium provided a sales tax exemption for the five-year period from January 1, 2011, until December 31, 2015, for companies that built a distribution facility in South Carolina, provided certain conditions were met. *Id.* In 2011 and 2012, an Amazon subsidiary built two distribution facilities in South Carolina. At the time, the dormant Commerce Clause of the United States Constitution allowed the State of South Carolina to impose sales tax only upon third-party sellers that had a physical presence in the state. *See Nat'l Bellas Hess, Inc. v. Dep't of Revenue of the State of Ill.*, 386 U.S. 753 (1967) (suggesting a business was required to have a physical presence in the taxing state to form the requisite nexus to the state); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (requiring, pursuant to the dormant commerce clause, a physical presence for a

¹ S.C. Code Ann. §§ 12-36-5 to -2692 (2014 & Supp. 2023).

² Amazon affiliates that engage in retail sales include: AmazonFresh, LLC; Fabric.com; Woot, Inc.; Zappos Retail, Inc.; 6pm.com, LLC; Amazon Web Services, Inc.; Quidsi Retail, LLC; IMDb.com, Inc.; BOP, LLC, Amazon.com, LLC; Warehouse Deals, LLC; and Amazon Digital Services, LLC.

business to have a substantial nexus with a taxing state such that it would be subject to that state's sales and use tax). Thus, by building distribution facilities in South Carolina, Amazon established the physical nexus required for the imposition of sales tax.³ Upon expiration of the Moratorium, Amazon Services began collecting and remitting sales tax for the retail sales of Amazon and its affiliates rather than all of the sales occurring on the Marketplace.

The Department conducted an audit and assessed Amazon Services \$12,490,502.15 in taxes, penalties, and interest for the first quarter of 2016. Amazon Services protested the proposed assessment. The Department issued a determination, concluding Amazon Services was a "person in the business of selling tangible personal property at retail, and the Department properly included all the proceeds from [its] online sales in the tax base." Specifically, the Department found Amazon Services owed sales and use tax in relation to the sale of products by third-party sellers occurring on the Marketplace.⁴ Amazon Services requested a contested case hearing before the ALC. The ALC held the contested case hearing in February 2019, after which it issued an order affirming the Department's determination.⁵ This appeal followed.

FACTS AND PROCEDURAL HISTORY

At the time of the contested case hearing, there were about 2.5 million third-party sellers on the Marketplace. An Amazon Services' employee, Christopher Poad, testified at the hearing and described Amazon's business model with respect to its own retail sales and sales of products by third-party sellers. He explained any third-party seller wishing to list its products for sale on the Marketplace must create an account and agree to the terms of Amazon's Business Solutions Agreement (the BSA). The BSA governs the relationship between Amazon Services and the third-party sellers as well as Amazon subsidiaries, including

³ In 2018, the United States Supreme Court decided *South Dakota v. Wayfair, Inc.* and held a physical presence is no longer required to establish a substantial nexus with the taxing state. 138 S. Ct. 2080, 2099 (2018).

⁴ Amazon Services already collected and remitted sales tax on its sales and the sales of Amazon affiliates; thus, sales tax on these transactions is not at issue.

⁵ The ALC noted the Department issued the proposed assessment without determining whether any merchants had already submitted sales tax for their sales in South Carolina and the Department agreed it would be inappropriate to collect sales tax for the same transaction from two different taxpayers.

Amazon Payments, Inc. and Amazon Fulfillment Services, Inc.⁶ Poad testified Amazon Payments, Inc. provides payment processing services to third-party sellers. Amazon Fulfillment Services, Inc. operates Amazon's warehouses and provides optional fulfillment services to third-party sellers, referred to as Fulfillment by Amazon, including storage, packaging, shipping, and delivery.

The BSA provides that Amazon Payments acts as the third-party seller's agent for purposes of processing payments, receiving and holding sales proceeds on the seller's behalf, remitting sales proceeds to the seller's bank account, charging the seller's credit card, and paying Amazon and its affiliates amounts the seller owes pursuant to the BSA and related services. The BSA states, "We will also receive all Sales Proceeds on your behalf for each of these transactions and will have exclusive rights to do so" The seller must agree "that buyers satisfy their obligations to you for [y]our [t]ransactions when we receive the [s]ales [p]roceeds." The BSA further provides the seller's sales proceeds will be held in an account with Amazon Payments and that prior to disbursing the funds to the seller, Amazon Payments may combine such proceeds with the funds of other sellers, invest them, or use them for other legally permissible purposes. According to the BSA, Amazon Services will "remit to [the seller] on a bi-weekly (14-day) (or at our option, more frequent) basis . . . any sales proceeds received by us or our Affiliates" less the fees the seller owes to Amazon Services. The BSA expressly disclaims the existence of an agency relationship between the third-party sellers and Amazon Services, except for Amazon Payments' role as a payment processing agent. With regard to tax collection, the BSA requires third-party sellers to agree to be responsible for the collection, reporting, and payment of all taxes. Amazon Services will collect sales tax if a third-party seller chooses to pay for its tax collection service, but this service is only available to professional sellers or Amazon Webstore sellers—not individual sellers. However, even if a third-party seller uses this tax collection service, Amazon Services collects the tax from the customer and then remits those funds back to the third-party seller to pay to the taxing authority.

Under the BSA, a seller may set any price it wishes for its product except that the seller must offer the price that is at least as favorable to Amazon site users as any price it offers such product through any other sales channel. In addition, third-party sellers must pay Amazon Services fees to sell their products on the

⁶ The BSA describes these entities as "affiliates," which it defines to mean "with respect to any entity, any other entity that directly or indirectly controls, is controlled by, or is under common control with that entity."

Marketplace. These fees include "Referral Fees," which are calculated based on the sales price and Amazon's categorization of the type of product sold. These fees range from six to forty-five percent, with a median fee of fifteen percent.

With regard to a third-party seller's communications with customers, the BSA precludes third-party sellers from receiving or requesting payments directly from customers and third-party sellers must agree to only use the tools and methods Amazon Services provides to communicate with Amazon users regarding transactions.

During the contested case hearing, the ALC admitted evidence of the Department's sworn statements made in 2018 related to proposed "marketplace facilitator" legislation "to the extent it might be probative." It concluded, however, the evidence had little probative value because the Department's interpretation was not entitled to deference and therefore there was no need to impeach its interpretation. The ALC further ruled the Department's statements in the context of the proposed legislation after the Department issued its determination did not render the Act ambiguous because it was the ALC's province, rather than the Department's, to interpret the law and determine whether the law was ambiguous.

The ALC concluded Amazon Services was in the business of selling tangible personal property at retail for the purposes of the Act. It found Amazon Services was not merely a conduit or intermediary but that its actions demonstrated it was in the business of selling pursuant to section 12-36-910(A). The ALC determined Amazon Services accepted consideration from customers because it initially directly received consideration for the sale and transferred the remaining funds to the seller after deducting its fees. The ALC further stated, Amazon Services' compensation was, in part, directly tied to the amount of sales it could generate, not for any one seller's products, but on the Marketplace as a whole. The ALC concluded Amazon Services indirectly retains a share of the profits from each sale through the Referral Fee. The ALC also found Amazon Services acted as third-party sellers' agent with respect to the sale of the third-party sellers' goods, regardless of whether a formal agency relationship was established. In addition, the ALC found Amazon Services and third-party sellers had a "consignment-type" relationship. The ALC further found the level of control Amazon Services exercised over the Marketplace and the third-party transactions indicated it was in the business of selling on the Marketplace. The ALC concluded that although third-party sellers set their own pricing, Amazon Services benefited from the parameters governing pricing because it received a profit from every sale through

its fees while also ensuring the offers listed on the Marketplace were the most attractive offers, which encouraged more sales on the Marketplace.

Finally, the ALC determined no constitutional violations occurred. The ALC concluded Amazon presented no evidence the Department imposed or attempted to impose pending legislation on Amazon Services to obligate it to remit sales and use tax for these transactions such that its actions violated the due process clause. Rather, it concluded the Department applied the existing tax scheme to a relatively new business model. The ALC rejected Amazon's argument that the Department's actions violated its equal protection rights. The ALC found Amazon Services failed to submit any evidence specifically identifying online marketplaces and showing such other online marketplaces were similarly situated.

ISSUES ON APPEAL

I. Did the ALC err in concluding that, under the Act in effect in 2016, Amazon Services owed a duty to collect and remit sales tax on products sold on the Marketplace by third-party sellers?

II. Did the ALC err in concluding the statute in effect in 2016 could not reasonably be read not to impose the obligation upon Amazon Services to collect and remit sales tax for third-party sales such that the statute was ambiguous and must be construed against the Department?

III. Did the ALC err in concluding that imposing a sales tax obligation on Amazon Services for third-party sales during the relevant period did not violate constitutional guarantees of fair notice or equal protection?

STANDARD OF REVIEW

When reviewing a final decision of the ALC,

[This] court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact. Th[is] court . . . may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2023).

"Questions of statutory interpretation are questions of law, which [the appellate c]ourt is free to decide without any deference to the [ALC]." *Rent-A-Ctr. E., Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 587, 824 S.E.2d 217, 219 (Ct. App. 2019) (alterations in original) (quoting *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016)).

LAW AND ANALYSIS

I. Sales and Use Tax

Amazon Services argues that, under the law in effect in 2016, it was not the "seller" of third-party products. Amazon Services argues the *Travelscape*⁷ decision does not support the ALC's conclusion because the website operator in that case was a price-setter as opposed to a marketplace operator. Amazon Services argues substantial evidence does not support the ALC's conclusion that it was "in the business of selling" under section 12-36-910(A). It contends it is a service provider and therefore not responsible for collecting and remitting sales tax. Amazon Services further contends its interpretation of section 12-36-70 is reasonable and therefore the ALC should have construed the statute in its favor pursuant to the holding in *Alltel Communications v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012). We disagree.

⁷ *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011).

We find the ALC did not err in determining Amazon Services was engaged in the business of selling tangible personal property at retail and was therefore responsible for collecting and remitting sales tax on sales of tangible personal property owned by third parties occurring on the Marketplace.⁸

The Act 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." § 12-36-910(A) (emphasis added). "'Business' includes all activities, with the object of gain, profit, benefit, or advantage, *either direct or indirect.*" § 12-36-20 (emphasis added).

"Retailer" and "seller" include every person:

(1)(a) selling or auctioning tangible personal property
whether owned by the person or others;

...

(c) renting, leasing, or otherwise furnishing tangible
personal property for a consideration;

...

(2)(a) maintaining a place of business or qualifying to do
business in this [s]tate; or

(b) not maintaining an office or location in this [s]tate but
soliciting business by direct or indirect representatives,
manufacturers agents, distribution of catalogs, or other
advertising matter or by any other means, and by reason
thereof receives orders for tangible personal property or
for storage, use, consumption, or distribution in this
[s]tate.

The [D]epartment, when necessary for the efficient
administration of this chapter, may treat any salesman,
representative, trucker, peddler, or canvasser as the agent
of the dealer, distributor, supervisor, employer, or other

⁸ Unless otherwise specified, our references to "the Act" refer to the version in effect in 2016.

person under whom they operate or from whom they obtain the tangible personal property sold by them, regardless of whether they are making sales on their own behalf or on behalf of the dealer, distributor, supervisor, employer, or other person. The [D]epartment may also treat the dealer, distributor, supervisor, employer, or other person as a retailer for purposes of this chapter.

§ 12-36-70 (emphasis added).

"Sale" and "purchase" mean any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration including:

- (1) a transaction in which possession of tangible personal property is transferred but the seller retains title as security for payment, including installment and credit sales;
- (2) a rental, lease, or other form of agreement;
- (3) a license to use or consume; and
- (4) a transfer of title or possession, or both.

§ 12-36-100.

First, we hold the statutes at issue were not ambiguous and therefore do not require us to resolve any substantial doubt in Amazon Services' favor.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *see also 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."). "The usual rules of statutory construction apply to the interpretation of tax statutes." *Multi-Cinema, Ltd. v. S.C. Tax Comm'n*, 292 S.C. 411, 413, 357 S.E.2d 6, 7 (1987). "[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an

interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." *Alltel Commc'ns, Inc.*, 399 S.C. at 321, 731 S.E.2d at 873 (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936)). However, "[i]f a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

In *Alltel*, our supreme court found the term "telephone company" was ambiguous because it was not defined in the statute. *Alltel Commc'ns, Inc.*, 399 S.C. at 316, 321, 731 S.E.2d at 870, 873. Here, however, the relevant terms—"seller," "business," and "sale"—are terms defined in the statute and we find there is no substantial doubt the definitions provided in the Act capture Amazon Services' activities. We therefore conclude the Act was not ambiguous. See *Rent-A-Ctr. E., Inc.*, 425 S.C. at 589, 824 S.E.2d at 221 (holding section 12-36-910(A) was unambiguous and therefore the ALC "was in no position to apply rules of statutory interpretation" and did not err in failing to construe it in the taxpayers' favor). Thus, there is no ambiguity to resolve in Amazon Services' favor.

Amazon Services further asserts the Department "told the legislature via sworn testimony that there was doubt that the statute could be applied to online marketplace facilitators like Amazon Services," and that the legislature specifically amended the statute in 2019 "to provide the clarity that the Department admitted was missing." Amazon Services argues this testimony confirmed the statute needed to be changed to impose sales tax obligations upon marketplace facilitators and demonstrated the reasonableness of Amazon Services' interpretation. Amazon Services argues this showed the Act was ambiguous and should therefore be construed in its favor. We disagree.

"When the Legislature adopts an amendment to a statute, this [c]ourt recognizes a presumption that the Legislature intended to change the existing law. Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent." *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) (citation omitted).

We recognize the rule of construction that the adoption of an amendment which materially changes the terminology of a statute under some circumstances indicates persuasively and raises a presumption that a departure

from the original law was intended. However, like all rules of construction, the presumption is merely an aid in interpreting an ambiguous statute and determining the legislative intent.

N. River Ins. Co. v. Gibson, 244 S.C. 393, 398, 137 S.E.2d 264, 266 (1964).

We acknowledge the General Assembly amended the Act in 2019 to expressly include marketplace facilitators. See Act No. 21, 2019 S.C. Acts 101-02. It was titled:

An act to amend the code of laws of South Carolina, 1976, by adding section 12-36-71 so as to define "marketplace facilitator"; to amend sections 12-36-70, 12-36-90, and 12-36-130, all relating to sales tax definitions, so as to further inform marketplace facilitators of their requirements; and to amend section 12-36-1340, relating to the collection of sales tax by retailers, so as to further inform marketplace facilitators of their requirements.

Id. However, as we stated, we hold the Act is unambiguous and therefore we need not "look for or impose another meaning" beyond the plain language of the Act. See *Paschal*, 317 S.C. at 437, 454 S.E.2d at 892. Further, the 2019 act contained prefatory language stating it "shall not be construed as a statement concerning the applicability of the [Act] to any sales and use tax liability in matters currently in litigation or being audited." Act No. 21, 2019 S.C. Acts 102. Thus, we need not consider either the Department's statements made in the context of the proposed amendments to the Act or the amendments themselves in deciding this issue. See *N. River Ins. Co.*, 244 S.C. at 398, 137 S.E.2d at 266 (opining that the presumption that the adoption of an amendment that materially changes the terminology of a statute means a departure from the original law was intended "is merely an aid in interpreting an ambiguous statute and determining the legislative intent"). Instead, we consider the language of the Act as it existed in 2016. Regardless, the use of the words "further inform" in the title of the 2019 act to amend the Act indicates the Act already encompassed persons with business models like those of Amazon Services. Based on the foregoing, we hold the statutes at issue were not ambiguous and therefore there is no substantial doubt that would require resolution in Amazon Services' favor.

As to Amazon Services' contention the ALC stated the Act was not clear, we hold the ALC was not bound by this statement because the ALC made this observation during the hearing but made no such finding in the written order. *See Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. The written order is the trial judge's final order and as such constitutes the final judgment of the court." (citation omitted)).

Next, we find the evidence supports the ALC's finding that Amazon Services was engaged in the business of selling tangible personal property at retail and was therefore responsible for collecting and remitting sales tax on such transactions pursuant to section 12-36-910(A).

As an initial matter, Amazon Services argues that it and Amazon Payments are separate entities and the actions of Amazon Payments are not attributable to Amazon Services. It asserts that when a customer purchases a product from a third-party seller, Amazon Payments—not Amazon Services—receives the sales proceeds and then remits those funds to the third-party seller. It contends the ALC incorrectly attributed Amazon Payments' actions to Amazon Services with no justification for "piercing the corporate veil." We reject this form-over-substance argument. *See Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978) ("In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding." (quoting *Helvering v. Lazarus & Co.*, 308 U.S. 252, 255 (1939))); *see also Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960) (setting aside the formal structure of the contractual arrangements of the company and holding "[t]o permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance"). In addition, the Act provides "any group or combination acting as a unit" is a "person" within the meaning of the Act. *See* § 12-36-30. Even the BSA treats these entities as the same because it refers to Amazon Services and Amazon Payments as "we." Thus, we find the ALC did not err in treating the actions of Amazon Payments as the actions of Amazon Services.

Both parties argue *Travelscape* should be read in their favor. We find *Travelscape* provides only limited guidance. There, the operator of Expedia.com (Travelscape) negotiated a rate for hotel rooms with hotels, offered those hotel reservations to customers for booking on Expedia.com, and charged the customer's credit card for the transaction. 391 S.C. at 95, 705 S.E.2d at 31. After the customer checked out of the hotel, the hotel invoiced Travelscape for the net room rate and sales tax owed by the hotel. *Id.* Travelscape would then remit the net room rate and tax

recovery charge to the hotel but retained facilitation and service fees. *Id.* at 95-96, 705 S.E.2d at 31. Travelscape did not pay sales tax on these fees. *Id.* at 96, 705 S.E.2d at 31. Our supreme court rejected Travelscape's argument that it was not "in the business of furnishing accommodations" within the meaning of section 12-36-920(E) because it did not own or operate hotels. *Id.* at 99, 705 S.E.2d at 33. Travelscape argued it was "only an intermediary providing hotel reservations to transients and d[id] not physically provide sleeping accommodations." *Id.* Our supreme court, however, concluded the definition of "furnish" encompassed "the activities of entities such as Travelscape who, whether directly or indirectly, provide hotel reservations to transients for consideration." *Id.* at 101, 705 S.E.2d at 34. The 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. We likewise interpret section 12-36-910(A) broadly.

Because section 12-36-20 itself defines "business" broadly, we hold the record shows Amazon Services' activities in connection with third-party sales on the Marketplace were with the object of achieving a profit or advantage. *See* § 12-36-20 ("Business' includes all activities, with the object of gain, profit, benefit, or advantage, *either direct or indirect.*" (emphasis added)). Specifically, Amazon Services' agreement with third parties required the third-party sellers to pay a per-item fee—the Referral Fee—based upon a percentage of the item's sales price and the category of the item sold. This is a profit from the third-party seller's sale of the item. *See id.* The restrictions and requirements placed upon third-party sellers in the Marketplace give Amazon Services an advantage over other sales channels. *See id.* For instance, the fact a third-party seller must offer its items at a price at least as low as it offers such item through any other sales channel is designed to ensure the buyer purchases the item from the Marketplace, thus giving Amazon Services an indirect advantage over the other sales channels.

Next, we hold Amazon Services is a seller within the meaning of section 12-36-70. Amazon Services is the only party a buyer encounters during the sales transaction. The buyer receives a confirmation from Amazon and Amazon conducts the transaction. Amazon Services, through Amazon Payments, processes the transaction, holds the funds, and remits those funds (less its fees) to the seller. Amazon Services, through Amazon Payments, has control over these funds until they are remitted to the third-party seller on a biweekly basis. The BSA provides that Amazon Payments may invest the funds and the third-party seller is not entitled to any interest. Although the items sold may be owned by the third-party, section 12-36-70 does not require the seller own the goods sold. We find the foregoing demonstrates Amazon Services is a seller under section 12-36-70.

Further, we find these transactions constitute sales as defined by 12-36-100 because Amazon Services receives payment in exchange for the items even if the items are not in its physical possession. Regardless of whether Amazon Services has title or possession of the items, it requires the third-party seller to send the items to the purchaser or refund the sale if it does not do so. Thus, Amazon Services effects the transfer of the goods and receives consideration. Although it remits the proceeds to the third-party seller, it retains the fees that the third-party seller is responsible for paying to it for the transaction, including the Referral Fee based upon the price of the item. Accordingly, we hold the definition of sale in section 12-36-100 encompasses these transactions.⁹

We reject Amazon Services' argument that it is merely a service provider. The parties do not dispute that customers making purchases on the Marketplace are buying goods, not services. Thus, we hold substantial evidence supports the ALC's finding Amazon Services is a service provider only with respect to its relationship to the third-party seller. *See Boggero v. S.C. Dep't of Revenue*, 414 S.C. 277, 285, 777 S.E.2d 842, 846 (Ct. App. 2015) ("[T]he analysis under the true object test focuses on factual questions; namely, whether the customer's purpose for entering the transaction was to procure a good or a service.").

Amazon Services further argues the ALC lacked a legal basis for applying the novel concept of a "point of sale" and argues the ALC erred by finding it had a "consignment-type" relationship with the third-party sellers. It asserts its relationship does not function like a consignment relationship because it does not control the inventory, decide what to sell, or set the price. The ALC analogized the sales at issue here to consignment sales. The ALC additionally found Amazon Services accepts customer payments at the point of sale—i.e., at the time the customer purchases the product—for all transactions on the Marketplace. Consideration of these concepts, although illustrative, is not necessary in determining whether Amazon Services was in the business of selling within the meaning of the Act. We find the ALC considered these concepts for purposes of

⁹ We note that, as the ALC observed, because Amazon Services exercises control over the transaction, third-party sellers do not have the opportunity to collect sales tax when the transaction occurs; therefore, without Amazon Services collecting the tax, it is unlikely it would ever be collected. This would not effectuate the legislative intent of the Act. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.").

illustrating the practical aspects of sales occurring on the Marketplace in applying the facts of this case to the Act. We therefore conclude the ALC's application of these concepts does not require reversal. *See Cox v. Cox*, 290 S.C. 245, 248, 349 S.E.2d 92, 93-94 (Ct. App. 1986) (holding the burden is on the appellant to show the trial court committed reversible error).

Amazon Services additionally argues that in South Carolina Revenue Ruling 18-14,¹⁰ the Department took the position that third-party sellers were the sellers of the products they sold in an online marketplace for purposes of calculating a remote seller's "gross revenue" from sales in South Carolina to determine if the requisite nexus required under *Wayfair* existed. Amazon Services asserts this interpretation demonstrates the reasonableness of its own interpretation of the statute. We find this argument is unpreserved because the ALC did not address this argument in its final order and Amazon Services did not seek reconsideration of this issue. *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), SCRCPP, motions to reconsider are permitted in ALC proceedings and often required for issue preservation purposes). Regardless, Revenue Ruling 18-14 states,

[U]nder South Carolina sales and use tax law, the sales made via [a] marketplace are sales by the marketplace, and the marketplace is required to . . . remit the sales and use tax on the marketplace's 'gross proceeds of sales,'^[11] which [would] include[] the . . . sales of products owned by [a] remote seller but sold by the marketplace.

In other words, the ruling treats online marketplaces as sellers in accordance with section 12-36-70 and states they are required to collect and remit sale and use tax under the Act. Therefore, Revenue Ruling 18-14 does not support Amazon Services' position.

¹⁰ S.C. Dep't of Revenue, S.C. Rev. Rul. 18-14, Retailers without a Physical Presence ("Remote Sellers") - Economic Nexus (2018), 2018 WL 4944851 (stating the Department's position regarding remote sellers in accordance with *Wayfair*, 138 S. Ct. at 2099, and section 12-36-70).

¹¹ § 12-36-90 (defining gross proceeds generally as "the value proceeding or accruing from the sale, lease, or rental of tangible personal property").

Finally, we are not persuaded by Amazon Services' reference to the tax laws of other jurisdictions. Citing to laws that were passed between 2017 and 2019 in other states, Amazon Services contends that as of June 2020, thirty-six other states had passed "marketplace facilitator" laws and none of these states concluded a marketplace facilitator was liable for sales tax on third-party sales prior to the enactment of such laws. Amazon Services has failed to identify, which, if any, of these states 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. In its reply brief, Amazon Services cited to *Normand v. Wal-Mart.com USA, LLC*, 2019-00263 (La. 1/29/20), 340 So. 3d 615, which was not decided until after it filed its initial brief. In *Normand*, the Louisiana Supreme Court held the trial court erred by concluding the online marketplace was a "dealer" such that it was required to collect and remit sales tax under Louisiana law. *Id.* at pp. 19-26, 340 So. 3d at 627-32. We find *Normand* distinguishable because the statutes at issue there do not contain the same language as the statutes at issue here. Compare La. Stat. Ann. § 47:301(4)(b) ("Dealer' includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in a taxing jurisdiction. 'Dealer' is further defined to mean: . . . (b) Every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in the taxing jurisdiction, tangible personal property as defined herein."), with § 12-36-910(A) (2014) ("A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person *engaged . . . in the business of selling* tangible personal property at retail." (emphasis added)), § 12-36-20 ("Business' includes all activities, with the object of gain, profit, benefit, or advantage, *either direct or indirect.*" (emphasis added)), and § 12-36-70(1)(a) (providing a "seller" includes every person "selling or auctioning tangible personal property *whether owned by the person or others*" (emphasis added)).

Based on the foregoing, we hold Amazon Services is a person engaged in the business of selling tangible personal property at retail with respect to sales occurring on the Marketplace and is therefore required to collect and remit sales tax on such sales. We further hold Amazon Services is a seller within the meaning of section 12-26-70 with respect to third-party sales on the Marketplace and that such transactions constitute sales under section 12-36-100. Accordingly, we affirm the ruling of the ALC.

II. Constitutional Violations

Amazon Services argues the Department's attempt to collect sales taxes from Amazon Services for third-party sales during the first quarter of 2016 violates the South Carolina and federal constitutional guarantees of due process. Citing to *FCC. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), it argues the Department's assessment was an attempt to retroactively apply the 2019 amendments to Amazon Services and thus violated the constitutional requirement of fair notice. Amazon Services next asserts that applying the 2019 amendments only to Amazon Services violated the constitutional guarantee of equal protection. It contends the Department singled out Amazon Services for retroactive enforcement of its interpretation. Amazon Services argues the Department's director admitted to the General Assembly that the current lawsuit would "pull up some retroactivity." Amazon Services argues the director testified that only Amazon Services had been forced to collect sales taxes on third-party sales before the 2019 amendment took effect. Amazon Services contends "[t]he Department had not attempted to collect sales tax from [it] or any other marketplace facilitator for third-party sales during the more than [fifteen]-year period that Amazon Services had been operating its marketplace." We disagree.

"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." *Fox Television Stations, Inc.*, 567 U.S. at 253. "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.*; see also U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."). "It requires the invalidation of laws that are impermissibly vague." *Fox Television Stations, Inc.*, 567 U.S. at 253. "[T]he void for vagueness doctrine addresses at least two . . . due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.*

We conclude the ALC did not err by finding Amazon Services has failed to show any constitutional violations. First, we find *Fox Television Stations* is inapplicable. There, the United States Supreme Court rejected the Federal Communications Commission's (the FCC's) attempt to retroactively apply a change in policy to two television stations for airing content that would have been permissible under the former policy. *Id.* at 249-55. Prior to issuing the determinations at issue in that case, the FCC had issued a ruling in 2004 in which it changed a preexisting indecency enforcement policy regarding the use of fleeting expletives. *Id.* at 248.

The prior policy distinguished between isolated and repeated broadcasts of indecent material and determined that as to the use of expletives, "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *Id.* at 246 (quoting *In the Matter of Pacifica Found., Inc. d/b/a Pacifica Radio L.A., Cal. of Kpfk-Fm L.A., Cal.*, 2 F.C.C. Rcd. 2698 (1987)). In the ruling changing the policy, the FCC stated "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Id.* at 248. In addition, the FCC had released prior decisions that declined to find isolated and brief moments of nudity actionably indecent. *Id.* at 257. Given the FCC's prior decisions pertaining to brief nudity, the Court found the FCC "c[ould] point to nothing that would have given [the station] affirmative notice that its broadcast [of a brief shot of nude buttocks] would be considered actionably indecent." *Id.* Even though the broadcasts at issue took place in 2002 and 2003—prior to the 2004 ruling—the FCC applied the indecency policy established in the 2004 ruling to the earlier broadcasts and found the stations violated the policy by broadcasting fleeting expletives and nudity. *Id.* at 249. In vacating these determinations, the Supreme Court found, "The [FCC] failed to give [the stations] fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent." *Id.* at 258. Here, however, no evidence shows the Department attempted to retroactively apply the new law or policies to Amazon Services' conduct. Rather, the Department applied the sales tax law that was in place at the time. Thus, we find the ALC did not err in finding Amazon Services failed to show the Department violated the constitutional requirement of fair notice.

Amazon Services' argument the Department had not attempted to collect sales tax from it prior to 2016 is technically correct, but it ignores the context of the Department's actions. First, prior to the 2018 *Wayfair* decision, the Department could not lawfully collect sales tax from a seller that had no physical presence in this state. *See Wayfair, Inc.*, 138 S. Ct. at 2099 (holding a physical presence is no longer required to establish a substantial nexus with the taxing state); *see also Quill Corp.*, 504 U.S. at 309-18 (requiring a physical presence for a business to have a substantial nexus with a taxing state). Therefore, until Amazon Services established a physical presence in this state by opening its distribution centers, it was not subject to the Act. However, when it established such presence, the Moratorium ensured the Department would not collect any sales tax from it until the Moratorium expired. *See* § 12-36-2691(D)(1) (providing the Moratorium would cease to apply as of January 1, 2016). Once the Moratorium expired, the Department could—and did—impose sales tax upon Amazon Services' sales

occurring on the Marketplace. This was not an attempt to retroactively apply subsequent legislation to Amazon Services' actions. Rather, the Department applied the law that was in place at the time to Amazon Services' sales. The fact the legislature later modified the law to specifically include marketplace facilitators does not establish the Act failed to provide fair notice to Amazon Services that third-party sales occurring on the Marketplace would be subject to sales tax. Further, any 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. *See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged."); *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose."). Accordingly, we reject this argument.

Further, we find Amazon Services has failed to show an equal protection violation. "The South Carolina Constitution provides that no 'person shall be denied the equal protection of the laws.'" *Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) (quoting S.C. Const. art. I, § 3); *see also* U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). "[T]o establish an equal protection violation, a party must show that similarly situated persons received disparate treatment." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 626, 503 S.E.2d 471, 479 (1998). "Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). "To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose." *Id.* 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. Thus, we find Amazon Services failed to show an equal protection violation. Based on the foregoing, we find the ALC did not err in concluding Amazon Services failed to show any constitutional violations on behalf of the Department.

CONCLUSION

For the foregoing reasons, the ALC's order is

AFFIRMED.

KONDUROS, J., and LOCKEMY, A.J., concur.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2019-001706

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

Amazon Services, LLC, ... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

Appellant's Petition for Rehearing

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

INTRODUCTION

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

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

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

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

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

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

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

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

STATEMENT OF THE FACTS

A. The Amazon.com Marketplace.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Amazon Services Was Not “in the Business of Selling” Third Parties’ Products in 2016.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. This Court Misread *Travelscape* to Require a “Broad” Reading of a Tax Statute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The “Point of Sale” Concept Does Not Support the ALC’s Ruling.

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

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

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

any event, the ALC’s new “point of sale” doctrine confuses the business of running a marketplace with the business of selling.

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

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

2. *The “Consignment Analogy” Does Not Support the ALC’s Ruling.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Charleston, South Carolina
February 8, 2024

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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 mischaracterizations² 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 conceded³ 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 tactic 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 reading¹¹ 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 Brief¹³ 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 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. The Order’s discussion of the “point of sale” for retail sales occurring on Amazon.com is both illustrative and appropriate.

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 customer¹⁹ 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,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

SC Court of Appeals

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.

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INTRODUCTION

The Department of Revenue’s Return to Amazon Services’s Petition for Rehearing confirms that rehearing is warranted. The Department has led this Court to adopt reasoning squarely at odds with South Carolina Supreme Court precedent and foundational principles of tax and statutory interpretation law. This reply focuses on three especially significant issues: (1) how the Department is misusing the “burden of proof” to lead this Court to abandon longstanding substantive legal standards, (2) the Department’s inability to reconcile this Court’s ruling with *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012), and (3) the Department’s inaccurate contention that Amazon Services failed to preserve arguments that plainly have been central to this litigation since its inception. The Department’s contrived machinations to sidestep these errors in this Court’s ruling reinforces that rehearing is both necessary and appropriate.

ARGUMENT

I. The Department’s Erroneous “Burden of Proof” Argument Changes Substantive Law and Underscores the Need for Rehearing.

The Department’s argument regarding the burden of proof reinforces the need for rehearing. (*See* Return at 3-6.) The Department is attempting to use the “burden of proof” to change substantive law by asserting that Amazon Services was required to show more than that its interpretation was reasonable. This represents a significant change in the law that requires correction on rehearing.

As a threshold matter, contrary to the Department’s argument, Amazon Services has not tried to “flip” or “shift” the burden of proof. (*Id.* at 3, 5.) Amazon Services does not dispute that it must ultimately prove that the Department’s assessment of the tax was incorrect. But, under well-established South Carolina law, one way to carry that burden is by showing that the tax law

was reasonably susceptible of an interpretation that excluded the taxpayer. (Appellant’s Opening Br. at 37-39; Appellant’s Reply Br. at 15-17.) The Department’s gloss on this Court’s ruling, if not corrected, would eliminate this critical taxpayer protection and work a sea change in South Carolina tax law.

The Department’s Return takes the view that because Amazon bears the burden of proof, Amazon must show more than just that its reading of the statute was reasonable. (Return at 3 (criticizing Amazon Services for arguing that it had to prove only that its understanding of the Sales Tax Act was “reasonable”).) Indeed, the Department insists that Amazon Services must show that the Department’s interpretation was “incorrect.” (*Id.* at 5.) This is a critical mischaracterization of South Carolina law and underscores just how destabilizing this Court’s ruling will be to tax law in South Carolina if it remains in effect. Under the Department’s view, this Court has ruled that once the Department persuades an ALC in a contested proceeding to read a tax statute in a manner that is unfavorable to the taxpayer, the taxpayer loses the benefit of any reasonable interpretation of the statute. That is not the law in South Carolina and contravenes decades of precedent that sides with taxpayers so long as their interpretation of the law is reasonable. (Appellant’s Opening Br. at 37-39; Appellant’s Reply Br. at 15-17.) This Court’s ruling cannot be reconciled with that longstanding precedent and warrants rehearing and correction.

DIRECTV, Inc. & Subsidiaries v. South Carolina Department of Revenue, 421 S.C. 59, 804 S.E.2d 633 (Ct. App. 2017) (*see* Return at 5), does not support the Department’s position. There, the issue turned on a question of fact, not law. For purposes of calculating corporate income tax that should be apportioned to South Carolina, the parties disputed the value of the taxpayer’s income-producing activities in South Carolina. This Court held that, as the party

challenging the Department's determination, DIRECTV had the burden to prove by a preponderance of the evidence that the Department's assessment was incorrect. The Court concluded that DIRECTV "failed to satisfy its burden of proof because it did not demonstrate an actual value for its [income-producing activities] and did not present other evidence proving the DOR incorrectly included 100% of DIRECTV's subscription receipts from South Carolina customers in the numerator of the gross receipts ratio." 421 S.C. at 80, 804 S.E.2d at 644. The ruling did not turn on any *legal* question of the value of the taxpayer's activities in South Carolina. It turned only on whether the Department had, as a matter of *fact*, properly accounted for the relevant activities. Largely because DIRECTV's expert's methodology was deemed unreliable, the Court held that it had simply failed as a matter of fact to prove that the Department had made any factual error. *See id.* (ALC did not clearly err when it found that DIRECTV's expert's "methods did not provide actual values for DIRECTV's services and his proxies did not provide a reasonably approximate value of DIRECTV's IPAs in South Carolina"). Accordingly, *DIRECTV* is inapposite, and the Department's inability to identify any case that actually supports its position reinforces the need for rehearing to bring this case into line with existing South Carolina precedent and longstanding principles of tax law interpretation.

II. The Department's Inability to Reconcile This Court's Ruling with *Alltel* Highlights the Far-Reaching Consequences of This Court's Decision and Further Supports Rehearing.

The Department's effort to reconcile this Court's ruling with the South Carolina Supreme Court's decision in *Alltel* also fails. Indeed, the Department's own reading of *Alltel* ultimately underscores that a taxpayer need only establish a reasonable interpretation of a tax statute that excludes the taxpayer, and nothing more. If this misunderstanding is not corrected, it will have consequences for all cases in which the taxpayer reasonably interpreted the law to not cover its activities.

According to the Department, the taxpayer in *Alltel* prevailed not because its reading of the tax statute was reasonable, but because that statute was “ambiguous.” (Return at 12-15.) This is verbal sleight-of-hand. A taxpayer cannot escape the reach of a tax statute merely by pointing to some ambiguity if that ambiguity provides no reasonable basis for excluding the taxpayer. What must be shown is that there is some reasonable understanding of the statute that excludes the taxpayer; that is what makes the statutory ambiguity relevant to the particular taxpayer. That is why *Alltel* stated that, “[w]here 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.” 399 S.C. at 321, 731 S.E.2d at 873 (emphasis added) (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm’n*, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936)). Amazon Services’s rehearing petition thus properly emphasized both its reasonable interpretation for why it was “excluded” from the sales tax collection duty with respect to third-party sales under the pre-2019 version of the Act, *and* how this Court’s ruling did not and could not explain what made Amazon Services’s interpretation unreasonable. Put simply, when it comes to tax statutes, a law is ambiguous in the relevant respect whenever a taxpayer offers a reasonable interpretation of the act that will exclude it from coverage. That is what *Alltel* means. This Court’s acceptance of the Department’s contrary reading warrants correction.

The details of *Alltel* confirm Amazon Services’s view. As the Department concedes, the “ambiguity in [*Alltel*] related to whether Alltel, as a cell phone provider, qualified as a ‘telephone company’ under the statute.” (Return at 12-13.) The Department claims that 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.” (*Id.* at 13.) But it

was unclear whether the definition of “telephone company” included cellular phone providers *because* it was reasonable to understand the term to exclude cellular providers. That was the ambiguity. Put another way, the Court had only two possible resolutions: did the statutory term “telephone company” reasonably exclude cellular providers or did it unambiguously cover them? To rule that the statute was ambiguous, as the Court did expressly, was the same thing as saying that Alltel had reasonably read the statute to exclude cellular providers. *See Alltel*, 399 S.C. at 318, 731 S.E.2d at 872. The reasonableness of Alltel’s position and the Supreme Court’s discussion of ambiguity went hand in hand.

Likewise, here, this Court’s task was to determine whether Amazon Services, as an online marketplace, had offered a reasonable interpretation of the statutory term “seller.” This case and *Alltel* are parallel. In *Alltel*, the Supreme Court reversed this Court because it failed to give effect to Alltel’s reasonable interpretation of the statute. Refusing to explain why a taxpayer’s interpretation of the tax statute’s application to its conduct was unreasonable is the same error.

Ultimately, the Department’s effort to explain its view ends in self-contradiction. The Department claims that “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.*” (Return at 15 (emphasis added).) Yet elsewhere in its Return the Department concedes: “Amazon has the burden of proving by a preponderance of the evidence that ... *the Act is reasonably susceptible to an interpretation that excludes Amazon’s business model from application.*” (*Id.* at 6 (emphasis added).)

That is not the Department’s only contradiction. The Department also claims that an “ambiguity argument” is somehow distinct from, and can never touch on, an argument about the

“application of the law to facts.” (*See* Return at 9, 13.) But the Department concedes elsewhere, as it must, that Amazon can carry its burden “by demonstrating that ... (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*.” (*Id.* at 6 (emphases added).) A statute may be ambiguous on its face, or as applied to the facts of a particular case; either way, “the taxpayer should receive the benefit in cases of doubt.” *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 (internal quotation marks omitted) (quoting *S.C. Nat’l Bank v. S.C. Tax Comm’n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989)).

To be sure, this Court said that the statute is unambiguous. Amazon Services’s Petition for Rehearing acknowledged as much. (Pet. 1-2.) But, as that Petition demonstrated, that assertion did not account for the reasonableness of Amazon Services’s interpretation. (*See id.* at 8-10, 21, 24-25.) The Department’s suggestion that this Court’s bare conclusion that the statute is unambiguous suffices *even though* it does not account for Amazon Services’s reasonable interpretation amounts to an admission that this Court has significantly changed the law in a way harmful to taxpayers. This Court should reconsider its ruling and reject the Department’s view of the law.

Importantly, Amazon Services has not argued and does not suggest that its mere “subjective belief” that it was excluded from the tax statute means it must prevail. (*Contra* Return at 13.) Such a mischaracterization of Amazon Services’s view reflects a failure to engage with the legally determinative question: was Amazon Services’s view reasonable? The relevant inquiry is objective, not subjective, and Amazon Services has never suggested otherwise.

The Department ultimately resorts to cases outside of tax law to justify its disruption to tax law. For example, the Department argues that *Paschal v. State Election Commission*, 317

S.C. 434, 436 S.E.2d 890, 892 (1995), “forbids a court from resorting to a party’s ‘reasonable’ contrary interpretation in the face of an unambiguous statute.” (Return at 4 n.6.) But *Paschal* is not a tax case and thus does not implicate the longstanding, foundational principle of tax law that taxpayers are entitled to the benefit of reasonable interpretations of tax statutes in their favor. And notwithstanding the Department’s misleading quotation marks, the word “reasonable” does not appear in the *Paschal* opinion. Nor does the case otherwise support the Department’s position. There, the State Election Commission’s construction of the statute was unreasonable. The Commission argued that it was entitled to retain filing fees of unopposed political candidates whose names *do not appear on the ballots* to be voted in primary elections. 317 S.C. at 436, 454 S.E.2d at 891 (emphasis added). The Supreme Court rejected that interpretation because the statute expressly stated the opposite. The statute provided, in no uncertain terms, that the Commission was entitled to receive only “filing fees for candidates whose names *are on ballots* to be voted on in all primaries.” *Id.* at 436, 454 S.E.2d at 891-92 (quoting the statute) (emphasis modified). Given that the Commission’s interpretation was contradicted by the statute’s plain language, there was no need to consider the Commission’s other arguments. *Paschal* cannot meaningfully inform the outcome of this case.

The Department also suggests that because different provisions of the Act had been construed and held to be unambiguous in prior decisions, they could not be found to be ambiguous here. (See Return at 8, 13.) That position guts this important rule. No prior decision of this Court or the South Carolina Supreme Court had considered whether the pre-2019 version of the Act applied to third-party sales on the Amazon.com marketplace. That the pre-2019 version unambiguously applied to the fees included from the sale of optional liability waivers when renting tangible personal property (*Rent-A-Center*) and retailers’ membership fees in the

context of retail bookstores (*Books-A-Million*) does not mean that it unambiguously imposes a collection duty on every business no matter how novel and unanticipated the business is structured. See *Rent-A-Center E., Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 589, 824 S.E.2d 217, 221 (Ct. App. 2019) (liability waivers); *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) (bookstore membership fees), *aff'd*, 437 S.C. 640, 880 S.E.2d 476 (2022). Amazon Services's role with respect to third-party sales on its marketplace is a particular business arrangement that requires its own specific analysis under the terms of the statute.

III. The Department's Meritless Waiver Arguments Do Not Provide Any Reason to Deny Rehearing.

Finally, the Return is replete with efforts to argue waiver over issues that have been at the heart of this long-running dispute from its inception. The most glaring example: contrary to the Return (see Return at 19-21), Amazon Services expended considerable effort in its briefing to explain how its interpretation of the Tax Act excluded Amazon Services because Amazon Services does not receive payment “for” the transfer of personal property. It receives payment from the third-party seller for the valuable services Amazon Services provides to those sellers. Indeed, Amazon Services never receives money from the buyer at all. Amazon Payments, a different corporate entity, performs that important role. This topic was the subject of extensive testimony at trial and lengthy briefing in this Court, the fundamentals of which were undisputed. (See Appellant's Opening Br. at 5-6 (describing different roles of each Amazon entity), 12-14 (explaining payment process), 24-30 (explaining Amazon Services's interpretation of the Act).) The Department imagines that this evidence was neither submitted nor discussed, and simply asserts, with no factual or legal basis, that Amazon Services's “referral fee” is payment from the buyer to Amazon Services “for” tangible personal property, rather than payment from the seller

to Amazon Services for the value the website provides to the seller. (*See* Return at 19-21.) There was no waiver.

In another glaring example of alleged waiver, the Department asserts that Amazon offered “no textual analysis of the Act itself.” (Return at 7 (internal quotation marks omitted).) That is a gross mischaracterization. Amazon Services explained, in detail, its interpretation of the language of the Act and why that language did not apply to its activities with respect to third-party sales. (Appellant’s Opening Br. at 24-30.) The Department effectively admits as much, expressly acknowledging that Amazon Services argued, among other things, that the plain and unambiguous meaning of “sale” in Section 12-36-100 of the Act did not encompass Amazon Services’s activities with respect to third-party sales. (*See* Return at 8 n.9; *id.* at 18 (“Amazon’s primary argument that its business model falls outside the scope of the Act is based on its ... reading of the definition of a ‘sale’ under S.C. Code Ann. § 12-36-100.”).) Contrary to the Department’s bald assertion, Amazon Services’s interpretation of “sale” in Section 12-36-100 is plainly a “textual analysis of the Act itself.”

The Department also claims that “Amazon does not contend that any specific section or term of the Act is ambiguous.” (Return at 8.) But Amazon Services’s lead argument was that the *best* reading of the pre-2019 Act excluded Amazon Services with respect to third-party sales. (Appellant’s Opening Br. at 23-37.) It then argued in the alternative that, even if the Court disagreed and ruled that the Department’s reading was better, Amazon Services’s reading was at least *reasonable*, which shows that the pre-2019 version of the law was ambiguous. (*Id.* at 37-47.) For purposes of this alternative argument, the principal source of ambiguity is the definition of “seller” in Section 12-36-70 (2016). And this ambiguity was eliminated by the 2019 amendment where the legislature explicitly expanded the definition of “seller” to include any

person “operating as a marketplace facilitator.” See S.C. Code Ann. §§ 12-36-70 (2019) (redefining “seller” to include those “operating as a marketplace facilitator”), -71 (2019) (adding definition of “marketplace facilitator”). It is the Department, not Amazon Services, that is unable to point to any “specific section or term of the Act” that covers Amazon Services’s activities with respect to third-party sellers. That is why—as the Department’s Director conceded (Ex. 194, R.1263 at 6:13-15, 8:40-50; Ex. 192, R.1256)—the 2019 amendment was necessary.

Likewise, the Department’s position that Amazon did not challenge the breadth of the ALC’s reasoning under *Travelscape* defies reality. (See Return at 23-24.) That topic was a central argument in Amazon Services’s principal brief and discussed during the oral argument. (See Appellant’s Opening Br. at 19-20, 28-29, 30-33; Oral Argument at 8:48–9:12, 45:46-46:54.) The Department’s willingness to double down on this Court’s reading of *Travelscape* as requiring courts to read tax statutes broadly confirms the extent to which this Court’s ruling departs significantly from the South Carolina Supreme Court’s precedents.

CONCLUSION

The Department has not and cannot offer a reading of this Court’s ruling that aligns with longstanding tax law principles because the ruling itself departs from those principles and in a manner that will have enormous implications for taxpayers throughout South Carolina. This Court should grant rehearing and rule in favor of Amazon Services.

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The South Carolina Court of Appeals

Amazon Services, LLC, Appellant,

v.

South Carolina Department of Revenue, Respondent.

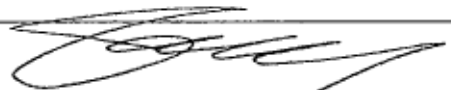
Appellate Case No. 2019-001706

ORDER

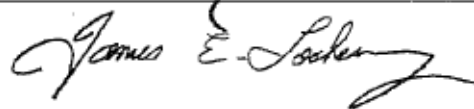
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



A.J.

Columbia, South Carolina

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