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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.

BRIEF OF AMICUS CURIAE PROFESSOR HAYES HOLDERNESS

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INTRODUCTION

In this appeal, Amazon Services, LLC ("Amazon") challenges the decision of the Court of Appeals that Amazon was unambiguously a "seller" under the South Carolina sales and use tax statutes that were in effect prior to 2019 with respect to the sales of third-party sellers using Amazon's marketplace facilitation services. That decision improperly assigned the sales of those third-party sellers to Amazon, in contrast to the plain reading of the statutes and conventional understandings and practices regarding sales and use tax collection and remittance obligations.

This Court should grant review to correct the errors of the Court of Appeals and thereby ensure that the South Carolina sales and use tax law is fairly administered in line with legislative intent. This Court would also be able to ensure that significant changes to the tax law such as the one brought about by the Court of Appeals are effectuated through legislative action rather than judicial decision.

INTEREST OF THE AMICUS CURIAE

Professor Hayes R. Holderness is a Professor of Law at the University of Richmond who writes and teaches in the areas of tax law, policy, and administration, with a particular focus on the area of state and local taxation. He has regularly written commentary and submitted Amicus briefs in cases concerning state and local tax law, including issues regarding sales and use taxation. He submits this brief to highlight the need for this Court to grant certiorari to correct the errors of the Court below and to demonstrate that the arguments for an expansive interpretation and application of the tax laws are misplaced.

SUMMARY OF THE ARGUMENT

This Court should grant certiorari in this case to rein in the Court of Appeals' expansive interpretation of the South Carolina sales and use tax collection and remittance statutes and to thus

return to the natural interpretation of the law. The question in this case is straightforward: prior to legislative action in 2019, were marketplace facilitators responsible for collecting and remitting South Carolina tax on only their own sales or were they also responsible for the sales of third-party sellers?

Conventional practice and understanding provides a clear answer to this question: marketplace facilitators were only responsible for collecting and remitting tax on their own sales. The third-party sellers bore that responsibility for their sales. Indeed, apart from a few explicit statutory exemptions not relevant to this case, no person had ever been responsible for collecting and remitting tax on a third party's sales.

Contrary to this conventional practice and understanding, the Court of Appeals interpreted the statutes to require Amazon to collect and remit taxes on the sales of third-party sellers. This interpretation is novel and improper, as it effectively provides that a person tangentially related to a seller's sales transaction has an obligation to collect and remit South Carolina taxes on that transaction. If left in place, this interpretation would effectuate a significant change in the administration of the South Carolina sales and use tax law from the bench to unfairly target a single entity, Amazon.

In reaching its decision, the Court of Appeals considered an amici curiae brief submitted by tax law professors Tessa R. Davis and Clinton G. Wallace. However, the tax law professors' brief did not address the core issue in this case and does not support the Court of Appeals' broad reading of the statutes at issue. When tax laws use broad language that can be interpreted only one way, they can and should be enforced according to their literal meaning. But courts should not interpret tax statutes "broadly" when narrower interpretations are permissible. Construing tax laws "broadly" can frustrate legislative intent and risks unfairly whipsawing compliant taxpayers. In

pursuing its broad reading of the law here, the Court of Appeals' decision risks bringing about both of these harms.

ARGUMENT

Since its enactment, the South Carolina sales and use tax law has required sellers to collect and remit taxes when they make sales in the state (subject to any relevant constitutional limitations). S.C. Code Ann. § 12-36-910(A). Sellers have not been responsible for collecting and remitting taxes on someone else's sales, absent explicit statutory authority.

In 2019, the South Carolina legislature, in line with the actions of other states across the country, explicitly required marketplace facilitators like Amazon to collect and remit taxes on the sales of independent third-party sellers that used their marketplace facilitation services. *See* Act No. 21, 2019 S.C. Acts 101-02. The question in this case is whether marketplace facilitators had a tax collection and remittance obligation for the sales of third-party sellers prior to that 2019 legislative action.

That question is answered not by asking if marketplace facilitators are "sellers" or in the "business of selling" generally, but by asking whether the sales of the independent third-party sellers are also the sales of the marketplace facilitators. The natural interpretation of the South Carolina tax law in place at the time of this controversy is that those sales were not the sales of the marketplace facilitators, as Amazon has argued.

The Court of Appeals concluded otherwise and held that Amazon was responsible for collecting and remitting tax on someone else's sales. Only by embracing a novel and expansive reading of the tax laws could this decision be reached. In an amici brief to the Court of Appeals, tax law professors Tessa R. Davis and Clinton G. Wallace advocated for such a reading to, in their view, effectuate legislative intent and to address taxpayer abuse. However, their reading of the tax

laws at issue here would frustrate legislative intent and whipsaw compliant taxpayers by deviating from sound principles of interpretation to target a single entity.

While the Court of Appeals did not explicitly adopt the positions of the tax law professors, the court did reach the result advocated for by the professors. The Court of Appeals' expansive reading of South Carolina sales tax collection obligations threatens to bring about these harms by expanding the scope of the sales and use tax collection and remittance obligations beyond the natural understanding. This result is concerning not only for the issue at hand, but more broadly for taxpayers and people subject to the laws of South Carolina.

This Court should grant certiorari to correct the errors of the Court of Appeals and to reestablish a principled approach to interpreting the laws in South Carolina.

A. The Broad Reading of South Carolina Tax Law Advanced By Tax Law Professors as Amici Curiae Is Not Relevant to This Matter and Threatens To Frustrate Legislative Intent and Whipsaw Compliant Taxpayers

In their amici brief, the tax law professors argued that Amazon attempts to misconstrue the South Carolina tax law by claiming that it was not responsible for collecting and remitting tax on the sales of the third-party sellers using its marketplace facilitation services. Effectively, the tax law professors argued that the tax laws of South Carolina should be read broadly to assign the sales of the third-party sellers to Amazon for three reasons: first, because the legislature intended the laws to be read broadly; second, to prevent taxpayer abuse; and third, because failing to do so would grant an unintended subsidy to Amazon. However, the tax law professors' brief did not address the relevant issue in this case regarding whether the sales of third-party sellers are properly attributable to Amazon and mistakenly concludes that there was both taxpayer abuse and an unintended subsidy to Amazon here when there was neither.

Thus, the tax law professors' arguments do not support the Court of Appeals' approach, and there is no principled reason for the Court of Appeals' broad interpretation of the statutes at issue instead of the natural and reasonable interpretation adopted by Amazon. Adopting the tax law professors' approach and allowing the Department of Revenue broad leeway to apply the tax laws as it prefers would threaten both to frustrate legislative intent behind the tax laws and to whipsaw compliant taxpayers.

1. Broad Jurisdictional Statutes Do Not Imply Broad Substantive Statutes

This Court has long held that "a tax statute is not to be extended beyond the clear import of its language . . . ." *Beard v. South Carolina Tax Comm'n*, 230 S.C. 357, 367 (1956). In arguing that the law should be interpreted broadly to make Amazon responsible for collecting and remitting tax on the sales of third parties, the tax law professors first claim that the clear import of the South Carolina sales and use tax law is to expansively ascribe sales to people subject to the state's tax jurisdiction. However, the tax law professors' argument is based in an issue that is not relevant to this case—nexus—and conflates jurisdictional tax law with substantive tax law. When one considers the legislative intent behind the substantive tax law, it is clear that Amazon's interpretation is correct and that the tax law professors are advancing an incorrect reading of the law.

"Nexus" refers to the connection that a person must have with a state before that person is subject to the state's tax jurisdiction. *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 177 (2018) (describing the nexus requirement). Prior to the United States Supreme Court's *Wayfair* decision in 2018, nexus doctrine required that a person have a physical presence in the state before the state could claim tax jurisdiction over the person, at least for sales and use tax purposes. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 317-18 (1992) (confirming the physical presence nexus standard). In *Wayfair*, the United States Supreme Court overturned the physical presence standard in favor

of an economic presence standard thought to be better equipped for modern means of doing business. *See Wayfair*, 585 U.S. at 177-88. In support of its decision in *Wayfair*, the United States Supreme Court noted concerns about taxpayer abuse of the physical presence standard to avoid falling subject to the tax jurisdiction of the states. *Id.* at 179.

In contrast to the jurisdictional issue of nexus, which addresses who and what are within the power of a state to tax, substantive tax law issues concern *what is actually taxed and how*. For instance, South Carolina substantively chooses not to subject most services consumed in the state to sales tax even though the state certainly has jurisdiction to tax those services. *See* S.C. Code Ann. § 12-36-910(A) (imposing sales tax only on sales of tangible personal property and certain enumerated services). Additionally, South Carolina substantively chooses to impose its sales tax on sellers rather than consumers even though the state certainly has jurisdiction to tax the consumers. *See id.* (imposing the tax on sellers).

In short, jurisdictional and substantive tax laws address very different matters. Failing to recognize this distinction, the tax law professors argue that South Carolina, like many other states, had adopted broad sales and use tax *jurisdictional* laws in the face of restrictive pre-*Wayfair* nexus doctrine. The physical presence requirement often frustrated state efforts to collect sales and use taxes, particularly with the rise of e-commerce. *See Wayfair,* 585 U.S. at 169, 175-176 (describing these harms). To relieve these frustrations, the states often adopted expansive statutes designed to claim tax jurisdiction over a seller for any conceivable physical presence. *See id.* at 185-86 (describing some such efforts).

The tax law professors are likely correct that the legislative intent behind these jurisdictional statutes was that they be interpreted broadly to apply to as many sellers as possible. But these statutes, and the *Wayfair* line of cases, have nothing to do with substantive issues of tax

law, including the issue of which sales in the state are the sales of the seller. A broad jurisdictional rule does not equal an expansive substantive taxation rule. The United States Supreme Court's loosening of the constitutional nexus standard by overturning the physical presence standard did not somehow broaden state-level substantive tax statutes. It simply does not follow that because the South Carolina legislature wished to claim tax jurisdiction over as many people as possible, it also wished to generally assign the sales of one person to another person for tax collection and remittance purposes.

In fact, it is wholly inappropriate to conflate a legislative intent to assert broad tax jurisdiction with a legislative intent to broadly interpret substantive tax law. Doing so frustrates the substantive policy choices of the legislature. Legislators, through the tax law, decide which members of society bear which burdens. Courts and administrators should not alter those legislative choices by failing to follow the clear import of the statutes adopted and expanding the scope of the law, even if the legislature decides to claim tax jurisdiction over as many people as possible.

Indeed, in a world devoid of constitutional restrictions on who and what states may tax, the best jurisdictional standard for a state to adopt is the broadest one.[1] Doing so would ensure that any person engaged in an activity that the state has decided to tax is subject to tax; no one would be able to avoid the burden that their elected officials have determined is appropriate. This would allow legislators to adopt substantive tax policies with precision. However, if people could avoid their burdens due to a lack of tax jurisdiction over them, then the legislators would have to adopt

[1] There are very good and important reasons for constitutional restrictions on state tax jurisdiction claims, particularly to ensure that states do not attempt to fully export their tax burdens to out-of-state people. In no way should the value of those restrictions be discounted by this point about states' preferences for broad jurisdictional standards.

a second-best position and shift the avoided burdens elsewhere, either through raising other taxes or reducing public spending.

In the case of sales taxation, South Carolina has decided that people who make sales of tangible personal property and certain enumerated services in the state should pay tax as a result. S.C. Code Ann. § 12-36-910(A). To treat anyone making such sales in South Carolina fairly, South Carolina should claim tax jurisdiction over as many sellers as possible, which very well may have been the legislative intent behind South Carolina's jurisdictional tax laws, as the tax law professors observe. However, there is no indication that the legislature intended the sales tax law to substantively be a cash grab from any seller under the state's tax jurisdiction. Just as it would be inappropriate to read "tangible personal property" broadly to capture unenumerated services, as might happen in the case where the tangible personal property is merely a vessel for an unenumerated service and as recognized by the Department of Revenue's regulations, *see* S.C. Code Ann. Regs. § 117-308 ("The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax . . . ."), so it is inappropriate to read "seller" broadly to conclude that a seller such as Amazon is responsible for collecting and remitting tax on the sales of a third party.

It is true that S.C. Code Ann. § 12-36-70(1)(a)) defines "seller" to include every person "selling or auctioning tangible personal property *whether owned by the person or others*" (emphasis added). The tax law professors argue that the emphasized language supports a broad reading of the statute. However, while S.C. Code Ann. § 12-36-70(1)(a) expands the types of transactions that can make someone a seller, it does not change the definition of a "sale" under S.C. Code Ann. § 12-36-100. To effectuate a sale, a person must transfer the tangible personal property for a consideration. S.C. Code Ann. § 12-36-100. A person could make a sale of another

person's property if they had the right to transfer that other person's ownership (Amazon did not have that right here with respect to the sales of the third-party sellers). To read the "owned by the person or others" language of S.C. Code Ann. § 12-36-70(1)(a) as broadly as the Court of Appeals did and as the tax law professors advocate inappropriately ignores the fact that the law substantively requires a "seller" to make a "sale" of the property in question before the seller is responsible for tax on the sale of the property. Such loose application of the tax statutes runs counter to general rule of law principles and threatens the ability of taxpayers to understand and comply with their tax obligations to the state.

In a way, this entire matter highlights the distinction between jurisdictional tax issues and substantive tax issues. Simply put, nexus is not an issue in this case; Amazon clearly was subject to South Carolina's tax jurisdiction by virtue of its physical presence in the state. The problem for South Carolina was that, even under the broadest interpretation of its jurisdictional tax laws, many of the third parties using Amazon's marketplace facilitation services may not have had nexus with the state prior to *Wayfair*. Even so, South Carolina likely had nexus with other people associated with the sales of those third parties: the customers, payment processors like MasterCard and Visa, common carriers delivering the goods sold, and marketplace facilitators like Amazon. Given that the state's preferred substantive policy of taxing the seller had been frustrated by the nexus standard, the state had to adopt a different substantive policy, which it clearly did. South Carolina did not respond by shifting the tax burden to payment processors, common carriers, or marketplace facilitators (until 2019); it shifted the burden to in-state consumers through the use tax, as did every other state in the nation. *See* S.C. Code Ann. § 12-36-1310 (imposing the use tax); HELLERSTEIN & HELLERSTEIN, STATE TAXATION ¶ 16.01 (describing the history and purpose of use taxes). This

substantive policy choice should not be ignored because it is easier to collect revenue from a particular entity, Amazon.

Thus, the Court of Appeals' broad interpretation of the substantive sales tax statutes did not effectuate legislative intent; it frustrated that intent in an unprincipled pursuit of revenue from a single entity. This Court should grant certiorari to correct this error and to confirm that broad interpretations of substantive tax laws must be based in sound reasoning to ensure that taxpayers are not unfairly burdened without reasonable notice of their obligations.

2. The Substance-Over-Form Doctrine Has No Relevance in This Matter

The tax law professors also argue that the substance-over-form doctrine applies in this matter to ensure that the state is able to accurately determine Amazon's sales tax obligations. The substance-over-form doctrine is a powerful anti-abuse doctrine which allows for formal arrangements to be recharacterized by their substance in order to ensure that the tax laws apply appropriately to them. *See Frank Lyon Co. v. United States*, 435 U.S. 561, 572-573 (1978) (detailing the doctrine); *Beard*, 230 S.C. at 368 (similar). However, the substance-over-form doctrine is not a blank check for the government to achieve the result it desires. *See Frank Lyon*, 435 U.S. at 581-84 (denying the government's efforts to recharacterize a transaction under the doctrine); *Beard*, 230 S.C. at 367 (observing the "well-established rule of construction that a tax statute is not to be extended beyond the clear import of its language" before introducing the substance-over-form doctrine).

As an initial matter, because of the potential expansiveness in the application of anti-abuse doctrines, generally they are often adopted by statute rather than judicial fiat. *See, e.g.,* 26 USC § 7701(o)(5)(A) (codifying the federal economic substance doctrine); S.C. Code Ann. § 12-6-5590(E) (adopting anti-abuse doctrines for the specific task of analyzing charitable contributions for income tax purposes). Taxpayer notice is an important goal in designing and administering tax

laws, and recharacterizing a taxpayer's activities is a serious undertaking that should be exercised with caution to avoid whipsawing compliant taxpayers. South Carolina does not have a relevant statutory anti-abuse rule for sales tax, and this Court has not articulated a general substance-over-form doctrine for use in the sales tax area. Both of these facts caution against recharacterizing Amazon's transactions with the third-party sellers under a general anti-abuse theory, especially because Amazon has not engaged in taxpayer abuse.

This is not to claim that there is no room to act against taxpayer abuse, and indeed, the sales tax laws do provide the Department of Revenue with some authority to disregard corporate structures when determining who the taxpayer is. *See* S.C. Code Ann. § 12-36-70 (permitting the Department to treat certain people's sales as the sales of an out-of-state seller when an agency-type relationship exists between the parties). In fact, the tax law professors rely on these provisions when advocating for a more general adaptation of the substance-over-form doctrine. Transactions among related entities certainly can raise red flags for tax administrators, because those related entities may be able to collude to avoid their tax obligations. But there typically is much less concern regarding market transactions between unrelated entities because the entities' lack of control over each other dilutes the possibility of abusive collusion.

It is unsurprising, then, that the tax law professors' arguments in favor of applying the substance-over-form doctrine are primarily addressed at the Amazon group's corporate structure in order to establish that Amazon was a seller in the state during the period at issue. But again, that Amazon was a seller is undisputed. The disputed issue is whether Amazon was a seller with respect to the sales of the third-party sellers. The tax law professors here fall into a similar mistake of conflating approaches to jurisdictional standards—who is a person subject to tax in the state—with approaches to substantive standards.

Sales and use taxes are transactional taxes, meaning that they are imposed on a specific activity that occurs in the state, a sales transaction. The watershed question for the administration of the law is whether a sale occurred; after a sale occurs, the Department must determine who the seller is. Historically, there is only one seller: the entity that transfers ownership of the goods sold. And in this context, formal distinctions between related entities have carried substantive effect—sales transactions between related entities are subject to sales tax in South Carolina because ownership of the goods sold has formally shifted, even though substantively ownership might not have changed. *See Edisto Fleets, Inc. v. S.C. Tax Comm'n*, 256 S.C. 350, 354-356 (1971) (imposing sales tax on sales between related entities).

Thus, while the Department of Revenue has authority to disregard formal taxpayer structures in appropriate cases to determine *who* is subject to tax, the Department's authority to recharacterize transactions between even related, let alone unrelated, parties is less clear and is less clearly needed. It is one thing to apply anti-abuse principles to turn one Amazon subsidiary into a tax collector for another Amazon subsidiary; it is a wholly different and more disruptive thing to turn Amazon into a tax collector for unrelated third parties by recharacterizing the third parties' activities as Amazon's. Even the authority contained in S.C. Code Ann. § 12-36-70 requires that the in-state person be making sales in an agency-type relationship on behalf of the out-of-state seller, demonstrating that recharacterizing transactions between unrelated parties is an extreme action not contemplated by the statutes. Following the tax law professors' proposal for a broader anti-abuse doctrine would erode rule of law principles and result in taxpayer uncertainty as any time a transaction could be done differently and result in more tax it could be recharacterized, counter to the clear import of the statutes.

Apart from the legal uncertainty surrounding whether a substance-over-form doctrine should apply to the South Carolina sales tax in the way that the tax law professors propose, factually, there is no basis here for applying such a doctrine even if adopted. Again, the transactions here are not controlled by related entities; they are made between unrelated entities, reducing concerns unless some collusion or abuse is clearly demonstrated. But there is no evidence of any such collusion or abuse; in fact, despite having no obligation to do so, Amazon informs the third-party sellers that they may have tax obligations to South Carolina for their sales.

No recharacterization here is appropriate because the substance of these transactions is exactly as Amazon has articulated. Amazon provided marketplace facilitation services to the third-party sellers and was paid for those services by the sellers, and those third-party sellers transferred ownership in their goods to their customers for consideration from the customers, thus effectuating the taxable sales transactions. Indeed, Amazon did not have the authority to convey ownership in the sellers' goods to the sellers' customers, meaning that Amazon could not make those sales. Additionally, Amazon did not receive consideration for transferring the tangible personal property at issue, it received consideration for the services it provided to the third-party sellers. In short, Amazon did not make the taxable sales at issue, the third-party sellers did.

The Court of Appeals implicitly recognized the substance of these transactions by declaring that the sales were the sales of the third-party sellers. Recharacterizing Amazon's transactions with the sellers and the sellers' customers to also make Amazon a seller with respect to the sales at issue creates a historical anomaly whereby there are two sellers of the same good to the same customer at one time. This simple fact demonstrates the lack of a need for applying an anti-abuse doctrine here to Amazon. The only entities potentially avoiding proper tax burdens are the third-party sellers. Making that tax abuse the responsibility of an unrelated party rather than the actual tax

avoider is a dangerous and expansive exercise of anti-abuse principles. If allowed to stand, more people could be unfairly burdened with others' tax liabilities when there is an opportunity for the state to raise more tax revenue. The tax law professors' position should not be followed.

3. Assigning Third-Party Sales to Amazon Does Not Prevent an Unintended Subsidy for Amazon, It Creates an Unintended Whipsaw of Amazon

The tax law professors conclude that failing to assign the sales of the third-party sellers to Amazon for tax collection and remittance purposes would grant Amazon an unintended subsidy. In truth, following the Court of Appeals' decision and assigning those sales to Amazon creates an unintended whipsaw of a compliant taxpayer. This fact highlights the overall concern for adopting expansive views of the substantive tax law and of anti-abuse doctrines. When those actions are undertaken, a compliant taxpayer may be blindsided by an unpredictable application of the law or recharacterization of legitimate transactions to be stuck with a greater tax bill. Again, the "clear import of [the statute's] language" must control in order to provide stability and predictability to the law. *See Beard*, 230 S.C. at 367.

The tax law professors argue that not requiring Amazon to collect and remit tax on the sales of the third-party sellers subsidizes Amazon vis-à-vis small mom-and-pop shops in South Carolina. The logic of this argument is difficult to follow, which is likely why the amicus brief focuses on the admitted subsidy received when Amazon was not required to collect tax on *its own sales*.

At all relevant times, Amazon complied with South Carolina tax law by collecting and remitting tax on all of the sales it made to its customers. In this way, Amazon was no different than the mom-and-pop shop that also collected tax on its sales to its customers. There is no subsidy in this comparison. In fact, to say that Amazon receives a subsidy by not having to pay tax on someone else's sales assumes the answer that Amazon should be responsible for that third party's

tax. This assumption obscures clear-minded interpretation of the law and demonstrates the target placed on Amazon.

The third-party sellers using Amazon's marketplace facilitation services have their own tax obligations to the South Carolina. Failing to require those third-party sellers to comply with their obligations would constitute the type of unintended subsidy that the tax law professors note, but that subsidy would be for those third-party sellers, not Amazon. If the concern is for lost revenues, the state should pursue those third-party sellers or explicitly place those tax obligations elsewhere through legislative action—*which is exactly what the state did in 2019.*

By assigning the tax collection and remittance obligations for those third-party sales to Amazon prior to the 2019 legislation, the Court of Appeals decision makes Amazon responsible for the non-compliance of those third-party sellers without clear legislative authorization to do so. This result would be no different than requiring a father to pay the tax liability of his non-compliant adult son. The father is not given an unintended subsidy if he is not made responsible for the son's taxes; rather, the father would be subject to an unfair whipsaw if he were so responsible.

Amazon is subject to such an unfair whipsaw under the Court of Appeals' approach because Amazon would have to expend resources to ensure that the correct amount of tax is collected and remitted to the State. Given that Amazon is unlikely to be able to track down the third-party sellers' customers and collect the tax from those customers that the third-party sellers should have collected, Amazon would likely have to pay the taxes out of its own funds.

Making one person responsible for the noncompliance of another person does not reflect the proper or fair administration of the tax law whether in this matter or more generally, yet it is exactly the result that the Court of Appeals and the tax law professors have endorsed by moving

past the clear import of the South Carolina tax statutes. This Court should grant certiorari to correct this error and protect future taxpayers from having to bear the burdens of others.

B. Even assuming the Court of Appeals' Broad Interpretation of the Tax Law was Plausible, Principled Approaches to the Interpretation of Tax Laws Counsel Against It

Though the clear import of the statutes in question establishes that the sales of third-party sellers were not attributable to marketplace facilitators prior to 2019, if the Court of Appeals' contrary interpretation of the statutes was deemed plausible, that interpretation still should not be adopted pursuant to principled approaches to statutory interpretation in tax. First, a well-established canon of statutory interpretation counsels that ambiguities in the tax law should be resolved in favor of reasonable interpretations of the taxpayer. Second, legislative action should be presumed to change the law rather than merely clarify it. These approaches promote taxpayer notice, rule of law principles, and judicial deference to legislative action.

As recognized by this Court, ambiguities in the tax law should be resolved in favor of reasonable interpretations of the taxpayer. *Alltel Comm'ns v. S.C. Dep't of Rev.*, 399 S.C. 313, 318 (2012). This canon of statutory interpretation finds its basis in principles of due process of law: taxpayers must be able to understand their obligations to the state in order to comply and punishing someone for failing to comply with an unclear law would be fundamentally unfair. *See U.S. v. Merriam*, 263 U.S. 179, 188 (1923) (describing the basis of the canon).

Here, if there are two plausible interpretations of the statute at issue (i.e., Amazon's interpretation and that adopted by the Court of Appeals), then the statute should be deemed ambiguous. *See Alltel*, 399 S.C. at 318, *citing Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76 (1936) ("[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.").

Amazon's interpretation that the sales of the third-party sellers were not its sales was reasonable given the natural reading of the statute. Multiple pieces of evidence confirm the reasonableness of Amazon's interpretation. The Director of the Department of Revenue offered testimony to the state legislature adopting the same interpretation. The statutes explicitly imposed tax collection and remittance obligations on specific actors, namely consignees and auctioneers, for the sales of other people, indicating that they were special deviations from the general rule. *See* S.C. Code Ann. §§ 12-36-70(1)(a), -90(1)(a) (2016). Finally, the general nationwide practice was not to attribute the sales of a third-party to another person for tax collection and remittance purposes unless specifically provided for by statute. *See* HELLERSTEIN & HELLERSTEIN, STATE TAXATION ¶ 12.01 (describing sales taxes as falling on vendors and consumers, not intermediaries); ¶ 19.08[5] (describing the historical tax collection obligations of intermediaries such as auctioneers and consignees). Amazon's reasonable interpretation of the South Carolina tax law should have prevailed.

Additionally, this Court has recognized that legislative action should be presumed to change the law rather than merely to clarify it. *Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 60 (2007). Future actions certainly cannot be conclusive as to the intention of an early legislature, but where there is ambiguity as to the scope of the law imposing tax obligations, courts should defer to legislative action rather than adopting expansive readings of the law. Deferring to legislative action ensures that significant changes to the law come from legislatures rather than judicial decisions, avoids unfairly subjecting taxpayers to unforeseen tax obligations, and avoids rendering legislative action futile. *See id.* at 60-61.

Here, the Court of Appeals' interpretation of the tax laws prior to the adoption of the marketplace facilitator law in 2019 was expansive and novel in both South Carolina and

nationwide. In other words, it represented a significant change in how sales and use tax collection and remittance obligations had been understood by the tax community. And that interpretation effectively rendered the 2019 legislation unnecessary, a view contrary to that of taxpayers and the Director of the Department of Revenue. The Court of Appeals should have avoided its expansive interpretation of the South Carolina tax law by following the presumption that legislative action changes the law.

By granting certiorari, this Court can correct the Court of Appeals' errors and reconfirm the state's commitment to applying sound principles of statutory interpretation in tax. Doing so would ensure that the tax laws are fairly applied, that taxpayers are made aware of their obligations, and that legislative action is granted its proper deference from the judiciary. Failing to do so would weaken protections for taxpayers in future cases that have acted upon reasonable interpretations of the law and of the effect of legislative action.

CONCLUSION

For the reasons stated in this Brief, tax law professor Hayes R. Holderness as Amicus Curiae respectfully requests that this honorable Court grant certiorari.

Respectfully submitted,

May 17, 2024

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