

May 28 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Appellate Case No. 2024-000625

Amazon Services, LLC, Petitioner,

v.

South Carolina Department of Revenue, Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

SOUTH CAROLINA DEPARTMENT OF REVENUE

Jason P. Luther (S.C. Bar No. 78021)

P.O. Box 12265

Columbia, SC 29211

(803) 898-5131

BURR & FORMAN LLP

Tracey C. Green (S.C. Bar No. 9342)

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

P.O. Box 11390 (29211)

1221 Main Street, Suite 1800

Columbia, SC 29201

(803) 799-9800

VIVA LAW FIRM

Lauren Acquaviva (S.C. Bar No. 100528)

672 Marina Drive, Suite 101

Charleston, SC 29492

(843) 216-7728

Attorneys for Respondent

Table of Contents

	Page
Table of Authorities	iii
Introduction.....	1
Counterstatement of the Issues Presented for Review	2
Statement of the Case.....	2
1. Background.....	3
2. Pertinent Factual Background.....	4
A. Amazon.com Customer Experience	4
B. Order Fulfillment.....	6
i. Fulfillment by Third-Party Merchant.....	6
ii. Fulfillment by Amazon.....	7
C. Amazon’s Relationship with Third-Party Merchants.....	8
D. Amazon’s Compensation	9
E. Sales and Use Tax Collection.....	9
Argument	10
1. Because the Court of Appeals’ decision holding that the Sales Tax Act is not ambiguous is entirely consistent with and supported by the plain language of the pertinent statutes as well as with <i>Travelscape</i> and other precedent of this Court and the Court of Appeals, certiorari is not warranted.	10
2. Certiorari is not warranted on the second issue because Amazon cannot make a comprehensive and unambiguous sales tax statute ambiguous merely because it articulates some subjective reason it should not be subject to that statute.	15
A. Certiorari is not warranted here because Amazon’s very artful definitions of the Act’s plain language do not create an ambiguity, let alone render its position reasonable.....	15
B. Certiorari is not warranted here because 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 and, thus, does not render the Act ambiguous or make Amazon’s position reasonable.....	19

- C. Certiorari is not warranted here because statements of the Department’s Director and the General Assembly in the context of the 2019 amendments to the Act does not mean that the Act is ambiguous or that Amazon’s interpretation of the 2016 Act was reasonable.....20
- D. Certiorari is not warranted here because decisions rendered by other states do not render this State’s Sales Tax Act ambiguous or make Amazon’s interpretation reasonable, especially given the well-settled principle that other states do not govern this State’s application of its own laws.22
- 3. Because, as both the Court of Appeals and the ALC concluded, the record contains no support for Amazon’s constitutional claims and because this is a matter of statutory interpretation that does not rise to one of constitutional import, certiorari is not warranted on these claims.23
 - A. No evidence of a due process violation.....23
 - B. No evidence of an equal protection violation.....24
- Conclusion25

Table of Authorities

	Page(s)
Cases	
<i>ABB, Inc. v. Integrated Recycling Grp. of S.C., LLC</i> , 432 S.C. 545, 854 S.E.2d 171 (Ct. App. 2021).....	22
<i>Alltel Commc'ns v. S.C. Dep't of Revenue</i> , 399 S.C. 313, 731 S.E.2d 869 (2012)	11, 12, 14
<i>Atl. Coast Builders & Contractors, LLC v. Lewis</i> , 398 S.C. 323, 730 S.E.2d 282 (2012)	24
<i>Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship</i> , 526 U.S. 434, 461 (1999).....	15
<i>Bazzle v. Huff</i> , 319 S.C. 443, 462 S.E.2d 273 (1995)	20
<i>Books-A-Million, Inc. v. S.C. Dep't of Revenue</i> , 437 S.C. 640, 880 S.E.2d 476 (2022).....	12, 13, 15
<i>Bryant v. City of Charleston</i> , 295 S.C. 408, 368 S.E.2d 899 (1988)	11, 13
<i>Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council</i> , 306 S.C. 488, 413 S.E.2d 13 (1991)	20
<i>Crescent Mfg. Co. v. Tax Comm'n</i> , 129 S.C. 480, 124 S.E. 761 (1924)	14
<i>Duvall v. S.C. Budget & Control Bd.</i> , 377 S.C. 36, 659 S.E.2d 125 (2008)	19
<i>Enos v. Doe</i> , 380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008).....	14
<i>Fuller v. S.C. Tax Comm'n</i> , 128 S.C. 14, 121 S.E. 478 (1924)	12
<i>Grant v. S.C. Coastal Council</i> , 319 S.C. 348, 461 S.E.2d 388 (1995)	24
<i>Home Med. Sys., Inc. v. S.C. Dep't of Revenue</i> , 382 S.C. 556, 677 S.E.2d 582 (2009)	10

<i>Jeter v. S.C. Dep’t of Transp.</i> , 369 S.C. 433, 633 S.E.2d 143 (2006)	20
<i>McCall v. Finley</i> , 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987).....	17
<i>Planned Parenthood S. Atl. v. State</i> , 438 S.C. 188, 882 S.E.2d 770 (2023)	22
<i>Rent-A-Ctr. E., Inc. v. S.C. Dep’t of Revenue</i> , 425 S.C. 582, 824 S.E.2d. 217 (Ct. App. 2019).....	12, 13, 15
<i>South Carolina Dep’t of Revenue v. Anonymous Co. A</i> , 401 S.C. 513, 678 S.E.2d 255 (2009)	17
<i>South Dakota v. Wayfair, Inc.</i> , 585 U.S. 162 (2018).....	1, 19, 21, 22
<i>Travelscape, LLC v. S.C. Dep’t of Revenue</i> , 391 S.C. 89, 705 S.E.2d 28 (2011)	10, 11, 13, 14
<i>Whaley v. Dorchester Cnty. Zoning Bd. of Appeals</i> , 337 S.C. 568, 524 S.E.2d 404 (1999)	25
<i>Whitner v. State</i> , 328 S.C. 1, 492 S.E.2d 777 (1997)	19
Statutes	
S.C. Code Ann. § 12-36-100.....	15
S.C. Code Ann. § 12-36-20.....	11, 14
S.C. Code Ann. § 12-36-2691 (2014).....	3
S.C. Code Ann. § 12-36-30.....	17, 18
S.C. Code Ann. § 12-36-70.....	16, 18
S.C. Code Ann. § 12-36-910.....	12, 15
S.C. Code Ann. § 12-36-910(A).....	13, 14
S.C. Code Ann. § 12-36-920.....	13
S.C. Code Ann. § 12-36-920(E).....	13

Rules

Rule 204(b), SCACR 3
Rule 242(b)(4), SCACR..... 2
Rule 242(b), SCACR 2
Rule 242, SCACR..... 10

Other Authorities

Rev. Rul. 14-4 (Sept. 10, 2014) 22
S.C. Information Letter 15-19 (Dec. 2, 2015)..... 22

Introduction

At issue in the appeal is the application of the law that existed in the first quarter of 2016 to Amazon Services (Amazon) and its business model. Amazon does not dispute that, since 2019, it has been and is responsible for remitting sales taxes on all sales occurring on Amazon.com (Website), including both products owned by Amazon and its affiliates as well as those owned by third parties. In 2019, the General Assembly enacted what is commonly identified as “marketplace facilitator” legislation to address the new interstate taxation landscape created by *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018), which upended nearly 50 years of tax policy previously based on a seller’s physical presence in a state. 2019 S.C. Acts No. 21 (effective April 26, 2019). Thus, the factual and legal issues in this appeal are discrete, and the decisions of the Administrative Law Court (ALC) and the Court of Appeals have no substantial continuing effect because the pertinent constitutional and statutory law has drastically changed.

Amazon tries to justify certiorari by claiming that the Court of Appeals’ decision impairs the longstanding principle that ambiguous tax statutes must be construed in favor of the taxpayer if there is a reasonable basis to do so. Amazon makes this contention even though incontrovertible and substantial evidence in the record demonstrates it sells tangible personal property on its Website, accepts payment for that property, makes no meaningful distinction between sales of its own goods and those owned by third-parties, and the Act uses—both now and in 2016—broad words such as “all” and “every” with respect to sales and businesses covered by the Act.

The primary deficiency in Amazon’s argument is that it attempts to create an ambiguity through its articulation of a supposedly reasonable alternative solution: its attenuated business model. But a taxpayer cannot escape liability for taxes merely because it has a theory as to why the statute does not apply; rather, there first must be an ambiguity in the statute before a taxpayer’s reasonable interpretation is implicated. But based on the applicable statutory language as well as

prior appellate decisions concluding that the Act is not ambiguous, the Court of Appeals correctly affirmed the ALC's ruling and held that the Act is not ambiguous and Amazon's argument against liability therefore is neither pertinent nor reasonable. Moreover, there is no constitutional issue because either the Act applies to Amazon or it does not, and Amazon's failure to adduce evidence during trial renders its due process or equal protection claim without factual support.

In sum, there are no "special and compelling reasons" for Court to grant certiorari. Rule 242(b) & (b)(4), SCACR. Amazon's petition therefore should be denied.

Counterstatement of the Issues Presented for Review

1. Did the Court of Appeals properly consider this Court's *Travelscape* decision as part of its holding that the governing Sales Tax Act statutes are not ambiguous and apply to Amazon in view of the fact that the pertinent language uses broad words like "all" and "every" and there is no dispute that sales occur on the Amazon.com website?
2. Did the Court of Appeals correctly hold that the Sales Tax Act is not ambiguous and, thus, reject Amazon's effort to create an ambiguity by articulating a subjective basis for escaping liability under the Act?
3. Did the Court of Appeals correctly hold that Amazon had failed to establish any due process or equal protection violation where the record contains no evidence to support either of Amazon's constitutional claims and where the underlying dispute is a matter of statutory interpretation that does not rise to constitutional import?

Statement of the Case

As found by the ALC and affirmed by the Court of Appeals, Amazon is the retailer and responsible for remitting sales tax on all products sold through its Website. The conclusion of both these courts is amply supported by the facts regarding Amazon's business activities, all of which belie any claim that Amazon was not responsible for collecting and remitting taxes on sales of products occurring on its Website. Amazon controls every aspect of transactions on its Website, earns sales-based fees on those transactions, and serves as the face of all customer interactions on the Website. Amazon is, in short, the seller or retailer for all sales made through the Website.

1. Background

In 2011, the South Carolina General Assembly passed the Distribution Facility Sales Tax Exemption (Moratorium) primarily to encourage investment by Amazon in South Carolina.¹ *See* S.C. Code Ann. § 12-36-2691 (2014). After the Moratorium expired at the end of 2015, the Department learned that Amazon was not remitting sales and use tax for *all* sales on the Website. **(App. pp. 680; 1024)** (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, not for sales of goods owned by third-parties. **(Id.)**. 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. **(App. pp. 1017-1032)** (Ex. 171, Dep’t Determination). Amazon challenged the assessment and, after a hearing, the ALC ruled in favor of the Department.² Amazon appealed³ and the Court of Appeals affirmed the decision of the ALC.

¹ Amazon lobbied for the Moratorium because it well knew that locating the distribution facility in South Carolina established nexus with the State for sales tax purposes. *See* § 12-36-2691(E) (requiring “[a] person to whom this section applies who makes a sale through the person’s Internet website” to provide notice to purchasers).

² Amazon erroneously contends that the ALC established a new tax law concept in identifying a point of sale. Pet. at 7. Neither the Department nor the ALC have 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.” **(App. p. 32)** (Order at 26). In any event, as Amazon recognizes, Pet. at 7, the Court of Appeals did not incorporate that concept into its analysis in holding that Amazon is a retailer under the Act.

³ The Court of Appeals *sua sponte* requested certification of this case for review pursuant to Rule 204(b), SCACR. By Order dated September 14, 2022, this Court denied that request.

2. Pertinent Factual Background.

Amazon owns and operates the Website. (**App. pp. 194; 309**) (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.” *E.g.*, (**App. p. 913**) (Ex. 14); (**App. p. 932**) (Ex. 40). The three primary persons and entities that list items for sale on the Website are: (1) Amazon;⁴ (2) Amazon affiliates; and (3) unaffiliated third-parties (Third-Party Merchants). During the period at issue, Amazon voluntarily collected sales and use taxes for sales of goods owned by Amazon or its affiliates. (**App. p. 1021**) (Ex. 171, Dep’t Determination at 4). Amazon did not remit sales and use taxes for Website sales of goods owned by Third-Party Merchants.

A. 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 selects—clicks on—the product the customer wishes to buy from the search results. (**App. p. 222**) (Tr. 75). The customer then is taken to a “product detail page” that displays the product’s attributes, including descriptions, images, and customer reviews.⁵ (**App. pp. 223; 931**) (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. (**App. 296-97**) (Tr. 149-50). Unless 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

⁴ Amazon is registered in South Carolina as a “retailer” for purposes of the Act and collects and remits sales tax related to its sale of “Amazon Prime” subscriptions to customers residing in South Carolina. (**App. pp. 326; 678-79**) (Tr. 179, 525-26).

⁵ Amazon extensively controls the creation and content of product detail pages. (**App. pp. 223; 931; 956-57**) (Tr. 76; Ex. 39; Ex. 83).

offeror. Amazon refers to the default offeror as the “winner” of the “Buy Box.” (**App. p. 912**) (Ex. 7). 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%, but he was unable to testify as to even a range of percentages. (**App. pp. 375-76; 18**) (Tr. 228-29; 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.” (**App. pp. 237, 383**) (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. (**App. pp. 329-30; 965-1010**) (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. (**App. pp. 325-26; 329-30**) (Tr. 178-79, 182-83). Customers input their payment information (*e.g.*, credit card information) directly into the Amazon.com website operated by Amazon. (**App. p. 386**) (Tr. 239).

When customers finish shopping, they click the “Proceed to checkout” button. (**App. p. 237**) (Tr. 90). Customers then are directed to Amazon’s Checkout page to select payment and shipping options. 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.⁶ (**App. pp. 218; 379**) (Tr. 71, 232). All money paid by customers for purchases on Amazon.com is submitted directly to Amazon via the Website. (**App. pp. 878-79**) (Ex. 3 at 15-16). Notably, there are no per-transaction costs or fees separately charged by Amazon to the customer.

⁶ Customers cannot make payments directly to Third-Party Merchants, and Third-Party Merchants are expressly prohibited from requesting any payments from customers. (**App. p. 869**) (Ex. 3 at 6).

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. (**App. pp. 965-1010**) (Ex. 122). 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.*). 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. (**App. pp. 965-1010; 336**) (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. (**App. p. 725**) (Tr. 572).

All of the above—a complete sales transaction on the Website—almost always occurs without any personal communication between a customer and the Third-Party Merchant. (**App. pp. 339-40; 40**) (Tr. 192-93; 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”)). Amazon prohibits Third-Party Merchants from directly communicating with customers except for very narrow and limited purposes. (**App. pp. 341; 869; 945-46**) (Ex. 3 at 6; Ex. 58; Tr. 194).

B. Order Fulfillment

For products owned by Third-Party Merchants, the order is shipped by the Third-Party Merchant or, for an additional fee, through the Fulfillment by Amazon (FBA) program.

i. Fulfillment by Third-Party Merchant

When a product owned by a Third-Party Merchant is sold, Amazon notifies the Third-Party Merchant about the sale. (**App. p. 334**) (Tr. 187). Under the terms of the Business Solutions Agreement (BSA), (**App. pp. 864-911**) (Ex. 3), which is the agreement between Amazon and the Third-Party Merchants, the Third-Party Merchant notifies Amazon when the product ships, but

Amazon notifies the customer by email that the product has shipped. (**App. pp. 334-35; 880**) (Tr. 186-87; Ex. 3 at 17); (**App. pp. 361-63; 879-80**) (Tr. 214-16; Ex. 3 at 16-17). Amazon strictly prohibits Third-Party Merchants from sending order confirmation emails. (**App. p. 880**) (Ex. 3 at 17). Amazon also controls which Third-Party Merchants can offer premium shipping and sets the parameters of shipping and handling charges by Third-Party Merchants. (**App. p. 879**) (Ex. 3 at 16). (**App. pp. 929-30**) (Ex. 38). Third-Party Merchants are also required to handle returns and refunds, but all payments flowing from the Third-Party Merchant to the customer must pass through Amazon. (*Id.*). Once Amazon receives notice that the Third-Party Merchant has shipped the product, it processes the customer's credit card. (**App. pp. 362-63**) (Tr. 215-16). Typically, this is done by its affiliate, Amazon Payments, Inc., although Amazon can, in its discretion, process the payments directly.⁷ (**App. pp. 871; 873; 319-20**) (Ex. 3 at 8, 10; Tr. 172-73).

ii. Fulfillment by Amazon.

If a Third-Party Merchant opts to pay extra for FBA, Amazon stores, selects, packages, and ships the Third-Party Merchant's products when a sale is made. (**App. pp. 244-45**) (Tr. 97-98). The costs of this program include monthly storage fees plus transaction-based fulfillment fees. (**App. p. 901**) (Ex. 3 at 38). Third-Party Merchants contract for FBA services with Amazon Services, which in turn directs AFS to carry out those FBA services. (**App. p. 873**) (Ex. 3 at 10).

When a customer purchases a product subject to FBA, Amazon sends an automated email to AFS. AFS selects which of the Third-Party Merchant's products to send to the customer, and then packages and ships the product to the customer. (**App. p. 406**) (Tr. 259). Upon shipment, Amazon processes the customer's credit card and the funds are distributed in the same manner as

⁷ Regardless of the entity that processes the payments, Amazon is always the entity that accepts the payment from the customer when the customer inputs their credit card information into Amazon.com. (**App. pp. 385-86**) (Tr. 238-39).

if a Third-Party Merchant shipped the item itself. (**App. pp. 363-64**) (Tr. 216-17). Under the BSA, Amazon has sole discretion regarding the resolution of *all* customer service issues relating to FBA products. (**App. p. 900**) (Ex. 3 at 37).

C. 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. The BSA is a single agreement to which Appellant and other Amazon affiliates are parties, all of which are collectively referred to simply as “Amazon” in the BSA. (**App. p. 864**) (Ex. 3 at 1).

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, but not the Third-Party Merchant. (**App. p. 313**) (Tr. 166); (**App. p. 870**) (Ex. 3 at 7). The BSA materially limits how Third-Party Merchants participate in Website transactions and how products are priced. *See, e.g.*, (**App. p. 881**) (Ex. 3 at 18). Additionally, Third-Party Merchants must provide product information in the format required by Amazon. (**App. p. 878**) (Ex. 3 at 15). The BSA also provides that Amazon has the sole discretion over all aspects of the Website. (**App. p. 873**) (Ex. 3 at 20).

Amazon also requires that its affiliate, Amazon Payments, be used as the payment processor for all Website transactions. (**App. p. 910**) (Ex. 3 at 47). However, Amazon, not Amazon Payments, “receive[s] all Sales Proceeds ... and will have exclusive rights to do so.” (**App. pp. 878-79**) (Ex. 3 at 15-16). Amazon also controls the frequency of fund transfers to Third-Party Merchants—generally, every two weeks—for the proceeds from the sale of their goods; Third-Party Merchants do “not have the ability to initiate or cause payments to be remitted to [them].” (**App. p. 882**) (Ex. 3 at 19). Amazon, at its sole discretion, can, *inter alia*, 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.*).

D. 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. (**App. pp. 365-67; 882; 915-21**) (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. (*Id.*). These referral fee percentages are determined in part based on the typical or average profit margins of the different products. (**App. pp. 416-17**) (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.

E. Sales and Use Tax Collection

Only Amazon directly interfaces with the customer through the purchase transaction. 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 \$39.99 monthly fee and subscribe to Amazon's "Tax Calculation Service." (**App. pp. 365-66; 915-21**) (Tr. 218-19; Ex. 16); (**App. pp. 922-25**) (Ex. 23). Under this program, Amazon collects the tax from the customer and then disburses the tax to the Third-Party Merchant after taking its percentage-based fee. (*Id.*). Amazon does not accept any responsibility for remitting or ensuring that taxes are remitted to any taxing authority. (*Id.*).⁸

⁸ But Amazon contractually requires Third-Party Merchants to be responsible for collecting, reporting, and paying all taxes. (**App. p. 868**) (Ex. 3 at 5). As the ALC found, Amazon's policy is inconsistent with the way these transactions actually occur. (**App. p. 54**) (Order at 48).

Argument

Amazon’s arguments for certiorari should be rejected because, as more fully explained below, the Opinion faithfully applies the statutory language as well as the prior precedent of this Court and the Court of Appeals in affirming the Department’s Determination. The Opinion also properly rejects Amazon’s efforts to find a constitutional issue in a straightforward matter of statutory interpretation. The Petition should be denied because there are no “special or compelling reasons” to grant certiorari in this case, Rule 242, SCACR, especially since the Act has been amended and even Amazon no longer disputes the Act’s application to its business model.

- 1. Because the Court of Appeals’ decision holding that the Sales Tax Act is not ambiguous is entirely consistent with and supported by the plain language of the pertinent statutes as well as with *Travelscape* and other precedent of this Court and the Court of Appeals, certiorari is not warranted.**

Although the Court of Appeals held that that this Court’s decision in *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011) “provides only limited guidance” to this case, Amazon contends that the decision below must be reversed because the court also held that “[t]he import of the *Travelscape* decision with respect to this case is that our supreme court interpreted [S.C. Code Ann.§] 12-36-920(E) of the Act broadly.” App. at 2117-18.⁹ But the Court of Appeals’ holding was nothing more than a recognition that the language of the Act—whether applied to entities such as *Travelscape* or Amazon—is broad because it contains broad language. In *Travelscape*, this Court evaluated the language “imposed on *every person* engaged or continuing within this State *in the business of*” that appears in § 12-36-920(E) in the context of whether

⁹ Amazon’s argument is unpreserved. Although the Court of Appeals appropriately noted that this 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. (**App. pp. 26, 31, 35, 39, 51, 52, 54**) (Order at 20, 25, 29, 33, 45, 46, 48). However, Amazon did not seek reconsideration of the issue before the ALC. See *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).

Travelscape was in the business of furnishing accommodations.¹⁰ 391 S.C. at 101, 705 S.E.2d at 34. It further looked to the definition of a “business” appearing in § 12-36-20, which is broadly defined as “*all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.*” *Id.* Given that the tax is imposed on “*every person,*” and “business” is defined as “*all activities,*” a description of the Act as broad is hardly noteworthy. *Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900–01 (1988) (“[I]n construing a statute its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.”).

Undeterred by such language as “every” and “all,” Amazon contends that the Act is not broad but is ambiguous as applied to its business model and, thus, it is entitled to escape liability regardless of the statutory words used. Amazon’s argument is based on *Alltel Communications v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012). But in *Alltel*, this Court equated substantial doubt regarding the application of the statute to Alltel with an ambiguity. *Id.*, 399 S.C. at 321, 731 S.E.2d at 873 (“The existence of an ambiguity in [S.C. Code Ann. §] 12-20-100 raises substantial doubt regarding the section’s application to [Alltel].”). The ambiguity there related to whether Alltel, a cell phone provider using an entirely different technology than a traditional phone line, constituted a “telephone company” under the statute and

¹⁰ 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. *See (App. p. 35)* (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.”)).

according to the parties' stipulations of fact.¹¹ But, importantly, there is no basis to evaluate substantial doubt or a reasonable contrary interpretation if the Act is not ambiguous.

Here, the Act is not ambiguous. Contrary to Amazon's argument, Pet. at 11, a broad reading of "telephone company" by Alltel would not have led to the conclusion that Alltel fell within the parameters of the license fee statute because, *inter alia*, an entirely different technology was involved than that contemplated by the statute. Here, in contrast, Amazon hardly used an entirely different technology by engaging in the business of selling tangible personal property. Rather, Amazon operates a business making sales through a website just like other retailers.

Moreover, Amazon's interpretation of the Act does not create an ambiguity in light of the language of the Act and prior case law interpreting the Act. *Fuller v. S.C. Tax Comm'n* 128 S.C. 14, 121 S.E. 478 (1924) ("[W]here 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."). The Court of Appeals in fact has recently reviewed the Act generally, and S.C. Code Ann. § 12-36-910 specifically, finding the statutory provisions unambiguous. *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) ("[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."), *aff'd*, 437 S.C. 640, 880 S.E.2d 476 (2022); *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) (holding § 12-36-910 "is unambiguous [and] the ALC was in no position

¹¹ 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 or facilities owned or leased by [Alltel] or licensed to [Alltel]." *Alltel*, 399 S.C. at 318, 731 S.E.2d at 871.

to apply rules of statutory interpretation”). And this Court reviewed and applied the Act and concluded the same not only in affirming *Books-A-Million*,¹² but also in deciding *Travelscape*. Because the Act has an unambiguously broad coverage, it is not ambiguous and a reviewing court’s obligation is to apply that language to the facts of the case without “resort to subtle or forced construction.” *Bryant*, 295 S.C. at 411, 368 S.E.2d at 900-01.

Amazon’s argument really boils down to the fact that they disagree that the Act applies to them because they have attempted to segregate the elements of a unified sale in an effort to evade the application of the Act. Those actions alone implicitly acknowledge the Act’s breadth. But the provisions of the Act applied here against Amazon have been interpreted *by courts of this state* and are appropriately construed consistent with *Rent-A-Center*, *Books-A-Million*, and, *Travelscape* just as the Opinion does. In particular, as noted above, while *Travelscape* construed § 12-36-920, the Court of Appeals properly interpreted its guidance to read broadly 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.” § 12-36-910(A) (emphasis added). *Compare* § 12-36-910(A) with § 12-36-920(E) (“The taxes imposed by this section are imposed on every person engaged or continuing within this State in the business of furnishing accommodations to transients for

¹² The concerns raised by the dissent in *Books-A-Million* are not present because there is no dispute that sales of *tangible* personal property are taking place or that the taxes imposed by the Act apply to Website sales. The only dispute is whether Amazon is the retailer. On this point, the dissent’s position in *Books-A-Million* is fully consistent with the reasoning of the Court of Appeals and ALC here. For example, the dissent focused on the plain meaning of the statutes and concluded they were unambiguous. *Compare Books-A-Million*, 437 S.C. at 650, 880 S.E.2d at 481 (James, J., dissenting), with (App. p. 2116) (Op. at 12) & (App. pp. 27-28, 39) (Order at 21–22, 33). The dissent also agreed the service and facilitation fees charged by an online company were subject to sales tax “by clear statutory provision” because *Travelscape* was *in the business of* furnishing accommodations. The fees were taxable because they were directly derived from furnishing a room, notwithstanding *Travelscape*’s argument that it did not own or operate the hotels but only provided a service via contract.

consideration.”). And both *Travelscape* and the Opinion note and rely upon the definition of “business” in § 12-36-20, which is broadly defined as “all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.” (App. pp. 2113, 2118, 2121) (Op. at 9, 14, & 17 (second emphasis added in opinion)). At bottom, 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*, Amazon’s construction of the Act is not reasonable in light of the prior judicial constructions of language identical to that appearing in § 12-36-910(A).

Amazon was previously dismissive of the Court of Appeals’ analysis and conclusions, asserting alternatively that it was “conclusory,” “without support,” [, and “without any textual analysis of the Act itself.” (App. pp. 2133, 2141) (Pet. for Reh’g at 1, 9 (emphasis in original)). But the Opinion’s analysis 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.”) (cleaned up).

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 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. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. 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* (**App. p. 51**) (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.”)). The Act is not ambiguous and certiorari is not warranted.

2. Certiorari is not warranted on the second issue because Amazon cannot make a comprehensive and unambiguous sales tax statute ambiguous merely because it articulates some subjective reason it should not be subject to that statute.

The Court of Appeals properly, in Amazon’s words, “treated its reading of the statute as the beginning and end of the analysis,” Pet. at 13, because it and the ALC correctly determined, based on the statutory language and existing precedent, that the Act is not ambiguous, leaving the lower courts “in no position to apply rules of statutory interpretation” or construe unambiguous provisions in the taxpayers’ favor. *Rent-A-Ctr.*, 425 S.C. at 589, 824 S.E.2d at 221 (interpreting § 12-36-910); *see also Books-A-Million, Inc.*, 430 S.C. at 399, 844 at 405 (noting that the petitioner had “failed to point to any ambiguity in either [S.C. Code Ann. § 12-36-90 or § 12-36-910]” 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”).

A. Certiorari is not warranted here because Amazon’s very artful definitions of the Act’s plain language do not create an ambiguity, let alone render its position reasonable.

Amazon’s primary argument that its position is reasonable and the Act ambiguous is sourced in a strained reading of “sale” under S.C. Code Ann. § 12-36-100. Amazon argues that it is not the retailer/seller because it does not receive the “gross proceeds of sales. Pet. at 13-14. But

for purposes of a “sale,” the Act requires only that “consideration” be exchanged, not that the seller receive all (or even any) of the “consideration.” *See* S.C. Code Ann. § 12-36-70. Rather, like a consignment sale, 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”—never mind that it does receive consideration based on the sales proceeds—Amazon is advancing an extremely narrow interpretation of “sales proceeds” that is not consistent with a plain reading of the statutory definitions.

There is no dispute that sales occur on Amazon.com. There also is no dispute that Amazon does receive a portion of the consideration, *i.e.*, the “gross proceeds of sales,” § 12-36-90, 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. § 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 the Court of Appeals correctly noted, the ALC found that Amazon receives transaction-based fees and compensation for all 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. (**App. pp. 2110, 2119**) (Op. at 6, 15); (**App. p. 37**); (Order at 31 (“[F]ees are charged on a ‘transaction-by-transaction’ basis.”)); *see also* (**App. pp. 915-921**). 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. (**App. p. 120**) (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, Amazon receives “value proceeding or accruing from the sale, lease, or rental of tangible personal property.” § 12-36-90. Rather than a fee for “services [] provided to the seller,” Pet. at 14, Amazon’s fee is tied directly to the sales price and proceeds of the sale of tangible personal property. And although Amazon contends that its operation is no different than that for “any credit card transaction,” Pet. at 14, the fact is that credit card sales typically are not made on websites hosted by a credit card company. *See also* discussion *supra* p.11, n.10. At a minimum, Amazon had the burden to prove otherwise and it adduced no evidence on this point.

Amazon also erroneously contends that the ALC erred in finding that the Amazon entities were a “group or combination acting as a unit.” Pet. at 15. It also complains of veil piercing. But neither the substance-over-form analysis nor S.C. Code Ann. § 12-36-30 were applied by the Department in assessing taxes, and also were not relied on by the ALC or the Court of Appeals in upholding the Department’s Determination. However, as the ALC and the Court of Appeals correctly noted, the BSA treats the entities as one. (**App. p. 2117**) (Op. at 13). More to the point, given the fact that Amazon receives consideration in the form of its transaction-based referral fee profit on every sale occurring on the website, the precise structure Amazon has implemented is not determinative in light of the overwhelming control that Amazon exerts when acting as the seller of goods on its website. *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.”). There has been no disregarding of corporate structures because the issue considered by the ALC and the Court of Appeals is how the companies acted externally in making sales on the Website.¹³

¹³ *South Carolina Dep’t of Revenue v. Anonymous Co. A*, 401 S.C. 513, 515-21, 678 S.E.2d 255, 256-59 (2009), cited by Amazon, Pet. at 16, does not compel a different result. *Anonymous* stands for the simple proposition that, based on the actual statutory language at issue, “the same taxpayer who paid the sales tax must be the taxpayer who charged the debt off for income tax purposes.” *Id.*, 401 S.C. at 517, 678 S.E.2d at 257. *Anonymous* effectively concluded that the statute requires

Amazon's articulation of a position that it is not in the business of selling tangible personal property because of its structure of the transactions also does not make the act ambiguous and its position reasonable. As noted above, Amazon directly or indirectly receives a fee based on a percentage of the sales on its website. The Act is hardly ambiguous on this point: it says that "business" includes "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect." § 12-36-20. If Amazon is engaged in making sales of tangible personal property on Amazon.com and it receives compensation in the form of a percentage of those sales, it cannot seriously be disputed that it is engaged in the business of selling tangible personal property. The Act is unambiguous on that point and the fact that Amazon structured its business to separate the key elements of a sale and Amazon articulates some precise and strained reading of the Act to escape that unambiguous conclusion does not make the Act ambiguous or Amazon's reading of it reasonable. And Amazon's recitation of a parade of horribles, Pet. at 17-18, does not change this conclusion.

In sum, Amazon receives consideration for sales of tangible personal property occurring on Amazon.com, and Amazon's arguments to the contrary do not mean that the statute is ambiguous, that Amazon's position is reasonable, or that certiorari is warranted.

that deductions match payments. It is a far cry to suggest that decision supports a conclusion that Amazon, based on the facts set forth above and considered by the ALC and the Court of Appeals, is not the "retailer" or "seller" that is "selling [through the Website] tangible personal property whether owned by the person or others," § 12-36-70, merely because Amazon attempted to separate the parts of a unified sale but then combine them externally by contract. *See also* § 12-36-30 (defining "person" to include "any group or combination acting as a unit.").

B. Certiorari is not warranted here because 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 and, thus, does not render the Act ambiguous or make Amazon’s position reasonable.

The 2019 marketplace facilitator amendments to the Act do 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 and Amazon’s contrary interpretation reasonable. Here, the 2019 amendments were hardly a “futile act,” Pet. at 19, but were intended to address the post-*Wayfair* landscape regarding taxation of interstate sales. More to the point, the amendments do not mean that the Act in 2016 did not encompass Amazon. “Just 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.” **(App. pp. 55-56)** (Order at 49-50). More to the point, the enactment of subsequent legislation on a broad topic does not mean that the Act did not apply to Amazon in 2016. *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.”) (cleaned up); *cf. 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”). That is especially so here because 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.” 2019 S.C. Acts No. 21, § 1(5). The existence of this provision specifically belies Amazon’s contention that the Court of Appeals erred in not considering the “extent and substance of the changes.” Pet. at 19. This issue

therefore does not render the Act ambiguous or Amazon's position reasonable and, thus, does not warrant the grant of certiorari.

C. Certiorari is not warranted here because statements of the Department's Director and the General Assembly in the context of the 2019 amendments to the Act does not mean that the Act is ambiguous or that Amazon's interpretation of the 2016 Act was reasonable.

The Act is not rendered ambiguous and Amazon's interpretation reasonable merely because Amazon cherry-picks and misconstrues 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. The Court of Appeals and the ALC correctly rejected Amazon's position. (**App pp. 25-26**) (Order at 17-18); (**App. p. 2124**) (Op. 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.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006) (“The issue of interpretation of a statute is a question of law for the court.”).¹⁴

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” that demonstrate the reasonableness of their contrary

¹⁴ 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. (**App. pp. 1017-32**) (Ex. 171, Determination).

position. However, 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 *Wayfair*. 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. 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. Moreover, 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.

None of those reasons renders the 2016 version of the Act ambiguous or endows Amazon’s argument with reasonableness. Indeed, Amazon completely ignores the fact that the 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 does not provide evidence of an ambiguity in the Act and does not mean its argument to the contrary is reasonable, and certiorari is not warranted on this basis.

D. Certiorari is not warranted here because decisions rendered by other states do not render this State’s Sales Tax Act ambiguous or make Amazon’s interpretation reasonable, especially given the well-settled principle that other states do not govern this State’s application of its own laws.

What another state has done or not done with respect to its own tax laws has no bearing on the interpretation of the Act by the courts of this State and, thus, does not mean that Amazon’s interpretation of the application of this State’s statutes is reasonable. *See Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 208 n.9, 882 S.E.2d 770, 781 n.9 (2023), *reh’g denied* (Feb. 8, 2023) (“[W]e do not rely on the decisions from other states as binding.”). The Court of Appeals correctly rejected this argument. (**App p. 2121**) (Op. at 17 (“[W]e are not persuaded by Amazon Services’ reference to the tax laws of other jurisdictions.”)).¹⁵ Similarly, the fact that this state—or other states—passed marketplace legislation after *Wayfair* was issued does not mean that Amazon’s interpretation of the Act is a reasonable one that warrants its escape from sales tax liability for sales made on its website. And while Amazon asserts that it had an expectation that South Carolina would follow the same approach, 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, and there was statutory authority and guidance from the Department¹⁶ regarding the treatment under the Act of similar transactions—*e.g.*, consignment sales. *See* § 12-36-90 (defining “gross proceeds

¹⁵ The Court of Appeals held that Amazon never identified any states with substantially similar statutes. (**App. p. 2121**) (Op. at 17). Amazon contends that it did properly argue to the Court of Appeals that other states’ statutes were substantially identical, but it supports that claim based on arguments first raised in its Reply Brief. *See* Pet. at 21-22; *see also* (**App. p. 2159**) (Pet. for Reh’g at 27 n.6). But “a party cannot raise an issue for the first time in an appellate reply brief.” *ABB, Inc. v. Integrated Recycling Grp. of S.C., LLC*, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (Ct. App. 2021).

¹⁶ Both S.C. Rev. Rul. 14-4, 2014 WL 8584515 (Sept. 10, 2014), and S.C. Information Letter 15-19, 2015 WL 8357916 (Dec. 2, 2015), which was issued at the end of the Moratorium, were fully consistent with the Department’s position in this case.

of sales” as including “the proceeds from the sale of property sold on consignment”); (**App. pp. 749-51; 1869**) (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, in *Travelscape*, this 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). Just because Amazon articulated a contrary position does not mean the Act was ambiguous and that it is entitled to prevail. The Court of Appeals correctly held that the statute was not ambiguous and this argument thus presents no basis for granting certiorari.

3. Because, as both the Court of Appeals and the ALC concluded, the record contains no support for Amazon’s constitutional claims and because this is a matter of statutory interpretation that does not rise to one of constitutional import, certiorari is not warranted on these claims.

The Court of Appeals and the ALC correctly rejected Amazon’s constitutional arguments based on a failure of proof on both the due process and equal protection claims. The Petition generally recites what Amazon has articulated to both the Court of Appeals and the ALC and does not explain why this Court should grant certiorari on those twice-rejected arguments that are wholly unsupported by anything in the record beyond the unsubstantiated claims of Amazon’s counsel in briefs. Moreover, either the statute is construed in the Department’s favor or Amazon’s, but there are no constitutional issues involved in that interpretation.

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 “violates the constitutional requirement of fair notice.” Pet. at 24. But Amazon’s argument cannot survive scrutiny because the issue is the interpretation and application of the law in effect in 2016, not the 2019 amendments.

The ALC found this in the Order, a finding which Amazon did not challenge on appeal. (**App. p. 55**) (Order at 49 (“Nowhere has the Department cited to the pending legislation in an attempt to apply it to Amazon Services in this case.”)); *see Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. at 329, 730 S.E.2d at 285 (“[A]n unappealed ruling, right or wrong, is the law of the case.”). Beyond that failing, however, there has never been any doubt as to the standard that the Department has sought to apply against Amazon’s business model. As the Court of Appeals correctly held, “no evidence shows the Department attempted to retroactively apply the [2019 amendment] or policies to Amazon Services’ conduct. Rather, the Department applied the sales tax law that was in place at the time....” (**App. p. 2124**) (Op. at 20). Therefore, this issue does not warrant the grant of certiorari.

B. No evidence of an equal protection violation.

Amazon’s equal protection claim also does not warrant certiorari because it suffers from the same lack of proof as the due process claim. Amazon correctly recognizes that an equal protection claim requires ““showing that similarly situated persons received disparate treatment.”” Pet. at 24 (citing *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995)). But this “showing” requires factual evidence in the record; continuously repeating an unfounded claim before each tribunal—as Amazon has done throughout this case—does not constitute a “showing.” As the Court of Appeals held, 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.” (**App p. 2124**) (Op. at 20); *see also* (**App. p. 57**) (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)).

The weakness of this argument is demonstrated by the fact that Amazon makes only a passing reference to one other online shopping website (eBay), Pet. at 25, while failing to point to any evidence setting forth the similarities between the business models of the two companies. 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.” (App. p. 58) (Order at 52). Thus “there is no evidence that the Department purposefully singled-out Amazon Services to intentionally discriminate against them with the imposition of the tax.” *Id.* Even a cursory review shows there is nothing in the record to support Amazon’s assertion that the Department chose not to audit or impose the sales and use tax on other similarly situated taxpayers before 2019.¹⁷ Amazon’s failure to show disparate treatment was correctly rejected by the lower courts and does not warrant certiorari. *See Whaley v. Dorchester Cnty. Zoning Bd. of Appeals*, 337 S.C. 568, 576, 524 S.E.2d 404, 408 (1999).

Conclusion

For the reasons stated above, the Petition for Certiorari should be denied. There are no “special or compelling reasons” for granting certiorari in this case because the Court of Appeals and the ALC correctly ruled in favor of the Department; because the Opinion is entirely consistent with existing caselaw regarding the Act and its lack of ambiguity; because Amazon’s alternative theory is not reasonable; and because there is no dispute that the Act now applies to Amazon after the 2019 amendments to the Act and therefore the Court of Appeals’ Opinion has little future relevance to the Department or taxpayers.

¹⁷ Again, the only reference Amazon makes is to eBay, for which there is no record support. Moreover, Amazon well knows that its obligation to remit sales and use tax for sales on the Website arose as the direct result of establishing nexus—*i.e.*, physical presence—in South Carolina when it built a distribution facility here in 2011.

Respectfully submitted,

BURR & FORMAN LLP

s/Tracey C. Green

Tracey C. Green (S.C. Bar No. 9342)
Chad N. Johnston (S.C. Bar No. 73752)
P.O. Box 11390 (29211)
1221 Main Street, Suite 1800
Columbia, SC 29201
(803) 799-9800
tgreen@burr.com
cjohnston@burr.com

S.C. DEPARTMENT OF REVENUE

Jason P. Luther (S.C. Bar No. 78021)
P.O. Box 12265
Columbia, SC 29211-9979
803-898-5110
jason.luther@dor.sc.gov

VIVA LAW FIRM

Lauren Acquaviva (S.C. Bar No. 100528)
672 Marina Drive, Suite 101
Charleston, SC 29492
(843) 216-7728
lauren@vivalawsc.com

Attorneys for S.C. Department of Revenue

Columbia, South Carolina
May 28, 2024