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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.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Department of Revenue asserts that the Court of Appeals' ruling has "no substantial continuing effect" because the version of the Sales and Use Tax Act at issue has already been changed. Return 1. But the Court of Appeals' opinion announces new rules for interpreting tax statutes that will have a significant impact well beyond this case. Those rules conflict with this Court's precedent and, if allowed to stand, would fundamentally change South Carolina tax law to taxpayers' detriment.[1]

In its response to the Petition, the Department openly rejects the rule that gives taxpayers the benefit of a reasonable interpretation of a tax statute. *See* Return 14 (declaring that Amazon Services "misconstrues *Alltel*" as reflecting that rule). But a taxpayer's right to rely on that rule is a longstanding, vital, and uniformly recognized protection against unfair and oppressive tax enforcement. The Department also repeatedly points to broad language within the Sales and Use Tax Act, such as "every" and "all" (*e.g.*, *id.* at 11), while ignoring the statutory terms "seller," "selling," "sale," and "purchase" that Amazon Services reasonably understood to refer to third-party sellers. The Department asserts that this Court's decision in *Travelscape* justifies the Court of Appeals' decision to read an ambiguous term like "seller" broadly when the ambiguous term appears adjacent to a broad term like "every." That approach abandons the long-recognized principle that tax statutes should be construed narrowly to protect the taxpayer. The conflict between the Court of Appeals' reading of *Travelscape* and this Court's decision in *Alltel* is clear. Only this Court's review can clarify this critical area of tax law.

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[1] The ruling also applies to nearly three years of third-party sales in the Amazon Services marketplace prior to the 2019 amendments. The Department misleadingly suggests that only $12.5 million is at issue. *See* Return 3. But the parties agreed to litigate just one quarter of sales (in 2016) and then apply the result to all remaining quarters prior to the amendment, and thus the amount at issue is far greater.

In addition, the South Carolina legislature, the Department's Director, and legislatures and courts across the country addressing similar statutes have all acted in ways that make no sense unless Amazon Services's interpretation was reasonable. Yet the Department here defends the Court of Appeals' decision to treat all of that as irrelevant as a matter of law. Return 19-23. The result is a new way of assessing the reasonableness of a taxpayer's understanding of tax law that weakens taxpayers' ability to protect themselves against the overzealous application of tax laws.

In the end, what the Department would have this Court leave in place is an inexplicably expansive reading of a tax statute that neither the ALC, nor the Court of Appeals, nor the Department can logically constrain. Indeed, there is no principled way to exclude all manner of businesses—including credit card processors and shippers that profit from the sales of others—from the overbroad interpretation applied to Amazon Services here. Instead, the Department dismisses this legitimate concern as mere "hyperbole" (Return 11 n.10), satisfied to leave taxpayers at the mercy of the Department's enforcement discretion.

Numerous amici and independent commentators have all noted how the Court of Appeals' ruling disrupts South Carolina tax law.[2] Only this Court's review can restore the predictability that is so critical to taxpayers and sound tax administration, and appropriately limit the Department's tax enforcement authority. This Court should grant the Petition.

[2] *See, e.g.*, "Amazon SC Sales Tax Case Could Decide Meaning of 'Seller'," Law360 (May 24, 2024), https://www.law360.com/tax-authority/articles/1840944/amazon-sc-sales-tax-case-could-decide-meaning-of-seller- (Diane Yetter, founder of Sales Tax Institute, commenting: "This is South Carolina, in my opinion, doing extreme overreach, going back retroactively.").

ARGUMENT

I. Review Is Warranted Because the Court of Appeals' Reading of *Travelscape* Cannot Be Reconciled with *Alltel*.

The Department asserts that "Amazon misconstrues *Alltel* as requiring a finding in its favor if it can advance a 'reasonable' interpretation of the Act that creates substantial doubt as to its applicability to Amazon." Return 14. But that principle is the backbone of *Alltel* and reflects decades of precedent from this Court and other jurisdictions. *See Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012); Pet. 9-10 (collecting cases). Indeed, the Department previously conceded in this litigation that Amazon Services should prevail if Amazon Services can establish that "the Act is reasonably susceptible to an interpretation that excludes Amazon's business model from application." App. 2173, DOR's Response to Petition for Rehearing 6.

The Court of Appeals' ruling misreads *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), as having rejected this vital principle. According to the Court of Appeals, *Travelscape* requires a presumption that a tax statute should be interpreted "broadly." Pet. 9; *see* App. 2118. Applying that presumption, the Court of Appeals considered the Sales and Use Tax Act "unambiguous" without assessing the reasonableness of Amazon Services's interpretation. Pet. 13; *see* App. 2115-16, 2118. The Department does not dispute that the Court of Appeals read and applied *Travelscape* this way. Instead, the Department justifies the Court of Appeals' reasoning as "nothing more than a recognition that the language of the Act … is broad because it contains broad language," such as "every" person and "all" activities. Return 10-11. But as explained below, that response only confirms the need for this

Court's review.[3]

The Department's focus on certain broad words misses the point. For example, the statute undoubtedly applies to "all" sellers. But that still leaves the question of whether Amazon Services is the "seller" for a third-party sale. By analogy, if a statute provides that "all vehicles must have a license plate," the presence of the word "all" tells us nothing about whether a bicycle is a "vehicle." That the statute uses some broad language does not mean that every statutory term—even ambiguous ones like "seller"—should be interpreted broadly. Yet the Department reads *Travelscape* as authorizing precisely that interpretive maneuver.

The Department repeats the same maneuver when it discusses how *Travelscape* interpreted the phrase "in the business of furnishing accommodations" in the tax statute at issue there. *Travelscape*, 391 S.C. at 99, 705 S.E.2d at 33 (quoting S.C. Code Ann. § 12-36-920(E)); *see* Return 10-11. The Department talks only about how this Court observed that the phrase "in the business of" was defined in far-reaching terms by the statute. Return 10-11, 13-14, 16, 18. That might be true, but that did not inform what it means to "furnish[] accommodations." This Court's ruling in *Travelscape* ultimately rested on the clear meaning of that phrase. Travelscape locked in reservations for a room at the price it set, so Travelscape furnished accommodations. *Id.* at 101, 705 S.E.2d at 34. As this Court explained, "'furnish' as it appears in [the statute] demonstrates that it encompasses the activities of entities such as Travelscape who … provide hotel reservations to transients for consideration." *Id.* Nothing in *Travelscape* justifies the method of reading tax statutes that the Court of Appeals applied and that the Department

[3] The Department suggests that Amazon Services did not adequately preserve its argument about the proper interpretation of *Travelscape*. *See* Return 10 n.9. How to read and apply *Travelscape* has been a central issue raised by Amazon Services at every stage of this litigation. *See, e.g.*, App. 1985-89, 1992-93, 2085-87. Both the ALC and the Court of Appeals squarely addressed it. *See* App. 29-31, 2117-18. There is no waiver.

defends.

Not only does the Department misread *Travelscape*, the Department also disregards how *Alltel* forecloses that misreading. The statute at issue in *Alltel* also included the word "every": it provided that "every … telephone company" was required to pay an increased license fee. S.C. Code Ann. § 12-20-100(A); *see Alltel*, 399 S.C. at 317, 731 S.E.2d at 871 (quoting this statutory provision). But this Court rightly understood that the word "every" in the statute did not help interpret the phrase "telephone company." *See Alltel*, 399 S.C. at 319-20, 731 S.E.2d at 872-73. And even though the statute applied to "every" telephone company, this Court recognized that the taxpayer reasonably read "telephone company" as not including cell phone companies. That is why this Court held that the statute was ambiguous and ruled in favor of the taxpayer.[4]

The Court of Appeals' way of interpreting tax statutes, if left to stand, would have significant consequences. Many tax statutes say "every" or "all" when referring to a category of taxpayers or conduct that is subject to a tax or collection responsibility. *See, e.g.*, S.C. Code Ann. § 12-11-20 ("A tax is imposed upon *every* bank engaged in business in the State …." (emphasis added)); *id*. § 12-13-30 ("*Every* association located or doing business within this State shall pay an income tax …." (emphasis added)); *id*. § 12-16-720(A) ("A tax is imposed upon *every* generation-skipping transfer …." (emphasis added)). If the presence of broad terms such as "every" or "all" requires that all other terms in a statute must also be interpreted broadly, then the presumption that tax statutes are to be construed narrowly would vanish.

The Department tries to square the Court of Appeals' ruling in this case with *Alltel*. It

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[4] The Department also ignores that the ALC, like the Court of Appeals in *Alltel*, acknowledged that the pre-2019 law was "not clear" as applied to third-party sales on Amazon Services's marketplace. App. 614-16; *accord* Pet. 10-11. Under *Alltel*, that alone should have resolved this case in Amazon Services's favor. *See Alltel*, 399 S.C. at 318-19, 731 S.E.2d at 872.

argues that the statutory phrase "telephone company" unambiguously excluded cell phone companies because cell phone service is "an entirely different technology" than what was "contemplated by the statute."[5] Return 12. But the statute in *Alltel* did not define the phrase "telephone company" with reference to particular technology. *See Alltel*, 399 S.C. at 316, 731 S.E.2d at 870; S.C. Code Ann. § 12-20-100(A). So the Court had to interpret that phrase. Because both the taxpayer's and the Department's interpretations of "telephone company" were reasonable, the Court concluded that there was ambiguity. Relying on the well-settled rule that "such ambiguity must be construed in the taxpayers' favor," the Court ruled for the taxpayer. *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873.

To be clear, and contrary to the Department's contention, Amazon Services has never argued that the "mere fact" that Amazon Services reads the statute differently from the Department means Amazon Services must prevail. *See* Return 14-15. Amazon Services has always insisted that its interpretation is *objectively* reasonable (and compelled by the language of the statute).

Notably, the Department cannot explain how to constrain the absurd implications of the Court of Appeals' interpretation of the statute. The ruling's interpretation of "seller" sweeps in a host of other service providers who derive a "profit" by "indirect means" from the sale of property owned by others. "Seller" would include payment processors, credit card companies, banks, delivery companies, and the like. Rather than describe some principled limit on the Court

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[5] Notably, the Department took the position in *Alltel* that cell service providers were *unambiguously covered* by the term "telephone company." *See Alltel*, 399 S.C. at 317, 731 S.E.2d at 871 ("DOR asserted each Petitioner was a 'telephone company' and therefore required to pay heightened license fees imposed on utilities and electric cooperatives in accordance with section 12-20-100."). The Department's present view that the statute unambiguously *excluded* cell phone companies cannot be reconciled with that position or this Court's ruling.

of Appeals' interpretation of the statute, the Department characterizes the concern as "hyperbole." Return 11 n.10. Such a back-of-the-hand response reveals the going-forward danger of allowing the Court of Appeals' ruling to evade review: the Department will have extraordinary discretion to enforce its view of tax statutes, limited only by the Department's own opinion of what is sensible.

Nothing in this Court's decisions in *Books-A-Million, Inc. v. South Carolina Department of Revenue*, 430 S.C. 388, 844 S.E.2d 399 (Ct. App. 2020), *aff'd*, 437 S.C. 640, 880 S.E.2d 476 (2022), or *Rent-A-Center E., Inc. v. South Carolina Department of Revenue*, 425 S.C. 582, 824 S.E.2d 217 (Ct. App. 2019), helps the Department. *See* Return 12-13. The taxpayers in *Rent-A-Center* and *Books-A-Million* received precisely what Amazon Services requests here: an evaluation of the reasonableness of their arguments in light of the language of the statute. In *Books-A-Million*, for example, this Court determined that retailers were "sellers" of their membership fees in the context of retail bookstores. 430 S.C. at 398, 844 S.E.2d at 404. Consistent with that ruling, Amazon Services recognized the difference between its membership fees and third-party sellers' sales. For example, it collected and remitted sales tax on Prime memberships for South Carolinians, even as it properly left sales tax collection on third-party sales to third-party sellers. Neither *Books-A-Million* nor *Rent-A-Center* articulates or applies any rule of interpretation for tax statutes that undermines the reasonableness of Amazon Services's interpretation at issue here.

II. Review Is Warranted Because the Court of Appeals' Ruling Severely Hinders a Taxpayer's Right to Demonstrate the Taxpayer's Reasonable Interpretation of a Tax Statute.

In its Petition, Amazon Services pointed to a variety of objective indicia that supported the reasonableness of its view that it was not the "seller" for third-party sales: (1) the extensive 2019 amendments that redefined "seller," (2) the Director's sworn statements that those

amendments were needed to fill a "gap" in the law so that no one had to "guess" about whether they were covered, and (3) the uniform recognition by other jurisdictions that marketplace facilitators were not responsible for collecting sales tax on third-party sales without the marketplace facilitator amendments. The Court of Appeals treated all of this as irrelevant as a matter of law when determining whether "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." *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873. That view was mistaken. When a taxpayer reasonably interprets a tax statute as not covering that taxpayer, a court should rule in the taxpayer's favor. Even if the Department offers an alternative interpretation, the presence of differing reasonable interpretations means that the statute is at least ambiguous. And when, as in this case, numerous other reasonable observers understood the statute as the taxpayer did, that fact must be weighed in favor of the reasonableness of the taxpayer's interpretation.

A. The Department Cannot Explain Why Amazon Services's Interpretation of the Statute's Language Was Unreasonable.

The Department refuses to engage with Amazon Services's interpretation of the statute. Amazon Services was a "seller" for third-party sales only if it received consideration "for" "any transfer, exchange, or barter[] … of tangible personal property." S.C. Code Ann. § 12-36-100. The Department has no evidence that Amazon Services received consideration "for" the property being transferred by third-party sellers to customers. The Department, like the Court of Appeals, fails to acknowledge that the customer did not pay Amazon Services at all. The customer paid the third-party seller (via the Amazon Payments processing system). The third-party seller then used *some* of those proceeds to pay Amazon Services for the marketplace services Amazon Services provided to the seller.

The Department points out that the third-party seller pays Amazon Services a portion of

the proceeds that a customer sends to the third-party seller. Return 16. But that is merely the way Amazon Services determines the fee to charge third-party sellers for its services. It is not, as the Department suggests, a reason to conclude that Amazon Services was paid by the customer for the product. *See id*. No language in the statute attaches a sales tax collection obligation to the fact that Amazon Services's compensation is "tied directly to the sales price." *See id.* at 16-17. The Department and the Court of Appeals shift away from the language in the statute and toward a focus on how Amazon Services's compensation was determined, even though the statute says nothing about that.

Unable to ground its position in the text of Section 12-36-70 (the definition of "seller" and "retailer") or Section 12-36-100 (the definition of "sale" and "purchase"), the Department pivots to the definition of "business" in Section 12-36-20. Return 18. But this again focuses on the wrong word in the statute: the question is whether Amazon Services is in the business of *selling*. *See* S.C. Code Ann. § 12-36-910(A). Amazon Services is not, for the reasons explained above. *See supra* at 8-9; Pet. 13-18. And, as discussed above, adopting the Court of Appeals' overly broad interpretation of the "the business of selling" means there is no principled way to exclude a variety of intermediaries that "indirectly" "profit" from sales to customers. *See supra* at 6-7; Pet. 17-18. It was, at the very least, reasonable for Amazon Services to expect that the Department would not adopt such an overly broad interpretation of the statute. And that alone means Amazon Services should prevail under *Alltel* and its predecessors.

When the Department addresses Amazon Services's business model, the Department once again distracts from the relevant legal question. The Department discusses at length the U.S. Supreme Court's ruling in *South Dakota v. Wayfair*, *Inc.*, 585 U.S. 162 (2018). *See* Return 1, 19-22. But *Wayfair* is irrelevant here. *Wayfair* gave South Carolina the *ability* to

require out-of-state sellers with no physical presence in South Carolina to collect sales tax on sales to South Carolina residents. But *Wayfair* said nothing about whether South Carolina law required Amazon Services to collect sales tax on third-party sales prior to 2019.[6] And *Wayfair* certainly gave Amazon Services no reason to conclude that its reading of South Carolina's sales tax law prior to 2019 was unreasonable.

The Department also claims that Amazon Services seeks "to evade the application of the Act" by dividing up "the elements of a unified sale." Return 13. Not so. It is true that Amazon Services and Amazon Payments are distinct entities that provide different services. But that is not why Amazon Services should prevail here. Amazon Services's interpretation of the statute does not turn on any distinctions between Amazon entities. Rather, its interpretation turns on the distinction between third-party sellers (who customers pay) and *all* Amazon entities (who customers never pay). The dispositive point, not addressed by the Department and the Court of Appeals, is that the consideration provided by the customer is undisputedly the property of the third-party seller even though that consideration travels through the Amazon Payments processing system. The same is true for any seller that uses a third-party payment processor to process payment. Amazon Services should prevail because no Amazon entity, nor any combination of Amazon entities, received consideration for third-party sales. Only third-party sellers received consideration for third-party sales.

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[6] The Department dissembles again when it baldly asserts that the marketplace facilitator amendments in 2019 were merely designed to "update the Act to reflect modern jargon regarding internet sales." *See, e.g.*, Return 21 (referring to the supposed "true purpose" of the marketplace facilitator amendments). As discussed below, the amendments created an entirely new class of "sellers"—those "operating as marketplace facilitators." *See infra* at 12. If the Department's *post hoc* explanation were correct, there would have been no need to change the statutory definition. As soon as the Supreme Court eliminated the physical nexus requirement in *Wayfair*, under the Department's logic, pre-2019 tax law in South Carolina imposed a sales tax collection obligation on marketplace facilitators.

B. Treating the 2019 "Marketplace Facilitator" Amendments as Legally Irrelevant Contradicts Common Sense and Settled Law.

The Department maintains that the 2019 marketplace facilitator amendments cannot help Amazon Services. Return 19-20. Specifically, the Department points to prefatory language accompanying the amendments, stating that the amendments would "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." 2019 S.C. Act No. 21, § 1(5); Return 19. But the legislature may not dictate whether a prior version of a statute is ambiguous as applied to a taxpayer. Instead, that prefatory language simply acknowledged that the legislature has not pre-judged that quintessentially legal question, and has left it (appropriately) for the courts. Yet the Court of Appeals, at the Department's urging, determined that the prefatory language required the Court to disregard the marketplace facilitator amendments. The Court of Appeals thus empowered the legislature to intrude on the court's duty to consider all the factors pointing toward ambiguity in a prior version of a tax statute.

Accepting the Court of Appeals' approach would reject both reason and the well-established presumption that a statutory amendment reflects the legislature's desire to make a change. *See, e.g.*, *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008); *Orthotic Shop, Inc. v. Wash. Dep't of Revenue*, 544 P.3d 1072, 1079 (Wash. Ct. App. 2024). As the Arkansas Supreme Court recently stated: if prior law clearly encompassed a business, then amendments designed to expressly cover such a business "would have been unnecessary," and "the legislature will not be presumed to have done a vain and useless thing." *Hotels.com, L.P. v. Pine Bluff Advert. & Promotion Comm'n*, --- S.W.3d ---, 2024 Ark. 86, 9-10 (2024) (holding that legislature's addition of "accommodations intermediaries" to list of entities subject to tax showed that they were not covered by prior version of statute). This Court should

accept review here to restore this sensible and widely recognized presumption concerning statutory amendments.

It is especially appropriate to apply the presumption here because the amendments at issue are strikingly expansive and highly relevant. The 2019 amendments specifically added a new type of "seller": those "operating as a marketplace facilitator." S.C. Code Ann. § 12-36-70(3) (2019). The legislature also added a new statutory section defining "marketplace facilitator." *See id.* § 12-36-71 (2019). That new section had several different sub-provisions carefully designed to expressly address some of the precise reasons Amazon Services had for reasonably concluding that the prior law did not oblige it to collect tax on third-party sales. For instance, the amendments expressly specified that a "marketplace facilitator includes any related entities assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace," such as Amazon Payments. *Id.* The Department addresses none of these specific provisions. Indeed, to acknowledge them would be to concede that such extensive amendments "would have been unnecessary" if the prior law unambiguously covered marketplace facilitators. *Hotels.com*, 2024 Ark. 86 at 10.

C. The Department Cannot Explain Why Its Own Statements to the Legislature Should Be Legally Irrelevant.

Contrary to the Department's contention, Amazon Services has never suggested that the statements of the Department's Director should displace this Court's role with respect to statutory interpretation. *See* Return 20. Amazon Services's view is far more modest. The Director is at least presumptively a reasonable reader of South Carolina tax statutes. So his statements about the ambiguity of a particular statute should inform the range of reasonable readings of the statute. That is why Amazon Services pointed out that the Director said that he needed legislative "help" to require marketplace facilitators to collect sales tax on third-party

sales. Ex. 205, App. 1411; Ex. 203, App. 1372; Ex. 194, App. 1287 at 5:50-6:06; Ex. 207, App. 1536. More importantly, he testified to the Legislative Oversight Committee that there was a "need [for] additional legislation" in order to "close[] the gap" so that "nobody has to guess" whether they must collect and remit sales tax on third-party sales. Ex. 194, App. 1287 at 5:50-6:06, 6:13-15, 8:40-50. The Department takes the striking position that such highly probative sworn statements are irrelevant as a matter of law. Return 20-21. The Department (and the Court of Appeals) would thus deprive courts of the Department's own statements about a tax statute when trying to understand the full range of reasonable views of that statute.

As for the substance of the Director's statements, the Department inexplicably asserts that Amazon Services has taken them out of context and "selective[ly]" quoted the Director's testimony. *See* Return 21. But the Department does not explain what context Amazon Services omitted or what additional testimony Amazon Services should have quoted. *See id.* at 20-21. The bottom line is that the Director recognized that there was a gap that left marketplace facilitators guessing about whether they had a duty to collect sales tax on third-party sales, and so it was reasonable for Amazon Services to read the law the same way. No additional "context" would change that fact.

D. The Department Would Change South Carolina Law by Disregarding the Decisions and Actions of Other Jurisdictions.

Even now the Department cannot point to a single other jurisdiction that has imposed sales tax on Amazon Services or any other marketplace facilitator before the enactment of a marketplace facilitator law. *See* Return 22-23. Instead, the Department asserts that what other states have done does not matter. *Id.* at 22. But the Department ignores this Court's statement in *Fuller v. South Carolina Tax Commission* that when other state courts interpret "practically identical" language in their tax statutes, "[t]he construction accorded that language, as applied to

facts substantially identical with those of this case, … is … entitled to great weight." 128 S.C. 14, 28, 121 S.E. 478, 483 (1924).

Given that longstanding legal rule, it was surely reasonable for Amazon Services to examine closely parallel out-of-state authorities when forming its positions. Even the case the Department cites does not support its argument. *See* Return 22. *Planned Parenthood South Atlantic v. State* says only that decisions from other states are not "binding." 438 S.C. 188, 208 n.9, 882 S.E.2d 770, 781 n.9 (2023). Amazon Services has never suggested otherwise. But non-binding decisions can obviously inform a reasonable understanding of the law.[7] This Court should accept review to vindicate that sensible approach to legal analysis.

The Department also claims that "Amazon was fully apprised of its obligations under the Act in 2011" because of a five-year moratorium on Amazon Services's sales tax obligations passed in 2011. *See* Return 22; *accord id.* at 3. But the moratorium applied to sales tax obligations that would otherwise have applied to Amazon Services as a *seller*. When the moratorium expired, Amazon Services had to collect and remit tax on sales covered by the Sales and Use Tax Act—*i.e.*, sales for which Amazon Services was the "seller." The expiration of the moratorium did not resolve the question at issue here—whether Amazon Services is the "seller" for third-party sales on its marketplace. Nothing about the lifting of the moratorium even suggests an answer to that question.

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[7] Yet again the Department claims that Amazon Services did not adequately preserve this argument. *See* Return 22 n.15. But Amazon Services cited many other states' treatment of marketplace facilitators in its Opening Brief in the Court of Appeals. *See* App. 2006-07. The Department asserted that none of those states had materially similar sales tax statutes. *See* App. 2063. Amazon Services then responded to that argument in its reply by citing and quoting specific sales tax language from several states as examples. *See* App. 2098-2100. There was no waiver.

III. The Department's Response Underscores the Department's Unconstitutionally Selective Application of the 2016 Version of the Sales and Use Tax Act.

The Department claims that Amazon Services's due process and equal protection arguments are not adequately supported by the record. *See* Return 23-25 (noting, for example, that "Amazon's equal protection claim … suffers from the same lack of proof as the due process claim"). But the *essential facts are undisputed*. It is undisputed that the legislature passed a law in 2019 that imposed a sales tax collection and remittance obligation on all marketplace facilitators. It is undisputed that Amazon Services is a marketplace facilitator. And it is undisputed that Amazon Services is the only marketplace facilitator that is being forced to pay a sales tax deficiency on third-party sales from before the 2019 amendments took effect. Other evidence about specific comparators is unnecessary where, as here, the essential facts are not in dispute.

Indeed, the Director acknowledged in testimony before the legislature that Amazon Services was being singled out. In response to a question from a legislator about whether the proposed marketplace facilitator legislation the Department was advocating for would be prospective only, the Director replied: "Absolutely, it will not be retroactive, right." Ex. 194, App. 1287 at 7:00-08. He then qualified that answer, acknowledging that this "lawsuit's going to pull up some retroactivity … *specific to that one company,* I haven't said their name." *Id.* at 7:10-18; *see also* Ex. 214, App. 1563 (emphasis added). Amazon Services is the only marketplace facilitator forced to bear that "retroactivity."

CONCLUSION

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

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