

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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Supreme Court Appellate Case No. 2024-000625

Court of Appeals Case No. 2019-001706

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

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

v.

South Carolina Department of Revenue,.....Respondent.

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**THE INSTITUTE FOR PROFESSIONALS IN TAXATION'S MOTION FOR LEAVE TO  
FILE *AMICUS CURIAE BRIEF***

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Pursuant to Rule 213, SCACR, the Institute for Professionals in Taxation (“**IPT**”) moves for leave to file an *amicus curiae* brief in this action. The above matter, pending in the original jurisdiction of this Court, addresses issues of substantial concern to IPT and its members, encompassing representatives from more than 1,400 corporations, firms, and taxpayers throughout the United States and Canada, including most of the Fortune 500 companies and numerous small businesses, spanning the aerospace, agriculture, manufacturing, wholesale and retail, communications, healthcare, financial, oil and gas, hospitality, and transportation sector, among others.

IPT and its members have a direct interest in this matter because its members have an interest in the fair, predictable, and efficient administration of sales and use taxes. IPT is extremely concerned that without this Court’s review of the decision below, taxpayers in South Carolina will be left subject to unpredictable and potentially arbitrary and selective enforcement by the South Carolina Department of Revenue, undermining core tenets of the voluntary compliance system. For the foregoing reasons, IPT respectfully requests that the Court grant leave to present an *amicus curiae* brief. A copy of the IPT’s proposed *amicus curiae* brief is attached hereto and is being filed with this motion in accordance with Rule 213, SCACR. A check is being concurrently mailed to the Court at PO Box 11330, Columbia, SC, 29211.

Respectfully submitted,

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**AMICUS CURIAE BRIEF OF THE INSTITUTE FOR PROFESSIONALS IN TAXATION  
IN SUPPORT OF APPELLANT AMAZON SERVICES, LLC**

---

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## INTEREST OF AMICUS CURIAE

The Institute for Professionals in Taxation (“IPT”) is a non-profit educational organization founded in 1976 under the laws of the District of Columbia. IPT’s organizational purposes include the promotion of uniform and equitable administration of taxes. It is also the only professional organization that educates, certifies, and establishes strict codes of conduct for state and local income, property, and sales and use tax professionals who represent taxpayers.

IPT has more than 4,100 members representing more than 1,400 corporations, firms, and taxpayers throughout the United States and Canada. Most of the Fortune 500 companies and numerous small businesses are represented within IPT’s membership. Member representation spans the industry spectrum, including aerospace, agriculture, manufacturing, wholesale and retail, communications, healthcare, financial, oil and gas, hospitality, transportation, and other sectors. IPT’s members are liable for sales and use taxes in various jurisdictions, including South Carolina.

IPT has an interest in this matter because its members have an interest in the fair, predictable, and efficient administration of sales and use taxes—the foundation upon which our voluntary compliance system is built. IPT is extremely concerned that without this Court’s review of the decision below, taxpayers in South Carolina will be left subject to unpredictable, arbitrary and selective enforcement by the South Carolina Department of Revenue (the “**Department**”). Such enforcement would undermine core tenets of the voluntary compliance system.

## **QUESTIONS PRESENTED FOR REVIEW AND STATEMENT OF THE CASE**

IPT adopts the Questions Presented for Review and the Statement of the Case in the Petition for Writ of Certiorari of Appellant Amazon Services, LLC (“**Amazon Services**” or “**Appellant**”). Appellant’s Petition for Writ of Certiorari at 3-9.

### **INTRODUCTION**

When it comes to tax, certainty is fundamental. “The tax which each individual taxpayer is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person.” ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 137 (New York: Modern Library ed., 1937). While Adam Smith was referring to taxes paid directly, the requirement for taxes being “clear and plain” transcends this original context. And nowhere is clarity more important than in sales tax collection and remittance.

Being compliant with the tax laws requires a complete understanding of those laws and all the business’s obligations. Mistakes in tax compliance—especially in the sales tax collection and remittance area—can create significant economic burdens for businesses both in terms of compliance cost and ultimate tax liability. These burdens are even more acute when foisted on businesses under ambiguous statutes. The imposition of a tax obligation on a taxpayer when there is ambiguity as to such obligation, is fundamentally unfair.

Additionally, where taxing authorities are allowed to engage in arbitrary and discriminatory enforcement of an ambiguous statute, taxpayers across the board are at risk of being targeted without warning. This targeting flies in the face of the fair, predictable, and efficient administration of tax, including sales tax, where taxpayers depend upon unambiguous law and fair warning about tax requirements.

Here, the General Assembly of South Carolina (“**General Assembly**”) provided fair warning in 2019 with the passage of Act No. 21—South Carolina’s marketplace facilitator collection law. Act No. 21 gave taxpayers who are marketplace facilitators the clarity they require to comply with their sales tax obligations. The Court of Appeals’ failure to acknowledge the significance of that statutory change and its willingness to allow the Department to retroactively change their enforcement course have sent a ripple of fear across the taxpayer and business community. Considering the incredible uncertainty that the Court of Appeals’ decision has created here, IPT strongly urges the Court to grant Appellant’s Petition for Writ of Certiorari.

### **ARGUMENT**

#### **I. The Court of Appeals’ Misapplication of the Law Has Created Significant Uncertainty for Taxpayers That Will Have Broad Implications—Undermining South Carolina’s Voluntary Compliance System and Creating a Hostile Environment for All Businesses Operating In South Carolina.**

This case implicates fundamental principles of statutory interpretation, which the Court of Appeals turned on its head. Although the Court of Appeals acknowledged the proper structure for analyzing the relevant provision, its application of that structure was significantly flawed. Without this Court’s review, taxpayers in general will be left with a situation where the Department can pick and choose its application of any law without any potential backstop by the courts, creating significant uncertainty for taxpayers.

##### **a. The Court of Appeals failed to properly apply the *Alltel* decision and misread *Travelscape*.**

In the decision below, the Court of Appeals properly acknowledged that, “[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.” *Amazon Servs., LLC v. S.C. Dep’t of Revenue*, 442 S.C. 313, 328, 898 S.E.2d 194, 200-202 (S.C. Ct. App. 2024) (quoting *Alltel Commc’ns, Inc.*

*v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) (internal quotations removed)). The Court of Appeals, however, incorrectly concluded that the statute in question was not ambiguous because it contained *some* definitions. *Amazon Servs., LLC* 442 S.C. at 328, 898 S.E.2d at 202. But the prior statute did not contain any definitions *relevant* to applying such statute to Amazon Services since the statute did not address marketplace facilitators. Without any relevant definitions, the Court of Appeals should have applied the rule in *Alltel* and resolved substantial doubt as to the application of the rule in Amazon Services' favor.

The proper application of *Alltel* is paramount for taxpayer predictability and certainty. *Alltel* remains good law, and taxpayers should be able to rely on the principle that if a tax law is reasonably susceptible to multiple interpretations, then any substantial doubt will be resolved in the taxpayer's favor.

The Court of Appeals also misapplied the rule in *Travelscape, LLC v. S.C. Dep't of Revenue* by failing to appreciate the difference between a seller engaged in sales activities (as in *Travelscape*) and a marketplace facilitator, which is not engaged in sales activities (as in the present case). 391 S.C. 89, 97, 705 S.E.2d 28, 32 (2011). Rather, the Court of Appeals concluded simply that the importance of *Travelscape* was that it interpreted the statute at issue "broadly." *Amazon Servs., LLC*, 442 S.C. at 332, 898 S.E.2d at 204.

Based on its unfounded determination that *Travelscape* required a broad interpretation of the relevant statutory provisions, the Court of Appeals' analysis was significantly distorted. The Court of Appeals ultimately determined that the relevant statutes, when broadly interpreted, were not ambiguous. The Court determined this even though the statutory definition of a "seller" did not capture someone who merely facilitates sales between buyers and sellers. Additionally, to bring Amazon Services within its reading of the term "seller," the Court of Appeals was required

to reshape the facts to disregard Amazon Services' marketplace facilitator activities and recharacterize it as a seller.

The Court of Appeals bent the facts to fit a marketplace facilitator into its broad interpretation of "seller." This manipulation is reason enough for this Court to find the statute was ambiguous with respect to Amazon Services' tax collection obligations. When considered in conjunction with the Court of Appeals' failure to apply *Alltel* and *Travelscape* properly, it becomes even more clear this Court must step in to correct the Court of Appeals' flawed legal analysis.

**b. The Court of Appeals' errors will create widespread uncertainty for taxpayers—especially in the context of sales tax collection.**

The Court of Appeals' decision will create significant uncertainty for other taxpayers if its contortion of the law is allowed to stand. In the decision below, the Court of Appeals considered whether Amazon Services, as an online marketplace, was a "seller" and "engaged in the business of selling" tangible personal property under South Carolina law prior to the enactment of Act No. 21 in 2019 (the state's marketplace facilitator collection law).

Amazon Services had a reasonable interpretation under the prior law. In interpreting the relevant provisions, which did not mention marketplace facilitators, Amazon Services took the view that it was not a "seller" for the third-party sales at issue and, alternatively, that the law was ambiguous with respect to the tax collection obligations of online marketplaces such as Amazon Services.

The Court of Appeals, however, did not give Amazon Services the benefit of its reasonable interpretation as required. Instead, it upheld the Administrative Law Court's ("ALC's") rejection of both arguments, holding that Amazon Services was a "seller" under the prior law. To reach this conclusion and fit Amazon Services into the prior statute, the Court of Appeals had first deny the gap that had been acknowledged to exist between the prior law and

the “marketplace facilitator” rule in Act No. 21 by both the General Assembly of South Carolina (“**General Assembly**”) and the Department itself. Appellant’s Opening Brief at 17, *Amazon Servs., LLC* (January 13, 2020). And second, the Court of Appeals had to disregard “the formal structure of the contractual arrangements of the company.” *Amazon Servs., LLC* 442 S.C. at 331, 898 S.E.2d at 203. In so doing, the Court of Appeals created uncertainty for taxpayers who will now not know whether their contract arrangements will be respected and will not know what to expect when courts interpret statutes.

The U.S. state and local tax system, which is based on voluntary compliance, depends on certainty and predictability for taxpayers. In the sales tax collection context especially, a business must be able to read the law and understand whether the law imposes a duty to collect or not. Sales taxes are trust taxes, imposed on consumers and collected by sellers as an administrative matter. Thus, businesses require more certainty as to their sales tax collection responsibility than they might for other taxes. This is because businesses are standing in the shoes of a tax collector in the sales tax context, with exposure to the government for under-collection and potential exposure to taxpayers for over-collection. An error on the under-collection side puts businesses at risk of ultimate liability for the taxes that they would otherwise only collect while an error on the over-collection side puts businesses at risk of having to refund customer money and then pursue a refund from the state. Without certainty as to their collection obligation, the economic impact of the sales tax is borne by businesses that did not collect the tax at the time of sale from their customers. And it gets even more burdensome. If a business did not collect sales tax at the point of sale, the state could assert crushing liability against that business afterwards given that the assessment compounds over a three-year audit cycle. Given these

economics, it is important that businesses are permitted protection when they rely on their reasonable interpretation of a sales tax law.

The Court of Appeals' decision created significant uncertainty not only for Amazon Services, but for all taxpayers going forward who cannot trust that the Department or the courts will respect their operations or their reasonable interpretation of statutes. Uncertainty is fundamentally unfair, inefficient policy, harmful to businesses, and a violation of the U.S. (U.S. Const. amend. XIV, § 1<sup>1</sup>) and South Carolina Constitutions (S.C. Const. amend. I, § 3). Taxpayers require fair notice and warning regarding their tax obligations for business planning, shareholder reporting, and other compliance purposes. Taxpayers are harmed when they do not have this predictability and certainty and their rights are violated. The Court of Appeals' failure to correctly apply the principles of *Alltel* and *Travelscape* has created uncertainty for taxpayers, generating broader issues for businesses trying to operate in South Carolina. Such uncertainty will result a hostile business environment for taxpayers.

## **II. The Court of Appeals' Decision Makes South Carolina an Outlier Following the *Wayfair* Decision and Is Contrary to Every Other Court Decision That Has Addressed This Issue.**

The central question before the Court of Appeals was whether Amazon Services, as an online marketplace, was a “seller” “engaged in the business of selling” tangible personal property under South Carolina law prior to the enactment of Act No. 21 – the state’s

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<sup>1</sup> Under the U.S. Supreme Court’s commerce clause jurisprudence, a state tax collection scheme cannot impose an undue burden on interstate commerce. *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970). In *Pike*, the U.S. Supreme Court set forth a balancing test. *Id.* at 142. The test first asks whether a state statute enacted in furtherance of a legitimate state interest operates evenhandedly regarding interstate commerce. If the statute passes this test, the law will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. Here, while the sales tax collection statute under prior law may pass the first part of the test, it does not pass the second. Specifically, the Department’s application of the law to marketplace facilitators creates uncertainty for taxpayers, fails to give deference to taxpayers’ reasonable interpretation of an ambiguous statute and imposes an impossible burden of sales tax collection after a sale has closed.

marketplace facilitator law. The Court of Appeals’ determination that Amazon Services was a “seller” under prior law is not only incorrect but flies in the face of what was done by every other state with a sales tax, as well as every court that has addressed this issue, following the U.S. Supreme Court’s decision in *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018).

First, no other state has required collection of sales tax by marketplace facilitators before the enactment of a specific marketplace facilitator law. Following the Supreme Court’s decision in *Wayfair*, the states were quick to adopt economic nexus laws.<sup>2</sup> Almost simultaneously, the states also enacted laws requiring marketplace facilitators to become responsible for tax collection.<sup>3</sup> During the post-*Wayfair* period, when the states were working to implement and

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<sup>2</sup> Alabama (Ala. Admin. Code § 810-6-2-.90.03); Arizona (Ariz. Rev. Stat. Ann. § 42-5044(A)(1)); Arkansas (Ark. Code Ann. § 26-52-111(a)); California (Cal. Rev. & Tax. Code § 6203(c)(4)(a)); Colorado (Colo. Rev. Stat. § 39-26-102(3)(c)(I)); Connecticut (Conn. Gen. Stat. § 12-407(a)(12)(G)); District of Columbia (D.C. Code Ann. § 47-2001(w)); Florida (Fla. Stat. § 212.06(2)); Georgia (Ga. Code Ann. § 48-8-2(8)(M.1)); Hawaii (Haw. Rev. Stat. § 237-2.5); Idaho (Idaho Code § 63-3611(3)(h)); Illinois (35 ILCS 105/2(9) and 35 ILCS 110/2(9)); Indiana (Ind. Code Ann. § 6-2.5-2-1(d)); Iowa (Iowa Code Ann. § 423.14A(2)-(3)); Kansas (Kan. Stat. Ann. § 79-3702(h)(1)(G)); Kentucky (Ky. Rev. Stat. Ann. § 139.340(2)(g)); Louisiana (La. Rev. Stat. Ann. § 47:301(4)(m)(i)); Maine (Me. Rev. Stat. Ann. tit. 36, § 1754-B(1-B)(B)); Maryland (Md. Regs. Code § 03.06.01.33); Massachusetts (Mass. Gen. L. ch. 64H, § 34(a)); Michigan (Mich. Comp. Laws § 205.52c(1)); Minnesota (Minn. Stat. § 297A.66(1)(c)); Mississippi (Miss. Code Ann. § 27-67-3(j)); Missouri (Mo. Rev. Stat. § 144.605(2)(e)); Nebraska (Neb. Rev. Stat. § 77-2701.13(2)); Nevada (Nevada L.C.B. File No. R189-18); New Jersey (N.J. Rev. Stat. § 54:32B-3.5); New Mexico (N.M. Stat. Ann. § 7-9-3.3); New York (N.Y. Tax Law § 1101(b)(8)(i)(E) & N.Y. Tax Law § 1101(b)(8)(iv)); North Carolina (N.C. Gen. Stat. § 105-164.8(b)(9)); North Dakota (N.D. Cent. Code § 57-39.2-02.2); Ohio (Ohio Rev. Code Ann. § 5741.01(I)(2)(g-h)); Oklahoma (Okla. Stat. Ann. tit. 68, § 1392(G)); Pennsylvania (72 Pa. Stat. § 7201(b)(3.5)); Rhode Island (R.I. Gen. Laws § 44-18-15.2(a)(1) & R.I. Gen. Laws § 44-18.2-3(E)); South Carolina (S.C. Code Ann. § 12-36-1340(6)); South Dakota (S.D. Codified Laws Ann. § 10-64-2); Tennessee (Tenn. Code Ann. § 67-6-543); Texas (Tex. Admin. Code tit. 34, § 3.286(a)(4)); Utah (Utah Code Ann. § 59-12-107(2)(c)); Vermont (Vt. Stat. Ann. tit. 32, § 9701(9)(F)(ii)); Virginia (Va. Code Ann. § 58.1-612(C)(10-11)); Washington (Wash. Rev. Code § 82.08.052(1)); West Virginia (W. Va. Code § 11-15A-6b); Wisconsin (Wis. Stat. § 77.51(13gm)); Wyoming (Wyo. Stat. § 39-15-501); *See*, 110 TAXNOTES STATE 587 (Nov. 20, 2023)

<sup>3</sup> Alabama (Ala. Code § 40-23-199.2(b)); Arizona (Ariz. Rev. Stat. Ann. § 42-5044(A)(2)); Arkansas (Ark. Code Ann. § 26-52-111(a)); California (Cal. Rev. & Tax. Code § 6042 and Cal.

enact economic nexus and marketplace facilitator collection laws, the states were generally consistent in their approach and did not attempt to impose their laws retroactively. This is not surprising, considering that the U.S. Supreme Court explicitly recognized that South Dakota’s law in the *Wayfair* case was not retroactive. *Wayfair* at 170. Following the Court’s decision in *Wayfair*, state guidance across the board also made it clear that marketplace facilitator collection laws (as well as economic nexus laws) should not be applied before the court’s decision in *Wayfair* and not without an explicit legislative change.<sup>4</sup>

Furthermore, in every state where a similar challenge case has arisen, the state courts have unanimously rejected the notion that marketplace collection obligations existed before their states’ enabling law.

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Rev. & Tax. Code § 6043); Colorado (Colo. Rev. Stat. § 39-26-105(1.5)(a)); Connecticut (Conn. Gen. Stat. § 12-407(a)(12)(M)); District of Columbia (D.C. Code Ann. § 47-2002.01a); Florida (Fla. Stat. § 212.06(2)); Georgia (Ga. Code Ann. § 48-8-2(8)(M.3)); Hawaii (Haw. Rev. Stat. § 237-4.5); Idaho (Idaho Code § 63-3620E); Illinois (35 ILCS 105/2d(b) and 35 ILCS 110/2d(b)); Indiana (Ind. Code Ann. § 6-2.5-4-18); Iowa (Iowa Code Ann. § 423.14A(2)-(3)); Kansas (Kan. Stat. Ann. § 79-5602(a)); Kentucky (Ky. Rev. Stat. Ann. § 139.450(2)); Louisiana (La. Rev. Stat. Ann. § 47:340.1(C)); Maine (Me. Rev. Stat. Ann. tit. 36, § 1951-C, and Me. Rev. Stat. Ann. tit. 36, § 1754-B(1-B)(K)); Maryland (Md. Code Ann. Tax-Gen. § 11-403.1(A)(1)); Massachusetts (Mass. Gen. L. ch. 64H, § 34(b), (c)); Michigan (Mich. Comp. Laws § 205.52d(1)); Minnesota (Minn. Stat. § 297A.66(2)(b)); Mississippi (Miss. Code Ann. § 27-65-7 and Miss. Code Ann. § 27-67-3(j)); Missouri (Mo. Rev. Stat. § 144.752.2); Nebraska (Neb. Rev. Stat. § 77-2701.32(2)(f)); Nevada (Nev. Rev. Stat. tit. 32, § 372.751); New Jersey (N.J. Rev. Stat. § 54:32B-3.6(b)); New Mexico (N.M. Stat. Ann. § 7-9-3.5); New York (N.Y. Tax Law § 1101(e)(1)); North Carolina (N.C. Gen. Stat. § 105-164.4J(b)); North Dakota (N.D. Cent. Code § 57-39.2-02.3); Ohio (Ohio Rev. Code Ann. § 5741.01(E)); Oklahoma (Okla. Stat. Ann. tit. 68, § 1392(A)); Pennsylvania (72 Pa. Stat. § 7201(b)(3.5) and 72 Pa. Stat. § 7237(b.1)); Rhode Island (R.I. Gen. Laws § 44-18.2-3(E)); South Dakota (S.D. Codified Laws Ann. § 10-65-5 and S.D. Codified Laws Ann. § 10-65-8); Tennessee (Tenn. Code Ann. § 67-6-501(f)); Texas (Tex. Tax Code Ann. § 151.0242(b)); Utah (Utah Code Ann. § 59-12-107.6(2)(a)); Vermont (Vt. Stat. Ann. tit. 32, § 9701(9)(J)); Virginia (Va. Code Ann. § 58.1-612.1); Washington (Wash. Rev. Code § 82.08.0531(2)); West Virginia (W. Va. Code § 11-15A-6b); Wisconsin (Wis. Stat. § 77.51(13)); Wyoming (Wyo. Stat. § 39-15-502(b)); *See*, 109 TAXNOTES STATE 127 (July 10, 2023).

<sup>4</sup> *See, e.g., Grosz v. California Dep’t of Tax and Fee Admin.*, 87 Cal. App. 5th 428 (2023); *Normand v. Wal-Mart.com USA, LLC*, 340 So. 3d 615 (La. 2020); *Orthotic Shop, Inc. v. Dep’t of Revenue*, 544 P.3d 1072 (Wash. Ct. App. 2024); Hawaii Tax Information Release No. 2019-03 (Oct. 17, 2019); Illinois Admin. Code, tit. 86, § 150.804(b)(1), Ex. 1; Michigan Notice Regarding 2019 Pas 143-146 Marketplace Facilitators and Economic Nexus (Dec. 23, 2019).

The first state court system to address this issue was Louisiana where one of the parishes assessed a sales tax obligation on Wal-Mart.com, the operator of an online marketplace that facilitated sales for third-party sellers, asserting it was required to collect and remit sales tax on its online sales made by third-party sellers through its marketplace before the enactment of Louisiana's marketplace collection law. *Normand* at 617. The Supreme Court of Louisiana, however, disagreed and concluded that marketplace facilitators were not required to collect on third-party sales under the state's general statutory tax regime before the enactment of the state's marketplace collection law. *Id.* at 633. Specifically, the Supreme Court of Louisiana concluded that "as [a] nonparty to the underlying sale[s] transaction, a marketplace facilitator is not a 'dealer'" for products sold by third-party sellers on its marketplace. *Id.* The Court went on to determine that explicit legislation was required to make a marketplace facilitator responsible for the collection and remittance of tax, which was not enacted until 2020. *Id.* at 630; *see also*, 2020 La. S.B. 138.

Similarly, California dismissed an action contending that a marketplace facilitator had an obligation to collect sales and use tax on products sold through a fulfillment program prior to California's adoption of marketplace facilitator legislation, which was effective in 2019. *Grosz*, 87 Cal. App. 5th 428. And most recently, the Washington Court of Appeals rejected a challenge that a marketplace facilitator was responsible for sales tax collection before the enactment of Washington's marketplace collection law. *Orthotic Shop*, 544 P.3d 1072. There, third-party sellers argued that the marketplace facilitator should have collected and remitted sales tax as the consignee of the goods under the sales tax law in existence prior to the enactment of Washington's marketplace collection law. *Id.* at 1075. The Court disagreed and held that "the Washington legislature enacted [the marketplace collection law], which explicitly requires most

marketplace facilitators to collect and remit sales taxes to Washington starting on January 1, 2020.” *Id.* at 1079. The court reasoned that “[w]e presume the legislature does not engage in vain and useless acts” and “[i]f the legislature thought that the law before [the marketplace collection law] required marketplace facilitators . . . to collect taxes, it would have faced no need to enact the new provisions.” *Id.*

Conversely, unlike *all* other states, South Carolina is now the only state in the country with case law requiring a marketplace facilitator to collect sales tax before the enactment of a specific marketplace collection law. This makes South Carolina an outlier treating marketplace facilitators—like Amazon Services—as a seller before the enactment of South Carolina’s marketplace facilitator collection law. The Court of Appeals’ decision is also completely out of step with every other state’s post-*Wayfair* actions.

Although not every business or taxpayer in South Carolina is impacted by the specific seller provision or marketplace facilitator collection law, the general uncertainty created by the Court of Appeals and the Department in this case is likely to have a ripple effect on tax administration and voluntary tax compliance more broadly. If the Department is allowed to pick and choose the way in which its tax laws are administered—turning a blind eye to U.S. Supreme Court dicta and sound tax policy, what is to restrain the Department’s actions with respect to other taxpayers? IPT members, which are tax professionals representing corporations, firms, and individuals throughout the US, many of whom do business in South Carolina, will be impacted by the broader implications of the Court of Appeals’ decision. This is an issue not only of paramount importance to Amazon Services, but also to all taxpayers generally.

### **III. The Court of Appeals’ Decision Renders Act No. 21 Unnecessary.**

If the Court of Appeals’ decision upholding the Department’s position is correct, there would have been no reason for the General Assembly to have enacted its marketplace facilitator

legislation in 2019. Legislative action must have meaning and must not be deemed to be futile. *Key Corp. Capital, Inc. v. Cty. Of Beaufort*, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007).<sup>5</sup>

Here, it is particularly noteworthy that the General Assembly acted at the behest of the Director of the Department (the “**Director**”), who recommended that new legislation was required to extend a tax collection obligation to online marketplaces like Amazon Services. On April 26, 2019, the General Assembly passed Act No. 21, which required a “marketplace facilitator” to collect and remit tax on behalf of online sellers using its platform. This law was effective April 26, 2019. The law did not create a retroactive collection requirement for marketplace facilitators. 2019 S.C. Act No. 21.

Not only does the General Assembly’s enactment of Act No. 21 undermine the Court of Appeals’ determination that the prior law unambiguously captured Amazon Services, it also requires this Court to take this case to rectify the Court of Appeals’ decision, which has the effect of rendering Act No. 21 meaningless.

As this Court has recognized, “[t]here is a presumption that the Legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.” *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003). Considering this, why would the General Assembly need to act if existing law unambiguously captured online marketplaces?

Not only does the enactment of any law undermine the Court of Appeals’ decision that the prior law unambiguously applied to Amazon Services but Act No. 21 also undermines the Court of Appeals’ interpretation. To illustrate this point, the General Assembly could have

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<sup>5</sup> See also, *Trs. of the Corcoran Gallery of Art v. District of Columbia*, 2014 D.C. Super. LEXIS 17, \*45 (D.C. Super. Ct. 2014); *Casanova v. Tri-County Cmty. Corr.*, 2019 Minn. Dist. LEXIS 459, \*83 (Minn. Dist. Ct. 2019); *Chattooga Cty. Bd. of Tax Assessors v. Connelly*, 370 Ga. App. 598, 602 (2024).

simply reaffirmed the conclusion that Amazon Services was a “seller” under the prior law. But it did not. Rather, the General Assembly enacted subsection (3) of § 12-36-70 that, when read in conjunction with the prefatory language, reads as follows: “Retailer and seller include every person: ... operating as a marketplace facilitator, as defined in Section 12-36-71.” S.C. Code Ann. § 12-36-70(3). So, while Amazon Services was found to be a “seller” pursuant to § 12-36-70(1)(a) by the Court of Appeals, the General Assembly determined that a new subsection § 12-36-70(3) was needed to capture marketplace facilitators like Amazon Services.

It is particularly noteworthy that the legislative change to the definition of “seller” just described was advocated for by none other than the Director himself. *See, e.g.*, Appellant’s Opening Brief at 17, *Amazon Servs., LLC* (January 13, 2020). Thus, while the Department was arguing that Amazon Services was captured by the existing definition of “seller,” in this litigation, the Director was simultaneously advocating to the General Assembly that a new definition of “seller” was needed to capture marketplace facilitators like Amazon Services.

The 2019 legislative changes were necessary to broaden the scope of the law. This is supported by the Department’s own testimony before the General Assembly, and without such necessity those changes would be superfluous. This Court’s review is necessary to correct the Court of Appeals’ incorrect determination regarding the subsequent action by the General Assembly.

#### **IV. The Court of Appeals’ Decision is Likely to Open Pandora’s Box on Targeted Assessments and Overaggressive Taxation in South Carolina Going Forward.**

If left unaddressed, the Court of Appeals’ decision will create a roadmap for the Department to target taxpayers in the future. Specifically, the Court of Appeals upheld an assessment where the Department changed course regarding a long-standing position without any statutory modification. Additionally, the decision supports the Department’s ability to

ignore actual changes by the General Assembly, where a shift in policy was intended. Thus, the Court of Appeals' decision is likely to embolden the Department to similarly change its position and ignore the General Assembly in other areas, which will create a hostile environment for businesses.

For all the reasons discussed above and in Appellant's brief, Amazon Services should not be required to collect taxes it had no reason to believe it was required to collect before the Supreme Court's decision in *Wayfair* and the subsequent change in law by the South Carolina General Assembly. Additionally, Amazon Services should not be required to collect taxes that were not required to be collected under the longstanding policy of South Carolina.

If, however, Amazon Services is required to collect this tax and the Department is left unrestrained, there is nothing to stop the Department from using its unbridled authority to target other taxpayers. This is of great concern to IPT and its members. Businesses and taxpayers must understand and be able to rely on long-standing policies unless there is notice of a prospective change. To allow the Court of Appeals' decision to stand shakes this notion to its core, which will leave businesses and taxpayers in South Carolina to wonder when they might be next.

It is imperative that the Court review the Court of Appeals' decision to ensure businesses and taxpayers are protected and not subject to the whim of the Department and the Court of Appeals.

### **CONCLUSION**

IPT respectfully urges this Court to grant Appellant's Petition to fix the errors and resolve the conflicts created by the Court of Appeals, which has created significant uncertainty for taxpayers generally. The Court of Appeals' decision has created a situation whereby the

Department may reverse course on long-standing positions without a legislative change as well as ignore the General Assembly's subsequent substantive changes. Without the Court stepping in to review this decision, taxpayers will be left to fend for themselves and simply hope that the Department doesn't decide to change its mind.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211, SCACR, I, Samantha K. Trencs, an attorney, certify that the foregoing complies with the length and formatting requirements of Rules 211 and 267, SCACR.

Dated: May 28, 2024

*s/ Samantha K. Trencs*  
Samantha K. Trencs

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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Supreme Court Appellate Case No. 2024-000625

Court of Appeals Case No. 2019-001706

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

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

v.

South Carolina Department of Revenue,.....Respondent.

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**PROOF OF SERVICE**

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I, the undersigned of the law firm Greenberg Traurig, LLP, attorneys for *amicus* Institute for Professionals in Taxation, hereby certify that I have served all counsel of record in this action with a copy of the pleading(s) hereinbelow specified in e-mailing a PDF copy of the same to the following e-mail addresses pursuant to SC Supreme Court's April 24, 2024 Order regarding the Methods of Electronic Filing and Service Under Rule 262:

Pleadings

THE INSTITUTE FOR PROFESSIONALS IN TAXATION'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE BRIEF* with [Proposed] *AMICUS CURIAE BRIEF* OF THE INSTITUTE FOR PROFESSIONALS IN TAXATION IN SUPPORT OF APPELLANT AMAZON SERVICES, LLC

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