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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Opinion No. 6062 (S.C. Ct. App. Filed June 12, 2024)

Appellate Case No. 2021-000031

Lowe's Home Centers, LLC ..... Appellant,

v.

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

SOUTH CAROLINA DEPARTMENT OF REVENUE'S RETURN TO LOWE'S HOME CENTERS, LLC'S PETITION FOR WRIT OF CERTIORARI

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November 4, 2024

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INTRODUCTION

This appeal involves the straightforward application of the South Carolina Sales and Use Tax Act, S.C. Code Ann. § 12-36-10 et seq. (the Sales Tax Act), to Lowe's sales of tangible personal property in conjunction with its self-described "Installed Sales" or "installation services." Lowe's arguments do not warrant certiorari because the Court of Appeals faithfully applied the plain language of the Sales Tax Act and affirmed the findings of the South Carolina Administrative Law Court (ALC) based on the substantial evidence in the record.

When a customer shops at Lowe's for home improvement materials, there are two basic ways the customer can purchase the materials for its home or business:

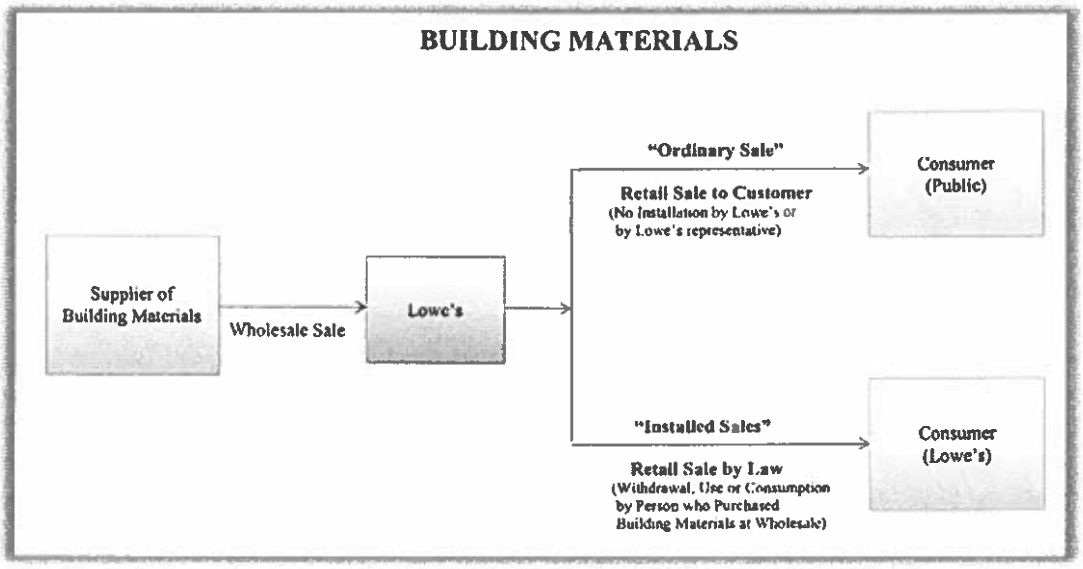
1. **Ordinary sale**: Lowe's sells the materials to the customer, who then installs them in a home or business.

2. **Installed Sales**: Lowes sells the materials to the customer and also agrees to install the materials in the customer's home or business, pursuant to an Installation Contract.

As a retailer, Lowe's purchases all of its materials at wholesale, free of tax. In the ordinary sale, Lowe's charges the customer its retail price (a 40% mark up from the wholesale price), regardless of whether it is a do-it-yourself (DIY) customer or a professional contractor. Lowe's agrees that, under the Sales Tax Act, this is a retail sale and Lowe's is liable for sales tax based on the retail price of the materials.

But with Installed Sales, Lowe's only remits tax based on its wholesale cost of the materials, even though it charges the customers the same retail (shelf) price as in an ordinary sale. Why? Lowe's claims that in the Installed Sales its identity morphs from retailer to contractor, and therefore it could not have purchased the materials at wholesale (because contractors must purchase materials at retail). So, Lowe's asserts it can retroactively alter the tax nature of its previously consummated wholesale purchases by transforming them into taxable retail sales after the fact, and then—when it uses those materials in an Installation Contract—remit a tax calculated on that wholesale (not retail) price.

The ALC has twice rejected this argument because it does not square with South Carolina law.[1] Based on the applicable provisions of the Sales Tax Act and the substantial evidence in the record, the Court of Appeals correctly affirmed the ALC's finding that the Installation Contracts are "retail sales" of tangible personal property from Lowe's to its customer. *See* S.C. Code Ann. § 12-36-110(1) (defining "retail sales"). Alternatively, when Lowe's withdraws materials for use in an Installed Sale, the Sales Tax Act defines that "withdrawal for use" as a retail sale. *See* S.C. Code Ann. § 12-36-110(1)(c). Either way, the Installation Contract constitutes a taxable retail sale.



(App. p. 1977). And regardless of whether Lowe's identifies as a contractor with respect to the Installation Contracts, the Sales Tax Act provides a clear answer for how to measure the tax owed on these retail sales of materials: Lowe's is liable for sales tax on the retail price—not wholesale price.

Lowe's attempts to justify certiorari by asserting the Court of Appeals misinterpreted the true nature of the Installation Contracts and misunderstood Lowe's identity as a contractor, not a retailer,

[1] (App. p. 2) (Final Order). *See also Home Depot U.S.A., Inc., d/b/a The Home Depot v. S.C. Dep't of Revenue*, Docket No. 15-ALJ-17-0253-CC (J. Anderson, Mar. 12, 2018) (concluding Home Depot acted as a retailer when it purchased materials for use in installation contracts), appealed docketed at Appellate Case No. 2018-000631, Order of Dismissal, Aug. 29, 2018.

in the Installed Sales. The Petition focuses most of its argument on topics like contractor's licenses, title and possession, real property improvement contracts and lump-sum agreements, the "true object test," and how other states have interpreted Lowe's role vis-à-vis the Installation Contracts.

These arguments are distractions from the real dispute: does Lowe's owe tax on the retail or wholesale price of these materials? At the end of the day, Lowe's is not principally concerned with whether it is technically considered a "general contractor" or whether the installation services constitute improvements to real property. Instead, Lowe's primary objection is to how the General Assembly has chosen to determine the taxable base (i.e. "gross proceeds of sales") for materials when a retail merchant like Lowe's sells and installs them for its retail customers. Make no mistake: at the heart of this dispute is Lowe's desire to maintain an "enormous economic" and competitive advantage over other contractors who, under the Sales Tax Act, cannot purchase large quantities of materials at reduced wholesale prices and must pay sales tax on the marked-up retail price of those materials. (App. pp. 25, 28, 145, 354–55). In short, Lowe's asks this Court to bless it with a reduced tax base compared to other contractors in South Carolina who pay tax on an amount 40% higher than Lowe's. Not to mention the detrimental impact such a carve-out has on the State's sales tax revenues.[2]

This appeal does not present any novel questions of law. Lowe's does not argue that any of the relevant provisions of the Sales Tax Act and accompanying regulations are ambiguous or unclear. Instead, Lowe's attempts a factual sleight of hand, and then urges the Court to adopt a "manipulated" construction of the Sales Tax Act based on provisions and regulations it cherry-picks (or ignores) to put Lowe's in a class of its own. (App. p. 25). In the same breath, Lowe's complains that treating it (under the Sales Tax Act) like other similarly situated retailers and contractors is unfair.

[2] For example, if Lowe's purchases a dishwasher at wholesale for $1,000, it sells the dishwasher at retail for $1,400. In an ordinary sale of that dishwasher, Lowe's should remit ~$84 in sales tax to the State, assuming the standard 6% sales tax rate. In the Installed Sale, Lowe's remits only $60. Many counties have their own local 1% "penny" sales tax on top of the standard 6% sales tax.

The Court of Appeals gave due consideration to each of Lowe's arguments and correctly concluded they were inconsistent with the law and facts. The Opinion is legally sound and supported by substantial evidence on the whole record. Lowe's may disagree with how the General Assembly has chosen to tax dual businesses, or how the Sales Tax Act applies to the facts as found by the ALC and affirmed by the Court of Appeals, but these are not "special and compelling reasons" for this Court to grant certiorari. *See* Rule 242(b), SCACR. The Department respectfully requests this Court deny Lowe's Petition.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. **Did the Court of Appeals correctly interpret the Sales Tax Act to require Lowe's to remit sales tax based on the retail price Lowe's charges its customer for materials, rather than the wholesale price Lowes paid to acquire those materials, including when the customer also hires Lowes to install those materials?**

II. **Did the Court of Appeals correctly reject Lowe's Equal Protection claim because Lowe's did not demonstrate that it is being treated differently from other similarly situated South Carolina retailers or contractors?**

STATEMENT OF THE CASE

A. Relevant Facts

Lowes is "the world's second largest home improvement retailer." It operates approximately 1,700 home improvement stores across all 50 states, over 40 of which were located in South Carolina during the audit at issue. (App. pp. 612, 723, 725). Each store averages in-stock inventory of between 40,000 to 60,000 items of tangible personal property; a customer can also shop from nearly 6 million items available through Lowe's special order sales system. (R. pp. 145, 723–25). Most of Lowe's customers are DIY homeowners and renters; approximately 30% of its customers are professional contractors or installers. (App. p. 722).

In an ordinary, over-the-counter retail sale, a customer (whether DIY or professional contractor) selects an item from existing inventory in a Lowe's location, pays for the item at the cash

register, and leaves the store with the purchased item.[3] Lowe's calculates and charges the sales tax to the customer based on the retail price of the materials, then remits this sales tax to the Department. (App. pp. 4, 73).

In the "Installed Sales model" transaction, Lowe's "offers installation services through independent contractors" to customers who purchase materials from Lowe's. (App. pp. 142–43, 615). Once the customer has chosen the materials, a Lowe's sales associate works with the customer and a 3rd party installer to determine the quantity of materials and labor needed for the project. For Installed Sales, Lowe's and the customer execute an "Installation Services Customer Contract" (Installation Contract). The Installation Contract separately identifies the material and labor costs and charges the customer the retail (shelf) price for the materials. (App. pp. 74–76, 900, 905). The customer pays the entire balance of the Installation Contract up front, but Lowe's does not collect any sales tax from the customer. (App. pp. 6, 123–24). Lowe's later remits tax to the Department based on the wholesale price it paid for the materials when it purchased them from its vendors (suppliers).

Lowe's does not offer any standalone contracting services; the Installation Contract requires the customer to purchase the materials from Lowe's. (App. pp. 142–43, 297). The labor for installation services is performed by 3rd party installers who are independent contractors, not Lowe's employees. (App. pp. 143–44, 901, 914). Approximately 94% of Lowe's total sales are derived from ordinary retail sales, while Installed Sales account for approximately 6% of its total sales. (App. pp. 615).

There are two types of Installed Sales: stock installation and special-order-sales (SOS). (App. pp. 6–7, 123). The chief difference is whether Lowe's has the materials "in stock" or has to special order them from its vendor. Otherwise, the two arrangements are "not radically different," the customer "doesn't know the difference," and the key elements of the stock and SOS contracts are

[3] There are various iterations of the traditional retail sales (e.g. online purchase, purchase an item that is not in-stock but can be ordered from Lowe's special order sales system, schedule the materials to be delivered or picked up at a later date, etc.), but none of these are relevant to the issues in this appeal.

identical: Lowe's purchases the materials at wholesale using a resale certificate, and the customer is charged the same retail (shelf) price for the materials. (App. pp. 6, 86, 128–29, 138).

Lowe's is a licensed retail merchant in South Carolina and holds a resale certificate, which gives Lowe's the privilege of purchasing merchandise at wholesale, free of tax, based on the legal presumption that Lowe's will resell those items to the end consumer and remit the sales tax at the time of that future sale. (App. pp. 9, 122, 237–38). When a purchaser like Lowe's extends a resale certificate, the liability for the sales tax shifts from the seller (vendor) to the purchaser (Lowe's). *Id.*; S.C. Code Ann. § 12-36-950 (explaining resale certificates).

It is undisputed that Lowe's uses its resale certificate to purchase all of its materials tax-free at wholesale, including the materials used in both types of Installation Contracts. (App. pp. 24, 128–29, 138). Each time, Lowe's certifies it is engaged in the business of selling personal property of the type it was acquiring from that vendor, and that all property being acquired from the vendor will be resold at retail. (App. p. 24). When Lowe's purchases inventory from a vendor, Lowe's does not know whether and which materials would be used in an ordinary retail sale or Installed Sale, and it did not designate or segregate specific materials for either type of sale. (App. pp. 129–30).

B. Procedural Background

The Department audited Lowe's for tax years 2002–2005 (First Audit) and determined that Lowe's was improperly calculating the sales tax owed on Installed Sales. (App. pp. 30, 219, 247–48, 269–70, 573–75, 577–79). The First Audit adjusted the tax owed on materials in Installed Sales to be measured by the retail (shelf) price rather than wholesale cost, and instructed Lowe's that going forward it should remit sales tax based on the retail shelf price for materials withdrawn for use in conjunction with the Installation Contracts. *Id.* Lowe's did not protest the First Audit. (App. p. 115).

The Department audited Lowe's again for tax years 2008–2011 (Second Audit) and discovered Lowe's was continuing to remit the incorrect tax measured by the wholesale price of the materials

used as part of Installation Contracts. (App. pp. 17, 215–18, 226, 445–51).[4] The Department assessed Lowe's for the additional tax due. On October 24, 2014, the Department issued its final agency Determination, upholding the assessment because the withdrawal, use, or consumption of materials by Lowe's in the Installation Contracts is a retail sale subject to sales tax in South Carolina pursuant to S.C. Code Ann. § 12-36-110(1)(c). (App. pp. 857–64). The Determination also concluded the gross proceeds of sales should be measured by the price Lowe's sells the materials at retail. *See* S.C. Code Ann. § 12-36-90(1)(c); (App. pp. 857–64). The Determination assessed $2,206,054.28 in sales tax, $360,580.69 in interest, and $290,593.35 in penalties. *Id.*

Lowe's appealed the Determination to the ALC. Following a contested case hearing, the ALC issued its Final Order on December 11, 2020, which upheld the Department's assessment of $2,206,054.28 in sales tax and $360,580.69 of interest but declined to uphold the penalties. (App. pp. 2–33). The ALC found that Lowe's acts as a retailer when it sells materials to its customers as part of an Installation Contract, thereby making that transaction a retail sale. *See* S.C. Code Ann. § 12-36-110 (defining a "retail sale"). The ALC further concluded that the taxable value of the materials is the retail selling price of the materials as reflected in the Installation Contract invoice. (App. p. 28).[5]

Lowe's appealed the ALC's decision on January 8, 2021. The Court of Appeals affirmed the ALC's decision on June 12, 2024 (Opinion) and denied Lowe's petition for rehearing on August 23, 2024. (App. pp. 2130–45, 2167).

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[4] During the First Audit period Lowe's "marked-up" retail price (both in ordinary sales and Installed Sales) was approximately 42%. During the Second Audit period the mark-up was approximately 40%. (App. p. 17, 218–19, 232, 453–54, 577–79).

[5] Because the ALC found that the Installation Contracts constituted retail sales by Lowe's to its customers, the ALC concluded it did not need to adopt the Department's view that the taxable retail sale was Lowe's withdrawal, use, or consumption of the materials during its performance of the Installation Contracts. (App. p. 27, 31); *see* S.C. Code Ann. § 12-36-110(1)(c) (defining a "retail sale" to include "the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale").

ARGUMENT

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. There are no special or important reasons in this case that warrant granting a writ of certiorari, nor does this case present any of the above "character of reasons" that the Court typically considers. *Id.* The Court of Appeals correctly affirmed the ALC's decision because, under a plain reading of the Sales Tax Act, the undisputed facts in this case support the conclusion that Lowe's, like other retailers who purchase their inventory at wholesale, should remit sales tax on the retail price of the items it sells to consumers, regardless of whether Lowe's also facilitates the installation of those materials.

This case does not present a novel question of law simply because the Court of Appeals rejected Lowe's forced construction of the applicable statutes and regulations. Nor does it present a novel question of law because the Sales Tax Act adopted by the General Assembly is different from the sales tax schemes implemented by other state legislatures. And Lowe's Equal Protection argument does not raise an important constitutional issue because, as the Court of Appeals and ALC both found, Lowe's is not being treated differently from other similarly situated taxpayers. Consequently, this Court should deny Lowe's Petition.

I. The Court of Appeals correctly interpreted the Sales Tax Act to require Lowe's to remit sales tax based on the retail price Lowe's charges its customer for materials, rather than the wholesale price Lowes paid to acquire those materials, including when the customer also hires Lowes to install those materials.

As in every sales tax case, the analysis begins and ends with the plain language of the applicable provisions of South Carolina law. The Sales Tax Act imposes a six percent sales tax on every person (retailer) in South Carolina that is engaged in the business of selling tangible personal property at retail. S.C. Code Ann. §§ 12-36-70, -910(A), -1110. The sales tax is computed on the "gross proceeds of sale," meaning the value that proceeds or accrues from the sale of the tangible personal property. S.C. Code Ann. §§ 12-36-90, -910(A). A "sale" and "purchase" means any transfer of tangible personal

property for consideration, while a "retail sale" means all sales of tangible personal property, except those defined as wholesale sales. S.C. Code Ann. § 12-36-100, -110. A "wholesale sale" includes sales of tangible personal property to licensed retail merchants. S.C. Code Ann. § 12-36-120. Because retailers purchase tangible personal property for resale, they purchase everything at wholesale. (App. pp. 237).

A contractor cannot hold a retail license, cannot sell at retail, and is not eligible for a resale certificate because contractors have to purchase their supplies at retail—not wholesale. (App. pp. 238–39); S.C. Code Ann. § 12-36-110. The Sales Tax Act does not prohibit a retailer from also holding a contractor's license, nor does it bar retailers from providing contractor or installation services. However, retailers that do both are required to purchase all items at wholesale and pay sales tax, in accordance with the Sales Tax Act, either (1) upon a sale to a customer or (2) when the retailer withdraws, uses, or consumes the item. *See* S.C. Code Ann. Reg. 117-324 ("Dual Business Regulation"); (App. pp. 376, 400). When the retailer withdraws the item, the gross proceeds of that taxable retail sale is the fair market value of the item, measured by the price at which the retailer would ordinarily sell that item at retail. S.C. Code Ann. § 12-36-90(1)(c); S.C. Code Ann. Regs. 117-309.17.

A. Substantial evidence supports the Court of Appeals' conclusion that the Installation Contracts are retail sales of tangible personal property from Lowe's to its customer.

In light of the plain and unambiguous provisions of the Sales Tax Act, the Court of Appeals (and ALC) did not err in holding that the Installation Contracts constitute retail sales of tangible personal property by Lowe's to its customer. The totality of the record evidence supports this holding. However, even if the Court of Appeals had found that Lowe's was acting as a contractor when it performed the Installation Contracts, it does not change the end-result for sales tax purposes. The Sales Tax Act still defines Lowe's "withdrawal for use" of the materials (which it previously purchased at wholesale, as a retailer) in the Installation Contract as a taxable retail sale.

1. The Court of Appeals did not apply an incorrect legal standard when analyzing the Installation Contracts.

Lowe's argues the Court of Appeals erred because it failed to apply the correct legal framework to determine whether the Installation Contracts constitute (a) retail sales of tangible personal property by Lowe's as a retailer, or (b) construction contracts/improvements to real property by Lowe's as a contractor. *See* Petition at 9. According to Lowe's, the Court of Appeals "should have considered the 'nature and characteristics of the [Installation Contracts]'" and "key factors" like "the intent of the parties." *See* Petition at 9–10.

This remonstration is perplexing because the Court of Appeals and ALC did consider the nature and characteristics of the Installation Contracts—it just viewed the facts differently than Lowe's. (App. pp. 2143) (finding certain facts did not "alter the retail nature of the transaction") (emphasis added); (App. pp. 20) (citing favorably the ALC's conclusion that Lowe's arguments do not "comport with the true nature of the installation contract transactions at issue" and "looking at the true nature of the installation contract transaction") (emphasis added). The Opinion dedicated several pages expressly analyzing the record evidence related to the nature and characteristics of the Installation Contracts and Installed Sales and (like the ALC) found the Installation Contracts were retail sales of tangible personal property by Lowe's as a retailer. (App. pp. 2140–41).

Lowe's also faults the Court of Appeals for referencing the "true object" test as articulated in the *Boggero* case, which Lowe's characterizes as unreliable and an improper departure from "traditional analysis." *See* Petition at 10–11. This criticism overstates the scope of the Court's reliance on *Boggero*. The Opinion does not expressly apply the "true object" test to the facts of this case. Instead, the Opinion's single paragraph summary of *Boggero* was "helpful to [the Court's] analysis" because it illustrates that (1) the dispositive issue (what are the gross proceeds of the Installed Sales) is a mixed question of law and fact subject to (2) the substantial evidence standard of review. (App. pp. 2139–

40). The next paragraph in the Opinion reaffirmed that "evidence supports the ALC's finding" that Installation Contracts are taxable retail sales and Lowe's had failed to meet its burden to prove otherwise. *Id.* (emphasis added).

Even if the Court of Appeals applied a "true object" test, Lowe's fails to make any compelling argument that this analysis is substantively different than the "traditional analysis" about the nature and characteristics of the agreement and the intent of the parties. In fact, the Opinion's brief explanation indicates the "true object test" focuses on factual questions like the "customer's purpose for entering the transaction," which is not dissimilar to what Lowe's describes as the "key factor" of considering the "intent of the parties." *See* Petition at 10. The Court of Appeals found substantial evidence supported the ALC's findings that the "overarching purpose of Lowe's operations—including installation contract services—is to facilitate a retail sale to retail customers" and that the "purchase of the materials is the primary, foundational transaction and the installation services are merely incidental and secondary in nature." (App. pp. 6, 21, 2140–43) (emphasis added).

Finally, Lowe's suggests the Court of Appeals erred because it did not discuss three specific cases. *See* Petition at 10 (referencing *Hyman v. Wellman Enters., Inc.*, 337 S.C. 80, 522 S.E.2d 150 (Ct. App. 1999); *Planter's Bank v. Lummus Cotton Gin Co.*, 132 S.C. 16, 129 S.E.2d 876 (1925); *S.C. Dep't of Revenue v. Springs Indus., Inc.*, No. 2003-UP-029, 2003 WL 27397024 (Ct. App. 2003)).[6] It is odd to fault the Court of Appeals for failing to discuss two of these cases (*Hyman* and *Planter's Bank*) when Lowe's never cited them in any of its briefings to the Court of Appeals. (App. pp. 1983–84, 2099–100) (table of authorities in Lowe's final brief and reply). Presumably, the Court of Appeals did not cite to *Springs Indus.* because it is an unpublished decision that has no precedential value and should not have been

[6] *See Hyman v. Wellman Enters., Inc.*, 337 S.C. 80, 522 S.E.2d 150 (Ct. App. 1999), *Planter's Bank v. Lummus Cotton Gin Co.*, 132 S.C. 16, 129 S.E.2d 876 (1925), and *S.C. Dep't of Revenue v. Springs Indus., Inc.*, No. 2003-UP-029, 2003 WL 27397024 (Ct. App. 2003).

cited anyway. *See* Rule 268(d)(2), SCACR. Regardless, *Springs Indus.* supports the Court of Appeals' decision because it identifies two factors for determining whether an agreement is with a contractor or a seller/installer: (1) if the seller/installer has a showroom where items are available for purchase without the requirement of purchasing installation services, and (2) if the agreement splits the charges between the items sold and the installation costs (the "hallmark of a seller/installer). *See Anonymous Corp. v. S.C. Dep't of Revenue*, No. 99-ALJ-17-0153-CC, 1999 WL 1094323, at *22 n.31 (Nov. 9, 1999), affirmed by *S.C. Dep't of Revenue v. Springs Indus., Inc.*, No. 2003-UP-029, 2003 WL 27397024 (Ct. App. 2003). Under this framework the Installation Contracts are undoubtedly sales with installation services—not construction contracts.[7]

2. The Court of Appeals correctly concluded the true nature and intent of the Installation Contract is to facilitate a retail sale of tangible personal property by Lowe's to its customer, with the subsequent installation of that property.

In addition to the undisputed facts discussed above, the record is replete with additional evidence to support the Court of Appeals' finding that the intent of the parties and the nature and characteristics of the Installation Contracts is to facilitate a retail sale that includes installation services, not a construction/improvement to real property contract. For example:

- The retail price of the merchandise is the same, regardless of whether Lowe's subsequently installs it. (App. pp. 84, 130–32).
- Lowe's purchased all of the materials at wholesale, tax-free, which Lowe's admits only retailers—but not contractors—can do. (App. p. 24).

[7] The South Carolina Sales and Use Tax Manual, published by the Department, contains similar factors to consider when determining whether a person is a retailer making sales and installations or a contractor. Those factors include (1) how a person advertises his business (as a retailer or contractor); (2) are retail sales made in which installation is not performed by the seller or on behalf of the seller; (3) does the person have a showroom to display his products and how would this showroom be perceived by the general public; (4) is the person licensed as a contractor under state law; (5) does the person perform labor for a general contractor as a "subcontractor;" etc. (App. p. 1864). The totality of these factors, in light of the record evidence, also support the Court of Appeals' ruling.

- By its terms, the Installation Contract is an agreement "between Customer and Lowe's concerning this sale of Goods and Installation Services." (App. pp. 903, 909) ("Customer agrees to purchase and Lowe's agrees to sell the goods and/or materials.") (emphasis added).

- The materials are sold to the customer, not to Lowe's (as a contractor) or the 3rd party installer. (App. pp. 5, 143–44, 901, 914). Lowe's own expert testified that the "buyer" in the Installation Contract is the Lowe's retail customer. (App. pp. 179).

- The Installation Contract contains a "Merchandise Summary" with materials costs and separately an "Installation Summary" that identifies labor costs. (App. pp. 74–76, 900–04).

- Lowe's does not provide installation services unless the customer purchases the materials from Lowe's. (App. pp. 6, 142–43, 297).

- Lowe's does not install the materials but arranges for the installation "to be performed by an experienced independent contractor." *Id.* Lowe's recognizes these independent contractors are installing "products they [the customers] purchase from us [Lowe's]." (App. p. 620).

- During the audit period, certain Installation Contracts were accompanied by a project estimate form in which Lowe's told the customer "LOWES IS A SUPPLIER OF MATERIALS ONLY. LOWES DOES NOT ENGAGE IN THE PRACTICE OF ENGINEERING, ARCHITECTURE, OR GENERAL CONTRACTING." (App. pp. 166–67, 905–11) (emphasis added).

- Lowe's could not have acted as a "general contractor" with respect to the majority of Installation Contracts because it was not licensed as a General Contractor in South Carolina until the last two months of the 36-month audit period. (App. pp. 891).

- In its annual Form 10-K, Lowe's describes this aspect of its business as "Installed Sales" and "installation services," not general contracting or real property improvement. (App. pp. 615). This "Installed Sales model" includes the sale of "both product and labor." *Id.*

- Lowe's complied with the Dual Business Regulation, which only applies to "those who actually carry on a retail business having a substantial number of retails sales and **does not apply to contractors** . . . and others . . . who have not set themselves up as being engaged in selling." S.C. Code Ann. Regs. 117-324 (emphasis added); (App. pp. 25–26).

Notwithstanding this overwhelming evidence, Lowe's argues the Court of Appeals disregarded certain key terms in the Installation Contract indicating it is a construction contract for real property improvement. But the Court of Appeals was more concerned with the actual language of the Installation Contracts, not Lowe's conclusory self-serving descriptions. (App. p. 2143). For example, Lowe's repeatedly claims the Installation Contracts "explicitly provide that Lowe's retains title to all

materials used to perform the real property improvements until after they are incorporated into the customers' real estate and have been converted into real property," but it does not identify where that explicit provision is. *See* Petition at 12. In fact, the Installation Contract never uses the term "title." As the ALC noted, there is no evidence that a customer does not obtain title to the materials at the time the Installation Contract is executed. (App. p. 22).

Lowe's also repeatedly declares the Installation Contracts to be "lump-sum agreements," but the Installation Contract separately lists the "materials price" and "labor charges," which is the hallmark of a sales and installation agreement, not a construction contract. *See Anonymous Corp.*, 1999 WL 1094323, at *22 n.31. Even if listing a "total charge" in addition to the separate line items renders the Installation Contract a lump-sum agreement, Lowe's fails to identify any provision of the Sales Tax Act for which this distinction is legally significant. However, separately listing the labor charge is legally significant for sales tax purposes because otherwise the total charge for the transaction (including both labor and materials) is taxable. *See* S.C. Code Ann. § 12-36-90(1)(b) (defining "gross proceeds of sales" to include labor charges); S.C. Code Regs. 117-313.3 (exempting charges for installation from sales tax if they are separately stated from the sales price of the property on the billing to customers). Lowe's is a sophisticated taxpayer that understands these tax implications and purposefully structured the Installation Contract to avoid labor costs being taxed. It cannot now ask the Court to ignore that decision and instead declare it a lump sum contract.

3. The Court of Appeals correctly applied the Dual Business Regulation.

Lowe's claims the Court of Appeals erred in interpreting the Dual Business Regulation, but Lowe's argues for a construction of the Dual Business Regulation that is inconsistent with its plain terms. The error in Lowe's argument is that it inserts a qualifier into the regulation that does not exist. Lowe's claims the Dual Business Regulation "required Lowe's to purchase all materials with a resale certificate and then remit tax on its purchase price," which Lowe's claims is a "reasonable

interpretation" of the Dual Business Regulation and other applicable provisions. *Id.* But the Dual Business Regulation does not state or support the assertion that dual businesses are to pay tax on the wholesale price. Instead, it requires a dual business to report both retail and withdrawals "under the sales tax laws." The applicable sales tax laws make clear that the sales tax is on the fair market value of the items withdrawn, measured by the retail price at which the person withdrawing the materials sells them to the public. S.C. Code Ann. § 12-36-90(1)(c); S.C. Code Ann. Regs. 117-309.17. The Court of Appeals did not err in rejecting Lowe's *un*reasonable interpretation of the Dual Business Regulation.

4. The Court of Appeals' straightforward application of the Sales Tax Act does not make South Carolina an outlier just because other states have different laws and different sales tax schemes.

Throughout this case, Lowe's has relied heavily on cases it has litigated in other jurisdictions, which Lowe's asserts should control the outcome of this case. Never mind that the statutory scheme in those states is far different from the Sales Tax Act. The ALC and Court of Appeals correctly distinguished these cases. Lowe's now urges this Court to grant certiorari, lest the Court of Appeals' ruling make South Carolina an outlier compared to these other states. *See* Petition at 17–18.

This is hardly a reason for the Court to grant certiorari. The primary objective when the Court reviews statutory schemes, including tax statutes, is to ascertain and effectuate the intent of the South Carolina legislature—not another state's legislature. *Books-A-Million, Inc. v. S.C. Dep't of Revenue*, 437 S.C. 640, 642–43, 880 S.E.2d 476, 477 (2022). That is especially true where the statutory language and requirements of other states are different from South Carolina. This Court recently rejected a similar argument about the very same provision of the Sales Tax Act that is in dispute here, noting that "other states have unique statutory language that yields different results." *Id.* at 644–45, 880 S.E.2d at 478. Thus, South Carolina's legislative intent is distinguishable from those states. *Id.*

Lowe's argument is self-defeating on its face. It claims that thirteen other states permit retailer-contractors to remit a use tax based on its cost price, but it has to acknowledge that those states have

made that determination based on their specific statutes and regulations. *See* Petition at 17 (citing North Carolina as an example). South Carolina's legislature has chosen to structure its sales tax scheme for dual businesses differently than North Carolina or other states, and the wisdom of that policy decision "is exclusively within the purview of the legislature and may not be supplied by this Court." *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 151, 750 S.E.2d 65, 75 (2013). It is South Caroliana's statutes and regulations that control.[8]

For this reason, the Opinion rightly considered the cases cited by Lowe's to be unpersuasive because the language of the statutes considered in the Kansas and Indiana cases[9] are materially different from the Sales Tax Act. (App. p. 2142). Indiana imposes the sales tax liability on purchasers—not retailers, like South Carolina. The Indiana code also "unambiguously required Lowe's to remit use tax" (not a sales tax) "on the construction materials at issue." *Lowe's Home Centers, LLC v. Indiana Dep't of State Revenue*, 23 N.E.3d 52, 56 (Ind. T.C. 2014) (emphasis added). Similarly, Kansas has a specific statute that allowed dual businesses like Lowe's to remit a tax based on the wholesale price it paid for the materials. *Matter of Lowe's Home Centers, L.L.C.*, 394 P.3d 149, 2017 WL 1369944, at *4 (Kan. Ct. App. 2017) (citing Kan. Stat. Ann. § 79-3603(l)(2) (West)). In its Petition, Lowe's makes no attempt to suggests that the Sales Tax Act mirrors these statutes, it just repeats its argument that because these courts have reached a different result, so our courts must too.

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[8] *Compare* N.C. Gen. Stat. Ann. § 105-164.4H ("When the property is withdrawn from inventory and installed or applied to real property, use tax must be accrued and paid on the retailer-contractor's purchase price of the property.") (emphasis added), *with* S.C. Code Ann. § 12-36-90, -110(1)(c) (defining property withdrawn as a retail sale upon which a sales tax is imposed on the fair market value of the property), *and* S.C. Code Ann. Regs. 117-309.17 (defining fair market value of a withdrawn item as the retail price for which the person withdrawing the item ordinarily sells it).

[9] Perhaps the Court of Appeals did not discuss the Oklahoma tax commission decision because it was the subject of the Motion to Strike the Department filed after Lowe's submitted its initial brief. *See* Motion to Strike (April 8, 2021). In its initial brief's "Statement of Facts" Lowe's included a number of "facts" based on findings and conclusions from the Oklahoma case that had never been presented to or ruled upon by the ALC. Lowe's also included these extraneous materials as an attachment to its brief, even though they were not a part of the Record on Appeal. In its motion, the Department asked the Court not consider the improper inclusion of the Oklahoma tax commission decision. *Id.*

Importantly, the Kansas Court of Appeals makes two key observations that are relevant to this Petition. First, it correctly recognized that the determination about the nature and characteristics of the Installation Contracts is a factual determination subject to the substantial evidence standard of review. *Matter of Lowe's Home Centers, L.L.C.*, 394 P.3d 149, 2017 WL 1369944, at *24 (Kan. Ct. App. 2017). Second, it rejected Lowe's argument based on how other states have addressed this issue, noting that "decisions should not be given much weight on either side of the issue, as the focus should be on the construction of the Kansas statutes." *Id.* at *23. The same is true here.

Finally, the Court of Appeals correctly reviewed the factual determinations of the ALC under the substantial evidence standard. If this correct standard of review restricts the Court of Appeals from setting aside the findings of the ALC (even where reasonable minds might differ and the Court of Appeals might view the evidence differently), then surely the non-binding factual findings and conclusions of an out-of-state court about non-South Carolina laws should not dictate how the Court of Appeals ruled. *Boggero*, 414 S.C. at 285, 777 S.E.2d at 846.

B. Even if Lowe's is operating as a contractor in an Installed Sales transaction, Lowe's withdrawal of those materials for use in performing the Installation Contract is still a retail sale under the Sales Tax Act.

Assuming Lowe's acted as a contractor in conjunction with the Installed Sales, South Carolina law still treats Lowe's withdrawal of those materials for use in performing the Installation Contracts as a taxable retail sale. The Sales Tax Act defines a retail sale broadly to include both an ordinary, over-the-counter sale and any instance in which tangible personal property is withdrawn, used, or consumed "by anyone who purchased it at wholesale." S.C. Code Ann. § 12-36-110(1)(c) (emphasis added). Anticipating that some retailers (in connection with their business) will use or consume items they previously purchased at wholesale, and to facilitate and administer this clear directive, the General Assembly also approved the Dual Business Regulation to ensure uniform and consistent tax treatment and ease of administration both for retailers and the Department.

Lowe's admits that it withdrew, used, or consumed all of the materials at issue in the course of performing the Installation Contracts. *See* Petition at 17; (App. pp. 128, 138–39). And it is undisputed that Lowe's purchased all of those materials at wholesale. *See* S.C. Code Ann. § 12-36-120 (defining "wholesale sale" or "sale at wholesale" to mean the sale of tangible personal property to licensed retail merchants for resale). When Lowe's withdrew the materials for use, that constitutes a retail sale under section 12-36-110(1)(c) and the Dual Business Regulation.

Rather than presenting a novel question of law, the relevant provisions of the Sales Tax Act and accompanying regulations were designed to address this very situation. If the Installation Contract is not a retail sale of materials from Lowe's to its customer, then the Sales Tax Act treats Lowe's withdrawal of the materials to be a retail sale from Lowe's (as a retailer) to Lowe's (as a contractor). In other words, even assuming Lowe's is acting as a contractor with respect to the Installation Contracts, the only way Lowe's (as a contractor) can acquire the materials for use in performing the contracts is to purchase those materials from a retailer—in this case, that retailer was itself. Therefore, as the Department has consistently maintained, this withdrawal for use is a retail sale under the Sales Tax Act. (App. pp. 188, 248, 577, 582, 815–17, 859).

C. The Court of Appeals correctly applied the Sales Tax Act to find that the "gross proceeds of sales" for materials in an Installation Contract is the fair market value of those materials, measured by the price Lowe's sells them to customers.

Ultimately, the real dispute in this case is what constitutes the "gross proceeds of sales" upon which the sales tax should be calculated. Under either the findings of the ALC and Court of Appeals, or the Department's view, the Sales Tax Act imposes a sales tax on the same tax base.

If the Installation Contract is a retail sale of materials by Lowe's to the customer, then the gross proceeds from this sale are the retail selling price of the materials. That retail selling price is clearly recorded in the Installation Contract and is the same price as in an ordinary sale. (App. p. 28). This is an easy application of the Sales Tax Act to the facts of this case, as both the ALC and Court

of Appeals concluded. *See* S.C. Code Ann. 12-36-90(1)(b) (defining "gross proceeds of sales" as "the value proceeding or accruing from the sale, lease, or rental of tangible personal property," which includes "the proceeds from the sale of tangible personal property"); S.C. Code Ann. Regs. § 117-318 (providing "'gross proceeds of sales' is the basis for calculating the sales tax").

The Department's approach under the Sales Tax Act produces the same result. The Court of Appeals did not reject the Department's approach, but merely declined to address it as unnecessary. (App. p. 2143). Nevertheless, this alternative sustaining ground further confirms that this Court need not grant certiorari. *See* Rule 220(c), SCACR (providing appellate courts may affirm the judgment of a lower court based on any ground appearing in the record).

The Opinion relies on subsection (b) of the definition of "gross proceeds of sales" because the Court of Appeals concluded the Installation Contract is a retail sale from Lowe's to its customer. *See* S.C. Code Ann. 12-36-90(1)(b). The Department relies on subsection (c), which defines "gross proceeds of sales" to include "the fair market value of tangible personal property previously purchased at wholesale which is withdrawn from the business or stock and used or consumed by any person withdrawing it." S.C. Code Ann. § 12-36-90(1)(c). Regulation 117-309.1 then explains how to calculate the fair market value in situations like the Installed Sales transactions:

> To be included in gross proceeds of sales is the money value of property purchased at wholesale for resale purposes and subsequently withdrawn from stock for use or consumption by the purchaser.
>
> **The value to be placed upon such goods is the price at which these goods are offered for sale by the person withdrawing them.** All cash or other customary discounts which he would allow to his customers may be deducted; however, in no event can the amount used as gross proceeds of sales be less than the amount paid for the goods by the person making the withdrawal.

S.C. Code Ann. Reg. 117-309.17 (emphasis added).

Here, the price of the materials listed in the Installation Contract is the same price for which Lowe's offers these goods for sale in an ordinary, over-the-counter retail sale. (App. pp. 6, 123–24).

As the Opinion notes, the Department's application of Regulation 117-309.17 produces the same result as the Court's approach: the sales tax is measured by the retail price. (App. p. 2143).

In the face of the plain, unambiguous, and binding instructions of Regulation 117-309.17, Lowe's now attempts to dismiss the Regulation by vaguely declaring it "violates South Carolina law." *See* Petition at 21. Notably, Lowe's barely mentioned Regulation 117-309.17 in its final brief to the Court of Appeals, and its discussion was limited to a mere two paragraphs at the end of the brief suggesting that the Regulation only applies to *retailers* and does not apply to Lowe's as a *contractor.* (App. pp. 2028–29). Lowe's Petition now raises several new objections to the Regulation, but Lowe's never challenged the validity or authority of Regulation 117-309.17 at the ALC or Court of Appeals. *But see* S.C. Code Ann. § 1–23–10(4) (defining "regulation"); S.C. Code Ann. § 12-4-320(1) (authorizing the Department to promulgate regulations, not inconsistent with law, to aid in the performance of its duties); *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) ("Regulations authorized by the legislature have the force of law.").

Regardless, Lowe's objection to the Opinion's calculation of fair market value is based solely on the general proposition that fair market value is the price a willing buyer will pay a willing seller. Regulation 117-309.17 is consistent with this general proposition because it requires the taxable value of the withdrawn items to be the "price at which these goods are offered for sale by the person withdrawing them." Section 12-36-90(1)(c) and Regulation 117-309.17 presumes (and rightly so) that the withdrawing retailer has ordinarily priced its goods at an amount that a willing buyer will pay the retailer, i.e. the fair market value. And the only evidence in this record regarding the retail price a willing buyer will pay a willer seller for these materials is the retail price for which Lowe's sells them.

Lowe's argument also rests on two unfounded premises. First, Lowe's makes the remarkable and unsubstantiated claim that, given the opportunity, it could have purchased the materials at retail for the same price it paid at wholesale. *See* Petition at 7, 21–23. The record contains no evidence to

support this assertion. The only evidence establishing the price of materials is the amount Lowe's actually paid at wholesale, and the amount Lowe's charged at retail (40% mark-up). (App. pp. 355).

Second, Lowe's claims the fair market value of an isolated over-the-counter retail sale to a contractor is not comparable to the fair market value of bulk sales of materials to a Fortune 50 business. That is true, but Lowe's negotiated those bulk purchases of materials in its capacity as a retailer with a resale certificate, not a contractor. In turn, 94% of Lowe's total sales are the result of reselling those materials in indisputable retail sales. Yet now Lowe's asks the Court to assume a *post facto* fiction that Lowe's could have negotiated those same bulk purchases from those same wholesale vendors in its capacity as a contractor. It did not, and there is no evidence of any other "large contractors" purchasing these same materials at retail for the same wholesale price that Lowe's paid.

II. The Court of Appeals correctly rejected Lowe's Equal Protection claim because Lowe's did not demonstrate that it is being treated differently from other similarly situated South Carolina retailers or contractors.

Lowe's argues—as it did before the ALC and Court of Appeals—that the Department's application of the Sales Tax Act and regulations violates Equal Protection by impermissibly distinguishing between Lowe's and other contractors who do not also operate retail businesses. *See* Petition at 21. By its own terms, this argument fails to satisfy the threshold requirements for an Equal Protection challenge, and therefore does not raise a constitutional issue warranting certiorari.

Lowe's cannot state a viable Equal Protection claim unless it can show it is receiving disparate treatment from "similarly situated persons." See S.C. Const. art. I, § 3; *Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) (analyzing equal protection challenge to provisions of the Act). Lowe's own statement of its Equal Protection argument reveals why the argument fails: the purported comparison class ("contractors who do not also operate retail businesses") is fundamentally different

from Lowe's (a retailer who also provides installation services). *See* Petition at 2, 21.[10] The Court of Appeals is correct, the contractors to whom Lowe's compares itself are "*not* similarly situated" for a variety of reasons, including that those contractors cannot purchase their materials tax-free at wholesale like Lowe's does. (App. p. 2144).

Of course, "not all classifications are unconstitutional." *Bodman*, 403 S.C. at 69, 742 S.E.2d at 367. The law can treat taxpayers differently so long as the classifications have a rational basis that is reasonably related to a legitimate legislative purpose. *Id.* Here, South Carolina law distinguishes between (a) retailers, (b) contractors, and (c) retailers who also provide contracting or installation services "because they are different types of taxpayers." (App. p. 74). The General Assembly has a legitimate purpose for creating a sales tax scheme that ensures consistent, uniform collection of sales tax at the retail level of trade and guards against potential manipulation and abuse through non-collection or under-collection of sales tax. Lowe's has chosen a dual business model that is different from a true contractor who is not in the business of retail sales, and Lowe's enjoys certain benefits as a result. Regardless, the Court of Appeals' application of the Sales Tax Act Lowe's (as a retailer) is treated like all other retailers who purchase materials at wholesale (using a resale certificate) and remit sales tax on the subsequent retail sale of those materials; and Lowe's (as a contractor) is treated like all other contractors who must purchase materials at retail (with sales tax due on the price at which the retailer would sell those materials to other contractors).

The uncontroverted evidence demonstrates that the Department is applying the Sales Tax Act to Lowe's no differently than to other similarly situated taxpayers, including retailers who provide

[10] In its Form 10-K annual report, Lowe's describes its "competition" as other home improvement warehouse chains, home supply retailers, general merchandise retailers, etc. (App. pp. 6132–14). Conspicuously absent from this list is any mention of contractors or general contractors. Lowe's describes itself as providing installation services, but never describes itself as a contractor. In fact, the term "contractor" only appears four times in the 10-K, and each time it is a reference to the *independent* contractors who install products that Lowe's sells to the customer. (App. pp. 615, 619–20).

installation or similar contracting services. (App. pp. 147, 393–94). In fact, the ALC has upheld the Department's application of the Sales Tax Act in another matter related to this identical issue and involving a competitor of Lowe's. *See supra*, n.1.

In reality, it is Lowe's construction of the Sale Tax Act that would result in disparate treatment. As a retailer, Lowe's advertises its retail products to professional contractors ("where the pros go") and boasts to investors that 30% of its total sales consist of selling supplies and materials to professional contractors that work in construction, maintenance, repair, etc. (App. pp. 722, 725). When those professional customers purchase materials, Lowe's charges them a sales tax on the retail price of the item (just like in an ordinary sale to a DIY customer).[11] Yet Lowe's complains it is unfair for Lowe's to pay sales tax on the same taxable base (the retail price) that those professional contractors and other customers do. (App. pp. 90–91, 147) (Lowe's witness testifying that Lowe's competitors include home improvement contractors like carpet installers, and that those installers are charged sales tax by Lowe's on their retail purchase of carpet from Lowe's). This is legal gaslighting cloaked as an Equal Protection challenge; Lowe's is not asking to be treated the same as other contractors and retailers—it is demanding special treatment. (App. pp. 2144). For these reasons, the Court should decline to grant a writ of certiorari because the Court of Appeals did not err in rejecting Lowe's Equal Protection argument.

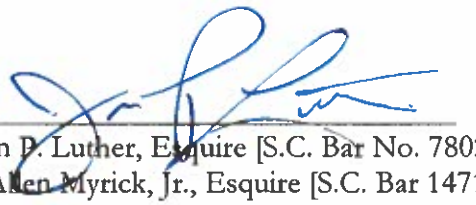
CONCLUSION

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 applied the plain, straightforward provisions of the Sales Tax Act and accompanying regulations to the facts of this case. As the substantial evidence demonstrates, the Installed Sales are

[11] Under the Sales Tax Act, it is the retail seller—not the purchaser—who is liable for remitting the sales tax. The seller may pass the sales tax on to the purchaser when it bills them, and most retailers do, but this is not a requirement. (App. pp. 1690).

retail sales under South Carolina law—either because Lowe's sold the materials to the customer (and then installed it), or because Lowe's sold the materials to itself by withdrawing and using or consuming those materials in connection with the Installation Contracts. Under section 12-36-110, this constitutes a taxable retail sale. And under section 12-36-90(1)(c) and Regulation 117-309.1, Lowe's should have remitted sales tax on the gross proceeds of the retail sale as measured by the fair market value—the retail price—that Lowe's charges its customers for those materials in an ordinary sale.

Respectfully Submitted,



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