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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

Supreme Court Appellate Case No. 2024-000625

Opinion No. Op. 6047 (S.C. Ct. App. Filed January 24, 2024)

Appellate Case No. 2019-001706

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

Amazon Services, LLC,..... Petitioner,

v.

South Carolina Department of Revenue, Respondent.

OPENING BRIEF OF PETITIONER AMAZON SERVICES LLC

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INTRODUCTION

This case is about the legal and fair way to interpret, apply, and enforce the tax laws, and about how the ruling of the Court of Appeals—if not reversed—would significantly weaken a longstanding protection for South Carolina taxpayers. In South Carolina, a statute may impose tax obligations only if it applies unambiguously to a taxpayer. If any reasonable interpretation of the tax statute excludes the taxpayer, the taxpayer prevails. For good reasons, this protection is recognized across the country. It makes tax enforcement uniform and fair. It promotes legislative accountability for tax burdens. And it is essential for sound financial and business planning.

Amazon Services operates the Amazon.com website, a marketplace where other Amazon entities and millions of independent third parties offer and sell products to consumers. The Amazon.com marketplace makes it easy for those third parties to sell to consumers and allows consumers to choose from a wider selection.

Before this case, the relevant South Carolina sales tax statute required only “sellers” to collect sales tax, and the definition of “seller” made no mention of marketplaces or the concept of facilitating sales between buyers and sellers. After this case began, the legislature—at the Department of Revenue’s urging—significantly expanded the statutory definition of “seller” by adding “marketplace facilitators” and defining that term. This substantial and detailed change in the law imposed tax collection obligations for the first time on “marketplace facilitators” for independent third-party sales. Amazon Services fully complied as soon as the amendment took effect.

In advocating for the change in the law, the Department repeatedly told the legislature that the change was needed to eliminate a statutory ambiguity (so that no marketplace facilitator “has to guess”) and to fill a statutory “gap.” In this litigation, however, the Department advocated a contrary view, maintaining that no amendment was needed because the prior version

of the statute always required marketplace facilitators like Amazon Services to collect tax on third-party sales. The Court of Appeals endorsed the Department’s litigation position. In doing so, the Court of Appeals erred and adopted rules of law that in three critical respects shift power to state tax enforcement authorities to the detriment of all South Carolina taxpayers.

First, the Court of Appeals read this Court’s decision in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), to require South Carolina courts to interpret tax statutes “broadly.” App. 2118. That reading of *Travelscape* contradicts decisions of this Court, both postdating and predating *Travelscape*, that grant a taxpayer the benefit of any reasonable interpretation of a tax law that favors the taxpayer. *See, e.g., Alltel Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 399 S.C. 313, 318, 731 S.E.2d 869, 872 (2012); *Cooper River Bridge, Inc. v. S.C. Tax Comm’n*, 182 S.C. 72, 188 S.E. 508, 509-10 (1936). In truth, *Travelscape* did not adopt any rule of “broad” construction of tax statutes, and this Court should reject such a rule here.

Second, the Court of Appeals declared the prior version of the tax statute “unambiguous” (and applicable to Amazon Services) even as it acknowledged the need to interpret the statute “broadly.” Moreover, the Court of Appeals did not consider whether Amazon Services’s alternative interpretation of the statute was reasonable, as required by precedent. App. 2116. As this Court has made clear, where “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.” *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 (emphasis added) (citation omitted).

Here, the Court of Appeals ruled that the substantial and detailed marketplace facilitator amendment to the sales tax law does not help demonstrate that Amazon Services reasonably

believed that the prior law did not apply to it. App. 2116. The Court of Appeals even refused to consider the Department's own public statements acknowledging that a change in the law was needed to eliminate a statutory ambiguity. The court also ignored the approach of courts in numerous other states that have confronted the same issue under similar tax statutes. Those courts have all reached the same conclusion: marketplace facilitators were not required to collect sales tax until the enactment of marketplace facilitator legislation. *Id.* at 2116, 2121.

Finally, the Court of Appeals also undermined federal and South Carolina constitutional protections for taxpayers. Holding Amazon Services liable for tax collection on third-party sales prior to the marketplace facilitator amendment violated the Due Process Clause's fair notice guarantee because neither the statute nor any Department regulation or practice notified marketplace facilitators that they must collect and remit sales tax on third-party sales.

Across the country, including in South Carolina, legislatures have amended their statutes to define marketplace facilitators and require them to collect sales tax on third-party sales in their marketplaces. What the Department has sought here—an expansive construction of a previously ambiguous tax statute that provided no notice of the taxpayer's collection obligation—is neither legal nor fair. This Court should reverse and order entry of judgment in favor of the taxpayer.

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals err in reading this Court’s decision in *Travelscape* to require a broad interpretation of a tax statute, contrary to this Court’s longstanding rule favoring a taxpayer’s reasonable interpretation?**
- II. Did the Court of Appeals err in finding the statute “unambiguous” without properly considering Amazon Services’s contrary and reasonable interpretation?**
- III. Did the Court of Appeals err in finding no due process violation when it is undisputed that Amazon Services is the only marketplace facilitator being held liable for sales tax on third-party sales under the pre-2019 version of the Sales and Use Tax Act?**

STATEMENT OF THE CASE

Amazon Services, the operator of the Amazon.com website, appeals a final order issued by the Administrative Law Court (“ALC”) holding that Amazon Services is liable for taxes on sales of products sold by independent third parties in the Amazon.com marketplace. The Department of Revenue conducted an audit beginning in September 2016 and, in June 2017, issued its determination that Amazon Services owed approximately \$12.5 million in sales taxes, interest, and penalties for the first quarter of 2016. Ex. 171, App. 1017-32. Amazon Services requested a contested case hearing in accordance with S.C. Code Ann. § 12-60-460 on July 21, 2017. App. 1935-52. Amazon Services contended that (a) the relevant statute only imposed sales tax obligations on sellers and that Amazon Services was not the seller for the transactions at issue; (b) to the extent the court disagreed with the foregoing, the statute was at least ambiguous and thus must be construed in Amazon Services’s favor; and (c) imposing sales tax obligations on Amazon Services violated its state and federal constitutional rights, including its due process and equal protection rights. A three-day evidentiary hearing was held February 4-6, 2019, and the ALC issued its final order ruling in favor of the Department on September 10, 2019. App. 7-60. Amazon Services filed a notice of appeal on October 10, 2019.

The South Carolina Court of Appeals heard oral argument regarding the appeal on February 14, 2023, and issued its opinion affirming the ALC’s final order on January 24, 2024. App. 2105-25. Amazon Services filed a petition for rehearing in the Court of Appeals on February 8, 2024 (App. 2126-67), which the Court of Appeals denied on March 18, 2024 (App. 2224). Amazon Services filed a petition for a writ of certiorari on April 17, 2024, which this Court granted on October 3, 2024.

STATEMENT OF THE FACTS

A. The Amazon.com Marketplace.

Amazon.com, Inc. (“Amazon”) was founded in 1994. App. 187. An early online retailer, Amazon initially sold only books on the Amazon.com website. App. 187. Amazon and its affiliates later expanded beyond books into other product categories like DVDs, music, and electronics. App. 187-88. Amazon companies bought products from suppliers, owned that inventory, set the prices for the products sold on the website, and transferred title to the products they sold. App. 188.

In 2000, Amazon.com became more than just an online retailer for Amazon companies. For the first time, Amazon.com also opened to third-party sellers and became a marketplace where *others* could sell. App. 188. This change allowed independent third-party companies with their own inventories to offer and sell their products directly to customers visiting the website. App. 188-89.

Amazon knew that customers wanted broad product selection, low prices, a larger inventory that would increase the probability that desired products would be in stock, and fast and convenient delivery. App. 189. With the Amazon.com website open to third-party sellers, customers would find a broader selection of products more quickly, and the competition among third-party sellers in the marketplace would produce lower prices, increase overall product

availability, and encourage faster delivery options. App. 189-90. At the same time, sellers would find the marketplace desirable to the extent it attracted a large volume of potential customers who found shopping there easy and convenient.

As of the first quarter of 2016 (the relevant time here), all of Amazon's own retail sales in the marketplace were made by several Amazon subsidiaries. App. 8 & n.2. Amazon's retail companies sell a broad range of products, in many cases *competing directly* with third-party sellers in Amazon Services's marketplace on price and other features, just as many third-party sellers compete with each other. App. 190, 234-35. Other Amazon companies do not compete with third-party sellers, but rather service the needs of those selling on the site including helping to *attract* third-party sellers to the marketplace. App. 372-73. Each of these entities serves a different role and performs different functions.

The first is Amazon Services, the taxpayer in this case. As noted above, Amazon Services operates the marketplace. App. 193. With one exception not relevant to this case, Amazon Services—as the name suggests—is a service provider.¹ Among other things, it offers tools to help third parties sell their products, including a customer-friendly interface, impressive search functionality, and the ability to advertise and market products to a wider potential customer base in the marketplace. Amazon Services also provides third-party sellers access to Seller Central, a website that helps sellers manage their businesses. App. 195. Amazon Services establishes various rules for the conduct of business in the Amazon.com marketplace, many of which are discussed below. Those rules promote fair competition and a satisfying selling and buying experience. App. 217.

¹ Amazon Services sells memberships in Amazon Prime, and there is no dispute that Amazon Services has fully complied with its sales tax obligations with respect to Prime memberships sold to South Carolina customers. App. 678-79; App. 1907.

Amazon Payments, Inc. (“Amazon Payments”) is a regulated payment processing company; it manages the flow of funds by processing credit card transactions, collecting money from a card-issuing bank, and transferring that money to the seller who sold the product. App. 195-96, 248-51, 256. Today, as in the first quarter of 2016, all third parties that sell in the Amazon.com marketplace agree to use the payment processing services of Amazon Payments. App. 379-80.

Amazon Fulfillment Services, Inc. (“Amazon Fulfillment”) provides warehousing and shipping services. App. 196-97. Like Amazon Payments, Amazon Fulfillment offers its services generally to businesses, not only to those selling in the Amazon.com marketplace. App. 247-48, 551. Unlike with Amazon Payments, those who sell in the marketplace need not agree to use Amazon Fulfillment’s services; they may elect to use Amazon Fulfillment and, for those that do, may elect to stop at any time. App. 226-28, 240, 244, 247-48.

Amazon Services, Amazon Payments, Amazon Fulfillment, and the various Amazon subsidiaries that sell products are distinct corporate entities. The Department has never argued to the contrary, nor did it present any evidence that would justify attributing the acts of one Amazon subsidiary to any other Amazon subsidiary.

B. How Products Are Sold in the Amazon.com Marketplace.

1. The Selling Experience.

Third parties selling in the Amazon.com marketplace agree to the terms of the Amazon Services Business Solutions Agreement (“BSA”). App. 206; Ex. 3, App. 864-911. The BSA is a comprehensive agreement among Amazon Services, Amazon Payments, and the third-party seller. It structures the relationships among the parties to ensure a safe and reliable way of conducting business for both sellers and consumers. App. 217-20.

For example, the BSA standardizes the “format” in which sellers list their products. Ex. 3, App. 878. As discussed in more detail below, this enables customers to efficiently gather and process the information sellers provide about their products, and it facilitates quick and easy comparisons between products. The BSA also prohibits false statements regarding products and generally prohibits defamatory and obscene material. *Id.* These rules of commerce ensure a safe, reliable, and generally pleasant buying experience for customers in the marketplace. *See, e.g.*, App. 218-19.

Amazon Services has no role in determining the substance of how third-party sellers describe their products. App. 211-12, 302-04. Sellers create their own product descriptions. To list a product for sale in the Amazon.com marketplace, third-party sellers click “Add a Product” on their Seller Central account and select the relevant product category (*e.g.*, electronics, shoes, household items, etc.). App. 209-11. They name the product, and enter the bar code, brand name, and other product details. App. 210-12, 436; Ex. 3, App. 878. Third-party sellers create titles and descriptions for their products, and may choose keywords to help attract customers. App. 459-62. They can add photos, videos, text, and graphics explaining their business or brand. App. 210-12, 304, 459-62, 464-66; Ex. 3, App. 878.

Third-party sellers set prices for their products and determine how many units are available. App. 212-13, 217, 225-28, 436-37, 460-62, 484-85. No Amazon subsidiary tells third-party sellers how to price their products or how many units to make available in the marketplace. App. 213, 283-84, 470-71. As a result, the same product may be available for sale to customers in the marketplace at a wide range of prices. App. 225-26, 234-35. Sellers can respond to price movements from competitors. After sellers initially list the product, they can change the price at any time, even multiple times a day. App. 213-14, 233, 245. The BSA contained only one pricing

restriction: third-party sellers must provide customers in the Amazon.com marketplace the lowest price they offer for that product anywhere else. App. 220, 569; Ex. 3, App. 881-82. This rule was designed to ensure the best experience for customers: customers want the assurance that the price in the marketplace is as good as anywhere else. App. 569. Because third-party sellers generally price their products competitively on the Amazon.com marketplace, the BSA's pricing restriction is rarely triggered. App. 569-70. Nothing in the BSA inhibits a third-party seller's ability to sell.

Third-party sellers set their shipping terms and fulfill (*i.e.*, deliver) their orders to customers. App. 238-39, 242-43, 437, 460-61, 558-60. They decide what shipping company to hire and whether to pass the cost of shipping onto customers. They can, but need not, use Amazon Fulfillment to handle fulfillment for them using the set of services referred to as Fulfillment by Amazon ("FBA"). Third-party sellers choose how to deliver their products on an item-by-item basis, and they may, and often do, change their fulfillment method at any time. App. 240, 471-72, 536-37, 549-50. When third-party sellers use a carrier unaffiliated with Amazon, they agree to bear responsibility for any delivery issues. Ex. 3, App. 888. Once again, this requirement maintains confidence among buyers in marketplace transactions. App. 537-38.

If a third-party seller chooses the FBA service, it sends its inventory to a fulfillment center, where Amazon Fulfillment stores the products on behalf of the third-party seller. App. 244-45. Amazon Fulfillment does not own the inventory; third-party sellers do. App. 245, 475-77, 552-53; Ex. 3, App. 898-99. Indeed, the seller may, at any time before a product is sold, have the product returned to it from the fulfillment center. App. 475-77, 480-81. When customers place orders for goods offered by third-party sellers and fulfilled using the FBA service, Amazon Fulfillment packs and ships the items on behalf of the third-party seller. App. 244-45, 406-07,

548-50. But the seller maintains control over its product until it is shipped; the seller may even cancel a transaction up until that point. App. 480-81, 556. Amazon Fulfillment provides additional services like product labeling, packaging, and re-packaging, and will dispose of or return items when directed by third-party sellers who have opted into the FBA service. App. 245, 553-57; Ex. 3, App. 899.

2. The Buying Experience.

When a customer shops in the Amazon.com marketplace, the customer typically searches for a particular product and is provided with several—sometimes dozens—of buying options to choose from. When the customer clicks on a search result, the customer is directed to a webpage displaying the product. This Product Detail Page is optimized so that customers who frequent the marketplace are provided a familiar “look and feel” of items offered for sale on the marketplace. App. 344-45, 348-49. When customers arrive at that page, they can readily find useful information like product images, a specific description of the product, and customer reviews. App. 210-12, 459-62.

The Product Detail Page includes two other formatting features of note, both placed along the right side of the page. First, the Product Detail Page typically contains what is called the “Buy Box.” App. 295-96. The Buy Box features one seller that has been selected based on a proprietary algorithm that analyzes all seller offers for that particular item based on a number of factors, including price, the number of units in stock, the speed of delivery, and the rating customers have given to each seller. App. 296. While the details of the algorithm were not presented in this litigation, it is publicly known that price is a predominant consideration. App. 295-97. If the customer intends to buy from the seller who “won” the Buy Box, the customer can click on a button to place the seller’s item in the customer’s virtual shopping cart and then, when the customer is ready to complete the order, click on another button to check out. App. 237.

The customer may select a seller who is not featured in the Buy Box. The Product Detail Page format makes it easy for customers to compare options offered by other sellers. Directly under the Buy Box, customers will find the number of other sellers and a link to further information about those offers.

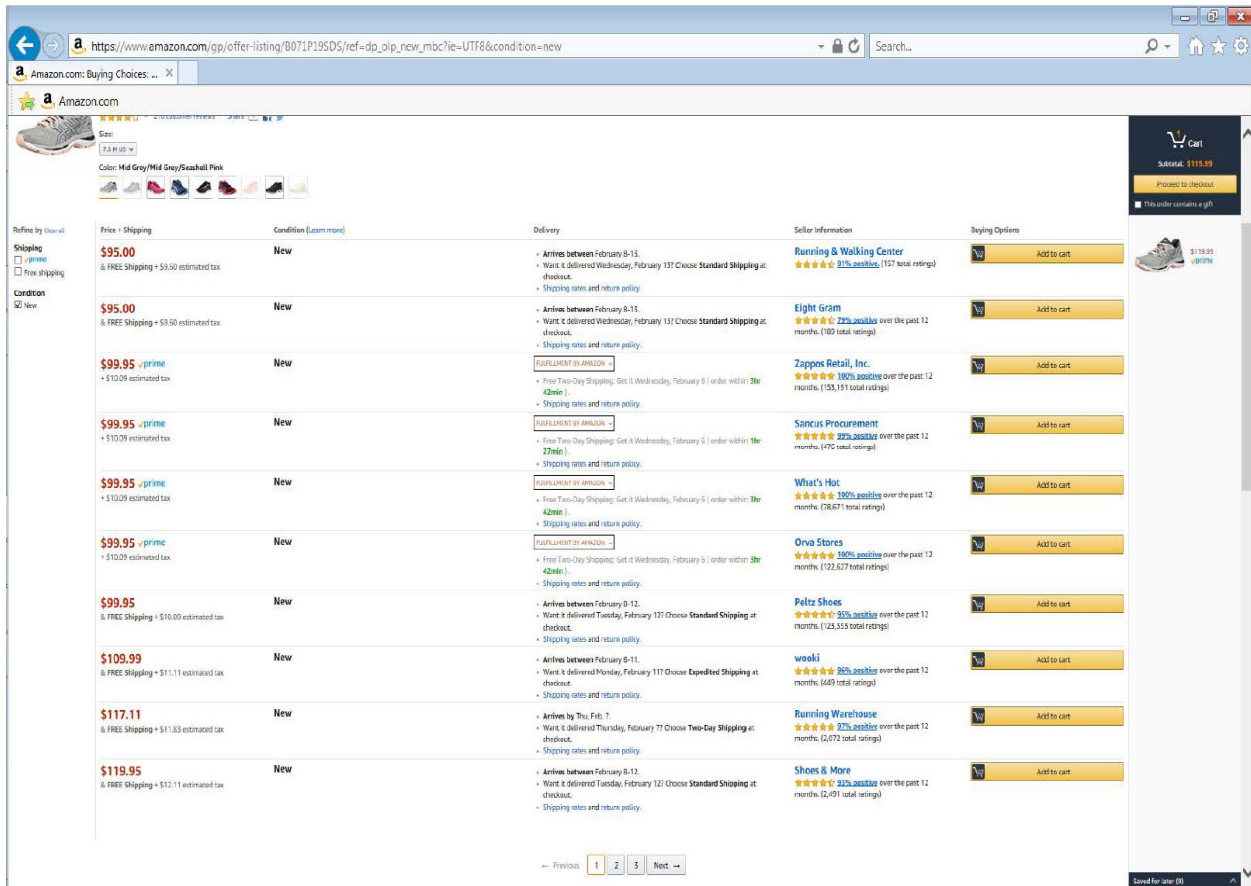


Ex. 178, App. 1049. In this image, the red arrows show the option to select the product offered by the winner of the Buy Box with the “Add to Cart” button as well the option to view different offers by other sellers who did not win the Buy Box.

Clicking on the link to other sellers takes the customer to the Offer Listing Page. App. 224-25. The Offer Listing Page shows all offers from all sellers offering that particular product. Each offer displays that seller’s price, the number of units it has in stock, and delivery options, among other information. App. 215, 224-25, 228, 232, 570; Ex. 210, App. 1544-47. Ultimately, the customer chooses from whom to buy, whether it is the seller featured in the Buy Box or some other seller.

During trial, Christopher Poad, a senior executive at Amazon.com, described a typical customer buying experience. He visited Amazon.com and searched for a particular product—a pair of ASICS sneakers. App. 222. He then followed the link on the Product Detail Page to the Offer Listing Page (reproduced below), which showed 21 different offers by 21 different sellers,

each with varying fulfillment options and prices ranging from \$95 to \$189. Ex. 210, App. 1544-47; App. 224-25.



Ex. 210, App. 1545 (excerpt).

Mr. Poad’s demonstration showed how third-party sellers—and not Amazon Services—set their prices. As Mr. Poad testified: “[I]f there was just one seller [Amazon Services], then it would be the same price” for every offering of that same pair of sneakers, but that is “not how the business works.” App. 225, 234-35. As this sneaker example shows, “dynamic competition between sellers on every product all the time in real time drives prices down [and] broadens selection” for consumers. App. 235. And all of this information is easy to find because customers can count on finding it in the same place whenever they visit a Product Detail Page.

3. *Customers Pay Third-Party Sellers for Products, and Third-Party Sellers Pay Amazon Services (and Other Amazon Companies) for Services.*

When a customer purchases a product from any seller in the marketplace, payment is processed through Amazon Payments. Amazon Services requires third-party sellers to use Amazon Payments to make it easier for customers to pay when buying in the marketplace and to help police and deter fraud. App. 250, 252-55. A hold is put on the customer's credit card (or other payment card) until the product ships. App. 248, 363-64. Upon shipment, Amazon Payments directs the credit card network (or other financial service provider) to charge the customer. App. 248, 362-64. The amount paid by the customer is the price of the product. Sales tax and shipping charges also may be assessed, if applicable, but they are separately indicated. *See, e.g.,* Ex. 122, App. 981.

Though the payment process takes place on the Amazon.com website, the customer pays only the seller.² The sales proceeds flow from the customer's account into an Amazon Payments account, where they are held for the benefit of the seller until the proceeds are disbursed. App. 248-49, 251; Ex. 3, App. 910-11.³ Amazon Services never receives nor holds the sales proceeds; Amazon Payments holds the proceeds temporarily, but expressly for the benefit of the third-party seller. App. 271-72, 290-91, 381; Ex. 3, App. 910-11. In all these respects, the customer and third-party seller enter into a sale transaction and use Amazon Payments to facilitate payment no differently than any other payment processor. As Matthew Revich, the owner of a third-party

² The name "Amazon" or an abbreviation for "Amazon Marketplace" typically appears on the customer's credit card statement, App. 725; App. 19, but that does not change the fact that the entity receiving the sales proceeds is the third-party seller. *See* App. 271-72; Ex. 3, App. 887 (the third-party seller is "always the seller of record").

³ Amazon Payments automatically disburses sales proceeds every 14 days, but third-party sellers can request disbursement sooner. App. 251-54, 358-59. Amazon Payments withholds third-party sellers' sales proceeds only in rare circumstances, like suspected fraud. App. 252-53.

seller named Yedi Houseware Appliances explained: “I’m the seller of these products.” App. 489-90.

Pursuant to the BSA, the third-party seller pays for the various services it purchases from Amazon entities that help facilitate its sale. Those payments are drawn from the funds received from the customer over the Amazon Payment system, with the balance remitted to the seller. App. 248, 271-72; Ex. 3, App. 864-65, 882-83, 890, 901, 910-11. Amazon Payments collects a fee for its service, and likewise for Amazon Fulfillment if it has been selected by the third-party seller. Amazon Services also charges various fees to third-party sellers. App. 269-72; Ex. 16, App. 915-21. Contrary to the suggestion of the Court of Appeals (App. 2118-19) and the ALC (App. 36-38), none of those fees bears a direct relationship to the profit margin of a particular product, and no Amazon entity knows whether any particular third-party sale was profitable. App. 416-18, 491-92.

Amazon Services also offers a tax calculation service to third-party sellers who choose to become “professional sellers.” Ex. 23, App. 923; Ex. 16, App. 915; App. 388-92. Third-party sellers must pay a fee for this tax service. App. 270-71, 388-92; Ex. 23, App. 922-25 (tax collection service terms); Ex. 122, App. 984. Through that service, Amazon Services calculates and adds to a customer’s purchase price the sales tax on the transaction. Ex. 23, App. 923; Ex. 16, App. 915; App. 270-71, 388-92. The sales tax added to the price of the product is sent to the third-party seller. Like any other seller that collects sales tax at the time of sale, third-party sellers on the Amazon.com marketplace forwarded that amount to the relevant taxing authority, including the South Carolina Department of Revenue. App. 390-92.

Third-party sellers also pay fees if they choose to use the FBA service. App. 270-71; Ex. 31, App. 926-28 (description of FBA features and fees); Ex. 50, App. 937-44 (2018 FBA fee

charges); Ex. 64, App. 947-52 (same); Ex. 122, App. 984 (example showing fee breakdown). As with Amazon Services’s fees, these amounts are deducted from the amount of sales proceeds delivered to third-party sellers, satisfying the sellers’ obligation to pay Amazon Fulfillment.

An individual transaction is illustrated by the Transaction Detail Page below:

Transaction Details
Use this page to view details of this transaction.

Order Payment for Order 102-1134859-2933048 ([view details of this order](#))

Transaction date: Feb 25, 2016

Shipping Address: [REDACTED] Billing Country: US
FORT MILL, SOUTH CAROLINA 29709-8433

Product charges	Qty:	
Comfy Clothiers 5 Metal Collar Extenders for Dress Shirts	1	\$11.95
Other		
Product Tax:		\$0.84
Sales Proceeds		\$12.79
Amazon fees		
FBA Order Handling Fee:		-\$1.00
FBA Pick & Pack Fee:		-\$1.06
FBA Weight Handling Fee:		-\$0.50
Referral Fee on Item Price:		-\$1.79
Sales Tax Service Fee:		-\$0.02
Change to your seller account balance		\$8.42

Ex. 122, App. 984 (excerpt). In this particular order, the seller paid Amazon Fulfillment’s Order Handling, Pick & Pack, and Weight Handling fees. It also paid Amazon Services’s Referral and Sales Tax Service fees.

4. Communication to the Customer About the Sale and the Product.

Upon completing the purchase, the customer receives an order confirmation email from the Amazon.com website. App. 335; Ex. 122, App. 965. The email describes the product or products, provides an order confirmation number, states the applicable charges (including sales tax and shipping charges), and provides an expected delivery date. Ex. 122, App. 965. The email

also includes a link to “View or manage order,” which takes the customer to his or her account on the Amazon.com website where the customer can view the name of the third-party seller. App. 427; Ex. 122, App. 979 (noting that product was sold by “Deals on Call”). Upon shipment, the customer receives a shipment confirmation email from Amazon.com, which contains the product summary, a summary of the applicable charges, and the expected arrival date. Ex. 122, App. 966. This email also links to the “Order details,” where information about the third-party seller is readily accessible. Ex. 122, App. 966.

Third-party sellers answer product-related questions, manage warranties and guarantees, and provide product care and support. App. 272-75; Ex. 3, App. 889. Amazon is responsible for issues relating to payment, credit card processing, debiting, or crediting. Ex. 3, App. 889. The customer can address product-related questions to the seller through the buyer-seller messaging service on the Amazon.com website or call the third-party seller for customer service. App. 466. If a dispute arises between the customer and seller that cannot be resolved, Amazon Services provides a rarely used backstop: its “A to Z Guarantee” provides a refund or some other benefit to the customer. App. 277-78. Amazon Services provides both the channel for communication between seller and customer and the A to Z Guarantee to ensure a convenient, safe, and reliable buying experience for customers in its marketplace. App. 218-20, 277-78.

Product returns are handled differently depending on whether the third-party seller has opted into the FBA service. Third-party sellers that fulfill their orders directly bear responsibility for processing cancellations, returns, and refunds, as well as handling recalls, nonconformities, and delivery errors. App. 543-46; Ex. 3, App. 880. For those that have opted into the FBA service, Amazon Fulfillment provides those services. App. 406-08.

C. The Department's Audit and Determination.

The Department began its audit in September 2016, more than 15 years after third parties began selling on Amazon.com. App. 682; Ex. 172, App. 1033-35. The Department admitted that, as of the first quarter of 2016, there was no rule, regulation, guidance, long-standing Department policy, or publication of any kind relating to the sales tax implications of third-party sales in online marketplaces. App. 696.

During its audit, the Department confirmed that Amazon.com LLC and other Amazon companies were collecting and remitting sales and use tax on their sales to South Carolina customers—taxes that between January 2016 and September 2018 amounted to \$138 million. App. 1933. Amazon Services did not collect tax on sales made by third-party sellers, who are responsible for collecting and remitting sales and use tax because they (not Amazon Services) sell the products to customers. Ex. 178, App. 1038-268. The Department disagreed and, in December 2016, issued a Proposed Notice of Assessment against Amazon Services. Ex. 175, App. 1036-37.

In June 2017, after Amazon Services filed its timely protest (Ex. 178, App. 1038-268), the Department issued its Determination, asserting that Amazon Services owed approximately \$12.5 million in sales and use taxes, interest, and penalties for the first quarter of 2016. Ex. 171, App. 1018. The Department asserted that “the totality of the Taxpayer’s activities clearly demonstrates that the Taxpayer is in the ‘business of selling tangible personal property at retail.’” *Id.* at 1024. In considering the “totality of the Taxpayer’s activities,” the Department relied on activities performed not by the taxpayer, Amazon Services, but rather by Amazon Payments and Amazon Fulfillment. For example, the Department contended that the “Taxpayer ... effects the actual transfer of the property,” and the Taxpayer “accepts payment for said property and holds the funds in ‘escrow’ for later disbursement of a portion of the funds to third parties.” *Id.* at

1024-25. The Department cited no evidence to support these claims. *See id.* The parties then proceeded to litigate before the ALC, which ultimately held a three-day evidentiary hearing.

D. The 2019 Changes to the Sales and Use Tax Act.

Before trial, while this litigation was ongoing, the Department urged the legislature to change the Sales and Use Tax Act to address the sales-tax obligations of online marketplace facilitators like Amazon Services. Throughout 2018, leaders of the Department made sworn statements to various legislative committees about the need to change the statute to reach the type of third-party sales at issue here. As the Director of the Department of Revenue candidly testified in May 2018, the proposed legislation would “close[] the gap” so that “nobody has to guess” about who owes sales taxes on third-party sales in online marketplaces. Ex. 194, App. 1287 at 6:13-15, 8:40-50. In response to a question about whether the proposed marketplace legislation would be prospective only, the Director replied: “Absolutely, it will not be retroactive, right.” *Id.* at 7:00-08. Yet the Director also admitted that this lawsuit was, in effect, an effort to impose the proposed amended statute’s rule governing marketplace facilitators on Amazon Services, and Amazon Services only. As he stated at the time, 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.

In October 2018, the Legislative Oversight Committee issued a report declaring that, without “this statutory change,” the Department could not force internet marketplace facilitators, like Amazon Services, to collect and remit sales taxes on products sold by third-party sellers through their websites. Ex. 192, App. 1274 (“this statutory change would allow [DOR] to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors”). Ultimately, the General Assembly passed the new legislation, and

the changes became effective on April 26, 2019, after this case was tried, but before the ALC issued its ruling. *See* 2019 S.C. Act No. 21 (effective April 26, 2019).

The legislation introduced significant changes to the applicable sales tax provisions. It created a new category of taxpayer, a “marketplace facilitator,” which it defined in Section 12-36-71. It changed the definition of “retailer” and “seller” to add every person “operating as a marketplace facilitator.” S.C. Code Ann. § 12-36-70 (2019). And it defined “marketplace facilitator” as “any person engaged in the business of facilitating a retail sale of tangible personal property by: (a) listing or advertising, or allowing the listing or advertising of, the products of another person in any marketplace where sales at retail occur; and (b) collecting or processing payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party.” *Id.* § 12-36-71(A)(1) (2019).⁴

The statute had never before said that “facilitating” sales would impose sales tax obligations. Nor had the statute ever said that the combination of “allowing the listing” of products and “processing payments” for products by “arrangement with a third party” would impose sales tax obligations. The changed statute provides that “a marketplace facilitator includes any related entities assisting the marketplace facilitator in sales, storage, distribution,

⁴ Prior to 2019, only five of the forty-five states with sales tax had marketplace facilitator laws in place. Jeffrey A. Friedman & Michele Borens, *Implementing a Successful Marketplace Collection Strategy*, 98 Tax Notes State 469, 469 (2020). By the end of 2020, all but three of the others had enacted such laws. *Id.*; *see infra* 39-42. The nationwide movement to incorporate marketplace facilitators into sales tax statutes reflected a widespread understanding that such legislative changes would ease both sales tax collection and remittance, make the operation of online marketplaces like Amazon.com more efficient and predictable, and smooth enforcement by state tax administrators who could audit only the marketplace facilitator rather than a multitude of remote third-party sellers. *See id.*; Mark F. Sommer, *Farewell 2019, Hello 2020!*, 94 Tax Notes State 865, 870 (2019) (noting the importance of marketplace legislation in light of “ever-continuing challenges facing taxpayers for being out of compliance in sales and use tax matters”).

payment collection, or in any other manner, with respect to the marketplace.” S.C. Code Ann. § 12-36-71(C) (2019). Never before had the sales tax statute suggested that the conduct of distinct but related corporate entities could create sales tax obligations.

Amazon Services has complied with the new statute.

E. The Lower Courts’ Decisions.

During trial, the ALC acknowledged that the pre-2019 law was “not clear” as applied to third-party sales on Amazon Services’s marketplace. App. 614-16. Nonetheless, the ALC ultimately ruled that even before the statute was changed, Amazon Services was “in the business of selling tangible personal property at retail” with respect to third-party sales and was therefore responsible for sales taxes on those sales. *Id.* at 52.⁵

To justify its ruling, the ALC applied two new tax law concepts. First, the ALC focused on what it called the “point of sale” and what the ALC believed Amazon Services controlled about the so-called “point of sale.” *See id.* at 13, 15-16, 31-33, 39-42, 44-45, 49, 52, 54. But the ALC cited no authority for this concept, and the Court of Appeals declined to endorse it. *Id.* at 2119-20. Second, the ALC attributed to Amazon Services actions taken at the “point of sale” by other Amazon companies, in particular Amazon Payments. *See, e.g., id.* at 31 (stating that Amazon Services “processes the customer’s payment,” “accepts the customer’s consideration,” and “remits the proceeds from the sale to the owner”). The Court of Appeals rejected that novel concept as well. *Id.* at 2119-20.

The ALC also relied heavily on this Court’s decision in *Travelscape*. *See* App. 29-36, 39-47, 50-52. The ALC observed that both this case and *Travelscape* involve transactions through a

⁵ The parties have agreed that the ruling in this case challenging one quarter in 2016 will apply equally to all subsequent quarters until the adoption of the 2019 amendment.

website, but the ALC ignored that *Travelscape* did not involve a marketplace. *Id.* at 31. The Court of Appeals did not adopt the ALC’s interpretation of *Travelscape*, concluding that the case provided “only limited guidance.” App. 2117. The guidance *Travelscape* provided, the Court of Appeals reasoned, was that this Court had interpreted a different provision of the Sales and Use Tax Act—Section 12-36-920(E)—“broadly.” *Id.* at 2118. The Court of Appeals misunderstood *Travelscape* to generally authorize the “broad” interpretation of tax statutes. *Id.*

According to the Court of Appeals, the old statute, read broadly, captured Amazon Services because Amazon Services received payment out of the proceeds of the sale. *Id.* at 2118. The Court of Appeals acknowledged that for the Department to prevail, Amazon Services’s interpretation of the statute had to be unreasonable. *Id.* at 2114-15. But the Court of Appeals never explained why Amazon Services’s position was unreasonable. In fact, it never considered Amazon Services’s interpretation of the statute and its application to its activities—*i.e.*, that the payment it received was not for selling property to the consumer but rather for the services it provided to the seller.

The Court of Appeals also stated that certain developments were legally irrelevant to the reasonableness of Amazon Services’s view, including the Department’s own acknowledgments that the statute was ambiguous and the stated reason for the 2019 amendment (to bring “marketplace facilitators” like Amazon Services under the statute). App. 2116. The amendment makes an entity responsible for sales tax collection in South Carolina by “facilitating” sales made by others. *See* 2019 S.C. Act No. 21 (eff. April 26, 2019) §§ 2-3 (amending S.C. Code Ann. §§ 12-36-71, -70). The new law also provides that, if an entity meets the “marketplace facilitator” definition set forth in subsection (1), “then that person is a marketplace facilitator *regardless* of whether the person receives compensation or other consideration in exchange for

his services.” *Id.* § 2 (emphasis added). None of this mattered, according to the Court of Appeals. App. 2116.

Having so ruled, the Court of Appeals, following the ALC, also rejected Amazon Services’s constitutional claims. App. 2122-24. It rejected Amazon Services’s due process claim of lack of fair notice, concluding that the Department merely “applied the law that was in place at the time to Amazon Services’s sales.” App. 2124. It reiterated that it found the 2019 amendment irrelevant, stating that “[t]he fact the legislature later modified the law to specifically include marketplace facilitators does not establish the Act failed to provide fair notice to Amazon Services that third-party sales occurring on the Marketplace would be subject to sales tax.” *Id.* It did not identify what specific language or feature of the pre-2019 law provided fair notice to Amazon Services that it was responsible for collecting sales tax on third-party sales. *See id.*

STANDARD OF REVIEW

The Administrative Procedures Act governs review of appeals from the ALC. S.C. Code Ann. § 1-23-310 *et seq.* Under the APA, this Court may reverse, vacate, or modify the judgment if it is, among other things, “in violation of constitutional or statutory provisions,” “in excess of the statutory authority of the agency,” or “affected by an error of law.” *Media Gen. Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 388 S.C. 138, 144, 694 S.E.2d 525, 528 (2010); *CarMax Auto Superstores W. Coast, Inc. v. S.C. Dep’t of Revenue*, 397 S.C. 604, 608-09, 725 S.E.2d 711, 713 (Ct. App. 2012) (citation omitted), *aff’d as modified*, 411 S.C. 79, 767 S.E.2d 195 (2014) . Questions of statutory interpretation are “questions of law, which [this Court is] free to decide without any deference to the court below.” *Centex Int’l, Inc. v. S.C. Dep’t of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (quoting *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). “As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial

evidence.” *MRI at Belfair, LLC v. S.C. Dep’t of Health & Env’t Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008).

ARGUMENT

I. The Court of Appeals’ Decision Misreads *Travelscape* to Require a Broad Construction of a Tax Statute, Contrary to This Court’s Decisions.

The Court of Appeals’ decision rests on a misunderstanding of this Court’s decision in *Travelscape*. The Court of Appeals wrongly derived from *Travelscape* a presumption that the Sales and Use Tax Act should be interpreted “broadly.” App. 2118. But *Travelscape* does not say that.⁶ And such an interpretation is inconsistent with the longstanding principle that taxing statutes must be narrowly construed in favor of the taxpayer. To read *Travelscape* as the Court of Appeals has would mean that it impliedly overruled a rule of statutory construction that South Carolina courts have recognized for decades. *Cf. Coleman v. Page’s Estate*, 202 S.C. 486, 491, 25 S.E.2d 559, 560 (1943) (“A decision which is to overrule all former precedents and to establish a principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside.”). The Court of Appeals’ decision places *Travelscape* at odds with other decisions of this Court, including the post-*Travelscape* ruling in *Alltel*.

In *Alltel*, this Court once again repeated the long-settled rule in South Carolina that where “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

⁶ See also *Books-A-Million, Inc. v. S.C. Dep’t of Revenue*, 437 S.C. 640, 651, 880 S.E.2d 476, 482 (2022) (James, J., dissenting) (in case about applicability of sales tax to sale of memberships, stating that *Travelscape* “was limited to the unique facts of that case”).

excluded, any substantial doubt being resolved in his favor.” *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 (quoting *Cooper River*, 182 S.C. 72, 188 S.E. at 509-10); *see also Hadden v. S.C. Tax Comm’n*, 183 S.C. 38, 190 S.E. 249, 251-52 (1937); *Columbia Ry., Gas & Elec. Co. v. Carter*, 127 S.C. 473, 121 S.E. 377, 380 (1924). This critical presumption is well-recognized across American jurisdictions. *See, e.g., Gould v. Gould*, 245 U.S. 151, 153 (1917) (“In case of doubt [tax statutes] are construed most strongly against the government, and in favor of the citizen.”); *Alan Wood Steel Co. v. Sch. Dist. of Phila.*, 229 A.2d 881, 885 (Pa. 1967) (“taxing statutes are subject to a strict construction”); *In re Aloha Motors, Inc.*, 536 P.2d 91, 94 (Haw. 1975) (“[I]f doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer.” (citation omitted)); *Debevoise & Plimpton v. N.Y. State Dep’t of Tax’n & Fin.*, 609 N.E.2d 514, 516 (N.Y. 1993) (“[I]t is well established that [a taxing statute] must be narrowly construed and that any doubts concerning its scope and application are to be resolved in favor of the taxpayer.”); *Hiland Crude, LLC v. Dep’t of Revenue*, 421 P.3d 275, 278 (Mont. 2018) (“Tax statutes are to be strictly construed against the taxing authority and in favor of the taxpayer.” (brackets and citation omitted)); *Acme Royalty Co. v. Dir. of Revenue*, 96 S.W.3d 72, 74 (Mo. 2002) (“Taxing statutes ... are to be strictly construed in favor of the taxpayer and against the taxing authority when any ambiguity exists.”); *Robinson v. Priceline.com, Inc.*, 389 So. 3d 168, 176 (La. Ct. App. 2024) (“In interpreting statutes that impose a tax, we begin with the well-settled premise that tax statutes must be strictly construed against the taxing authority, and where a tax statute is susceptible of more than one reasonable interpretation, the courts adopt a construction favorable to the taxpayer.”). This rule is a bulwark against the natural tendency of governments to expand the reach of their taxing authority, and it ensures that taxpayers are given fair notice so that they can structure their affairs accordingly.

There is no plausible way to square the reasoning of the Court of Appeals in this case with this Court’s ruling in *Alltel*. In *Alltel*, the Department assessed a tax deficiency, arguing that cellular service providers were “telephone companies” under the statute. The Court of Appeals in *Alltel*, like the ALC here during trial (App. 615-16), acknowledged that the law “was not ‘absolutely clear,’” but it rejected the taxpayers’ argument that such lack of clarity resolved the case in their favor. *Alltel*, 399 S.C. at 318-19, 731 S.E.2d at 872. This Court reversed. It applied the “settled” rule that any substantial doubt is resolved in favor of the taxpayer, and held that the statute was ambiguous as applied to the wireless service providers. *Id.*

Here, the Court of Appeals stated that the ALC was not “bound” by its own characterization, offered during trial, that the law was not clear. App. 2117. But even if the ALC was not bound by that statement, the fact that the ALC had itself acknowledged the ambiguity confirms that it was at least reasonable to conclude that the statute was ambiguous. *See Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 (“Petitioners point to the court of appeals’ acknowledgement that application of section 12-20-100 to Petitioners was not ‘absolutely clear as a matter of law.’ ... We agree.”). The Court of Appeals further attempted to distinguish *Alltel* on the ground that, unlike in *Alltel*, the governing statute in this case defines the “relevant terms.” App. 2115. This misreads *Alltel*. The 2016 Act defines “sale” and “seller” and “business.” S.C. Code Ann. §§ 12-36-100, -70, -20. But the question *Alltel* required the Court of Appeals to answer here was whether the terms of the statute *as a whole* “unambiguously” impose a duty on the allegedly taxable activity or entity. As discussed more fully below, had the Court of Appeals taken the step that *Alltel* requires and looked to how the statutory definitions might reasonably apply here, the Court of Appeals could not have concluded that the 2016 Act “unambiguously” encompassed Amazon Services’s activities with respect to third-party sales. Indeed, that no terms covered

marketplace facilitators like Amazon Services is *precisely why the statute was amended in 2019* to add “marketplace facilitator” to the definition of “seller.”

Rather than apply *Alltel*, the Court of Appeals misapplied *Travelscape*. According to the Court of Appeals, *Travelscape* interpreted one provision (Section 12-36-920(E))⁷ of the Sales and Use Tax Act “broadly,” so likewise the Court of Appeals interpreted a different provision of the 2016 version of the Sales and Use Tax Act “broadly” (Section 12-36-910(A)).⁸ App. 2118. It is difficult to square this reasoning with *Alltel*. A “broad” construction of the statutory term “telephone company” would have included wireless telephone service providers in *Alltel*. But this Court did not adopt such a construction because it recognized that a narrower construction was reasonable.

In fact, the words “broad” and “broadly” do not appear in *Travelscape*. To read the opinion as if it generally requires “broad” constructions of tax statutes contradicts the settled rule that taxpayers should receive the benefit of reasonable interpretations of tax statutes. Adopting a broad construction of a statute necessarily rejects a narrower alternative. Imposing a broad interpretation on Amazon Services here contradicts *Alltel* and the numerous cases that have repeated this important principle of tax code construction for decades. *See Alltel*, 399 S.C. at 318, 731 S.E.2d at 872 (citing *Cooper River Bridge*); *Cooper River Bridge*, 182 S.C. 72, 188 S.E. at 509-10 (collecting cases dating back to 1924). And it contradicts the related principle that “statutes levying taxes ... are *not to be extended by implication* beyond the clear import of the

⁷ Section 12-36-920 imposes a sales tax on accommodations for transients. Subsection (E) provides: “The taxes imposed by this section are imposed on every person engaged or continuing within this State in the business of furnishing accommodations to transients for consideration.” S.C. Code Ann. § 12-36-920(E).

⁸ Section 12-36-910(A) provides: “A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.” S.C. Code Ann. § 12-36-910(A).

language used.” *Cooper River Bridge*, 182 S.C. 72, 188 S.E. at 510 (emphasis added); *see also Hadden*, 183 S.C. 38, 190 S.E. at 252-53 (rejecting argument that language of tax statute should be read broadly where statute did not expressly cover income at issue).

Alltel and *Travelscape* are easily harmonized. *Travelscape* fell within the scope of the relevant statute; it was paid by its customers to “furnish” hotel rooms to them. *Travelscape* was not a marketplace. It negotiated with hotels so that *Travelscape* could sell to customers the right to occupy the hotels’ rooms. *Travelscape* was a price-setter: it determined the ultimate price customers would pay by (1) negotiating a rate it would pass on to hotels, and (2) adding a markup of its own that it would keep. *See Travelscape*, 391 S.C. at 95, 705 S.E.2d at 31. Critically, the customer reserving the room paid *Travelscape* for it; the customer did not pay the hotel operator. So the actual price listed for the room—that is, the amount the customer actually paid as consideration for the right to occupy the room—was determined by *Travelscape* and, when paid, the money belonged to *Travelscape*, not the hotel. *See id.* at 95-96, 705 S.E.2d at 31.⁹ The hotel at which the customer stayed was paid by *Travelscape*, not the customer. And the hotel was paid at the agreed rate that had been negotiated between *Travelscape* and the hotel before the customer reserved the room. *Id.* The customer had nothing to do with paying the hotel. In short, *Travelscape*, not the hotel, sold the right of occupancy to the customer.

Travelscape remains useful here because it provides a clear contrast between taxpayers that are unambiguously paid for *selling* taxable items and those, like Amazon Services, that are

⁹ *Travelscape* argued otherwise, but this Court rejected that argument. *Travelscape* argued that its service fee was not part of the gross proceeds the customer paid for the room. But the Supreme Court ruled that under the relevant statute, *Travelscape*’s fee was part of the gross proceeds customers paid for the room. *Travelscape*, 391 S.C. at 98, 705 S.E.2d at 33. (“Because the cost of services is specifically included in the definition of gross proceeds of sales, we find the fees retained by *Travelscape* for its services are taxable as gross proceeds.”).

not. Nothing in the facts of *Travelscape* required a rule of broad construction of taxing statutes. Had this Court intended to revolutionize South Carolina tax law as the Court of Appeals has proposed, it surely would have discussed and explained taking such a fateful step.

Because the Court of Appeals' opinion misread and diverged from this Court's precedent, it should be reversed.

II. The Court of Appeals' Failure to Consider the Reasonableness of Amazon Services's Interpretation Deprived Amazon Services of the Benefit of Substantial Doubt When Construing Tax Statutes.

The Court of Appeals ignored Amazon Services's analysis of the sales tax statute and it refused to consider concessions by taxing authorities that the statute could reasonably be read not to reach Amazon Services. The court treated its own reading of the statute as the beginning and end of the analysis. That approach defies *Alltel* and the important tax-law principle it reflects: the law must constrain the tendency of the taxing authority to expand its reach by providing taxpayers the protection of reasonable interpretations of tax statutes. This Court should reverse the Court of Appeals' decision and restore that longstanding rule of law.

A. Amazon Services Offered a Reasonable Interpretation of the Statute's Language That Excluded Its Conduct.

Amazon Services presented a textual analysis explaining why the *best* reading of the Act supports its position. Amazon Services maintains that view, but this Court need not decide the best interpretation of the statute. The critical point is that Amazon Services's interpretation of the statute was at least reasonable, and that resolves this case under *Alltel* and its predecessors.

The statute defines "sale" as "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property *for* a consideration." S.C. Code Ann. § 12-36-100 (emphasis added). So, under the law in effect at the time of the transactions at issue here, Amazon Services did not conduct any "sale" if it did not receive consideration "for" transferring personal property.

And if it was not conducting any “sale,” it was not “engaged in the business of selling” within the meaning of the statute. *See* S.C. Code Regs. § 117-300.1 (requiring retailers to obtain a business license if they “mak[e] sales of tangible personal property ... in this state”).

When a customer orders a product on the Amazon.com website from a third-party seller, the funds the customer provides for that product—the “Sales Proceeds”—are sent to Amazon Payments (not Amazon Services) and those funds belong to the seller. Under the BSA, the sales proceeds are held in an account with Amazon Payments. Ex. 3, App. 910. Amazon Payments temporarily holds the sales proceeds, but only *for the benefit* of the third-party seller. *Id.* at 910-11. Amazon Services *never* holds the sales proceeds. Moreover, the question the statute asks is who receives payment “for” the transfer of the tangible personal property that is the subject of the sale. S.C. Code Ann. § 12-36-100. The customer sends the proceeds *to the third-party seller* “for” the transfer of the property. The customer—that is, the party to the transaction surrendering consideration in exchange *for* the purchased product—does not pay Amazon Services for anything.

That should be the end of the analysis—Amazon Services never receives payment from the *consumer* for *anything*. It is true that the seller uses Amazon Payments to facilitate payment for the transfer of the property. It is likewise true that the payment transaction is carried out over the Amazon Services website. But none of these facts, whether in isolation or combination, mean that Amazon Services collects any payment at all from the customer, much less for the transfer of personal property. The BSA provisions are undisputed and to the contrary. There is no testimony, exhibit, or other evidence that shows Amazon Services receives consideration in exchange for the transfer of tangible personal property.

None of this is to deny that Amazon Services gets paid. But, once again, the undisputed evidence demonstrates that *sellers* pay Amazon Services for various services that Amazon Services provides to *them*. Those services are detailed in the record and discussed above. *See supra* at 5-10, 13-15. They include offering the sellers access to Seller Central, advertising services, and a safe and reliable interface for listing a product. The compensation Amazon Services receives is not consideration for an exchange of tangible personal property; it is compensation for having provided services to sellers.

Amazon Services receives its payment out of the proceeds that a customer sends to the third-party seller. *Cf.* App. 2118. However, the Court of Appeals failed to acknowledge that such payment was not “for” the transfer of personal property to the consumer, but rather “for” the services it provided to the seller. The Court of Appeals concluded that Amazon Payments has “control” over the funds until they were remitted to third-party sellers. *Id.* But the Court of Appeals did not, because it could not, conclude that the funds were the property of Amazon Payments, much less Amazon Services. And, more importantly, the Court of Appeals did not, because it could not, deny that Amazon Services reasonably understood that the funds it eventually received were compensation from the seller for its services and not from the consumer for the transfer of tangible personal property.

Adding to the reasonableness of Amazon Services’s view is the undisputed fact that the flow of funds here is no different than for *any* credit card transaction. A credit card processing company always receives funds from a cardholder buying a product, but it is never paid *for* the product. A third-party seller who sells on its own website might use Amazon Payments or one of its competitors as a payment processor. *See* App. 254-55. That website might be maintained by a contractor the seller hired to build and host the site. *See id.* at 520-21. Neither the website host

nor the payment processor incurs sales tax liability because every sale on that website quite obviously is made *by the third-party seller*, not by a payment processor or the website host. Those companies provide *services* to sellers and receive consideration for those services. That remains true even if the consideration those companies receive is tied to the sellers' volume of sales. Only sellers receive consideration for selling tangible personal property.

The Court of Appeals' conclusion that the ALC correctly treated Amazon Services and Amazon Payments as a "group or combination acting as a unit," App. 2117, was erroneous and, more importantly, irrelevant. The Court of Appeals' sole evidence for this conclusion is that the BSA at times refers to Amazon Payments and Amazon Services (and Amazon Fulfillment) as "we" for certain purposes. *See id.* The Court of Appeals did not, because it could not, present any basis for piercing the corporate veil. It also did not, because it could not, offer *any* other reason to treat Amazon Services's argument as "form-over-substance." *Id.* Amazon Services and Amazon Payments are distinct legal entities with distinct lines of business; the Department never even suggested any reason to conclude that their distinctness is a matter of form masking an underlying substantive unity. The Court of Appeals cited no case where distinct but related corporate entities could be so easily combined for sales tax liability purposes. The distinction between corporate entities is one of the most elemental in the law, and it cannot and should not be so lightly cast aside.¹⁰ *See, e.g., Mid-S. Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588,

¹⁰ The Court of Appeals' tangentially related concern that third-party sellers are prevented from collecting sales tax is unfounded. App. 2119 n.9. Amazon Services allows all third-party sellers to enroll in a service, for \$39.99 per month, that includes a tax calculation service. For those enrolled, Amazon Services calculates and withholds taxes from each transaction. Ex. 23, App. 922-25. Amazon Services later disburses the withheld tax to the merchant to then remit to the state. *Id.* The record shows that some third-party sellers took advantage of this service. App. 263, 391. In any event, administrative convenience is not a legitimate basis for retroactively imposing a collection duty on conduct not covered by the statute. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900-01 (1988). Indeed, the Department could have attempted to

597-98, 649 S.E.2d 135, 140-41 (Ct. App. 2007) (courts “disregard the corporate entity” only when the party seeking to pierce the veil has proven “injustice or fundamental unfairness”); *S.C. Dep’t of Revenue v. Anonymous Co. A*, 401 S.C. 513, 515-21, 678 S.E.2d 255, 256-59 (2009) (rejecting argument that two corporations should be treated as one entity for purposes of applying sales tax statute). Indeed, maintaining the distinction between related corporate entities is critical; otherwise, South Carolina law would exclude from taxation transactions between such related entities. South Carolina, in fact, assesses sales tax to transactions between related corporations because South Carolina respects distinct corporate status for sales tax purposes. *See Edisto Fleets, Inc. v. S.C. Tax Comm’n*, 256 S.C. 350, 356, 182 S.E.2d 713, 715-16 (1971). The Court of Appeals never explained why Amazon Services could not have *reasonably* concluded that its distinct corporate form would be respected.

Regardless, the Court of Appeals failed to examine whether Amazon Services’s interpretation was reasonable *even if* it was proper to collapse the distinctions among Amazon entities. Amazon Services’s interpretation benefits from the distinction among Amazon entities, but it does not depend on that distinction. Rather, it depends on the distinctions between third-party sellers and *all* Amazon entities. Neither Amazon Payments nor Amazon Services nor some imagined combination of the two received payment *for* the purchased product given the undisputed fact that the money held temporarily by Amazon Payments is held for the benefit *of the third-party seller*. And neither Amazon Services nor Amazon Payments has any right to do anything with sales proceeds other than what third-party sellers direct; it is the sellers (through the BSA) who directed that some portion of the proceeds be used to satisfy their obligations to

justify its treatment of Amazon Services by invoking the “efficient administration” provision of the statute, *see* S.C. Code Ann. § 12-36-70, but it expressly chose not to. *See* App. 169 (“[W]e have ... elected not to proceed with that theory.”).

the relevant Amazon entities. *See* Ex. 3, App. 910-11. As the Court of Appeals elsewhere acknowledged, Amazon Services is “a service provider ... with respect to its relationship to the third-party seller.” App. 2119.

For similar reasons, Amazon Services reasonably concluded that it was not “in the business of selling” third-party products. S.C. Code Ann. § 12-36-910(A). Under section 12-36-20, “business” includes “all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.” The Court of Appeals emphasized the language “direct or indirect” when quoting the statute, and ruled that an entity is covered by the definition of “business of selling” when it is paid “a per-item fee ... based upon a percentage of the item’s sales price and the category of the item sold.” App. 2118. Even assuming that such a broad construction of the statute is textually possible, it is most certainly not compelled and far from the only reasonable way to read the statute. The business of selling necessarily requires the activity of selling, and the Court of Appeals did not identify the activity that made Amazon Services’s business “selling.”

Again, the mechanics of third-party sales in the Amazon Services marketplace were undisputed. Amazon Services (1) did not choose what items third-party sellers made available to customers in the marketplace or at what price, (2) did not determine the number of products to make available to customers in the marketplace, (3) did not own any inventory third-party sellers made available to customers in the marketplace, (4) did not receive payment from buyers for the products, and (5) did not transfer ownership of products to the buyers. The seller controlled all of these selling decisions. The Court of Appeals did not dispute (or discuss) any of these facts. Before this case, no court or tax regulator had said that a marketplace—a business that engages in *none* of these selling activities—was “in the business of selling” property it did not own.

No court or regulator had stretched the statute this far for good reason. The standard contains no principled stopping point. Numerous industries *serve* those who sell and thus achieve a “profit” by “indirect means” from the sale of property owned by others. Payment processors, credit card companies, banks, delivery companies, advertisers, and more *all* receive fees connected with sales by others. The Court of Appeals did not even discuss the breadth of the principle it adopted, much less explain how to constrain it. The ALC at least acknowledged the extraordinary scope of its reasoning, noting that it *could* be understood to encompass payment processors as “sellers” with sales tax collection obligations. App. 35 & n.28. The ALC’s response—an ad hoc declaration that payment processors are *not* sellers without explanation—would provide no comfort to taxpayers. The rationale of both the ALC and the Court of Appeals would place extraordinary authority in the hands of the Department to penalize South Carolina businesses for failing to comply with sales tax “obligations” that many businesses reasonably believe do not apply to them. Only a court under the mistaken view that *Travelscape* requires a broad construction and application of taxing statutes could have adopted this view. And neither the Court of Appeals nor the ALC ever explained what made Amazon Services’s failure to anticipate such an extravagant construction *unreasonable*.

B. The Legislature’s Decision to Amend the Law to Add “Marketplace Facilitators” Confirms That Amazon Services’s Interpretation of the Act Was Reasonable.

The extensive changes to the Sales and Use Tax Act confirm that there was substantial doubt that the 2016 Act required Amazon Services to collect and remit sales tax from South Carolina residents for third-party sales conducted on its marketplace. The Court of Appeals erred in refusing to recognize as much. *See Centex Int’l*, 406 S.C. at 145, 750 S.E.2d at 72 (“Although this amendment post-dates the tax years in question, it is instructive as to the intended purpose of the statutes at issue.”). The obvious purpose of the 2019 amendment was to expand the reach of

the law to cover marketplace facilitators—a new category of taxpayer. *See* 2019 S.C. Act No. 21 (effective Apr. 26, 2019); Ex. 192, App. 1274 (“this statutory change would allow [DOR] to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors”). The new term “marketplace facilitator” was added and specifically defined in the statute. Never before had the statute said or been interpreted to mean that merely “facilitating” sales would trigger sales tax obligations. Nor had the statute ever before said or been interpreted to mean that the combination of “allowing the listing” of products and “processing payments” for products under an “arrangement with a third party” would carry sales tax obligations. *See* S.C. Code Ann. § 12-36-71(A)(1) (2019).

“When the Legislature adopts an amendment to a statute, [there is] a presumption that the Legislature intended to change the existing law.” *See, e.g., Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008); *Key Corp. Cap., Inc. v. Cnty. of Beaufort*, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2007). To hold otherwise would imply that the amendment was “essentially [] a futile act,” an implication courts typically avoid. *Key Corp. Cap.*, 373 S.C. at 61, 644 S.E.2d at 678. The legislature’s significant changes to the Act fully support the conclusion that this “presumption” has not been overridden here. *See, e.g., Centex Int’l*, 406 S.C. at 145, 750 S.E.2d at 72 (“Because the legislature is presumed to be aware of prior legislation and does not perform futile acts, we find the 2008 amendment represents a conscious decision by the legislature to preclude partnerships from earning and passing through certain tax credits.”); *Berkeley Cnty. Sch. Dist. v. S.C. Dep’t of Revenue*, 383 S.C. 334, 347-48, 679 S.E.2d 913, 920 (2009) (relying on legislative amendment to determine meaning of prior law); *Hotels.com v. Pine Bluff Advertising & Promotion Comm’n*, 688 S.W.3d 399, 407 (Ark. 2024) (“The legislature’s addition of ‘accommodations intermediaries’ to the list of entities subject to taxation, its

definition of that group as a ‘person other than the owner, operator, or manager,’ and its decision to title Act 822 as one to require accommodations intermediaries to collect and remit sales and tourism taxes, demonstrate that accommodations intermediaries were newly subject to the taxes.”); *StubHub, Inc. v. Wis. Dep’t of Revenue*, 2024 Wisc. Cir. LEXIS 38, at *42-43 (Wis. Cir. Ct. Feb. 1, 2024) (“That the legislature intended new forms of liability rather than mere clarification should be apparent both from the fact that ‘facilitating a sale’ plainly means something different than ‘selling,’ ... and because, if the legislature actually thought concepts like ‘sale’ or ‘selling’ were sufficiently confusing to warrant a clarifying amendment, it would have only compounded that confusion by introducing the ... concepts of ‘facilitating’ or ‘processing payment’ for that ‘sale.’” (citation omitted)). At a minimum, the changes indicate that the applicability of the previous version of the statute was at least ambiguous.

The Court of Appeals nevertheless reached the opposite conclusion, finding that the 2019 amendment to the Act rebutted the presumption and fit the rare case of amendments intended to only “clarify[]” what the law already meant. App. 2115-16. But an unambiguous law does not require clarification. *See, e.g., Hotels.com*, 688 S.W.3d at 407 (“If accommodations intermediaries had previously been subject to the taxes, then the 2019 amendments would have been unnecessary.”); *Kaiser Foundation Health Plan of Wash. v. Dep’t of Revenue*, 30 Wash. App. 2d 1054, 2024 WL 1726751, at *4 (Wash. Ct. App. Apr. 23, 2024) (“If [the prior version of the statute] was unambiguous as the DOR claims, there would have been no need for the 2019 amendments. And if we were to adopt the DOR’s interpretation of the pre-2019 statute, the amendments would be meaningless.”). And it remains the duty of the courts, regardless of any statement by the legislature, to determine whether the need for clarification left the taxpayer with a reasonable basis to conclude that it was previously excluded.

More fundamentally, the Court of Appeals chose simply not to consider the extent and substance of the changes enacted by the legislature. App. 2116 (“we need not consider ... the amendments themselves in deciding this issue”). This was legal error, and a fundamental one at that. The extent of the changes required to clearly capture a taxpayer’s activities cannot be *irrelevant* to the reasonableness of the taxpayer’s construction of the prior statute. That the legislature must introduce a new statutorily-defined taxpayer and specify and define a variety of new conduct that is covered by the statute is at least reason to doubt that such conduct was previously included. Yet the Court of Appeals here ruled that the extensive and detailed changes in the marketplace facilitator amendment could be ignored.

C. The Department’s Own Statements to the Legislature and Past Practice Confirm That Amazon Services’s Interpretation of the Prior Law Was Reasonable.

The Court of Appeals also wrongly declared that the Director of the Department of Revenue’s own statements, which support the reasonableness of Amazon Services’s view, were irrelevant. App. 2116 (“we need not consider ... the Department’s statements”). The Director stated that “[t]here is no law related to taxation of third party sales,” and he asked the legislature to “help” the Department collect sales tax on third-party sales from marketplace facilitators by changing the statute. Ex. 205, App. 1411; Ex. 203, App. 1372; Ex. 194, App. 1287 at 5:50-6:06; Ex. 207, App. 1536. The Director told the Legislative Oversight Committee that whether online marketplaces were required to remit sales taxes on third-party sales was an “emerging issue.” Ex. 213, App. 1554-55; *see also* Ex. 202, App. 1320. The Director asked for a legislative “change” to “ensure that online marketplace retailers collect/remmit sales tax.” Ex. 213, App. 1555; *see also* Ex. 202, App. 1320. And the Director told the Committee that there was a “need [for] additional legislation” to “close[] the gap” so that “nobody has to guess” as to who must collect and remit taxes on third-party sales. Ex. 194, App. 1287 at 5:51-6:06, 6:13-15, 8:40-50.

These statements are relevant not because Amazon Services relied on them; they occurred well after the 2016 period at issue. These statements are relevant because they are objective indications that the Department itself viewed the application of the statute to Amazon Services's business model as ambiguous and that, accordingly, Amazon Services's interpretation was not idiosyncratic or baseless. The Director's statements reflect the considered view of an authority on the possible reasonable understandings of the statute. That he admitted the existence of a "gap" should be treated as dispositive under *Alltel*. But at a minimum, the Court of Appeals cannot be correct that these statements shed no light *at all* on the reasonableness of Amazon Services's interpretation.

Amazon Services's interpretation is also supported by the Department's past practices. The Department had been receiving sales tax payments from third-party sellers for sales on Amazon.com. Indeed, Amazon Services offered to collect and remit *to the third-party seller* applicable sales tax owed on third-party sales. App. 388-92; Ex. 23, App. 922-25. As of 2016, the Department had not once suggested that this process was wrong or that Amazon Services, not the third-party seller, was responsible for collection. It is thus not only subsequent admissions from the Department, but its conduct during the period at issue, that lend support to Amazon Services's interpretation. *See Cooper River Bridge*, 182 S.C. 72, 188 S.E. at 511 (rejecting Tax Commission's argument that the phrase "or other form of public service" was broad enough to cover bridge companies and noting that Tax Commission had only recently changed its view).

The Court of Appeals' decision in another recent case strongly supports the relevance of the Director's statements and the Department's past practice here. In *Synovus Bank v. South Carolina Department of Revenue*, 444 S.C. 30, 906 S.E.2d 85 (Ct. App. 2024), *reh'g denied* (Sept. 5, 2024), the Court of Appeals affirmed the ALC's finding that a taxpayer-bank could not

avail itself of a federal income tax deduction when calculating its net income for state bank tax purposes. *Id.* at 34, 906 S.E.2d at 88. To support its decision, the Court of Appeals relied, in part, on testimony from the then-President and CEO of the South Carolina Bankers Association at a public hearing of the South Carolina Taxation Realignment Commission. *Id.* at 42-43, 906 S.E.2d at 92. The public testimony revealed that banks had long recognized the bank tax as a franchise tax that was calculated differently than federal income tax and did not encompass the tax exemption the taxpayer sought. *Id.* The Court of Appeals reasoned that even “[t]hough this testimony is not binding, it is further evidence of how the bank tax has historically been interpreted,” and concluded that this “history and historical understanding” undermined the taxpayer’s argument. *Id.* at 43, 906 S.E.2d at 92.

The Court of Appeals’ willingness to consider the relevance of public testimony to a legislative commission by the Bankers Association representative in *Synovus Bank* cannot be squared with its refusal to consider public testimony to the South Carolina legislature by the Director of the Department himself. If public testimony of *private* entities is relevant when it undermines a taxpayer’s construction of a statute, surely public testimony of *government tax officials* must also be relevant when it supports a taxpayer’s interpretation.

D. The Decisions and Actions of Other Jurisdictions Confirm That Amazon Services’s Interpretation of the Prior Law Was Reasonable.

The sheer novelty of the result below confirms the reasonableness of Amazon Services’s interpretation. Every other state that imposes sales tax, along with the District of Columbia, has passed a “marketplace facilitator” law.¹¹ But no other taxing agency or court from those

¹¹ *See, e.g.*, Alabama (2018 H.B. 470), Arizona (2019 H.B. 2757), Arkansas (2019 H.B. 576), California (2019 A.B. 147, 2019 S.B. 92), Colorado (H.B. 19-1240), Connecticut (2018 S.B. 417), District of Columbia (2018 B22-1070), Hawaii (2019 S.B. 396), Idaho (2019 S.B. 259), Illinois (2019 S.B. 689), Indiana (2019 HEA 1001), Iowa (2018 S.F. 2417), Kentucky (2019 H.B. 354), Maine (2019 H.P. 1064), Maryland (2019 H.B. 1301), Massachusetts (2019 H.4000),

jurisdictions has concluded that Amazon Services—or any marketplace facilitator—was liable for sales tax on third-party sales before those changes were enacted. The Court of Appeals’ ruling stands alone.

Moreover, the Department conceded at trial that “as of the first quarter of 2016, there was no rule, regulation, guidance, [or] publication of any kind ... relating to the tax of third party sales on online marketplaces.” App. 696. It agreed there had been “zero guidance, absolutely no guidance ... that had been communicated or written down for the public’s benefit on the topic of third party sales and online marketplaces.” *Id.* And it conceded that “[n]o other state has attempted to pursue this legal theory against online retailers like Amazon.” Ex. 205, App. 1386. Amazon Services was reasonable in expecting that South Carolina would not make itself such a dramatic outlier.

The Court of Appeals incorrectly stated that Amazon Services “failed to identify” any states that “had statutes substantially similar to sections 12-36-20, 12-36-70, and 12-36-910(A) in effect prior to the enactment of the marketplace facilitator laws.” App. 2121. In truth, Amazon Services highlighted several substantially similar laws. *See* App. 2099-100 (citing, *e.g.*, *Cincinnati Reds, L.L.C. v. Testa*, 122 N.E.3d 1178, 1183 (Ohio 2018) (“Sale is defined ... to include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, ... but this definition applies only if those transactions are for a consideration.” (cleaned up)); *Comptroller of Treasury v. J/Port, Inc.*, 967 A.2d 253, 262 (Md.

Minnesota (2017 H.F. 1, 2019 H.F. 5), Nebraska (2019 L.B. 284), Nevada (2019 A.B. 445), New Jersey (2018 A4496), New Mexico (2019 H.B. 6), New York (2019 S. 1509 Part G), North Dakota (2019 S.B. 2338), Ohio (2019 H.B. 166), Oklahoma (2018 H.B. 1019XX), Pennsylvania (2017 Act 43, 2019 H.B. 262), Rhode Island (2017 H. 5175A, 2019 S. 251), South Dakota (2018 SB2), Texas (2019 S.B. 1525), Utah (2019 S.B. 168), Vermont (2019 H. 536), Virginia (2019 G. 1722), Washington (2017 H.B. 2163, 2019 S.B. 5581), West Virginia (2019 H.B. 2813), Wisconsin (2019 A.B. 251), and Wyoming (2019 S.B. 69).

Ct. Spec. App. 2009) (“The term sale is further defined ... as a transaction for a consideration whereby ... title or possession of property is transferred or is to be transferred absolutely or conditionally by any means” (cleaned up)). Neither the Court of Appeals nor the Department could identify any language or feature of the pre-2019 tax law that was unique to South Carolina that explains why its statute covered marketplace facilitators before the 2019 amendment when the tax laws of every other state with a sales tax did not. And it most certainly has never identified what was unique about the South Carolina statute that made it *unreasonable* for Amazon Services to conclude that South Carolina law was consistent with everywhere else.

Moreover, a number of other states’ courts with recently-enacted marketplace facilitator laws have issued opinions that squarely disagree with the Court of Appeals, casting further doubt on its conclusion. *See Normand v. Wal-Mart.com USA, LLC*, 340 So. 3d 615, 626 (La. 2020) (“Clearly, an online marketplace is not a party to the underlying sales transaction between the third party retailers and their customers, but rather a facilitator of the sale.”); *Orthotic Shop, Inc. v. Wash. Dep’t of Revenue*, 544 P.3d 1072, 1077 (Wash. Ct. App. 2024) (concluding that third-party sellers, not Amazon, “sold to buyers” and explaining that “[t]his conclusion accords with the merchants’ descriptions of their business activities and the contractual agreements between the merchants and Amazon to sell goods on Amazon’s site”); *StubHub*, 2024 Wisc. Cir. LEXIS 38, at *23-24 (finding sales tax statute did not obligate StubHub to remit sales tax for third-party ticket sales on its website because “reasonable persons could disagree about whether StubHub was ‘selling’ anything by running an online marketplace for other ticket sellers,” and ambiguities in statute “must be resolved in favor of the person upon whom it is sought to impose the tax” (internal quotation marks omitted)). As one court recently explained, “If the legislature thought that the law before [the marketplace facilitator amendment] required marketplace facilitators

such as Amazon to collect taxes, it would have faced no need to enact the new provisions.”

Orthotic Shop, 544 P.3d at 1079. The same is true here.

This Court, of course, is the authoritative arbiter of South Carolina law. But South Carolina law confirms that it was reasonable for Amazon Services to conclude that South Carolina would not be an outlier here. As this Court has long recognized, when other state courts interpret “practically identical” language in their taxing statutes, “[t]he construction accorded that language, as applied to facts substantially identical with those of this case, ... is ... entitled to great weight.” *Fuller v. S.C. Tax Comm’n*, 128 S.C. 14, 121 S.E. 478, 483 (1924); *see also*, *e.g.*, *Centex Int’l*, 406 S.C. at 146, 750 S.E.2d at 72 (“[W]e have looked to other jurisdictions to see if courts have permitted the type of pass through that Appellant seeks. While these cases are not dispositive as they are based on specific state statutes, we view them as instructive.”); *Duke Energy Corp. v. S.C. Dep’t of Revenue*, 415 S.C. 351, 357, 782 S.E.2d 590, 593 (2016) (“We agree ... that extra-jurisdictional cases addressing this [tax] issue are instructive ...”). That every state in the country that imposes a sales tax—many with statutes much like South Carolina’s—has enacted marketplace facilitator legislation to extend sales tax remittance duties to Amazon Services and its peers demonstrates that legislative action was required to capture the novel business model that internet marketplaces reflect with respect to third-party sales. *Cf.* *Fuller*, 128 S.C. 14, 121 S.E. at 484 (invalidating tax assessment and noting that the Tax Commission failed to cite any “decisions from other states” upholding a similar tax assessment). Yet the Court of Appeals rejected wholesale the experience and judgment of every other taxing jurisdiction in the country. App. 2121. This Court should reverse.¹²

¹² Throughout this litigation, the Department has invoked the U.S. Supreme Court’s decision in *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018), to support its position. But *Wayfair* is irrelevant here. In *Wayfair*, the Supreme Court eliminated the “physical nexus” requirement,

III. Applying the Sales Tax Law Prior to the Marketplace Facilitator Amendments to Amazon Services Violates the Due Process Guarantee of Fair Notice.

The Court of Appeals also erred when it held that the Department’s application of the Sales and Use Tax Act did not violate the due process guarantee of fair notice protected by the South Carolina and U.S. Constitutions.

“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); accord *Huber v. S.C. State Bd. of Physical Therapy Exam’rs*, 316 S.C. 24, 26-28, 446 S.E.2d 433, 435 (1994). “[R]egulated parties should know what is required of them so [that] they may act accordingly,” and “precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *Fox Television*, 567 U.S. at 253; see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”). A law or regulation that “fails to provide a person of ordinary intelligence fair notice of what is prohibited [or required], or is so standardless that it authorizes or encourages seriously discriminatory enforcement” violates this constitutional guarantee. *Fox Television*, 567 U.S. at 253 (citation omitted).

holding that an out-of-state seller’s physical presence in the taxing state is not necessary to require the seller to collect and remit the state’s sales tax. *Id.* at 188 (overruling *Quill Corp. v. N. Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753 (1967)). *Wayfair* thus gave South Carolina the *power* to require out-of-state sellers with no physical presence in South Carolina to collect sales tax on sales to South Carolina residents, without running afoul of the U.S. Constitution. But *Wayfair* said nothing about whether South Carolina had in fact *exercised* that power by enacting a statute that covered the conduct at issue here. 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’s reliance on *Wayfair* is a red herring.

The Department’s attempt to impose the sales tax collection obligation on Amazon Services for third-party sales prior to 2019 effectively subjects Amazon Services to the 2019 amendment retroactively, and violates the constitutional requirement of fair notice. As discussed above, during the first quarter of 2016 (the specific period at issue here), the law did not impose any sales tax obligation on online marketplace facilitators for third-party sales. The Department itself acknowledged that under then-existing law “[t]here [was] no law related to taxation of third party sales” and that taxpayers had to “guess” who owed sales tax for third-party sales on online marketplaces. *See, e.g.*, Ex. 194, App. 1287 at 6:13-15, 8:40-50; Ex. 203, App. 1372; Ex. 205, App. 1411; Ex. 207, App. 1563. The Department had not attempted to collect sales tax from Amazon Services or any other marketplace facilitator for third-party sales during the more than 15-year period that Amazon Services had been operating its marketplace. It was not until 2018 that the Department announced a sudden policy change when it issued for the first time any guidance related to the taxation of third-party sales on online marketplaces (in the form of S.C. Revenue Ruling 18-4). That is why the Department advocated for—in the Department’s own words—“legislative change.” Ex. 202, App. 1320. And that is also why the legislature adopted a comprehensive set of amendments specifically crafted to impose this duty on online marketplace facilitators. *See supra* at 34-37.

Fox Television shows why the Department’s attempt to give retroactive effect to the 2019 amendments must be rejected. There, the FCC had a history of enforcing a federal law banning “obscene, indecent, or profane language” only if the obscenity was pervasive and repeated rather than “isolated or fleeting.” 567 U.S. at 246. After isolated curse words and brief displays of nudity were broadcast on Fox and ABC, the FCC “clarified” its policy in a new order stating that

isolated incidents could be indecent under federal law. *Id.* at 249. The FCC retroactively applied this “clarification” to impose fines on Fox’s and ABC’s previous broadcasts. *Id.*

The U.S. Supreme Court struck down the sanctions orders as a violation of the constitutional guarantee of fair notice. As the Court explained, the regulatory history leading up to the fines made “it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent.” *Id.* at 254. The FCC’s “lack of notice to Fox and ABC that its interpretation had changed ... failed to provide a person of ordinary intelligence fair notice of what is prohibited.” *Id.* (brackets, citation, and internal quotation marks omitted).¹³ So too here.

The Court of Appeals’ attempt to distinguish *Fox Television* is circular. The Court of Appeals found *Fox Television* “inapplicable” because unlike in that case, here, “no evidence shows the Department attempted to retroactively apply the new law or policies to Amazon Services’s conduct. Rather, the Department applied the sales tax law that was in place at the time.” App. 2122-23. The Court of Appeals’ distinction rests entirely upon the assumption that the 2016 Act unambiguously imposed a duty on Amazon Services to collect sales tax for third-party sales. As discussed above, that assumption was wrong. This Court should reverse.

CONCLUSION

For the foregoing reasons, Amazon Services respectfully requests that this Court reverse the Court of Appeals’ decision.

¹³ It did not matter that, years earlier, the FCC had issued a decision stating that televising nudity “might well raise a serious question of programming contrary to [federal law].” *Fox Television*, 567 U.S. at 256 (citation omitted). “An isolated and ambiguous statement from [an earlier] Commission decision,” the Court explained, “does not suffice for the fair notice required when the Government intends to impose over a \$1 million fine for allegedly impermissible speech.” *Id.* at 256-57.

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