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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Appellate Case No. 2024-000625

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

v.

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

BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF REVENUE

SOUTH CAROLINA DEPARTMENT OF REVENUE
Jason P. Luther (S.C. Bar No. 78021)
300A Outlet Pointe Blvd.
Columbia, SC 29210
(803) 898-5131

BURR & FORMAN LLP
Tracey C. Green (S.C. Bar No. 9342)
Chad N. Johnston (S.C. Bar No. 73752)
P.O. Box 11390 (29211)
1221 Main Street, Suite 1800
Columbia, SC 29201
(803) 799-9800

VIVA LAW FIRM
Lauren Acquaviva (S.C. Bar No. 100528)
672 Marina Drive, Suite 101
Charleston, SC 29492
(843) 216-7728

Attorneys for Respondent

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Introduction

Amazon Services, LLC (Petitioner or Amazon) owns and operates Amazon.com, an online, direct-to-consumer shopping website that has become ubiquitous in the American commercial goods and products space over the past thirty years. The undisputed facts and evidence of this case demonstrate that a customer can search for, compare, select, tender payment, purchase, track, receive, return, and request/receive a refund for tangible personal property on Amazon.com and only interact—and transact—with one entity: Petitioner Amazon Services, LLC. The products offered for sale on Amazon.com are owned by Amazon, an Amazon affiliate, or third-parties who have contracted with Amazon. Regardless of who owns the product, customers follow the same purchasing process for all products sold on Amazon.com, and Amazon offers those products for sale and accepts payment from customers for those products, on its website.

At issue here is the application of the law that existed in the first quarter of 2016 and whether—under those laws—Amazon is in the business of selling tangible personal property at retail. Admittedly, the landscape of sales tax law is different today than when the Department of Revenue (Department) initiated the instant audit of Amazon's tax remittance for the first quarter of 2016. In 2019, three years after the Department audited Amazon, the General Assembly enacted what is commonly identified as "marketplace facilitator" legislation to address the new interstate taxation landscape created by *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018), which upended nearly 50 years of sales tax policy previously based on a seller's physical presence in a state. 2019 S.C. Acts 21 (effective April 26, 2019) (Act 21). Amazon contends that, since 2019, it has been and is responsible for remitting sales taxes on all sales occurring on Amazon.com (including both products owned by Amazon and its affiliates and those owned by third parties), but only because Act 21 changed the rules. And Amazon accuses the Department of retroactively applying Act 21 to the first quarter of 2016.

But contrary to Amazon's characterizations, although Act 21 addressed a variety of business models, it did not change existing law insofar as it applied to Amazon's retail business operations. And at no time has the Department argued or advocated for the application of Act 21 to the Petitioner with respect to period in question. The Department completed its audit and issued its assessment and Determination long before marketplace facilitator legislation was even a pre-filed bill. Nor did the Administrative Law Court (ALC) or the Court of Appeals apply the post-*Wayfair* clarification of the law to Amazon retroactively. Thus, the factual and legal issues in this appeal are discrete, and the decisions of the ALC (the Order) and the Court of Appeals (the Opinion) have no substantial continuing effect because the parties agree as to the application of pertinent constitutional and statutory law post-Act 21 to present and in the future.

As to the questions before the Court, Amazon concedes that sales of tangible person property occur on Amazon.com. In that first quarter of 2016, the South Carolina Sales and Use Tax Act (the Act) imposed a sales tax "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) (emphasis added), defined a "business" as including "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect," *id.* § -20, and defined a "retailer" or "seller" to include, in relevant part, "every person . . . selling or auctioning tangible personal property *whether owned by the person or others*," *id.* § -70(1)(a) (emphasis added). Because the substantial evidence of record demonstrates that Amazon falls within all of these provisions, the ALC correctly ruled that Amazon is the seller/retailer of tangible personal property sold on Amazon.com and is therefore required to collect and remit sales and use tax for all products sold its website—including those owned by third-parties—during the period at issue in this case.

In asking this Court to reverse, Amazon tries to escape the routine application of the Act to its business by claiming that the ALC's Order and the Court of Appeals' Opinion run counter to and

impair the longstanding principle that ambiguous tax statutes must be construed in favor of the taxpayer if there is a reasonable basis to do so. But a taxpayer cannot escape liability for taxes merely because it has a constructed a theory as to why the statute does not apply, if the language otherwise plainly covers the taxpayer; rather, there first must be an ambiguity in the statute before a taxpayer's reasonable interpretation is implicated. Applying the plain statutory language to the facts found by the ALC in the first instance—as is required by principles of statutory application and this Court's standard of review—demonstrates that Amazon sells and makes a profit on the sale of all tangible personal property sold on Amazon.com, makes no meaningful distinction between sales of its own goods and those owned by third-parties and, thus, is encompassed within the plain language of the Act.

Based on the applicable statutory language, as well as prior appellate decisions concluding that the Act is not ambiguous, the Court of Appeals correctly affirmed the ALC's determination, held that the Act is not ambiguous, and found Amazon's argument against liability therefore is neither pertinent nor reasonable. Moreover, there is no constitutional due process issue because, either the 2016 version of the Act applies to Amazon or it does not, and Amazon's failure to adduce evidence on its constitutional claim during trial renders the due process claim meritless. The Opinion should be affirmed.

Counter Statement of the Case

In 2011, Amazon sought to locate a warehouse/distribution facility in Lexington County, South Carolina for the first time. Doing so would have also subjected Amazon to the Act's sales tax collection and remittance obligations for the first time because its physical presence in the state would establish a substantial nexus for sales tax purposes. *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (*overruled*) (requiring, pursuant to the dormant commerce clause, a physical presence for a business to have a substantial nexus with a taxing state such that it would be subject to that state's sales and use

tax). Fully aware of these tax consequences, Amazon lobbied the General Assembly to pass a reprieve as a part of the State's incentive package for locating a facility in South Carolina.

Amazon succeeded. In 2011, the South Carolina General Assembly passed the Distribution Facility Sales Tax Exemption (the Moratorium) primarily to encourage investment by Amazon in South Carolina. *See* S.C. Code Ann. § 12-36-2691 (2014) (Moratorium Statute). The Moratorium was in place from 2011 through 2015, and exempted companies from remitting sales and use tax under the existing law on goods sold in South Carolina if those companies maintained a distribution facility in the state meeting certain criteria as defined in the statute. *Id.* Amazon was the principal beneficiary of this exemption, avoiding the Act's requirement that it collect and remit sales tax and thereby gaining a competitive advantage over brick and mortar businesses during the Moratorium's reprieve. **(App. p. 1046)** (Ex. 178 at 9). Prior to 2011, Amazon did not have a physical presence in South Carolina and, thus, had no obligation to collect and remit sales and use tax. *Id.*

After the Moratorium expired and Amazon's obligation to collect and remit sales and use tax began, the Department ascertained that Amazon was not collecting sales and use tax for *all* of the sales taking place on Amazon.com. **(App. pp. 680, 1024)** (Tr. 527; Ex. 171, Dep't Determination at 4). Upon further investigation, the Department learned that Amazon was remitting sales and use tax only for sales of goods owned by Amazon companies and affiliates, but not for sales of goods listed on Amazon.com by third-parties. *Id.* Consequently, the Department audited Amazon's first quarter 2016 operations and, on June 21, 2017, issued its Determination assessing Amazon a total of $12,490,502.15 in taxes, penalties, and interest for the period of January 1, 2016 through March 31, 2016. **(App. pp. 1017-1032)** (Ex. 171, Dep't Determination). On July 21, 2017, Amazon filed its request for a contested case hearing with the ALC. **(App. pp. 1935-52)** (Amazon Request for Contested Case). An evidentiary hearing was held on February 4-6, 2019, and on September 10, 2019 the ALC issued its Order affirming the Department's Determination. **(App. pp. 7-60)**.

Amazon filed its notice of appeal on October 10, 2019. The Court of Appeals issued its Opinion affirming the ALC on January 24, 2024. **(App. pp. 2105-2125)**. Amazon sought reconsideration, which was denied by Order dated March 18, 2024. Amazon sought certiorari from this Court on April 17, 2024, and this Court granted the Petition on October 3, 2024.

Counter Statement of the Facts

Amazon refers to purchasers of products on Amazon.com as *its* "buyers" or "customers." **(App. pp. 194, 309)** (Tr. 47, 162); **(App. p. 913)** (Ex. 14) ("Amazon places high importance on maintaining the trust of *our* millions of satisfied *buyers*." (emphasis added)); **(App. p. 932)** (Ex. 40) (requiring pricing parity "[t]o ensure that *our customers* have access to a large selection of Products at competitive prices" (emphasis added)); **(App. p. 912)** (Ex. 7) ("Customers trust that they will find low prices on Amazon.com."). The three primary persons or entities that list items for sale on Amazon.com are: (1) Amazon;[1] (2) Amazon affiliates; and (3) unaffiliated third-parties (Third-Party Merchants). During the period at issue, Amazon voluntarily collected sales and use taxes for retail Amazon.com sales of goods owned by Amazon or its affiliates. **(App. p. 1024)** (Ex. 171, Dep't Determination at 4). Amazon did not, however, collect or remit sales and use taxes for Amazon.com sales of goods owned by Third-Party Merchants.

1. Amazon.com Customer Experience

Given the ubiquitous nature of shopping on Amazon.com, the customer experience of purchasing tangible personal property on the website is likely known to the reader, but the below

[1] Although Amazon appears to dispute it, *see* Pet'r's Br. at 29, it is a fact that Amazon is registered in South Carolina as a "retailer" and collects and remits sales tax for sales on Amazon.com of property that it or its affiliates own, as well as its sale of "Amazon Prime" subscriptions to customers residing in South Carolina. **(App. pp. 8, 326, 678-79)** (Order at 2, n.3; Tr. 179, 525-26). Amazon Prime subscriptions provide Amazon customers who purchase the subscription a variety of benefits that improve their shopping experience on Amazon.com, including free and discounted expedited shipping. **(App. p. 394)** (Tr. 253).

offers a summary recapitulation of the experience, as supported by the evidence adduced during the contested case hearing:

- An individual interested in purchasing tangible personal property searches Amazon.com, a website owned and operated by Amazon. **(App. pp. 17, 222)** (Order at 11; Tr. 75).
- The search results populate on the website. **(App. pp. 17, 223)** (Order at 11; Tr. 76).
- The individual can broaden or narrow the search results by interacting directly with Amazon.com. **(App. pp. 222-23)** (Tr. 75-76).
- The individual clicks on a product to select it and is taken to a "product-detail page" on Amazon.com.[2] **(App. p. 17)** (Order at 11). This page is created and maintained by Amazon and displays the product's attributes, including descriptions, images, and customer reviews, based on product information supplied by the owner (whether an Amazon affiliate or third-party merchant). **(App. pp. 223, 931)** (Tr. 76; Ex. 39). The content on this page is highly regulated by Amazon based on specific rules that are intended to normalize the retail experience. **(App. pp. 48-49)** (Order at 42-43).
- Amazon's proprietary algorithm determines which product—owned by either an Amazon affiliate or a Third-Party Merchant—will be the default product displayed on the product detail page. **(App. pp. 11, 296-97)** (Order at 5; Tr. 149-50).

[2] If the product is sold by more than one merchant, Amazon requires that there only be one "product detail page" per product regardless of whether Amazon, an Amazon affiliate, or one or more Third-Party Merchants may list the product on Amazon.com. Amazon explains this requirement is to "optimize the buying experience" for customers on Amazon.com. **(App. p. 931)** (Ex. 39). Accordingly, "[t]he creation of product detail pages is limited to products that do not already exist within Amazon's catalog" and "[c]reating a product detail page for a product already in the Amazon catalog is prohibited" by Amazon. *Id.* For new products, Amazon imposes content-specific and other detail-page creation policies upon Third-Party Merchants, as well as requirements for any images of the product. *Id.*; **(App. pp. 956-57)** (Ex. 83). Amazon also "uses complex image ranking technology to determine the best images to display" for each product and is not required to use the images uploaded by any Third-Party Merchant. **(App. p. 956)** (Ex. 83).

- Unless the customer clicks a small hyperlink on the product detail page for "Other Sellers on Amazon," the customer will by default purchase the product that the Amazon algorithm determined to be the offeror, which it refers to as the "winner" of the "Buy Box." **(App. pp. 18, 912)** (Order at 12; Ex. 7).[3]
- From there, the individual can choose either to add selected product to a virtual "Cart" on Amazon.com, or immediately purchase the product on Amazon.com via a "buy now" option. **(App. pp. 12, 18, 237, 383)** (Order at 6, 12; Tr. 90, 236).
- Similar to a brick and mortar store, customers can place multiple products from different Third-Party Merchants and Amazon affiliates in the Cart at once and can purchase them during the same transaction. **(App. pp. 12, 329-30, 965-1010)** (Order at 6; Tr. 182-83; Ex. 122).
- Amazon requires the individual to create an Amazon account as a prerequisite to making retail purchases on Amazon.com. **(App. p. 8)** (Order at 2). Amazon requires the individual to choose a user name and password; provide *Amazon* with an email address, billing address, and shipping address; and input and save their credit or debit card information *with Amazon*. All of this occurs on Amazon.com; only after creating this account may a customer purchase the product(s). **(App. pp. 325-26, 329-30, 385)** (Tr. 178-79, 182-83, 238).

[3] Amazon's algorithm uses price, shipping cost, and other variables to determine the winner of the Buy Box. **(App. pp. 296-97, 912)** (Tr. 149-50; Ex. 7). Amazon provides general information to Third-Party Merchants on how to "win" the Buy Box (*e.g.*, "price competitively"); however, Amazon considers the complete method and criteria for winning the Buy Box to be proprietary, and thus it is not publicly available, has not been disclosed by Amazon in this proceeding or elsewhere, and it varies by category and over time. **(App. pp. 373-74)** (Tr. 226-27). Amazon's primary company witness testified that he believed the percentage of sales on Amazon.com that go to the winner of the Buy Box is at least 50%, although he surprisingly was unable to testify as to a more precise percentage or even a range of percentages. **(App. pp. 375-76, 18)** (Tr. 228-29; Order at 12 n.17).

- When customers finish shopping and are ready to pay, they click the "Proceed to checkout" button, which directs them to Amazon's Checkout page. **(App. p. 12)** (Order at 6). There, the customer inputs or confirms its shipping address and payment method and also select a shipping or delivery option. *Id.*; **(App. p. 237)** (Tr. 90).
- Amazon accepts credit and debit cards, U.S.-based checking accounts, "Amazon Store Cards," and Amazon gift cards, but not cash, check, or methods such as PayPal.[4] **(App. pp. 218, 379)** (Tr. 71, 232).
- The transaction occurs entirely on Amazon.com; there is no pop-up window or other action that directs the customers to another website operated by some other third party or even another Amazon affiliate to make payment, rather, the customer's form of payment is either on file with Amazon or tendered directly to Amazon during the transaction on Amazon.com.[5] **(App. p. 13)** (Order at 7).
- On the Checkout page, Amazon provides an "Order Summary" with the total cost of the "Item(s)" selected for purchase, the cost for "Shipping & handling," and the "Estimated tax to be collected" (if any). Notably, there are no per-transaction costs or service fees identified or separately charged by Amazon to the customer. **(App. p. 18)** (Order at 12).
- If the customer purchases more than one product at a time, including from different merchants, Amazon processes the purchases in one transaction. At the time of purchase,

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

[5] Amazon's contract with Third-Party Merchants expressly provides that Amazon has the exclusive right to receive sales proceeds for sales taking place on Amazon.com. **(App. pp. 878-79)** (Ex. 3 at 15-16) ("We will also receive all Sales Proceeds on your behalf for each of these transactions and will have exclusive rights to do so, and will remit them to you in accordance with these Selling on Amazon Service Terms.").

Amazon, through a contractual relationship with its affiliate Amazon Payments, places a hold on the customer's card *provided to and stored by Amazon*. **(App. p. 13)** (Order p. 7).

- Customers receive a specific Amazon.com order number and order confirmation email *from Amazon* detailing their order. **(App. pp. 11-12, 965-1010)** (Order at 5-6; Ex. 122). Amazon's order confirmation email provides: "Thank you for shopping *with us*"; "We'll send a confirmation when your item ships"; and "We hope to see you again soon. **Amazon.com**." **(App. pp. 19, 965)** (Order at 13; Ex. 122) (italics supplied, emphasis in original). The Third-party Merchant, if applicable, is not mentioned in the order confirmation email. **(App. p. 19)** (Order at 13).
- Customers can access their Order Summary and invoices for all of their orders through their Amazon.com customer account or by following the link in the confirmation email. **(App. pp. 18, 965)** (Order at 12; Ex. 122). Like the Checkout page Order Summary, the post-purchase Order Summary identifies the total cost of the "Item(s)" purchased, the "Shipping & handling," and the "Estimated tax to be collected" (if any). **(App. p. 967)** (Ex. 122). Customers can also check the status of their order on the Amazon.com Order Summary page. *Id.* The invoice prepared and provided by Amazon also includes the product costs, shipping and handling costs, and sales taxes (if any). *Id.*
- Customers typically receive only one Amazon.com order number and one invoice from Amazon for a specific transaction, regardless of the number of items purchased and the number of Amazon affiliates or Third-Party Merchants involved. **(App. pp. 12, 965-1010; 336)** (Order at 6; Ex. 122; Tr. 189).
- The customer's bank or credit card statement lists Amazon.com or Amazon Marketplace as the entity charging the card. **(App. pp. 19, 725)** (Order at 13; Tr. 572).

- When the tangible personal property is ready to ship, Amazon sends a shipment confirmation email that identifies only Amazon and provides the option to "Track your package" on Amazon.com. **(App. p. 966)** (Ex. 122). If multiple items are purchased, Amazon is permitted to combine separate orders and products in one box.
- Once the item(s) ship, Amazon Services, again through Amazon Payments, processes payment for the purchase on the customer's card *provided to and stored by Amazon.* **(App. pp. 13-14)** (Order at 7-8).
- Customers may only return a purchased product through their Amazon.com account. Any refund issued to the customer flows through Amazon, and the refund is listed on the customer's bank or credit card statement as "Amazon.com" or "Amazon Marketplace." **(App. pp. 14, 880)** (Order at 8; Ex. 3 at 17).
- Amazon also controls the interaction between the customer and the Third-Party Merchant. If there is any contact prior to a purchase, it must be initiated by the customer by calling the Third-Party Merchant or using a feature on Amazon.com called "buyer/seller messaging," which permits customers to ask product-specific questions.[6] **(App. p. 332)** (Tr. 185). Amazon prohibits Third-Party Merchants from having any direct communications with customers except for the limited purpose of providing product-specific information in response to a direct customer inquiry, completing orders (*e.g.*, confirming shipping addresses), or responding to customer service inquiries. **(App. pp. 11, 869, 945-46, 341)** (Order at 5; Ex. 3 at 6; Ex. 58; Tr. 194).

[6] Third-Party Merchants are not provided access to any potential customer's email through "buyer/seller messaging," but rather receive an encrypted version of the customer's email along with the potential customer's inquiry. **(App. p. 329)** (Tr. 182).

Each of the above findings of the ALC are supported by the evidence and have not been challenged on appeal. As so found, Amazon is the only party directly interacting with customers, accepting payment and shipping information, issuing the sales confirmation and receipt, and otherwise performing the required sales-side aspects of the transaction at the point in time which sales occur on Amazon.com. Moreover, all of the above—a complete sales transaction on Amazon.com—can and typically does occur without any personal contact or communication between a customer and the Third-Party Merchant. **(App. pp. 339-40, 40)** (Tr. 192-93; Order at 34 (finding that "the evidence clearly establishes that sales can be made, and often are made, without any interaction between customers and Merchants")).

2. Order Fulfillment

If a customer orders a product owned by a Third-Party Merchant, the order is shipped to the customer in one of two ways: Either the Third-Party Merchant ships the product itself or, for an additional fee imposed on the Third-Party Merchant, the Third-Party Merchant opts to use Fulfillment By Amazon (FBA) to ship the product.

A. Fulfillment by Third-Party Merchant

When a product owned by a Third-Party Merchant is purchased, Amazon sends the Third-Party Merchant an email notifying it of the sale. **(App. p. 334)** (Tr. 187). The Third-Party Merchant then ships the product to the customer and is required to notify Amazon (rather than notifying the customer) when the item ships.[7] **(App. pp. 361-63, 879-80)** (Tr. 214-16; Ex. 3 at 16-17). Under the terms of the Business Solutions Agreement (BSA), **(App. pp. 864-911)** (Ex. 3), which is the agreement between Amazon and the Third-Party Merchants, *Amazon* then notifies the customer by email that the product has shipped. **(App. pp. 333-34, 880)** (Tr. 186-87; Ex. 3 at 17). Amazon strictly prohibits

[7] Amazon requires Third-Party Merchants to ship items within two business days of order notification. **(App. p. 960)** (Ex. 97).

Third-Party Merchants from sending order confirmation emails to customers. **(App. p. 880)** (Ex. 3 at 17) (providing that a Third-Party Merchant will "except as expressly permitted by this Agreement, not send customers emails confirming orders or fulfillment of Your Products").

Once Amazon receives notice that the Third-Party Merchant has shipped the product, it processes the customer's credit card. **(App. pp. 362-63)** (Tr. 215-16). Typically, this is done by its affiliate, Amazon Payments, Inc., although Amazon can, in its discretion, process the payments directly.[8] **(App. pp. 871, 873, 319-20)** (Ex. 3 at 8, 10; Tr. 172-73). Amazon records the transaction in the Third-Party Merchant's "Seller Account," which is part of the "Seller Central" online portal where Third-Party Merchants can view the proceeds of sales along with the applicable fees paid to Amazon. **(App. pp. 910-11)** (Ex. 3 at 47-48). However, Amazon does not actually maintain separate bank or deposit accounts for each Third-Party Merchant, and in fact may combine the sales proceeds into a single account, and even invest them for Amazon's own benefit. **(App. pp. 386-87, 910-11)** (Tr. 239-40; Ex. 3 at 47-48). Every two weeks, or more frequently if requested (but always at Amazon's discretion), Amazon transfers the sales proceeds less its fees to the Third-Party Merchant's bank account. **(App. p. 882)** (Ex. 3 at 19). However, Amazon expressly reserves the right to withhold payments from Third-Party Merchants until it is "confident that customers have received the products they ordered." **(App. p. 933)** (Ex. 41).

Amazon determines which Third-Party Merchants are permitted to offer "Premium Shipping" options, including same-day, one-day, and two-day shipping. **(App. pp. 929-30)** (Ex. 38). To offer Premium Shipping, Third-Party Merchants must have been listing products on Amazon.com for more than 90 days and must meet certain delivery performance requirements established by Amazon. *Id.* If

[8] Regardless of the entity that processes the payments, Amazon, as owner and operator of Amazon.com, is always the entity that accepts the payment from the customer when the customer inputs his or her credit card information into Amazon.com. **(App. pp. 385-86)** (Tr. 238-39). The fact that Amazon may share that customer information with an affiliate for credit card processing purposes does not change the fact that Amazon, and not the Third-Party Merchant, accepts the payment.

a Third-Party Merchant's performance falls below established thresholds, Amazon may revoke the Third-Party Merchant's eligibility to offer Premium Shipping. *Id.* Amazon also requires that the amount of all shipping and handling charges for orders fulfilled by Third-Party Merchants remain within the parameters set by Amazon. **(App. p. 879)** (Ex. 3 at 16). And for certain types of orders, such as for products offered by Third-Party Merchants on the "Individual selling plan" and for "BMVD Products,"[9] Amazon sets "category-based shipping and handling charges," which the Third-Party Merchants must "accept . . . as payment in full for [their] shipping and handling." *Id.*

For sales in which the order is fulfilled by the Third-Party Merchant, the BSA provides that the Third-Party Merchants are responsible for responding to claims for certain shipping-related issues, including non-performance, non-delivery, mis-delivery, theft, or mistake. **(App. p. 880)** (Ex. 3 at 17). Third-Party Merchants are also required to handle returns and refunds, but all payments flowing from the Third-Party Merchant to the customer must go through Amazon. *Id.* Notwithstanding these requirements, Amazon also implements an "A-to-Z Guarantee Program," which allows customers to submit claims related to sales involving Third-Party Merchants directly to Amazon for resolution. **(App. pp. 880-81)** (Ex. 3 at 17-18). Under this program, Amazon contacts the Third-Party Merchant about the complaint to confirm certain information about the transaction, and then determines in its sole discretion how to settle the claim with the customer, which may include reimbursement to the customer at the Third-Party Merchant's expense. *Id.*

B. Fulfillment by Amazon

If a Third-Party Merchant opts to pay extra for FBA, Amazon stores, selects, packages, and ships the Third-Party Merchant's products when a sale is made. **(App. pp. 244-45)** (Tr. 97-98). The costs of this program include monthly storage fees, as well as transaction-based fulfillment fees. **(App.**

[9] "'BMVD Product' means any book, magazine or other publication, sound recording, video recording, and/or other media product in any format . . . ." **(App. p. 883)** (Ex. 3 at 20).

p. 901) (Ex. 3 at 38). To start the process, Third-Party Merchants register each product for FBA, which is operated by another Amazon affiliate, Amazon Fulfillment Services (AFS). **(App. p. 896)** (Ex. 3 at 33). However, Third-Party Merchants do not have any contractual relationship with AFS. Rather, Third-Party Merchants contract for FBA services with the Petitioner, Amazon Services, who in turn directs AFS to carry out those FBA services. Third-Party Merchants sign up for FBA through Amazon.com. **(App. p. 873)** (Ex. 3 at 10).

As part of FBA, Third-Party Merchants must initially pay to ship their products to an Amazon fulfillment center and also pay storage fees to Amazon. **(App. pp. 896-97)** (Ex. 3 at 33-34). Unless the Third-Party Merchant pays an extra fee for Amazon to restrict its distribution options, Amazon selects in its discretion the fulfillment center to which the Third-Party Merchant ships its product. **(App. pp. 404-06, 953-55)** (Tr. 257-59; Ex. 65). Otherwise, Third-Party Merchants have no control as to the fulfillment center(s) at which their products are stored. Third-Party Merchants agree that once Amazon receives their products, Amazon can commingle products of the same type. **(App. p. 898)** (Ex. 3 at 35). Third-Party Merchants may request their product units be returned to them, but must pay a per-item fee to Amazon to complete the return or must have Amazon dispose of the product. **(App. pp. 899, 958-59, 575-76)** (Ex. 3 at 36; Ex. 88; Tr. 422-23).

When a customer purchases a product subject to FBA, Amazon sends an automated email to AFS. AFS then selects which of the Third-Party Merchant's products to send to the customer, and then packages and ships the product to the customer. **(App. p. 406)** (Tr. 259). Amazon may combine products from different Third-Party Merchants or Amazon affiliates together into one shipment. **(App. p. 898)** (Ex. 3 at 35). Upon shipment, Amazon processes the customer's credit card and the funds are distributed in the same manner as if a Third-Party Merchant shipped the item itself. **(App. pp. 363-64)** (Tr. 216-17). Importantly, under the BSA, Amazon has sole discretion regarding the resolution of *all* customer service issues relating to FBA products. **(App. p. 900)** (Ex. 3 at 37).

3. Amazon's Relationship with Third-Party Merchants

Amazon's relationship with the Third-Party Merchants who supply products for sale on Amazon.com is delineated in the BSA, as well as numerous policy documents promulgated by Amazon that impose on the Third-Party Merchants various guidelines, terms and conditions, codes of conduct, and other requirements. The BSA is a single agreement with multiple subsections to which Petitioner and other Amazon affiliates are parties, all of which are collectively referred to simply as "Amazon" in the BSA. **(App. p. 864)** (Ex. 3 at 1). The BSA contains general provisions covering the overall relationship between Amazon and the Third-Party Merchants, as well as more specific provisions governing particular parts of Amazon's sales platform, including "Selling on Amazon," "Fulfillment by Amazon," and "Transaction Processing."

To list products on Amazon.com, a Third-Party Merchant must agree to the terms of the BSA. The BSA may be modified at any time by Amazon. **(App. p. 870)** (Ex. 3 at 7). However, Third-Party Merchants do not have the option of altering the terms of the BSA. **(App. p. 313)** (Tr. 166). Any modifications by Amazon also are deemed accepted by a Third-Party Merchant simply by them continuing to list products on Amazon.com after Amazon posts the modification on Seller Central. **(App. p. 870)** (Ex. 3 at 7). The separate policy documents promulgated by Amazon may be modified by Amazon and become effective without notice to the Third-Party Merchants. *Id.* Amazon may suspend or terminate the BSA with a Third-Party Merchant, and suspend or terminate a Third-Party Merchant's ability to list products on Amazon.com, at any time and for any reason. **(App. pp. 965-66)** (Ex. 3 at 2-3).

The BSA includes many material limitations on how Third-Party Merchants participate in Amazon.com transactions. For example, with respect to product pricing, the BSA requires Third-Party Merchants to ensure that the price they set, as well as any other terms or conditions relating to the product they wish to list on Amazon.com, "is at least as favorable to Amazon Site users as the

most favorable terms upon which a product is offered or sold via [the Third-Party Merchant's other] Sales Channels . . . ." **(App. p. 881)** (Ex. 3 at 18). Additionally, Third-Party Merchants must provide product information in the format required by Amazon. **(App. p. 878)** (Ex. 3 at 15). The BSA also provides that Amazon has the sole discretion to "determine the content, appearance, design, functionality, and all other aspects of [Amazon.com], including by redesigning, modifying, removing or restricting access to [the site], and by suspending, prohibiting or removing any listing." **(App. p. 883)** (Ex. 3 at 20).

Amazon also controls the flow of funds between customers, Amazon, and Third-Party Merchants. Amazon requires that its affiliate, Amazon Payments, subject to Amazon's discretion as references above, be used as the payment processor for all transactions on Amazon.com. **(App. p. 910)** (Ex. 3 at 47). However, pursuant to the BSA, Amazon, not Amazon Payments, will "receive all Sales Proceeds on your behalf for each of these transactions and will have exclusive rights to do so, and will remit them to you in accordance with these Selling on Amazon Service Terms." **(App. pp. 878-879)** (Ex. 3 at 15-16). As discussed above, all refunds to customers must be routed through Amazon as well. **(App. p. 880)** (Ex. 3 at 17).

Amazon also controls the frequency of fund transfers to Third-Party Merchants for the proceeds from the sale of their goods. Specifically, the BSA provides that proceeds—reduced by Amazon's fees—will be remitted to the Third-Party Merchants, at Amazon's sole discretion, on a bi-weekly basis. **(App. p. 882)** (Ex. 3 at 19). Although a company witness testified that Third-Party Merchants may request more frequent distributions, the BSA states that Third-Party Merchants do "not have the ability to initiate or cause payments to be remitted to [them]." *Id.* And Third-Party Merchants are not entitled to any earned interest on the proceeds held by Amazon. **(App. pp. 910-11)** (Ex. 3 at 47-48). Amazon also bears the risk of credit card fraud. **(App. p. 879)** (Ex. 3 at 16). However, Amazon, at its sole discretion, can withhold a transaction for investigation, refuse to process the

transaction, restrict shipping, or stop or cancel a transaction, and Third-Party Merchants must stop or cancel an order when directed to do so by Amazon. *Id.* For orders that are cancelled at the direction of Amazon, the Third-Party Merchant is required to remit the proceeds to Amazon so that Amazon in turn can issue the refund to the customer. **(App. pp. 879-80)** (Ex. 3 at 16-17).

Moreover, Amazon maintains strict control over the information of customers purchasing goods on the Marketplace. **(App. p. 869)** (Ex. 3 at 6). Third-Party Merchants are strictly prohibited from using Amazon's customer information for any purpose other than those tasks that are necessary to fulfill the Third-Party Merchants' duties related to the transaction on Amazon.com. *Id.* To the extent a Third-Party Merchant needs to initiate any communications with an Amazon customer, it is required to use tools on Amazon.com to communicate with that customer and may not use any other means or methods of communicating with that customer. *Id.*

4. Amazon's Compensation

Amazon is compensated for transactions on Amazon.com through referral fees, applicable variable closing fees, the non-refundable monthly Selling on Amazon subscription fee, and other fees paid by Third-Party Merchants. **(App. pp. 365-67, 882, 915-21)** (Tr. 218-20; Ex. 3 at 19; Ex. 16). Most notable is the "referral fee," which is a variable fee charged by Amazon calculated as a percentage of the gross proceeds of each sale according to Amazon's categorization of the type of product sold, which includes an evaluation of the product's typical margin. **(App. p. 120)** (citing Amazon's R. 30(b)(6) Dep. at 151-54 ("Different products have different margins. Typically, fashion products have high gross margins, electronics have low gross margins.")). Thus, rather than a service or convenience fee associated with, for example, operating Amazon.com, or the opportunity cost of displaying, selling, and processing of payment for a product, the referral fee is tied directly to the sales price and proceeds of the sale. The referral fee percentages assigned by Amazon vary by product category, ranging from six percent (6%) on the low end, to forty-five percent (45%) on the high end **(App. pp. 365-67, 882,**

915-21) (Tr. 218-20; Ex. 3 at 19; Ex. 16), with a median of fifteen percent (15%) **(App. p. 2110)** (Op. at 6). Amazon is therefore compensated through transaction fees calculated based on the sales price of the product and not through flat service fees. By structuring its profit as a transaction-based fee, Amazon ensures that it makes a profit on—and receives consideration for—every sale occurring on Amazon.com. **(App. pp. 37-38)** (Order at 31-32) ("Amazon Services therefore profits from every product that is sold upon its website—its profits are simply set by a fee structure.").

5. Sales and Use Tax Collection

No person or entity other than Amazon directly interfaces with the customer through the purchase transaction.[10] Only Amazon accepts and processes customer payments, and Amazon is the only entity that participates at the point of sale[11] for all transactions on Amazon.com. Thus, only Amazon has the ability to collect sales and use taxes arising from the purchase of tangible personal property on Amazon.com.

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

[11] In evaluating Amazon's business model under the Act, the ALC appropriately discussed the aspects of retail sales occurring on Amazon.com, including Amazon's involvement in and control of the point in time in which a sale occurs on the marketplace. Neither the Department nor the ALC has never used the term "point of sale" as an undefined, extra-statutory sword that resolves the question of Amazon's liability under the Act, as implied by Amazon, but rather as a fair description of "the point in time when a sale takes place and who is present at that point[, which] is an elementary consideration in determining who is the seller." **(App. p. 32)** (Order at 26). The purpose of the Act is not just to impose a tax, but to ensure the remittance of the tax. Thus, a focus on the "point of sale"—*i.e.*, the point where offer, acceptance and exchange of payment information is received from a customer—in the determination of the "seller" or "retailer" for any given transaction is foundational to the application of the tax to any sale.

During the period at issue, a "Professional" Third-Party Merchant could pay a fee and subscribe to Amazon's "Tax Calculation Service." **(App. pp. 922-25)** (Ex. 23).[12] Under this program, Amazon provides the "Professional" Third-Party Merchant a list of tax codes, the Third-Party Merchant matches the tax codes to its products and, when the products are sold, Amazon calculates and withholds taxes for the transaction. *Id.* Amazon collects the tax from the customer and then disburses the tax to the Third-Party Merchant after taking its percentage-based fee. *Id.* Even under this program, Amazon does not accept any responsibility for remitting the taxes, or ensuring that the taxes are remitted, to any taxing authority. *Id.*

Notably, Amazon did not make available the tax collection service to non-professional Third-Party Merchants during the period at issue. *Id.* (offering tax collection option to "Marketplace Professional seller[s] or Amazon Webstore seller[s]" only). Again, the BSA specifically prohibits Third-Party Merchants from receiving any funds from a customer outside of Amazon's payment process on Amazon.com. Thus, during the period at issue, a non-professional Third-Party Merchant had no way to collect sales and use tax for sales transactions involving products listed by that Third-Party Merchant on Amazon.com. In other words, despite claiming that Third-Party Merchants are the "sellers" responsible for collecting, reporting, and paying all taxes, Amazon's own policies and procedures were designed in such a way that disincentivized Third-Party Merchants from complying with any such tax obligation because it prevented them from collecting the sales tax from the customer at the time of purchase, which the Act expressly allows. *See* S.C. Code Ann. § 12-36-940 (authorizing retailers to collect tax from purchase by including it in the sales price but confirming retailers are still responsible for the tax even if they are unable to collect it from the purchaser).

[12] Amazon's "Professional Selling Plan" requires Third-Party Merchants to pay a $39.99 monthly subscription fee to Amazon. **(App. pp. 365-66, 915-21)** (Tr. 218-19; Ex. 16). Third-Party Merchants who do not subscribe to this plan are referred to as "Individual sellers," and must pay a $0.99 per-item fee for each item that is sold on Amazon.com, in addition to other fees, including the aforementioned referral fee. *Id.*

6. Comparable Transactions and Relationships

The ALC found that Amazon.com was akin to a traditional retail store or consignment shop, **(App. pp. 45, 52-53)** (Order at 39, 46-47), and that the Third-Party Merchants' participation on Amazon.com most closely resembles that of a manufacturer, distributor, or wholesaler in the more traditional retail setting, or that of a consignor in a consignment scenario, **(App. pp. 16-17, 19, 41, 42, 48, 50)** (Order at 10-11, 13 n.20, 35 n.33, 36, 42, 44). While the evidence presented by Amazon showed that Third-Party Merchants may develop, manufacture, and source their products, and may even develop the product packaging for such products, as well as handle product-specific customer service questions, the ALC found this to be indicative of what a traditional manufacturer or wholesaler does, rather than a retailer. *Id.* On the other hand, the functions typically associated with a brick-and-mortar retail store—advertising and offering for sale multiple products, providing a "shopping cart" to customers to select those products, accepting payment for those products, and handling refunds and other non-product specific customer service issues—all are handled by Amazon. Crucially, the ALC found that a customer's purchase on Amazon.com can—and most often does—occur only through interaction with Amazon and no one else, including any Third-Party Merchant. **(App. p. 40)** (Order at 34).

Standard of Review

Because Amazon was challenging the Department's Determination before the ALC, it had the burden of proof to show by a preponderance of the evidence that the Department's application of the law to the facts of the case was incorrect. *Leventis v. S.C. Dep't of Health & Env't Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that as a general rule the complaining party bears the burden of proof). It carries that burden into this appeal. *Conran v. Joe Jenkins Realty, Inc.*, 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974) ("The burden of proof is on the appellant to convince this Court that the lower court was in error.").

Amazon therefore has the burden of proving that the ALC's determination should be reversed because it was:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B).[13] Matters of law are reviewed de novo. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below."). However, this Court "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Carmax Auto Superstores W. Coast, Inc. v. S.C. Dep't of Revenue*, 411 S.C. 79, 85, 767 S.E.2d 195, 198 (2014). Rather, judicial review of the ALC's findings of fact is limited to determining if the findings are 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). "Substantial evidence is . . . evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the [ALC] reached . . . ." *Leventis*, 340 S.C. at 130, 530 S.E.2d at 650.

Argument

The Court of Appeals should be affirmed because the Opinion faithfully interprets and applies the statutory language as well as the prior precedent of this Court and the Court of Appeals in affirming the Department's Determination. The Opinion also properly rejects Amazon's efforts to find a constitutional issue in a straightforward matter of statutory interpretation.

[13] Although the standard is effectively the same, Amazon cites S.C. Code Ann. § 1-23-310 *et seq.*, which governs the ALC's review of agency decisions, rather than this Court's standard of review on appeal from decision of the ALC, which is contained in § -610(B).

1. Because the Court of Appeals and the ALC correctly determined that Amazon is a seller or retailer of the tangible personal property sold on Amazon.com based on the plain language of the Act, it is unnecessary to consider Amazon's effort to shift the burden of proof to the Department and the Opinion should be affirmed.

A. Introduction.

In an effort to shift the burden of proof to the Department and escape its obligation to prove its case, Amazon has effectively abandoned its arguments that the plain language of the Act does not require Amazon to pay sales and use tax for sales of products owned by Third-Party Merchants. Instead, Amazon now relies on the argument that it should be excepted from the routine application of the plain statutory language simply because it has articulated a contrary theory. Amazon takes this tack because the Court of Appeals and the ALC determined that a straightforward application of the Act makes Amazon the seller or retailer of products owned by Third-Party Merchants that are purchased by customers on Amazon.com. In other words, Amazon loses if the Act is plainly applied to its operations based on the factual findings made by the ALC.

Amazon's argument hinges upon a flawed statutory analysis because there is no place for an ambiguity analysis if the pertinent statute plainly applies to the taxpayer. *Crescent Mfg. Co. v. Tax Comm'n*, 129 S.C. 480, 124 S.E. 761, 765 (1924) ("If the intent of the Legislature is apparent from an examination and consideration of the statute as a whole, the rule of strict construction in favor of the taxpayer has no application."). Thus, this Court's decision in *Alltel Communications v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012), is not the first step in the required analysis just because Amazon crafts an argument that the Act does not apply. *Colonial Life & Acc. Ins. Co. v. S.C. Tax Comm'n*, 233 S.C. 129, 149, 103 S.E.2d 908, 918 (1958) ("On the other hand, if the legislative intent is clearly apparent from the language of the statute, there is no occasion for resort to the rule of statutory construction."). Because, as the ALC found and the Court of Appeals affirmed, the Act plainly applies to make Amazon the seller or retailer of goods sold on Amazon.com, there is no place for the ambiguity analysis.

In an effort to circumvent the required statutory analysis and take shelter in ambiguity, Amazon effectively concedes what it once denied: the plain language of the Act applies to make it the seller or retailer of all goods purchased through Amazon.com. *See* Amazon Ct. App. Br. at 23 ("Amazon Services Operates an Online Marketplace and Does Not Sell Third-Party Sellers' Products.") **(App. p. 1983)**. Because the Act plainly applies to Amazon by its language, the Opinion must be affirmed. There is no ambiguity for this Court to consider because both this Court and the Court of Appeals have on multiple occasions held that the Act is unambiguous. This Court recognized the lack of ambiguity when affirming the Court of Appeals' decision in *Books-A-Million, Inc. v. S.C. Dep't of Revenue*, 430 S.C. 388, 399, 844 S.E.2d 399, 405 (Ct. App. 2020) ("[W]e find the language of the statutes is not ambiguous, and the ALC's reading of the statutes was correct and consistent with the intent of the legislature."), *aff'd*, 437 S.C. 640, 880 S.E.2d 476 (2022). And, in *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), this Court did not find any ambiguity in the almost identical provisions of the accommodations tax statute, nor did it strictly construe the statute in favor of the taxpayer when it applied the almost exact set of facts as this case to that statute. *See* **(App. p. 51)** (Order at 45) ("Notably, the Supreme Court engaged in statutory construction in its analysis in *Travelscape*—where it obviously was not clear at first glance whether the tax was imposed on Travelscape—yet the Supreme Court did not find the statutory scheme to be ambiguous or to require substantial doubt to be resolved in Travelscape's favor."). And, in *Rent-A-Ctr. E., Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 589, 824 S.E.2d 217, 221 (Ct. App. 2019), the Court of Appeals reviewed the Act generally, and section 12-36-910 specifically, holding that section 12-36-910 "is unambiguous [and] the ALC was in no position to apply rules of statutory interpretation." (Certiorari granted, August 5, 2019; Dismissed as Improvidently Granted February 19, 2020).

In sum, just because the Act employs indisputably broad coverage, it does not render it ambiguous, and a reviewing court's obligation is to apply that language to the facts of the case without

"resort to subtle or forced construction." *Bryant*, 295 S.C. at 411, 368 S.E.2d at 900-01. The Opinion should be affirmed.

B. The Court of Appeals and the ALC correctly applied the statutory language in determining that the Act plainly applies to Amazon and its sales of goods on Amazon.com.

(1) Amazon is engaged in the business of selling tangible personal property at retail and therefore is a "retailer" or "seller" under the plain language of the Act.

A straightforward application of the Act to the findings of fact made by the ALC shows that Amazon is "engaged . . . in the business of selling tangible personal property at retail." **(App. p. 2117)** (Op. at 13); *see* S.C. Code Ann. § 12-36-20 (defining "business" to "include[ ] *all* activities, with the object of gain, profit, benefit, or advantage, either *direct or indirect*") (emphasis added); *see also* § 12-36-910(A). A review of just some of the pertinent facts as found by the ALC and as set forth in the Department's Counter Statement of the Facts demonstrates that the Opinion should be affirmed.

Amazon is the exclusive owner and operator of Amazon.com, through which customers obtain tangible personal property in exchange for payment to Amazon on Amazon.com. Customers select one or more products, purchase those products, and pay for those products through the well-known Amazon.com. Amazon accepts a customer's payment information and then collects the payments directly from the customers, issuing receipts to those customers for the products they purchased. All order and shipping confirmations are sent by Amazon, and Amazon restricts the communications that Third-Party Merchants can have with Amazon customers. In the order confirmation email received by the customer, Amazon thanks the customer for "shopping with us," tells them Amazon "hope[s] to see [them] again soon," and electronically signs the email, "Amazon.com." In some cases, Amazon ships the ordered product directly to the customer from its distribution centers. In other cases, after an order is placed, Amazon directs the Third-Party Merchant to ship the product, requires that the Third-Party Merchant does so within two days of the order, and can withhold payment to the Third-Party Merchant until Amazon is confident the order was properly

fulfilled. All refunds for any returned items also must go through Amazon, and such refunds are almost completely at the discretion of Amazon. Throughout the purchasing process, customers can, and most commonly do, interface only with Amazon.

Amazon actively controls all aspects of Amazon.com, including the content on the website and the flow of funds from the purchasers of products. Although Third-Party Merchants in some instances provide product descriptions and images, in many instances they cannot alter the existing descriptions and, ultimately, Amazon controls the format of these descriptions for purposes of Amazon.com. Additionally, Amazon, in its discretion, can modify or remove product descriptions or images. Amazon also controls product pricing by requiring Third-Party Merchants to list products at prices "at least as favorable to" Amazon customers "as the most favorable terms upon which a product is offered or sold" by the Third-Party Merchants elsewhere and through the various fees charged to Third-Party Merchants, including transaction-based fees. Amazon actively guides the selling process through its proprietary algorithm, which selects and prominently displays the product offers that Amazon has determined are the best offers for Amazon customers (*i.e.*, that have won the "Buy Box"). Amazon's control of Amazon.com, which is the retail store, confirms that it is the seller of the goods.

Amazon.com is not a free and open space. Third-Party Merchants cannot list products at any price they wish and in any reasonable manner. Third-Party Merchants cannot ship goods in whatever manner they desire. And Third-Party Merchants cannot collect payment directly from the purchaser. Rather, Amazon takes an active role in determining how, which, and at what prices products are sold on Amazon.com, which Amazon readily states that it does in order to cultivate the buying experience and trust of *its* buyers and *its* customers, and then ultimately accepts the payment for these products from its customers. Accordingly, as the Court of Appeals held, Amazon is "engaged . . . in the business of selling tangible personal property at retail." § 12-36-910(A).

(2) The Court of Appeals and the ALC correctly determined that Amazon makes sales on Amazon.com.

Throughout the course of this litigation, Amazon has simply proclaimed that it is not engaged in the business of selling because it self-identifies as a service provider and allegedly does not receive payments from customers or receive "consideration" for products owned by Third-Party Merchants. Pet'r's Br. at 28-29. In order to create its advanced fiction, Amazon undertakes definitional sleight of hand. Amazon's primary argument that its business model falls outside the scope of the Act is based on its strained reading of the definition of a "sale" under S.C. Code Ann. § 12-36-100. Amazon argues that it is not the retailer/seller if it does not receive consideration for sales of third-party merchant's property. And it argues that it does not receive consideration for the sales occurring on Amazon.com because it does not receive the gross proceeds of those sales, which are held for Amazon's and the third-party merchant's benefit by its affiliate, Amazon Payments. Pet'r's Br. at 28-29 ("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.").

As an initial matter, the concept of "conducting a sale" finds no basis within the definitions of the Act. The Act imposes the sales tax on the gross proceeds of sales of every person engaged in the State in the business of selling tangible personal property at retail. S.C. Code Ann. § 12-36-910(A). The Act specifically defines:

- "Business" (section 12-36-20) to include *all* activities with the object of gain, profit, benefit, or advantage, either direct or indirect;
- "Gross proceeds of sales" (section 12-36-90) to mean the value proceeding or accruing from the sale of tangible personal property;
- "Sale" and "purchase" (section 12-36-100) to mean *any* transfer or exchange of tangible personal property for consideration; and

- "Retailer" and "seller" (section 12-36-70) selling tangible personal property, whether owned by the person *or others*.

The General Assembly defined "sale" and "purchase" for the purpose of determining whether, as a prerequisite to the imposition of a sales tax, a sale or purchase occurred. It separately defined who qualifies as the "retailer" or "seller" of such sales. For purposes of a "sale," the Act requires "consideration" be exchanged. But in defining a "retailer" or "seller," the General Assembly did not require such person or entity receive all (or even any) of the "consideration." *See* S.C. Code Ann. § 12-36-70. In other words, while there must be an exchange of tangible personal property for consideration in order for there to be a sale, there is no statutory requirement that the consideration land directly in the wallet of the retailer—the retailer can be (as Amazon is here) the conduit for the consideration received for property owned by others. By arguing that it did not conduct a "sale" if it did not receive "consideration," Amazon is conflating the definition of sale with the definition of retailer/seller. Stated differently, in defining "sale" or "purchase", the General Assembly directed the evaluation only to ***whether*** it occurred, evaluated through the lens of ***whether*** tangible personal property was transferred or exchanged for consideration. By contrast, the General Assembly addressed the question of ***who*** was conducting the sale in defining a "retailer" or "seller". Amazon's hyper focus on whether it "conducted a sale" through the receipt of consideration for transferring tangible personal property is thus misplaced.

Here, there is no question—and Amazon has conceded—that sales occur on Amazon.com. **(App. p. 1983)** (Amazon Ct. App. Br. at 23) ("Everyone agrees that items sold to South Carolina customers [on Amazon.com] are 'tangible personal property' sold 'at retail' in South Carolina."); **(App. p. 2135)** (Amazon Ct. App. Pet. For Reh'g at 3) ("This case concerns only *sales* of products offered by third-party sellers on the Amazon.com marketplace operated by Amazon Services.") (emphasis added). Moreover, as referenced above, it is undisputed that Amazon is in the business of selling

tangible personal property, is registered in South Carolina as a retailer, and collects and remits sales tax for some sales made on Amazon.com. **(App. p. 8)** (Order at 2 and n.3). Having conceded what is otherwise self-evident from the evidence of record, *i.e.*, that sales occur on Amazon.com, the concept of directly receiving "consideration" on admitted sales is not controlling on the question of whether Amazon is a retailer/seller.

To be clear, however, Amazon does receive a portion of the consideration, *i.e.*, the gross proceeds of sales, from every sale occurring on Amazon.com, which necessarily factors into the Court's consideration of whether Amazon is in the business of selling tangible personal property at retail. *See* S.C. Code Ann. § 12-36-20 (defining business to include "all activities, with the object of gain, *profit*, benefit, or advantage, *either direct or indirect*.") (emphasis added). The ALC found—in an unappealed finding—that Amazon receives consideration for the sales occurring on Amazon.com in the form of fees deducted directly from the gross proceeds of sale prior to transferring the balance to third-party merchants. **(App. pp. 31, 36-38)** (Order at 25, 30-32). These are transaction-based fees and compensation that flow to Amazon for every sale that occurs on Amazon.com. **(App. p. 37)** (Order at 31) ("[F]ees are charged on a 'transaction-by-transaction' basis"). Amazon plainly receives payments from customers on Amazon.com because it owns and operates that website and that is where customers present their payment information—in essence, swipe their credit card—to buy the purchased products. Amazon does not dispute this fact, but confuses the issue by claiming in conclusory fashion that "the customer pays only the [Third-Party Merchant]."[14] Pet'r's Br. at 13

[14] Contrary to Amazon's arguments, the ALC did not erroneously attribute conduct of Amazon Payments to Amazon Services. The fact that Amazon Payments must be used as the payment processor under the BSA does not change the fact that customers directly pay Amazon Services on Amazon.com. Moreover, Amazon's own BSA provides that Amazon Services also can provide payment processing services in certain situations.

("Though the payment process takes place on the Amazon.com website, the customer pays only the seller.").

There is no dispute in this case whether a "sale" or "purchase" or, even more specifically, a transfer of title to, and possession of, tangible personal property for consideration, occurs when a customer obtains goods by submitting payment on Amazon.com. Indeed, from a customer's perspective—*i.e.*, the "purchase" side of the transaction—they are receiving title and possession in exchange for consideration. And customers provide that consideration to *Amazon* for the right to receive title and possession for a transaction initiated on and completed through Amazon.com. As the ALC correctly found, customers likely have no knowledge of the behind-the-scenes exchange of money between Amazon and the Third-Party Merchants. **(App. p. 37)** (Order at 31). Nor does that information matter to customers because they are paying Amazon, not for services, but for tangible personal property, an indisputable fact reflected on the invoices and order confirmations that Amazon provides to customers. *Id.* As such, the lower courts correctly determined that Amazon makes sales on Amazon.com within the plain meaning of § 12-36-100.

(3) The Court of Appeals and the ALC correctly determined that Amazon is a seller of tangible personal property.

For the same reasons, Amazon is also a seller as defined in the Act. **(App. p. 2118)** (Op. at 14). South Carolina Code Section 12-36-70(1)(a) defines the terms "retailer" and "seller" to include "every person . . . selling or auctioning tangible personal property *whether owned by the person or others*" (emphasis added). In other words, the fact that Third-Party Merchants—"others"—own the goods actually sold on Amazon.com does not exclude Amazon from being the seller of those goods. Amazon is the entity that makes those goods available for purchase on Amazon.com and, as the Court of Appeals held, is "the only party a buyer encounters during the sales transaction." **(App. p. 2118)** (Op. at 14). Under Amazon's flawed theory, it does not receive "consideration" in exchange for the goods because it does not own those goods. But because § 12-36-70(1)(a) expressly states that the "seller"

or "retailer" need not be the owner of the goods and because § 12-36-20 defines the term "business" to include "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect," the lower courts correctly determined the Amazon is the seller or retailer of the goods purchased on Amazon.com and, under § 12-36-910(A), is in the business of selling tangible personal property at retail and, thus, subject to sales tax.

C. The Court of Appeals' holding that the Act is not ambiguous is entirely consistent with and supported by the plain language of the pertinent statutes as well as with the precedent of this Court and the Court of Appeals and the Opinion should be affirmed.

Amazon bases its ambiguity argument on the Court of Appeals holding that "[t]he import of the *Travelscape* decision with respect to this case is that our supreme court interpreted [S.C. Code Ann.§] 12-36-920(E) of the Act broadly." **(App. pp. 2117-18)** (Op. at 13-14). In making this argument, Amazon ignores the straightforward principle that the ambiguity analysis is not applicable if the straightforward application of the statutory language encompasses the taxpayer. *See Colonial Life & Acc. Ins. Co.,* 233 S.C. at 149, 103 S.E.2d at 918.[15] Amazon further ignores that the Court of Appeals also held that *Travelscape* "provides only limited guidance" to this case; i.e., that decision did not drive the Court of Appeals' decision to affirm the ALC.

The Court of Appeals' holding was nothing more than a recognition that the language of the Act—regardless of the taxpayer—is broad because it contains broad language. In *Travelscape*, this Court evaluated the language "imposed on *every person* engaged or continuing within this State *in the business of*" that appears in § 12-36-920(E) in the context of whether Travelscape was in the business of furnishing accommodations. 391 S.C. at 101, 705 S.E.2d at 34. It further looked to the definition of a "business" appearing in § 12-36-20, which is broadly defined as "*all* activities, with the object of gain,

[15] Thus, contrary to Amazon's argument, Pet'r's Br. at 22, the Opinion does not impliedly overrule the rules of statutory construction because the Act straightforwardly defines Amazon as the seller or retailer of all transactions occurring on Amazon.com.

profit, benefit, or advantage, *either direct or indirect*." *Id.* Given that the tax is imposed on "*every* person," and "business" is defined as "*all* activities," **a description of the Act as broad is hardly noteworthy**. *Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900–01 (1988) ("[I]n construing a statute its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.").

Thus, a straightforward application of the statutory language to Amazon—as illustrated above—results in the unexceptional conclusion that Amazon is the seller or retailer of all sales made through Amazon.com. In point of fact, if a brick-and-mortar store followed Amazon's business model, there would be no question that it would be responsible for collecting and remitting sales and use tax. The mere fact that the Act (in 2016) did not expressly address sales on the internet does not mean that internet sales are not sales, that those entities that direct them are not retailers, or that they are not engaged in the business of selling tangible personal property at retail. *See* **(App. pp. 24-25)** (Order at 18-19 (*citing*, *inter alia*, *Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018)) ("While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.") (emphasis in original)). Indeed, at base, the Supreme Court's ruling in *Travelscape* confirmed that the broad provisions of the Act are applicable to new business models (*i.e.*, relationships driven by expediencies that the internet has made available), and thus it is similarly applicable to Amazon's internet sales through Amazon.com.

Undeterred by the commonsense result of applying the plain statutory language, Amazon contends that it is entitled to escape liability regardless of the statutory words used because the Act is not broad but ambiguous. Amazon's argument is, as noted above, sourced in *Alltel*. But *Alltel* employs an ambiguity analysis and, thus, is inapposite if the plain language of the statute encompasses the taxpayer. *Alltel*, 399 S.C. at 320-21, 731 S.E.2d at 873 ("Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not

needed and the court has no right to impose another meaning.") (cleaned up). For the reasons explained above, the lower courts correctly determined that the Act plainly defines Amazon as the seller or retailer of all sales completed through Amazon.com and, thus, *Alltel* does not apply to allow Amazon to escape its tax obligations. *See* discussion *supra* § 1.B.

The substantial doubt identified in *Alltel* arose because there was no statutory definition of what constituted a telephone company. *Id.*, 399 S.C. at 321, 731 S.E.2d at 873 ("The existence of an ambiguity in [S.C. Code Ann. §] 12-20-100 raises substantial doubt regarding the section's application to [Alltel]."). Specifically, the Department had sought to apply the telephone company license tax to a provider of wireless phone service using an entirely different technology than that employed by traditional phone service providers,[16] but there was no definition of a "telephone company" in the pertinent statute. *Id.,* 399 S.C. at 321, n.3, 731 S.E.2d at 873 n.3 (noting that "the absence of a statutory definition for 'telephone company' leaves the matter in doubt"). That is not so here because all of the pertinent statutory terms are defined and, thus, the question is whether Amazon must pay sales and use tax on all of the sales made through Amazon.com based on the straightforward application of the Act to Amazon's business model.

Amazon's argument really boils down to frustration with the lower courts' refusal to allow it to escape liability by trying to, through internal machinations and corporate shell games, separate the elements of what is a unified sales process, even though everything the customer does to purchase the goods occurs through Amazon.com. *See also* discussion *supra* pp.5-13. But the Department, the ALC, and the Court of Appeals concluded that Amazon was liable for all sales made through Amazon.com

[16] The *Alltel* decision was also influenced by the parties' stipulations, where they agreed that "[t]elephones and telephone companies transmit intelligence over a vast network of wires located in public rights of way and in easements over private property," "[Alltel] do[es] not have facilities located in public rights of way," and [Alltel] provide[s] wireless voice and data communications services [using] radio communication towers or facilities owned or leased by [Alltel] or licensed to [Alltel]." *Alltel*, 399 S.C. at 318, 731 S.E.2d at 871.

based on a plain reading of the Act. And, importantly, the provisions of the Act applied here against Amazon have been interpreted *by courts of this state* and are appropriately construed consistent with *Rent-A-Center*, *Books-A-Million*, and *Travelscape* just as the Opinion does. In particular, while *Travelscape* construed section 12-36-920, the Court of Appeals properly interpreted its guidance to read broadly the identical "imposed on *every person* engaged or continuing within this State *in the business of*" language that appears in both sections of the same Chapter. *Compare* S.C. Code Ann. § 12-36-910(A), *with* S.C. Code Ann. § 12-36-920(E) ("The taxes imposed by this section are imposed on every person engaged or continuing within this State in the business of furnishing accommodations to transients for consideration."). And both *Travelscape* and the Opinion note and rely upon the definition of "business" in § 12-36-20, which, as noted above, is broadly defined as "*all* activities, with the object of gain, profit, benefit, or advantage, *either direct or indirect*." **(App. pp. 2113, 2118, 2121)** (Op. at 9, 14, & 17 (second emphasis added in opinion)).

In light of the language of the Act, and prior case law interpreting the Act, Amazon cannot create an ambiguity and escape liability merely by articulating some different and self-serving theory. *Fuller v. S.C. Tax Comm'n* 128 S.C. 14, 121 S.E. 478 (1924) ("[W]here the language incorporated into a statute is identical or substantially identical with that appearing in similar statutes . . . which have received judicial construction and interpretation . . . [it should be construed] in accordance with the construction given it" in prior cases."). The mere fact that the parties disagree about the application of the Act to the facts does not mean that the statute is ambiguous or must be construed in favor of the taxpayer—it just means that one of the parties is wrong. *See Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461 (1999) (Thomas, J., concurring) ("A mere disagreement among litigants over the meaning of the statute does not prove ambiguity; it usually means that one of the litigants is simply wrong"); *see also* **(App. p. 51)** (Order at 45) ("[A]lthough the application of specific statutes to a set of facts may not be initially clear, this does not mean that the statutes are

ambiguous such that the case must be resolved in the taxpayer's favor. Rather, the existence of an ambiguity must be determined by reading the statutory scheme as a whole in light of the pertinent facts of the case."). Because the lower courts correctly recognized that the Act unambiguously encompasses Amazon's sales of goods on Amazon.com, there is no need to apply the rules of statutory construction and the Opinion should be affirmed.

2. Amazon cannot escape the result of plainly applying the Act merely by claiming ambiguity and asserting some subjective reason it should not be subject to tax for sales on Amazon.com

The Court of Appeals properly, in Amazon's words, "treated its own reading of the statute as the beginning and end of the analysis," Pet'r's Br. at 28, because it and the ALC correctly recognized that the Act is not ambiguous, leaving the lower courts "in no position to apply rules of statutory interpretation" or construe unambiguous provisions in Amazon's favor. *Rent-A-Ctr.*, 425 S.C. at 589, 824 S.E.2d at 221 (interpreting § 12-36-910); *see also Books-A-Million, Inc.*, 430 S.C. at 399, 844 at 405 (noting that the petitioner had "failed to point to any ambiguity in either [S.C. Code Ann. § 12-36-90 or § 12-36-910]" and holding that "we find the language of the statutes is not ambiguous, and the ALC's reading of the statutes was correct and consistent with the intent of the legislature").

A. The Court of Appeals should be affirmed because Amazon's artful definitions of the Act's plain language do not create an ambiguity, let alone render its position reasonable.

As discussed above, Amazon's primary argument that its position is reasonable and the Act ambiguous is sourced in a strained reading of "sale" under section 12-36-100. Amazon argues that it is not the retailer or seller because it does not receive the "gross proceeds of sales" from the consumer. Pet'r's Br. at 29. But for purposes of a "sale," the Act requires only that "consideration" be exchanged, not that the seller receive all (or even any) of the "consideration." *See* S.C. Code Ann. § 12-36-70(1)(a). Rather, like a consignment sale, the retailer can be—as Amazon is here—the conduit for the consideration received for property owned by others. *Id.* By arguing that it did not conduct a "sale" if

it did not receive "consideration"—never mind that it does receive transaction-based consideration on every sale occurring on Amazon.com—Amazon is advancing an extremely narrow interpretation of "sales proceeds" that is not consistent with a plain reading of the statutory definitions.

Thus, Amazon at a minimum receives "value proceeding or accruing from the sale, lease, or rental of tangible personal property." S.C. Code Ann. § 12-36-90. Rather than a fee for "services [ ] provided to the seller," Pet'r's Br. at 29-30, Amazon's fee in fact "proceed[s] . . . from the sale . . . of tangible personal property." And, although Amazon contends that its operation is no different than that for "any credit card transaction," Pet'r's Br. at 30-31, the fact is that credit card sales typically are not made on websites hosted by a credit card company. *See also* discussion *supra* § 1.B.(2). Amazon had the burden to prove otherwise under the correct legal framework and it adduced no evidence on this point.

The lower courts also properly rejected Amazon's attempt to avoid the result of a straightforward application of the Act through its efforts to separate the elements of a sale into different entities. Amazon, of course, contests the Court of Appeals' citation to S.C. Code Ann. § 12-36-30, which defines a "person" as any "group or combination acting as a unit," and complains of veil piercing. Pet'r's Br. at 31-32. But neither the ALC nor the Court of Appeals relied on § 12-36-30 to reach its decision and neither did the Department in issuing the Determination. Nor did the Department rely on a substance-over-form analysis in assessing taxes. However, as the lower courts correctly noted, the BSA treats the entities as one. **(App. p. 2117)** (Op. at 13). More to the point, given the fact that Amazon receives consideration in the form of its transaction-based referral fee profit on every sale occurring on Amazon.com, the precise structure Amazon implemented is not determinative in light of the overwhelming control that Amazon exerts over Amazon.com transactions, making it the seller of goods on Amazon.com. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). To be clear, the Department's

position is that Amazon's actions, standing on their own, make it the retailer/seller of property sold on Amazon.com. There has been no disregarding of corporate structures because the issue considered by the ALC and the Court of Appeals is the characteristics of transactions occurring on Amazon.com and how the companies acted externally in making those sales.[17]

At bottom, Amazon's position—that it is not in the business of selling tangible personal property because of the structure of the transactions—also does not make the Act ambiguous and its position reasonable. As noted above, Amazon directly or indirectly receives a fee based on a percentage of each sale on Amazon.com. The Act is hardly ambiguous on this point: it says that "business" includes "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect." S.C. Code Ann. § 12-36-20. If Amazon is engaged in making sales of tangible personal property on Amazon.com and it receives compensation in the form of a percentage of those sales, it cannot seriously be disputed that it is engaged in the business of selling tangible personal property. The Act is unambiguous on that point and the fact that Amazon purposefully structured its business to separate, and thereby avoid collecting and remitting tax, the key elements of a sale, while articulating some strained reading of the Act to escape that unambiguous conclusion, does not make the Act ambiguous or Amazon's reading of it reasonable. And Amazon's recitation of a parade of horribles, Pet'r's Br. at 34, does not change this conclusion.

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[17] *South Carolina Dep't of Revenue v. Anonymous Co. A*, 401 S.C. 513, 515-21, 678 S.E.2d 255, 256-59 (2009), cited by Amazon, Pet'r's Br. at 32, does not compel a different result. *Anonymous* stands for the simple proposition that, based on the actual statutory language at issue, "the same taxpayer who paid the sales tax must be the taxpayer who charged the debt off for income tax purposes." *Id.*, 401 S.C. at 517, 678 S.E.2d at 257. *Anonymous* effectively concluded that the statute requires that deductions match payments. It is a far cry to suggest that decision supports a conclusion that Amazon, based on the facts set forth above and considered by the ALC and the Court of Appeals, is not the "retailer" or "seller" that is "selling [through Amazon.com] tangible personal property whether owned by the person or others," § 12-36-70, merely because Amazon attempted to separate the parts of a unified sale but then combine them externally by contract. *See also* § 12-36-30 (defining "person" to include "any group or combination acting as a unit.").

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

B. The Court of Appeals should be affirmed because passage of the 2019 amendments to the Act did not mean that the 2016 version of the act did not encompass Amazon's business model or make it liable to pay taxes for transactions on Amazon.com and, thus, does not render the Act ambiguous or make Amazon's position reasonable.

Should the Court nevertheless find the 2016 Act to be ambiguous, utilization of Act 21 to construe the meaning of Act is foreclosed. In passing Act 21, the General Assembly expressly stated that the legislative changes "shall not be construed as a statement concerning the applicability of the South Carolina Sales and Use Tax Act to any sales and use tax liability in matters currently in litigation or being audited." 2019 S.C. Acts 21, § 1(5). Yet Amazon's entire litigation strategy is built around doing precisely that which the General Assembly forbade. *See Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 366, 798 S.E.2d 555, 559 (2017) ("This Court has stated that '[w]hile the preamble is not a part of the effective portion of a statute, it may supply the guide to the meaning of an act.'") (quoting *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015)); *S.C. Pipeline Corp. v. Lone Star Steel Co.*, 345 S.C. 151, 155, 546 S.E.2d 654, 656 (2001) (looking to findings in the preamble to aid in determining legislative intent). Accordingly, both the ALC and the Court of Appeals were correct to disregard Amazon's substantial reliance on Act 21 as evidence of an alleged ambiguity in the interpretation and application of the Act as it existed in 2016 to Amazon. This Court should likewise heed the express direction of the General Assembly. *See Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 475, 892 S.E.2d 121, 127 (2023), *reh'g denied* (Aug. 29, 2023) ("[T]he General Assembly's authority to legislate is plenary: the South Carolina Constitution grants power to the legislature to enact any act it desires to pass, if such legislation is not expressly prohibited by the Constitution of this state, or the Constitution of the United States.") (citation and quotations omitted).

Beyond that express prohibition, the General Assembly's enactment of Act 21 does not require an inference that the Act did not cover Amazon in 2016 or that the Act was ambiguous and Amazon's contrary interpretation reasonable. To repeat: if the statute plainly applies to the taxpayer, there is no basis for applying the rules of statutory interpretation. *See* discussion *supra* § 2.A. Because Amazon had physical presence in this state on January 1, 2016, the Act applied to it regardless of the 2019 amendments or the changes effected by *Wayfair*. In not identifying any ambiguity in the statutory scheme that creates any substantial doubt as to whether Amazon is a "seller" or "retailer," Amazon also is attempting, without a shred of legal justification, to turn the traditional ambiguity analysis on its head by looking first to extraneous materials (an amendment passed three years after the audit was initiated) to attempt to prove the existence of an ambiguity in the statute, rather than identifying an actual ambiguity in the statute. Because the lower courts correctly rejected this theory in favor of applying the correct statutory analysis to the facts found by the ALC, the 2019 amendments do not allow Amazon to escape sales tax liability by pointing to the 2019 legislation.

By way of background, in 2019, the General Assembly amended the Act to address changes to the taxation of out-of-state sales as a result of *Wayfair*. *See* 2019 S.C. Acts 21 (Act 21). Prior to *Wayfair*, the Act applied to sales only if the seller had a physical presence in South Carolina. The General Assembly enacted Act 21 to (1) update the Act to reflect modern jargon regarding internet sales; (2) clarify the law in a post-physical-nexus environment; and (3) ensure a level playing field for all online marketplaces, regardless of whether they had physical nexus or not. *See* 2019 S.C. Acts 21. Those amendments did not impact Amazon because it already had physical presence in South Carolina, as recognized in the Moratorium Statute. S.C. Code Ann. § 12-36-2691(A) ("Notwithstanding another provision of this chapter, owning, leasing, or utilizing a distribution facility, including a distribution facility of a third party or an affiliate, within South Carolina is not considered in determining whether the person has a physical presence in South Carolina sufficient to establish

nexus with South Carolina for sales and use tax purposes."); *see also* discussion *supra* pp. 5-20 (counter-statement).

The Moratorium Statute further recognized the applicability of the Act to all sales occurring on Amazon.com through its enactment of notification requirements to purchasers that they might owe use tax on Amazon.com purchases. S.C. Code Ann. § 12-36-2691(E) ("A person to whom this section applies [i.e., Amazon] who makes a sale through [Amazon.com] shall notify a purchaser in a confirmation email that the purchaser may owe South Carolina use tax on the total sales price of the transaction."). And the Moratorium Statute required "a person to whom this section applies [i.e., Amazon]" to send an annual statement to purchasers stating as follows in pertinent part: "You may owe South Carolina use tax on purchases you made from us during the previous tax year." S.C. Code Ann. § 12-36-2691(E)(3)(a). In requiring these statements, the Moratorium Statute made no distinction between Amazon and any Third-Party Merchants and required the statements to be sent to all purchasers of goods on Amazon.com. Accordingly, in providing Amazon the Moratorium that it sought from the State to locate its first distribution facility in South Carolina, the General Assembly also expressly put Amazon on notice that sales tax should be collected from sales occurring on its website.

In truth, Act 21 was primarily a response to *Wayfair*, not a legislative effort to close the loop on Amazon. The fact that Act 21 was not directed at Amazon is demonstrated by a number of reasons. First, the 2019 Act expresses the law already in existence "*requires* any person engaged in business as a retailer to remit sales and use tax" and that this "requirement applies to all retail sales of tangible personal property by the retailer, *whether the tangible personal property is owned by the retailer or another person*." 2019 S.C. Acts 21, § 1(1) (emphasis added). Further, as part of its "Findings" in support of the legislation, the General Assembly stated:

> Internet marketplaces where a person sells tangible personal property at retail by listing or advertising, or allowing the listing or advertising of, another person's products on

> an online marketplace and collects or processes the payment from the customers *are* retailers required to remit the sales and use tax.

2019 S.C. Acts 21, § 1(2) (emphasis added). The General Assembly therefore considered entities operating like Amazon to be "retailers" under the Act *before* the enactment of the amendment. Act 21 then demonstrates that it was motivated by *Wayfair* by analogizing entities operating internet marketplaces to traditional retailers selling tangible personal property of others or on consignment, noting that "the *longstanding requirement . . . that a retailer remit the tax on retail sales of tangible personal property owned by another person* must apply to *all retailers*, including both Internet retailers and brick and mortar retailers," 2019 S.C. Acts 21, § 1(3) (emphasis added); *i.e.*, both retailers located out-of-state as well as in-state. The Act further explains its purpose as clarifying existing law to ensure that "retailers selling another person's tangible personal property on the Internet must clearly understand and be informed of their requirements to remit the sales and use tax." 2019 S.C. Acts 21, § 1(4). Further, the General Assembly revised S.C. Code Ann. § 12-36-90(1) to add the following emphasized language to the definition of the "gross proceeds of sales": "the proceeds from the sale of property sold on consignment, *including property sold through a marketplace by a marketplace facilitator*." (emphasis added). Notably, the revised language says "including" rather than "and," thereby demonstrating that the General Assembly considers sales by a "marketplace facilitator" to be "consignment" sales for purposes of the Act.

Contrary to Amazon's arguments, the lower courts' analysis hardly makes Act 21 a "futile act," Pet'r's Br. at 35, but instead recognizes the express prohibition against utilizing the amendments in this active litigation and that those amendments were a response to *Wayfair*. *See also* S.C. Rev. Rul. 18-14 ("On June 21, 2018, the [U.S.] Supreme Court in *South Dakota v. Wayfair, Inc.* ruled that retailers (including online retailers) without physical presence in a state may be subject to sales and use tax. *This decision overturned the Court's longstanding position* in *Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, which allowed states to collect sales and use tax only on retailers with

a physical presence.") (emphasis added & citations omitted). The elimination of the physical presence requirement was a watershed change in the taxation of out-of-state sales. *Cf.* Steven M. Hogan & Alan J. LaCerra, *South Dakota v. Wayfair: The Case That Changes Everything*, Fla. B.J., March/April 2019, at 22 ("The *Wayfair* decision overruled *Quill* and eliminated the "physical presence" test. Now, every state in the union can potentially force online retailers to collect and remit sales tax on their sales into those states. *This new dynamic will color the entire field of sales and use taxation for decades to come*.") (emphasis added). Thus, characterizing Act 21 as a response to *Wayfair* is supported not only by that case's elimination of the physical presence requirement but also by the characterization of the purpose of Act 21 at that time. *See* **(App. p. 1263)** (Ex. 194 at 0:05) (Department's Director testimony regarding Act 21 referencing the broad nature of change brought about by the *Wayfair* decision).

But because Amazon already had physical presence on January 1, 2016, once the Moratorium Statute expired, it was subject to taxation on all sales it made through Amazon.com beginning in the first quarter of 2016. Thus, as the ALC correctly recognized, enactment of Act 21 did not mean that the Act in 2016 did not encompass Amazon. "Just because a new business structure is created does not mean that this new structure is immune from existing tax obligations or other legal obligations simply because the existing statutory scheme does not specifically incorporate the new business model." **(App. pp. 55-56)** (Order at 49-50). More to the point, the enactment of *subsequent* legislation pertaining to a *subsequent* watershed change in constitutional law does not mean that the Act did not apply to Amazon in 2016. *See*, *e.g.*, *Whitner v. State*, 328 S.C. 1, 9, 492 S.E.2d 777, 781 (1997) ("Generally, the legislature's subsequent acts cast no light on the intent of the legislature which enacted the statute being construed. . . . Rather, this Court will look first to the *language* of the statute to discern legislative intent, because the language itself is the best guide to legislative intent.") (cleaned up); *cf. Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) (holding that statutory amendments "may also be interpreted as clarifying original legislative intent"). And the requirement to construe Act

21's purpose as clarifying rather than changing existing law is manifest in the findings expressed by the General Assembly, a fact distinguishing this case from all of those cited by Amazon. *See* Pet'r's Br. at 35-36. Thus, the changes enacted by Act 21 do not "[a]t a minimum, . . . indicate that the applicability of the previous version of the statute was at least ambiguous." Pet'r's Br. at 36.

In sum, when adopting Act 21, the General Assembly understood that the law already in effect at that time required all retailers to remit and pay sales taxes for all sales it made, including sales of property owned by another person, and it was just clarifying that application applied to out-of-state retailers as well as in-state retailers. Because Amazon already had a physical presence in South Carolina, *Wayfair* did not change the taxation of Amazon's sales through Amazon.com of its own property or that owned by others. Consistent with that interpretation, the General Assembly expressly stated that Act 21 must not be applied to any Act litigation ongoing at the time the legislation was enacted. Therefore, the lower courts correctly concluded that enactment of Act 21 did not alter Amazon's sales and use tax liability for sales made through Amazon.com in the first quarter of 2016. Based on the General Assembly's express statement, it would be impermissible for Courts, as suggested by Amazon, to utilize or rely upon Act 21 in this litigation, including to compel an ambiguity in the plain language of the Act as it existed in 2016.

C. The Court of Appeals should be affirmed because statements of the Department's Director to the General Assembly in the context of the 2019 amendments to the Act does not change the result of plainly applying the Act, does not mean that the Act is ambiguous, and does not mean that Amazon's interpretation of the 2016 version of the Act is reasonable.

Nor is the Act rendered ambiguous and Amazon's interpretation reasonable merely because Amazon cherry-picks and misconstrues a few statements of Department officials made in the context of proposed legislation, well after the period at issue and the initiation of this contested case. Statutory interpretation is a question of law reserved for the courts, and the Court of Appeals and the ALC correctly rejected Amazon's position. **(App pp. 25-26)** (Order at 17-18); **(App. p. 2124)** (Op. at 20

("[A]ny statements the Department's director made in 2018 during hearings before the legislature are irrelevant to the Department's 2016 audit and our consideration of the law as it existed at the time of such audit.") (citing *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991); *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995)); *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006) ("The issue of interpretation of a statute is a question of law for the court."); *Bazzle*, 319 S.C. at 445, 462 S.E.2d at 274 ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose."). Accordingly, statements by Department officials are irrelevant here.

Amazon's argument is based on a few statements made by the Department Director approximately two years after the period at issue in the context of the General Assembly's enactment of Act 21, claiming these were "admissions" demonstrating the reasonableness of their contrary position.[18] *See* Pet'r's Br. at 37 ("there is no law related to taxation of third party sales" and "close[] the gap"). As an initial matter, Amazon again turns ambiguity analysis on its head, pointing to extraneous statements to prove an ambiguity, rather than an identifying ambiguity in the plain language of the statute. However, a fair representation of the genesis of Act 21 cannot be made absent reference to *Wayfair* and its elimination of the physical presence requirement. **(App. p. 1263)** (Ex. 194 at 0:05) (Department's Director testimony regarding Act 21 referencing the broad nature of change brought about by the *Wayfair* decision). Correctly viewed in this light, none of the reasons advanced by Amazon renders the 2016 Act ambiguous or endows Amazon's argument with reasonableness. Indeed, Amazon completely ignores the fact that the now-enacted legislation applies not just to Amazon but

[18] Regardless of those statements and their relevance, the Department's position as to whether Amazon is a retailer or seller under the Act has been unfailingly consistent. **(App. pp. 1017-32)** (Ex. 171, Dep't Determination). The Department encourages the Court to watch the hearing cited by Amazon, rather than simply accept Amazon's selective quoting and characterizations, as the Director emphasized that the Act is "crystal clear" as it applies to Amazon and the then-proposed Act 21 was "no change in the law" as it applied to Amazon. **(App. p. 1263)** (Ex. 194 at 2:08; 2:50).

rather to a broad range of entities that could be classified as "marketplace facilitators," many with business models substantially different than Amazon's, some of which have physical presences in the State and others that do not. The Department's efforts to assist the General Assembly in clarifying the law to address the post-*Wayfair* landscape, new technological advancements, and to ensure that *all* so-called "marketplace facilitators" could not exempt themselves from the requirements of the Act, do not amount to any admission with respect to the application of the then-existing provisions of the Act to Amazon's specific business.

Taken in the proper context, the Department's comments to the General Assembly in support of Act 21 clearly reflect need for clarification of and guidance as to the reach of the State's sales tax law brought about by *Wayfair* with respect to remote sellers and retailers—including online marketplaces—who lacked a physical nexus in South Carolina, regardless of how Amazon has now tried to twist them in their favor as a part of an obvious post-hoc litigation strategy. With the physical nexus distinction removed, clarification *was* required in order to treat all retailers the same, regardless of whether they had a physical presence in South Carolina (Amazon), or not (for which "there was no law."). Thus, Act 21 was a change in law for retailers that lacked a physical presence in the State, *i.e.*, the "gap" referenced by the Director, but it was not a change in law for Amazon, who had a physical presence in the State starting in 2011. *See* **(App. p. 1263)** (Ex. 194 at 2:08; 2:50) (wherein the Director emphasized that the Act as it existed in 2016 is "crystal clear" as it applies to Amazon and that the then-proposed Act 21 was "no change in the law" as it applied to Amazon).

Amazon now attempts to buttress its position through reference to the Court of Appeals' recent decision in *Synovus Bank v. S.C. Dep't of Revenue*, 444 S.C. 30, 906 S.E.2d 85 (Ct. App. 2024), *reh'g denied* (Sept. 5, 2024). In that case, the Court of Appeals referenced three indicators of how the state bank tax had historically been viewed as a franchise tax and not an income tax. *Id.*, 444 S.C. at 41, 906 S.E.2d at 91. Amazon focuses on the third indicator, Pet'r's Br. at 38-39, which was testimony before

a public hearing of the South Carolina Taxation Realignment Commission to the effect that the bank tax is a franchise tax. *Synovus*, 444 S.C. at 42-43, 906 S.E.2d at 92. But, just as legislative changes to a statute are not always binding illustrations that the statute previously meant something different, *see* discussion *supra* § 2.B, public statements about legislation are not always binding demonstrations about what the statute means. *Id.*, 444 S.C. at 43, 906 S.E.2d at 92 ("Though this testimony is not binding, it is further evidence of how the bank tax has historically been interpreted, even by banks."); *see*, *e.g.*, **(App. p. 1263)** (Ex. 194 at 2:08; 2:50) (2016 Act "crystal clear" as it applies to Amazon and Act 21 was "no change in the law" as it applied to Amazon).

As discussed above, Act 21 expressed that the Act in existence when that legislation was enacted already required retailers to submit sales and use taxes when selling goods owned by others and that the legislation sought to apply the Act to out-of-state as well as in-state retailers. Because Amazon already had physical presence in South Carolina, its sales of goods owned by the Third-Party Merchants was already encompassed with the Act just as the General Assembly recognized in Act 21. Therefore, the statements by the Department Director as cited by Amazon in fact address the need to ensure that the Act clearly applies to out-of-state retailers and that there would be no dispute that the Act applied to Amazon on a going forward basis.

In short, the Opinion should be affirmed because, again, application of the Act's plain language to Amazon demonstrates that the Opinion should be affirmed without the need to resort to an ambiguity analysis. Amazon's selective use of the Director's statements does not change this analytical procedure, does not provide evidence of an ambiguity in the Act, and does not mean its argument to the contrary is reasonable.

D. The Court of Appeals should be affirmed because decisions rendered by other states do not render this State's Act ambiguous or make Amazon's interpretation reasonable, especially given the fact that a plain application of the Act makes Amazon liable for taxes on all Amazon.com sales and in view of the well-settled principle that other states do not govern this State's application of its own laws.

What another state has done or not done with respect to its own tax laws has no bearing on the interpretation of the Act by the courts of this State and, thus, does not mean that Amazon's interpretation of the application of this State's statutes is reasonable. *See Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 208 n.9, 882 S.E.2d 770, 781 n.9 (2023), *reh'g denied* (Feb. 8, 2023) ("[W]e do not rely on the decisions from other states as binding."). The Court of Appeals correctly rejected this argument. **(App p. 2121)** (Op. at 17) ("[W]e are not persuaded by Amazon Services' reference to the tax laws of other jurisdictions.").[19] Similarly, the fact that this state—or other states—passed marketplace legislation after *Wayfair* was issued does not mean that Amazon's interpretation of the Act is a reasonable one that warrants its escape from sales tax liability for sales made on Amazon.com. Contrary to Amazon's protestations, Pet'r's Br. at 42 n.12, the reference to *Wayfair* is hardly a red herring given that it eliminated the constricting physical presence requirement and thus, as explained above, was the primary motivation behind the enactment of Act 21's language applying the Act applied to both out-of-state and in-state retailers.

[19] The Court of Appeals held that Amazon never identified any states with substantially similar statutes. **(App. p. 2121)** (Op. at 17). Amazon contends that it did properly argue to the Court of Appeals that other states' statutes were substantially identical, but it supports that claim based on arguments first raised in its Reply Brief. *See* Pet'r's Br. at 39-40; *see also* **(App. p. 2159)** (Pet. for Reh'g at 27 n.6). But "a party cannot raise an issue for the first time in an appellate reply brief." *ABB, Inc. v. Integrated Recycling Grp. of S.C., LLC*, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (Ct. App. 2021). Further, Amazon only points to similar definitions of a "sale" from other jurisdictions as support for its contention that this Court should rely on those decisions to interpret the Act. But as discussed above, the fact that sale are occurring on Amazon.com is conceded by Amazon, rendering any construction of S.C. Code Ann. § 12-36-100 unnecessary and irrelevant. The operative provision in this case is S.C. Code Ann. § 12-36-910 ("in the business of selling"), and Amazon has not identified any other state with similar statutory language.

Although Amazon asserts it had an expectation that South Carolina would follow the same approach, the Moratorium Statute, which granted Amazon a five-year moratorium on the payment of sales taxes in return for locating in South Carolina, demonstrates that Amazon was fully apprised of its obligations under the Act well before January 1, 2026. *See* S.C. Code Ann. § 12-36-2691; *see also* discussion *supra* pp. 4, 38-39. Amazon sought and enjoyed a reprieve from paying sales taxes for five years, and was on notice that its obligations would be in force no later than the expiration of the Moratorium on January 1, 2016.[20] The existence of physical presence beginning on that date takes Amazon out of the marketplace facilitator analysis.

Moreover, there was no direct guidance regarding the payment of sales taxes on goods owned by Third-Party Merchants for the simple reason that it was not an issue in view of the fact that Amazon was not located in South Carolina until 2011 and did not have a legally recognized physical presence until 2016. Because the seller's physical presence remained a bedrock requirement for the ability to tax sales, there was no basis for issuing guidance because Amazon would not be subject to sales and use taxes in any way until January 1, 2016. As reflected in this case, the Department operated under the view that the Act in existence on January 1, 2016, encompassed all of the sales on Amazon.com. And at any rate there was statutory authority and guidance from the Department[21] regarding the treatment under the Act of similar transactions—*e.g.*, consignment sales. *See* § 12-36-90 (defining "gross proceeds of sales" as including "the proceeds from the sale of property sold on consignment"); **(App. pp. 749-51, 1869)** (Tr. 596-98 (former Department official describing publicly available information regarding

[20] *See* **(App. p. 1263)** (Ex. 194 at 3:25-4:05) (wherein Senator Sheheen states in the committee hearing that the General Assembly wrote the Moratorium Statute to provide Amazon a "grace period where they didn't withhold sales tax" and that its argument "that they don't have to withhold it after we actually gave them the benefit for five years" is in "very bad faith").

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

sales tax treatment of consignment sales prior to 2016); Ex. 215, Ch. 23, p. 19)). Further, in *Travelscape*, this Court applied nearly identical facts to nearly identical statutory provisions and held that the entity offering and accepting payment for goods owned by others on its website (*i.e.*, Travelscape) was required to remit the taxes, not the owners of the goods (*i.e.*, the hotels). Just because Amazon articulated a contrary position does not mean the Act did not encompass all sales on Amazon.com in the first quarter of 2016. The Court of Appeals' holding on this issue should be affirmed because the actions of other states do not illuminate the meaning of this Act.

3. Because, as both the Court of Appeals and the ALC found, the record contains no support for Amazon's constitutional due process claim that legislative enactments in 2019 are being applied to its conduct in 2016 and because this is a matter of statutory interpretation that does not rise to constitutional significance, the Opinion should be affirmed on this issue.

There has never been any doubt as to the standard that the Department has sought to apply against Amazon's business model. In point of fact, the audit underlying the Determination began in the second quarter of 2016, years before the 2019 amendments took shape or were passed. As the Court of Appeals correctly held, "no evidence shows the Department attempted to retroactively apply the [2019 amendment] or policies to Amazon Services' conduct. Rather, the Department applied the sales tax law that was in place at the time. . . ." **(App. p. 2124)** (Op. at 20); see also **(App. p. 55)** (Order at 49) ("Nowhere has the Department cited to the pending legislation in an attempt to apply it to Amazon Services in this case.").[22] The crux of Amazon's argument is that the Department's assessment of sales and use tax for Amazon's sales from the first quarter of 2016 "effectively seeks to subject Amazon Services to the 2019 amendments," which "violates the constitutional requirement of fair notice." Pet'r's Br. at 47.

[22] Amazon did not appeal from this express finding by the ALC, rendering it the law of the case. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case.").

In support, Amazon has repeatedly cited *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), in which the U.S. Supreme Court rejected the FCC's attempt to retroactively apply a change in policy to two TV stations for airing content that previously would have been permissible. The Court held that the FCC's actions violated the "void for vagueness" doctrine, which requires "first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 253. The Court further explained that "a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved." *Id.*

Here, there is no doubt about the regulatory standard to which Amazon is being held—it is simply the plain language of the Tax Act as it existed in the first quarter of 2016. The Department's tax assessment against Amazon did not represent a reversal in policy, or a change in the regulatory framework governing online retailers, but rather application of the plain statutory language, which require that anyone "engaged . . . in the business of selling tangible personal property at retail" must pay sales tax to the state. § 12-36-910(A). Certainly, Amazon disagrees that its online sales activities meet the standard set out in the Act, but that does not mean that it is "unclear as to what fact must be proved." *Fox Television Stations*, 567 U.S. at 253. Having effected an "exchange . . . of tangible personal property for a consideration," § 12-36-100, Amazon has placed itself squarely within the requirement to collect and remit sales and use tax to South Carolina, and this statutory framework was in place and known to Amazon well before the first quarter of 2016.

Other facts demonstrate that Amazon was on notice in the first quarter of 2016 of its obligation to collect and remit sales and use tax for all of the sales taking place on Amazon.com. As discussed above, Amazon lobbied for the passage of the Moratorium Statute in connection with placing a large distribution center in Lexington County so that it could be exempt from collecting and

remitting sales tax to South Carolina for a period of time. The Moratorium demonstrates that Amazon had carefully examined, and had devoted significant resources to mitigating, its tax obligations under South Carolina law in 2011, well prior to the first quarter of 2016. Also during the summer of 2011, this Court issued *Travelscape*, which directly addresses the tax obligations under South Carolina law of those who sell on the internet. So the idea that Amazon was taken by surprise by its obligation to collect and remit sales and use tax in South Carolina for its online retail sales is spurious.

In sum, there is no due process violation—either the Act as it existed in 2016 defined Amazon as the retailer or seller of goods owned by Third-Party Merchants through Amazon.com or it did not, but there is no effort to retroactively apply Act 21 to sales made in 2016. And there is no serious question that Amazon was on notice of the provisions of the Act and cases interpreting same by 2016, and its position that its due process rights have been violated in this case lacks any merit.[23] The Court of Appeals' holding in this regard should be affirmed.

Conclusion

For the reasons stated above, the Opinion should be affirmed. In sum, the Court of Appeals and the ALC correctly ruled in favor of the Department; the Opinion is entirely consistent with existing caselaw regarding the Act and its lack of ambiguity; because Amazon's alternative theory is not reasonable; and because there is no credible claim of a due process violation.

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[23] Here again, Amazon cites collateral, out-of-context statements in legislative audit submissions and by the Department's Director in 2018 in a vain attempt to demonstrate confusion about the application of the Act to Amazon's sales on Amazon.com. Besides the mischaracterization of these statements, the Department observes once more that statements by Department employees do not alter or amend state law. *E.g., TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 621, 503 S.E.2d 471, 477 (1998) ("Although Brodie believed the Department had the authority to grant retroactive exemptions, and exemptions may have been granted under this erroneous view, neither the Commission nor the courts are bound by his erroneous interpretation.").

Respectfully submitted,

BURR & FORMAN LLP

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

S.C. DEPARTMENT OF REVENUE
Jason P. Luther (S.C. Bar No. 78021)
300A Outlet Pointe Blvd.
Columbia, SC 29210
803-898-5785
jason.luther@dor.sc.gov

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

Attorneys for S.C. Department of Revenue

Columbia, South Carolina
December 12, 2024