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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Supreme Court Appellate Case No. 2024-000625

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

Appellate Case No. 2019-001706

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

Amazon Services, LLC, Petitioner,

v.

South Carolina Department of Revenue, Respondent.

REPLY BRIEF OF PETITIONER

NELSON MULLINS RILEY &
SCARBOROUGH LLP

Bryson M. Geer
SC Bar No. 13606
bryson.geer@nelsonmullins.com
John C. von Lehe, Jr.
SC Bar No. 5719
john.vonlehe@nelsonmullins.com
151 Meeting Street / 6th Floor
Charleston, SC 29401-2239
(843) 853-5200

C. Mitchell Brown
SC Bar No. 12872
mitch.brown@nelsonmullins.com
1320 Main Street / 17th Floor
Columbia, SC 29201
(803) 799-2000

SIDLEY AUSTIN LLP

Carter G. Phillips
(admitted *Pro Hac Vice*)
cphillips@sidley.com
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SIDLEY AUSTIN LLP

Robert N. Hochman
(admitted *Pro Hac Vice*)
rhochman@sidley.com
Neil H. Conrad
(admitted *Pro Hac Vice*)
nconrad@sidley.com
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Attorneys for Amazon Services LLC

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INTRODUCTION

The Department's response brief does not defend the Court of Appeals' reasoning and offers arguments that do not withstand scrutiny.

First, this Court's tax decisions all reflect a bedrock rule of tax law recognized for decades in South Carolina and across the country. If a tax statute is "reasonably susceptible of an interpretation that will exclude [a taxpayer], then [the taxpayer] will be excluded, any substantial doubt being resolved in his favor." *Alltel Commc 'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012). The Department does not and cannot defend the Court of Appeals' erroneous view that *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), abandoned that rule and instead required the opposite, commanding courts to read tax statutes "broadly." App. 2118. The Department further diminishes this Court's rulings by discussing only the outcomes of this Court's prior tax decisions. *See* Resp. Br. 22-24. The Department disregards this Court's careful reasoning to urge this Court to retreat from the important taxpayer protections against overzealous tax enforcement that the rule provides. Faithful application of this Court's tax precedents requires reversal here.

Second, the Department focuses on facts that are irrelevant and ignores those that matter. For instance, the Department emphasizes that Amazon Services wants buyers and sellers to have a positive and safe experience in its marketplace, that Amazon Services sometimes refers to "our" customers, and that Amazon Services wants buyers to be able to easily find products that interest them. *See* Resp. Br. 5-10. But all of that makes no difference because the language of the statute places the tax collection obligation *on the party that receives consideration for the transfer of personal property*. S.C. Code Ann. §§ 12-36-100, -70, -20 (2016). The Department asserts that Amazon Services is that party, but does not and cannot cite any evidence supporting

that view. *See* Resp. Br. 28. In fact, the record makes clear that Amazon Services is never paid for the transfer of personal property and is paid only for services it provides to sellers.

Amazon Services's opening brief emphasized how its reading of the statute was not only reasonable but also the proper interpretation of the 2016 Act in light of this Court's prior rulings. Pet. Br. 28-34. The Department responds not with a refutation of that argument, or even an explanation for why it is unreasonable. It merely offers its own construction of staggering breadth. To the Department, any business that facilitates payment for a sale is covered by the 2016 Act. Resp. Br. 26-29. But such a construction would apply to ordinary payment processors in every credit-card sale transaction. Even the Department admits some limiting principle is necessary to prevent its interpretation from producing absurd results, but it cannot offer one. *See id.* at 36. Amazon Services's view is faithful to the language of the statute, objectively reasonable in scope, and respectful of prior decisions of this Court.

Third, every state administering a sales tax has previously recognized the need for new legislation to address marketplace facilitators explicitly. South Carolina is no exception. It adopted the marketplace facilitator amendment that other states had enacted at the public urging of the Department's Director. The Department suggests that the new law was needed to reach sellers with no physical presence in South Carolina. *See, e.g., id.* at 38. But the Department fails entirely to account for the language of the amendment, which could not have more explicitly been drawn to impose sales tax obligations on marketplace facilitators (with or without a physical presence in the state) that provide marketplace services to sellers, including when affiliates (like Amazon Payments) facilitate payment in the marketplace. *See* S.C. Code Ann. §§ 12-36-70, -71(A)(1) (2019).

This Court should preserve its longstanding rules, and the consistent and fair application of its tax laws, and reverse the judgment of the Court of Appeals.

ARGUMENT

I. The Department Urges This Court to Abandon the Crucial Rule Granting Taxpayers the Benefit of Reasonable Interpretations of Tax Statutes.

The Court of Appeals chose to read the 2016 tax statute “broadly.” App. 2115-16, 2118. That view cannot be squared with the more than century old rule applied in South Carolina, and elsewhere, that taxpayers are given the benefit of a reasonable interpretation that favors them. Pet. Br. 23-24 (collecting cases). Faced with the impossibility of trying to explain how the Court of Appeals’ reading of *Travelscape* can be squared with this settled rule of tax law, the Department instead treats *Travelscape* and various of this Court’s tax cases as nothing more than a series of conclusions. According to the Department, in any case where the Court ultimately concluded that the statute clearly applied to the taxpayer (as in *Travelscape*, *Books-A-Million*, and *Rent-A-Center*), the Department prevailed. *See* Resp. Br. 23-24. When the Court concluded that the statute was not clear as applied to the taxpayer (as in *Alltel*), the taxpayer prevailed. *See id.* at 31-32. So, the Department suggests, this Court should affirm the Court of Appeals because that court *concluded* that the 2016 Tax Act clearly applied to Amazon Services with respect to third-party sales. *See id.* at 22.

But the law is not a series of conclusory assertions, and precludes the Department’s circular logic. This Court’s decisions always reflect a careful reasoning that applies the law to the facts of the case to reach the proper conclusion. The Department never discusses this Court’s reasoning because it cannot be squared with the Court of Appeals’ conclusion.

Start with *Travelscape*. The Department prevailed there because the statute applied tax to those who are “in the business of furnishing accommodations.” *Travelscape*, 391 S.C. at 99, 705

S.E.2d at 33 (quoting S.C. Code Ann. § 12-36-920(E)). The Court looked into the business structure and the agreements between hotels and the internet-based taxpayer in that case and how each of them engaged with customers. It found that Travelscape actually held an inventory of hotel rooms that it made available to its customers, Travelscape determined the price the customers would have to pay to Travelscape for access to those rooms (guests did not pay the hotel at all), and Travelscape could and in fact did grant its customers the right to those rooms.

Contrary to the Court of Appeals' view (*see* App. 2118), this Court did not point to the word “furnish” and declare that it is broad and therefore the taxpayer lost. And it likewise did not, as the Department suggests, observe that there are *some* terms in the tax statute that are undeniably broad, such as “all” and “every,” and therefore the taxpayer should lose. *See* Resp. Br. 30. Instead, this Court looked at what the taxpayer actually did and asked whether there was any way to reasonably deny that all of what the taxpayer did amounted to “furnishing” hotel rooms. As this Court explained, “‘furnish’ as it appears in [the statute] demonstrates that it encompasses the activities of entities such as Travelscape who ... provide hotel reservations to transients for consideration.” *Travelscape*, 391 S.C. at 101, 705 S.E.2d at 34. The Department prevailed in *Travelscape* because the critical word—furnish—could not reasonably be read to exclude Travelscape given Travelscape’s way of doing business.¹

The same process worked in favor of the taxpayer in *Alltel*. The statute at issue in *Alltel* provided that “every ... telephone company” was required to pay an increased license fee. S.C. Code Ann. § 12-20-100(A); *see Alltel*, 399 S.C. at 317, 731 S.E.2d at 871. The task of the Court

¹ The Department claims that this Court applied “almost identical provisions of the accommodations tax statute” to “the almost exact set of facts as this case” in *Travelscape*. Resp. Br. 23. But, as Amazon Services’s opening brief detailed, Travelscape was not a marketplace, held its own inventory of rooms, and was paid by customers for the right to rooms. The business models are fundamentally different. *Compare id.*, with Pet. Br. 27-28.

was to determine whether Alltel’s business—namely, providing cell phone service—could reasonably be excluded from the meaning of “telephone company.” Importantly, even though the statute applied to “every” telephone company, the presence of the broad word “every” did not dictate the outcome. *See Alltel*, 399 S.C. at 319-20, 731 S.E.2d at 872-73. Instead, the Court considered the taxpayer’s argument that “telephone company” should be understood to apply only to companies that use landlines, rather than radio waves, to transmit communications. *See id.* The statute was silent on the distinction between landlines and radio waves, but the Court nonetheless recognized that Alltel’s interpretation was reasonable because the statute had been drafted, and the tax imposed, on the assumption that landline technology was involved in telephone service. *See id.* at 319 n.3, 731 S.E.2d at 872 n.3. Because the statute was “reasonably susceptible of an interpretation that [would] exclude [Alltel],” the Court reversed the Court of Appeals and entered judgment in favor of the taxpayer. *Id.* at 321, 731 S.E.2d at 873.

The Department’s explanation for the outcome in *Alltel* actually favors Amazon Services here. The Department notes that the statutory phrase “telephone company” unambiguously excluded cell phone companies because cell phone service is “an entirely different technology” than what was contemplated by the statute.² Resp. Br. 32. But the phrase “telephone company” did not confine itself to a particular technology. *See Alltel*, 399 S.C. at 316, 731 S.E.2d at 870; S.C. Code Ann. § 12-20-100(A). Had the Court followed the approach the Department suggests here, it would simply have declared that “telephone company” is broad and unqualified and indifferent to the technology facilitating telephone communication, and would have concluded

² Contrary to its characterization in its brief here, the Department took the position in *Alltel* that cell service providers were unambiguously *covered* by the term “telephone company.” *See Alltel*, 399 S.C. at 317, 731 S.E.2d at 871 (“DOR asserted each Petitioner was a ‘telephone company’ and therefore required to pay heightened license fees ... in accordance with section 12-20-100.”).

that there was no room for an “ambiguity analysis” as the Department calls it. Resp. Br. 22. Instead, the Court noted that the context of the law and the statute’s application to the particular business of the taxpayer left uncertain whether a cell phone company was covered. “[S]uch ambiguity must be construed in the taxpayers’ favor,” so the Court ruled for the taxpayer. *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873.

The same process played out in both *Books-A-Million, Inc. v. S.C. Dep’t of Revenue*, 430 S.C. 388, 844 S.E.2d 399 (Ct. App. 2020), *aff’d*, 437 S.C. 640, 880 S.E.2d 476 (2022), and *Rent-A-Center East, Inc. v. S.C. Dep’t of Revenue*, 425 S.C. 582, 824 S.E.2d 217 (Ct. App. 2019). Neither case helps the Department. *See* Resp. Br. 23, 33-34. The taxpayers in *Rent-A-Center* and *Books-A-Million* received precisely what Amazon Services requests here: an evaluation of the reasonableness of their arguments in light of the language of the statute and the particular facts of their business operations.

In *Books-A-Million*, this Court determined that retailers were “sellers” of their membership fees in the context of retail bookstores. 430 S.C. at 398, 844 S.E.2d at 404. Consistent with that ruling, Amazon Services recognized the difference between its membership fees and third-party sellers’ sales. Because it receives consideration for its memberships from customers, Amazon Services collected and remitted sales tax on Prime memberships for South Carolinians. Likewise, because Amazon Services received no consideration from customers on third-party sales, Amazon Services properly did not collect and remit tax on those sales.

In *Rent-A-Center*, the Court of Appeals held that S.C. Code Ann. §§ 12-36-910(A) and 12-36-90 unambiguously imposed a tax on liability-waiver fees that were “fundamentally interconnected” with rental agreements for durable consumer goods. 425 S.C. at 585-86, 824 S.E.2d at 219. The Court carefully examined the evidence and the taxpayer’s business model,

including the connection between the waivers and the rental agreements (both of which the taxpayer charged its customers a fee for), and concluded that “the value proceeding from the Rental Agreements included the value Taxpayers received from the Waivers,” so the waivers were not exempt from the sales tax. *Id.* at 591-93, 824 S.E.2d at 222-23. Amazon Services, by contrast, does not charge fees *to customers* on third-party sales at all.

Neither *Books-A-Million* nor *Rent-A-Center* articulates or applies any rule of interpretation for tax statutes that undermines the reasonableness of Amazon Services’s interpretation at issue here.³

Contrary to the Department’s repeated suggestion, Amazon Services has never argued—and it is a strawman to suggest—that the “mere fact” that Amazon Services reads the statute differently from the Department means Amazon Services must prevail. *See* Resp. Br. 33. Mere subjective disagreement is insufficient; what matters is whether Amazon Services’s alternative interpretation is objectively reasonable. *See Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 (focusing on whether the language of the tax law is “*reasonably* susceptible of an interpretation that will

³ The two other cases the Department cites in passing do not support its position, either. *See* Resp. Br. 22. *Crescent Manufacturing Co. v. Tax Comm’n*, 129 S.C. 480, 124 S.E. 761 (1924), reaffirmed the principle that “a tax statute should be strictly construed against the government,” *id.* at 487, 124 S.E. at 763, and that “any substantial doubt . . . must be resolved against the government and in favor of the taxpayer,” *id.* at 492, 124 S.E. at 765. The Court simply held that this rule did not support the taxpayer in that case because the taxpayer’s interpretation was objectively unreasonable. As the Court explained, the taxpayer read one provision incorrectly and in isolation, and its reading was inconsistent with the statute as a whole. *See id.* at 484-94, 124 S.E. at 762-65. *Colonial Life & Accident Insurance Co. v. S.C. Tax Commission*, 233 S.C. 129, 103 S.E.2d 908 (1958), is likewise distinguishable. There, the taxpayer’s construction of the statute was flatly inconsistent with another provision of the statute that made clear the tax covered intangible personal property as well as tangible personal property. *See id.* at 149, 103 S.E.2d at 918 (“On the contrary, the provision excepting from investment income to which the tax is applicable . . . would seem clearly to imply legislative intent that the tax should apply to other intangibles not so excepted.”). Nothing like that in the Sales Tax Act undermines Amazon Services’s interpretation here.

exclude” the taxpayer (emphasis added)); *S.C. Dep’t of Soc. Servs. v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct. App. 2008) (“If a statute is susceptible to two reasonable interpretations, it is ambiguous.”). And it *is* objectively reasonable, as evidenced by the statutory language and all of the objective indicia of reasonableness discussed below. Amazon Services seeks only what other taxpayers in South Carolina and across the country are entitled to: the benefit of an objectively reasonable application of the tax statute to its business that would result in no tax liability.

II. Amazon Services Has Not Abandoned Its View That the Language of the Statute Is Best Read Not to Apply to a Marketplace Facilitator Like Amazon Services.

Amazon Services has consistently maintained that its view—that the 2016 statute does not apply to its marketplace facilitator activities for third-party sellers—reflects the best reading of the statute. The Department is under the misimpression that Amazon Services no longer believes its reading of the statute is best because Amazon Services has argued it should also prevail even if its reading is not the best but still reasonable. *See* Resp. Br. 23 (claiming that Amazon Services has “effectively concede[d]” this point). Yet Amazon Services devoted an entire section of its opening brief to explaining why its interpretation of the statute is best. *See* Pet. Br. 28-34.

In its opening brief, Amazon Services focused on the definition of “sale” in the statute because the provision identifying “sellers” and “retailers” does not define the term other than by listing categories of sellers that indisputably do not cover Amazon Services (*e.g.*, furnishing accommodations to transients for a consideration, operating a laundry, etc.). *See* S.C. Code Ann. § 12-36-70 (2016). The Department has never denied that only someone who makes a “sale” can be considered a “seller” or “in the business of selling.” So, following the process laid out in this Court’s prior tax cases like *Travelscape* and *Alltel*, it is both logical and appropriate to ask: Does

Amazon Services make a “sale” when it acts as a marketplace facilitator with respect to third-party sales?⁴

The statute defines “sale” as “any transfer, exchange, or barter[] ... of tangible personal property *for* a consideration.” S.C. Code Ann. § 12-36-100 (emphasis added). The Department tacitly concedes that receiving consideration “for” the transfer of tangible personal property is the heart of selling under the law. It asserts, repeatedly, that Amazon Services does, in fact, receive consideration for the transfer of personal property. *See, e.g.*, Resp. Br. 18, 28, 35, 37. Yet the Department never cites any document or testimony that supports its assertion. This (admittedly) critical fact—whether Amazon Services is paid by buyers “for” the transfer of personal property—was the focus of substantial evidence in the record. And *all* of it refutes the Department’s assertion. Amazon Services does not receive consideration for the transfer of third-party sellers’ property.

The Department’s reasons for asserting that Amazon Services receives “consideration” for third-party sales all fail when probed. They all rest on the Department’s efforts to distract from the evidence that actually answers the question. For example, according to the Department, Amazon Services receives “consideration” for the exchange of tangible personal property because it receives a “transaction-based referral fee profit on every sale occurring on Amazon.com.” Resp. Br. 35; *see also id.* 18 (“By structuring its profit as a transaction-based fee,

⁴ The Department argues that Amazon Services “is conflating the definition of sale with the definition of retailer/seller.” Resp. Br. 27. Not so. Amazon Services is presenting an interpretation of the statute that reads the provisions together and makes sense of the statute as a whole, which is required under this Court’s cases. *See, e.g., TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). The “retailer/seller” provision does not define what “seller” or “selling” means, which is why it makes sense to consider the definition of a “sale.” The Department’s interpretation, by contrast, is not grounded in any statutory language, cannot reconcile the “sale” provision with the “seller” provision, and produces an absurd result.

Amazon ensures that it makes a profit on—and receives consideration for—every sale occurring on Amazon.com.”). But this is a clear non sequitur. The fee that Amazon Services receives is not consideration *for* the exchange of tangible personal property, and it is not paid by the customer. Rather, the fee that Amazon Services receives is consideration for the *services* it provides to the third-party sellers, and it is paid by the third-party sellers to Amazon Services.

As Amazon Services detailed in its opening brief, the sales proceeds flow from the customer’s account into the Amazon Payments account, where they are held for the benefit of the third-party seller until the proceeds are disbursed. App. 248-49, 251; Ex. 3, App. 910-11. Amazon Services never receives nor holds the sales proceeds; Amazon Payments holds the proceeds temporarily, but expressly for the benefit of the third-party seller. App. 271-72, 290-91; Ex. 3, App. 910-11. In all these respects, the customer and third-party seller enter into a sale transaction and use Amazon Payments to facilitate payment no differently than any payment processor. As the owner of a third-party seller explained at the hearing, “I’m the seller of these products. It’s my money.” App. 489-90. And, pursuant to the BSA, the third-party seller pays Amazon Services for its various marketplace facilitation services. The third-party seller’s payment for those services is drawn from the seller’s portion of the funds received from the customer and held by Amazon Payments, with the balance remitted to the third-party seller. App. 248, 272; Ex. 3, App. 864-65, 882-83, 890, 901, 910-11; *see also* Pet. Br. 13-15. Put simply, the seller (not the buyer) has instructed Amazon Payments to send a portion of the seller’s money to Amazon Services when Amazon Payments sends the rest to the seller. The customer never pays Amazon Services for anything.

The evidence on this point is undisputed—the Department simply ignores it. That Amazon Services’s fee is “based” on the transaction (which merely means it is calculated from

the purchase price paid by the buyer to the seller) does not mean that it is consideration for the exchange of tangible personal property. *See* Resp. Br. 36. However it is calculated, it is money paid by the third-party seller to Amazon Services for its services.

The Department cannot overcome this evidence, so it tries to dismiss it all as “corporate shell games” that Amazon Services used to try to “escape liability” by “separat[ing] the elements of what is a unified sale.” Resp. Br. 32. There is nothing to this disconcerting departure from bedrock principles of corporate law. Amazon Services and Amazon Payments are distinct entities that provide different services. That has never been disputed. The Department never tried to pierce the corporate veil distinguishing the various Amazon businesses it hoped the ALC and the Court of Appeals would lump together. And even now the Department continues to cause confusion by repeatedly using “Amazon” as a catch-all to refer to both entities. *See id.* at 1.

In the end, the Department’s effort to brand Amazon as playing games with its corporate structure is just another distraction. The distinction between Amazon Services and Amazon Payments is real, but ultimately that is not why Amazon Services should prevail here. Amazon Services’s interpretation of the statute does not turn on any distinctions between Amazon entities. Rather, its interpretation turns on the distinction between third-party sellers (who customers pay) and *all* Amazon entities (who customers never pay for third-party products). The dispositive point, which the Department never refutes, is that the consideration provided by the customer is undisputedly the property of the third-party seller even though that consideration travels through the Amazon Payments processing system. That is how the BSA, which describes the reality of the relationship between all the Amazon entities and third-party sellers, treats every transaction. Amazon Services should prevail because no Amazon entity, nor any combination of entities, received consideration for third-party sales. Only third-party sellers received

consideration for third-party sales, and thus only they made the sales. Amazon Services is not a “seller” or in the business of “selling” in the context of third-party sales.⁵

Amazon Services’s interpretation of the statute is the best way to understand the statute’s plain language. It is also better than the Department’s because Amazon Services’s view does not produce the absurd results that the Department’s view does. *See, e.g., Duke Energy Corp. v. S.C. Dep’t of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (“[R]egardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly.”). Under the Department’s view, a “seller” would include payment processors, credit card companies, banks, delivery companies, and the like, whenever any of them charge a “transaction-based fee” and profit “indirectly” from a sale transaction. Rather than describe some limiting principle for its interpretation, the Department simply characterizes the concern as a “recitation of a parade of horrors.” Resp. Br. 36. This dismissive response reveals the going-forward danger of allowing the Court of Appeals’ ruling to stand: the Department will have extraordinary discretion to enforce its view of tax statutes, limited not by law but only by the Department’s own opinion of what is sensible.

With no basis in the agreements or the underlying facts about how Amazon Services’s marketplace facilitator business operates, the Department relies on what it declares is the customer’s impression of the sale transaction. *See, e.g.,* Resp. Br. 29 (“from a customer’s perspective ... they are receiving title and possession in exchange for consideration”). But

⁵ Contrary to the Department’s bald assertion, Amazon Services’s argument does not turn on whether it “owns” the third-party items sold on the Amazon.com marketplace. *See* Resp. Br. 29-30. So the fact that S.C. Code Ann. § 12-36-70(1)(a) defines a “seller” or “retailer” to include “every person ... selling or auctioning tangible personal property whether owned by the person or others” does not undermine Amazon Services’s interpretation.

nothing in the Sales Tax Act makes the customer's perspective relevant to determining whether Amazon Services is responsible for collecting sales tax for third-party sales. And that is for good reason: businesses need certainty when planning their financial and tax affairs. Having to speculate about how a customer might view a transaction is no substitute for the underlying legal and factual realities of transactions and the relationship between a marketplace facilitator and a third-party seller that customers often do not know or care about. The governing statutes, court rulings, and regulations focus on identifiable business and legal realities, not on amorphous concepts like varying customer perceptions. And here, the Department's argument is based on pure speculation in any event. The Department did not introduce any evidence regarding whether customers in fact perceived that they were buying from third-party sellers. And it ignores the evidence that the Amazon.com website identifies the third-party seller for the purchaser. *See* Pet. Br. 11 (describing evidence and showing screenshot of product page).

Unable to show that Amazon Services receives consideration for the exchange of tangible personal property in the third-party sales context, the Department falls back on facts about how Amazon Services has structured the marketplace to be effective and beneficial to both buyers and sellers. Amazon Services has never disputed that customers enter their payment information on the Amazon.com website when creating a profile, that customers receive invoices and order confirmations from Amazon Services, that customers receive a single notification from Amazon Services regardless of how many products are purchased or from how many third-party sellers, and that Amazon Services handles most of the communications with customers. *See* Resp. Br. 6-10, 24-25, 28-29. But those facts do not, under the statute, make Amazon Services a seller. They establish nothing more than the mechanisms Amazon Services built to facilitate sales in its marketplace.

While it may make sense as a matter of convenience to impose the tax collection obligation on the marketplace facilitator, convenience is no basis to affirm here. Among other reasons, the Department expressly abandoned any theory of administrative convenience (which could not have supported the retrospective relief it is defending in any event). App. 169 (“[W]e have ... elected not to proceed with that theory.”). Moreover, as discussed below, every state with a sales tax has addressed the convenience of having marketplace facilitators collect sales tax by amending their statutes. South Carolina is no exception. As in every other state, it was only after the statute was changed that the sales tax laws covered marketplace facilitators.

III. The Department Cannot Set Aside the Many Reasons Why Amazon Services’s Interpretation of the Statute Is Objectively Reasonable.

Amazon Services identified in its brief a variety of objective indicia that supported the reasonableness of its view that it was not the “seller” for third-party sales: (1) the Department Director’s sworn statements that the statute would need to change in order to fill a “gap” in the law so that no one had to “guess” about whether they were covered, (2) the extensive 2019 amendment that filled that gap by, among other things, redefining “seller” to include marketplace facilitators, and (3) the uniform recognition by other jurisdictions that marketplace facilitators were not responsible for collecting sales tax on third-party sales without the marketplace facilitator amendments. The Court of Appeals treated all of this as irrelevant as a matter of law when determining whether “the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person.” *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873. That view was mistaken. When a taxpayer reasonably interprets a tax statute as not covering that taxpayer, a court should rule in the taxpayer’s favor. Even if the Department offers an alternative interpretation, the presence of differing reasonable interpretations means that the statute is ambiguous. And when, as here, numerous sources of

objective evidence support the taxpayer’s interpretation, those facts must be weighed when assessing the reasonableness of the taxpayer’s interpretation.

A. Amazon Services Has Not “Cherry-Picked” from the Department’s Sworn Statements Acknowledging That a Change in the Law Was Necessary to Impose Sales Tax Collection Duties on Marketplace Facilitators Like Amazon Services.

The Department does not deny that its own Director told the legislature there was a “need [for] additional legislation” to “close[] the gap” so that “nobody has to guess” as to who must collect and remit sales tax on third-party sales sold on online marketplaces like Amazon.com. Pet. Br. 37; *accord* Resp. Br. 42-45. The Department accuses Amazon Services of “cherry-pick[ing]” and “misconstru[ing]” just a “few statements” made after the tax period in question. Resp. Br. 42. But the Department does not (and cannot) support these accusations.

First, the Department never explains what context Amazon Services has omitted. The Department purports to provide context when it claims that the “gap” referenced by the Director in his testimony before the legislature referred to “retailers that lacked a physical presence in the State.” Resp. Br. 44. But that mischaracterizes the testimony. As the Director’s full comments make clear, the “gap” referred to imposing collection duties on marketplace facilitators for third-party products and had nothing to do with whether the facilitator had a physical presence in the state. *See* Ex. 194, App. 1287 at 6:02-6:33 (“There’s five states that have gone out and passed what we would call marketplace legislation. Marketplace legislation. Basically, this is legislation that closes the gap solid and says if you are the retailer selling third-party products, then you must collect and remit sales tax. It removes us from the court and puts it back in the statute.”). The Department also asserts in a footnote that the Director told the legislature that he believed the pre-2019 version of the Act was “crystal clear” that it applied to Amazon Services. *See* Resp. Br. 43 n.18. But neither the Department in its brief nor the Director in the cited testimony ever explains what language or feature of the pre-2019 statute imposed a collection duty on

marketplace facilitators in the third-party sales context. And of course, if something about the pre-2019 version had clearly imposed that duty, there would have been no “gap” to fill.

Second, the testimony that Amazon Services has cited is not just a “few statements.” Resp. Br. 42. Department officials—including the Department’s Director—*repeatedly* observed that the law prior to 2019 had to be changed to make internet marketplace facilitators responsible for sales tax on third-party sales. These were not isolated remarks; they were part of the Department’s consistent pitch to have the law changed, which was repeated many times over a period of months, in both written and oral testimony. *See, e.g.*, Ex. 192, App. 1274 (“DOR reports that this *statutory change* would allow it to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors through the marketplace sites. ... DOR estimates that, *if there had been a law like this in 2016*, Amazon’s additional sales tax liability for that year would have been \$57 million.” (emphasis added)).

Third, the fact that these statements were made after the tax period in question (*see* Resp. Br. 42) does not undermine their probative value. *Cf. Centex Int’l, Inc. v. S.C. Dep’t of Revenue*, 406 S.C. 132, 145, 750 S.E.2d 65, 72 (2013) (“Although this amendment post-dates the tax years in question, it is instructive as to the intended purpose of the statutes at issue.”). That the Department’s many statements were made during the litigation—and precisely when the scope of the Act was being hotly debated before the ALC and the legislature—makes them even more significant than if they had been made well before this case began.

The Department had previously taken the position that the Court of Appeals was correct to treat all of these statements as irrelevant. *See* Pet. Br. 38-39; DOR Return to Cert. Pet. 20. Now, the Department retreats and says they are not “binding.” *See* Resp. Br. 45. But of course, Amazon Services has always argued that courts interpret statutes and that they are not “bound”

by the statements of the Director. So when the Department tries to treat *Synovus Bank v. S.C. Dep't of Revenue*, 444 S.C. 30, 906 S.E.2d 85 (Ct. App. 2024), as beside the point (*see* Resp. Br. 44-45), the argument falls flat. As Amazon Services explained, if public testimony of private entities is relevant when it undermines a taxpayer's construction of a statute like in *Synovus*, then public testimony of government tax officials must also be relevant when it supports a taxpayer's interpretation, as it does here. Pet. Br. 39. The Department has no answer. *See* Resp. Br. 45.

Finally, it is not just the statements by Department officials, but also the Department's past practices that support Amazon Services's position. The Department does not dispute that it had been receiving sales tax payments from third-party sellers for sales on Amazon.com, and that as of 2016, the Department had not once suggested that this process was wrong or that Amazon Services, not the third-party sellers, was responsible for collection. Pet. Br. 38; *accord* Resp. Br. 42-45. It is thus both the Department's statements and its conduct that strongly support the reasonableness of Amazon Services's view.

B. The Department Cannot Overcome the Presumption That the 2019 Marketplace Facilitator Amendment Changed the Law.

The Department tries but fails to explain away the comprehensive set of changes enacted in 2019 that for the first time extended a sales-tax collection duty to marketplace facilitators like Amazon Services. The Department clings to the prefatory language that the amendment "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." Resp. Br. 37 (quoting S.214, 123d Session, 2019-2020 S.C. Gen. Assembly, § 1(5)). The Department would have this prefatory language bind the parties and this Court and require that the 2019 amendment be deemed irrelevant. *Id.* That extreme claim, unsupported by any

applicable legal authority,⁶ is meritless.

The prefatory language merely clarifies that changes in the law would apply only prospectively, and that the General Assembly was not attempting to interfere with the judicial task of resolving the active dispute between the Department and Amazon Services—a dispute that the Department’s Director repeatedly discussed while urging the legislature to adopt the proposed amendment. *See, e.g.,* Ex. 214, App. 1563. The prefatory language does not purport to, and cannot, override the settled rule that, when the legislature adopts an amendment to a statute, there is a presumption that the legislature intended to change the existing law. *See* Pet. Br. 34-36.

There can be no reasonable doubt the 2019 amendment changed the law with respect to third-party sales on online marketplaces. The 2016 version of the Act had expressly identified other parties that were not sellers but who nonetheless were to be treated as sellers for sales-tax collection purposes. S.C. Code Ann. § 12-36-70 (2016). The 2019 amendment expressly added marketplace facilitators like Amazon Services to the group of non-sellers who would be treated as sellers for sales-tax collection purposes. To bring the new business model within the scope of the statute, the legislature implemented a comprehensive set of changes, across multiple provisions of the Act. The amendment changed virtually every provision the Department has relied on in this litigation in its quest to hold Amazon Services liable for sales tax under the 2016 law, including (1) changing the definition of “retailer” and “seller” in § 12-36-70 to include

⁶ Neither case cited by the Department (*see* Resp. Br. 37) supports the notion that courts are “forbidden” from considering amendments when determining the meaning of a prior law. They simply stand for the unremarkable proposition that a preamble can inform a statute’s meaning. *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) (per curiam) (“We look to the preamble ... as an aid in determining” legislative intent.).

every person “operating as a marketplace facilitator”; (2) adding a specific, detailed definition of “marketplace facilitator” in § 12-36-71; (3) changing “gross proceeds of sales” in § 12-36-90(1)(a) and “sales price” in § 12-36-130(1) to include “property sold through a marketplace by a marketplace facilitator”; and (4) expanding the list of those responsible for collecting sales tax in § 12-36-1340 to include any retail seller who “operates as a marketplace facilitator.” Fifth, the amendment even provided that “a marketplace facilitator includes any related entities,” such as Amazon Payments, “assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace.” S.C. Code Ann. § 12-36-71(C) (2019). That so many changes were required to cover Amazon Services’s online marketplace business model proves that the previous version of the statute did not do so. As the Legislative Oversight Committee explained, without this “statutory change,” the Department would not be able “to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors through the marketplace sites.” Ex. 192, App. 1274.

The Department never grapples with how comprehensive and perfectly tailored these changes are to capture Amazon Services’s activities with respect to third-party sales. *See* Resp. Br. 37-42. Nor does the Department successfully distinguish the legion of cases cited in Amazon Services’s opening brief showing that South Carolina courts do not lightly override the presumption that amendments imply a change in law. *See* Pet. Br. 34-36 (collecting cases). All the Department says is that the legislature’s purpose of “clarifying rather than changing existing law is manifest in the findings expressed by the General Assembly.” Resp. Br. 41-42. But nothing in the General Assembly’s findings or the language of the 2019 amendment says the amendment was designed to clarify rather than change the existing law. And the case the

Department cites only underscores the point.⁷ In *Duvall v. S.C. Budget & Control Board*, unlike here, the legislative amendment actually said on its face that it was intended “to clarify the contribution requirements on unused annual leave and the use of such payments in calculating average final compensation.” 377 S.C. 36, 47, 659 S.E.2d 125, 130 (2008) (quoting 2005 Act No. 14, § 3 (emphasis added)). No such language can be found in the 2019 amendment.

But even more fundamentally, the Department misses the crucial point that this is a tax case (unlike *Duvall*). Even if the 2019 amendment were a “clarification” rather than a “change,” the fact that a clarification was needed defeats the Department’s case. The need for clarification reveals that the version in effect during 2016 was ambiguous with respect to third-party sales through Amazon Services’s marketplace. On this basis alone, Amazon Services should prevail. See *Alltel*, 399 S.C. at 320-21, 731 S.E.2d at 873.

C. The Department Cannot Make *Wayfair* Relevant Here.

The Department continues to dissemble when it repeatedly asserts that the marketplace facilitator amendment in 2019 was merely designed “to address changes to the taxation of out-of-state sales as a result of” the Supreme Court’s decision in *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018). Resp. Br. 38. There is no merit to the Department’s characterization.

As Amazon Services explained in its opening brief, the issue in *Wayfair* has no bearing on the statutory interpretation issue here and does not explain the many changes reflected in the 2019 amendment. In *Wayfair*, the Supreme Court held that an out-of-state seller’s physical presence in the taxing state is not necessary to require the seller to collect and remit the state’s sales tax. Pet. Br. 42-43 n.12. This changed the prior physical presence rule for determining

⁷ The Department also cites *Whitner v. State* (see Resp. Br. 41), but that case concerned proposed bills, not actual legislative amendments. 328 S.C. 1, 9, 492 S.E.2d 777, 781 (1997).

whether the activity being taxed had “substantial nexus with the taxing State.” *Wayfair*, 585 U.S. at 174. But the 2019 amendment did something different: it created an entirely new class of “sellers”—those “operating as marketplace facilitators.” *See supra* at 18-19. If the Department’s *post hoc* explanation were correct, there would have been no need for the wholesale changes to the statute that were implemented.

Incredibly, the Department asserts in its brief that “Act 21 was primarily a response to *Wayfair*, not a legislative effort to close the loop on Amazon.” Resp. Br. 39. But when the Director spoke to the legislature, he emphasized that the *Wayfair* decision was “completely different” than the marketplace facilitator amendment he was urging the General Assembly to adopt:

Chairman Bruce Bannister: The next suggested recommendation is [that] third-party sales will be subject to tax using draft language ... Um, maybe ... The record ... One more time, the *Wayfair* decision is not this, this is something else?

Director Hartley Powell: That is correct. This is something ***completely different***. There’s some similarity, but it’s completely different. So, what we’re talking about is a large internet seller who in this case would have physical presence already in the State of South Carolina. ...

Ex. 199, App. 1287 at 2:45:14-2:46:01 (emphasis added). The Director reiterated this distinction multiple times in his sworn testimony before the legislature. *See* Ex. 196, App. 1287 at 1:57:15-1:58:58 (“*Wayfair*, which is, um, ... for remote sellers. ... Now, the marketplace legislation is different. That is going to help us with third-party sellers who fall up under the marketplace umbrella. ... The marketplace legislation would make it very clear that even though you’re up under the tent you can’t avoid collecting sales tax for all the [third-party] vendors up under the tent. ... Completely separate from remote sellers.”); Ex. 201, App. 1287 at 1:58:24-2:02:35 (Director Powell explaining that *Wayfair* was different than the marketplace facilitator

amendment in exchange with Senator Vincent Sheheen).⁸ The Department has long known that marketplace facilitator legislation was needed without regard to *Wayfair*.

D. Contrary to the Department’s Position, the Decisions and Actions of Other States Are Relevant and Strongly Support Amazon Services’s Position.

Not once during this case has the Department been able to point to a single other jurisdiction that has imposed sales tax on Amazon Services or any other marketplace facilitator for third-party sales before the enactment of a marketplace facilitator amendment. *See* Resp. Br. 46-48. Nor has the Department attempted to distinguish the cases where courts in other states have rejected both the result and reasoning of the Court of Appeals here. *See id.*; Pet. Br. 41-42.

Instead, the Department asserts that what other states have done does not matter. Resp. Br. 46. But the Department ignores this Court’s repeated recognition that when other state courts interpret “practically identical” language in their tax statutes, “[t]he construction accorded that language, as applied to facts substantially identical with those of this case, ... is ... entitled to great weight.” *Fuller v. S.C. Tax Comm’n*, 128 S.C. 14, 28, 121 S.E. 478, 483 (1924); *see also* Pet. Br. 42 (citing other cases). Indeed, some of the cases cited by the Department consider the persuasive value of cases from other jurisdictions. *See Colonial Life*, 233 S.C. at 150-51, 103 S.E.2d at 918-19 (considering cases from California, Massachusetts, and Texas); *Rent-A-Center*, 425 S.C. at 591, 824 S.E.2d at 221-22 (analyzing cases from Louisiana and noting that “these decisions [are] instructive”).

Given that longstanding rule, it was surely reasonable for Amazon Services to examine closely parallel out-of-state authorities when forming its view of how the pre-2019 statute

⁸ Further underscoring the reality that the marketplace facilitator amendments are not simply a reaction to *Wayfair* is that multiple states enacted the legislation before *Wayfair* was decided, including Washington (2017 H.B. 2163) and Pennsylvania (2017 Act 43), among others.

applied to third-party sales. Even the case the Department cites does not support its argument. *See* Resp. Br. 46. *Planned Parenthood South Atlantic v. State* says only that decisions from other states are not “binding.” 438 S.C. 188, 208 n.9, 882 S.E.2d 770, 781 n.9 (2023). Amazon Services has never suggested otherwise. But non-binding decisions can obviously inform a reasonable understanding of the law.

The Department claims that Amazon Services never identified any states with substantially similar statutes. *See* Resp. Br. 46 n.19. But Amazon Services cited many other states’ treatment of marketplace facilitators in its opening brief in the Court of Appeals. *See* App. 2006-07. The Department asserted that none of those states had materially similar sales tax statutes. *See* App. 2063. Amazon Services then responded to that argument in its reply by citing and quoting specific sales tax language from several states as examples. *See* App. 2098-2100. There was no waiver.

The Department also claims that “Amazon was fully apprised of its obligations under the Act well before January 1, [2016]” because of a five-year moratorium on Amazon Services’s sales tax obligations passed in 2011. *See* Resp. Br. 47. But the moratorium sheds no light on the question presented by this appeal. As the Department concedes, “the Moratorium Statute made no distinction between Amazon and any Third-Party Merchants.” *Id.* at 39. Once the moratorium expired, Amazon Services was required to collect and remit sales tax on items sold by it or its affiliates—i.e., on sales where it is the “seller.” Nothing in the moratorium informs whether Amazon Services was also responsible for collecting sales tax on third-party sales.

IV. The Department Ignores the Core of Amazon Services’s Due Process Argument.

The Department claims that “[t]here has never been any doubt as to the standard that the Department has sought to apply against Amazon’s business model.” Resp. Br. 48. But its own Director admitted that, without the 2019 marketplace facilitator amendment, marketplace

facilitators like Amazon Services were left to “guess” about how the pre-2019 law applied to third-party sales. A law that requires a taxpayer to “guess” about its obligations violates due process because a law must “provide a person of ordinary intelligence fair notice of what is prohibited [or required].” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

Unwilling to engage with its own statements, the Department claims that “[o]ther facts demonstrate that Amazon [Services] was on notice.” Resp. Br. 49. The Department claims that Amazon Services was on fair notice of its potential liability because it “lobbied for the passage of the Moratorium Statute” and “had carefully examined ... its tax obligations under South Carolina law in 2011.” *Id.* at 49-50. But, as explained above, lobbying for the passage of the moratorium statute does not mean that Amazon Services had fair notice of its potential liability for sales tax on third-party sales. Amazon Services and other Amazon affiliates understood they had the responsibility to collect sales tax on sales of *their* products once the moratorium expired, and it is undisputed that they did so. The moratorium provided no notice to Amazon Services that the Department would suddenly claim in 2016 that it was responsible for collecting sales tax on third-party products sold by others.

The Department also argues that *Travelscape* provided notice because it “directly addresse[d] the tax obligations under South Carolina law of those who sell on the internet.” Resp. Br. 50. But *Travelscape* did not even concern a marketplace. And it is distinguishable for all the reasons discussed above. *See supra* at 3-4 & n.1.

Finally, the Department asserts that “there is no effort to retroactively apply Act 21 to sales made in 2016.” Resp. Br. 50. But the record shows that this is precisely what is happening. In response to a question from a legislator about whether the proposed marketplace facilitator legislation the Department was advocating for would be prospective only, the Director replied:

“Absolutely, it will not be retroactive, right.” Ex. 194, App. 1287 at 7:00-08. He then qualified that answer, acknowledging that this “lawsuit’s going to pull up some retroactivity ... specific to that one company, I haven’t said their name.” *Id.* at 7:10-18; *see also* Ex. 214, App. 1563.

Amazon Services is the only marketplace facilitator forced to bear that “retroactivity.”

At bottom, the Department suggests time and again that Amazon Services is trying to “escape” from the “routine application” of the plain statutory language, and that this plain language provided fair notice of Amazon Services’s liability. Resp. Br. 2, 22, 49-50. But there is nothing “routine” about how the Department is attempting to apply the words of the pre-2019 statute to Amazon Services. It cannot point to one analogous case where any South Carolina court applied the language to a marketplace facilitator and found that the marketplace facilitator was responsible for sales tax collection on third-party sales. And when advocating for the 2019 amendment before the legislature, it repeatedly acknowledged as much. It admitted that “There is no law related to taxation of third party sales.” *E.g.*, Ex. 205, App. 1411. It admitted that the “taxation of online retail sales” was an “emerging issue.” *E.g.*, Ex. 202, App. 1320. And it admitted that its position was an extreme outlier, conceding that “No other state has attempted to pursue this legal theory against online retailers like Amazon, so the SCDOR is on the cutting edge of tax strategy in this litigation.” Ex. 205, App. 1386. Pushing an unprecedented interpretation on an “emerging issue” that no other state had pursued, and under a statute that left marketplace facilitators to “guess” about how it applied to third-party sales, is far from a “routine application” of the plain language of a tax statute. Nothing the Department cites shows that Amazon Services had fair notice of the Department’s new interpretation of the statute.

CONCLUSION

For the foregoing reasons, Amazon Services respectfully requests that this Court reverse the Court of Appeals’ decision and dismiss the Department’s assessment of sales tax liability.

Charleston, South Carolina
January 7, 2025

By: Bryson M. Geer

NELSON MULLINS RILEY &
SCARBOROUGH LLP

Bryson M. Geer
SC Bar No. 13606
bryson.geer@nelsonmullins.com
John C. von Lehe, Jr.
SC Bar No. 5719
john.vonlehe@nelsonmullins.com
151 Meeting Street / 6th Floor
Charleston, SC 29401-2239
(843) 853-5200

C. Mitchell Brown
SC Bar No. 12872
mitch.brown@nelsonmullins.com
1320 Main Street / 17th Floor
Columbia, SC 29201
(803) 799-2000

SIDLEY AUSTIN LLP

Carter G. Phillips
(admitted *Pro Hac Vice*)
cphillips@sidley.com
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SIDLEY AUSTIN LLP

Robert N. Hochman
(admitted *Pro Hac Vice*)
rhochman@sidley.com
Neil H. Conrad
(admitted *Pro Hac Vice*)
nconrad@sidley.com
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Attorneys for Amazon Services LLC