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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.

RESPONDENT SOUTH CAROLINA DEPARTMENT OF REVENUE'S RESPONSE TO THE *AMICUS CURIAE* BRIEFS OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, NETCHOICE, SOUTH CAROLINA CHAMBER OF COMMERCE, AND THE GREATER COLUMBIA CHAMBER OF COMMERCE; THE COUNCIL ON STATE TAXATION; THE INSTITUTE FOR PROFESSIONALS IN TAXATION; THE NATIONAL RETAIL FEDERATION; AND PROFESSOR HAYES HOLDERNESS

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Summary of Argument

Quite a few amici have filed briefs in support of Amazon Services, LLC (Amazon) in this matter. Specifically, briefs have been filed by the Chamber of Commerce of the United States of America, Business Roundtable, Netchoice, South Carolina Chamber of Commerce, and the Greater Columbia Chamber of Commerce (Chambers); the Council on State Taxation (COST); the Institute for Professionals in Taxation (IPT); the National Retail Federation (NRF); and Professor Hayes Holderness. To simplify matters, the Department is providing this consolidated response to all of the pro-Amazon amici.

Filing a consolidated response is appropriate because the amici briefs filed in this case do little, if anything, to advance this Court's understanding of the issues and arguments and, instead, largely present repackaged versions of the arguments made by Amazon in this case. The Seventh Circuit has recognized the potential problems with an amicus brief, noting in part that "amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs" and that "the filing of an amicus brief is often an attempt to inject interest group politics into the [ ] appeals process." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003). Most of the amicus briefs supporting Amazon's position present both of these problems. *Cf.* U.S. Sup. Ct. Rule 37(1) ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.").

The argument themes generally adopted by the amici fail to appreciate the requirement that the courts fairly apply the statutory language in effect at the time of the transactions at issue on Amazon.com. Rather than attempt to correct every such misstatement or incorrect assertion contained in the amici briefs—of which there are many—the Department respectfully refers the Court to the briefing of the parties in this appeal, where such issues were fully and thoroughly addressed by the

parties who actually have an interest in this case. However, the Department briefly address below several key arguments made by the amici, generally summarized as follows:

- **Predictability and uncertainty**. Predictability and uncertainty are not impaired and are in fact advanced through the objective application of the statutory language to the facts, regardless of whether the facts involve an allegedly novel business model or structure.
- **Ambiguity analysis required**. As both the Court of Appeals and the ALC concluded, the ambiguity analysis was not required here because the straightforward application of the law to the findings of fact made by the ALC correctly results in a determination that Amazon is responsible for taxes on all Amazon.com sales.
- **Change in the law**. Contrary to the General Assembly's express prohibition against utilizing the 2019 marketplace facilitator legislation to determine Amazon's liability under the 2016 version of the South Carolina Sales and Use Tax Act (the Act), and despite their best efforts to argue otherwise, the amici cannot show that enactment of the 2019 legislation conclusively means that Amazon.com transactions in goods owned by third-parties were not sales made by Amazon under the Act pre-2019.
- **Retroactivity**. As the Court of Appeals held and the ALC found, there is no evidence that the Department applied the 2019 marketplace facilitator legislation to Amazon.com sales made in 2016; rather, the Department, the ALC, and the Court of Appeals all applied the law in effect in 2016.
- **Targeted tax assessments**. The Department discharged its duty to enforce the revenue laws of this state based on its reasonable interpretation of the Act and without regard to the identity of the taxpayer. There is no evidence the Department has applied the Act differently to other taxpayers similarly situated to Amazon.

- **Other states' decisions**. The decisions of other states cited by the amici not only do not bind this Court, but also shed no light on the application of the unique and broad nature of this State's statutes.
- **Judicially empowered, rogue tax authority**. One amicus made this hyperbolic statement; there is no evidence to support this unwarranted accusation, especially based on the facts of the case and the determinations by not one but two lower courts.
- **Broad reading**. One amicus advances Amazon's making of much ado about the Opinion's statement about the broad nature of the Act; however, that statement was nothing more than the common sense observation that the language of the sales tax statutes is unequivocally broad and does not mean that Amazon is unfairly taxed for those transactions.
- **Substance-over-form**. The Opinion does not apply any substance-over-form doctrine but, instead, applies the statutory language to the facts to determine that Amazon is responsible for taxes on Amazon.com sales.
- **Unintended whipsaw**. One amicus contends that Amazon is the victim of an "unintended whipsaw," but that cannot be so just because a reviewing court applies the plain statutory language to the facts and concludes that the taxpayer's activities fall within the statute.

Argument

1. Contrary to the Chambers' suggestion, predictability of tax laws is furthered by a straightforward application of the plain language of tax statutes even if the taxpayer has attempted to avoid that application by creating an unusual business model.

The Chambers' brief boils down to an argument—also made by other amici in some form—that if a tax statute is applied to a new situation or business arrangement, it is unpredictable and

therefore must be treated as an ambiguity to be automatically resolved in the taxpayers' favor. Just as the ALC determined, that is not the law:

> However, even though Amazon Services' business model is new and not specifically referenced in the Act, the novelty of its business model does not mean the application of the Act to Amazon Services is necessarily ambiguous such that it requires a resolution in Amazon Services' favor.

(App. pp. 24-25) (Op. at. 18-19). As stated by another source cited by the Chambers, "'The meaning of rules is constant . . . [o]nly their application to new situations presents a novelty.'" **(App. p. 25)** (Op. at 19) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 86 (2012)). In short, as recognized by the ALC, **(App. pp. 24-25)** (Op. at 18-19), the fact that Amazon may have a novel business structure does not mean the existing laws do not apply to that structure.

Objectively interpreting tax statutes advances predictability by ensuring that the tax laws are applied fairly and that neither the taxpayer nor the government is unfairly advantaged. The concept that those who participate in and benefit from an economy must pay taxes to sustain the functions of its government is not a new one. *See* THE FEDERALIST NO. 30 (Alexander Hamilton) ("Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions."). The Chambers' predictability position is nothing more than a disguised argument for allowing businesses to hire "lawyers and accountants," Chambers Br. at 5,[1] to create novel and convoluted business arrangements to evade the straightforward application of a tax statute. Certainly federal tax law recognizes that as so:

> Our reading of the statute as requiring that the transaction be treated as a unified whole is reinforced by the well-established "step-transaction" doctrine, a doctrine that the

[1] The Chambers state that, "[w]hen tax obligations are unclear, businesses must hire lawyers and accountants to navigate the uncertainty, creating a deadweight economic loss." Chambers. Br. at 5. But, if accepted, the Chambers' argument would approve those businesses hiring those lawyers and accountants to form novel business structures to try and avoid tax liability by separating the elements of admitted sales on the business' website and, thus, create that uncertainty.

> Government has applied in related contexts, *see, e.g.*, Rev. Rul. 75-447, 1975-2 Cum. Bull. 113, and that we have expressly sanctioned, *see Minnesota Tea Co. v. Helvering*, 302 U.S. 609, 613 (1938); *Commissioner v. Court Holding Co.*, 324 U.S. 331, 334 (1945). Under this doctrine, interrelated yet formally distinct steps in an integrated transaction may not be considered independently of the overall transaction. By thus "linking together all interdependent steps with legal or business significance, rather than taking them in isolation," federal tax liability may be based "on a realistic view of the entire transaction." 1 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶ 4.3.5, p. 4-52 (1981).

Comm'r v. Clark, 489 U.S. 726, 738 (1989). The Chambers' disguised predictability argument would benefit only taxpayers with the economic resources to pay the lawyers and accountants to form legal structures to create uncertainty and, thus, force other taxpayers to shoulder more of the burden of funding the government. In light of Amazon's successful efforts to secure the years' long reprieve afforded to Amazon by the Moratorium,[2] *see* DOR Br. at 3-4, 47, the suggestion that the breadth of the sales tax statutes body was overlooked or could not have been ascertained by Amazon at the time it began remitting sales tax to the Department in the first quarter of 2016—but only for half of the sales taking place on its retail website—strains credulity.

Moreover, the parade of horribles advanced by the Chambers is—as often is so for such a rhetorical device—misleading. This case is about the interpretation and application of the sales tax laws applicable to Amazon.com sales in 2016. Two courts have concluded those laws plainly apply to all of the sales occurring on Amazon.com based on a reasoned application of those laws to the facts

[2] As explained in the Department's brief, the South Carolina General Assembly enacted the Distribution Facility Sales Tax Exemption (Moratorium) in 2011 primarily to encourage investment by Amazon in South Carolina. *See* 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."). The statutory Moratorium was in place from 2011 through the end of 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. (**App. p. 1038**) (Ex. 178 at 9).

as found by the ALC. The ALC received over 200 exhibits into evidence, and also considered extensive pre- and post-hearing briefing from the parties on these issues, including dispositive motions. The ALC's Order was over 50 pages long, containing extensive factual findings and a thorough examination of Amazon's business model, the manner in which transactions are conducted on the Amazon website, and Amazon's particular involvement in and control over those transactions. The Order also carefully and thoughtfully applied Amazon's business model to the relevant provisions of the Act in order to determine whether Amazon fit the statutory definitions for a "retailer" and "seller," S.C. Code Ann. § 12-36-70, as well as a "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), and ultimately determined that Amazon did meet those definitions. The Court of Appeals affirmed that determination by applying the 2016 statutory language to the facts found by the ALC. The Chambers' "sky-is-falling" commentary adds nothing to this analysis, and it should be disregarded.

And as explained in the Department's Brief, DOR Br. at 37-42, the General Assembly in 2019 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 tax policy previously based on a seller's physical presence in a state. 2019 S.C. Acts No. 21 (effective April 26, 2019). Thus, the factual and legal issues in this appeal are discrete, and the decisions of the ALC and the Court of Appeals have no substantial continuing effect because the parties agree as to the application of the pertinent constitutional and statutory law post-Act 21 to present and in the future.

In short, the Opinion is not only correctly decided, but also is not the broad upheaval of tax law that the Chambers describe. The asserted need for predictability does not require the automatic application of the rule of ambiguity in tax statutes even if those statutes are applied to a novel business structure or operation. And, regardless, the Chambers' ambiguity arguments are wrong for the reasons

stated in the Department's brief. DOR Br. at 22-24, 34-48. In short, the Opinion does not overturn centuries of applying tax statutes; it is a straightforward application of the law to the facts found by the ALC. And all taxpayers are entitled to predictability and fairness in the collection of tax revenues, not just those with the ability to hire "lawyers and accountants" to establish novel and convoluted business structures allowing the taxpayer to take refuge in "uncertainty," "unpredictability," and "ambiguity." The Chambers' brief provides no credible or substantive basis for reversing the Court of Appeals.

2. Contrary to COST's position, both the Court of Appeals and the ALC applied sound tax policy by engaging in an objective application of the law to the facts without placing the proverbial thumb on Amazon's side of the scales to determine that Amazon is liable for taxes on all sales occurring through that website.

Parroting Amazon's brief, COST contends that the pertinent sales tax statutes must automatically be deemed ambiguous and applied in Amazon's favor. As this Court well knows, there is no ambiguity analysis if the 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."). As COST recognizes, "[s]ound tax policy dictates that statutes are given their plain meaning," COST Br. at 4, and that is exactly what both the Court of Appeals and the ALC did: apply the plain meaning of the Act to determine that Amazon is liable for taxes on all sales occurring through Amazon.com.

The fact that the legislature amended the statutes in 2019 to account for elimination of the physical presence requirement in no way means that the 2016 statutes did not apply to Amazon, which already had physical presence in South Carolina,[3] or demonstrate that the statutory provisions at issue

[3] The marketplace facilitator amendments did not impact Amazon—though it continued to vehemently argue otherwise—because it already had physical presence in South Carolina, as recognized in the Moratorium statute enacted in 2011. *See also* discussion *supra* n.2. As explained in the Department's brief, the South Carolina General Assembly enacted the Moratorium statute in 2011

in this case are ambiguous. *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." (internal quotation marks and citations omitted)). Although Amazon falls into the newly enacted definitions, that does not mean that Amazon did not fall into the prior definitions of "seller" and "retailer," and of "person engaged or continuing within this State in the business of selling tangible personal property at retail" in the Act—just as the Court of Appeals and the ALC determined.

Further, as referenced above, the "marketplace facilitator" legislation contains a specific provision that it "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 in audit." S.214, 123d Session, 2019-2020 S.C. Gen. Assemb., § 1(5). Because this matter was in litigation when the marketplace facilitator legislation was passed, the express language of the "marketplace facilitator" legislation forecloses any party (or *amicus*) from relying on it in support of its position in this case, which is precisely what Amazon—and now COST—is trying to do.

Finally, there is no retroactive application of the 2019 legislation at issue. 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."). And there is no basis for COST's hyperbolic claim that the Opinion "could

primarily to encourage investment by Amazon in South Carolina. *See* § 12-36-2691. 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.***), a distinction rendered moot by *Wayfair*.

also open the floodgates for other assessments." COST Br. at 14. There is no evidence for such a claim and any statute of limitations has long since expired. *See generally* S.C. Code Ann. § 12-54-85(A) ("Except as otherwise provided in this section, taxes must be determined and assessed within thirty-six months from the date the return or document was filed or due to be filed, whichever is later.").

Thus, the question for the Court and the one decided by the Opinion is, at bottom, the straightforward application of South Carolina law as it existed in the first quarter of 2016—the tax period at issue—to Amazon's online retail business to determine whether it was, in fact, "engaged or continuing within this State in the business of selling tangible personal property at retail." § 12-36-910(A).[4] That is precisely the analysis performed by the Court of Appeals and the ALC, both of which determined that Amazon did meet this definition. COST's arguments do not inform the analysis of this state's laws in any meaningful way. COST's unhelpful brief should be disregarded.

3. Contrary to IPT's position, the Opinion does not create uncertainty, let alone undermine the voluntary compliance system, and there is no basis whatsoever for their hyperbolic claims of "targeted tax assessments."

A. ***For the same reasons that the Opinion does not further unpredictability as claimed by the Chambers, it also does not create uncertainty for "all" taxpayers.***

IPT's arguments about uncertainty mirror the Chambers' argument about unpredictability and COST's arguments about ambiguity and should be ignored for the same reasons. The Opinion applies an objective analysis of the plain statutory language to conclude that Amazon is liable for taxes on all sales made through Amazon.com; thus, there is no need to engage in any ambiguity analysis. DOR

[4] Contrary to COST's contention, COST Br. at 12, n.9, there is no Due Process violation. As more fully explained in the Department's Brief, DOR Br. at 48-50, the question is whether the 2016 statutory language encompassed all sales on Amazon.com. Both the Court of Appeals and the ALC rejected this argument. *See, e.g,* **(App. pp. 2122-24)** (Op. at 18-20) (rejecting Due Process argument); **(App. pp. 54–56)** (Final Order at 48–50) (finding "no evidence that the Department imposed, or was trying to impose, pending legislation on Amazon Services to obligate Amazon Services to remit sales and use tax for these transactions" and noting "the folly of relying on unenacted legislation to interpret legislative intent or construe existing statutes").

Br. at 22-24, 34-48. That analysis is not changed by the enactment of the 2019 marketplace facilitator amendment for several reasons, including but not limited to the fact that Amazon already had physical presence in South Carolina. *See* discussion *supra* pp. 7-8 & n.2. The Department now and always has taken the position that the language in effect in 2016 governs this case, as evidenced by the fact that it issued the determination on June 21, 2017, DOR Br. at 4, well before the 2019 legislation was even pre-filed on the heels of the 2018 *Wayfair* decision. *See also* discussion *supra* n.3 (there is no cognizable Due Process claim at issue here).[5]

In advancing its uncertainty argument, IPT surprisingly mischaracterizes the nature of the sales tax obligation in South Carolina. IPT Br. at 6 ("Sales taxes are trust taxes, imposed on consumers but collected by sellers as an administrative matter to ensure compliance (by the consumer)."). The fact is that South Carolina imposes the sales tax on the seller. § 12-36-910(A) ("A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing in the business of selling tangible personal property at retail."). Although the retailer is authorized to pass that tax along to the consumer, the "inability, impracticability, refusal, or failure to add these amounts to the sales price and collect them from the purchaser does not relieve the taxpayer" from the sales tax. S.C. Code Ann. § 12-36-940(A), (B). Again: the issue is Amazon's liability for sales taxes, not the consumer's. Amazon assumed the risk of failing to collect the sales taxes from customers on all Amazon.com sales in the first quarter of 2016, a failure especially glaring given the language of the

[5] IPT also tries to morph the Due Process issue into a commerce clause issue, IPT Br. at 8., n.3, never mind that Amazon has not presented such a claim. It is unclear if IPT has simply repackaged briefs in other cases that involved this issue but there is no basis for this assertion here. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) ("As Chief Judge Alex Sanders so aptly stated, '[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.'") (quoting *State v. Austin*, 306 S.C. 9, 19, 09 S.E.2d 811, 817 (Ct. App. 1991)); *see also* Rule 213, SCACR (requiring that amicus briefs "are limited to argument of issues on appeal as presented by the parties").

Moratorium statute and notices that Amazon was required to give while the Moratorium was in effect. *See* DOR Br. at 39; *see also* discussion *supra* at pp. 7-8 & n.2.

B. ***There is no basis for IPT's hyperbolic claim of targeted tax assessments.***

The Department was "created to administer and enforce the revenue laws of this State." S.C. Code Ann. § 12-4-10. The fact that the Department discharges those duties by issuing a deficiency determination against a taxpayer based on its understanding of the statutory language hardly constitutes a targeted tax assessment, regardless of whether Amazon is the only entity of its type physically present in South Carolina. A disagreement about the interpretation of the statutory language is not tantamount to a targeted tax assessment.

C. ***The fact that other states enacted marketplace facilitator legislation in the wake of the* Wayfair *decision does not mean that Amazon was not liable for taxes on all sales made through Amazon.com in the first quarter of 2016.***

Simply put, the fact that other states—like South Carolina—enacted marketplace facilitator language following the United States Supreme Court's decision in *Wayfair*, is not relevant to the evaluation of this case. The question is whether the governing law in the first quarter of 2016 encompassed Amazon, and the Court of Appeals and the ALC determined the answer to that question is yes. And the cases cited by IPT from other states hardly shed light on the analysis of South Carolina law by this Court. *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."). Or, as previously stated by the Court of Appeals:

> [T]his court does not have to follow other states' interpretations of their tax laws in interpreting [South Carolina] tax laws. *See State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019) ("When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions."); *S.C. State Highway Dep't v. Wilson*, 254 S.C. 360, 366, 175 S.E.2d 391, 395 (1970) ("The decisions of courts from other jurisdictions are, of course, only persuasive authority."); *cf. Widenhouse v. Colson*, 405 S.C. 55, 59 n.2, 747 S.E.2d 188, 191 n.2 (2013) (noting a state is not "required to defer to another state's judgment regarding 'the disposition or devolution of realty' in the forum state" (quoting *Williams v. State of North Carolina*, 317 U.S. 287, 294 n.5, 63 S.Ct. 207, 87 L.Ed. 279 (1942)), or

> required "to apply the law of another state in an action in its own courts" (citing *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436-37, 64 S.Ct. 208, 88 L.Ed. 149 (1943))).

Books-A-Million, Inc. v. S.C. Dep't of Revenue, 430 S.C. 388, 396, 844 S.E.2d 399, 403 (Ct. App. 2020), *reh'g denied* (July 14, 2020).

Moreover, the decisions from other states actually cited by COST are not helpful. Thus, in *Grosz v. California Dep't of Tax & Fee Admin.*, 87 Cal. App. 5th 428, 449 (2023), *as modified on denial of reh'g* (Jan. 23, 2023), *review denied* (Apr. 26, 2023), the court held only that "to conclude that whether a taxpayer is a retailer for purposes of the Sales and Use Tax Law is a discretionary determination and not a ministerial task." Although the court in *Normand v. Wal-Mart.com USA, LLC*, 340 So. 3d 615 (2020), did decide an "online marketplace" was not responsible for collecting taxes on sales of property owned by other entities, there was no statute defining a seller to include sales of property "owned by the person or others" as is so with § 12-36-70(1)(a). *See Normand*, 340 So. 3d at 627, n.32 ("Although an online marketplace is a 'dealer' for the retail sales of its own products through the online marketplace, it is not a "dealer" for the retail sales made by others (*i.e.*, third party retailers) through Wal-Mart.com's online marketplace."). *Compare* § 12-36-70(1)(a) (defining a "retailer" or "seller" to include, in relevant part, "every person . . . selling or auctioning tangible personal property *whether owned by the person or others*") (emphasis added) *with* La. Stat. Ann. § 47:301(4)(l) (2020) (defining dealer to include "[e]very person who engages in regular or systematic solicitation of a consumer market in the taxing jurisdiction by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system."). Similarly, although the court in *Orthotic Shop, Inc. v. Dep't of Revenue*, 544 P.3d 1072 (2024), held that Amazon was not required to collect taxes on website sales of goods owned by third-parties, there was no reference to any Washington statute similar to § 12-36-70(1)(a). Therefore, these decisions are not only not binding but also are not helpful to this Court's review of the Opinion.

4. NRF's brief is wholly unhelpful to evaluating the issues before the Court.

The NRF Brief does not provide any additional material or analysis that will aid this Court in its consideration of the issues in this case. Indeed, the NRF Brief does not substantively reach the issues that are before this Court at all. Instead, NRF simply assumes the conclusion upon which its argument is based, and then spends almost the entire length of its brief describing all the severe and terrible things that can happen when taxpayers are assessed taxes for which they—allegedly—could not have expected to be liable because they are not specifically itemized in the statute in great detail. *See* NRF Br. at 6-7, n.7 (asserting "how uniquely vulnerable the retail industry is to unbound whims of a judicially empowered, rogue tax authority"). NRF echoes the arguments of other amici about predictability and retroactivity[6] and those arguments should be rejected for the same reasons set forth above and in the Department's brief. This case is not about other retailers: this case is about applying the law existing in 2016 to Amazon for all sales made through Amazon.com and, contrary to the suggestion, this case has no ongoing impact on any taxpayer because the law has since been amended and even Amazon no longer disputes that it is governed by the sales tax laws of South Carolina for all Amazon.com sales. But as recognized by the Court of Appeals and the ALC and explained in the Department's brief, Amazon always was responsible for sales taxes on all Amazon.com sales.

[6] NRF does says that "[m]ost retailers operate on slim operating margins," apparently setting up the straw man that the Department will begin randomly assessing sales taxes against all retailers everywhere and destroy their business. But this case is about Amazon, not about a "rogue tax authority." The fact is, as demonstrated by the fact that both the Court of Appeals and the ALC affirmed the determination, the Department's discharge of its statutory duties by assessing Amazon for taxes on all sales made through Amazon.com is more than reasonable. And Amazon hardly operates on a slim margin. *See*, *e.g.,* 2023 Amazon Annual Report, found at https://s2.q4cdn.com/299287126/files/doc_financials/2024/ar/Amazon-com-Inc-2023-Annual-Report.pdf (reporting earnings of $30.4 billion in 2023).

5. Although Professor Hayes R. Holderness's brief is less hyperbolic than that submitted by the other amici, he nevertheless does not meaningfully evaluate application of the statutory language to the facts as found by the ALC.

A. ***The Opinion's language regarding a broad reading of the statute is nothing more than a recognition of the broad statutory language found in the Sales Tax Act.***

Professor Holderness contends that the Court of Appeals could not have affirmed the ALC "without adopting a broad reading" of the term "sale," Holderness Br. at 3-4. Yet, the fact is that the Opinion does nothing more than affirm the determination of the ALC by applying the statutory language to the facts found by the lower court as more fully explained in the Department's brief. Professor Holderness respectfully nitpicks the Opinion by deriving strawmen from the prior amicus brief of Professors Tessa R. Davis and Clinton G. Wallace, advanced to the Court of Appeals, and then knocking them down. In doing so, however, Professor Holderness never persuasively addresses the application of the statutory language to the facts of sales on Amazon.com.

i. *Professor Holderness's discussion of jurisdictional versus substantive statutes is unhelpful to adjudicating the issues in this case.*

Amazon is liable for taxes on all sales made through Amazon.com in the first quarter of 2016 because it made sales of goods owned by others as required for imposing substantive liability on it for remitting sales taxes. *See* § 12-36-70(1)(a). Professor Holderness begins his argument with an extended discussion of *Wayfair*. Holderness Br. at 5-7. Notwithstanding, his ultimate conclusion that *Wayfair* has nothing to do with this case is correct, because Amazon never raised nexus as an issue in this case, and the question evaluated by the ALC—and for this Court—is whether Amazon was engaged in the business of selling tangible personal property under the South Carolina sales tax statutes. As is evident from its briefing, the Department does not suggest that *Wayfair* informs this Court's decision as to the discrete issue on appeal; rather, the context of the sea change brought about by *Wayfair* explains the derivation the 2019 marketplace legislation and thereby refutes the contrived spin foisted upon these proceedings by Amazon's misplaced reliance on Act 21 to create an ambiguity in the Act as it existed

at the time of the Department's audit. In the first quarter of 2016, Amazon had a very large distribution facility situated and operating in Lexington County, South Carolina. Thus, during the period at issue, Amazon had a physical presence in South Carolina and was not a "remote seller" for the purposes of South Carolina tax law. Amazon's sales tax remittance obligations to South Carolina under the Act were therefore not altered by *Wayfair*. While *Wayfair* no doubt had profound tax implications for many online retailers (including Amazon) throughout the country, it has no application to this appeal—as evidenced by the fact that the Opinion does not discuss *Wayfair* in the context of adjudicating Amazon's substantive tax liability for Amazon.com sales.

Professor Holderness then proceeds to contend that the legislature did not intend to make "a cash grab from any seller under the state's tax jurisdiction." Holderness Br. at 8. But Professor Holderness surely would agree that what the legislature intended—putting aside use of the negative colloquialism "cash grab"—is best determined by reference to the statutory language. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'") (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). The Opinion recognized this requirement. **(App. at 2115)** (Op. at 10-11). The Opinion also recognized that the 2016 statutory language encompassed all sales made on Amazon.com based on applying that statutory language to the facts found by the ALC—facts that Professor Holderness never discusses.

Undoubtedly recognizing the breadth of the statutory definition of seller to include everyone "selling or auctioning tangible personal property whether owned by the person or others," § 12-36-70(1)(a), Professor Holderness attempts to evade the unavoidable result of applying this language to the facts by cleverly defining the terms in favor of—and echoing the argument of—Amazon. Holderness Br. at 8-9. He does this when he argues that, "[t]o effectuate a 'sale,' a person

must transfer the tangible personal property for a consideration." *Id.* at 8.[7] But as the Court of Appeals held and the ALC found, Amazon does exactly this for all sales made through Amazon.com. *See, e.g.*, DOR Br. at 26-29.

Finally, as both the Court of Appeals and the ALC recognized, the question in this case is not the retroactive application of the 2019 legislation to the 2016 sales on Amazon.com. Rather, it is the application of the 2016 statutory language to those 2016 sales. *See* DOR Br. at 48-49; *see also* discussion *supra* at pp. 8-9 & n.3. Professor Holderness's reference to the retroactivity discussion in *Wayfair* is his spin on the Due Process argument that was made but never factually developed by Amazon. Both lower courts correctly rejected this argument as inapposite and factually unsupported.

ii. *Professor Holderness's contention that the Court of Appeals "appeared to rely" on the "substance-over-form" doctrine should be rejected.*

Professor Holderness erroneously suggests that the Opinion "appeared to rely" on the "substance-over-form" doctrine to combine the third-party vendors with Amazon.com. Holderness Br. at 12. Contrary to Professor Holderness's contention, the "substance-over-form doctrine" did not drive that Court's analysis. What the Opinion does do, however, is correctly reject as "form-over-substance" Amazon's arguments that it was not a seller because it did not receive the payments or consideration for that sale, even though it is the operator of Amazon.com, all purchases are made through Amazon.com, payments are submitted only through Amazon.com, and Amazon ultimately receives compensation (i.e., consideration) based on the amount of every sale made on the website. And as the Opinion notes in part, "the BSA treats these entities as the same because it refers to Amazon Services and Amazon Payments as 'we.'" **(App. at 2117)** (Op. at 13). The Court of Appeals

[7] Professor Holderness's reference to "effectuat[ing] a sale" is the same as Amazon's argument regarding "conduct[ing] a sale," *see* Amazon Br. at 28-29. Neither concept finds any basis within the Act and is nothing more than a definitional sleight of hand, combining the definition of a sale with the definition of a seller/retailer to create a straw man statutory standard that does not exist. DOR Br. at 26-27.

and the ALC applied the statutory language to Amazon's business structure based on the facts found by the ALC to determine that Amazon was the seller of all goods sold through Amazon.com in 2016 and, thus, is liable for taxes for all of those sales.

iii. *Professor Holderness's argument that Amazon was subject to an "unintended whipsaw" misses the mark in view of the facts found by the ALC.*

Even if Amazon's business model was novel, there was no "whipsaw" of Amazon through the straightforward application of the statutory language to all transactions occurring through Amazon.com. Rather, just as the Court of Appeals and the ALC concluded, the 2016 sales tax statutes encompassed all sales made through Amazon.com based on the facts of the transactions as adduced before the ALC. If anything, it is the State of South Carolina that has been whipsawed by Amazon, having provided incentives and the requested Moratorium reprieve in an effort to entice the company to locate a distribution facility in the State, only for Amazon to not fulfill its obligations to follow the law at the conclusion of the reprieve. And the remainder of Professor Holderness's argument in Part A.3 of his brief is a policy argument that (1) does not analyze the actual statutory language or the findings of fact governing this case and (2) is no longer relevant to any issue whatsoever in view of the General Assembly's enactment of the 2019 marketplace facilitator legislation. In short, there is no recharacterization of the transactions made through Amazon.com—there is the application of the applicable statutory language to those transactions and to Amazon.

B. *Professor Holderness takes the same tack as Amazon and the other amici by effectively contending that the ambiguity analysis is the first step in applying the statutory language.*

Professor Holderness takes the approach that the ambiguity analysis must be applied because Amazon and the Department—and the Court of Appeals and the ALC—disagree about the meaning and application of the Act to Amazon's business model. Holderness Br. at 17. But that is not so. *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."). And the argument that the 2019 legislation must be viewed as changing the law is not correct, especially in view of the language that it must not be applied in any litigation pending on the effective date. *See* DOR Br. at 37. Thus, as more fully explained in the Department's brief, DOR Br. at 22-24, 34-48, the Court of Appeals and the ALC correctly applied the applicable statutory language and determined that Amazon is responsible for tax on all sales made through Amazon.com in the first quarter of 2016.

Conclusion

As set forth above, the briefs of amici in this case siding with Amazon do not provide any helpful or beneficial material or analysis that assist in resolving this case and mostly read as additional briefing on behalf of Amazon. The briefs contain no substantial policy analysis beyond the rote recitation of a parade of horribles or the repetition of Amazon's positions on ambiguity and retroactivity.

[*Signature Page Follows*]

Respectfully submitted,

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