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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

Court of Appeals Case No. 2019-001706

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

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

South Carolina Department of Revenue, …….Respondent.

BRIEF OF *AMICI CURIAE* TAX LAW PROFESSORS TESSA R. DAVIS AND CLINTON G. WALLACE

IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Tessa R. Davis and Clinton G. Wallace are Professors of Law at the University of South Carolina Joseph F. Rice School of Law who teach tax law.[1] They have regularly written articles and commentary and submitted Amicus briefs in cases concerning tax law, tax policy and tax administration issues, including addressing the physical nexus standard at issue here when it was considered by the United States Supreme Court in 2018. They submit this brief to aid the Court with understanding the historical context for the constitutional and statutory doctrines at issue in this dispute, to promote sound tax administration in the public interest, and to respond to misconceptions presented by Amazon and *amici* supporting Amazon (including misconstruing the arguments we offered as *amici* in the Court of Appeals).[2]

INTRODUCTION

In this appeal, Petitioner Amazon Services, LLC ("Amazon") challenges the holding of the Administrative Law Court, as affirmed by the Court of Appeals, that Amazon is a "retailer" or "seller" under the South Carolina tax statute that was in effect prior to 2019. That holding properly confirmed the authority of Respondent South Carolina Department of Revenue ("DOR") to collect sales tax from Amazon for retail sales of third-party merchant-owned products on Amazon's website. By affirming that decision, this Court would not only ensure collections of sales tax consistent with accepted tax administration practices and tax policy principles, but would also avoid creating a tax

[1] *Amici* submit this brief in their individual capacities as experts on tax policy. *Amici* have not been compensated for their participation in this case, and no counsel for a party authored it in whole or part. Apart from *amici*, no person contributed money to fund its preparation or submission. Affiliations and titles with *amici*'s current employer, the University of South Carolina School Joseph F. Rice School of Law, are listed for identification purposes only; this brief does not purport to present the Law School's or any other institutional views.

[2] In the appeal before the Court of Appeals, the Professors Davis and Wallace submitted an amicus brief in support of the DOR to which the Court of Appeals directed Amazon and DOR to respond, and the Court of Appeals requested that the *amici* participate in oral arguments.

break for Amazon that the General Assembly did not intend. Such a judicially created tax break (in the event of a reversal by this Court) would favor Amazon over competing businesses in South Carolina and would potentially impose additional burdens on other taxpayers in the state.

SUMMARY OF THE ARGUMENT

In this case, Amazon has attempted to advance an ahistorical, one-size-fits-all litigation and business strategy that has worked for Amazon in other states—but it has done so here with little or no regard for the specific legal context in South Carolina. We provide some background regarding: (1) the breadth and strength of South Carolina's long-standing sales tax statute; (2) the state and national legal context that allowed Amazon to establish a physical nexus in South Carolina without (at least initially) simultaneously subjecting Amazon to state sales tax obligations required by the state's broad statute; (3) how states similarly-situated to South Carolina have addressed Amazon's attempts to avoid sales tax obligations; and (4) key policy considerations relevant to the case, including one advanced by United States Supreme Court Justice Gorsuch, characterizing the use of physical nexus to avoid sales tax obligations as a "judicially created tax break." We felt compelled to become involved in this litigation in the first instance because failure to collect sales tax from Amazon for the sales at issue here would constitute a judicially created tax subsidy for Amazon, and would create a "playbook" for any taxpayer with deep pockets to litigate their way out of South Carolina tax liability.

ARGUMENT

I. Historical context for understanding South Carolina's sales tax statutes.

As mail order sales increased in the mid-twentieth century, many states followed a policy of imposing sales tax obligations only on sellers who "maintained a place of business in the state." *Dep't of Revenue v. Nat'l Bellas Hess, Inc.*, 34 Ill.2d 164, 167 (1966). When out-of-state sellers refused to collect sales tax under then existing statutes, many states responded by adding so-called "catalogue amendments," which imposed sales tax obligations on retailers who solicited orders via catalogues or

other advertisements, but who had no other connection to the state. *See, e.g.*, *id.* South Carolina had previously addressed this issue: when the South Carolina General Assembly established a sales tax for the first time in 1951, it imposed sales tax obligations on anyone who "distributes catalogs, or other advertising matter, and by reason of that distribution receives and accepts orders from residents within the State" as well as on anyone who "solicits and receives purchases or orders by an agent or salesman." 1951 Stat. 47, No. 379, Art. I, Sub. Art. IV §3(b). That language from the 1951 statute has been maintained ever since. *Id.* (codified as S.C. Code Ann. § 65-1429 (1952); recodified as S.C. Code Ann. § 12-35-890 (1976); recodified in 1990 as current S.C. Code Ann. § 12-36-1340).

With such authority, South Carolina (similar to other states that amended their statutes) imposed sales and use tax collection and remittance obligations on sellers whose only business connection in the state was that they made remote sales to South Carolina customers. From the advent of its sales tax, then, the State attempted to level the playing field for both local businesses and their out-of-state competitors. These statutory requirements continued in effect through 2018, and they apply equally to Internet sellers as they do to sellers using mail order catalogues: as the leading South Carolina tax treatise observed in 2013 (i.e., notably before the tax years at issue in this litigation), "[t]he Internet should be equated to the mail or the telephone." John C. von Lehe, Jr. & Jennifer W. Davis, SOUTH CAROLINA TAXATION AND ECONOMIC TAX INCENTIVES (3d ed., S.C. Bar 2013).

States were not wholly successful in imposing these remote seller requirements, though. In a series of decisions that followed the adoption of "catalogue amendments," the United States Supreme Court held that, as a matter of constitutional law under the Dormant Commerce Clause and Due Process Clause of the Fourteenth Amendment, states could only impose sales tax obligations on businesses that had some *physical* nexus in the state. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of the State of Illinois*, 386 U.S. 753 (1967) (reversing the state Supreme Court of Illinois); *see also Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992) (affirming *Bellas Hess* in part, and emphasizing the physical nexus

rule under the Dormant Commerce Clause while dispensing of it as a requirement under the Due Process Clause).

The physical nexus requirement created an unambiguous *on/off switch*: having a physical presence in a state constituted sufficient nexus to allow the state to impose sales tax; no physical presence meant no nexus and no power for a state to impose tax. Thus, a seller or retailer could choose to create or avoid tax liability—flip the switch on or off—by deciding to establish a physical presence or not. This situation would persist until 2018, although it was widely recognized to be problematic from a policy perspective. *See generally*, *Brief of Amici Curiae Law Professors and Economists in Support of Petitioner*, South Dakota v. Wayfair, Inc., No. 17-494 (Mar. 5, 2018) (brief for the United States Supreme Court joined by Amicus Clinton G. Wallace arguing for the removal of the physical nexus requirement because it was ill-suited to Internet commerce for various policy reasons, a position that the Court adopted in *Wayfair*).

The DOR was relatively well-prepared to confront the challenges presented by the physical nexus requirement and its *on/off switch*. The 1951 South Carolina law gave the DOR the power to impose sales tax obligations on any sales made by or on behalf of a person with a physical presence in the state. S.C. Code Ann. § 12-36-70 (1976) (as amended and recodified in 1990 from § 12-35-90). As the Court of Appeals properly emphasized, the South Carolina statutory definitions of "retailer" and "seller" provide a clear statutory mandate to impose sales tax on any "person" engaged in "selling" any tangible personal property, whether "owned by the person or by others." S.C. Code Ann. § 12-36-70(1)(a) (1976); *see* Amazon Services, LLC v. S.C. Dep't of Revenue, 442 S.C. 313, 327-28, 332-33, 898 S.E.2d 194, 201, 204 (2024). Further, the sales tax statute specifies that a "person" includes "any group or combination" of "corporations" or other business entities or people who are "acting as a unit." S.C. Code Ann. § 12-36-30 (1976). In short, the General Assembly cast a broad net to ensure even-handed imposition of sales and use tax obligations on all sellers.

Consistent with its statutory duties, the DOR has long sought to exercise its authority to impose sales tax liability to the full extent permitted by statute. In 1989, the DOR recognized that "[c]ertain out-of-state retailers are making sales to South Carolina residents [and] it is questionable as to when such retailers are required to collect and report this State's use tax." S.C. Rev. Rul. #89-13 at 2 (Jul. 19, 1989). As the guidance explained, "[t]he State may require an out-of-state mail-order retailer to collect and remit the use tax, if such retailer has a[] … warehouse located in South Carolina." *Id.* at 7. The DOR may impose that requirement even if a single warehouse were the retailer's only physical location in the state, and even for items sold from outside the state that never touched the in-state warehouse. *See id.*

Further, citing numerous United States Supreme Court precedents, the DOR explained that "[t]he courts have established that a retailer may not departmentalize its in-state retail and out-of-state mail-order operations to avoid collection and the taxing state's use tax on retailers' mail order sales. Retailers' in-state and out-of-state operations are to be considered in the aggregate for purposes of use tax collection." *Id.* at 6. Thus, the guidance continued, a warehouse located in South Carolina would be sufficient to allow the state to impose sales and use tax obligations on the seller, "even if the in-state and out-of-state activities are unrelated." *Id.* at 7.

Nonetheless, ignoring the definitions of "retailer," "seller," and "person" in sections 12-36-30 and section 12-36-70) and the clear guidance described above, Amazon contested the DOR's application of the statute to all of its sales. Among other errors, Amazon claims that, until 2019, "[n]ever before had the sales tax statute suggested that the conduct of distinct but related corporate entities could create sales tax obligations." Pet'r's Br. at 20. Read together, however, code sections 12-36-30 and 12-36-910, which imposes the sales tax, establish that a "person engaged or continuing within this state in the business of selling tangible personal property at retail," includes a "group or combination" of business entities. S.C. Code Ann. §§ 12-36-30, 12-36-910 (1976). That is precisely

what Amazon does by operating through its group of related business entities. Amazon mistakenly relies on *S.C. Dep't of Revenue v. Anonymous Co. A*, 401 S.C. 513 (2009), as an example of this Court's treatment of related corporations separately, Pet'r's Br. at 30, but this is Amazon turning the issue on its head: *Anonymous Co. A* has nothing to do with using multiple related entities to get around constitutional nexus and avoid sales, as Amazon maintains. Pet'r's Br. at 30-31. The statute and guidance have long made clear that South Carolina would require sales tax collection and remittance by *any* seller with *any* physical presence in the state, even if the sales were conducted entirely remotely, and without regard to the seller's formal corporate or operational structure. S.C. Rev. Rul. #89-13 at 7.

II. The legal environment when Amazon established physical nexus in South Carolina and Amazon's special sales tax moratorium that expired in 2016.

Amazon and its *amici* correctly assert that the 2018 United States Supreme Court decision in *Wayfair* is irrelevant here. *E.g.*, Pet'r's Br. at 42 n.12. Further, however, they assert that *Wayfair* and the concept of nexus more generally are about jurisdiction to impose tax, not about "substantive" tax law. Holderness Br. at 6. We disagree with that false dichotomy: the South Carolina General Assembly defined "seller" broadly, S.C. Code Ann. § 12-36-70(1)(a) (1976), in order to treat all sales within the state similarly. The extent to which the DOR could enforce this broad conception of seller was limited by the pre-*Wayfair* physical nexus doctrine, so the State was not always successful in its pursuit of similar treatment of all sales into South Carolina.

However, the pre-*Wayfair* limitations have little import in the present case because in 2011 Amazon flipped the physical nexus switch in South Carolina to *on* when it built its distribution center in the state. Before breaking ground, and surely aware of the implications of physical nexus, Amazon lobbied for the enactment of special legislation to enable it to avoid, for a time, the tax consequences of its decision to locate the distribution center in the state. *See* ASSOCIATED PRESS, *Amazon deal clears*

hurdle in South Carolina Senate (May 23, 2011) (explaining that "[t]he deal would give Amazon the five-year sales tax exemption it seeks to open a distribution center this year in the state."). The special legislation, with its targeted moratorium on sales tax obligations, gave Amazon a unique arrangement among South Carolina retailers: unlike any other retailer in the state, and even though it would have a physical presence in the state, Amazon would be exempt from sales and use tax obligations for nearly five years. S.C. Code Ann. § 12-36-2691 (Supp. 2012). The special legislation was an enticement for Amazon to build its distribution facility in the State—a brick-and-mortar building that created jobs, and also established the requisite constitutional nexus over Amazon's activities to enable the State to benefit from Amazon's sales tax revenue, and, eventually (beginning in 2016), for in-state sellers to compete with Amazon on a level playing field.

The DOR's position was clear as to the state of the law while the special legislation was in place. *See* S.C. Rev. Rul. #14-4 (Sep. 10, 2014) (summarizing actions that would establish nexus, and citing relevant United States Supreme Court precedent.); S.C. Inf. Ltr. #15-19 (Dec. 2, 2015) (describing the special legislation as a "special nexus provision," and explaining that once that provision expired, as of January 1, 2016, the usual rules for "determining whether [a taxpayer] has a physical presence in South Carolina" would apply to determine sales tax obligations). Plainly, this was the law when Amazon established its distribution center in South Carolina in 2011 and flipped the physical nexus switch to *on*, and it remained the law when the special legislation expired at the end of 2015.

Amazon was, or should have been, well-aware that it would be responsible for sales tax on all of its sales starting in 2016. As Amazon's special sales tax legislation was nearing expiration, it disclosed to its own shareholders that states might "successfully assert" sales tax liability under existing laws. Specifically, in its Form 10-K for 2015, filed with the Securities and Exchange Commission in January

2016, Amazon made the following disclosure in the Risk Factors section, under the header "We Could Be Subject to Additional Sales Tax…":

> U.S. Supreme Court decisions restrict the imposition of obligations to collect state and local sales taxes with respect to remote sales in the U.S. However, *an increasing number of states, and certain foreign jurisdictions, have considered or adopted laws or administrative practices that attempt to impose obligations on remote sellers and online marketplaces to collect taxes on their behalf.* We support a Federal law that would allow states to require sales tax collection by remote sellers under a nationwide system. More than half of our revenue is already earned in jurisdictions where we collect sales tax or its equivalent. *A successful assertion by one or more states or foreign countries requiring us to collect taxes where we do not do so could result in substantial tax liabilities, including for past sales, as well as penalties and interest. In addition, if the tax authorities in jurisdictions where we already collect sales tax or other indirect taxes were successfully to challenge our positions, our tax liability could increase substantially.*

Amazon.com Inc., Annual Report for the Fiscal Year Ended Dec. 31, 2015 (Form 10-K) (Jan. 28, 2016), https://shorturl.at/9IYQP (emphasis added). This disclosure was made nearly three years before the *Wayfair* decision eliminated the physical nexus requirement and just before DOR received its first inquiries from confused consumers as they learned that Amazon was not including sales tax on all of their purchases. Determination Ltr. p. 4 (R. 1024, Ex. 171). For Amazon to claim that it was caught unaware by the prospect of paying sales tax on all of its sales in South Carolina, Pet'r's Br. at 44, is thus inconsistent with its own disclosures as well as its actions in negotiating the special legislation that allowed it to avoid sales tax obligations legally prior to 2016.

III. Similar circumstances in other states support the Court of Appeals' holding.

Amazon asserts that South Carolina's position in this litigation makes the state a "dramatic outlier" as compared to other states. Pet'r's Br. at 40. This is highly misleading because other states *did* attempt to impose sales tax in similar circumstances. For example, in 2011, a news article described many states—including Illinois, Connecticut, Colorado, New York and California—modifying their sales tax statutes to impose sales tax obligations on Amazon based on minimal physical presence. NEW YORK TIMES, *Amazon Takes Sales Tax War to California* (Jul. 13, 2011)). Multiple news articles described Amazon's attempts to circumvent, avoid and change various states' sales tax statutes as a "war" on

sales taxes. *Id.*; *see also* FORTUNE, *Amazon's (not so secret) war on taxes* (May 23, 2013). As one of Amazon's *amici* previously noted, Amazon negotiated special sales tax exemptions—like the one it received in South Carolina—with numerous other states, including California, Connecticut, Florida, Massachusetts, New Jersey, Nevada, Tennessee, Texas and Virginia. *See* Hayes Holderness, *The Unexpected Role of Tax Salience in State Competition for Businesses*, 84 U. CHI. L. REV. 1091, 1092 n.3, 1095 n.16 (2017). Without a doubt, physical nexus was central to Amazon's business planning in South Carolina and many other states prior to the *Wayfair* decision.

Further, Amazon's brief erroneously states that "no other taxing agency or court from those jurisdictions [that impose sales tax] has concluded that Amazon Services—or any marketplace facilitator—was liable for sales tax on third-party sales before" statutory changes that followed *Wayfair*. Pet'r's Br. at 39-40. While the terms of many of Amazon's special tax exemptions and any disputes that arose in connection with those terms were not disclosed publicly, some very revealing information made its way into the public sphere following one of Amazon's first forays into establishing physical nexus in a new state. In 2005, Amazon established a warehouse in Texas through a subsidiary. *See* Billy Hamilton, *What an Amazon Sales Tax Deal Looks Like*, 65 STATE TAX NOTES 675 (Sep. 9, 2012). Years later, when the state of Texas learned that the facility was owned by Amazon, the state assessed Amazon for $269 million in sales tax liability for its sales in the state from 2005 to 2009. REUTERS, *Texas sends Amazon.com a $269 million tax bill* (Oct. 22, 2010). Amazon claimed that it was not liable for sales tax because it had no physical presence in the state, arguing that only its subsidiary was located in Texas, and that subsidiary did not sell anything in the state and therefore it had no sales tax liability. Hamilton at 675. Amazon also threatened to withdraw from the state and cancel future investments, which prompted the state of Texas to negotiate a settlement for the past tax liability. *Id.* Amazon and Texas ultimately reached an agreement under which the state agreed to collect a small portion of the tax due. *Id.* Amazon negotiated for the settlement to include sales made by third-party merchants—

the exact type of sales at issue here. *Id.* at 678. To quote the agreement, it included and released Amazon for further liability for any "unrelated third parties who make retail sales through Taxpayer's Internet websites." *Id.* Thus, while Amazon's claim regarding other jurisdictions may be technically accurate, it ignores the fact that the Texas settlement shows that at least as early as 2012, Amazon was aware of and concerned about its own liability for sales made by third parties, and, further that at least the state of Texas seems to have contemplated imposing sales tax for such transactions. *Id.*

Amazon's claim that South Carolina is an outlier as compared to other states is accurate in one respect, however. These other states generally found themselves confronting Amazon with statutory mandates that were less plain and that define "seller" more narrowly than the laws enacted by the South Carolina General Assembly. *See, e.g.*, *Amazon Services*, 442 S.C. at 335, 898 S.E.2d at 205 (comparing the more limited Louisiana statute and concluding that the South Carolina definition of seller is broader). In Texas in 2011, after reaching the settlement with Amazon described above, the state amended its sales tax law to clarify that "ownership" was not necessary for someone to be a "seller" for state sales tax purposes. Texas Tax Code Ann. § 151.008 (West 2012). In short, Texas eventually made its statute *more like* South Carolina's section 12-36-70(1)(a). To the extent South Carolina is an outlier in comparison to other states, it is because the General Assembly drafted South Carolina's longstanding sales tax statute more broadly than did legislatures in some of the other states where Amazon has conducted similar business.

IV. Tax policy considerations that support affirming the Court of Appeals.

Amazon and its *amici* suggest that the posture taken by the DOR and confirmed by both the Administrative Law Court and the Court of Appeals constitutes an unusual and troubling shift away from fair and consistent tax administration in South Carolina. Pet'r's Br. at 43. This suggestion ignores not only the historical context generally and Amazon's specific history in South Carolina as discussed above, but also miscasts at least three important policy considerations—the problem of retroactive

application of new tax laws (non-existent here), the application of the judicial doctrine of "substance over form" (appropriate here, and also not necessary to reach the appropriate result given the direct, applicable statutory authority), and the prospect of judicial policymaking and overreach (which militates against Amazon's position, contrary to its assertions). We address each of these policy considerations in turn here.

A. Imposition of sales tax liability on Amazon is not retroactive application of the tax laws.

To resolve this dispute properly, this Court should affirm the Court of Appeals' interpretation of the tax law *as of 2016*, when Amazon's special legislation expired. Amazon's argument that the sales tax imposed here somehow constitutes retroactive taxation represents a misunderstanding of the nature of retroactive taxation. *See, e.g.*, Pet'r's Br. at 44-45. The DOR's actions to collect sales tax from Amazon do not constitute retroactive taxation any more than an audit of an income tax return that finds additional tax due for a prior year would constitute retroactive taxation. The audit process and the DOR's authority to assess tax liability upon receiving relevant information from the taxpayer are critical features of the South Carolina sales and use tax regime. In a normal sales tax examination, a retailer may not be aware of the possibility that it could owe additional sales and use tax until well after the period at issue has concluded (when the retailer receives a notice or request for information from the DOR). In contrast, Amazon had notice from the DOR that its plan to skip sales tax on third party sales was potentially problematic shortly after it commenced that practice at the start of 2016, well before any statute of limitations started to run against the DOR. Determination Ltr. p. 4 (R. 1024, Ex. 171). This situation hardly consists of retroactive imposition of the sales tax law.

The effects of the legislation enacted after the *Wayfair* decision—and, indeed, the effects of the United States Supreme Court's reevaluation of the nexus standard and revocation of the physical

nexus requirement in *Wayfair*—were purely prospective. This Court should, of course, give no regard to any laws enacted after the time periods at issue in this litigation.

B. Imposition of sales tax liability on Amazon preserves consistency among similarly-situated taxpayers, as sought by the General Assembly.

Amazon should be treated just like any other similarly-situated taxpayer whose sales tax obligations would be determined under applicable constitutional doctrines and state laws. The Court of Appeals properly held that Amazon Services, LLC, the entity that operates the Amazon website, is a "retailer" or "seller" under the statutory definition of that term. *Amazon Services*, 442 S.C. at 332-33, 898 S.E.2d at 204. However, Amazon argues for *different* treatment by making much of the formal organizational divisions among its corporate entities and their contractual arrangements for conducting sales.[3] Pet'r's Br. at 17, 28-29. Amazon's corporate formalities are not relevant to the statutory definition on which the Court of Appeals and the Administrative Law Court focused, a point which is underscored by case law that elaborates on general principles of tax administration.

First, in the context of sales tax and physical nexus specifically, the United States Supreme Court has held that states are empowered to impose sales tax obligations even in the face of taxpayers' attempts to shield themselves from such obligations with corporate forms or structures like those that Amazon constructed. In *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), a Georgia corporation entered into contracts with individuals to act as part-time sales people in Florida, a state where the corporation had no employees, no offices and no other physical presence. *Scripto* at 209-10. The Court held that Florida could impose sales tax on the Georgia corporation with the physical nexus requirement satisfied by

[3] Amazon argues that its various subsidiaries and related entities—including Amazon Services, Amazon Payments, Amazon Fulfillment—are "distinct legal entities," and that those entities entered contracts with unrelated individuals and entities to provide services, all of which it asserts means the State does not have authority to impose tax on the sales at issue here. Pet'r's Br. at 31.

the non-employees who were performing certain limited services under contract in Florida. *Id.* at 212-13.

Similar to Amazon here, the Georgia corporation also attempted to rely on the particulars of the flow of funds and transmission of orders involved in its sales into Florida to claim that Florida had no authority to impose sales tax obligations on its activities. Specifically, the Georgia corporation described itself as using "independent contractors" to perform services that allowed it to make sales in Georgia and ship products from Georgia, asserting that the independent contractors provided order information but were not empowered to accept or reject orders (that was done in Georgia, not Florida), and that payment was made directly from Florida customers to the Georgia corporation. *Id.* at 209. Once payment was received, the Georgia corporation would pay service commissions to the independent contractors. *Id.* at 209-10. The Court found all of these details to be irrelevant to the question of constitutional nexus. *Id.* at 212-13.

In *Scripto*, the Court set aside the formal structure of the contractual arrangements, opining that "[t]o permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance." *Id.* at 211. The Court has continued to endorse its *Scripto* holding, citing it favorably in *Quill* as an example of the extent that physical nexus gave rise to a bright-line rule, and again in *Wayfair* as good authority on the reach of the physical nexus standard. *Quill* at 315; *Wayfair* at 2094. The holding in *Scripto* is consistent with the more generally applicable "substance over form" doctrine, which allows courts and tax administrators to disregard certain forms of business arrangements to ensure that tax laws are applied consistently. *See Beard v. S.C. Tax Comm'n*, 230 S.C. 357, 368, 370 (1956) (emphasizing that "[o]ur search is for substance, not form" and that in South Carolina "the incidence of taxation depends upon the substance of a transaction.").[4] As the United

[4] In addition to the statutory definitions that the Court of Appeals focused on, DOR is also empowered to impose sales tax obligations on a physically present person or entity as an "agent" of a remote entity. S.C. Code Ann. § 12-36-70 (1976) (as amended and recodified in 1990 from § 12-35-90). Although this authority is

States Supreme Court has explained, "[i]n the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding." *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978) (internal citations omitted).

Allowing Amazon to escape sales and use tax obligations through reliance on its organization of the form of its corporate structure would contradict established judicial doctrine, South Carolina tax laws, and the longstanding DOR position that such distinctions based on form are irrelevant in this very context. In 2016, when the special legislation expired, DOR was empowered by the General Assembly to ensure that Amazon was complying with state tax statutes in substance, regardless of Amazon's attempts to create confusion via the form of its business organization and arrangements with third-party merchants. Despite Amazon's attempts to distract from basic statutory construction, the Court of Appeals properly focused on the authority the General Assembly has expressly given to the DOR by the definitions of "retailer" and "seller." *Amazon Services*, 442 S.C. at 331-32, 898 S.E.2d at 203-04.

In sum, deferring to Amazon's corporate form and structure would be inconsistent with the constitutional standard for physical nexus that prevailed prior the *Wayfair* decision in 2018 and contrary to South Carolina law dating back to 1951 that broadly defined "retailer" and "seller." Once Amazon established a physical nexus in the state in 2011, it should have been clear to Amazon, just as it was to the DOR, the Administrative Law Court and the Court of Appeals, that it would be

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not necessary to affirm the Court of Appeals opinion given that Amazon is a properly a seller under section 12-36-70(1)(a) and has a physical presence in the State, this additional language emphasizes that the natural (and broad) reading of subsection 1(a) is consistent with legislative intent to impose sales tax broadly.

For further background, when the General Assembly enacted the marketplace facilitator legislation in 2019, subsection (3) of section 12-36-70 of was inserted *between* subsection (2)(b) and the "agent" language, creating the appearance that the broad authority that the "agent" language suggests was not a part of the pre-2019 statute. S.C. Code Ann. § 12-36-70(3) (Supp. 2020). Considered together, section 12-36-70(2)(b) and this "agent" flush language make clear that even prior to 2019, the General Assembly endorsed substance-over-form principles, consistent with *Beard*, to empower the DOR to impose sales tax obligations on a physically present person or entity as an "agent" of a remote entity.

required to collect and remit sales tax once its special legislation expired in 2016, regardless of how it constructed its business operations, inventory and payment arrangements.

C. Allowing Amazon to avoid tax liability would constitute a "judicially created tax break."

In his concurrence in *Wayfair*, Justice Gorsuch noted that the physical nexus rule constituted a "judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals." *Wayfair* at 2100 (Gorsuch, J. concurring). Adoption of Amazon's position here would create an extra "judicially created tax break" for Amazon's business here in South Carolina. Such a result would be contrary to South Carolina's sales tax laws, and it would extend Amazon's unfair competitive advantage over local businesses beyond both what the physical nexus rule gave it prior to 2011, and what the General Assembly allowed from 2011 to 2015 by way of special legislation.

If Amazon prevails here, the consequences will be stark. It will establish a "playbook" for well-resourced taxpayers to unilaterally proclaim statutory ambiguity so as to contest tax laws, in a manner that will never be an option for mom-and-pop South Carolina businesses. No small retailer can afford the decade-long political and legal "war" that Amazon has undertaken to avoid paying sales tax, and no small retailer will benefit if Amazon prevails.[5] Further, if or when future vital government spending priorities require funding and Amazon prevails here, the increased tax burden to support those priorities will fall elsewhere, namely upon other taxpayers who can ill afford the burden and are powerless to shed it. *See generally*, SC SMALL BUSINESS CHAMBER OF COMMERCE, *Amazon.com: The bigger picture* (Apr. 7, 2011), https://scsbc.org/amazon-com-the-bigger-picture/ (arguing against any sales tax exemption for Amazon on grounds that it "will be paid for by every small business (brick and

[5] We unequivocally disagree with the assertions made by *amici*, including the National Retail Federation and the Chambers of Commerce, that affirming the Court of Appeals will somehow harm local South Carolina businesses. *See* National Retail Federation Br. at 6-7; Chambers of Commerce Br. at 13. To the contrary, we see the potential precedent of allowing a national business to escape taxes that local businesses are obligated to pay as a particularly troubling consequence of a reversal of the Court of Appeals.

mortar and otherwise) in the state" as well as by other individual taxpayers); THE STATE, *Controversial Amazon SC tax break set to expire in 2016* (Dec. 28, 2014) ("even its supporters say it is time for the tax break to lapse, putting Amazon on a level playing field with traditional brick-and-mortar retailers who collect sales taxes.").

CONCLUSION

For the reasons stated in this Brief, Tax Law Professors Tessa R. Davis and Clinton G. Wallace, as *Amici Curiae*, respectfully request this honorable Court affirm the decision of the South Carolina Court of Appeals.

Respectfully submitted,

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March 5, 2025

APPENDIX

Hamilton, Billy, *What an Amazon Sales Tax Deal Looks Like*, 65 STATE TAX NOTES 675 (Sep. 9, 2012)

What an Amazon Sales Tax Deal Looks Like

by Billy Hamilton

Anyone who has followed state sales taxes in recent years knows that Amazon.com has been busy working out sales tax collection agreements with a handful of states — eight to date by my count. Most involve the company agreeing to collect tax beginning on some future date, usually a year or two in the future, in exchange for establishing facilities and creating jobs in the state. Over the last three years, the company has negotiated arrangements with California, Indiana, Nevada, New Jersey, South Carolina, Tennessee, Texas, and Virginia. It may be working on others.[1]

These agreements often are made public by a joint announcement by Amazon and state officials. A handful of details are provided, usually including the number of jobs and millions of dollars in investment the company will make in the state and when it will begin collecting tax.

But did you ever wonder exactly what else might lurk in the legal fine print that lies behind the few facts that are provided to the public? Now we have an idea because Texas has released its agreement with Amazon, and although the circumstances in its case differ in some particulars from the situations in the other seven states, it still makes for interesting reading.

Texas came to its agreement with the online giant through a circuitous route that started more than four years ago. The Texas Office of the Comptroller of Public Accounts, the state's tax agency, began investigating Amazon's tax status in May 2008, the same month that Amazon sued New York over its pioneering affiliate nexus law. In New York the company argued that it didn't have a physical presence in the state. *The Dallas Morning News*, noting that Amazon had a warehouse in neighboring Irving, Texas, questioned why the company wasn't collecting state sales tax.

The story apparently prompted a state review that found that Amazon had been operating the Irving facility through a subsidiary, Amazon.com.kydc LLC, since 2005. The company argued that the subsidiary made no sales in Texas and didn't owe tax. The state disagreed and in September 2010 set the company and several subsidiaries up for $269 million in taxes covering December 2005 through December 2009.

> ***Did you ever wonder exactly what else might lurk in the legal fine print in state Amazon deals?***

During the 2011 legislative session, the company attempted to work out a settlement deal with the Texas Legislature. Meeting stiff resistance from the Texas Retailers Association and brick-and-mortar retailers generally, lawmakers refused to go along, and the bargaining fell to the comptroller's office. On April 27, 2012, Amazon.com and the comptroller's office announced that they had reached an agreement under which the company would begin collecting Texas sales taxes on July 1 of this year, considerably sooner than under similar agreements in other states.

As part of the settlement, Amazon agreed to create 2,500 jobs and invest $200 million in new distribution centers in Texas over the next several years. In return, the state agreed to forgo a large percentage of the back taxes the state claimed Amazon owed. That last fact wasn't part of the public announcement. Amazon reported to the SEC

[1]The total number of states where Amazon collects tax is difficult to pin down — at least for me. In addition to the eight settlement states, it also collects tax in four states where it already has facilities — Kansas, Kentucky, North Dakota, and Washington. It also collects in New York pending ongoing litigation. The company is reported by some sources as collecting in Pennsylvania and Vermont because of collection statutes. That makes a total of 15 states with a total population of 150 million.

that it was making "an immaterial payment to the state" to settle the back taxes.

Outside observers of this little pas de deux were perplexed by why the state would give up what sounded like a mountain of back taxes, even if the result was a collection agreement going forward. At least one critic argued that the agreement was illegal, and reporters and other outside observers wanted to see for themselves exactly what the state and Amazon had agreed to beyond the bare facts provided in the April announcement. The comptroller's office received multiple requests for copies of the settlement document.

Having worked for the comptroller's office, I can speculate that one reason for the settlement of "an immaterial payment" of back taxes is that the $269 million was never more than an estimate and not the result of a detailed audit of the company's books. The company didn't provide the state with records, so auditors made what was, in effect, an educated guess. Had the case gone to court, the amount probably would have been reduced anyway, and what the final dollar amount would have been is anyone's guess. The agreement short-circuited what would have been several years of litigation that the state might well have lost because Amazon.com.kydc wasn't making sales in Texas — it was a warehouse — and the Texas courts are sometimes tough on the state when tax cases are concerned.

Still, stacked against a quarter-billion-dollar tax liability, "an immaterial payment" is the sort of phrase about which inquiring minds want to know more, but about which the agency was unwilling to yield more detail. It initially refused to release any more details about the agreement than it had already announced, citing confidentiality restrictions under state law, which normally keep most tax information a confidential matter between the taxpayer and the state. The agency also said the agreement was exempted from disclosure by provisions of state law that protect the release of anything that might involve a taxpayer's proprietary business information.

The answer didn't satisfy the curious — particularly the news media — and the comptroller eventually requested a ruling on the issue from Texas Attorney General Greg Abbott (R). Submitting issues to the attorney general is a traditional way for Texas state agencies to dodge thorny questions they'd just as soon not answer themselves. One of the provisions of the state's open records law is the provision allowing "an interested third party" — namely Amazon — 10 days after being notified by the state of an open records request to submit its reasons for why the information should be withheld from public disclosure. Amazon didn't submit any arguments, either because it was satisfied with the comptroller's arguments against release or was unconcerned about the settlement becoming public.

On July 13, almost two months after the agreement was announced and two weeks after Amazon began collecting tax on Texas purchases, the attorney general's office released its ruling. It said that most of the settlement's provisions didn't merit confidentiality and should be released. It did, however, make an exception for some information that was marked for redaction. The redacted information included several key dollar figures — including that pesky immaterial payment. The attorney general ruled that those figures should remain confidential because they revealed "the business affairs, operations, sources of income, profits, losses, or expenditures of the taxpayer."

To find out what all the fuss was about, I filed my own open records request with the comptroller's office, asking for a copy of the settlement. It isn't that hard if you're interested. You just send an e-mail to the comptroller's Open Records Division, citing the Public Information Act and asking for a copy of the Amazon.com settlement agreement. The division will provide you an electronic copy of the document, free of charge, including a copy of the attorney general's ruling requiring the document's release.

> ***The redacted information on the Texas-Amazon agreement included several key dollar figures — including that pesky immaterial payment.***

The document itself is called a voluntary collection and settlement agreement, and it follows the format that the comptroller's office routinely uses to work out settlements with taxpayers who, for whatever reason, haven't been collecting tax but have now agreed to do so. If I was expecting something more elaborate — and I sort of was — I was doomed to disappointment. The agreement wouldn't make good beach reading even for the most rabid state and local tax attorney.

For one thing, it's shorter than I expected. What I received from the agency was 19 pages long, including the attorney general's opinion, which runs to four pages. The agreement itself is nine pages long, and there are six additional pages consisting of two different versions of two exhibits — exhibits A and B. Exhibit A is a list of the Amazon companies that were to begin collecting tax in July, and Exhibit B is a much shorter list of Amazon companies, all subsidiaries, that were already collecting state sales or business franchise taxes. The second set of exhibits corrects the first two exhibits by moving subsidiary Brilliance Audio from the list of those companies already paying tax to the list of those that would begin collecting.

The main agreement begins with a set of recitations, a string of sentences beginning with the legalistic "whereas" that outlines the basic situation — "Whereas certain members of Taxpayer's affiliated group have been issued assessments of Texas Sales and Use Tax by the Comptroller . . . " All that leads up to a declaration of why the settlement is desirable — to save both sides money and to avoid litigation: "Now therefore, in the interest of minimizing collection and administrative expenses, mitigating hazards of litigation and the continuing expense of litigation by both parties, the Taxpayer and Comptroller" agree to the provisions in the rest of the document, which actually set out the terms.

The most important part of the agreement begins on the third page. After the recitations and a few details about Amazon and its subsidiaries registering and paying tax — and giving them 60 days to get their ducks in a row — comes a section headed "Assessment and Litigation." This section is the most heavily redacted portion of the document, with four numbers redacted. There apparently were four separate assessments made against Amazon.com LLC, Amazon Corporate LLC, Amazon.com.kydc LLC, and Amazon.com Inc., for various periods from December 2005 through December 2009. The comptroller's audit staff issued all the assessments on September 13, 2010. Presumably, those assessments collectively added up to the widely reported figure of $269 million.

The section also says that the comptroller agrees to withdraw the assessments and won't reissue similar assessments at a later date. In return, Amazon agrees to withdraw what's known as a petition for redetermination, an early step in the state's tax appeals process that eventually could have led to state district court.

The following section, "Payments," contains the only other piece of redacted information — the infamous immaterial payment. The brief section simply says that Amazon agrees to pay the comptroller the redacted amount within 60 days of the effective date of the agreement, which presumably was April 24, when both parties signed it.

When the agreement was originally announced, I checked around with some state tax attorneys to see what might constitute an immaterial payment for SEC reporting purposes. Most said it would be hard to say exactly what might be viewed as immaterial to a company as large as Amazon, but if my little exercise in crowd-sourcing is any indication, a reasonable guess is about $13 million, somewhere in the neighborhood of 5 percent or less of the original assessment. Neither side has yet decided to let the cat out of the bag, though, and probably won't.

One piece of financial information in the agreement wasn't redacted, and that's the one that received the most attention in the news media when reporters were able to get their hands on a copy. That amount had to do with what Amazon would pay if it failed to meet the job and investment agreements outlined in the settlement.

In the section following the payment terms, the agreement turns to the question of jobs and investment. It specifies that Amazon "directly or through a third party" will create 2,500 full-time new jobs at "one or more distribution facilities or other facilities" in Texas by the end of 2014. Not more than 5 percent of the jobs will come from third parties. Also, the company agreed to make "directly or through a third party" capital investments in Texas of at least $200 million related to the creation of the new facilities. Amazon also agreed to maintain the new jobs and investment in Texas for five years from "the date the required investment thresholds are met," so presumably from 2015 through 2019.

> ***What happens if the company doesn't follow through on the promised jobs and investment? The provision calls for Amazon to pay the comptroller the grand total of $1 million.***

And what, you may wonder, happens if the company doesn't follow through on the promised jobs and investment? Ah, there's the rub. The provision calls for Amazon to pay the comptroller the grand total of $1 million. I'm not sure what an immaterial payment is to Amazon, but a million bucks surely fits comfortably into the definition.

The reporters who wrote about the settlement's release seemed surprised that the state would agree to such a paltry penalty for the company reneging on its agreement at some point six and a half years in the future when everyone associated with the agreement may have moved on — with the possible exceptions of Jeff Bezos, Amazon's founder and CEO, and a couple of reporters who you can bet have ticklers on their calendars and will check.

The ironic thing is that sources outside the comptroller's office who are familiar with the details of the deal told me that the agency wasn't particularly interested in extracting a jobs and investment deal from Amazon, which isn't surprising since it has no history of making such deals on tax settlements. Instead, it wanted to resolve the tax problem without going to court and get the company set up and collecting taxes in the shortest possible time frame.

Reportedly, it was Amazon that insisted on throwing in the jobs and investment provisions. In that context, the "penalty" provision makes perfect sense, and given how many jobs the company has pledged to create in the eight settlement states — about 22,000 full-time jobs and 30,000 seasonal jobs by my

count — the company put itself in a win-win situation, gaining a good corporate citizen halo effect for appearing to bestow economic goodies on the state without actually having to follow through if it doesn't eventually make sense to do so.

> ***Reportedly, it was Amazon that insisted on throwing in the jobs and investment provisions. In that context, the 'penalty' provision makes perfect sense.***

Following the section dealing with investment and jobs, there is another section titled "Releases." The provision releases the company, its officers, directors, and employees from any additional back taxes for as long as water flows or grass grows on the earth — I'm paraphrasing. It extends the same protection to the company for any past liabilities of "unrelated third parties who make retail sales through Taxpayer's Internet websites," meaning Amazon also isn't liable for past tax collection activities — or lack thereof — of its affiliates. Also exempted is "any underreported tax during the first 60 days of collection." There's also a provision protecting Amazon's Texas customers from past use tax liability by freeing the company from providing information on past purchases of goods or services by Texas customers except when the information is needed to verify sales for resale or other exempt sales as part of an audit or a refund claim.

Other sections provide that the comptroller will have access to Amazon's future records and that Amazon can contest audit findings just like any other taxpayer. The state reserves the right to void the whole agreement if it later discovers that the information Amazon has provided differs materially from what the state finds when it eventually does an audit. And the agreement also provides that the company can ask the comptroller for guidance on taxability questions. The agency agrees to provide guidance within 60 days of a request and warrants that the answers it provides will be binding on the agency, assuming Amazon hasn't misrepresented the facts. That's all pretty standard and is available to any taxpayer.

Most of the remainder of the document is a series of provisions that you might find in any sort of legal settlement. Texas law governs the agreement, and neither party concedes its original position on whether the company should have been paying tax. They just agree to stop arguing over the matter and make a fresh start.

There's also a confidentiality clause, which provides that the agreement is confidential "to the full extent provided by law," although it does make provision for the all-important press announcement "on or about April 27, 2012." It even provides what could be discussed in the announcement — the fact that a settlement had been reached, the date Amazon would start collecting tax, and the company's commitment to create jobs and invest in the state. The million-dollar penalty for noncompliance isn't on the table for discussion, nor, of course, is the amount of the payment to settle back taxes.

The last pieces of the agreement are the appended exhibits, and they are fairly interesting documents because they show just how diverse Amazon is in its particular "retail space." The corrected Exhibit A lists 31 separate companies that weren't collecting tax in Texas before the agreement but are covered by the settlement terms. In addition to Amazon.com, the companies include Brilliance Audio (an audio book publisher), Audible.com (an audio bookseller), Zappos (shoes), Fabric.com, Warehouse Deals, On-Demand Publishing, Amazon Procurement, Amazon Publishing, and IMDb, the Internet Movie Database.

Four Amazon companies were already registered and collecting tax in Texas, although three of the four are the various components of Woot, a discount online retailer located in Carrollton, Texas. It offers discount products that vary from day to day on its quirky website. For example, in its FAQ, it addresses the question of its relationship to Amazon:

> Usually it's a good rule to never believe what you hear from a rapping monkey puppet. But in this case, yes, Woot is an independent subsidiary of Amazon. No, we don't get an Amazon discount. So stop asking, Mom.

You may be wondering about that "rapping monkey puppet" crack. If you are of a certain age, you may fear that it is some sort of hip youth jargon to which oldsters aren't privy. But no. Woot used a video of a monkey puppet doing a rap song to announce its acquisition by Amazon.[2] Sample lyrics:

> You can labor every day until you're tired and old/
> Or wait for Amazon to call and when they do, you say 'Sold!'

That seems to be the way it is for the other states that have worked out Amazon deals as well. Several have toiled away on the streamlined agreement for more than a decade, but if Amazon comes calling and wants to work out a unilateral collection arrangement, most states are willing to make the deal. Compliance may be delayed a year or two, but eventually the online giant will collect tax, and that's a comparative improvement over the status quo. It's almost possible to feel sorry for New York, which started this ball rolling with its original

[2]*See* the rapping monkey puppet at http://www.woot.com/blog/post/video-we-got-acquired-by-amazon.

affiliated nexus law. It is collecting tax from the company, but it has to fight the issue in court, the very thing that motivated Texas to work out a deal.

In Texas's case, the decision makes sense despite the questions about Amazon's payment of back taxes. Although the state maintains that it had a case against Amazon, the outcome wouldn't have been a foregone conclusion in court. The state might have lost, and in that regard, the deal it worked out may be imperfect, but it's a reasonable exchange to get Amazon registered and paying tax. Setting aside the controversy over the immaterial payment, the state was successful in persuading Amazon to begin collecting tax starting in July, two months before it begins collecting in California, even though California's agreement was signed in September of last year, seven months before the Texas agreement was worked out.

Here in Texas, most of the grumbling about the settlement seems to have faded. There hasn't been any more talk of the agreement being illegal, and the Legislature, which doesn't meet again until January 2013, doesn't appear interested in pressing the comptroller's office on the issue. Associate Deputy Comptroller Mike Reissig appeared before the powerful Legislative Budget Board in early August to discuss the economy and tax collections, and the topic of the Amazon agreement didn't come up. Things have moved on.

If Amazon comes calling and wants to work out a unilateral collection arrangement, most states are willing to make the deal.

The one critical fact that remains is the larger implications of the Amazon settlement in Texas and elsewhere. Amazon likely has its own reasons for pursuing the settlements. It may actually want to open dozens of new distribution centers in locations all over the nation, or it may be attempting to head off costly litigation over new "Amazon" laws, the New York-style affiliate nexus laws that are largely aimed at Amazon and a handful of other large Internet retailers. Whatever its motivation, Amazon's decision to settle its tax issues in many of the most populous states may have real value for the states in breaking the back of the status quo and pushing Congress to act on the remote sales tax question. If Amazon is willing to collect tax, why shouldn't the other online titans go along?

That, of course, isn't how many of the other online companies see it. NetChoice, a coalition of e-commerce and online companies that includes eBay, Expedia, Overstock.com, and Facebook, has said it believes Amazon is trying to squelch competition from smaller online merchants by forcing them to comply with separate tax requirements in the 45 states that have sales taxes.

Amazon has seen the future and it is taxable.

In August testimony to the U.S. Senate Committee on Commerce, Science, and Transportation, Steve DelBianco, executive director of NetChoice, basically said that Amazon hasn't so much gone rogue from the cause of unfettered e-commerce as it has defected to the other side, namely to the side of the big-box stores:

> [Amazon] is changing its business model by adding distribution centers in new states to enable faster delivery to customers. Amazon is also adding drop-boxes in convenience stores and marketing daily deals to local merchants. . . . Like the big-box stores, Amazon would reduce its tax compliance costs if states adopted even tiny steps toward simplification. Moreover, Amazon and the big-box chains benefit if Congress allows states to impose new tax collection burdens on their smaller online-only competitors. To impose expensive collection burdens on small sellers would be grossly unfair.[3]

Well, if so, the current situation also is unfair for small local retailers that have to compete not only with Amazon and the big-box stores, but also with the specialty online companies — and still collect and remit sales tax. They seem to be managing, and the Amazon settlements demonstrate that the online companies with all their technical expertise can manage too, if they want to. The settlements also show that the remote sales tax issue is drifting toward a final resolution at long last. Amazon, for all the faults its competitors never tire of pointing out, has always been a forward-looking and innovative company. In this case, Amazon has seen the future and it is taxable. ☆

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[3]Steve DelBianco, executive director of NetChoice, Testimony before the U.S. Senate Committee on Commerce, Science, and Transportation, Hearing on "Marketplace Fairness: Leveling the Playing Field for Small Businesses," Aug. 1, 2012, *available at* http://www.netchoice.org/wp-content/uploads/NetChoice-Testimony-Senate-Commerce-Aug-2012.pdf.