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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Supreme Court Appellate Case No. 2024-000625

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

Appellate Case No. 2019-001706

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

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

v.

South Carolina Department of Revenue, ... Respondent.

PETITIONER'S RESPONSE TO BRIEF OF *AMICI CURIAE* TAX LAW PROFESSORS TESSA R. DAVIS AND CLINTON G. WALLACE

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INTRODUCTION

The brief of *amici curiae* professors Tessa R. Davis and Clinton G. Wallace focuses on a set of issues that have nothing to do with resolving this appeal. They provide "background" on issues concerning the evolution of the law to allow a state to subject a seller to sales tax obligations regardless of whether it has a physical presence (i.e., physical nexus) in the state. But this case has never been about Amazon's physical nexus to South Carolina. All agree that Amazon had a physical nexus throughout the period at issue, and nobody doubts that the South Carolina legislature had the authority to impose sales tax collection obligations on Amazon Services. Moreover, everyone agrees that the legislature imposed sales tax collection obligations on Amazon Services for sales by *all Amazon affiliates* made through the Amazon Services marketplace after a statutory moratorium expired in 2016 because Amazon was the "seller" of those products.

This appeal raises an entirely different question: whether Amazon Services was the "seller" subject to sales tax obligations on sales by *third-party* sellers—independent businesses unaffiliated with Amazon—made through the Amazon Services marketplace before the 2019 marketplace facilitator amendment. Thus, the outcome of this appeal turns on the meaning of South Carolina's pre-2019 sales tax statute (namely, who is the "seller" and "retailer" of sales by third-party sellers), not the "physical presence" nexus or the Supreme Court's Dormant Commerce Clause jurisprudence. And under that statute, Amazon Services was not the "seller" or "retailer" for sales made by third parties. *Amici* suggest that they are presenting "historical context" to decide this case. But they do not and cannot explain how any of the "context" they provide informs the meaning of the terms "seller" and "retailer" prior to the 2019 marketplace facilitator amendments.

When *amici* do address South Carolina's pre-2019 statute, they do not and cannot dispute that Amazon Services's interpretation must prevail so long as it was reasonable. Instead, *amici* baldly assert that it "should have been clear" to Amazon Services that it was required before 2019 to collect and remit sales tax on third-party sales. *Amici* Br. 14. *Amici*'s conclusory assertion is at odds with the considerable record evidence supporting Amazon Services's interpretation, including the ALC's own recognition that the law was "not clear" with respect to third-party sales on the Amazon.com marketplace, the Department's admissions that the pre-2019 version of the tax law did not cover marketplace facilitators like Amazon Services, and the fact that a legislative amendment was necessary to create a new class of statutory seller—the "marketplace facilitator." In revising the statute, the legislature did not behave as if it "should have been clear" to any reasonable taxpayer that a "marketplace facilitator" of third-party sales was a "seller"; otherwise, it would not have needed to define a "marketplace facilitator" and then state that any such entity is a "seller" with the 2019 amendments. *Amici*'s argument treats the legislature's amendment as meaningless and thus runs headfirst into the long-recognized presumption under South Carolina law that when the legislature adopts an amendment to a statute, it intends to change the existing law.

Amazon Services's interpretation of South Carolina's pre-2019 statute was correct and, at a minimum, plainly reasonable. Contrary to the suggestion of *amici*, they do not and cannot point to any language in the pre-2019 Sales Tax Act that made South Carolina the *sole* jurisdiction in the nation to impose sales tax obligations on a marketplace facilitator prior to adopting statutory language defining a "marketplace facilitator" and declaring that such an entity is a "seller" for purposes of sales tax obligations. The Court of Appeals' decision should be reversed.

I. This Case Is Not About South Carolina's Constitutional Authority to Require Amazon Services to Collect South Carolina Sales Tax or the Evolution of the "Physical Nexus" Rule.

Amici argue that South Carolina had the authority, under the U.S. Constitution, to impose sales tax liability on Amazon beginning in 2011 when Amazon built a warehouse in South Carolina and thus established a physical presence in the State. *Amici* Br. 6 ("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."). *Amici* go on to note that the South Carolina legislature enacted a moratorium that lasted for approximately five years that exempted Amazon from sales and use tax obligations notwithstanding its physical presence in the state. *Id.* at 6-7. And *amici* conclude by saying that, once the moratorium expired, "Amazon was, or should have been well-aware that it would be responsible for sales tax on all of *its* sales starting in 2016." *Id.* at 7 (emphasis added).

Amazon Services agrees. Amazon Services *did* collect sales tax on all of *its* sales when the moratorium was lifted. *See* Pet. Opening Br. 6 n.1; App. 2022, DOR COA Br. 3 (acknowledging that "Amazon *was* remitting sales and use tax [ ] for transactions involving goods owned by Amazon and its affiliates" (emphasis added)). And Amazon Services did that precisely because it understood it had physical presence in South Carolina and was therefore required to collect sales tax on its sales once the moratorium expired.

But the question in this case is different. The question is whether the pre-2019 version of South Carolina's sales tax statute imposed a collection duty on Amazon Services for sales made by third-party sellers, not its own sales. The fact that South Carolina had the *constitutional authority* to impose such a requirement on Amazon starting in 2011 (because Amazon had a physical presence in the state) has no bearing on the separate question whether South Carolina had, in fact, done so.

In fact, as the record demonstrates unequivocally, it had not. The South Carolina sales tax statute in 2016 required sellers and retailers, and only sellers and retailers, to collect and remit sales tax on goods sold to customers in South Carolina. Amazon Services did not become such a seller or retailer *with respect to third-party sales* until 2019, when the marketplace facilitator amendments took effect and added "marketplace facilitators" as a new category of "seller" and "retailer." In other words, Amazon Services's position has never been that it does not owe sales tax on third-party sales prior to 2019 because of a physical presence requirement. It has always been that the pre-2019 version of the statute did not treat Amazon Services as a "seller" of third-party sales. *Amici*'s extensive discussion of the evolution of the physical nexus rule (*see Amici* Br. 1-9) is therefore simply not relevant to resolving the issues before this Court.

II. *Amici* Offer No Principled Basis to Conclude That the Department Had the Statutory Authority to Impose Sales Tax Liability on Amazon Services for Third-Party Sales Before 2019.

The key dispute between the Department and Amazon Services is whether South Carolina's sales tax statute in 2016 required Amazon Services to collect sales tax on sales made by third parties who sell their products through the Amazon.com marketplace for a fee. The answer to that question is no. With respect to third-party sales, Amazon Services operated the Amazon.com marketplace and provided services to sellers; it was not a seller itself. Recognizing that the pre-2019 version of the statute did not cover online marketplaces like Amazon Services, the legislature, at the request of the Director of the Department, amended the statute in 2019 to cover precisely these kinds of third-party sales when it added "marketplace facilitators" to the list of statutory "sellers" and "retailers" required to collect sales tax on third-party sales.

Amici's brief largely avoids the statute, for good reason. Amazon Services had no duty to collect and remit sales tax under the pre-2019 sales tax law because it did not "transfer, exchange, or barter … tangible personal property for a consideration" with respect to those third-

party sales. S.C. Code Ann. § 12-36-100. Rather, Amazon Services received consideration for services it provided to the third-party sellers for operating its online marketplace. Pet. Opening Br. 28-31; Pet. Reply Br. 6, 9-11. *Amici* ignore the relevant provisions of the pre-2019 version of the sales tax law, instead (wrongly) declaring that Amazon Services was a "seller" of third-party sellers' products on the Amazon.com marketplace and repeatedly asserting that the sales tax statute was intended to be "broad." *Amici* Br. 6, 10. They do not defend the Court of Appeals' interpretation and application of *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), which cannot be squared with *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012). Pet. Opening Br. 23-28; Pet. Reply Br. 3-6. They do not explain how the legal standard adopted by the Court of Appeals and the ALC could avoid the absurd result that payment processors, credit card companies, banks, delivery companies, and the like would all be considered "sellers" under the Department's view. Pet. Opening Br. 30-31, 33-34; Pet. Reply Br. 12. And they never address why the legislature would add "marketplace facilitators" to the list of entities that constitute a "seller" and "retailer" if they were already included.

Instead of addressing the issues before the Court, *amici* suggest that Amazon Services can be considered an "agent" of the third-party seller and liable under the "efficient administration" prong of Section 12-36-70. *Amici* Br. 13 n.4 (citing S.C. Code Ann. § 12-36-70). But that evidence-free speculation cannot help the Court. The Department expressly waived this argument. When the ALC asked the Department whether it was pursuing this argument at the hearing, the Department responded: "For a number of reasons we have just elected not to proceed with that theory." App. 169. That concession was not surprising, because the Business Services Agreement that governs the relationship between Amazon Services and third-party

sellers explicitly states that there is no agency relationship between them (*see* Ex. 3, App. 869), and the Department offered no evidence suggesting otherwise. Nor could the Department have offered any evidence suggesting that Amazon Services is a "salesman, representative, trucker, peddler, or canvasser" as the "efficient administration" provision requires.[1] *See* S.C. Code Ann. § 12-36-70(3); *see also State ex rel. Roddey v. Byrnes*, 219 S.C. 485, 512, 66 S.E.2d 33, 44 (1951) (noting that "efficient administration" provision vested the Tax Commission with "limited discretionary power" to address instances of outright tax evasion, but even that discretion is limited by "whom the Commission may classify as retailers for the purpose of the Act, as stated in the quoted provision" of the statute). And even if the Department could have, Amazon Services, had the argument not been waived, would have been able to rebut the assertion with its own evidence. Consistent with the fact that Amazon Services did not fit within the text of this provision, the South Carolina General Assembly in 2019 amended Section 12-36-70 to add "marketplace facilitator" as a statutory "seller" under the relevant provision of the tax code (*see* S.C. Code Ann. § 12-36-70 (2019))—an amendment that would have been unnecessary under *amici*'s interpretation of "agent" in the statute.

III. The "Substance Over Form" Principle Addressed By *Amici* Requires Reversal.

Amici argue that Amazon Services's interpretation of South Carolina's pre-2019 sales tax statute violates the "substance over form" doctrine because, they claim, Amazon Services is attempting to "shield" itself from sales tax obligations by assigning different functions to distinct

[1] As a general rule, South Carolina courts do not entertain arguments raised by *amici* that were not raised by the parties. SCACR Rule 213. And to the extent there are exceptions to that rule, they are "narrow[ ]," as this Court has observed. *State v. Langford*, 400 S.C. 421, 433, 735 S.E.2d 471, 477 (2012). Given the clarity of the Department's waiver and the absence of any evidence to support *amici*'s "agency" argument, this case warrants no exception. *Cf. James v. Anne's Inc.*, 390 S.C. 188, 193-94, 701 S.E.2d 730, 732-33 (2010) (applying Rule 213 and declining to consider argument not raised by party).

corporate entities. *Amici* Br. 12-15. This argument grossly mischaracterizes Amazon Services's position and turns the "substance over form" doctrine on its head. Properly applied in this case, the "substance over form" principle compels reversal of the Court of Appeals' decision.

The *substance* of the third-party seller transactions is that third parties are the true sellers of their products. *See* Pet. Opening Br. 28-34; Pet. Reply Br. 8-14. By contrast, Amazon Services is not either in form or substance a seller of those products. Instead, it is paid by third-party sellers for the services it provides to those sellers; it is not paid for the products those third parties sell to South Carolina customers on Amazon's online marketplace. In short, Amazon Services is substantively a service provider (not a seller of products) and the form of how and why it is paid follows that substance. Indeed, that is true for *every* Amazon entity with whom third-party sellers contract. No Amazon entity—not Amazon Services, not Amazon Payments, and not Amazon Fulfillment—is ever paid for the products that third parties sell. They are all paid for services provided to the third-party sellers. It is always the third-party sellers who are paid for the products customers buy from those sellers (Pet. Opening Br. 29-31; Pet. Reply Br. 8-11), and thus the third-party sellers, not Amazon Services, had the duty under the pre-2019 version of the law to collect and remit sales tax on third-party sales. Indeed, some third-party sellers did collect and remit sales tax on third-party sales to South Carolina, and neither the Department nor *amici* contend that it was error for them to have done so.

Amici emphasize that, under the language of the pre-2019 statute, 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 "acting as a unit." *Amici* Br. 4-5 (citing S.C. Code Ann. §§ 12-36-30 and 12-36-910). According to *amici*, "[t]hat is precisely what Amazon does by operating through its group of related business entities." *Id.* at 5-6. But that

misses the point. *None* of the Amazon-related entities, whether considered individually or as a "group or combination," receives consideration for third-party sales on the Amazon.com marketplace. Only the independent third-party seller does, and thus only the third-party seller can be considered to be in the business of *selling.* So neither the substance nor the form favors treating *any* Amazon entity as the "seller" of third-party sales prior to the marketplace facilitator amendments. Amazon Services's argument does not turn on which Amazon entity performs which service; the point is that *none* of the Amazon entities, individually or collectively, receives consideration in exchange for any sale of the third-party product.

Indeed, *amici* misunderstand and hence mischaracterize *why* Amazon Services has described the other Amazon entities—Amazon Payments, Inc. ("Amazon Payments") and Amazon Fulfillment Services, Inc. ("Amazon Fulfillment")—in this appeal. Amazon Services has done so to correct various factual misstatements by the ALC concerning facts that are not in dispute. For example, the ALC asserted that Amazon Services "processes the customer's payment" and "remits the proceeds from the sale to the owner." App. 31. But the unrefuted evidence at trial established that *Amazon Payments* performs these functions. As Amazon Services has explained, brick-and-mortar stores use third-party payment processors and fulfillment companies, and nobody asserts that such service providers are required to collect sales tax on goods sold in those stores. *See* Pet. Opening Br. 33-34; Pet. Reply Br. 10. Brick-and-mortar stores remain the seller with sales tax obligations because they, not the payment processor or fulfillment company, receive consideration in exchange for their sales. Pet. Opening Br. 30-31. The same is true here: the third-party seller—not Amazon Services, or Amazon Payments or Amazon Fulfillment for that matter—receives consideration from the customer for their products, and therefore had the duty under the pre-2019 version of the sales tax law to collect

and remit the sales tax.[2] Amazon Services, on the other hand, receives consideration *from the third-party sellers* in exchange for services it provides *to them*; it does not replace or stand in the shoes of the sellers vis-à-vis the customers. Contrary to *amici*'s suggestion, the "substance" of third-party transactions supports Amazon Services's position.

IV. *Amici* Offer No Reason Why Amazon Services's Interpretation of the Pre-2019 Version of the Sales Tax Law Is Unreasonable.

Amici's brief is notable for what it does *not* say. *Amici* do not dispute that as long as Amazon Services's interpretation of the statute was reasonable Amazon Services must prevail in this appeal. Pet. Opening Br. 23-26, 28; Pet. Reply Br. 3, 7-8. *Amici* claim that "it should have been clear to Amazon … that it would be required to collect and remit sales tax" once the moratorium expired in 2016. *Amici* Br. 14-15. But that assertion is nothing more than *amici*'s conclusory assertion and reflects a misunderstanding of the issues in this case.[3]

Amici offer no explanation why Amazon Services's interpretation was not reasonable given the many factors set forth in Amazon Services's briefs, including that the ALC recognized

[2] Contrary to *amici*'s assertion, Amazon Services is not "using multiple related entities to get around constitutional nexus and avoid sales [tax]." *Amici* Br. 6. As discussed above, Amazon Services does not dispute that there was "constitutional nexus" beginning in 2011. Once again, the relevant question is whether, under South Carolina's statute, Amazon Services was a "seller" or "retailer" for third-party sales. It was not, because it did not receive consideration for the transfer or exchange of any personal property; only the third-party seller did. *Amici*'s claim that "[t]he 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" is thus irrelevant. *Amici* Br. 6.

[3] *Amici* cite a Form 10-K for 2015 in which Amazon acknowledged to investors that sales tax rules might change to impose sales tax obligations on Amazon Services. *Amici* Br. 7-8. To the extent *amici* suggest that Amazon Services knew it already *was* required to collect sales tax *without* any change, they are wrong. The statement merely acknowledges what was obvious to all: states were changing their rules and the Supreme Court could reconsider the physical nexus ruling, and *going forward* Amazon would have to comply with those changes.

that the law was "not clear" as applied to third-party sales on the Amazon.com marketplace (App. 615-16), and that multiple government officials, including the Department's own Director, repeatedly acknowledged that the applicable version of the sales tax law did not apply to marketplace facilitators and would not unless it was changed. Pet. Opening Br. 37-39; Pet. Reply Br. 15-17. Nor do *amici* dispute that when the legislature adopts an amendment to a statute, there is a well-settled presumption under South Carolina law that the legislature intended to change the existing law. Pet. Opening Br. 34-37; Pet. Reply Br. 17-20. That is exactly what the legislature did here when it introduced a comprehensive set of changes tailor-made to bring marketplace facilitators like Amazon Services within the scope of the law. *Amici* have not tried to explain why the legislature would have so thoroughly amended the statute if it was *unreasonable* to believe that internet marketplace facilitators like Amazon Services were not required to collect and remit sales tax on third-party products sold on their marketplaces before the amendment.

Amici take issue with Amazon Services's characterization of the Department's position as a "dramatic outlier" among taxing jurisdictions. *Amici* Br. 8. *Amici* claim this characterization is "highly misleading" because "other states *did* attempt to impose sales tax in similar circumstances." *Id.* But *amici*'s support for this statement is that several states "modif[ied] their sales tax statutes to impose sales tax obligations on Amazon *based on minimal physical presence*."[4] *Id.* (emphasis added). Again, the physical presence issue is irrelevant to this appeal.

[4] Indeed, the 2011 *New York Times* article that *amici* cite is about a referendum proposed in "response to a California law, passed [the previous month], that require[d] Internet retailers to pay sales tax if they have affiliates or subsidiaries in the state." Matt Richtel & Verne G. Kopytoff, "Amazon Takes On California," *New York Times* (July 13, 2011), available at https://www.nytimes.com/2011/07/14/technology/amazon-takes-sales-tax-war-to-california.html. The article is *not* about the distinction between Amazon's sales and third-party sales. The same is true of the 2013 *Fortune* article that *amici* cite, which is also about the physical nexus rule. *See* Peter Elkind & Doris Burke, "Amazon's (not so secret) war on taxes," *Fortune* (May 23, 2013),

These states did not impose a collection duty on Amazon Services *for third-party sales* before marketplace facilitator amendments were adopted.

Amici also contend that Amazon Services "erroneously states that 'no other taxing agency or court … has concluded that Amazon Services—or any other marketplace facilitator—was liable for sales tax on third-party sales before statutory changes that followed *Wayfair*." *Amici* Br. 9 (quoting Pet. Opening Br. 39-40). But *amici*'s only counterexample is a 2012 settlement agreement with Texas's tax agency, and that settlement agreement resolved a dispute about whether Amazon had established a *physical presence* in the state by virtue of owning a warehouse through a subsidiary, which is, again, not the issue in this appeal. *See* Billy Hamilton, "What an Amazon Sales Tax Deal Looks Like," *Tax Notes* 675, 675 (Sept. 3, 2012) (attached to *amici*'s brief as an appendix) ("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 … ."). *Amici* observe that, according to the cited article, the settlement agreement included a broad release that released Amazon "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." *Id.* at 678; *see also Amici* Br. 9-10. But the fact that Amazon sought and received a broad release in connection with the settlement agreement does not mean that any tax regulator or court had concluded that Amazon Services was liable for sales tax on third-party sales made through the Amazon.com marketplace. Indeed, Texas did not amend its tax laws to impose liability for third-party sales tax

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available at https://fortune.com/2013/05/23/amazons-not-so-secret-war-on-taxes/ (explaining that the dispute was about whether Amazon had a "'physical presence' in Texas").

on marketplace facilitators until 2019. *See, e.g.*, Tex. Tax Code Ann. §§ 151.008(b)(7); 151.0242 (effective October 1, 2019).

In truth, *amici* cite no case from any other jurisdiction holding that a marketplace facilitator like Amazon Services was responsible for sales tax on third-party sales before the jurisdiction's law was amended to cover marketplace facilitators, because there is none.[5] *Amici* suggest that this can be explained away because South Carolina's sales tax law is written more broadly than other states', but they cite no example and do not explain how the language in the South Carolina statute is materially different from laws in other jurisdictions. *See Amici* Br. 10. To the contrary, many states had sales tax statutes that were materially similar before the

[5] *Amici*'s discussion of catalog and mail-order sales is revealing. *See Amici* Br. 2-3. As *amici* explain, many states amended their sales tax statutes to impose "sales tax obligations on retailers who solicited orders via catalogues or other advertisements" because their pre-existing laws did not cover out-of-state taxpayers. *See id.* Amending the statute to impose duties on those not previously covered by existing laws is exactly what happened here when South Carolina amended the sales tax law in 2019 to impose sales tax obligations on marketplace facilitators.

marketplace facilitator amendments were adopted, including Washington,[6] Connecticut,[7] Hawaii,[8] Kentucky,[9] North Dakota,[10] and Wisconsin.[11]

[6] Washington imposed a sales tax on "every person engaging within this state in the business of making sales at retail." Wash. Rev. Code Ann. § 82.04.250(1) (2014). A "sale" was defined as "any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a 'sale at retail' or 'retail' sale." *Id.* § 82.04.040 (effective to July 2019). "Business" was defined broadly to include "all activities engaged with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." *Id.* § 82.04.140 (1961).

[7] Connecticut imposed a sales tax "[f]or the privilege of making any sales … at retail, in this state for a consideration, … on all retailers." Conn. Gen. Stat. Ann. § 12-408(1) (effective to September 30, 2018). A "retailer" was defined to include "[e]very person engaged in the business of making sales at retail or in the business of making retail sales at auction of tangible personal property owned by the person or others." *Id.* § 12-407(a)(12)(A) (effective to November 30, 2018). A "retail sale" was defined to include "a sale for any purpose other than resale in the regular course of business." *Id.* § 12-407(a)(3)(A). And "business" was defined broadly to include "any activity engaged in by any person … with the object of gain, benefit or advantage, either direct or indirect." *Id.* § 12-407(a)(10).

[8] Hawaii imposed a sales tax on "every person engaging or continuing in the business of selling any tangible personal property whatsoever." Haw. Rev. Stat. Ann. § 237-13(2)(A) (2018). A "sale" was defined to include "the exchange of properties as well as the sale thereof for money." *Id.* § 237-1(2) (effective to December 31, 2019). And "business" was defined broadly to include "all activities (personal, professional, or corporate) engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect." *Id.* § 237-2.

[9] Kentucky imposed a sales tax on "all retailers at the rate of six percent … of the gross receipts derived from … [r]etail sales of … [t]angible personal property." Ky. Rev. Stat. Ann. § 139.200 (effective to April 13, 2018). A "retailer" was defined as "[e]very person engaged in the business of making retail sales of tangible personal property … ." *Id.* § 139.010(27)(a). And "business" was defined broadly to include "any activity engaged in by any person … with the object of gain, benefit, or advantage, either direct or indirect." *Id.* § 139.010(2).

[10] North Dakota imposed "a tax of five percent upon the gross receipts of retailers from all sales at retail" of "[t]angible personal property." N.D. Cent. Code Ann. § 57-39.2-02.1(1) (2019). A "retailer" was defined to include "every person engaged in the business of selling tangible goods, wares, or merchandise at retail." *Id.* § 57-39.2-01(22) (effective to July 1, 2019). A "sale at retail" was defined to include "any sale … for any purpose other than for resale." *Id.* § 57-39.2-01(21). A "sale" was defined as "any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by any means whatever, for a consideration." *Id.* § 57-39.2-01(23). And "business" was defined broadly to include "any activity engaged in by

Moreover, *amici* ignore decisions like the Supreme Court of Louisiana's decision in *Normand v. Wal-Mart.com USA, LLC*, which specifically rejected this argument under a similar statute when holding that Wal-Mart.com was not liable for third-party sales made in its online marketplace. 340 So. 3d 615 (La. 2020). There, the statute defined a "sale at retail" as "a sale to a consumer or to any other person for any p[urpose] other than for resale as tangible personal property." *Id.* at 626 (quoting La. R.S. 47:301(10)(a)(i)). A "sale," in turn, was defined as "any transfer of title or possession, or both ... conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration." *Id.* (quoting La. R.S. 47:301(12)). As the Supreme Court of Louisiana explained:

> [T]hese statutory provisions contemplate that the seller and purchaser/consumer are the actual parties to the sale. Relative to sales by third party retailers on Wal-Mart.com's online marketplace, the actual participants to the sale are the third party retailers that actually sell the goods and the purchasers. Clearly, an online marketplace is not a party to the underlying sales transaction between the third party retailers and their customers, but rather a facilitator of the sale.

Id. So too here.

Amici argue that the Department's attempt "to collect sales tax from Amazon do[es] 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." *Amici* Br. 11. But they

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any person … with the object of gain, benefit, or advantage, either direct or indirect." *Id.* § 57-39.2-01(2).

[11] Wisconsin imposed a sales tax on all "retailers" "[f]or the privilege of selling, licensing, leasing or renting tangible personal property at retail." Wis. Stat. Ann. § 77.52(1)(a) (effective to April 17, 2018). A "retailer" was defined to include "[e]very person engaged in the business of making sales of tangible personal property or items, property, or goods." *Id.* § 77.51(13(b)). And "business" was defined broadly to include "any activity engaged in by any person … with the object of gain, benefit or advantage, either direct or indirect." *Id.* § 77.51(1fd).

ignore that this case, unlike the typical audit case, involves a statutory amendment that added a new type of statutory seller and that Department officials conceded this amendment was necessary to "close[] [a] gap" and "change" the law. *See* Ex. 194, App. 1287 at 6:00-6:33; *accord* Ex. 192, App. 1274 ("DOR reports that this *statutory change* would allow it to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors through the marketplace sites. … DOR estimates that, *if there had been a law like this in 2016*, Amazon's additional sales tax liability for that year would have been $57 million." (emphases added)).

Finally, *amici* claim that adopting Amazon Services's position "would create an extra 'judicially created tax break' for Amazon's business here in South Carolina," and that it will create "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." *Amici* Br. 15. This argument is badly misguided and runs contrary to decades of South Carolina precedent on the proper rules for interpreting tax statutes.

Amazon Services followed the South Carolina sales tax law as written prior to the 2019 amendment with respect to an emerging sales tax issue it faced across the nation. *Every* state, including South Carolina, has addressed this issue through a statutory amendment. Amazon Services did not collect sales tax on third-party sales because, until that amendment, it reasonably read the prior statute to impose the collection duty on third-party sellers, not itself. But as soon as that duty was extended to "marketplace facilitators," it promptly complied. Respectfully, this is a model of how the development of tax law *ought* to work when novel business arrangements arise. Had the Department collected from the right entity under the pre-2019 statute—the third-party seller—there would have been no lost sales tax revenue.

Amazon Services's position is not, and never has been, that a taxpayer's subjective "proclamation" of statutory ambiguity allows it to escape tax responsibilities. As Amazon Services has maintained throughout this litigation, the question is an objective one: Is the taxpayer's interpretation of the statute reasonable? Both large companies and local businesses alike can and should be judged by the reasonableness of their arguments, not the depth of their pocketbooks. That is all Amazon Services requests here.

This lawsuit treats Amazon Services differently than any other marketplace facilitator. *Amici* do not deny that the effect of this litigation is that the Department is attempting to impose a collection duty for third-party sales on Amazon Services, as a marketplace facilitator before the marketplace facilitator amendments took effect, and Amazon Services alone. *See* Ex. 194, App. 1287 at 7:10-18; *see also* Ex. 214, App. 1563 (Director admitting that this "lawsuit's going to pull up some retroactivity … [s]pecific to that one company, I haven't said their name"). Nor do they deny that if this Court adopts the Department's broad interpretation of the sales tax statute and its approach to interpreting tax statutes more generally, it will mean that the Department will have extraordinary discretion to enforce its views of tax statutes, even retroactively, limited only by the Department's own opinion of what is sensible. That unbridled discretion is a threat to both large and small businesses, and is directly contrary to this Court's rules for construing statutes that impose a tax.

CONCLUSION

The Court of Appeals' decision should be reversed because Amazon Services had no duty to collect and remit sales tax on third-party sales under the plain language of the pre-2019 sales tax law, and its interpretation of the statute was at least reasonable. *Amici* do not address Amazon Services's arguments for reversal, and they provide no reason to affirm the Court of Appeals' decision.

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