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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

Opinion No. Op. 28319 (S.C. Filed March 18, 2026)

Appellate Case No. 2019-001706

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

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

Amazon Services, LLC, Petitioner,

v.

South Carolina Department of Revenue, Respondent.

PETITION FOR REHEARING

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Pursuant to SCACR Rule 221, Petitioner Amazon Services LLC (“Amazon Services”) petitions for rehearing of this Court’s March 18, 2026 decision affirming the Court of Appeals’ ruling in favor of the South Carolina Department of Revenue (the “Department”). *Amazon Servs., LLC v. S.C. Dep’t of Revenue*, --- S.E.2d ---, 2026 WL 759312 (S.C. Mar. 18, 2026) (“Op.”).

INTRODUCTION

This case presents the following question: when the South Carolina Sales and Use Tax Act imposes a tax on persons “engaged . . . in the business of selling tangible personal property at retail,” and the Act separately defines both “sale” and “seller,” should the phrase “business of selling” be read in conjunction with those definitions—or should the phrase be interpreted in isolation, divorced from its statutory context? The majority chose the latter course. It held that Amazon Services was “engaged in the business of selling” without ever finding that Amazon Services made a “sale” as the statute defines that term or that it was a “seller” as the statute defines that term. Instead of relying on the words in the statute, the Court looked elsewhere. It introduced a novel “integral”-versus-“incidental” distinction that does not appear in the text of the statute, which resulted in an interpretation that will sweep broadly and has no principled stopping point. Such a broad, sweeping interpretation should be questioned when the Department itself admitted that at the time of the assessment there was “zero guidance, absolutely no guidance” on the taxation of third-party sales on online marketplaces, which meant Amazon Services had no reason to anticipate this novel interpretation.

The majority’s approach cannot be squared with the Act’s text, this Court’s precedents requiring that statutes be read as a whole, the century-old rule that ambiguity in tax statutes must be resolved in the taxpayer’s favor, or the fair-notice requirement of due process. It also renders the Legislature’s comprehensive 2019 marketplace facilitator tax amendments superfluous, a result at odds with the presumption in South Carolina law that a legislative amendment implies a

substantive change. It treats as irrelevant evidence showing that Amazon Services’s interpretation was reasonable, declaring the statute “unambiguous” even though the majority itself employs a novel framework beyond the text of the statute to interpret it. And it imposes a multi-million dollar retroactive assessment based on a theory the Department’s own Director described as requiring taxpayers to “guess,” that was on the “cutting edge” of tax enforcement, and that was “completely different” from existing law and the approach of other jurisdictions.

The consequences of the majority’s decision will reverberate beyond this case. This Court has, for decades, adhered to the bedrock rule that “[w]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.” *Alltel Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) (citation omitted). If this decision is not revisited, that taxpayer protection and the protection previously afforded by the fair-notice requirement of the Due Process Clause will be seriously weakened in South Carolina. The practical effect of these changes is that the Department will have substantially more power to assess taxes selectively based on novel, previously-unannounced enforcement theories. That shift in power will affect many more taxpayers than just Amazon Services. This is an exceptional case that warrants rehearing.

BACKGROUND

This case addresses Amazon Services’s appeal of a final order issued by the Administrative Law Court (“ALC”) holding that Amazon Services is liable for taxes on sales of products sold by independent third parties in the Amazon.com marketplace. The tax period at issue in this case is, as a formal matter, the first quarter of 2016. But this Court’s ruling will have implications for two cases currently before the ALC covering later periods leading up to the 2019 amendments.

Each time a court in this litigation has issued a decision upholding the Department’s tax

assessment, the court has relied on a different rationale. When the ALC ruled against Amazon Services, it relied on a novel tax law concept: the so-called “point of sale.” *See, e.g.*, App. 13, 15-16, 31-33, 39-42. The Court of Appeals correctly rejected that concept. *Id.* at 2119-20. In its place, the Court of Appeals relied on a second novel concept—the notion that *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), adopted a “broad” interpretation of the South Carolina Sales and Use Tax Act, and that under a broad interpretation of the statute, Amazon Services was liable for collecting sales tax on third-party sales. App. 2118. This Court rightly rejected that concept as well. Op. at 7.

In its place, this Court—splitting 3-2—took a third approach: it held that the phrase “engaged . . . in the business of selling,” which appears in one provision of the Sales and Use Tax Act (S.C. Code Ann. § 12-36-910(A)), “unambiguous[ly]” applies to Amazon Services’s conduct with respect to third-party sales. Op. at 7. To reach this conclusion, the majority relied on a third novel concept: a distinction, not tied to any language in the text of the statute, between sales facilitators that are “integral” to the transaction versus those that are “incidental.” *Id.* at 5-6. The majority then concluded that Amazon Services’s contrary interpretation was “not ‘reasonable,’” because its interpretation “relies on words the statute does not contain,” specifically “sale and seller.” *Id.* at 7. The majority reached this conclusion notwithstanding the fact that “sale” and “seller”—unlike “integral” and “incidental”—*are* addressed in different sections of the same statutory scheme. *See* S.C. Code Ann. § 12-36-70 (definition of “seller” and “retailer”); S.C. Code Ann. § 12-36-100 (definition of “sale” and “purchase”).

Chief Justice Kittredge, joined by Acting Justice Clyburn Pope, dissented. The dissent concluded that Amazon Services’s interpretation of the statute was “reasonable,” and thus the principle of *Alltel* “requires” the Court “to rule in favor of Amazon” because “[a]ny substantial

doubt in the application of a tax statute must be resolved in favor of the taxpayer.” Op. at 9 (Kittredge, C.J., dissenting) (citations and internal quotation marks omitted).

ARGUMENT

I. The Majority’s Interpretation of the Sales and Use Tax Act Fails to Read the Statute as a Whole and Is Internally Inconsistent, Leading to an Erroneous Conclusion.

This Court has repeatedly held that a “statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect.” *Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992); *see also TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (same). The majority’s analysis does not follow this principle.

The Sales and Use Tax Act is not a single provision. It is an interlocking statutory scheme through which multiple statutory provisions apply to the imposition and administration of the sales and use tax in this State. Section 12-36-910(A) imposes a tax on persons “engaged . . . in the business of selling tangible personal property at retail.” Section 12-36-100 defines “sale” as a “transfer, exchange, or barter . . . of tangible personal property *for a consideration*.” Section 12-36-70 defines “retailer” and “seller” to include certain types of persons. Section 12-36-20 defines “business.” And § 12-36-1340 imposes the duty to collect and remit the sales tax on “[e]ach *seller* making retail *sales* of tangible personal property.” The majority’s analysis does not construe these provisions together.

The problem is visible on the face of the opinion. The majority makes two assertions in its analysis of the statute that cannot both be correct. The majority holds that Amazon Services’s interpretation “is not ‘reasonable,’” because its interpretation “relies on words the statute does not contain—sale and seller.” Op. at 7. But “sale” and “seller” *are* contained in related provisions in the very same chapter of the Act. And, in that same paragraph of the opinion, the majority itself

relies on the statutory definition of “sale,” stating: “it is the phrase ‘engaged . . . in the business of selling’ *and* the statutory definitions of ‘[b]usiness’ and ‘[s]ale’ *together* that determine who is required to remit these sales taxes.” *Id.* (emphasis added). The majority thus acknowledges that the definition of “[s]ale” *is* part of the analysis. It cannot be that when Amazon Services invokes the definition of “sale” to show that it did not receive consideration “for” the transfer of tangible personal property—as the statutory definition requires—Amazon Services’s reliance on that term is “not reasonable.” *Id.* The definition of “sale” either informs the meaning of “in the business of selling” or it does not. Under *Alltel*, the Court should have employed the definition of “sale” to reach a conclusion in favor of Amazon Services’s statutory interpretation. Instead, the Court erroneously employed that definition in favor of the Department.

This is not a minor tension. The word “selling” in § 12-36-910(A) is the present participle of “sell,” which the majority acknowledges means “to offer for sale.” Op. at 4. “Sale” is a defined term in the Act: a “transfer . . . of tangible personal property for a consideration.” S.C. Code Ann. § 12-36-100. The majority’s holding that Amazon Services was “in the business of selling” thus necessarily requires a finding that Amazon Services engaged in conduct meeting the statutory definition of a “sale.” Yet the majority never makes that finding. It never explains how Amazon Services’s receipt of service fees from third-party sellers—not from customers, and not for the transfer of property—constitutes consideration “for” the transfer of tangible personal property.

The majority compounds this error by dismissing § 12-36-70 on the ground that “the word ‘seller’ does not appear” in § 12-36-910(A). Op. at 5. But § 12-36-910(A) uses the word “selling,” and the Act defines who is doing the “selling.” In addition, § 12-36-1340 imposes the duty to collect sales tax on “[e]ach *seller* making . . . *sales* of tangible personal property.” Under the principle that statutory provisions must be read together to produce a single, harmonious result,

see, e.g., CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011), these other provisions necessarily inform the meaning of “selling” in § 12-36-910(A).

The majority’s failure to consider these related provisions reads the phrase “engaged in the business of selling” in isolation from the statutory scheme of which it is a part. This cannot be reconciled with South Carolina law. *See, e.g., id.* (“We therefore should not concentrate on isolated phrases within the statute.”); *Centex, Int’l, Inc. v. S.C. Dep’t of Revenue*, 406 S.C. 132, 140, 750 S.E.2d 65, 69 (2013) (same). Nor can it be reconciled with the fact that when the Legislature enacted the 2019 marketplace facilitator amendments, it amended multiple provisions of the Act, including the definition of “seller”—demonstrating that the *Legislature itself* thought these other provisions of the Act were relevant. At a minimum, it was not *unreasonable* for Amazon Services to read these provisions together when interpreting the Sales and Use Tax Act as it did.

II. The Majority’s “Integral”-Versus-“Incidental” Distinction Is Not Grounded in the Statute and Has No Principled Stopping Point.

The majority’s attempt to cabin the scope of its statutory interpretation does not work and will produce confusion in future cases. The majority holds that Amazon Services is responsible for collecting sales tax on third-party sales because its involvement in third-party transactions was “integral,” while credit card companies, payment processors, banks, delivery companies, and advertisers are not covered because their involvement is “incidental.” Op. at 6. The words “integral” and “incidental” do not appear in the statute. Nor does the majority explain what makes involvement “integral” rather than “incidental,” beyond observing that “a third-party transaction could not occur on Amazon.com without actions taken by Amazon Services.” *Id.* A credit card transaction cannot occur without a credit card company or a payment processor either, so the majority’s distinction fails to resolve the “no principled stopping point” dilemma.

During oral argument, members of this Court expressed concern about this very problem.

Oral Arg. at 55:25–59:24. The Justices questioned whether the Court of Appeals’ ruling could be constrained and whether the Department’s interpretation unfairly singled out Amazon Services while excluding businesses like credit card companies. *Id.* at 56:35–57:17. Those concerns were well-founded. Payment processors like Square and Stripe “control” (*see* Op. at 6) the checkout experience, establish merchant rules, handle disputes, process refunds, and take a percentage of every sale. Under the majority’s analysis, they would appear to qualify as “integrally involved” in the sale. The majority does not explain why they would not. And it cannot do so based on the words in the statute.

Indeed, at one point in the opinion, the majority states that “[t]he phrase ‘engaged . . . in the business of selling’ both encompasses Amazon Services’ business model and differentiates Amazon Services from other incidental service providers.” Op. at 6. There is no support for that premise in the majority opinion. Nor could there be. The phrase “engaged . . . in the business of selling” does not “differentiate” between Amazon Services and other service providers because, looking only at the words in the statute as the majority claims it must, there is no textual basis permitting such a distinction. The dictionary definitions on which the majority relies do not permit such a distinction either, because they sweep just as broadly: defining “engaged” as “involved in activity,” “greatly interested,” and “to employ or involve oneself.” Op. at 4 (citing Webster’s Ninth New Collegiate Dictionary (1988); Black’s Law Dictionary (11th ed. 2019)). The same can be said for all of the sales-adjacent companies and business types that Amazon Services has identified throughout this litigation because they are all “*involved*” in the sale.

Amazon Services followed South Carolina law and reasonably read the statute more narrowly because such a broad interpretation produces the absurd result that every sales-adjacent company or business type is responsible for collecting sales tax. *See, e.g., Duke Energy Corp. v.*

S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (“[R]egardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly.”). The Department has never provided a limiting principle for its position, which powerfully supports the reasonableness of Amazon Services’s interpretation. *See* Oral Arg. at 59:04–59:24 (Justice Few: “Ha[s the Department] not thought about this? This is one of [Amazon Services’s] main points. . . . If there’s no way to constrain the reach of this subsection, I think you’ve got ambiguity.”). And the reasonableness of Amazon Services’s interpretation is confirmed anew by the fact that the majority’s decision must rely on words not found in the statute to justify a limiting principle that ultimately fails upon inspection.

At the very least, the fact that the majority must rely on words outside the statute to ground its interpretation shows that the text of the statute does not unambiguously apply to Amazon Services. *See* Op. at 6. As this Court has previously recognized, when interpreting statutes, this Court “should not look beyond the statutory text to discern its meaning” “[a]bsent an ambiguity.” *Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017). That the majority utilized a new “integral”-versus-“incidental” distinction not found in the statutory text demonstrates there was an ambiguity that required applying the rules of statutory interpretation. *See id.* And because the text is not unambiguous under the majority’s own reasoning, the majority had no basis to exclude the other evidence and arguments Amazon Services offered to support its interpretation of the statute.

Because the majority opinion relies on words and concepts that have no textual basis in the statute, it does not “simply apply the text as written.” *See* Op. 6. That the majority was required to go beyond the literal text shows there was ambiguity, and that the majority’s decision to ignore all the evidence and arguments supporting an alternative interpretation of that text was clear error. At

a minimum, the parties should be given the opportunity to address the “integral” and “incidental” framework added to the analysis for the first time in this matter by the majority opinion.¹

III. The 2019 Marketplace Facilitator Amendments Are a Nullity Under the Majority’s Interpretation of the Statute.

The majority’s decision also fails to address the meaning and significance of the 2019 marketplace facilitator amendments, which comprehensively revised multiple provisions of the Sales and Use Tax Act to create a new category of tax collector called a “marketplace facilitator.” *See* 2019 S.C. Act. No. 21. In so doing, the majority’s approach violates another rule of statutory interpretation: “When the Legislature adopts an amendment to a statute, [there is] a presumption that the Legislature intended to change the existing law.” *See, e.g., Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008). To hold otherwise implies that the amendment was “essentially . . . a futile act,” an implication courts should avoid. *Key Corp. Cap., Inc. v. Cnty. of Beaufort*, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007).

If the phrase “engaged in the business of selling” already covered marketplace facilitators, then Act 21’s comprehensive set of changes was entirely superfluous and “futile.” The Legislature did not need to create a new statutory category of “marketplace facilitator”; amend the definitions of “retailer” and “seller”; amend the definition of “gross proceeds of sales”; expand the list of those responsible for collecting sales tax; or provide that “a marketplace facilitator includes any related entities assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner.” 2019 S.C. Act No. 21.² The Legislature’s significant and multifaceted

¹ Neither the ALC nor the Court of Appeals used an “integral” versus “incidental” framework, and thus neither party briefed this issue before this Court.

² The legislative history only underscores the point. The Legislative Oversight Committee concluded that, without the 2019 statutory change, the Department could not “force internet marketplace retailers . . . to collect and remit sales tax on items sold by third-party vendors.” Ex. 192, App. 1274. And the Department’s Director told the Legislature that new legislation was

changes fully support the conclusion that the presumption recognized by South Carolina courts for decades should apply here. *See, e.g., Centex*, 406 S.C. at 145, 750 S.E.2d at 72 (“Because the legislature is presumed to be aware of prior legislation and does not perform futile acts, we find the 2008 amendment represents a conscious decision by the legislature to preclude partnerships from earning and passing through certain tax credits.”).

The nationwide pattern confirms the point. Every state that imposes a sales tax has enacted specific marketplace facilitator legislation. The universal legislative judgment of every taxing jurisdiction in the country was that existing statutes did not cover marketplace facilitators and that new legislation—like South Carolina’s Act 21—was required to reach them.

The meaning and significance of the 2019 marketplace facilitator amendments, including the relevance of (1) the presumption that legislative amendments imply a substantive change in law and (2) the nationwide adoption of similar amendments, was extensively briefed by the parties. *See Amazon Services’s Opening Br.* at 34-37, 39-40; *DOR’s Br.* at 37-42, 46-47; *Amazon Services’s Reply Br.* at 17-20, 22. The majority does not address these important facts when explaining its interpretation of the statute. *See Op.* at 4-7. However, these facts speak directly to Amazon Services’s reasonable reliance on *its* interpretation of the statutory scheme.

IV. The Majority’s Approach Undermines the Century-Old Rule Protecting Taxpayers Against Ambiguous Tax Statutes.

The majority’s opinion significantly weakens the fundamental rule that “any substantial doubt in the application of a tax statute must be resolved in favor of the taxpayer.” *Alltel*, 399 S.C. at 318, 731 S.E.2d at 872. This rule is a structural feature of South Carolina’s tax system, recognized since at least 1924. *See Cooper River Bridge, Inc. v. S.C. Tax Comm’n*, 182 S.C. 72,

needed to “close[] the gap” so that “nobody has to guess.” Ex. 194, App. 1287 at 6:13-15, 8:40-50. If the existing statute already covered marketplace facilitators, there was no “gap” to close.

188 S.E. 508, 509-10 (1936); *Columbia Ry., Gas & Elec. Co. v. Carter*, 127 S.C. 473, 121 S.E. 377, 380 (1924). It ensures that the power to impose tax obligations resides in the Legislature, not in the taxing authority’s litigation theories. It gives taxpayers the ability to plan their affairs with confidence. And it constrains the natural tendency of government to expand its reach.

The majority’s approach undermines each of these functions. By declaring the statute “unambiguous” and thus not considering the rules of statutory construction, the majority enables the Department to assert novel interpretations of existing statutes and, if a court agrees, retroactively impose those interpretations on taxpayers who had no notice of the obligation. The dissent recognized this danger, observing that the Court of Appeals’ “improper interpretation of *Travelscape* is inextricably linked with its erroneous conclusion that the statute is unambiguous.” Op. at 9-10 (Kittredge, C.J., dissenting). And, as this Court held in *Cooper River Bridge*, “statutes levying taxes . . . are not to be extended by implication beyond the clear import of the language used.” 182 S.C. 72, 188 S.E. at 510. The majority’s decision extends the phrase “engaged in the business of selling” by implication to reach marketplace facilitation—conduct the Legislature addressed only when it enacted Act 21 three years later.

Amazon Services has marshaled much in support of its interpretation of the statute: a text-based interpretation that read the statute as a whole, the Legislature’s decision to adopt the 2019 marketplace facilitator amendments, the Department’s own statements to the Legislature,³ the

³ The Director of the Department stated before the adoption of the 2019 marketplace facilitator amendments that “[t]here is no law related to taxation of third party sales,” and he asked the Legislature to “help” the Department collect sales tax on third-party sales from marketplace facilitators by changing the statute. Ex. 205, App. 1411; Ex. 203, App. 1372; Ex. 194, App. 1287 at 5:50-6:06; Ex. 207, App. 1536. The Director asked for a legislative “change” to “ensure that online marketplace retailers collect/remit sales tax.” Ex. 213, App. 1555; *see also* Ex. 202, App. 1320. And he told the Committee there was a “need [for] additional legislation” to “close[] the gap” so that “nobody has to guess” as to who must collect and remit taxes on third-party sales. Ex. 194, App. 1287 at 5:50-6:06, 6:13-15, 8:40-50.

Department’s past enforcement practice,⁴ Amazon Services’s experience in other jurisdictions, the ALC’s acknowledgment that the pre-2019 law was “not clear,”⁵ the Court of Appeals’ belief that it had to read the Sales and Use Tax Act “broadly” under *Travelscape* to reach Amazon Services’s conduct, the majority’s reliance on a previously-unstated “integral”-versus-“incidental” distinction not found in the statutory text, and now two votes from Justices of this Court.

Given all this, allowing this decision to stand effectively eviscerates the *Alltel* principle and shifts power from the Legislature to the taxing authority. It emboldens the Department to stake out “cutting edge” enforcement theories⁶ with the confidence that South Carolina courts will simply agree with the Department’s interpretation and declare any countervailing evidence irrelevant—a concern others have already raised about this Court’s decision. *See* Perry Cooper, “Amazon Ruling Sparks Concern About Retroactive Tax Obligations,” *Bloomberg Tax* (Mar. 19, 2026) (“The South Carolina Supreme Court’s ruling upholding Amazon Services LLC’s multi-million dollar sales tax obligations has the potential to empower other courts to reinterpret older tax laws to fit modern business models, taxpayer advocates warn.”). The *Alltel* principle is threatened at its core in South Carolina if this decision is not revisited.

V. The Majority’s Treatment of Amazon Services’s Due Process Claim Does Not Address Amazon Services’s Actual Argument or the Undisputed Evidence.

The majority disposes of Amazon Services’s due process claim by holding that “the

⁴ Prior to the tax period at issue, the Department received sales tax payments from third-party sellers for sales on Amazon.com. Indeed, Amazon Services offered to collect and remit *to the third-party seller* applicable sales tax owed on third-party sales. App. 388-92; Ex. 23, App. 922-25. As of 2016, the Department had not once suggested that this process was wrong or that Amazon Services, not the third-party seller, was responsible for collection.

⁵ App. 615-16.

⁶ The Department conceded: “No other state has attempted to pursue this legal theory against online retailers like Amazon, so the SCDOR is on the cutting edge of tax strategy in this litigation.” Ex. 205, App. 1386.

Department could not have applied Act 21 retroactively because the Act did not exist when the determination was issued.” Op. at 8. That misses the point. Amazon Services has never argued that the Department formally invoked Act 21 to apply retroactively. Its argument is that the obligation the Department seeks to impose—requiring a marketplace facilitator to collect and remit sales tax on third-party sales—is the very same obligation the Legislature created for the first time in Act 21, and that the pre-2019 statute provided no fair notice of that obligation.

“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). “[R]egulated parties should know what is required of them so they may act accordingly,” and a law that “is so standardless that it authorizes or encourages seriously discriminatory enforcement” violates this guarantee. *Id.*; see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“individuals should have an opportunity to know what the law is”).

The undisputed record establishes that no marketplace facilitator could have known, prior to 2019, that the existing statute required it to collect sales tax on third-party sales. The Department conceded at trial that “as of the first quarter of 2016, there was no rule, regulation, guidance, [or] publication of any kind . . . relating to the tax of third party sales on online marketplaces.” App. 696. It confirmed “zero guidance, absolutely no guidance.” *Id.* A party that has received “zero guidance” on the existence of a tax obligation has not received fair notice of that obligation.

The Department’s own Director reinforced this point when he told the Legislature that “[t]here is no law related to taxation of third party sales” and that new legislation was needed to “close[] the gap” so that “nobody has to guess.” Ex. 194, App. 1287 at 6:13-15, 8:40-50; Ex. 205, App. 1411. Asked whether the proposed marketplace facilitator legislation would apply retroactively, the Director was unequivocal: “Absolutely, it will not be retroactive, right.” Ex. 194,

App. 1287 at 7:00-08. He then acknowledged, however, that *this “lawsuit’s* going to pull up some retroactivity . . . *specific to that one company.*” *Id.* at 7:10-18 (emphasis added).

The Director also told the Legislature, repeatedly, that the marketplace facilitator legislation was “completely different” from the changes precipitated by the Supreme Court’s decision in *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018)—refuting the Department’s litigation position that Act 21 was simply a post-*Wayfair* update. When the Chairman of the Legislative Oversight Committee asked, “One more time, the *Wayfair* decision is not this, this is something else?”, the Director answered: “That is correct. This is something completely different.” Ex. 199, App. 1287 at 2:45:14–2:46:01. The Director admitted: “*Wayfair* . . . is . . . for remote sellers. . . . Now, the marketplace legislation is different.” Ex. 196, App. 1287 at 1:57:15–1:58:58. These are not stray remarks. They are the Department’s sworn explanations to the Legislature of why a new law was needed in order to tax Amazon Services for third-party sales.

At the time, no other state had pursued the theory the Department advanced here. The Department conceded as much: “No other state has attempted to pursue this legal theory against online retailers like Amazon.” Ex. 205, App. 1386. And it described its own position as being “on the cutting edge of tax strategy.” *Id.* An enforcement theory the taxing authority itself describes as “cutting edge” cannot, by definition, have provided the fair notice that due process requires.⁷

The parallel to *Fox Television* is direct and unmistakable. There, the FCC had a longstanding policy of not penalizing “fleeting” expletives. It then “clarified” its policy and retroactively imposed fines. 567 U.S. at 249. The Supreme Court struck them down: the FCC’s

⁷ The Court of Appeals of Wisconsin later held that StubHub, an online marketplace for ticket sales, was responsible for collecting sales tax on its transactions, but that decision came nearly a decade after the tax period at issue here, and the Court applied a materially different statute. *See StubHub, Inc. v. Wis. Dep’t of Revenue*, --- N.W.3d ---, 2026 WL 89458, at *4 (Wis. Jan. 13, 2026) (statutory definition of “sale” did not contain “for a consideration” language).

“lack of notice . . . that its interpretation had changed . . . fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.” *Id.* at 254. The Court added that even “[a]n isolated and ambiguous statement from [an earlier] Commission decision does not suffice for the fair notice required when the Government intends to impose over a \$1 million fine.” *Id.* at 256-57. Here, the Department cannot point to anything suggesting that marketplace facilitators bore this obligation. There was nothing—no rule, no regulation, no guidance, no publication.

The majority attempts to distinguish *Fox Television* by asserting that “the Department applied the South Carolina Sales and Use Tax Act as written in 2016.” *Op.* at 8. But the FCC likewise applied the statute (18 U.S.C. § 1464) as written. The constitutional violation was not that the agency applied a *different* statute; it was that the agency applied the *same* statute under an interpretation the regulated party had no reason to anticipate. That is precisely what happened here.

Finally, the majority’s appendage of “integral” and “incidental” onto the statute underscores the due process problem. Whether a business’s involvement in a transaction is “integral” or “incidental” is exactly the kind of “standardless” test *Fox Television* warns against. 567 U.S. at 253. And the Department has exercised its standardless discretion in precisely the discriminatory manner the Constitution forbids: Amazon Services is the only marketplace facilitator subjected to this theory. The Director acknowledged as much, admitting that the litigation targets “that one company, I haven’t said their name.” *Ex.* 194, *App.* 1287 at 7:10-18. This situation—a taxing authority pursuing a multi-million dollar tax assessment based on a novel theory against a single taxpayer under a standard that provides no guidance *ex ante*—is a paradigmatic example of lack of fair notice.

CONCLUSION

For the foregoing reasons, Amazon Services respectfully requests that this Court grant the petition for rehearing and rehear this matter.

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