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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Appellate Case No. 2024-000625

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

v.

South Carolina Department of Revenue,..... Respondent.

RETURN TO PETITION FOR REHEARING

Pursuant with Rules 221(a) and 240(e) of the South Carolina Appellate Court Rules (“SCACR”), and consistent with the Court’s April 20, 2026, request, Respondent South Carolina Department of Revenue (“Department”) respectfully submits this return to the April 17, 2026, petition for rehearing (“Petition”) of Petitioner Amazon Services, LLC (“Petitioner” or “Amazon”).

INTRODUCTION

In its Published Opinion No. 28319, filed March 18, 2026 (“Opinion”), the majority opinion of the Court appropriately recognized and affirmed the Administrative Law Court’s (“ALC”) findings regarding the significant control and ubiquitous nature of Amazon’s role in every aspect of the undisputed retail sales occurring on its website, Amazon.com. Applying the unambiguous plain language of the 2016 version of the South Carolina Sales and Use Tax Act (“Act”)¹ to Amazon’s business and activities, the Opinion correctly determined that Petitioner is in the business of selling

¹ S.C. Code Ann. § 12-36-5 *et seq.*

tangible personal property at retail for all sales occurring on Amazon.com, upholding the Department's June 21, 2017, determination ("Determination") and assessment against Amazon for unremitted sales tax under the Act, and affirming Opinion 6047 of the Court of Appeals and the order of the ALC ("Order"), respectively.

In order to successfully petition for rehearing, a party "shall state with particularity the points [of its argument] supposed to have been overlooked or misapprehended by the court," rather than merely voice its disagreement with the conclusions reached by, or reasoning of, the Court in interpreting controlling statutes and case law or applying the findings of facts to the law. Rule 221(a), SCACR. The Petition does not adhere to that standard, failing to articulate any point with particularity that the Court overlooked or misapprehended from the prior briefing by Amazon on the limited questions for which certiorari was granted. Instead, the throughline of the Petition is incredulity, expressed in increasingly hyperbolic pronouncements, that the Court would evaluate the findings of fact as to Amazon's business model through the lens of the unique and unambiguous language of the Act, rather than fall in line with pronouncements of courts in other states applying the readily distinguishable sales tax laws of those jurisdictions. Amazon's recycling of these same repeated assertions—which the Opinion necessarily rejected as they are not new—does not warrant rehearing.

The Opinion correctly reads the 2016 version of the Act as imposing an obligation of collection and remittance of sales tax on all sales occurring on the website, so the Petition's catastrophizing of the perceived effects and long-term ramifications of the Opinion does not withstand scrutiny. Indeed, most of the Petition's criticisms do not relate to the Court's application of the Act to Amazon at all, but rather to its claimed parade of horrors about the purported impact of the Opinion on issues and third parties not before the Court in this appeal. It is worth reiterating that, despite the Petition's stark warning that "[t]he consequences of the majority's decision will reverberate beyond this case," Petition at 2, the effect of the Opinion is already known and defined: it determines

the tax liability of a single taxpayer, during a discrete period of time, and under a version of the Act that no longer exists.

When focused on the issues of actual relevance, the Petition merely recycles the same statutory arguments that it made to the Department in advance of the Determination, to the ALC in the contested case hearing, and to the court of appeals and this Court in its appellate briefings. Amazon maintains that its overly-narrow construction of the Act is reasonable, while accusing the majority of failing to read the Act as a whole. That accusation rings hollow, however, as Amazon has consistently—throughout the litigation and continuing in the Petition—relied on individual provisions of the Act in isolation to avoid its application. Amazon’s attempts at parsing the Act for perceived technicalities, all to avoid its unmistakable involvement in, significant control over, and transaction-based remuneration from every sale occurring on Amazon.com, is precisely why each court that has reviewed this case has rejected Amazon’s arguments. Those efforts now extend to unreasonably parsing the Opinion’s straightforward application of the Act to Amazon’s business model and attempting to pit that analysis against the guidance provided by the Court as to the Act’s application to entities and business models that the majority accurately describes as “incidental to the transaction.” Opinion at 6 (Howard Advance Sheet No. 11 at 14, filed March 18, 2026).

Nor does the Opinion “weaken,” “undermine,” or “eviscerate” the principle espoused by the Court in *Alltel Communications, Incorporated v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012). Rather, the majority conducted the required statutory interpretation and determined that, consistent with the Court’s prior pronouncements, section 12-36-910 is not ambiguous and, applying the plain and unambiguous language of statute to the findings of fact regarding the company’s role in all sales occurring on its website, Amazon’s interpretation was not reasonable.

In short, the Petition does not identify any issue that the Court overlooked, instead erroneously equating Amazon's disagreement as to the majority's holdings to a misapprehension of the issues. A review of the Opinion and the record shows that is not so. Because Amazon fails to meet its burden under Rule 221(a), and its restated arguments on the merits are incorrect in any event, rehearing is not warranted and the Court should deny the Petition.

STANDARD FOR REHEARING

Rule 221(a), SCACR, authorizes a party who believes that the court overlooked or misapprehended points of law or fact to petition for rehearing. The petition must state "the points supposed to have been overlooked or misapprehended by the court," Rule 221(a), SCACR, so as "to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light, Co.*, 168 S.C. 163, ___, 167 S.E. 234, 238 (1933). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citation omitted). In sum, the losing party may not be granted rehearing just because it disagrees with the Court's decision; rather, the losing party must point out overlooked or misapprehended points of law or fact. The Petition does not meet this standard.

ARGUMENT

I. The Opinion Correctly Interprets the Act as Applying to Amazon and *Alltel* Does Not Compel a Different Result.

Where the language of the Act is plain and unambiguous, as it is here, and where a taxpayer's construction of the statute fails to give effect to that plain language and the overall legislative purpose of the Act, the rule of strict construction espoused in *Alltel* is not implicated, substantial doubt does not exist, and the plain language of the Act controls.

a. The Act is Not Ambiguous and It Applies to All Sales Occurring on Amazon.com.

As the Opinion correctly recognizes, the operative section of the Act is subsection 12-36-910(A), which provides that “[a] sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.” Contrary to the Petition’s assertion, the majority’s analysis of the Act does not construe subsection 12-36-910(A) in isolation but instead gives the due effect of those definitions and provisions in applying the Act as a whole to Amazon.

As a starting point, the reference to “at retail” within subsection 12-36-910(A) is grounded in the definition of “sale at retail” and “retail sale” in section 12-36-110. It includes “all sales of tangible personal property except those defined as wholesale sales,” and further provides that “[t]he quantity or sales price of goods sold is immaterial in determining if a sale is at retail.” S.C. Code Ann. § 12-36-110. In turn, a “sale” and “purchase” is defined in section 12-36-100 as “any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration.” S.C. Code Ann. § 12-36-100. Thus, the sales tax under subsection 12-36-910(A) is imposed on “all [transfers, exchanges, or barter] of tangible personal property [for a consideration].” S.C. Code Ann. §§ 12-36-100, -110 (combined).

This is a logical point at which to pause and note that Amazon *agrees* that the transactions occurring on Amazon.com are “sales” and “sales at retail / retail sales”. (**App. p. 1983**) (Amazon Final App. Br. to COA at 23) (“Everyone agrees that items sold to South Carolina customers in the marketplace are ‘tangible personal property’ sold ‘at retail’ in South Carolina.”). Thus, it is undisputed that sales tax under subsection 12-36-910(A) is owed on all items sold on Amazon.com. *See* Opinion at 4, (Howard Advance Sheet No. 11 at 12, filed March 18, 2026) (“There is no question sales taxes were due on third-party merchants’ sales made on Amazon.com involving residents of this State.”).

Because Amazon concedes that the transactions occurring on Amazon.com are “sale[s]” and “purchase[s],” it necessarily also concedes that consideration is exchanged for all transactions occurring on the website; otherwise, the transactions on Amazon.com would not qualify as sales and purchases. *See* S.C. Code Ann. § 12-36-100 (requiring the transfer, exchange, or barter of tangible personal property “for a consideration” in order to qualify as a “sale” or “purchase”). Further, section 12-36-100 does not specify to whom the consideration is required to go; instead, it merely states that consideration must be exchanged to be a “sale” or “purchase.” Having conceded what is otherwise self-evident from the record, *i.e.* that sales and purchases occur on Amazon.com, Amazon’s parsing of the Act to avoid its application runs squarely into several major obstacles.

The Petition asserts that the Opinion erred in finding that Amazon “was ‘engaged in the business of selling’ without ever finding that [it] **made** a ‘sale’ as the statute defines that term.” Petition at 1 (emphasis added). Amazon previously advanced the identical concept and argument in its briefing to the Court, albeit using different terminology, arguing extensively that it did not “conduct a sale.” *See, e.g.,* Br. of Pet. at 28-29 (“Amazon Services did not conduct any ‘sale’ if it did not receive consideration ‘for’ transferring personal property. And if it was not conducting any ‘sale,’ it was not ‘engaged in the business of selling’ within the meaning of the statute.”). But the Opinion specifically acknowledges this argument, noting that “Amazon Services argues it did not **conduct a ‘sale’** because it did not receive consideration ‘for’ transferring tangible personal property and, therefore, was not ‘engaged . . . in the business of selling.’” Opinion at 7 (Howard Advance Sheet No. 11 at 15, filed March 18, 2026) (emphasis supplied).

The majority correctly rejected this definitional misdirection; the Opinion did not overlook or misapprehend this argument; it just resolved the argument against Amazon. As noted above, in defining “sale” or “purchase”, the General Assembly directed the evaluation only to **whether** a sale/purchase occurred, evaluated through the lens of **whether** tangible personal property was

transferred or exchanged for a consideration. Stated differently, sales tax is only assessed under subsection 12-36-910(A) when there is a sale or purchase at retail. Again, because Amazon concedes that the transactions occurring on Amazon.com are “sale[s]” and “purchase[s]” “at retail,” it likewise necessarily concedes that consideration is exchanged for those transactions and that sales tax is owed.

Determining *who* is obligated to pay—or collect—and remit the sales tax is a different question altogether. In imposing the sales tax under subsection 12-36-910(A), the General Assembly did not require that the person or entity “in the business of selling” receive all (or even any) of the consideration.² *See* Opinion at 7 (Howard Advance Sheet No. 11 at 15, filed March 18, 2026) (“[T]he plain language of subsection 12-36-910(A) does not require the taxpayer to receive consideration ‘for’ the sale subject to the statute.”). In other words, while there must be an exchange of tangible personal property for a consideration in order for there to be a sale/purchase, there is no statutory requirement that the consideration land directly in the wallet of the person “in the business of selling” or the seller/retailer; instead, under the Act, the critical inquiry focuses on whether the taxpayer—here, Amazon—effectuates the transfer of goods for a consideration, regardless of the amount of or how consideration is received by the person, *see* section 12-36-20 (“either direct or indirect”), and irrespective of whether it comes in the form of the full sales price, or a fee or commission.³ Thus, the concept of whether Amazon directly receives “a consideration” on the conceded sales occurring on Amazon.com does not control answering the question whether Amazon is in the business of selling tangible personal property at retail, and the Opinion is therefore faithful to the plain language of the

² Nor did the 2016 version of the Act require that the “retailer” or “seller,” as those terms were defined by the General Assembly, receive all—or any—of the consideration. *See* S.C. Code Ann. § 12-36-70 (defining “retailer” and “seller” as “includ[ing] every person: (1)(a) selling or auctioning tangible personal property whether owned by the person or others”).

³ But, as discussed extensively below, substantial evidence supports the ALC’s factual findings that Amazon does, in fact, receive consideration for every sale occurring on Amazon.com that is untethered to any service that it provides, and was not merely a “conduit” for transferring funds from buyers to the third-party merchants. *See, infra*, pp. 17 - 20.

Act. Moreover, as noted by the Opinion, because Amazon relies on phrases and concepts— *e.g.*, “made a sale,” “conducting a sale,” and that a person in the business of selling must “receive consideration ‘for’ the transfer of tangible personal property”—out of context or that do not appear in the Act at all, its proffered interpretation of the Act is not reasonable. *Id.*

Returning to subsection 12-36-910(A) of the Act, and taking the analysis a step further, sales tax is imposed on persons “engaged ... in the business of selling.” This operative portion of the subsection is appropriately broken down into three separate parts, all of which are informed by the definitions and provisions of the Act:

First, as noted in the Opinion, “engaged” is not defined in the Act, but is construed in accordance with its usual and customary meaning as being “involved” and “greatly interested.” Opinion at 4 (Howard Advance Sheet No. 11 at 12, filed March 18, 2026) The Opinion went on to note the high level of control exhibited by Amazon over every step involved in the sale of tangible personal property on Amazon.com. *Id.* at 5 (Howard Advance Sheet No. 11 at 13, filed March 18, 2026) (describing the “purposefully crafted business model” under the Business Solutions Agreement designed to “tightly control[] every third-party merchant transaction”). That control, *inter alia*, prevented communications between third-party merchants and customers, except through Amazon’s approved communication channels, and restricted third-party merchants’ ability to collect sales and use tax from customers at the time of purchase. *But see* S.C. Code Ann. § 12-36-940 (authorizing retailers to collect tax from purchasers by including it in the sales price but confirming that retailers are still responsible for the tax even if they are unable to collect it from the purchaser). In fact, the evidence shows⁴ that complete sales transactions on Amazon.com can and typically do occur without

⁴ *See* Department Final Resp. Br. at pp. 5-20 (describing in detail, with citation to the appendix and findings of fact by the ALC, the significant level of control exhibited by Amazon as to every step of the listing, sale, shipment, payment, tax collection, and returns, of tangible personal property on Amazon.com).

any personal contact or communication between a customer and the third-party merchant. (**App. pp. 339-40, 40**) (Tr. 192-93; Order at 34 (finding that “the evidence clearly establishes that sales can be made, and often are made, without any interaction between customers and Merchants”)). Thus, the majority’s characterization of Amazon’s role as “integral” is both warranted and supported by the evidence of record. Amazon’s integral involvement is particularly notable because there is no meaningful difference between sales on Amazon.com of products owned by third-party merchants versus products owned by Amazon (or Amazon’s affiliates).

Second, “business” is defined in the Act as “includ[ing] all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.” The Petition does not challenge, and Amazon has not argued in this case, that its activities related to the operation of Amazon.com are not for the object of gain or profit, either direct or indirect. Nor could it, as the unchallenged evidence and findings of fact demonstrate that Amazon ensures that it makes a profit on every sale occurring on Amazon.com. (**App. pp. 37-38**) (Order at 31-32) (“Amazon Services therefore profits from every product that is sold upon its website—its profits are simply set by a fee structure.”).

Third and finally, “selling” is not specifically defined in the Act, but is used in at least one other operative provision and is likewise construed in accordance with its usual and customary meaning. As noted by the Opinion, and as agreed to by Amazon in the Petition, “selling” is the present participle of the verb “sell.” Opinion at 4 (Howard Advance Sheet No. 11 at 12, filed March 18, 2026); Petition at 5. The term “selling” is also utilized in the definition of “retailer” and “seller” as “every person ... selling ... tangible personal property whether owned by the person or others.” S.C. Code Ann. § 12-36-70.⁵ However, the Opinion correctly notes that “selling” does not stand alone in

⁵ If nothing else, section 12-36-70 confirms the General Assembly’s intent that ownership of the tangible personal property is not relevant to the determination of whether a person is “selling” the tangible personal property and has an obligation to collect and remit sales tax.

subsection 12-36-910(A) but rather is a part of the phrase “in the business of selling.” Opinion at 6 (Howard Advance Sheet No. 11 at 14, filed March 18, 2026). Because “business” is defined as including “all activities, with the object of gain [or] profit, ... either direct or indirect,” the logical inference is that “in the business of selling” encompasses not only “selling” but all those profit-generating activities that are integral to a sale. Which, in turn, fully explains and supports the majority’s holding that “the word ‘seller’ does not appear in [12-36-910(A) and] ... [t]he question posed by subsection 12-36-910(A) is not whether Amazon Services was a ‘seller,’ but whether Amazon Services was ‘engaged . . . in the business of selling.’” *Id.*⁶

By contrast, the Petition, while accusing the majority of relying on portions of the Act in isolation, reveals itself as doing exactly what it criticizes. As discussed above, Amazon retreats to the definitions of “retailer/seller” and “sale,” rather than addressing head-on the operative provision of “engaged . . . in the business of selling.” But the definition of retailer/seller is unhelpful to its cause, as it merely confirms that a person does not need to own the tangible personal property to be its seller. S.C. Code Ann. § 12-36-70. And Amazon’s hyper-focus on the definition of a sale is misplaced, as it concedes that the transactions on Amazon.com are sales, rendering section 12-36-100 irrelevant to the question of who is obligated to collect and remit sales tax. Amazon’s reliance on the receipt of consideration as being determinative is likewise of no utility, as—again—the Act does not require the person obligated to collect and remit sales tax to receive all—or any—of the consideration for a sale. Finally, the Petition’s citation to section 12-36-1340, *see* Petition at 4, 5, is particularly unhelpful because, contrary to the Petition’s assertion that it relates to the duty to collect and remit *sales* tax,

⁶ Although the Court determined that finding Amazon was the seller/retailer of tangible personal property on Amazon.com was not necessary for Amazon to be subject to subsection 12-36-910(A), the Department’s position in this case has been, and remains, that the evidence supports a finding that Amazon is the seller/retailer of all goods sold on the website.

section 12-36-1340 speaks only to the obligation to collect *use* tax, not sales tax. S.C. Code Ann. § 12-36-1340 (falling under the heading of Title 12, Chapter 36, Article 13, Use Tax).⁷

In sum, the Opinion appropriately and accurately construes the plain language of the Act as encompassing the integral control exerted by Amazon for all sales occurring on Amazon.com, rendering it “engaged ... in the business of selling tangible personal property at retail.”

b. The Guidance Provided by the Opinion as to the Applicability of the Act to Persons or Entities Providing Services Incidental to the Sale of Tangible Personal Property Has No Direct Application to Amazon.

Notwithstanding the straightforward application of the plain language of the Act to Amazon’s business activities, a crucial part of Amazon’s defense in this case centered on its attempt to misdirect focus away from it to third parties not before the Court by listing a parade of horrors as to claimed *potential* applications of the Act. Those efforts and arguments are easily distinguishable, as the discussion in the preceding section demonstrates, when the plain language of the Act is applied to the level of control and involvement by Amazon here as juxtaposed against the third-parties that Amazon identifies. Amazon has repeatedly wielded this rhetorical tool of “whataboutism.”⁸ Of course,

⁷ Of note, although this case centered on Amazon’s sales tax obligations, the use tax, which is owed in the alternative to sales tax on all sales of tangible personal property, is also implicated. In fact, in its Order, the ALC found that Amazon was alternatively required to collect use tax at the time of each sale on the website based on Amazon’s control of the point in time in which sales occur. (**App. p. 53**) (Order at 47) (citing S.C. Code Ann. § 12-36-1350(A)). And Amazon would be deemed to have constructive knowledge of the use tax requirement, as it was expressly disclosed as to internet sales in the 2015 Sales and Use Tax Manual. (**App. p. 1611**); *see* Rule 220(c), SCACR.

⁸ *United States v. Jones*, 2021 WL 5984901, at *4 (9th Cir. Dec. 16, 2021) (describing the rhetorical device of whataboutism as, “[i]n response to an accusation, the purveyor of ‘whataboutism’ deflects by arguing that someone else (such as the accuser) has also done something wrong. Whether the accusation holds up is irrelevant, relentless whataboutism is a way to justify and distract, not to make a genuine case” (citing Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 Ohio St. L.J. 815, 827 (2020) (cleaned up); Robert Spohrer & Roger Dodd, *Spotting 10 Logical Fallacies*, 57 Trial 46, 48 (Feb. 2021) (characterizing “whataboutism” as a “fallacy [that] ignores the question and switches the subject to something else”)); *see also In re Cote d’Azur Est. Corp.*, No. 2017-0290-JTL, 2022 WL 17574747, at *9 (Del. Ch. Dec. 12, 2022) (discussing the “phenomenon [of] ‘whataboutism,’ in which a party responds to a charge leveled by the other side with ‘but what about this,’ then points to

whataboutism is no defense at all. Rather, it is typically employed as an excuse, or by Amazon here, as alarmism: pay no attention to the straightforward application of the 2016 version of the Act to Amazon’s business model, because such a finding could open the hypothetical door to its application to other persons who are merely incidental to the sale of tangible personal property.

In point of fact, it is undisputed that there are no payment processors, credit card companies, banks, delivery companies, or advertisers who were parties to the contested case before the ALC or who are parties to this appeal. Nor did the ALC make any findings of fact as to the specific services that those companies provide in the context of online marketplaces. Nor could it have, given the discrete question and issues related to the application of the 2016 version of the Act to Amazon that were before it. In sum, nothing about those separate service providers is an issue in this case. But, even if broad-sweeping characterizations of those individually unique service areas were possible—which is unlikely given the disparate functions those services provide and the varying methods those service providers employ to differentiate themselves from their competition—there is no evidence in this record that gives purchase to Amazon’s arguments. More importantly, **the Department has never taken the position that an entity that only processes payments for sales of tangible personal property, or similarly, credit card companies, banks, delivery companies, or advertisers, are *in the business of selling* tangible personal property for the purpose of having the obligation to collect and remit sales or use tax under the 2016 version of the Act.**⁹

something the other side has done. [The] tactic[] work[s] by distraction [but is not] a valid response to the original charge.”).

⁹ In fact, here we know precisely who the payment processor is for all sales occurring on the website, an affiliate Amazon company Amazon Payments, Inc., as well as the primary storer/packer/shipper of tangible personal property sold on the website, another affiliate Amazon company Amazon Fulfillment Services, LLC. (**App. p. 8**) (Order at 2). Thus, the Court need look no further than this case for demonstration that the Department does not view those incidental service providers as being “in the business of selling.” Excluding those services from its determination as to the proper taxpayer for these sales, the Department has always maintained that the Petitioner—not Amazon Payments or Amazon Fulfillment—is the entity “in the business of selling” on Amazon.com.

Understandably, as the Court of last resort in this state, the majority sought to provide clarification as to the reach of the sales tax imposition under section 12-36-910 of the Act. The Opinion’s analysis is sound and is grounded in the plain language of the Act: “[t]hus the ‘stopping point’ is found in the plain language of subsection 12-36-910(A) and is illustrated in its application to a potential taxpayer’s business model.” Opinion at 6, (Howard Advance Sheet No. 11 at 14, filed March 18, 2026). The language utilized in the Opinion to describe the nature of an entity’s role within the construct of a sale of tangible personal property, *i.e.*, integral versus incidental, is merely illustrative of the analysis to be employed in future cases based on “a potential taxpayer’s business model” to “the plain language of subsection 12-36-910(A).” *Id.*

Notwithstanding, the Petition spills much ink on the topic of the guidance provided by the Court as to the “stopping point” of the reach of the Act. Yet, none of that clarification and guidance as to the outer limits of subsection 12-36-910(A)’s reach was necessary to decide the question of whether Amazon is in the business of selling tangible personal property at retail. Therefore, Amazon’s reliance on that discussion in the Opinion as a demonstration of the “reasonableness” of its position that the Act should not apply to it, is the very definition of circular. The Court correctly ruled that Amazon’s role was integral to every sale occurring on the website and therefore fell squarely under the ambit of the Act. That finding is supported by the plain language of the Act. The Court’s guidance as to the outer limits of the reach of the Act is likewise supported by the plain language of the Act and will be determined on a case-by-case basis in the future based on the application of the Court’s guidance to the specific activities, role, and control of the taxpayers in those cases.

c. Amazon’s Assertion That It Is Required Only to Advance a Reasonable Interpretation Under *Alltel* in Order to Prevail Is Inconsistent with the Standard of Review.

Although Amazon’s position in this case is not reasonable based on the Opinion’s application of the plain language of the Act, underlying Amazon’s assertion that the Act should be read to exclude

it from having the obligation to collect and remit sales tax is a fundamental misreading of South Carolina law and precedent. That misreading by Amazon seeks to flip—and thereby lower—the burden of proof in Amazon’s favor, something it has tried to do since this matter began. Throughout this litigation, continuing in the Petition, Amazon has averred that, in order to prevail, it need only conjure a “reasonable” argument as to why its activities fall outside the scope of the Act. Petition at 3-4 (citing the dissent for the proposition that, if it advances a reasonable interpretation of the Act, “*Alltel* ‘requires’ the Court ‘to rule in favor of Amazon.’”). This assertion is not consistent with the standard governing tax disputes and Amazon’s burden of proof in this case. Because the Determination found that Amazon’s business model subjected it to the 2016 version of the Act, and required it to remit sales tax for retail sales occurring on Amazon.com, South Carolina law and precedent dictated that *Amazon* had the absolute burden of proof in the underlying contested case. That burden required *Amazon* to prove by a preponderance of the evidence that the Department’s position was incorrect,¹⁰ or that the 2016 Act was ambiguous, rendering it reasonably susceptible to an interpretation that would exclude its conduct. *See, e.g., DIRECTV, Inc. & Subsidiaries v. S.C. Dep’t of Revenue*, 421 S.C. 59, 804 S.E.2d 633 (Ct. App. 2017) (confirming that the party opposing or challenging the Department’s determination bears the burden of proof).

In fact, the issue of which party bore the burden of proof was explicitly litigated in the contested case before the ALC. Below, Amazon attempted to flip its burden to the Department, similar to what it presents in the Petition, in favor of a requirement that the Department bear the

¹⁰ Sales tax is imposed on the gross proceeds of sales, *see* S.C. Code Ann. § 12-36-910(A), and the General Assembly has specifically announced the burden of proof in disputes arising from the imposition of sales tax on gross proceeds of sales is on the identified seller. *See* S.C. Code Ann. § 12-36-950 (“It is presumed that all gross proceeds are subject to the tax until the contrary is established. The burden of proof that the sale of tangible personal property is not a sale at retail is on the seller.”).

burden of proving that Amazon's argument was both incorrect and unreasonable. The ALC correctly rejected Amazon's attempt to shift the burden of proof, stating succinctly in the Order:

Because Amazon Services is challenging a Department Determination, Amazon Services has the burden of proof to show by a preponderance of the evidence that the Department's Determination was incorrect. *Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that generally, the complaining party bears the burden of proof).

(App. p. 21) (Order at 15).¹¹

Similarly, to prevail in this appeal, Amazon bore the burden of demonstrating that the ALC's factual conclusions are unsupported by substantial evidence, or that the ALC's legal conclusions are affected by an error of law or in violation of the Constitution or statutory provisions, subject to this Court's *de novo* review of the questions of statutory interpretation. S.C. Code Ann. § 1-23-610(B); *Leventis v. S.C. Dep't of Health & Env't Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that as a general rule the complaining party bears the burden of proof); *Conran v. Joe Jenkins Realty, Inc.*, 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974) ("The burden of proof is on the appellant to convince this Court that the lower court was in error."). Thus, Amazon had the burden of proving by a preponderance of the evidence that the Department was incorrect in its assessment of Amazon's activities under the Act by demonstrating that: (1) substantial evidence does not support the ALC's findings of fact that its business model falls under the plain language of the Act; and (2) a) the Act is ambiguous on its face or in its application to Amazon's business model; or b) the Act is reasonably susceptible to an interpretation that excludes Amazon's business model from application.

¹¹ Moreover, Amazon's trial counsel acknowledged the ALC's ruling and its burden during the trial. **(App. p. 789)** (Tr. 636) ("We understand the Court's ruling on the burden of proof. And while we disagree respectfully with that ruling for the purposes of this proceeding, this trial, we have embraced that burden. The Court ruled that we bear the burden to show by a preponderance of the evidence that we do not owe the taxes and penalties demanded by the Department.").

As set forth above, Amazon neither met its burden below nor satisfied it in this appeal. This Court correctly found that, relying on the plain language of the Act, the provisions of the Act sought to be applied by the Department are not ambiguous and that Amazon’s business model falls squarely under the activities subject to regulation under the Act, rendering Amazon’s attempted parsing of the Act in the context of its comprehensive retail sale platform on Amazon.com unreasonable.

d. Amazon’s Reliance on the Dissent Does Not Satisfy its Burden.

In varying places of the Petition, Amazon relies on the dissent for the proposition that it has satisfied its sole burden of demonstrating the reasonableness of its argument that it should be excluded from application of the Act. Petition at 3-4, 11; *see also* Opinion at 10-11, (Kittredge, C.J., dissenting) (Howard Advance Sheet No. 11 at 18-19, filed March 18, 2026). The Department respectfully disagrees.

The Department notes that the dissent recognizes that its interpretation of the Act is “reasonable.” Opinion at 10, n.2 (Kittredge, C.J., dissenting) (Howard Advance Sheet No. 11 at 18, filed March 18, 2026). The dissent goes on to state that it likewise finds Amazon’s position to be reasonable. *Id.* Based on its finding that “both parties’ arguments [are] reasonable interpretations of the statute,” *id.* at 10, the dissent indicates that the precedent of *Alltel* requires the Court to rule in favor of Amazon. However, the Department respectfully submits that, under the standard of review established by S.C. Code Ann. § 1-23-610(B), and the precedent requiring a challenging taxpayer to prove by a preponderance of the evidence that the Department’s position is incorrect, absent a finding of an ambiguity, Amazon’s advancement of a “reasonable” argument is insufficient to prevail in this case. *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 (equating the existence of “substantial doubt” to the existing of an ambiguity and holding that, “[t]he existence of an ambiguity in section 12–20–100 raises substantial doubt regarding the section’s application to Petitioners. This doubt must be resolved in favor of Petitioners.”).

In support of its finding that Amazon’s position is reasonable in this case, the dissent further posits that “there is some doubt as to whether Amazon received consideration for any particular third-party sale....” Opinion at 10, n.2 (Kittredge, C.J., dissenting) (Howard Advance Sheet No. 11 at 18, filed March 18, 2026). However, in the Order, the ALC specifically found that “Amazon Services thus directly receives consideration for a customer’s purchase, a portion of which is retained by Amazon Services as various fees.” **(App. p. 38)** (Order at 32). The ALC further found that:

[I]nstead of simply providing a service and charging Merchants a fee based on the operating cost of listing products on a website and processing payments, Amazon Services indirectly retains a share of the profits from each sale through the Referral Fee. Amazon Services therefore profits from every product that is sold upon its website—its profits are simply set by a fee structure. Indeed, since its service is the selling of the product, then calling its “profit, benefit, or advantage” a fee is simply a matter of semantics. Additionally, like Amazon Services’ other fees, the Referral Fee is not reimbursed to Amazon Services after the Merchant receives her funds; rather, it is withheld by Amazon Services before the Merchant’s funds are disbursed.

Id. Even assuming for this purpose that Amazon’s general appeal of the Order qualifies as an appeal of these specific findings of fact, which is questionable, pursuant to the statutorily-mandated standard of review of administrative appeals under subsection 1-23-610(B), the Court “may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact,” *see Carmax Auto Superstores West Coast, Incorporate v. S.C. Department of Revenue*, 411 S.C. 79, 85, 767 S.E.2d 195, 198 (2014), and judicial review of the ALC’s findings of fact is limited to determining if the findings are supported by “substantial evidence,” *see MRI at Belfair, LLC v. S.C. Dep’t of Health & Env’t Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008). Amazon made no attempt to meet that standard in its briefing, and the dissent contains no discussion upon which Amazon may rely to warrant the setting aside of the ALC’s findings as to Amazon’s receipt of consideration—and direct, transaction-based profit from the consideration—as unsupported by the evidence of record.

Moreover, although the majority correctly notes that the plain language of “subsection 12-36-910(A) does not require the taxpayer to receive consideration ‘for’ the sale,” Opinion at 7 (Howard

Advance Sheet No. 11 at 15, filed March 18, 2026), the evidence of record supports the ALC’s findings and unequivocally demonstrates that Amazon does, in fact, receive a portion of the consideration from every sale occurring on Amazon.com. Sales tax under section 12-36-910 is imposed against the “gross proceeds of sales,” which term is specifically defined in the Act in section 12-36-90 as “the value proceeding or accruing from the sale, lease, or rental of tangible personal property.”¹² Section 12-36-90 goes on to state that the term gross proceeds of sales “includes (a) the proceeds from the sale of property sold on consignment [and] (b) the proceeds from the sale of tangible personal property without any deduction for: (i) the cost of goods sold; (ii) the cost of materials, labor, or *service*; [and] (vii) any other expenses.” (Emphasis supplied). Further, the Act defines “sales price” in section 12-36-130 as being nearly identical to “gross proceeds of sales”: “the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of materials used, labor or service cost ... or any other expenses” including specifically “(1)(a) any services or transportation costs that are a part of the sale....” So, in sum, and stated differently, the sales price paid by the customer *is* the gross proceeds of the sale and, in turn, both the sales price and the gross proceeds of sale *are the consideration* that customers pay in exchange for the transfer of the tangible personal property being sold. (**App. p. 1983**) (Amazon Final App. Br. To COA at 23) (“Everyone agrees that the prices third-party sellers charge for their products are the ‘gross proceeds’ of the sales at issue here.”).

In terms of the compensation that Amazon receives for transactions occurring on Amazon.com, that compensation comes in the form of referral fees, applicable variable closing fees,

¹² This case is not a “gross proceeds of sale” case in the sense that Amazon is not challenging whether the sales tax should be applied against the total sales price paid by customers on Amazon.com, including Amazon’s fees, which are calculated in part as a percentage of the sales proceeds and deducted off the top of the consideration received from the customers (i.e., the sales proceeds) before the remaining balance of the consideration is transferred to third-party merchants.

the non-refundable monthly Selling on Amazon subscription fee, and other fees deducted from the gross proceeds of sales. (**App. pp. 365-67, 882, 915-21**) (Tr. 218-20; Ex. 3 at 19; Ex. 16). Most notable for this discussion is the “referral fee,” which is a variable fee retained by Amazon from, and individually calculated as a percentage of, the gross proceeds/sales price of each particular sale occurring on the website. The variable fee is calculated according to a categorization set unilaterally by Amazon through its Business Solutions Agreement based on the type of product sold, which includes Amazon’s evaluation of the product’s typical profit margin. (**App. pp. 15, 38**) (Order at 9) (“Referral Fees are charged by product category and are based, in part, on the expected gross margin of the product.”), at 32 (“[T]he Referral Fee is separate from the flat, monthly subscription fee, and it is based upon a percentage of the sale price of each product depending upon the category of product sold and the typical profit margin for that product.”); *see also* (**App. p. 120**) (citing Amazon’s R. 30(b)(6) Dep. at 151-54 (“Different products have different margins. Typically, fashion products have high gross margins, electronics have low gross margins.”)).

Thus, rather than a service or convenience fee associated with, for example, operating Amazon.com, or the opportunity cost of displaying, selling, and processing of payment for a product, the referral fee is tied directly to the sales price and taken by Amazon as a percentage of and directly from the gross proceeds of the sale—*i.e.*, the consideration exchanged by the customer in exchange for the transfer of tangible personal property.¹³ The referral fee percentages assigned by Amazon vary

¹³ Thus, contrary to the dissent’s conclusion that fees charged by Amazon “were not consideration for particular sales but, rather, fees that encompassed Amazon’s provision of various services to the third-party sellers, including advertising,” Opinion at 10, n.2 (Kittredge, C.J., dissenting) (Howard Advance Sheet No. 11 at 18, filed March 18, 2026), the record demonstrates that, based on Amazon’s Business Solutions Agreement, the referral fee is specifically calculated as a variable percentage of the sales price of each individual sale that occurs on the website, untethered to any service provided to third party merchants by Amazon (all of which are covered by other fees), and which is retained by Amazon from the gross proceeds of the sale prior to the remittance of the remaining sales proceeds to the merchants.

by product category, ranging from six percent (6%) on the low end, to forty-five percent (45%) on the high end (**App. pp. 365-67, 882, 915-21**) (Tr. 218-20; Ex. 3 at 19; Ex. 16), with a median of fifteen percent (15%) (**App. p. 2110**) (COA Op. at 6). Thus, Amazon retains 15% of the gross proceeds of every sale on the website, on average, and as much as 45% on certain categories of products. Amazon is therefore compensated directly from the consideration received from the customer for purchases of tangible personal property through variable transaction-based fees calculated on the sales price of the product and not through flat service fees. By structuring its profit as a per-sale / per-transaction percentage of the sales price, Amazon ensures that it makes a profit on—and receives consideration for—every sale occurring on Amazon.com. (**App. p. 38**) (Order at 32) (“Amazon Services therefore profits from every product that is sold upon its website—its profits are simply set by a fee structure.”).

In sum, the Department respectfully submits that the Petition’s citations to the dissent do not support rehearing of this matter.

e. The Opinion Does Not Undermine the Rule of Strict Construction Applicable to Tax Statutes.

Contrary to the Petition’s frequent hyperbole, the Opinion does not “weaken,” “undermine,” or “eviscerate” the rule of strict construction in favor of taxpayers espoused by the Court in *Alltel*, 399 S.C. at 318, 731 S.E.2d at 872 (“[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.”) (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm’n*, 182 S.C. 72, 76, 188 S.E. 508, 509–510 (1936)). While Amazon is quick to jump to the above-citation of the Court in *Alltel*, it ignores the required analysis and instead just touts the ultimate holding that was rendered based on an entirely different statute. By contrast, the Opinion is faithful to the analysis required by *Alltel*, albeit reaching a result with which Amazon disagrees.

The Court in *Alltel* confirmed, rather than refuted, that “[t]he usual rules of statutory construction apply to the interpretation of tax statutes.” 399 S.C. at 319–20, 731 S.E.2d at 872 (citation omitted). Thus, “[w]here the statute’s language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.* at 320–21, 731 S.E.2d at 873; *see also Crescent Mfg. Co. v. Tax Comm’n*, 129 S.C. 480, 124 S.E. 761, 765 (1924) (“If the intent of the Legislature is apparent from an examination and consideration of the statute as a whole, the rule of strict construction in favor of the taxpayer has no application.”). Here, as discussed above, the majority confirmed, consistent with its prior holdings,¹⁴ that the relevant provisions of the Act are unambiguous as a matter of law. Opinion at 6 (Howard Advance Sheet No. 11 at 14, filed March 18, 2026) (“Because subsection 12-36-910(A) is unambiguous, we simply apply the text as written, and we do not need the rules of statutory construction.”) (citing *Centex Int’l, Inc. v. S.C. Dep’t of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013)).

Further, having found the language of the Act to be unambiguous, the majority applied the plain language of the Act as written and determined that Amazon’s reliance on isolated words or phrases within the statute out of context, and in particular that did not appear in the tax imposition subsection of 12-36-910(A), rendered “its interpretation[] not “reasonable” under *Alltel*.” Opinion at 7 (Howard Advance Sheet No. 11 at 15, filed March 18, 2026). Simply put, *Alltel* does not compel a

¹⁴ *See, e.g., Books-A-Million, Inc. v. S.C. Dep’t of Revenue*, 430 S.C. 388, 399, 844 S.E.2d 399, 405 (Ct. App. 2020) (“[W]e find the language of the statutes is not ambiguous, and the ALC’s reading of the statutes was correct and consistent with the intent of the legislature.”), *aff’d*, 437 S.C. 640, 880 S.E.2d 476 (2022); *Rent-A-Ctr. E., Inc. v. S.C. Dep’t of Revenue*, 425 S.C. 582, 589, 824 S.E.2d 217, 221 (Ct. App. 2019) (finding section 12-36-910 “is unambiguous [and] the ALC was in no position to apply rules of statutory interpretation”), *cert. dismissed as improvidently granted*, 429 S.C. 464, 839 S.E.2d 882 (2020).

particular result, it compels a specific rubric for the Court’s analysis.¹⁵ The majority precisely applied the analysis required by *Alltel*; therefore, regardless of whether it reaches the same taxpayer-favorable result, the Opinion is faithful to *Alltel* and does not “weaken,” “undermine,” or “eviscerate” that decision.

Moreover, the application of *Alltel* in any given taxpayer challenge is a fact-intensive inquiry that depends on the Court’s analysis of the provisions of the statute in question, as applied to the taxpayer in question, and the facts and circumstances giving rise to the particular challenge. Necessarily, the Court conducts such analysis on a case-by-case basis. Here, despite Amazon’s best efforts at construing the Opinion as doing damage to the principle espoused by *Alltel*, it does no such thing.

II. 2019 Act 21 is not Rendered a Nullity by the Opinion.

The Petition’s contention that the Opinion renders Act 21 a nullity and that its subsequent adoption by the General Assembly (and the adoption of similar marketplace legislation by every other state) should materially factor into this Court’s analysis of whether the 2016 version of the Act applies to Amazon’s business model, is both overstated and inconsistent with the Court’s ambiguity precedent.

Amazon argues that if the statutory amendments to Act 21 are not required to bring *it* under the ambit of the Act then Act 21 must be an exercise in futility. This demonstrates a remarkable level of hubris, as it necessarily presumes there are no other marketplace facilitators selling tangible personal property on the internet who are doing business in South Carolina and therefore the General Assembly enacted Act 21 solely to reach Amazon. There is no evidence in this record to support such a

¹⁵ To hold otherwise, as Amazon suggests, would mean that every taxpayer challenge would result in a decision against the Department, as no taxpayer *believes* that the Department’s position is correct and presumably could conjure an interpretation that it *believes* is “reasonable.”

contention.¹⁶ And while the lack of evidence in the record is dispositive for this purpose, given that Amazon bore the burden of proof in this case, the Court could take judicial notice¹⁷ of the fact that there are many online marketplaces doing business in South Carolina. Each marketplace facilitator has a different business model and online sales platform, exercises varying levels of control, and utilizes different methods for online listings, storage, payment processing, shipping, and returns. In order to both (1) update the language of the Act to reflect the existence of internet marketplaces, and (2) to ensure that all variations of marketplace facilitators and traditional brick and mortar stores are identified as having the same obligation to collect and remit sales tax, Act 21 applies to more than just Amazon and is not a nullity.

Moreover, in arguing that the clarifications enacted under Act 21 effected material changes to the Act that brought Amazon and other marketplace facilitators under the ambit of the statute for the first time, Amazon is merely restating its litigation position that the Court should accept the enactment of Act 21 as evidence of the ambiguous nature of the 2016 version of the Act. But this tactic stands the Court's ambiguity analysis on its head. Extraneous evidence can only be looked to *after* an ambiguity in the plain language of the statute is found. It cannot be used to manufacture an ambiguity in the first instance. *See Hodges*, 341 S.C. at 87, 533 S.E.2d at 582 (“If the legislature’s intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute.”) (citing *Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956)); *id.* (“When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature’s language, and there is no need to resort to statutory interpretation or legislative intent to

¹⁶ In fact, this argument is the exact opposite of the equal protection claim that Amazon advanced in this litigation. *See, e.g.*, (**App. p. 2009**) (Amazon Final App. Br. To COA at 48) (citing eBay as a similarly-situation taxpayer); (**App. p. 2166**) (Amazon Pet. for Rehearing to COA at 34) (same); Amazon Pet. for Cert. at 25 (filed April 27, 2024) (same).

¹⁷ *See, e.g.*, *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011).

determine its meaning.”) (citing *Timmons v. South Carolina Tricentennial Comm’n*, 254 S.C. 378, 175 S.E.2d 805 (1970)).

The Opinion correctly recognizes Amazon’s efforts for what they are: avoiding application of the Act’s plain language. *See* Opinion at 6 (Howard Advance Sheet No. 11 at 14, filed March 18, 2026) (“Because subsection 12-36-910(A) is unambiguous, we simply apply the text as written, and we do not need the rules of statutory construction.”) (citing *Centex*, 406 S.C. at 139, 750 S.E.2d at 69 (“When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.”) (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007))). The only thing that matters in this case is the application of the 2016 version of the Act to Amazon and its business model. Thus, while Amazon asserts that its reliance on Act 21 demonstrates the reasonableness of its position, and criticizes the majority for “not address[ing] these important facts when explaining its interpretation of the statute,” Petition at 10; in fact, the opposite is true: Amazon’s reliance on amendments to the Act that occurred more than three years after the Department’s audit and Determination, and which are not relied upon by the Department to assess Amazon’s liability in this case, demonstrate that Amazon’s position is not reasonable.

III. The Opinion Appropriately Analyzes and Rejects Amazon’s Due Process Claim.

The Opinion was correct to find that “the Department could not have applied Act 21 retroactively because [] Act [21] did not exist when the determination was issued.” Opinion at 8 (Howard Advance Sheet No. 11 at 16, filed March 18, 2026). Likewise, for a number of reasons, Amazon knew or should have known that its business model would be subject to collection and remittance obligations imposed under the 2016 version of the Act. The question here is whether section 12-36-910 as it existed in the first quarter of 2016 required Amazon to remit sales tax on all sales occurring on its website during that time. Either it did or it did not—the Opinion decided that

it did—but there is no retroactive application of anything to Amazon to support a due process argument, one that every court to have reviewed it has rejected out of hand.

a. The Department Could Not Have, and Did Not, Apply Act 21 Retroactively Against Amazon.

It is undisputed that the Department has never sought to apply the marketplace facilitator language of Act 21 to Amazon in this case. Nor could it, as the Opinion correctly notes. The audit underlying the Determination began in the second quarter of 2016, years before the 2019 amendments took shape, were debated in the subcommittee hearings of the General Assembly, or were ultimately passed. At no time did the Department advocate for retroactive application of Act 21 to the tax period in question. The ALC found this fact expressly in the Order, a finding which Amazon did not challenge in this appeal. **(R. p. 49)** (Order at 49) (“Nowhere has the Department cited to the pending legislation in an attempt to apply it to Amazon Services in this case.”).¹⁸

The Petition now attempts to backtrack on its argument, accusing the majority of “miss[ing] the point” of Amazon’s due process claim, and going so far as to misrepresent to the Court that “Amazon Services has never argued that the Department formally invoked Act 21 to apply retroactively.” Petition at 13. Of course, a simple review of the record reveals that to be untrue, as that is precisely what Amazon has argued throughout this case, including to this Court. *See* **(App. p. 606)** (Tr. 453:20-25) (“So it’s a recognition that current law doesn’t actually support the Department’s case and that they’re intending to subject Amazon Services retroactively to a tax that would only be imposed by the proposed legislation.”); **(App. p. 2008)** (Amazon Final App. Br. To COA at 48) (“*Fox Television* shows why the Department’s attempt to give retroactive effect to the 2019 amendments must be rejected.”); **(App. p. 2010)** (Amazon Final App. Br. To COA at 50) (“It is clear that the

¹⁸ Amazon did not appeal from this express finding by the ALC, rendering it the law of the case. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. at 329, 730 S.E.2d at 285 (“[A]n unappealed ruling, right or wrong, is the law of the case.”).

Department, through this litigation, is attempting to apply the 2019 changes retroactively to only one taxpayer.”); (**App. p. 2166**) (Amazon Pet. for Rehearing to COA at 34) (“It is clear that the Department, through this litigation, is attempting to apply the 2019 changes retroactively to only one taxpayer.”); Amazon Pet. for Cert. at 24 (filed April 27, 2024) (“Retroactively Applying the 2019 Amendment to Amazon Services, and Amazon Services Alone, Violates the Guarantee of Equal Protection.”); Amazon Br. of Pet. at 44 (filed Nov. 12, 2024) (“The Department’s attempt to impose the sales tax collection obligation on Amazon Services for third-party sales prior to 2019 effectively subjects Amazon Services to the 2019 amendment retroactively, and violates the constitutional requirement of fair notice.”; and “[*F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012)] shows why the Department’s attempt to give retroactive effect to the 2019 amendments must be rejected.”); Amazon Reply Br. of Pet. at 24 (filed Jan. 7, 2025) (“[T]he Department asserts that ‘there is no effort to retroactively apply Act 21 to sales made in 2016.’ Resp. Br. 50. But the record shows that this is precisely what is happening.”).

Beyond that brazen about-face, Amazon continues to characterize the Department’s assessment as retroactive and therefore invalid. Petition at 2 (“imposes a multi-million dollar retroactive assessment”); at 11 (asserting that the Opinion enables the Department to “retroactively impose” interpretations and assessments on taxpayers); at 12 (citing a *Bloomberg Tax* article for the proposition that it will “empower other courts to reinterpret older tax laws to fit modern business models”).¹⁹ As discussed above, there is nothing retroactive about the application to Amazon of

¹⁹ Never mind that this is precisely what the law requires. *See, e.g., Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018) (“While every statute’s *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.”) (emphasis in original); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 86 (2012) (“The meaning of rules is constant . . . [o]nly their application to new situations presents a novelty.”). As Justice Scalia explained, “[d]rafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances that they could not possibly envision.” SCALIA & GARNER at 86. The fact that Amazon created a new business model does not give them a pass on paying sales taxes.

section 12-36-910 as it existed in 2016. Nor does *Fox Television* support Amazon’s contention. 567 U.S. at 253 (“[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.”). Here, there is no doubt about the regulatory standard to which Amazon is being held—it is simply the plain language of the Act as it existed in the first quarter of 2016. The Department’s tax assessment against Amazon did not represent a reversal in policy, or a change in the regulatory framework governing online retailers, but rather application of the plain statutory language to Amazon’s business model. Thus, *Fox Television* is distinguishable, as are the decisions of courts in other states applying their own unique tax laws.

Nor does the Director’s accurate statement that the “lawsuit’s going to pull up some retroactivity ... specific to that one company,” (**App. p. 1287**) Ex. 194 at 7:00-08, alter the analysis.²⁰ That statement is hardly the “smoking gun” or “mic drop” that Amazon has portrayed. Instead, it merely recognizes the reality that, because the period in question for the Determination was the first quarter of 2016, “*the lawsuit*” necessarily involves liability for sales tax occurring in the past (as of the time of the testimony). Moreover, the fact that an audit and an assessment would only involve the taxpayer in question, as opposed to any non-party(ies), is self-evident, not a revelation. Therefore, it

²⁰ The other Department statements and characterizations cherry-picked by Amazon are likewise easily explainable with the full and proper context:

- (1) “there is no law related to taxation of third-party sales” is an inaccurate statement of law (*see* S.C. Code Ann. § 12-36-70, making clear that a person can be deemed a retailer if they sell the products of others), made in the context of the proposed Act 21 legislation, and is a reference to the lack of clarity regarding third-party sellers who lacked a physical nexus to the state, following the *Wayfair* decision;
- (2) “close[] the gap” was made in subcommittee testimony regarding Act 21 and more accurately is a reference to difference between those online marketplaces that had a physical presence in the state (like Amazon) and those that did not; and
- (3) “nobody has to guess” was likewise made in same subcommittee testimony regarding Act 21 and came on the heels of a lengthy explanation by the Director regarding the correlation between online marketplaces and the Department’s longstanding policy regarding consignor/consignee relationships, with the intent of Act 21 being to update the existing law to make it more detailed, specific, and “to reflect the modern jargon and times.”

is not controversial that this case only relates to “that one company,” *i.e.*, Amazon, as the Director accurately testified. (**App. p. 1287**) Ex. 194 at 7:10-18.²¹

In sum, there is no evidence that the Department sought to retroactively apply Act 21 to Amazon in this case.

b. The Evidence of Record Demonstrates That Amazon Should Have Been on Notice of its Obligation at the Expiration of the Moratorium.

As discussed above, because Amazon was “in the business of selling tangible person property at retail,” § 12-36-910(A), having effected an “exchange . . . of tangible personal property for a consideration,” § 12-36-100, on a website that it owns and controls completely for “the object of gain, profit, benefit, or advantage, either direct or indirect,” § 12-36-20, for property “whether owned by the person or others,” § 12-36-70, Amazon has placed itself squarely within the requirement to collect

²¹ Amazon improperly attempts to resurrect its equal protection claim for which certiorari was denied when it argues that “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.” Petition at 15 (also accusing the Department of discriminatorily “target[ing]” or “singl[ing]” Amazon); *see* Order dated October 3, 2024 (denying Question III related to equal protection). These claims are wholly unsupported by the record, and the court of appeals and ALC specifically ruled that Amazon failed to offer any evidence of discriminatory enforcement. (**App p. 2124**) (COA Op. at 20) (“Amazon Services failed to present any evidence specifically identifying other online marketplaces and showing such marketplaces were similarly situated persons. Further, Amazon Services failed to present any evidence that any such similarly situated persons received disparate treatment.”); (**App. p. 57**) (Order at 51) (“Amazon Services has failed to submit any evidence specifically identifying other online marketplaces *and* showing that these other online marketplaces are similarly situated.”) (emphasis in original); (**App. p. 58**) (Order at 52) (“[I]here is no evidence that the Department purposefully singled-out Amazon Services to intentionally discriminate against them with the imposition of the tax.”).

It was Amazon’s burden to demonstrate that the Department was treating similarly situated taxpayers differently, and it failed to adduce any evidence supporting its claim. Further, Amazon’s argument ignores the fact that Amazon (a) intentionally set out to build a one-of-a-kind business where consumers “can come to find and discover[] anything they may want to buy online,” and (b) built a distribution facility in South Carolina that (after the special exemption legislation expired) subjected Amazon to this State’s sales tax laws (unlike potential otherwise similarly situated online marketplaces). (**App. p. 312**) (Tr. P. 165:15-17); (**App. p. 677**) (Tr. p. 524:3-7). Every court in this litigation has seen through these red herring arguments to recognize this reality: the novelty of Amazon’s marketplace business model neither renders the Act inapplicable to Amazon.com nor establishes disparate treatment by the Department.

and remit sales and use tax to South Carolina, and this statutory framework was in place and known to Amazon well before the first quarter of 2016.

Beyond that straightforward application of the law, Amazon, of course, seeks to diminish the impact of the U.S. Supreme Court's controlling precedent on these topics and its obligations. Petition at 14. Prior to the Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), if a company had a physical presence in South Carolina, the Act applied to it; if it did not have a physical presence in the State, it did not. *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (requiring, pursuant to the dormant commerce clause, a physical presence for a business to have a substantial nexus with a taxing state such that it would be subject to that state's sales and use tax). In 2011, pre-*Wayfair*, Amazon sought to locate a warehouse/distribution facility in Lexington County, South Carolina for the first time. Doing so would have subjected Amazon to the Act's sales tax collection and remittance obligations for the first time under the substantial nexus regime applicable at the time. Fully aware of this fact, Amazon lobbied the General Assembly to pass a reprieve as a part of the State's incentive package for locating a facility in South Carolina.

Amazon succeeded. In 2011, the General Assembly passed the Distribution Facility Sales Tax Exemption (the "Moratorium") to encourage investment by Amazon in the State. *See* S.C. Code Ann. § 12-36-2691 (2014). The Moratorium was in place from 2011 through 2015 and exempted qualifying companies from remitting sales and use tax under the existing law on goods sold in South Carolina if those companies maintained a distribution facility in the State meeting certain criteria as defined in the statute. *Id.* Amazon was the principal beneficiary of this exemption. (**App. p. 1046**) (Ex. 178 at 9). In addition to providing a five-year reprieve, the Moratorium expressed the General Assembly's clear understanding that companies availing themselves of its safe harbor were the retailers/sellers of goods sold on their websites. In particular, subsection (E)(1) directed that "[a] person to whom this section applies *who makes a sale through the person's Internet website . . .*," (emphasis supplied), was

required to provide certain notice to the purchaser of such goods, which Amazon did. Thus, the Moratorium demonstrates that Amazon was fully aware of its obligations under the Act in 2011, sought and enjoyed a reprieve for five years, and was or should have been on notice that its obligations resumed upon the expiration of the Moratorium on January 1, 2016.²²

Amazon’s notice should also be imputed by virtue of Revenue Ruling 14-4,²³ issued in 2014, and Department Information Letter 15-19,²⁴ issued near the end of the Moratorium, both of which are consistent with the Department’s position in this case. There was no further guidance regarding the payment of sales taxes on third-party merchant sales on Amazon.com for the simple reason that Amazon did not have a physical presence in South Carolina until 2011 and that physical presence was not legally recognized until 2016 as a result of the Moratorium. Because, pre-*Wayfair*, a seller’s physical presence remained a bedrock requirement for the ability to tax sales, there was no basis for issuing guidance because Amazon would not be subject to sales and use taxes in any way until January 1, 2016. As reflected in this case, the Department considered that the Act as it existed on January 1, 2016, encompassed all sales occurring on Amazon.com. Further, there was statutory authority and guidance from the Department regarding the treatment under the Act of similar transactions—*e.g.*, consignment sales. *See* § 12-36-90 (defining “gross proceeds of sales” as including “the proceeds from the sale of property sold on consignment”); (**App. pp. 749-51, 1869**) (Tr. 596-98 (former Department official describing publicly available information regarding sales tax treatment of consignment sales prior to 2016); Ex. 215, Ch. 23, p. 19)). Just because Amazon articulated a contrary position does not mean

²² *See* (**App. p. 1263**) (Ex. 194 at 3:25-4:05) (wherein Senator Sheheen states in the committee hearing that the General Assembly wrote the Moratorium Statute to provide Amazon a “grace period where they didn’t withhold sales tax” and that its argument “that they don’t have to withhold it after we actually gave them the benefit for five years” is in “very bad faith”).

²³ <https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/RR14-4.pdf>

²⁴ <https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/IL15-19.pdf>

the Act did not encompass all Amazon.com sales during the first quarter of 2016. Amazon was or should have been on notice of its obligations to remit sales tax on all Amazon.com sales on January 1, 2016.

CONCLUSION

The Petition presents no basis for rehearing or reconsideration of the Opinion. Primarily, the Petition fails to identify any issue which this Court overlooked or misapprehended; instead, it largely restates or repackages the arguments previously advanced by Amazon in prior briefing and argument to the Court. As discussed above, the majority's analysis is consistent with and accurately applies the plain language of the Act to Amazon's business model. Amazon's reliance on the guidance the Opinion provides as to the outer limits of the Act that might impact non-parties in future cases is misplaced, as it does not address Amazon's liability. Further, the Opinion is faithful to, not contradicted by, *Alltel*. Finally, the Opinion neither renders Act 21 a nullity nor fails to meaningfully address Amazon's due process argument. In sum, no basis exists upon which this Court should grant rehearing, and the Department respectfully submits that denial of the Petition is warranted and appropriate.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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