

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2019-001706

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

RECEIVED

JAN 13 2020

SC Court of Appeals

Amazon Services, LLC, ... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

INITIAL BRIEF OF APPELLANT AMAZON SERVICES LLC

NELSON MULLINS RILEY &
SCARBOROUGH LLP

SIDLEY AUSTIN LLP

SIDLEY AUSTIN LLP

Bryson M. Geer

SC Bar No. 13606

bryson.geer@nelsonmullins.com

John C. von Lehe, Jr.

SC Bar No. 5719

john.vonlehe@nelsonmullins.com

151 Meeting St / 6th Floor

PO Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

Carter G. Phillips

(admitted *Pro Hac Vice*)

cphillips@sidley.com

1501 K Street, N.W.

Washington, D.C. 20005

(202) 736-8000

Constantine L. Trela, Jr.

(admitted *Pro Hac Vice*)

ctrela@sidley.com

Robert N. Hochman

(admitted *Pro Hac Vice*)

rhochman@sidley.com

Neil H. Conrad

(admitted *Pro Hac Vice*)

nconrad@sidley.com

One South Dearborn Street

Chicago, IL 60603

(312) 853-7000

Attorneys for Amazon Services LLC

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS	4
A. The Amazon.com Marketplace.....	4
B. How Products Are Sold in the Amazon.com Marketplace.....	6
1. The Selling Experience.....	6
2. The Buying Experience.....	9
3. Customers Pay Third-Party Sellers for Products, and Third-Party Sellers Pay Amazon Services (and Other Amazon Companies) for Services.....	12
4. Communication to the Customer About the Sale and the Product	14
C. The Department's Audit and Determination.....	15
D. The 2019 Changes to the Sales and Use Tax Act.....	17
E. The ALC's Decision	18
STANDARD OF REVIEW.....	20
ARGUMENT.....	21
I. Amazon Services Operates an Online Marketplace and Does Not Sell Third-Party Sellers' Products.....	23
A. Under the 2016 Sales Tax, Amazon Services Is Not the Seller of Third- Party Products on Its Marketplace.....	24
1. Amazon Services Receives Compensation Only for Services Provided to Sellers, and Those Services Are Not Subject to the Sales Tax.....	24
2. The ALC's Conclusion That Amazon Services Is "in the Business of Selling" Is Not Supported by Substantial Evidence and Is Wrong as a Matter of Law.....	29

B.	The ALC’s “Point of Sale” Construct Has No Basis in the Law.....	32
C.	Amazon Services Is Not a Consignee Responsible for Sales Tax on Third-Party Sales.....	35
II.	Amazon Services’s Interpretation of the Statute Was Reasonable and That Alone Warrants Reversal.....	37
A.	A Taxpayer Cannot Be Held Liable When a Reasonable Interpretation of the Statute Excludes the Taxpayer from Tax Obligations.	37
B.	There Is Ample Evidence That Amazon Services’s Interpretation of the Statute Was Reasonable.....	39
1.	The Department’s Statements to the Legislature and Its Prior Practice Confirm the Reasonableness of Amazon Services’s Interpretation.....	39
2.	The Legislature’s Decision to Add “Marketplace Facilitators” to the Sales and Use Tax Act Confirms the Reasonableness of Amazon Services’s Interpretation.	41
3.	The Department’s Treatment of Remote Sellers Confirms the Reasonableness of Amazon Services’s Interpretation.	44
4.	The Decisions of Other Jurisdictions Confirm the Reasonableness of Amazon Services’s Interpretation.....	46
III.	Applying the Sales Tax to Amazon Services’s Marketplace Facilitation Services Is Unconstitutional.....	47
A.	Applying the Sales Tax to Amazon Services’s Marketplace Facilitation Services Violates the Due Process Guarantee of Fair Notice.....	47
B.	Retroactively Applying the 2019 Amendments to Amazon Services, and Amazon Services Alone, Violates the Guarantee of Equal Protection.....	49
	CONCLUSION.....	50

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Allstate N.J. Ins. Co. v. Amazon.com, Inc.</i> , No. 17-2738, 2018 WL 3546197 (D.N.J. July 24, 2018)	36
<i>Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue</i> , 399 S.C. 313, 731 S.E.2d 869 (2012)	37, 38, 39
<i>Bryant v. City of Charleston</i> , 295 S.C. 408, 368 S.E.2d 899 (1988)	22, 24
<i>CarMax Auto Superstores W. Coast, Inc. v. S.C. Dep't of Revenue</i> , 397 S.C. 604, 725 S.E.2d 711 (Ct. App. 2012), <i>aff'd as modified</i> , 411 S.C. 79, 767 S.E.2d 195 (2014)	21
<i>City of Charleston v. Hotels.com, LP</i> , 520 F. Supp. 2d 757 (D.S.C. 2007)	29
<i>Columbia Ry., Gas & Elec. v. Carter</i> , 127 S.C. 473, 121 S.E. 377 (1924)	37
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	23
<i>Denene, Inc. v. City of Charleston</i> , 352 S.C. 208, 574 S.E.2d 196 (2002)	42
<i>Dep't of Commerce v. New York</i> , 139 S.Ct. 2551 (2019)	50
<i>Duvall v. S.C. Budget & Control Bd.</i> , 377 S.C. 36, 659 S.E.2d 125 (2008)	42, 44
<i>FCC v. Fox Television Stations, Inc.</i> , 567 U.S. 239 (2012)	47, 48, 49
<i>Gould v. Gould</i> , 245 U.S. 151 (1917)	40
<i>Grant v. S.C. Coastal Council</i> , 319 S.C. 348, 461 S.E.2d 388 (1995)	49
<i>Greenwood Mfg. Co. v. Worley</i> , 222 S.C. 156, 71 S.E.2d 889 (1952)	35

<i>Hadden v. S.C. Tax Comm’n</i> , 183 S.C. 38, 190 S.E. 2d 249 (1937)	37
<i>Hodges v. Rainey</i> , 341 S.C. 79, 533 S.E.2d 578 (2000)	24
<i>Huber v. S.C. State Bd. of Physical Therapy Exam’rs</i> , 316 S.C. 24, 446 S.E.2d 433 (1994)	47
<i>Key Corp. Capital, Inc. v. Cty. of Beaufort</i> , 373 S.C. 55, 644 S.E.2d 675 (2007)	42
<i>Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’tl. Control</i> , 411 S.C. 16, 766 S.E.2d 707 (2014)	45
<i>Mid-S. Mgmt. Co. v. Sherwood Dev. Corp.</i> , 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007)	26
<i>Milo & Gabby LLC v. Amazon.com, Inc.</i> , 693 F. App’x 879 (Fed. Cir. 2017)	37
<i>MRI at Belfair, LLC v. S.C. Dep’t of Health & Env’tl. Control</i> , 379 S.C. 1, 664 S.E.2d 471 (2008)	21
<i>N. River Ins. Co. v. Gibson</i> , 244 S.C. 393, 137 S.E.2d 264 (1964)	42
<i>Pacolet Mfg. Co. v. Query</i> , 174 S.C. 359, 177 S.E. 653 (1934)	37
<i>Quill Corp. v. North Dakota</i> , 504 U.S. 298 (1992)	23
<i>S.C. Dep’t of Revenue v. Anonymous Co. A</i> , 401 S.C. 513, 678 S.E.2d 255 (2009)	27
<i>S.C. Farm Bureau Mut. Ins. Co. v. Mumford</i> , 299 S.C. 14, 382 S.E.2d 11 (Ct. App. 1989)	30
<i>South Dakota v. Wayfair, Inc.</i> , 138 S. Ct. 2080 (2018)	23, 44
<i>Stiner v. Amazon.com, Inc.</i> , 120 N.E.3d 885 (Ohio Ct. App. 2019)	36
<i>TNS Mills, Inc. v. S.C. Dep’t of Revenue</i> , 331 S.C. 611, 503 S.E.2d 471 (1998)	42, 49

Travelscape, LLC v. South Carolina Department of Revenue,
391 S.C. 89, 705 S.E.2d 28 (2011). (See Op. 23-30.)..... *passim*

Univ. of S. Cal. v. Moran,
365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005).....21

Statutes

S.C. Code Ann. § 1-23-310 *et seq.* 20

S.C. Code Ann. § 12-36-70 (2019).....18, 42

S.C. Code Ann. § 12-36-71 (2019).....17, 42

S.C. Code Ann. § 12-36-71(A)(1) (2019).....18, 42

S.C. Code Ann. § 12-36-71(C) (2019).....18, 43

S.C. Code Ann. § 12-36-90 (2011).....23

S.C. Code Ann. § 12-36-90(1) (2011) 35

S.C. Code Ann. § 12-36-100.....21, 24

S.C. Code Ann. § 12-36-910(A) 21, 23, 29

S.C. Code Ann. § 12-36-940(B).....24

S.C. Code Ann. § 12-36-1310(A) 24

S.C. Code Ann. § 12-36-1340 (1998).....24

S.C. Code Ann. § 12-60-460.....4

2019 S.C. Act No. 21 (effective April 26, 2019).....17, 41

Other Authorities

U.S. Const. amend. XIV, § 1 47, 49

S.C. Const., art. I, § 3.....49

S.C. Code Regs. § 117-300.1 24

Jerome R. Hellerstein & Walter Hellerstein, II *State Taxation: Sales and Use,
Personal Income, and Death and Gift Taxes and Intergovernmental
Immunities* (3d ed. 2000) § 13.01(2)(d).....35

S.C. Dep't of Revenue, *S.C. Sales and Use Tax Manual* 23

INTRODUCTION

This case is about whether South Carolina could, prior to passage of new legislation in 2019, deem Appellant Amazon Services LLC (“Amazon Services”) the seller of the products offered and sold in the Amazon.com marketplace by independent third parties (so-called “third-party sales”). Amazon Services sets the rules for and operates the Amazon.com marketplace, and provides various services to the third-party sellers who choose to offer and sell products in the marketplace. It is a marketplace facilitator of sales. But Amazon Services does not decide what products are offered for sale, the prices of those products, or how much inventory third parties make available, and Amazon Services does not get paid for transferring title to third-party products sold in the marketplace.

Third-party sellers had for many years sold their products in the Amazon Services marketplace, and South Carolina had for many years been collecting sales tax from those sellers on sales to South Carolina customers. Then, suddenly, in 2016 the Department reversed course and declared that it would start treating Amazon Services as the seller. Even then, it continued to collect sales tax from the third-party sellers. Despite all of this, the Administrative Law Court (“ALC”) ruled that Amazon Services was the seller of third-party products in 2016.

The ALC’s ruling violates basic principles of statutory interpretation, misreads South Carolina Supreme Court precedent, establishes an expansive legal standard with no principled limit, relies on legal doctrines the ALC created out of whole cloth just for this case, and would impose sales-tax obligations on a marketplace business model that, in 2016, the law simply did not require. The ruling also blurs the different functions performed by different Amazon companies. In doing so, the ALC misstated who actually receives payment for third-party sales in the Amazon.com marketplace. The record is undisputed: only the third-party sellers receive consideration for third-party sales. There is no evidence, and certainly no substantial evidence,

for the ALC's assertions that Amazon Services receives consideration for the products sold by third parties.

Prior to 2019, South Carolina's sales tax statute did not require marketplace facilitators like Amazon Services to collect and remit sales tax for third-party sales. This Court can and should reverse because the ALC's novel interpretation and application of the 2016 statute to Amazon Services's marketplace business model is wrong. The most that can be said is that the 2016 statute was ambiguous as applied to marketplace facilitators. Even assuming it was ambiguous, the taxpayer's reasonable interpretation still prevails. The evidence here overwhelmingly establishes that Amazon Services reasonably read the statute prior to 2019 not to require it to collect and remit tax on third-party sales.

In fact, while litigating this case, the Department itself elsewhere declared the statute ambiguous. In May 2018, the Department said the 2016 statute contained a "gap" with respect to online marketplaces and that meant marketplaces and sellers had "to guess" about whether they must collect and remit sales tax. In October 2018, just four months before the evidentiary hearing in this case, the Legislative Oversight Committee issued a report stating that *unless the statute were changed*, the Department could not force internet marketplaces, including "Amazon," to collect and remit tax on third-party sales. The Committee observed that *if the statutory changes it was considering had been in place in 2016, Amazon would have been* responsible for the sales taxes at issue in this case.

These statements were not surprising; numerous states had already decided that, because marketplace facilitators are not sellers, the *only* way to impose sales-tax obligations on them was to change the law. And—at the Department's request—that is what the South Carolina legislature did; the legislature changed the statute to cover internet marketplaces. Amazon

Services immediately began complying with the changed law, as it has done in states across the country that have enacted similar legislation.

That is how changes to tax law work. Here, South Carolina decided to expand its tax law by enacting legislation to cover marketplaces that the law previously did not cover. Such expansions apply prospectively only. The ALC's decision would capture *past* activity not covered by South Carolina's tax law when it took place. That is *not* how changes to tax law work.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether, under the Sales and Use Tax Act in effect during 2016, Amazon Services, an online marketplace operator, owed a duty to collect and remit sales tax on products sold on its marketplace by third parties.

2. Whether the statute in effect in 2016 could reasonably be read not to impose on online marketplace facilitators, such as Amazon Services, the obligation to collect and remit sales taxes for third-party sales such that the statute is ambiguous and must be construed against the Department.

3. Whether imposing a sales-tax obligation on Amazon Services for third-party sales during the relevant period violates the U.S. and South Carolina constitutional guarantees of fair notice or equal protection.

STATEMENT OF THE CASE

Amazon Services, the operator of the Amazon.com website, appeals a Final Order issued by the ALC holding that Amazon Services is liable for taxes on sales of products sold by independent third parties in the Amazon.com marketplace. The Department of Revenue conducted an audit beginning in September 2016 and, in June 2017, issued its Determination that Amazon Services owes approximately \$12.5 million in sales taxes, interest, and penalties for the

first quarter of 2016. (Ex. 171.) Amazon Services requested a contested case hearing in accordance with S.C. Code Ann. § 12-60-460. (Amazon Services's Request July 21, 2017.) A three-day evidentiary hearing was held February 4-6, 2019, and the ALC issued its Final Order on September 10, 2019. (Final Order September 10, 2019.) Amazon Services timely filed a notice of appeal on October 10, 2019.

STATEMENT OF THE FACTS

A. The Amazon.com Marketplace

Amazon.com, Inc. ("Amazon") was founded in 1994. (Tr. 40.) An early online retailer, Amazon initially sold only books on the Amazon.com website. (Tr. 40.) Amazon and its affiliates later expanded beyond books into other product categories like DVDs, music, and electronics. (Tr. 40-41.) Amazon companies bought products from suppliers, owned that inventory, set the prices for the products sold on the website, and transferred title to the products they sold. (Tr. 41.)

In 2000, Amazon.com became more than just an online retailer for Amazon companies. For the first time, Amazon.com also opened to third-party sellers and became a marketplace where *others* could sell. (Tr. 41.) This change enabled independent third-party companies with their own product inventories to offer and sell their products directly to customers visiting the website. (Tr. 41-42.)

Amazon realized that customers shopping online wanted broad product selection, low prices, a larger inventory that would increase the probability that desired products would be in stock, and fast and convenient delivery. (Tr. 42.) With the Amazon.com website open to third-party sellers, customers would find a broader selection of products more quickly, and the competition among third-party sellers in the marketplace would produce lower prices, increase overall product availability, and encourage faster delivery options. (Tr. 42-43.) At the same

time; sellers would find the marketplace desirable to the extent it attracted a large volume of potential customers who found shopping there easy and convenient.

As of the first quarter of 2016, the relevant time here, several Amazon subsidiaries made all of Amazon's own retail sales in the Amazon marketplace. (See Op. 2 & n.2.) Amazon's retail companies sell a broad range of products, in many cases *competing directly* with third-party sellers in Amazon Services's marketplace on price and other features, just as many third-party sellers compete with each other. (Tr. 43, 87-88.) Other Amazon companies do not compete with third-party sellers, but rather service the needs of those selling on the site including helping to *attract* third-party sellers to the marketplace. (Tr. 225-26.) Three of these Amazon companies merit special attention.

The first is Amazon Services, the taxpayer in this case. As noted above, Amazon Services operates the marketplace. (Tr. 46.) Among other things, it offers tools to help third parties sell their products, including a customer-friendly interface, impressive search functionality, and the ability to advertise and market products to a wider potential customer base in the marketplace. Amazon Services also provides third-party sellers access to Seller Central, a website that helps sellers manage their businesses. (Tr. 48.) Amazon Services establishes various rules for the conduct of business in the Amazon.com marketplace, many of which are discussed below. Those rules promote fair competition and a satisfying selling and buying experience. (Tr. 70.) With one exception, Amazon Services—as the name suggests—is a service provider.¹

¹ Amazon Services sells memberships in Amazon Prime, and there is no dispute that Amazon Services has fully complied with its sales-tax obligations with respect to Prime memberships sold to South Carolina customers. (Tr. 525-26, 542; Dep't's Proposed Final Order and Decision at 3.)

Amazon Payments, Inc. ("Amazon Payments") is a payment processing company; it processes credit card transactions, collects money from the card-issuing bank, and transfers that money to the seller who sold the product. (Tr. 48-49, 101-04, 109.) Today, as in the first quarter of 2016, all third parties that sell in the Amazon.com marketplace agree to use the payment processing services of Amazon Payments. (Tr. 232-33.) In addition, Amazon Payments offers payment services to sellers more broadly; its business is not limited to sales made in the Amazon.com marketplace. (Tr. 107.)

Amazon Fulfillment Services, Inc. ("Amazon Fulfillment") provides warehousing and shipping services. (Tr. 49-50.) Like Amazon Payments, Amazon Fulfillment offers its services generally to businesses, not only to those selling in the Amazon.com marketplace. (Tr. 100-01, 398.) Unlike with Amazon Payments, those who sell in the marketplace need not agree to use Amazon Fulfillment's services; they may elect to use Amazon Fulfillment and, for those that do, elect to stop at any time. (Tr. 79-81, 93, 97, 100-01.)

Amazon Services, Amazon Payments, Amazon Fulfillment, and the various Amazon subsidiaries that sell products are distinct corporate entities. The Department has never argued to the contrary, nor did it present any evidence that would justify attributing the acts of one Amazon subsidiary to any other Amazon subsidiary.

B. How Products Are Sold in the Amazon.com Marketplace

1. The Selling Experience

Third parties who sell in the Amazon.com marketplace agree to the terms of the Amazon Services Business Solutions Agreement ("BSA"). (Tr. 59; Ex. 3.) The BSA is a comprehensive agreement among Amazon Services, Amazon Payments, and the third-party seller. It structures the relationships among the parties to ensure a safe and reliable way of conducting business. (Tr. 70-73.)

For example, the BSA reserves to Amazon Services the authority to determine the “format” in which sellers list their products. (Ex. 3 at AS0000050.) As discussed in more detail below, this enables customers in the marketplace to efficiently gather and process the information sellers provide about their products, and it facilitates quick and easy comparisons between products. The BSA also prohibits false statements regarding products, and generally prohibits defamatory and obscene material. (*Id.*) These basic rules of commerce ensure a safe, reliable, and generally pleasant buying experience for customers in the marketplace. (*See, e.g.*, Tr. 71-72.)

But Amazon Services has no role in determining the substance of how third-party sellers’ products are described. (Tr. 64-65, 155-57.) Sellers create their own product descriptions. To list a product for sale in the Amazon.com marketplace, third-party sellers click “Add a Product” on their Seller Central account and select the relevant product category (*e.g.*, electronics, shoes, household items, etc.). (Tr. 62-64.) They name the product, and enter the bar code, brand name, and other product details. (Tr. 63-65, 289; Ex. 3 at AS0000050.) Third-party sellers create titles and descriptions for their products, and may choose keywords to help attract customers. (Tr. 306-09.) They can add photos or videos, as well as text and graphics explaining their business or brand. (Tr. 63-65, 155, 306-09, 311-13; Ex. 3 at AS0000050.)

Third-party sellers set the prices of their products, and decide how many units are available and whether to offer warranties or guarantees. (Tr. 65-66, 70, 78-81, 289-90, 307-09, 331-32.) No Amazon subsidiary tells third-party sellers how to price their products, or how many units to make available in the marketplace. (Tr. 66, 136-37, 317-18.) As a result, the same product may be available for sale to customers in the marketplace at a wide range of prices. (Tr. 78-79, 87-88.) And sellers can respond to price movements from competitors; after sellers

initially list the product, they can change the price at any time, even multiple times a day. (Tr. 66-67, 86, 98.) The BSA contains only one pricing restriction: third-party sellers must provide customers in the Amazon.com marketplace the lowest price they offer for that product anywhere else. (Tr. 73, 416; Ex. 3 at AS0000053-54.) This rule ensures the best experience for customers: customers want the assurance that the price in the marketplace is as good as anywhere else. (Tr. 416.) Because third-party sellers generally price their products competitively on the Amazon.com marketplace, the BSA's pricing restriction is rarely triggered. (Tr. 416-17.)

Nothing in the BSA inhibits a third-party seller's ability to sell.

Third-party sellers set their shipping terms and fulfill (*i.e.*, deliver) their orders to customers. (Tr. 91-92, 95-96, 290, 307-08, 405-07.) They decide what shipping company to hire, and whether to pass the cost of shipping onto customers. They can, but need not, use Amazon Fulfillment to handle fulfillment for them with the set of services referred to as Fulfillment by Amazon ("FBA"). Third-party sellers choose how to deliver their products on an item-by-item basis, and they may, and often do, change their fulfillment method at any time. (Tr. 93; 318-19, 383-84, 396-97.) When third-party sellers use a carrier unaffiliated with Amazon, they agree to bear responsibility for any delivery issues. (Ex. 3 at AS0000060.) Once again, this requirement maintains confidence among buyers in marketplace transactions. (Tr. 384-85.)

If a third-party seller chooses the FBA service, it sends its inventory to a fulfillment center, where Amazon Fulfillment stores the products on behalf of the third-party seller. (Tr. 97-98.) Amazon Fulfillment does not own the inventory in its possession; third-party sellers do. (Tr. 98, 322-24, 399-400; Ex. 3 at AS0000070-71.) Indeed, the seller may, at any time before a product is sold, have the product returned to it from the fulfillment center. (Tr. 322-24, 327-28.)

When customers place orders for goods offered by third-party sellers and fulfilled using the FBA service, Amazon Fulfillment packs and ships the items on behalf of the third-party seller. (Tr. 97-98, 259-60, 395-97.) But the seller maintains control over its product until it is shipped; the seller may even cancel a transaction up until that point. (Tr. 327-28, 406.) Amazon Fulfillment provides additional services like product labeling, packaging, and re-packaging, and will dispose of or return items when directed by third-party sellers who have opted into the FBA service. (Tr. 98, 400-04; Ex. 3 at AS0000071.)

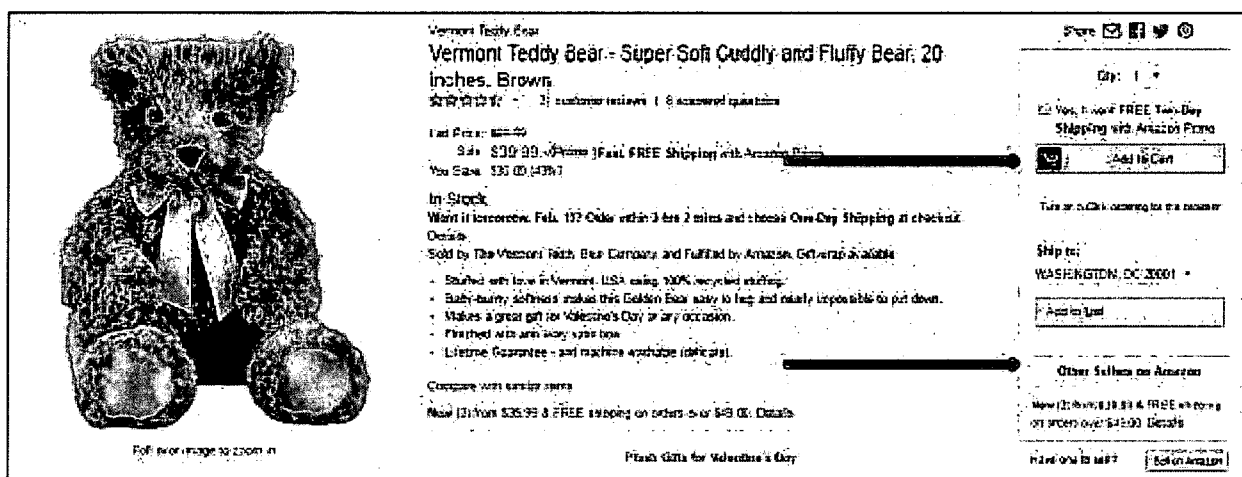
2. The Buying Experience

When a customer shops in the Amazon.com marketplace, the customer typically searches for a particular product by entering the name or description of the product in the website's search bar. When the customer clicks on a search result, the customer is directed to a webpage displaying the product... This Product Detail Page, as well as the website's search functionality, have been optimized to provide an easy and satisfying buying experience. As noted above, Amazon Services determines only the "format" of the Product Detail Page. (Tr. 197-98.) When customers arrive at that page, they can readily find useful information like product images, a specific description of the product, and customer reviews. (Tr. 63-65, 306-09.)

The Product Detail Page includes two other formatting features of note, both placed along the right side of the page. First, the Product Detail Page typically contains what is called the "Buy Box." (Tr. 148-49.) The Buy Box features one seller that has been selected based on a proprietary algorithm that analyzes all seller offers for that particular item based on a number of factors, including price, the number of units in stock, the speed of delivery, and the rating customers have given to each seller. (Tr. 149.) While the details of the algorithm were not presented in this litigation, it is publicly known that price is a predominant consideration. (Tr. 148-50.) If the customer intends to buy from the seller who "won" the Buy Box, the customer

can click on a button to place the seller's item in the customer's virtual shopping cart and then, when the customer is ready to complete the order, click on another button to checkout. (Tr. 90.)

The customer need not buy from the seller who "wins" the Buy Box. The Product Detail Page format makes it easy for customers to review options offered by other sellers. Directly under the Buy Box, customers will find the number of other sellers and a link to further information about those offers.



(Ex. 178 at 12.) In this image, the red arrows show the option to select the product offered by the winner of the Buy Box with the "Add to Cart" button as well the option to view different offers by other sellers who did not win the Buy Box.

Clicking on the link to other sellers takes the customer to the Offer Listing Page. (Tr. 77-78.) The Offer Listing Page shows all offers from all sellers offering that particular product. Each offer displays that seller's price, the number of units it has in stock, and delivery options, among other information. (Tr. 68, 77-78, 81, 85, 417; Ex. 210.) Ultimately, the customer chooses from whom to buy, whether it is the winner of the Buy Box or some other seller.

During trial, Christopher Poad, a senior executive at Amazon.com, walked through a typical customer buying experience. He went to Amazon.com and searched for a particular product—a pair of ASICS sneakers. (Tr. 75.) He then followed the link on the Product Detail

Page to the Offer Listing Page (reproduced below), which showed 21 different offers by 21 different sellers, each with varying fulfillment options and prices ranging from \$95 to \$189. (Ex. 210; Tr. 77-78.)

Price + Shipping	Condition	Delivery	Seller Information	Buying Options
\$95.00 + FREE Shipping + \$9.50 estimated tax	New	Arrives between February 8-11. Want it delivered Tuesday, February 12? Choose Standard Shipping at checkout. Shipping rates and return policy.	Running & Walking Center ★ ★ ★ ★ ★ 4.9 (17 total ratings)	Add to cart
\$95.00 + FREE Shipping + \$10.00 estimated tax	New	Arrives between February 8-11. Want it delivered Wednesday, February 13? Choose Standard Shipping at checkout. Shipping rates and return policy.	Eight Grom ★ ★ ★ ★ ★ 4.9 (12 total ratings)	Add to cart
\$99.95 + prime + \$10.00 estimated tax	New	FREE Two-Day Shipping: Get it Wednesday, February 8 (order within the U.S.). Shipping rates and return policy.	Zappos Retail, Inc. ★ ★ ★ ★ ★ 4.9 (100 total ratings over the past 12 months) (153 total ratings)	Add to cart
\$99.95 + prime + \$10.00 estimated tax	New	FREE Two-Day Shipping: Get it Wednesday, February 8 (order within the U.S.). Shipping rates and return policy.	Amazon Prime ★ ★ ★ ★ ★ 4.9 (100 total ratings over the past 12 months) (172 total ratings)	Add to cart
\$99.95 + prime + \$10.00 estimated tax	New	FREE Two-Day Shipping: Get it Wednesday, February 8 (order within the U.S.). Shipping rates and return policy.	What's Hot ★ ★ ★ ★ ★ 4.9 (100 total ratings over the past 12 months) (100 total ratings)	Add to cart
\$99.95 + prime + \$10.00 estimated tax	New	FREE Two-Day Shipping: Get it Wednesday, February 8 (order within the U.S.). Shipping rates and return policy.	Orvis Stores ★ ★ ★ ★ ★ 4.9 (100 total ratings over the past 12 months) (100 total ratings)	Add to cart
\$99.95 + FREE Shipping + \$10.00 estimated tax	New	Arrives between February 8-11. Want it delivered Tuesday, February 12? Choose Standard Shipping at checkout. Shipping rates and return policy.	Petra Shoes ★ ★ ★ ★ ★ 4.9 (100 total ratings over the past 12 months) (100 total ratings)	Add to cart
\$109.99 + FREE Shipping + \$11.11 estimated tax	New	Arrives between February 8-11. Want it delivered Monday, February 11? Choose Expedited Shipping at checkout. Shipping rates and return policy.	Wooki ★ ★ ★ ★ ★ 4.9 (100 total ratings over the past 12 months) (100 total ratings)	Add to cart
\$117.11 + FREE Shipping + \$11.83 estimated tax	New	Arrives by Thu, Feb. 11. Want it delivered Tuesday, February 12? Choose Two-Day Shipping at checkout. Shipping rates and return policy.	Running Warehouse ★ ★ ★ ★ ★ 4.9 (100 total ratings over the past 12 months) (100 total ratings)	Add to cart
\$119.95 + FREE Shipping + \$12.11 estimated tax	New	Arrives between February 8-11. Want it delivered Tuesday, February 12? Choose Standard Shipping at checkout. Shipping rates and return policy.	Shoes & More ★ ★ ★ ★ ★ 4.9 (100 total ratings over the past 12 months) (100 total ratings)	Add to cart

(Ex. 210 at 2 (excerpt).)

Mr. Poad's demonstration showed how third-party sellers—and not Amazon Services—set their prices. As Mr. Poad testified, “if there was just one seller [Amazon Services], then it would be the same price” for every offering of that same pair of sneakers, but that is “not how the business works.” (Tr. 78; 87-88.) As this sneaker example shows, “dynamic competition between sellers on every product all the time in real time drives prices down [and] broadens selection” for the consumer: (Tr. 88.) And all of this information is easy to find because customers can count on finding it in the same place whenever they visit a Product Detail Page.

3. *Customers Pay Third-Party Sellers for Products, and Third-Party Sellers Pay Amazon Services (and Other Amazon Companies) for Services.*

When a customer purchases a product from any seller in the marketplace, payment is processed through Amazon Payments. Amazon Services requires third-party sellers to use Amazon Payments to make it easier for customers to pay when buying in the marketplace and to help police and deter fraud. (Tr. 103, 105-08.) A hold is put on the customer's credit card (or other payment card) until the product ships. (Tr. 101, 216-17.) Upon shipment, Amazon Payments directs the credit card network (or other financial service provider) to charge the customer. (Tr. 101, 215-17.) The amount paid by the customer is the price of the product. Sales tax and shipping charges also may be assessed, if applicable, but they are separately indicated. (See, e.g., Ex. 122 at AS0115627.)

Though the payment process takes place on the Amazon.com website, the customer pays only the seller.² The sales proceeds flow from the customer's account into an Amazon Payments account, where they are held for the benefit of the seller until disbursed. (Tr. 101-02, 104, 109; Ex. 3 at AS0000082-83.) Amazon Services does not receive or hold the sales proceeds and is not paid by the customer. (Tr. 124-25, 143-44, 234.) As Matthew Revich, the owner of a third-party seller named Yedi Houseware Appliances explained, "I'm the seller of these products. It's my money." (Tr. 336-37.)

Amazon Payments automatically disburses sales proceeds every 14 days, but third-party sellers can request disbursement sooner. (Tr. 104-07, 211-12.) Amazon Payments withholds third-party sellers' sales proceeds only in rare circumstances, like suspected fraud. (Tr. 105-06.)

² The name "Amazon" or an abbreviation for "Amazon Marketplace" typically appears on the customer's credit card statement (Tr. 572; Op. 13), but that does not change the fact that the entity receiving the sales proceeds is the third-party seller. (See Tr. 124-25; Ex. 3 at AS0000059 (the third-party seller is "always the seller of record").)

Pursuant to the BSA, when Amazon Payments disburses a third-party seller's sales proceeds, the amount of the disbursement will satisfy the seller's obligation to pay various Amazon subsidiaries for services they provided the seller in connection with its marketplace sales: (Tr. 101, 124-25; Ex. 3 at AS0000036-37, 54-55, 62, 73, 82-83.) Amazon Services, for example, charges various fees to sellers. (Tr. 122-125; Ex. 16 (fee schedule).) None of those fees bears a direct relationship to the profit margin of a particular product, and no Amazon entity knows whether any particular third-party sale was profitable. (Tr. 269-71, 338-39.) Amazon Payments subtracts Amazon Services's fees owed for the relevant period from the total sales proceeds ultimately forwarded to the seller. This is how the sellers pay Amazon Services for its services.

Amazon Services also offers to collect sales tax from customers for third-party sellers (with a minimum volume of sales); this service carries an additional fee. (Tr. 123-24, 241-45; Ex. 23 (tax collection service terms); Ex. 122 at AS0115630.) Where applicable, Amazon Payments deducts this fee as well from the sales proceeds. The sales tax added to the price of the product at the time of sale is not deducted; that amount is sent onto the seller. Like any other seller who collects sales tax at the time of sale, third-party sellers in the Amazon.com marketplace must forward that amount to the relevant taxing authority. (Tr. 243-45.)

Third-party sellers also pay fees if they choose to use the FBA service. (Tr. 123-24; Ex. 31 (description of FBA features and fees); Ex. 50 (2018 FBA fee charges); Ex. 64 (same); Ex. 122 at AS0115630 (example showing fee breakdown).) As with Amazon Services's fees, these amounts are deducted from the amount of sales proceeds delivered to third-party sellers, satisfying the sellers' obligation to pay Amazon Fulfillment.

An individual transaction is illustrated by the Transaction Detail Page below:

Transaction Details

Use this page to view details of this transaction.

Order Payment for Order 102-1134859-2933048 ([view details of this order](#))

Transaction date: Feb 25, 2016

Shipping Address:


 FORT MILL, SOUTH CAROLINA 29708-8433

Billing Country

US

Product charges

Comfy Clothiers 5 Metal Collar Extenders for Dress Shirts

Qty: 1

\$11.95

Other

Product Tax:

\$0.84

Sales Proceeds

\$12.79

Amazon fees

FBA Order Handling Fee:

-\$1.00

FBA Pick & Pack Fee:

-\$1.05

FBA Weight Handling Fee:

-\$0.50

Referral Fee on Item Price:

-\$1.79

Sales Tax Service Fee:

-\$0.02

Change to your seller account balance**\$8.42**

(Ex. 122 at AS0115630 (excerpt).) In this particular order, the seller paid Amazon Fulfillment's Order Handling, Pick & Pack, and Weight Handling fees. It also paid Amazon Services's Referral and Sales Tax Service fees.

4. Communication to the Customer About the Sale and the Product

Upon completing the purchase, the customer receives an order confirmation email from the Amazon.com website. (Tr. 188; Ex. 122 at AS0115611.) The email describes the product or products, provides an order confirmation number, states the applicable charges (including sales tax and shipping charges), and provides an expected delivery date. (Ex. 122 at AS0115611.)

The email also includes a link to "View or manage order," which takes the customer to his or her account on the Amazon.com website where the customer can view the name of the third-party seller. (Tr. 280; Ex. 122 at AS0115625 (noting that product was sold by "Deals on Call").)

Upon shipment, the customer receives a shipment confirmation email from Amazon.com, which

contains the product summary, a summary of the applicable charges, and the expected arrival date. (Ex. 122 at AS0115612.) This email also links to the "Order details," where information about the third-party seller is readily accessible. (Ex. 122 at AS0115612.)

Third-party sellers answer product-related questions, manage warranties and guarantees, and provide product care and support. (Tr. 125-28; Ex. 3 at AS0000061.) Amazon is responsible for issues relating to payment, credit card processing, debiting, or crediting. (Ex. 3 at AS0000061.) The customer can address product-related questions to the seller through the buyer-seller messaging service on the Amazon.com website or call the third-party seller for customer service. (Tr. 313.) If a dispute arises between the customer and seller that cannot be resolved, Amazon Services provides a rarely used backstop: its "A to Z Guarantee" provides a refund or some other benefit to the customer. (Tr. 130-31.) Amazon Services provides both the channel for communication between seller and customer and the A to Z Guarantee to ensure a convenient, safe, and reliable buying experience for customers in its marketplace. (Tr. 71-73, 130-31.)

Product returns are handled differently depending on whether the third-party seller has opted into the FBA service. Third-party sellers that fulfill their orders directly bear responsibility for processing cancellations, returns, and refunds, as well as handling recalls, nonconformities, and delivery errors. (Tr. 390-93; Ex. 3 at AS0000052.) For those that have opted into the FBA service, Amazon Fulfillment provides those services. (Tr. 259-61.)

C. The Department's Audit and Determination

The Department began its audit in September 2016, more than 15 years after third parties began selling on Amazon.com. (Tr. 529; Ex. 172.) The Department admitted that, as of the first quarter of 2016, there was no rule, regulation, guidance, long-standing Department policy, or

publication of any kind relating to the sales-tax implications of third-party sales in online marketplaces. (Tr. 543.)

During its audit, the Department confirmed that Amazon.com LLC and other Amazon companies were collecting and remitting sales and use tax on items those companies sold to South Carolina customers—taxes that between January 2016 and September 2018 amounted to \$138 million. (Hunt Aff. ¶ 6.) As to third-party sales, Amazon Services explained to the Department that the third parties are responsible for collecting and remitting sales and use tax because they, not Amazon Services, sell the products to customers. (Ex. 178.) The Department disagreed and, in December 2016, issued a Proposed Notice of Assessment against Amazon Services. (Ex. 175.)

In June 2017, after Amazon Services filed its timely protest (Ex. 178), the Department issued its Determination, asserting that Amazon Services owes approximately \$12.5 million in sales and use taxes, interest, and penalties for the first quarter of 2016. (Ex. 171 at AS0140247.) The Department asserted that “the totality of the Taxpayer’s activities clearly demonstrates that the Taxpayer is in the ‘business of selling tangible personal property at retail.’” (*Id.* at AS0140253.) In considering the “totality of the Taxpayer’s activities,” the Department relied heavily on activities performed not by Amazon Services but rather by Amazon Payments and Amazon Fulfillment. For example, the Department contended that the “Taxpayer ... effects the actual transfer of the property,” and Taxpayer “accepts payment for said property and holds the funds in ‘escrow’ for later disbursement of a portion of the funds to third parties.” (*Id.* at AS0140253-54.) The Department cited no evidence to support these claims. (*See id.*) The parties then proceeded to litigate before the ALC, which ultimately held a three-day evidentiary hearing.

D. The 2019 Changes to the Sales and Use Tax Act

Before trial, the Department sought legislative action to change the Sales and Use Tax Act to address the sales-tax obligations of online marketplace facilitators like Amazon Services. Throughout 2018, members of the Department made sworn statements to various legislative committees about the need to change the statute to reach the type of third-party sales at issue here. As the Director of the Department of Revenue candidly testified in May 2018, in the midst of this litigation, the proposed legislation would “close[] the gap” so that “nobody has to guess” about who owes sales taxes on third-party sales in online marketplaces. (Ex. 194 at 6:13-15, 8:40-50.) In response to a question about whether the proposed marketplace legislation would be prospective only, the Director replied: “Absolutely, it will not be retroactive, right.” (*Id.* at 7:00-08.) Yet the Director also admitted that this lawsuit was, in effect, an effort to impose the proposed amended statute’s rule governing marketplace facilitators on Amazon Services, and Amazon Services only. As he stated at the time, this “lawsuit’s going to pull up some retroactivity . . . specific to that one company, I haven’t said their name.” (*Id.* at 7:10-18.; *see also* Ex. 214.)

In October 2018, based on all of its fact gathering and independent analysis, the Legislative Oversight Committee issued a report which declared that, without “this statutory change,” the Department could not force internet marketplace facilitators like Amazon Services to collect and remit sales taxes on products sold by third-party sellers through their websites. (Ex. 192 at AS140231.) Ultimately, the General Assembly passed the new legislation, and the changes became effective on April 26, 2019, after this case was tried, but before the ALC issued its ruling. *See* 2019 S.C. Act No. 21 (effective April 26, 2019).

The legislation created a new taxpayer, a “marketplace facilitator,” which it defined in Section 12-36-71, and it changed the definition of “retailer” and “seller” in the sales tax statute to

add every person “operating as a marketplace facilitator.” S.C. Code Ann. § 12-36-70 (2019). A “marketplace facilitator” is “any person engaged in the business of facilitating a retail sale of tangible personal property by: (a) listing or advertising, or allowing the listing or advertising of, the products of another person in any marketplace where sales at retail occur; and (b) collecting or processing payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party.” S.C. Code Ann. § 12-36-71(A)(1) (2019). Importantly, the statute had never before said that merely “facilitating” sales would impose sales-tax obligations. Nor had the statute ever said that the combination of “allowing the listing” of products and “processing payments” for products by “arrangement with a third party” would impose sales-tax obligations. The new definition also provided that “a marketplace facilitator includes any related entities assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace.” S.C. Code Ann. § 12-36-71(C) (2019). Never before had the sales tax statute suggested that the conduct of distinct but related corporate entities could create sales-tax obligations.

Amazon Services has complied with the new requirements under the new statute.

E. The ALC’s Decision

The ALC ruled in September 2019. It held that, with respect to third-party sales in the first quarter of 2016, Amazon Services was “in the business of selling tangible personal property at retail” and is therefore liable for sales taxes on those sales. (Op. 46.) The ALC’s ruling relied repeatedly on a small number of legal and factual assertions that cannot withstand scrutiny.

First, the ALC focused on what it called the “point of sale” and everything that the ALC believed Amazon Services controlled about the so-called “point of sale.” (*See id.* at 7, 9-10, 25-27, 33-36, 38-39, 43, 46, 48.) But the ALC cited no legal authorities—no court decisions, tax regulations, etc.—that had ever discussed the “point of sale” when determining sales-tax

obligations. The ALC also repeatedly attributed to Amazon Services actions taken at the “point of sale” by other Amazon companies, in particular Amazon Payments. (*See, e.g., id.* at 25 (asserting that Amazon Services “processes the customer’s payment,” “accepts the customer’s consideration,” and “remits the proceeds from the sale to the owner”); *id.* at 26 (asserting that Amazon Services “encumber[s] the customer’s [credit] card”).) For example, the ALC declared that “Amazon Services is the only party present at the point of sale accepting money from customers, and this creates an inference that they [*sic*] are in the business of selling.” (*Id.* at 33.) But the ALC cited no evidence that Amazon Services, rather than third-party sellers who have contracted with Amazon Payments, “accept[s] money from customers.” (*See id.*)

Second, the ALC relied heavily on the Supreme Court’s decision in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011). (*See Op.* 23-30, 33-41, 44-46.) The ALC observed that both this case and *Travelscape* involve transactions through a website run by the putative taxpayer, but ignored that *Travelscape* did not involve a marketplace. (*Id.* at 25.) Ultimately, the ALC read *Travelscape* as adopting a broad rule that covered Amazon Services’s business of running a marketplace: when a business engages in “activity . . . to achieve a profit, benefit, or advantage by either direct or indirect means from the sale of property owned by [it] or others,” that business is responsible for collecting and remitting sales tax under the law in effect in 2016. (*Id.* at 23.) This standard, the ALC realized, would sweep in payment processors, like banks and credit card companies, so the ALC simply carved them out. (*Id.* at 29 n.28.) Those providing shipping services, too, fall within the ALC’s sweeping standard, as do advertisers. So the ALC simply deemed them excluded too. (*Id.* at 28 n.27.)

Third, the ALC observed that the Department could not prevail just because the ALC agreed with the Department's broad interpretation of the 2016 statute. For the Department to prevail, reading the statute more narrowly to exclude marketplace facilitators like Amazon Services would have to be unreasonable. (Op. 16.) The ALC simply declared that Amazon Services's position was "unreasonable" (*id.* at 47), despite acknowledging that, at the time of the audit, "no specific statutory provision imposed the responsibility to collect sales or use tax on a 'marketplace facilitator'" (*id.* at 18). Also, as noted above, the Department had repeatedly told the legislature that changes to the statute were needed to eliminate an ambiguity regarding marketplace facilitators (*i.e.*, to "close[] the gap" so that "nobody has to guess"), and the legislative committee had reported that the law had to be changed to cover internet marketplace facilitators. Indeed, the Department had been for some time accepting sales tax revenue collected and remitted by third-party sellers for sales on Amazon.com to customers in South Carolina. The ALC never explained why it was unreasonable for Amazon Services to treat the Department's acceptance of sales tax revenue from third-party sellers as a reliable indication that the Department understood that those third-party sellers were the responsible seller in South Carolina for sales tax purposes. That is especially true in the absence of any guidance to the contrary.

Having ruled that the 2016 statute unambiguously applied to third-party sales, the ALC rejected Amazon Services's constitutional claims. (*Id.* at 48-52.) This appeal followed.

STANDARD OF REVIEW

Appeals from the ALC are governed by the Administrative Procedures Act ("APA"). S.C. Code Ann. § 1-23-310 *et seq.* Under the APA, this Court may reverse, vacate, or modify the ALC's decision if Amazon Services's substantial rights have been prejudiced because the administrative decision was "(a) in violation of constitutional or statutory provisions; (b) in

excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” *CarMax Auto Superstores W. Coast, Inc. v. S.C. Dep’t of Revenue*, 397 S.C. 604, 608-09, 725 S.E.2d 711, 713 (Ct. App. 2012) (quoting S.C. Code Ann. § 1-23-380(5)), *aff’d as modified*, 411 S.C. 79, 767 S.E.2d 195 (2014). “As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence.” *MRI at Belfair, LLC v. S.C. Dep’t of Health & Envtl. Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008). “An issue regarding statutory interpretation is a question of law,” which is reviewed *de novo*. *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005).

ARGUMENT

The distinction upon which the ALC foundered—between the business of operating a marketplace on the one hand and of selling goods in a marketplace on the other—has not historically troubled state sales tax administrators or courts. A successful retail shopping mall in Charleston will attract many customers and generate substantial revenue for the merchants who lease space there. Nobody has ever doubted that the independent sellers, not the mall operator, must collect and pay the sales taxes for purchases made in stores located in the mall, even though the mall’s business is to profit (through, for example, lease payments linked to sales volume) from the transactions facilitated by its marketplace. In the language of the applicable South Carolina Sales and Use Tax statute, the operator of a marketplace does not “transfer, exchange, or barter . . . tangible personal property for a consideration,” and the operator of a marketplace is not “engaged . . . in the business of selling tangible personal property.” S.C. Code Ann. §§ 12-36-100, -910(A).

To be sure, the marketplace that Amazon Services operates lacks four walls and its patrons shop online. But like any marketplace, physical or online, it must attract buyers. A physical marketplace, like a retail shopping mall, needs, among other things, ample parking, wide, well-lit hallways, security, prominent signage, and a set of rules for those selling or buying at the mall. Similarly, Amazon Services's marketplace must provide reliable information about products in a format buyers can readily understand, and it has to assure buyers, among other things, that their financial information is secure and that sellers will deliver on their promises. And it needs a set of rules that makes shopping easy, quick, and reliable for buyers. Amazon Services, working in conjunction with other Amazon companies, performs these same functions. But none of these functions, individually or collectively, means that Amazon Services transferred third-party sellers' tangible goods for consideration or was engaged in the business of selling third-party sellers' products.

South Carolina, like dozens of other states, has decided to *add* online marketplace operators like Amazon Services to the kinds of businesses required to collect and remit sales taxes. It changed its statute in various ways to implement that new policy *prospectively*.

The decision of the ALC, however, impermissibly attempts to reach back in time and sweep a marketplace business model into a sales tax statute that did not cover it. Doing so might be more convenient for the Department, as the ALC itself appeared to recognize at the outset of the hearing. (See Tr. 22.) But administrative convenience is not a legitimate basis for

retroactively capturing conduct not clearly covered by a tax statute. See *Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900-01 (1988). So the ALC, reasoning

backwards from its conclusion that Amazon Services *should* be subject to the sales tax, cast the language of the statute aside, created new and unbounded legal standards, misread *Travelscape*,

and never even asked the controlling question: whether Amazon Services's position that it was not subject to the 2016 statute was reasonable. This Court should reverse the decision of the ALC.

I. Amazon Services Operates an Online Marketplace and Does Not Sell Third-Party Sellers' Products.

The application of the South Carolina Sales and Use Tax Act to third-party sales in the Amazon.com marketplace is, in certain respects, undisputed. The statute provides that a "sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged . . . in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A). Everyone agrees that items sold to South Carolina customers in the marketplace are "tangible personal property" sold "at retail" in South Carolina. (See Dep't's Proposed Final Order & Decision at 3, 16.) In addition, the term "gross proceeds of sale" means "the value proceeding or accruing from the sale, lease, or rental of tangible personal property." S.C. Code Ann. § 12-36-90 (2011). Once again, everyone agrees that the prices third-party sellers charge for their products are the "gross proceeds" of the sales at issue here. (See Dep't's Proposed Final Order & Decision at 14.) So that is the tax base to which the sales tax is applied. Finally, it is agreed that, for those sellers who had the requisite connection to South Carolina, the seller is responsible for paying the tax to the State, even if the seller does not, at the time of sale, collect the tax from the buyer.³ See S.C. Dep't of Revenue, S.C. Sales and Use Tax Manual, Ch. 2, p. 2

³ The U.S. Constitution requires a "substantial nexus" between an out-of-state taxpayer's activity and the taxing jurisdiction before a tax may be applied to the out-of-state taxpayer's activity. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In 2016, this "substantial nexus" requirement was satisfied in the retail sales context only if the remote seller had a physical presence in the taxing jurisdiction. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). This physical-presence requirement was overruled by *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092-99 (2018).

(2015); S.C. Code Ann. § 12-36-940(B).⁴ The only question at issue here concerns *who* made the sales.

A. Under the 2016 Sales Tax, Amazon Services Is Not the Seller of Third-Party Products on Its Marketplace.

The statute defines “sale” as “any transfer, exchange, or barter, conditional or otherwise, of tangible personal property *for* a consideration.” S.C. Code Ann. § 12-36-100 (emphasis added). The words of a statute “must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” *Bryant*, 295 S.C. at 411, 368 S.E.2d at 900-01. “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). So, under the law in effect at the time of the transactions at issue here, 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. *See* S.C. Code Regs. 117-300.1 (requiring retailers to obtain a license to do business if they “mak[e] sales of tangible personal property . . . in this state”).

I. Amazon Services Receives Compensation Only for Services Provided to Sellers, and Those Services Are Not Subject to the Sales Tax.

The evidence established that, when a customer orders a product on the Amazon.com website from a third-party seller, the funds the customer provides for that product—what the

⁴ The sales tax is complemented by a use tax, which is “imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.” S.C. Code Ann. § 12-36-1310(A). Retail sellers who have the requisite connection to South Carolina are required to remit and collect the use tax. *See* S.C. Code Ann. § 12-36-1340 (1998).

BSA calls the “sales proceeds”—are sent to Amazon Payments (not Amazon Services) and those funds belong to the seller. Under the BSA, the sales proceeds are held in the third-party seller’s account with Amazon Payments. (Ex. 3 at AS0000082.)

Uncontroverted trial testimony confirmed what the BSA provides regarding payment. When a buyer purchases an item from a third-party seller, Amazon Payments “charge[s] the customer’s credit card or payment card,” and the “funds . . . flow from the customer’s account to Amazon Payments.” (Tr. 101.) Amazon Payments is “the conduit through which the funds from the customer get to the [third-party] seller.” (Tr. 102; *see also* Tr. 337 (describing payment process from a third-party seller’s perspective and concluding: “These are my products. I’m the seller of these products. It’s my money.”).) The seller can request disbursement of its money immediately, if it wants. (Tr. 212.) The customer—that is, the party to the transaction surrendering consideration in exchange *for* the purchased product—does not pay Amazon Services for anything. There is no testimony, exhibit, or other evidence that shows Amazon Services receives consideration in exchange for the transfer of tangible personal property.

In fact, the evidence demonstrates conclusively the opposite. Sellers owe payments to Amazon Services for various services that Amazon Services provides to *them*. Those services are detailed in the record, and discussed above. *See supra* at 12-14. They include offering the sellers access to Seller Central, advertising services, and a safe and reliable interface for listing a product. The compensation Amazon Services receives is not consideration for an exchange of tangible personal property; it is compensation for having provided services to sellers.

The third-party sellers have authorized Amazon Payments to satisfy their payment obligations to Amazon Services out of their product’s sales proceeds. But the seller’s agreement to pay a portion of sales proceeds to a service provider is beside the point. The evidence is

undisputed that when Amazon Payments deducts those service fees from the sales proceeds and remits the fees to Amazon Services on behalf of the sellers, the seller's payment obligation to Amazon Services is satisfied. (See Ex. 3 at AS0000062.) Thus, the money was the seller's to disburse, and a portion was disbursed to Amazon Services at the seller's direction. Amazon Payments has no right to do anything with sales proceeds other than what sellers direct. (See Ex. 3 at AS0000082-83.) Only the sellers could have directed the payment of a portion of the sale proceeds to Amazon Services. The customers who purchased the products had no right to direct any payment to Amazon Services, no reason to do so, and did not do so. The customers paid the sellers and nobody else.

The ALC rejected this straightforward conclusion, repeatedly insisting that *Amazon Services* receives payment from the customer. (Op. 8-9, 30-33, 39, 43, 47.) For example, the ALC stated: "Amazon Services accepts money from customers in exchange for the promise that the Merchant will transfer her product to the customer. Amazon Services receives the money and eventually remits a portion of the proceeds—minus its fees—from the sale to the Merchant on its bi-weekly disbursement schedule." (*Id.* at 30.) But the ALC cited no evidence for the assertion that Amazon Services "accepts money from customers." And there is none. There is no evidence—much less substantial evidence—that Amazon Services "receives the money" or "remits" any money to merchants. It is clear that Amazon Services does neither.

It might be that the ALC attributed conduct of Amazon Payments to Amazon Services. But it never offered any legal justification for doing so. Amazon Services and Amazon Payments are distinct companies, in form and function. There was no suggestion that the corporate veil should be pierced, and no evidence that would justify doing so. See *Mid-S. Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597-98, 649 S.E.2d 135, 140-41 (Ct. App. 2007)

(courts “disregard the corporate entity” only when the party seeking to pierce the veil has proven “injustice or fundamental unfairness”); *see also, e.g., S.C. Dep’t of Revenue v. Anonymous Co. A*, 401 S.C. 513, 515-21, 678 S.E.2d 255, 256-59 (2009) (rejecting argument that two corporations should be treated as one person for purposes of applying sales tax statute).

But even more fundamentally, conflating Amazon Services and Amazon Payments shows the ALC’s failure to appreciate the true nature of the transaction. The customer does not provide consideration to Amazon Payments (or Amazon Services); the customer provides consideration to the third-party seller, and the seller has hired Amazon Payments to process the transaction. A third-party seller who sells over its own website might use Amazon Payments as payment processor. (*See* Tr. 107.) That website might be maintained by a contractor the seller hired to build and host the site. (*See* Tr. 367-68 (discussing website host alternative).) Still, every sale on that website quite obviously is made *by the third-party seller*, not by Amazon Payments and not by the website host. Those companies provide *services* to the seller, and receive consideration for those services. That remains true even if the consideration those companies receive is tied to the volume of sales the seller makes. Only the seller receives consideration for selling tangible personal property. So it is with third-party sales on the Amazon.com marketplace.

The Supreme Court’s decision in *Travelscape* does not support the ALC’s conclusion because *Travelscape* dealt with a business model materially different from the marketplace Amazon Services operates.

In *Travelscape*, the website operator (Travelscape) was not a marketplace. Instead, Travelscape negotiated with hotels so that Travelscape could sell to customers the right to occupy the hotels’ rooms. Unlike Amazon Services, Travelscape was a price-setter: it

determined the ultimate price customers would pay by (1) negotiating a rate it would pass on to hotels, and (2) adding a markup of its own that it would keep. *See Travelscape*, 391 S.C. at 95, 705 S.E.2d at 31. The actual price listed for the room—that is, the amount the customer actually paid as consideration for the right to occupy the room—was thus finally determined by Travelscape. *See id.* at 95-96, 705 S.E.2d at 31.⁵

Critically, the customer reserving the room paid Travelscape for it; the customer did not pay the hotel operator. It is not just that payment was initiated over Travelscape's website (which is equally true of the Amazon.com marketplace). Rather, actual payment, the flow of money, went to Travelscape; the money *belonged to* Travelscape, not the hotel. *Id.* at 95-96, 705 S.E.2d at 31. The hotel at which the customer stayed sent an invoice to Travelscape after the customer checked out. Travelscape then paid the hotel what Travelscape had agreed to pay the hotel for the stay, an agreed rate that was negotiated before the customer reserved the room. *Id.* The customer had nothing to do with paying the hotel. In short, Travelscape, not the hotel, sold the right of occupancy.

The ALC seemed to believe that identifying the party *receiving payment* is the most important factor in determining who is the seller. (*See Op.* 25-26.) Even if true, that distinguishes this case from *Travelscape*. In *Travelscape*, a website operator was a retailer of hotel room reservations, and was paid by customers for providing them the right to stay in a hotel room. The Department read *Travelscape* the same way, citing *Travelscape* and arguing that “a

⁵ Travelscape argued otherwise, but the Supreme Court rejected that argument. Travelscape argued that its service fee was not part of the gross proceeds the customer paid for the room. But the Supreme Court ruled that under the relevant statute, Travelscape's fee was part of the gross proceeds customers paid for the room. *Travelscape*, 391 S.C. at 98, 705 S.E.2d at 33. (“Because the cost of services is specifically included in the definition of gross proceeds of sales, we find the fees retained by Travelscape for its services are taxable as gross proceeds.”).

sale occurs when one person provides another with payment for the right to take possession of property.” (Dep’t’s Memo. in Support of Mot. for Summary Judgment at 1-2.) Here, Amazon Services is not a retailer of the personal property sold by the third parties and is not paid by customers for providing them personal property owned by the third parties. *Travelscape* thus supports reversing the ALC’s decision.⁶

2. *The ALC’s Conclusion That Amazon Services Is “in the Business of Selling” Is Not Supported by Substantial Evidence and Is Wrong as a Matter of Law.*

Just as Amazon Services has not engaged in conduct meeting the definition of “sale” with regard to third-party transactions in its marketplace, likewise Amazon Services is not “in the business of selling” with respect to those sales. S.C. Code Ann. § 12-36-910(A). The ALC’s contrary conclusion depends on an unprecedented expansion of the statute, and appears custom-designed to retroactively tax only Amazon Services. This Court should reject it.

The ALC interpreted the phrase “in the business of selling” to impose the following legal standard: “The Court thus must determine whether the object of Amazon Services’ business activity is to achieve a profit, benefit, or advantage by either direct or indirect means from the sale of property owned by Amazon Services or others on its Marketplace.” (Op. 23.) That standard is inconsistent with the undisputed facts that Amazon Services (1) does not choose what items third-party sellers make available to customers in the marketplace and at what price, (2) does not determine the number of products to make available to customers in the marketplace

⁶ *City of Charleston v. Hotels.com, LP*, 520 F. Supp. 2d 757 (D.S.C. 2007), is distinguishable on the same basis. *See id.* at 768 (hotel website operators “consummate[ed] the sale,” “collect[ed] the retail rate for the room and the tax,” and were “the only entity on the selling part of the transaction who [knew] the amount of the gross price paid by the consumer” (quoting submission by taxing jurisdiction)); *accord Travelscape*, 391 S.C. at 100, 705 S.E.2d at 34 (discussing *City of Charleston*: the court’s “inquiry was directed not at determining who was physically providing sleeping accommodations, but rather on who was accepting money in exchange for supplying the room”).

nor own or exercise control over any inventory third-party sellers make available to customers in the marketplace, (3) does not receive payment from buyers for the products, and (4) does not transfer ownership of products to the buyers. Prior to the ALC's ruling, no court or tax regulator had said that a marketplace—a business that engages in *none* of these selling activities—was “in the business of selling” property it did not own.

No court or regulator had stretched the statute this far, and for good reason. The ALC's expansive standard contains no principled stopping point. Numerous industries *serve* those who sell and thus, in the language of the ALC's standard, have as their “object” achieving a “profit” by “indirect means from the sale of property owned by . . . others.” Payment processors, credit card companies, banks, delivery companies, advertisers, and more *all* fall within the uncontainable breadth of the ALC's new standard. The ALC's ruling tacitly observes as much because it recognizes that all of these industries that serve and support those who sell were not meant by the legislature to be included within the statute. (*See* Op. 28 n.27, 29 n.28.)

The ALC's new standard would also encompass brick-and-mortar mall operators. Such mall operators collect rent for space in the mall and so they benefit, at least indirectly, from the sale of goods by others. Yet, unsurprisingly, neither the Department nor any court has ever suggested that mall operators must collect and remit sales tax. So it appears that the ALC's new standard is designed to achieve a single purpose: to tax the act of providing marketplace services *only* over the internet, while exempting all other industries that fall within its broad terms.

This is policymaking in the form of statutory interpretation. It is an admission that what is driving the outcome is not, as the law requires, the meaning of the words the legislature has written into the statute. *See S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 20, 382 S.E.2d 11, 14 (Ct. App. 1989) (“Once the Legislature has made [a] choice, there is no room for

the courts to impose a different judgment based upon their own notions of public policy.”).

Another clear sign that this is judicial policymaking is how the ALC’s conclusion produces inexplicable oddities. If Amazon Services is the seller of third-party products, then it is constantly offering the *same* product at different prices. (Tr. 87-88.) And if Amazon Services is the seller of third-party products, then Amazon Services is often *competing* with other Amazon companies selling the same products. In addition to being factually incorrect, neither of these conclusions makes any sense.

The *ad hoc* exceptions that the ALC had to acknowledge to cabin its interpretation are found in no regulation issued by the Department to which the ALC could defer. To the contrary, the ALC noted that the regulations clearly and unqualifiedly provide that “receipts from services, when the services are the true object of the transaction” are *not* subject to the sales tax. (Op. 28 n.27 (citing S.C. Code Regs. 117-308).) That regulation makes clear that mall operators and other service providers are not responsible for collecting and remitting sales tax, and it equally makes clear that Amazon Services, an internet marketplace operator and service provider, likewise is not responsible for collecting and remitting sales tax.

As with the definition of “sale,” the ALC misread the decision in *Travelscape* to support its misinterpretation of the phrase “in the business of selling.” Just as the relevant sales tax provision imposes obligations on those “engaged in the business” of selling, the hotel tax statute at issue in *Travelscape* imposed obligations on those “engaged in the business” of furnishing hotel accommodations. As discussed above, in *Travelscape*, the website operator itself provided the room reservation to the customer, and the customer paid the website operator the amount the website operator ultimately determined to charge for that room reservation. *See supra* at 27-29. What made the website operator subject to tax was the fact that it actually “provide[d] hotel

reservations to transients for consideration.” *Travelscape*, 391 S.C. at 101, 705 S.E.2d at 34. It did not matter that the hotel “physically provide[d]” the room. *See id.* The website operator in *Travelscape* had been paid for providing the reservation, which the hotel would treat just the same as any other reservation made directly by phone or through the hotel’s own website. The decisive fact was that the website operator “accept[ed] money in exchange for supplying hotel rooms.” *Id.* at 101, 705 S.E.2d at 35. The website operator was thus “in the business” of furnishing rooms.

The ALC’s standard lops off critical limitations that the Supreme Court carefully included in *Travelscape*. *Travelscape* emphasized that the taxpayer was paid by the customer for the reservation being sold. That rationale does not capture marketplace operators, who do not receive payment for what is being sold. Amazon Services does not (1) negotiate an amount with third-party sellers that Amazon Services will pay them for products that Amazon Services then sells on Amazon.com, (2) determine the ultimate price shown to the customer after applying its own mark-up charge, (3) get paid itself by the customer for the product, (4) receive an invoice from the third-party seller after the product is shipped to the customer, or (5) pay the seller the negotiated amount it had agreed to pay the seller. *Travelscape* thus provides no support for the unlimited and baseless expansion of the tax statute that the ALC developed for this case.

B. The ALC’s “Point of Sale” Construct Has No Basis in the Law.

With no textual support in the statute, regulation, or court decision interpreting the statute, the ALC’s decision created an entirely new concept to resolve this case. According to the ALC, Amazon Services is liable for sales tax on third-party sales because it “conducts the point of sale.” (Op. 7; *see also id.* at 9-10, 25-27, 33-36, 38-39, 43, 46, 48.) The ALC acknowledged that this phrase has no footing in the statute. (*Id.* at 25-26.) This unprecedented

legal concept is completely foreign to South Carolina sales-tax law, and yet is a cornerstone of the ALC's decision.

Because no South Carolina authority discusses the "point of sale" in the context of South Carolina sales-tax law, the ALC had no established framework it could apply to Amazon Services's business to determine whether what it deemed "control" over the "point of sale" made Amazon Services the seller of third-party sellers' products. The ALC repeatedly pointed to rules Amazon Services established in the BSA to maximize the efficiency and reliability of transactions for both buyers and sellers—rules that make the marketplace attractive. But that is what a *marketplace* does. That should not be confused with the selling that goes on *within* that marketplace. The ALC's new "point of sale" doctrine confuses the business of running a marketplace with the business of selling.

It is true that third-party sellers agree that Amazon Services will provide order information to customers, and third-party sellers agree to accept and process cancellations, returns, and refunds in accordance with the BSA and the applicable Amazon refund policies. (See, e.g., Op. 4-6, 8, 13, 25-27.) Such policies help assure customers that transactions completed in the Amazon.com marketplace are reliable. (See, e.g., Tr. 71-73, 130-31.) The same is true of third-party sellers' agreement not to contact customers with the intent to collect any amounts owed in connection with transactions. (See Op. 4.) Customers want confidence that transactions completed in the marketplace are, in fact, complete. (Tr. 70-73.) This rule also helps protect customers against fraud by unscrupulous sellers. (Tr. 105-08.) That benefits not only customers but the numerous honest sellers who Amazon Services is eager to attract to sell in its marketplace. (Tr. 225-26.) Third-party sellers also agree to use only those tools and methods Amazon Services designates for communications with users of the Amazon.com website. (Op.

4.) But sellers can and sometimes do make other modes of communication available to customers who use the marketplace by including that information on the seller page that Amazon Services allows the seller to create. (Tr. 82-83.) None of these rules, either individually or taken together, supports the notion that Amazon Services is the *seller* of the third-party goods. Instead, these rules construct the marketplace in which the actual sellers of third-party goods can effectively and efficiently sell their products. That Amazon Services exerts some control over how the marketplace operates does not make it the seller any more than does a mall operator's choice to insist that the building open at a certain time in the morning and close at a certain time at night.⁷

Worse, not only is the "point of sale" concept novel, but the ALC badly mischaracterized what Amazon Services controls at the so-called "point of sale." According to the ALC, "the most important consideration is who is accepting money in exchange for the product at the point of sale." (Op. 38.) As noted above, the ALC wrongly asserted that "Amazon Services is the party who is present at the point of sale and who accepts consideration in exchange for the transfer of the product." (*Id.* at 39.) Indeed, as the ALC itself acknowledged elsewhere, "Amazon Services clearly does not accept the money . . . because that function is carried out by Amazon Payments." (*Id.* at 30.) The record is clear: Amazon Services does *not* accept money in exchange for the product—at the so-called "point of sale" or anywhere else. Third-party sellers

⁷ In any event, none of these policies inhibits third-party sellers' ability to sell. (See Tr. 72-73, 103, 131, 139-40, 285, 411-12, 434-35.) The Department produced *no evidence* that *any* seller viewed the rules governing the Amazon.com marketplace as inhibiting its ability to sell. These are rules that third-party sellers *accept* when they voluntarily decide to sell in the marketplace. If the rules inhibited sellers' ability to sell, the marketplace would be *less* successful *as a marketplace*. Put simply, the business of operating a marketplace is not the same thing as the business of selling.

accept money in exchange for the product, and they contract with Amazon Payments, not Amazon Services, to process those payments. *See supra* at 12-14.

C. Amazon Services Is Not a Consignee Responsible for Sales Tax on Third-Party Sales.

The Sales and Use Tax Act provides that the “gross proceeds of sales” include “the proceeds from the sale of property sold on consignment by the taxpayer.” S.C. Code Ann. § 12-36-90(1) (2011). The ALC found that Amazon Services is not in fact a consignee of goods sold by third-party sellers. Yet the ALC took another novel turn when it reasoned that Amazon Services is enough *like* a “consignee” of third-party sellers’ property—asserting that it has a “consignment-type relationship” with third-party sellers—to warrant imposing sales-tax collection and remittance obligations on it. (Op. 46.) The ALC cited no South Carolina authority for attaching sales-tax obligations to “consignment-type relationships.”

To begin, the ALC was correct that Amazon Services is not a consignee of third-party sellers’ sales. A consignment sale requires an agency relationship between the consignee (*i.e.*, the retailer) and consignor (*i.e.*, the owner of the property). *See Greenwood Mfg. Co. v. Worley*, 222 S.C. 156, 161, 71 S.E.2d 889, 891 (1952) (“if it is a consignment, title does not pass, being merely an agency for the purpose of the sale”) (citing 77 C.J.S. Sales § 270 at p. 1072)); *see also* Jerome R. Hellerstein & Walter Hellerstein, II *State Taxation: Sales and Use, Personal Income, and Death and Gift Taxes and Intergovernmental Immunities* (3d ed. 2000) § 13.01(2)(d). The BSA expressly disclaims any such agency relationship. (Ex. 3 at AS0000041.)

In addition, undisputed testimony at trial explained how a consignment relationship is structured. The testimony left no doubt that the relationship between Amazon Services and third-party sellers is materially different from a consignment relationship.

In a consignment transaction the retailer [consignee] sets the price, in a third party sale the seller sets the price. In a consignment

transaction the retailer [consignee] determines which products to sell, in a third party transaction the seller, the third party seller, decides which products to sell. In a consignment transaction the retailer [consignee] is the seller of record, in third party sale[s] the [third] party is the seller of record to the customer. In a consignment model . . . the retailer [consignee] determines how much cost—how much inventory to carry, even though it’s still owned by the supplier, in a third party sale the third party seller determines how many units of a product to sell.

(Tr. 159-60.)

As discussed above, Amazon Services does not control the inventory, and does not decide what to sell or set the price. *See supra* at 7-9. Third-party sellers control all of that, and may, in their discretion, change how many units to sell, adjust the price, or even cancel orders at any point before title to their products shifts to their customers. (Tr. 325-28, 390-91.)

The ALC’s reasons for imposing tax obligations on Amazon Services based on the supposed “consignment-type” relationship ignore all of these facts. Indeed, some of the ALC’s reasons are based on findings with no support in the record. For example, the third-party seller is not “prohibited from accepting payment from the customer.” (Op. 46.) To the contrary, it *does* accept payment from the customer. *See supra* at 12-14. In addition, it is not true that only “Amazon” “provides a receipt for the products purchased.” Third-party sellers can and do include receipts with the products they ship. (*See* Ex. 3 at AS0000051-52.)

Given the lack of similarity between consignment sales and third-party sales on Amazon.com, it is not surprising that courts in other jurisdictions have rejected the argument that marketplace operators should be considered or treated as consignees. *See Stiner v. Amazon.com, Inc.*, 120 N.E.3d 885, 892 (Ohio Ct. App. 2019) (distinguishing Amazon marketplace from consignee); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197, at *8-12 (D.N.J. July 24, 2018) (Amazon marketplace not a broker who exercised control over product by taking title to it; instead, it resembled broker who never exercised control and was thus not a

“seller”); *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App’x 879, 887-88 (Fed. Cir. 2017) (rejecting argument that Amazon.com, Inc. was engaged in consignment sales when listing products sold by third-party sellers on its website). This Court should not break new ground.

II. Amazon Services’s Interpretation of the Statute Was Reasonable and That Alone Warrants Reversal.

For all the reasons discussed above, there is no basis in the statute, regulations, or case law to impose sales-tax obligations on Amazon Services for third-party sales in its marketplace in 2016. This Court can and should reverse the ALC’s ruling on that basis. But even if this Court does not believe that Amazon Services’s interpretation of the 2016 Sales and Use Tax Act is the *best* interpretation, it is *at least* a reasonable one. For that reason as well, this Court should reverse the ALC’s decision.

A. A Taxpayer Cannot Be Held Liable When a Reasonable Interpretation of the Statute Excludes the Taxpayer from Tax Obligations.

It is well settled in South Carolina that where “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) (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm’n*, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936)); *see also Hadden v. S.C. Tax Comm’n*, 183 S.C. 38, 190 S.E. 249 (1937); *Columbia Ry., Gas & Elec. v. Carter*, 127 S.C. 473, 121 S.E. 377 (1924). This critical presumption is a bulwark against the natural tendency for governments to expand the reach of their taxing authority, and ensures that taxpayers are given fair notice so that they may structure their affairs accordingly. *See, e.g., Pacolet Mfg. Co. v. Query*, 174 S.C. 359, 364, 177 S.E. 653, 655 (1934).

The ALC recognized the Department's heavy burden to prove that Amazon Services's interpretation of the statute was not just wrong but unreasonable. (Op. 16.) But at no point as the ALC interpreted the language of the statute in the novel ways discussed above did the ALC ever explain why Amazon Services's interpretation of the statute was unreasonable. As the ALC observed at trial, the law "is not clear" as applied to third-party sales on the Amazon.com marketplace. (Tr. 462-63.) That fact should have been dispositive. Instead, it was simply not discussed in the ALC's ruling.

Alltel Communications thus requires reversal of the ALC's decision. There, the taxpayers were cellular service providers that provided wireless voice and data communication services using radio communication towers and facilities. *Alltel Commc'ns*, 399 S.C. at 316, 731 S.E.2d at 871. Section 12-20-100 imposed a heightened license fee on a "telephone company," which the cellular service providers did not pay. *Id.* at 317, 731 S.E.2d at 871 (citing S.C. Code Ann. § 12-20-100(A)). The Department assessed a tax deficiency, arguing that cellular service providers were "telephone companies" under the statute. The Court of Appeals, like the ALC here, acknowledged that the law "was not 'absolutely clear,'" but it rejected the taxpayers' argument that such lack of clarity resolved the case in their favor. *Id.* at 318, 731 S.E.2d at 872. On appeal to the Supreme Court, the cellular service providers argued that they should prevail in light of the Court of Appeals' acknowledgment that the statute "was not 'absolutely clear.'" *Id.* at 321, 731 S.E.2d at 873.

The Supreme Court agreed. Applying the "settled" rule that any substantial doubt is resolved in favor of the taxpayer, the Supreme Court held that the statute was ambiguous as applied to the wireless service providers, and reversed the Department's determination and Court of Appeals' decision. *Id.* at 318, 731 S.E.2d at 872. The Supreme Court explained that "the

absence of a statutory definition for ‘telephone company’ leaves the matter in doubt,” and such doubt must be resolved in favor of the taxpayers. *Id.* at 320 & n.3, 731 S.E.2d at 872 & n.3. The Court of Appeals’ acknowledgment that the law was “not ‘absolutely clear’” foreclosed the Department’s attempt to impose the tax on cellular service providers. *Id.* at 321, 731 S.E.2d at 873.

Here, as in *Alltel Communications*, there is no defined term or other express statutory indication that online marketplace operators are “sellers” or “retailers” within the meaning of the statute. And here, as in *Alltel Communications*, the ALC acknowledged during trial that “the tax law is not clear.” That should resolve the case.

B. There Is Ample Evidence That Amazon Services’s Interpretation of the Statute Was Reasonable.

Even without the ALC’s express acknowledgment that the issue was unclear, there is overwhelming evidence that reading the statute as not imposing sales-tax obligations on Amazon Services for sales by third parties is reasonable. The language of the 2016 statute does not impose sales tax on Amazon Services for sales by third parties. The Department told the legislature via sworn testimony that there was doubt that the statute could be applied to online marketplace facilitators like Amazon Services. The legislature specifically amended the statute in 2019 to provide the clarity that the Department admitted was missing. And numerous other jurisdictions that considered the meaning of similar statutory language had refrained from applying their sales-tax statutes to online marketplace facilitators like Amazon Services until those statutes were similarly amended.

1. The Department’s Statements to the Legislature and Its Prior Practice Confirm the Reasonableness of Amazon Services’s Interpretation.

The Department effectively conceded that the 2016 version of the Sales and Use Tax Act is ambiguous when its Director addressed the General Assembly while this litigation was

ongoing. In public testimony given at various times during 2018, the Department's Director repeatedly admitted that "[t]here is no law related to the taxation of third party sales," and he urged the legislature to change the statute. (Ex. 205 at DOR1762; Ex. 203 at DOR1236; Ex. 207 at DOR2021.) The Director testified that the proposed legislation would "close[] the gap" so that "nobody has to guess" who owes taxes on third-party sales. (Ex. 194 at 6:13-15, 8:40-50.) That there was a "gap" in the 2016 version of the statute that required a taxpayer like Amazon Services to "guess" whether it owed the tax is the precise concern that the rule giving taxpayers the benefit of the doubt is designed to guard against. *See Gould v. Gould*, 245 U.S. 151, 153 (1917) (collecting cases).

Not only did the Department admit that the law (at best) left Amazon Services to "guess" whether it was obliged to collect and remit sales tax on third-party sales, but the Department's practice suggested that the best "guess" was that Amazon Services should not. The Department was receiving sales-tax payments from third-party sellers for sales on Amazon.com to customers in South Carolina. Indeed, Amazon Services offered to collect and remit *to the third-party seller* applicable sales tax owed on third-party sales (for third-party sellers whose sales volume topped a certain threshold). (Tr. 241-45; Ex. 23 (tax collection service terms).) The third-party seller, not any Amazon entity, then remitted the sales tax to the State. (Tr. 244-45.) As of 2016, the Department had issued no guidance suggesting that such a process was wrong because Amazon Services, and not the third-party seller, was the responsible seller for sales-tax purchases. Instead, the Department collected the payments without telling Amazon Services (or the third-party sellers) that Amazon Services was liable for the tax. It was surely reasonable for marketplace facilitators to infer from this practice that the Department agreed that the third-party seller bore South Carolina's sales-tax obligations.

2. *The Legislature's Decision to Add "Marketplace Facilitators" to the Sales and Use Tax Act Confirms the Reasonableness of Amazon Services's Interpretation.*

On June 18, 2018, the Director of the Department of Revenue told the Legislative Oversight Committee that there was an "emerging issue" about whether online marketplaces were required to remit sales taxes on third-party sales, noting that "Amazon is a prime example." (Ex. 213 at 36-37; *see also* Ex. 202 at DOR1184.) The Director told the Committee that there needed to be legislative "change" to "ensure that online marketplace retailers collect/remit sales tax." (Ex. 213 at 37; *see also* Ex. 202 at DOR1184.)

Several months later, in October 2018, the Legislative Oversight Committee summarized legislative changes that had been recommended by the Department. (*See* Ex. 192.) The Committee noted that the Department had recommended changes "to ensure that online third-party sales will be subject to tax." (Ex. 192 at AS140231.) The Department had "report[ed] that this statutory change would allow it to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors through the marketplace sites." (*Id.*) "Without this ability," the Committee continued, the Department "would have the right to collect sales tax directly from some third-party sellers, but it predicts that the significant administrative burden of collecting from so many individuals and companies would result in a large percentage of these taxes going uncollected." (*Id.*) Singling out Amazon, the Committee noted "that, *if there had been a law like this in 2016*, Amazon's additional sales tax liability for that year would have been \$57 million." (*Id.* (emphasis added).)⁸

The legislature ultimately changed several provisions of the Sales and Use Tax Act to reach the business model at issue here. *See* 2019 S.C. Act No. 21 (effective April 26, 2019).

⁸ The \$57 million figure reflects the annualized deficiency for 2016 sought by the Department in this case.

“When the Legislature adopts an amendment to a statute, [there is] a presumption that the Legislature intended to change the existing law.” *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008); *Key Corp. Capital, Inc. v. Cty. of Beaufort*, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2007); *N. River Ins. Co. v. Gibson*, 244 S.C. 393, 398, 137 S.E.2d 264, 266 (1964). To hold otherwise would imply that the amendment was “essentially [] a futile act,” an implication courts typically avoid. *Key Corp. Capital*, 373 S.C. at 61, 644 S.E.2d at 678; see also *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002); *TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). The aggressive legislative surgery at issue here fully supports the “presumption” that the law has been changed. At a minimum, it indicates conclusively that the previous law was unclear with respect to its reach.

The 2019 changes were tailor-made to extend the duty to collect sales tax on third-party sales to online marketplace facilitators like Amazon Services. The legislature changed the definition of “retailer” and “seller” to include every person “operating as a marketplace facilitator.” S.C. Code Ann. § 12-36-70 (2019). The legislature added a specific, detailed definition of “marketplace facilitator” in Section 12-36-71. Under the new definition, a “marketplace facilitator” is “any person engaged in the business of facilitating a retail sale of tangible personal property by: (a) listing or advertising, or allowing the listing or advertising of, the products of another person in any marketplace where sales at retail occur; and (b) collecting or processing payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party.” S.C. Code Ann. § 12-36-71(A)(1) (2019). As discussed above, *supra* at 17-18, these changes include new and critical terms that expand the statute’s reach. The statute had never before said that merely “facilitating” sales would carry sales-tax obligations.

Nor had the statute ever before said that the combination of “allowing the listing” of products and “processing payments” for products by “arrangement with a third party” would carry sales-tax obligations.

The new definition also provides that, for purposes of these new activities that combine to create sales-tax obligations, “a marketplace facilitator includes any *related entities* assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace.” *Id.* § 12-36-71(C) (2019) (emphasis added). Never before had the sales-tax statute suggested that the conduct of distinct but related corporate entities could create sales-tax obligations.

All of these changes cover online marketplaces as no provision of the statute, regulation, or court decision had done before. Yet the ALC rejected the significance of the 2019 changes entirely and all but ignored the numerous statements from the Department confirming the need to change the statute to impose sales-tax obligations on online marketplace facilitators for third-party sales. The court pointed instead to prefatory language in the enacting legislation stating that the amendments “shall not be construed as a statement concerning the applicability of the South Carolina Sales and Use Tax to any sales and use tax liability in matters currently in litigation or being audited.” (Op. 18-19 n.24 (quoting 2019 S.C. Act No. 21 § 5 (effective April 26, 2019)).) According to the ALC, this language prevented it from “drawing any inferences” from the amendment. (*Id.*)

But the question is not whether the ALC should “draw any inferences” from the legislation. The question is whether there is any reason to override the legal presumption that amendments to a law changed the law. It cannot be that such a prefatory statement attached to legislation eviscerates that presumption. The statement, on its face, merely respects the

separation of powers: the legislature made clear it would not interfere in the judicial task of resolving this legal dispute between the Department and Amazon Services about the statute in effect during the time period relevant to this case. The prefatory language merely reinforces the point that changes in the law would apply only prospectively. The legislature took care to ensure that the amendments would not have an impermissible retroactive effect.

Properly read, the prefatory statement underscores rather than undermines that the normal rules for adjudicating this case apply, including the presumption that amendments to a law change the law. *See Duvall*, 377 S.C. at 46, 659 S.E.2d at 130. The ALC set aside that presumption without any basis in law or fact, and in the face of all the evidence confirming the presumption with respect to this set of amendments.

3. The Department's Treatment of Remote Sellers Confirms the Reasonableness of Amazon Services's Interpretation.

The Department's treatment of remote sellers—*i.e.*, retailers without a physical presence in South Carolina—provides yet more evidence that Amazon Services's interpretation of the statute was reasonable. In September 2018, the Department issued S.C. Revenue Ruling 18-14 (Ex. 137), which set forth the Department's official position on the sales-tax responsibilities of remote sellers in the wake of the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). This was the first time that the Department had *ever* issued any public guidance on the sales-tax implications of third-party sales in online marketplaces. (Tr. 598-99, 603-04.) In the Revenue Ruling, the Department took the position that, for purposes of calculating a remote seller's "gross revenue" from sales in South Carolina (licensing and sales-tax obligations are triggered when surpassing a threshold of "gross revenue" for sales in South Carolina), third-party sellers are the sellers of their products sold in an online marketplace. (Ex.

137 at 3-4.) This ruling underscores that it was *reasonable*, in 2016, to treat third-party sellers as the sellers of their products sold on internet marketplaces.

It is true that the 2018 Revenue Ruling also declared that those same sales should be excluded from the calculation of the seller's total sales-tax liability, and should be treated instead as sales made by the online marketplace when the marketplace determined its sales-tax liability. (Ex. 137 at 3-4.) For the reasons explained above, Amazon Services believes that treatment of those sales was legally unsupported. But, even if the Department could read the statute in 2018 (the same version applicable in 2016) as allowing it to treat *both* the third-party seller and the online marketplace operator as "sellers" of the same product, that would not undermine the *reasonableness* of Amazon Services's view that only third-party sellers are "sellers" of their products for all sales-tax purposes.

Having decided to treat third-party sellers as "sellers" for purposes of triggering licensing and sales-tax obligations, the Department surely could have *reasonably* concluded that third-party sellers are sellers of their products for *all* sales-tax obligations. After all, nothing in the language of the statute distinguishes between "seller" for purposes of the threshold requirement to trigger sales-tax responsibility and "seller" for purposes of calculating one's total sales-tax liability, so that would be a more natural reading. That the Department chose otherwise does not undermine the reasonableness of that more natural approach. And had the Department in the Revenue Ruling treated third-party sellers as the sellers for all purposes, a court surely would have deferred to the Department's judgment precisely because it would have been *reasonable*. See *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33-34, 766 S.E.2d 707, 717-18 (2014) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 439-40, 581 S.E.2d 836, 838 (2003)). That

reasonable interpretation of the statute is precisely Amazon Services's interpretation of the statute.

4. *The Decisions of Other Jurisdictions Confirm the Reasonableness of Amazon Services's Interpretation.*

Finally, the sheer novelty of the Department's approach confirms the reasonableness of Amazon Services's interpretation. 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." (Tr. 543.) It agreed there had been "zero guidance, absolutely no guidance . . . that had been communicated or written down for the public's benefit on the topic of third party sales and online marketplaces." (*Id.*) And it has conceded that "[n]o other state has attempted to pursue this legal theory against online retailers like Amazon." (Ex. 205 at DOR1737.) There are now at least 36 other states (besides South Carolina) that have passed "marketplace facilitator" laws,⁹ and in none of those other jurisdictions did a taxing agency or court ever conclude that Amazon Services—or any marketplace facilitator—was liable for sales tax on third-party sales before those changes were enacted. Amazon Services reasonably expected that South Carolina would not make itself such an outlier.

⁹ Alabama (2018 H.B. 470), Arizona (2019 H.B. 2757), Arkansas (2019 H.B. 576), California (2019 A.B. 147, 2019 S.B. 92), Colorado (H.B. 19-1240), Connecticut (2018 S.B. 417), District of Columbia (2018 B22-1070), Hawaii (2019 S.B. 396), Idaho (2019 S.B. 259), Illinois (2019 S.B. 689), Indiana (2019 HEA 1001), Iowa (2018 S.F. 2417), Kentucky (2019 H.B. 354), Maine (2019 H.P. 1064), Maryland (2019 H.B. 1301), Massachusetts (2019 H.4000), Minnesota (2017 H.F. 1, 2019 H.F. 5), Nebraska (2019 L.B. 284), Nevada (2019 A.B. 445), New Jersey (2018 A4496), New Mexico (2019 H.B. 6), New York (2019 S. 1509 Part G), North Dakota (2019 S.B. 2338), Ohio (2019 H.B. 166), Oklahoma (2018 H.B. 1019XX), Pennsylvania (2017 Act 43, 2019 H.B. 262), Rhode Island (2017 H. 5175A, 2019 S. 251), South Dakota (2018 SB2), Texas (2019 S.B. 1525), Utah (2019 S.B. 168), Vermont (2019 H. 536), Virginia (2019 H. 1722), Washington (2017 H.B. 2163, 2019 S.B. 5581), West Virginia (2019 H.B. 2813), Wisconsin (2019 A.B. 251), and Wyoming (2019 S.B. 69).

III. Applying the Sales Tax to Amazon Services's Marketplace Facilitation Services Is Unconstitutional.

A. Applying the Sales Tax to Amazon Services's Marketplace Facilitation Services Violates the Due Process Guarantee of Fair Notice.

The Department's attempt to collect sales taxes from Amazon Services for third-party sales during the first quarter of 2016 violates the South Carolina and federal constitutional guarantees of due process. U.S. Const. amend. XIV, § 1; *accord Huber v. S.C. State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 26-28, 446 S.E.2d 433, 435 (1994). "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 [that] they may act accordingly," and "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* A law or regulation that "fails to provide a person of ordinary intelligence fair notice of what is prohibited [or required], or is so standardless that it authorizes or encourages seriously discriminatory enforcement" violates this constitutional guarantee. *Id.* (citation omitted).

The Department's attempt to impose the sales tax on Amazon Services for third-party sales in the first quarter of 2016 effectively seeks to subject Amazon Services to the 2019 amendments, adopted years after the tax period at issue here, and violates the constitutional requirement of fair notice. As discussed above, during the first quarter of 2016, the law was silent as to any sales-tax obligation on online marketplace facilitators for third-party sales. The Department itself acknowledged that under then-existing law "[t]here [was] no law related to taxation of third party sales" and that taxpayers had to "guess" who owed sales tax for third-party sales on online marketplaces. (*See, e.g.*, Ex. 194 at 6:13-15, 8:40-50; Ex. 203 at DOR1236; Ex. 205 at DOR1762; Ex. 207 at DOR2021.) The Department had not attempted to collect sales tax

from Amazon Services or any other marketplace facilitator for third-party sales during the more than 15-year period that Amazon Services had been operating its marketplace. It was not until 2018 that the Department announced a sudden policy change when it issued for the first time any guidance related to the taxation of third-party sales on online marketplaces (in the form of S.C. Revenue Ruling 18-4). That is why the Department advocated for—in the Department’s own words—“legislative change.” (Ex. 202 at DOR1184.) And that is also why the legislature adopted a comprehensive set of amendments specifically crafted to impose this duty on online marketplace facilitators. *See supra* at 17-18, 41-44.

Fox Television shows why the Department’s attempt to give retroactive effect to the 2019 amendments must be rejected. There, the FCC had a history of enforcing a federal law banning “obscene, indecent, or profane language” only if the obscenity was pervasive and repeated rather than “isolated or fleeting.” 567 U.S. at 246. After isolated curse words and brief displays of nudity were broadcast on Fox and ABC, the FCC “clarified” its policy in a new order stating that isolated incidents could be indecent under federal law. *Id.* at 249. The FCC retroactively applied this “clarification” to impose fines on Fox’s and ABC’s previous broadcasts. *Id.*

The U.S. Supreme Court struck down the sanctions orders as a violation of the constitutional guarantee of fair notice. As the Court explained, the regulatory history leading up to the fines made “it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent.” *Id.* at 254. The FCC’s “lack of notice to Fox and ABC that its

interpretation had changed . . . failed to provide a person of ordinary intelligence fair notice of what is prohibited.” *Id.* (brackets, citation, and internal quotation marks omitted).¹⁰ So too here.

B. Retroactively Applying the 2019 Amendments to Amazon Services, and Amazon Services Alone, Violates the Guarantee of Equal Protection.

Applying the Department’s novel interpretation of the Sales and Use Tax Act against Amazon Services also violates the South Carolina and federal constitutional guarantees of equal protection. U.S. Const. amend. XIV, § 1; *accord* S.C. Const., art. I, § 3. “The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment.” *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995); *see also TNS Mills*, 331 S.C. at 626, 503 S.E.2d at 479.

The equal-protection guarantee requires the Department to apply its (doubtful) interpretation of the law equally to all other online marketplace facilitators (*e.g.*, eBay). Indeed, given the breadth of the legal standard the ALC invented to resolve this case, *see supra* at 29-32, equal protection would likely require the Department to apply the interpretation to brick-and-mortar marketplaces like malls, as well as payment processors, credit card companies, banks, delivery companies, and advertisers, all of whom benefit, directly or indirectly, from the sale of products owned by others. The record clearly demonstrates that the Department has singled out Amazon for retroactive enforcement of its extraordinary interpretation.

The Director of the Department of Revenue testified that only Amazon would be subject to the Department’s selective approach to enforcement. In response to a question about whether

¹⁰ It did not matter that, years earlier, the FCC had issued a decision stating that televising nudity “might well raise a serious question of programming contrary to [federal law].” *Fox Television*, 567 U.S. at 256 (citation omitted). “An isolated and ambiguous statement from [an earlier] Commission decision,” the Court explained, “does not suffice for the fair notice required when the Government intends to impose over a \$1 million fine for allegedly impermissible speech.” *Id.* at 256-57.

the proposed legislation would be prospective only, the Director replied: “Absolutely, it will not be retroactive, right.” (Ex. 194 at 7:02-18.) The Director then admitted that this lawsuit is “going to pull up some retroactivity . . . specific to that one company, I haven’t said their name.” (*Id.*; *see also* Ex. 214.) Singling out Amazon Services as the only marketplace facilitator forced to bear the retroactive effect of the Department’s view is disparate treatment.

The ALC dismissed this argument on the hollow ground that Amazon Services “failed to submit any evidence specifically identifying other online marketplaces *and* showing that these other online marketplaces are similarly situated.” (Op. 51.) But the 2019 changes to the Sales and Use Tax Act apply to all online marketplaces, and the Director testified that *only* Amazon Services has been forced by the ALC’s ruling to collect sales taxes on third-party sales before those 2019 changes took effect. When evaluating agency action, courts “cannot ignore the disconnect between the decision made and the explanation given. [A court’s] review is deferential, but [it is] not required to exhibit a naiveté from which ordinary citizens are free.” *See Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation and internal quotation marks omitted). It is clear that the Department, through this litigation, is attempting to apply the 2019 changes retroactively to only one taxpayer. That attempt violates the equal-protection guarantee and should be rejected.

CONCLUSION

The ALC’s decision should be reversed.

Charleston, South Carolina
January 13, 2020

By: Bryson M. Geer
With Express Permission
by John T. Moore

NELSON MULLINS RILEY &
SCARBOROUGH LLP

SIDLEY AUSTIN LLP

SIDLEY AUSTIN LLP

Bryson M. Geer
SC Bar No. 13606
bryson.geer@nelsonmullins.com
John C. von Lehe, Jr.
SC Bar No. 5719
john.vonlehe@nelsonmullins.com
151 Meeting St / 6th Floor
PO Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Carter G. Phillips
(admitted *Pro Hac Vice*)
cphillips@sidley.com
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Constantine L. Trela, Jr.
(admitted *Pro Hac Vice*)
ctrela@sidley.com
Robert N. Hochman
(admitted *Pro Hac Vice*)
rhochman@sidley.com
Neil H. Conrad
(admitted *Pro Hac Vice*)
nconrad@sidley.com
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Attorneys for Amazon Services LLC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2019-001706

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

RECEIVED
JAN 13 2020
SC Court of Appeals

Amazon Services, LLC, ... Appellant,
v.
South Carolina Department of Revenue Respondent.

PROOF OF SERVICE

I the undersigned Administrative Assistant of the law firm of Nelson Mullins Riley & Scarborough, LLP, attorneys for Amazon Services LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by FedEx, postage prepaid, to the following address(es):

Pleadings: INITIAL BRIEF OF APPELLANT AMAZON SERVICES LLC

APPELLANT AMAZON SERVICES LLC'S DESIGNATION OF
MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Counsel Served:

Lauren Acquaviva, Esq.
Jason P. Luther, Jr., Esq.
John M. Hoefer, Esq.
Tracey C. Green, Esq.
Chad N. Johnston, Esq.
John W. Roberts, Esq.
Andrew R. Hand, Esq.
Counsel for Litigation
South Carolina Department of Revenue
Office of General Counsel for Litigation
P. O. Box 12265

Columbia, SC 29211

Margaret Marks
By Catherine F. Sease
Administrative Assistant

January 13, 2020



Bryson M. Geer
(Admitted in NC & SC)
T 843.534.4306
bryson.geer@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

151 Meeting Street | Sixth Floor
Charleston, SC 29401-2239
T 843.853.5200 F 843.722.8700
nelsonmullins.com

January 13, 2020

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JAN 13 2020
SC Court of Appeals

RE: Amazon Services LLC v. South Carolina Department of Revenue
Appellate Case No. 2019-001706
NMRS File No. 54685.09000

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the following documents:

1. Initial Brief of Appellant Amazon Services LLC;
2. Appellant Amazon Services LLC's Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

Please return clocked in copies of these documents to me via our courier. By copy of this correspondence to counsel of record, we are serving them with a copy of the enclosed documents.

Thank you for your assistance with this matter, and please do not hesitate to contact us with any questions or concerns.

With kind regards,

Bryson M. Geer
with Bryson M. Geer's permission
by *John T. Moore*
Bryson M. Geer

BMG:mam
Enclosures

cc: Lauren Acquaviva, Esq.

The Honorable Jenny Abbott Kitchings

January 13, 2020

Page 2

Jason P. Luther, Jr., Esq.

John M. S. Hoefer, Esq.

Tracey C. Green, Esq.

Chad N. Johnston, Esq.

John W. Roberts, Esq.

Andrew R. Hand, Esq. (all via email and U.S. Mail)