THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Amazon Services, LLC, ... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

INITIAL BRIEF OF RESPONDENT

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INTRODUCTION

Amazon Services, LLC (Appellant or Amazon) owns and operates the website Amazon.com (Website), which allows a customer to search for, select, and pay for—all on the Website—products that are shipped directly to the customer. The products offered for sale on Amazon.com are owned by Amazon, an Amazon affiliate, or third-parties who have contracted with Amazon. Regardless of who owns the product, customers follow the same purchasing process for all products sold on the Website and need to—and most often do—interact only with Amazon during that process. Customers find products using Amazon's search function, which, through a proprietary algorithm developed by Amazon, directs customers to the specific offer for a product that Amazon has determined is best for its customers. Customers use an online shopping cart provided by Amazon in which to place each of the products selected for purchase, and they checkout with Amazon by entering their payment information directly onto and making payment through Amazon.com. In short, through its Website, Amazon offers goods to the public for sale and accepts payment in exchange for those goods.

The South Carolina Sales and Use Tax Act (the Tax Act) imposes a sales tax "upon every person engaged or continuing within this State *in the business of selling* tangible personal property at retail," S.C. Code Ann. § 12-36-910(A) (emphasis added), and defines a "retailer" or "seller" to include, in relevant part, every person "selling or auctioning tangible personal property *whether owned by the person or others*," S.C. Code Ann. § 12-36-70(1)(a) (emphasis added). Because the substantial evidence of record demonstrates that Amazon falls within all of these provisions, the South Carolina Administrative Law Court (ALC) correctly ruled that Amazon is required to collect and remit sales and use tax for all products sold on Amazon.com—including those owned by third-parties—during the period at issue in this case.

But this is not an entirely new issue for the courts of this state. The Supreme Court has previously applied nearly identical statutory provisions to a substantially congruent factual scenario and held that the entity offering items owned by third-parties for sale on its website and accepting payment directly from customers for those items was responsible for collecting and remitting the taxes owed. *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011). In asking this Court to reverse the ALC, Amazon disregards most of the substantial evidence presented at trial demonstrating that, analogous to the taxpayer in *Travelscape*, it is in the "business of selling" and is the "retailer" or "seller" with respect to sales made on its Website. Amazon instead claims it is similar to a mall, never mind the fact that shopping at a mall differs significantly from shopping on Amazon.com, such as the fact that malls do not provide a single checkout point for all of their stores. In the end, the ALC applied clear precedent to the nearly identical factual scenario in this case. The Department urges this Court to do the same.

COUNTER STATEMENT OF THE ISSUES

1. Is Amazon required to collect and remit sales and use tax for all goods sold on its website, including those owned by third-parties, for which goods Amazon receives payment directly from the customers?

2. Does imposition upon Amazon of the obligation to collect and remit sales and use tax for goods sold on its website, including those owned by third-parties, comport with the United States Constitution and the South Carolina Constitution?

COUNTER STATEMENT OF THE CASE

In 2011, the South Carolina General Assembly passed the Distribution Facility Sales Tax Exemption (the "Moratorium"), primarily to encourage investment by Amazon in South Carolina. *See* S.C. Code Ann. § 12-36-2691 (2014). The Moratorium was in place from 2011 through 2015, and exempted companies from remitting sales and use tax under the existing law on goods sold in South Carolina if those companies maintained a distribution facility in the state meeting certain

criteria as defined in the statute. *Id.* Amazon was the principal beneficiary of this exemption. **(R. pp.)** (Ex. 178 at 9). Prior to 2011, Amazon did not have a physical presence in South Carolina and, thus, had no obligation to collect and remit sales and use tax. ***(Id.)***.

After the Moratorium expired and Amazon's obligation to collect and remit sales and use tax began, the Department ascertained that Amazon was not collecting sales and use tax for *all* of the sales taking place on its Website. **(R. pp.)** (Tr. 527; Ex. 171, Dep't Determination at 4). Upon further investigation, the Department learned that Amazon was remitting sales and use tax only for transactions involving goods owned by Amazon and its affiliates, but not for transactions involving goods owned by third-parties. ***(Id.)***. Consequently, the Department audited Amazon's first quarter 2016 operations and, on June 21, 2017, issued its Determination assessing Amazon a total of $12,490,502.15 in taxes, penalties, and interest for the period of January 1, 2016 through March 31, 2016. **(R. pp.)** (Ex. 171, Dep't Determination). On July 21, 2017, Amazon filed its request for a contested case hearing with the ALC. **(R. pp.)** (Amazon Request for Contested Case). An evidentiary hearing was held on February 4-6, 2019, and on September 10, 2019 the ALC issued its Final Order affirming the Department's Determination. **(R. pp.)** (Final Order). Amazon filed its notice of appeal on October 10, 2019.

STATEMENT OF THE FACTS

Amazon owns and operates the Website. **(R. pp.)** (Tr. 47, 162). The Website lists various items available for purchase, including items owned by third-parties. Amazon refers to purchasers of products on the Website as *its* "buyers" or "customers." **(R. p.)** (Ex. 14 ("Amazon places high importance on maintaining the trust of *our* millions of satisfied *buyers*." (emphasis added))); **(R. p.)** (Ex. 40 (requiring pricing parity "[t]o ensure that *our customers* have access to a large selection of Products at competitive prices" (emphasis added))); **(R. p.)** (Ex. 7 ("Customers trust that they

will find low prices on Amazon.com.")). The three primary persons and entities that list items for sale on the Website are: (1) Amazon;[1] (2) Amazon affiliates; and (3) unaffiliated third-parties (Third-Party Merchants). During the period at issue, Amazon voluntarily collected sales and use taxes for retail Website sales of goods owned by Amazon or its affiliates. **(R. pp.)** (Ex. 171, Dep't Determination at 4). Amazon did not, however, collect or remit sales and use taxes for Website sales of goods owned by Third-Party Merchants.

1. Amazon.com Customer Experience

Generally, a Website sale starts with a customer searching for a product on Amazon.com. The search results populate on the screen, and then the customer will select—click on—the product the customer wishes to buy from the search results. **(R. pp.)** (Tr. 75). The customer then is taken to a "product detail page" that displays the product's attributes, including descriptions, images, and customer reviews.[2] **(R. pp.)** (Tr. 76; Ex. 39). Amazon's proprietary algorithm also determines what product—owned by either an Amazon affiliate or a Third-Party Merchant—will be the default product displayed on the product detail page. **(R. pp.)** (Tr. 149-50). Unless the customer

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[1] Amazon is registered in South Carolina as a "retailer" for purposes of the Tax Act and collects and remits sales tax related to its sale of "Amazon Prime" subscriptions to customers residing in South Carolina. **(R. pp.)** (Tr. 179, 525-26). Amazon Prime subscriptions provide Amazon customers who purchase the subscription a variety of benefits that improve their shopping experience on Amazon.com, including free and discounted expedited shipping. **(R. pp.)** (Tr. 253).

[2] Amazon requires that there only be one product detail page per product regardless of whether Amazon, an Amazon affiliate, or one or more Third-Party Merchants may list the product on the Website. Amazon explains this requirement is to "optimize the buying experience" for customers on Amazon.com. **(R. pp.)** (Ex. 39). Accordingly, "[t]he creation of product detail pages is limited to products that do not already exist within Amazon's catalog" and "[c]reating a product detail page for a product already in the Amazon catalog is prohibited" by Amazon. ***(Id.)***. For new products, Amazon imposes content-specific and other detail-page creation policies upon Third-Party Merchants, as well as requirements for any images of the product. ***(Id.)***; **(R. pp.)** (Ex. 83). Amazon also "uses complex image ranking technology to determine the best images to display" for each product and is not required to use the images uploaded by any Third-Party Merchant. **(R. pp.)** (Ex. 83).

clicks a small hyperlink on the product detail page for "Other Sellers on Amazon," the customer will by default purchase the product from the algorithm-determined offeror.

Amazon refers to the default offeror as the "winner" of the "Buy Box." **(R. pp.)** (Ex. 7). Amazon's algorithm uses price, shipping cost, and other variables to determine the winner of the Buy Box. **(R. pp.)** (Tr. 149-50; Ex. 7). Amazon provides general information to Third-Party Merchants on how to "win" the Buy Box (*e.g.*, "price competitively"); however, Amazon considers the complete method and criteria for winning the Buy Box to be proprietary, and thus it is not publicly available, has not been disclosed by Amazon in this proceeding or elsewhere, and it varies by category and over time. **(R. pp.)** (Tr. 226-27). Amazon's primary company witness testified that he believed the percentage of sales on the Website that go to the winner of the Buy Box is at least 50%, although he surprisingly was unable to testify as to a more precise percentage or even a range of percentages.[3] **(R. pp.)** (Tr. 228-29; Final Order at 12 n.17).

When customers wish to purchase a product, they either click the "Buy now" button, which immediately takes them to Amazon's "Checkout" page or, if they wish to continue shopping, they place the product in the online "Cart." **(R. pp.)** (Tr. 90, 236). Customers can place multiple products from different Third-Party Merchants and Amazon affiliates in the Cart at once and can purchase them during the same transaction. **(R. pp.)** (Tr. 182-83; Ex. 122). To make a purchase, customers must create a customer account on Amazon.com and enter, among other things, their shipping address and payment method. **(R. pp.)** (Tr. 178-79; 182-83). Customers input their

[3] The ALC found that much of the testimony of Amazon's primary witness, Mr. Chris Poad, was not reliable or credible because, although he was presented to "methodically" explain the sale of Third-Party Merchant products on Amazon.com, his testimony consisted mainly of conjecture and was not supported by any statistical data. **(R. pp.)** (Final Order at 5 n.10, 11 n.16).

payment information (*e.g.*, credit card information) directly into the Amazon.com website operated by Amazon. **(R. p.)** (Tr. 239).

When customers finish shopping and are ready to pay, they click the "Proceed to checkout" button. **(R. pp.)** (Tr. 90). Customers then are directed to Amazon's Checkout page where they input or confirm their shipping address and payment method and also select a shipping or delivery option. Amazon accepts credit and debit cards, U.S.-based checking accounts, "Amazon Store Cards," and Amazon gift cards, but not cash, check, or methods such as PayPal.[4] **(R. p.)** (Tr. 71, 232). There is no pop-up window or other action that directs the customers to another website operated by some other third party or even another Amazon affiliate to make payment. Rather, all money paid by customers for purchases on Amazon.com is submitted directly to Amazon via the Website.[5] On the Checkout page, Amazon provides an "Order Summary," which identifies the total cost of the "Item(s)" selected for purchase, the cost for "Shipping & handling," and the "Estimated tax to be collected" (if any). Notably, there are no per-transaction costs or service fees identified or separately charged by Amazon to the customer.

After customers input their payment and shipping information, they click the "Place your order" button. Customers receive a specific Amazon.com order number and order confirmation email from Amazon detailing their order. **(R. pp.)** (Ex. 122). In addition to the order details, the Amazon email confirmation states:

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[4] Customers cannot make payments directly to Third-Party Merchants, and the Third-Party Merchants are expressly prohibited by Amazon from requesting any payments from customers. **(R. pp.)** (Ex. 3 at 6).

[5] Amazon's contract with Third-Party Merchants expressly provides that Amazon has the exclusive right to receive sales proceeds for sales taking place on the Website. **(R. pp.)** (Ex. 3 at 15-16 ("We will also receive all Sales Proceeds on your behalf for each of these transactions and will have exclusive rights to do so, and will remit them to you in accordance with these Selling on Amazon Service Terms.")).

- "Thank you for shopping with us."
- "We'll send a confirmation when your item ships."
- "We hope to see you again soon. **Amazon.com**"

(R. pp.) (Ex. 122 (emphasis in original)).

Customers can access their Order Summary and the invoices for all of their orders through their Amazon.com customer account or by following the link in their confirmation email. ***(Id.)***. Like the Checkout page Order Summary, the post-purchase Order Summary identifies the total cost of the "Item(s)" selected for purchase, the cost for "Shipping & handling," and the "Estimated tax to be collected" (if any). ***(Id.)***. Customers also can check the status of their order on the Order Summary page. ***(Id.)***. The invoice prepared and provided by Amazon also includes the product costs, shipping and handling costs, and sales taxes (if any). ***(Id.)***. Customers typically receive only one Amazon.com order number and one invoice from Amazon for a specific transaction, regardless of the number of items purchased and the number of Amazon affiliates or Third-Party Merchants involved. **(R. pp.)** (Ex. 122; Tr. 189). A customer's credit card statement will identify the transactions on Amazon.com with an abbreviation of the words "Amazon marketplace payments" in the merchant descriptor field. **(R. p.)** (Tr. 572). When a specific item ships, Amazon sends another email informing the customer of the shipment and providing the option to "Track your package." **(R. pp.)** (Ex. 122).

All of the above—a complete sales transaction on the Website—can and typically does occur without any personal contact or communication between a customer and the Third-Party Merchant. **(R. pp.)** (Tr. 192-93; Final Order at 34 (finding that "the evidence clearly establishes that sales can be made, and often are made, without any interaction between customers and Merchants")). If there is any contact prior to a purchase, it must be initiated by the customer by calling the Third-Party Merchant or using a feature on Amazon.com called "buyer/seller

messaging," which permits customers to ask product-specific questions.[6] **(R. p.)** (Tr. 185). However, Amazon prohibits Third-Party Merchants from having any direct communications with customers except for the limited purpose of providing product-specific information in response to a direct customer inquiry, completing orders (*e.g.*, confirming shipping addresses), or responding to customer service inquiries. **(R. pp.)** (Ex. 3 at 6; Ex. 58; Tr. 194).

2. Order Fulfillment

If a customer orders a product owned by a Third-Party Merchant, the order is shipped to the customer in one of two ways: Either the Third-Party Merchant ships the product itself or, for an additional fee imposed on the Third-Party Merchant, the Third-Party Merchant opts to use Fulfillment By Amazon (FBA) to ship the product.

A. Fulfillment by Third-Party Merchant

When a product owned by a Third-Party Merchant is purchased, Amazon sends the Third-Party Merchant an email notifying it of the sale. **(R. pp.)** (Tr. 187). The Third-Party Merchant then ships the product to the customer and is required to notify Amazon (rather than notifying the customer) when the item ships.[7] **(R. pp.)** (Tr. 214-16; Ex. 3 at 16-17). Under the terms of the Business Solutions Agreement (BSA), **(R. pp.)** (Ex. 3), which is the agreement between Amazon and the Third-Party Merchants, *Amazon* then notifies the customer by email that the product has shipped. **(R. pp.)** (Tr. 186-87; Ex. 3 at 17). Amazon strictly prohibits Third-Party Merchants from sending order confirmation emails to customers. **(R. pp.)** (Ex. 3 at 17 (providing that a Third-Party

[6] Third-Party Merchants are not provided access to any potential customer's email through "buyer/seller messaging," but rather receive an encrypted version of the customer's email along with the potential customer's inquiry. **(R. pp.)** (Tr. 182).

[7] Amazon requires Third-Party Merchants to ship items within two business days of order notification. **(R. p.)** (Ex. 97).

Merchant will "except as expressly permitted by this Agreement, not send customers emails confirming orders or fulfillment of Your Products")).

Once Amazon receives notice that the Third-Party Merchant has shipped the product, it processes the customer's credit card. **(R. pp.)** (Tr. 215-16). Typically, this is done by its affiliate, Amazon Payments, Inc., although Amazon can, in its discretion, process the payments directly.[8] **(R. pp.)** (Ex. 3 at 8, 10; Tr. 172-73). Amazon records the transaction in the Third-Party Merchant's "Seller Account," which is part of the "Seller Central" online portal where Third-Party Merchants can view the proceeds of sales along with the applicable fees paid to Amazon. **(R. pp.)** (Ex. 3 at 47-48). However, Amazon does not actually maintain separate bank or deposit accounts for each Third-Party Merchant, and in fact may combine the sales proceeds into a single account, and even invest them for Amazon's own benefit. **(R. pp.)** (Tr. 239-40; Ex. 3 at 47-48). Every two weeks, or more frequently if requested (but always at Amazon's discretion), Amazon transfers the sales proceeds less its fees to the Third-Party Merchant's bank account. **(R. pp.)** (Ex. 3 at 19). However, Amazon expressly reserves the right to withhold payments from Third-Party Merchants until it is "confident that customers have received the products they ordered." **(R. pp.)** (Ex. 41).

Amazon determines which Third-Party Merchants are permitted to offer "Premium Shipping" options, including same-day, one-day, and two-day shipping. **(R. pp.)** (Ex. 38). To offer Premium Shipping, Third-Party Merchants must have been listing products on the Website for more than 90 days and must meet certain delivery performance requirements established by Amazon. ***(Id.)***. If a Third-Party Merchant's performance falls below established thresholds,

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[8] Regardless of the entity that processes the payments, Appellant, as owner and operator of the Website, is always the entity that accepts the payment from the customer when the customer inputs his or her credit card information into Amazon.com. **(R. pp)** (Tr. 238-39). The fact that Amazon may share that customer information with an affiliate for credit card processing purposes does not change the fact that Amazon, and not the Third-Party Merchant, accepts the payment.

Amazon may revoke the Third-Party Merchant's eligibility to offer Premium Shipping. ***(Id.)***. Amazon also requires that the amount of all shipping and handling charges for orders fulfilled by Third-Party Merchants remain within the parameters set by Amazon. **(R. p.)** (Ex. 3 at 16). And for certain types of orders, such as for products offered by Third-Party Merchants on the "Individual selling plan" and for "BMVD Products,"[9] Amazon sets "category-based shipping and handling charges," which the Third-Party Merchants must "accept . . . as payment in full for [their] shipping and handling." ***(Id.)***.

For sales in which the order is fulfilled by the Third-Party Merchant, the BSA provides that the Third-Party Merchants are responsible for responding to claims for certain shipping-related issues, including non-performance, non-delivery, mis-delivery, theft, or mistake. **(R. pp.)** (Ex. 3 at 17). Third-Party Merchants are also required to handle returns and refunds, but all payments flowing from the Third-Party Merchant to the customer must go through Amazon. ***(Id.)***. Notwithstanding these requirements, Amazon also implements an "A-to-Z Guarantee Program," which allows customers to submit claims related to sales involving Third-Party Merchants directly to Amazon for resolution. **(R. pp.)** (Ex. 3 at 17-18). Under this program, Amazon contacts the Third-Party Merchant about the complaint to confirm certain information about the transaction, and then determines in its sole discretion how to settle the claim with the customer, which may include reimbursement to the customer at the Third-Party Merchant's expense. ***(Id.)***.

B. Fulfillment by Amazon

If a Third-Party Merchant opts to pay extra for FBA, Amazon stores, selects, packages, and ships the Third-Party Merchant's products when a sale is made. **(R. pp.)** (Tr. 97-98). The costs

[9] "'BMVD Product' means "any book, magazine or other publication, sound recording, video recording, and/or other media product in any format . . . ." **(R. p.)** (Ex. 3 at 20).

of this program include monthly storage fees, as well as transaction-based fulfillment fees. **(R. pp.)** (Ex. 3 at 38). To start the process, Third-Party Merchants register each product for FBA, which is operated by another Amazon affiliate, Amazon Fulfillment Services (AFS). **(R. pp.)** (Ex. 3 at 33). However, Third-Party Merchants do not have any contractual relationship with AFS. Rather, Third-Party Merchants contract for FBA services with the Appellant, Amazon Services, who in turn directs AFS to carry out those FBA services. Third-Party Merchants sign up for FBA through Amazon.com. **(R. pp.)** (Ex. 3 at 10).

As part of FBA, Third-Party Merchants must initially pay to ship their products to an Amazon fulfillment center and also pay storage fees to Amazon. **(R. pp.)** (Ex. 3 at 33-34). Unless the Third-Party Merchant pays an extra fee for Amazon to restrict its distribution options, Amazon selects in its discretion the fulfillment center to which the Third-Party Merchant ships its product. **(R. pp.)** (Tr. 257-59; Ex. 65). Otherwise, Third-Party Merchants have no control as to the fulfillment center(s) at which their products are stored. Third-Party Merchants agree that once Amazon receives their products, Amazon can commingle products of the same type. **(R. pp.)** (Ex. 3 at 35). Third-Party Merchants may request their product units be returned to them, but must pay a per-item fee to Amazon to complete the return or must have Amazon dispose of the product. **(R. pp.)** (Ex. 3 at 36; Ex. 88; Tr. 422-23).

When a customer purchases a product subject to FBA, Amazon sends an automated email to AFS. AFS then selects which of the Third-Party Merchant's products to send to the customer, and then packages and ships the product to the customer. **(R. pp.)** (Tr. 259). Amazon may combine products from different Third-Party Merchants or Amazon affiliates together into one shipment. **(R. pp.)** (Ex. 3 at 35). Upon shipment, Amazon processes the customer's credit card and the funds are distributed in the same manner as if a Third-Party Merchant shipped the item itself. **(R. pp.)**

(Tr. 216-17). Importantly, under the BSA, Amazon has sole discretion regarding the resolution of *all* customer service issues relating to FBA products. **(R. pp.)** (Ex. 3 at 37).

3. Amazon's Relationship with Third-Party Merchants

Amazon's relationship with the Third-Party Merchants who supply products for sale on the Website is delineated in the BSA, as well as numerous policy documents promulgated by Amazon that impose on the Third-Party Merchants various guidelines, terms and conditions, codes of conduct, and other requirements. The BSA is a single agreement with multiple subsections to which Appellant and other Amazon affiliates are parties, all of which are collectively referred to simply as "Amazon" in the BSA. **(R. p.)** (Ex. 3 at 1). The BSA contains general provisions covering the overall relationship between Amazon and the Third-Party Merchants, as well as more specific provisions governing particular parts of Amazon's sales platform, including "Selling on Amazon," "Fulfillment by Amazon," and "Transaction Processing."

To list products on the Website, a Third-Party Merchant must agree to the terms of the BSA. The BSA may be modified at any time by Amazon. **(R. p.)** (Ex. 3 at 7). However, Third-Party Merchants do not have the option of altering the terms of the BSA. **(R. p.)** (Tr. 166). Any modifications by Amazon also are deemed accepted by a Third-Party Merchant simply by them continuing to list products on the Website after Amazon posts the modification on Seller Central. ***(Id.)***. The separate policy documents promulgated by Amazon may be modified by Amazon and become effective without notice to the Third-Party Merchants. ***(Id.)***. Amazon may suspend or terminate the BSA with a Third-Party Merchant, and suspend or terminate a Third-Party Merchant's ability to list products on the Website, at any time and for any reason. **(R. pp.)** (Ex. 3 at 2-3).

The BSA includes many material limitations on how Third-Party Merchants participate in Website transactions. For example, with respect to product pricing, the BSA requires Third-Party Merchants to ensure that the price they set, as well as any other terms or conditions relating to the product they wish to list on the Website, "is at least as favorable to Amazon Site users as the most favorable terms upon which a product is offered or sold via [the Third-Party Merchant's other] Sales Channels . . . ." **(R. p.)** (Ex. 3 at 18). Additionally, Third-Party Merchants must provide product information in the format required by Amazon. **(R. p.)** (Ex. 3 at 15). The BSA also provides that Amazon has the sole discretion to "determine the content, appearance, design, functionality, and all other aspects of [Amazon.com], including by redesigning, modifying, removing or restricting access to [the site], and by suspending, prohibiting or removing any listing." **(R. p.)** (Ex. 3 at 20).

Amazon also controls the flow of funds between customers, Amazon, and Third-Party Merchants. Amazon requires that its affiliate, Amazon Payments, be used as the payment processor for all transactions on the Website. **(R. pp.)** (Ex. 3 at 47). However, pursuant to the BSA, Amazon, not Amazon Payments, will "receive all Sales Proceeds on your behalf for each of these transactions and will have exclusive rights to do so, and will remit them to you in accordance with these Selling on Amazon Service Terms." **(R. pp.)** (Ex. 3 at 15-16). As discussed above, all refunds to customers must be routed through Amazon as well. **(R. pp.)** (Ex. 3 at 17).

Amazon also controls the frequency of fund transfers to Third-Party Merchants for the proceeds from the sale of their goods. Specifically, the BSA provides that proceeds—reduced by Amazon's fees—will be remitted to the Third-Party Merchants, at Amazon's sole discretion, on a bi-weekly basis. **(R. pp.)** (Ex. 3 at 19). Although a company witness testified that Third-Party Merchants may request more frequent distributions, the BSA states that Third-Party Merchants do

"not have the ability to initiate or cause payments to be remitted to [them]." (*Id.*). And Third-Party Merchants are not entitled to any earned interest on the proceeds held by Amazon. **(R. pp.)** (Ex. 3 at 47-48). Amazon also bears the risk of credit card fraud. **(R. pp.)** (Ex. 3 at 16). However, Amazon, at its sole discretion, can withhold a transaction for investigation, refuse to process the transaction, restrict shipping, or stop or cancel a transaction, and Third-Party Merchants must stop or cancel an order when directed to do so by Amazon. (*Id.*). For orders that are cancelled at the direction of Amazon, the Third-Party Merchant is required to remit the proceeds to Amazon so that Amazon in turn can issue the refund to the customer. **(R. pp.)** (Ex. 3 at 16-17).

Moreover, Amazon maintains strict control over the information of customers purchasing goods on the Marketplace. **(R. pp.)** (Ex. 3 at 6). Third-Party Merchants are strictly prohibited from using Amazon's customer information for any purpose other than those tasks that are necessary to fulfill the Third-Party Merchants' duties related to the transaction on the Website. (*Id.*). To the extent a Third-Party Merchant needs to initiate any communications with an Amazon customer, it is required to use tools on Amazon.com to communicate with that customer and may not use any other means or methods of communicating with that customer. (*Id.*).

4. Amazon's Compensation

Amazon is compensated for transactions on the Website through referral fees, applicable variable closing fees, the non-refundable monthly Selling on Amazon subscription fee, and other fees paid by Third-Party Merchants. **(R. pp.)** (Tr. 218-20; Ex. 3 at 19; Ex. 16). The referral fees are calculated as a percentage of the sales price of a product, and the percentage amount varies based upon the type of product being sold, ranging from 45% of the total sale value for "Amazon Device Accessories" to 6% for personal computers. **(R. pp.)** (Tr. 218-20; Ex. 3 at 19; Ex. 16). These referral fee percentages are determined in part based on the typical or average profit margins

of the different products. **(R. pp.)** (Tr. 269-70). Amazon therefore is compensated through transaction fees calculated based on the sales price of the product and not through flat service fees.

5. Sales and Use Tax Collection

No person or entity other than Amazon directly interfaces with the customer through the purchase transaction.[10] Only Amazon accepts and processes customer payments, and Amazon is the only point of sale for all transactions on the Website. Thus, only Amazon has the ability to collect sales and use taxes arising from the purchase of tangible personal property on the Website.

During the period at issue, a "Professional" Third-Party Merchant could pay a fee and subscribe to Amazon's "Tax Calculation Service." **(R. pp.)** (Ex. 23).[11] Under this program, Amazon provides the "Professional" Third-Party Merchant a list of tax codes, the Third-Party Merchant matches the tax codes to its products and, when the products are sold, Amazon calculates and withholds taxes for the transaction. ***(Id.)***. Amazon collects the tax from the customer and then disburses the tax to the Third-Party Merchant after taking its percentage-based fee. ***(Id.)***. Even under this program, Amazon does not accept any responsibility for remitting the taxes, or ensuring that the taxes are remitted, to any taxing authority. ***(Id.)***.

Notably, Amazon did not make available the tax collection service to non-professional Third-Party Merchants during the period at issue. ***(Id.)***. (offering tax collection option to "Marketplace Professional seller[s] or Amazon Webstore seller[s]" only). Again, the BSA specifically prohibits Third-Party Merchants from receiving any funds from a customer outside of

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[10] But Amazon contractually requires Third-Party Merchants to be responsible for collecting, reporting, and paying all taxes. **(R. p.)** (Ex. 3 at 5). As found by the ALC, Amazon's policy is inconsistent with the way these transactions actually occur. **(R. p.)** (Final Order at 48).

[11] Amazon's "Professional Selling Plan" requires Third-Party Merchants to pay a $39.99 monthly subscription fee to Amazon. **(R. pp.)** (Tr. 218-19; Ex. 16). Third-Party Merchants who do not subscribe to this plan are referred to as "Individual sellers," and must pay a $0.99 per-item fee for each item that is sold on the Website. ***(Id.)***

Amazon's payment process on the Website. Thus, during the period at issue, a non-professional Third-Party Merchant had no way to collect sales and use tax for sales transactions involving products listed by that Third-Party Merchant on the Website. In other words, despite claiming that Third-Party Merchants are the "sellers" responsible for collecting, reporting, and paying all taxes, Amazon's own policies and procedures were designed in such a way that practically prevented those Third-Party Merchants from complying with any such tax obligation.

6. Comparable Transactions and Relationships

The ALC found that Amazon.com was akin to a traditional retail store or consignment shop, **(R. pp.)** (Final Order at 39, 46-47), and that the Third-Party Merchants' participation on Amazon.com most closely resembles that of a manufacturer, distributor, or wholesaler in the more traditional retail setting, or that of a consignor in a consignment scenario, **(R. pp.)** (Final Order at 10-11, 13 n.20, 35 n.33, 36, 42, 44). While the evidence presented by Amazon showed that Third-Party Merchants may develop, manufacture, and source their products and may even develop the product packaging for such products as well as handle product-specific customer service questions, the ALC found this to be indicative of what a traditional manufacturer or wholesaler does, rather than a retailer. ***(Id.)***. On the other hand, the functions typically associated with a brick-and-mortar retail store—advertising and offering for sale multiple products, providing a "shopping cart" to customers to select those products, accepting payment for those products, and handling refunds and other non-product specific customer service issues—all are handled by Amazon. Crucially, the ALC found that a customer's purchase on Amazon.com can—and often does—occur only

through interaction with Amazon and no one else, including any Third-Party Merchant. **(R. p.)** (Final Order at 34).

STANDARD OF REVIEW

This Court may reverse the ALC's determination only if that 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.

S.C. Code Ann. § 1-23-610(B); *see Travelscape*, 391 S.C. at 96-97, 705 S.E.2d at 32.

Judicial review of an ALC's findings of fact is limited to determining if the findings are 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). "Substantial evidence is . . . evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the [ALC] reached . . . ." *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000). This Court also "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Carmax Auto Superstores W. Coast, Inc. v. S.C. Dep't of Revenue*, 411 S.C. 79, 85, 767 S.E.2d 195, 198 (2014).

ARGUMENT

1. Amazon owes sales and use tax with respect to all retail sales on Amazon.com because it is "in the business of selling" and is a "retailer" or "seller" under the plain language of the Tax Act.

In South Carolina, a "sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A). Complementing this tax is

the 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. The use tax must be collected by the seller "at the time of making the sales or, if the storage, use, or consumption is not then taxable, at the time the storage, use, or other consumption is taxable" and the seller must "give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected." S.C. Code Ann. § 12-36-1350(A).

A "retailer" and "seller" includes, in relevant part, every person "selling or auctioning tangible personal property whether owned by the person or others." S.C. Code Ann. § 12-36-70(1)(a). A "retail sale mean[s] all sales of tangible personal property except those defined as wholesale sales." S.C. Code Ann. § 12-36-110. More generally, a "sale" or "purchase" is broadly defined to mean:

> any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration including:
> (1) a transaction in which possession of tangible personal property is transferred but the seller retains title as security for payment, including installment and credit sales;
> (2) a rental, lease, or other form of agreement;
> (3) a license to use or consume; and
> (4) a transfer of title or possession, or both.

S.C. Code Ann. § 12-36-100.

A. All sales and purchases on Amazon.com are subject to sales and use tax.

There is no dispute that the transactions taking place on Amazon.com are taxable "sales" or "purchases" within the meaning of section 12-36-100. *See* Appellant's Br. at 23. A customer accesses Amazon.com, searches for and selects a product or products, and then, in exchange for monetary payment, immediately receives the right to receive, and, in a matter of days, actually

does receive, the product or products. This is a "transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration," and thus is a sale subject to South Carolina sales and use tax. S.C. Code Ann. § 12-36-100.

B. Amazon is required to collect and remit sales and use tax with respect to sales and purchases on the Website.

i. The substantial evidence in the record demonstrates that Amazon is engaged in the business of selling and is a "retailer" or "seller" under the Tax Act.

The ALC correctly determined that Amazon is "engaged . . . in the business of selling tangible personal property at retail" and is the "retailer" or "seller" with respect to all sales on Amazon.com. S.C. Code Ann. § 12-36-910(A); S.C. Code Ann. § 12-36-70(1)(a). Amazon is the exclusive owner and operator of Amazon.com, through which customers obtain tangible personal property in exchange for payment to Amazon on the Website. Customers select one or more products, purchase those products, and pay for those products through the Website. Amazon collects the payments directly from the customers and issues receipts to those customers for the products they purchased. All order and shipping confirmations are sent by Amazon, and Amazon restricts the communications that Third-Party Merchants can have with Amazon customers. In the order confirmation email received by the customer, Amazon thanks the customer for "shopping with us," tells them Amazon "hope[s] to see [them] again soon," and electronically signs the email, "Amazon.com." **(R. pp.)** (Ex. 122). In some cases, Amazon ships the ordered product directly to the customer from its distribution centers. In other cases, after an order is placed, Amazon directs the Third-Party Merchant to ship the product, requires that the Third-Party Merchant does so within two days of the order, and can withhold payment to the Third-Party Merchant until Amazon is confident the order was properly fulfilled. All refunds for any returned items also must go

through Amazon, and such refunds are almost completely at the discretion of Amazon. Throughout the purchasing process, customers can, and most commonly do, interface only with Amazon.

Amazon actively controls all aspects of the Website, including the content on Amazon.com and the flow of funds from the purchasers of products. Although Third-Party Merchants in some instances provide product descriptions and images, in many instances they cannot alter the existing descriptions and, ultimately, Amazon controls the format of these descriptions for purposes of the Website. Additionally, Amazon, in its discretion, can modify or remove product descriptions or images. Amazon also controls product pricing by requiring Third-Party Merchants to list products at prices "at least as favorable to" Amazon customers "as the most favorable terms upon which a product is offered or sold" by the Third-Party Merchants elsewhere and through the various fees charged to Third-Party Merchants, including transaction-based fees. Amazon actively guides the selling process through its proprietary algorithm, which selects and prominently displays the product offers that Amazon has determined are the best offers for Amazon customers (*i.e.*, that have won the "Buy Box"). Amazon's control of the Website, which is the retail store, confirms that it is the seller of the goods.

Amazon does not simply operate a free and open space. Third-Party Merchants cannot list products at any price they wish and in any reasonable manner. Third-Party Merchants cannot ship goods in whatever manner they desire. And Third-Party Merchants cannot collect payment directly from the purchaser. Rather, Amazon takes an active role in determining how, which, and at what prices products are sold on its Website, which Amazon readily states that it does in order to cultivate the buying experience and trust of *its* buyers and *its* customers, and then ultimately accepts the payment for these products from its customers. Accordingly, as the ALC correctly

determined, Amazon is "engaged . . . in the business of selling tangible personal property at retail." § 12-36-910(A).

Rather than addressing the factual aspects of its business model, Amazon simply proclaims it is not engaged in the business of selling because it self-identifies as a service provider and allegedly does not receive payments from customers or receive "consideration" for products owned by Third-Party Merchants that are sold on the Website. Appellant's Br. at 24-26. But Amazon plainly receives payments from customers on the Website because it owns and operates Amazon.com and that is where customers present their payment information—in essence, swipe their credit card—to buy the purchased products. Amazon does not dispute this fact, but confuses the issue by claiming in conclusory fashion that "the customer pays only the [Third-Party Merchant]."[12] Appellant's Br. at 12 ("Though the payment process takes place on the Amazon.com website, the customer pays only the seller."). Amazon then combines this factual mischaracterization with two equally flawed legal premises: (1) whoever transfers title must be the seller and (2) whoever receives consideration must be the seller. However, as recognized by the ALC, neither of those assumptions is supported by the plain language of the Tax Act. **(R. pp.)** (Final Order at 22-23).

At bottom, Amazon's argument is based on its effort to artificially separate the parts of a sale, never mind that all sales and payments occur through the Website. Amazon's argument ultimately fails because it ignores the statutory definition of a "retailer" or "seller" as "includ[ing] every person . . . selling or auctioning tangible personal property *whether owned by the person or*

[12] Contrary to Appellant's arguments, the ALC did not erroneously attribute conduct of Amazon Payments to Amazon Services. The fact that Amazon Payments must be used as the payment processor under the BSA does not change the fact that customers directly pay Amazon Services on the Website. Moreover, Amazon's own BSA provides that Amazon Services also can provide payment processing services in certain situations.

others . . . ." S.C. Code Ann. § 12-36-70(1)(a) (emphasis added). Amazon's contention that it cannot be the seller because it does not receive "consideration" for products also relies entirely on the fact that Amazon does not own or hold title to the products.[13] In other words, under Amazon's theory, it does not receive "consideration" in exchange for the goods because it is not the owner of the goods. But section 12-36-70(1)(a) expressly states that the "seller" or "retailer" need not be the owner of the goods.

Moreover, section 12-36-100 defines a "sale" or "purchase" as "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration," and then includes as one of several examples, "a transfer of title or possession, or both." Other examples in the statute include: "a transaction in which possession of tangible personal property is transferred but the seller retains title as security for payment"; "a rental, lease, or other form of agreement"; and "a license to use or consume." *Id.* All of these examples expand, rather than limit, the meaning of what might otherwise be considered a "transfer" or "exchange" of tangible personal property for a consideration, thereby demonstrating the General Assembly's intent to define broadly a "sale" or "purchase," and consequently, a "seller" or "retailer."

Regardless, there is no dispute in this case whether a "sale" or "purchase," or even more specifically a transfer of title to, and possession of, tangible personal property for consideration, occurs when a customer obtains goods by submitting payment on Amazon.com. Indeed, from the customers' perspective—*i.e.*, the "purchase" side of the transaction—they are receiving title and possession in exchange for consideration. And customers provide that consideration for the right

[13] Nevertheless, as found by the ALC, Amazon does receive consideration for products sold on the Website. **(R. pp.)** (Final Order at 31-32) In fact, "most of the fees are charged on a 'transaction-by-transaction' basis, and the 'Referral Fee' is imposed as a percentage of the gross price paid by the customer for the product." **(R. p.)** (Final Order at 31).

to receive title and possession to *Amazon*. As the ALC correctly found, customers likely have no knowledge of the behind-the-scenes exchange of money between Amazon and the Third-Party Merchants. **(R. p.)** (Final Order at 31). Nor does that information matter to a customer's purchase of goods. Customers are not paying Amazon for any services. Rather, they are paying Amazon for the right to receive tangible personal property, which is reflected on the invoices and order confirmations that Amazon provides to customers. ***(Id.)***.

ii. Application of the Supreme Court's Decision in Travelscape Confirms Amazon is Engaged in the Business of Selling.

The *Travelscape* decision confirms the ALC's conclusion that Amazon is in the business of selling tangible personal property at retail. In *Travelscape*, the Supreme Court held that an online travel company was required to collect and remit sales tax on the gross proceeds it received from providing hotel reservations to third-party hotels located in South Carolina. 391 S.C. at 110, 705 S.E.2d at 39. The facts and analysis of *Travelscape* are very similar to this case. There, the taxpayer, which did not own or operate any hotels, offered hotel reservations at third-party hotels through its website Expedia.com. A customer could book a hotel room through Expedia.com by entering a request and, after the customer submitted payment directly to the taxpayer's website via credit card, the taxpayer issued the customer a confirmation of the room reservation, which gave the customer the right to occupy the room at the hotel selected for a particular time.

Travelscape argued that it was not responsible for paying the accommodations tax in South Carolina because it did not physically furnish hotel rooms to customers, and that the word "furnishing" as used in the Tax Act contemplated the physical provision of hotel rooms. *Id.* at 99-101, 33-35. The Supreme Court resolved this question as follows:

> Travelscape is correct in pointing out that "furnish" as used in subsection (A) invokes the connotation of physically providing sleeping accommodations to customers. Indeed, the American Heritage Dictionary defines "furnish" as "to equip

> with what is needed" and to "supply" or "give." *Am. Heritage Dictionary* 540 (2d College Ed. 1982). Relying on *Powerex*, Travelscape argues the term "furnish" as used in subsection (E) should be read consonant with its use in subsection (A). We agree. As used in subsection (E), "furnish" does mean to physically provide sleeping accommodations. However, Travelscape's argument ignores the antecedent language in (E) that it applies to all persons "engaged ... in the business of" furnishing accommodations. *"Business" includes "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect."* S.C. Code Ann. § 12-36-20 (2000). Accordingly, we find the context of "furnish" as it appears in subsection (E) demonstrates that it encompasses the activities of entities such as Travelscape who, *whether directly or indirectly*, provide hotel reservations to transients for consideration. Contrary to the dissent's view, we do not read the term "furnish" differently in subsection (E) than we do in (A). Instead, we interpret subsection (E) in such a manner as to give effect to all the language contained therein—particularly that the entity be "engaged ... in the business of" furnishing accommodations—rather than focusing on the term "furnish" in isolation. *While Travelscape does not physically provide accommodations, it is in the business of doing so.*

Id. at 101, 34 (emphases added). This same reasoning applies here. While Amazon may not own the third-party products sold on the Website and may not always physically ship the products to the customers, it is without question engaged in the "business" of selling those products.

Amazon attempts to distinguish *Travelscape* from this case and the transactions on Amazon.com. Specifically, Amazon appears to contend that the fact that Travelscape negotiated with the hotels the rates that would be offered on its website and then added its own markup for service fees is a material distinction between that case and this one. Appellant's Br. at 27-28. But other than just saying so, Amazon does not explain how this is a material distinction. In fact, the ALC specifically addressed the striking similarities between the two business models:

> Both provide an online platform where they facilitate the sale of other persons' products. Both are the sole entity that interacts with the customer at the point of sale, processes the customer's payment, accepts the customer's consideration, takes a fee, and then remits the proceeds from the sale to the owner.

(R. p.) (Final Order at 25). Regardless, no language in *Travelscape* suggests the ruling was based on the terms of the specific contractual arrangement between Travelscape and the hotels. And

again, the behind-the-scenes exchange of money does not change the fact that, in *Travelscape* and here, the customer pays only the entity with which it interacts (Travelscape or Amazon) for the right to receive the product—a hotel room or tangible personal property.

Similarly, Amazon attempts to distinguish this case from *Travelscape* by arguing that when a customer paid for a hotel room on Expedia.com, the money that was received "belonged" to Travelscape, whereas in this case when a customer pays for a product on Amazon.com, the money received "belong[s]" to the Third-Party Merchant. Appellant's Br. at 28. But, again, other than just declaring this to be the case, Amazon fails to explain how the payments received by Travelscape "belonged" to it, but the customer payments received by Amazon "belong" to the Third-Party Merchants. In both cases, the entity receiving payment directly from the customer was contractually obligated to pay the amount received—less its fees—to the owner of the product. And in both cases the price paid by the customer was the result of the combination of the amount set by the owner of the product and the fees charged by the entity offering the product for sale and collecting payment through its website. To claim there is a distinction between the two that renders the Supreme Court's decision in *Travelscape* inapposite (or in favor of Amazon's position) is, in the recent language of the U.S. Supreme Court in a similar context, artificial "line-drawing [that] does not make a lot of sense." *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1522 (2019). No amount of conclusory wordplay or reliance on Amazon's adhesion contract with Third-Party Merchants, which is inconsistent with the economic reality of the relationships between customers, Amazon, and Third-Party Merchants, can change the fact that Amazon is in the "business of selling" and is the "retailer" or "seller" for purposes of the Tax Act with respect to the taxable transactions at issue—*i.e.*, the purchase of goods by customers on Amazon.com.

Further, the immaterial distinction that Amazon contends distinguishes *Travelscape* does not even support its position. In *Travelscape*, customers were charged "service fees" by Travelscape in addition to the rate for the hotel room, which were shown on the invoices or receipts received by the customers. But here, a customer of Amazon.com only pays Amazon for the price of the product—it does not pay Amazon any "service" fees. Indeed, the invoices provided by Amazon only identify the product purchased, shipping costs, and applicable taxes (if any). **(R. pp.)** (Ex. 122). As the ALC found, this "creates an even greater inference" that Amazon is engaged in the business of selling Third-Party Merchant products and is not simply a service provider. **(R. p.)** (Final Order at 28). Simply put, *Travelscape* requires affirming the ALC's decision.

iii. The ALC did not apply an "unprecedented expansion" of the Tax Act.

Amazon contends that the standard employed by the ALC to determine if Amazon was "in the business of selling" depends on an "unprecedented expansion of the statute" that would encompass brick-and-mortar mall operators, payment processors, banks, and advertisers. Appellant's Br. at 30. However, the standard criticized by Amazon that was employed by the ALC in this case and by the Supreme Court in *Travelscape* is based directly on the plain language of the statute, which defines "business" as "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect." S.C. Code Ann. § 12-36-20; **(R. pp.)** (Final Order at 23-25); *Travelscape*, 391 S.C. at 101, 705 S.E.2d at 34 (finding that the statutory language "engaged in the business of furnishing accommodations . . . encompasses the activities of entities such as Travelscape who, whether directly or indirectly, provide hotel reservations to transients for consideration."). The ALC correctly found that "[b]ased on the facts of this case, the object of Amazon Services' business activities is to achieve a profit or benefit, by either direct or indirect means, from the sale of Merchant property on its [Website]." **(R. p.)** (Final Order at 39). The ALC

also did not engage in "policymaking in the form of statutory interpretation," Appellant's Br. at 30, by applying the undisputed facts about the Website and transactions at issue—rather than Amazon's generalizations and assumptions—to the plain language of the law.

Amazon criticizes the ALC's conclusions by declaring that "no court or tax regulator had said that a marketplace . . . was 'in the business of selling' property it did not own." Appellant's Br. 30. This is a hollow argument, as Amazon does not cite to a single order of a "court or tax regulator" that previously considered whether a "marketplace,"[14] let alone a company that operates a business model like Amazon's, was in the "business of selling" under *South Carolina* law, which specifically defines a "retailer" or "seller" as someone who sells property owned by others. Moreover, the Tax Act expressly contemplates the sale of property owned by others as a transaction subject to sales and use tax.

Further, while the Tax Act's application is broad, it is still applied based on the specific facts of each case. However, Amazon asks this Court to reverse the ALC based mostly on a hypothetical mall analogy and its self-characterization as a "service provider" operating a "marketplace." But this avoids the ALC's specific factual findings that Amazon.com operates similarly to a conventional retail store and nothing like a traditional mall. Indeed, Amazon presented no evidence below of any mall that operates in the same manner as Amazon. The Department knows of no mall that (1) provides a single "shopping cart" for customers to add products from multiple merchants; (2) has a single "checkout" for all products sold at the mall; (3) accepts and collects all customer payments; (4) prohibits merchants from accepting money directly

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[14] Amazon's self-characterization as a "marketplace" or "service provider" also is not controlling. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 410 S.C. 415, 421, 764 S.E.2d 712, 715-16 (Ct. App. 2014), *aff'd as modified on other grounds,* 415 S.C. 351, 782 S.E.2d 590 (2016) (Duke Energy's characterization of itself as a service provider was not determinative of its treatment as a manufacturer for purposes of the state tax laws).

from customers; (5) receives a percentage of the purchase price of each product sold by all merchants, which percentage is based on the profitability of that particular product; (6) restricts merchants' communications with customers; (7) requires that all refunds of any purchased products be processed through the mall rather than by the individual merchants; and (8) offers its own guaranty of the products sold at the mall. If there is such a mall, that mall also should have been collecting and remitting sales and use taxes during the period at issue.

Amazon not only failed to present evidence to the ALC showing that it operates like a mall, but also fails now to adequately address or challenge the ALC's findings that Amazon operates similarly to a traditional retail store, and that the Third-Party Merchants operate like traditional manufacturers or suppliers.[15] **(R. pp.)** (Final Order at 35, 39, 42, 44, 46). Indeed, Amazon specifically ignores these findings when it lists the "selling activities" it claims it does not engage in to show it is not engaged in the "business of selling." Appellant's Br. at 29-30 (asserting that it does not set the price of the goods sold, exercise control over inventory, or transfer ownership).[16] However, the ALC correctly found that inventory management and price-setting are typical

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[15] Amazon also fails to adequately address the ALC's observation that "Amazon's attempt to segregate all that it does into discrete 'service' buckets creates an unreasonable interpretation of the [Tax Act]" because its "self-characterization as a service provider could be employed by any brick-and-mortar retail store or consignment shop to evade tax responsibility as a seller." **(R. p.)** (Final Order at 47). As aptly described by the ALC:

> [Any brick-and-mortar retail store or consignment shop] could claim that instead of being engaged in the business of selling tangible personal property, they just provide an array of discrete, non-taxable services, charging the same types of "service" fees as Amazon Services even though, in reality, they are selling products. Separating the actions of a retail seller such as Target into discrete, non-taxable services would be absurd, and so it is here.

(Id.).

[16] Amazon also asserts that it "does not receive payment from buyers for the products." Appellant's Br. at 30. Once again, this assertion is erroneous and misleading because customers pay Amazon directly on the Website in exchange for the purchased products.

functions of the product supplier and do not conclusively determine the entity that is the "retailer" or "seller." **(R. pp.)** (Final Order at 40, 44 & n.40). As discussed above, under the Tax Act, ownership of the goods also is not a prerequisite to be a "seller."

Likewise, Amazon's attacks on the ALC's comparison of Amazon's business model to that of a traditional consignee are baseless. For one, in contending that it does not operate like a consignee, Amazon relies almost entirely on the description by its company witness, Mr. Poad, of what he believes constitutes a consignment relationship.[17] Appellant's Br. at 35-36. But Mr. Poad is a fact witness. His opinion on legal issues is irrelevant and carries no weight. In any event, the ALC specifically found his testimony to be "unpersuasive." **(R. pp.)** (Final Order at 40).

Particularly, the distinctions raised by Mr. Poad and in Amazon's brief between Amazon's business model and a traditional consignee, to the extent they are even distinctions, are immaterial. ***(Id.)***. And, again, Amazon focuses only on a few cherry-picked "differences" related to inventory management and price-setting, but ignores all of the other similarities. The similarities between Amazon's business model and a traditional consignment shop far outweigh any possible differences. Amazon offers for sale products owned by others; Amazon accepts payment directly from customers for those products; Amazon provides a receipt to the customer for those products;

[17] Amazon also relies on three out-of-state decisions (two of which were unpublished) in the contexts of products liability and copyright infringement to support its position that it is not a consignee. Appellant's Br. at 36-37. But these decisions construing other statutes and other facts have no bearing on whether Amazon, based on the substantial evidence in the record in this case, is in the "business of selling" and is a "retailer" or "seller" for purposes of the Tax Act. Indeed, the analyses of whether someone can be held responsible for an allegedly defective product or copyright infringement under the laws of different jurisdictions are entirely different inquiries from whether that person is required to collect and remit sales and use tax under South Carolina law.

Amazon directs the transfer of, or itself transfers, the products to the customers; and Amazon then pays the owner of the product, less its own fees.[18]

Ultimately, the question is not whether Amazon's business model differs materially from a traditional retail or consignment store. The dispositive question in this case is whether Amazon is in the business of selling goods of others. The fact that Amazon's operations are substantially similar to that of a traditional retail store or consignee only further demonstrates that the General Assembly intended to require companies operating like Amazon to collect and remit sales and use tax. This is especially so considering that Amazon—not the Third-Party Merchants—exclusively controls the point of sale and accepts payment directly from the customers, and thus, is the only party to the transaction in a position to collect the sales and use tax.

iv. ALC correctly focused on the "Point of Sale."

The ALC recognized that several principles can be distilled from *Travelscape* to guide the analysis of whether someone is engaged "in the business of selling tangible personal property at retail." **(R. p.)** (Final Order at 25). Two of these principles are that "the person accepting money in exchange for a product is responsible for sales tax" and "the person who the customer interacts with at the point of sale is presumed to be the seller." ***(Id.)***. Contrary to Amazon's contention, this "point of sale" focus is not a new theory of sales and use taxation and is not "completely foreign to South Carolina sales-tax law." Appellant's Br. at 32-33. Of course, a sale has to occur at a point in the purchasing process, which necessarily is the point of sale. And a focus on the point of sale is not, as Amazon coarsely asserts, a new theory to pull Amazon under the ambit of the Tax Act.

[18] The ALC also specifically found that, like a consignment relationship, Amazon acts as the Third-Party Merchants' agent in the sale of products, notwithstanding the BSA disclaiming any such agency. **(R. p.)** (Final Order at 41). Amazon has not appealed this finding by the ALC, which further demonstrates that Amazon is in the "business of selling."

See Travelscape, 391 S.C. at 102, 705 S.E.2d at 35 ("[T]he legislature intended to levy the tax not merely on those physically providing sleeping accommodations, but *on those entities, who were accepting money in exchange for supplying hotel rooms.*" (emphasis added)); Appellant's Br. at 32 ("The decisive fact [in *Travelscape*] was that the website operator 'accept[ed] money in exchange for supplying hotel rooms.'").

Thus, a focus on the point of sale is logical and inherent in the pertinent provisions of the Tax Act. For instance, section 12-36-1350 requires the seller to collect the use tax from the purchaser "at the time of making the sales" and the seller must "give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected."[19] This demonstrates that the General Assembly intended that the "seller" would be the party directly interacting with and accepting payment from the customer, regardless of the entity having legal ownership of the goods. That cannot happen if the Third-Party Merchant is deemed the seller because, for all purchase transactions completed through the Website, Amazon is the only party that may accept payment, and is the only party that provides at the time of the sale a receipt for items purchased. Indeed, Amazon exclusively controls the point of sale and the functionality by which customers' payments

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[19] The Sales and Use Tax Regulations also provide in pertinent part:

> "When, however, warehousemen buy and sell property as a regular course of business of such sales, if not otherwise exempted, are subject to the sales tax, *including sales of goods held on consignment and including transactions in which the warehouseman acts as a broker selling goods not actually owned by him or in his possession at the time he accepts the order.*"

S.C. Code Regs. 117-319 (emphasis added); *see Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) ("Regulations authorized by the Legislature have the force of law.") (quoting *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995)). This regulation confirms not only the interpretation that neither ownership nor possession is necessary for someone to be a "retailer" or "seller" responsible for collecting and remitting sales tax, but also the that the focus of any inquiry in the sales and use tax context should be on the time and place at which the sale occurs. *See* S.C Code Regs. 117-319 (". . . at the time he accepts the order.").

are accepted and processed, and expressly prohibits Third-Party Merchants from sending order confirmations to customers. The purpose of the Tax Act is not just to impose a tax, but to ensure the collection and remittance of the tax. Thus, a focus on the "point of sale"—*i.e.*, the point where payment is received from a customer—in the determination of the "seller" or "retailer" for any given transaction is foundational to the application of the tax to any sale.

In addition to challenging the "point of sale" inquiry, Amazon also continues its absurd contention that Amazon does not "accept money" from the customers. Amazon selectively quotes the ALC as stating, "Amazon Services clearly does not accept the money . . . because that function is carried out by Amazon Payments." Appellant's Br. at 34. But what the ALC actually said was "Amazon Services clearly does not accept the money ***as an 'intermediary' payment processor*** because that function is carried out by Amazon Payments," and this was stated in addressing Amazon's argument that it only acted as a "conduit or intermediary for the consideration to pass through it from the customer to the Merchant." **(R. p.)** (Final Order at 30 (emphasis added)). In other words, the ALC was rejecting Amazon's argument that it only provided payment processing services; it was not addressing the undisputed fact that customers submit payment directly to the Appellant, Amazon Services, on the Website in exchange for the purchased products.

Amazon also attempts to downplay the myriad ways in which it engages in the business of making retail sales as simply operating a "marketplace." Appellant's Br. at 33-34. But Amazon.com is not a free and open space for Third-Party Merchants to list their products at whatever price they wish and accept payment using whatever method they prefer. Rather, Amazon has specifically imposed a set of rules and requirements to attract and benefit *Amazon's* customers. These requirements provide no benefit to Third-Party Merchants (*e.g.*, pricing and customer communication restrictions). Regardless, Amazon's level of control over the sales on the Website,

including the use of its proprietary algorithm to select the winner of the "Buy Box," evidences Amazon's direct participation in the sale of goods on Amazon.com. Amazon's control over the Website, combined with Amazon's direct participation and control over the transactions occurring on the Website (as discussed above), demonstrate that Amazon is in the "business of selling" and is the "retailer" or "seller" with respect to sales on Amazon.com.

C. The Tax Act is Not Ambiguous or Reasonably Susceptible to an Interpretation in Favor of Amazon.

Notwithstanding the earlier acknowledgment in its brief that the Tax Act's "language is plain and unambiguous," Appellant's Br. at 24, Amazon contends that the statute must be construed in its favor because the Tax Act "is ambiguous or is reasonably susceptible of an interpretation that will exclude [Amazon]," *id.* at 2, 37-39. But Amazon provides no real explanation as to what exactly about the Tax Act is ambiguous.[20] And in fact, the Tax Act is neither ambiguous nor *reasonably* susceptible to an interpretation that would exclude Amazon.

To begin, this Court very recently held that the Tax Act is "unambiguous"—a holding Amazon never addresses in its brief. *See Rent-A-Center East, Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 589, 824 S.E.2d 217, 221 (Ct. App. 2019). Additionally, in *Travelscape*, the Supreme Court did not find any ambiguity in the almost identical provisions of the accommodations tax

[20] Amazon's claim that the Department had the "heavy burden to prove that Amazon's interpretation of the statute was not just wrong but unreasonable," Appellant's Br. at 38, has absolutely no basis in the law. Because Amazon was challenging the Department's Determination before the ALC, it had the burden of proof to show by a preponderance of the evidence that the Department's application of the law to the facts of the case was incorrect. *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that as a general rule the complaining party bears the burden of proof). In other words, it was Amazon's burden to prove that, based on the evidence presented, and considering the plain language and purposes of the Tax Act, its interpretation that it was *not* in the "business of selling" or a "retailer" or "seller" was correct. In this appeal, Amazon again bears the burden to show that it was a legal error for the ALC to hold based on the substantial evidence in the record that Amazon was in the "business of selling" and a "retailer" or "seller" under the Tax Act.

statute, nor did it strictly construe the statute in favor of the taxpayer when it applied the almost exact set of facts as this case to that statute. *See* **(R. p.)** (Final Order at 45 ("Notably, the Supreme Court engaged in statutory construction in its analysis in *Travelscape*—where it obviously was not clear at first glance whether the tax was imposed on Travelscape—yet the Supreme Court did not find the statutory scheme to be ambiguous or to require substantial doubt to be resolved in Travelscape's favor.") (citing *Travelscape*, 391 S.C. 89, 705 S.E.2d 28)).

At bottom, Amazon's argument is that its interpretation is reasonable based on the facts of this case and its business model (or, at least, how it characterizes those facts and its business model). But that is not an "ambiguity" or "strict construction" argument; it is just a traditional application-of-the-law-to-facts argument. And the fact that there is a disagreement about the application of a tax statute does not mean that the statute is ambiguous or must be construed in favor of the taxpayer—it just means that one of the parties is wrong. *Bank of Am. NT & SA v. 203 N. Lasalle Street P'ship*, 526 U.S. 434, 461 (1999) (Thomas, J. concurring); *see* **(R. p.)** (Final Order at 45 ("[A]lthough the application of specific statutes to a set of facts may not be initially clear, this does not mean that the statutes are ambiguous such that the case must be resolved in the taxpayer's favor. Rather, the existence of an ambiguity must be determined by reading the statutory scheme as a whole in light of the pertinent facts of the case.")). Here, the ALC correctly concluded Amazon is wrong and its interpretation is unreasonable considering the plain language and purposes of the Tax Act.

As recognized by the ALC, the "rule of strict construction of penal laws and tax statutes is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose . . . ." *Crescent Mfg. Co. v. Tax Comm'n*, 129 S.C. 480, 492, 124 S.E. 761, 765 (1924) (citations omitted); **(R. p.)** (Final Order at 45). From the beginning, section 12-36-910(A)

evidences the General Assembly's intention that the Tax Act should be applied broadly, as it imposes a sales tax "upon every person engaged . . . in the *business* of selling tangible personal property." (emphasis added). "Business" includes "*all activities*, with the object of gain, profit, benefit, or advantage, *either direct or indirect*." S.C. Code Ann. § 12-36-20 (emphasis added)). Likewise, a "sale" or "purchase" is broadly defined to mean "*any* transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration" and provides examples of such transfers that might not otherwise be considered a "sale" or "purchase." S.C. Code Ann. § 12-36-100 (emphasis added). Moreover, and important here, the General Assembly defined in section 12-36-70(1)(a) a "retailer" or "seller" as every person "selling or auctioning tangible personal property *whether owned by the person or others*." (emphasis added). And, finally, the use tax must be collected by the seller "*at the time of making the sales*" and the seller must then "give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected." S.C. Code Ann. § 12-36-1350(A) (emphasis added). Based on substantial evidence in the record demonstrating Amazon's business model and a "reasonable, sensible construction, having in view effectuation of the legislation purpose" of these statutory provisions, there can be no doubt that Amazon, rather than the Third-Party Merchants, is responsible for the sales and use tax owed for transactions on Amazon.com.

Through the relevant statutory provisions, the General Assembly expressly recognized that the obligation to collect and remit transaction-based taxes under the Tax Act applies to more than just the owners of the goods sold. § 12-36-70(1)(a). The General Assembly also evidenced its intention that the "seller" would be the person who interacts with the customer. § 12-36-1350(A). The relevant statutory provisions also require a focus on the transaction from the customer's perspective. § 12-36-100; *see Rent-A-Center*, 425 S.C. at 590, 824 S.E.2d. at 221 ("[T]he true

object test focuses on factual questions; namely, whether *the customer's purpose* for entering the transaction was to procure a good or a service." (emphasis added)) (quoting *Boggero v. S.C. Dep't of Revenue*, 414 S.C. 277, 285, 777 S.E.2d 842, 846 (Ct. App. 2015)); *Edisto Fleets, Inc. v. S.C. Tax Comm'n*, 182 S.E.2d 713, 715, 256 S.C. 350, 355 (1971) ("The terms 'sale' and 'purchase' are inextricably related and bound together and must be so construed . . . ."). Accordingly, based on a plain reading of the Tax Act consistent with its purpose of imposing and collecting sales and use taxes, Amazon's operation of Amazon.com through which sales of goods owned by others are completed, and by which Amazon—and no one else—receives payment directly from, and gives a receipt directly to, customers makes it a "seller" or "retailer" engaged "in the business of selling" that is statutorily required to collect and remit sales and use tax for retail sales on the Website.[21]

i. The Department's statements in the context of the proposed "marketplace facilitator" legislation are irrelevant to the interpretation of the statutory provisions in existence for the period at issue.

Unable to identify any credible ambiguity in the provisions of the Tax Act, Amazon contends that a few statements of Department officials made in the context of proposed legislation, and well after the period at issue and the initiation of this contested case, are admissions that the Tax Act is ambiguous. This contention was flatly rejected by the ALC. **(R. pp.)** (Final Order at 17-18). Simply put, statutory interpretation is a question of law reserved for the courts that is not changed by any statements made by governmental officials or even agencies. *Jeter v. S.C. Dep't*

[21] If a brick-and-mortar store followed Amazon's business model, there would be no question that it would be responsible for collecting and remitting sales and use tax. The mere fact that the applicable law does not expressly address sales on the internet does not mean that internet sales are not sales, that those entities that direct them are not retailers, or that they are not engaged in the business of selling tangible personal property at retail. *See* **(R. pp.)** (Final Order at 18-19 (*citing, inter alia, Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) ("While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.") (emphasis in original)). Indeed, the Supreme Court's ruling in *Travelscape* confirmed that the broad provisions of the Tax Act apply to internet sales.

of Transp., 633 S.E.2d 143, 146, 369 S.C. 433, 438 (2006) ("The issue of interpretation of a statute is a question of law for the court."); *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose."). Accordingly, statements by Department officials are irrelevant to determining the meaning of the Tax Act.[22] *Id.*

The Department's position also has been the same all along: Amazon is a "seller" or "retailer" and is engaged in the business of selling tangible personal property pursuant to the Tax Act based on its specific business model. **(R. pp.)** (Ex. 171, Dep't Determination). Amazon points to a few statements by the Department Director made approximately two years after the period at issue in the context of the proposed "marketplace facilitator" legislation, and claims these were "admissions" for purposes of this case. However, read in context, those statements reflect only an assessment of the new legislation that would quickly resolve any future dispute between the Department and Amazon—or other similar taxpayers—for future periods, without the need for protracted litigation. Indeed, Amazon completely ignores the fact that the proposed (and now enacted) legislation applies not just to Amazon but rather to a broad range of entities that could be classified as "marketplace facilitators." And many of these entities have business models that are very different than Amazon's. The Department's efforts to assist the General Assembly in clarifying the law to address new technological advancements and to ensure all so-called "marketplace facilitators" could not exempt themselves from the requirements of the Tax Act do

[22] By not identifying any ambiguity in the statutory scheme that creates any substantial doubt as to whether Amazon is a "seller" or "retailer," Amazon also is attempting without legal support to turn the traditional ambiguity analysis on its head by looking first to extraneous materials to attempt to prove the existence of an ambiguity in the statute, rather than the other way around.

not amount to any admission with respect to the application of the then-existing provisions of the Tax Act to Amazon's specific business.

ii. Amazon's arguments about its sales tax collection practices prior to 2016 are inapposite.

Amazon also erroneously asserts that it was reasonable for Amazon to infer that the Department's position was to treat Third-Party Merchants as the party required to collect and remit sales tax allegedly because, prior to 2016, Amazon made available to certain Third-Party Merchants the option of having Amazon collect sales and use tax on their behalf, and the Department never issued any guidance suggesting this process was wrong. Appellant's Br. at 40. First, this argument is improper and unpreserved as it was not raised to and ruled upon by the ALC, and Amazon did not present any evidence that it collected sales tax on behalf of Third-Party Merchants that was remitted to the Department prior to 2016. *Murphy v. Hagan*, 275 S.C. 334, 339, 271 S.E.2d 311, 313 (1980) (holding an appellate court will not hear issues not raised or preserved in a lower court proceeding). This also is a disingenuous argument by Amazon, as it is fully aware that, prior to 2016, the Moratorium exempted Amazon from collecting and remitting sales tax for all sales on the Website. **(R. p.)** (Tr. 609). Additionally, prior to the U.S. Supreme Court's 2018 decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), the Department was not permitted to collect sales and use tax from entities that did not have a physical presence in South Carolina. Amazon did not have a physical presence in South Carolina until it built its distribution facility in Lexington County in 2011. Accordingly, there was no "practice" of the Department prior to 2016 that would have suggested Amazon was not the appropriate party to collect and remit sales tax. Indeed, contrary to Amazon's argument, the very existence of the Moratorium, as well as the plain language of the Tax Act and the Supreme Court's 2011 decision in *Travelscape* regarding online retailers, provided clear direction to Amazon that it was

responsible to collect and remit sales and use tax for all customer purchases on Amazon.com when the Moratorium expired.

iii. The enacted "Marketplace Facilitator" legislation does not support Amazon's position.

The enacted "Marketplace Facilitator" legislation also does not demonstrate that the statutory provisions at issue in this case are ambiguous or must be construed in favor of Amazon. *See, e.g., Whitner v. State*, 328 S.C. 1, 9, 492 S.E.2d 777, 781 (1997) ("Generally, the legislature's subsequent acts cast no light on the intent of the legislature which enacted the statute being construed . . . . Rather, this Court will look first to the *language* of the statute to discern legislative intent, because the language itself is the best guide to legislative intent.") (internal quotation marks and citations omitted). In fact, the "Marketplace Facilitator" legislation contains a specific provision that it "shall not be construed as a statement concerning the applicability of the South Carolina Sales and Use Tax Act to any sales and use tax liability in matters currently in litigation or in audit." S.214, 123d Session, 2019-2020 S.C. Gen. Assemb., § 1(5). As this matter was in litigation at the time of the legislation, this provision forecloses either party from relying on the "Marketplace Facilitator" legislation in support of their position.[23] It is absurd for Amazon to argue that the General Assembly intended to allow Amazon to assert in this case that there is a "presumption" that the General Assembly intended to change the law, yet that is was it does.

In any event, statutory amendments "may also be interpreted as clarifying original legislative intent." *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008). Here, even if the Court looks beyond the General Assembly's statement in the legislation,

[23] This provision also precludes Amazon's effort to rely on the Department Director's discussion of the proposed "Marketplace Facilitator" legislation before the General Assembly. That is, the Director's statements to the General Assembly about the legislation also are barred from consideration.

it is evident that the General Assembly intended to clarify the law with respect to the broad category of "internet marketplaces" rather than change it. For instance, as part of its "Findings" in support of the legislation, the General Assembly stated:

> [T]he Internet marketplaces where a person sells tangible personal property at retail by listing or advertising, or allowing the listing or advertising of, another person's products on an online marketplace and collects or processes the payment from the customer are retailers required to remit the sales and use tax on such retail sales under the provisions of South Carolina sales and use tax law[.]

S.214, 123d Session, 2019-2020 S.C. Gen. Assemb., § 1(2). The General Assembly therefore considered entities operating like Amazon to be "retailers" under the Tax Act *before* the enactment of the "Marketplace Facilitator" legislation. In its "Findings," the General Assembly also analogized entities operating internet marketplaces to traditional retailers selling tangible personal property of others or on consignment and made specific reference to "the *longstanding* requirement in the sales and use tax law that a retailer remit the tax on retail sales of tangible personal property owned by another person." *Id.* at § 1(2), (3) (emphasis added). And as part of its amendments, the General Assembly revised S.C. Code Ann. § 12-36-90(1) to add the following emphasized language to the definition of the "gross proceeds of sales": "the proceeds from the sale of property sold on consignment, *including property sold through a marketplace by a marketplace facilitator*." (emphasis added). Notably, the revised language says "including" rather than "and," thereby demonstrating that the General Assembly considers sales by a "marketplace facilitator" to be "consignment" sales for purposes of the Tax Act. In short, the "Marketplace Facilitator" legislation—at least with respect to application to entities operating like Amazon—was a clarification to the existing law, not a change.

iv. The treatment of "remote sellers" for purposes of determining "nexus" after the period at issue is irrelevant.

Amazon incorrectly contends the Department has somehow admitted that Amazon's interpretation of the Tax Act is reasonable by issuing guidance after the U.S. Supreme Court's *Wayfair* decision in 2018 regarding the determination of whether a person or entity has "nexus" with South Carolina. Appellant's Br. at 44-45. As an initial matter, Amazon failed to preserve this argument for appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to *and* ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (emphasis added); *Murphy*, 275 S.C. at 339, 271 S.E.2d at 313 (same). Here, Amazon's contention that the Department's issuance of guidance in 2018 related to the determination of whether a person or entity has "nexus" with the state demonstrates that Amazon's position is reasonable was never addressed by the ALC in its Final Order. Amazon never sought reconsideration of the ALC's Final Order on this issue or any other issue prior to filing its appeal, so this issue is not preserved. *Id.*

Nevertheless, as acknowledged by Amazon, the very Department guidance upon which Amazon relies (Revenue Ruling 18-14) expressly states that online "marketplaces"—the category within which Amazon falls—are the "sellers" or "retailers" under the Tax Act required to collect and remit sales and use tax, not the Third-Party Merchants that may list their products on the marketplaces. Far from an admission against interest, this is a confirmation that the Department's position about Amazon has not changed. Regardless, the determination of whether a person or entity has "nexus" with a state is separate and apart from the determination of whether that person or entity has an obligation to collect and remit sales and use tax related to a specific transaction.

In order for a state to subject a person or entity to its taxing jurisdiction, there must be "nexus" (*i.e.*, a sufficient connection) between an activity, property, or transaction of that person

or entity and the state. Prior to the 2018 *Wayfair* decision, a person or entity's physical presence in the state was required to establish this "nexus." However, in *Wayfair*, the U.S. Supreme Court held that physical presence was not required and that nexus can be established through both "economic and virtual contacts" with a state. 138 S. Ct. at 2099. In light of *Wayfair*, many states, including South Carolina, have established "economic nexus" thresholds to determine whether that state will exercise its taxing jurisdiction over a specific person or entity based on the overall amount of economic activity and connection that person or entity has with a state. In South Carolina, like other states, that threshold is met if the person or entity derives "gross revenue" greater than $100,000 from services or sales of products "transferred electronically" into South Carolina, regardless of whether the transfer is subject to South Carolina sales and use tax. *See* S.C. Rev. Rul. 18-14.

In other words, the South Carolina nexus threshold is determined by both a person or entity's direct sales into the state, as well as the transfer of its services or products into the state through other means. For example, a person may directly transfer goods into South Carolina by selling goods on its own website. For these transactions, that person is the "seller" or "retailer" for purposes of the Tax Act. That same person also might transfer its goods into the state through listing the products on Amazon.com. Because that person has "transferred" goods into the state, those transfers are counted for "nexus" purposes. But that does not mean that the person was the "seller" or "retailer" for purposes of collecting and remitting sales and use taxes. That is a different inquiry altogether.

In short, Revenue Ruling 18-14 does not declare that Third-Party Merchants are the retailers with respect to transactions on the Website for purposes of the Tax Act as Amazon

suggests, and it certainly does not absolve Amazon of its liability as the retailer for these transactions. It simply concerns another issue entirely.

v. Amazon's reliance on decisions, or the absence thereof, from other states regarding different laws is unhelpful.

Amazon claims that a lack of prior guidance in this state, as well as the fact that no taxing agency or court in any other state has interpreted their own state's tax statutes yet to treat Amazon as the entity required to collect and remit sales and use tax, demonstrates the reasonableness of its interpretation of the Tax Act. Appellant's Br. at 46. But, the simple lack of published guidance or court rulings about a specific application of facts to a statute does not mean that the statute does not apply or that it is ambiguous.

Regardless, while there was no guidance specifically discussing the treatment of sales on Amazon.com or other online marketplaces prior to 2016, there was statutory authority and guidance from the Department regarding the treatment under the Tax Act of similar transactions (*e.g.*, consignment sales). *See* S.C. Code Ann. § 12-36-90 (defining "gross proceeds of sales" as including "the proceeds from the sale of property sold on consignment"); **(R. pp.)** (Tr. 596-98 (former Department official describing publicly available information regarding sales tax treatment of consignment sales prior to 2016); Ex. 215, Ch. 23, p. 19). Further, as discussed above, in *Travelscape*, the Supreme Court applied nearly identical facts to nearly identical statutory provisions and held that the entity offering and accepting payment for goods owned by others on its website (*i.e.*, Travelscape) was required to collect and remit the taxes, not the owners of the goods (*i.e.*, the hotels). Accordingly, contrary to Amazon's arguments, there was ample prior

guidance and authority in this State demonstrating that Amazon was required to collect and remit sales and use tax for the sales of goods on Amazon.com.[24]

Likewise, Amazon's reliance on the absence of any other state's taxing authority requiring Amazon to collect and remit sales and use taxes is unhelpful. What another state has done or not done with respect to its own tax laws has no bearing on the interpretation of the *South Carolina* Tax Act. Indeed, Amazon does not identify a single state with statutory provisions similar to the Tax Act. And despite titling this section of its brief "The Decisions of Other Jurisdictions Confirm the Reasonableness of Amazon Services Interpretation," Amazon does not cite to a single decision from another jurisdiction. The absence of action by other states with respect to their own tax laws is therefore irrelevant to the interpretation of the Tax Act and does not support Amazon's claim that its interpretation is reasonable.[25]

2. Application of the Tax Act to Amazon's Business Does Not Violate the U.S. Constitution or the South Carolina Constitution.

A. Amazon's Due Process Rights Have Not Been Violated.

Amazon argues that applying the Tax Act to Website sales violates both federal and South Carolina constitutional guarantees of due process. The crux of Amazon's argument is that the Department's assessment of sales and use tax for Amazon's sales from the first quarter of 2016

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[24] Moreover, if Amazon believed that it could not reasonably determine whether it was subject to the Tax Act's requirements, it could have requested and obtained an advisory opinion from the Department's Policy Division. The Department's website and Revenue Procedure #09-3 contain readily accessible information detailing the procedure for obtaining such a written determination. There is no evidence that Amazon made such a request, presumably because it preferred not to know the Department's anticipated answer. Amazon is a sophisticated taxpayer, and it cannot now justify its failure to comply with South Carolina law by claiming there is a dearth of published guidance when Amazon had the ability to request such guidance—and chose not to.

[25] To be clear, Amazon's subjective belief as to what it allegedly "reasonably expected" would be the treatment of sales on the Website under the Tax Act also is completely irrelevant. Appellant's Br. at 46.

"effectively seeks to subject Amazon Services to the 2019 amendments," which "violates the constitutional requirement of fair notice." Appellant's Br. at 47. In support, Amazon cites *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), in which the U.S. Supreme Court rejected the FCC's attempt to retroactively apply a change in policy to two TV stations for airing content that previously would have been permissible. The Court held that the FCC's actions violated the "void for vagueness" doctrine, which requires "first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 253. The Court further explained that "a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved." *Id.*

Here, there is no doubt about the regulatory standard to which Amazon is being held—it is simply the plain language of the Tax Act as it existed in the first quarter of 2016. The Department's tax assessment against Amazon did not represent a reversal in policy, or a change in the regulatory framework governing online retailers, but rather an enforcement of the clear words of the statute, which require that anyone "engaged . . . in the business of selling tangible personal property at retail" must pay sales tax to the state. § 12-36-910(A). Certainly, Amazon disagrees that its online sales activities meet the standard set out in the Tax Act, but that does not mean that it is "unclear as to what fact must be proved." *Fox Television Stations*, 567 U.S. at 253. Having effected an "exchange . . . of tangible personal property for a consideration," section 12-36-100, Amazon has placed itself squarely within the requirement to collect and remit sales and use tax to South Carolina, and this statutory framework was in place and known to Amazon well before the first quarter of 2016.

Moreover, other facts demonstrate that Amazon was on notice in the first quarter of 2016 of its obligation to collect and remit sales and use tax for all of the sales taking place on its Website. To begin, Amazon lobbied for the passage of the 2011 Distribution Facility Sales Tax Exemption in connection with placing a large distribution center in Lexington County so that it could be exempt from collecting and remitting sales tax to South Carolina for a period of time. Thus, Amazon had carefully examined, and had devoted significant resources to mitigating, its tax obligations under South Carolina law prior to the first quarter of 2016, when the Moratorium ended. Also during the summer of 2011, the South Carolina Supreme Court issued the *Travelscape* decision, which directly addresses the tax obligations under South Carolina law of those who sell on the internet. So the idea that Amazon was taken by surprise by its obligation to collect and remit sales and use tax in South Carolina for its online retail sales is spurious.

Amazon's argument that the Department, by its tax assessment issued in December 2016, effectively seeks to have statutory amendments that were passed in 2019 applied to Amazon in this case, is a red herring. As the ALC observed in its order, at no point during these proceedings has the Department argued that the 2019 amendments should apply to make Amazon liable for sales and use tax in the first quarter of 2016. *See* **(R. p.)** (Final Order at 49). Rather, the Department's position has consistently been that the plain language of the Tax Act as it existed in 2016 applies to the retail sales taking place on Amazon's Website, and makes Amazon liable for sales and use tax for those transactions. At no time has the Department attempted to impose a new or different policy, rule, or regulation on Amazon, making this case plainly distinguishable from *Fox Television Stations*. There can be no question that Amazon was on notice of the provisions of

the Tax Act, and South Carolina cases interpreting the Tax Act, in 2016, and its position that its due process rights have been violated in this case is without merit.[26]

B. Amazon's Equal Protection Rights Have Not Been Violated.

Amazon also wrongly argues that the application of the Tax Act to its retail sales violates South Carolina and federal constitutional equal protection principles. "In order to establish an equal protection violation, a party must show that similarly situated persons received disparate treatment." *TNS Mills*, 331 S.C. at 626, 503 S.E.2d at 479. "Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). "To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose." *Id.* Further, "[a] violation is established only if the plaintiff can prove that the state intended to discriminate." *Whaley v. Dorchester Cnty. Zoning Bd. of Appeals*, 337 S.C. 568, 576, 524 S.E.2d 404, 408 (1999); *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 329 (4th Cir. 2005).

As the ALC observed, Amazon's threadbare equal protection argument suffers from several critical errors and omissions. To begin, Amazon does not assert that it is part of a suspect class, or that any fundamental right was abridged in this case, and thus implicitly concedes that the rational basis test is appropriate, though it never uses the words "rational basis" in its brief. While

[26] Here again, Amazon cites collateral, out-of-context statements in legislative audit submissions and by the Department's Director in 2018 in a vain attempt to demonstrate confusion about the application of the Tax Act to Amazon's retail sales. Besides the mischaracterization of these statements, the Department observes once more that statements by Department employees do not alter or amend state law. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 627, 503 S.E.2d 471, 480 (1998); *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995); *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991).

Amazon has failed to show disparate treatment in the first place, *see* discussion *infra*, the Department submits that its collection of statutorily-mandated sales and use tax meets the rational basis test in any event.

More importantly, however, Amazon failed to submit *any* evidence at trial identifying any other taxpayer that is similarly situated to Amazon such to enable the ALC to perform an equal protection analysis. **(R. p.)** (Final Order at 51). Even now, Amazon can muster only passing mention of another online shopping website, *see* Appellant's Br. at 49 ("e.g., eBay"); however, it does so without offering any analysis about the similarities between its business model and eBay's. The evidence at trial included extensive documents and testimony examining in careful detail the manner in which Amazon operates its Website, the control it exacts over transactions taking place on its Website, and all the many ways in which it directly participates in, and profits from, the online retail sales that are at issue in this case. The mere mention on appeal of another website whereupon goods are exchanged, without more, hardly satisfies to allow any helpful comparison to Amazon for the purpose of evaluating its equal protection argument.[27]

Further, "Amazon Services offered no evidence regarding whether the Department assessed sales and use tax on another online marketplace or why the Department failed to impose the tax on such a similarly situated business." **(R. p.)** (Final Order at 52). Thus, as the ALC explained, "there is no evidence that the Department purposefully singled-out Amazon Services to intentionally discriminate against them with the imposition of the tax." *Id.* Purposeful discrimination is a required showing for an equal protection claim. *See Whaley*, 337 S.C. at 576,

[27] The Department assumes that Amazon's statement that sales and use tax ought to be collected from "malls, as well as payment processors, credit card companies, banks, delivery companies, and advertisers," Appellant's Br. at 49, is hyperbole, because none of these business types combine these discrete functions into one unified sales platform as does Amazon.

524 S.E.2d at 408; *Sunrise Corp. of Myrtle Beach*, 420 F.3d at 329. Amazon's failure to make any such showing in this case is fatal to its claim, and the ALC was correct to reject it.

In its brief, Amazon appears to hang its equal protection argument on a singular statement made by the Department's Director during a legislative committee meeting years after the tax period at issue in this case that the "lawsuit's going to pull up some retroactivity, . . . specific to that one company, I haven't said their name." Appellant's Br. at 50. However, the Director's statement was merely a reference to the fact of pending (and public) litigation between the Department and Amazon, not an affirmation of selective enforcement of then-existing provisions of the Tax Act against Amazon. It bears repeating that at no point in these proceedings has the Department argued that the 2019 amendments to the Tax Act should apply to Amazon's retail sales in the first quarter of 2016. Rather, the Department's position is that the manner in which Amazon operates its online sales platform makes it liable for sales and use tax under the provisions of the Tax Act that were in place well before that time. Amazon's attempt to contort the Director's words into some sort of admission for the purposes of this litigation is unavailing, and it was rightly rejected by the ALC.

Ultimately, Amazon failed to submit any evidence at trial demonstrating that it is similarly situated to other online "marketplaces," that it was treated differently from those other entities, or that the Department engaged in purposeful discrimination against Amazon, all of which were required to substantiate its equal protection claim. Even if it had made these showings, it has failed to even attempt an argument that the Department's actions lacked a rational relationship to a legitimate government purpose, which they plainly do. For these reasons, Amazon's equal protection claim must fail as it did at the ALC.

CONCLUSION

For the reasons explained above, this Court should deny the appeal of Amazon and affirm the Final Order of the Administrative Law Court.

Respectfully submitted,

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Columbia, South Carolina
March 13, 2020

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. 2019-0017006

Amazon Services, LLC, ... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

PROOF OF SERVICE

This is to certify that I, Elizabeth Kurtz, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy each of **Respondent's Initial Brief** and **Designation of Matter to be Included in the Record on Appeal** by depositing the same in the U.S. Mail to the following:

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March 13, 2020

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Amazon Services, LLC v. S.C. Dep't of Revenue*, Appellate Case No. 2019-001706

Dear Ms. Kitchings:

Enclosed please find a copy of **Respondent's Initial Brief** and **Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter.

By copy of this letter, I am serving counsel of record for Amazon Services, LLC and enclose a proof of service to that effect. If the Court has any questions, or requires additional information, please contact me at your convenience.

Thank you. If you have any questions, please call.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

John

John W. Roberts

Enclosure

cc: Bryson M. Geer, Esquire
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