

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**Dec 30 2020**

**SC Court of Appeals**

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

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Appellate Case No. 2019-001706

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

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Amazon Services, LLC .....Appellant,

v.

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

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**COUNCIL ON STATE TAXATION'S REPLY TO RESPONDENT'S RETURN IN  
OPPOSITION TO THE MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF**

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*Counsel for Council On State Taxation*

Pursuant to Rules 213 and 240(f) of the South Carolina Appellate Court Rules (“SCACR”), the Council On State Taxation (“COST”) respectfully submits the reply to Respondent South Carolina Department of Revenue’s (the “Department”) return and memorandum in opposition to COST’s Motion for Leave to File an *Amicus Curiae* Brief (the “Motion”) filed on December 9, 2020. For the reasons discussed below, COST has met the burden of demonstrating an interest in this appeal and possession of unique information that would benefit the Court’s review and application of South Carolina law as required by Rule 213, SCACR. Thus, COST’s Motion should be granted.

### **PROCEDURAL POSTURE**

This is an appeal from the Administrative Law Court’s (“ALC”) final decision as to the Department’s determination and assessment of sales and use tax, penalties, and interest (the “Determination”) against Appellant Amazon Services, LLC (“Amazon Services”). The Department determined that Amazon Services was a “seller” required to collect and remit sales and use tax under the State’s law that pre-existed recent statutory amendments specifically authorizing the expansion of South Carolina’s sales tax obligation to include marketplace facilitators, such as Amazon Services, on a prospective basis only. On July 21, 2017, Amazon Services contested the Determination with the ALC. Following a hearing on February 4-6, 2019, the ALC issued its Final Order affirming the Department’s Determination on September 10, 2019. Amazon Services filed its Notice of Appeal to this Court on October 10, 2019. Final briefs were completed by the Appellant and Respondent on June 11, 2020. On December 9, 2020, COST filed its Motion seeking leave to file an *amicus* brief. The Court has not assigned this case yet.

## STANDARD

Rule 213, SCACR allows an *amicus* brief to be filed “only by leave of the appellate court granted on motion.” Under Rule 213, SCACR, the motion for leave to file an *amicus* brief must “identify the interest of the applicant” and “state the reasons why a brief of an *amicus curiae* is desirable.” It is within this Court’s discretion to determine whether to grant leave to file an *amicus* brief. *See, e.g., Cook v. S.C. Dep’t of Highways & Pub. Transp.*, 309 S.C. 179, 184, 420 S.E.2d 847, 850 (1992) (finding no abuse of discretion in a trial court granting leave to file an *amicus* brief).

Beyond this discretionary standard, South Carolina’s courts have not provided detailed guidance on how to evaluate an *amicus* brief filed pursuant to Rule 213, SCACR. The Seventh Circuit Court of Appeals, however, recently took the opportunity to discuss *amicus* brief standards in *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 2020 WL 5867923 (7th Cir. Sept. 24, 2020). The Seventh Circuit’s analysis provides useful guidance for measuring the utility of an *amicus* filing in federal or state court. The Seventh Circuit provides that “[a]n *amicus curiae* brief should be additive—it should strive to offer something different, new, and important.” *Id.* at 763 (accepting all three *amicus* brief filings at issue because each added something new that could help the court’s evaluation of the case, even though the briefs could have included “some unnecessary and unwelcomed (though perhaps inevitable) repetition” of a party’s arguments). The Seventh Circuit further enumerates ways in which an *amicus* can add value. “[A] friend of the court interested in a particular outcome can contribute in clear and distinct ways, by, for example:

- Offering a different analytical approach to the legal issues before the court;
- Highlighting factual, historical, or legal nuance glossed over by the parties;

- Explaining the broader regulatory or commercial context in which a question comes to the court;
- Providing practical perspectives on the consequences of potential outcomes;
- Relaying views on legal questions by employing the tools of social science;
- Supplying empirical data informing one or another question implicated by an appeal;
- Conveying instruction on highly technical, scientific, or specialized subjects beyond the ken of most generalist federal judges;
- Identifying how other jurisdictions—cities, states, or even foreign countries—have approached one or another aspect of a legal question or regulatory challenge.” *Id.*

### **ARGUMENT**

COST respectfully submitted the Motion, complying with the letter and spirit of *amicus curiae* by adding contributions to this Court to help its evaluation of the issues presented on appeal. COST’s interest in this matter aligns with its mission—to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. The Final Order directly (and adversely) impacts COST’s mission as applied to COST members who are marketplace facilitators and to COST members doing business in South Carolina.

Although Respondent claims the outcome of this case only impacts the Appellant, case law is precedential in nature. Amazon Services’ business model is not an anomaly, but similar to many other marketplace facilitators, some of which are COST members. As a result, COST members who are marketplace facilitators are directly impacted and interested in this matter. COST also has an interest in the imposition of marketplace facilitator collection obligations, effectuated by state legislation, on a prospective basis only. To that end, COST has opposed attempts by other

jurisdictions to circumvent the “prospective only” application of marketplace facilitator legislation. See Brief for COST as *Amicus Curiae, Normand v. Wal-Mart.com USA, LLC*, No. 2019-C-00263, 2020 WL 499760 (La. Jan. 29, 2020). And COST is actively involved in efforts to provide more uniformity with states’ marketplace facilitator legislation, such as the National Conference of State Legislatures Task Force on State and Local Taxation’s work group, which adopted model marketplace facilitator legislation.

On a broader level, this matter raises concern over clear and fair tax administration. A significant number of COST members own property, have employees, and make substantial sales in South Carolina. Thus, COST has an interest in the resolution of this case in a manner that maintains business community trust in the administration of South Carolina’s tax system.

The Respondent further questions COST’s interest in this matter based on the timing of the *amicus* brief filing. Rule 213, SCACR, however, neither equates the timing of the brief filing with the interest of the *amicus curiae* nor imposes a submission deadline. It is entirely illogical to assert that no “friend of the court” can exist unless that friend became involved at the near inception of a controversy. This position would limit practically all *amicus curiae* participation, as such parties typically get involved at varying points (and levels) during the appellate process. Since the Court has not assigned this matter, the Motion is well within the timeframe to contribute to the Court’s evaluation of this case.

Additionally, COST has participated in over two hundred *amicus* briefs on state and local tax matters of interest to COST members since its inception. To our knowledge, none of these briefs have been rejected by a court.

Review of the Motion also demonstrates that the *amicus* brief contributes to this Court’s evaluation of the case in multiple ways. COST highlights pertinent historical and legal nuances

such as the impact of *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2091, 201 L.Ed.2d 402, 417 (2018) and how states, including South Carolina, have addressed ineffective remote seller sales tax collection through the enactment of prospective marketplace facilitator legislation. COST analyzes similar litigation in another jurisdiction that was resolved in favor of the taxpayer. *Normand v. Wal-Mart.com USA, LLC*, No. 2019-C-00263, 2020 WL 499760 (La. Jan. 29, 2020). COST also draws attention to a broader commercial context – torts liability – which raises similar issues that this Court may find helpful in making its decision. Lastly, COST offers a different analytical approach to the ALC’s determination that *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011) is dispositive by drawing attention to fundamental differences between the online travel company business model in *Travelscape* and the marketplace facilitator business model at issue here.

COST respectfully offers multiple different and important insights to aid the Court to make a fully informed evaluation of this case. “A true friend of the court will seek to add value to [the] evaluation of the issues presented on appeal.” *Prairie Rivers Network*, 976 F.3d at 763. Accordingly, COST’s contributions are all perspectives not fully developed by the litigating parties.

**CONCLUSION**

For the reasons explained above, this Court should grant COST's Motion for Leave to File an *Amicus Curiae* Brief in this case.

Respectfully submitted,



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Amazon Services, LLC .....Appellant,

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PROOF OF SERVICE

I, the undersigned of the law offices of Parker Poe Adams & Bernstein LLP, attorneys for *amicus* Council On State Taxation, hereby certify that I have served all counsel of record in this action with a copy of the pleading(s) hereinbelow specified by e-mailing a PDF copy of the same to the following e-mail addresses pursuant to SC Supreme Court COVID Order 2020-05-29-02:

Pleadings                    COUNCIL ON STATE TAXATION  
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December 30, 2020

VIA E-MAIL (CTAPPFILINGS@SCCOURTS.ORG)

The Honorable Jenny Abbot Kitchings  
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**Dec 30 2020**  
**SC Court of Appeals**

***Re: Amazon Services, LLC v. South Carolina Department of Revenue  
Appeal from the Administrative Law Court  
Docket No. 17-ALJ-17-0238-CC  
Appellate Case No. 2019-001706***

Dear Ms. Kitchings:

Enclosed for electronic filing by email and in accordance with Supreme Court Order 2020-05-29-02, part (c)(6), and pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Council On State Taxation respectfully submits its reply to Respondent's Return in Opposition to Council On State Taxation's Motion for Leave to File an *Amicus Curiae* Brief and accompanying Proof of Service.

By copy of this correspondence, we are serving all counsel of record with a copy of the enclosed documents by e-mail. Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Madison Felder

Enclosures

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The Honorable Jenny Abbot Kitchings

December 30, 2020

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