THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2019-001706

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

Amazon Services, LLC,..Appellant

v.

South Carolina Department of Revenue, ...Respondent.

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, INTERNET ASSOCIATION, SOUTH CAROLINA CHAMBER OF COMMERCE, AND GREATER COLUMBIA CHAMBER OF COMMERCE, AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AMAZON SERVICES, LLC

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STATEMENT OF INTEREST AND ASSISTANCE TO THE COURT

Amici curiae have a substantial, legitimate interest in the manner in which a state applies its tax laws to *amici*'s members and to the nation's business community as a whole. They and their members have, in particular, a keen interest in the predictability that comes when rules for taxation are clear and announced in advance, rather than promulgated in hindsight through the course of an audit. Without such predictability, the planning that is critical to business success and to the employment (and tax revenues) dependent upon business success is rendered impossible. The Administrative Law Court expanded the scope of the phrases "business of selling" and "seller making retail sales" under South Carolina law (S.C. Code Ann. 12-36-910(A) (2014) and S.C. Code Ann. 12-36-1340 (2014)) to hold an entity responsible for sales tax on past transactions to which that entity was not a party, involving goods in which the entity never had an interest. This expansion, and the retroactive penalties it endorses, may significantly affect *amici*'s members, their business interests, and the nation's business community.

Amici's brief demonstrates the far-reaching effects of the agency's interpretation, which would result in a shift in South Carolina's tax law that is contrary to the State's legislatively-established public policy. Such policy changes should be made by the General Assembly with public notice in advance of their applicability—as, in fact, the tax law was changed for periods after April 26, 2019. See Act No. 21, 2019 S.C. Acts ____, codified at S.C. Code Ann. 12-36-70, -71, -1340, (Supp. 2019), and in related provisions.

The Chamber of Commerce of the United States of America (the "U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including matters of taxation. The U.S. Chamber has previously appeared in the courts of Louisiana regarding the same issue, under Louisiana law, that is presented here under the laws of South Carolina: whether the provider of on-line marketplace services has, where the statute is silent, a responsibility to collect and remit sales or use taxes on transactions between two parties (a seller and a buyer) unrelated to it that occur through its on-line platform.[1]

The Business Roundtable ("BRT") is an association of chief executive officers who collectively manage more than 16 million employees and $7 trillion in annual revenues. BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy that affects business and commerce. It participates in litigation as *amicus curiae* in a variety of contexts where important business interests are at stake.

The Internet Association is the only trade association that exclusively represents leading global internet companies on matters of public policy. The Internet Association's mission is to foster innovation, promote economic growth, and empower people through the free and open internet.

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[1] The Supreme Court of Louisiana agreed with the position advocated by the U.S. Chamber and held that the existing sales tax collection law did not require an on-line marketplace to collect sales tax on transactions by unrelated third-party retailers. Normand v. Wal-Mart.com USA, LLC, ___ So.3rd ___, 2020 WL 499760 (La., January 29, 2020).

The South Carolina Chamber of Commerce (the "State Chamber") is a leading advocacy organization for economic growth and development in the State, including advocacy for a balanced and predictable tax and spending system. The non-profit and non-partisan State Chamber identifies and addresses issues impeding economic growth and development at both the State and federal level, often by filing *amicus curiae* briefs in appellate cases that involve important common interests of South Carolina businesses. The State Chamber joins in submitting this brief to stress the overall importance of this case and to aid the court in understanding how the decision of the Administrative Law Court – allowing Respondent South Carolina Department of Revenue to impose, after-the-fact, a statutory interpretation that does not appear in the language of the statute, that is contrary to prior understanding, that leap-frogs General Assembly action on the issue, and that is contrary to interpretations of similar laws in other states against which South Carolina competes for business – is contrary to the established public policy of South Carolina that promotes economic growth and development.

The Greater Columbia Chamber of Commerce (the "Columbia Chamber") has, since 1902, been a trusted resource for businesses and their employees. Its members rely on the Columbia Chamber's assistance in navigating complex issues facing the business community. Through public policy and advocacy, the Columbia Chamber provides a unified voice for the regional business community, in order to create and promote a stronger community for businesses and for residents and an environment where businesses can flourish.

STATEMENT OF THE ISSUES ON APPEAL, OF THE CASE, AND OF THE FACTS; AND STANDARD OF REVIEW

Amici curiae concur in and adopt by reference the "Statement of the Issues on Appeal," the "Statement of the Case," the "Statement of the Facts," and the "Standard of Review" set forth in the "Final Opening Brief of Appellant Amazon Services LLC" ("AS Br.") and the "Final Reply Brief of Appellant Amazon Services LLC" ("AS Repl.Br.").

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case calls for the Court to decide (i) whether Amazon Services should have collected and remitted sales tax on sales made not by it but by third parties, at a time when the existing statutory language and administrative framework clearly did not require them to do so; and (ii) whether Amazon Services is now liable from its own funds for the amount of such sales or use taxes in light of the State's changed regulatory position (adopted in the course of an audit by Respondent South Carolina Department of Revenue ("DOR")) – even though Amazon Services has no practical ability to go back after-the-fact to try to collect from the sellers or users who are actually liable.[2]

DOR contends that, although it has the legal right to enforce sales and use taxes against sellers and users (and has, in fact, been doing so – AS Br., pp. 1 and 16), doing so

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[2] To avoid cumbersome circumlocutions, obligations that Amazon Services or its affiliates have or had, or that Respondent claims that they have or had, are described throughout this brief in the present tense, as if they were the same during all periods. *Amici* note, however, that pursuant to S.C. Code Ann. 12-36-2691 (2014), Amazon Services and its corporate affiliates were exempt from such obligations until January 1, 2016, and that, pursuant to S.C. Code Ann. 12-36-70, -71, -1340 (Supp. 2019), and other sections amended by Act No. 21, 2019 S.C. Acts ____, Amazon Services and its corporate affiliates now do have obligations to collect and remit sales tax on third-party sales made through amazon.com after April 26, 2019.

is less convenient than deputizing Amazon Services to be the involuntary tax collector.[3] But even if that were true, the issue here is not what is the most convenient method by which to collect and remit sales and use taxes. Amazon Services does, in fact, collect and remit without protest now that it has been given prospective notice to do so by the 2019 statutory amendments.

Instead, the issue here is the State's retroactive administrative imposition of an obligation on Amazon Services to collect and remit these taxes long after the completion of sales, despite statutory and regulatory silence at the time of sale. Due to the difficulties of collecting these taxes from customers at this point, Amazon Services now must remit these substantial sums from its own funds. The tax burden thus functions as a retroactive penalty imposed on Amazon Services. This result is inconsistent with basic precepts of the rule of law that require the government to publicly articulate legal obligations in terms that are clearly understandable to regulated parties, in advance of the governed conduct, so that the governed person may conform his conduct to the law.[4]

In addition to running afoul of fundamental legal principles, DOR's interpretation contravenes the general and the specific public policy of South Carolina. That public policy seeks to create in South Carolina a hospitable environment to which businesses are attracted and in which they can thrive – in other words, an environment in which businesses can perform their vital planning functions for investment, operations, and growth based on

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3 See Ex. 192, R. 1256, and DOR Br. pp. 15, 23, and 33. As Amazon Services notes in its Reply Brief, however, pp. 14-15, DOR abandoned that argument at trial and cannot resurrect it now. Southern Ry. Co. v. Routh, 161 S.C. 328, 158 S.E. 640, 642 (1931) (an issue conceded at trial cannot be raised on appeal).

4 See, e.g., Lon L. Fuller, The Morality of Law (rev. ed., Yale University Press, 1969).

stable and predictable tax regimes. The business investment, growth, and employment enabled and encouraged by that certainty benefits the State as a whole and the citizens who seek to earn a living here. DOR's retroactively applied, novel administrative interpretation deprives businesses of this predictability, to the detriment of the State of South Carolina.

ARGUMENT

I. DOR'S POSITION CONTRAVENES BASIC RULE OF LAW PRINCIPLES LONG FOLLOWED BY SOUTH CAROLINA'S COURTS.

DOR's administrative interpretation suffers from numerous flaws: its interpretation was not publicly promulgated in advance; was not readily understandable from the statute; and was not prospective in application. Thus, DOR's imposition of penalties upon Amazon Services violates the basic tenets of due process and the rule of law, which require the lawgiver (here, DOR) to publicly articulate the legal obligations that it will impose upon taxpayers in terms that are clearly understandable to them, in advance of the governed conduct.

A. At the time of sales, neither the General Assembly nor DOR had publicly promulgated the rule that DOR now seeks to impose, thus blindsiding Amazon Services.

The first problem is that there was no publicly promulgated rule for Amazon Services to follow. DOR has acknowledged to the General Assembly that, prior to the recent amendments, "[t]here [was] no law related to taxation of third party sales,"[5] and has

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[5] "DOR Recommended Law Changes," dated September 6, 2018, from Meeting Packet for House Economic Development, Transportation, and National Resources Subcommittee Meeting of September 10, 2018: R. 01342.

testified in this proceeding that it had provided "zero guidance, absolutely no guidance on that topic" prior to this case.[6]

Yet it is well established in South Carolina that the States may not impose legal duties without prior public promulgation of the rules to be followed. This Court reaffirmed that principle just two years ago. In McIntyre v. Sec. Comm'r of S.C., 425 S.C. 439, 452, 823 S.E.2d 193, 199–200 (Ct. App. 2018), reh'g denied (Feb. 19, 2019), cert. denied (June 28, 2019), this Court wrote that where a private party had not been given prior notice of the rules that were to govern its interaction with the agency, the process was

> arbitrary and so affected fundamental fairness that to deem it harmless would only add insult to the injury to the rule of law . . . . If unchecked administrative rule-making is a leviathan, we are not sure what to call an agency's decision to adjudicate vast private property rights without posting any prescribed rules despite legislative direction, but we cannot call such a creature harmless.

This Court further emphasized the need for legal certainty in protecting its citizens. Quoting Groning v. The Union Ins. Co., 10 S.C. L. 537, 537–38 (S.C. Const. App. 1819), this Court reiterated:

> The only security which the citizens of any country can have for their property, or even for their lives, is derived from the promulgation and certainty of the laws. One of the most distinguishing features in the administration of the Emperor Caligula, whose name is proverbial for his tyranny, was, that he caused his edicts to be suspended so high that they could not be read by his subjects.

McIntyre, supra., 425 S.C. at 453, 823 S.E.2d at 199. DOR's acknowledgement that "[t]here [was] no law" and "zero guidance" on this topic, makes clear that its novel interpretation tramples on these established principles of fair notice.

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6 Tr., R. 00684, testimony of Ms. Logan Mitchell, DOR Audit Supervisor. See also Order, R. 00014.

B. A taxpayer must not be required to guess at the meaning of the tax laws, and any lack of clarity or coverage must be resolved in favor of the taxpayer.

The version of South Carolina's sales-tax statute in effect at the time of the sales at issue in this case could not reasonably be understood to obligate Amazon Services to act as a tax collector for third-party sales. Where a law "forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application," the purported law offends due process. Curtis v. State, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001). That principle is applicable in the civil context as well as the criminal. S.C. Human Affairs Comm'n v. Zeyi Chen, 430 S.C. 509, 529–30, 846 S.E.2d 861, 871 (2020). It is neither of recent vintage nor unique to South Carolina. See, e.g., THE FEDERALIST NO. 62, at 421 (James Madison) (Jacob E. Cooke, ed.; Wesleyan Univ. Press): ("It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be . . . so incoherent that they cannot be understood . . . or undergo such incessant changes, that no man who knows what the law is to-day, can guess what it will be to-morrow.").

This longstanding principle applies with particular force in the area of tax administration. It is black-letter law in South Carolina that a taxpayer is entitled to clear direction as to what is expected of him, and any lack of clarity must be resolved in the taxpayer's favor. Alltel Commc'ns. Inc. v. S.C. Dep't. of Revenue, 399 S.C. 313, 731 S.E.2d 869 (2012).

Contrary to this settled and controlling principle in the tax field, DOR seeks to impose an obligation on Amazon Services where DOR admits that it proposed statutory

amendments to enable "clear understanding"[7] so that "nobody has to guess."[8] The House Legislative Oversight Committee understood DOR's position to be that the proposed amendments did, in fact, change the law;[9] and the House Economic Development, Transportation and Natural Resources Subcommittee understood DOR's position to be that there was a vacuum in the tax code pertaining to third-party internet sales that needed to be filled[10] – a "gap to be closed," in the words of the DOR Director.[11] Indeed, DOR acknowledged in its liability determination letter, after concluding its audit and after receiving Amazon Services' protest, that DOR was still unable to decide who owed what taxes in the context of what is now called a "marketplace facilitator."[12] To suggest that the obligations of a market participant like Amazon Services were clear to the rest of the world when they were not clear even to DOR simply strains credulity.

As the Administrative Law Court acknowledged, DOR may prevail only if it shows that Amazon Services' understanding of the statute was unreasonable. Opinion, R. 00016, 00047. Yet DOR's understanding did not differ from Amazon Services'. In some instances,

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[7] *Id.*; and Tr., R. 00603-04.

[8] DOR Director, before General Assembly Joint Education and Finance Study Committee (October 23, 2018), R. 1263 at 2:09:55 – 58 (time marks here are from the entire hearing, available at https://www.scstatehouse.gov/video/archives.php).

[9] "Recommendations," from Agenda Packet for House Legislative Oversight Committee Meeting of October 23, 2018: R. 01256.

[10] "DOR Recommended Law Changes," dated September 6, 2018, from Meeting Packet for House Economic Development, Transportation, and National Resources Subcommittee Meeting of September 10, 2018: R. 01342.

[11] DOR Director, before General Assembly Joint Education and Finance Study Committee (October 23, 2018), R. 1263 at 2:07:20 – 24 (time marks here are from the entire hearing, available at https://www.scstatehouse.gov/video/archives.php).

[12] DOR determination of Amazon Services' liability, June 21, 2017 –: R. 01001, fn. 3.

DOR was collecting taxes from remote third-party sellers. That latter fact demonstrates that Amazon Services' understanding was reasonable, as it would be unreasonable to believe that two entities both had an obligation to collect and remit the same tax. See Se. Kusan, Inc. v. S.C. Tax Comm'n, 276 S.C. 487, 490, 280 S.E.2d 57, 59 (1981) (construing a statute to "avoid the pyramiding of taxes on the same commodity (thereby preventing the increase of sales price to the ultimate consumer) and to promote new industry within the State and encourage expansion of present industry"). Accordingly, Alltel requires that the lack of clarity be resolved in Amazon Services' favor.

C. The retroactive aspect of DOR's new rule as applied to Amazon Services violates "the most basic conceptions of the rule of law."

The absence of clear, publicly declared tax obligations underscores the retroactivity problems with DOR's position. Again in McIntyre, supra, this Court emphasized that prospectivity is a critical feature of the rule of law. It called an administrative action by the South Carolina Securities Commissioner "an affront to the most basic conceptions of the rule of law" because it failed to provide notice of governing rules. McIntyre, 425 S.C. at 447, 823 S.E.2d at 197 (citing 1 William Blackstone, Commentaries *46 ("All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term 'prescribed.'")). Accord Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 227-29 (7th Cir. 1992) (Posner, J.) ("The idea that the law should confine its prohibitions and regulations to future conduct, so that the persons subject to the law can conform their conduct to it and thus avoid being punished, whether criminally or civilly, for conduct that they had no reason to think unlawful, is a component of the traditional conception of the 'rule of law.'").

Yet, in the face of this venerable and universal principle, DOR, through the audit process, has sought to impose retroactively a rule that it had not previously announced and that even it could not clearly discern from the statute. And DOR acknowledges that retroactive effect on Amazon Services caused by DOR's administrative action and the decision of the Administrative Law Court upholding that action in this case.[13]

DOR's position cannot be reconciled with fundamental principles of the rule of law.

II. THESE RULE OF LAW VIOLATIONS MAKE IMPOSSIBLE THE PLANNING THAT IS CRITICAL TO AMICI'S MEMBER BUSINESSES.

Of broader importance to *amici* and the businesses they represent is that DOR's approach to tax policy presents an insurmountable obstacle to the critically necessary business task of planning, which depends on predictability. As James Madison wrote in THE FEDERALIST NO. 62, supra, at 421-22:

> What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government?

See also Antonin Scalia, The Rule of Law as a Law of Rules, 56 U.Chi.L.Rev. 1175, 1179 (1989) (stating predictability is "a needful characteristic of any law worthy of the name").

The problem here is the recently all-too-common phenomenon of "regulation by enforcement" wherein regulators conjure new obligations through the enforcement process, thus finding violations – and "fill[ing] the state treasury through monetary

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13 "[*The 2019 statutory amendment*] will not be retroactive. . . . [*This*] lawsuit is gonna pull up some retroactive . . . to that one company [*Amazon Services*]." DOR Director, before General Assembly Joint Education and Finance Study Committee (October 23, 2018), R. 1263 at 2:08:10 – 30 (time marks here are from the entire hearing, available at https://www.scstatehouse.gov/video/archives.php).

penalties" – by companies "that are found not to be in compliance with rules that have never before been clearly articulated."[14] Such "regulation by enforcement" makes South Carolina's tax environment unwelcoming to businesses.

And such an administratively created environment is directly contrary to the long-standing, legislatively established, and judicially affirmed public policy of this State. South Carolina has for generations recognized that economic development is crucial to the welfare of the State. Ninety years ago, the Supreme Court, in upholding economic development as a public policy, wrote that "the prosperity of counties and of states, as well as of cities and towns, is becoming increasingly dependent upon the opportunity afforded their people for employment." Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865, 871 (1930). And over 50 years ago, the General Assembly, in Act No. 103, 1967 S.C. Acts 120, found that it was "imperative that new industries be encouraged to locate in South Carolina and those now located herein to expand their investments. . . ." In upholding that Act, the Supreme Court wrote:

> The Act here under consideration recites that South Carolina has promoted industrial expansion and has actively supported the State Development Board, for which public moneys have been appropriated, and through it has endeavored to promote the industrial development of the state for the welfare of its inhabitants. This has been done as a matter of state policy. . . . We conclude that the Act here was for a public purpose and represents merely an expansion of the established legislative policy of improving the industrial climate of South Carolina in order to provide for the welfare and prosperity of its inhabitants . . . . [*Emphasis added.*]

Elliott v. McNair, 250 S.C. 75, 86–89, 156 S.E.2d 421, 427–28 (1967). Although the early establishment of this policy related primarily to manufacturing enterprises, the General

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[14] https://www.corporatecomplianceinsights.com/combating-regulation-by-enforcement-a-strategic-framework-for-responding-to-state-agency-overreach/

Assembly and the Supreme Court have made clear that the same policy applies to commercial and retail enterprises. See WDW Properties v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000) (approving for economic development purposes the financing of commercial and retail space, and analyzing and reaffirming a line of cases that held that South Carolina's public policy favoring economic development is established by the General Assembly and is not limited to industrial/manufacturing projects).

The policy has often been implemented through the State's tax treatment of businesses. In the Fee in Lieu of Tax Simplification Act (S.C. Code Ann. 12-44-10 *et seq.*), the General Assembly found that certain "tax burdens [*there addressing property taxes*] historically have impeded new and expanded business in South Carolina." S.C. Code Ann. 12-44-20(2). But the General Assembly's implementation of the policy has not been directed to property taxes only.

DOR and the Administrative Law Court have undertaken not only to adopt a rule that disfavors a business, but – and much more importantly – to do so in a way that would cause businesses contemplating relocation to or expansion in South Carolina to ask themselves Madison's questions: Why should we "hazard [our] fortunes in any new branch of commerce when [we] know[] not" what new rule may be applied retroactively to past conduct? Why should we "lay [our]sel[ves] out for the encouragement given to any particular cultivation or establishment, when [we] can have no assurance that [our] preparatory labors and advances will not render [us] a victim to an inconstant government"? The disadvantage of this regulation-by-enforcement approach for South Carolina vis-à-vis other states is made clear by the fact that 36 other states have – like South Carolina's General Assembly has now done – adopted a rule requiring marketplace

facilitators like Amazon Services to collect and remit sales taxes, but none of which (other than Louisiana's judicially blocked effort) has attempted to do what DOR seeks to do here, which is to impose that requirement retroactively.

CONCLUSION

For all the foregoing reasons, *amici curiae* respectfully request that this Court reverse the Order below.

Respectfully submitted,

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