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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,

South Carolina Department of Revenue, …….Respondent.

BRIEF OF *AMICI CURIAE* TAX LAW PROFESSORS TESSA R. DAVIS AND CLINTON G. WALLACE

IN SUPPORT OF RESPONDENT

ROBERT T. BOCKMAN (S.C. BAR 00757)
The Law Center
1525 Senate Street
Columbia, SC 29208
(803) 256-4028
rtbockman@gmail.com

Counsel for Amici Curiae

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INTRODUCTION

In this appeal, Amazon Services, LLC ("Amazon") challenges the holding of the Administrative Law Court ("ALC") that Amazon is a "retailer" or "seller" under the South Carolina tax statute that was in effect prior to 2019. That holding properly confirmed the authority of Respondent South Carolina Department of Revenue ("DOR") to collect sales tax from Amazon for retail sales of third-party merchant owned products on Amazon's website. By affirming that decision, this Court would not only ensure collections of that tax, but also would avoid validation of Amazon's deliberate manipulation of the South Carolina tax laws. That manipulation was aimed at creating a tax break for Amazon that the General Assembly did not intend, and which would have favored Amazon over competing businesses in South Carolina and would impose additional burdens on other taxpayers in the state.

INTEREST OF THE *AMICI CURIAE*

Professors Tessa R. Davis and Clinton G. Wallace are Associate Professors of Law at the University of South Carolina who write and teach in the areas of tax law, policy, and administration.[1] They have regularly written commentary and submitted Amicus briefs in cases concerning tax law and tax administration issues, including addressing the physical nexus standard at issue here when it was considered by the United States Supreme Court in 2018. They submit this brief to provide historical context for the constitutional and statutory doctrines at issue in this dispute, to elaborate on the policy implications of this Court's decision, and to promote sound tax administration in the public interest.

[1] *Amici* submit this brief in their individual capacities as experts on tax policy. *Amici* have not been compensated for their participation in this case, and no counsel for a party authored it in whole or part. Apart from *amici*, no person contributed money to fund its preparation or submission. Affiliations and titles with *amici*'s current employer, the University of South Carolina School of Law, are listed for identification purposes only; this brief does not purport to present the Law School's or any other institutional views.

SUMMARY OF THE ARGUMENT

Amazon asserts that the 2019 marketplace facilitator legislation, described below, was necessary to enable South Carolina to require Amazon to collect sales tax on all in-state transactions completed through its website, and that the DOR's position that Amazon was responsible for collecting sales tax for all transactions on its website amounts to retroactive taxation. App. Br. pp. 22-23. Amazon misinterprets the relevant law and ignores the historical development of federal constitutional jurisprudence on nexus and South Carolina's sales tax statutes. Further, Amazon's assertions are contrary to sound tax policy and administration. We focus on dispelling three particular misconceptions in Amazon's arguments. First, contrary to Amazon's and other Amici's assertions, the 2019 legislation was not necessary to enable South Carolina to impose sales tax obligations on Amazon because Amazon's decision in 2011 to establish physical nexus in the State empowered the State to impose those obligations. Second, the formality of Amazon's corporate organizational structure does not shield it from sales tax obligations for all sales on its website. Third, failure to collect sales taxes from Amazon would create a tax subsidy that benefits Amazon to the detriment of local sellers who compete with Amazon; that result was unintended by the General Assembly, unexpected by Amazon, and it violates established principles of equitable and even-handed tax administration.

ARGUMENT

I. Amazon became subject to sales tax liability by virtue of its decision to establish a physical presence in the State in 2011, such that Amazon's tax liability at issue here preexisted the 2019 legislation and is not dependent upon it.

Amazon seeks to convince this Court that without the 2019 marketplace facilitator legislation[2] none of its sales in South Carolina from third-party merchants could be subject to sales tax. This is incorrect. In 2011, eight years before that legislation was enacted, Amazon established sufficient nexus

[2] 2019 S.C. Acts 21 (S.B. 214), amending S.C. Code Ann. § 12-36-70 (1976) and adding S.C. Code Ann. § 12-36-71 (Supp. 2020).

in South Carolina to satisfy constitutional requirements for the State to impose sales tax obligations under the law in effect at that time. Once Amazon established physical presence in the State in 2011, from then on, the State of South Carolina was empowered under the dormant Commerce Clause of the United States Constitution (as interpreted *at that time* to require physical presence) to impose and require collection of sales tax on all of Amazon's sales in the State. The statutory changes in 2019 were a response to a United States Supreme Court decision, *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080 (2018), that shifted the concept of nexus to give states greater ability to tax out-of-state Internet sellers even if they lack physical presence in a state. Both the new nexus standard under the *Wayfair* opinion, and the 2019 legislation incorporating that standard into South Carolina law, are irrelevant to determining Amazon's 2016 tax obligations.

An understanding of the historical context for this dispute is revealing. As mail order sales increased in the mid-twentieth century, many states were imposing sales tax obligations only on sellers who maintained a place of business in the state. For example, in Illinois the early sales tax laws only imposed tax on retailers "maintaining a place of business in the state." *Dep't of Revenue v. Nat'l Bellas Hess, Inc.*, 34 Ill.2d 164, 167 (1966). As mail-order sales increased, and out-of-state sellers refused to collect sales tax under existing statutes, Illinois (and other states) responded by adding so-called "catalogue amendments," which imposed sales tax obligations on retailers who solicited orders via catalogues or other advertisements, but had no other connection to the state. *Id.* The Illinois legislature, like many others, expanded its definition of "retailer" in 1961 to include anyone "[e]ngaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." *Id.* at 172 (allowing Illinois to use this newly enacted authority to impose sales tax on mail orders).

The South Carolina General Assembly established a sales tax for the first time in 1951. From the outset, it included sales tax obligations on anyone who "distributes catalogs, or other advertising

matter, and by reason of that distribution receives and accepts orders from residents within the State" as well as on anyone who "solicits and receives purchases or orders by an agent or salesman." 1951 Stat. 47, No. 379, Art. I, Sub. Art. IV §3(b).[3] With such authority, South Carolina (similar to other states like Illinois that amended their statutes) sought to impose sales and use tax collection and remittance obligations on sellers whose only business connection in the state was that they made remote sales to South Carolina customers. From the advent of its sales tax, then, the State attempted to level the playing field between local businesses and their out-of-state mail order competitors.

As states sought to ensure that their tax laws and enforcement practices kept pace with the times, the United States Supreme Court introduced additional challenges. In a series of decisions, the Court held that states could only impose sales tax obligations on businesses that had some *physical* nexus in the state. In *Bellas Hess*, the Court introduced the physical nexus rule as a requirement for states to tax under the dormant Commerce Clause and the Due Process Clause of the Fourteenth Amendment. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of the State of Illinois*, 386 U.S. 753 (1967) (reversing the state Supreme Court). Then in *Quill*, the Court affirmed *Bellas Hess* in part, emphasizing the physical nexus rule under the dormant Commerce Clause, while dispensing of it as a requirement under the Due Process Clause. *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992).

The United States Supreme Court's opinions on the physical nexus requirement created a simple o*n/off nexus switch*: physical presence in a state constituted sufficient nexus to allow the state to impose sales tax; no physical presence meant no nexus and no power to impose a tax. The *on/off switch* put control in the hands of large, sophisticated taxpayers that could take advantage of the physical nexus requirement to manipulate state tax laws. These sellers could keep the nexus switch *off* by

[3] This language was first enacted in 1951, and has been maintained ever since. (codified as S.C. Code Ann. § 65-1429 (1952); recodified as S.C. Code Ann. § 12-35-890 (1976); recodified as current S.C. Code Ann. § 12-36-1340 in 1990).

avoiding establishing any physical presence in certain states, while directing increasing volumes of commerce into those states. They thereby were able to gain a competitive advantage over local businesses that were invariably required to charge sales tax to consumers. *See generally*, *Brief of Amici Curiae Law Professors and Economists in Support of Petitioner*, South Dakota v. Wayfair, Inc., No. 17-494 (Mar. 5, 2018) (brief joined by Amicus Clinton G. Wallace arguing that the Supreme Court should overturn *Quill* on the basis that the physical nexus requirement was problematic as applied to Internet commerce for various policy reasons, a position that the Supreme Court adopted).

Along with many other state tax administrators across the country, the DOR reacted to the challenges that the physical nexus requirement and its *on/off switch* presented to taxing out of state sellers. *E.g.*, S.C. Rev. Rul. #89-13 (Jul. 19, 1989). Recognizing that "[c]ertain out-of-state retailers are making sales to South Carolina residents [and] it is questionable as to when such retailers are required to collect and report this State's use tax," *id.* at 2, DOR issued guidance making clear that South Carolina would require sales tax collection and remittance by *any* seller with *any* physical presence in the state, even if the sales were conducted entirely remotely. *Id.* As the guidance explained, "[t]he State may require an out-of-state mail-order retailer to collect and remit the use tax, if such retailer has a[] … warehouse located in South Carolina," even if a single warehouse were the retailer's only physical location in the state, and even for items sold from outside the state that never touched the in-state warehouse. *Id.* at 7. The mail order catalog businesses of the 20th century became the Internet businesses of the 21st century.[4]

The United States Supreme Court has repeatedly affirmed the DOR's understanding of the physical nexus requirement as an *on/off switch*. In its 1992 decision in *Quill*, the Court acknowledged

[4] As the leading South Carolina tax treatise observed recently in this context (but, notably, before the tax years at issue in this litigation), "[t]he Internet should be equated to the mail or the telephone." John C. von Lehe, Jr. & Jennifer W. Davis, SOUTH CAROLINA TAXATION AND ECONOMIC TAX INCENTIVES (3d ed., S.C. Bar 2013).

that "[w]hether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office." *Quill* at 315 (citing *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), discussed *infra*). Later, the Court itself would recognize that the arbitrary nature of its *Quill* physical nexus rule was problematic as precedent. In *Wayfair*, the Court observed that the physical nexus rule could subject to taxation a business that "stocks a few items of inventory in a small warehouse" in the state, even on "sales that have nothing to do with the warehouse," and even as the state remained unable to tax substantial sales of businesses which carefully avoided establishing any physical nexus.[5] *Wayfair* at 2094-95.

No matter how manipulable the pre-*Wayfair* nexus rule was, as of 2016 South Carolina law gave the DOR the power to require out-of-state sellers to collect sales tax if they chose to flip the physical nexus switch to *on*. As the ALC properly emphasizes, the South Carolina statutory definition of "retailer" and "seller" provides a statutory mandate to impose sales tax on any person "selling" any tangible personal property, whether "owned by the person or by others." S.C. Code Ann. § 12-36-70(1)(a) (1976); ALC Final Order p. 20-23, 41. That definition, which dates back more than 50 years, is supported by a clear legislative emphasis on imposing sales tax as broadly as possible.[6]

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[5] In contrast, the Court noted, the physical nexus rule allowed that a seller with no physical presence whatsoever would be taxed on none of its sales into the state, even if it sold the same items in the same manner as the seller with a minor physical presence. *Id.*

[6] In addition to the statutory definition the ALC focused on, for example, DOR is also empowered to impose sales tax obligations on a remote entity *on whose behalf* a person or entity with a physical presence in South Carolina is performing services, and may impose sales tax obligations on the physically present person or entity as an "agent" of the remote entity. S.C. Code Ann. § 12-36-70 (1976) (as amended and recodified in 1990 from § 12-35-90). Although this authority is not necessary to affirm the ALC opinion given that Amazon is a properly a seller under section 1(a) and has a physical presence in the State, this additional language emphasizes that the natural (and broad) reading of subsection 12-36-70(1)(a) (the authority that the ALC focused on) is consistent with legislative intent to impose sales tax broadly.

For further background, when the General Assembly enacted the marketplace facilitator legislation in 2019, subsection (3) of section 12-36-70 of was inserted *between* subsection (2)(b) and the "agent" language discussed above, creating the appearance that the broad authority (that the "agent" language suggests) was not a part of the pre-2019 statute. S.C. Code Ann. § 12-36-70(3) (Supp. 2020). Considered together, section (2)(b) and this "agent" flush language make clear that even prior to 2019, the General Assembly endorsed broad

With this legislative backdrop, Amazon flipped the physical nexus switch in South Carolina to *on* when it built its distribution center in the state in 2011. Before breaking ground and surely aware of the implications of physical nexus, Amazon lobbied for the enactment of special legislation to enable it to avoid, for a time, the nexus consequences of its decision to locate the distribution center here.[7] *See, e.g.*, ASSOCIATED PRESS, *Amazon deal clears hurdle in South Carolina Senate* (May 23, 2011)) ("The deal would give Amazon the five-year sales tax exemption it seeks to open a distribution center this year in the state."). The special legislation gave Amazon a unique arrangement among South Carolina retailers: unlike any other retailer in the state, and even though it would have a physical presence in the state, Amazon would be exempt from sales and use tax obligations for nearly five years. S.C. Code Ann. § 12-36-2691 (Supp. 2012). Stated simply, the special legislation was an enticement for Amazon to build its distribution facility in the State—a brick-and-mortar building that created jobs, but also established the requisite constitutional nexus over Amazon's activities to enable the State to benefit from Amazon's sales tax revenue, and eventually (beginning in 2016) for in-state sellers to compete with Amazon on a level playing field.

To resolve this dispute, this Court should affirm the ALC's interpretation of the tax law as of 2016, when Amazon's special legislation expired. Amazon's arguments (along those of other Amici) that the sales tax imposed here somehow constitutes retroactive taxation represent a misunderstanding of the nature of retroactive taxation. See, e.g., *Brief of Amicus Tax Exec. Institute* at 2 (asserting that DOR

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substance-over-form principles (discussed further in Section II on this brief) to empower the DOR to impose sales tax obligations on a physically present person or entity as an "agent" of a remote entity.

[7] The South Carolina arrangement was not novel for Amazon. Around the same time that Amazon sought a sales tax exemption from South Carolina, it pushed for similar concessions in many other states, including California, Connecticut, Florida, Massachusetts, New Jersey, Nevada, Tennessee, Texas and Virginia. *See* Hayes Holderness, *The Unexpected Role of Tax Salience in State Competition for Businesses*, 84 U. CHI. L. REV. 1091, 1092 n.3, 1095 n.16 (2017) (identifying "customer-based incentives," namely sales tax exemptions, as a new form of state economic development incentive that Amazon began to push for in the early 2010s).

acted "long after the transactions took place"). The effects of the 2019 legislation—and, indeed, the effects of the United States Supreme Court's reevaluation of the nexus standard and revocation of the physical nexus requirement in *Wayfair*—are purely prospective. This Court should, of course, give no regard to any laws enacted after the time periods at issue in this litigation. To be clear, however, the DOR's actions to collect sales tax from Amazon do not constitute retroactive taxation any more than an audit of an income tax return that finds additional tax due for a prior year would constitute retroactive taxation.[8] The audit process and the DOR's authority to assess tax liability upon receiving relevant information from the taxpayer are critical features of the South Carolina sales and use tax regime.[9] Further, there are no statutory or state constitutional limits on the DOR's authority to assert administratively—within the time prescribed by law—that the relevant law requires a taxpayer to pay an additional amount.

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[8] In the usual sales tax examination, a retailer may not be aware of the possibility that it could owe additional sales and use tax until well after the period at issue has concluded (when the retailer receives a notice or request for information from the DOR). In contrast, Amazon had notice from the DOR that its practices were potentially problematic shortly after it commenced those practices at the start of 2016, well before any statute of limitations started to run against the DOR. Determination Ltr. p. 4. This situation hardly consists of retroactive imposition of the sales tax law.

[9] The same is generally true in other states as well, which raises an important collateral point regarding the Amazon's assertion that South Carolina is an "outlier" because in no "other jurisdictions did a taxing agency or court" ever impose sales tax liability for "any marketplace facilitator" prior to *Wayfair*. App. Br. pp. 2, 46-47; see also App. Rep. Br. pp. 22, 24; *Brief of Amicus Council on State Taxation* at 1-2. This is highly misleading for two reasons. First, the breadth and clarity of the South Carolina definition of "retailer" and "seller" stands in contrast to some other states. Second, other states did attempt to impose sales tax in similar circumstances, even while relying on less firm statutory authority. For example, news reports indicate that the state of Texas assessed Amazon for $269 million in sales tax liability for its sales in the state from 2005 to 2009, based on Amazon's establishing physical facilities in that state in 2005. REUTERS, *Texas sends Amazon.com a $269 million tax bill* (Oct. 22, 2010). Amazon and Texas ultimately reached a settlement under which the state agreed to collect a small portion of the tax due. Billy Hamilton, *What an Amazon Sales Tax Deal Looks Like*, 65 STATE TAX NOTES 675 (Sep. 9, 2012). That settlement included a release for "unrelated third parties who make retail sales through [Amazon's] website" for any potential liabilities on past sales. *Id.* at 678 (quoting the settlement agreement, which the author reviewed but which was never released publicly). That is, Amazon took responsibility for sales of third-party merchants—the precise type of sales at issue here. Texas subsequently, in 2011, amended its sales tax law to make it more like South Carolina's section 12-36-70(1)(a) by clarifying that "ownership" was not necessary for someone to be a "seller." Texas Tax Code Ann. § 151.008 (West 2012).

II. The nexus rule, along with the applicable statute and general principles of tax administration, allow the State to look past the formality of organizational and contractual structures to accurately determine sales tax obligations.

Amazon should be treated just like any other similarly situated taxpayer whose sales tax obligations would be determined under applicable constitutional doctrines and state laws. The ALC properly found that Amazon Services, LLC, the entity that operates the Amazon website, is a "retailer" or "seller" under the statutory definition of that term. ALC Final Order pp. 46-48. However, Amazon argues for different treatment by making much of the formality of the organizational divisions between its corporate entities and their contractual arrangements for conducting sales.[10] App. Br. pp. 6, 25-27; App. Rep. Br. p. 1. These formalities are not relevant to the statutory definition on which the ALC focused, a point which is underscored by case law elaborating on general principles of tax administration.

First, in the context of sales tax and physical nexus specifically, the United States Supreme Court has held that states are empowered to impose sales tax obligations even in the face of taxpayers' attempts to shield themselves from such obligations with formal structures such as those Amazon constructed. In *Scripto*, a Georgia corporation entered into contracts with individuals to act as part-time sales people in Florida, a state where the corporation had no employees, no offices and no other physical presence. *Scripto* at 209-10. The Court held that Florida could impose sales tax on the Georgia corporation with the physical nexus requirement satisfied by the non-employees who were performing certain limited services under contract in Florida.[11] *Id.* at 212-13.

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[10] In brief, Amazon argues that its various subsidiaries and related entities—including Amazon Services, Amazon Payments, Amazon Fulfillment—are "distinct corporate entities," and that those entities entered contracts with unrelated individuals and entities to provide sales services, all of which it asserts means the State does not have authority to impose tax on the sales at issue here. App. Br. p. 6.

[11] Similar to Amazon, the Georgia corporation also relied on the particulars of the flow of funds and transmission of orders involved in its sales into Florida to claim that Florida had no authority to impose sales tax obligations on its activities. Specifically, the Georgia corporation described itself using "independent contractors" to perform services that allowed it to make sales in Georgia and ship products from Georgia, and

In *Scripto*, the Court set aside the formal structure of the contractual arrangements, opining that "[t]o permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance." *Id.* at 211. The Court has continued to endorse its *Scripto* holding, citing it favorably in *Quill* as an example of the extent that physical nexus constituted bright-line rule, and again in *Wayfair* as good authority on the reach of the physical nexus standard. *Quill* at 315; *Wayfair* at 2094.

Second, and more generally, Amazon's reliance on formalities in the distinctions among its entities contradicts the longstanding tax doctrine that says that the substance of a transaction, rather than its mere form, should control tax treatment. This "substance over form" doctrine allows courts and tax administrators to look through certain formal business arrangements to ensure that tax laws are applied consistently. "Substance over form" is often cited as a judicial doctrine that the Internal Revenue Service or a state department of revenue may use to combat abusive tax structures and transactions. For example, as the United States Supreme Court has explained, "[i]n the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding." *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978) (internal citations omitted); see also *Beard v. S.C. Tax Comm'n*, 230 S.C. 357, 368, 370 (1956) (subscribing to "substance over form" doctrine and emphasizing that in the South Carolina income tax context the "incidence of taxation depends upon the substance of a transaction.").

The South Carolina tax laws have various features that reflect the general policy of "substance over form." For example, the state sales tax statute specifies that "any group or combination" of

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argued that the independent contractors provided order information but were not empowered to accept or reject orders (that was done in Georgia), and payment was made directly from the Florida customers to the Georgia corporation. Once payment was received, the Georgia corporation would pay service commissions to the independent contractors. The Court found all of these details to be irrelevant to the question of constitutional nexus.

"corporations" or other business entities or people who are "acting as a unit" should be treated as a "person" in the state sales tax statute. S.C. Code Ann. § 12-36-30 (1976).[12] Further, the South Carolina statutory definitions of "retailer" and "seller," S.C. Code Ann. § 12-36-70 (1976), reflect the "substance over form" principle and the *Scripto* treatment of formalities in that the far-reaching definitions make clear that contractual formalities, such as ownership at the time of sale, are irrelevant (as elaborated in note 6 of this brief).

DOR policy has long reflected these principles, as well. As the DOR explained in 1989 guidance, which continued to have force until the *Wayfair* opinion altered the physical nexus requirement, "[t]he courts have established that a retailer may not departmentalize its in-state retail and out-of-state mail-order operations to avoid collection and the taxing state's use tax on retailers' mail order sales. Retailers' in-state and out-of-state operations are to be considered in the aggregate for purposes of use tax collection." S.C. Rev. Rul. #89-13 at 6. Thus, the guidance continued, a warehouse located in South Carolina would be sufficient to allow the state to impose sales and use tax obligations on the seller, "even if the in-state and out-of-state activities are unrelated." *Id.* at 7. Plainly, this was the law when Amazon established its fulfillment center in South Carolina in 2011 and flipped the physical nexus switch to *on*, and it remained the law when the special legislation expired at the end of 2015. *See* S.C. Rev. Rul. #14-4 (Sep. 10, 2014) (summarizing actions that would establish nexus, and citing *Quill*, *Scripto*, and *National Bellas Hess, Inc.*); S.C. Inf. Ltr. #15-19 (Dec. 2, 2015) (describing

[12] The natural reading of this provision is that a "person engaged or continuing within this state in the business of selling tangible personal property at retail," S.C. Code Ann. § 12-36-910 (1976), includes a "group or combination" of business entities like the many entities through which Amazon runs its business. Amazon points out that the South Carolina Supreme Court has held that the term "person" does not mean that multiple corporations under common ownership should be aggregated, in accordance with *S.C. Dep't of Revenue v. Anonymous Co. A*, 401 S.C. 513, 515-21 (2009). App. Br. p. 27; App. Rep. Br. p. 7. That holding is correct as to the technical point of how to tax sales between related entities. Indeed, dating back to the early 1970s, it is well-established, for example, that sales between a parent corporation and its subsidiary, are subject to sales tax. *Edisto Fleets, Inc. v. S.C. Tax Comm'n*, 256 S.C. 350 (1971). However, that proposition has nothing to do with using multiple related entities or using an agent to *avoid* sales tax obligations by way of avoiding constitutional nexus, which is the argument that Amazon is advancing. App. Br. p. 6, 25-27.

the special legislation as a "special nexus provision," and explaining that once that provision expired as of January 1, 2016, the usual rules for "determining whether [a taxpayer] has a physical presence in South Carolina" would apply to determine sales tax obligations).

Allowing Amazon to escape sales and use tax obligations through formalities would contradict established Supreme Court doctrine, South Carolina statutes, and the longstanding DOR position that such formal distinctions are irrelevant in this very context. As of 2016, DOR was empowered to exercise various options under existing authority to look beyond the formalities of Amazon's business organization and arrangements with third-party merchants. Despite Amazon's attempts to distract from basic statutory construction, as well as the U.S. constitutional law context and judicial doctrine that forecloses the use of formalistic methods of tax avoidance, the ALC properly focused on the authority the General Assembly has expressly given to the DOR in the definition of "retailer" and "seller." ALC Final Order p. 23-30.

In sum, deferring to Amazon's formal arrangements would be inconsistent with the constitutional standard for physical nexus that prevailed prior the *Wayfair* decision in 2018 and contrary to South Carolina law prior to 2019 that broadly defined "retailer" and "seller." Once Amazon established a physical nexus in the state in 2011, it should have been obvious to Amazon that it would be required to collect and remit sales tax, once its special legislation expired in 2016, regardless of how it constructed its business operations, inventory and payment arrangements.

III. Affirming the ALC's decision would prevent rewarding Amazon with an additional subsidy at the expense of local businesses, a subsidy that was neither intended by the General Assembly nor expected by Amazon.

Amazon was, or should have been, well-aware that it would be responsible for sales tax on all of its sales starting in 2016. As Amazon's special sales tax legislation was nearing expiration, it disclosed to its own shareholders that states might "successfully assert" sales tax liability under existing laws. Specifically, in its Form 10-K for 2015, filed with the Securities and Exchange Commission in January

2016, Amazon made the following disclosure in the Risk Factors section, under the header "We Could Be Subject to Additional Sales Tax…":

> U.S. Supreme Court decisions restrict the imposition of obligations to collect state and local sales taxes with respect to remote sales in the U.S. However, *an increasing number of states, and certain foreign jurisdictions, have considered or adopted laws or administrative practices that attempt to impose obligations on remote sellers and online marketplaces to collect taxes on their behalf.* We support a Federal law that would allow states to require sales tax collection by remote sellers under a nationwide system. More than half of our revenue is already earned in jurisdictions where we collect sales tax or its equivalent. *A successful assertion by one or more states or foreign countries requiring us to collect taxes where we do not do so could result in substantial tax liabilities, including for past sales, as well as penalties and interest. In addition, if the tax authorities in jurisdictions where we already collect sales tax or other indirect taxes were successfully to challenge our positions, our tax liability could increase substantially.*

Amazon.com Inc., Annual Report for the Fiscal Year Ended Dec. 31, 2015 (Form 10-K) (Jan. 28, 2016), shorturl.at/ekrvI (emphasis added). This disclosure was made nearly three years before the *Wayfair* decision eliminated the physical nexus requirement and just as the DOR was about to receive its first inquiries from confused consumers upon learning that Amazon was not including sales tax on all of their purchases. Determination Ltr. p. 4. For Amazon to claim that it was caught unaware by the prospect of paying sales tax on all of its sales in South Carolina (App. Br. p. 47, App. Rep. Br. p. 25) is thus inconsistent with its own disclosures as well as its actions in negotiating the special legislation that allowed it legally to avoid sales tax obligations prior to 2016.

In *Wayfair*, Justice Gorsuch noted that the old physical nexus rule constituted a "judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals." *Wayfair* at 2100 (Gorsuch, J. concurring). Adoption of Amazon's position would create an extra subsidy for Amazon's business, providing it with a new "judicially created tax break," as Justice Gorsuch termed it, here in South Carolina. Such a result would be contrary to South Carolina's sales tax laws and it would extend Amazon's unfair competitive advantage over local businesses beyond both what the physical nexus rule gave it prior to 2011, and what the General Assembly allowed it via special legislation from 2011 to 2016.

If Amazon prevails here, the consequences will be stark. First, it will establish a "playbook" for well-resourced taxpayers to contest tax laws in a manner that will never be an option for "mom-and-pop" South Carolina businesses. No small retailer can afford the decade-long political and legal efforts that Amazon has undertaken to avoid paying sales tax, and no small retailer will benefit if Amazon prevails.[13]

Second, the cost of lost government revenue from an additional tax break for Amazon would eventually fall on law-abiding South Carolina taxpayers. *See generally*, SC SMALL BUSINESS CHAMBER OF COMMERCE, *Amazon.com: The bigger picture* (Apr. 7, 2011), https://scsbc.org/amazon-com-the-bigger-picture/ (arguing against any sales tax exemption for Amazon on grounds that it "will be paid for by every small business (brick and mortar and otherwise) in the state" as well as by other individual taxpayers); THE STATE, *Controversial Amazon SC tax break set to expire in 2016* (Dec. 28, 2014) ("even its supporters say it is time for the tax break to lapse, putting Amazon on a level playing field with traditional brick-and-mortar retailers who collect sales taxes."). If this Court affirms the ALC's decision and requires Amazon to remit the sales tax liability that it refused to collect starting in 2016, the state's tax revenues will grow by tens of millions of dollars or more. However, if vital government priorities require funding and Amazon prevails here, the tax burden to support those priorities will fall elsewhere, namely upon other taxpayers who can ill afford the burden and are powerless to shed it.

[13] We unequivocally disagree with the assertions made by Amici, including the National Retail Federation and the Chambers of Commerce, that affirming the ALC will somehow harm local South Carolina businesses; to the contrary, we see the potential precedent of allowing a national business to escape taxes that local businesses are obligated to pay as a particularly troubling consequence of a reversal of the ALC.

CONCLUSION

For the reasons stated in this Brief, tax law professors Tessa R. Davis and Clinton G. Wallace as Amici Curiae respectfully request this honorable Court affirm the decision of the Administrative Law Court.

Respectfully submitted,

/s/ Robert Bockman
ROBERT T. BOCKMAN (S.C. BAR NO. 00757)
The Law Center
1525 Senate Street
Columbia, SC 29208
(803) 256-4028
rtbockman@gmail.com

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