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.

AMICUS CURIAE BRIEF OF COUNCIL ON STATE TAXATION IN SUPPORT OF APPELLANT, AMAZON SERVICES, LLC

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INTEREST OF THE AMICUS

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today, COST has an independent membership of over five hundred multistate corporations engaged in interstate and international commerce, many of which conduct substantial business in South Carolina and employ a significant number of South Carolina citizens and taxpayers. COST's mission is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities, a mission it has pursued since its inception.

The decision below is gravely concerning to COST and its members. The Administrative Law Court held that the South Carolina Department of Revenue ("Department") is not only authorized to shift the sales tax collection and remittance responsibility to Amazon Services LLC ("Amazon Services") for sales made by others in the absence of legislative authority, but that it may do so well after those sales have been consummated by third-party sellers on the Amazon.com marketplace. Effectively, the decision below sanctions the ability of the Department to create new "taxpayers" and new reporting and payment obligations from whole cloth.

The Department's extension of the tax collection and remittance responsibility to include Amazon Services directly contradicts the language and intent of the State's recent statutory amendments specifically authorizing the expansion of the sales tax obligation to include marketplace facilitators such as Amazon Services on a prospective basis only. Significantly, South Carolina now has the dubious distinction of being the **only** state to impose a collection and remittance obligation on marketplace facilitators in the absence of express legislation. In contrast to South Carolina, all other states that have adopted such an expansion have done so

appropriately through clear and prospective legislation. The Department usurps the South Carolina Legislature's prerogative, violating core principles of fair tax administration and notice and fundamentally infringing on taxpayers' due process rights to be informed of their tax obligations. The Department's expansion also renders the recent marketplace facilitator legislation unnecessary—a result contrary to established canons of statutory construction.

Over the past fifty years, COST, as amicus, has participated in numerous cases before the United States Supreme Court and state courts. In South Carolina, COST has filed *amicus* briefs in *Rent-A-Center West, Inc. v. South Carolina Department of Revenue*, 418 S.C. 320, 792 S.E.2d 260 (Ct. App. 2016); *CarMax Superstores West Coast, Inc. v. South Carolina Department of Revenue*, 411 S.C. 79, 767 S.E.2d 195 (2014) and *Bodman v. State*, 403 S.C. 60, 742 S.E.2d 363 (2013).

Because the Department's expansion of South Carolina's sales tax collection and remittance obligation without legislative authority will have a harmful impact on COST's members and set a negative precedent, COST is significantly invested in reversal of the Department's unfair application of the law. For these reasons, COST urges the Court to reverse the decision below.

STATEMENTS AND STANDARD OF REVIEW

COST adopts the Statement of The Issues on Appeal, the Statement of the Case, the Statement of The Facts, and the Standard of Review as set forth by Plaintiff-Appellant in its Final Opening Brief of Appellant Amazon Services LLC (hereinafter referred to as "Plaintiff-Appellant's Brief"). Plaintiff-Appellant's Brief at 3-21.

ARGUMENT

Amazon Services is not the "seller," [1] within the meaning of the Tax Act as it existed in 2016, of products offered and sold on the Amazon.com marketplace by independent third-party sellers. S.C. Code Ann. § 12-36-910 (2016); *see also* S.C. Code Regs. § 117-300.1 (2016). Rather, it operates an Internet marketplace, akin to a virtual shopping mall, that facilitates sales made by third-party sellers. Amazon Services fails to meet the indicia of a "seller" of these third-party products.[2] Amazon Services provides for a fee the necessary tools, including a user-friendly web interface, an advanced search function, and a large base of consumers that utilize the Amazon.com marketplace to enable third-party sellers to efficiently and effectively reach potential customers and increase their sales. For these third-party products, Amazon Services does not: (1) receive payments from customers; (2) determine what items are made available for sale; (3) set the sales price of the products; (4) determine the number of units available for purchase; (5) own or exercise control over the inventory made available to consumers; (6) dictate or produce the substantive description of the products; (7) determine the shipping and fulfillment terms; or (8) handle post-sale product-related services.

Instead of coming to a similar conclusion, the ALC found the South Carolina Supreme Court's decision in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), dispositive. That conclusion is mistaken. *Travelscape* involved online

[1]South Carolina defines "seller" in relevant part as including every person "selling or auctioning tangible personal property whether owned by the person or others." S.C. Code Ann. § 12-36-70(1)(a). South Carolina defines a "sale" as "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration." S.C. Code Ann. § 12-36-100.

[2]The facts regarding the sale of third-party products on Amazon Services' marketplace are set forth in the Plaintiff-Appellant's Brief at 1-15.

travel companies ("OTCs"), which have a fundamentally different business model than marketplace facilitators, such as Amazon Services.

I. The Administrative Law Court Erroneously Relied on *Travelscape*.

The Department and the ALC erroneously relied on the South Carolina Supreme Court's decision in *Travelscape* to impose sales tax collection responsibility on Amazon Services. In *Travelscape*, the Supreme Court held that Travelscape, an OTC that offers hotel reservations, must remit State accommodations tax on the gross proceeds it received for providing hotel reservations in South Carolina. *Travelscape*, 391 S.C. at 110, 705 S.E.2d at 39. The Supreme Court found Travelscape was engaged in the business of furnishing accommodations in South Carolina because it: (1) entered into contracts with hotels in South Carolina for reservations at a discounted rate; (2) sent employees into the State to negotiate the agreements; and (3) booked reservations in exchange for services to be performed by hotels in the State. *Id*. at 103, 705 S.E.2d at 35.

Reliance on *Travelscape* is misplaced. Travelscape had a fundamentally different business model than Amazon Services. In *Travelscape*, the operator of the marketplace was not merely "facilitating" sales, but actually making sales. Travelscape entered into agreements with hotels to pay the hotels a fixed price for hotel rooms it resold on its website to consumers. Unlike Amazon Services or other marketplace facilitators, Travelscape set the price for the reservations it sold on its website. Unlike Amazon Services, Travelscape received payments directly from its customers. Then, Travelscape paid the hotels the agreed-upon price for the hotel rooms. This is akin to a retailer who purchases goods on a wholesale basis and then resells the goods to its own customers. The hotel customer's relationship and purchase were with Travelscape, not with the hotel.

A clear difference between marketplace facilitators, such as Amazon Services, and OTCs, such as Travelscape, is the virtual absence of the application and enforcement of existing sales tax collection statutes on marketplace facilitators (other than the instant case and *Normand v. Wal-Mart.com USA, LLC*, No. 2019-C-00263, 2020 WL 499760 (La. Jan. 29, 2020) in Louisiana (discussed further below)), as compared to the large number of cases across the country under existing statutes that assert OTCs were responsible for collecting room occupancy and/or sales taxes. Indeed, *Travelscape* is nearly identical to dozens of other cases that adjudicated whether the OTC or the hotel was the "seller" for purposes of room occupancy or sales and use tax collection responsibilities. OTCs have both won and lost many of these cases, depending on the specific statutory language and intent as to whether the retailer (the hotel) or wholesaler/aggregator/reseller (the OTC) was responsible for collecting the tax.

The crux of many state court cases that have found an OTC responsible for collecting room occupancy and sales tax on the retail price charged to its customers is finding that the OTC satisfied key indicia of a retailer for purposes of the statute. *See Village of Rosemont v. Priceline.com Inc*., No. 09 C 4438, 2011 WL 4913262 (N.D. Ill. Oct. 14, 2011) (OTCs are "owners" who receive consideration for rentals because the customer cannot access his hotel room unless and until he pays the OTC's entire charge); *Expedia, Inc. v. District of Columbia*, 120 A.3d 623 (D.C. 2015) (Congress intended to tax the full amount customers pay for hotel rooms; "it is the sale. . . to the ultimate purchaser that is taxable"); *Expedia, Inc. v. City of N.Y. Dep't of Fin*., 22 N.Y3d 121, 3 N.E.3d 121 (2013) (hotel occupancy tax included the total charge paid by a hotel occupant, including sums paid directly to third-party travel companies); *Travelscape*, 391 S.C. 89, 705 S.E.2d 28 (2011) (legislature intended to tax entities who were accepting money in exchange for supplying hotel rooms in addition to those physically supplying

the rooms); *Travelocity.com, LP v. Wyo. Dep't of Revenue*, 2014 WY 43, 329 P.3d 131 (2014) (OTCs control the financial aspects of the transactions, they rent the rooms at a price they establish and monitor refunds).

Cases holding that tax is only due on the wholesale price paid to the hotels generally find that OTCs are not retailers subject to sales tax based on statutory interpretation, that they do not operate hotels or similar type businesses, or that they do not possess the right to rent or lease rooms. *See Pitt Cty. v. Hotels.com, LP*, 553 F.3d 308 (4th Cir. 2009) (OTCs are not "retailers" because they are not "operators of hotels . . . and similar type businesses"); *In re Transient Occupancy Tax Cases*, 2 Cal.5th 131, 384 P.3d 1236 (2016) (OTCs are not "operators" because they do not operate any hotels or other structures in the city); *Alachua Cty. v. Expedia, Inc*., 110 So. 3d 941, 38 Fla. L. Weekly D 482 (Fla. Dist. Ct. App. 2013) (OTCs are not engaged in the business of renting rooms to consumers because they lack a leasehold interest to convey in the hotel room); *Orbitz, LLC v. Ind. Dep't of State Revenu*e, 66 N.E.3d 1012, No. 49T10-0903-TA-00010, 2016 Ind. Tax LEXIS 51 (Ind. T.C. Dec. 20, 2016) (OTCs are not "retail merchants" because the hotelier had exclusive possession and control of the rooms, and OTCs only had the right to confirm a pre-paid reservation for a hotel room); *City of Branson v. Hotels.com, LP*, 396 S.W.3d 378 (Mo. Ct. App. Jan. 23, 2013) (OTCs are not "operators" because they do not "actually operate" such a facility); *State v. Priceline.com, Inc.*, 172 N.H. 28, 206 A.3d 333 (2019) (OTCs are not hotel "operators" because they do not have a possessory interest in or control of the hotels); *Wis. Dep't of Revenue v. Orbitz, LLC*, 367 Wis. 2d 593, 877 N.W.2d 372 (Ct. App. 2016) (construed "furnishing" to not include facilitation of accommodations, concluding that if legislature intended to tax the sale of the furnishing of rooms or lodging it could have said so).

In contrast to the wide number of cases and divergence of court opinions on whether the hotel or the OTC is a "retailer" for purposes of collecting the room occupancy tax or sales and use tax, there is **not a single case in the country** where a court (other than the ALC in South Carolina) has ruled that marketplace facilitators, not third-party sellers, are the "sellers" for purposes of sales and use tax collection on Internet sales transactions.

II. The Evolution of Marketplace Facilitator Sales and Use Tax Collection Responsibilities Support the Need for New Legislative Authority Before Expanding the Definition of "Seller."

The Department's attempt to impose sales and use tax collection responsibilities on Amazon Services absent new statutory authority is clearly invalid based on the history of states' long-standing efforts to impose sales and use tax collection responsibilities on remote sellers and marketplace facilitators associated with Internet (and other remote) commerce. Remote sellers and marketplace facilitators are very different—only remote sellers, before states changed their laws, had the indicia of a "seller" for sales tax collection purposes. But both share the history of states trying to expand sales and use tax collection responsibilities to businesses engaged in Internet commerce.

A. The Elimination of the Physical Presence Requirement Gave States Permission to Impose Sales and Use Tax Collection Responsibilities on Remote Sellers.

In South Carolina, sales taxes are privilege taxes. Although the imposition of South Carolina's sales tax is on the person engaged in the business of making retail sales, the sales tax may be added to the sales price of the taxable good sold, and thereby passed on to the consumer. S.C. Code Ann. § 12-36-910. A state, however, is constitutionally prohibited from imposing these obligations on an out-of-state seller unless the state's tax "applies to an activity with a substantial nexus with the taxing State." *South Dakota v. Wayfair, Inc*., 138 S.Ct. 2080, 2091, 201 L.Ed.2d 402, 417 (2018). If a seller does not have substantial nexus with the taxing state

and sales tax is not collected from the seller, then the consumer must remit a corresponding consumer's use tax to the state. As pointed out by *Wayfair*, consumer use tax remittance compliance and enforcement by state taxing agencies has historically been ineffective, resulting in lost revenue. *Id.* at 2088, 201 L.Ed.2d at 410.

Thus, the states began a fifty-year legal quest to redefine "substantial nexus" in a manner that would include remote sellers within the definition of sellers subject to sales and use tax collection responsibilities, as first addressed by the United States Supreme Court in *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753, 87 S.Ct. 1389 (1967). There, the United States Supreme Court found that the Commerce Clause and Due Process Clause prohibit a state from imposing a sales and use tax collection responsibility on a remote seller whose only connection with in-state customers is by means of common carrier or by mail (*i.e.,* physical presence was required). *Id.* at 758, 87 S.Ct. at 1392.

Twenty-five years later and frustrated by the constraints placed on states by *Bellas Hess* and the growing mail-order business, North Dakota, working with other states, hoped to overturn *Bellas Hess*. The United States Supreme Court, however, provided no such relief in *Quill Corp. v. North Dakota*, 504 U.S. 298, 307, 112 S. Ct. 1904, 1910 (1992). Instead, the United States Supreme Court reaffirmed the physical presence requirement under the dormant Commerce Clause.[3]

Another twenty-five years later, still frustrated by the constraints placed by the physical presence requirement, lack of Congressional will to provide states participating in the

[3]The United States Supreme Court distinguished the case from *Bellas Hess,* ruling that physical presence was not required under the Due Process Clause. *Quill*, 504 U.S. at 309, 112 S.Ct. 1904 at 1911.

Streamlined Sales and Use Tax Agreement with collection authority,[4] and the growing e-commerce business economy (instead of mail-order businesses), states again sought to overturn *Quill* and *Bellas Hess*.[5] South Dakota took the lead and enacted economic nexus legislation directly conflicting with *Quill's* physical presence test and carefully framed its legislation to not retroactively impose its sales tax obligation on remote sellers.[6] This time, in *Wayfair*, the United States Supreme Court overturned its *Quill* physical presence nexus rule in light of the modern e-commerce economy. *Wayfair*, 138 S.Ct. at 2099, 201 L.Ed.2d at 426.

The new "economic presence" test that replaced the "physical presence" test after *Wayfair* has given states the authority to impose a collection responsibility on a remote seller (without a physical in-state presence) for the first time.[7] This watershed decision also opened the door for states to adopt sales tax economic nexus provisions similar to those in South Dakota. This seismic change in redefining a "seller" for sales tax purposes to include a remote seller became possible only after the United States Supreme Court removed the physical presence test.

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[4]*See* Main Street Fairness Act, H.R. 5660, 111th Congress (2009-2010); Main Street Fairness Act, H.R. 2701, 112th Congress (2011-2012); Marketplace Fairness Act of 2013, S. 743, 113th Congress (2013-2014); Marketplace Fairness Act of 2015, S. 698, 114th Congress (2015-2016); Marketplace Fairness Act of 2017, S. 976, 115th Congress (2017-2018).

[5]Forty-one states, two territories, and the District of Columbia sought to overturn *Quill*'s physical presence test. *Wayfair*, 138 S.Ct. at 2095, 201 L.Ed.2d at 422.

[6]Other states soon enacted similar economic nexus legislation.

[7]Of note, the United States Supreme Court did not address other undue tax burdens and remanded the case to address these issues. The case was ultimately settled before those issues were decided. The Court, however, emphasized three features of South Dakota's law that mitigated undue burdens on interstate commerce: (1) the law would not be applied retroactively; (2) the law had a small business exclusion; and (3) South Dakota was part of the Streamlined Sales and Use Tax Agreement. *Wayfair*, 138 S.Ct. at 2099, 201 L.Ed.2d at 426.

Virtually all states then switched to the "economic presence" standard, but only after legislation was enacted in each state to effectuate this change.[8]

B. The Expansion of Sales Tax Collection Responsibilities to Marketplace Facilitators Requires Legislative Authority.

After the states prevailed in their fifty-year litigation battle to require remote sellers to collect sales and use tax from in-state customers, states turned their attention to a quickly rising business model in Internet commerce—the use of online marketplace facilitators that were not themselves acting as sellers, but were "facilitating" the sales of other third-party remote sellers to in-state customers. States quickly realized that it was administratively more efficient for states to have marketplace facilitators, such as Amazon Services, collect the sales tax than it was for their revenue agencies to administer and audit collection activities of thousands of remote sellers (who as a result of *Wayfair* now had collection responsibilities). Moreover, it allowed states like South Carolina to require marketplace facilitators to collect the sales tax on behalf of the thousands of remote sellers that fell below the new statutory filing and collection responsibility thresholds. *See* S.C. Rev. Rul. 18-14 (2018) (only a remote seller with $100,000 or more in total

[8]Alabama (Ala. Admin. Code § 810-6-2-.90.03 (2018); Arizona (2019 HB 2757); Arkansas (2019 SB 576); California (2019 SB 92); Colorado (2019 HB 1240); Connecticut (2019 HB 7424); District of Columbia (2018 B 22-914); Georgia (2019 HB 182); Hawaii (2017 SB 2514); Idaho (2019 H 259); Illinois (2018 HB 3342); Indiana (2017 HB 1129); Iowa (2019 HF 779); Kentucky (2018 HB 487); Louisiana (2018 HB 17); Maine (2019 HP 1064); Maryland (COMAR 03.06.01.33); Massachusetts (2019 HB 4000); Michigan (2019 HB 4542); Minnesota (2019 HF 5 ch. 6); Mississippi (2020 HB 379); Nebraska (2019 LB 284); Nevada (2018 R189-18); New Jersey (2018 AB 4496); New Mexico (2019 HB 6 §25); New York (2019 SB 6615); North Carolina (2019 SB 56); North Dakota (2019 SB 2191); Ohio (2019 SB 166); Oklahoma (2019 SB 513); Pennsylvania (2017 Act 43, Sales And Use Tax Bulletin 2019-01); Rhode Island (2019 HB 5278); South Dakota (2016 SB 106); Tennessee (2020 SB 2932, ch. 759); Texas (Tex. Admin. Code § 3.586 (2019)); Utah (2018 SB 2001); Vermont (2016 H 873); Virginia (2019 SB 1083, 2019 HB 1722); Washington (2017 HB 2163, 2019 SB 5581); West Virginia (2019 HB 2813); Wisconsin (2017 SB 883); Wyoming (2017 HB 19).

gross proceeds in South Carolina within a calendar year has economic nexus in the State). Thus, marketplace facilitators, legislatively added to the statutory definition of businesses required to collect state sales taxes, expanded the sales tax collection base to include remote sellers that might otherwise have fallen below the minimum economic sales or transaction thresholds established by the states.

The imposition of the collection responsibility on a new type of business structure—a marketplace facilitator—needs to be accomplished through clear legislation. It was widely recognized in South Carolina (and nearly all other states) that if a state desires to expand the long-standing definition of what types of businesses are classified as "sellers," then it can do so only by legislative enactment. To that end, most states after *Wayfair* that enacted statutes imposing a collection responsibility (with some safeguards) on remote sellers also enacted legislation that imposed sales tax collection responsibilities on marketplace facilitators. *See* Multistate Tax Comm'n, *Wayfair* Implementation & Marketplace Facilitator Work Group July 2020 White Paper at 9-11 (2020), http://www.mtc.gov/getattachment/The-Commission/News/Wayfair-Implementation-%E2%80%93-Marketplace-Facilitator-C/White-Paper-7-6-20-w-app.pdf.aspx.

These states, including South Carolina, enacted legislation to include marketplace facilitators as entities responsible for sales tax collection—a substantial extension that required significant changes to existing statutes. This is especially true because a marketplace facilitator's business model failed to satisfy the traditional indicia of a seller. This is demonstrated by the extensive efforts by states to put marketplace facilitator legislation in place.

Indeed, the Department was cognizant of these realities and requested amendments to the Tax Act to address the sales tax responsibilities of online marketplace facilitators such as

Amazon Services. Prior to the enactment of South Carolina's 2019 marketplace facilitators legislation, Department representatives advocated for new legislation to impose a collection responsibility on marketplace facilitators to various legislative committees. *See* Plaintiff-Appellant's Brief at 17. Subsequently, South Carolina enacted legislation that was almost identical to legislation in other states and expanded the definition of a "seller" to include a new category of persons "operating as a marketplace facilitator." 2019 S.C. Act No. 21, effective April 26, 2019. South Carolina Code of Laws § 12-36-70 (2016) had never previously stated that merely "facilitating" sales would impose sales tax collection obligations, but it did under the 2019 marketplace facilitator amendments, on a prospective basis only.

In just three years, forty states enacted legislation requiring marketplace facilitators to collect and remit sales and use tax on third-party product sales facilitated on their marketplaces.[9] The actions of these states and of the intergovernmental state tax agencies[10] reflect a dynamic

[9]Alabama (2018 HB 470); Arkansas (2019 HB 576); Arizona (2019 HB 2757); California (2019 AB 147, 2019 SB 92); Colorado (2019 HB 1240); Connecticut (2018 SB 417); District of Columbia (2018 B 22-914); Georgia (2020 HB 276); Hawaii (2019 SB 396); Idaho (2019 H 259); Indiana (2019 HEA 1001); Iowa (2018 SF 2417); Kentucky (2019 HB 354); Louisiana (2020 SB 138); Maine (2019 HP 1064); Maryland (2019 HB 1301); Massachusetts (2019 HB 4000); Michigan (2019 HB 4540, 4541, 4542, 4543); Minnesota (2017 HF 1, 2019 HF 5); Mississippi (2020 HB 379); North Carolina (2019 S 557); North Dakota (2019 SB 2338); Nebraska (2019 LB 284); New Jersey (2018 AB 4496); New Mexico (2019 HB 6); New York (2019 S. 1509 Part G); Nevada (2019 AB 445); Ohio (2019 HB 166); Oklahoma (2018 HB 1019XX); Pennsylvania (2017 Act 43, Sales And Use Tax Bulletin 2019-01); Rhode Island (2017 H 5175A, 2019 S 251); South Carolina (2019 SB 214); South Dakota (2018 SB2); Tennessee (2020 SB 2182); Texas (2019 HB 1525); Utah (2019 SB 168, 2020 SB 114); Virginia (2019 SB 1083, 2019 HB 1722); Vermont (2019 H 536); Washington (2017 HB 2163, 2019 SB 5581); West Virginia (2019 HB 2813); Wisconsin (2019 AB 251).

[10]Addressing the states' new marketplace facilitator laws, the National Conference of State Legislatures ("NCSL") Task Force on State and Local Taxation formed its own work group ("Task Force") in May 2019 to engage in a consensus process to develop model legislation and to standardize state laws concerning remote seller legislation and marketplace facilitator legislation. Legislators, the MTC, the Federation of Tax Administrators, the Streamlined Sales

nationwide state tax policy shift, as well as the comprehensive legal and administrative underpinning of the new laws imposing a sales and use tax collection responsibility on marketplace facilitators.

C. The Louisiana Supreme Court's *Walmart.com* Decision is Illustrative of Judicial Rejection of Expanding Sales Tax Collection Responsibilities to Marketplace Facilitators Without Legislative Change.

Equally as important as what happened in other states, is what did not happen. To date, no other state court has held a marketplace facilitator liable for sales and use tax collection and remittance under the laws pre-dating a state's new marketplace facilitator legislation. The only state court system, other than South Carolina, that has considered this issue is the Supreme Court of Louisiana in *Wal-Mart.com*. In *Wal-Mart.com*, Jefferson Parish, a locality of Louisiana, asserted that Wal-Mart.com, the operator of an online marketplace at which website visitors could buy products from third-party sellers sold on the online marketplace, was required to collect and remit sales tax on online sales made by third-party sellers through Wal-Mart.com's marketplace. The Supreme Court of Louisiana disagreed, concluding that Wal-Mart.com was not obligated under the State's general statutory tax regime to collect and remit sales tax on third-party sales. The Supreme Court of Louisiana held that "as a nonparty to the underlying sale transaction, a marketplace facilitator is not a 'dealer'" for products sold by third-party sellers on its marketplace. *Walmart.com*, 2020 WL 499760 at 28. It found that without legislation to make a marketplace facilitator (instead of the third-party seller) responsible for this collection and remittance obligation, "double taxation could result if both online marketplaces and third

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Tax Governing Board, state tax officials, and business representatives (including COST) participated in the Task Force's proceedings. In January 2020, the NCSL's Executive Committee approved model marketplace facilitator legislation to promote more uniformity in the states' marketplace laws. Nat'l Conference of State Legislatures, Marketplace Facilitator Sales Tax Collection Model Legislation (2020), https://www.ncsl.org/Portals/1/Documents/Taskforces/SALT_Model_Marketplace_Facilitator_Legislation.pdf?ver=2020-01-30-122035320&timestamp%20=1580412048938.

party retailers are obligated to collect sales tax on the same transaction." *Id*. at 26. To that end, "[i]t is not in the province of the judiciary to create an exception (in the context of a retail sale) to the seller's obligation to collect sales tax for a marketplace facilitator" without such a legislative amendment.[11] *Id.*

If this Court allows the ALC's decision to stand, South Carolina will become the sole outlier, taking an unprecedented position that contradicts all other states and the national historical context in which this case is before this Court.

D. The Tax Act in Effect for the Periods at Issue Must Be Evaluated and Understood in Relation to the State's Subsequent 2019 Marketplace Facilitator Amendments.

The Department and ALC ignore the fact that the Tax Act in effect for Amazon Services' assessment period pre-dates the enactment of South Carolina's marketplace facilitator law. *See* 2019 S.C. Act No. 21, effective April 26, 2019. The 2019 law change to address marketplace facilitators demonstrates that the Legislature did not intend the Tax Act in effect prior to this change to subject marketplace facilitators to sales tax collection and remittance responsibility.

What possible purpose could be served by the legislation if a marketplace facilitator was already required to collect and pay sales tax on sales made by a third-party on its website? The answer is as obvious as the question is rhetorical: the legislation was necessary because South Carolina (and all other states) had never before treated marketplace facilitators as the "sellers" of sales of third-party products.

[11]On June 11, 2020, Louisiana enacted legislation compelling a marketplace facilitator to collect and remit sales tax for each remote sale transaction on its marketplace that is delivered into Louisiana. Louisiana (2020 SB 138).

South Carolina's new legislation would not be necessary if the Tax Act unambiguously defined a "retailer" and "seller" to include a marketplace facilitator, such as Amazon Services, as the ALC erroneously failed to recognize. These amendments were tailored to extend the duty to collect and remit sales and use tax to online marketplace facilitators (including Amazon Services). Concluding that Amazon Services is responsible for sales tax collection and remittances under the Tax Act that pre-dates these amendments ignores the presumption that the Legislature intended to change existing law with these amendments. *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008); *Key Corp. Capital, Inc. v. Cty. of Beaufort*, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2007); *N. River Ins. Co. v. Gibson*, 244 S.C. 393, 398, 137 S.E.2d 264, 266 (1964) (an amendment that materially changes the terminology of a statute is a departure from existing law, rather than a clarification of original intent). "[T]o hold otherwise would indicate that this amendment essentially was a futile act[.]" *Key Corp. Capital*, 373 S.C. at 61, 644 S.E.2d at 678; *see also Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) ("[t]he Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something").

By rejecting the significance of these amendments, the ALC overrode the presumption that these amendments effectuate the Legislature's intent to change the existing law. At worst, the ALC ignored that marketplace facilitators such as Amazon Services were not subject to sales tax collection responsibility prior to these amendments. But at a minimum, the 2019 amendments demonstrate that the pre-existing Tax Act was ambiguous enough that the

Legislature needed to amend the law to create plain and unambiguous language.[12] And as noted by the ALC, but dismissed in importance, the Department has been inconsistent in its position on whether marketplace facilitators were sellers. Final Order September 10, 2019 at 17; *see also* Plaintiff-Appellant's Brief at 40 (noting, the Department's Director's testimony urging the Legislature to adopt marketplace facilitator legislation in 2018 to "close the gap" on who owes sales taxes on third-party sales). Accordingly, the South Carolina Supreme Court's prior decisions, such as in *Alltel Communications*, should be followed in construing an ambiguous tax law against the government.[13]

Under the ALC's reasoning, if the pre-existing Tax Act applies to Amazon Services and presumably to other marketplace facilitators, a lingering question remains: how does the pre-existing Tax Act reconcile with the marketplace facilitator amendments which provide clear sales tax collection rules for marketplace facilitators such as Amazon Services? The only reasonable answer to this question is that the Department's utilization of the pre-existing Tax Act and the ALC's affirmation of such action is an unlawful application of prior law, unsupported by any legal authority.

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[12]The rules of statutory interpretation are not needed "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning." *Media Gen. Commc'n., Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010). Had the ALC found the Tax Act ambiguous, Amazon Services would have been entitled to have such ambiguity resolved in its favor. *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 318, 731 S.E.2d 869, 872 (2012); *see also Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509-510 (1936) ("where the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor").

[13]Revenue agencies must also comply with constitutional due process requirements and provide clear notice of its laws to avoid "secret" tax laws. A hidden tax law change that lacked fair notice was struck down by an appellate court in *Ariz. Pub. Serv. Co. v. City of San Luis*, No. 1 CA-TX 16-0009, 2017 WL 3301768 (Ariz. Ct. App. Aug. 3, 2017). Thus, the Department's failure to provide clear notice is another reason for this Court to reverse the ALC.

III. The South Carolina Legislature Properly Avoided Retroactive Application of Collection and Remittance Responsibility on Marketplace Facilitators.

South Carolina's marketplace facilitator legislation is not a "clarification" of pre-existing law. Fortunately, the Legislature did not attempt to have its new legislation deemed to be a "clarification" of existing law to avoid running afoul with the United States Supreme Court's limitation on retroactive corrective legislation for "only a modest period of retroactivity." *United States v. Carlton*, 512 U.S. 26, 32, 114 S. Ct. 2018, 2023 (1994); *see Rivers v. State*, 327 S.C. 271, 279, 490 S.E.2d 261, 265 (1997) (holding that retroactive tax legislation violated "the Due Process Clause of the South Carolina and United States Constitutions").

In *Carlton*, the United States Supreme Court held that a retroactive amendment to a tax statute does not violate the Due Process Clause if, in part, the amendment is enacted "promptly" and the retroactive period is "modest." *Carlton*, 512 U.S. at 27, 114 S. Ct. at 2020. *Carlton* involved a one-year retroactive effective date. *Id*. Here, if South Carolina's marketplace facilitator legislation is considered a correction or clarification of the definition of a "seller" or "retailer" pursuant to S.C. Code Ann. § 12-36-70, then such retroactive application would apply back twenty-nine years to 1990 when the statute was added to the Tax Act. 1990 S.C. Act No. 612, Part II, § 74A. This retroactive period would go well beyond the scope of what *Carlton* considered to be modest. More recently, the United States Supreme Court in *Wayfair*, expressed concern over the retroactive application of tax laws. *Wayfair*, 138 S.Ct. at 2099, 201 L.Ed.2d at 425-26.

Here, the Department seeks to assess Amazon Services for sales tax on third-party seller sales that occurred prior to the enactment of the State's 2019 marketplace facilitator law. This enforcement action would neither heed the United States Supreme Court's warning in *Wayfair* against retroactivity nor limit its applicability to a modest period as required by *Carlton*.

Indeed, the South Carolina Legislature has acknowledged the constitutional constraints placed on the retroactive application of imposing a collection obligation on marketplace facilitators. It remedied potential defects by exercising its authority to compel marketplace facilitators to collect and remit sales tax on a prospective basis only (2019 S.C. Act No. 21, effective April 26, 2019); thus, conforming to the constitutional limitations to retroactive enforcement as set forth by the United States Supreme Court in *Carlton* and by the South Carolina Supreme Court in *Rivers.*

To allow the Department to impose this collection responsibility before the 2019 legislative change could also open the floodgates for other assessments. In that situation, nothing would prevent the Department from retroactively assessing other marketplace facilitators for failing to collect sales and use taxes for periods even earlier than those at issue in the instant case, or from initiating collection activities against marketplace facilitators who never previously registered to collect South Carolina sales tax. Given the lack of fair notice or regulatory guidance prior to the 2019 marketplace facilitator amendments, this Court should not permit retroactive enforcement of sales tax collection responsibilities on marketplace facilitators.

IV. Recent Tort Liability Cases Affirm that Amazon Services Was Not a "Seller" for Purposes of Sales Made by Third-Party Sellers on Amazon Services Website Marketplace.

Recent tort liability cases are instructive in differentiating Amazon Services' activities from that of the "seller" when addressing product liability lawsuits. The United States Court of Appeals for the Ninth Circuit in *State Farm Fire and Casualty Co. v. Amazon.com, Inc.*, No 19-17149, 2020 WL 6746745 (9th Cir. Nov. 17, 2020) concluded that Amazon Services' business model does not make it the seller of defective products (hoverboards) sold by third-party sellers on Amazon.com's online marketplace. The Ninth Circuit found that Amazon.com was not liable for the defective third-party products. The court concluded that numerous factors weighed in

favor of Amazon.com. Importantly, the court determined that "while Amazon facilitated the shipping of the third-party seller's hoverboards from the warehouse to the consumer, *this did not make Amazon the seller of the product any more than the U.S. Postal Service or United Parcel Service* are when they take possession of an item and transport it to a customer." *Id.* at 4-5 (emphasis added).[14]

Other cases around the country have come to similar conclusions that Amazon Services was not acting as a seller for product liability purposes. *See Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, D.N.J. No 17-2738, 2018 U.S. Dist. LEXIS 123081 (D.N.J. 2018) (Amazon never exercised sufficient control over the product to make it the seller); *Fox v. Amazon.com, Inc.,* 930 F.3d 415, 2019 U.S. App. LEXIS 20043 (6th Cir. 2019) (Amazon did not offer the product for sale, had not set the price, and did not make any safety representations); *Carpenter v. Amazon.com Inc.,* N.D. Cal. No. 17-cv-03221, 2019 U.S. Dist. LEXIS 45317 (N.D. Cal. 2019) (It was not established that Amazon's role was integral to the business enterprise and necessary factor to bring a product to the consumer market); *Stiner v. Amazon.com, Inc*., 2020-Ohio-4632, Ohio LEXIS 2205 (Ohio Oct. 1, 2020) (an e-commerce company was not a supplier because it did not have the requisite control over the product, also noting the court could not modernize a law by judicial fiat).

Amazon Services does not make a "sale," as defined under S.C. Code Ann. § 12-36-100, to the customers of the third-party products purchased on Amazon Services' Internet

[14]The Ninth Circuit focused on other factors to reach its conclusion that Amazon.com was not strictly liable for these third-party products. Specifically, Amazon.com (1) did not hold title to the defective third-party products; (2) was not listed as the seller; (3) disclaimed all warranties; (4) did not inspect the products; (5) derived only a small benefit from each of the transactions; and (6) did not influence the design or manufacturing of the products. *Id.* at 4-6.

marketplace, as detailed in the Plaintiff-Appellant's Brief. Given the activities performed by and under the control of the third-party sellers, it is clear that Amazon Services is not the "seller" of these products under the statute in effect at the time and cannot have been required to collect sales or use tax on the third-party products sold on its Internet marketplace by third-party sellers. Amazon Services merely facilitates the sales made by third-party sellers; it does not make the sales.

CONCLUSION

The Department and ALC both erred in reaching an unsupported legal conclusion that Amazon Services, a marketplace facilitator, is a "seller" responsible for sales tax collection on third-party sales based on the thirty-year old Tax Act provisions in effect prior to the State's 2019 enactment of marketplace facilitator legislation. Their actions also ignore the South Carolina Legislature's intent to apply the collection and remittance responsibility to marketplace facilitators on a prospective basis only. Accordingly, this Court should reverse the ALC.

Respectfully submitted,

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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.

CERTIFICATE OF COMPLIANCE

This Brief of *Amicus Curiae* complies with Rules 208(b) and 211, SCACR, as required by Rule 213, SCACR.

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