THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Supreme Court Appellate Case No. 2024-000625
Court of Appeals Appellate Case No. 2019-001706
Case No. 17-ALJ-17-0238-CC

Amazon Services, LLC, ……Petitioner-Appellant,

v.

South Carolina Department of Revenue, ……... Respondent.

AMICUS CURIAE BRIEF OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER-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 approximately five hundred multistate corporations engaged in interstate and international commerce, many of which conduct substantial business in South Carolina and employ many South Carolina citizens. 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.

Clearly written and consistently interpreted statutes and ordinances are paramount to fair and equitable tax administration and compliance. All taxpayers need to be able to rely on the plain meaning and application of tax laws. Clearly written guidance adopted by a state or local jurisdiction is particularly important for multijurisdictional taxpayers, including COST members, who are required to know and follow the tax laws of multiple states and their local taxing jurisdictions. Guidance based on the plain meaning of a law's words promotes sound tax policy and creates certainty and predictability, reduces confusion, prevents unintentional non-compliance, and enhances fairness and equity in the tax system. By creating a transparent and understandable framework, clear interpretation of tax laws ensures that such laws serve their intended purposes while building and maintaining public trust in the tax system. This trust fosters voluntary compliance and promotes a stable economic environment for both the states and their local taxing jurisdictions. Clarity of the law is particularly important when deciding whether a business is required to serve as a tax collection agent for a state.

COST, over the past fifty-five years, has participated as amicus in numerous cases before the U.S. Supreme Court and state courts, including South Carolina courts. Notably, COST has

filed amicus briefs addressing South Carolina tax issues 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), *Bodman v. State*, 403 S.C. 60, 742 S.E.2d 363 (2013), and the Court of Appeals in this case.

STATEMENT OF THE CASE

In this case, the Court of Appeals affirmed the Administrative Law Court's ("ALC") conclusion that the South Carolina Department of Revenue (the "Department") was authorized to shift the sales tax collection obligation for third-party sales from third-party sellers to Amazon Services, LLC ("Amazon Services"). This decision is contrary to the canons of statutory construction and ignores the actions of the South Carolina Legislature.[1] All forty-five states imposing sales taxes, and the District of Columbia have enacted legislation to expand sales tax collection obligations to marketplace facilitators. South Carolina would be an outlier if the Court of Appeals' decision is allowed to stand because it would impose a marketplace collection obligation retroactively prior to this State's Legislature enacting such a law. The Department is attempting to impose a sales tax liability against Amazon Services well after third-party sellers consummated their sales on the Amazon.com marketplace. This is especially alarming considering the Legislature's 2019 changes to South Carolina's Sales and Use Tax Act, 2019 S.C. Act No. 21, effective April 26, 2019 ("2019 Tax Act"), which provided legislative authority to impose a collection obligation on marketplace facilitators. The Department's imposition of a sales tax collection and remittance obligation on Amazon Services prior to this 2019 law change was not

[1] "Sales tax" as used in this brief refers to states' sales taxes and includes states' complementary use taxes.

authorized by the Legislature. Without legislative authority, the Department's actions violate the core principles of fair tax administration and notice—fundamentally infringing on taxpayers' due process rights to be informed of their tax collection obligations.

The Department's expansion of South Carolina's sales tax collection and remittance obligations without legislative authority will not only have a harmful impact on taxpayers, but also sets a negative precedent for future statutory interpretation. Moreover, if this Court allows the Court of Appeals' decision to stand, South Carolina's marketplace facilitator legislation is essentially rendered an unnecessary act, which the Legislature is presumed not to do. For these core reasons, COST urges this Court to reverse the Court of Appeals' decision on the merits.

QUESTIONS PRESENTED FOR REVIEW AND STANDARD OF REVIEW

COST adopts the Questions Presented for Review and the Standard of Review as set forth by Petitioner in its opening brief at 4-5 and 22.

ARGUMENT

I. Sound Tax Policy Dictates that the Canons of Statutory Construction are Followed.

Clearly written and consistently interpreted statutes are paramount to fair and equitable administration of tax laws and taxpayer compliance. All business entities need to be able to rely on the plain meaning of the statute. Unambiguous statutory guidance is particularly important for multijurisdictional businesses that are required to know and comply with multiple states sales and use tax laws. Statutory interpretation based on the plain meaning of statutory words not only promotes sound policy, but it also creates certainty and predictability, reduces confusion, and prevents unintentional non-compliance. When a business entity is acting as a collection agent for the state, as the seller is in the case of sales and use taxes, fundamental fairness dictates that the business entity clearly understands its collection obligation.

No state court has upheld the imposition of a collection obligation on a marketplace facilitator without specific statutory authority addressing this novel Internet-based business model. Sound tax policy dictates that statutes are given their plain meaning. To comply with statutory obligations, a taxpayer must be able to understand those obligations. Imposing a tax collection obligation on a taxpayer for its failure to comply with an ambiguous statute is fundamentally unfair. The U.S. Supreme Court when interpreting taxing statutes has stated:

> [I]n statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer.

U.S. v. Merriam, 263 U.S. 179, 187-188 (1923) (internal citations omitted).

These longstanding canons of statutory construction have been adopted by the South Carolina courts. *See Cooper River Bridge Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 188 S.E. 508 at 510 (1936) ("Statutes levying taxes. . .are not to be extended by implication beyond the clear import of the statute."). South Carolina courts have also embraced the fundamental rule of statutory construction that ambiguities in the taxing statute should be construed in favor of the taxpayer. *Alltel Communications v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E. 2d 869 (2012).

Contrary to the Court of Appeals' finding, the statute imposing a sales tax collection obligation does not unambiguously reach Amazon Services with respect to third-party sales. The statute defines both the terms "sale" and "purchase" as:

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

(3) a license to use or consume; and

(4) a transfer of title or possession, or both.

S.C. Code Ann. §12-36-100.

Each of the listed transactions involves the transfer for consideration of a right to exercise control over or grant possession of tangible personal property. It is the third-party sellers, not Amazon Services, who own the property and have the right to transfer the tangible property. It is the third-party sellers who establish the sales price for the transaction and receive the consideration. Amazon Services neither had the right to transfer, exchange, or barter the third-party seller's tangible personal property, nor did it receive consideration for the sale of that property. Thus, Amazon Services' interpretation of the statutory collection obligation as not applying to a marketplace facilitator was reasonable under the plain wording of S.C. Code Ann. § 12-36-70 (the "2016 Tax Act").

The South Carolina Legislature's 2019 statutory amendment was unnecessary if the prior statute had unambiguously defined a "retailer" and "seller" to include a marketplace facilitator, such as Amazon Services. The purpose of the amendments was to extend the obligation to collect and remit sales and use tax to marketplace facilitators. The Court of Appeals erred in not construing the ambiguous statute in favor of Amazon Services' reasonable interpretation.

II. Legislative Authority Is Required to Expand the Definition of "Seller" to Include a Marketplace Facilitator.

The Court of Appeals sanctioning the Department's attempt to enforce a sales tax collection obligation on Amazon Services for sales made by third-party sellers without statutory authority is not only out-of-step with every other state taxing jurisdiction but contrary to the plain meaning of the statute and usurps the authority of the South Carolina Legislature.

A. The Elimination of the Physical Presence Requirement Allowed States to Impose a Sales and Use Tax Collection Requirement on Remote Seller.

After approximately fifty years of legal battles, the U.S. Supreme Court redefined the term "substantial nexus" in *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018). The South Carolina sales tax is a privilege tax imposed 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 is constitutionally prohibited from imposing a collection obligation unless the retailer has a substantial presence within the taxing jurisdiction. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). *Wayfair* reversed the Court's earlier decisions that the Commerce Clause prohibited a state from imposing a collection obligation on a remote seller who did not have physical presence in the taxing jurisdiction. *Nat'l Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In its place, the Court replaced the physical presence test, which had stood for fifty years, with an economic presence test, recognizing there was a growing e-commerce economy and a shift in business models. *Wayfair*, 585 U.S. at 188.

The replacement of the physical presence test for an economic presence standard gave states the authority to adopt an economic presence standard like the one adopted by South Dakota in *Wayfair* and impose a tax collection obligation on remote sellers. Thus, *Wayfair* opened the door allowing a state to expand the term "seller" to include remote sellers. Virtually all the states, utilizing the newfound authority, have enacted legislation adopting economic presence standards.[2]

[2] Alabama (Ala. Admin. Code § 810-6-2-.90.03 (2018)); Alaska (Ordinance No. O-19-08-11 (Sept. 1, 2019)); Arizona (2019 HB 2757); Arkansas (2019 SB 576); California (2019 SB 92); Colorado (2019 HB 1240); Connecticut (2019 HB 7424); District of Columbia (Internet Sales Tax Amendment Act of 2018 A22-0584); 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 Act No. 5); Maine (2019 HP 1064); Maryland (COMAR

B. Legislative Action Is Required to Expand the Sales Tax Collection Obligation to Marketplace Facilitators.

After the states prevailed in their fifty-year litigation 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 realized that it was administratively more efficient 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 tens of thousands of remote sellers (who because 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 gross proceeds in South Carolina within a calendar year has economic nexus in the State).

It was widely recognized by all states with sales and use taxes that if a state desires to expand the long-standing definition of what types of businesses are classified as "sellers" with collection obligations, then it can do so only by prospective legislative enactment. The new legislation was required because the marketplace facilitator business model failed to satisfy the

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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); New York (2019 SB 6615); North Carolina (2019 SB 56); North Dakota (2019 SB 2191); Ohio (2019 SB 251); Oklahoma (2019 SB 513); Pennsylvania (Corporation Tax Bulletin 2019-04); Rhode Island (2019 HB 5278); South Carolina (2019 SB 214); South Dakota (2018 SB 1); 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); Washington (2019 SB 5581); West Virginia (2019 HB 2813); Wisconsin (2017 SB 883); Wyoming (2017 HB 19).

traditional indicia of a seller. To that end, within five years after *Wayfair*, all states imposed a collection responsibility (with some safeguards) on remote sellers and imposed sales tax collection responsibilities on marketplace facilitators (*see* Figure 1).[3]

The actions of these states and of the intergovernmental state tax agencies[4] reflect a dynamic nationwide state tax policy shift that embodied the comprehensive legal and administrative underpinning of the new laws imposing a sales and use tax collection responsibility on marketplace facilitators.[5] This policy shift impacting virtually all states represents one of the quickest enactments of major state tax reform.

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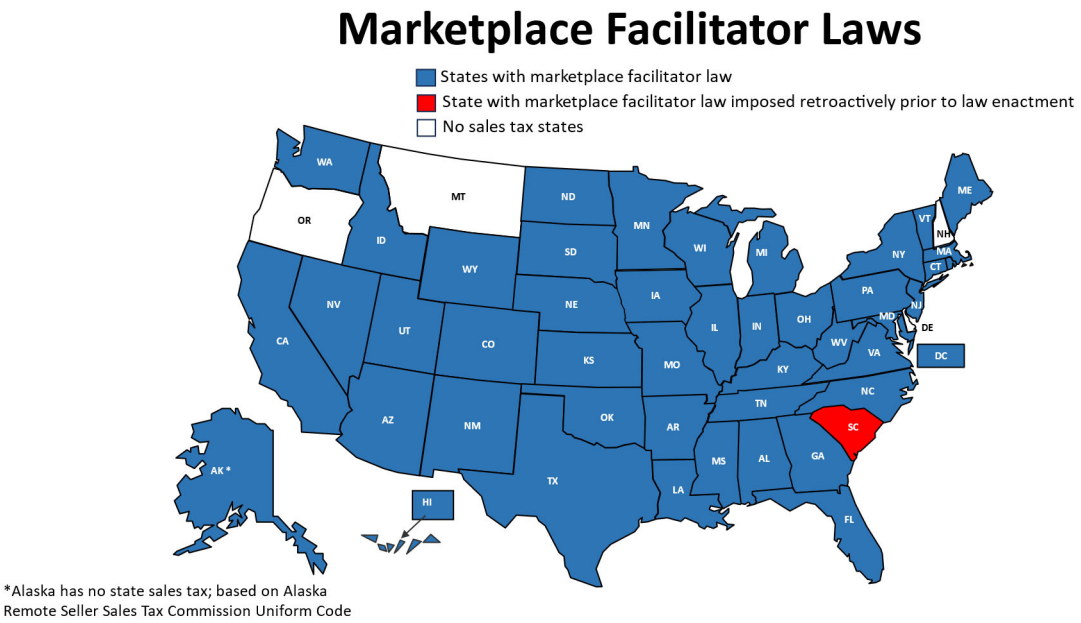
[3] Alabama (2018 HB 470); Arkansas (2019 HB 576); Arizona (2019 HB 2757); California (2019 AB 147, 2019 SB 92); Colorado (2019 HB 1240); Connecticut (2018 SB 417); District of Columbia (Internet Sales Tax Amendment Act of 2018 A22-0584); Georgia (2020 HB 276); Hawaii (2019 SB 396); Idaho (2019 HB 259); 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 H 4000); Michigan (2019 HB 4540, 4541, 4542, 4543); Minnesota (2017 HF 1, 2019 HF 5 ch. 6); 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, 2019 HB 262); 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 H 1722); Vermont (2019 H 536); Washington (2017 HB 2163, 2019 SB 5581); Wisconsin (2019 AB 251).

[4] 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 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.

[5] *See also* Multistate Tax Comm'n, *Wayfair* Implementation & Marketplace Facilitator Work Group July 2020 White Paper at 9-11 (2020), http://www.mtc.gov/getattachment/The-

Figure 1



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All states with sales and use taxes, including South Carolina, now include marketplace facilitators as the entities responsible for sales and use tax collection—a substantial extension that required significant changes to the states' sales taxes.[6] Indeed, the Department was cognizant of the uniqueness of the marketplace facilitator business model and requested amendments to the 2016 Tax Act to address the sales tax collection 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:* Final Opening

Commission/News/Wayfair-Implementation-%E2%80%93-Marketplace-Facilitator-C/White-Paper-7-6-20-w-app.pdf.aspx

[6] The new marketplace facilitator provisions simultaneously accomplished two goals: (1) for the first time, a sales and use tax collection responsibility was imposed on marketplace facilitators for third-party sales made on the marketplace facilitator's Internet platform; and (2) the sales and use tax collection responsibility was expanded to encompass sales made by remote sellers that are below the minimum economic sales or transaction thresholds established by the states.

Brief of Appellant Appendix Vol. VII at 01977. Subsequently, South Carolina enacted the 2019 Tax Act, which was similar to legislative actions in other states and expanded the definition of a "seller" to include a new category of persons "operating as a marketplace facilitator." The 2016 Tax Act never stated that merely "facilitating" sales would impose sales tax collection obligations.

C. The 2016 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.

If, as the Department asserts, Amazon Services was a "seller" under the 2016 Tax Act and had a collection obligation, there was no need for subsequent legislative action. The Department's position is contrary to the established principle "[w]hen the Legislature adopts an amendment to a statute, [there is] a presumption that the Legislature intended to change the existing law[.]" *Duvall v. S.C. Budget and Control Board*, 377 S.C. 36, 46, 659 S.E.2d. 125, 130 (2008); *see also Key Corp. Capital, Inc. v. County 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). The Department's interpretation renders the legislative enactment of a significant statutory amendment, the 2019 Tax Act, a useless action. South Carolina courts, as well as those of other states, avoid interpretations implying that legislative enactments are futile acts. *Key Corp.*, 373 S.C. 55, 644 S.E.2d 675 (2007). The South Carolina Legislature recognized that a significant statutory change was required to impose a collection obligation on a marketplace facilitator. Such a significant change was not a mere "clarification" as the Court of Appeals determined.

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, which has considered this issue

is Louisiana in *Normand v. Wal-Mart.com USA, LLC*, 340 So.3d 615 (La. 2020). In *Wal-Mart.com USA, LLC*, Jefferson Parish, a locality of Louisiana, asserted that Wal-Mart.com USA, LLC, 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 USA, LLC's marketplace. The Supreme Court of Louisiana disagreed, concluding that Wal-Mart.com USA, LLC was not obligated under the State's general statutory tax regime to collect and remit sales tax on third-party sales. The Court 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. *Id*. at 633. 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-party retailers are obligated to collect sales tax on the same transaction." *Id*. at 631. 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.[7] *Id.*

What possible purpose could be served by the enactment of the 2019 Tax Act if marketplace facilitators were 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 legislative action was necessary because South Carolina (and the other states with sales taxes) had never treated marketplace facilitators as the "sellers" of sales of third-party products. In the broader historical and comparative state context, the Court of Appeals' conclusion that the pre-*Wayfair* sales and use

[7] 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).

tax statute, enacted decades before, was "unambiguous" as applied to the collection responsibility of marketplace facilitators (a radically different business model) is both jarring and inexplicable.[8] If this Court allows the Court of Appeals 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.

At worst, the Court of Appeals' decision ignores that marketplace facilitators, such as Amazon Services, were not subject to sales tax collection responsibility prior to the 2019 legislation specifically addressing marketplace facilitators. At a minimum, however, the 2019 Tax Act demonstrates that the pre-existing 2016 Tax Act was ambiguous enough that the Legislature needed to amend the law to create plain and unambiguous language. 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.[9]

The Court of Appeals' endorsement of the Department's overly broad interpretation of a pre-existing sales and use tax statute to impose a collection responsibility on a marketplace facilitator for third-party sales over an Internet platform is particularly troublesome here where the taxpayer was acting in a completely responsible and lawful manner and fully collecting and remitting sales and use tax on its own sales over the Internet platform. The Department's action can be viewed as punitive, particularly in the sales and use tax context, where the taxpayer is acting

[8] *Amazon Services, LLC v. South Carolina Department of Revenue,* 442 S.C. 313; 898 S.E.2d 194.
[9] 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 Court of Appeals.

in effect as a "trustee" for the State, collecting and remitting taxes that are collected from the ultimate customers.[10]

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

South Carolina's 2019 Tax Act, as evidenced by the title "to further inform marketplace facilitators of their requirements" 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 of the U.S. Supreme Court's limitation on retroactive corrective legislation for "only a modest period of retroactivity." *U.S. v. Carlton*, 512 U.S. 26, 32, (1994); *see also 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 U.S. Constitutions").

In *Carlton*, the U.S. 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. *Carlton* involved a one-year retroactive effective date. *Id*. 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 U.S. Supreme

[10] Under S.C. Code Ann. § 12-36-910A, the State imposes the sales tax; under S.C. Code Ann. § 12-36-940(A), the State allows a retailer to pass the tax along to the customer; and under S.C. Code Ann. § 12-36-1340, the State addresses remittance. Taken together, these three sections create a collection responsibility, in effect imposing a "trustee" responsibility on the seller. In addition, South Carolina recognizes the "trustee" nature of the sales and use tax collection responsibility by providing some measure of vendor compensation to sellers. S.C. Code Ann. § 12-36-2610.

Court in *Wayfair* expressed concern over the retroactive application of tax laws. *Wayfair*, 585 U.S. at 189.

Here, the Department seeks to assess Amazon Services for sales tax on third-party sales that occurred prior to the enactment of the State's 2019 marketplace facilitator law. This enforcement action neither heeds the U.S. Supreme Court's warning in *Wayfair* against retroactivity nor limits 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 (the 2019 Tax Act was effective on April 26, 2019), which complied with constitutional limitations to retroactive enforcement as set forth by the U.S. 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. This is especially so now that the Court of Appeals has endorsed the Department's position. If this decision is not reversed by this Court, 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 for invoking a similarly broad interpretation of sales and use tax laws in other unrelated future sales and use tax audits to achieve a result not anticipated or authorized under long-standing rules. 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.

CONCLUSION

The Court of Appeals 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. The Court of Appeals' decision also ignores 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 rule on the merits and reverse the Court of Appeals' decision.

Respectfully submitted,

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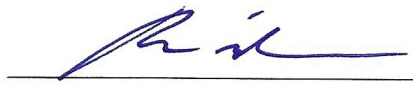
CERTIFICATE OF COMPLIANCE

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



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