THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2024-000625

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

Amazon Services, LLC ..... Petitioner,

v.

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

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, NETCHOICE, THE SOUTH CAROLINA CHAMBER OF COMMERCE, AND THE GREATER COLUMBIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in reading this Court's decision in *Travelscape* to require a broad interpretation of a tax statute, contrary to this Court's longstanding rule favoring a taxpayer's reasonable interpretation?

II. Did the Court of Appeals err in finding the statute "unambiguous" without properly considering Amazon Services' contrary and reasonable interpretation?

III. Did the Court of Appeals err in finding no due process or equal protection violation when it is undisputed that Amazon Services is the only marketplace facilitator being held liable for sales tax on third-party sales under the pre-2019 version of the Sales and Use Tax Act?

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

Business Roundtable is an association of chief executive officers of America's leading companies representing every sector of the U.S. economy and with employees in every state. Business Roundtable works to promote a thriving United States economy and economic opportunity for all Americans by advocating for sound public policies.

NetChoice is a national trade association of online businesses that works to protect free expression and promote free enterprise on the internet. Toward those ends, NetChoice is engaged in litigation, amicus curiae work, and political advocacy. At both the federal and state levels, NetChoice fights to ensure the internet stays innovative and free.

The South Carolina Chamber of Commerce ("State Chamber") is a not-for-profit, statewide organization with a mission of serving as the leading voice for business in South Carolina and a vision of making South Carolina's economy the most vibrant in the United States, creating opportunity and prosperity for all. The State Chamber's membership is comprised of businesses from across the state and across industries, from startups and family-owned businesses to multi-national enterprises—all of whom call South Carolina home. The State Chamber aims to protect the interests of South Carolina's business community by identifying and addressing issues that may impair economic development and growth, and routinely participates in state and federal litigation as an amicus.

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

Amici have a strong interest in ensuring that the business community can predict its tax obligations in advance. The decision below undermines that interest because the Court of Appeals weakened an established rule that helps to make the tax laws predictable: Doubts on the meaning of tax statutes are resolved in the taxpayer's favor. Ensuring that courts follow that rule and preserve the predictability of the tax laws has great importance for amici and their members, in South Carolina and nationally.

SUMMARY OF THE ARGUMENT

The predictability of the tax laws is essential to the business community and the economy as a whole. Businesses need their tax obligations to be predictable so that they can plan and invest for the future. When tax obligations are instead unpredictable, it is difficult for businesses to make the plans and investments that are needed to spark economic growth and innovation. Unexpected tax bills can even drive companies out of business, especially when those companies are small. These harms to the business community produce downstream harms to everyone in the form of slower growth, higher prices, lower wages, and fewer jobs.

An important tool exists for avoiding these harms: the time-honored rule that doubts on the meaning of tax statutes are construed in favor of the taxpayer. For more than a century, this pro-taxpayer rule has helped businesses in South Carolina and beyond to predict their tax obligations with confidence.

The predictability of the tax laws is now under threat from the decision of the Court of Appeals in this case. That decision departed from this Court's precedent

by eviscerating the rule that doubts in tax statutes are resolved in the taxpayer's favor. If left intact, the Court of Appeals' new approach to the interpretation of tax statutes would impair the predictability of the tax laws and inflict serious harm on the South Carolina business community and its overall economy.

To prevent those harms and to resolve the conflict between the decision below and this Court's precedent, this Court should grant Amazon Services' petition for a writ of certiorari.

ARGUMENT

I. The predictability of the tax laws is vital to the business community and to the economy as a whole.

In tax law, "certainty is desirable." *United States v. Generes*, 405 U.S. 93, 105 (1972). Indeed, a core principle of tax policy is that "[t]ax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction." Ass'n of Int'l Certified Pro. Accts., *Tax Policy Concept Statement 1, Guiding principles of good tax policy: A framework for evaluating tax proposals* 4 (2017), https://bit.ly/4b1uZ72.

This need for predictability in the tax laws is especially important for the business community. Businesses are constantly planning for the future. They must decide on a regular basis, for example, whether to hire more workers, whether to expand their operations into new geographic areas, and how to invest their capital. When businesses make those decisions, they need to account for their future tax

obligations. Thus, to adopt successful business strategies and to make effective investments, businesses must be able to predict their tax obligations with accuracy.

A lack of predictability in tax laws, in contrast, harms both the business community and the overall economy.

As a prospective matter, an unpredictable tax environment makes it difficult for businesses to plan and invest. "When businesses are uncertain about taxes," they "adopt a cautious stance" because "it is costly to make a hiring or investment mistake." Steven J. Davis et al., Am. Enter. Inst., *Business Class: Policy Uncertainty Is Choking Recovery* (Oct. 6, 2011), https://bit.ly/4bmfG8K. This caution inhibits investment and "undermine[s] longer-run growth." *Id.* As James Madison put the point long ago, "[w]hat prudent merchant will hazard his fortunes in any new branch of commerce, when he knows not but that his plans may be rendered unlawful before they can be executed?" THE FEDERALIST NO. 62, at 421 (James Madison) (Jacob E. Cooke ed., 1961).

Unpredictability also imposes retrospective harms. Unexpected tax bills disrupt businesses' operations and disturb existing investments. These unexpected costs can even drive small companies out of business altogether. The resulting disruptions hurt not just the taxpaying businesses, but the businesses they partner with, the consumers they serve, and the workers they employ.

Unpredictability in tax laws harms businesses and the economy in other ways as well. When tax obligations are unclear, businesses must hire lawyers and accountants to navigate the uncertainty, creating a deadweight economic loss. The

size of this loss is significant: The nationwide costs of tax compliance are hundreds of billions of dollars each year, an amount that exceeds the combined profits of the country's 25 largest corporations. Jason J. Fichtner & Jacob M. Feldman, Mercatus Ctr., *The Hidden Costs of Tax Compliance* 9 (2013), https://bit.ly/4aXhtRT. These compliance costs "add[ ] to the price of every product, but they do nothing to make our factories more efficient, our computers faster or our cars more durable." U.S. Dep't of the Treasury, *Treasury Secretary Paul O'Neill Statement on Treasury's Plan to Combat Abusive Tax Avoidance Transactions* (Mar. 20, 2002), https://bit.ly/4bnFW2P. As a result, compliance costs "raise prices and curtail innovation." Laura Alix, Am. Banker*, Rising Compliance Costs are Hurting Customers, Banks Say* (Apr. 12, 2018), https://bloom.bg/4b0xmHt.

When faced with uncertainty, businesses also might try to avoid audits and unexpected tax liabilities by paying more in taxes than they actually owe. *See* Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 Tax L. Rev. 489, 499-501 (2011) (describing risk-aversion models that predict this type of over-reporting of tax burdens). These overpayments also prevent businesses from making beneficial investments and pursuing profitable endeavors.

In sum, unpredictability in tax laws inflicts significant harms on the business community and the economy. Businesses cannot reliably plan and invest for the future, and they face unexpected tax bills and unnecessary compliance costs. Consumers and employees, in turn, suffer the consequences through slower growth, higher prices, lower wages, and lost jobs. To avoid these harms, and to produce a

vibrant business climate that fosters economic growth, it is important to ensure that businesses can confidently predict their tax obligations in advance.

II. The established rule that ambiguity must be resolved in the taxpayer's favor supports a predictable tax system.

Businesses depend on a time-honored rule of tax law to help provide the predictability that they need: the rule that doubts on the meaning of tax statutes are resolved in favor of the taxpayer.

This rule has been woven into the fabric of tax law for more than a century. In 1917, the U.S. Supreme Court held that "[i]n case of doubt," tax statutes "are construed most strongly against the government, and in favor of the citizen." *Gould v. Gould*, 245 U.S. 151, 153 (1917). The courts of nearly every state have since embraced this same rule. *See* 3A Shambie Singer, *Sutherland Statutes and Statutory Construction* § 66:1 n.2 (8th ed., Nov. 2023 update) (citing decisions from 47 states and the District of Columbia).

This Court is no exception. In fact, this Court helped to pioneer the rule that doubts in tax statutes are construed in the taxpayer's favor. In 1924, this Court recognized that it was already an "established rule" under South Carolina law that "substantial doubt" on the scope of a tax statute "must be resolved against the government." *Columbia Ry., Gas & Elec. Co. v. Carter*, 127 S.C. 473, 482, 121 S.E. 377, 380 (1924). In the century since, the Court has reaffirmed its commitment to this rule multiple times, including most recently in *Alltel Communications, Inc. v. South Carolina Department of Revenue*. *See* 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012); *see also S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d

512, 513 (1989); *Hadden v. S.C. Tax Comm'n*, 183 S.C. 38, 46-47, 190 S.E. 249, 253 (1937); *Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 188 S.E. 508, 509-11 (1936); *Fuller v. S.C. Tax Comm'n*, 128 S.C. 14, 21-22, 121 S.E. 478, 481 (1924).

The bedrock rule that doubts in tax statutes are construed to favor the taxpayer helps to provide the predictability that the business community needs in multiple ways.

First, this rule allows businesses to interpret tax statutes with confidence. The pro-taxpayer rule means that if a tax statute "is ambiguous or is reasonably susceptible of an interpretation that will exclude" a person, "then the person will be excluded." *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 (quoting *Cooper River Bridge*, 182 S.C. at 76, 188 S.E. at 509-10). As a result, businesses can predict with certainty that unless a tax statute unambiguously covers a particular business activity, the statute will not apply to that activity.

Second, the pro-taxpayer rule encourages the legislature to speak clearly in tax statutes. The rule does so by making the legislature aware that if it does not speak clearly, its statutes will be construed against the government, and tax revenues will decrease. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 301 (2012) ("The less the courts insist on precision, the less the legislatures will take the trouble to provide it."). And when the legislature speaks clearly in tax statutes, those statutes provide the certainty and predictability that businesses need.

Third, the pro-taxpayer rule guards against attempts by the government to enforce new tax obligations in a retroactive, selective, and discriminatory way. When the government retroactively and selectively imposes unexpected tax obligations, it destroys the predictability that is so important to the business community. As Amazon Services notes in its petition, this type of retroactive, selective enforcement also violates constitutional guarantees of due process and equal protection. *See* Pet. 23-25. Construing doubts in tax statutes to favor the taxpayer helps to avoid those constitutional problems and to preserve predictability. It does so by limiting the ability of tax officials to read new obligations into old statutes in enforcement actions that are brought only against particular taxpayers.

In sum, this Court and other courts across the country have long helped to give the business community the predictability that it needs by following the rule that doubts in tax statutes are construed to favor the taxpayer.

III. The decision below impairs the predictability of the tax laws by eviscerating the rule that ambiguity is resolved in the taxpayer's favor.

The decision of the Court of Appeals in this case threatens to sap the tax laws of their predictability. It does so by weakening the rule that doubts on the meaning of tax statutes are resolved in the taxpayer's favor.

To be sure, the Court of Appeals paid lip service to the pro-taxpayer rule. *See* App. 2114-15.[1] But the court's analysis clashes with that rule in two important ways.

First, the Court of Appeals held that tax statutes should be construed "broadly." App. 2118. But when tax statutes are construed broadly, doubts are construed to favor the government, not the taxpayer. The approach adopted by the Court of Appeals is thus the polar opposite of the rule that doubts in tax statutes are construed in the taxpayer's favor.

The Court of Appeals tried to find support for its view that tax statutes should be construed broadly in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011). *See* App. 2118. In *Travelscape*, however, this Court did not hold that tax statutes should be construed broadly. As Amazon Services points out, the words "broad" and "broadly" do not even appear in this Court's opinion. Pet. 12. Rather than construe a tax statute broadly, this Court merely held that the "plain language" of the statute in *Travelscape* applied to the activity at issue. 391 S.C. at 98, 705 S.E.2d at 33. The Court thus held that *there was no doubt* about the meaning of the statute, not that unclear statutes should be construed broadly to favor the government.

In any event, even if *Travelscape* could be understood to hold that tax statutes should be construed broadly, this case would still call for the Court's review. One year after *Travelscape*, this Court reaffirmed in *Alltel* that doubts in

[1] "App." refers to the appendix to Amazon Services' petition.

tax statutes are resolved in the taxpayer's favor. *See* 399 S.C. at 321, 731 S.E.2d at 873. Thus, even if the Court of Appeals' reading of *Travelscape* were correct, *Travelscape* would conflict with *Alltel*. On that understanding, this Court's review would be warranted to resolve the conflict in its decisions and to bring clarity to this important issue.

The second way that the Court of Appeals' analysis clashes with the pro-taxpayer rule is that the court jumped too quickly to the conclusion that, in this case, there is no statutory doubt to be resolved in Amazon Services' favor. If the court's approach were replicated in other cases, the meaning of tax statutes would almost never be viewed as subject to doubt, and the rule that doubts should be construed to favor the taxpayer would be a dead letter.

This problem flows from multiple parts of the decision below.

For example, the Court of Appeals reasoned that the statute at issue here is unambiguous because the statute includes definitions of the relevant statutory terms. App. 2115. As this Court has held, however, statutory definitions can themselves be ambiguous. *See Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 344-46, 549 S.E.2d 243, 245-46 (2001). Thus, the mere presence of definitions does not make a statute unambiguous. Under the Court of Appeals' contrary approach, because statutory definitions are so prevalent, the pro-taxpayer rule would seldom apply.

The court also concluded that the statute here is unambiguous without engaging with Amazon Services' interpretation of the statute. *See* Pet. 13-18. If

courts need not engage with taxpayers' interpretations of tax statutes, they will conclude too often that those statutes unambiguously favor the government.

The court also reasoned that, because it deemed the statute to be unambiguous as of 2016 (the relevant tax year in this case), it need not consider that the legislature amended the statute in 2019 to cover the exact activity at issue. *See* App. 2116. But the fact that the legislature saw the need to amend the statute to cover this activity is itself strong evidence that the 2016 version of the statute was ambiguous. If courts can deem a statute unambiguous without considering indicators that the statute is ambiguous, that too will put a thumb on the scale in favor of the government.

The court likewise reasoned that, because it deemed the statute unambiguous, it was irrelevant that the Director of the Department of Revenue *told* the legislature that the statute's application to the activity here was subject to doubt. *See* App. 2115-16; *see also* Pet. 19-20. Here as well, the court erroneously leapt to the conclusion that the statute was unambiguous without considering powerful evidence to the contrary. When tax officials state that tax statutes are ambiguous, those statements should be treated as highly probative, not as irrelevant.

Finally, the court erroneously disregarded Amazon Services' showing that courts in other states with similar tax statutes have uniformly concluded that those statutes do not cover the activity at issue here. *See* App. 2121; *see also* Pet. 21-23. This uniform body of law is also strong evidence that South Carolina's statute does

not unambiguously favor the government in this case. Yet the Court of Appeals gave no weight to these decisions from other states.[2]

For these reasons, under the approach taken by the Court of Appeals, courts would erroneously conclude that tax statutes unambiguously favor the government far too often. That would leave toothless the rule that ambiguities in tax statutes should be construed in the taxpayer's favor.

Weakening the pro-taxpayer rule in this way would have consequences that extend far beyond this case. As discussed above, rigorous adherence to the pro-taxpayer rule helps to provide the predictability that the business community needs. *See supra* pp. 8-9. By eviscerating that rule, the decision below would produce the many harms that flow from a lack of predictability in the tax laws. *See supra* pp. 4-6. Those harms would be inflicted not just on Amazon Services, but on the entire South Carolina business community, including the many small businesses that operate here. Small and large businesses alike would need to think

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[2] The Court of Appeals also mistakenly overrode another important rule that helps to ensure the predictable application of tax laws: the rule that courts are "generally reluctant" to disregard the corporate form, and that they will do so only to prevent "injustice or fundamental unfairness." *Mid-S. Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597-98, 649 S.E.2d 135, 140-41 (Ct. App. 2007). Here, the Court of Appeals showed no reluctance to disregard the corporate separateness of Amazon Services and Amazon Payments. The court collapsed those separate entities into a single one, not to prevent injustice or fundamental unfairness, but merely because an Amazon Services contract used the term "we" to refer to both entities. *See* App. 2117. As Amazon Services notes, that error does not ultimately affect the outcome of this case. *See* Pet. 16. But the Court of Appeals' decision to disregard the corporate form on such weak grounds is another illustration of the court's inattention to the importance of the predictable application of the tax laws.

twice about making investments in South Carolina, and many might choose to move their operations to states that provide a more predictable tax environment. The brunt of these effects would ultimately be borne by the State's consumers and employees through higher prices, lower wages, and lost jobs.

To prevent those harms and to reaffirm this State's longstanding commitment to the predictable application of the tax laws, this Court should grant review and reverse the decision below.

CONCLUSION

Amici ask that the Court grant Amazon Services' petition for a writ of certiorari and reverse the decision of the Court of Appeals.

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