



August 4, 2020

U.S. House of Representatives  
Committee on the Judiciary  
Subcommittee on Antitrust, Commercial,  
and Administrative Law  
Washington, DC 20515-6216  
116th Congress

Re: Testimony by Mr. Jeff Bezos on Behalf of Amazon

Dear Subcommittee Members:

The Online Merchants Guild (“OMG”), is a trade association made up of third-party sellers from around the country. We provide a common voice for the diverse group of merchants who sell on Amazon and elsewhere online. Our membership is limited to non-publicly traded companies who sell goods in eCommerce using marketplace platforms such as Amazon, eBay, Walmart or their own eCommerce site.

The majority of our members are small businesses with less than \$1 million in revenue. Many of our members are true kitchen-table enterprises. Often, eCommerce provides our members a means of earning self-sufficiency for those without educational advantages and access to capital, or after economic setbacks.

Our members have real-world experience with how Amazon actually works in practice. eCommerce stores like Amazon’s have brought many benefits to us and to society, but there are several aspects of the eCommerce world—and Amazon’s store in particular—that deserve Congress’s close attention.

Below, we outline some key issues for the Subcommittee to consider. We would welcome the opportunity to discuss these matters further with Subcommittee staff.

### **Anti-Competitive Aspects of Amazon’s Fulfilled by Amazon and Amazon Prime Programs**

The Subcommittee is likely aware of Amazon’s Fulfilled by Amazon (“FBA”) program, which comprises the vast majority of physical product sales on Amazon. And no doubt the Committee has heard of Amazon Prime.

Participating in FBA and Prime are essential to our members’ businesses, but Amazon deploys anti-competitive features in both programs.

In general, FBA works as follows. Third-party merchants, such as OMG members, source products for possible sale on Amazon. The merchant will propose a sale price to Amazon. Amazon has full discretion to approve the products for sale, and to approve the price. (Amazon's pricing algorithm is largely inscrutable to merchants; it warrants transparent scrutiny by the Subcommittee.) Amazon also retains editorial control over the product listing.

After Amazon approves the offer and sale price, Amazon will direct the merchant to ship the products to a warehouse of Amazon's choosing. From there, Amazon may keep the goods in that warehouse, or ship them anywhere for positioning, including after breaking up the lot.

After a consumer purchases the product, Amazon is responsible for shipment to the consumer. Amazon also collects payment, and—after holding onto the funds for several weeks—credits the merchant's account. On FBA sales, Amazon charges merchants a **45% commission**. By contrast, merchants who fulfill their own orders only pay a 15% commission.

Our members depend on FBA as their primary source of revenue; FBA can account for over 90% of sales for many members.

FBA is essential in Amazon's store because it is the primary way to become "Prime Eligible." Being Prime Eligible is critical, because in general products that are not Prime Eligible are not offered the "Buy Box"—the most prominent, and Amazon-endorsed listing. Products without Buy Box access are at a significant competitive disadvantage, because consumers tend to favor the items that Amazon has so promoted. The practical effect of this, as we have observed in the seller community, is that many of our members made their leap from being casual sellers to multi-million dollar sellers on Amazon once they adopted Amazon's FBA system and the goods they sold in Amazon's store become Prime Eligible.

Because FBA is a necessity for most participants to be successful on Amazon, as it leads to exponential sales volume growth far beyond any other platform, such as eBay or Walmart, participating in Amazon's FBA program—and paying Amazon a 45% commission—is effectively necessary to meaningfully access customers on Amazon's store.

We believe Amazon's arrangement raises anti-competitive concerns. There is a tying aspect to how Amazon effectively requires our members to "buy" access to Prime. Further, Amazon's heavy—and practically unavoidable—commissions limit the ability to compete on price.

### **Amazon's Pricing Controls**

We also believe Amazon's control over pricing raises anti-competitive concerns in its own right. As explained above, third-party merchants do not actually have final control over pricing of "their" products in Amazon's store—Amazon does, through an inscrutable pricing algorithm that will reject proposed prices Amazon deems too high or too low. Not only does that make it difficult for third-party merchants to compete against other third-party merchants on price, our members have experienced *Amazon's system reject attempts to compete with Amazon's own*

*listings* on price. The potential for direct suppression of competition deserves close scrutiny by the Subcommittee.

### **Amazon's Sales Tax Collection Practices**

One of Amazon's most striking anti-competitive practices was successfully avoiding collecting sales tax for years. Until very recently, Amazon refused to collect sales tax on sales of third-party products, which are the majority of sales on Amazon. That deprived state and local governments of billions of dollars in revenue and allowed Amazon to undercut other stores on price. By offering, for example, electronic goods at tax-free prices, Amazon could artificially reduce its prices relative to brick-and-mortar stores or online retailers who collected sales taxes on their sales. The success of that effort should be no surprise—many consumers chose the “cheaper” option, perhaps not appreciating the anti-competitive basis for the lower price. (Consumers were also misled into personal exposure for use tax, although it appears unlikely that tax collectors are going to systematically pursue consumers on that basis.).

For example, consider the case of Stan Grosz. Mr. Grosz owns a small camera store in Fresno. For years, Mr. Grosz watched as potential customers would use his store employees to do their “homework” on various cameras that they were interested in purchasing, only to then purchase the actual product from Amazon, from their phones, often times while standing in his store, just to save 8%. Amazon, as a convenience to its customers, would allow sellers to sort products by price, taking into account sales tax, so buyers would know which sellers to pick in order to avoid their local tax.

Mr. Grosz has since filed a lawsuit against the state of California, under California's Government Waste doctrine, to hold the state accountable for the lost revenue that the state helped facilitate by refusing to make Amazon collect sales tax.<sup>1</sup> That's right, California had their heavy hand in ensuring Amazon was treated differently among other retailers, intentionally putting small California retailers at a disadvantage. And while there is nothing Mr. Grosz can do about the economic impact of Amazon being granted the sales tax equivalent of “duty free” status while its local competition was not, Mr. Grosz, has sought to challenge the state's effort to pick a winner, as Amazon's obligation to collect sales tax in California was not a matter of discretion, and therefore seeks to recover those taxes for the state's benefit. States don't have discretion to say we like Home Depot better than Walmart or Target, so Home Depot doesn't have to collect a consumer-borne tax, yet that's exactly what states were doing with respect to Amazon, as Amazon was “wooing” them with jobs, capital investments and even an HQ.

For example, when California's Treasurer Fiona Ma went to Seattle to meet with Amazon and investigate why Amazon wasn't collecting sales tax on half of its sales, claiming that it was a marketplace, she concluded that this was incorrect. At the time, Treasurer Ma was not the Treasurer, she held a seat on the state's sales tax board. After meeting with Amazon, she concluded that this was incorrect, Amazon should have been collecting tax, but when she told the

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<sup>1</sup> Mederios Babb, “Fresno Business Files Lawsuit Claiming Amazon Owes Billions in Back Taxes,” *Your Central Valley*, <https://www.yourcentralvalley.com/news/fresno-business-files-lawsuit-claiming-amazon-owes-billions-in-back-taxes/> (August 12, 2019).

Governor (“Brown”) he refused. His response, according to Treasurer Ma’s statement in a 2018 article featured in Capital and Main was:

“Number one,” Ma explained, “the governor’s office has been trying to woo Amazon into putting a headquarters here. I’ve been pushing [for the Governor to make Amazon collect tax] and they haven’t wanted to do anything up front.” Indeed, Los Angeles is on the shortlist for the massive HQ2 project.<sup>2</sup>

Not only did Amazon not want to collect tax, they didn’t want California to proactively encourage Amazon’s merchants to do it either. So, merchants who were absolutely clueless of Amazon’s illegal attempts to shift their obligations to collect tax on to them, as it is Amazon’s store, only found out years later that, rather than enforcing the tax obligation against Amazon as the store, that these small out-of-state businesses with no due-process connection to California were being targeted, like this Philadelphia-based merchant who received a million dollar tax bill from California, related to taxes that Amazon was legally required to collect, not him.<sup>3</sup>

The following year, as California ramped up its efforts to pursue Amazon merchants for back taxes, Treasurer Ma wrote a letter to Governor Brown, explaining how, in her experience, it would be illegal to pursue Amazon’s sellers. She discusses how in the past, California’s sales tax enforcement arm had been threatening sellers, asking them to fork-over their life’s savings, everything they earned on Amazon to cover the tax shortfall caused by Amazon’s failure to follow state law, and how the state had even gone as far as to threaten sellers with felony jail time if they didn’t come forward and pay the tax. Her letter can be found here: <https://onlinemerchantsguild.org/wp-content/uploads/2019/03/Letter-to-Governor-Newsom.pdf>, fully discussing the nature of this fraudulent tax grab California has engaged in over the last three years. In her letter Treasurer Ma recites a situation where she was contacted by a small business owner in Renton, WA, Mindy Wright. In the letter, Treasurer Ma includes Mrs. Wright’s recounting of her experience dealing with California’s illegal tax assertion, as the state looks to hold Mrs. Wright responsible for Amazon’s tax avoidance.

“Recently in last December we received a letter from California’s CDTFA asking us to comply with their tax rules and we did [without considering whether it was legal in the first place]. After signing up with California business license department we are now collecting and remitting sale[s] tax starting 1-1-2019. We did not realize the CDTFA would go after us for the uncollected sales tax and income tax up to 8 years. Now we are facing tens of thousands of dollars in back taxes, penalties and interest. This alone will force us out of business and into bankruptcy. We just do not make much money and we are distraught and frightened.”

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<sup>2</sup> David Dayen, “The ‘Amazon Tax’ Ruling: Disrupting the Disruptors,” *Capital & Main*, <https://capitalandmain.com/the-amazon-tax-ruling-disrupting-the-disruptors-0710> (July 10, 2018).

<sup>3</sup> Harold Brutbaker, “California Hits Philly-Area Amazon Seller with \$1.6 Million Sales-Tax Bill,” *The Philadelphia Inquirer*, <https://www.inquirer.com/business/california-sales-tax-amazon-seller-philadelphia-business-20191105.html> (November 5, 2019).

More information about state efforts to give Amazon a distinct competitive advantage over brick and mortar is discussed in more detail in testimony OMG provided to the U.S. House Committee on Small Business - Subcommittee on Economic Growth, Tax and Capital Access – Hearing on *South Dakota v. Wayfair, Inc.*, How Mainstreet is Fairing and Whether Federal Intervention is Necessary, March 3, 2020 (enclosed as Exhibit 1).

In our experience, Amazon has defended its sales tax practices by disclaiming any role in the sale, but respectfully we find that argument difficult to accept. It's Amazon's store, and Amazon approves the product listing—including the price. Then, Amazon takes a large portion of the sale via commission payments. Amazon is not a hands-off intermediary like, say, a common carrier or even a classified ad service, as Amazon has likened itself to.

Another Amazon approach has been to “settle” tax disputes with state revenue departments in exchange for the promise of job creation or economic development in the state. We all remember the HQ2 scramble. Setting aside the dubious lawfulness as a matter of tax law, the effect was anti-competitive—it privileged Amazon over retailers that complied with sales tax collection laws.

A recent decision by a South Carolina court revealed the absurd nature of Amazon's positioning, upholding a finding that Amazon acts like a store, controls sales and the customer relationship like a store, and must collect sales taxes like a store.<sup>4</sup>

More recently, our members have seen Amazon try to shift the blame to third-party merchants. In our understanding, Amazon has been providing state revenue officials with the names and personal information of merchants and pushing tax officials to seek back sales tax payments from them rather than from Amazon. The potential retroactive tax burden is crushing for small businesses, which raises a host of legal and practical issues. An additional dynamic to consider is that a large fraction of third-party merchants are overseas, mostly in China, and therefore beyond the practical reach of state tax officials. U.S.-based small businesses are at a disadvantage because state tax officials, working with Amazon, can target them. And for various practical and legal reasons, it is difficult for individuals to challenge Amazon's sales tax practices in individual tax disputes. The net effect leaves Amazon's capture of state tax collection policy beyond meaningful scrutiny.

We respectfully urge the Subcommittee to use its oversight powers to explore Amazon's manipulation of the sales tax collection system, which has occurred on an interstate scale.

### **Amazon's Arbitration Clause and Internal “Judicial” System**

Amazon's arbitration clause, and Amazon's internal “judicial” system more broadly, are ripe for anti-competitive abuse. It is relatively easy for bad actors to attack competitors and have their accounts frozen or suspended, with little effective recourse. The net effect is not only bad for

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<sup>4</sup> *Amazon Services, LLC v. S.C. Dep't of Rev.*, No. 17-ALJ-17-0238-CC (S.C. Admin. Law Ct. Sept. 10, 2019), <https://src.bna.com/Leb>.

merchants, but also harms consumers by facilitating market distortion and preventing fair competition.

Amazon relies heavily on its arbitration provisions to deny payments to sellers, suspend sellers' right to sell goods on the platform without sufficient cause, and does little to police abuse from other sellers, especially those domiciled in foreign countries where there is little repercussion for engaging in such abuses. This has led to behavior such as foreign sellers establishing fake law firms to send cease and desist letters which result in the suspension of an unsuspecting user.

Amazon succeeds in its ability to abuse sellers by relying on its arbitration provision. Through arbitration, Amazon knows it holds all the cards, and in many ways has the final say whenever there is a dispute. Sellers, knowing their arbitration remedies will likely be limited, are often left to appeal their disputes internally within Amazon. There, an Amazon representative will review the seller's complaint, typically in the form of a plan of action. Plans of action often require sellers to admit fault, even when there is no fault, and explain why what happened won't happen again. Once submitted the seller may have to wait days, weeks, or sometimes indefinitely for a response. If the response isn't favorable, the seller may have to resubmit the plan of action, often with the help of consultants who specialize in dealing with Amazon. At a certain point, if there is no relief, the seller has one option, that is to appeal to the Supreme Court of Amazon, also known as submitting a "Jeff Letter."

A "Jeff Letter" is almost like a Writ of Certiorari within Amazon's internal court system. It's an email to Amazon CEO's Jeff Bezos' email address [Jeff@Amazon.com](mailto:Jeff@Amazon.com) where someone from Jeff's executive team will review your issue and decide whether or not to offer relief. When emailing Jeff, sellers will often work with consultants or attorneys who have experience with the process, to ensure the email sent to Jeff meets all the requirements of what is generally known to be effective. If an email is sent to Jeff prematurely, it may not work, you are expected to run down all other notice-dispute avenues within Amazon before going to Jeff and should actually plead that such action was taken before sending the email. By no means does an email to Jeff mean that your account will be reinstated, payment no longer withheld, or false infringement claim lifted, it's merely a higher-level Amazon employee reviewing your case and making a determination.

By this point, a seller could be locked out of their account, or denied funds, for weeks, losing hundreds of thousands of dollars, even if the mistake was Amazon's. In one instance, a US seller lost their ability to sell online because someone in China impersonated an owner of an unrelated patent and claimed infringement. Amazon does not want to get involved in patent disputes, so it typically tells sellers to resolve any patent dispute on their own with the patent owner. However, in this case, we knew the patent owner didn't file the infringement claim, because the owner was deceased. The person who emailed Amazon wasn't claiming to be a successor-in-rights to the patent, but actually the patent owner, who again, was deceased. They were impersonating them using a generic email account with the person's name as the address but hosted on a public email service such as Gmail.

Nonetheless, Amazon repeatedly refused to take action to reinstate the seller's account. Claiming over and over again that there must be a retraction from the patent owner. Eventually,

an email to Jeff@Amazon did result in a reinstatement, but the seller lost out on substantial sales during a crucial holiday period. So if it wasn't the patent owner, who complained to Amazon? Most likely it was a competitor based in China, as this is fairly common in the seller community, and commonly referred to as "Black Hat" tactics.

In another instance, an Amazon seller lost \$200,000 because a [company in China created a fake US law firm website](#), and filed an infringement claim. Had Amazon performed any diligent investigation into the origin of that website, it would have reinstated the seller right away, realizing the website had only been established for a week using a hosting service in China, despite claiming the law firm had a long history in New York. Instead, the seller ended up losing a substantial amount of money waiting a week for Amazon to reinstate them.

Even without provocation from a malicious person, Amazon's treatment of sellers has been notably unfair. In one instance, a seller who sold organic pesticides had their inventory destroyed by Amazon because they didn't comply with a certain labeling requirement. What Amazon didn't realize, despite numerous attempts by the seller to make them aware, is that their product didn't contain the ingredient Amazon claimed it did. Ultimately, before the seller had the opportunity to reclaim their inventory, Amazon destroyed it. However, with arbitration as the only costly remedy, the seller was discouraged from attempting to hold Amazon accountable.

In California, these recounts of unfair treatment led to the passing of [Assembly Bill 1790](#), a first of its kind eCommerce marketplace seller rights bill. This bill is meant to require Amazon to offer sellers more transparency with respect to under what conditions will result in a suspension, and how can the suspension be cured. This law was based on a [law passed by the European Union](#) to accomplish the same objective. We've yet to see meaningful change come out of this bill, and Amazon's lobbyists even noted that such attempts to regulate Amazon are futile, as they would likely be ruled as an unauthorized circumvention of arbitration by the state.

### **Disclaiming Responsibility for Unsafe Products While Facilitating their Sale**

Amazon has quietly undone many of the product safety measures that keep Americans safe and the marketplace honest. How? By facilitating the sale of dangerous goods by ephemeral sellers, mostly in China, who are effectively beyond the reach of U.S. law, and then by Amazon denying responsibility in U.S. courts. Amazon courts products made in China, where production costs are low—in part because of lower safety standards. Although Amazon nominally requires sellers to carry insurance, it is widely known that Amazon rarely enforces that policy. Nor, in our experience, does Amazon police the safety and sourcing of Chinese-made goods. Amazon is now apparently even subsidizing shipping for China-based sellers.<sup>5</sup>

But Chinese sellers are effectively beyond the reach of U.S. law. It is nearly impossible to locate the seller, much less serve them and bring them into U.S. courts. The net effect leaves American consumers without tort remedies, and the marketplace without the discipline that product liability

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<sup>5</sup> Elizabeth Weise, "Amazon Pushing Hard into Ocean Shipping, Making it Easier for Chinese Goods to Get to You," *USA Today* (Jan. 18, 2019), <https://www.usatoday.com/story/money/2019/01/18/amazon-pushing-hard-into-ocean-shipping-china-u-s/2589422002/>.

law imposes. Instead, overseas manufacturers can beat U.S. suppliers on price by skimping on safety and insurance.

To offer just one example, a hoverboard purchased from a China-based seller caught on fire and burned down the customer's house. The customer had no way of making the China-based seller pay—they had disappeared. The American customer's only option was Amazon, [but Amazon denied liability](#), likening themselves to a classified ad service such as Craigslist. Amazon's strategy has been, and continues to be, disclaiming all responsibility. [Recently the Wall Street Journal published a study identifying that thousands of banned or dangerous products were available for sale on Amazon](#). And just recently, [CNBC published an article about how moldy and expired food products were also being regularly sold on its platform](#). With limited exceptions, the courts have accepted Amazon's self-serving characterization—in part because the full reality of how Amazon operates is only just starting to come to light.

A similar dynamic involves Amazon facilitating intellectual property theft by overseas sellers. Almost as predictable as clockwork, the moment a product begins to gain traction we are met with foreign competition from out-of-country sellers who don't play by the rules, copying our members' designs and marketing while undercutting on price. Amazon still benefits, as the demand for the products we initiate will continue to sell via our China-based imitators, and Amazon will continue to take commission profits on the sales. Similarly, consumer often don't know when they are buying from Amazon versus a seller, an argument [pointed out in a recent lawsuit involving Williams and Sonoma](#), where it accuses Amazon of infringement by leading people to believe they were buying authentic Williams and Sonoma products on its site. And with the ability to make verbal orders through Amazon's Alexa program, consumers are even more likely to assume the goods they are buying come direct from Amazon and therefore meet the health and safety standards that we expect Fortune 10 companies to abide by.

Amazon has little incentive to police intellectual property theft and deceptive sales practices, and its arbitration clause and byzantine internal "judicial" system leave sellers with little ability to protect their IP from rampant infringement.

Amazon attempts to evade responsibility for the products it sells by redefining itself as something other than a powerful retailer with total control over its store. Amazon's self-definition deserves the Subcommittee close scrutiny. In testimony to this body, Amazon has repeatedly represented that it is a **store**, with all of the power and responsibility that entails

For example, Mr. Bezos's recent written testimony acknowledged that "the success of our store depends entirely on customers' satisfaction with their experience in our store," including "offering everyday low prices," among other things.<sup>6</sup>

In prior testimony, Amazon has repeatedly emphasized that it is a store:

- "In some cases, typically in highly negotiated agreements that impose significant obligations on Amazon, such as obligations to carry a vendor's products, Amazon asks

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<sup>6</sup> Statement by Jeffrey P. Bezos, Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law (July 29, 2020).



vendors and sellers to agree to provisions designed to prevent discrimination against **Amazon's store and Amazon's customers.**"<sup>7</sup>

- "Amazon seeks to provide customers with a vast selection of products with great prices and convenient delivery options. In support of those efforts and like most other retailers, Amazon uses software and employees to monitor publicly available information about products offered by other stores, including information about product pricing and availability. This information helps to ensure that customers continue to find a competitive range of selection at great price in **Amazon's store.**"<sup>8</sup>
- Customers come to Amazon for a vast selection of products with great prices and convenient delivery. If customers are disappointed in the offerings at Amazon, they will quickly turn to other stores to find the best selection, prices, and convenience. **To maintain trust with customers that they will find low prices in the Amazon store,** Amazon sets the prices on its first party sales to match competitors across all channels of retail. For sales by third parties, who are responsible for setting their own prices in the **Amazon store,** Amazon may suggest that a seller lower its price in its store, offer an Amazon-funded discount on the product, or choose not to feature higher-priced offers on a product's detail page.<sup>9</sup>
- To maintain trust with customers that they will find low prices in the **Amazon store,** Amazon may take steps to ensure that customers can continue to find great prices in **Amazon's store,** such as suggesting that a seller lower its price, offering an Amazon-funded discount on the product, or choosing not to feature higher-priced offers on a product's detail page.<sup>10</sup>

Amazon's testimony to the Subcommittee goes on like that at length. But when Amazon wants to dodge liability, it represents that it is not a store without power and accountability, but rather a "marketplace"—a self-made definition that Amazon likens to a classified ad service or a shopping mall. That, along with other apparent rhetorical sleight-of-hand by Amazon, should make the Subcommittee skeptical of Amazon's high-level claims about its business practices.

We respectfully urge the Subcommittee to drill down on just how much control Amazon actually exercises over its store. Documents and depositions, not general, pre-packaged statements, will illuminate the commercial reality against which the Subcommittee can generate policy. For the Subcommittee's convenience, we include further detail at the end of this submission about just how much Amazon differs from a shopping mall.

### **Amazon Competing Against Sellers – Wholesale**

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<sup>7</sup> Amazon, Responses to Questions for the Record following the July 16, 2019, Hearing of the Subcommittee on Antitrust, Commercial, and Administrative Law, Committee on the Judiciary, Entitled "Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship," (Oct. 11, 2019), at 1, <https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD038.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* As noted above, Amazon's answer on third-party pricing is incomplete and gives the false impression that Amazon does not retain final control over the price of third-party goods in Amazon's store. We respectfully urge the Subcommittee to explore that issue in detail with Amazon, including by exploration of how Amazon operates its pricing algorithm in practice.

<sup>10</sup> *Id.* at 2.

Many of our members, and others in the seller community, have reported situations where Amazon competing against them both in private-label and in wholesale. Wholesalers will often recount scenarios of Amazon asking them to verify their goods are authentic by sharing invoices with them, only to find later on that Amazon will use that information to contact their source in order to cut them out.

### **Amazon Competing Against Sellers – Private Label Brands**

Has Amazon abused this unique position as their market share has grown? Yes.

As consumers have searched for other brands, Amazon has instead redirected their consumers to Amazon's own brands in a targeted manner (a practice they recently limited or stopped). And in many instances, the brands Amazon uses to compete against sellers aren't obvious, [as they may carry a unique name, as opposed to more obvious ones like Amazon Basics](#). While Amazon had access to complete information on customer interest (search volume) and sales of top competitors, non-Amazon brands were not given the same access to information.

Amazon has retained various advantages for a limited set of brands including their own—curated reviews for new products, ability to launch new products leveraging the sales momentum of existing winners, and protection and exceptions from Amazon processes that can often stop or slow sales of competing products. But their own brands usually start with the benefit of the doubt and exceptional marketing treatment by Amazon.

Amazon is quick to stop sales of a small company's products, reluctant to explain why, and not always correct in their reasons. When they do so, Amazon can be both punitive and surprisingly mercenary, such as indefinitely holding the funds that a small company needs to survive.

These kinds of behaviors, this ownership of both the engines and rails of ecommerce, has [caused countries like India to force Amazon to split their business as a manufacturer of products from their core as a marketplace of products](#).

As Amazon's market share has grown, especially in the US, it has just begun recognizing its responsibility to provide a level playing field. A fair platform for itself and its competitors. Especially in 2019, some proactive steps are visible. In its DNA as a company, however, Amazon largely remains focused on using all available information and tools to maximize its competitiveness at every level.

### **Pay Per Click Advertising – Another Example of Tying**

It is now common belief in the Amazon seller community that the only way to sell on Amazon is through Amazon's Pay-Per-Click ("PPC") offering. In the past, the belief was more reviews would create a trending product, Amazon in the wake of the review manipulation, Amazon has now adopted a pay-to-play model. Sellers now have to contend with spending on PPC in order to maintain prominent display over the competition, however, some sellers have reported that competitors are using bots to click on their ads to drive up their ACOS / PPC cost. As one

reporter stated in an [article how Amazon surpassed \\$3 Billion in Q4' 2018, making it the 3<sup>rd</sup> largest ad revenue company, behind Google and Facebook](#):

*With advertising becoming less of an option and more of a requirement for sellers to compete on the e-commerce platform, every one of those 200,000 Small Businesses is either a current or likely near-future advertiser.*

PPC has become a major point of frustration for many sellers, with many sellers left feeling as if they are paying a mandatory fee, and have even described PPC as a way for Amazon to increase their seller fees without looking like they are increasing their seller fees.

### **Amazon's Buy Box**

Amazon's Buy Box, referenced above, presents several opportunities for anti-competitive practices, but Amazon's operation of the Buy Box is shrouded in secrecy. We urge the Subcommittee to explore the Buy Box in detail.

Over 80% of desktop sales on Amazon occur in what is known as the "Buy Box"; in a commodity market, consumers are more likely to choose the Amazon-recommended and highly-visible Buy Box item over other similar offerings. Sellers who offer the same products therefore are left to compete for the Buy Box. Amazon's power over the Buy Box and Amazon's product display practices actually reduce price-competition while purporting to guarantee lower prices.

Some observations we and our members have made are as follows:

1. As of approximately mid-2019, Amazon would "suppress" or hide the Buy Box when the product was listed for a lower price elsewhere online. That may sound pro-consumer, but it's actually not in practice. Because of Amazon's dominant market share, sales on Amazon are more important than online sales anywhere else. Losing sales on Amazon is more costly than gaining sales in other e-commerce stores. So sellers are actually incentivized to *raise* prices on Amazon, and/or reduce distribution outside of Amazon. In essence, Amazon penalizes sellers for offering lower prices elsewhere. Not only does that depress price-competition across e-commerce, it inflates the premium that Amazon can charge for Prime by inflating the value of Prime membership.
2. More recently, Amazon appears to have updated its tactics. Amazon's AI is constantly scraping the web. When Amazon's AI spots a product listed for lower than the price on Amazon, Amazon's search results will actually display those nominally "competing" listings. But, as with the above illustration, instead of actually being pro-consumer, the effect is to prevent lower prices in e-commerce generally. Amazon actually ends up driving sellers off competing stores, and/or incentivizing sellers to raise their non-Amazon prices to match their Amazon prices.
3. Geography may determine the Buy Box so that Amazon can lower its operating costs at the expense of lower consumer prices. Amazon may display a higher priced good in the Buy Box because it is closer to the buyer's destination. For example, if there are two

sellers A & B who are selling the same product, A's product is located in Amazon's facility in Washington, where the prospective customer is located and B's product is located in New York, Amazon will be more likely to give A's product the Buy Box in that instance because the shipping cost for Amazon is lower, even if B's product is being offered at a lower price. That benefits Amazon, but not the consumer (or the harmed seller).

4. Sellers are substantially less likely to get the buy box when Amazon is a seller. Sellers have reported that when Amazon is one of the competing sellers of a product, they are less likely to get the Buy Box, as Amazon is trying to move their own inventory first.
5. Sellers must be enrolled as a pro-seller to gain access to the Buy Box: Amazon has to seller subscription models; one is free and the other \$39.99 a month. By paying the subscription fee your cost of sale is \$1.00 less, so any seller who makes 40 sales a month or more would opt for the subscription.
6. Amazon rotates the Buy Box: Amazon does not want any one seller to "dominate" the Buy Box. The exact criteria as far as when a seller achieves the Buy Box is not known, however, it is not always based on price. Amazon seems to have its own antitrust approach within its platform designed to prevent larger sellers from squeezing out smaller sellers, by offering an artificially low price for a sustained period of time and then raising the price at a later time once competition has dropped off. Amazon wants to ensure prices are low within its platform, as high prices would impact the perceived value of Prime Membership.

### **Review Manipulation, Acceleration & Hijacking**

Review Manipulation: Amazon reviews have lost a lot of credibility over the years, given the ability to manipulate reviews. While Amazon claims to police review manipulation, even going so far as scanning sellers' Facebook pages to see if any of their friends may have left a review, a number of independent companies still provide incentivized review programs using coupon codes, rebates, or PayPal payments. In many instances, consumers are promised a full refund of their purchase if they submit a review and send the company a screenshot. Most recently, it was discovered that [Amazon sellers were using Facebook chatbots promising reimbursements through PayPal to drive incentivize reviews](#). Many Amazon sellers are unaware of the legal issues surrounding incentivized reviews as there are many seemingly legitimate companies offering review generation services. As eCommerce businesses are often touted by SBA as a great way to start a business, we would ask that this Subcommittee suggest that FTC establish a layman's guide to what is and is not permitted when it comes to generating reviews online.

Acceleration: Another way to increase the popularity of a product sold on Amazon is through acceleration of sales. As your product gains in popularity it gets picked up as a trending product by Amazon. Companies will help sellers facilitate this acceleration by offering sellers the opportunity to feature their product at a steep discount to their own user base. Users will click on the link and purchase the product in Amazon at a discount. The end result will drive

acceleration of the products sales, and cause Amazon’s algorithm to flag that product as a trending product and suggest it to other users.

**Hijacking:** Hijacking is where a dead listing is brought back to life to sell another product. For example, a listing for a product that was popular five years ago and has a substantial number of five-star reviews may be changed in its entirety to promote an entirely different product. While the listing content has changed, the products reviews remain intact. A consumer, unaware of the change may not know to look and actually read the reviews to realize that the product being reviewed isn’t the product they are actually buying. As one [Consumer Reports journalist noted](#):

*In one afternoon I spotted more than a dozen listings that all followed the same general pattern: an item, usually sold by a company I’d never heard of before, with lots of positive reviews for products different from the one listed at the top of the page.*

In some instances, review hijacking has been used as a “Black Hat” tactic to result in a suspension of a seller’s listing, or to sabotage their ability to sell the product. A hijacker might alter a listing to say things like “contains dangerous chemicals” which will cause Amazon to automatically suspend the listing or will upload erroneous pictures that would deter the customer from buying the product.

Amazon has little incentive to police this state of affairs, because Amazon’s profits are apparently not harmed. In essence, Amazon facilitates—or is willfully blind to—grossly anti-competitive practices in its store, which harms both U.S. consumers and U.S. businesses.

### **Amazon Prohibits Direct Ship Online Arbitrage**

Amazon prohibits what is known as direct ship online arbitrage on their platform. The effect insulates Amazon from potential marketing competition by other retailers.

Direct ship online arbitrage is where a product is listed on Amazon and shipped directly to the consumer from a known competing retailer. For example, a merchant lists a product on Amazon as seller fulfilled, meaning they will ship the product themselves, not Amazon. When the consumer purchases the product on Amazon for \$40, the merchant will go on a competing website, such as Costco.com and purchase the same product for \$30. Instead of inputting their shipping address on the Costco website, the merchant will use the buyer’s address so that Costco ships the product directly to the Amazon buyer. This activity is prohibited on Amazon and will result in a suspension and potential withholding of funds if Amazon discovers that the seller engaged in this activity. Amazon does not want customers receiving shipments from Costco, as it might have the effect of driving the customer away from Amazon, knowing that the product was purchased from Costco. Amazon utilizes this policy to limit marketing competition.

### **Addendum: Amazon Is Not a Mall or a Hands-Off Platform**

When it comes to claiming to be a marketplace and not a retailer, Amazon tells different stories to different audiences. When it comes to tax and accountability for the safety or integrity of

products sold, Amazon will claim it's just a marketplace, but when it comes to the customer, Amazon wants the customer to think of them as the retailer, not the seller.

However, one way to analyze it and see the flaw in their approach is to compare Amazon to traditional marketplaces or malls. For example, consider Mall of America, an iconic marketplace where individual retail stores establish storefronts to sell goods to consumers. Each store front has its own unique logos prominently displayed, store layouts, product mix, warranties, return policies, and overall approach to customer service. That's not the case with Amazon.

With Amazon, sellers are forbidden from engaging with the customer unless they are being asked a product specific question, which they can reply to using Amazon's monitored scrambled messaging service. [Return policies are set by Amazon](#), customer service disputes resolved by Amazon (almost always in the customer's favor). Unlike a mall where there is a giant Apple representing the Apple store, only Amazon's logos are prominently displayed on its site. Only Amazon can collect email information, offer a store credit card, extended warranties, etc. Sellers names are not-prominently displayed, and almost ignored, which is why the typical Amazon customer cannot tell you the name of the seller they bought from. Consumers might remember the brand, but they typically pay no attention to the individual seller they are buying from. And even the confirmation email sellers receive from Amazon after purchasing from a seller lack any mention of the seller's name, stating at the top "[Thank You For Shopping with Amazon](#)" (see link pp. 16).

Attempts by sellers to make contact with the customer are forbidden, and if caught, could result in a permanent suspension. Such actions are known as diversions. Amazon terms of service even prevent sellers from using store names like "lightbulbs.com" because the .com at the end might clue the customer in on the fact that the same product might be available cheaper elsewhere.

Amazon also demands a level of control over customer contact that no mall could hope to impose:

- "You may not send unsolicited or inappropriate messages. All communications to customers must be sent through Buyer-Seller Messaging and be necessary for fulfilling the order or providing customer services. Marketing communications are prohibited."
- "If you receive customer information such as addresses or phone numbers to fulfill orders, you may use that information only to fulfill orders and must delete it after the order has been processed. You may not use customer information to contact customers (except through Buyer-Seller Messaging) or share it with any third-party."
- "You may not attempt to circumvent the Amazon sales process or divert Amazon customers to another website. This means that you may not provide links or messages that prompt users to visit any external website or complete a transaction elsewhere."<sup>11</sup>

As a true marketplace, The Mall of America, would not prohibit their retailers from engaging in such actions. Mall of America allows Apple to prominently display their logos and determine

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<sup>11</sup> Amazon, "Selling Policies and Seller Code of Conduct," [https://sellercentral.amazon.com/gp/help/external/G1801?language=en\\_US&ref=efph\\_G1801\\_cont\\_200386250](https://sellercentral.amazon.com/gp/help/external/G1801?language=en_US&ref=efph_G1801_cont_200386250).

their own return policy. Mall of America allows their tenants to suggest the customer shop online instead of in the mall, collecting their emails to send them online promotions. And the customer service desk at Mall of America is certainly not going to force Apple to give a customer a refund because they claim there was a brick inside of their iPhone box ([this happens so often, that it's become a right of passage for many sellers](#)).

We could continue, but this limited illustration should explain why the Subcommittee should carefully scrutinize how Amazon works in practice, not how Amazon describes itself in high-level terms.

### **Scapegoating Merchants**

During the COVID crisis, we saw another Amazon practice come to light, that is not all that different than what they do with sales tax. Sellers who purchased COVID-related goods from home-depots in middle America, in January, were being accused of price gouging by state governments. These sellers, who did not understand the price gouging laws, and were misled by Amazon's use of terms like "match lowest price" and the use of automatic re-pricing software that Amazon didn't take appropriate steps to control during the pandemic, would protect them. We wrote an open letter to the AG's discussing why Amazon needs to be held accountable, not the individual small merchants, when it comes to making pricing rules clear on Amazon. We also successfully challenged the constitutionality of price gouging as applied to Amazon, because states flat out refused to see Amazon as anything other than their partner. When all the states are bending over backwards to protect the world's largest company, in order to remain at the top of Amazon's list for the next state to receive Amazon jobs, we will never see sellers protected, and we will never see Amazon do the right thing if they know states will always allow them to use their merchants as scapegoats. Our letter to the AG's is attached as Exhibit 2.

### **Policy Suggestions**

Among the many policy responses the Subcommittee might consider are the following:

#### **Solution 1: Prime Delivery as a Quasi-Public Company**

With the help of state subsidies Amazon's fulfillment network has become the railroad of eCommerce. There is no platform out there that can compete with the volume of sales Amazon brings to small businesses. However, like the railroads did in their time, Amazon takes advantage of its position of power. State governments diverted billions in public funds to Amazon to help the company build warehouses and "create jobs" in their state (jobs that Amazon needed anyway), while the states were not aware of the collective impact of their efforts across the nation, or had no option but to "compete" for those jobs.

One could imagine a hypothetical scenario where, during the dawn of the automobile era, Henry Ford had travelled state to state offering to build a highway system in each state, which he would retain rights to own, in exchange for incentives and job creation, at the end of the day Ford would have owned a national highway system, maintaining full control with the right to exclude other cars from using it. This would have resulted in tremendous inorganic growth, due to



Ford's unmatched competitive advantage of selling the only car that comes with access to the nation's highway system.

However, in the context of eCommerce, one does not need to imagine such a scenario, as Amazon has done just that, building a sophisticated and unmatched logistics network that has allowed it to thrive by growing its Prime membership base. Prime members are addicted to the convenience that Amazon brings with it, and it remains unlikely that other retailers are in a position to match it, especially without the state subsidies Amazon received. But the fact remains this network was paid for using public funds, and its significance cannot be understated as Amazon's Prime user base continues to surpass 100 million users and penetrating 62% of US households in just a few short years.

Amazon's dominance is undeniable, but concerns need to be raised about how it obtained its position. In addition to the billions in state subsidies it has received over the years, Amazon has also manipulated the market by engaging in price suppression. Because Amazon values dominance over profit it was able to redirect funds from its highly profitable cloud business to its retail business. Investors saw losses, because funds from its cloud business were being used to subsidize its FBA business, offering FBA to sellers at below its true cost, in order to build a dependence on their platform. Many sellers will often joke that FBA was like a drug addiction, cheap at the beginning, in order to get them hooked, but now as the cost of selling begins to rise less and less US sellers are able to continue operating on the platform.

Meanwhile, it is well known among OMG's manufacturing experts in China that China has been subsidizing its manufacturers who sell into the US, offering substantial tax breaks to manufacturers that can "bring in US dollars" through the Amazon platform. Manufacturers in China already have the ability to operate at lower margins, especially since they are not subject to US regulations, and with the added tax incentives are better suited to weather the storm of Amazon's increased FBA costs, or mandatory PPC requirements. Many sellers in the US have a bleak outlook for their Amazon business but feel as if they are unable to compete in any other meaningful way, as it is difficult to build an eCommerce site without the help of Amazon's logistics.

A solution to this problem therefore should involve government regulation of the Amazon delivery platform. Regulating the eCommerce railroad can come in many forms. One viable option would be to spin off into a public-private company, structured like Amtrak. Through an independent delivery network, Prime delivery could become a feature of any eCommerce website, whether Walmart, Target, Bloomingdales, Macys or a seller's own eCommerce site.

Further, we believe that allowing Prime members to use their Prime credentials to shop on participating eCommerce websites, big or small, would enhance competition in eCommerce, as the consumer would be more likely to go through the check-out process on a small eCommerce site if they could do so conveniently with a Prime single sign-on. Similarly, consumers would appreciate not having to re-enter their details every time, and without having to worry about things like data theft, since the transaction was processed with Prime, as consumers may be concerned that small eCommerce sites may not have the security features that larger sites have.



Plug-in technology is available, similar to Google Checkout, that would allow eCommerce site operators to offer this feature.

Overall, we believe this would be a substantial step forward in leveling the playing field, making Amazon a level competitor with other eCommerce and brick and mortar hybrids who can offer Prime delivery. Just as it would seem absurd in the analogy above that Henry Ford could build and control the national highway system with public support and exclude other car manufacturers from using it, it is equally absurd that Amazon should be permitted to retain exclusive control over the eCommerce Highway, especially when so much of it was built using public funds.

## **Solution 2: Holding Amazon Accountable as Retailer**

Laws and regulations by their nature are burdensome, but time has proven that they are a necessity. Companies spend billions of dollars every year seeking to maintain compliance with laws put in place to protect the public. However, laws and regulations can also result in unfair advantages if one company is exempt from those laws while its competitors have to follow them. Amazon is the product of such an advantage.

As noted above, by classifying itself as a marketplace, not a retailer, Amazon refuses to hold itself accountable for the rules and regulations passed by our legislators to protect the people. Strict product liability, environmental regulations, copyright, all are a serious concern for big-box retailers, causing them to invest billions in audit and vendor accountability programs to ensure the public is safe, as these companies know that they can be held to answer if something goes wrong.

Rather than a patchwork of state-by-state definitions (and perhaps federal definitions) of whether Amazon is subject to the same consumer safety and fair business practices laws that other eCommerce giants abide by, a uniform federal law could be a solution.

Further, the Subcommittee's national scope, and ability to investigate broad patterns of business conduct with great efficiency, could help shine a light on the effects that Amazon's practices are having on consumers and competitors.

## **Solution 3: Seller Bill of Rights**

Finally, small businesses need to be protected. Amazon's monopoly power over eCommerce, gives it a tremendous advantage to overreach when it comes to how it deals with its sellers. With over a million small businesses reliant on Amazon to "eke" out a living, Congress needs to take immediate action to protect these business owners, who take all of the risk, but only receive a fraction of the benefit. It used to be that being a million-dollar-seller meant something. Today that means you are earning \$75,000 a year on average. But in light of the risks sellers take to earn that salary, sourcing enough inventory to sell a million, with the threat of Amazon shutting down their account at any moment, something needs to be done to make sure these small businesses are protected.

## Conclusion

The Online Merchants Guild thanks the Subcommittee for its time and attention to these important issues. We would welcome the opportunity to discuss these issues further with Subcommittee staff. We also have some potential regulatory solutions for consideration, which we would be pleased to outline in further detail as the Subcommittee gathers information.

Sincerely,

A handwritten signature in black ink, appearing to read 'PR', with a stylized flourish extending from the end.

Paul Rafelson  
Executive Director  
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The Honorable Andrew N. Kim  
Chairman  
U.S. House Committee on Small Business  
Subcommittee on Economic Growth, Tax and  
Capital Access  
2361 Rayburn HOB  
Washington, DC 20515

The Honorable Kevin R. Hern  
Ranking Member  
U.S. House Committee on Small Business  
Subcommittee on Economic Growth, Tax and  
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Washington, DC 20515

***Written Testimony of***

***Paul Rafelson, Online Merchants Guild***

Hearing on *South Dakota v. Wayfair, Inc.* : How Mainstreet is Fairing and Whether Federal Intervention is  
Necessary

March 3, 2020

Chairman Kim, Ranking Member Hern, and Members of the Subcommittee, thank you for holding this hearing on state taxation. I am honored to offer my perspective during this critical moment in history.

My name is Paul Rafelson, and I am the volunteer Executive Director of the Online Merchants Guild ("OMG"). In addition to my role at OMG, I am an attorney in private practice, where I represent Online Merchants in tax and other eCommerce related legal matters. Prior to being in private practice, I was an attorney with some of the largest companies in the world including Microsoft, Walmart and GE, defending them in tax state tax matters throughout the United States.

OMG is a trade association for small eCommerce sellers. Our members are small, non-publicly traded businesses, and our mission is to advocate on behalf of our members and provide them with a voice. Most of our members generate between \$500,000 to \$1,000,000 per year in gross revenue and earn between \$50,000 to \$100,000 per year in total income (including salary).

Some of our members have also submitted written testimony for the record, detailing their struggles in trying to comply with unreasonable state tax laws, as well as their recent experiences in dealing with states such as California, Washington and Massachusetts, all of which systematically targeted these small business owners, falsely accusing them of sales tax evasion, and illegally and unconstitutionally seeking to recover back taxes from them.

For our members and those non-members who decided to speak and submit their testimony, I commend their bravery. But please know, that for every small business owner who submitted testimony, there are thousands who were too afraid. Too afraid to tell the United States Congress about how top officers of state tax agencies engage in goon-like tactics to shake down small out-of-state business owners for taxes that their own state laws said these businesses do not owe, nor would they owe due to longstanding constitutional precedent.

I'll share with you some of those comments I received from those who were too afraid to come forward and tell their tragic story, as just because they are too afraid to speak openly, doesn't mean they shouldn't be heard:

*After really looking into this I have decided not to make a [statement]. Although I am on the side of small business, I am afraid to bring attention to myself for past years.*

*Does this put a bigger target on our back?*

*I don't want to draw attention to ourselves at the state tax level. I am sure you understand. We believe the impact has been about \$250k+ in software development costs, and another \$50-\$100k per year in accounting costs, in case you can use that information anonymously.*

As a nation whose forefathers took arms and defeated an oppressive empire imposing tyrannical taxes, I'm here to tell you that the document forged to prevent such tyranny from ever recurring again, The United States Constitution, has failed to protect these thousands of business owners from the recent and currently ongoing tyrannical acts of these state tax authorities. Small business cannot survive in this environment, where many are even too scared to tell Congress about what they are facing, in fear that states may read it and more will take unlawful action against them. For as long as states choose to continue to operate with zero regard for the foundational constitutional protections of due process, fair notice and preventing undue burdens from being placed on interstate commerce, small business owners simply do not stand a chance.

### Congress Must Protect eCommerce Sellers From Unconstitutional Actions of State Tax Enforcers

Before I address the how Congress can fix the sales tax crisis, I want to spend some time explaining the why. In order to do that, I want to share with you the recent and ongoing shameful behavior of state tax administrators who are terrorizing small out-of-state business owners, as we speak. Over the last few years, state tax administrators have become overzealous prosecutors, not interested in enforcing their laws, but instead flexing their muscles in an effort to extort tax revenues from defenseless business owners. Their bullying-style of tax enforcement has demonstrated that the states cannot be trusted, as they will only think in terms of the revenue they can get, not in terms of the legality of their actions, or the unconstitutional burdens they place on interstate commerce when they indulge in such chicanery.

Over the last 12 years, eCommerce has grown into a form of self-reliance, giving people of all backgrounds the same opportunity for success, and many have taken advantage of this new opportunity to become self-reliant. I personally am proud of the diversity of our membership base, and the eCommerce community as a whole, but I am also appalled by the fact that these pioneers of eCommerce, people that we should be lauding, are being treated as criminals by various state tax authorities.

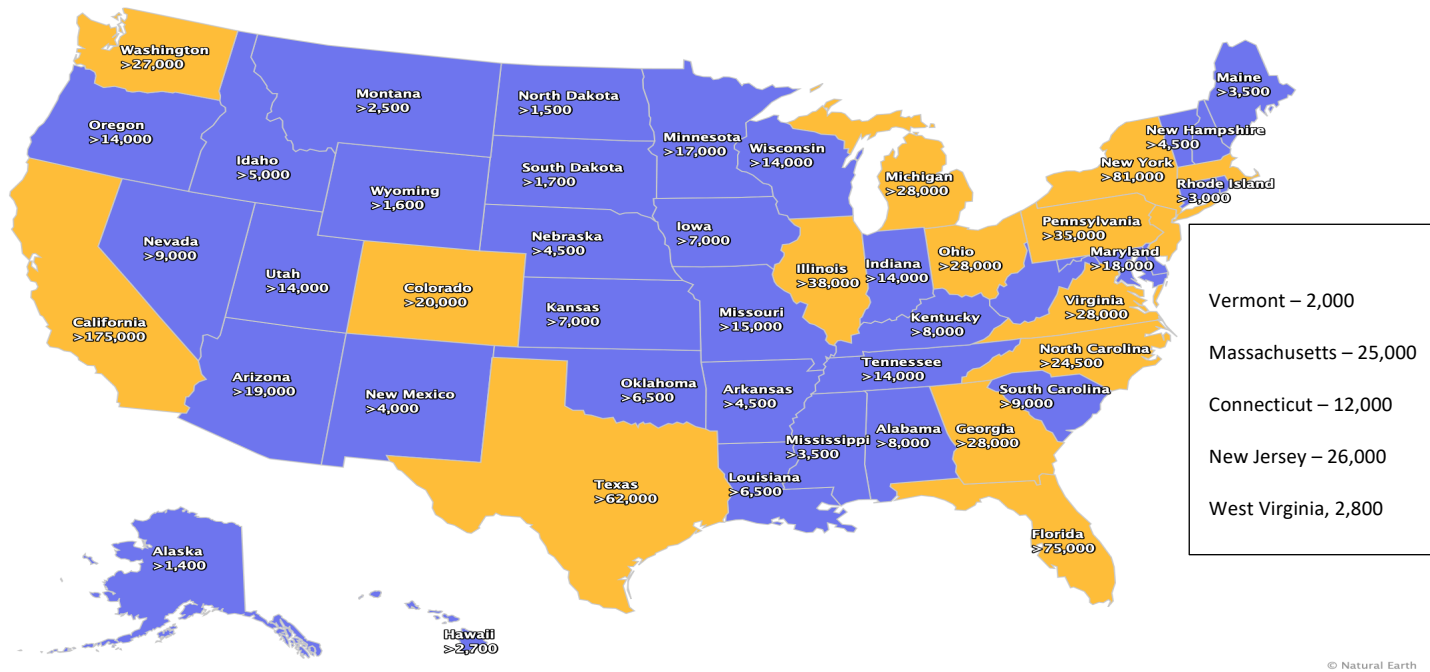
Part of the reason for the growth of eCommerce has to do with how it is conducted. Biases that sadly exist in real world commerce have completely been eradicated in the world of eCommerce. With eCommerce, people of all backgrounds are given equal opportunity to succeed, as business owners in eCommerce are only judged by the merits of what they bring to market, not their gender or ethnic background. This is why, through eCommerce, we have seen a welcome expansion of successful women and minority owned business. As Congresswoman Robin Kelly of Illinois noted:

*We're in the middle of a black entrepreneurship renaissance fueled by the internet and ecommerce. Companies like Amazon have reduced the barrier to entry and made it easier to sell goods, products and services online. And black entrepreneurs have taken advantage of this opportunity and are chasing their dreams.*

But chasing their dreams would slowly turn into a nightmare for small business owners, as in the eyes of these state government officials, business owners would fall prey to unethical actions of state tax enforcers who claimed that all of them are in violation of state sales tax laws, going back to 2012, simply because they participate in a program called Fulfillment by Amazon (FBA).

In 2008, Amazon revolutionized eCommerce with the introduction of Fulfillment by Amazon (FBA), which led to the birth of hundreds of thousands of eCommerce business owners throughout the United States. The Map below, prepared by Marketplace Pulse using Amazon seller data, shows just how many eCommerce businesses there were on Amazon alone in 2018.

Amazon Sellers' Location By State



Source: <https://www.marketplacepulse.com/amazon/top-states>

For as little as a few dollars, a small business owner can now supply their goods to Amazon, have them listed on Amazon's website as "Prime", and capitalize on Amazon's large member-base of convenience driven customers. To participate in FBA, sellers pack a box full of products they wish to sell, place an Amazon provided UPS label on the box, and voila! Their products now are featured on Amazon's website as "Prime". Carrying the "Prime" designation on their listing is a crucial requirement for most sellers to succeed on Amazon. Without "Prime" designation, sellers do not have access to the "buy box." The buy box is critical, as the seller who is in the "buy box" receives the Amazon customer's purchase when they add a product to their cart.

It's so simple to start an FBA business. Anyone can simply drive to the nearest Walmart or TJ Maxx, roam the clearance aisles, and purchase some items that are popular on Amazon. To discover these products, they may have researched from their smartphone while standing in the clearance aisle. Once someone understands how to look at product rankings on Amazon, they can determine what sells well on Amazon. Next, they simply pack the items in a box, slap on an Amazon issued UPS label, and they suddenly have a viable business. In fact, in the eCommerce community, this is known as retail arbitrage, and is often seen as a first steppingstone towards eventually becoming a brand owner who makes their own product. Many of our members have pulled themselves out of poverty and have grown into successful brand owners by starting out in retail arbitrage.

The UPS label Amazon provides tells UPS which Amazon warehouse to ship the seller's product to. Usually Amazon chooses the closest facility to the seller's location, but it is **ALWAYS** at Amazon's discretion (not the seller's). For most FBA sellers, that's all they know. In reality, what Amazon actually does once the product arrives at a facility, is re-sort it. Amazon's algorithm tells them which facilities to send the seller's products to, based on where Amazon expects to sell it. Amazon then bulk ships the seller's inventory to that facility, which could be in any number of states, as Amazon operates fulfillment centers in the majority of states. Before Wayfair in 2018, most Amazon sellers were none-the-wiser that this was going on. In essence, they were supplying Amazon with inventory, much like a maple syrup manufacturer in Vermont might supply product to Williams-Sonoma. In reality, once Amazon receives products at the original fulfillment center the seller ships it to, they redistribute the goods across their network of fulfillment centers. This process, in actuality, is the same process brick and mortar retailers use to distribute their products among their nationwide retail stores.

Through FBA, Amazon takes as much inventory as sellers, many of whom are small businesses, are willing to supply, and sells it for them through their online store. When setting up their seller account, Amazon sellers have

two choices of how to sell their products, either fulfillment by merchant (i.e., seller), or fulfillment by Amazon (FBA). Most sellers in the US start out with the fulfillment by merchant option. By switching to FBA, sellers suddenly can go from selling tens of thousands of dollars a year on Amazon's webstore, to over a million dollars, and often times more. But there is one catch, Amazon's terms and conditions with the merchant (i.e., seller) who supplied them these goods, claims that they (the seller) are the retailer, not Amazon, despite it being Amazon's store.

FBA triggered an explosive revolution for eCommerce. Today, any one operating from their kitchen table can now scale their sales instantly, by selling on Amazon with "Prime" (or two-day) delivery to the customer. This "Prime" customer, in many cases, believes they purchase directly from Amazon since the item they purchased is labeled as "Prime". Prime (or FBA) sellers often ship as much product as they can get their hands on to Amazon. There seemingly is no limit, this is the Wild West of eCommerce, and Amazon is the Gold Rush.

In the 2011 Supreme Court case *McIntyre*, the Court found the fact that machines owned by *McIntyre* "ended up in New Jersey" was not enough to show that "*McIntyre* purposefully availed itself of the New Jersey Market." Yet, when one Amazon customer returned a book they bought from Amazon, supplied by Jennifer Jenson (whose testimony has been submitted to this committee) via FBA, and that returned item wound up in Amazon's warehouse in Washington State, without Jenson's knowing, little did she know that six years later, Washington would come for her business. The use of Amazon's facility does not constitute nexus under the Due Process clause, but states do not care. Truly, they know that the cost of litigating a case like that would be impossible for small business owners like Jenson, and the thousands of others they have chased down over the last few years, and that is all that matters to them. Wayfair does not change this fundamental principal of nexus, as Wayfair only addresses the commerce clause element, the Due Process element still stands as it has for centuries. *J. McIntyre Machinery, Ltd. v. Nicaastro*, 564 U.S. 873 (2011).

Even with respect to the Commerce Clause, states also ignore their responsibility not to burden interstate commerce, as the Commerce Clause requires states to consider less burdensome means to accomplish state interests, especially if less burdensome means are available for the state to accomplish its goals. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In the case of Amazon, it is Amazon's store, Amazon's website, Amazon's customer, and Amazon customers interacting with Amazon to checkout, just as a customer does on competing websites that are tax compliant. Rather than simply imposing a tax collection obligation on Amazon, as it is in the best position to do so, and who is already collecting tax on the sales it is the seller for, states assert that a small supplier operating out of their kitchen table is best suited to register in all fifty states, simply for using FBA. When sellers do not register, they often learn (up to six years later) that they should have registered, at least in the eyes of the state. This is despite the law and the constitution saying otherwise.

Of course for Amazon, collection is the last thing they want to do. As senior editor of Bloomberg and Amazon tell author, Brad Stone, notes in his book "The Everything Store", Amazon sees sales tax avoidance as competitive advantage, and he even dedicates a whole chapter on how committed Amazon is to maintaining that advantage. Amazon is known to invest more money in trying to avoid collecting tax from the customer than most companies spend trying to avoid paying the taxes that they are actually accountable for, such as income tax. By the time the book was published, Amazon was only through the first phase of its tax avoidance game. Phase two had just begun, emphasizing itself as a marketplace, in order to avoid tax collection on half of its sales, even after claiming it was collecting tax in every state. For this to work, they needed to get state tax officials on their side.

For Amazon, the FBA marketplace fallacy creates a technicality that fuels their perception that they can successfully avoid sales tax collection in almost every state. And in some states such as Florida, Amazon's second largest consumer state, that tax avoidance continues today. Many of you may have read news articles in the past stating that Amazon collected tax in every state. Often those authors remain very misinformed. Until very recently, (October 2019 in the case of California, Amazon's largest consumer state), Amazon asserts that they collected tax in every state, but in actuality that collection only pertained to less than half of their sales.

This resulted because Amazon cleverly, and with clear intent to avoid sales tax, imagined up this notion that, by opening up their "store" to third parties offering their inventory to Amazon on consignment, that they are merely a mall, or marketplace. Even though Amazon owns the website, Amazon claims the customers are theirs, Amazon sets the return policy, Amazon controls all customer service aspects, Amazon previously told the states that

for sales tax purposes they are just a mall. By making this legally baseless argument that their store is actually a mall, and using their influence of job creation to get states to buy their “bridge in Brooklyn” equivalent of tax law interpretation, Amazon would focus more and more of its efforts to drive what it called “marketplace” sales, so that its customers would still have the ability to shop tax free, even though it is Amazon’s store.

Of course, my saying its Amazon’s store could sound as self-serving, but Amazon has said the same thing, under oath, to another House committee. In nearly 70 pages of inquiry responses sent to the House Antitrust Committee, Amazon makes it abundantly clear that it is their store. Of course, for antitrust purposes, when Amazon is accused of competing against its sellers, (using their sales data), they want to claim that their Amazon Basics brand is simply the equivalent of Costco’s Kirkland brand, so they need to emphasize the fact that they are a store, not a marketplace. When it comes to sales tax and tax avoidance, Amazon is quick to say, also under oath as they recently did in a South Carolina appeal, that their website is just a mall. So which one is it? Is Amazon a store or a mall? I guess it just depends on who is asking. Here is just one of many examples from their responses to the committee below:

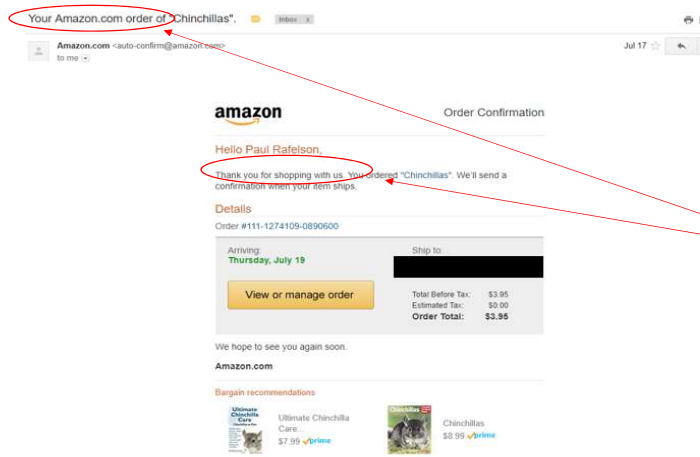
*Q. Please identify whether Amazon modifies its treatment of or relationship with Marketplace merchants if it learns that merchants are selling products on non-Amazon websites at a lower price than on Amazon or on an Amazon-owned or operated website.*

*A. To maintain trust with customers that they will find low prices in the Amazon store, Amazon may take steps to ensure that customers can continue to find great prices in Amazon’s store, such as suggesting that a seller lower its price, offering an Amazon-funded discount on the product, or choosing not to feature higher-priced offers on a product’s detail page.*

<https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD038.pdf>

To put into perspective just how absurd Amazon’s tax avoidance strategy is, claiming it is merely a marketplace, let us consider this in the context of how its tax avoidance strategy would sound if Amazon were a brick and mortar not the webstore that is physically present in all 50 states. Imagine if a local Target store decides it does not want to collect tax, and rather than focus on its unavoidable nexus, it decides to re-brand itself as not a retail store, but merely a marketplace. To make it seem legit, it claims that its cashiers are merely “facilitators” of sales not actually the seller of record, while also claiming that the true seller is really the supplier of the goods on its shelves, which it now calls sellers. But, that is not how the customer sees it.

## Customer Confirmation Email (Actual Taxpayer Order)



Confirmation Email: Amazon Takes All Credit For the Order, No Mention of 3p Merchant in Confirmation Email

This represents an absurd distinction that would never work, and in fact it did not work in the one state that challenged Amazon on this issue, South Carolina. The court in that case, using Target as an example noted:

*Customers meaningfully interact with Amazon Services to consummate the sales of Merchant products and no one else. Moreover, Amazon Services' self-characterization as a service provider could be employed by any brick-and-mortar retail store or consignment shop to evade tax responsibility as a seller. Either could claim that instead of being engaged in the business of selling tangible personal property, they just provide an array of discrete, non-taxable services, charging the same types of "service" fees as Amazon Services even though, in reality, they are selling products. Separating the actions of a retail seller such as Target into discrete, non-taxable services would be absurd, and so it is here. Amazon Services, LLC v. South Carolina Dept. of Rev.*

It is not just the State of South Carolina who finds the distinction between marketplace and retailer to be nothing more than self-serving contractual formality, the type courts, and usually state tax administrators are keen to look right past. The United States Supreme Court quickly shot down Apple's attempts to rebrand its App store as merely a marketplace for individual application retailers. The Court in that case made rather quick work of Apple's attempts to rebrand itself as a marketplace, in the context of antitrust, holding that:

*Yet Apple's proposed rule would allow a consumer to sue the monopolistic retailer in the former situation but not the latter. In other words, under Apple's rule a consumer could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale. Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct. As the Court of Appeals aptly stated, "the distinction between a markup and a commission is immaterial." *Apple v. Pepper* (2019).*

Substance over form is the most basic foundational principle in tax enforcement, but with Amazon it is all form, and the states have been willing to turn a blind eye to it, but why?

### Even With Joint Shopping Cart (1p & FBA) Amazon Uses Single Checkout Claims Amazon Claims Only to be a Partial Retailer

**3 Review items and shipping**

Get a \$10 reward from Amazon Restaurants by choosing FREE No-Rush Shipping below  
Choose FREE No-Rush Shipping and receive a \$10 reward to use at Amazon Restaurants  
(www.amazon.com/restaurants). Restaurants you love, delivered by Amazon.

**Estimated delivery: Aug. 3, 2018**  
Items shipped from Amazon.com

**Keurig K55/K-Classic Coffee Maker, K-Cup Pod, Single Serve, Programmable, Black**  
\$99.99 ✓ prime  
Qty: 1  
Sold by: OEDWV  
Only 5 left in stock.  
Add a gift receipt  
and see other gift options  
Conceal Package Contents

**Guaranteed delivery date: Aug. 3, 2018** if you order in the next 19 hours and 15 minutes (details)  
Items shipped from Amazon.com

**Keurig K55/K-Classic Coffee Maker, K-Cup Pod, Single Serve, Programmable, Black**  
\$99.99 ✓ prime  
Qty: 1  
Sold by: Amazon.com Services, Inc.  
Add a gift receipt  
and see other gift options  
Conceal Package Contents

**Choose your Prime delivery option:**  
☐ 1 business day  
 \$25.98 - One-Day Shipping  
☐ Thursday, Aug. 2 - Friday, Aug. 3  
 FREE Two-Day Shipping  
 Ship each item as soon as possible  
☒ Friday, Aug. 3  
 FREE Delivery in fewest possible packages  
☐ Tuesday, Aug. 7 - Wednesday, Aug. 8  
 FREE No-Rush Shipping  
 Get a \$10 reward to use at Amazon Restaurants. Details

**Place your order**  
By placing your order, you agree to Amazon's privacy notice and conditions of use.

**Order Summary**

Items (2):	\$199.98
Shipping & handling:	\$0.00
Total before tax:	\$199.98
Estimated tax to be collected:	\$6.35
<b>Order total:</b>	<b>\$206.33</b>

How are shipping costs calculated?  
Prime shipping benefits have been applied to your order.

Both products were identically priced at \$99.99 making the total amount due in the shopping cart \$199.98.

With a Connecticut tax rate of 6.35%, the tax collected of \$6.35 is only being applied to one of the two shopping cart items, despite the fact that the sale is consummated in the same transaction.

(In light of Washington's marketplace laws, it would not be possible to recreate this example using a Washington address)

Even when an item Amazon sells and an FBA item are purchased in the same shopping cart, Amazon claims it is only the retailer for one of the two, even though the checkout process is through Amazon. Therefore, Amazon is only charging state tax on the item it lists itself as the seller, and not the item it credits to the third party, despite being a singular retail transaction for the consumer.



With tens of billions in lost revenue over the last twelve years, starting from when Amazon first agreed to start collecting on what it deemed its own sales, this marketplace versus retailer distinction used by Amazon to avoid tax collection on over half of its sales is the biggest tax avoidance scheme in history, and Amazon is getting away with it. But, when the avoidance is so obvious, and with the states openly allowing this to happen, one has to question the ethics of the very state tax authorities that allow Amazon to get away with this, especially in light of their actions to recoup their losses by illegally persecuting thousands of small out-of-state business owners, and not to mention the harm to the state itself; hundreds of billions of dollars remain in uncollected tax revenue nationwide, and local competition suffers from an unlevel playing field.

Years ago, states were falsely claiming that Wayfair was the main reason for their lost revenue, yet in reality, it was their backroom deals with Amazon, that allowed Amazon to avoid billions of dollars a year in tax collection. States claim this unlevel playing field remains mainly a Wayfair issue, because they do not want to hold the largest online retailer, Amazon, accountable for taxes they are required to collect from their customers. The fact is, until January of 2018 (when Washington became the first state to finally require Amazon to collect tax, and over six months before Wayfair was decided), Amazon avoided an obvious tax collection burden. This is what hit the local businesses harder. It would take the states two more years to make Amazon a tax collector in forty of the forty-five sales tax states.

But only one state has asked the question, why didn't Amazon collect the tax earlier? This state is South Carolina, but all states should have asked this question, especially with respect to FBA. Instead, the rest of the states decided to go after the out-of-state merchants who supplied product for Amazon's FBA program. States complain about a lack of a level playing field, meanwhile every local business owner wonders why the world's largest retailer in their state, has not collected tax when they have major operations going on in their state for years. This scenario was fixable before Wayfair, but as you will see, every state was trying to "woo" Amazon for more jobs and investment, so how could they insist Amazon collect tax like everyone else in their state?

Why did so many states choose to give Amazon a pass, and seek to recover their losses by taking a nefarious, and unlawful tax position against out-of-state sellers? To answer that, I would like you to consider what California's Treasurer, and again former Sales Tax Board Member, said, in her own words, as she is quoted in a 2018 article in the publication Capital & Main. Treasurer Ma, who also submits her testimony before this committee, calling out her state's unconstitutional and unlawful actions against out-of-state Amazon sellers, is quoted in the article as follows (Article quote below, Ma's direct statement as underlined below):

*Ma finds the aggressive enforcement of small sellers, when Amazon controls practically every aspect of the transactions, to be **unconscionable**. But why has California been so reluctant to force Amazon's hand? "Number one," Ma explained, "the governor's office has been trying to woo Amazon into putting a headquarters here. I've been pushing and they haven't wanted to do anything up front."*  
<https://capitalandmain.com/the-amazon-tax-ruling-disrupting-the-disruptors-0710>

Trying to "woo" Amazon, that is what led these states to abandon their obligation to evenly enforce the tax law, giving Amazon a pass so that it could sell tax free in the state, while local businesses could not compete. Amazon's anticompetitive approach to tax avoidance is equivalent to outright bribery, convincing states to sell out their own local economies, by letting Amazon sell goods tax free, in exchange for the promise of Amazon's jobs and warehouses. To be clear just how obvious Amazon's obligation is to collect, consider the fact that in just about every state the definition of a sale is the transfer of title or possession, both of which Amazon does, when it ships inventory supplied by third-party merchants from their warehouses when customers make a purchase in their store. But in this case, states routinely pursue Amazon's small out-of-state business owners, who act as their suppliers.

In California, the most aggressive state when it comes to falsely accusing sellers of tax avoidance, sellers have been harassed by California's call-center debt collectors, and are told to say anything to scare sellers into believing they owe this tax that **Amazon** actually owes, just as California Treasurer, and former sales tax board member, Fiona Ma points out in her testimony. Some sellers have received letters and emails, claiming they may face felony incarceration, due to their failure to comply with California's requests. See below:

From: Fowler, Lelania <Lelania.Fowler@cdtfa.ca.gov>  
 Sent: Thursday, March 2018  
 Subject: RE: [REDACTED]

The Registration Requirement is based on my investigation and our telephone conversations.

I am doing my due diligence in order to provide you with your options and maintain a record for a potential Audit Referral if you choose not to register.

If you choose not to voluntarily comply to obtain a sellers permit these are some of the possible outcomes:

- Law codes  
<https://www.boe.ca.gov/lawguides/business/archive/2010/vol1/sutl/sales-and-use-tax-law-chapter10-all.html>
  - 6071. **Unlawful acts.** A person who engages in business as a seller in this state without a permit or permits or after a permit has been suspended or revoked, and each officer of any corporation which so engages in business, is guilty of a misdemeanor punishable as provided in Section 7153.
  - 7153. **Same.** Any violation of this part by any person, except as otherwise provided, is a misdemeanor. Each offense shall be punished by a fine of not less than one thousand dollars (\$1,000) and not more than five thousand dollars (\$5,000), or imprisonment not exceeding one year in the county jail, or both the fine and imprisonment in the discretion of the court.
  - 7153.5. **Same.** Notwithstanding any other provision of this part, any person who violates this part with intent to defeat or evade the reporting, assessment, or payment of a tax or an amount due required by law to be made is guilty of a felony when the amount of unreported tax liability aggregates twenty-five thousand dollars (\$25,000) or more in any 12-consecutive-month period. Each offense shall be punished by a fine of not less than five thousand dollars (\$5,000) and not more than twenty thousand dollars (\$20,000), or imprisonment for 16 months, two years, or three years, or both the fine and imprisonment in the discretion of the court.

#### Business Taxes Law Guide - SALES AND USE TAX LAW

So, what does **California law actually say** about who is the responsible party for tax collection? Is the responsibility on Amazon, or its third-party merchants? In addition to California's definition of a sale, the transfer of title or possession, you'll see that California law states that Amazon's third party merchants are not the seller for sales tax purposes, that Amazon is the responsible party, not the small business owners who supplied them with goods to sell in Amazon's store, and the state law couldn't be more clear about it:

*A person who has possession of property owned by another, and also the power to cause title to that property to be transferred to a third person without any further action on the part of its owner, and who exercises such power, is a retailer when the party to whom title is transferred is a consumer. Tax applies to his gross receipts from such a sale. Cal Rev & Tax Code Section 1569*

Amazon is a person (tax codes refer to corporations as persons) who has possession of property owned by another (the goods are legally titled to me but they sit in Amazon's warehouse – meaning it's in their possession) and also the power to cause title to that property to be transferred to a third person (when a customer purchases

goods merchants ship to Amazon, Amazon packs and ships those goods out immediately) without any further action on the part of its owner (Amazon ships goods automatically, merchants are not required to approve any orders) is a retailer...:

So, by all definitions under a plain reading of their law, it's unfathomable how small businesses could be considered a retailer, when the law is written so clearly. Yet when Amazon sellers reply to California's tax division, asking for an explanation of the law, what they get in return is another surprise, a letter ruling from the state tactfully avoiding the question of who is the retailer altogether, claiming they (the seller) are the retailer, but the real surprise comes when sellers who received this letter from the CDTFA, realize that it contains hidden data that indicates Amazon was involved in helping the CDTFA write the letter.

STATE OF CALIFORNIA

EDMUND G. BROWN JR.  
GovernorMARYBEL BATJER  
Secretary, Government Operations AgencyNICOLAS MADUROS  
Director

## CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION

OUT-OF-STATE OFFICE  
3321 POWER INN ROAD, SUITE 130  
SACRAMENTO, CA 95826-6641  
916-227-6600 • FAX 916-227-6641  
[www.cdtfa.ca.gov](http://www.cdtfa.ca.gov)

TAXPAYER  
5th Avenue  
New York, NY 10012

Dear Ms. Taxpayer:

This is in response to your letter dated \_\_\_\_\_ which was in response to the correspondence we sent you on \_\_\_\_\_. In that correspondence, we informed you that if you own inventory that is stored in warehouses or fulfillment centers in California for delivery to consumers in this State, then you are required to register with the California Department of Tax and Fee Administration (CDTFA), file sales and use tax returns, and pay tax on sales to consumers in California.

Attached to your response is a letter signed by Mr. Paul Rafelson, who you identify as a state tax attorney and state tax law professor at Pace University Law School. In this letter, Mr. Rafelson argues that the State of California is placing an unconstitutional burden on retailers located in and out of California to collect and report the applicable taxes to CDTFA on sales they made on Amazon and other marketplaces. He further argues that Amazon has nexus with California and is responsible for the tax on sales made on its marketplace.

However, California Revenue and Taxation Code (RTC) section 6203, subdivision (c)(1), provides in part that a retailer who maintains, occupies, or uses, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, warehouse or storage place, or other place of business, may meet the definition of "retailer engaged in business in this state," thereby establishing a requirement to register with CDTFA. CDTFA Regulation 1684 contains similar nexus provisions and can be found on CDTFA's website.

Thus, under current law, you are considered the retailer of the inventory you sell through Amazon and other marketplaces. As such, you are required to register with CDTFA or demonstrate to us that you do not have nexus in California by completing the California Nexus Questionnaire we previously sent you and returning it to the address shown above. We are taking this matter seriously; failure to comply may result in necessary enforcement action

Amazon Fulfillment Services, Inc. and Affiliates

November 07, 2017

including issuance of a deficiency determination in accordance with Revenue and Taxation Code section 6487.

To register, visit our website at [www.cdtfa.ca.gov](http://www.cdtfa.ca.gov) and select *Register*, then select *Register a business activity with CDTFA*. If you need assistance in registering, filing your returns, or have any additional questions, please contact the Out-of-State office at 1-916-227-6600.

Out-of-State Office  
California Department of Tax and Fee Administration

The state's explanation in their letter obviates the fact that they have no reasonable explanation for why they terrorize entire communities of sellers in places like Brooklyn, NY or Lakewood, NJ, instead holding Amazon accountable. And their explanation for why Amazon's metadata is in the letter is simply that it was "inadvertent", to which I agree. I have no doubt the CDTFA did not intend to leave Amazon's data in their letter ruling. The letter avoids the obvious question though. Who is the actual retailer? Amazon asserts, and has successfully convinced California, that the retailer is the merchant (i.e. third-party merchant) who provides their goods to the end consumer. This is what sellers are asking, but it is not the question CDTFA and Amazon willingly address. The law cites, by CDTFA and with Amazon's help, that there is no reasonable explanation for why they are pursuing sellers, other than they just want to give Amazon a pass, and cover their losses by going after out-of-state sellers.

There is even more evidence of Amazon's influence over the state's decision to hold me and thousands of small sellers accountable for taxes we don't owe. In 2012, after Amazon agreed to collect sales tax in the state, after closing a back room deal with California to collect tax "voluntarily" in exchange for what would amount to 20,000 jobs, a CNET reporter sent an inquiry to the tax board. In the inquiry, the reporter asks why Amazon would not also be the seller on the goods sold by sellers like me, especially when goods are packaged and delivered by Amazon under the "Prime" badge. The Board's initial response to the reporter asserts that Amazon is responsible, not the third parties that supply the goods, stating that:

*Since Amazon is handling the merchandise and all aspects of the sale, the Board of Equalization [the organization in charge of sales tax in California until 2017, when the responsibility was shifted to the CDTFA] would consider them the retailer, and Amazon would have to collect tax on the transaction," the initial statement said.*

So, even reasonable minds within California's tax division initially agreed that Amazon is the seller, not third parties. However, the article goes on to state, that this quickly changed, after the reporter took the Board's comment to Amazon seeking their response. Shortly after informing Amazon of the Board's comments, something suddenly changed, as the reporter notes in the article:

*Late last night, a few hours after CNET contacted Amazon for a response, the board responded with what it described as "updated" information...*

That updated information, was the sales tax agency's revised quote featured in the article:

*It's difficult for us to comment on the way Amazon is set up within its family of companies (and) whether there would be a consignment relation," the representative said.*

Even the reporter was surprised by the sudden change in direction, referring to it as:

*The State Board of Equalization's maybe-yes-maybe-no approach is a significant departure from its position yesterday, when a representative sent CNET a statement saying that Amazon would have to collect taxes on orders it fulfills.*

All of this can be read (and should be read) in the article below:

<https://www.cnet.com/news/amazon-shoppers-will-squeeze-through-calif-tax-loop-hole/>

In an effort to recover from that CNET article, the Board issued an unpublished ruling for Amazon's benefit, the same day the article was published, articulating a tax strategy that never would work for any other taxpayer, saying that Amazon could avoid taxes by simply using a wholly-owned and controlled subsidiary to conduct fulfillment. (Ruling available upon request). These strategies are regularly shot down in California, and just about every state, and even the Supreme Court has found such tax avoidance structures to be baseless:

*To permit such formal "contractual shifts" to make a constitutional difference would open the gates to a stampede of tax avoidance. Scripto v. Carson, 362 US 207 (1960).*

With the extreme departure from state ethical norms in administering their tax laws, Amazon's merchants are now being told they should have known for six years that they are responsible for these taxes, and those letters, emails and threats are still going on today, even though they are not responsible under the law, or in accordance with the Constitution of the United States.

Sellers have also been told over and over again by some of the best tax and constitutional lawyers, that they better prepare for a long multi-year tax court case, as their ability to seek relief in their home federal court, or even the federal courts of California, is blocked by the State Tax Anti-Injunction Act. To make matters worse, California's state Constitution prohibits any taxpayer from seeking injunctive relief in state courts. And, after the recent Supreme Court decision in Hyatt, state courts are under the impression they cannot issue such relief to protect their own state businesses, because they do not have jurisdiction to enjoin another state's tax agency. Small sellers have no remedy to fight back against the unconstitutional assaults when states like California, Washington and Massachusetts go after them, other than to engage in multi-year tax litigation, like the Fortune 500, something the impacted small businesses cannot afford to do.

The fact that California and other states think they can simply choose to go after small out-of-state businesses, who lack sufficient nexus under both the due process and commerce clauses, amounts to tyranny. Even if they have nexus, they are not retail sellers under the law. Even though it is not the law, sellers have no right to protect themselves in their home state. This amounts to tyranny. It is deplorable behavior, which I doubt anyone in Congress is aware of, and I hope that this testimony today, shed light on the hostile and unconstitutionally discriminatory realities small businesses are dealing with today. Therefore, as a first step to fixing the sales tax problem that plagues small businesses, I ask you to take steps to bring forth legislation that will amend the State Tax Anti-Injunction Act, and allow small sellers the right to seek sanctuary from the unconstitutional assaults and abuses that are happening right now, as told by our organization and the many others who submitted their testimony to this Committee.

#### The Solution Moving Forward: Make It Easy

It is fundamentally important for this Committee to be aware of how the states have aggressively targeted small businesses in the past, and just how willing states are to violate the constitutional rights of small self-reliant

business owners. For if this were a different story, states respecting the constitution and their own laws, then certainly that might dictate a different response from Congress.

To fix the sales tax problem Congress needs to do two things. One, they need to amend the Tax Injunction Act, and give small businesses who fall victim to the overzealous prosecutor mentality of the states a chance to seek sanctuary in their home state federal court. Second, Congress must require states to streamline the sales tax compliance process, but what does that look like?

We view thresholds as a temporary fix to the sales tax solution, but even as a temporary fix they don't work for many of us, as most small businesses sell on their own website **AND** use FBA. For many states that means no threshold at all. When a seller utilizes FBA, many states have said that there is no threshold. Keep in mind that selling products through FBA is something any one of us could do in a matter of five minutes for as little as five dollars. Yet by doing so, even just selling one item, many of the states are claiming this constitutes "Quill" nexus, not Wayfair nexus, therefore no threshold pertains. Suddenly a kitchen-table enterprise will now have to be fully invested with hundreds of thousands of dollars of sales tax implementation costs, if they want to have their own website independent of Amazon, who only recently started collecting tax in 40 of the 45 sales tax states.

We believe that there is no reason in today's technological age that a central clearinghouse solution cannot be created that would make it easy for any small business to collect and remit sales tax. So easy in fact, that the whole concept of threshold could be done away with entirely. After all, if it is easy, then there is no burden. But we are far from that point, and without Congress, we many never get there.

Why does it need to cost hundreds of thousands of dollars to collect tax in every state, when a bureaucracy free technologically sound solution is fathomable? Such a solution will only occur if Congress mandates it. Personally, I am shocked that in the 26 years between Quill and Wayfair, the states have the nerve to cry foul, yet have done nothing to mitigate the burdens they place on small businesses.

**The Small Business Administration Loan Program**, a program many of our members rely on, is a federal program that helps launch new businesses. Do you think it was Congress' intent that the first \$200,000 of loan proceeds would be spent by a new-business owner on tax compliance, or should that money be invested in growing the business and hiring employees? It is obvious that states have a problem, and they need Congress to mandate a fix.

The good news is that states do not have to drastically revamp their tax laws to fix this, they just need to be required to embrace a single software solution that can handle those nuances. This is not hard to do, as most small eCommerce companies use one of just a few platforms to run their business such as Shopify, BigCommerce and Wix. Certainly, the states can develop a standardized collection and reporting software package for eCommerce platforms to offer, that would take advantage a central clearinghouse that would receive certified data from these platforms. This clearinghouse would generate all the information states need for tax reporting, even if they have hundreds of small jurisdictions.

That's what sound solution looks like, and in today's technologically advanced world, and by offering sellers this type of solution, there would be **no need for states to audit** these companies, as long as the sales occurred on eCommerce platforms that were certified by a state or federal entity responsible for administering sales tax. There is no excuse for states making the burden of sales tax compliance exponentially more complicated than it needs to be. When states' refusal to "get with the times" suppresses the ability of citizens to become self-reliant business owners, it becomes a per se burden on interstate commerce, and it needs to be fixed.

Stop putting the burden on the small business owners, depriving them of their right to be self-reliant small businesses, and put the burden where it belongs, on the states. States had 26 years between Quill and Wayfair to come up with a workable solution, yet what they accomplished in that time frame is an embarrassment; a streamlined sales tax program that less than half the states participate in, and still requires small businesses to individually register in each of the states. Why should small business and the principles of being a self-reliant business owner be burdened by the states' unwillingness to get with the times and embrace technological efficiency? Congress needs to put the burden on the states to make tax compliance easy. That is all we want- for you, Congress, to make it easy. If tax compliance is easy, then there is no need for a threshold, which is exactly what the Court

found in Wayfair. Remove the burden, by making the process easy and inexpensive, and the issue of commerce clause nexus goes away.

Finally, Congress must ask what this is really about. States are aggressively using sales tax registration as a gateway to sales tax, or to “non-income” based taxes states impose that circumvent the intent of the income tax protection law known as Public Law 86-272. But is it really necessary for a kitchen-table enterprise to be registered as a taxpayer in all fifty states if they simply want to collect sales tax? Therefore, Congress needs to reinforce Public Law 86-272 and stop states from using creative taxes, such as the Commercial Activity Tax to circumvent it. And, in the process of addressing the sales tax problem, make sure that the solution involves one where a small business owner only has to register and report to one entity or state, their home state (as is the case with the International Fuel Tax Agreement), or a central clearinghouse where sellers can simply upload all of their data at once, pay one amount, and leave it to the states to divide the revenue among themselves. We are asking you to force the states to make it easy and safe, and we will all be happy to comply. The technology is there to solve this problem, and if you remove the bureaucracy of states unwillingness to work together, you realize it is actually not a hard problem to solve. But we need Congress to force states to cut through the bureaucracy that prevents technology from being the solution to this problem.

Therefore, I propose the Congress enact the following requirements, an eCommerce sellers’ sales tax “Bill of Rights” requiring that, for small business owners, states administer their sales tax laws as follows:

1. **eCommerce Sellers shall be entitled to a state guaranteed (meaning if it doesn’t work it is the state’s fault) free plugin application that works with eCommerce platform providers (i.e. Shopify, BigCommerce, Wix), which automatically calculates the tax due during the customer check-out process.**
2. **eCommerce Sellers should only be burdened with a single monthly certified sales and collection report upload provided through their eCommerce platform provider (e.g. Shopify, BigCommerce, Wix) to either their home state, or a central state clearinghouse run by the states.**
3. **eCommerce Sellers, when remitting sales taxes collected, shall only make one payment, representing all of the taxes they collected throughout the US, to their home state, or a central clearinghouse, based on the sales data generated by certified eCommerce platform companies.**
4. **Once data is uploaded, and the tax is remitted to the clearinghouse or to the seller’s home state, the burden then shifts on to the states to use the uploaded data to redistribute the taxes remitted.**
5. **Sellers shall not have to register with every state, if their only obligation is to collect and remit the sales tax, one state or centralized agent is enough.**

In conclusion, I urge Congress to mandate the parameters for what an innovative and streamlined sales tax solution looks like. Do not let the states destroy the culture of self-reliance that eCommerce has brought us. I urge Congress to take **immediate emergency action** and introduce a separate State Tax Sanctuary law allowing small businesses to seek refuge (injunctive relief) in the federal courts of their home state when states break the law and violate the constitutional rights of small business owners who are operating outside of that state’s sovereign territory.

Thank you for taking the time to consider my testimony on behalf of the small eCommerce businesses worldwide who only want a workable solution to sales tax, so they can be self-reliant business owners, and protection from states that engage in tyrannical tax enforcement tactics.

Sincerely,



Paul Rafelson  
Executive Director, Online Merchants Guild



ONLINE MERCHANTS GUILD  
OPEN LETTER TO STATES' ATTORNEYS GENERAL:

STOP PURSUING ONLINE "MARKETPLACE" MERCHANTS FOR PRICE GOUGING  
 AND  
 WITHDRAW ALL SUBPOENAS, DEMANDS, OR OTHER INQUIRIES

My name is Paul Rafelson, and I am the Executive Director of The Online Merchants Guild. In addition to my role at The Online Merchants Guild, I am also an adjunct professor at Pace Law School in New York, where I teach a course on Constitutional Law (The Commerce Clause) and taxation. The Online Merchants Guild is a trade association that advocates for small eCommerce businesses, many of whom sell products in Amazon's store.

I am writing because it has come to our attention that a number of States' Attorneys have issued subpoenas, demand letters or inquiries requesting information from third-party merchants who supply goods to Amazon's national retail store; the very store that has disclosed merchant information to you, without prior warning. It also appears that Amazon may be assisting you in drafting the language of these subpoenas, demand letters and inquiries.

Please be advised that the subpoenas you are issuing pertain to laws that, when applied to Amazon's third-party merchants, are unconstitutional. However, even if the laws were constitutionally applicable to these merchants, these laws are being misapplied. Consumer price gouging laws protect the consumer, and it is the party that sells to the consumer that is accountable, not the supplier. Amazon's merchants are not retail stores operating in a mall, they don't have rights to solicit the customer and don't even receive the name and information of the customer, unless they direct ship, nor do they set their own return policies or make customer service decisions. In fact, if you took the time to compare how a shopping mall operates versus how Amazon operates, you'll see pretty quickly, that Amazon's claims that it's not a store and just a marketplace or mall are merely smoke and mirrors. Amazon's goal is to deflect your attention away from its wrong-doing, and to put the blame on your resident merchants, Amazon's scapegoats.

And while I understand that in some states Amazon has a way of getting away with things that no other large company would, with its promise of jobs or even a headquarters (or three), in their political efforts to placate to Amazon, I often find states don't consider how many small Amazon merchants live in their state. Therefore, I've provided a link to a map of sellers by state in the footnote, and just to highlight a few: 175,000 in California; 85,000 in New York; 75,000 in Florida; and 60,000 in Texas. Also, keep in mind that this map is a few years old, and



based on Amazon's marketplace growth over the last two years, the numbers are likely to be larger.<sup>2</sup>

Frankly, I am not surprised to see Amazon sell-out their merchants in an effort to save itself from liability for its price gouging, it's an all too common practice in other areas of the law. In fact, unless you're the South Carolina, Amazon is probably getting away with the biggest tax evasion scheme in US history, federal or state, and owes your state a substantial amount of back taxes, for sales taxes it didn't collect for the last few years. In fact, the tax evasion Amazon perpetuated in your state was based on the same excuse it's using now with price gouging, that it is just a "marketplace" platform and not a store.

This is the excuse that Amazon relied on when it was selling goods tax free in your state, while the local businesses in your state could not, and had to operate at a competitive disadvantage.<sup>3</sup> In some states, such as Florida (Amazon's second largest state in terms of customers) and Missouri, Amazon is still taking advantage of that loophole as it sells freely in those states by claiming it's a marketplace, while local businesses struggle to compete. Sadly, many of your tax department leaders are under enormous political pressure to let Amazon get away with exploiting your market while depriving your state of much needed revenue and leaving local business owners helpless because they just couldn't compete with Amazon's quasi "duty-free" treatment in your state. It certainly wasn't the law that stopped them, as you'll see that, Amazon is the store factually, by their own admission, and under the law.

And just like with price gouging, when states wanted to collect back taxes, not only had Amazon denied it was a store it, it also helped state tax authorities go after business owners in your state. Amazon provided them with your resident merchants' personal information, leaving your residents small business owners fending for themselves as the State of California (30,000 Amazon Jobs), Washington (Amazon's Home State) and Massachusetts, have been systematically persecuting the merchants in your state. These tax witch-hunts are not only unconstitutional, and in violation of state law, as California's own Treasurer and former Sales Tax Chief stated in a six page letter to the governor, they were also destructive, as California and others were claiming these sellers owed their life savings in back taxes, even though under their state law Amazon was the liable party. You can read the California Treasurer's eye-opening letter using the link in the footnote.<sup>4</sup>

This is what Amazon does, they distort the law to benefit themselves, and use their political influence to shift the blame on to their merchants. The tax witch hunt is still going on today, and many small business owners in your state that are suffering right now are even more helpless, because they cannot defend themselves in the complex multistate tax litigation reserved for the Fortune 500, like the Philadelphia Amazon merchant who received a \$1.5 million dollar tax assessment from California, for taxes that Amazon owed under the law, not the merchant, as reported in the Philadelphia Inquirer.<sup>5</sup> Meanwhile, Amazon is taking advantage of this price gouging crisis by inciting States' Attorneys to adopt a fundamental assumption to Amazon's

<sup>2</sup> <https://www.marketplacepulse.com/amazon/top-states>

<sup>3</sup> <https://www.yourcentralvalley.com/news/fresno-business-files-lawsuit-claiming-amazon-owes-billions-in-back-taxes/>

<sup>4</sup> <https://onlinemerchantsguild.org/wp-content/uploads/2019/03/Letter-to-Governor-Newsom.pdf>

<sup>5</sup> <https://www.inquirer.com/business/california-sales-tax-amazon-seller-philadelphia-business-20191105.html>

“duty free” status, namely that it is not a seller and is just a mall, which only helps Amazon further their efforts to avoid liability for the tens of billions in back taxes it collectively owes the states, but likely won’t ever be held liable for because states seem to be ok with letting them off the hook (except South Carolina).

Now, the purpose of this letter isn’t to address Amazon’s sales tax avoidance via its marketplace, or the tens of billions it currently owes across the states. But it is important, highlight Amazon’s sordid history, as Amazon’s claims to be merely a passive marketplace has become its modus operandi for violating your tax laws, environmental laws, consumer safety laws as well as many other laws, including price gouging. And what is worse, states choose to let Amazon get away with it.

For example, when inventors and brand owners in your state are regularly ripped off by counterfeiters in China, Amazon makes it tedious if not impossible for these intellectual property rights owners to stop them, forcing these rights owners to play a never-ending game of whack-a-mole, while profiting handsomely on every illegal sale. In fact, it’s not uncommon for an intellectual property rights owner to report infringers to Amazon, only to have those products receive the Amazon’s choice badge.

Then of course there is the issue of dangerous products being sold to consumers in your state, such as products containing lead sold to children by Amazon merchants based in China. The Wall Street Journal did an in-depth investigation into this, but what action did you take to protect your residents?<sup>6</sup> What happens when those products hurt your residents, like Mrs. Oberdorf in Pennsylvania who lost eyesight in one eye after buying a product in Amazon’s store, only to have the so called “retailer” disappear, and be left with trying to bring a claim against Amazon, which of course claims they can’t be held liable because they aren’t the store.

Did Amazon act responsibly, Absolutely not! Once again, Amazon claims they’re not the store so they can’t be held accountable, and you are letting them get away with it, by refusing to take action against Amazon’s fiction. With over half of Amazon’s 4-5 million merchants based in China, and with no incentive for those merchants carry any liability insurance since it’s nearly impossible to sue them, your citizens are left with no path to recover damages when they are injured by the countless dangerous products Amazon sells. Their only option is to take on Amazon, who routinely denies liability for the harm caused the products they sold to your in-state consumers, claiming they are not the store. The fact that Amazon has over two million merchants operating in China with complete impunity is no coincidence. As long as you allow Amazon to get away with its “we’re just a mall or marketplace” defense, your citizens will continue to be victims of dangerous goods sold by sellers on Amazon.

However, there are scenarios where Amazon “wants to” be the store, so much so that they even said it was their store under oath, multiple times, to a House Subcommittee on Antitrust.<sup>7</sup> So, when it comes to antitrust law, Amazon wants to make it abundantly clear that it is their store, not a marketplace, which is what they did in their testimony to the House

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<sup>6</sup> <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990>

<sup>7</sup> <https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD038.pdf>

Subcommittee and in a 70-page written response to a Congressional inquiry issued by the House Subcommittee on Antitrust. But why would Amazon want to offer such an inconsistent statement?<sup>10</sup>

Perhaps it has to do with the fact that Amazon is being investigated for its unfair business practices, including how it uses information it receives from its merchants, the local business owners in your state, to compete against them.<sup>12</sup> For example: When a seller in your state comes up with a great product, Amazon is known to come in and push them out of the market with their “Amazon Basics” or other private-label brands. In addition, Amazon is known to manipulate the search results so that when a customer is searching for the merchants branded goods, Amazon’s brand comes up instead. For a neutral marketplace that could sound alarming. But not for a store. As a store, Amazon can argue that promoting Amazon Basics is no different than a store brand offering, such as: Kirkland at Costco, Great Value at Walmart, or Method at Target.

So, which one is it, is Amazon a store, or is it a mall? Well, if you ask Amazon the answer clearly depends on who’s asking. However, who’s asking is not how the law works. In the law, substantive fact carries over pretextual formalities used to avoid it. The substance in Amazon’s case says that the clear answer is that Amazon is a store. Therefore, if anyone can be held accountable for state price gouging, the law says it can only be Amazon.

## **I. Price Gouging Laws, When Applied to Amazon’s Third-Party Merchants, Are Unconstitutional**

A state price gouging law cannot be applied to merchants whose goods are sold by online websites like Amazon, because the merchant cannot control the price of a commodity on a state by state basis, only Amazon can. When a state law seeks to restrict a merchant’s ability to sell goods on a national platform, but those merchants lack the ability to direct their activity towards or away from a particular state, as they are simply placing goods into the stream of commerce, that law has the effect of regulating extraterritorial commerce. Therefore these laws as applied to Amazon’s merchants, is in violation of the commerce clause.

**For example:** If Florida issues a state of emergency during a hurricane and institutes its price gouging law, constitutionally, that law could only be applied to local business, stores, that sell intrastate. When Florida seeks to apply that law to merchants who sell in interstate commerce, via national eCommerce web stores such as Amazon, it creates an undue burden on interstate commerce, because the law is restricting the ability of that seller to engage in transactions in other states, as the seller doesn’t have the ability to choose what markets to sell to, nor do they have the ability to set a price based on each state’s law. Only Amazon can do that.

In other words, while a hammer selling for \$20.00 in a Florida hardware store might be considered price gouging during a state of emergency, under Florida law, if that same hammer is offered for sale on Amazon, and available to be purchased by anyone in the US, it cannot be

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<sup>10</sup>*Id.*

<sup>12</sup> <https://www.cnbc.com/2018/10/02/amazon-is-testing-a-new-feature-that-promotes-its-private-label-brands-inside-a-competitors-product-listing.html>

subject to Florida's price gouging law, even in a state of emergency, just because there is a possibility that a Floridian might buy it, as this application of law restricts the sellers ability to sell into the 49 other states.

Since Amazon's merchants are not given the option by Amazon to price commodities on a state by state basis, only the ability to offer their goods nationally via Amazon's webstore, they cannot be held liable for violating a state's price gouging law, even if the merchant resides in the state. By attempting to apply state price gouging law to Amazon's merchants, you are regulating the price, supply and availability of goods extraterritorially, in violation of the commerce clause.

The principle factors of extraterritoriality are outlined by The United States Supreme Court in *Healy v. Beer Institute*<sup>13</sup>. The three factors established by the *Healy* Court are as follows:

1. A state statute may not regulate "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.
2. A statute that directly controls commerce occurring wholly outside the [legislating state's] boundaries ... is invalid regardless of whether the statute's extraterritorial reach was intended (emphasis mine).
3. In evaluating a statute's "practical effect," the Court considers "not only ... the consequences of the statute itself, but also ... how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if ... every state adopted similar legislation." This is because "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."<sup>14</sup>

In 2018, The Fourth Circuit Court of Appeals had addressed a similar issue involving a pharmaceutical price gouging law enacted in Maryland, noting that:

[T]he fundamental problem with the Act is that it "regulate[s] the price of [an] out-of-state transaction." The Act instructs prescription drug manufacturers that they are prohibited from charging an "unconscionable" price in the initial sale of a drug, which occurs outside Maryland's borders. Maryland cannot, even in an effort to protect its consumers from skyrocketing prescription drug costs, impose its preferences in this manner. The "practical effect" of the Act, much like the effect of the statutes struck down in *Brown-Forman* and *Healy*, is to specify the price at which goods may be sold beyond Maryland's borders (emphasis mine). *See Healy*, 491 U.S. at 336, 109 S.Ct. 2491 ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." (citing *Brown-Forman*, 476 U.S. at 579, 106 S.Ct. 2080)). The district court erred by failing to account for this impact<sup>15</sup>

<sup>13</sup> *Healy v. Beer Institute*, 491 U.S. 324 (1989).

<sup>14</sup> *Assoc. for Accessible Medicines v. Frosh*, 887 F.3d 664 (April 13, 2018), cert denied.

<sup>15</sup> *Id.*

Similarly, the practical effect of the state price gouging laws when applied to Amazon sellers, is to limit the price which goods may be sold, beyond the state's borders.

However, that does not mean that state price gouging laws can't be applied to Amazon. Certainly, Amazon did have the power to limit price increases by category of goods (e.g. N95 masks or Hand Sanitizer), and block attempts to set prices above a certain average price for a state that has declared a state of emergency. And, because Amazon's buy box algorithm is partial to the location of goods relative to the location of the consumer, we know Amazon was also able to limit the available prices of a commodity, on a state by state basis. This means that if a state declared a state of emergency Amazon could have rejected the ability to offer that commodity at a price above a trailing average price (e.g. 30,60,90 days), so that the products would not be sold at those prices to consumers in your state.

Therefore, based on a longstanding principle of constitutional law, the commerce clause, Amazon merchants cannot be subject to state price gouging laws for goods sold via Amazon's store, as such application has the effect of regulating extraterritorial commerce when applied to Amazon's third-party merchant suppliers.

## **II. Only Amazon Can Be Liable for Price Gouging Under State Law**

In addition to the constitutional barrier, the price gouging laws have another defect when applied to Amazon's merchants, and that's the fact that the merchants residing in your state are not retail sellers; they are not the store. Amazon is the store, the merchants are the suppliers of Amazon's store.

When consumers buy products supplied by the merchant, the customer is Amazon's customer. Amazon's Business Solutions Agreement expressly forbids its third-party merchants from soliciting their customers. Customers check out via Amazon's shopping cart (online equivalent of a cash register), regardless of whether the goods are offered by Amazon, by its merchants or if its a mix of the two in the same shopping cart transaction.

Additionally, as an Amazon merchant, it is Amazon that sets the return policy, handles all customer service disputes (almost always siding with the buyer), sets pricing policies, suspends selling activities, charges the consumers credit card (Amazon.com), withholds funds for period of time after goods were delivered. Even the emails Amazon sends to its customers for products supplied by third-party merchants say thank you for shopping with Amazon, with no mention of the merchant. Most importantly, Amazon is the sole party in privity of contract with its customer, and their business services agreement specifically states that there is no agency relationship between Amazon and its third-party merchants.

This is quite the opposite of how an actual mall works, where stores are free to encourage their customers to transact outside of the mall (e.g. Skip the trip to the mall: Shop online next time and save 10%). Similarly, malls don't dictate the terms of each sale of their independent retailers, they do not set the return policy, and they do not make customer services decisions. In other words, if a person is upset about their iPhone warranty, they don't go to the Mall of

America's customer service desk with the expectation that the Mall of America will force The Apple Store to give that customer their money back. With Amazon it's quite the opposite, because Amazon is a store, not a mall.

### **A. Amazon's Antitrust Admissions Under Oath: It's Our Store**

If you are still not convinced that Amazon is the store, perhaps you should refer to Amazon's recent statements to the House Antitrust Committee, which are deemed to be made under penalty of perjury. For example, when Amazon was asked by Committee Member Cicilline to "[D]escribe how Amazon responds when it discovers that a product sold by a Marketplace merchant is being sold at a lower price on a non-Amazon website," Amazon responded as follows:

Customers come to Amazon for a vast selection of products with great prices and convenient delivery. If customers are disappointed in the offerings at Amazon, they will quickly turn to other stores to find the best selection, prices, and convenience. To maintain trust with customers that they will find low prices in the Amazon store, Amazon sets the prices on its first party sales to match competitors across all channels of retail. For sales by third parties, who are responsible for setting their own prices in the Amazon store, **Amazon may** suggest that a seller to lower its price in its store, offer an Amazon-funded discount on the product, or **choose not to feature higher-priced offers on a product's detail page**.<sup>17</sup>

So, not only does Amazon makes it clear in their near 70-page statement to the committee, and under penalty of perjury, that it is, in fact, Amazon's store, Amazon also admits that it has the ability to block prices, if they deem them to be too high. These pricing error notifications Amazon is referring to are a regular occurrence on Amazon, and have even led to a class action lawsuit for price fixing. This is because Amazon regularly suspends its sellers' ability to sell a product at a certain price if Amazon's scanner software discovered that the same product was offered in another marketplace, such as eBay, at a lower price.<sup>18</sup>

### **B. Amazon Retains Ultimate Control of the Price Ceiling and Price Floor**

Amazon has the final say when it comes to the prices that are set in its store. Sellers suggest a price, just as manufacturers suggest prices, but Amazon, like any other retail store has the ultimate right to decide what price goods can sell for in its store. But by baking in a little ambiguity into how goods are priced, by not telling sellers what an acceptable price is and leaving them to guess, while retaining the right to reject a price, Amazon can claim it didn't set the price, even though it accepted it, in order to weasel out of its obligations not to price gouge, which is exactly what Amazon did, and continues to do, during the Covid-19 crisis.

With the outbreak, Amazon saw it was in their financial interest to allow high priced, counterfeit or sub-standard goods to be sold to a panicking public, earn the higher fees and

<sup>17</sup><https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD038.pdf>

<sup>18</sup><https://www.law.com/2020/03/20/amazon-hit-with-antitrust-class-action/?slreturn=20200304185550>

commission and shift the blame to the merchants who supply them, the usual scapegoat. Many of these merchants would list their products using Amazon's "match lowest price option," thinking that how could it be price gouging if Amazon's offering them a low price button. What they did not know, was that Amazon was going to make their merchants think their price was legitimate by allowing the price to go live, collect their fees, only to later sell those merchants out to their own state officials.

### **C. Amazon Could Have Prevented Price Gouging by Blocking Automatic Reprice Software**

Many of the merchants use automatic repricing software that can change a merchant's price, automatically re-pricing a product as the market conditions change, via Amazon's application protocol interface ("API"). This means that a commodity originally listed for 10, can be automatically adjusted to 15 based on the software's algorithm, and unless the seller is paying attention, they may not even know. As the panic began to grow, so did the prices of various commodities, and the repricing tools appeared to get out of control. But, had Amazon simply turned off the feature in their API that allows these repricing tools to work, many of the high prices inflated via the repricing tools would have been mitigated. But why would Amazon want to do that when the repricing tools enable Amazon to earn higher commission and fees, and especially when Amazon can shift the blame onto its sellers.

This model of no accountability, just profits, has worked really well for Amazon. Even if states were successful at stopping every supposed "price-gouger" in the US, Amazon will still profit from its over two million merchants in other countries, especially China where many of the masks sold on Amazon right now are coming from. These merchants will continue to sell goods into the marketplace at any price and without any adherence to consumer or safety standards, with complete impunity. And that impunity will extend to Amazon as well, as long as States' Attorneys allow Amazon to get away with this distortion of the law; that they are merely a marketplace or a mall, not the store.

### **D. Courts (including SCOTUS) Are Aware of the Marketplace Fallacy**

As convenient as Amazon's split personality is for them, our legal system certainly operates under the principle of substance over form. In other words, just because someone says they aren't a duck, doesn't mean they aren't. In fact until Amazon, we were pretty sure it was just the opposite. Thankfully, courts, including The Supreme Court of the United States, have seen through this charade, meaning now is the time for the States' Attorneys to who are charged with enforcing the law to take action.

For example, a South Carolina tax court recently found that Amazon was liable for uncollected sales tax pertaining to its marketplace, despite Amazon claims that each of its 4-5 million sellers were individually responsible (over half of whom are not in the US). The Court made pretty quick work of Amazon's claims, holding that:<sup>19</sup>

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<sup>19</sup> *Amazon Services, LLC v. South Carolina Dept. of Revenue* 17-ALJ-17-0238-CC (September 10, 2019) Available at <https://src.bna.com/Leb>.



Customers meaningfully interact with Amazon Services to consummate the sales of Merchant products and no one else. Moreover, Amazon Services' self-characterization as a service provider could be employed by any brick-and-mortar retail store or consignment shop to evade tax responsibility as a seller. Either could claim that instead of being engaged in the business of selling tangible personal property, they just provide an array of discrete, non-taxable services, charging the same types of "service" fees as Amazon Services even though, in reality, they are selling products. Separating the actions of a retail seller such as Target into discrete, non-taxable services would be absurd, and so it is here.

Then there is the Supreme Court's ruling in *Apple v. Pepper* where the Court found a similar claim made by Apple, that its app store was merely a marketplace or mall (as opposed to a retail seller of the apps) to be nonsensical, holding that:<sup>20</sup>

Under Apple's rule a consumer could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale. Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct. As the Court of Appeals aptly stated, "the distinction between a markup and a commission is immaterial."

Frankly, I think the world is a little tired of Amazon's benefitting from constantly breaking the rules, and acting as if rules don't apply because they label their retail store a "marketplace."<sup>21</sup> By letting Amazon off the hook and shifting the blame to the small sellers in your state, you only encourage Amazon to continue with its reckless disregard for your laws, while using its sellers, your local business owners, as scapegoats, in order to get away with it. Amazon is not above the law, and it's time somebody let them know.

### **III. Amazon Should Have Acted Responsibly**

So, while you can blame the merchants, the in-state small business owners, the employers, the second-income earners known as retail arbitragers, who all year round sell things online found in stores for substantial multiples over what they paid for it, please understand that this is what they do. This is how they earn a living. This is how many of your residents pulled themselves out of poverty, got through hard times, support their families, all year round to earn

<sup>20</sup> *Apple v. Pepper* 587, U.S. \_\_\_\_; 139 S. Ct. 1514 (2019).

<sup>21</sup> See *Oberdorf v. Amazon, Inc.*, 930 F.3d 136 (2019); See also <https://www.inquirer.com/business/amazon-online-sale-product-liability-law-oberdorf--20191202.html>



income and become self-reliant. When a person buys a bathing suit on clearance for 90% off at a Boston retail store in November and resells it online for 1,500% profit to Amazon's customer in Florida, it's a perfectly legal activity, and it's pretty typical. Now, in this one instance, we see that you are seeking to punish these people because they didn't fully understand the implications of a pandemic in January or February of 2019, but who really did?

Is it fair to blame a single-mother in Tennessee for failing to understand the gravity of Covid-19 in January or February, when no state of emergency had been declared, and the idea that we would all be forced to shelter-in-place had not crossed most people's mind? I'm going to go out on a limb and say, no.

What about Amazon? Did Amazon understand the potential for higher prices due to Covid-19 in January and February? Did Amazon foresee that there was potential for price-panic in their store? Could Amazon have taken swift action early on to have prevented the panic buying from ensuing in their store? Absolutely! But did Amazon take any reasonable measures to stop it? No, they did not. They chose to allow the panic to ensue, profit from it, and pass the blame on to its merchants.

\$700 toilet paper in Amazon's store could have been avoided if Amazon had done the right thing by preventing it from ever happening, implementing price ceilings pro-actively on essential products, such as masks and sanitizer, based on trailing price averages. Their systems saw that prices were starting to move into panic mode, and once they allowed those prices to go live in their store, they became accountable for the further panic in the market that ensued. It was a cascading effect, Amazon could have prevented. Yes, Amazon could have done that, but why would they if they could profit from it instead, especially when they have the perfect scapegoat, their merchant business owners in your state that you are now punishing, while predictably falling for Amazon's alibi, it's not our store.

Let me put it another way, as a hypothetical: imagine walking into your local Walmart store and seeing a \$700 "rollback" on toilet-paper. You immediately speak to the manager, raising your concerns, and the manager responds: "We've adopted a new business model here at Walmart where our physical store acts as a marketplace for some of the items we sell. Now, we let the toilet paper suppliers tell us what price to sell toilet paper for, and we just earn a commission on every sale. Therefore, technically we're not the ones price gouging, and can't be held responsible."

Do you honestly think this type of excuse, our store is now a marketplace, would end well for Walmart in this hypothetical? I didn't think so. But, for some reason when it comes to Amazon, it does. It ends well every single time, whether its tax, avoiding responsibility for dangerous goods, counterfeits and now price gouging. Why? Because, whether you realize it or not, you let Amazon get away with it every time, and by letting them get away with it, you only enable them to take it further and further. It's time to put a stop to it.

Now, perhaps the reason it always ends well for Amazon is that you haven't taken the time to learn the facts (hopefully). Or, perhaps the political pressure of Amazon's promise of jobs has limited your ability to take adverse action against them (sad but quite common). Which

one is it for you? Is Washington going to continue to look the other way because Amazon is their home state? Is California going to blame the small business owners because Amazon has 20,000 jobs in the state, like they are currently doing when it comes to holding Amazon accountable for billions in back taxes, going after the out-of-state merchants instead?<sup>22</sup> The right answer here is to hold Amazon accountable, not to let them off the hook just so you don't hurt your state's chances at Amazon's HQ 3, 4 or 50.

Not only should you be taking action because Amazon allowed the transactions to go on, but for using the crisis as an opportunity to profit while misleading and entrapping the merchants in your state. Fooling your local business owners into doing Amazon's dirty work by telling them their prices were acceptable, even offering sellers a "match lowest price" option so they would think they were operating within the rules is deplorable behavior. Amazon knew that when the price gouging inquiries came Amazon would sell their merchants out; your citizens, your small business owners, your voters.

To Amazon the merchants are merely pawns, every one of which are disposable to them. Take this merchant from Redmond, WA featured in a recent New York Times Article. This merchant was once one of Amazon's most celebrated electronics brand-owner merchants, and now Amazon is using all their dirty tricks to push him out, and drive his customers to Amazon basics.<sup>23</sup> This is what ruthless Amazon thinks of your small business owners, and this is what they do to them time and time again, so is it any surprise that they were entrapping your local businesses to do Amazon's dirty work, while Amazon earned its commission?

Let me repeat that, Amazon earned between 15% to 30% commission (again what the Supreme Court says is synonymous with a markup in the Apple case) on every sale of abnormally high priced commodities sold to your residents, more profit than most of the merchants actually made, especially those who had to pay for shipping the goods. Yet, Amazon receives none of the accountability. This is Amazon's fault, Amazon could have prevented it. But they chose not to, because they had the perfect scapegoat, your constituent residents and business owners.

#### **IV. Withdraw Your Subpoenas**

Enough is enough, don't put your merchants through more misery than they have already been through. Message received, you have scared the heck out of our merchants to the point where they are afraid to sell travel pillows in this environment, because they think they could get accused of price gouging. But this has to end now, because your message is having an unconstitutional chilling effect, that is restricting their ability to engage in interstate commerce.

Now is the time for Amazon to be taught a lesson. From the merchants' perspective, this is long overdue, and would be a nice change after decades of watching Amazon act as if they are above the law after robbing the states of tens of billions of tax revenue, allowing dangerous

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<sup>22</sup> <https://www.forbes.com/sites/kirimasters/2019/08/08/california-lawsuit-says-amazon-should-pay-billions-in-back-taxes/#613be5eb729a>

<sup>23</sup> <https://www.nytimes.com/2019/12/19/technology/amazon-sellers.html>

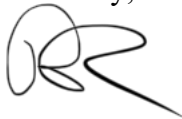
products to harm consumers, profiting from counterfeits, and take advantage of your in state merchants, all the while hiding behind arbitration clauses in their adhesive agreements that prevent the merchants from having any meaningful recourse against them.

I have spent a lot of time over the last few years educating people on the realities of Amazon's marketplace, as it is very misunderstood. Most people, especially in government only hear Amazon's explanation of how the marketplace works, so we are willing to accept that this is a misunderstanding, and we want to help you understand the realities of being an Amazon seller. Reach out to us at Online Merchants Guild, speak to the merchants in your community, learn the truth. We are here to help you in any way we can to make that happen.

But now that you have heard the real story. Now that you know the facts, not Amazon's fairytale, we expect you to do the right thing and withdraw every subpoena. However, if this continues, if our merchants continue to be harassed, based on unconstitutional and unconscionable legal theories, we are prepared to take action which may include filing for a temporary restraining order in federal court (in light of the fact that multiple states are pursuing these unconstitutional inquiries, civil and criminal). We are also prepared to seek damages under 42 USC 1983, as the Supreme Court has recognized that damages for commerce clause violations are recoverable in civil rights cases.<sup>24</sup>

But, our hope is that this won't be necessary. Our hope is that you will do the right thing: Withdraw the subpoenas; revisit your facts; stop taking Amazon's side and stand up for your small businesses and residents FOR ONCE! Stop acting as Amazon's enforcer, facilitating Amazon's efforts to turn your constituents into Amazon scapegoats, while Amazon profited in violation of your state's price-gouging laws.

Sincerely,

A handwritten signature in black ink, appearing to read 'PR' with a stylized flourish extending to the right.

Paul Rafelson  
Executive Director  
Online Merchants Guild  
[paul@onlinemerchantsguild.org](mailto:paul@onlinemerchantsguild.org)

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<sup>24</sup> *Dennis v. Higgins* 498 U.S. 439 (1991).