

SUPREME COURT OF LOUISIANA

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DOCKET NO. 2019-C-263

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NEWELL NORMAND, SHERIFF & EX-OFFICIO TAX COLLECTOR  
FOR THE PARISH OF JEFFERSON,  
Respondent

VERSUS

WAL-MART.COM USA, LLC,  
Applicant

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CIVIL ACTION

---

ON APPLICATION FOR WRIT OF CERTIORARI FROM  
THE COURT OF APPEAL, FIFTH CIRCUIT  
DOCKET NO. 18-CA-211

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*,  
RETAIL LITIGATION CENTER, INC.,  
NATIONAL RETAIL FEDERATION, AND  
LOUISIANA RETAILERS ASSOCIATION  
IN SUPPORT OF WAL-MART.COM USA, LLC'S ORIGINAL BRIEF

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Respectfully Submitted,

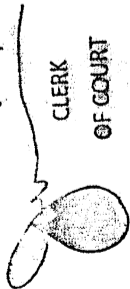
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Retail Litigation Center, Inc.,  
National Retail Federation, and  
Louisiana Retailers Association*

SUPREME COURT  
OF LOUISIANA

2019 JUN 20 PM 3 33

CLERK  
OF COURT



**MAY IT PLEASE THE COURT:**

The Retail Litigation Center (“RLC”), National Retail Federation (“NRF”), and Louisiana Retailers Association (“LRA”) (collectively, “*Amici*”) respectfully move under Rule VII, Section 12 of the Rules of the Louisiana Supreme Court for leave to file their brief as *amicus curiae* in support of the Original Brief (the “Original Brief”) filed by Wal-Mart.com USA, LLC (“Walmart.com”) to address the ruling of the Court of Appeal, Fifth Circuit (the “Fifth Circuit”) in *Normand v. Wal-Mart.com USA, LLC*, 18-211 (La. App. 5 Cir. 12/27/18) (“*Wal-Mart.com*”). In support of their Motion, *Amici* represent the following:

1.

The RLC is a public policy organization dedicated to representing the retail industry in the judiciary. The RLC counts as its members many of the country’s largest and most innovative retailers, across a breadth of industries. These member retailers employ millions of workers in the United States and account for tens of billions of dollars in annual sales. The RLC seeks to present courts with the retail industry’s perspective on legal issues that impact its members and to provide insight into the potential consequences of particular outcomes in pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* before state supreme courts, federal district courts, federal courts of appeal, and the U.S. Supreme Court in nearly 150 cases.

2.

The NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing \$2.6 trillion to annual GDP. The NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues, including the specific issue of how to interpret state and local tax statutes with regard to online marketplaces.

3.

The LRA is a statewide organization of retailers that represents the legislative, legal, regulatory and political interests of the Louisiana retail industry at the local, state and federal levels. The LRA has a keen interest in matters, such as the one currently before this Court, which will affect retailers in the state of Louisiana, many of whom are members of LRA.

4.

The holding of the Fifth Circuit, specifically that a third-party online marketplace is considered a “dealer” under Louisiana sales tax law and responsible for the collection and remittance of sales taxes arising from the sales by separate third-party retailers, directly affects the interests of the members of *Amici*.

5.

If the decision of the Fifth Circuit is not overturned, there is serious potential for inconsistency and lack of uniformity among local collectors and between local collectors and the Louisiana Department of Revenue, which can create massive confusion and unnecessary compliance burdens for online marketplaces trying to comply with Louisiana’s combined state and local sales tax regimes. Any imposition of a sales tax collection and reporting requirement upon online marketplaces should be done in a way that is clear and consistent – and prospective in nature – so as to avoid adding even more confusion, complexity, and undue burdens to Louisiana’s already highly complex and burdensome state and local sales tax systems.

6.

*Amici* are concerned about the retroactivity, uncertainty, and lack of uniformity in the taxing of online marketplaces and separate e-commerce retailers in Louisiana that will follow if the Fifth Circuit’s decision in *Wal-Mart.com* is not reversed.

7.

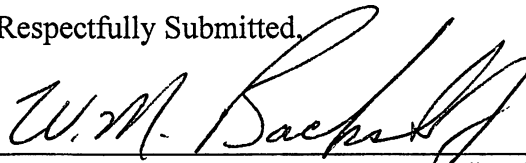
This resulting confusion, added complexity and burden, and negative financial impact from expected litigation and audit costs, both prospectively and retroactively, would have a clear adverse effect on the members of *Amici*.

8.

Thus, *Amici* have a substantial, legitimate interest in this matter. *Amici* have read the briefs of the parties and believe that the additional information and arguments raised in *Amici’s* brief as *amicus curiae* in support of Walmart.com’s Original Brief will be helpful to the court in deciding this matter. In addition, *Amici* represent that their brief addresses matters of fact or law that might otherwise escape the Court’s attention and that they have a substantial, legitimate interest in the outcome of the case and they believe their interest will not be adequately protected by those already party to the *Wal-Mart.com* case.

WHEREFORE, *Amici*, respectfully request leave of Court to file the attached Brief as *amici curiae* in support of Walmart.com's Original Brief before this Honorable Court.

Respectfully Submitted,



---

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*Attorneys for Amici,  
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Louisiana Retailers Association*

**VERIFICATION AND CERTIFICATE OF SERVICE**

BEFORE ME, the undersigned Notary Public, duly authorized and commissioned in and for the Parish of Orleans, State of Louisiana, personally came and appeared WILLIAM M. BACKSTROM, JR. who after being duly sworn did depose and state that:

I hereby certify that the allegations set forth in the foregoing Motion for Leave, and corresponding Brief of Retail Litigation Center, Inc., National Retail Federation, and Louisiana Retailers Association as *Amici Curiae* in Support of the Original Brief of Wal-Mart.com USA LLC is true and correct to the best of my knowledge.

I hereby certify that a copy of the foregoing Motion for Leave, and corresponding Brief of Retail Litigation Center, Inc., National Retail Federation, and Louisiana Retailers Association as *Amici Curiae* in Support of the Original Brief of Wal-Mart.com USA LLC was served on this 20th day of June, 2019, via U.S. Mail, postage prepaid, on the following:

Via U.S. Mail

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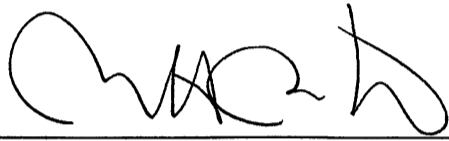
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*Attorneys for Amicus Curiae, Council on State Taxation*

  
WILLIAM M. BACKSTROM, JR.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 20<sup>th</sup> day of June,  
2019.



NOTARY PUBLIC

**MATTHEW A. MANTLE**  
**ATTORNEY NOTARY**  
State of Louisiana  
My Commission Is Issued For Life  
La Bar Roll No. 32570  
Notary ID No. 91299

SUPREME COURT OF LOUISIANA

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DOCKET NO. 2019-C-263

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NEWELL NORMAND, SHERIFF & EX-OFFICIO TAX COLLECTOR  
FOR THE PARISH OF JEFFERSON,  
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VERSUS

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Applicant

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CIVIL ACTION

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ON APPLICATION FOR WRIT OF CERTIORARI FROM  
THE COURT OF APPEAL, FIFTH CIRCUIT  
DOCKET NO. 18-CA-211

---

ORDER

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Considering the Motion for Leave to File Brief of Retail Litigation Center, Inc., National Retail Federation, and Louisiana Retailers Association as *Amici Curiae* in Support of Wal-Mart.com USA LLC's Original Brief:

**IT IS ORDERED** that *Amici* be and are hereby **GRANTED** leave to file the attached brief as *amici curiae*.

**THUS DONE AND SIGNED** this \_\_\_\_ day of June, 2019, in New Orleans, Louisiana.

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JUSTICE, LOUISIANA SUPREME COURT



SUPREME COURT OF LOUISIANA

---

DOCKET NO. 2019-C-263

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NEWELL NORMAND, SHERIFF & *EX-OFFICIO* TAX COLLECTOR  
FOR THE PARISH OF JEFFERSON,  
Respondent

VERSUS

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THE COURT OF APPEAL, FIFTH CIRCUIT  
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BRIEF OF  
RETAIL LITIGATION CENTER, INC.,  
NATIONAL RETAIL FEDERATION, AND  
LOUISIANA RETAILERS ASSOCIATION  
AS *AMICI CURIAE* IN SUPPORT OF THE ORIGINAL BRIEF  
OF WAL-MART.COM USA, LLC, APPLICANT

---

Respectfully Submitted,

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National Retail Federation, and  
Louisiana Retailers Association*

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## **MAY IT PLEASE THE COURT:**

The Retail Litigation Center (“RLC”), National Retail Federation (“NRF”), and Louisiana Retailers Association (“LRA”) (collectively, “*Amici*”), upon motion and notice to the parties, conditionally file this brief as *amici curiae* in support of Applicant, Wal-Mart.com USA, LLC (“Applicant” or “Wal-mart.com”), seeking a reversal of the decision of the Court of Appeal, Fifth Circuit (the “Fifth Circuit”) in *Normand v. Wal-Mart.com USA, LLC*, 18-211 (La. App. 5 Cir. 12/27/18) (“*Wal-Mart.com*”). As organizations dedicated to representing the retail industry, *Amici* have a substantial, legitimate interest in this case because their members will be adversely affected if this Court does not reverse the Fifth Circuit’s decision in *Wal-Mart.com*. In addition, *Amici* represent that this brief addresses matters of fact or law that might otherwise escape the Court’s attention and the interests of their members will not be adequately protected by those already party to the *Wal-Mart.com* case.

### **I. IDENTITY AND INTEREST OF AMICI**

#### **A. Retail Litigation Center.**

The RLC is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC counts as its members many of the country’s largest and most innovative retailers, across a breadth of industries. These member retailers employ millions of workers in the United States and account for tens of billions of dollars in annual sales. The RLC seeks to present courts with the retail industry’s perspective on legal issues that impact its members and to provide insight into the potential consequences of particular outcomes in pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* before state supreme courts, federal district courts, federal courts of appeal, and the U.S. Supreme Court in nearly 150 cases.

#### **B. National Retail Federation.**

The NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs — approximately 42 million American workers — and contributing \$2.6 trillion to the annual GDP. The NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues,

including the specific issue of how to interpret state and local tax statutes with regard to online marketplaces.

**C. Louisiana Retailers Association.**

The LRA is a statewide organization of retailers that represents the legislative, legal, regulatory, and political interests of the Louisiana retail industry at the local, state, and federal levels. The LRA has a keen interest in the outcome of this matter and its consequences, which will affect retailers in the State of Louisiana, many of whom are members of the LRA.

**II. INTRODUCTION AND SUMMARY OF ARGUMENT**

At issue in this case is whether a local sales tax collector can unilaterally and without prior notice of any kind expand a Louisiana sales tax law term (the statutory definition of “dealer”) and then apply the expanded definition retroactively to commercial activity (a third-party transaction facilitated by a marketplace tech platform facilitator) that occurred long before the local tax collector’s expanded interpretation. The outcome of this case could affect all retailers (large and small), including in-state brick and mortar stores, e-commerce retailers, and third-party online marketplaces, not only because of the expanded interpretation and retroactive application of the old definition of “dealer” in this instance, but also because it clears a path for all local tax collectors to change settled definitions whenever they wish, without notification to affected vendors, and on a retroactive basis. This Court should overturn the Fifth Circuit’s *Wal-Mart.com* decision for the five reasons summarized below.

First, the Jefferson Parish Sheriff’s expansion of the term “dealer” to apply retroactively to online *marketplace facilitators* of third-party sales transactions is inconsistent with the plain reading of the statute and legislative intent. Prior to the *Wal-Mart.com* decision, the Department and the 63 local sales tax collectors in Louisiana consistently applied the definition of “dealer” only to retail *sellers* that actually transferred title to and/or possession of a product to an end consumer for a stated price. The Jefferson Parish Sheriff, however, without prior notice of any kind, unilaterally decided to expand the definition of “dealer” to apply retroactively to third-party online marketplace facilitators’ tech platforms, which did not exist when the statutory definition at issue was enacted in 1990. Moreover, the Louisiana Legislature has chosen not to include online marketplace facilitators within the definition of “dealer” when subsequently amending that

definition to cover other business transactions. Thus, the actions of the Jefferson Parish Sheriff are a statutory overreach and should be prevented.

Second, the Fifth Circuit's decision is inconsistent with the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) ("*Wayfair*"), which affirmed that states have the authority to require all retailers – regardless of whether those retailers have a physical presence in the state – to collect and remit sales tax. *Wayfair* provides state legislatures a clear template for implementing new sales tax collection and reporting requirements on businesses such as online marketplace facilitators and other e-commerce retailers. The template provided by the Court sets forth criteria that, if enacted, will avoid the risk of discrimination against online marketplace facilitators and other e-commerce retailers and undue burden on interstate commerce caused by a complex sales tax system,<sup>1</sup> thus satisfying the protection afforded taxpayers by Article I, Sec. 8, Cl. 3 of the United States Constitution (the "Commerce Clause"). These criteria include simplification, uniformity, and prospective application. The Jefferson Parish Sheriff's retroactive expansion of "dealer" to third-party marketplace facilitators fails to meet any of the *Wayfair* criteria.

*Amici's* members have long argued for a level sales tax collection playing field as between traditional brick and mortar retailers and online sellers<sup>2</sup> and have been encouraged by recent efforts by the Louisiana Legislature working with the Louisiana Sales and Use Tax Commission for Remote Sellers (the "Remote Sellers Commission")<sup>3</sup> to develop proposals for the fair and uniform taxation of remote sellers and marketplace facilitators consistent with *Wayfair*. Such efforts should not be undermined by local power grabs that are protected by lower courts.

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<sup>1</sup> Louisiana is considered by experts to be one of the most complex and burdensome state and local sales tax systems in the United States. *See, e.g.*, Council on State Taxation (COST), "The Best and Worst of State Sales Tax Systems: COST Scorecard on Sales Tax Simplification, Uniformity & the Exemption of Business Inputs" (April 2018) (by Karl Frieden and Fred Nicely) (Louisiana earned an "F" score), available at: <https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/the-best-and-worst-of-state-sales-tax-systems-august-17-2018-final.pdf>; Tax Foundation, "2019 State Business Tax Climate Index" (2018) (Louisiana's sales tax systems were ranked 50<sup>th</sup>, dead last), available at: <https://taxfoundation.org/publications/state-business-tax-climate-index>; Tax Foundation, "Louisiana Legislature Partially Extends Sales Tax Hike, Fate of Online Sales Tax Still Uncertain" (July 12, 2018) (by Scott Drenkard and Ben Strachman), available at: <https://taxfoundation.org/louisiana-legislature-partially-extends-sales-tax-hike-fate-online-sales-tax-still-uncertain>; The Public Affairs Research Council of Louisiana, "Having it Both Ways on Sales Taxes," (June 27, 2018) ("In summary, if Louisiana had to meet the Supreme Court's implied standards for a streamlined and efficient sales tax system, it would surely fail."), available at: <http://parlouisiana.org/wp-content/uploads/2018/06/Having-it-Both-Ways-on-Sales-Taxes.pdf>.

<sup>2</sup> *See* Brief of Retail Litigation Center, Inc. as *Amicus Curiae* in Support of Petitioner, in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) available at <https://www.rila.org/enterprise/retailitigationcenter/Documents/E-Fairness%20Files/eFCertAmicus-RLC.pdf>.

<sup>3</sup> *See* La. R.S. 47:339 and 47:340.

Third, even assuming for the sake of argument that the Jefferson Parish Sheriff has the authority to unilaterally and retroactively redefine a long-standing definition of Louisiana sales tax law (which *Amici* dispute), the Jefferson Parish Sheriff still has not met its “duty of clarity.” The Sheriff’s newly expanded definition of “dealer” will require marketplace facilitators to act as “deputy tax collectors” for the Sheriff and collect and remit sales taxes to Jefferson Parish on third-party sales transactions. The “duty of clarity” is based on the fundamental concept of fairness and is intended to protect impacted deputy tax collectors by requiring that taxing authorities provide advance notice of precise, non-speculative obligations to collect and remit taxes.<sup>4</sup> Here, the Jefferson Parish Sheriff ignored its duty of clarity and fundamental principles of fairness and instead seeks to retroactively impose collection and remittance obligations, and the accompanying retroactive financial implications, on marketplace facilitators without issuing any guidance. This Court should reject the Jefferson Parish Sheriff’s efforts to bypass these critical protections afforded deputy tax collectors and reverse the Fifth Circuit’s decision.

Fourth, failure to overturn the Fifth’s Circuit decision will in essence open a “Pandora’s box.” Once one local tax authority is authorized to take unilateral and retroactive action to expand a tax statute, there is nothing to prevent other Louisiana local taxing jurisdictions from doing the same. The number of potential actions is endless. Such a result will promote inconsistency and lack of uniformity among Louisiana state and local sales tax systems, thereby multiplying the administrative and compliance burden on retailers and others who are operating under Louisiana’s complex state and local sales tax systems.

Fifth, while *Amici* agree that the proper approach to addressing taxation of e-commerce and marketplaces is *for the state* to adopt clear, comprehensive, uniform, and *prospective* legislation, as outlined in *Wayfair*, only this Court can take action to prevent irreparable harm to retailers resulting from retroactive tax assessments. Since Louisiana law<sup>5</sup> prevents the Louisiana Legislature from retroactively overruling judicial decisions, such as *Wal-Mart.com*, the Louisiana Legislature is powerless to remedy the situation created by the Fifth Circuit’s decision. Only this

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<sup>4</sup> See, e.g., *Central Illinois Public Service Co. v. U.S.*, 435 U.S. 21 (1978). The “duty of clarity” is especially important in cases such as this one where Wal-mart.com would be the Sheriff’s agent, or statutory “deputy tax collector,” for purposes of collecting and remitting applicable Jefferson Parish sales taxes. See La. R.S. 47:337.18(A)(5). The duty of clarity is discussed in Section III.D., *supra*.

<sup>5</sup> La. Const. Art. II, Sec. 2. See also, e.g., *Unwired Telecom Corp. v. Par. of Calcasieu*, 03-0732 (La. 01/19/05); 903 So. 2d 392 and *Mallard Bay Drilling, Inc. v. Kennedy*, 2004-1089 (La. 06/29/05); 914 So. 2d 533.



Court can restore the necessary certainty for taxpayers for prior periods. Then, the rest of the effort falls upon the Louisiana Legislature to clearly address sales tax collection obligations of marketplace facilitators on a prospective basis.

Each of these arguments is discussed in full below. Accordingly, we urge the Louisiana Supreme Court to reverse the Fifth Circuit's decision.

### III. ARGUMENT

#### A. **The Jefferson Parish Sheriff's Expansion of the Definition of "Dealer" is Inconsistent with the Plain Language of the Statute, as Well as the Long-Standing Interpretation of the Term by Louisiana Tax Collectors.**

Under Louisiana law, sales tax is imposed on a taxable "sale at retail." La. R.S. 47:302. A "sale at retail" is generally defined as any transaction by which title to or possession of tangible personal property is transferred for a consideration, whether paid in cash or otherwise, to a person for any purpose other than for resale. La. R.S. 47:301(10). The term "sale" is defined as any transfer of title or possession, or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration. La. R.S. 47:301(12). These definitions apply at both the state and local levels.

For Louisiana state and local sales tax purposes, the term "dealer" is defined in La. R.S. 47:301(4).<sup>6</sup> Subsection (l) of that provision defines "dealer" to include "[e]very person who engages in regular or systematic solicitation of a consumer market in the taxing jurisdiction by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system." This is the *only* definition that the Jefferson Parish Sheriff relies upon to assert that a statutory "dealer" should include a separate, third-party (non-seller) online marketplace facilitator.<sup>7</sup>

The definition of "dealer" in La. R.S. 47:301(4)(l) was added to the law by Acts 1990, Reg. Sess., No. 478, which took effect July 18, 1990. The original legislative intent of the term "dealer"

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<sup>6</sup> Pursuant to the authority granted under Article VI, Section 29 of the Louisiana Constitution, Jefferson Parish has adopted by reference the Uniform Local Sales Tax Code ("ULSTC") set forth in La. R.S. 47:337.1, *et seq.* (which is mandatorily imposed on all local sales tax jurisdictions) and the definitions set forth in La. R.S. 47:301. *See* La. R. S. 47:337.1, *et seq.*; La. R.S. 47:337.6(B) ("The words, terms, and phrases used in this Chapter [the ULSTC] shall have the same meaning ascribed to them as provided for in R.S. 47:301, unless the context clearly indicates a different meaning, except to the extent expressly limited in that Section."); Jefferson Parish Code of Ordinances, Sections 35-16 and 35-22 through 35-24.1.

<sup>7</sup> La. R.S. 47:301(4)(m), which was enacted by Acts 2018, Second Ex. Sess., No. 5, was not in effect during the years at issue in this matter.

did not cover marketplace facilitators' tech platforms, as these platforms did not exist at the time of enactment. In fact, the "dealer" definition in La. R.S. 47:301(4)(l) was enacted to expand the State's jurisdictional reach to true out-of-state *sellers* that *sold* goods into Louisiana through catalogs and other mailings. Since 1990, the Legislature has enacted amendments to the term "dealer" in La. R.S. 47:301(4) in order to cover some new commercial activities that did not exist when the Louisiana state and local sales tax laws were originally enacted. For example, to cover online services that link residential property owners with potential short-term renters, the Louisiana Legislature amended La. R.S. 47:301(4)(f) to expand the definition of "dealer" to include any person engaged in collecting the amount required to be paid by a transient guest as a condition of occupancy at a residential location.<sup>8</sup> To date, the Legislature has not enacted any legislation (either by amending the existing statutory term "dealer" or new legislation) that covers third-party sales on marketplace facilitators' platforms.

Consistent with long-held statutory interpretation, neither the Department nor any of the 62 other local tax collecting authorities has ever sought to require any marketplace facilitator to register, collect, and remit Louisiana local sales taxes on marketplace transactions involving separate, third-party online sellers. In fact, recognizing that Louisiana's state and local sales tax laws do *not* cover the relatively new concept of online marketplace facilitators, various stakeholders, including the Department and the Remote Sellers Commission, are working together to develop appropriate definitions and provisions for online marketplace transactions, as well as procedures for the registration, collection, remittance, and administration of state and local sales taxes related to online marketplace transactions.<sup>9</sup>

*Amici* urge the Court to recognize the plain meaning of the statute and to prevent an individual taxing jurisdiction from expanding local (and state) sales tax laws unilaterally, retroactively, and without prior notice. This Court should do so by overturning the Fifth Circuit's decision in *Wal-mart.com*.

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<sup>8</sup> Acts 2016, First Ex. Sess., No. 17.

<sup>9</sup> See, section B, *supra*, for more detailed discussion of recent efforts by the Remote Sellers Commission and Louisiana Legislature to address the issue of collection of state and local sales taxes by remote sellers and marketplace facilitators.

**B. The Fifth Circuit’s Decision Conflicts with the U.S. Supreme Court’s Decision in *Wayfair* and Undermines Louisiana’s Ongoing Efforts to Implement Legislation Consistent with *Wayfair*.**

This Court should be guided by the U.S. Supreme Court’s recent decision in *Wayfair* and recognize that state legislatures – not local taxing authorities – are the appropriate mechanism for developing uniform, prospective state and local sales tax laws to regulate online marketplaces and e-commerce retailers. The U.S. Supreme Court’s decision in *Wayfair* leveled the playing field for brick-and-mortar retailers and provides a clear template for states to require both in-state and remote online retailers to collect and remit state and local sales taxes from in-state customers.

The Court in *Wayfair* expressly overturned prior precedents (*Quill Corp. v. North Dakota*<sup>10</sup> and *National Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*<sup>11</sup>) and ruled that a retailer’s “physical presence” in the state alone is no longer the proper touchstone for assessing whether a state has the constitutional authority to require a retailer to collect and remit the sales tax that is owed to the state by its residents on a transaction. In eschewing “physical presence” as the gatekeeper nexus test, the Court specifically reminded state and local sales tax collectors that other Commerce Clause principles still apply, and that those principles may invalidate a state or local sales tax scheme if such scheme is discriminatory or imposes an undue burden on interstate commerce.

With a specific concern for small businesses, the Court recognized several features of a tax system that would comply with the Commerce Clause when the Court reviewed the relevant South Dakota law:

First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act insures that no obligation to remit the sales tax may be applied retroactively. [Citation Omitted] Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: it requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State.<sup>12</sup>

The Court’s road map provides clear guidance for designing state and local sales tax systems that avoid trampling on established Commerce Clause principles. In keeping with the Court’s

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<sup>10</sup> *Quill Corp. v. North Dakota*, 504 U. S. 298, 112 S. Ct. 1904 (1992).

<sup>11</sup> *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753, 87 S. Ct. 1389 (1967).

<sup>12</sup> *Wayfair* at p. 23, 138 S. Ct. at 2099.

guidance, new laws for regulating e-commerce retailers and separate online marketplaces should have the following characteristics, among others:

- Clear statutory thresholds and *de minimis* provisions;
- Prospective application; and
- Standardization, uniformity, and simplicity in administration.

The Fifth Circuit’s decision to uphold the action of the Jefferson Parish Sheriff in this case fails to meet any of the criteria articulated in *Wayfair*. Here, the Jefferson Parish Sheriff seeks to retroactively apply its unannounced, unilaterally expanded definition of “dealer” with no statutory thresholds or *de minimis* standards. In addition, instead of promoting standardization, uniformity, and simplicity in tax administration, this action, if upheld, will create uncertainty and chaos for impacted parties by allowing Louisiana’s 63 local tax collectors unfettered autonomy to develop unique interpretations of state tax law provisions and potentially impose different periods of applicability. Clearly, this chaotic situation would be a far cry from the sales tax system described by the U.S. Supreme Court in *Wayfair* and likely will spawn further litigation in Louisiana.

A more rational approach taken by other states is for the legislature to review current state tax laws and enact legislative amendments, where necessary, to require online retailers and separate online marketplaces to collect and remit state and local sales taxes on a prospective basis. To date, 40 states and the District of Columbia have adopted uniform legislation or regulations consistent with the U.S. Supreme Court’s guidance that prospectively requires remote sellers to collect and remit sales taxes.<sup>13</sup> Of those jurisdictions, 32 have also adopted similar legislation that applies to remote online marketplaces. Many more, including Louisiana, are considering such legislation. Louisiana is making efforts, primarily through the work of the Remote Sellers Commission, to develop proposals for the fair and consistent taxation of remote sellers and marketplace facilitators in line with the standards articulated in *Wayfair*.<sup>14</sup> Some of the Remote

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<sup>13</sup> See, e.g., Alabama, 2018 HB 470; Arizona, 2019 HB 2757; Arkansas, 2019 S 576; California, 2019 A 147; Colorado, 2019 H 1240; Connecticut, 2018 SB 417; DC, 2018 22-914; Georgia 2017-18 HB 61; Hawaii, 2018 Act 41; Idaho, 2019 HB 259; Illinois, 2018 HB 3342; Indiana, 2017 IC 6-2.5-2-1(c); Iowa, 2019 H 779; Kentucky, 2019 HB 354; Louisiana, 2018 Act 5; Maine, 2017 Title 36 M.R.S.A. 1951-B; Maryland, 2019 HB 1301/SB728; Michigan, 2015 SB 658/659; Minnesota, 2019 H 5; Mississippi Title 35, Part IV, Subpart 3, Chapter 09; Nebraska, 2019 L 284; Nevada, 2018 R189-18; New Jersey, 2018 A4496; New Mexico, 2019 HB 6; New York, 2019 AB 2009/SB 1509; North Carolina, 2019 S 56; North Dakota, 2019 SB 2338; Oklahoma, 2018 HB 1019XX; Pennsylvania, 2017 Act 43; Rhode Island, 2017 H 5175A; South Carolina, 2019 SB 2014; South Dakota, 2018 SB2; Texas, 2019 H 1525; Tennessee, 2019 H 667; Utah, 2019 SB 168; Vermont, 2016 Act 134; Virginia, 2019 H 1722; Washington, 2017 HB 2163; West Virginia, 2019 H 2813; Wisconsin, 2017 Act 368; Wyoming, 2019 HB 69.

<sup>14</sup> See, e.g., RSIB 18-002 (Dec. 18, 2018).

Sellers Commission’s work was submitted to the Louisiana Legislature for consideration in the 2019 Regular Session.<sup>15</sup> While Act No. 360 makes some important, but minor, changes to various aspects of Louisiana sales tax law related to e-commerce transactions, the new law does not address the specific issue of whether marketplace facilitators will be required to collect and remit sales taxes on third-party transactions. This issue will continue to be the subject of further work by the Remote Sellers Commission over the next few months and the Louisiana Legislature in future legislative sessions. That work should be unencumbered by the Fifth Circuit’s decision in *Walmart.com*.<sup>16</sup>

**C. Even if the Jefferson Parish Sheriff Is Allowed to Impose an Expanded Interpretation of Dealer for Sales Tax Purposes, It Failed To Meet Its “Duty of Clarity” to Walmart.com in Its Role as Deputy Tax Collector Regarding Sales Tax Collection and Remittance.**

If not reversed, the *Walmart.com* decision would allow the Jefferson Parish Sheriff to impose an expanded interpretation of “dealer” on a retroactive basis without having provided any notice of such interpretation to Walmart.com. This action by the Sheriff would result in the collection of additional taxes and related amounts from Wal-Mart.com in its capacity as a statutorily-mandated collection agent for the Sheriff with respect to sales taxes.<sup>17</sup> The Jefferson Parish Sheriff, as well as other local sales tax collectors, could take the same position with respect to other similarly-situated marketplace facilitators.

In situations where a tax collector seeks to impose new or expanded collection and remittance obligations on a business in its capacity as a “deputy tax collector,” the U.S. Supreme Court, as well as other courts, have adopted a principle of fundamental fairness holding that such tax collectors owe a “duty of clarity” to the tax collector’s “deputy tax collectors.” This duty includes providing advance and clear notice of new or expanded tax collection and remittance

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<sup>15</sup> See H.B. 524, Reg. Sess. 2019 (original) and La. H.B. 547, Reg. Sess. 2019 (original). House Bill No. 524 died in the House Ways and Means Committee, but H.B. 547 was amended and enacted into law as Act No. 360, Reg. Sess. 2019. During the deliberative legislative process, however, specific language addressing marketplace facilitators was amended out of Act No. 360.

<sup>16</sup> Important public policy issues like the issue of expansion of tax obligations fall within the jurisdiction of the state legislature, not the courts. See, e.g., *Thomas v. Bridges*, 2013-1855 (La., 2014); 144 So. 3d 1001, 1003 (“For reasons discussed below, we find this issue involves policy considerations that should be addressed by the Louisiana Legislature rather than resolved by this Court. Our function is to merely interpret the laws passed by the legislature, not to make laws.”).

<sup>17</sup> See La. R.S. 47:337.18(A)(5) (“For the purpose of collecting and remitting to the taxing authority the tax imposed by the local ordinance, the dealer is hereby declared to be the agent of the taxing authority.”).

obligations to the tax collector's deputy tax collectors. In the absence of such notice, the deputy tax collectors cannot be held responsible for retroactive liabilities for taxes and related amounts.

For example, in *Central Illinois Public Service Company v. United States*, 435 U.S. 21 (1978) (“*Central Illinois*”), the U.S. Supreme Court considered whether the U.S. Internal Revenue Service (“IRS”) had the authority to retroactively impose a new interpretation of federal income tax withholding obligations to require an employer/taxpayer to withhold taxes related to employees’ lunch reimbursements. Historically, employees’ lunch reimbursements had been considered to be income and not wages subject to withholding obligations. However, the IRS argued that income and wages were essentially the same and that an employer’s withholding obligation is implicated any time an employee receives income. The Court disagreed and held in favor of the employer/taxpayer. In so holding, the Court emphasized the distinction between primary and secondary liability for a tax, stating: “Because the employer is in a secondary position as to liability for any tax of the employee, it is a matter of obvious concern that, absent further specific congressional action, the employer’s obligation to withhold be precise and not speculative.” 435 U.S. at 31. (Emphasis added).

Noting the IRS’s lack of notice to employers regarding their withholding obligations with respect to the reimbursements at issue, the Court held that “[n]o employer, in viewing the regulations in 1963, could reasonably suspect that a withholding obligation existed,” and “it is hardly reasonable to require an employer to fill the gap on its own account.” *Id.* at 32. The Court concluded its opinion as follows:

This is not to say, of course, that the Congress may not subject lunch reimbursements to withholding if in its wisdom it chooses to do so by expanding the definition of wages for withholding. It has not done so as yet. And we cannot justify the Government’s attempt to do so by judicial determination.

*Id.*

The duty of clarity owed by tax collectors to their deputy tax collectors, as articulated in *Central Illinois*, has been extended to collection and remittance responsibilities for taxes other than employment withholding taxes. See e.g., *Bombardier Aero. Corp. v. U.S.*, 831 F.2d 268, 279-283 (5<sup>th</sup> Cir. 2016) (court adopted the concept of “duty of clarity” to avoid confusion regarding a deputy

tax collector's responsibilities to collect and remit federal transportation excise taxes)<sup>18</sup> and *NetJets Large Aircraft, Inc. v. U.S.*, 2015 U.S. Dist. LEXIS 155354 (S.D. Ohio 2015) (court similarly applied the "duty of clarity" to require the IRS to provide advance notice clearly defined federal transportation excise tax collect and remit obligation).

Consistent with the concept of fundamental fairness and duty of clarity outlined in the above cases, even if this Court does not reverse the *Walmart.com* decision, the Jefferson Parish Sheriff cannot hold a business, such as Wal-mart.com, secondarily liable for failure to collect applicable Jefferson Parish sales taxes *unless* the Sheriff provided the business with advance notice and "precise and not speculative" guidance that the business had an obligation to collect the taxes. The Jefferson Parish Sheriff has not met this test.

There is no dispute that the Jefferson Parish Sheriff did not provide Wal-mart.com with any notice of the Sheriff's unilateral, retroactive expansion of the definition of "dealer" in La. R.S. 47:301(4)(1) to include marketplace facilitators. In fact, to date, the Jefferson Parrish Sheriff has not issued any administrative guidance whatsoever as to how marketplace facilitators are to discharge their duties as deputy tax collectors. Like the employer/taxpayer in *Central Illinois*, no marketplace facilitator could have reasonably suspected that a collection and remittance responsibility existed with respect to Jefferson Parish sales taxes on sales by unrelated third-parties to customers in Jefferson Parish. Given the Jefferson Parish Sheriff's failure to provide notice of clear obligations, "it is hardly reasonable to require [a marketplace facilitator] to fill the gap on its own account."

For all the reasons set forth in Walmart.com's Original Brief and in this Brief of *Amici*, this Court should reverse the *Walmart.com* decision. Even assuming for the sake of argument that the Jefferson Parish Sheriff has the authority to unilaterally and retroactively redefine a long-standing definition of Louisiana sales tax law (which *Amici* dispute), because the Jefferson Parish Sheriff failed to meet its duty of clarity established by the U.S. Supreme Court in *Central Illinois*, this Court should reverse the Fifth's Circuit's decision in *Wal-mart.com* and hold that Walmart.com is not responsible for the assessment of taxes and related amounts alleged by the Jefferson Parish Sheriff. Paraphrasing the U.S. Supreme Court's opinion in *Central Illinois*,

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<sup>18</sup> The court ultimately ruled against the taxpayer in *Bombardier* based on the facts in that case that are not present in this case.

This is not to say, of course, that the [Louisiana Legislature] may not subject [marketplace facilitators] to [collection and remittance obligations] if in its wisdom it chooses to do so by expanding the definition of [dealer] for [sales tax collection and remittance purposes]. It has not done so as yet. And we cannot justify the [Jefferson Parish Sheriff's or any other state or local tax collector's] attempt to do so by judicial determination.

**D. Upholding the Fifth Circuit's Decision Will Promote Inconsistency and Lack of Uniformity Among Louisiana's State and Local Sales Tax Systems and Impose Undue Burdens on Retailers.**

Although the *Wal-Mart.com* decision only involves one local collector's interpretation of state sales tax law, a decision by this Court to affirm the Fifth Circuit's decision will most certainly encourage other local taxing authorities to develop independent expansive approaches to increase their local tax bases without any notice and on a retroactive basis. Allowing 63 taxing authorities to impose separate, distinct, and potentially inconsistent interpretations of state tax law provisions will undermine uniformity and create uncertainty for businesses. Such actions would be a clear contradiction to the Louisiana Legislature's intent in enacting the ULSTC, which includes the interest of making the assessment, collection, administration, and enforcement of state and local sales tax *uniform*. See La. R.S. 47:337.2(A)(1)(b).

For example, other localities could choose to opt in (or opt out) of the new, expanded interpretation of "dealer" espoused by the Jefferson Parish Sheriff or to develop other interpretations of the term. If this Court upholds the Jefferson Parish Sheriff's ability to do an end-run around the legislative process and develop new interpretations of settled tax law terms, there is nothing to prevent other local tax authorities from developing new expansive interpretations of other historically clear state and local sales tax law provisions (*e.g.*, what falls within the definitions of "services" or "tangible personal property" subject to sales tax) through unpublished and retroactive interpretations.

The predictable result of the *Wal-Mart.com* decision will be widespread unpredictability in terms of different interpretations of multiple tax provisions and different periods of applicability by all 63 independent parishes and the Department. These independent and retroactive actions threaten the uniform application of Louisiana's state and local sales tax laws and will create unnecessary uncertainty and confusion for all retailers (large and small) operating in the state.



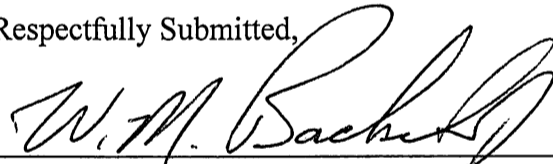
**E. Only Action by This Court Can Prevent Irreparable Harm to Retailers.**

The Department, the Remote Sellers Commission, and the Louisiana Legislature have already indicated their intentions to address the taxation of online marketplace facilitators through clear, *prospective* legislation. Such legislation, if enacted, will provide retailers and state and local tax authorities a roadmap going forward. However, such legislation cannot *retroactively* remediate the problem caused by the *Walmart.com* decision because the Louisiana State Constitution forbids the Legislature from doing so.<sup>19</sup> Thus, even though the Louisiana Legislature may establish uniformity and clarity in the taxation of online marketplaces for the future, unless this Court reverses the *Walmart.com* decision, local taxing jurisdictions could still attempt to use the decision to impose retroactive sales tax collection and remittance obligations. This Court reverse the *Walmart.com* decision to prevent irreparable harm to retailers and other companies doing business in Louisiana.

**IV. CONCLUSION**

For the reasons stated in Walmart.com's Original Brief, and for the reasons stated herein, *Amici* respectfully ask this Court to reverse the Fifth Circuit's decision in *Wal-Mart.com* that Walmart.com is liable for sales taxes and related amounts on third-party sales.

Respectfully Submitted,



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<sup>19</sup> La. Const. Art. II, Sec. 2, guarantees separation of powers among Louisiana's legislative, judicial, and executive branches of government. *See also, e.g., Unwired*, 903 So. 2d 392; *Mallard Bay*, 914 So. 2d 533.

**VERIFICATION AND CERTIFICATE OF SERVICE**

BEFORE ME, the undersigned Notary Public, duly authorized and commissioned in and for the Parish of Orleans, State of Louisiana, personally came and appeared WILLIAM M. BACKSTROM, JR. who after being duly sworn did depose and state that:

I hereby certify that the allegations set forth in the foregoing Brief of Retail Litigation Center, Inc., National Retail Federation, and Louisiana Retailers Association as *Amici Curiae* in Support of the Original Brief of Wal-Mart.com USA LLC is true and correct to the best of my knowledge.

I hereby certify that a copy of the foregoing Brief of Retail Litigation Center, Inc., National Retail Federation, and Louisiana Retailers Association as *Amici Curiae* in Support of Wal-Mart.com USA LLC's Application for Writ of Certiorari was served on this 20<sup>th</sup> day of June, 2019, via U.S. Mail, postage prepaid, on the following:

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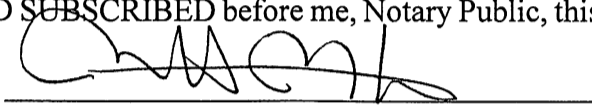
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SWORN TO AND SUBSCRIBED before me, Notary Public, this 20<sup>th</sup> day of June, 2019.



NOTARY PUBLIC

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