



Martin E. Landrieu  
mlandrieu@gamb.law

201 St. Charles Avenue, 40th Floor  
New Orleans, Louisiana 70170-4000  
(504) 582-1111 · Fax (504) 582-1121  
www.gamb.law

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Ref: 6623-34534

**VIA EMAIL and U.S. Mail – kenfonte@aol.com**

Mr. Kenneth C. Fonte  
One Galleria Blvd., Suite 1822  
Metairie, LA 70001

Re: *Newell Normand, Sheriff and Ex-Officio Tax Collector for the Parish of Jefferson v. Wal-Mart.com USA, LLC*, Louisiana Supreme Court, Docket No. 2019-C-263

Dear Ken:

Enclosed please find a copy of Wal-Mart.com USA, LLC's, Defendant and Applicant Reply Brief, which was electronically filed today with the Clerk of Court for the Louisiana Supreme Court in the above-referenced matter.

Please do not hesitate to call with any questions.

Sincerely,

Martin E. Landrieu  
Counsel for Wal-Mart.com USA

MEL/tr  
Enclosures

cc: Mr. Jeffrey Friedman (via email)  
Mr. Charlie Kearns (via email)

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Mr. Kenneth C. Fonte  
August 21, 2019

Page 2

**Amicus Curiae Counsel (with Enclosure):**

Ms. Cheryl Kornick (via email)  
Mr. Robert Angelico (via email)  
Ms. Jaye Calhoun (via email)  
Ms. Linda Akchin (via email)  
Ms. Alicia Pilar Mata (via email)  
Mr. William Backstrom, Jr. (via email)  
Mr. Matthew Mantle (via email)  
Mr. Joseph Landry (via email)  
Ms. Rhonda Betbeze (via email)  
Mr. Paul Pitts (via email)  
Mr. Jonathan Maddison (via email)  
Mr. Gregory Roberts (via email)  
Ms. Kelly B. Becker (via email)  
Ms. Nicole Frey (via email)  
Ms. Kathryn Z. Gonski (via email)  
Ms. Emily Kesler (via email)  
Mr. Gregory Bodin (via email)  
Mr. David Cassidy (via email)  
Mr. David Kelly (via email)  
Mr. Winson DeCuir (via mail)  
Mr. Brandon DeCuir (via mail)  
24<sup>th</sup> Judicial District Court: 769-149-JDC:24 Div:N (via mail)  
Court of Appeal, Fifth Circuit: 18-CA-211 (via mail)

SUPREME COURT OF LOUISIANA

**No. 2019-C-263**

Newell Normand,  
Sheriff & Ex-Officio Tax Collector for the Parish of Jefferson,

versus

Wal-Mart.com USA, LLC

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Writ of Certiorari or Review  
to the Court of Appeal, Fifth Circuit  
Parish of Jefferson

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**Reply Brief of Wal-Mart.com USA, LLC, Defendant and Applicant**

Jeffrey A. Friedman (*pro hac vice*),  
D.C. Bar No. 489684  
Charles C. Kearns,  
La. Bar No. 29286  
EVERSHEDS SUTHERLAND (US) LLP  
700 Sixth Street, NW, Suite 700  
Washington, D.C. 20001-3980  
Tel: (202) 383-0864  
Fax: (202) 637-3593  
*JeffFriedman@eversheds-sutherland.com*  
*CharlieKearns@eversheds-sutherland.com*

Martin E. Landrieu,  
La. Bar No. 18995  
GORDON, ARATA, MONTGOMERY,  
BARNETT, McCOLLAM, DUPLANTIS &  
EAGAN, LLC  
201 St. Charles Avenue, 40th Floor  
New Orleans, LA 70170  
Tel: (504) 582-1111  
Fax: (504) 582-1121  
*mlandrieu@gamb.law*

*Counsel for Wal-Mart.com USA, LLC, Defendant and Applicant*

## **I. Sales Tax Must Be Collected By the Seller – a “Basic Concept”**

This case is straightforward:

- Walmart.com is responsible for collecting sales tax on its own retail sales.
- Third-party sellers are responsible for collecting sales tax on their own retail sales.

That is because La. R.S. 47:301(4)(b) defines dealer to be the seller in the context of a retail sale, and La. R.S. 47:304, in turn, requires “the” dealer making the sale to collect the tax from the purchaser. La. R.S. 47:304(A) (“The tax levied in this Chapter shall be collected by *the* dealer . . .”) (emphasis added); La. R.S. 47:304(B) (“Every dealer located outside the state *making sales* of tangible personal property . . . in this state, shall *at the time of making sales* collect the tax imposed by this Chapter from the purchaser.”) (emphasis added); La. R.S. 47:337.17(A), (B). The statute’s references to “the” dealer “making sales” indicates that the Legislature contemplated that there can only be one dealer required to collect tax. [See *amicus curiae* Br. Inst. Prof. Taxation 3-5.] In a retail sale, that is the seller.

La. R.S. 47:301(4)(l), the provision relied on by the Parish and the lower courts, does not change the fact that sales tax must be collected by the seller in the transaction, for several reasons.

First, the Louisiana Department of Revenue (“Department”) describes this core principle of the sales tax – that tax must be collected by the seller – as a “basic concept.” L.A.C. 61:I.4307(C)(1) (“[T]he sales tax law places a liability upon the seller to collect the state and local sales or use tax from the purchaser and remit the tax to the appropriate collector. Because of this basic concept, special provisions have been included in R.S. 47:303(C) and 47:337.15(C) to cover sales which do not fall within that general method of doing business.”). Because that is such a fundamental principle of the sales tax regime, the Legislature had to enact a special provision to deviate from it in the case of auctioneers, where the auctioneer is held responsible for collecting the tax in lieu of the seller. La. R.S. 47:303(C). This shows that the Legislature knows how to enact exceptions

to this basic concept if it desires. It did not do so for marketplace facilitators or for anyone other than auctioneers.

Second, the construction of La. R.S. 47:301(4)(l) espoused by the Parish and adopted by the Fifth Circuit is unprecedented. From 1990, when the statute was enacted, until 2018, when the trial court issued its opinion in this case, the statute had never been applied to someone other than a seller. There is not a single case, administrative decision, letter ruling, or any other published guidance pre-dating this case suggesting that La. R.S. 47:301(4)(l) would apply to anyone other than the seller. The Department never applied it in that manner, let alone to Walmart.com. Nor did any other parish in the state. If La. R.S. 47:301(4)(l) were not limited to the seller in the transaction, it would have been applied to a non-seller at some point in its first 28 years on the books.

Third, if La. R.S. 47:301(4)(l) were not limited to the seller in the transaction, it would result in double taxation. Unlike the auctioneer statute and regulation, which require the auctioneer to collect the tax in lieu of the seller, *i.e.* the “actual owner,” nothing in La. R.S. 47:301(4)(l) relieves the seller of its own tax-collection obligation. A seller is unquestionably a dealer under La. R.S. 47:301(4)(b), which states that “dealer” includes “[e]very person who sells at retail.” The Fifth Circuit’s interpretation of La. R.S. 47:301(4)(l) allows the Parish to seek tax from two parties – Walmart.com and the seller – with no limitation or guidance to avoid both being held liable on the same sales.

Fourth, untethering La. R.S. 47:301(4)(l) from the basic concept that sales tax must be collected by the seller in the transaction will fundamentally change the nature of the sales tax. The statutory language refers to “[e]very person who engages in regular or systematic solicitation of a consumer market in the taxing jurisdiction” by various means, including “the distribution of catalogs, periodicals, advertising fliers, or other advertising.” La. R.S. 47:301(4)(l). This language must be interpreted as referring to a person’s “solicitation of a consumer market” for its own products. Otherwise, under the Fifth Circuit’s decision, any third party that provides advertising services to customers in Louisiana by print, radio, or television will now be responsible for collecting sales tax on sales made by the companies for whom they are advertising. That result is absurd and unfair – everyone will have responsibility for collecting tax on everyone else’s sales. That

is not how the sales tax was intended to function, nor how it has functioned throughout its entire history before this case.

The legislative history of La. R.S. 47:301(4)(l) reinforces that the statute was intended to apply only to sellers. Its purpose was to require a seller to collect sales tax on its sales even if it did not have the “physical presence” in Louisiana required by the U.S. Constitution at the time the statute was enacted. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); Minutes, H. Comm. Ways and Means, June 5, 1990, H.B. 1560 at 8 (stating that “certain means of solicitation by economic and electronic means will have as much bearing as to whether a dealer must collect sales tax as physical presence now does”). La. R.S. 47:301(4)(l) does not require another person, such as a marketplace operator, to collect tax on sales made by *other sellers*.

Oddly, the Parish devotes the first five pages of its Argument section to “proving” that Walmart.com had physical presence in Louisiana, a point Walmart.com readily acknowledged in its opening brief. [Br. Walmart.com 7, 19–20.] Walmart.com did not describe the history of the physical presence requirement, including *Bellas Hess* and *Quill*, to argue that *it* lacked physical presence in Louisiana. Rather, it did so to show that La. R.S. 47:301(4)(l) was enacted in 1990 in an attempt to create a basis to overturn the physical presence standard, not to impose new tax-collection obligations on marketplaces or any other non-sellers, as the Parish seeks to do in this case.<sup>1</sup>

## **II. Third-Party Sellers Were Not Walmart.com’s “Suppliers” – They Made Their Own Retail Sales**

The Parish mischaracterizes the nature of third-party sales. It refers to third-party sellers as Walmart.com’s “suppliers,” rather than what they are: independent sellers making their own retail sales. [Parish Br. 1 (“Other transactions involve products *supplied* by third-party vendors that participate in the market by contract with Walmart.com.” (emphasis added).] The Parish falsely suggests that third-party sellers sell

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<sup>1</sup> *Bellas Hess* and *Quill* also show why the Parish is wrong when it says that Walmart.com’s position renders La. R.S. 47:301(4)(l) superfluous. [Parish Br. 15.] While La. R.S. 47:301(4)(b) includes sellers as dealers, La. R.S. 47:301(4)(l) is specifically aimed at including as dealers those sellers who were constitutionally protected by *Bellas Hess* and *Quill*. That is why the contemporaneous legislative statements surrounding La. R.S. 47:301(4)(l) referred to including “vendors that have no other nexus to this state.” La. H.B. 1560, Reg. Sess. 1990.

goods to Walmart.com, and that Walmart.com re-sells those goods to Jefferson Parish customers. That is not the case.<sup>2</sup>

The Parish's characterization of third-party sellers as "suppliers" is contradicted by its own audit report and the decisions of both lower courts, all of which acknowledge that third-party sellers made their own sales. [Pl.'s Ex. 16 at 2 ("The taxpayer allowed 3<sup>rd</sup> party vendors to sell items on the www.walmart.com website through Marketplace agreements."); R. 205; Writ App. 33 ("Walmart.com operates an online marketplace . . . where it, along with third-party retailers, sell their goods.").]

Michael Trembley, Walmart.com's Vice President of Partner Services, also addressed the relationship of third-party sellers and Walmart.com at trial. Mr. Trembley testified that Walmart.com did not sell any goods owned by third-party sellers, that Walmart.com never shipped any goods owned by third-party sellers, and that Walmart.com never took possession of any goods sold by third-party sellers. [R. 346, 486.] He also debunked the Parish's related mischaracterizations that Walmart.com and third-party sellers were partners, "acting together as independent contractors,"<sup>3</sup> and "acting together to carry out the sale." [R. 479, 486, 561.]

Mr. Trembley's uncontroverted testimony that third-party sellers made their own sales included these descriptions of the relationship:

- "[T]hese are independent retailers that are operating themselves determining which products to list inside the Walmart Marketplace, specifying all of the information and you know, making them available for sale." [R. 341.]
- "[W]e want to make sure that the customers are aware that they are engaging with a third-party retailer so they understand that these products

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<sup>2</sup> Nor did Walmart.com operate as an "online 'consignment'" shop, as alleged by *amicus curiae* City of New Orleans. [Br. City of New Orleans 8.] Unlike in a consignment transaction, goods sold by third parties were never "delivered" to or possessed by Walmart.com. See La. R.S. 10:9-102(a)(20) (defining "consignment" to require delivery of goods from a person to a merchant for sale).

<sup>3</sup> The Parish's assertion that Walmart.com and third-party sellers were "acting together as independent contractors" is self-contradictory. See *independent contractor*, Black's Law Dictionary (10<sup>th</sup> ed. 2014) ("Someone who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.").

are not coming from Walmart and they are in fact coming from another third-party retailer.” [R. 342.]

- Third-party sellers are “absolutely” making their own sales, separate from Walmart.com. [R. 346.]
- “[T]he transaction occurs between the customer and the retailer . . . It’s their transaction.”<sup>4</sup> [R. 490–491.]

Mr. Trembley’s testimony directly refutes the Parish’s assertion that Walmart.com was “certainly a party to the transaction.” [Parish Br. 19.] The transaction was between the third-party seller and its customer, the purchaser. Third-party sellers made their own sales on the marketplace, and were the parties required to collect sales tax on their own transactions.

### **III. The Marketplace Retailer Agreement Did Not “Prohibit” or Make It “Impossible” for Third-Party Sellers to Collect Tax**

Although third-party sellers were responsible for collecting tax on their own sales, the Parish asserts that Walmart.com must instead be held responsible because its “Marketplace Retailer Agreements *prohibited* its participating third party vendors from collecting the taxes from the online market customers.” [Parish Br. 24 (emphasis added).] The Parish similarly states that “it is *impossible* for the third party retailer to perform the duty of a collector to collect the sales and use tax from the consumer.” [Parish Br. 17 (emphasis added).] These assertions cannot be reconciled with the plain language of the Agreement and the uncontroverted testimony describing its operation.

Rather than prohibiting the collection of tax by third-party sellers, the Agreement facilitates sales and use tax collection. A third-party seller wishing to sell its goods on the marketplace was required to go through a set-up process to indicate the taxability of its goods in each jurisdiction in the United States. [Def.’s Ex. 2, Ex. H ¶ 4 (requiring third-party sellers to “assign Tax Codes” to each item they sell and to specify in which state and local jurisdictions they have a tax remittance obligation); R. 567–570; R. 569–570 (B. Fryar) (“[T]he tax codes and tax designations work hand in hand in conjunction with the

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<sup>4</sup> Mr. Trembley’s testimony similarly refutes the Parish’s assertion that Walmart.com was “certainly a party to the transaction.” [Parish Br. 19.] The transaction was between the third-party seller and its customer, the purchaser.

jurisdiction, so it allows the Marketplace retailer [*i.e.*, the third-party seller] to determine the taxability of the products that it sells to consumers, and it also determines which jurisdictions they will charge tax within.”] And some third-party retailers did collect and remit the tax to the Parish, which in itself disproves the Parish’s claim that doing so was impossible. [R. 590–591.]

The Parish conflates Walmart.com’s provision of services to third-party sellers, including payment processing, with the third-party seller’s obligation to remit sales tax. As more fully explained in the *amicus curiae* brief of the Electronic Transactions Association, payments for retail sales transactions are frequently processed by service providers who are not parties to the transaction and are not responsible for collecting sales tax. [See generally Br. Elec. Transactions Ass’n.] The fact that an intermediary transmits the funds to a seller does not relieve the seller of its tax-collection obligation, nor cause the intermediary to assume the seller’s obligation.

**IV. If Any Third-Party Sellers Did Not Collect the Tax, the Parish’s Recourse Was to Collect From Those Third-Party Sellers or Their Purchasers.**

During the years at issue, a seller was constitutionally protected from collecting sales taxes in any state or locality where it did not have a physical presence. *Bellas Hess*, 386 U.S. 753; *Quill*, 504 U.S. 298.<sup>5</sup> Some third-party sellers that made sales on the Walmart.com marketplace were constitutionally protected from having to collect the Parish’s sales tax on sales they made to purchasers in Louisiana and Jefferson Parish.

To the extent any third-party sellers did not collect sales tax on such sales because of this constitutional protection, the Parish had *one* alternative – collect the tax from the seller’s purchaser. L.A.C. 61:I.4307(A)(1) (“Dealer includes both the seller and the purchaser of tangible personal property . . . .”); *Collector of Revenue v. J.L. Richardson Co.*, 247 So.2d 151, 157 (La. Ct. App. 1971) (“[I]f the seller fails to collect this tax, the State has a right to proceed directly against the purchaser.”).

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<sup>5</sup> Although *Bellas Hess* and *Quill* were recently overturned by *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), the physical presence requirement was the relevant federal constitutional standard during the years at issue, a point the Parish agrees with. [Parish Br. 5.]

The Parish knew this was the alternative. Both of its auditors testified on this point at trial. [R. 298 (C. Power) (testifying that it would be important to know the purchaser's identity because "both part[ies] to a transaction are responsible for the tax. Jefferson Parish may have wanted to contact the purchaser directly for the use taxes they may have owed."); R. 323 (J. Theriot) (testifying that "the purchase[r] is always liable for the sales tax," if the seller does not charge the tax at the time of sale).] The Parish chose not to pursue its resident purchasers. Yet, ironically, the Parish accuses Walmart.com of "promot[ing] and facilitat[ing] use tax evasion by consumers," *i.e.*, its own residents. [Parish Br. 7.]<sup>6</sup>

Walmart.com provided the Parish with information about the third-party sellers to equip the Parish to seek the tax from those sellers, and Walmart.com provided the Parish with information about the third-party sellers' customers, to equip the Parish to alternatively seek the tax from those customers. [Def.'s Ex. 5; Def.'s Ex. 10; Def.'s Ex. 12a; R. 593, 595, 601, 718.] Instead of pursuing either, it chose neither.

The Parish invented a second alternative – one that is not supported by Louisiana law. The Louisiana Legislature did not authorize a tax-collection obligation to be imposed on marketplaces, and, in fact, recently rejected it. *See* La. H.B. 547, Reg. Sess. 2019, H. Comm. Amend. No. 13 (May 13, 2019) (amending the bill to remove proposed provisions that would have required marketplace facilitators to collect tax on behalf of third-party sellers).

## **V. The Parish's Inflammatory Claims that Walmart.com Facilitated "Tax Evasion" Have No Merit**

The Parish makes several outlandish claims accusing Walmart.com of purposely structuring a system that allowed parties to engage in tax evasion. [Parish Br. 7, 23–24.] At the risk of giving these claims any more attention than they deserve, Walmart.com briefly responds to point out that the record does not support these claims.

First, Walmart.com could have taken the position that it was constitutionally protected from collecting sales tax on its *own* sales into Louisiana, because it, in fact, has

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<sup>6</sup> It is not clear how a seller could ever facilitate tax evasion by a consumer. As the Parish's auditor stated, the purchaser may always be held liable, particularly when the seller does not collect the tax.

no physical locations or employees in the state. Walmart.com instead took a conservative position, by attributing the in-state presence of its brick-and-mortar affiliates and voluntarily collecting the tax on its own sales to Walmart.com customers in Louisiana and Jefferson Parish. [R. 241–42 (B. Fryar testimony).]

Second, although Walmart.com and the Parish dispute whether Walmart.com is responsible for tax related to sales made by third-party sellers, there is no dispute that Walmart.com properly collected tax on its own sales. [R. 279–80 (C. Power) (Parish’s auditor testifying that Walmart.com appropriately reported sales tax on its own sales).] Brent Fryar, who oversaw Walmart.com’s filing of sales tax returns in Jefferson Parish (and across the country), testified that Walmart.com had never before had any material adjustments as a result of a Louisiana state or parish sales tax audit. [R. 576.] In short, Walmart.com is a compliant taxpayer.

Third, the Department reviewed the Marketplace Retailer Agreement and did not assess Walmart.com on sales made by third-party sellers. If the Agreement were designed for tax-evasion purposes, would the Department have let Walmart.com off the hook? No other state or locality in the country, including Louisiana and the other 63 parishes in Louisiana, assessed Walmart.com for tax on sales made by third-party sellers.<sup>7</sup> While the Parish asserts that Walmart.com finally “got caught,” the reality is that the Parish concocted a rogue legal theory that violates Louisiana’s sales tax law, the Uniform Local Sales Tax Code, and the Department’s regulations. [Parish Br. 24.]

Fourth, the parties agreed at trial that even if Walmart.com were liable, the amount of tax at issue on third-party sales is approximately \$75,000 over a six-year period. [Pl.’s Ex. 26; R. 725.] Notably, when the Louisiana Legislature held a recent hearing on H.B. 547 – a bill that would have legislatively established marketplace collection had it been enacted – the Parish’s Director of Revenue and Taxation stated that Walmart and Sam’s Club were the largest taxpayers in Jefferson Parish. *Hearing on H.B. 547 Before the H. Comm. On Ways & Means, 2019 Leg. (La. 2019)* (response to question from Rep. Phillip

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<sup>7</sup> This includes the City of New Orleans (coterminous with Orleans Parish). Ironically, the City of New Orleans filed an *amicus curiae* brief arguing that Walmart.com “was always obligated to collect and remit tax” on third-party sales. [Br. City of New Orleans 1.] Yet the City did not even impose its own tax on Walmart.com.

DeVillier, Member, H. Comm. On Ways & Means).<sup>8</sup> These two entities are affiliates of, and share a tax department with, Walmart.com. The notion that Walmart.com went to the lengths alleged by the Parish to structure the Agreement in order to evade \$12,500 in tax per year, while its affiliates paid more tax to the Parish than any other taxpayer, strains credulity past the breaking point, as does the notion that the Parish is the only jurisdiction in the country to “catch” Walmart.com for such behavior.

## **VI. The Parish Abandoned Its Summary Proceeding Due to Its Own Actions**

Although the Court granted Walmart.com’s writ application, the Parish tries to revive its argument that the application was untimely.<sup>9</sup> This case is not a summary proceeding, *i.e.*, one “conducted with rapidity,” and is therefore timely. La. Code Civ. Proc. art. 2591.

The Parish never treated this case as a summary proceeding and cannot do so now. The Parish proposed a recess in the middle of trial, lasting nearly three months, to re-audit Walmart.com. This alone is sufficient to “destroy” the Parish’s intent to maintain this case as a summary proceeding. *Williams & Gray v. Stewart*, 147 So. 103, 106 (La. Ct. App. 1933) (“The summary character of the suit was destroyed by the delay, which plaintiff voluntarily caused by asking for a long continuance.”). As in *Williams & Gray*, the Parish voluntarily caused significant delay by asking for the recess. [R. 404 (“My client has just instructed me to make the following proposal that we would agree to a recess of the trial . . .”).]

The Parish also agreed to keep the record held open after the conclusion of trial so that Walmart.com could supplement the record with additional evidence. Counsel for the Parish made it clear that he was in no hurry to close out the case. [R. 764 (“Your Honor, I don’t have a problem with giving them more time . . . I don’t care whether it’s one week, two weeks, 30 days or 45 days, for that matter.”).] Nor did the trial court. [R. 765 (“Let’s

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<sup>8</sup> Available at [http://house.louisiana.gov/H\\_Video/VideoArchivePlayer.aspx?v=house/2019/may/0513\\_19\\_WM](http://house.louisiana.gov/H_Video/VideoArchivePlayer.aspx?v=house/2019/may/0513_19_WM) (starting at 0:40:35).

<sup>9</sup> Walmart.com addressed this argument more fully in its March 4, 2019, Opposition to Respondent’s Motion to Dismiss Wal-Mart.com USA, LLC’s Writ Application for Lack of Jurisdiction.

do this. It is not like this hasn't been around for a while. A little longer won't kill anybody.”.)]

The Parish then requested an extension of 12 days on its post-trial brief addressing Walmart.com's additional evidence, two extensions for a total of 28 days for its Fifth Circuit brief, and an extension of 20 days to file its response brief at this Court.

The Parish conducted this case as an ordinary proceeding, not a summary proceeding. Walmart.com's writ application was timely.

## **VII. Conclusion**

Defendant and Applicant Walmart.com respectfully prays that this Court reverse the holding of the Fifth Circuit that Walmart.com is liable for tax on third-party sales.

Respectfully submitted,

s/Martin E. Landrieu

Martin E. Landrieu, La. Bar No. 18995  
GORDON, ARATA, MONTGOMERY, BARNETT,  
McCOLLAM, DUPLANTIS & EAGAN, LLC  
201 St. Charles Avenue, 40th Floor  
New Orleans, LA 70170  
Tel: (504) 582-1111  
Fax: (504) 582-1121  
*mlandrieu@gamb.law*

and

Jeffrey A. Friedman (*pro hac vice*),  
D.C. Bar No. 489684  
Charles C. Kearns, La. Bar No. 29286  
EVERSHEDS SUTHERLAND (US) LLP  
700 Sixth Street, NW, Suite 700  
Washington, D.C. 20001-3980  
Tel: (202) 383-0864  
Fax: (202) 637-3593  
*JeffFriedman@eversheds-sutherland.com*  
*CharlieKearns@eversheds-sutherland.com*

**CERTIFICATE OF TRANSMITTAL TO OPPOSING COUNSEL**

Pursuant to Louisiana Supreme Court Rule VII § 8, I certify that a copy of this Reply Brief of Wal-Mart.com USA, LLC, Defendant and Applicant, has been transmitted and delivered via e-mail to counsel for Respondent, Kenneth C. Fonte at kenfonte@aol.com on this 21st day of August, 2019.

s/Martin E. Landrieu  
Martin E. Landrieu, La. Bar No. 18995