SUPREME COURT OF LOUISIANA

DOCKET NO. 2019-C-263

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

VERSUS

WAL-MART.COM USA, LLC,
Applicant

CIVIL ACTION

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

MOTION FOR LEAVE TO FILE BRIEF OF COUNCIL ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF WAL-MART.COM USA, LLC'S ORIGINAL BRIEF

SUPREME COURT
OF LOUISIANA
2019 JUN 20 PM 2 26
CLERK
OF COURT

Respectfully Submitted,

WILLIAM M. BACKSTROM, JR. (#02667)
MATTHEW A. MANTLE (#32570)
JOSEPH Z. LANDRY (#37762)
Jones Walker LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8228
Facsimile: (504) 589-8228

Attorneys for the Council on State Taxation

MAY IT PLEASE THE COURT:

The Council On State Taxation ("COST") respectfully moves under Rule VII, Section 12 of the Rules of the Louisiana Supreme Court for leave to file its 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 its Motion, COST represents the following:

1.

COST is a non-profit association based in Washington, D.C. that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today, COST has an independent membership of approximately 550 of the largest multi-state corporations engaged in interstate and international commerce, many of which do business in Louisiana.

2.

COST members employ a substantial number of Louisiana citizens, own extensive property in Louisiana, and conduct significant business in Louisiana. Thus, COST is vitally interested in cases such as this one, which present issues significantly affecting the uniformity, certainty, and fair application of Louisiana's state and local sales and use tax laws as to who constitutes a "dealer" pursuant to La. R.S. 47:301(4)(l) and its resulting obligations of sales tax collection and remittance for both the state and for the parishes. Given the variety of implications that COST's members will experience as a result of an expansion in the interpretation of who is a "dealer" for Louisiana sales tax, COST will bring an important prospective into this dispute.

3.

COST's brief as *amicus curiae* will be helpful to the Court to identify not only the significant economic impact to Louisiana, but also the tax policy ramifications of a single parish collector seeking to improperly expand, unilaterally and retroactively, the scope of an older statute from 1990 to apply it to a whole new group of entities – non-seller, third-party online marketplace facilitators. Uniform application of the state's sales and use tax laws at both the state and local levels is vital for taxpayers to effectively collect and remit state and local sales and use taxes. As the State's ultimate interpreter of the law, this Court should review Jefferson Parish's stance that a marketplace facilitator has a collection and remittance obligation when the State's revenue

agency and other Louisiana parishes have not taken similar positions that marketplace facilitators are required to collect the sales tax at the state or parish level. Moreover, there have been discussions by the Louisiana Legislature to enact legislation that will address the taxation of marketplace facilitators directly and on a prospective basis.

4.

This issue is significant and of great concern to members of COST and other similarly situated businesses who have relied on the plain language of La. R.S. 47:301(4)(l) and its definition of "dealer." Thus, COST has a substantial, legitimate interest in this matter.

5.

COST has read the Original Brief and believes that the additional information and arguments raised in COST's brief as *amicus curiae* in support of the Original Brief will be helpful to the Court in deciding this matter.

6.

COST represents that the their brief addresses matters of fact or law that might otherwise escape the Court's attention, and COST believes it has substantial, legitimate interests that will likely be affected by the outcome of the case and will not be adequately protected by those already party to the case.

WHEREFORE, COST, respectfully requests 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,

WILLIAM M. BACKSTROM, JR. (#02667)
MATTHEW A. MANTLE (#32570)
JOSEPH Z. LANDRY (#37762)
Jones Walker LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8228
Facsimile: (504) 589-8228

Attorneys for the Council on State Taxation

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 Council on State Taxation as *Amicus Curiae* in Support of Wal-Mart.com USA LLC's Original Brief 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 Council of State Taxation as *Amicus Curiae* in Support of Wal-Mart.com USA LLC's Original Brief was served on this 20th day of June, 2019, via U.S. Mail, postage prepaid, on the following:

Via U.S. Mail
Honorable Cheryl Q. Landrieu
Clerk, Louisiana Fifth Circuit Court of Appeal
Lawrence A. Chehardy Courthouse
101 Derbigny Street
Gretna, Louisiana 70053

Via U.S. Mail
Honorable Stephen D. Enright, Jr.
Judge, 24th Judicial District Court, Parish of Jefferson
Thomas F. Donelon Courthouse
200 Derbigny Street
Gretna, Louisiana 70053

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

AND

Via U.S. Mail and email: mlandrieu@gamb.law
Martin E. Landrieu, La. Bar No. 18995
GORDON, ARATA, MONTGOMERY, BARNETT,
McCOLLAM, DUPLANTIS & EAGAN, LLC
201 St. Charles Avenue, Suite 4000
New Orleans, Louisiana 70170-4000
Telephone: (504) 582-1111
Facsimile: (504) 582-1121

Attorneys for Applicant, Wal-Mart.com USA, LLC

Via U.S. Mail and email: kenfonte@aol.com
Kenneth C. Fonte, La. Bar No. 5649
Golden & Fonte
One Galleria Blvd., Suite 1822
Metairie, Louisiana 70001
Telephone: (504) 708-3301
Facsimile: (866) 387-5791

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

Via U.S. Mail and email: pmata@tei.org
Alicia Pilar Mata (pro hac vice)
1200 G Street NW, Suite 300
Washington, DC 20005
Telephone: (202) 464-8346
Facsimile: (202) 638-5607

AND

Via U.S. Mail and email: jaye.calhoun@keanmiller.com
Jaye A. Calhoun, La. Bar No. 21187
Via U.S. Mail and email: linda.akchin@keanmiller.com
Linda S. Akchin, La. Bar No. 17904
II City Plaza
400 Convention Street, Suite 700
Baton Rouge, Louisiana 70802
Telephone: (225) 382-3423
Facsimile: (225) 338-9133

Attorneys for Tax Executives Institute

Via U.S. Mail and email: rsangelico@liskow.com
Robert S. Angelico, La Bar No. 17906
Via U.S. Mail and email: cmkornick@liskow.com
Cheryl M. Kornick, La. Bar No. 19652
LISKOW & LEWIS
One Shell Square
701 Poydras Street, Suite 5000
New Orleans, Louisiana 70139-5099
Telephone: (504) 581-7979
Facsimile: (504) 556-4108

Attorneys for the Louisiana Association of Business and Industry and Electronics Transactions Association

William M. Backstrom, Jr. (#02667)
Matthew A. Mantle (#32570)
Joseph Z. Landry (#37762)
JONES WALKER LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
Telephone: (504) 582 8228
Facsimile: (504) 589 8228

Attorneys for the Retail Litigation Center, Inc., National Retail Federation, and Louisiana Retailers Association

WILLIAM M. BACKSTROM, JR.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 20th 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

DOCKET NO. 2019-C-263

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

VERSUS

WAL-MART.COM USA, LLC,
Applicant

CIVIL ACTION

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ORDER

Considering the Motion for Leave to File Brief of Council on State Taxation as *Amicus Curiae* in Support of Wal-Mart.com USA LLC's Original Brief:

IT IS ORDERED that Council on State Taxation be and is hereby **GRANTED** leave to file the attached brief as *amicus curiae*.

THUS DONE AND SIGNED this _____ day of June, 2019, in New Orleans, Louisiana.

_____
JUSTICE, LOUISIANA SUPREME COURT

SUPREME COURT OF LOUISIANA

DOCKET NO. 2019-C-263

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

VERSUS

WAL-MART.COM USA, LLC,
Applicant

CIVIL ACTION

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THE COURT OF APPEAL, FIFTH CIRCUIT
DOCKET NO. 18-CA-211

BRIEF OF COUNCIL ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF WAL-MART.COM USA, LLC, APPLICANT

Respectfully Submitted,

WILLIAM M. BACKSTROM, JR. (#02667)
MATTHEW A. MANTLE (#32570)
JOSEPH Z. LANDRY (#37762)
JONES WALKER LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8228
Facsimile: (504) 589-8228

Attorneys for the Council On State Taxation

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MAY IT PLEASE THE COURT:

The Council On State Taxation ("COST"), upon motion and notice to the parties, conditionally files this brief as *amicus curiae* to address the ramifications of the Court of Appeal, Fifth Circuit (the "Fifth Circuit") holding that the definition of "dealer" contained in La. R.S. 47:301(4)(l) applies to marketplace facilitators—a form of marketing products that did not exist in 1990 when the "dealer" definition at issue was enacted. COST's membership includes marketplace facilitators and/or marketplace sellers who are directly impacted by the decision of the Fifth Circuit in *Newell Normand, Sherriff & Ex-Officio Tax Collector for the Parish of Jefferson v. Wal-Mart.com USA, LLC*, 18-211 (La. App. 5 Cir. 12/27/2018), 263 So. 3d 974 (the "Fifth Circuit Decision"). Additionally, many COST members are concerned with and often negatively impacted by local and state tax administrators' attempts to retroactively expand the interpretation of a state's tax laws to broadly apply to situations not contemplated when the tax law was enacted (or last amended). Thus, COST's interest in this case is substantial and legitimate. In addition, the interests of COST and its members will not be adequately protected by those already a party to the case.

I. IDENTITY AND INTEREST OF COST

COST is a nonprofit trade association based in Washington, D.C. COST was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today, COST has an independent membership of approximately 550 of the largest multistate corporations engaged in interstate and international commerce, many of which do business in Louisiana. COST members represent the part of the nation's business sector that is most directly affected by state taxation of interstate and international business operations.

COST is vitally interested in cases such as this one, which present issues significantly affecting the uniformity, certainty, and fair application of Louisiana's sales and use tax laws for a business that constitutes a "dealer." Because a business that meets the definition of a "dealer" is required to collect and remit sales taxes at both the state and parish levels, uniformity and certainty are necessary to maintain sound and effective tax administration.

COST's mission is, and has always been, to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST members

employ a substantial number of Louisiana citizens, own extensive property in Louisiana, and conduct substantial business in Louisiana.

Given the implications of Louisiana's complex and burdensome state and local sales and use tax systems on COST's members, COST brings an important perspective to this dispute. The imposition of sales tax collection and remittance responsibilities on a business without clear, precise, and non-speculative notice that it was required to collect and remit state or local sales taxes is draconian. Sales taxes are meant to be imposed on the ultimate consumer with a seller, as agent for the tax collector, having the responsibility to collect and remit the taxes to appropriate governmental taxing agency or agencies. Thus, any ambiguity of who is a seller should be read carefully to not retroactively impose a collection and remittance obligation on a person that was not aware (*e.g.,* provided with actual or at least public notice) that it had an obligation to collect and remit the taxes from its purchasers. A seller (*i.e.,* a "dealer" pursuant to La. R.S. 47:301(4)(l)) is only required to collect and remit the sales taxes if that seller meets the definition of a dealer and is otherwise subject to the State's and/or a parish's taxing authority. Here, because Wal-Mart.com and other similarly situated non-seller marketplace facilitators are outside the scope of the definition of a dealer when engaging in marketplace activities,[1] they had no reason to believe such a collection and remittance duty existed for those types of sales. The Parish of Jefferson — and the State of Louisiana—certainly provided no such guidance to any marketplace facilitator.

COST also recently released its State Sales Tax Systems Scorecard,[2] which highlights the mind-numbing complexity of Louisiana's state and local sales tax systems for sellers (and purchasers). According to COST's State Sales Tax Systems Scorecard, Louisiana has one of the most complex, inefficient, and unfair sales and use tax systems in the country. This is due primarily to the fact that the State allows the Louisiana Department of Revenue (the "Department") and each of the 63 parishes that levy local sales taxes (through the local tax collector for each parish) to separately administer their respective sales and use tax codes. If the Fifth Circuit

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[1] Walmart.com does not dispute its status as a "dealer" when it sells its goods to Louisiana and Jefferson Parish customers. The appropriate taxes were collected and remitted on those sales, and they are not relevant to this dispute.

[2] Karl Frieden and Fred Nicely, "The Best and Worst of State Sales Tax Systems: COST Scorecard on Sales Tax Simplification, Uniformity & Exemption of Business Inputs," Council On State Taxation, April 2018. 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.

Decision stands, this Court will allow one of its parishes (and potentially many more) to deveatte from the Department's interpretation of a "dealer" and retroactively and without any notice impose administrative burdens on non-seller marketplace facilitators, making the collection and remittance of Louisiana's state and local sales taxes even more unduly burdensome on transactions in interstate commerce.

II. ARGUMENT

COST fully supports Wal-Mart.com's legal arguments and positions outlined in its briefs before the lower courts, its application for *writ of certiorari* of the Fifth Circuit Decision to this Court, and its Original Brief filed with the Court in this matter. As with its prior *amicus* brief supporting this Court's acceptance of Wal-Mart.com's application for *writ of certiorari*, COST's focus is to urge this Court to reverse the Fifth Circuit Decision and allow the Louisiana Legislature to clearly and precisely address the state and local sales tax collection and remittance responsibilities of marketplace facilitators. COST is deeply concerned about tax laws, without legislative intervention, being broadened to apply in situations never contemplated when a definition was last addressed by a state's legislative body. A law enacted years before the commercialization of the internet should not be interpreted broadly and retroactively by a tax administrator to expand sales tax collection and remittance responsibilities to someone who is not a seller.

Internet marketplace facilitators did not exist when the underlying legislation was enacted.[3] The interpretation by the Parish of Jefferson to broaden the definition of "dealer" certainly should not be implemented, without prior notice, in an audit of one marketplace facilitator; additionally, it clearly should not be applied retroactively. Rather than attempting to shoehorn a marketplace facilitator into a well-established definition of "dealer" in a tax audit and on a retroactive basis, any expansion of the definition of "dealer" to apply to non-seller marketplace facilitators should be made—and can only be made—by the Louisiana Legislature in a precise and clear fashion and on a prospective-only basis. Finally, COST will highlight the exceedingly complex sales tax

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[3] The first international conference addressing the world-wide web did not take place until 1994. *See* "First International Conference on the World-Wide Web," CERN (May 25-27, 1994), http://www94.web.cern.ch/WWW94/.

administration systems in Louisiana, which, if the Fifth Circuit Decision stands, will make the systems even more burdensome for sellers, purchasers, and online marketplace facilitators.

A. Legislative Intent and History Exclude a Marketplace Facilitator from the "Dealer" Definition.

A fundamental principle of Louisiana law is that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written." La. C.C. art. 9. In *McLane Southern, Inc.*, this Court specifically stated that a "statute must...be applied and interpreted in a manner, which is consistent with logic and the presumed fair purpose and intention of the Louisiana Legislature in passing it."[4] This rule is even more important in the tax context to determine whether, and when, a tax is imposed.[5] For a tax system to rely on voluntary compliance, it needs to be imposed in a fair and consistent manner. This comports with Louisiana law, which instructs us that "taxing statutes must be construed liberally in favor of the taxpayer and against the taxing authority."[6] Thus, the proper inquiry of interpreting a law begins with the words of the statute in light of the maxim that a taxing statute must be interpreted in the manner least onerous to the taxpayer.[7]

1. The Fifth Circuit Decision Lacks Consideration of Statewide Uniformity and Would Allow Retroactive Imposition of New Tax Collection and Remittance Obligations.

Considering the text of La. R.S. 47:301(4)(l), it is important to understand that imposing sales tax collection and remittance obligations on marketplace facilitators without precise and non-speculative legislation is an attempt to retroactively force collection and remittance of taxes by a business using a statutory definition that simply does not fit. As the saying goes—this is an attempt to place a square peg in a round hole.

The Parish of Jefferson has adopted, as required under Louisiana law, the Uniform Local Sales Tax Code ("ULSTC") as set forth in La. R.S. 47:337.1, *et seq.* While parishes have the authority to levy and administer local-level sales and use taxes, the ULSTC was enacted to provide

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[4] *McLane Southern, Inc. v. Bridges*, 11-1141 (La. 1/24/12); 84 So. 3d 479.

[5] *Id.* at 483.

[6] *UTELCOM, Inc. v. Bridges*, 10-0654 (La. App. 1 Cir. 9/12/11); 77 So. 3d 39, 47, writ denied, 11-2632 (La. 3/2/12); 83 So. 3d 1046 (citing *Entergy Louisiana, Inc. v. Kennedy*, 03-0166 (La. App. 1 Cir. 7/2/03), 859 So. 2d 74, 79, writ denied, 03-2201 (La. 11/14/03); 858 So.2d 430; *Cleco Evangeline, LLC v. Louisiana Tax Comm'n*, 01-2162 (La. 4/3/02); 813 So. 2d 351, 355; *Goudchaux/Maison Blanche. Inc. v. Broussard*, 590 So. 2d 1159, 1161 (La. 1991); *United Gas Corp. v. Fontenot*, 129 So. 2d 776, 781 (1961)).

[7] *See Vulcan Foundry, Inc. v. McNamara*, 414 So. 2d 1193, 1197 (La. 1982).

a uniform sales and use tax base, process, and procedure among the parishes. Uniformity is key for easing the compliance burdens with respect to local sales and use taxes. If the Fifth Circuit Decision stands, it would present a troubling inconsistency with the Department and 62 other parishes not being uniform with the Parish of Jefferson. And, to the detriment of fair tax administration, it may also put pressure on those tax agencies to also retroactively require Wal-mart.com and other marketplace facilitators to remit their taxes (not collected directly from purchasers) on products marketed on their websites. This conundrum will be avoided if this Court reverses the Fifth Circuit Decision and holds that it is the Legislature's responsibility to prospectively impose a sales tax collection requirement on marketplace facilitators for third-party sales. This Court should make it clear that a rogue parish may not unilaterally and without notice expand the meaning of a 1990's law to use internet marketing activities as the sole pretext to retroactively impose sales tax collection and remittance requirements on a person that is not the seller.[8]

Following the adoption of the ULSTC, the various local sales tax collectors in Louisiana have 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. However, the Parish of Jefferson, without notice, unilaterally and retroactively decided the definition of "dealer" should be expanded to also apply to online marketplaces, even though such businesses' marketing structures did not exist when the statutory definition at issue was enacted. The Parish of Jefferson's attempt to apply the "dealer" definition to online marketplace facilitators, and the Department's inconsistent treatment with that position, highlights the fact that the definition of "dealer" in La.

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[8] The Louisiana Legislature during the 2019 Regular Session considered, but failed to pass, legislation to address state and local sales tax collection and remittance responsibilities for marketplace facilitators. *See* La. H.B. 524, Reg. Sess. 2019 (Original) and La. H.B. 547, Reg. Sess. 2019 (Original). H.B. 524 died in the House Ways and Means Committee. In its original form, H.B. 547 included the same marketplace facilitator provisions that were included in H.B. 524. But those provisions were stripped from H.B. 547, which was enacted into law as Act No. 360 of the 2019 Regular Session. Further legislation is critical to clearly delineate the state and local sales tax collection and remittance responsibilities of marketplace facilitators and sellers using a facilitator's marketing platform.

R.S. 47:301(4)(l) may be subject to more than one plausible interpretation. As such, this Court must be guided by the relevant legislative history to determine the proper intent of the statute.[9]

The specific provision at issue is La. R.S. 47:301(4)(l), which defines a "dealer" as follows:

> "Every 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 provision was originally enacted in 1990, well before the general public was using the internet (or marketplace facilitators) to purchase tangible personal property. At that time, state and local sales and use tax administrators and state legislatures were focused on sales made by mail order catalogs, commercial television, and telecommunications sellers. Louisiana was not alone—it was one of many states in the late 1980s and early 1990s that modified their laws in an attempt to require catalog, commercial television, and telecommunications *sellers* to collect and remit state and local sales taxes on *their* sales. The goal of these state efforts was to overturn U.S. Supreme Court precedent and mandate broad sales tax collection and remittance responsibilities for remote *sellers*, and that attempt culminated with the U.S. Supreme Court's review of North Dakota's jurisdictional tax collection law that had provisions similar to Louisiana's definition of dealer.[10] Ultimately, the U.S. Supreme Court struck down the North Dakota statute in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and affirmed its long-standing position that "physical presence" was required before a state or locality could enforce a sales tax collection and remittance requirements on a remote *seller*.[11]

Several decades later, the Parish of Jefferson, without any input or support from the Louisiana Legislature or the Department, without any prior notice, and on a retroactive basis, suddenly decided to resurrect this dormant statutory provision and unilaterally *expand* the scope

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[9] *Red Stick Studio Development, L.L.C. v. State ex rel. Dept. of Economic Development*, 2010-0193, p. 9 (La. 1/19/11), 56 So. 3d 181, 189 ("However, in light of the language used in [the statutory provision], and considering the parties' arguments relative to its meaning, we find the words 'to qualify for' to be ambiguous. Looking strictly at the language of [the statutory provision], we find both of the interpretations provided by the parties to be ***plausible***. Thus, to correctly interpret [the statutory provision], we ***must*** examine the legislative intent behind the statute.") (emphasis added).

[10] *See National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753 (1967). *See also Quill Corp. v. North Dakota*, 504 U. S. 298 (1992).

[11] *Id.*

of this definition to apply to a whole new group of entities—non-seller marketplace facilitators—that did not exist in 1990. When the history and legislative context are considered, it is clear that it could not have been the intent of the Louisiana Legislature to include marketplace facilitators within the scope of the definition of a "dealer" as set forth in La. R.S. 47:301(4)(l).

Similarly, in *McLane Southern*, this Court addressed whether "smokeless tobacco" should be added to a list of tobacco products subject to tax in La. R.S. 47:854. In that case, this Court properly determined that the list of tobacco products in La. R.S. 47:854 had not been amended to add "smokeless tobacco" to a list of tobacco products upon which it was the Legislature's "intent and purpose" to levy the tax. As in *McLane Southern*, the definition of "dealer" in La. R.S. 47:301(4)(l) has never been amended to include non-seller marketplace facilitators or any business similar to a marketplace facilitator.

The issue of sales tax collection and remittance responsibilities of remote sellers, including marketplace facilitators, is an important legislative issue that many states with sales and use taxes are presently addressing. Louisiana tepidly joined that group when the Louisiana Legislature in 2017 established the "Sales and Use Tax Commission for Remote Sellers" (the "Remote Sellers Commission")[12] to study issues regarding the sales tax collection and remittance obligations of remote sellers and separate marketplace facilitators, and to make corresponding recommendations to the Louisiana Legislature. The Remote Sellers Commission held several meetings during the last year and suggested legislation related to marketplace facilitators.[13] The Louisiana Legislature considered such legislation, La. H.B. 524, Reg. Sess. 2019 (Original) and La. H.B. 547, Reg. Sess. 2019 (Original), during the 2019 Regular Session that would have required marketplace facilitators to collect sales taxes on behalf of the marketplace sellers using the facilitators' platforms.[14] In addition, virtually all other states have considered whether to extend sales and use tax collection

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[12] *See* Act No. 274 of the 2017 Regular Session of the Louisiana Legislature.

[13] For more information on the Commission's activities, see La. Dept. of Rev. Louisiana Sales and Use Tax Comm'n for Remote Sellers, LA. DEPT. OF REV. (Jun. 17, 2019) http://www.revenue.louisiana.gov/LawsAndPolicies/RemoteSellersCommissionMaterials.

[14] *See supra* footnote 8.

and remittance responsibilities to marketplace facilitators by enacting clear, precise, and prospective legislation.[15]

The same is needed in Louisiana. Clear, precise, and prospective legislation is necessary to impose a new, expanded collection and remittance responsibility on marketplace facilitators in Louisiana. This Court should reverse the Fifth Circuit Decision and reiterate that the power and authority to expand the state and local sales tax collection and remittance responsibilities of marketplace facilitators is reserved solely to the Louisiana Legislature, and not the Parish of Jefferson through a secret, singular, unilateral, administrative action.

If the Louisiana Legislature sees fit, it also could enact legislation to make other changes to Louisiana's state and local sales tax systems to avoid undue burdens on interstate commerce. For example, as the imposition of collection and remittance responsibilities on marketplace facilitators in the Parish of Jefferson stands right now, it is unclear if a marketplace facilitator alone is responsible for collecting the local sales tax, or if the marketplace facilitator and the actual seller are mutually liable. There is also no information whatsoever regarding the reporting requirements of online sellers versus third-party online marketplace facilitators. Legislation could address these potentially overlapping responsibilities.

Additionally, the Legislature should address which marketplaces would be required to collect state and local sales and use taxes.[16] For instance, will the new rules apply to all marketplace facilitators equally, or just to Wal-Mart.com? And, how will the new rules apply to other types of marketplace facilitators, such as Craigslist, that lack the same sales information as marketplace facilitators such as Wal-Mart.com?

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[15] The following states have enacted marketplace facilitator legislation: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Minnesota, Nebraska, New Jersey, New Mexico, New York, Nevada, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. Other than Louisiana, the following states have (or had) pending legislation that would require marketplace facilitators to collect and remit sales and use taxes this year: Florida (S.B. 1112), Georgia (H.B. 276), Kansas (S.B. 22), Maine (H.P. 1064), Massachusetts (H. 1 and H.B. 3801), Michigan (H.B. 4540 and H.B. 4541), Missouri (H. 548 and S. 46), North Carolina (S.B. 622 and H.B. 966), Ohio (H.B. 166), Tennessee (S. 82), and Wisconsin (A.B. 56, S.B. 59, and A.B. 251).

[16] Legislation would also be able to clarify who a purchaser must contact to deal with a tax dispute and/or refund, address how sellers and marketplace facilitators would be audited, what documentation the sellers and marketplace facilitators must retain, and the liability imposed on marketplace facilitators when determining what is taxable based on a seller's representations of a product.

Finally, through legislation, the Louisiana Legislature could also establish a clear and *prospective* collection start date to provide marketplace facilitators and sellers using those marketplaces with adequate notice of their collection and compliance responsibilities. The imposition or start date should also provide a reasonable time period for both third-party marketplace facilitators and the sellers who use such marketplaces to implement or modify their tax systems to properly collect the State's and the parishes' sales taxes.

Each of these issues will be addressed in more detail below; however, these are policy decisions the Louisiana Legislature, as opposed to the Parish of Jefferson, must make. This orderly, legislative process should be allowed to proceed without interference, and it can only properly do so if this Court reverses the Fifth Circuit Decision in *Wal-Mart.com.*

2. Due Process Requires Adequate Notice to Impose a Collection Responsibility on Marketers.

The Parish of Jefferson's change of policy regarding who is required to collect and remit sales and use taxes under La. R.S. 47:301(4)(l) has come about not through a carefully orchestrated, prospective announcement of its position, but instead through audit and litigation. The record is devoid of either the Department or any parish, including the Parish of Jefferson, providing any regulatory guidance, including any public notice, that marketplace facilitators now somehow meet the definition of a "dealer."[17] Thus, the Parish of Jefferson's unilateral expansion of well-established state and local sales tax law to marketplace facilitators is unenforceable because it did not provide any marketplace facilitators with precise, non-speculative notice of this alleged duty.

Taxing authorities must comply with constitutional due process requirements when providing notice of tax laws—in other words, there can be no "secret" tax laws. In similar circumstances, a hidden tax law change that lacked fair notice was recently reviewed by an Arizona appellate court in *APS v. City of San Luis*, 2017 Ariz. App. Unpub. LEXIS 1052, 2017 WL

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[17] By contrast, in 2015, the Alabama Department of Revenue through regulation promulgated an economic nexus rule that was not supported by the State's nexus statute. See *Newegg Inc. v. Al. Dep't of Revenue,* Al. Tax Tribunal, Docket S. 16-613-JP (6/14/2018). The Alabama Department of Revenue's regulation asserted a seller with more than $250,000 in sales to customers in the State was sufficient to require a remote seller to collect and remit Alabama's tax. However, Alabama's nexus statute, found in Ala. Code § 40-23-68(b)(10), originally enacted in 1991, had not been updated at that time to support an economic nexus position. Unlike the Parish of Jefferson, which did provide notice to the public, Alabama subsequently amended its nexus law to *prospectively* address this issue.

3301768 (August 3, 2017). That court held the failure to properly publish a law violated due process. The Parish of Jefferson's attempt to radically redefine a statute designed for a different purpose without any guidance or notice to the affected taxpayers is a clear violation of Wal-Mart.com's (and other similarly situated marketplace facilitators') due process rights. Thus, the failure to provide that notice is yet another reason for this Court to reverse the Fifth Circuit Decision and hold that Wal-Mart.com does not owe any retroactive taxes and related amounts to the Parish of Jefferson.

3. Retroactive Enforcement and Assessment of La. R.S. 47:301(4)(l) Will Result in Extensive Litigation.

On June 21, 2018, there was a sea-change as to the constitutional nexus requirements for state and local taxes with the U.S. Supreme Court decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). This decision completely altered the landscape of sales and use tax collection because the Court specifically overruled the *Quill* "physical presence" test and determined that an economic and virtual presence could be sufficient to establish substantial nexus with a state or locality. Thus, if codified in a state's law, a state (and a locality) could begin requiring remote sellers without a physical presence to collect and remit applicable state and local sales taxes. While the *Wayfair* decision was ultimately remanded to the South Dakota Supreme Court to address whether South Dakota's law was discriminatory or otherwise imposed an undue burden on interstate commerce, the case was settled with the parties agreeing to prospectively begin collecting South Dakota's sales tax on January 1, 2019.[18]

Although the Court did not resolve whether South Dakota's law was discriminatory or otherwise imposed an undue burden on interstate commerce, the Court noted three features in South Dakota's law that mitigated undue burdens on interstate commerce. Those features were: 1) clear statutory thresholds and *de minimis* provisions; 2) *no retroactive imposition of tax*; and 3) South Dakota's adoption (along with more than 20 other states) of the Streamlined Sales and Use Tax Agreement.[19]

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[18] Notice of the settlement is available at: "State of South Dakota Reaches Settlement in Remote Seller Law Litigation," S. DAK. STATE NEWS, http://news.sd.gov/newsitem.aspx?id=23939.

[19] *Wayfair* at p. 23, 138 S. Ct. at 2099.

Here, the Parish of Jefferson seeks to assess Wal-Mart.com for sales taxes going back to 2009.[20] This retroactive application of the Parish of Jefferson's new, expanded interpretation of La. R.S. 47:301(4)(l) is capricious for several reasons and must be avoided. First, as discussed above, Louisiana's Legislature needs to adopt legislation with clear and precise statutory language if it intends to extend the sales tax collection responsibility to a new channel of commerce. Second, the Parish of Jefferson's retroactive application of La. R.S. 47:301(4)(l) is likely to result in discriminatory double-taxation. Purchasers within the Parish of Jefferson who did not pay sales tax at the time of a purchase have always been required to remit use tax to the Parish on their taxable purchases. Allowing the Parish of Jefferson to retroactively assess taxes against Wal-Mart.com is discriminatory where users, particularly business purchasers that commonly file use tax returns, did in fact pay their use tax obligations. In those situations, the Parish will reap an unintended windfall of improper double collection of sales and use taxes, which is an absurd result and is specifically precluded by law.[21] Further, requiring an out-of-state marketplace facilitator to determine, years later, whether a purchaser has already remitted the State's or a parish's use taxes would impose an undue burden on interstate commerce. Each of these issues can be avoided if this Court reverses the Fifth Circuit Decision and allows the Louisiana Legislature to enact carefully crafted, precise, and prospective legislation.

The U.S. Supreme Court was clear in its discussion of South Dakota's law in *Wayfair* that the prospective nature of that law was one of the key features that would likely allow it to pass constitutional muster. This Court should heed the U.S. Supreme Court's warning on this issue. The Fifth Circuit Decision affirmed an assessment dating back to 2009, and if this Court fails to reverse the Fifth Circuit Decision, there is nothing to prevent the Department or other parishes from also retroactively assessing marketplace facilitators for failing to collect sales taxes for an even greater period of time. This nine-year retroactive enforcement of a sales tax remittance obligations pre-*Wayfair* is unconscionable given the lack of notice, and this Court cannot let that decision stand.

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[20] *See* Fifth Circuit Decision at 2.

[21] *See, e.g.*, La .R.S. 47:337.15 ("[T]here shall be no duplication of the tax in any event.").

Further, the Parish of Jefferson's assessment is contrary to the Remote Sellers Commission's report, which previously imposed a January 1, 2019 implementation date for remote sellers to begin collecting the Louisiana state and local sales taxes based on the *Wayfair* decision.[22] This is also contrary to recent legislation, La. H.B. 547 (Reg. Sess. 2019), which was enacted into law as Act No. 360 of the 2019 Regular Session, that requires the Remote Sellers Commission to select an enforcement date of no later than July 1, 2020, with public notice provided at least 30 days before that enforcement date. The Parish of Jefferson should not be allowed to "jump the gun" and attempt to seek enforcement prior to other remote sellers and non-seller marketplace facilitators being required to collect the State's and parishes' sales and use taxes.

Finally, reversing the Fifth Circuit Decision will avoid costly future litigation that is likely to flourish throughout the State if this case is not reviewed. Again, the U.S. Supreme Court in *Wayfair* was keenly aware of and concerned about the retroactive application of state and local sales tax collection and remittance obligations, noting such application could be discriminatory and would likely unduly burden interstate commerce. This concern is particularly acute in a state such as Louisiana, which has an already complex and burdensome sales and use tax system (*see* Section B, *infra*). We urge this Court to reverse the Fifth Circuit Decision to stop the imposition of tax retroactively and avoid such expansive and expensive litigation.

B. Leaving the Fifth Circuit Decision in Place Would Further Contribute to Louisiana's National Reputation for Having an Inefficient, Burdensome, and Dysfunctional Sales and Use Tax System.

Louisiana and its parishes have one of the most complex, inefficient, and burdensome state and local sales tax systems in in the country in comparison to the other states. If the Parish of Jefferson's provocative interpretation of a "dealer," pursuant to its new and retroactive reading of La. R.S. 47:301(4)(l), is upheld and retroactively applied to marketplace facilitators, the state and its localities will continue to descend down a "rabbit hole" of sales tax compliance dysfunction.

In 2018, COST published its first comprehensive analysis of state sales tax systems: "The Best and Worst of State Sales Tax Systems: COST Scorecard on Sales Tax Simplification, Uniformity, and Exemption of Business Inputs" (the "Scorecard").[23] The Scorecard objectively

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[22] *See* Remote Sellers Information Bulletin (RSIB) 18-001, LA. DEPT. OF REV. (Aug. 10, 2018).

[23] *Supra*, footnote 2.

evaluates the statutes and rules that govern state and local tax departments' administration of their sales taxes for each state that imposes sales and use taxes. The Scorecard evaluates state and local sales taxes on their effectiveness in implementing uniform, fair, and centralized administration. The states' differences in tax rates and breadth of the tax base (other than taxing business inputs), however, were not part of the evaluation.[24] Sales tax administrative systems that violate basic principles of fairness and efficiency make compliance for sellers and purchasers more difficult and hinder states' efforts to modernize their sales tax bases.

Louisiana is among three states that received a failing grade of "F" in the Scorecard.[25] Louisiana earned the second-lowest score of the 45 states that have state and local sales tax systems in the U.S., trailing only Colorado in the standings. Louisiana received a "D" or "F" grade in several of the subcategories in the Scorecard, including fair sales tax administration, centralized sales tax administration, and simplification and transparency.[26]

Not surprisingly, all of these issues are highlighted in this matter before the Court. The Parish of Jefferson is: unfairly imposing the sales tax based on a novel and unprecedented interpretation of what business constitutes a "dealer;" adopting a go-it-alone approach that is inconsistent with the position taken by the Department (as well as the other parishes) on the same set of facts and based on the same statute; and applying the new rule retroactively without adequate notice and transparency.

Instead of allowing Louisiana's complex, unfair, and inefficient state and local sales tax systems to fall even further behind other states (and localities), this Court should reverse the Fifth Circuit Decision and rule in favor of Walmart.com. The failure to do so would amount to a tacit endorsement of the policy adopted by the Parish of Jefferson and would encourage other parishes, and potentially the Department, to follow suit and adopt the same wrong-headed approach to sales and use tax compliance. Further, this would usurp the Louisiana Legislature's power to govern, including that body's responsibility to enact precise, clear tax laws that fairly provide notice to

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[24] To accomplish these purposes, the Scorecard is divided into the following categories: "Extent of taxation of business inputs or pyramiding of sales taxes; Fair sales tax administrative practices; Uniformity of state and local sales tax bases and centralized administration; Simplification and transparency of the sales tax; Reasonable tax payment and credits administration; and Fair audit and refund procedures." Scorecard at 2.

[25] *Id.*

[26] *Id.* at 9-18.

taxpayers of their tax obligations. Finally, it would make Louisiana's complex systems even more susceptible to constitutional infirmities in light of *Wayfair*.

C. The Fifth Circuit Decision Should Only Be Applied on a Prospective Basis Under the *Lovell* Test.

Alternatively, and only if this Court does not reverse the Fifth Circuit Decision, it should make it clear that under the factors set forth in *Lovell v. Lovell*,[27] the Fifth Circuit Decision should be applied on a prospective basis. This Court has previously applied the *Lovell* factors to give a prospective only effect to a decision concerning local sales tax in *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n*, 04-0473 (La. 6/22/05); 903 So. 2d 1071. In *Willis-Knighton*, the court held that because the public relied on the long-standing interpretation of a law and there was no "clear indication...that foreshadowed its demise," prospective application only was appropriate.[28]

Prior to the Fifth Circuit Decision, the Department and the various 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 Louisiana Legislature has endeavored to provide uniformity, predictability, and certainty for state and local sales and use taxes in the ULSTC, including common sales tax law definitions.

However, the Parish of Jefferson unilaterally and retroactively decided to apply the "dealer" definition to marketplace facilitators even though such businesses did not exist when the statutory definition at issue was enacted. As a result, the Fifth Circuit Decision could encourage other local taxing authorities to take the same approach that the Parish of Jefferson did and unilaterally and expansively interpret any provision of state tax law and apply it retroactively to a business that had been acting in good faith reliance for decades on the plain language of the statute as it had long been understood by all other businesses and government entities operating in the state.

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[27] *Lovell v. Lovell*, 378 So. 2d 418 (La. 1979). Three factors are considered when determining whether to apply a judicial decision retroactively: (1) The decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) The merits and demerits must be weighed in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective application will further or retard its operation; and (3) The inequity imposed by retroactive application must be weighed. *Id.* at 419.

[28] *See generally Willis-Knighton*, 903 So. 2d at 1107-1108.

The resulting confusion, added complexity, and negative financial impact from litigation and audit costs, spawned from the retroactive application of sales tax collection and remittance responsibilities to marketplace facilitators by a single parish without any prior notice of such responsibility, would greatly harm those businesses that had relied on the previous interpretations of Louisiana sales tax law. Therefore, following this Court's guidance in *Lovell* and *Willis Knighton*, if this Court ultimately upholds the Fifth Circuit Decision, it should be given prospective effect only.

III. CONCLUSION

For the reasons stated above, COST strongly encourages the Court to reverse the Fifth Circuit Decision, which would improperly require Wal-Mart.com (as a third-party marketplace facilitator), without statutory support and with a retroactive impact, to remit the Parish of Jefferson's sales taxes.

Respectfully Submitted,

WILLIAM M. BACKSTROM, JR. (#02667)
MATTHEW A. MANTLE (#32570)
JOSEPH Z. LANDRY (#37762)
JONES WALKER LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8228
Facsimile: (504) 589-8228
Attorneys for the Council on State Taxation

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 Council on State Taxation as *Amicus Curiae* in Support of Wal-Mart.com is true and correct to the best of my knowledge.

I hereby certify that a copy of the foregoing Brief of Council on State Taxation as *Amicus Curiae* in Support of Wal-Mart.com was served on this 20th day of June, 2019, via U.S. Mail, postage prepaid, on the following:

Via U.S. Mail
Honorable Cheryl Q. Landrieu
Clerk, Louisiana Fifth Circuit Court of Appeal
Lawrence A. Chehardy Courthouse
101 Derbigny Street
Gretna, Louisiana 70053

Via U.S. Mail
Honorable Stephen D. Enright, Jr.
Judge, 24th Judicial District Court, Parish of Jefferson
Thomas F. Donelon Courthouse
200 Derbigny Street
Gretna, Louisiana 70053

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

AND

Via U.S. Mail and email: mlandrieu@gamb.law
Martin E. Landrieu, La. Bar No. 18995
GORDON, ARATA, MONTGOMERY, BARNETT,
McCOLLAM, DUPLANTIS & EAGAN, LLC
201 St. Charles Avenue, Suite 4000
New Orleans, Louisiana 70170-4000
Telephone: (504) 582-1111
Facsimile: (504) 582-1121

Attorneys for Applicant, Wal-Mart.com USA, LLC

Via U.S. Mail and email: kenfonte@aol.com
Kenneth C. Fonte, La. Bar No. 5649
Golden & Fonte
One Galleria Blvd., Suite 1822
Metairie, Louisiana 70001
Telephone: (504) 708-3301
Facsimile: (866) 387-5791

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

Via U.S. Mail and email: pmata@tei.org
Alicia Pilar Mata (*pro hac vice*)
1200 G Street NW, Suite 300
Washington, DC 20005
Telephone: (202) 464-8346
Facsimile: (202) 638-5607

AND

Via U.S. Mail and email: jaye.calhoun@keanmiller.com
Jaye A. Calhoun, La. Bar No. 21187
Via U.S. Mail and email: linda.akchin@keanmiller.com
Linda S. Akchin, La. Bar No. 17904
II City Plaza
400 Convention Street, Suite 700
Baton Rouge, Louisiana 70802
Telephone: (225) 382-3423
Facsimile: (225) 338-9133

Attorneys for Amici Curiae Tax Executives Institute

Via U.S. Mail and email: rsangelico@liskow.com
Robert S. Angelico, La. Bar No. 17906
Via U.S. Mail and email: cmkornick@liskow.com
Cheryl M. Kornick, La. Bar No. 19652
LISKOW & LEWIS
One Shell Square
701 Poydras Street, Suite 5000
New Orleans, Louisiana 70139-5099
Telephone: (504) 581-7979
Facsimile: (504) 556-4108

Attorneys for the Louisiana Association of Business and Industry
and Electronics Transactions Association

William M. Backstrom, Jr., La. Bar No. 02667
Matthew A. Mantle, La. Bar No. 32570
Joseph Z. Landry, La. Bar No. 37762
JONES WALKER LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8228
Facsimile: (504) 589-8228

Attorneys for Amici, Retail Litigation Center, Inc., National Retail Federation and Louisiana Retailers Association

WILLIAM M. BACKSTROM, JR.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 20th 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