SUPREME COURT OF LOUISIANA

No. 2019-C-0263

NEWELL NORMAND, SHERIFF AND EX OFFICIO TAX COLLECTOR FOR THE PARISH OF JEFFERSON

VERSUS

WAL-MART.COM USA, LLC

On Writ of Review to the Court of Appeal, Fifth Circuit, No. 18-CA-211, Johnson, Chehardy and Molaison, Judges; on appeal from the Parish of Jefferson, 24th Judicial District Court, Div. N, No. 769-149, Hon. Stephen D. Enquist, presiding

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TAX EXECUTIVES INSTITUTE'S *AMICUS CURIAE* BRIEF FILED IN SUPPORT OF WAL-MART.COM USA, LLC'S BRIEF ON THE MERITS

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INTEREST OF *AMICUS CURIAE*

Tax Executives Institute, Inc. ("TEI" or "the Institute") is the largest organization representing taxpayers' interests on issues associated with tax administration. It is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators responsible for the tax affairs of their employers. TEI was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code. TEI dedicates itself to the development of sound tax policy, the uniform and equitable enforcement of tax laws, the minimization of administrative and compliance costs for governments and taxpayers, and the vindication of taxpayers' rights.

TEI's members are employed by a broad cross-section of the business community. As in-house tax professionals, TEI's members evaluate tax laws, advise their companies regarding the tax consequences of various transactions and business decisions, and make practical judgments regarding their tax compliance obligations, including determinations regarding which states and localities they must register with for the collection and remittance of sales and use tax. TEI's members have a vital interest in ensuring they are provided with adequate notice of their registration, collection, and remittance responsibilities so they can structure their business activities and processes to meet these requirements.

The Fifth Circuit's sanction of Jefferson Parish's ("Jefferson Parish" or "the Parish") attempt to shift tax liability to Wal-Mart.com is alarming. Stripped to its core, the Parish's effort to hold Wal-Mart.com liable for sales tax based on sales made by third-party sellers is nothing more than an illegitimate money grab seeking to recover tax revenues that Jefferson Parish consumers failed to remit. Jefferson Parish's attempt to do this – long after the transactions occurred, using a statute not intended for this purpose, and without advance notice or guidance for taxpayers – contradicts basic principles of fair tax administration. TEI is concerned parish tax collectors across Louisiana and the State of Louisiana ("State") may also seek to deny taxpayers' rights if this Court does not reverse the Fifth Circuit Court of Appeal's decision.

SUMMARY OF THE ARGUMENT

The Fifth Circuit Court of Appeal erred by treating the trial court's determination that Wal-Mart.com was a "dealer" under La. R.S. 47:301(4)(*l*) as a finding of fact and by holding that the meaning of La. R.S. 47:301(4)(*l*) was clear and unambiguous. The Fifth Circuit then further erred by failing to consider the implications for deeming marketplace facilitators as "dealers" within Louisiana's sales and use tax regime, by ignoring the legislative history and intent of La. R.S. 47:301(4)(*l*), and by summarily concluding the trial court's finding of fact was not manifestly erroneous. This Court's intervention is necessary to correct the Fifth Circuit's erroneous decision and to ensure its decision does not encourage other Louisiana parishes or the State to shift tax liabilities from sellers and their purchasers to marketplace facilitators.

The legislative history and statutory scheme confirm the Louisiana legislature enacted the definition of "dealer" in La. R.S. 47:301(4)(*l*) when states were challenging the physical presence rule established in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and the definition was intended to apply to out-of-state sellers lacking physical presence in the state, not marketplace facilitators. Moreover, Jefferson did not provide marketplace facilitators notice regarding its intent to hold them responsible for this purported liability or guidance regarding how it would administer the sales and use tax if marketplace facilitators were to undertake such responsibilities.

If Louisiana and its parishes wish to impose tax collection and remittance responsibilities upon marketplace facilitators fairly and legitimately, they must enact the appropriate laws and regulations. The need for explicit legislation has been widely recognized by Louisiana and other states and governmental organizations considering this issue. These taxing authorities made deliberate policy decisions and provided notice and guidance to taxpayers – which Jefferson Parish has not done.

Advanced notice and guidance are critical because they enable marketplace facilitators and marketplace sellers to structure their business arrangements and processes to meet these requirements before any tax is due. Notice and guidance are particularly important to delineate taxpayer sales tax collection responsibilities because collectors can mitigate 100 percent of their liability for these taxes if the taxing authority adequately informs them of the authority's intent to hold them responsible for tax on such transactions. It offends principles of sound tax policy to permit taxing authorities to hold marketplace facilitators liable for tax when the same taxing authority has not undertaken these fundamental tax administration responsibilities.

TEI urges the Court to reverse the decision of the Fifth Circuit Court of Appeal. If it does not, parish tax collectors and the State may similarly seek to deny taxpayers' rights without honoring their obligation to administer their tax systems in a just and equitable manner.

LAW AND ARGUMENT

I. **The Fifth Circuit Erred in Treating the Trial Court's Determination that Wal-Mart.com Was a "Dealer" Under La. R.S. 47:301(4)(*l*) as a Finding of Fact.**

The Fifth Circuit first erred when it concluded that "the trial court had made a factual determination that Walmart.com was a 'dealer' under La. R.S. 47:301(4)(*l*)" and "factual findings of the trial court are subject to the manifest error standard of review." (Op. at 6.) Such deference is appropriate for the trial court's conclusions of fact regarding Wal-Mart.com's functions and activities, and the relationships between Wal-Mart.com, its marketplace sellers, and their customers. However, whether Wal-Mart.com is a "dealer" within the meaning of La. R.S. 47:301(4)(*l*) is a legal determination and is subject to independent, *de novo* review. *See Denham Springs Econ. Dev. District v. All Taxpayers, Pro. Owners*, 2004-1674 (La. 2/4/05), 894 So.2d 325, 330 ("Questions of law, such as the proper interpretation of a statute, are reviewed by this court under the *de novo* standard of review."); *see also Jackson v. City of New Orleans*, 2012-2742 (La. 1/28/14), 144 So.3d 876, 882. Here, Judge Johnson, writing for the three-judge panel, opened the "Facts and Procedural History" section of the Opinion with the statement: "The facts of this case are undisputed." Thus, the issue presented to this Court is whether, given the undisputed facts established by the record, Wal-Mart.com is a "dealer" as defined by the statute. That is a matter first of statutory interpretation, and second, application of that interpretation to the undisputed facts – both issues of law. *See Willis-Knighton Med. Ctr. v. Caddo Shreveport Sales and Use Tax Comm'n*, 2004-0473 (La. 4/1/05), 903 So.2d 1071, 1082 ("Thus, we begin as we must, with the words of the law."); and *State v. Carter*, 2013-94 (La. App. 5 Cir. 10/30/13), 128 So.3d 1108, 1117 ("In the instant case, the facts were depicted in surveillance footage and were largely undisputed. Thus, the case turned on the application of law."). *See also Starks v. Am. Bank Nat'l Ass'n*, 2004-1219 (La. App. 3 Cir. 5/4/05), 901 So.2d 1243, 1219 (Genovese, J.) ("However, in a case in which there are no contested issues of fact, and the only issue is the application of the law to the undisputed facts, as in the case at bar, the proper standard of review is whether or not there has been legal error.").

By misapplying long-standing and well-developed rules regarding judicial review, the Fifth Circuit undermines the judicial process and frustrates Wal-Mart.com's right of appeal.

II. <u>The Fifth Circuit Erred in Determining that La. R.S. 47:301(4)(*l*) Was Clear and Unambiguous.</u>

The Fifth Circuit further erred when it determined that La. R.S. 47:301(4)(*l*) was clear and unambiguous as applied to Wal-Mart.com. (Op. at 5.) "The fundamental question in all cases of statutory interpretation is legislative intent and the ascertainment of the reason or reasons that prompted the Legislature to enact the law." *McLane S., Inc. v. Bridges*, 2011-1141 (La. 1/24/12), 84 So.3d 479, 483. "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La. Civ. Code art. 9. However, "[w]hen the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole." La. Civ. Code art. 12. "Laws on the same subject matter must be interpreted in reference to each other," La. Civ. Code art. 13; *see also McLane S.,* 84 So.3d at 483) ("The meaning and intent of a law is determined by considering the law in its entirety and all other laws on the same subject matter and placing a construction on the provision in question that is consistent with the express terms of the law and with the obvious intent of the Legislature in enacting it.")

La. R.S. 47:301(4)(*l*) defines "dealer" as:

> 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.

The Fifth Circuit read this definition in isolation when it determined Wal-Mart.com constituted a "dealer." Using the Fifth Circuit's interpretation, taxpayers engaged in the distribution of newspapers, magazines, advertising circulars, and radio broadcasters, television broadcasters, and telemarketers also constitute "dealers" of the products they advertise through their medium of communication. Similarly, delivery companies could be deemed "dealers" of the goods they transport. *See* La. R.S. 47:301(4)(*j*).

It would be absurd – and unprecedented - to hold such parties liable for tax on sales when they are not a party to the actual sale.[1] Neither Louisiana nor its parishes have attempted to hold such persons who were not parties to the actual sale liable for sales tax on a transaction. This disconnect alone demonstrates La. R.S. 47:301(4)(*l*) is ambiguous, requiring an inquiry beyond the plain meaning of the words in La. R.S. 47:301(4)(*l*) and an examination of the provision within the context of Louisiana's sales and use tax regime more generally.

That La. R.S. 47:301(4)(*l*) does not clearly and unambiguously impose collection and remittance responsibilities on marketplace facilitators is further demonstrated by the State's audit of Wal-Mart.com and conclusion that Wal-Mart.com was not a "dealer." To the contrary, the State has publicly acknowledged legislation should be considered to hold such parties liable for sales tax, stating: "[s]pecific definitions for marketplace facilitators, as well as collection, remittance, and administrative matters related to marketplace facilitators, will be considered by the Commission and submitted to the Legislature for consideration in the 2019 Regular Session." *See* Louisiana Sales and Use Tax Commission for Remote Sellers, Remote Sellers Information Bulletin 18-002 (Dec. 18, 2018).[2] Such efforts would be unnecessary if La. R.S. 47:301(4)(*l*) unambiguously defined "dealers" to include marketplace facilitators. Moreover, no other Louisiana parish has issued an assessment against Wal-Mart.com under Jefferson Parish's novel legal theory.

III. Wal-Mart.com Is Not a "Dealer" Within the Meaning of La. R.S. 47:301(4)(*l*).

Our civilian methodology requires courts to examine the context in which La. R.S. 47:301(4)(*l*) occurs and consider the text of the sales and use tax law as a whole to resolve whether Wal-Mart.com is a "dealer." *See* La. Civ. Code art. 12. Further, because ambiguity is present, the Court must construe the statute in favor of the taxpayer and against the taxing authority. *Cleco Evangeline, LLC v. La. Tax Comm'n*, 2001-2162 (La. 4/3/02), 813 So.2d 351, 356. Examination of the legislative history, the statutory scheme, and Louisiana's regulations confirms marketplace facilitators are not "dealers" within the meaning of La. R.S. 47:301(4)(*l*).

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[1] Jefferson Parish sought to justify its position that "dealers" need not be "sellers" on the grounds that Wal-Mart.com provided third-party sellers with payment processing services. (Jefferson Parish's Original Br. at 13-15.) However, La. R.S. 47:301(4)(*l*) does not define "dealer" as "persons engag[ing] in regular or systematic solicitation of a consumer market" <u>and</u> providing the seller with payment processing services. The Parish cannot rely on this unwritten limitation to make its interpretation more palatable.

[2] Available at http://revenue.louisiana.gov/Miscellaneous/RSIB%2018-002%20-%20Definition%20of%20Remote%20Seller%20-%20As%20Adopted.pdf.

a. La. R.S. 47:301(4)(*l*) Must Be Interpreted and Understood in the Full Context of this Nation's Nexus Evolution.

Jefferson Parish's attempt to use La. R.S. 47:301(4)(*l*) for the novel purpose of holding Wal-Mart.com responsible for tax imposed on transactions between third-party sellers and consumers must be examined in the full context of this country's decades-long nexus debate.

Sales and use taxes, such as Louisiana's, are generally regarded as consumption taxes — taxes not imposed on retailers' activities, but on their consumers' use or consumption of products and services within a jurisdiction. While the economic incidence of the tax falls on consumers, retailers nevertheless play a critical role in administering such taxes: retailers collect the tax from consumers and remit the tax to the taxing jurisdiction. *See, e.g.*, Hellerstein, Hellerstein & Swain, *State Taxation* ¶ 12.01 (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through Apr. 2019).[3]

The U.S. Constitution, however, forbids states from compelling out-of-state retailers to undertake this obligation or hold them liable for failing to do so unless a retailer has substantial nexus with the state. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018). If a retailer lacks substantial nexus with a state and does not collect the tax from consumers, consumers have a legal obligation to remit the corresponding use tax to the state. *Id.* at 2088. In practice, however, not all consumers remit their use tax, and states lack an efficient mechanism to measure or track consumers' use tax liabilities. *Id.*

Thus, whether a retailer has "substantial nexus" with the state has been long debated by states and taxpayers. The U.S. Supreme Court first answered this question in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), when it addressed whether Illinois could compel a Missouri-based mail order seller to collect sales tax on goods sold to Illinois customers if the seller had no physical presence in the state. The Court held the Due Process Clause and Commerce Clause of the U.S. Constitution require "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax," and declined to allow states to impose tax on mail order sellers "who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.* at 756, 758.

[3] Online version accessed on Checkpoint (www.checkpoint.riag.com) on Jun. 7, 2019.

"[T]he remarkable growth of the mail-order business 'from a relatively inconsequential market niche' in 1967 to a 'goliath . . .,'" *Quill Corp. v. North Dakota*, 504 U.S. 298, 303 (1992), caused states to become increasingly frustrated with the physical presence rule during the years following *Bellas Hess.* Thus, several states mounted a challenge to reverse the *Bellas Hess* decision by enacting statutes imposing sales tax collection and remittance responsibilities upon persons who engage in "regular or systematic solicitation" of a consumer market in the jurisdiction, envisioning this standard would satisfy the "substantial nexus" standard even if a mail order seller was not physically present in the state. *See, e.g.*, Bloomberg Tax, Tax Management Portfolio 1420-2nd: *Limitations on States' Jurisdiction to Impose Sales and Use Taxes*, Detailed Analysis, E. State Legislation.

North Dakota enacted a statute in this regard in 1987. Former N.D. Cent. Code § 57-40.2-01(6). Louisiana designed its legislation, the provision at issue in this case, after the North Dakota statute and enacted the Louisiana law while North Dakota's litigation was ongoing. *See* Minutes, H. Comm. Ways and Means, June 5, 1990, H.B. 1560 (subst'd by H.B. 2093) at 8 (statement of Rep. Deano) (attached at Ex. A). The legislative history of La. R.S. 47:301(4)(*l*) confirms Louisiana's new definition for "dealers" was intended to embrace "interstate catalog sales at such time as authorized by federal legislation or jurisprudence." *Id.*

The states' hopes were dashed again in 1992 when the U.S. Supreme Court decided *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), holding North Dakota's statute was unconstitutional, and reaffirming physical presence was a prerequisite for states to impose sales tax collection and remittance responsibilities on out-of-state sellers. Many "regular or systematic solicitation" mail order seller statutes, such as La. R.S. 47:301(4)(*l*), nonetheless remained on the books in a dormant stage following the *Quill* decision. *See, e.g.*, Bloomberg Tax, Tax Management Portfolio 1420-2nd at Detailed Analysis, E. State Legislation.

The *Quill* court invited Congress to exercise its authority under the Commerce Clause and to enact federal legislation addresing "whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Quill*, 504 U.S. at 318. Following years of Congressional inaction, state governments, with input from state legislatures, tax administrators, and private sector representatives, formed the Streamlined Sales Tax Governing Board in 2000 to "find solutions for the complexity in state sales tax systems that resulted in the U.S. Supreme Court holding (Bellas Hess v. Illinois and Quill Corp. v. North Dakota) that a state may not require a seller that does not have physical presence in the state to collect tax on sales into the state." [4] This effort culminated in the development of the Streamlined Sales and Use Tax Agreement, which is designed to simplify sales and use tax administration systems and address the concerns raised by the U.S. Supreme Court in *Quill*. *Id.*

States also began to legislate innovative, alternative theories on which to impose sales tax collection responsibilities on out-of-state sellers. Some states enacted click-through nexus statutes, which purport to confer nexus on out-of-state retailers when in-state referrers post links to the retailers' websites in exchange for a commission on sales. *See* Hellerstein, Hellerstein & Swain, *State Taxation* at ¶ 19.03. Other states enacted affiliate nexus statutes, which purport to confer nexus on out-of-state retailers when retailers' in-state affiliates perform certain services for the retailers, such as in-store returns or offering joint customer loyalty programs. *Id.* States also attempted to coerce out-of-state retailers to voluntarily collect and remit sales tax by enacting statutes mandating certain information reporting and requiring out-of-state retailers to report details of transactions with their customers located in the state. *Id.*

In 2016, the National Conference of State Legislatures ("NCSL") adopted a model legislative proposal[5] to help states advance their nexus challenges in the courts. NCSL's model legislation comprised three parts:

(1) a statute expanding nexus-creating activities by including, among other things, an economic nexus provision determining sellers with a certain dollar amount of sales in the state were engaged in business in the state and were subject to sales tax collection and remittance responsibilities, even if they lacked a physical presence in the state (*Id.* at 3-6),

(2) a statute imposing sales tax collection and remittance responsibilities upon marketplace facilitators who list or advertise tangible personal property or taxable services on any forum for marketplace sellers, and who collect and transmit receipts from such sales to marketplace sellers (*Id.* at 6-8), and

[4] Streamlined Sales Tax Governing Board, Inc., About Us, available at https://www.streamlinedsalestax.org/about-us/about-sstgb.

[5] Available at http://www.ncsl.org/Documents/fiscal/2016_Sales-Use_Tax%20Nexus_.pdf.

(3) a statute imposing reporting requirements on referrers who receive more than $10,000 in fees per year for listing sellers' tangible personal property or taxable services on any forum and who transfer customers to the sellers' websites to complete the purchases (*Id.* at 8-11).

NCSL's model legislation specified the "effective date should be fixed and in the future. One of the significant problems that arose during the *Quill* litigation that gave the justices concern was that the tax would be retroactive." (*Id.* at 1.)

South Dakota was the first of many states to enact economic nexus legislation directly challenging *Quill*'s physical presence requirement. In 2018, the U.S. Supreme Court reversed *Quill* and upheld South Dakota's economic nexus statute. *South Dakota v. Wayfair*, 138 S. Ct. at 2099. The Court noted South Dakota's law contained several features to "prevent discrimination against or undue burdens upon interstate commerce," including a safe harbor for those transacting a limited amount of business in the state, protection from retroactive liability, and adherence to the Streamlined Sales and Use Tax Agreement, which reduced administrative and compliance costs for taxpayers. *Id.* at 2099-2100.

After *Wayfair*, the states began to consider marketplace facilitator laws. The Multistate Tax Commission ("MTC") convened a workgroup in 2018 to identify issues arising when imposing collection and remittance responsibilities on marketplace facilitators, to recommend best practices for addressing those issues, and to develop proposed statutory language. Multistate Tax Commission, Marketplace Facilitator Work Group, Final White Paper (issued Nov. 20, 2018).[6] Louisiana participated in the MTC's effort and surveys.

Questions discussed by the MTC workgroup included:

- Recommended definitions for marketplaces, marketplace facilitators, and marketplace sellers;
- Whether the marketplace facilitator and/or marketplace seller must register to collect tax, and the scope of sales for which each is responsible;
- Which entity should be subject to audit and potential alternatives for relief if the audited party relied upon information provided by the other party;

[6] Available at http://www.mtc.gov/getattachment/Uniformity/Project-Teams/Wayfair-Implementation-Informational-Project/White-Paper-Final-clean-v4.pdf.aspx?lang=en-US)

- The appropriate economic nexus threshold and whether to count the combined sales of the marketplace facilitator and its marketplace sellers in this determination;
- Which party must maintain exemption certificates; and
- Whether states should protect marketplace facilitators from class action lawsuits.

To date, approximately 31 states and the District of Columbia enacted marketplace facilitator laws.[7] As demonstrated by the MTC's Final White Paper and the marketplace facilitator laws enacted in these states, taxing authorities considering these issues have made the deliberate policy decision to put a comprehensive regime into place and to provide advanced notice and guidance to marketplace facilitators conducting business in their jurisdiction before imposing those policy decisions.

b. <u>Marketplace Facilitators Are Not "Dealers" Within the Meaning of La. R.S. 47:301(4)(*l*).</u>

i. <u>The Legislative History and Context of La. R.S. 47:301(4)(*l*) Confirm It Applies to Out-of-State Sellers, Not Marketplace Facilitators.</u>

It is readily evident from the legislative history and historical context of La. R.S. 47:301(4)(*l*) that this provision was intended to reach out-of-state sellers (i.e., sellers of goods without a physical presence within Louisiana), not marketplace facilitators.

Louisiana's legislature enacted La. R.S. 47:301(4)(*l*) to encompass sellers who did not meet the various indications of physical presence otherwise found throughout La. R.S. 47:301(4) but who sold products or services to consumers in the state. There is no indication La. R.S. 47:301(4)(*l*) was intended to reach third parties, like Wal-Mart.com, who were not parties to a sale, simply because they solicited a consumer market within the state on behalf of a seller. In the nearly 30 years since its passage, neither the State nor its parishes have attempted to hold taxpayers engaged in the distribution of newspapers, magazines, advertising circulars, or radio

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[7] *See, e.g.*, Ala. Code § 40-23-199.2; Ariz. Rev. Stat. § 42-5001(8); Ark. Code Ann. § 26-52-111; Cal. Rev. & Tax Code § 6042; Colo. Rev. Stat. § 39-26-105(1.5); Conn. Gen. Stat. § 12-408e; D.C. Code Ann. § 47-2002.01a; Haw. Rev. Stat. § 237-1; Idaho Code § 63-3620E; 35 ILCS 105/2d; Ind. Code § 6-9-29.5-2; Iowa Code § 423.14A; Ky. Rev. Stat. Ann. § 139.450; Md. Code Ann. Tax-Gen. § 11-403.1; Minn. Stat. § 297A.66; Neb. Rev. Stat. § 77-2701.13; N.J.S.A. § 54:32B-3.6; N.M. Stat. Ann. § 7-9-3(J); N.Y. Tax Law § 1132(l); N.D. Cent. Code § 57-39.2-02.3; Okla. Stat. § 1392; Pa. Stat. Ann. § 7213.1; R.I. Gen. Laws § 44-18.2-3(I); S.C. Code Ann. § 12-36-1340(5); S.D. Codified Laws § 10-65-5; Tex. Tax Code § 151.0242; Utah Code Ann. § 59-12-107.6; Va. Code Ann. § 58.1-612.1; Vt. Stat. Ann. § 9713; Wash. Rev. Code § 82.08.053; W. Va. Code § 11-15A-6b; Wyo. Stat. § 39-15-502.

broadcasters, television broadcasters, or telemarketers liable for sales tax on sales made by out-of-state sellers who use these channels of communication to advertise sales to Louisiana consumers, even though these persons "engage 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 universal administrative practice confirms La. R.S. 47:301(4)(*l*) applies only to the actual out-of-state sellers.

ii. <u>The Fifth Circuit's Decision Did Not Address the Litany of Questions Arising if La. R.S. 47:301(4)(*l*) Applies to Marketplace Facilitators.</u>

By relying upon La. R.S. 47:301(4)(*l*) to impose liability rather than working with the State to enact a comprehensive legislative scheme, Jefferson Parish – and the Fifth Circuit - skirted important policy questions that arise when shifting the burden for collecting and remitting tax to marketplace facilitators. For example, Louisiana's sales and use tax does not:

- Define marketplaces, marketplace facilitators, or marketplace sellers;
- Address which party must register with the jurisdiction and collect the tax on marketplace sellers' sales when the marketplace facilitator and marketplace seller both have substantial nexus with the jurisdiction;
- Address which party should be subject to audit;
- Address how that party should be entitled to mitigate liability arising due to incorrect information received from the other party;
- Address when a marketplace facilitator has substantial nexus with the jurisdiction;
- Address which party must maintain exemption certificates; or
- Protect marketplace facilitators from class action lawsuits.

In contrast, Louisiana's sales and use tax law *does* address how parties should divide responsibilities and liability for tax when auctioneers assist the sellers in making sales. La. R.S. 47:303(C) expressly requires auctioneers to register as dealers and provides they "shall be responsible for the collection of all local and state taxes on articles sold by them and shall report and remit to the collector as provided in this Chapter." Louisiana provides no such delegation of responsibilities and liabilities for marketplace facilitators, suggesting such persons are not considered dealers within the meaning of La. R.S. 47:301(4)(*l*).

These questions can be answered only by a carefully drafted statute, not through ad hoc litigation. The State understands this to be true. The Louisiana Department of Revenue actively participated in the MTC's Marketplace Facilitator Work Group and formed the Louisiana Sale and Use Tax Commission for Remote Sellers. This Commission acknowledged the need to conduct this analysis and make such decisions, stating "[s]pecific definitions for marketplace facilitators, as well as collection, remittance, and administrative matters related to marketplace facilitators, will be considered by the Commission and submitted to the Legislature for consideration in the 2019 Regular Session." *See* Louisiana Sales and Use Tax Commission for Remote Sellers, Remote Sellers Information Bulletin 18-002. Jefferson Parish should not be permitted to advance this case when the State itself has expressed the need to address these matters.

iii. <u>It Would Be Inherently Unfair and Inequitable to Apply La. R.S. 47:301(4)(*l*) to Marketplace Facilitators.</u>

Finally, it is fundamentally unfair to allow Jefferson Parish to impose liability on marketplace facilitators when the Parish failed to provide them notice of its intent to hold marketplace facilitators responsible for tax on transactions taking place over their communication channels. Sales and use taxes are imposed on consumers' use or consumption of products and services within a state. Sellers collect these taxes from consumers and remit them to the taxing jurisdiction. Had Jefferson Parish alerted marketplace facilitators to its intention to treat them as "dealers" and hold them responsible for the collection of tax, Wal-Mart.com could have mitigated 100 percent of its liability by collecting tax from consumers at the time of the sale. Jefferson Parish's failure to provide such notice thus illegitimately shifts liability for this tax from consumers to marketplace facilitators, who were never a party to the sale.

The State and the Parish can do this, of course. But in our rule-based democracy, they must do so through legislative or regulatory action, not through an arbitrary decree whereby liability for the tax is retroactively assessed upon an unsuspecting party after a transaction has occurred and beyond the time the tax can be collected from the rightful party from whom the tax is due.

And, if the Fifth Circuit's decision stands, Jefferson Parish will receive a windfall. Some consumers — in particular, business consumers — do regularly remit use tax to states. The United States Government Accountability Office estimates compliance rates for business consumers range from approximately 70 to 90 percent. *See, e.g.*, U.S. Government Accountability Office, GAO-18-114, Sales Tax — States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs, 14 (Nov. 2017).[8] Thus, it is reasonable to assume some of the taxes in issue in this case have already been voluntarily remitted to the Parish by the in-state purchasers of the goods. Moreover, Jefferson Parish may have audited and assessed consumers who purchased products from third-party sellers over Wal-Mart.com's online platform. Thus, the Jefferson Parish will likely collect tax twice on many sales at issue in this case if it is permitted to assess Wal-Mart.com for taxes.

Fairness, certainty, and notice are essential attributes of a sound tax system, particularly a system relying upon voluntary compliance. Taxing authorities have an obligation to tell taxpayers what the laws are, how they apply, and make them easy to administer. Springing an unsupported interpretation of a taxing statute on an unaware taxpayer violates every tenet of sound tax policy. While governments may change their laws and policies, fairness demands that governments provide taxpayers with notice of their obligations and responsibilities, especially when such notice will enable taxpayers to mitigate their tax and to fulfill their compliance burdens. Fairness, certainty, and notice are thus imperative when a party collects tax owed by the consumer on a parish's behalf and is not a party to the sale.

CONCLUSION

The Fifth Circuit's opinion erroneously treats the legal interpretation and application of La. R.S. 47:301(4)(*l*) as a clear and unambiguous finding of fact. The Fifth Circuit's decision further errs by reaching an incorrect and unsupportable legal conclusion that Wal-Mart.com – a party providing an electronic channel of communication through which a sale occurred – is a "dealer" within the meaning of La. R.S. 47:301(4)(*l*). There is no prior precedent for such an interpretation, for good reason, as it illegitimately shifts liability for sales tax to a person who was not a party to the sale and had no notice of the Parish's intent to do so. Accordingly, this Court should reverse the Court of Appeal's decision.

[8] Available at: https://www.gao.gov/assets/690/688437.pdf.

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VERIFICATION AND CERTIFICATE OF SERVICE

Before me, the undersigned Notary Public in and for the aforesaid jurisdiction, on this 19th day of June, 2019 appeared Linda S. Akchin, who upon being duly sworn did (i) verify that the allegations in the foregoing brief are true to the best of his or her knowledge and (ii) certify that, on this day, a copy of the foregoing brief was mailed by US Mail or delivered upon all parties and counsel as listed below:

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Sworn to and Subscribed before me, this 19th day of June, 2019

Notary Public

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House Committee on Ways and Means

Minutes of Meeting
1990 Regular Session
June 5, 1990

I. CALL TO ORDER

Representative Raymond Laborde, Chairman of the House Committee on Ways and Means, called the meeting to order at 9:20 a.m. in House Committee Room 2 of the State Capitol, in Baton Rouge, Louisiana.

II. ROLL CALL

MEMBERS PRESENT:

Representative Raymond Laborde, Chairman
Representative Charles Lancaster, Vice Chairman
Representative Al Ater
Representative Odon Bacque, Jr.
Representative Harry Benoit
Representative Irma Dixon
Representative Kernan "Skip" Hand
Representative Melvin "Kip" Holden
Representative Melvin Irvin, Jr.
Representative Billy Montgomery
Representative Virgin Orr
Representative Sean Reilly
Representative Arthur "Art" Sour
Representative Steve Theriot

MEMBERS ABSENT:

Representative James St. Raymond

III. STAFF MEMBERS PRESENT:

Jo Bruce, Research Analyst
Deborah Davison, Attorney
Pamela Davis, Secretary
Lyman Brent, Sergeant at Arms
Dorothy Jarvis, Sergeant at Arms

EXHIBIT
A

IV. DISCUSSION

House Bill No. 1410 by Representative Waddell

Representative Waddell presented House Bill No. 1410, which would provide for a tax deduction for expenses incurred in the purchase and installation of burglary prevention devices at a taxpayer's residence.

Representative Waddell explained the bill. The estimated fiscal impact is $1.2 million this year.

There was discussion of the rate reduction given by insurance companies when burglary prevention devices are installed.

Representative Irvin moved to defer action on House Bill No. 1410. There being no objection, action was deferred on House Bill No. 1410 by a vote of 12 yeas and 0 nays. Those voting yea were Representatives Alario, Ater, Bacque', Benoit, Holden, Irvin, Montgomery, Orr, Reilly, Sour, Steve Theriot, and Lancaster.

House Concurrent Resolution No. 72 by Representative Patti

Representative Patti presented House Concurrent Resolution No. 72 which expressed the legislative intent of Act 258 of 1985 to subject all refinery gas to state and local sales and use taxes.

Representative Sour moved to report House Concurrent Resolution No. 72 favorably. There being no objection, House Concurrent Resolution No. 72 was reported favorably by a vote of 11 yeas and 0 nays. Those voting yea were Representatives Alario, Ater, Bacque', Benoit, Holden, Irvin, Montgomery, Orr, Reilly, Sour, and Steve Theriot.

House Bill No. 868 by Representative DeWitt and Senators Kelly and Nunez

Representative DeWitt presented House Bill No. 868, which would repeal the Transportation and Communication Utilities Tax as it applies to telephone companies and levies a 2% sales and use tax on the furnishing of telecommunication services. He said that there should be no negative fiscal impact, in fact, there may be a small revenue increase.

House Bill No. 1560 by Representative Deano

Representative Deano presented House Bill No. 1560, which would provide for the method of collection of sales and use tax on interstate catalog sales at such time as authorized by federal legislation or jurisprudence. He offered a substitute bill.

Representative Deano said that the substitute bill expands the definition of a dealer for the purpose of taxation on mail order catalog sales. He said that the legislation is modeled after a North Dakota statute.

There was discussion of who or what businesses would be included in the definition.

Mr. Raymond Tangney, director, sales tax division, Department of Revenue and Taxation, testified that the bill would enable the department to expand the number of dealers registered for sales tax purposes. Present laws regarding dealers are geared toward a personal representation of the dealer in Louisiana. He said that in the past few decades, physical presence has not been as important in soliciting sales. Mr. Tangney said 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.

Mr. Chris Dicharry, Louisiana Association of Business and Industry, Baton Rouge, Louisiana, was present in support of the legislation.

Representative Bacque' moved to report House Bill No. 1560 by substitute. There being no objection, House Bill No. 1560 was reported by substitute by a vote of 15 yeas and 0 nays. Those voting yea were Representatives Alario, Ater, Bacque', Benoit, Dixon, Forster, Hand, Holden, Irvin, Montgomery, Orr, Reilly, Sour, Steve Theriot, and Lancaster.

Senate Bill No. 341 by Senator Nelson, et al.

Senator Nelson presented Senate Bill No. 341 which would increase the annual compensation for all assessors, and create the assessor's professional certification program. The bill contains a new salary schedule (10% raise, plus an additional 7% raise if certified) for assessors. He said that the bill was filed on behalf of the assessors.

Mr. Conrad Cathey, Mr. James Little, and Mr. Rich Bailey, Louisiana Assessors Association, were present in support of the legislation.