

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

A CIVIL PROCEEDING

OF THE DECISION OF THE LOUISIANA COURT OF APPEAL,
FIFTH CIRCUIT, DOCKET NO. 18-CA-211 AND JUDGMENT OF THE
TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON,
STATE OF LOUISIANA, CIVIL ACTION NO. 769-149, THE
HONORABLE STEPHEN D. ENRIGHT, JR., PRESIDING

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
ON BEHALF OF THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA
IN SUPPORT OF WAL-MART.COM, LLC'S ORIGINAL APPLICATION FOR
SUPERVISORY WRITS OF CERTIORARI, MANDAMUS AND REVIEW**

NOW INTO COURT, through undersigned counsel, comes the Chamber of Commerce of the United States of America (“Chamber”), who moves the Court for leave to file the attached *Amicus Curiae* Brief in this matter, as follows.

The Chamber is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation’s business community.

The Chamber has a substantial, legitimate interest in the manner in which a state’s tax laws are applied to its members and to the nation’s business community as a whole. This interest will undoubtedly be affected by the outcome of this case. Specifically, the Fifth Circuit’s expansion of the scope of the term “dealer” under Louisiana law to hold an entity responsible for

sales taxes on a transaction to which that entity was not a party will significantly impact the Chamber's members, indirect business interests, and the nation's business community. The Chamber's brief as *amicus curiae* will assist this Court in that it demonstrates the far-reaching effects of the Fifth Circuit's unprecedented ruling and shows that such a radical shift in Louisiana's tax law should (and may soon) come instead from the Louisiana Legislature.

The Chamber files its *amicus curiae* brief herewith, conditioned upon this Court's grant of leave. By service of this motion and brief, the Chamber has served notice on all counsel of record.

WHEREFORE, the Chamber of Commerce of the United States of America respectfully requests leave of Court to file the attached brief as *amicus curiae*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing brief has been served upon the following via email, Federal Express, and/or by placing same in the United States mail, properly addressed and postage prepaid, this 8th day of March, 2019, as specified below:

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ORDER

Having considered the foregoing Motion For Leave to File a Brief as *Amicus Curiae* on behalf of the Chamber of Commerce of the United States of America,

IT IS ORDERED that the Chamber of Commerce of the United States of America be and is hereby GRANTED leave to file the attached Brief as *Amicus Curiae*.

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

JUSTICE, LOUISIANA SUPREME COURT

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Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION1

II. ARGUMENT2

III. CONCLUSION.....4

CERTIFICATE OF SERVICE5

TABLE OF AUTHORITIES

Cases

Bill Roberts, Inc. v. McNamara,
539 So. 2d 1226 (La. 1989)..... 2

Collector of Revenue v. J.L. Richardson Co.,
247 So. 2d 151 (La. App. 4th Cir. 1971)..... 2

South Dakota v. Wayfair, Inc.,
138 S. Ct. 2080 (2018) 3

United Cos. Printing Co. v. Baton Rouge,
569 So. 2d 73 (La. 1991)..... 2

Statutes

ALA. CODE § 40-23-199.2(i) 3

IOWA CODE § 423.14(A)(3)(d)(3)(A)..... 3

LA. REV. STAT. § 47:304 2

LA. REV. STAT. § 47:301(4)(l)..... 3, 4

LA. REV. STAT. § 47:337.17 2

LAC 61:I.4311(A)..... 2

Other Authorities

La. Sales and Use Tax Comm’n,
Remote Sellers Info. Bulletin No. 18-002 (Dec. 18, 2018)..... 1, 3

ORECK,
LOUISIANA SALES & USE TAXATION, § 6.1 2

I. INTRODUCTION

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation’s business community.¹

It is undeniable that the rise of e-commerce has significantly changed the manner in which consumers purchase goods and services. This shift towards online sales has led to the emergence of “online marketplaces,” wherein a company facilitates sales between third-party retailers and consumers. These marketplaces allow consumers to shop online from a variety of merchants in one place, and provide significant benefits both for smaller sellers and large retailers.

With these benefits, however, also come challenges. As highlighted by the issue before the Court in this case, a major concern that has arisen nationwide with respect to online marketplaces is which entity bears the responsibility for the tax obligations owed on the transactions. This important issue is one that must be determined by legislatures, to ensure that a comprehensive, carefully crafted, and uniform rule of law can be established. For example, several state legislatures have already begun addressing the issue, and critically, the Louisiana Department of Revenue recently announced that the Louisiana Legislature will consider legislation related to sales tax collection by marketplace operators in its upcoming session.²

The Fifth Circuit’s decision in this case thus usurped the Legislature’s role, unilaterally announcing for the first time in Louisiana that an online marketplace (*i.e.*, a facilitator of sales) qualifies as a “dealer” such that it can be held responsible for the collection of sales taxes on the transactions it facilitates. This decision represents a radical shift in Louisiana law, which until now, limited the definition of “dealer” to the actual parties to the transaction (*i.e.*, the seller or

¹ *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

² La. Sales and Use Tax Comm’n, *Remote Sellers Info. Bulletin No. 18-002* (Dec. 18, 2018), available at <https://revenue.legislation.gov/lawsandpolicies/remotesellerscommissionmaterials>.

the purchaser). Expanding the scope of the term “dealer” in this regard creates the significant risk of inconsistent enforcement among the 64 parishes throughout the State and raises considerable uncertainty as to which entity will be held responsible for the tax obligations on these transactions—*i.e.*, the newly defined “dealer-facilitator” or the traditional “dealer-seller”? These concerns affect not only this case, but the numerous online marketplaces currently facilitating transactions in Louisiana, and the many more that can be expected to appear as online sales continue to increase exponentially. Such a drastic, far-reaching change in Louisiana’s tax law must (and may soon) come from the Legislature—not a single appellate court decision. The Chamber respectfully requests that this Court grant Wal-Mart.com USA, LLC’s writ application and reverse the Fifth Circuit’s decision.

II. ARGUMENT

Until this decision, the responsibility for any applicable Louisiana state or parish sales tax was borne *only* by the parties to the sale—the seller and the purchaser. *See, e.g.*, LAC 61:I.4311(A) (stating that La. R.S. 47:304 (state sales tax) and La. R.S. 47:337.17 (parish sales taxes) “place the primary burden for operation of the sales tax system upon the seller of merchandise, the performer of taxable services, and the rentor or lessor of property, and require that he collect the tax from the purchaser, user, or consumer.”); *Collector of Revenue v. J.L. Richardson Co.*, 247 So. 2d 151, 157 (La. App. 4th Cir. 1971) (“The provision placing the responsibility on the seller or dealer to collect the tax from the purchaser does not preclude the State from proceeding against the purchaser. The tax is due to the State at the time the sale is consummated; and if the seller fails to collect this tax, the State has a right to proceed directly against the purchaser.”); ORECK, LOUISIANA SALES & USE TAXATION, § 6.1 n. 1 (citing *Bill Roberts, Inc. v. McNamara*, 539 So. 2d 1226 (La. 1989); *United Cos. Printing Co. v. Baton Rouge*, 569 So. 2d 73 (La. 1991)) (“As defined, the term ‘Dealer’ makes *either party to any taxable transaction* or taxable service liable for payment of the tax.”) (Emphasis added).

Although enforcement of this traditional framework may have become more difficult in the digital age with the ease and prevalence of interstate sales, Louisiana law never expanded the liability for sales tax obligations beyond the parties to the transaction. In fact, the very provision on which the Fifth Circuit relied to do so in this case was actually enacted to accomplish the exact opposite result—*i.e.*, to ensure that the parties to the transaction remained responsible for

the sales tax obligations. Enacted in 1990, La. R.S. § 47:301(4)(l) expanded the definition of “dealer” to include:

Every person who engages in a 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 legislative history of this provision makes clear that it was not intended to expand the definition of “dealer” beyond the parties to the transaction, but was to ensure that out-of-state mail-order sellers lacking a physical presence in the state could still be held responsible for tax obligations on sales in Louisiana. The Supreme Court of the United States recently upheld a similar provision from another state in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

The Fifth Circuit’s decision thus radically departs from established Louisiana sales tax law, finding for the first time that an entity that is *not* a party to the transaction, but instead, is a mere facilitator of the transaction, can nonetheless be held responsible for tax obligations related to the sale. Such a significant shift in the law must come from the Louisiana Legislature, and not a single appellate court decision. Indeed, a handful of states have already enacted legislation (i) transferring the tax obligations from the third-party seller to the online marketplace operator, and (ii) creating comprehensive schemes to prevent multiple taxation on the transaction. *See, e.g.*, Ala. Code § 40-23-199.2(i) & Iowa Code § 423.14(A)(3)(d)(3)(A) (requiring “marketplace facilitators” (as defined therein) to collect tax on behalf of third-party sellers). And Louisiana may not be far behind, as the Louisiana Department of Revenue recently announced that the Louisiana Legislature will consider legislation related to sales tax collection by marketplace operators in its upcoming session.³ Simply put, the Fifth Circuit jumped the gun by unilaterally announcing a new, dramatically different rule of law with significant ramifications for participants in online transactions in Louisiana.

First, as highlighted by what happened in this very case, the risk of inconsistent enforcement among the 64 parishes as well as between the parishes and the State is substantial. Here, both the Louisiana Department of Revenue and Jefferson Parish audited WalMart.com for the same time period and the same third-party sales. The Department, which of course is well

³ La. Sales and Use Tax Comm’n, *Remote Sellers Info. Bulletin No. 18-002* (Dec. 18, 2018), available at <https://revenue.legislation.gov/lawsandpolicies/remotesellerscommissionmaterials>.

aware of the longstanding interpretation of the term “Dealer” and of the definition set forth in La. R.S. 47:301(4)(I), nonetheless determined that WalMart.com was not liable for sales tax owed on sales made by third-party sellers. Jefferson Parish, on the other hand, reached the exact opposite conclusion, which the trial court upheld and the Fifth Circuit affirmed. If allowed to stand, this decision will be controlling in only a fraction of the parishes throughout the State, creating the very strong likelihood that what was supposed to be a uniform body of tax laws will be applied inconsistently depending on the parish in which the transactions occur. On this basis alone, this Court should grant the writ application to prevent this untenable result.

But there is more. The decision further results in considerable uncertainty as to which entity will now be held responsible for the tax obligations related to third-party sales. Under the decision, both the marketplace operator *and* the third-party seller can be held liable for collecting and remitting the same tax from the same purchaser on the same transaction. Such uncertainty as to what tax obligations may be owed in a given state—or parish—is patently unfair to these entities and should not be condoned by this Court. If a change is to be made with respect to the entity historically responsible for sales tax obligations, it must be accomplished through a uniform system enacted by the Legislature, and not an outlier decision from a single Louisiana appellate court. The writ application should be granted, and the Fifth Circuit’s erroneous, over-reaching decision reversed.

III. CONCLUSION

The Chamber of Commerce of the United States of America respectfully requests that this Court grant Wal-Mart.com USA, LLC’s writ application and reverse the Fifth Circuit’s decision.

Respectfully submitted,

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