

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

ORDER

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

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

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

JUSTICE, LOUISIANA SUPREME COURT

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**BRIEF OF
RETAIL LITIGATION CENTER, INC.,
NATIONAL RETAIL FEDERATION AND
LOUISIANA RETAILERS ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF
WAL-MART.COM USA, LLC'S APPLICATION
FOR WRIT OF CERTIORARI**

Respectfully Submitted,

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SUPREME COURT
OF LOUISIANA

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MAY IT PLEASE THE COURT:

The Retail Litigation Center (“RLC”), National Retail Federation (“NRF”) and Louisiana Retailers Association (“LRA”) (collectively, “*Amici*”) conditionally submit, upon motion to this Court, this brief as *amici curiae* in support of the Application for Writ of Certiorari (the “Writ Application”) filed by Wal-Mart.com USA, LLC (“Walmart.com”) to address and ultimately reverse 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*”). As organizations dedicated to representing the retail industry, *Amici* are able to offer unique perspectives and insights regarding the potential adverse impacts of the Fifth Circuit’s decision in *Wal-Mart.com* on the broader retail community, as well as the impact on the industry if this Court does not grant Walmart.com’s Writ Application and reverse the lower court. In addition, *Amici* represent that their brief addresses matters of fact or law that might otherwise escape the Court’s attention and that they have a substantial, legitimate interest in the outcome of the case and they believe their interest will not be adequately protected by those already party to the *Wal-Mart.com* case.

I. IDENTITY AND INTEREST OF AMICI

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

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

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

II. INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in the case is whether a local sales tax collector can reinterpret a Louisiana state and local sales tax law term (here: the definition of “dealer”) and then apply the new interpretation retroactively (here: to third-party online marketplaces) to commercial activity that happened well in the past. Specifically, prior to the lower court’s *Wal-Mart.com* decision, the Louisiana Department of Revenue (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 Jefferson Parish sales tax collector, however, unilaterally and retroactively decided to apply the definition to online *marketplaces* even though such businesses did not exist when the statutory definition at issue was enacted. The outcome of this case could affect all retailers, including in-state brick and mortar stores, ecommerce retailers and third-party online marketplaces, not only because of the reinterpretation and retroactive application of the new definition in this instance but because it clears a glide path for all local parishes to change settled state tax law definitions whenever they wish.

Amici’s members have long argued for a level sales tax collection playing field as between traditional brick and mortar retailers and online sellers because, if a state has the authority to require traditional retailers to collect and remit sales taxes, that authority should extend to all retailers – regardless of whether those retailers have a physical presence in the state.¹ However, any changes in sales tax authority should be communicated clearly and uniformly in a way that provides adequate notice of any new collection and remittance responsibilities. Prospective application of new requirements is especially important here to avoid adding confusion to Louisiana’s highly complex state and local sales tax systems.²

¹ See Brief of Retail Litigation Center, Inc. as *Amicus Curiae* in Support of Petitioner, in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018) available at <https://www.rila.org/enterprise/retail litigation center/Documents/E-Fairness%20Files/eFCertAmicus-RLC.pdf>.

² Louisiana is considered by experts to be one of the most complex and burdensome state and local sales tax systems in the country. See, e.g., Council on State Taxation (COST), “The Best and Worst of State Sales Tax Systems: COST

As explained in more detail below, we encourage Louisiana’s state and local sales tax administrators and its courts to be guided by the U.S. Supreme Court’s recent decision in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018), which provides a clear template for imposing new tax collection and reporting requirements on entities such as online marketplaces and separate e-commerce retailers. The U.S. Supreme Court took great care to elucidate hallmarks of implementation that would avoid potential constitutional infirmity under Article I, Sec. 8, Cl. 3 of the United States Constitution (the “Commerce Clause”). These include simplification, uniformity, and prospective application. To date, many states have followed the U.S. Supreme Court’s guidance and adopted or are in the process of adopting uniform legislation that prospectively requires all remote sellers and remote online marketplace providers to collect and remit state sales tax.³ The appropriate state entities in Louisiana are themselves currently developing legislation to be introduced in the upcoming 2019 Regular Session of the Louisiana Legislature. The Fifth Circuit’s decision undermines this effort.

Amici’s members are concerned about the impact on retailers and separate online marketplaces that operate in Louisiana if the lower court’s decision in *Wal-Mart.com* is not reversed. If Jefferson Parish is allowed to bypass the state legislature and impose expansive new interpretations of settled tax statute terms (such as redefining “dealer” to include online marketplaces in this case, or of any other terms in the future), other local taxing jurisdictions in Louisiana will surely take the same approach whenever it suits their fancy, thereby multiplying the impact of the decision on retailers and others who are operating under Louisiana’s already complex state and local sales tax system. *Amici’s* members believe – as apparently do the Louisiana Legislature and the Department – that the proper approach to implementing sales tax requirements for online marketplaces is *for the state* to adopt clear, comprehensive, uniform, and *prospective* legislation, as outlined in *Wayfair*⁴ and as other states have done.⁵ Such state-wide

Scorecard on Sales Tax Simplification, Uniformity, & the Exemption of Business Inputs,” (April 2018) (by Karl Frieden and Fred Nicely), 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>.

³ See, e.g., Washington, 2017 HB 2163; Rhode Island, 2017 H 5175A; Pennsylvania, 2017 Act 43; South Dakota, 2018 SB2; Oklahoma, 2018 HB 1019XX; Connecticut, 2018 SB 417; New Jersey, 2018 A4496; and Alabama, 2018 HB 470. See also, Minnesota, 2017 HF 1, which was passed and signed into law prior to the Supreme Court’s decision in *Wayfair*; however, the legislative provisions are consistent with the principles outlined in the *Wayfair* decision and notice of prospective enforcement was not issued until after the *Wayfair* decision was announced.

⁴ *Wayfair* at p. 23, 138 S. Ct. at 2099.

⁵ See note 3, *supra*.

action taken by the duly elected Louisiana Legislature should not be undermined by local power grabs that are protected by lower courts. Since Louisiana law⁶ prevents the legislature from retroactively overruling judicial decisions such as *Walmart.com*, the Legislature is powerless to retroactively remedy the situation created by the lower court's decision: only this Court can restore the necessary calm and certainty. Accordingly, we strongly urge the Louisiana Supreme Court to grant *Walmart.com*'s Writ Application and prevent local authorities from imposing new extra-statutory requirements for commercial activity that occurred long ago.

III. ARGUMENT

A. Jefferson Parish's Reinterpretation of "Dealer" to Apply to Third-Party Online Marketplaces is Inconsistent with the Plain Meaning and Legislative History of the Statute as Well as the Long-standing Interpretation of State Tax Authorities and 62 Other Local Tax Authorities.

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

Moreover, the applicable local sales taxes must be collected by the "dealer" from the purchaser or consumer for any taxable retail sales that take place within a local taxing jurisdiction. La. R.S. 47:337.17(A)(1). "Dealer" is generally defined under Louisiana law as "every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in a taxing jurisdiction." La. R.S. 47:301(4). Subparagraphs (4)(a) through (l), inclusive of the relevant provision, further define the term "dealer" for purposes of state and local sales and use tax.⁷ In particular, subparagraph (4)(l)

⁶ La. Const. Art. II, Sec. 2. See also, e.g., *Unwired Telecom Corp. v. Par. of Calcasieu*, 03-0732 (La. 01/19/05); 903 So. 2d 392 and *Mallard Bay Drilling, Inc. v. Kennedy*, 2004-1089 (La. 06/29/05); 914 So. 2d 533.

⁷ See La. R.S. 47:301(4)(a)-(l). Pursuant to the authority granted under Article VI, Section 29 of the Louisiana Constitution, Jefferson Parish has adopted by reference the Uniform Local Sales Tax Code ("ULSTC") set forth in La. R.S. 47:337.1, *et seq.* (which is mandatorily imposed on all local sales tax jurisdictions) and the definitions set forth in La. R.S. 47:301. See La. R.S. 47:337.1, *et seq.*; La. R.S. 47:337.6(B) ("The words, terms, and phrases used in this Chapter [the ULSTC] shall have the same meaning ascribed to them as provided for in R.S. 47:301, unless the context clearly indicates a different meaning, except to the extent expressly limited in that Section."); Jefferson Parish Uniform Local Sales Tax Code Ordinance, Section 35-16 and 35-22 through 35-24.1.

defines "dealer" to include "[e]very person who engages in regular or systematic solicitation of a consumer market in the taxing jurisdiction by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system." Louisiana's state and local tax statutes are replete with definitions of "dealer;" however, this is the *only* definition that the Jefferson Parish collector relied upon to assert that a statutory "dealer" should include a separate, third-party (non-seller) online marketplace provider.

The origin of this specific definition of "dealer" is worth particular note because it was added to the Louisiana sales tax statutes by Act No. 478 of the 1990 Regular Session of the Louisiana Legislature, which took effect July 18, 1990. Enactment was thus well before third-party online marketplaces were conceived, let alone the practical realities that they are today. Since online marketplaces, such as Walmart.com, did not exist when La. R.S. 47:301(4)(l) was enacted, the Legislature could not have intended to apply the 1990 "dealer" definition to online, remote facilitators that are not actually *sellers* and that do not actually transfer title or possession of the product to an end consumer. In fact, it appears that the "dealer" definition in La. R.S. 47:301(4)(l) was enacted to expand the state's jurisdictional reach to those true out-of-state *sellers* who *sold* goods into Louisiana through catalogs and other mailings – not to reach today's third-party online marketplaces.⁸

This argument is further supported by the observation that neither the Department nor any local sales tax collector in Louisiana (other than Jefferson Parish, just recently) has ever sought to require online marketplaces to register, collect, and remit Louisiana local sales taxes on marketplace transactions involving separate, third-party online sellers. In fact, recognizing that Louisiana's state and local sales tax laws do *not* cover the relatively new concept of online marketplaces, the Department, the Governor's administration, and the separate Louisiana Sales and Use Tax Commission for Remote Sellers (the "Commission")⁹ are together working to develop appropriate definitions for online marketplaces, as well as potential procedures for the registration, collection, remittance, and administration of state and local sales taxes related to online

⁸ Walmart.com's Writ Application and corresponding memorandum in support address the improper use of the "dealer" definition in La. R.S. 47:301(4)(l) by the Jefferson Parish collector and the Fifth Circuit to apply to third-party marketplace providers. Thus, this brief will not focus upon that specific argument.

⁹ See La. Act No. 274 (2017 Regular Session).

marketplaces. Jefferson Parish tax authorities are certainly aware of the current state tax law's limitations with respect to online marketplaces because the Commission includes representatives from both the Department and Louisiana's local sales tax collectors. One of the Commission's stated goals is to draft comprehensive proposed legislation to clearly outline the changes to Louisiana state and local sales tax law for online marketplaces. The Commission's work will be submitted to the Louisiana Legislature for consideration in the 2019 Regular Session.¹⁰

Nonetheless, the Fifth Circuit disregarded the plain language and legislative history of the statute and ignored the long-held interpretations of "dealer" by state tax officials and 62 local tax authorities, and instead, upheld the Jefferson Parish collector's unannounced, independent, and retroactive interpretation that Walmart.com, as a third-party online marketplace, was a "dealer," as defined by La. R.S. 47:301(4)(l). *Amici* urge the Court to uphold the plain meaning of the statute and not allow an individual taxing jurisdiction to unilaterally and retroactively (without prior notice) expand local (and state) sales tax laws through the judiciary (by way of an audit and summary proceeding against a single taxpayer/marketplace provider) rather than through uniform legislation. This Court should do so by taking this case and overturning the Fifth Circuit's decision.

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

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

The Court in *Wayfair* expressly overturned its prior precedents (namely, *Quill Corp. v. North Dakota*¹¹ and *National Bellas Hess, Inc. v. Dep't of Revenue of Ill.*¹²) and ruled that a

¹⁰ See LDR, Remote Sellers Information Bulletin ("RSIB") 18-002 (Dec. 18, 2018) ("Specific 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.")

¹¹ *Quill Corp. v. North Dakota*, 504 U. S. 298, 112 S. Ct. 1904 (1992).

¹² *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753, 87 S. Ct. 1389 (1967).

retailer's "physical presence" in the state alone is no longer the proper touchstone for assessing whether a state has the constitutional authority to require a retailer to collect and remit the sales tax that is owed to the state by its residents on a transaction. In eschewing "physical presence" as the gatekeeper nexus test, the Court was careful to remind state and local tax collectors that other Commerce Clause principles still apply and that those may invalidate a state or locality's sales tax scheme if, for example, they impose undue burdens on interstate commerce or otherwise discriminate against interstate commerce. Importantly, the Court recognized several features of a tax system that would not impermissibly impinge on the Commerce Clause when it discussed the relevant law in the Petitioner's state:

First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act insures that no obligation to remit the sales tax maybe applied retroactively. S.D. 106, §5. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: it requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State.¹³

The Court's clear road map provides sound guidance for designing state and local sales tax systems that avoid treading on the Commerce Clause. In keeping with the Court's guidance, *Amici* recommend that new laws for regulating e-commerce retailers and separate online marketplaces have the following characteristics:

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

Following *Wayfair*, states across the country are reviewing their current state tax laws and enacting amendments where necessary to require online retailers and separate online marketplaces to collect and remit state and local sales taxes on a prospective basis.¹⁴ Louisiana is looking to follow suit. As noted above, the Department, the Governor's administration, and the Commission are all currently working on comprehensive state sales tax legislation to propose in the 2019 Regular Session of the Louisiana Legislature. That legislation is being designed within the U.S.

¹³ *Wayfair* at p. 23, 138 S. Ct. at 2099.

¹⁴ See note 3, *supra*.

Supreme Court's *Wayfair* framework and will address the prospective applicability of the state and local sales tax collection laws to online marketplaces plainly and comprehensively.¹⁵ In addition, the Commission, acting within the Department, is working on creating a uniform, simplified system for the collection and administration of state and local taxes on remote sales by remote sellers.¹⁶ All of these endeavors are part of the orderly legislative process working toward the shared goal of generating new state and local sales tax revenue by expanding Louisiana's state and local sales tax systems to cover ecommerce retailers and online marketplaces in a manner consistent with the principles outlined in *Wayfair*. This process should be allowed to proceed without interference, and it can only properly do so if this Court reverses the Fifth Circuit's decision in *Wal-Mart.com*.

C. The Fifth Circuit's Decision Will Promote Inconsistency and Lack of Uniformity Among Louisiana's State and Local Sales Tax Systems.

The lower court's decision in *Walmart.com* could encourage other local taxing authorities to take the same approach that Jefferson Parish did and reinterpret 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. These independent and retroactive actions threaten the uniform application of the state and local sales tax laws and will create uncertainty and confusion for all retailers operating in the state. Although the Fifth Circuit's decision only concerns one local collector's interpretation of state sales tax law, the current decision in *Wal-Mart.com* could embolden other localities within the Fifth Circuit's jurisdiction to opt in (or opt out) of the expansive interpretation of "dealer" espoused by Jefferson Parish or to develop new interpretations of the term or different prior tax periods for retroactive application. The Fifth Circuit's decision could also encourage other localities throughout the state to seek new expansive interpretations of other historically clear state and local sales tax law provisions through unpublished and retroactive interpretations. The ultimate result of the *Wal-Mart.com* decision could be different interpretations of "dealer," and the related taxability of online marketplaces, by all 63 independent parishes and

¹⁵ See, e.g., RSIB 18-002 (Dec. 18, 2018).

¹⁶ *Id.*

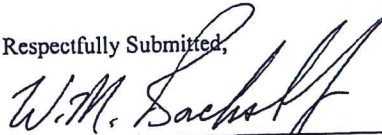
the Department. Clearly, this situation would be a far cry from the sales tax system described by the U.S. Supreme Court in *Wayfair* and could spawn further litigation.

As discussed above, the Fifth Circuit's decision to ratify Jefferson Parish's *retroactive* application of its unpublished, unilateral interpretation of "dealer" to include online marketplaces in prior tax periods is especially troubling. The Department and the Commission have already indicated their intention to address the taxation of online marketplaces through *prospective* legislation. However, although such legislation will provide retailers and state and local tax authorities a good roadmap going forward, it cannot retroactively remediate the problem caused by the Fifth Circuit's decision because the Louisiana Constitution forbids the Legislature from doing so.¹⁷ Thus, even though the Louisiana Legislature may establish uniformity and clarity in the taxation of online marketplaces for the future, local taxing jurisdictions could still attempt to use the *Wal-Mart.com* decision to impose retroactive sales tax liability on online marketplaces, unless this Court acts and overturns the Fifth Circuit's decision.

IV. CONCLUSION

For the reasons stated in Walmart.com's Writ Application, and for the reasons stated herein, *Amici* respectfully ask this Court to grant Walmart.com's Writ Application and review the Fifth Circuit's decision in *Wal-Mart.com*.

Respectfully Submitted,



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¹⁷ La. Const. Art. II, Sec. 2 guarantees separation of powers among Louisiana's legislative, judicial and executive branches of government. See also, e.g., *Unwired*, 903 So. 2d 392; *Mallard Bay*, 914 So. 2d 533.

VERIFICATION AND CERTIFICATE OF SERVICE

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

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

I hereby certify that a copy of the foregoing Brief of Retail Litigation Center, Inc., National Retail Federation, and Louisiana Retailers Association as *Amici Curiae* in Support of Wal-Mart.com USA LLC's Application for Writ of Certiorari was served on this 25th day of February, 2019, via U.S. Mail, postage prepaid, on the following:

Via U.S. Mail

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Clerk, Louisiana Fifth Circuit Court of Appeal
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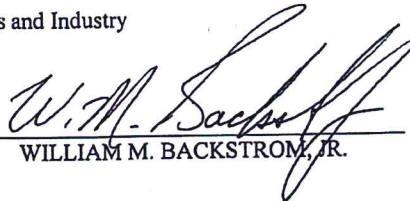
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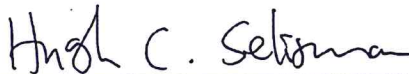
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WILLIAM M. BACKSTROM, JR.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 25th day of February,

2019.



NOTARY PUBLIC

HUGH C. SELIGMAN
NOTARY PUBLIC
State of Louisiana
My Commission Is Issued For Life
LA Bar Roll No. 35315