Nos. 20-CV-0392 & 20-CV-0530

DISTRICT OF COLUMBIA
COURT OF APPEALS

CENTER FOR INQUIRY, INC.,

Appellant-Respondent,

v.

WALMART, INC.,

Appellee-Petitioner

and

CVS PHARMACY, INC.,

Appellee-Petitioner.

On appeal from the Superior Court of the District of Columbia
Civil Division No. 2019 CA 3340 B, The Honorable Florence Y. Pan
Civil Division No. 2018 CA 4698 B, The Honorable Fern Flanagan Saddler

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Motion for Leave to File Brief on Behalf of Amici Curiae Retail Litigation Center, Inc. and the National Retail Federation in Support of Rehearing or Rehearing En Banc

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CORPORATE DISCLOSURE STATEMENT

The Retail Litigation Center, Inc. ("RLC") is a 501(c)(6) membership association that has no parent company. No publicly held company owns a ten percent or greater ownership interest in the RLC.

The National Retail Federation ("NRF") is a 501(c)(6) membership association that has no parent company. No publicly held company owns a ten percent or greater ownership interest in the NRF.

Under District of Columbia Court of Appeals Rule 29(b)(2)-(3), the Retail Litigation Center, Inc. ("RLC") and the National Retail Federation ("NRF") respectfully move for leave to file the attached brief as amici curiae in support of rehearing or rehearing en banc. On October 14, 2022, Appellees Walmart Inc. and CVS Pharmacy, Inc. gave consent to file this brief. On October 15, 2022, Appellant Center for Inquiry, Inc. informed amici that it "is not granting consent for amicus briefs in this case at this time."

I. Interest of Amici

Both the RLC and the NRF regularly participate as amici in significant cases.

The RLC represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of industries. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases.

The NRF is the world's largest retail trade association. The NRF's membership includes retailers of all sizes, formats and channels of distribution in over 45 countries. In the United States, the NRF represents the breadth and

diversity of an industry that is the nation's largest sector employer with more than 52 million employees and contributes $3.9 trillion annually to GDP.

In Washington, D.C. alone, there are over 7,000 retail establishments, employing over 80,000 people and generating a direct $4.5 billion impact on local GDP.[1] Whether these D.C. retailers in particular—and amici's members more generally—can organize lawful products according to their lawful labels is an issue of significant importance to amici. If retailers can be sued merely for organizing lawful products according to their labels, then amici's members will be forced to change their stores' layouts in confusing and inefficient ways. And because no layout can preclude the theory of liability permitted by the Division's decision, retailers will *still* face costly litigation even if they attempt to subdivide similar wares to avoid liability. Retailers and their customers will be harmed by the decision. Thus, amici have a vital interest in whether this Court grants the petition for rehearing or rehearing en banc.

II. Desirability and Relevance of Amici Brief

Given their network of retailers—representing many different products, sizes, and business models—amici are well positioned to speak to the significance

[1] *See* National Retail Federation, *Retail's Impact in District of Columbia* (2020), *available at* https://cdn.nrf.com/sites/default/files/2020-09/dc-2020-retails-impact.pdf.

of the panel's decision for retailers in the District specifically and the nation more generally.

Amici can also speak directly to the infeasibility of operating under the Decision's reasoning. Amici can draw on the collective and varied experience of their countless members to explain why it would be incredibly burdensome, and ultimately impossible, to reorganize their stores' product layout to address the implications of the Division's decision. Moreover, amici can speak to how different interest groups with different agendas often press retailers to take or refrain from certain actions and how it would be impossible for retailers to organize their stores in a way that appeases all ideological litigants.

For those reasons, amici respectfully request leave to file the attached brief as amici curiae in support of rehearing or rehearing en banc.

Dated: October 20, 2022

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IDENTITY OF THE AMICI CURIAE, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

In Washington, D.C. alone, there are over 7,000 retail establishments—from individually owned small footprint "mom and pop's" to large footprint national chain stores. Collectively, they employ over 80,000 people and generate a direct $4.5 billion impact on local GDP.[1] The RLC represents leading national and regional retailers in all verticals. The NRF is the world's largest retail trade association. Whether retailers can be held liable for how they organize lawful products in their stores is an issue of significant importance to the RLC, the NRF, and their members.

On October 14, 2022, Appellees Walmart, Inc. and CVS Pharmacy, Inc. consented to this brief. On October 15, 2022, Appellant Center for Inquiry, Inc. indicated that it "is not granting consent for amicus briefs in this case at this time." The RLC and NRF have filed a concurrent motion for leave to submit this brief.[2]

INTRODUCTION

Retailers small and large must exercise their best judgment on how to organize their inventories in ways that make sense to consumers. Many arrange their shelves and signage according to the labels that manufacturers place on

[1] National Retail Federation, *Retail's Impact in District of Columbia*, *available at* https://cdn.nrf.com/sites/default/files/2020-09/dc-2020-retails-impact.pdf.

[2] No party counsel authored this brief in whole or in part, and no party or party counsel, or any other person other than the RLC, NRF, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

products, grouping similarly labeled products together. This is not only logical but cautious. All products must be labeled in accordance with applicable federal and state law, and some products may be sold only if federal or state regulators have approved their labeling, including their intended use. Organizing inventory according to product labels puts products where consumers can easily find them, while relying on regulators' and manufacturers' expertise in labeling.

The Division's decision gives opportunistic or ideological litigants a heckler's veto over retail store organization. Claims analogous to those here could be brought against grocers selling almond milk in the dairy aisle[3] or alcohol-free beer in the liquor aisle,[4] pharmacies selling cloth masks alongside KN-95 ones,[5] bookstores selling texts on "humanism" in the religion section,[6] or hardware stores selling "green" cleaning products alongside stronger chemical ones.[7] The threat of

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[3] Adam Belz, *As regulators ponder food labels, dairy farmers press harder against nut 'milk'*, StarTribune (Feb. 18, 2019), *available at* https://www.startribune.com/as-regulators-ponder-food-labels-dairy-farmer-press-harder-against-nut-milk/505992462/.

[4] Foodie, *Tested: Alcohol-Free Beers, Spirits and More* (Jan. 1, 2022), *available at* https://www.afoodieworld.com/brew-852/non-alcoholic-beer-wine-and-spirits ("[S]hould alcohol-free beers, wines and spirits be available at the supermarket near the juices and soft drinks? Or should they stay in the aisle with the grog?").

[5] Apoorva Mandavilli, *C.D.C. concedes that cloth masks do not protect against the virus as effectively as other masks*, New York Times (Jan. 14, 2022), *available at* https://www.nytimes.com/2022/01/14/health/cloth-masks-covid-cdc.html.

[6] *See Williamson v. Brevard Cty.*, 928 F.3d 1296, 1300-02 (11th Cir. 2019) (discussing dispute amongst residents over whether humanism is a "religion").

[7] Laura Daily, *Do 'green' cleaning products really work?*, The Seattle Times (continued...)

such liability will force retailers to reorganize their wares in inefficient, confusing ways. Even then, retailers will face unending litigation costs because any arrangement will be vulnerable to the kinds of claims in this case. Store owners will stop selling certain products that attract these kinds of claims. All of this will yield worse layouts, higher prices, less competition, and reduced choice.

Given these serious consequences for retailers—from small mom-and-pop's to large general merchandisers, from dollar stores to supermarkets—and ultimately for consumers, this case presents a question of "exceptional importance" warranting rehearing or rehearing en banc. D.C. App. R. 35(a)(2).

ARGUMENT

I. THE DIVISION'S DECISION INVITES ENDLESS LITIGATION AND PREVENTS RETAILERS FROM SENSIBLY ORGANIZING THEIR STORES.

Placing products in a retail store is a mix of art and science, but whether employing instinct or intellect, "the placement of items in a store is done with deliberation."[8] Depending on their size, retailers rely on everything from experience and horse-sense to data-driven analytics and AI.[9] All these techniques

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(Sept. 6, 2021), https://www.seattletimes.com/explore/at-home/do-green-cleaning-products-really-work/.

[8] dotActiv, *The Psychology Behind Retail Product Placement* (Jan. 6, 2020), *available at* https://www.dotactiv.com/blog/retail-product-placement.

[9] Smartbridge, *Market Basket Analysis 101: Anticipating Customer Behavior* (Mar. 15, 2022), *available at* https://smartbridge.com/market-basket-analysis-101/.

"help[] retailers better understand—and ultimately serve—their customers."[10] One way to better serve customers is through "product clustering. … Products can be clustered in different ways (and for different purposes). They can be clustered by type, shape, occasion, materials, features, price, style, design, color, size, family, brand, function, and more."[11] Every retailer's approach is different, but they share a common goal of organizing products to help customers find what they want.[12]

Thus, while products in clusters share some similarities, it is also true that "products in stores are generally placed next to products that have some differences." *Ctr. For Inquiry, Inc. v. CVS Pharmacy, Inc.* ("*CFI v. CVS*"), No. 2018 CA 4698 B, slip op. at 9 (D.C. Super. Aug. 5, 2020). Historically, retailers have not faced liability for exercising judgment to group clearly labeled products used for similar purposes (though of course with some differences) in the same area.

By relying on manufacturers' lawful labeling, retailers can organize their stores without independently studying and testing every third-party product on their shelves. As the Supreme Court explained as to one kind of retailing, "[i]f the

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[10] *Id.*

[11] Retalon, *How to Effectively Use Product Clustering in Retail* (2022), *available at* https://retalon.com/blog/product-clustering.

[12] *See, e.g.*, Ioana Ciuaru, *Why Are Eggs In The Dairy Section? Here Are 4 Good Reasons* (Foodiosity, Jul. 12, 2022), *available at* https://foodiosity.com/why-are-eggs-in-the-dairy-section/.

contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed." *Smith v. California*, 361 U.S. 147, 153-54 (1959). Making an independent assessment of the claims on product labels would be even more onerous—akin to not just inspecting but fact-checking the contents of all the material sold in a bookshop.

The Division's decision also imposes a second serious burden on retailers: the practical challenge of subdividing similar products into separate areas to underscore their differences. Small stores with less real estate may simply not have enough space to do this in a non-confusing way. Larger footprint stores have more space, but they also have far more products. A layout designed to minimize claims would be a confusing maze that would frustrate customers. Further, more precise categorization could *strengthen* a claim that the retailer was making representations about the product, rather than merely adopting a conventional layout.

The burdens on retailers could cause upstream harms as well: reducing the variety of products sold—whether due to space constraints or fear of litigation as to the placement of those products—would harm smaller manufacturers of popular products, and all manufacturers of niche products. This, too, would reduce choice, increase prices, and promote consolidation in ways that harm consumers and businesses. And it would allow opportunistic or ideological litigants to supplant regulators' well considered and researched determinations as to what can lawfully

be sold and how it should be lawfully labeled. The beneficiaries of such a change would be litigators and interest groups, not consumers or retailers.

All this may be fine for the Center for Inquiry ("CFI"), whose stated goal is "to remove homeopathic drugs from the market," Op. 12, but the consequences will go beyond homeopathy. As noted, similar claims could be brought over groceries, safety gear, cleaning products, or any other retail good. The question is not whether every lawsuit will succeed. The decision holds that whether specific "signage and product placement influence consumers … can be answered only with evidence." Op. 23-24. The question is thus whether retailers will be chilled by the threat of costly litigation through discovery and trial—and the answer, as CFI boasts, is yes.

Unfortunately, while the costs and risks of litigation will compel retailers to make considerable changes, no taxonomy would preclude the kind of claim authorized by the Division's decision. All products differ in *some* way, so any grouping could be said to imply a similarity that does not exist. Take the dairy aisle. Putting almond milk in a new "nut milk" aisle would just invite a new claim—after all, almonds are not "true nuts."[13] Putting almond milk, oat milk, and others in a "dairy substitute" aisle would invite claims over modified lactose-free

[13] Caitlin Bard, *Cashews and almonds aren't technically nuts. So what are they?*, McGill Office for Science and Society (Jul. 10, 2020), https://www.mcgill.ca/oss/article/nutrition-did-you-know/cashews-and-almonds-arent-technically-nuts-so-what-are-they.

products. Now multiply this by the 142,000 different products sold by Walmart.[14]

Indeed, one need not look further than this case to see why retailers cannot just give in to today's interest group to avoid tomorrow's lawsuit. Suppose Walmart and CVS create two sections, one for non-homeopathic medicines and one for homeopathic medicines. The problem is that while to some "homeopathy" may be a shorthand for all alternative medicine, to others "[h]omeopathy does *not* mean home remedies, or alternative medicine, or some vague term like that."[15] To this latter group, "[e]chinacea is not a homeopathic remedy. … So, if you're trying out a neti pot to deal with allergies, or echinacea because you hope it might help your cold, enjoy—they might work, they might not—but don't call them homeopathic remedies."[16] To the former group, echinacea *is* a homeopathic (i.e., "alternative") remedy.[17] Where, then, should it be sold? It is no solution to propose vague store sections—"Traditional Medicine" vs. "Alternative Medicine"—which would provide little guidance to customers and would arguably imply a stronger value judgment than what CFI alleges here.

In sum, retailers will be forced to change their layouts *and* to endure

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[14] *Our Retail Divisions*, Walmart (Jan. 6, 2005), *available at* https://corporate.walmart.com/newsroom/2005/01/06/our-retail-divisions.

[15] Beth Skwarecki, *What "Homeopathy" Is, And Why it's Useless* (lifehacker, May 31, 2017), *available at* https://lifehacker.com/what-homeopathy-is-and-why-its-useless-1795694290.

[16] *Id.*

[17] https://www.boironusa.com/product/echinacea/.

opportunistic or ideological lawsuits. This cannot have been the intent behind the Consumer Protection Procedures Act, and it is not what the Act requires. But setting aside the merits, at a minimum this Court should recognize the *significance* of this case—the significance that has caused amici to file this brief.

II. THE DIVISION'S DECISION WILL BE ABUSED TO STOP RETAILERS FROM SELLING LAWFUL PRODUCTS.

The Division's decision will encourage lawsuits brought by litigants seeking to promote agendas unrelated to the purposes of the Act. One such agenda could be to disadvantage a competitor. Another could be to get rid of lawful products to which an interest group objects on moral grounds.

There is no need here to imagine a parade of horribles because that parade has already begun, and CFI is the drum major. The decision acknowledges that CFI is motivated by a "multi-year mission to remove homeopathic drugs from the market." Op. 12. That is an understatement. In a blog post discussing the Division's decision, CFI states that the Court's recognition of "CFI's mission-driven opposition to homeopathy as a pseudoscience and CFI's efforts to remove homeopathic drugs from the market" was "a really big deal."[18] CFI's loathing of homeopathy is not consumer-driven or medicine-driven, but is part of its larger war

[18] Nicholas Little, *Score One for the Good Guys—A Major Battle Won in the Continuing War on Homeopathy Fraud*, CFI Blog (Sept. 29, 2022) https://centerforinquiry.org/blog/score-one-for-the-good-guys-a-major-battle-won-in-the-continuing-war-on-homeopathy-fraud/.

against "old superstitions, prejudices, and magical thinking."[19] Indeed, CFI's post about the Division's decision is the second article highlighted on the frontpage of CFI's homepage; pride of place is given to "SALVATION IS FUTILE: How Christianity Markets a Need that Doesn't Exist."[20]

CFI's mission statement is illuminating. If the past few years have taught us anything, it is that there are passionate views and an appetite for litigation on both sides of almost every product that can be characterized as medical or political. Today's organization has sued to express its dislike of homeopathy; tomorrow's organization will sue to express its dislike of vaccines, masks, how clothing accounts (or does not account) for gender, meat products (or meat substitutes), contraceptives, petroleum-based products, or nearly anything else under the sun. These organizations can plead complaints just as well as CFI and can cast their claims in terms of consumer confusion, supported by well-pleaded allegations (whether false or true) of a product's inefficacy or side effects. The Division's decision makes such suits inevitable.

This Court should not turn retailers' aisles into culture-war battlegrounds, particularly since a retailer's concession to one litigant will simply invite attacks by others. Frankly, that could happen even with regard to the products at issue

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[19] *See* CFI, *Our Mission*, *available at* https://centerforinquiry.org/about/. The RLC takes no position on the merits of CFI's mission.

[20] https://centerforinquiry.org/, *as visited on* October 17, 2022.

here: if retailers create a "traditional medicine" aisle for products like DayQuil and an "alternative medicine" aisle for homeopathic products, a pro-homeopathy organization could bring suit claiming confusion because homeopathy is actually more traditional (in the sense of venerable) than clinically tested chemically compounded medicines like DayQuil. It could claim that consumers were being misled into thinking that the medicine purchased in the "traditional medicine" aisle had a pedigree of hundreds, rather than dozens, of years. Under the decision, whether the new "signage and product placement influence consumers … c[ould] be answered only with evidence." Op. 23-24.

CONCLUSION

Given the significance of subjecting retailers to opportunistic and ideological lawsuits based merely on the "benign practice" of product clustering, *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 130 (2d Cir. 2009), this case should be reheard either by the Division or en banc.

Dated: October 20, 2022

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CERTIFICATE OF SERVICE

I hereby affirm that on this 20th day of October 2022, I served the foregoing (1) Motion for Leave to File Brief on Behalf of Amici Curiae Retail Litigation Center, Inc. and the National Retail Federation in Support of Rehearing or Rehearing En Banc and (2) Brief on Behalf of Amici Curiae Retail Litigation Center, Inc. and the National Retail Federation in Support of Rehearing or Rehearing En Banc via electronic means through the DCCA eFiling system upon all counsel of record.

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