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November 17, 2022

Honorable Chief Justice Tani Cantil-Sakauye and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

Re: *Salazar v. Walmart, Inc.*, Case No. S277109
Amicus Letter of Retail Litigation Center, Inc., the National Retail Federation, and the California Retailers Association in Support of Petition for Review

Dear Chief Justice Tani Cantil-Sakauye and Associate Justices:

There are over 500,000 retail establishments—from individually owned small footprint "mom and pops" to large footprint national chain stores—in California. Collectively, they support over 25% of the jobs in the state and generate a direct $221.9 billion impact on our state GDP.[1] Whether those stores can be held liable for how they organize lawful products on their shelves is an important question of law that will have tremendous practical impact on retailers and their customers. It is an issue that matters greatly to California, and an issue that matters greatly to the Retail Litigation Center (RLC), National Retail Federation (NRF), and California Retailers Association (CRA), who submit this letter as *amici curiae*.[2]

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[1] (National Retail Federation, *Retail's Impact: California* <https://nrf.com/retails-impact/california> [as of November 7, 2022].)

[2] 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

INTRODUCTION

Retailers small and large must exercise their best judgment on how to organize their inventories in ways that make sense to consumers. Typically, that means grouping products together by how they will be used, which makes it easy for customers to find what they want and comparison shop.

By holding that it can be actionably misleading to group different products used for similar functions, the Court of Appeal's Opinion creates an essentially unlimited threat of liability against retailers for how they lay out their stores. Today's lawsuit rests, at least in part, on the oft-rejected theory that it is misleading to have a baking aisle that contains both chocolate chips and non-chocolate "white chips." Tomorrow's lawsuits could be brought against grocers for selling almond milk in the dairy aisle,[3] alcohol-free beer in

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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.

The CRA is the only statewide association representing all segments of the retail industry, including general merchandise, department stores, mass merchandisers, online markets, convenience stores, supermarkets and grocery stores, chain drug and specialty retail stores.

[3] (Adam Belz, *As regulators ponder food labels, dairy farmers press harder against nut 'milk'*, StarTribune (Feb. 18, 2019) <https://www.startribune.com/as-regulators-ponder-food-labels-dairy-farmer-press-harder-against-nut-milk/505992462/> [as of November 7, 2022].)

the liquor aisle,[4] or freshwater catfish in the seafood aisle;[5] against pharmacies for selling cloth masks alongside KN-95 ones;[6] against bookstores for selling texts on homeopathy or chiropractic care in the health section; or against hardware stores for selling "green" cleaning products alongside stronger chemical ones.[7]

The threat of such suits will force retailers to reorganize their wares in inefficient, confusing ways or to reduce assortments and stop stocking niche products. But even then, retailers will face unending litigation costs because almost any clustering of products will be vulnerable to the kinds of claims authorized by the Opinion. All of this will yield worse layouts, higher prices, and fewer choices.

Given these serious consequences for retailers—from small mom-and-pops to large general merchandisers, from dollar stores to supermarkets—and ultimately for consumers, this case presents "an important question of law." Furthermore, because other jurisdictions have rejected *the same* theory of liability as to *the same* kind of product ("white" non-chocolate products sold alongside chocolate products), review is also necessary to "secure uniformity."

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[4] (Foodie, *Tested: Alcohol-Free Beers, Spirits and More* (Jan. 1, 2022) <https://www.afoodieworld.com/brew-852/non-alcoholic-beer-wine-and-spirits> [as of November 7, 2022] ["[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] (See *Can food made with fishes from lakes and rivers be called seafood?*, Quora <https://www.quora.com/Can-food-made-with-fishes-from-lakes-and-rivers-be-called-seafood> [as of November 7, 2022].)

[6] (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) <https://www.nytimes.com/2022/01/14/health/cloth-masks-covid-cdc.html> [as of November 7, 2022].)

[7] (Laura Daily, *Do 'green' cleaning products really work?*, The Seattle Times (Sept. 6, 2021) <https://www.seattletimes.com/explore/at-home/do-green-cleaning-products-really-work/> [as of November 7, 2022].)

(See Cal. Rules of Court, rule 8.500(b)(1).)

For these reasons, *amici* respectfully request that the Court grant Walmart's petition for review.

ARGUMENT

I. The Opinion 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 "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]

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[8] (dotActiv, *The Psychology Behind Retail Product Placement* (January 6, 2020) <https://www.dotactiv.com/blog/retail-product-placement> [as of November 7, 2022].)

[9] (Smartbridge, *Market Basket Analysis 101: Anticipating Customer Behavior* (March 15, 2022) <https://smartbridge.com/market-basket-analysis-101/> [as of November 7, 2022].)

[10] (*Ibid.*)

[11] (Retalon, *How to Effectively Use Product Clustering in Retail* (2022) <https://retalon.com/blog/product-clustering> [as of November 7, 2022].)

[12] (See, e.g., Ioana Ciuaru, *Why Are Eggs In The Dairy Section? Here Are 4 Good Reasons* (Foodiosity, July 12, 2022) <https://foodiosity.com/why-are-eggs-in-the-dairy-section/> [as of November 7, 2022].)

Thus, while products in clusters share some similarities, it is also true that products in stores are generally placed next to similar products with some differences. Courts have routinely rejected claims that such side-by-side placement is deceptive. Indeed, they have specifically rejected the very theory of liability permitted here, holding that the "placement of [a 'white' confection] alongside other [chocolate] bars would not cause a reasonable consumer to suddenly be misled into believing the product contains white chocolate." (See *Winston v. Hershey Co.* (E.D.N.Y., Oct. 26, 2020, No. 19-CV-3735-ENV-JO) 2020 WL 8025385 [p.5] [collecting cases].)

Because it is not feasible for retailers to change product packaging,[13] the Opinion would practically require subdividing stores and separating products to underscore their differences. But this presents its own extraordinary challenge. Smaller stores with less real estate may simply not have enough space to separate all products. Larger stores have more space, but they also have more products. A layout designed to minimize claims (such as those in this case) based on product clustering 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—which in turn could harm smaller manufacturers of popular products, as well as manufacturers of niche products. This, too, would reduce choice, increase prices, and promote consolidation in ways that harm consumers and businesses. The beneficiaries of such a change would be litigators and interest groups, not consumers or retailers.

All this may be fine for today's opportunistic plaintiffs, and the loss of white chips from grocery stores may seem like one society can bear. But the Opinion's consequences will go beyond the baking aisle. As noted, similar

[13] *Amici* acknowledge that, in this instance, the white baking chips are a Walmart private brand product, but the Opinion does not turn on that fact.

claims could be brought over all sorts of groceries, safety gear, cleaning products, or any other retail good. There is no need to conjure a *reductio ad absurdum* because the claim here—that a retailer's placement of "white baking chips" in the baking aisle is misleading—is itself absurd, and gives license to any and all of the claims discussed above. The question is not whether every lawsuit will succeed. Rather, because the Opinion holds that product-placement-based confusion claims generally cannot be "properly resolved at the pleading stage" (Op. at p.11), the question is whether retailers will be chilled by the threat of costly litigation through discovery and trial. The answer is obviously 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 some separate "nut milk" aisle would just invite a new claim—after all, almonds are not "true nuts."[14] Putting almond milk, oat milk, and others in a separate "dairy substitute" aisle would invite claims over modified lactose-free products. Now multiply this by the 142,000 different products sold by Walmart.[15]

In sum, retailers will be forced to change their layouts *and* to endure unavoidable litigation. That cannot be what the law requires. And setting aside the merits, at a minimum this Court should recognize the *importance* of the legal question presented by this case—importance that has caused *amici* to file this brief.

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[14] (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> [as of November 7, 2022].)

[15] (*Our Retail Divisions*, Walmart (January 6, 2005) <https://corporate.walmart.com/newsroom/2005/01/06/our-retail-divisions> [Nov. 7, 2022].)

II. By Diverging from Decisions in Other Jurisdictions, the Opinion Will Introduce Chilling Uncertainty for Retailers.

Federal courts across the country have dismissed claims against manufacturers and retailers for selling goods with truthful packaging, even where it is possible consumers' assumptions about those goods might lead them astray. Plaintiff's counsel are well aware of this fact. They have lost at least two cases in federal court on the precise issues presented here.[16] Undeterred, they brought this nearly identical case to state court hoping for a different result. They got their wish. And two days after the Court of Appeal diverged from federal precedent, plaintiff's counsel filed another nearly identical lawsuit in a different Superior Court.[17] This is just the beginning.

California's UCL, CLRA, and false advertising laws should not mean different things in different courts. Thus, in addition to the issue's importance, the question presented in this case is one on which review is necessary to secure uniformity.

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[16] (See, e.g., *Prescott v. Nestle USA, Inc.* (N.D.Cal., Apr. 8, 2022, No. 19-cv-0747-BLF) 2022 WL 1062050 [p.4] [holding that additional allegations, such as "allegations that they were misled by images on the Product package of a dark-colored cookie containing white morsels" and "allegations about a consumer survey," were still "insufficient to state a claim under the reasonable consumer standard"], No. 22-15706, *appeal docketed*; *Cheslow v. Ghirardelli Chocolate Co.* (N.D.Cal. 2020) 445 F.Supp.3d 8, 17 ["Simply because some consumers unreasonably assumed that 'white' in the term 'white chips' meant white chocolate chips does not make it so."].)

[17] (Compare Compl. ¶ 2 ["Ghirardelli Chocolate Company, a company synonymous with chocolate and the famous 'Ghirardelli Square' California landmark, is the number one seller of premium chocolate in the United States that also sells fake white chocolate baking chips and tries to pass them off as white chocolate."], *Varela v. Ghirardelli Chocolate Co.* (Super. Ct. L.A. County, Sept. 21, 2022, No. 22STCV30991), with *Cheslow*, *supra*, 445 F.Supp.3d at p.12 [describing nearly identical allegations].)

The confusion over when and whether a product's placement can be actionably deceptive spans both state and federal courts. Several federal courts across the country have rejected attempts to impose liability on manufacturers and retailers where the merchandise contains no arguably false statement and products are grouped in a logical fashion—i.e., baking goods in the baking aisle. For instance, in *Cheslow v. Ghirardelli Chocolate Co.* (N.D. Cal. 2020) 472 F.Supp.3d 686, the district court held that "it was unreasonable for plaintiffs to think that the term 'white' in 'white chips' meant 'white chocolate chips.'" (*Id.* at p.695.) It based that conclusion on "both the lack of an affirmative deceptive statement and the presence of an ingredient list to dispel any doubt as to the contents of the product." (*Ibid.*) And it reached this conclusion despite allegations that the offending "white chips" were in a section of the store labeled "chocolate chips." (*Id.* at p.690.) Similarly, in *Prescott*, the district court held at the motion to dismiss stage that "[n]othing about the ordinary and common meanings of the adjectives 'white' and 'premier' would suggest to a reasonable consumer that the Product is white *chocolate*." (*Supra,* 2022 WL 1062050, at p.4.)

Outside of California, other federal district courts have held similarly. For example, in *Rivas v. Hershey Co.* (E.D.N.Y., July 27, 2020, No. 19-cv-3379(KAM)(SJB)) 2020 WL 4287272, the district court held that "Plaintiff's complaint alleges no plausible facts that the presence of the word 'white' on the package of Kit Kat White bars gives rise to a plausible claim that consumers would be misled into believing that chocolate was an ingredient." (*Ibid.* at p.5.) In *Winston v. Hershey Co.* (E.D.N.Y., Oct. 26, 2020, No. 1:19-cv-03735-ENV-JO) 2020 WL 8025385, the district court held it "implausible beyond genuine dispute that a reasonable consumer acting reasonably under the circumstances would be misled into believing that [Reese's White candy bar] contains white chocolate." (*Ibid.* at p.4.) And in *Burns v. Gen. Mills Sales, Inc.*, (S.D.Ill., Aug. 30, 2022, No. 3:21-cv-01099-DWD) 2022 WL 3908783, the district court rejected the claim that General Mills' fudge brownie mix box was misleading because it did not contain milk and butter where the plaintiff's own allegations refuted the claim that fudge *always* contains milk and butter. (*Ibid.* at p.5.)

Other cases have come out similarly.[18]

As even the Court of Appeal acknowledged, Walmart's packaging does not "have any false statements." (Op. at p.7.) Here, the sole basis for concluding there might be a consumer protection claim against Walmart is the "possibility" a customer might believe the word "white" does not mean a color, but instead is "shorthand for 'white chocolate.'" (*Id.* at p.10 [citing *Bober v. Glaxo Wellcome PLC* (7th Cir. 2001) 246 F.3d 934, 940]). That possibility rested, among other things, on the fact that white chips were sold exactly where any retailer would logically put them: the baking aisle. (Op. at p.10.)

In other words, the Court of Appeal held a retailer liable for selling lawful products with lawful labels based on the mere *possibility* that a literally truthful label might be misinterpreted when placed next to *different* products on a shelf. Federal courts, interpreting the exact same laws, have held the opposite. The Court need look no further than the activities of plaintiff's counsel in this case to understand the implication of such diverging interpretations of California consumer protection laws—cases previously unsuccessfully brought in federal courts in California are now being brought by the same firm in state courts in California. This is exactly the sort of forum

[18] (See, e.g., *Becerra v. Dr Pepper/Seven Up, Inc.* (9th Cir. 2019) 945 F.3d 1225, 1231 ["the allegations in the complaint fail to sufficiently allege that reasonable consumers read the word 'diet' in a soft drink's brand name to promise weight loss, healthy weight management, or other health benefits"]; *Boris v. Wal-Mart Stores, Inc.* (C.D. Cal. 2014) 35 F.Supp.3d 1163, 1168 ["A merchant's liability cannot be premised solely on a consumer's assumptions about a product based on a product's price and the color of its packaging."], aff'd (9th Cir. 2016) 649 F. App'x 424; *Lee v. Mondelez Int'l, Inc.* (S.D.N.Y. Oct. 28, 2022, No. 22-cv-1127 (LJL)) 2022 WL 16555586 [p.11] ["The Complaint contains no allegations that support that a reasonable consumer would believe that 'cacao' is associated with 'unprocessed cacao.' It is undisputed that the label itself makes no representation about whether the cacao has been processed, only stating a percentage followed by the word 'cacao.' Read in context, the language on its face does not imply that the cacao is unprocessed."]).

shopping that underscores the harm of a lack of uniformity on an important issue of law.

Consumers are not served by endless litigation about mere possibilities of confusion, the costs of which drive up the price of goods. Rather, only reasonable claims of confusion should survive the pleadings. And, regardless of what requirements are placed on *manufacturers*, it is not reasonable to hold a *retailer* liable for selling a lawfully labeled product and placing it on a shelf in an aisle suggesting likely use—i.e., putting baking chips in a baking aisle. Federal courts have acknowledged these facts. *Amici* urge the court to rectify the Court of Appeal's divergence from these principles.

CONCLUSION

For all these reasons, *amici* urge the Court to grant Walmart's petition for review.

Respectfully submitted,

/s/ Ariel C. Green Anaba

WILSON SONSINI GOODRICH & ROSATI
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cc: See attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 633 W 5th Street, Suite 1550, Los Angeles, CA 90071**.**

On November 17, 2022, I served **AMICUS LETTER BRIEF,** on the interested parties, addressed as follows:

Ryan J. Clarkson, Esq. Glenn Danas, Esq. CLARKSON LAW FIRM, P.C. 22525 Pacific Coast Highway Malibu, CA 90265 rclarkson@clarksonlawfirm.com; gdanas@clarksonlawfirm.com	Attorneys for Plaintiff-Respondent *David Salazar*

☒	**[BY TRUEFILING]** I caused the above document to be electronically served on counsel of record by using TrueFiling's e-service and all interested parties registered by e-service for this case.
☒	**(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

HONORABLE DAVID COHN San Bernardino Superior Court Department S26 247 West Third Street, 11th Floor San Bernardino, CA 92415-0302	Trial Court Judge
San Bernardino County District Attorney's Office 303 W. 3rd Street San Bernardino, CA 92415	

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Executed on November 17, 2022 at Los Angeles, California.

/s/ Tatiana Thomas
Tatiana Thomas