

No. 21-0363 & 21-0650

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IN THE SUPREME COURT OF TEXAS

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*IN RE WALMART, INC. AND WAL-MART STORES, TEXAS LLC*

*Relators*

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Original Proceeding  
From the 448<sup>th</sup> Judicial District Court, El Paso County, Texas  
Cause No. 2019DCV3471

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**AMICUS BRIEF OF THE RETAIL LITIGATION CENTER, INC.**

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## INTEREST OF THE AMICUS CURIAE

The Retail Litigation Center, Inc., (“RLC”) is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC’s members include many of the country’s largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 150 judicial proceedings of importance to retailers. Its amicus briefs have been favorably cited by multiple courts, including the Supreme Court of the United States. *See, e.g., South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *State v. Welch*, 595 S.W.3d 615, 630 (Tennessee 2020).

The RLC and its members have a significant interest in the outcome of this case. Nearly all its members operate retail locations in

Texas and around the United States. The RLC's members prioritize the safety of their customers and employees, and they are concerned that the outcome of this litigation could lead to operational changes with harmful unintended consequences. As explained in greater detail in this brief, extending liability to retailers for the tragic results of unpredictable mass violence would be counterproductive, inimical to important aspects of the free society on which retailers depend, and thwart retailers' own vigorous efforts to improve customer safety. Thus, Amici and their members will be significantly affected by this Court's decision in this case.

No party's counsel authored this brief in whole or in part, and no party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or its counsel have made a monetary contribution to this brief's preparation or submission. Tex. R. App. P. 11.

## INTRODUCTION

No Texan wants to live “in the oppressive climate a police state spawns.” *UDR Texas Properties, L.P. v. Petrie*, 517 S.W.3d 98, 104 (Tex. 2017). The ability to conduct one’s business—to go to the supermarket, or buy some books, or fill up a gas tank—without the presence of heavily armed squads or weaponized drones is a freedom we take for granted. Yet a world where the limited rule of *Timberwalk* expands to impose liability on retailers for random mass shootings would risk that dystopian result. Under threat of liability for another’s terroristic attacks, retailers would be forced to take extreme and counterproductive steps to try to prevent these tragic events. The legal rule the trial court and Plaintiffs seem to embrace is not one this Court should accept or ignore, but instead should clearly reject. If any entity is to create new and unprecedented rules for these terrible attacks, it must be the Texas Legislature, not the courts.

To be sure, this case is here on Walmart’s discovery mandamus, not on the merits. Respondents insist in their briefing that this action is premature, calling the relief sought “outlandish” and moot. But the handwriting is already on the wall in the trial court. The trial court has



made clear it believes *Timberwalk* is not the rule of law in this case. It has said that a more expansive test is needed. If this case proceeds without a clear message from this Court that *Timberwalk* means exactly what it says—that it creates only the most limited exception to the normal no-duty rule for harms caused by a third-party’s crimes—the consequences for Texas public policy would be serious. This Court can and should intervene now to set a clear path.

The retailers represented by the RLC want to help create a safe and healthy environment for shoppers and customers in Texas and around the United States. RLC members spend millions of dollars each year to enhance security to address ever-evolving risks. But requiring the type of 24/7 armed preparation that Plaintiffs inherently contend is necessary to forestall tort liability is not the answer. Understood correctly, the road Plaintiffs and the trial court are paving will lead to a result no one wants: a fortified society with no greater assurance that a terroristic individual won’t commit a mass crime. Amicus Curiae RLC urges this Court to grant mandamus and issue an opinion directing the trial court to comply with *Timberwalk* as this Court announced it.

## ARGUMENT

### **I. Texas law has long recognized that security must be balanced with the demands of liberty.**

This Court has explained many times that premises owners are not all-purpose insurers of societal safety. To be sure, “crime may be visited upon virtually anyone at any time or place.” *See Trammell Crow Central Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9, 10 (Tex. 2008), quoting *Lefmark Management Co. v. Old*, 946 S.W.2d 52, 56 (Tex. 1997) (Owen, J., concurring). But criminal conduct of a specific nature at a particular location is not automatically foreseeable just because crime “is increasingly random and violent” and could occur “almost anywhere.” *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998). State courts around the country agree. As one high court explained, because criminal activity is “irrational and unpredictable” it can in a sense be “foreseeable” in all locations. *McKown v. Simon Prop. Grp. Inc.*, 344 P.3d 661, 669 (Wash. 2015), quoting *MacDonald v. PKT, Inc.*, 628 N.W.2d 33, 39 (Mich. 2001). As a result, it is “unjustifiable” to place the toll of random, inexplicable crime – no matter how tragic – solely on the premises owner where the criminal happened to act. *Id*

Courts have adopted this careful approach in part because tort liability creates powerful incentives towards overcorrection. Deborah J. La Fetra, 28 WHITTIER L. REV. 409, 460-61 (2006) (noting that the community as a “whole” should “shoulder” the responsibility of reducing crime). Especially when dealing with crime, societally excessive deterrence is dangerous. As a four-justice concurrence of this Court explained, discarding *Timberwalk’s* strict limits on liability can lead to a private “police state” with “snipers on the roof” and officers “on every corner.” See *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 19 (Tex. 2008) (Jefferson, C.J., concurring). As that concurrence properly concluded, such measures would leave society in an “oppressive” condition inconsistent with American liberty. *Id.* Or, in the words of another judge considering the same problem, the “creation of myriad private police forces and the shift of law enforcement duties to the private sector amounts to taking the law into one’s own hands and contravenes public policy.” *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36, 42 (N.C. 1981) (Carlton, J. dissenting). The consequences of random acts of extreme violence cannot be placed at the doorstep of

innocent businesses without risking equally dramatic societal repercussions.

Mass shootings are a sadly new context for the well-established *Timberwalk* rule. But this Court should not stray from the path it has charted for premises liability for other crimes. Indeed, the policy considerations that led this Court to *Timberwalk* are even stronger here. The type of horrific mass shooting at issue is in fact *more* random and (thankfully) more rare than other crimes. Mass shootings cannot be anticipated in any particular place or time. And as explained further below, they cannot reasonably be prevented by private actors once their perpetrator has chosen his target except by the most extreme and undesirable methods.

## **II. Expanding liability for crime beyond *Timberwalk* risks dangerous and counterproductive results.**

Expanding *Timberwalk* to impose liability on retailers for mass shootings like the tragedy in El Paso would not accomplish the goal of increasing safety. First, the security measures available to private businesses (like employing armed guards or blanketing a store with security cameras) are unlikely to deter mass shootings or end them once they begin. While guards may be effective in preventing or de-escalating

smaller violent confrontations, they are often ineffective against mass shootings that can occur in just seconds. If the purpose of imposing tort liability is to prevent or at least mitigate harm, there is no indication these traditional measures would do anything in that regard. In most cases, as in this one, mass shootings occur with so little warning that victims are killed within minutes or seconds. The 2019 Dayton, Ohio shooting left nine dead in just 32 seconds, and it was stopped only because *six* police officers responded immediately. Alejandro de la Garza & Michael Zennie, *Dayton Shooting Lasted Just 32 Seconds and Left 9 Dead*, TIME MAGAZINE, available at <https://time.com/5643405/what-to-know-shooting-dayton-ohio/>.

In fact, as a leading study has found, the presence of a guard might actually *increase* the death toll of a shooting incident, perhaps because the guard attracts shooters intent to achieve a violent death, or because of “an exchange of gunfire,” *Williams v. Cunningham Drug Stores, Inc.*, 379 N.W.2d 458, 460 (Mich. Ct. App. 1985), or because the presence of an armed defender makes the shooter even more violent than before. See Jillian Peterson, James Densley, Gina Erickson, *Presence of Armed School Officials and Fatal and Nonfatal Gunshot*

*Injuries During Mass School Shootings, United States, 1980-2019,*

JAMA Network Open, available at

[https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2776515?utm\\_campaign=articlePDF&utm\\_medium=articlePDFlink&utm\\_source=articlePDF&utm\\_content=jamanetworkopen.2020.37394](https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2776515?utm_campaign=articlePDF&utm_medium=articlePDFlink&utm_source=articlePDF&utm_content=jamanetworkopen.2020.37394) (“School

shooting study”). Moreover, “[p]rivately hired security guards simply lack the authority and training to effectively and safely defuse” many armed confrontations. *Williams*, 379 N.W.2d at 460. What is undeniable is that mass shooters are unusual criminals. Often, they are motivated by terroristic reasoning, like the shooter in this case. They do not care that they are likely to be apprehended and they are unlikely to be intimidated by the deterrent effect of a security guard. *See School shooting study* at 4.

As for more passive measures like enhanced security cameras, even experts in hardening civilian targets concede that law enforcement will be left with just a “video or a still shot of the guy who killed a whole bunch of people.” Tyler Kern, *Can Retailers Take a Proactive Approach to Prevent Mass Shootings?*, MARKET SCALE, available at <https://marketscale.com/industries/retail/can-retailers-take-proactive->

[prevent-shootings/](#). Perhaps surveillance systems and cameras can make sure the perpetrator is later apprehended, but that is hardly the problem presented in this case or cases like it—indeed, the El Paso criminal surrendered to police after his murderous rampage.

What, then, will retailers do, if Plaintiffs’ and the trial courts’ apparent rule is adopted as Texas law? Faced with devastating liability as insurers against tragedy, retailers may be forced to adopt extreme security measures to withstand legal scrutiny after a mass shooting. The most plausible options, as the *Trammell Crow* concurrence anticipated, lead to a world where stores are impregnable fortresses, bristling with cameras and weapons. That is, exactly the “police state” four justices expressly rejected. 267 S.W.3d at 19.

Consider drones, for examples, which are one of the technologies that some security experts are bandying about as a potential security enhancement. Proposals to use drones to provide security against mass shootings involve fielding “taser-armed micro-[unmanned aerial] vehicles to swoop in and engage active shooters.” Harry H. Wingo, *Set Your Drones to Stun: Using Cyber-Secure Quadcopters to Disrupt Active Shooters*, SCHOOL OF JOINT INFORMATION STRATEGY AND POLICY,

NATIONAL DEFENSE UNIVERSITY. Other observers imagine drones able to fire an “incendiary device” at an attacker. See Jason Reagan, *Could Police Drones Help Stop Mass Violence?*, DRONE LIFE, available at <https://dronelife.com/2017/10/04/police-drones-help-curtail-mass-shootings/>. While such devices may one day be able to stop mass shootings, they are hardly consistent with the free environment Texans and Americans expect when out shopping today. And even that puts aside the potential for mistakes and malfunctions, especially in a state like Texas that robustly protects the Second Amendment right to bear arms in public.

More conventionally, retailers might respond with what amount to private “SWAT” teams—highly-trained security units able to engage a mass shooter. But these too would be impractical and dangerous. Security officers with the “qualifications, experience, and talents” to serve in this way are not a dime-a-dozen. Joel Griffin, *Interest in armed guard services up following mass shootings*, SECURITY INFO WATCH, available at <https://www.securityinfowatch.com/security-executives/protective-operations-guard-services/article/10767825/guard-services-firms-say-theyve-seen-an->



[increase-in-inquiries-about-armed-security-personnel-following-recent-shootings](#). To the contrary, “specialized teams such as SWAT units receive complex tactical training in how to respond to dynamic situations with many moving parts.” Police Executive Research Forum, *The Police Response to Active Shooter Incidents*, available at [https://www.policeforum.org/assets/docs/Critical\\_Issues\\_Series/the%20police%20response%20to%20active%20shooter%20incidents%202014.pdf](https://www.policeforum.org/assets/docs/Critical_Issues_Series/the%20police%20response%20to%20active%20shooter%20incidents%202014.pdf), at 2. Boiling that training down for police officers is “difficult”; to adapt it for the tens of thousands of civilian armed guards that would be necessary to harden every significant retailer in Texas is impossible. *Id.* Nor is the equipment experts recommend in these scenarios widely available. *See, e.g.*, James J. Seebock, *Responding to High-Rise Active Shooters*, DEFENSE TECHNICAL INFORMATION CENTER (2018), available at <https://apps.dtic.mil/sti/citations/AD1069735> (recommending “armored vehicles” to safely respond to some kinds of mass shootings).

Without the training and equipment required for mass shooting response, even sworn police officers responding to mass shootings often become casualties themselves. *See, e.g.*, Federal Bureau of Investigation, *A study of active shooter incidents in the United States*

between 2000 and 2013, available at <https://www.fbi.gov/file-repository/active-shooter-study-2000-2013-1.pdf> And effective mass shooter response requires unusual tactics that even police officers find difficult to execute. For example, there is now expert consensus that officers responding to mass shootings must ignore the wounded to stop the shooter. See *The Police Response* at 2, 7. The obstacles to providing the “special training and special skills” that would be necessary are near-insurmountable. *Foster* 281 S.E.2d at 42 (Carlton, J. dissenting). And it is reasonably foreseeable that all the additional guards and ammunition that would be necessary in this scenario could result in the loss of life of innocent shoppers.

Trying to limit that problem by requiring retailers (but not other premises owners) to provide such heightened security raises its own problems. As we have learned from anti-terrorist efforts, hardening some targets triggers “a process of threat displacement to [make it] easier to attack” targets nearby. *The London Bombings: Protecting Civilian Targets from Terrorist Attacks: Hearing before the Committee on Homeland Security*, 109th Cong. (2005) (statement of Peter Lowy, Westfield Group). This displacement from the heaviest guarded

locations to softer targets is exactly what happened in some of the worst mass shootings of the last few years, including the Pulse nightclub attack. *See, e.g.*, Tim Fitzsimons, *What really happened that night at Pulse?*, NBCNEWS.COM, available at <https://www.nbcnews.com/feature/nbc-out/what-really-happened-night-pulse-n882571> (explaining that the shooter had been considering “other venues” but rejected them because “they were more heavily guarded.”). It is no answer to “harden” all retail stores but then leave high school football games, churches, bowling alleys and the like exposed. *See also Foster*, 281 S.E.2d at 42 (Carlton, J. dissenting) (“If foreseeability itself gave rise to a duty to provide police protection for others, every residential curtilage, every shop, every store, every manufacturing plant, would have to be patrolled by the private arms of the owner”). Shifting the most horrifying results of any crime, let alone a tragic mass shooting, to softer targets is not what *Timberwalk* is about.

In all events, assuming – somehow – these challenges could be met, the result would be retail stores that are armed camps—not quite the snipers-on-the-roof foreshadowed in *Trammell Crow*, but close enough. That is not the recipe for the free society that this Court found

so important in *Timberwalk* and which this Court has prized in its third-party crime cases.

### **III. American retailers already prioritize making their stores safe for the public.**

Even if all the above were not true, expanding *Timberwalk* to impose liability on retailers for random mass shootings would risk thwarting the consistent work retailers are doing to make sure their stores are safe places for shoppers to visit. In fact, retailers around the United States are at the cutting-edge of protocols designed to reduce the risk from many crimes, including mass shootings. Even though mass shootings are not predictable, retailers have gone above and beyond to find ways to deter them and, when they do happen, to save as many lives as possible. Among the new techniques retailers have adopted without the coercive power of tort liability are enhanced trainings, alarms to ensure law enforcement is called quickly, video surveillance, and mass notification systems. Plaintiffs would have the courts step in and short-circuit these developments by mandating a different solution—armed guards, Pl.’s Br. at 11—that as explained in Part II above is unlikely to work and may even be counterproductive. This Court should avoid that result.

## CONCLUSION AND PRAYER

This Court should grant Walmart's petition for writ of mandamus.

Respectfully submitted,

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