E082756 & E084385

IN THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION 2

CARLOS FERNANDEZ and ROSALIA FERNANDEZ, et al.,
Plaintiffs-Respondents/Cross-Appellants,

v.

WALMART, INC.,
Defendant-Appellant/Cross-Respondent.

Riverside Superior Court Case No. RIC1904598
Hon. Harold W. Hopp

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT/CROSS-RESPONDENT and BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT/CROSS-RESPONDENT

DONALD M. FALK (SBN 150256)
dfalk@schaerr-jaffe.com
SCHAERR | JAFFE LLP
One Embarcadero Center,
Suite 1200
San Francisco, California 94111
Telephone: (415) 562-4942

Counsel for Amici Curiae

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT/CROSS-RESPONDENT

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three 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, like this one, that raise issues of concern to the nation's business community. (*E.g.*, *EpicentRx, Inc. v. Superior Court* (2025) 18 Cal.5th 58; *Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478; *Bielski v. Coinbase, Inc.* (9th Cir. 2023) 87 F.4th 1003; *Jane Doe No. 1 v. Uber Technologies, Inc.,* (2022) 79 Cal.App.5th 410; *Caremark, LLC v. Chickasaw Nation* (9th Cir. 2022) 43 F.4th 1021.)

The California Chamber of Commerce ("CalChamber") is a non-profit business association with approximately 13,000 members, both individual and corporate, representing 25% of the state's private sector workforce and virtually every economic interest in the state of California. While CalChamber represents several of the largest corporations in California, 70% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic

and jobs climate by representing business on a broad range of legislative, regulatory and legal issues.

As the nation's and the state's leading business organization, respectively, *amici* are uniquely positioned to explain the importance of adhering to existing law limiting the duty to protect against third-party harm and the significant policy consequences that would result from expanding that duty. *Amici*'s members are frequent targets of lawsuits seeking to impose liability for third parties' wrongful conduct. In particular, American manufacturers and retailers face countless lawsuits that seek to hold them liable for unaffiliated third parties' harmful misuse of legitimate goods and services. Many members of the *amici* and the broader business community manufacture, sell, or use merchandise and business equipment that a criminal could misuse to harm others. These businesses would face significant and unjustified risk and expense were this Court to hold that a business owes a tort-law duty to prevent criminal acts by third parties outside its control. These costs and burdens would harm consumers as well.

The longstanding limits on such tort liability ensure that businesses are not treated as quasi-insurers strictly liable for the intentional misconduct of unaffiliated third parties. *Amici* have a significant interest in ensuring that this Court enforces the traditional limits on tort liability recognized under California law and rejects efforts to unduly expand liability.

No party or counsel for a party authored this brief in whole or in part. No person or entity other than *amici*, their members,

or their counsel in this matter has made any monetary contributions intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.520, subd. (f)(4).)

CONCLUSION

The Court should grant this application and permit *amici* to file the attached *amici curiae* brief.

Dated: October 7, 2025

Respectfully submitted,

/s/ Donald M. Falk

Donald M. Falk (SBN 150256)
dfalk@schaerr-jaffe.com
SCHAERR | JAFFE LLP
One Embarcadero Center
Suite 1200
San Francisco, CA 94111
Telephone: (415) 562-4942

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Treatises

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs ask this Court to approve the jury's unjustified, legislative decision to require retailers to secure baseball bats in some unspecified manner in order to reduce the vanishingly small and unforeseeable likelihood that a criminal will grab a bat off the shelf and randomly attack others nearby. (See RB 32–42 [referring to wide variety of proposed security measures].) This Court should cut that proposal off at the threshold by finding that there is no tort duty to eliminate any possibility that an unknown criminal will commandeer a merchant's goods—or any other business's property or resources—to use as a weapon or other instrument of crime.

The overbroad tort duty endorsed below would expose a wide range of ordinary businesses to liability for unforeseeable acts by unaffiliated third parties outside those businesses' control. Courts have appropriately recognized that treating businesses as strict-liability insurers against others' criminal acts would disrupt the economy and harm consumers—especially those in higher-crime communities. This Court should reject Plaintiffs' attempt to erase the established limits on businesses' duty to protect against third-party harm.

ARGUMENT

A. Businesses Have No Duty To Prevent Random Criminal Behavior That Uses Business Property.

This case should be resolved on the fundamental ground that a business has no duty to prevent unforeseeable, random criminal behavior that exploits the availability of business property—here, a merchant's wares—to harm others. Everyday

businesses are not insurers against virtually all conceivable forms of harmful conduct. (See *Kentucky Fried Chicken of Cal., Inc. v. Superior Ct*. (1997) 14 Cal. 4th 814, 819.) The Court should apply California's long-established limits on businesses' liability for harms caused by the criminal acts of third parties.

"Courts invoke the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act[.]" (*Modisette v. Apple Inc*. (2018) 30 Cal.App.5th 136, 143, cleaned up.) The duty element ensures that liability remains within reasonable limits and is fairly imposed only on those society has deemed culpable. A central limit is that "there is generally no duty to protect others from the conduct of third parties." (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 627; Rest.2d Torts, § 315 (1965).) And this "no-duty-to-protect rule" (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 211) is especially robust when applied to intentional criminal acts of unknown third parties. That is in part because "it is difficult if not impossible in today's society to predict when a criminal might strike." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1150.) Moreover, "if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal." (*Ibid*.) That is, any duty imposed is unlikely to be effective in significantly reducing harms from criminal conduct using lawful, widely available goods.

A narrow "exception to this general rule" of no duty arises when there is a "special relationship" between the defendant and

either the plaintiff or the third party. (*Regents*, *supra*, 4 Cal.5th at p. 627.) These special relationships "involv[e] dependence or control." (*Brown*, *supra*, 11 Cal.5th at p. 220.) Generally, they arise where "one party relies to some degree on the other for protection." (*Regents*, *supra*, 4 Cal.5th at p. 620.) Further, a special relationship requires that the relied-upon party has "control over the means of protection" (*id.* at p. 621), which may include "the ability to control the third party" who commits the harm. (*Wise v. Superior Court* (1990) 222 Cal.App.3d 1008, 1013, emphasis omitted; see also Rest.2d Torts, *supra*, § 320 [special relationship based on having "custody of another … such as to deprive the other of his normal power of self-protection" and "ability to control the conduct of the third persons"]; Prosser & Keeton, Torts (5th ed. 1984) § 56, p. 374.) Because customers in a store are not "wholly within defendants' charge" (*Orr v. Pacific Southwest Airlines* (1989) 208 Cal.App.3d 1467, 1474), the narrow, "so-called 'special relationship' between a business entity and its patrons" arising in that context (*Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 335, collecting cases) is tightly limited—far more confined than, for example, the relationship between a common carrier and a passenger in an enclosed conveyance.

"In evaluating whether a business is under a duty to provide precautionary measures to protect patrons against potential third-party criminal conduct," the California courts focus on "(1) the degree of foreseeability that the danger will arise on the business's premises and (2) the relative burden that providing a particular precautionary measure will place upon the

business." (*Id.* at p. 338.) When the precautionary burden is "onerous rather than minimal"—as the burdens here undoubtedly are (see pp. 20–27, *infra*)—California common law does not impose it unless there is a showing of "heightened or [a] high degree of foreseeability," because the imposition of such burdens is generally a matter better left to the Legislature. (*Id.* at pp. 338–39.) This threshold duty analysis provides critical protections whether the cause of action is brought in negligence or in premises liability; after all, "[t]he elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.)

1. The exceptionally high level of foreseeability that is required is absent here.

Plaintiffs' arguments for liability depend on an attenuated, radically low bar for foreseeability, as the statistics Walmart sets forth make clear. (See AOB 35–38.) That low bar is necessary to Plaintiffs' position because the crime here did not cross even the threshold for legal foreseeability that applies in garden-variety tort cases. "An injury is reasonably foreseeable only if its occurrence is likely enough in modern daily life that reasonable people would guard against it." (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 538.) Under that standard, no duty arises here. Sporting goods stores have sold baseball bats for at least a century and a half, but bat attacks in those stores are exceptionally rare. No reasonable person would "guard against" such a random event.

But in this case, a standard for foreseeability much higher than in the run-of-the-mine case applies because a third party's intervening misconduct is the direct cause of the harm. A defendant is generally not liable for such third-party misconduct unless the "intervening conduct … is predictable and derivative of the alleged misconduct" by the defendant. (*Kesner*, *supra*, 1 Cal.5th at p. 1149.) Indeed, when intervening *criminal* conduct is the direct cause of an injury, no duty to protect arises without an "extraordinarily high degree of foreseeability." (*Melton*, *supra*, 183 Cal.App.4th at p. 536 [quoting *Garcia v. Paramount Citrus Ass'n* (2008) 164 Cal.App.4th 1448, 1457].) That steeply heightened standard is appropriate given the difficulty, if not impossibility, of predicting when, where, and how a criminal will strike, and what otherwise-benign means he might commandeer for a malevolent purpose. (See *Wiener*, *supra*, 32 Cal.4th at p.1150.) General tort duties are simply not the right tool to prevent "sudden, unexpected, violent criminal conduct." (*Al Shikha v. Lyft, Inc.* (2024) 102 Cal.App.5th 14, 28.)

For the heightened standard of foreseeability to accomplish its duty-limiting function, foreseeability must be defined at a relatively low level of abstraction and generality. Heightened foreseeability cannot be satisfied, for example, by a showing that crime is foreseeable, or that some crime will take place in business establishments. It is not enough that some criminals foreseeably use baseball bats as weapons, or that a tiny proportion do so by misappropriating bats on display at retail stores, even if some of those stores are among the dozens,

hundreds, or (here) thousands operated by the defendant. Instead, as with the general requirements for holding property owners or business proprietors liable for third-party crime committed on their premises, heightened foreseeability requires knowledge of similar (if not identical) criminal conduct at the same location (*E.g.*, *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1189–99 [prior bank robberies in same building did not make later sexual assault sufficiently foreseeable])—or (even more rarely) "actual knowledge of the perpetrator's violent propensities" (*Al Shikha*, *supra*, 102 Cal.App.5th at p. 33, citations omitted).

This granular view of foreseeability accords with the law of other states. *E.g.*, *Timberwalk Apartments, Partners, Inc. v. Cain* (Tex. 1998) 972 S.W.2d 749, 757.) Such precision is necessary because a foreseeability-based duty is inherently "difficult of definition"—"both in respect to space and the extent of care to be exercised." (*Pulka v. Edelman* (1976) 40 N.Y.2d 781, 786.)

Permitting a duty to rest on the watered-down foreseeability standard Plaintiffs propose would threaten liability for businesses to an indeterminate class of plaintiffs based on criminal conduct by an indeterminate class of third-party wrongdoers. A vast array of products on retailers' shelves could be used as weapons by determined criminals: frying pans, kitchen knives, hammers, large flashlights, shovels, fireplace tongs, glass bottles, extension cords, and more. Nor is there any reason to think that an expanded duty would remain confined only to retailers, for whom any product that might be used in a crime

would become a potential source of a protective duty and liability. Any business whose dangerous equipment could be stolen and turned to criminal effect—construction companies, landscapers, arborists, countless others—could find itself on the wrong end of a novel tort duty to protect from third-party crime.

One also could expect renewed claims that manufacturers should foresee—and thus have a duty to protect against—criminal misuse of their products. Thus, automobile manufacturers could be held liable for not making their products difficult enough to steal and use in other crimes, or for not taking sufficient measures to prevent speeding or driving while intoxicated. And the many businesses with employees that criminals impersonate in telephone or online phishing scams could be held to have a duty to prevent the impersonation. (See *Jane Doe No. 1*, *supra*, 79 Cal.App.5th at p. 427 [plaintiffs sought liability for Uber based on criminals' impersonation of Uber drivers]; *Harding v. Lifetime Financial, Inc.* (2025) 109 Cal.App.5th 753, 755 [plaintiff sought liability for investment firm based on criminal's impersonation of investment adviser].)

To forestall those harmful results, this Court should adhere to precedent recognizing that only an "extraordinarily high degree of foreseeability" suffices to impose a duty to prevent third-party crime (*Melton*, *supra*, 183 Cal.App.4th at p. 536)—that is, knowledge either of the same type of crime in the same place, or actual knowledge of the particular wrongdoer's violent propensities. (See pp. 11–12, *supra*.)

2. The misfeasance-nonfeasance distinction governing liability for third-party crime in other contexts should inform the boundaries of a business's duty as well.

Outside a "special relationship" such as the strictly limited one that arises between a business and a customer on its premises, liability for a third-party's criminal act arises only when a defendant engages in misfeasance rather than nonfeasance—that is, when it "engage[s] in active conduct" to "stimulate" the third party's wrongdoing. (*Melton*, *supra*, 183 Cal.App.4th at pp. 534–35.)

The Restatement (Second) of Torts confirms that "under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law." (Rest.2d Torts, § 302B, com. d.) Liability may be imposed on someone other than the criminal only for an "affirmative act [that] has created or exposed the [plaintiff] to a recognizable high degree of risk of harm" from criminal misconduct. (*Id.* com. e.)

A similar analysis should inform the existence and scope of any duty when ordinary business conduct is advanced as a basis for liability for third-party crimes, including within a business's limited special relationship with customers on the premises. That a manufacturer or seller by going about its business "simply made" it "possible" for a criminal to accomplish a crime in a specific way should not be sufficient to trigger a duty to protect from third-party crimes, where the business "did not put the danger in play." (*Modisette*, *supra*, 30 Cal.App.5th at pp. 146–47.) When a defendant takes "no action to stimulate the criminal conduct" and merely creates conditions making that conduct

possible, imposing liability "would expand the concept of duty far beyond any current models." (*Melton*, *supra*, 183 Cal.App.4th at pp. 534–35 [quoting *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398, 406].) "[M]any commonplace commercial activities" feature some risk of harms from third-party misconduct—that is "an inescapable aspect of … life." (*Id.* at p. 534 [quoting *Sakiyama*, *supra*, 110 Cal.App.4th at p. 409].) Holding businesses liable for those harms, absent "active conduct" by those businesses that increased the risks (*id.* at p. 533), would invert California's traditional rule, transforming the default no-duty rule into one in which businesses serve as quasi-insurers against third parties' misconduct.

It is thus not enough that Plaintiffs' assailants "may not have been able to as easily commit their crimes … were it not for" the presence of baseball bats on the Walmart rack. (*Jane Doe No. 1*, *supra*, 79 Cal.App.5th at p. 427.) In the absence of an additional factor contributing to the bats' use for a crime, imposing liability merely for offering bats for sale would "unduly broaden the scope of the legal duty of care." (*Sakiyama*, *supra*, 110 Cal.App.4th at p. 408.)

3. Imposing liability for unforeseeably rare and random criminal attacks would make California an outlier among the states.

Imposing a tort duty on businesses to prevent unforeseeably rare and random criminal attacks—where there is no record of similar incidents at the relevant location, or of violent conduct by the same, known assailant—would not only

depart from California precedent, but would put California significantly out of step with other jurisdictions.

In other states, as here, "judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." (*Hamilton v. Beretta U.S.A. Corp.* (2001) 96 N.Y.2d 222, 233.) "The duty to protect another from the criminal acts of a third party is one traditionally imposed on our government, not the owners of private property." (*Main St. Mkt., LLC v. Weinberg* (Tenn. Ct. App. 2013) 432 S.W.3d 329, 340.) The principles governing liability in other states parallel those here, except where there are fewer exceptions to the traditional rule that one "has no legal duty to protect another from the criminal acts of a third person." (*Timberwalk*, *supra*, 972 S.W.2d at p. 756 [quoting *Walker v. Harris* (Tex. 1996) 924 S.W.2d 375, 377].)

The great mass of states apply a similar heightened foreseeability test, similarly focused on crimes of a similar type on the same premises or adjacent to them.[1] (See generally Annot., *Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party* (1995 & 2025 supp.) 31 A.L.R.5th 550; 2A Speiser et al., American Law of Torts (Feb. 2025 update) § 9:20;

---

[1] Additional bases for foreseeability, not relevant here, include knowledge of a particular assailant's "violent tendencies," or of "events *occurring immediately before* the actual criminal activity that made imminent harm foreseeable." (*Mitchell v. Rite Aid of Maryland, Inc.* (2023) 257 Md. App. 273, 325–26 [290 A.3d 1125, 1155–56], citation omitted.)

Comment Note, *Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person* (1966 & 2025 supp.) 10 A.L.R.3d 619.) These courts recognize that "[n]o man can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded." (*Cunis v. Brennan* (1974) 56 Ill.2d 372, 376 [quoting Prosser, Handbook of the Law of Torts (4th ed. 1971) § 31, p. 146].)

This heightened foreseeability requirement applies off-premises as well. The New York courts have held that manufacturers have no duty to prevent their products from being misused by criminals, even though the manufacturers know that "large numbers of their [products] enter the illegal market and are used in crime." (*Hamilton*, *supra*, 96 N.Y.2d at p. 231.)

Tellingly, *amici* are not aware of a single case where a business was held liable for a random criminal attack based on the business's alleged failure to secure any property other than a weapon. This Court should not be the first.

4. Imposition of specific duties to guard against criminal misuse of business property is properly the Legislature's prerogative.

Plaintiffs' proposed expansion of duty would distort the relationship between courts and the other branches of government. Tort liability is a particularly inappropriate means of regulating third-party crime associated with commercial activities. The complex technical and policy judgments involved

in such regulations should instead be left to legislatures and regulatory agencies.

As the California Supreme Court has observed, "a costly or burdensome precautionary safety measure to protect against potential future third-party criminal conduct should more appropriately be made by the Legislature rather than by a jury applying a general reasonableness standard in a particular case." (*Verdugo*, *supra*, 59 Cal.4th at pp. 338–39.) That is because "the Legislature stands in the best position to identify and weigh the competing consumer, business, and public safety considerations" underlying such a determination. (*Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal.4th 151, 163.)

Tort law is effectively "a form of regulation administered through the courts rather than the state's regulatory agencies." (*In re Firearms Cases* (2005) 126 Cal.App.4th 959, 991, citation and quotation marks omitted.) And tort law is a "peculiarly blunt and capricious method of regulation, depending as it does on the vicissitudes of the legal system, which make results highly unpredictable in probability and magnitude." (*Ibid*., citation and quotation marks omitted.) By "adopting broad new theories of [tort] liability," courts risk "undermin[ing] the democratic process through which the people normally decide whether, and to what degree, activities should be fostered or discouraged within the state." (*Ibid*., citation and quotation marks omitted.)

Imposing such wide-reaching obligations is not the proper role of tort law. Duty rules should be clear and predictable. And judges and juries are ill-suited for devising methods to prevent

third-party crime, or to evaluate the feasibility of proposed safety features. Instead, the complex policy and technical judgments involved in defining business's obligations to safeguard public safety are best left to legislatures and expert regulatory agencies. This Court should reject the superior court's creation of an amorphous new tort duty that would vest courts and juries with the responsibility of defining precisely how businesses must prevent any and all third-party harm somehow related to those businesses' legitimate operations.

B. The Unlimited Duty Recognized Below Would Adversely Affect Businesses and Consumers.

The California Supreme Court has also instructed that when and whether to impose a tort duty depends in part on the "consequences to the community of imposing a duty." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) In particular, before imposing a duty to protect, courts consider "the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." (*Wiener*, *supra*, 32 Cal.4th at p. 1147, citation and quotation marks omitted.) In deciding whether to create a novel duty, courts must consider whether "its social benefits outweigh its costs" to avoid "set[ting] a dangerous precedent with unintended consequences." (*Hamilton*, *supra*, 96 N.Y.2d at p. 232; *Estate of Ciotto v. Hinkle* (Ohio Ct. App. 2019) 145 N.E.3d 1013, 1031.) The consequences here would be significant and harmful to businesses and consumers alike.

1. The recognition of an expanded duty to protect against third-party crime would vastly increase the litigation risks for American businesses.

Every year, American manufacturers and retailers are the targets of countless lawsuits that seek to hold them liable for unaffiliated third parties' harmful misuse of legitimate goods and services. Without the established limitations on tort duties to protect others from third-party crime, "ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer." (*Twitter, Inc. v. Taamneh* (2023) 598 U.S. 471, 489.) And not only merchants—the harmful consequences would reach manufacturers, distributors, service providers, and any other business that makes, sells, or uses a commercially useful and socially beneficial product that could be misappropriated and misused by unaffiliated criminals. Indeed, the duty could potentially extend to service businesses who could be said to have somehow created an opportunity that a criminal exploited.

That expansion of duty would pose an unwarranted threat to American businesses across the economy. Such a sweeping duty would be premised on the inadvertent provision, through ordinary business behavior, of a rarely exploited means to turn a lawful, benign product—not a weapon—to criminal effect. A theory of duty based on creating such an opportunity, combined with attenuated foreseeability, could lead to retailer liability for assaults using almost any product on their shelves. But it would go much further: crowbar manufacturers could be liable for burglaries; oil and gas manufacturers and retailers (or anyone

whose fuel was stolen) could be liable for arson; chemical fertilizer companies could be liable for illegal explosives manufactured by criminals; and drone manufacturers could be liable for privacy violations. For that matter, banks would have to fear tort liability for phone scammers impersonating bank representatives. Businesses whose employees travel to customers' homes—from plumbers to cable companies—might owe a duty to protect against criminals impersonating their employees. And businesses would have to take into account the risk of such liability in setting the scope of their services.

The massively increased risk of potential liability would expose businesses to potentially crushing costs to insure and defend against massive damages awards like those in this case—more than $30 million after a partial remittitur. The huge sums at stake as the result of crimes committed by third parties would exert considerable pressure on businesses to settle even questionable or meritless claims, especially because judicial approval for the imposition of liability for routine commercial conduct renders the outcome of litigation even less predictable than usual. "[E]ven a small chance of a devastating loss" can render "the risk of an error" entirely "unacceptable" and force settlement (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 350), even of "anemic cases" (*Bell Atl. Corp. v. Twombly* (2007) 550 U.S. 544, 559.) Even where such cases do not result in a verdict or settlement, businesses would still suffer the additional expense and intrusion associated with defending against such suits, including costly and invasive discovery.

Further, the inevitable increase in the volume of suits seeking to hold lawful businesses responsible for the acts of unaffiliated criminals would harm those businesses' reputations—and the longer the litigation, the greater the reputational harm. Those risks would expose companies to "*in terrorem*" settlement to avoid the risk of even "groundless claim[s]" (*Dura Pharmaceuticals, Inc. v. Broudo* (2005) 544 U.S. 336, 347 [quoting *Blue Chip Stamps v. Manor Drug Stores* (1975) 421 U.S. 723, 741), given that companies otherwise must expend significant resources on protracted litigation simply to clear their names. As discussed below, all of these costs would in turn be passed through to consumers in the form of increased prices and reduced access to goods and services, as well as to employees in the form of lower compensation.

Maintaining an exceptionally high foreseeability bar to the imposition of a duty to prevent third-party crimes is critical to prevent erosion of tort law's baseline rule against imposing a duty to prevent harms caused by others—a principle grounded in the unfairness of holding one person liable for another's wrongdoing. But the loose foreseeability-based standard adopted below and pressed by Plaintiffs here would make some degree of liability for third-party criminal conduct the norm rather than the exception. No longer would a business's duty to protect from third-party crime depend on its knowledge of occurrences of the same type of crime in the same place with some degree of recency or frequency (or knowledge of the dangers posed by a particular individual). The occurrence, however rare, of the same crime in a

similar setting anywhere would make the crime foreseeable enough to make the business into the victim's insurer.

Broadly expanding duty as Plaintiffs suggest could also have harmful consequences in lawsuits brought by governments or private parties under public-nuisance theories. Nuisance actions may rely on "a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the public interest." (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 359 [quoting Rest.2d Torts, § 824].) In many cases, overlapping negligence and nuisance claims stand or fall together. (*Melton*, *supra*, 183 Cal.App.4th at p. 542.) So duties expanded in one context are likely to resonate in the other. In recent years, public prosecutors and plaintiffs' lawyers have sought to twist the historically narrow public-nuisance cause of action to "allow suits over the alleged societal impacts of a variety of otherwise lawful products—from firearms, lead paint, and subprime mortgages to fossil fuels, opioids, and asbestos." (U.S. Chamber of Commerce Institute for Legal Reform, *Taming The Litigation Monster: The Continued Threat of Public Nuisance Litigation* (Dec. 2022) p. 2, available at https://bit.ly/3ZxQxVv.) This troubling distortion of hornbook tort law underscores the importance of reaffirming traditional limits on duty to avoid converting public nuisance and other attenuated tort theories "into a 'litigation monster' with few, if any, predictable bounds." (*Ibid.*)

2. Complying with the expanded duty recognized below would unduly burden businesses and harm consumers.

Setting aside the litigation risks described above, complying with Plaintiffs' proposed amorphous duty would pose a severe, exceedingly unpredictable burden on businesses. Even Plaintiffs themselves are unable to define what their proposed duty would require of Walmart, let alone other businesses facing the possibility of third-party wrongdoing. Plaintiffs' wide variety of proposed countermeasures—from a baseball bat security officer to locking up the bats to prevent unassisted customer access and more—indicates that even Plaintiffs aren't sure what their liability rule requires, let alone whether any proposed measure would work. (See AOB 338–42; RB 32–42.)

Other businesses reacting to the rule adopted below would have an even worse time trying to develop measures to somehow prevent third-party harm without any certainty about what level of precautions would avoid tort liability. What precautions applied to which merchandise, products, or business property capable of criminal misuse would be anybody's guess. This uncertainty would leave businesses unable to assess their exposure and make appropriate business judgments as to (1) their practices; (2) the appropriate amount of liability insurance to purchase; and (3) how much of a cash reserve would be necessary to fund future settlements and litigation.

The consequences are not limited to businesses. Most if not all the unpredictable, precautionary burdens placed on businesses will ultimately fall on consumers. For one thing, the

customer experience would be degraded. To take an example from the facts of this case, almost nobody will buy a baseball or softball bat without handling it and testing the feel of the swing. A ballplayer can't tell whether a bat is right simply by looking at it, its packaging, or its specifications. Any of the measures proposed by Plaintiffs would impede—if not practically preclude—the ability of customers to try out various bats to find the right fit. Similar burdens imposed on other products would have similarly unpredictable—but anti-consumer—results.

Manufacturers, retailers, and service providers also will pass their increased economic burdens on to consumers in the form of higher prices and higher insurance premiums. See Strassel et al., Editorial Report, *How Lawsuits Cost You $3,600 a Year,* Wall St. J. (Dec. 11, 2022), available at https://tinyurl.com/47z4mk4r (costs of tort litigation are "spread through the economy in the form of higher insurance premiums that fall on nearly every family, either directly (car insurance) or indirectly (medical malpractice or product-liability insurance)"); David Williams, *Economic Impact of Mass Tort Litigation, Abuse,* Real Clear Markets (Oct. 9, 2023), available at https://tinyurl.com/ypj6h5dn (estimating that just under $500 billion in tort costs is passed on to consumers); David McKnight & Paul Hinton, U.S. Chamber of Commerce Institute for Legal Reform, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System* (Nov. 2024), available at https://tinyurl.com/y92b984p.

The virtually limitless duty imposed below promises to have additional social costs, as well. Businesses would face a greater threat of tort suits when they serve consumers who are vulnerable to third-party crime. That would deter businesses from offering or facilitating valuable services where they are needed most. Dangerous areas are already unattractive to many businesses; increasing tort exposure would only make those areas more underserved. And serving vulnerable populations in such areas should be encouraged, not discouraged.

These burdens on normal, productive commercial conduct indicate that the duties imposing those burdens are inappropriate. Duties should be designed so that they do not discourage "socially desirable" conduct (*Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1089–90), or inhibit ordinary, useful commercial or productive activity. (See, e.g., *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 461 [rejecting imposition of duty that would be breached "merely by operating socially beneficial machinery in a manner that is regular and necessary"].) Yet the decision below removes reasonable limits on businesses' tort liability for third-party criminal acts and subjects normal business conduct to jury hindsight. Expanding liability so substantially, and without predictable (or, indeed, apparent) limits, would significantly raise the costs of everyday commercial activity. If the judgment below stands, a business's duty to "protect against criminal misuse of its product" could force it to take products with "socially valuable uses" entirely "off the market due to the threat of limitless

liability." (*McCarthy v. Olin Corp*. (2d Cir. 1997) 119 F.3d 148, 157.) This Court should reject a rule with such sweeping negative consequences for businesses and the consumers they serve.

* * * * *

In short, "[t]he inability of government and law enforcement officials to prevent criminal attacks does not justify transferring the responsibility to a business owner." (*Nivens v. 7-11 Hoagy's Corner* (1997) 133 Wash.2d 192, 206 (en banc) [quoting *Williams v. Cunningham Drug Stores, Inc.* (Mich. 1988) 418 N.W.2d 381, 384–85].) And "[t]he practical consequences of an expansion" of tort duties "provide a further reason to reject [the superior court's] approach." (*Stoneridge Investment Partners, LLC v. Sci.-Atlanta, Inc.* (2008) 552 U.S. 148, 163.) This Court should instead enforce the common-law principles that properly limit tort liability to actions that are in fact culpable.

CONCLUSION

The judgment should be reversed.

Dated: October 7, 2025

Respectfully submitted,

/s/ Donald M. Falk
Donald M. Falk (SBN 150256)
dfalk@schaerr-jaffe.com
SCHAERR | JAFFE LLP
One Embarcadero Center
Suite 1200
San Francisco, CA 94111
Telephone: (415) 562-4942

Counsel for Amici Curiae

CERTIFICATION OF COMPLIANCE

In compliance with California Rules of Court, Rule 8.520(c), I hereby certify that this Brief of *Amici Curiae* contains 5,126 words, including footnotes but excluding the items referenced in California Rules of Court, Rule 8.520(c)(3), as calculated by the word processing software used to prepare this Brief of *Amici Curiae*.

Dated: October 7, 2025

SCHAERR | JAFFE LLP

By: */s/ Donald M. Falk*
Donald M. Falk

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I am over the age of 18 and not a party to this action. My business address is One Embarcadero Center, Suite 1200, San Francisco, CA 94111. On October 7, 2025, I electronically served the above

Application of the Chamber of Commerce of the United States of America and the California Chamber of Commerce for Leave to File Brief As *Amici Curiae* In Support of Defendant-Appellant/Cross-Respondent and Brief of *Amici Curiae* In Support of Defendant-Appellant/Cross-Respondent

on the following via TrueFiling:

Paul Heidenreich, SBN 116618
David Brown, SBN 147321
HUSKINSON, BROWN & HEIDENREICH, LLP
1200 Aviation Boulevard, Suite 202
Redondo Beach, CA 90278
Telephone: (310) 545-5459
Email: dwtbrown@gmail.com
pheidenreich@hbhllp.com
Attorneys for Plaintiffs, Respondents, and Cross-Appellants

Arash Khorsandi
Brian G. Beecher, SBN 239486
THE LAW OFFICES OF ARASH KHORSANDI, PC
2960 Wilshire Boulevard, Third Floor
Los Angeles, CA 90010
Telephone: (310) 277-7529
Email: ak@arashlaw.com
bbeecher@arashlaw.com
escobar@arashlaw.com
alex@arashlaw.com
service@arashlaw.com
Attorneys for Plaintiffs, Respondents, and Cross-Appellants

Stuart B. Esner, SBN 105666
Kevin K. Nguyen, SBN 322665
ESNER, CHANG, BOYER & MURPHY
600 S. Lake Avenue, Suite 408
Pasadena, California 91106
Telephone: (626) 535-9860
Email: sesner@ecbm.law
knguyen@ecbm.law
Attorneys for Plaintiffs, Respondents, and Cross-Appellants

M. Kevin Underhill
SHOOK, HARDY & BACON, L.L.P.
555 Mission Street, Suite 2300
San Francisco, CA 94105
Telephone: (415) 544-1900
Email: kunderhill@shb.com
Attorneys for Defendant and Respondent Walmart, Inc.

Scott A. Chesin
Mike Rayfield
SHOOK, HARDY & BACON, L.L.P.
1 Rockefeller Plaza, Suite 2801
New York, NY 10020
Telephone: (212) 989-8844
Email: schesin@shb.com
mrayfield@shb.com
Attorneys for Defendant and Respondent Walmart, Inc.

Andrew N. Kohn
PETTIT KOHN INGRASSIA LUTZ & DOLIN PC
11622 El Camino Real, Suite 300
San Diego, CA 92130
Telephone: (858) 755-8500
Email: akohn@pettitkohn.com
Attorneys for Defendant and Respondent Walmart, Inc.

And on the following served electronically:

Clerk of the Court
SUPREME COURT OF CALIFORNIA
350 McAlllister Street
San Francisco, CA 94102

And on the following Trial Court (Unbound Brief Only Via Mail Only) to:

Hon. Harold Hopp
RIVERSIDE COUNTY SUPERIOR COURT
Historic Courthouse, Dept. 1
4050 Main Street
Riverside, CA 92501

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 7, 2025.

/s/ Donald M. Falk
Donald M. Falk