No. 16-72963
(Consolidated with Nos. 16-73186 and 16-73279)

In the United States Court of Appeals for the Ninth Circuit

THE ORGANIZATION UNITED FOR RESPECT AT WALMART,
Petitioner,

WAL-MART STORES, INC.,
Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

AMICUS CURIAE **BRIEF IN SUPPORT OF WAL-MART STORES, INC. BY AMERICAN HOTEL AND LODGING ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INTERNATIONAL FRANCHISE ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL RETAIL FEDERATION, RESTAURANT LAW CENTER, AND RETAIL LITIGATION CENTER, INC.**

On Appeal from the National Labor Relations Board
Nos. 32-CA-090116, 32-CA-092512, 32-CA-092858, 32-CA-094004, 32-CA-094011, 32-CA-094381, & 32-CA-096506

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(*Caption Continued on Inside Cover*)

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(OUR WALMART),

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CORPORATE DISCLOSURE STATEMENT

None of the *amici* have outstanding shares or debt securities in the hands of the public, and they do not have a parent company. Therefore, no publicly held company has a 10% or greater ownership interest in any of the *amici*.

Dated: May 30, 2017

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IDENTITY AND INTEREST OF *AMICUS CURIAE* AND AUTHORITY TO FILE

The *amici* have authority to file this brief under Federal Rule of Appellate Procedure 29(a)(2) as all parties have consented to its filing. No party's counsel authored the brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, and no other person—other than the *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

The **American Hotel and Lodging Association ("AHLA")**, founded in 1910, is the sole national association representing all segments of the lodging industry, including hotel owners, REITs, chains, franchisees, management companies, independent properties, bed and breakfasts, state hotel associations, and industry suppliers. Supporting 8 million jobs and with over 24,000 properties in membership nationwide, the AHLA represents more than half of all the hotel rooms in the United States. The mission of AHLA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AHLA serves the lodging industry by providing representation at the federal, state and local level in government affairs, education, research, and communications. AHLA also represents the interests of its members in litigation that raises issues of widespread concern to the lodging industry.

The Coalition for a Democratic Workplace ("CDW") is a business association comprised of 600 organizations representing millions of businesses that employ tens of millions of workers nationwide in nearly every industry. CDW members are joined by their mutual concern over recent changes and proposed changes to labor law that threaten entrepreneurs, other employers, employees and economic growth. One of the CDW's primary missions is addressing regulatory overreach by the NLRB. CDW believes that the NLRB has repeatedly tried to upend labor relations to increase the number of dues-paying union members without regard to the negative consequences of doing so for employees, employers and the economy. The CDW continuously fights against these assaults and the expansive overreach of the NLRB.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 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 the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases raising issues of concern to the nation's business community.

Founded in 1957, the **International Council of Shopping Centers (“ICSC”)** is the global trade association of the shopping center industry. Its more than 70,000 members in over 100 countries include shopping center owners, developers, managers, investors, retailers, brokers, academics, and public officials. ICSC members also include attorneys from around the country who represent both owners/landlords and retail tenants of shopping centers and are keenly aware of the issues shopping centers face. The shopping center industry is essential to economic development and opportunity. Shopping centers are a significant job creator, driver of GDP, and critical revenue source for the communities they serve through the collection of sales taxes and the payment of property taxes. These taxes fund important municipal services like firefighters, police officers, school services, and infrastructure like roadways and parks. Shopping centers aren’t only fiscal engines, however; they are integral to the social fabric of their communities and provide support to local philanthropic and other community endeavors and events.

The International Franchise Association (“IFA”) is the world’s oldest and largest organization representing franchising worldwide. IFA works through its government relations and public policy, media relations and educational programs to protect, enhance and promote franchising and nearly 733,000 franchise establishments that support nearly 7.6 million direct jobs, $674.3 billion

of economic output for the U.S. economy and 2.5 percent of the Gross Domestic Product. IFA members include franchise companies in over 300 different business format categories, individual franchisees and companies that support the industry in marketing, law, technology and business development.

The National Federation of Independent Business ("NFIB") is the largest small business association in the country. The NFIB is a non-profit that works to defend the right of small business owners to own and operate their businesses without undue government interference. The NFIB believes that small business owners know that employees are their most valuable resource. Small business owners work hard to train and retain employees by creating a rewarding workplace. However, government rules and regulations have made labor issues more complicated than ever. Accordingly, the NFIB urges policymakers to simplify the employment process for small business, eliminate burdensome mandates and prevent cumbersome regulations that inhibit job creation.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million

working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

The Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing almost 14.7 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second largest private-sector employers. The Law Center seeks to provide courts with the industry's perspective on legal issues significantly impacting the industry. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases such as these, through amicus briefs on behalf of the industry.

While employees have the right to withhold their labor, they do not have the right to occupy the workplace and prevent customers from enjoying an atmosphere that is free from disruption and interference. As the NLRB had previously recognized, in retail, and particularly in restaurant settings, creating a pleasant in-store environment is a foundational component of production. If the position now taken by the NLRB were to prevail, it would nullify the rights of restaurants to continue operating during labor disputes. Hence, the Law Center and its affiliates have vital interests in the outcome of these proceedings.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents 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 seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Near midnight before the grand reopening of a Wal-Mart store that had been undergoing substantial renovations, the temporary employees hired to do the remodeling work told the store's assistant manager they would stop working unless they were offered permanent positions. E.R. at 2 & 9. When their demands were not met, the employees carried through on their threat about 30 minutes before the grand reopening at 6:00 a.m. They walked to the customer service area inside the store and unfurled a 10-foot-long banner. E.R. at 2. The number of protesters crowding the customer service area quickly grew to nearly 20 people. Around 6:30 a.m., eight protesters (including six employees) moved to an aisle about 20 feet inside the store's front entrance. E.R. at 3. They wore green "OUR Walmart" t-shirts and carried a 3-foot-by-2-foot sign that read "ULP Strike." *Id.*

Despite repeated requests by store management either to leave the store or return to work, the employees refused. They remained on the clock and inside the store well over an hour after the work stoppage began. *Id.* Wal-Mart issued written warnings with no monetary penalties to the employees involved in the work stoppage. *Id.* The employees filed unfair labor practice charges and the NLRB determined that Wal-Mart violated the National Labor Relations Act ("NLRA") by issuing the warnings.

The NLRB's decision sets a dangerous precedent that seriously upsets the careful balance struck by federal labor law—with significant practical consequences for businesses and the customers they serve. Although employees have the right to strike, picket, and engage in demonstrations in a labor dispute, employers have the right to use their property to conduct their business and, in a retail environment, to serve their customers. Federal labor law strikes a fair, sensible balance by precluding *in-store* demonstrations that prevent the employer from conducting business and serving its customers.

The NLRB's decision upsets this balance and will lead to absurd results to the detriment of businesses and customers alike:

- Will restaurant workers be permitted to picket around customers' tables while they are eating their meals?
- Will hotel workers be permitted to march through the halls of a hotel, chanting with bullhorns and waking guests in their rooms?
- Will retail workers be permitted to demonstrate in the aisles as customers are shopping?
- Will television workers be permitted to demonstrate behind anchors during a live broadcast of the nightly news?

Although the answers to these questions should clearly be no, the NLRB's decision in this case throws all of that into question. The root of the problem is the

unwieldy ten-factor test applied by the NLRB in this case. Setting aside the inherent uncertainty generated by such a test, it is entirely unrealistic to expect a supervisor or manager to remember, analyze, and appropriately balance all ten factors when there is an ongoing demonstration inside the employer's business while customers are there. The employees involved in the demonstration also should know when their actions are protected by labor law or whether they are in jeopardy of being disciplined for engaging in the in-store demonstration.

This case shows beyond cavil that the NLRB's ten-factor test has become so untethered from basic, well-established principles of federal labor law that it will lead to arbitrary results that concern *amici*. As one member of the NLRB noted in his dissent, the ten-factor test should not apply at *all* in the retail environment where customers are present—unlike, for example, in a factory or other workplace where they are not. In a retail setting, employees have the right to protest and communicate their message to customers and the general public *outside* the store. But federal labor law does not—and should not—require employers (and by extension their customers) to tolerate protests and demonstrations *inside* the store or other retail establishment.

ARGUMENT

I. Federal Labor Law Has Long Prohibited Strikes and Demonstrations Inside an Employer's Business Premises.

Most fundamentally, the NLRB's decision overlooks decades of precedent that has consistently recognized the critical distinction in federal labor law between a conventional strike—where employees walk off the job and refuse to work until their demands are met—and an in-store work stoppage where employees demonstrate *inside* the employer's premises and interfere with the employer's ability to operate the business during the strike.

The former is a permissible form of "economic warfare" protected by the NLRA, whereby employees are entitled to withhold their labor so as to exert leverage over their employer in support of whatever demands they have made in the labor dispute. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181-82 (1967) ("The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms . . . ."); *see also Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 128 (1985) (Blackmun, J., dissenting) ("The strike or the threat to strike is the workers' most effective means of pressuring employers, and so lies at the center of the collective activity protected by the Act.").

Although a strike may provide employees with leverage, it does not require an employer to retreat from engaging in commerce and shut its doors to customers,

even if only temporarily. To the contrary, the employer is entitled to continue operating its business during the strike—either with employees who choose to remain at work or replacement workers. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (the replacement of striking employees with others in an effort to carry on business is not an unfair labor practice; the NLRA does not deprive an employer the right to protect and continue his business by supplying places left vacant by strikers).

In this way, the relative leverage exerted by striking employees who have absented themselves from work in support of their demands may be countered by the employer's efforts to operate the business without those employees. The economic harm suffered by both parties in a conventional strike, or a lockout by the employer, is fundamental to the NLRA's system of resolving labor disputes. As the Supreme Court has explained, the presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of this system that Congress created for peaceably resolving labor disputes. *See NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 489 (1960). This system of economic warfare—in which each side is able to exert leverage in support of its respective position in negotiations—permits strikes and lockouts in labor disputes precisely because it is the mutual threat of economic harm that motivates the parties to reach an agreement. *Id.*

The NLRA's system of economic warfare should not be confused with anarchy. Employees and unions are not entitled to occupy the employer's property, thereby preventing the employer from running its business by engaging in an in-plant strike, picketing or other demonstrations inside the employer's premises. This has been the law since 1939, when the Supreme Court held that an employer could lawfully terminate employees who engaged in a "sit in" strike, which prevented the employer from continuing to operate its plant. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256-58 (1939). Although the Supreme Court made clear that employees had "the unquestioned right to quit work," the Court held that the NLRA does not protect employees who occupy an employer's premises "to prevent their use by the employer in a lawful manner." *Id.* at 256. The Court explained that prohibiting employers from disciplining employees engaged in in-plant strikes would encourage defiance of the law and tend to nullify the NLRA's system for peaceably resolving labor disputes. *Id.* at 258.

Following the logic of *Fansteel*, subsequent decisions by the Supreme Court and the courts of appeals have repeatedly held that an employer is permitted to prohibit employees from engaging in a strike or picketing in working areas inside the property. *See S. S.S. Co. v. NLRB*, 316 U.S. 31, 40-41 (1942) (employees were not protected by the NLRA when they deliberately and persistently defied direct

commands to perform their duties or vacate the working area so that the ship could sail without them); *Advance Indus. Div.-Overhead Door Corp. v. NLRB*, 540 F.2d 878, 884-85 (7th Cir. 1976) ("it is clear that the Act would have protected the [employees] if they had left the plant and formed a picket line outside," but the "work-in" cannot be found protected because doing so would encourage compulsion necessarily leading to confrontation and violence between employees and employers, which is wholly repugnant to the basic purposes of the Act); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 454 (4th Cir. 1969) (employer issued a lawful instruction to employees protesting inside the plant to resume work or leave the plant and engage in the strike activity off of company property); *cf. Isla Verde Hotel Corp. v. NLRB*, 702 F.2d 268, 272 (1st Cir. 1983) (croupiers who left the premises without incident when requested to do so by the employer retained the protection of the NLRA).

Until the decision in the instant case, the Board's unequivocal precedent taught that employees who refuse to obey a lawful directive to leave the interior, working areas of their employer's property are not entitled to the NLRA's protection. *Atlantic Scaffolding Co.*, 356 NLRB 835, 836-38 (2011) (agreeing that when employees in the course of protests occupy their employer's property in spite of the employer's order to leave and deprive the employer of the use of its property for an unreasonable period of time, they lose protection of the Act); *Cambro Mfg.*

Co., 312 NLRB 634, 635 (1993) (concluding that in-plant work stoppage reached a point where it was not protected when employees failed to abide by the employer's instructions to either return to work or to clock out and leave the plant); *Waco, Inc.*, 273 NLRB 746, 746-47 (1984) (employees who refused employer's demand that they choose between working and carrying on their protest off the premises lost the protection of the NLRA).

Further, it is well established that an employer is not required to tolerate union-related solicitation or distribution of literature in a manner that interferes with work or production inside the employer's property. An employer is entitled to prohibit employees from soliciting their co-workers during working time and from distributing union literature in working areas of the property. *See, e.g.*, *Peyton Packing Co., Inc.*, 49 NLRB 828, 843 (1943) ("The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours.").

Under the weight of all this authority, the NLRB's current position—that employers cannot so much as issue a warning to employees who refuse a lawful request either to go back to work or to take their demonstration outside—simply collapses. Decades of precedent have carefully struck a balance between the rights

of employees and those of employers, and the NLRB's decision in this case upsets that balance and strikes at the core of the system of "economic warfare" envisioned by the NLRA for peaceably resolving labor disputes while minimizing disruptions to commerce.

II. The NLRB's Application of Its Ten-Factor Test Is Inconsistent with Well-Established Principles of Labor Law and Creates Intolerable Uncertainty.

As this case shows, the NLRB's application of its ten-factor test—first articulated in *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056-57 (2005)—has proven to be unwieldy and to result in outcomes that are inconsistent with the well-established principles of federal labor law laid out above. As the outcome in this case illustrates, the application of the ten-factor test provides no guidance when it matters most—when a front-line manager or supervisor must respond to a strike or demonstration that is disrupting business inside the employer's premises. The NLRB's application of this test results in decisions that cannot reasonably be predicted by the employers who are expected to apply it in difficult and urgent circumstances. *See LeMoyne–Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.) ("thorough, careful, and consistent application of a multi-factor test is important to allow relevant distinctions between different factual configurations [to] emerge . . . . In the absence of an explanation, the "totality of the circumstances" can become simply a cloak for agency whim—or worse."

(internal quotation marks and citation omitted)); *Green v. City of Tucson*, 255 F.3d 1086, 1089 (9th Cir. 2001), *receded from on other grounds by Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) (recognizing that multi-factor tests are prone to mechanical applications that often overlook or underemphasize the most important features of inquires).

A. The *Quietflex* Test Does Not Apply to Demonstrations in Retail Establishments.

The NLRB's application of its ten-factor test is not only arbitrary and inconsistent with longstanding precedent, but also entirely inappropriate in the retail context. As the dissenting member explained, the NLRB has previously recognized that "retail establishments are governed by special rules that permit employers to prohibit actions that disrupt or interfere with the employer's operations in the presence of customers inside the retail establishment." E.R. at 11 (citing *Restaurant Horikawa*, 260 NLRB 197 (1982)).

In *Restaurant Horikawa*, the NLRB held that employees who boisterously paraded and demonstrated for ten to fifteen minutes during the dinner hour inside a restaurant were not engaged in activity that the NLRA protects. Notably, the NLRB did not apply a ten-factor test to reach that conclusion, and it should not. As the NLRB recognized in *Restaurant Horikawa*, creating a pleasant in-store environment is a foundation of a successful retail business. When employees

engage in protests or demonstrations inside a retail establishment, they deprive the employer of its ability to conduct business and serve its customers. E.R. at 11.

Thus, as Member Miscimarra explained in his dissent in this case, the NLRB majority clearly erred in its threshold decision to apply the *Quietflex* test to the in-store protest in this case. The NLRB has, instead, applied a "disruption or interference" standard to such activities in retail establishments. E.R. at 12. The in-store protest in this case was plainly disruptive to business inside the store and therefore not protected activity under the NLRA. The NLRB erred in holding to the contrary.

B. The NLRB's Application of the *Quietflex* Test Is Problematic for Employers in All Industries.

Although it was error under the NLRB's own precedent to apply the *Quietflex* test at all in the retail context of this case, the NLRB's application of the *Quietflex* test more generally sets a dangerous precedent for employers in all industries. When employees stop working and engage in demonstrations in working areas, employers must be allowed to address the situation by advising them—consistent with longstanding Supreme Court precedent—that working time and working areas are for work. When employees refuse to engage in work, yet remain on the clock, or occupy their employers' business premises to engage in a protest, employers deserve, at the very least, clear guidance about how they may

lawfully respond to protect their legitimate business interests while at the same time respecting employees' right to strike.

This guidance has been provided by the Supreme Court's decision in *Fansteel* and the decades of precedent that have followed—*i.e.*, an employer has the right to use its property and continue its business operations during a strike. If employees engage in an in-store strike or protest, the employer is entitled to give the employees the choice between returning to work or taking their protest outside. Should the employees refuse to comply with these options within a reasonable time, the employer may then lawfully take disciplinary action. The employer is not required to continue tolerating the in-store protest. These basic, common-sense principles should be clear based on nearly 80 years of precedent.

But the NLRB's perplexing application of its ten-factor test is flatly inconsistent with these principles—leaving management without any reliable guidance about how to respond lawfully to an in-store protest. Because an in-store protest creates a crisis for the unfortunate manager who happens to be on duty—and typically with customers present—the law must be clear on this point. It is entirely unreasonable to expect the manager on duty even to know—much less to correctly apply—the ten factors that the NLRB apparently expects to be considered and balanced in the heat of the moment. Even if the manager has a labor lawyer on speed dial, it will be difficult to predict what conclusion the NLRB will reach

months or years after the fact, because the NLRB's application of these ten factors is untethered from any guiding principles that would point to a clear or consistent conclusion. *See Green*, 255 F.3d at 1089.

All participants in a labor dispute deserve clearly defined rules of engagement. The employer should know how it may lawfully respond to an in-store protest, and the employees should know that they are at risk of discipline or termination if they refuse a lawful directive to take the protest outside. The "return to work or take it outside" principle is simple to understand, easy to apply, and consistent with well-established case law. It should be dispositive without the need to balance any other factors.

III. The NLRB Erred in Its Application of Its Ten-Factor Test to the Facts of This Case.

Although the NLRB should not have applied its ten-factor test in the retail context of this case, a proper application of the test leads inexorably to the conclusion that Wal-Mart responded lawfully to the in-store protest in this case.

Five minutes after the employees began demonstrating in the store's customer service area, Human Resources Manager Janet Lilly and another Manager, Paul Jankowski, approached the employees—who were still on the clock—and requested that they return to work. E.R. at 2, 10. The employees refused. Thirty minutes later, at 6:00 a.m.—when the store was opened to the public—Lilly repeated her request to no avail. E.R. at 2. A dozen non-employee

protesters then joined the six employees and continued occupying the customer service area while holding a ten-foot-long banner. *Id.* Jankowski approached the group, informed them they were trespassing, and told them that they needed to leave. Twice more the managers told the employees engaged in the work stoppage that they needed to leave. E.R. at 3. When the police arrived over an hour after the protest began, the protesting employees finally clocked out and left the store. *Id.*

If the ten-factor test had been properly applied, the outcome would have been foreordained: the employees' in-store protest is not protected by the NLRA because they refused to comply with repeated, lawful directives to either return to work or take their protest outside the store (which they eventually did after the police arrived). Wal-Mart lawfully issued written warnings—without any monetary penalties—to the employees for failing to comply with this lawful directive.

This conclusion is consistent with the Supreme Court's decision in *Fansteel* and its progeny. Just as in *Fansteel*, the employees who persisted in their in-store protest—after being told to take it outside—were trespassing upon the employer's property. They had the choice to either quit work and take their protest outside the store (thereby engaging in a conventional strike), or else return to work. By doing neither, they were engaged in activity that is not protected by the NLRA. *See*

Fansteel, 306 U.S. at 256. In reaching a contrary result, the NLRB's decision sets a dangerous precedent that contravenes fundamental principles of labor law, flouts basic principles of fairness and common sense, and is impractical for employers—particularly retail employers—to apply in the real world. It should not be permitted to stand.

CONCLUSION

For all of the foregoing reasons, the *amici* respectfully request the Court to grant Wal-Mart's petition for review and set aside the NLRB's decision and order.

Dated: May 30, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,502 words.

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Dated: May 30, 2017

/s/ Allyson N. Ho
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amicus Curiae Brief in Support of Wal-Mart Stores, Inc. by American Hotel and Lodging Association, Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, International Council of Shopping Centers, International Franchise Association, National Federation of Independent Business, National Retail Federation, Restaurant Law Center, and Retail Litigation Center, Inc. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on May 30, 2017. A copy will be served on counsel of record by operation of the Court's electronic filing system.

Dated: May 30, 2017

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