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**Nos. 21-0363 & 21-0650**

# In the Supreme Court of Texas

In re Walmart, Inc. and Wal-Mart Stores Texas, LLC,

*Relators,*

Original Proceedings from the 448th Judicial District Court,
El Paso County, Texas
No. 2019DCV3471

## AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE TEXAS ASSOCIATION OF BUSINESS, THE NATIONAL RETAIL FEDERATION, AND THE TEXAS AUTOMOBILE DEALERS ASSOCIATION IN SUPPORT OF RELATORS

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## STATEMENT OF INTEREST OF AMICI

The Chamber of Commerce of the United States of America ("Chamber") 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, that raise issues of concern to the nation's business community.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. NRF's membership includes retailers of all sizes, formats, and channels of distribution, as well as restaurants and industry partners from the United States and more than forty-five countries abroad. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs. For over a century, NRF has been a voice for every retailer and every retail job, communicating the impact retail has on local communities and global economies. NRF's *amicus* briefs have been cited favorably by

multiple courts. *See, e.g.*, *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 791 n.20 (2d Cir. 2016).

The Texas Association of Business ("TAB") is the voice fighting for public policy issues that grow the economy and Texas jobs, representing over 1,500 companies of all sizes and industry sectors and over 200 local chambers.

The Texas Automobile Dealers Association ("TADA") is an organization comprising Texas franchised automobile and heavy duty truck dealers. As the distribution and sale of motor vehicles affects the general economy of the state, TADA supports a sound system of distribution and selling motor vehicles through the state's licensing and regulating system and supports ethical business practices and commercial integrity in the retail distribution and sale of new vehicles in Texas. TADA and its members are concerned with ever-growing litigation costs associated with irrelevant and burdensome discovery, such as that presented in *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 190 (Tex. 1999).

The burdens and costs of irrelevant discovery are of particular concern to Amici and their members for whom the costs of discovery frequently soar into millions of dollars, resulting in an inexorable pressure to settle claims regardless of the underlying merits.

Amici have no direct financial interest in the outcome of this litigation. No counsel for a party in these proceedings wrote this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

## INTRODUCTION

There is no dispute that mass shootings are horrific crimes that inflict untold harm on the victims, their communities, and the nation. Anyone perpetrating such a heinous act should be held fully accountable for their actions in any criminal and civil proceedings.

This lawsuit, however, seeks to hold a premises owner liable for an inherently unforeseeable criminal act committed on its property by a third party. This Court should confirm the binding authority in *Timberwalk* and limit the scope of permissible discovery in this and similar premises liability cases. The trial court improperly rejected *Timberwalk* as governing the limits of relevancy in this case, making an advance ruling on the scope of upcoming depositions by allowing inquiry into unrelated and dissimilar crimes at remote locations in contravention of *Timberwalk*.

The discovery dispute is live[1] and cries out for resolution by this Court to protect premises owners from invasive and irrelevant discovery regarding a tragic third-party crime they could not reasonably foresee. The alternative is expansive, unrestrained, and largely irrelevant discovery into unrelated

[1] The Real Parties' recent withdrawal of their written discovery requests did not moot the dispute since they are pursuing the same irrelevant information through depositions. *See In re Allied Chem. Corp.*, 227 S.W.3d 652, 655 (Tex. 2007 (orig. proceeding) (parties cannot "manipulate pretrial discovery to evade appellate review"); *In re American Airlines, Inc.*, No. 20-0789 (Tex. October 22, 2021) (orig. proceeding) ("Brinksmanship discovery tactics cannot deprive an opposing party of the right to seek protection").

incidents at other business locations years earlier involving policies, budgets, and training that may never be at issue. A practical and workable rule that focuses litigation and limits discovery on the first and critical requirement for mass-shooting liability is available to this Court—and is a compelling necessity in an unfortunate time when mass-shootings continue.

While premises owners cannot avoid meritless litigation altogether, requiring them to engage in costly discovery that goes far beyond permissible limits irresponsibly increases litigation costs for businesses, ultimately burdening their patrons and the communities they serve as well as the legal system itself. Since foreseeability is a threshold issue in a mass shooting case such as this—a premises owner owes no duty to protect invitees from an *unforeseen* third-party crime—discovery should be limited to that threshold issue until the plaintiffs can demonstrate that the harm was foreseeable.

This Court has prudently established precedent to initially abate and limit discovery in unique cases, such as this one until a plaintiff first establishes the threshold existence of a duty (which here requires foreseeability) before forcing the defendant to undergo the expense of litigating and conducting discovery on issues that may be unnecessary.

## ARGUMENT

### I. The Trial Court's Rejection Of *Timberwalk* Must Be Corrected.

#### A. *Sound policy reasons support Timberwalk's limits on liability for the criminal acts of third parties.*

It is a fundamental legal principle that a landowner "is not an insurer of [a] visitor's safety." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 769 (Tex. 2010). That is particularly true when the risk of harm comes not from an existing property condition, but from the criminal acts of a third party. A landowner generally "has no legal duty to protect another from the criminal acts of a third person." *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998) (quoting *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996)).

The limited exception at issue here imposes a duty to use *ordinary* care to protect invitees from the criminal acts of third parties *if* the premises owner knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee. *Timberwalk*, 972 S.W.2d at 756. Foreseeability is a "prerequisite" to establishing a duty, and only after "this prerequisite is met" should courts "determine the parameters of the duty." *Id.*

Foreseeability that a third-party criminal act might harm invitees requires that similar criminal conduct must have occurred on or near the premises, recently and with some frequency, with publicity such that the

landowner was or should have been aware of it. *Timberwalk*, 972 S.W.2d at 757. Sound public policy supports these limitations, else premises owners will owe a universal duty and become absolute insurers of their visitors' safety. *Id*. at 756.

### B. *The trial court expressly rejected Timberwalk's limits.*

Instead of hewing to *Timberwalk's* requirement, the trial court twisted this Court's logic, concluding that because "we're not going to have any situation similar and close to our area … we have to go a little bit further outside" the area. MR311. That is exactly what *Timberwalk* prohibits, as it limits the relevant inquiry to "similar" crimes "on the property or in its immediate vicinity." *Timberwalk*, 972 S.W.2d at 757-58.

In allowing wide-ranging discovery of dissimilar crimes in far-flung locations, the trial court rejected the rule that foreseeability must be based on proximity, recency, frequency, similarity, and publicity, as *Timberwalk* instructs. Disregarding binding precedent is a clear abuse of discretion. *See City of New Braunfels v. Stop the Ordinances Please*, 520 S.W.3d 208, 209 (Tex. App.—Austin 2017, pet. denied) ("Based on the Texas Supreme Court's most recent binding precedents … we must reverse" the judgment); *see also*. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

Even before *Timberwalk*, this Court established the limits of relevancy, which in turn inform the limits of permissible discovery. In *K Mart Corp. v. Sanderson*, the Court held that in a premises liability case, discovery requests about dissimilar crimes in remote locations is overly broad and "well outside the bounds of proper discovery." 937 S.W.2d 429, 431 (Tex. 1996) (quoting *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995)); *In re USAA Gen. Indem. Co.*, 624 S.W.3d 782, 794 (Tex. 2021) (discovery that "exceed[s] the relevant subject matter of the suit" is improper, warranting mandamus relief). *Timberwalk*'s tenets further affirm the need to focus discovery on relevant issues instead of launching into a costly and potentially wasted fishing expedition.

Moreover, the irrelevant information plaintiffs seek will not lead to the discovery of any admissible evidence. *See* TEX. R. CIV. P. 192.3(a). Evidence of dissimilar crimes at distant locations will not be admissible for any purpose, and neither will Walmart's security responses to such crimes.[2] The court of appeals' attempt to justify the requested discovery on the grounds that it might be relevant to the "unreasonableness" inquiry—which is based on policy considerations, not discoverable facts—falls far short. *See UDR*

[2] Indeed, revealing a company's security measures could *compromise* its ability to provide a safe environment for its patrons.

*Props., L.P. v. Petrie*, 517 S.W.3d 98, 101-02 (Tex. 2017). Even if this Court is inclined to deny Walmart's petition for writ of mandamus, it should do so with an opinion rejecting the court of appeal's analysis and affirming the import of binding authority.

## II. The Random Act Of A Mass Shooting Is Inherently Unforeseeable, Negating The Threshold Prerequisite That A Duty Exist.

"The existence of a duty is a question of law determined by the court." *Trammell Crow Cent. Texas v. Gutierrez*, 267 S.W.3d 9, 12 (Tex. 2008). In *Trammell Crow*, the Court rendered a take nothing judgment in favor of a landowner on whose property a "seemingly random" brutal murder had occurred. *Id.* at 11, 17. The Court held that no duty arose as a matter of law because the attack in question was not foreseeable in light of dissimilar prior criminal activity—the "previous crimes were not sufficiently frequent and similar to give rise to a duty." *Id.* at 17. The same is true here.

### A. *Mass shootings are inherently unforeseeable.*

Mass shootings are horrific, inexplicable, extraordinary, and random. Shooters alone decide when and where to perpetrate their atrocity—in towns and cities large and small, from small churches and schools to large sporting events and concerts.[3] They are, by their very nature, inherently

[3] According to a recent study, locations that suffer mass shootings "run the full gamut of American communities;" from small towns and suburbs to large cities; in rich, poor, and

unforeseeable, and thus generally should be deemed unforeseeable as a matter of law.

"The foreseeability requirement protects the owners and controllers of land from liability for crimes that are so random, extraordinary, or otherwise disconnected from them that they could not reasonably be expected to foresee or prevent the crime." *Trammell Crow*, 267 S.W.3d at 17 (internal citations omitted). Even more than the "seemingly random attack" in *Trammell Crow*—where "the assailant opened fire from behind at long range without making any prior demand"—the sudden, horrific, and unexpected attack here was truly "extraordinary." *Id.* at 11, 17.

This case does not involve a premises owner located in a crime-ridden area where certain types of criminal activity directed at the owner's invitees might be reasonably foreseen. Indeed, no specific location in the U.S. has suffered a repeat mass shooting, and no particular property or location can be said to be a foreseeable target for a mass shooter.[4]

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middle-class communities; in racially mixed as well as predominantly white communities. All Kinds of U.S. Communities Have Suffered Mass Shootings - Bloomberg ("*Where Do Mass Shootings Take Place?*", citing Patrick Adler, Martin Prosperity Institute).

[4] According to the Federal Bureau of Investigation, only 26.7% of mass shootings from 2000 to 2018 occurred at businesses open to pedestrian traffic. Quick Look: 277 Active Shooter Incidents in the United States Between 2000-2018 — FBI (last visited November 3, 2021). Twenty percent occurred at schools, 13.4% at businesses closed to pedestrian traffic, 13.4% at open spaces. *Id.* Other locations include government and military facilities, health care facilities, houses of worship, and private residences. *Id.*

Because of the random, utterly unexpected, and extraordinary nature of most mass shootings, the *Timberwalk* factors—proximity, recency, frequency, similarity, and publicity—simply cannot be met. While there may be rare circumstances in which a fact issue regarding foreseeability exists, mass shootings generally are unforeseeable as a matter of law. An issue of fact may arise, for example, if a premises owner has sufficient advance warning of the impending hazard, such as the unusual facts in *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tex. 2010). But absent specific and sufficient advance warning, a landowner is in no better position than its invitees to anticipate or foresee that a mass shooter will choose a particular location at a particular time to perpetrate an atrocity. This Court should hold that absent extraordinary circumstances such as sufficient advance warning, mass shootings are inherently unforeseeable as a matter of law.

Categorical determinations of inherency are not foreign to our jurisprudence. In the context of the statute of limitations and the discoverability of an injury, courts "determine whether an injury is inherently undiscoverable on a categorical basis because such an approach 'brings predictability and consistency to the jurisprudence.'" *Wagner & Brown v. Horwood*, 58 S.W.3d 732, 735 (Tex. 2001) (quoting *Apex Towing*

*Co. v. Tolin*, 41 S.W.3d 118, 122 (Tex. 2001)); *Archer v. Tregellas*, 566 S.W.3d 281, 290 (Tex. 2018).

Here, the categorical inquiry is whether an unannounced mass shooting is "the type of [hazard] that could be [foreseen] through the exercise of reasonable diligence." *See Archer*, 566 S.W.3d at 290 (quoting *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 66 (Tex. 2011)). As a matter of law, it is not. As this Court noted in *Trammell Crow*, while "criminal conduct is difficult to compartmentalize, some lines can be drawn." *Trammell Crow*, 267 S.W.3d at 17 (internal citation omitted). Here, the line to draw is clear: a mass shooting can and should be compartmentalized into a category of inherently unforeseeable crimes. That will bring "predictability and consistency to the [state's] jurisprudence." *See Wagner & Brown*, 58 S.W.3d at 735.

### B. *Foreseeability is a threshold issue that should be determined prior to expanded, invasive discovery.*

In *Timberwalk* the Court pronounced:

> The foreseeability of an unreasonable risk of criminal conduct is a *prerequisite* to imposing a duty of care on a person who owns or controls premises to protect others on the property from the risk. *Once this prerequisite is met*, the parameters of the duty must still be determined.

972 S.W.2d at 756 (emphasis added).

"'Foreseeability is the beginning, not the end, of the analysis in determining the extent of the duty to protect against criminal acts of third parties.'" *Timberwalk*, 972 S.W.2d at 756 (quoting *Lefmark Management Co. v. Old*, 946 S.W.2d 52, 59 (Tex. 1997) (Owen, J., concurring).

Citing to *UDR Properties*, Real Parties focus on the "not the end" portion of this sentence in *Timberwalk*. (Real Parties' Br. at 15). But foreseeability is not necessarily the end of the analysis because other factors must be met *if* the risk was foreseeable. In *UDR*, this Court rejected the court of appeals' reversal of summary judgment for the landowner on the grounds that foreseeability was a fact issue without also examining unreasonableness. *UDR Props.*, 517 S.W.3d at 101-103.

In other words, *if* a hazard is foreseeable, *then* the "policy implications of imposing a legal duty to protect against foreseeable criminal conduct," *i.e.*, unreasonableness, must be examined. *Id.* at 103. In contrast, if the beginning prerequisite of foreseeability is lacking, that is the end of the analysis. No resources, including discovery, need be spent on remaining policy considerations unless and until the threshold issue of foreseeability is established.

## III. Mandamus Relief Should Issue To Avoid The Significant Costs Of Pursuing Irrelevant Discovery.

As this Court has recognized, discovery can be "a weapon capable of imposing large and unjustifiable costs on one's adversary." *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 190 (Tex. 1999). Litigation costs can constitute an enormous part of a company's business expenses, capable of crippling this State's thriving economy.

Rising discovery costs often steer the resolution of lawsuits, particularly those with multiple plaintiffs such as the present case, regardless of their merits. *See CSR, Ltd. v. Link*, 925 S.W.2d 591, 598 (Tex. 1996) (Gonzalez, J., concurring) (recognizing that the costs of multi-party litigation can drive defendants to settle regardless of the merits); *see, e.g.*, Nicholas M. Pace & Laura Zakaras, RAND Institute for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, at 17 (2012) (finding that median e-discovery cost is $1.8 million); Litigation Cost Survey of Major Companies 3-4 (2010), Litigation Cost Survey of Major Companies (uscourts.gov) (between 2006-2008, high end discovery costs were reported to be between $2.3 million and $9.7 million); Linzey Erickson, *Give us a Break: The (IN)Equity of Courts Imposing Severe Sanctions for Spoliation without a Finding of Bad Faith*, 60 Drake L. Rev.

887, 925 (2012) ("In many instances, the cost of litigation may be so high that companies are unwilling to try the case on the merits.").

Discovery costs continue to grow at an alarming rate, frequently overwhelming the potential value of the underlying suit and frustrating the goals of a "just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1; *see also* TEX. R. CIV. P. 1. Discovery costs comprise 50 to 90 percent of total litigation costs in a given case, and as well as the highest "liability costs" (which includes discovery expenses) of its peer countries at 2.6 times the average level of the Eurozone economies.[5] These high discovery costs hinder a defendant's ability to meaningfully defend its rights and interests by inappropriately increasing plaintiff attorneys' settlement leverage.

Courts often limit discovery pending resolution of threshold issues such as venue, jurisdiction, forum non conveniens, special appearance, and official immunity. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999); *USX Corp. v. West*, 759 S.W.2d 764, 767 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding). Here, the threshold issue of whether a duty

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[5] *See* U.S. Chamber Institute for Legal Reform: Public Comment To the Advisory Committee On Civil Rules Concerning Proposed Amendments To The Federal Rules of Civil Procedure, dated Nov. 7, 2013, at 1 (citing studies), *available at* http://www.instututeforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf.

exists under these extraordinary facts should be determined first, and the existence of a duty hinges on foreseeability.

Requiring a plaintiff to establish the existence of a duty before allowing wide-ranging discovery in unique circumstances such as this is sound policy arising under common law. In the insurance context, for example, courts routinely sever extracontractual claims premised on a contractual duty under the insurance policy, and abate such claims until the contractual duty is established. *See In re American Nat'l Co. Mut. Ins. Co.*, 384 S.W.3d 429, 438-39 (Tex. App.—Austin 2021, orig. proceeding). Here, the existence of a duty is determined by applying sound principles of tort law, not by interpreting a contract. But how the duty may arise should not change the threshold requirement of establishing that duty in the first instance.

In *In re State Farm Mut. Auto. Ins. Co.*, 629 S.W.3d 866 (Tex. 2021) (orig. proceeding), this Court held that in "the unique context of UIM [under/uninsured motorist] litigation," bifurcation of contractual and extracontractual claims makes sense because the latter cannot be resolved "without first determining whether [the insurer] has a contractual duty to pay UIM benefits." *Id.* at 876. Bifurcation "preserve[s] judicial resources" by avoiding the "expense of litigating and conducting discovery on issues that ultimately may be unnecessary…." *Id.* (quoting *In re Colonial Cnty. Mut. Ins.*

*Co.*, No. 01-19-00391-CV, 2019 WL 5699735, at *5 (Tex. App.—Houston [1st Dist.] Nov. 5, 2019, orig. proceeding) (per curiam) (mem. op.).

This premises liability case, based on the unforeseeable criminal actions of a mass shooter, is the kind of unique context in which the threshold question of whether a duty exists should be determined before engaging in extensive and expensive discovery on other aspects of the case.

## PRAYER

This Court should grant mandamus relief to ensure compliance with *Timberwalk* and prevent the needless and burdensome discovery of irrelevant information.

Respectfully submitted,

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This brief complies with the length limitations of TEX. R. APP. P. 9.4(i)(2) because this brief consists of 2,968 words as determined by Microsoft Word Count, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

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