

**IN THE SUPREME COURT OF TENNESSEE  
AT KNOXVILLE**

STATE OF TENNESSEE,

Appellee,

v.

ABBIE LEANN WELCH,

Appellant.

KNOX COUNTY CRIM. 107201

No. E2018-00240-SC-R11-CD

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**BRIEF OF RETAIL LITIGATION CENTER, INC., NATIONAL  
ASSOCIATION FOR SHOPLIFTING PREVENTION, AND  
TENNESSEE RETAIL ASSOCIATION AS *AMICI CURIAE* IN  
SUPPORT OF APPELLEE**

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Stanley E. Graham  
Tenn. BPR No. 019788  
WALLER LANSDEN DORTCH AND  
DAVIS, LLP  
511 Union St.  
Suite 2700  
Nashville, TN 37219  
(615) 850-8935 (telephone)  
(615) 244-6804 (fax)

Hyland Hunt (*pro hac vice* pending)  
Ruthanne Deutsch  
DEUTSCH HUNT PLLC  
300 New Jersey Ave., NW  
Suite 900  
Washington, DC 20001  
(202) 868-6915 (telephone)  
(202) 609-8410 (fax)

*Counsel for Amici Curiae*

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## STATEMENT OF INTEREST OF *AMICI CURIAE*<sup>1</sup>

The Retail Litigation Center, Inc. is a public-policy organization that identifies and engages in legal proceedings affecting the retail industry. The Center's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The Center seeks to provide courts with retail-industry perspectives on important legal issues and to highlight the potential industry-wide consequences of significant pending cases. Toward that end, the RLC has filed more than 150 amicus briefs since its founding in 2010.

The National Association for Shoplifting Prevention (NASP) is a non-profit organization and the nationwide leader in shoplifting prevention efforts. NASP's mission is to raise public awareness about the harmful effects of shoplifting on youth, families, and communities; unite public opinion toward constructive solutions; deliver needed programs and services; and engage community action in prevention efforts to improve the lives of all affected and reduce the number of people who become involved. To that end, NASP provides shoplifter education programs that have been proven to substantially reduce recidivism rates

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

for shoplifting.

The Tennessee Retail Association (TRA) works for the protection, promotion and prosperity of the retail industry in Tennessee. The TRA advocates before the government on behalf of its member companies and organizations. A non-profit trade association based in Nashville, the TRA is governed by a Board of Directors representing the wide variety of the state’s 79,000 retail businesses and 890,000 retail employees.

This case is important to *amici* because serial shoplifting is an intractable problem that causes serious harm to retailers and the public at large. Retailers are doing all they can to prevent shoplifting. But their efforts cannot succeed unless they are backed up by the potential for serious penalties, when warranted—including the possibility of charging repeat shoplifters with felony burglary when they enter stores and steal after they have received no-trespass notices. That much-needed threat of enforcement serves as a necessary deterrent, as the experience of other jurisdictions demonstrates. *Amici* can attest, based on their experiences in Tennessee and across the country, that allowing enforcement of the Tennessee burglary statute as written is not only the right result as a matter of constitutional law and statutory interpretation, as the State of Tennessee argues, it is also a sound and critically-important policy.

### SUMMARY OF ARGUMENT

In *Breakfast at Tiffany’s*, Audrey Hepburn’s character, Holly Golightly, spends a day with her neighbor encouraging him to do things he’s never done before, including stealing from a “five and ten.” The pair wander the aisles of a dime store picking up odds and ends like rolling

pins and lamp shades under the watchful eye of store clerks before they finally put on two cartoon masks and walk out the doors without paying. It's a game, a lark, and it makes for a great movie scene. In popular culture, shoplifting is often depicted this way—as the prank theft of a small trinket, showing a character's willingness to break seemingly small rules, to be a little less square. But the reality is much darker.

Shoplifting costs retailers and their customers billions of dollars each year. Yet worse than the financial harm is the risk to physical safety. Shoplifting not infrequently escalates into violent encounters that put bystanders, store workers, and first responders at risk, and each year retail workers are killed or gravely injured during shoplifting apprehensions that turn violent. These harms are largely caused by serial shoplifters—the more than a quarter of shoplifters who steal weekly on average yet are caught only about once a year. Whether driven by drug addiction, organized retail crime networks, or simply the thrill of getting away with it, serial shoplifters are difficult to deter and their thefts are very difficult to prevent.

Retailers collectively invest billions in preventing and deterring shoplifting, including hiring specialized personnel, installing cameras and alert systems, and supporting shoplifter education programs to break the recidivism cycle. No-trespass letters are critical to these efforts, because they directly target repeat offenders—and specifically address the need to deter serial shoplifters from returning to the same store, as they prefer to do. No-trespass letters, if complied with, also serve to avoid any future encounters with individuals who have demonstrated their unwillingness to refrain from theft, rather than requiring loss prevention

personnel to rely on after-the-theft apprehensions that increase the risk of violence. And if the serial shoplifter returns nonetheless, law enforcement officers are more likely to respond to enforce a felony burglary offense than a minor misdemeanor charge.

But no-trespass letters serve little purpose if they are effectively voided any time a person manages to re-enter a store in defiance of being barred from the premises. Such illegal entries occur because it is impossible, as a practical matter, for stores to identify and deny entry to every individual who has been served a no-trespass letter, every time. Doing so would require unsustainable investments in staff and impair the store's relationship with its paying customers. What's more, requiring stores to physically bar entry in order to maintain the validity of a no-trespass letter would increase the potentially violent confrontations that no-trespass policies are designed to avoid.

A more sensible approach—adopted by Tennessee and other states—recognizes that shoplifters who re-enter a store to steal (again) after being formally barred have committed a serious crime, which will be deterred only with serious penalties. *Amici's* decades of experience show that misdemeanor penalties are not enough. Habitual shoplifters know the law, and they know how to keep each theft under the felony threshold while stealing much more in the aggregate. They also know that misdemeanor property crimes like trespass and shoplifting are much less likely to result in arrest or prosecution. That explains why, when felony thresholds rise, so does shoplifting. Some criminal justice agencies have gone so far as to announce policies of not responding to shoplifting calls, or not prosecuting them. Such policies may serve vital goals of

reducing incarceration for minor, one-off offenses. But they do not account for the seriousness of serial shoplifting, and they encourage chronic shoplifters to keep stealing absent appropriate alternatives to address this more serious criminal conduct.

Far from raising constitutional issues, permitting the enforcement of burglary statutes as written—to cover banned serial shoplifters who enter retail establishments without effective consent, and attempt or carry out theft—is well within the state’s prerogative and constitutional bounds. Other states’ experiences prove as much, as burglary charges for shoplifting in violation of a no-trespass letter are far from novel. Retaining this arrow in the enforcement quiver is good public policy to help deter the tide of serial shoplifting.

## ARGUMENT

### I. **Serial Shoplifting Is A Serious Crime That Causes Significant Economic And Social Harms.**

Every day, retailers nationwide lose an estimated \$45.7 million to shoplifting—\$16.7 *billion* per year. *See* Kelsey Seidler, *Shedding Light on Retail Theft Statistics*, Loss Prevention Magazine (Apr. 10, 2019), <https://tinyurl.com/y6yf5w4q>, (reporting 2017 survey estimating \$46.8 billion inventory loss in 2017, with shoplifting accounting for 35.7% of that loss). Such inventory loss is far from the whole measure of harm. There are other financial costs, too—borne by retailers, local governments, and customers alike. In the worst cases, the harm is more than financial; store workers and police officers have been injured or even killed when shoplifting apprehensions have turned violent. And there are

less tangible, but no less negative, consequences for society. It is not uncommon for a person to shoplift in order to test the waters of criminality, learn that no serious consequences result, and begin committing other criminal acts. Shoplifting, in other words, is a gateway crime.

But shoplifters need not shift to new types of crimes to cause significant harm. Those who focus on shoplifting—nonprofessional but habitual shoplifters—do the lion’s share of the damage. Loss Prevention Media, *Issues with ORM and Shoplifting*, 5, <https://tinyurl.com/y5vn3fjp> (“Shoplifting Issues”) (reporting that about 85% of total shoplifting losses are caused by about 27% of shoplifters). For that reason, one critically important way to reduce the economic and often physical injuries caused by shoplifting is to reduce the frequency of theft by repeat offenders.<sup>2</sup>

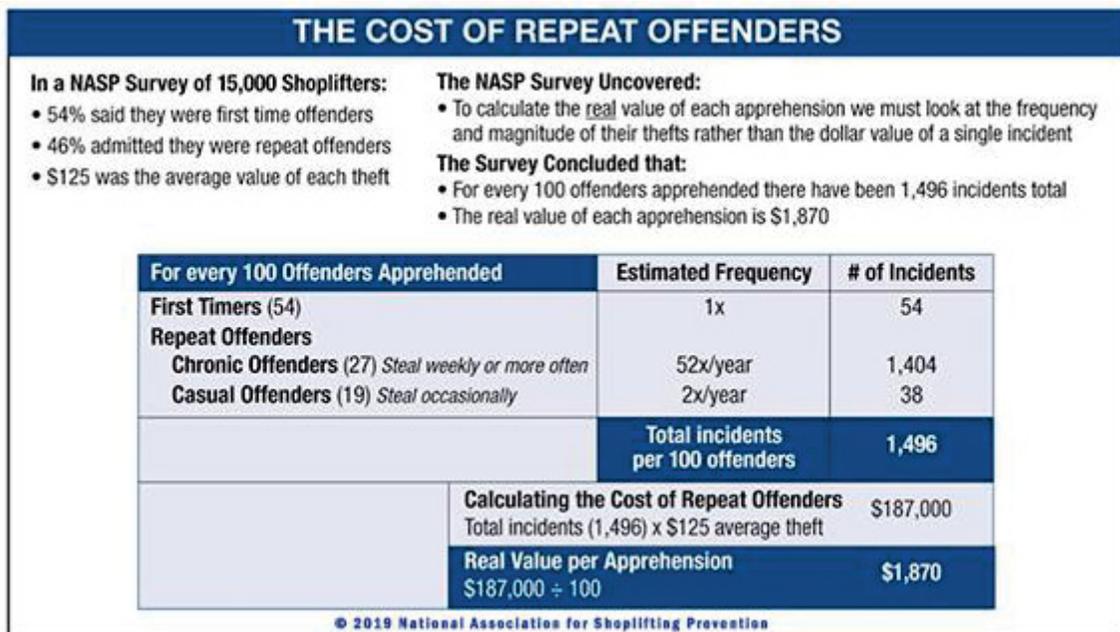
Reducing serial shoplifting is no easy task. An estimated 1 in 11 Americans has shoplifted in their lifetime. Shoplifting Statistics, *supra*. The majority shoplifted only once. See NASP, *The Cost of Repeat Offenses by Consumer Shoplifters* (Dec. 13, 2018), <https://tinyurl.com/y5cwnymq> (reporting that 54% of adults participating in a shoplifter education program stated it was the first time they had shoplifted) (“Repeat Offenses Study”). But in a survey of 15,000 shoplifters, nearly half (46%) admitted to shoplifting more than once, and more than a fifth (22%) said

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<sup>2</sup> Professional shoplifters are those who steal for resale and profit. NASP, Shoplifting Statistics, <https://tinyurl.com/y2aw6mrm> (last modified Apr. 29, 2019) (“Shoplifting Statistics”). They represent about 3% of shoplifters and are responsible for about 10% of shoplifting losses. *Id.*

they had been shoplifting for more than a year. *Id.* Of the repeat offenders, the majority—representing more than a quarter (27%) of all shoplifters—stole weekly or more often. *Id.* The odds against apprehension favor such repeat players. Serial shoplifters are very rarely caught; although they steal weekly (or more), shoplifters are caught, on average, only once in every 48 times they steal, and arrested only half the time when apprehended. So, for every 100 thefts, there is only one arrest. Shoplifting Statistics, *supra*.

All of this adds up to major financial costs. As depicted in the below chart, each time a shoplifter is apprehended they have caused, on average, \$1,870 in losses before that apprehension:



Repeat Offenses Study, *supra*. The \$1,870 in losses per apprehension is an average figure; actual losses per apprehension are thousands of dollars higher for the 27% of shoplifters who are chronic offenders, with correspondingly lower theft amounts for one-time shoplifters. And *amici*

can attest that these losses have increased significantly since this data was collected.

Beyond the billions of dollars in lost merchandise, retailers must invest in costly measures to prevent and deter theft. Expenditures to keep the costs of shoplifting at bay include loss prevention personnel, cameras, and electronic tag and alert systems. See Loss Prevention Media, *What Is Loss Prevention?*, 2-3 (2019), <https://tinyurl.com/y27v2cfk> (“Loss Prevention”). For small retailers, in particular, these costs can prove difficult to bear. As the owner of a fashion boutique explained, shoplifting is “devastating to small business owners. ... This is my only income.” Scottie Kay, *Lawmakers Considering Changes to Alabama’s Shoplifting Laws*, WAAY TV (Apr. 30, 2019), <https://tinyurl.com/y2ylx92m>. Given her experience with shoplifting, this shopkeeper planned to hire another employee if a bill passed in her state raising the dollar thresholds for felony theft (thus increasing the likelihood of shoplifting, see pp. 15-16, *infra*), to “make sure more eyes are on customers,” even though it meant she would take less money home. *Id.*

Shoplifters also steal revenue that would have been paid to state and local governments on sales transactions. Given an average sales tax rate of 7.1% among states that collect sales tax, shoplifting reduces the coffers of states and cities by nearly \$1.2 billion each year, based on the estimated total inventory loss of \$16.7 billion per year. See Janelle Cammenga, Tax Foundation, *State and Local Sales Tax Rates 2019* (Jan. 30, 2019) <https://tinyurl.com/yywqcosm> (listing average rate in each state). And honest customers pay, too. In the form of higher prices, of

course, but also in the myriad different ways that retailers are forced to shape the customer experience with an eye to preventing theft—putting high-value merchandise behind counters or locked doors, requiring customers to present receipts as they exit, adding cumbersome packaging which is difficult to open, and the like. *See* Loss Prevention at 5 (describing trade-offs from making merchandise more secure). No one wants to shop in a space where they feel mistrusted—or unsafe—with all of the merchandise nailed down. Stores ideally would offer a seamless, engaging shopping experience, and retailers want to be able to trust their customers.

Shoplifters take advantage of that trust. For example, when a customer entered a Nashville-area family-owned boutique, and the customer did not seem to want any help, the owner “tried to respect that, give her some space, only to discover that she kind of took advantage” by shoplifting. Brittany Weiner, *Bellevue business believes woman used stroller to help shoplift*, WSMV News 4 (Mar. 28, 2019), <https://tinyurl.com/y53dfog3>. Theft is up this year, and the store has been hit by shoplifters multiple times. *Id.* The owner is adding cameras, but it’s not just the loss of money that bothers her; it’s also the fact of someone just “tak[ing] what they want,” and being so cavalier about the crime. *Id.*

Such financial losses, if left unchecked, are hard enough to bear. Yet the boutique owner was lucky that she suffered only financial injury; harms from shoplifting can be much worse. Estimates of shoplifting-related violence range from 2.3% to 13% of shoplifting incidents; precise numbers are unavailable due to inconsistent tracking and reporting. *See* Shoplifting Issues at 2; Adrian Beck, et al., *Policies and Practices on*

*Managing Shoplifting in Retailing*, 5-6 (Jan. 2017) (“Policies and Practices”). Even the lowest estimate indicates, however, that for large retailers, each store will suffer more than one violent incident per year, putting customers, store personnel, and public responders at risk. Policies and Practices at 6. The risk of violence is greatest when store personnel attempt to apprehend shoplifters, *id.*, and there have been numerous tragic incidents where store personnel or police officers have been injured or killed as the result of a confrontation with a shoplifter. See, e.g., Caleigh Bourgeois, *Suspect Named In Walmart Shoplifting Turned Deadly Shooting*, News 9 (Feb. 11, 2019), <https://tinyurl.com/y2owevb7> (store security officer and police responder shot and injured during apprehension of shoplifter); *Dallas Officer Dead, 2 Critical After Home Depot Triple Shooting*, NBC 5 (Apr. 24, 2018), <https://tinyurl.com/yxw9dskj> (asset protection associate and two police officers were shot, one fatally, during attempted apprehension of shoplifter at Home Depot); *Shoplifting Suspect Fatally Stabs Va. Mall Store Security Guard*, NBC Washington (Mar. 5, 2017), <https://tinyurl.com/y4a38k39> (shoplifting suspect fatally stabbed a security guard at Burlington Coat Factory). Because of this risk of violence, many stores prohibit personnel from engaging in any physical contact with a suspected shoplifter, requiring them to let anyone go who will not willingly stay. Policies and Practices at 9 (survey indicating nearly a fifth (18%) of retailers prohibited any apprehensions and nearly half (45%) had a “no touch” policy).

There is a strong link between shoplifting and drug addiction that feeds both serial shoplifting and the risk of violence. People who are

addicted to drugs are much more likely to shoplift, and addicted shoplifters steal more frequently than other shoplifters. See Trevor Bennett, et al., *The Statistical Association Between Drug Misuse and Crime: A Meta-Analysis*, 13 *Aggression & Violent Behavior* 107, 114 (2008) (odds of shoplifting among drug users were about 4 to 6 times greater than among non-users); Matthias Pierce, et al., *Insights into the Link Between Drug Use and Criminality*, 179 *Drug & Alcohol Dependence* 309 (2017) (rate of shoplifting thefts for opiate users in UK is 3.5 to 4.7 times higher than non-using shoplifters). Confronting shoplifters who are high is unpredictable and can easily result in harm. Moreover, the need to pay for drugs is an inexorable pull to shoplift again and again, with drug dealers sometimes operating as “fences” for stolen merchandise. See Shoplifting Issues at 14. In some places—including Knoxville—shoplifting by drug addicts for the purpose of returning stolen items for gift cards (which are then sold on secondary markets at a discount or traded for drugs) has been directly linked to the opioid crisis. Contessa Brewer & Scott Zamost, *Gift card crime fueling opioid addiction across the US*, CNBC (Dec. 7, 2017), <https://tinyurl.com/y2yshf6k> (reporting that Knoxville police linked 83 to 98 drug overdoses to gift card fraud in a three-month period).

Other social problems, like drug addiction, thus contribute to increased serial shoplifting. And serial shoplifting, in turn, contributes to increased crime of other kinds, as offenders gain confidence in breaking laws with impunity. The “gateway” nature of shoplifting is thus also part of a full accounting of its harms. The vast majority (79%) of judges, prosecutors, probation professionals and law enforcement officers

surveyed by NASP believe that shoplifting is a gateway crime, meaning that many shoplifters graduate to more serious forms of shoplifting or other crimes. Loss Prevention Media, *Shoplifting: A Gateway Crime?* (Apr. 11, 2019), <https://tinyurl.com/y4luyvt5>. As described by a probation officer, “Young people often shoplift small things and are caught only a small percentage of the time,” which encourages them to continue to steal. *Id.* According to a prosecutor, “Juveniles begin testing authority/boundaries by shoplifting. If they get away with it, criminal behavior is reinforced and continues.” *Id.*

In sum, Holly Golightly’s charm notwithstanding, shoplifting is neither a prank nor a victimless crime. Serial shoplifting causes significant economic losses to retailers, consumers, and the public fisc, along with increasing the risk of violence and other crimes. Effective penalties, including felony burglary charges when warranted, are needed to stem the tide.

## **II. Effective Penalties Are A Critical Component Of A Comprehensive Solution To Serial Shoplifting.**

Serial shoplifters take advantage of knowledge gained “on the job” and tend to return to the same store if they can. *See* Shoplifting Issues at 6 (reporting that more than 90% of repeat shoplifters prefer returning to the same store to shoplift). From a serial shoplifter’s perspective, this makes great sense. Repeated thefts from the same store enable frequent shoplifters to familiarize themselves with the store’s layout, personnel, security practices, and peak shopping hours, and undoubtedly increase the likelihood of their success. No-trespass letters aim to break this cycle, as it makes little sense to allow serial shoplifters to stay in their comfort

zones, returning again and again to steal from the same store with few consequences. Refusing to attach meaningful consequences to violation of no-trespass letters only encourages serial shoplifters.

The problem of serial shoplifting thus cannot be solved unless retailers' efforts are reinforced by a criminal justice system that applies fair but effective penalties, including—when circumstances warrant—felony-level prosecutions. Like Tennessee, many other states have recognized that returning to the same store, entering it in knowing disregard for having been barred, and stealing (again) is more culpable than either simple trespass or theft, and may warrant the charge of burglary. As other states' experience shows, defining burglary in this way is neither novel nor unconstitutional, but sound public policy.

**A. Retailers Invest in a Number of Solutions to Prevent Serial Shoplifting, yet It Remains an Intractable Problem that Retailers Alone Cannot Solve.**

Retailers invest substantial resources in many different programs to deter and address shoplifting, including supporting diversion and education programs for first-time shoplifters so they can break the cycle of repeat shoplifting before it starts. No-trespass letters are an important part of retailers' efforts, especially because the risk of violent confrontations makes barring a person from the premises—and thus in theory avoiding any future interaction—a critical substitute for after-the-fact apprehensions that are unpredictable at best, and deadly at worst. But no-trespass letters serve little function without teeth in the form of effective penalties. And although retailers try, and do, enforce no-trespass letters when they identify banned individuals in the store, it

would be impossible (and likely bad business) for retailers to try to positively identify each individual among the hundreds or thousands entering their stores daily. Moreover, placing the burden on store workers to confront and physically bar banned individuals at the entrance only increases the risk of violence that no-trespass letters and policies cabining apprehension procedures are designed to prevent.

Loss prevention programs include trained personnel and specialized technology, such as cameras and electronic tag systems. *See* Loss Prevention at 3, 8-10. These programs are costly. A global survey estimated that retailers spend about 0.34% of sales on loss prevention programs, which adds up to nearly \$12 billion annually for the U.S. market. *See* Centre for Retail Research, *The Global Retail Theft Barometer* (2011), <https://tinyurl.com/44e4ggj>; Seidler, *supra* (U.S. sales figures in 2017).

Such on-the-scene efforts are designed to prevent shoplifting at the moment a person might decide to steal. Beyond these real-time efforts, retailers also support programs, like those provided by NASP, to address the root causes of shoplifting and stop the cycle of repeat offenses. For example, NASP provides shoplifter education programs to individuals who may have been court-ordered to attend, found the programs on their own, or voluntarily entered the program after being apprehended by a retailer who refers shoplifters to the program. *See* Repeat Offenses Study. These educational programs are very successful, with an average recidivism rate nationally of 2.9%, far below the 30-40% recidivism rates when no offender education is provided. NASP, Criminal & Juvenile Justice, <https://tinyurl.com/yy669u5w>.

But unless a court requires it, individuals must be willing to participate in such programs when offered. When individuals are not ready to change their behavior, however, no-trespass letters serve to protect retailers, their employees, and the public, from future harm. For that reason, most retailers use no-trespass letters like the ones issued to Ms. Welch. Policies and Practices at 12 (87% of retailers surveyed had a no-trespass policy). Such letters bar shoplifters from returning to either the same store or to the same retailer, and they withdraw consent for a person to enter for any purpose. For example, as the asset protection officer involved with Ms. Welch's case testified, Walmart asks individuals who have been barred to leave if they are identified, even if they are just shopping. (II, 49-51); *see also* Tenn. Br. 8. And Walmart's employees do so despite the risks of confronting known repeat offenders.

Retailers expect this formal revocation of consent to enter their premises to be honored. Defendant-Appellee's *amici* argue the store rescinded its revocation by allowing Ms. Welch to enter Walmart and shop there. TACDL Br. 25-28. Not so. If that were the rule, retailers would have to check identification at the door for everyone in order to maintain the validity of their no-trespass letters. That is impracticable and defeats the very purpose of no-trespass letters, which put the repeat shoplifter on formal notice that consent to enter has been withdrawn. The high volume of store traffic, not to mention the need to provide a pleasant customer experience, would make it impossible to stop each person entering a store, and check them against a no-trespass list before allowing them to enter. For example, around 140 million people visit a Walmart store or buy from Walmart.com each week. Walmart, *The*

*Grocery List: Why 140 Million Americans Choose Walmart* (Oct. 3, 2016), <https://tinyurl.com/y3gom5a9>. Based on the ratio between e-commerce and in-store revenue in a recent earnings report, that represents about 133 million in-store Walmart visitors weekly. See Walmart Inc., Annual Report (Form 10-K) 78-79 (Mar. 28, 2019). Walmart has 5,362 stores in the U.S. See Walmart, Location Facts, <https://tinyurl.com/y2hg8ll4>. That works out to about 3,500 shoppers per day, per store. Smaller stores presumably have lower foot traffic, of course—but also smaller staffs. In such circumstances, failing to stop a barred person from entering a store is not intentional, much less “effective consent” or “assent in fact.” *Contra* TACDL Br. 25-28. It would cripple stores—and seriously impair their relationship with customers—if they could only enforce no-trespass letters by confirming at the door whether each shopper was barred or permitted.<sup>3</sup>

For all of these reasons, no-trespass letters work as shoplifting-prevention tools only if they are enforceable and backed up by effective penalties any time a person violates the letter and enters a store without consent. For a simple (but unlawful) re-entry to shop, a criminal trespass misdemeanor appropriately addresses the trespasser’s culpability and matches the harm. But when someone chooses to disregard the store’s denial of consent—notwithstanding that she received clear notice of it and signed it, as Ms. Welch did here (TN Br. 8)—enters the store and

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<sup>3</sup> Some stores that require membership may check membership cards at the door. But their customers understand that such checks are part of the bargain they made in joining the membership program in exchange for discount prices.

carries out a theft (or attempts to do so), the transgression is much greater. If such a brazen re-victimization of the same store results in no greater punishment, retailers' efforts to use no-trespass letters to deter and reduce serial shoplifting will likely come to naught.

**B. Serious Penalties, Including Through Burglary Prosecution when Warranted, Are a Common and Important Part of a Comprehensive Solution to Serial Shoplifting.**

*1. The distinction between misdemeanor and felony punishments is meaningful for deterrence.*

Decades of research have established that shoplifters respond to penalties and that stronger penalties deter future shoplifting while weaker penalties or “no enforcement” policies encourage shoplifting. In NASP surveys, shoplifters report that “the most important factor in their decision to shoplift again is their experience the time before.” NASP, *When It Comes to Misdemeanor Shoplifting, Criminal Justice Has Left the Building*, Loss Prevention Magazine (Feb. 25, 2019), <https://tinyurl.com/yynz2at6> (“Criminal Justice”). If there is no law enforcement response, no prosecution, or a meaningless penalty, serial shoplifters will be encouraged to continue shoplifting and re-victimizing the same stores.

The distinction between felony and misdemeanor penalties is key here. The police are called for a shoplifting incident only about half the time. Shoplifting Statistics, *supra*. But they do not necessarily respond to misdemeanor shoplifting calls. *See, e.g., Morse Diggs, Atlanta Police will no longer respond to some shoplifting calls*, Fox 5 (Mar. 20, 2018) (describing Atlanta police policy that officers will not respond to

shoplifting calls in one of Atlanta’s high-end shopping neighborhoods); Criminal Justice, *supra* (reporting that many police departments in Texas will not respond to shoplifting calls for thefts under \$100). In fact, some cities discourage stores from calling the police to report shoplifting. *See, e.g.,* Criminal Justice, *supra*; Lynn Commero, *Excessive calls for police help with shoplifters will cost E. Lampeter businesses*, Lancaster Online (Oct. 13, 2015), <https://tinyurl.com/y53qau96> (describing ordinance that imposes fees when stores make “excessive” police calls for shoplifting). Even when police do respond, misdemeanor shoplifting often is not prosecuted. *See* Dave Wagner, *Overwhelmed with shoplifters, underwhelmed by city's response*, KIRO 7 (Nov. 12, 2018), <https://tinyurl.com/yastqlb4> (reporting that one Seattle store called the police more than 200 times for shoplifting that year, but only one prosecution resulted). In fact, several cities have adopted policies making non-prosecution of misdemeanor shoplifting the default rule. *See* Criminal Justice, *supra* (describing policies in Philadelphia and the Boston area); *Business owners have mixed reactions to Dallas County DA’s new policies*, Fox 4 News (Apr. 12, 2019), <https://tinyurl.com/y47v37ch> (describing Dallas policy of not prosecuting thefts under \$750 of “necessary items”).

Non-prosecution policies can serve laudatory goals of reducing incarceration and avoiding criminal justice system involvement for minor offenses, and adoption of such policies is occurring contemporaneously with a movement across states to raise the dollar thresholds for felony theft. Criminal Justice, *supra*. Those objectives are worthwhile, especially for first-time offenders who are provided with education to

avoid recidivism. But such strategies also have the unintended consequences of encouraging serial shoplifting. Habitual shoplifters are well aware of felony thresholds, and take pains to ensure that each theft falls below felony levels while stealing far more than felony thresholds over the course of a year. A now-banned Reddit forum even “informed readers of the dollar value of stolen goods that would result in felony charges in their respective states, so that shoplifters can ‘stay safe’ and ‘keep it a misdemeanor.’” Lawrence J. McQuillian, *California Property Crime Surge Is Unintended Consequence of Proposition 47*, Indep. Institute (June 28, 2019), <https://tinyurl.com/yy8ucsl1>. As one shoplifter who stole \$2,690 worth of merchandise over a series of thefts taunted in a police interrogation, “I’m telling you. Are you listening? ... I’m never going to get over \$1,000 at any store. Never—because that makes it a Theft One.” *Shoplifting plagues Portland retailers*, KGW8 (May 5, 2017), <https://tinyurl.com/y57ylvm2>.

In short, policies designed to minimize consequences for one-time offenders often—even if unintentionally—sweep chronic shoplifters under their protection as well. The result is higher shoplifting rates in states that have raised their felony thresholds. *See, e.g.,* Mia Bird, et al., Public Policy Inst. of Ca., *The Impact of Proposition 47 on Crime and Recidivism*, 10-12 (2018), <https://tinyurl.com/yxsse829> (indicating that shoplifting increased 12% a year after increase in felony threshold, with subsequent decline possibly linked to reduced reporting by retailers). The Retail Litigation Center’s members have experienced this firsthand, with a large majority reporting increased shoplifting in San Francisco in 2018,

after California's felony threshold increase, with most identifying decriminalization of shoplifting as the most important driving factor.

Recognizing the problematic interaction between higher felony thresholds and serial shoplifting, many states have considered increasing statutory penalties for repeat shoplifters, as has Tennessee. *See id.* at 10 (describing proposed measure in California); Tenn. Code Ann. § 39-14-146 (making fifth shoplifting offense within two years a felony). These acts reflect a legislative judgment that even as leniency should be provided for simple theft by a first-time offender (reflected in higher felony thresholds), serial shoplifting is more culpable, and deterring it requires more serious penalties. That same judgment is reflected in Tennessee's adoption of the statute at issue, which judges it a felony-level crime for an individual to knowingly enter a building where they have been barred and commit a repeat theft against the same victim. Tenn. Code Ann. § 39-14-402(a)(3).

Because meaningful penalties are essential to deterring serial shoplifting, it is sensible and legitimate for the state to provide prosecutors with discretion to charge burglary when a shoplifter re-victimizes the same retailer in brazen disregard for having been previously barred from the premises. The conduct making up the burglary offense is more culpable than simply re-entering the store to shop (which itself is criminal trespass), a first-time theft, or even repeat thefts involving a new victim, because it is a repeat violation against a retailer that has used every tool at its disposal to avoid any further interactions with the shoplifter, but cannot in the end protect itself. Violating a no-trespass letter to steal again causes as much harm as

serial shoplifting from multiple stores (also a felony), and possibly more because, as discussed above, shoplifters prefer to return to the same store over and over, and might be deterred from additional thefts if that opportunity were shut down. Contrary to the argument of Defendant-Appellee's *amici* (Br. 19-21), the fact that the legislature gave prosecutors an additional tool for addressing this complex problem by subjecting five-time theft to more serious penalties does not negate the legitimacy or importance of burglary prosecutions when circumstances warrant. *See* Tenn. Br. 20-22.

**2. *Other states employ analogous burglary statutes in the same way as Tennessee, and have done so for years.***

Tennessee is not alone in judging criminal conduct like Ms. Welch's to be burglary. Many other states have analogous statutes under which entry into a building (public or not) without consent plus theft or intent to steal constitutes burglary. Prosecutors in those states have for years charged serial shoplifters with burglary. There is thus nothing unprecedented or arbitrary about a similar application of Tennessee's burglary statute here.

In fact, the statutes of several other states are more stringent than Tennessee's. In many, entering a building without consent (*i.e.*, after issuance of a no-trespass letter) with intent to steal is enough to commit the offense of burglary. For example, in Washington, a person commits burglary if he "enters or remains unlawfully in a building" with intent to commit a crime against person or property. Rev. Code Wash. § 9A.52.030. That statute has long been applied to shoplifters who return to the same

store to shoplift after being issued a no-trespass letter. *State v. Kutch*, 951 P.2d 1139 (Wash. Ct. App. 1998). Similar statutes have been adopted in New York, Kansas, and Missouri, and burglary convictions have been upheld in those states for people who shoplifted—or simply entered without consent with the intent to shoplift—after being issued no-trespass letters. N.Y. Penal Code § 140.20; Kans. St. § 21-5807; Mo. Stat. § 569.170; *People v. Ramnarain*, 861 N.Y.S.2d 6 (N.Y. App. Div. 2008); *State v. Acevedo*, 315 P.3d 261 (Kans. Ct. App. 2013); *State v. Proby*, 437 S.W.3d 375 (Mo. Ct. App. 2014).

Some states take an even harder-line position. In both Arizona and Idaho, no trespass or unlawful entry is even required to commit the crime of burglary; entering with intent to shoplift is enough. *See State v. Madrid*, 552 P.2d 451, 452-53 (Ariz. 1976) (holding shoplifters lawfully convicted of burglary because unlawful entry not required and burglary requires only criminal intent at entry whereas shoplifting requires completed theft); *Matthews v. State*, 741 P.2d 370, 373 (Id. Ct. App. 1987) (rejecting argument that charging shoplifting as burglary is “unduly harsh” where statute “does not even require a trespass” but “establishes an offense based largely upon a state of mind—the intent to commit a crime upon entry”); *see also* Tenn. Br. 25 & n. 7.

In contrast to these other states, in Tennessee it is not a burglary to simply enter a store with intent to steal, or even to enter a store without consent with intent to steal. Rather, Tennessee requires that a person both enter the store without consent and actually steal, or attempt to steal, once inside. Tenn. Code Ann. § 39-14-402(a)(3). Tennessee legislators thus made a balanced and informed choice in crafting the

burglary statute. Prosecutors are within their discretion to enforce the statute as written. And it hardly violates fundamental notions of fairness and due process for Tennessee to take this middle-of-the-road approach to burglary, which appropriately balances the seriousness of serial shoplifting with concerns for not over-penalizing more minor crimes.

Ms. Welch’s *amici* cite cases from Illinois, New Mexico and Hawaii finding that those states’ burglary statutes did not encompass the crime of entering a store without consent (or entering areas of the store closed to the public) and then shoplifting. *See* TACDL Br. 20, 23-24. In Illinois, however, the court noted that burglary could be committed by remaining on premises once consent has been “explicitly revoked”—as with a no-trespass letter—and the case did not address entry into a store after expressly being barred. *People v. Bradford*, 50 N.E.3d 1112, 1120 (Ill. 2016). The other two cases stand only for the unremarkable proposition that different state legislatures may reach different judgments on whether to define burglary to include unlawful re-entry into a store, without consent, to shoplift. *See State v. King*, 368 P.3d 886, 893 (Haw. 2016); *State v. Archuleta*, 346 P.3d 390, 394-95 (N.M. Ct. App. 2014). Neither suggests that other states are constitutionally barred from taking a different approach, as Tennessee did here.

In sum, Tennessee’s approach is constitutionally sound and well within the Tennessee General Assembly’s prerogative. What’s more, enforcing Tennessee’s burglary statute as written to cover shoplifting after issuance of a no-trespass letter is not only sound statutory interpretation; it is good policy. Allowing felony burglary charges for serial shoplifters who violate no-trespass letters and steal, or attempt to

steal, is also consistent with the practice in other states; reflects the serious damage caused by serial shoplifting, especially involving re-victimization of the same stores; and is an essential part of solving this intractable problem that harms retailers, their employees, their customers, and local governments alike.

### CONCLUSION

The court of appeal's judgment should be affirmed.

Dated: July 29, 2019

Respectfully submitted,

s/ Stanley E. Graham

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Stanley E. Graham  
Tenn. BPR No. 019788  
WALLER LANSDEN DORTCH AND  
DAVIS, LLP  
511 Union St.  
Suite 2700  
Nashville, TN 37219  
(615) 850-8935 (telephone)  
(615) 244-6804 (fax)

Hyland Hunt (*pro hac vice* pending)  
Ruthanne Deutsch  
DEUTSCH HUNT PLLC  
300 New Jersey Ave., NW  
Suite 900  
Washington, DC 20001  
(202) 868-6915 (telephone)  
(202) 609-8410 (fax)

*Counsel for Amici Curiae*

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## CERTIFICATE OF COMPLIANCE

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s/ Stanley E. Graham  

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Stanley E. Graham