IN THE SUPREME COURT OF GEORGIA

Case No. S22G0527

GEORGIA CVS PHARMACY, LLC,

Defendant-Appellant,

v.

JAMES CARMICHAEL,

Plaintiff-Appellee.

BRIEF OF GEORGIANS FOR LAWSUIT REFORM AS *AMICUS CURIAE* IN SUPPORT OF GEORGIA CVS PHARMACY, LLC.

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INTEREST OF AMICUS CURIAE

Georgians for Lawsuit Reform ("GLR") represents a broad and diverse range of industry and commerce in Georgia. It was founded by prominent members of the business community to advocate for a more fair, balanced, and efficient legal climate for all Georgia citizens. As part of its efforts, GLR educates the public about the impact that the civil justice system has on the economy and business environment, and GLR advocates for the interests of its members in a variety of forums, including the courts. To this end, GLR occasionally files briefs as *amicus curiae* in cases of gravity and concern for the business community, like this one.

The certified questions in this case pertaining to the proper apportionment of damages and the reasonable foreseeability standard in negligent security cases have broad ramifications not just for the defendant business in this case, but for businesses throughout Georgia, many of which are GLR members. The Court of Appeals' interpretation of Georgia's apportionment statute and application of the reasonable foreseeability standard is not only legally incorrect but also has unintended consequences for Georgia businesses, consumers, and underprivileged communities. GLR respectfully submits this brief to illustrate to this Court those errors and their consequences.

ARGUMENT AND CITATION OF AUTHORITY

The jury in this case heard evidence that Mr. Carmichael suffered permanent injuries after being shot in his vehicle in a CVS parking lot on Moreland Avenue in a notoriously "high crime" area of southeast Atlanta. *See Georgia CVS Pharmacy, LLC v. Carmichael*, 362 Ga. App. 59, 60-61 (865 S.E.2d 559) (2021). The jury determined that this horrific shooting was foreseeable to CVS, that CVS was negligent in failing to take reasonable precautions to protect Mr. Carmichael from this criminal activity, and that Mr. Carmichael was injured in the amount of $45 million. *Id.* 59-62. But although it was required to consider and apportion fault among *all* responsible parties, *see* OCGA § 51-12-33 (2005), the jury inexplicably relieved Mr. Carmichael's assailant of *any* responsibility. The jury assigned 95% fault to CVS, 5% to the victim, and not so much as a single percent to the man who shot him multiple times. *Georgia CVS Pharmacy*, 362 Ga. App. at 62, 70.

That facially absurd verdict, which is inherently contradictory because it finds a business owner liable for failing to protect its customer from a criminal who, according to the jury, did nothing wrong, should have been set aside as void. Yet the Court of Appeals affirmed, condoning both the jury's reasonable foreseeability finding and its apportionment of damages. *Id.* at 72. That decision is not only contrary to law, but it has several unintended consequences—it (1) upends Georgia's legislative judgment in enacting the apportionment statute, (2) will perversely

incentivize businesses providing vital resources, like the pharmacy in this case, to avoid operating in "high crime" areas, areas often in great need of access to such resources, and (3) will increase costs for consumers, because increased litigation and liability costs are inevitably passed on to consumers, or cause businesses to close altogether.

This Court should not allow the jury's verdict and decision below to distort the law and punish the vulnerable residents of neighborhoods that face the twin challenges of high crime and limited access to goods and services. This Court should reverse the Court of Appeal's decision, hold the jury's verdict void, and directly enter judgment in favor of CVS, or at the least remand this case for a new trial.

I. The jury verdict apportioning 0% fault to Mr. Carmichael's shooter and 95% fault to CVS is void.

In 2005, after much debate and deliberation, Georgia's elected legislators enacted a broad tort reform package, part of which requires jurors to apportion damages in certain tort suits according to the fault of each person contributing to the plaintiff's injuries. OCGA § 51-12-33 (2005); *Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC*, 312 Ga. 350, 350 (862 S.E.2d 295) (2021). This is one such suit. But the jurors in this case misunderstood, misapplied, or defied that legislative mandate when they apportioned 95% fault to CVS for failing to protect Mr. Carmichael, and 0% fault to the criminal who shot him. And the Court of Appeals' decision upholding the jury's apportionment cements that outrageous result.

The Court of Appeals' decision, in attempting to rationalize the irrational apportionment in this case, not only defies Georgia's legislative policy choice reflected in Georgia's apportionment statute but also defies this Court's mandate that the apportionment statute must be read according to the plain and ordinary meaning of the text. *Hatcher*, 310 Ga. at 353 ("In construing a statute, 'we must afford the statutory text its plain and ordinary meaning,' view it 'in the context in which it appears,' and read it 'in its most natural and reasonable way, as an ordinary speaker of the English language would.'" (quoting *Deal v. Coleman*, 294 Ga. 170, 172-73 (751 S.E.2d 337) (2013)). This Court should reverse and declare the jury's verdict void.

A. The jury verdict, if allowed to stand, undermines Georgia's legislative policy choice reflected in Georgia's apportionment statute.

A jury verdict is void, and no valid judgment can be entered on it, when it is "contradictory and repugnant." *Anthony v. Gator Cochran Constr., Inc.*, 288 Ga. 79, 79 (702 S.E.2d 139) (2010) (citation omitted). A verdict is "contradictory and repugnant" when it is internally inconsistent or, to the extent it is ambiguous, inconsistent in all plausible interpretations. *Id.* at 79-81 ("[I]f the verdict is ambiguous and susceptible of two constructions," an interpretation "which would uphold it is to be applied." (citation omitted)); *see also Bunch v. Mathieson Drive Apartments, Inc.*, 220 Ga. App. 855, 857 (470 S.E.2d 895) (1996).

The apportionment statute in effect when Mr. Carmichael filed this case states in relevant part that "[w]here an action is brought against more than one person for injury to person," the jury shall "apportion its award of damages among the persons who are liable according to the percentage of fault of each person." OCGA § 51-12-33(b) (2005). To "assess[] [the] percentages of fault," the jury "shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." *Id.* at § 51-12-33(c) (2005).

This statute "is designed to apportion damages among 'all persons or entities who contributed to the alleged injury or damages'—even persons who are not and could not be made parties to the lawsuit." *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 362 (729 S.E.2d 378) (2012); *see also Martin v. Six Flags Over Georgia II, L.P.*, 301 Ga. 323, 337 (801 S.E.2d 24) (2017); *Zaldivar v. Prickett*, 297 Ga. 589, 590 (774 S.E.2d 688) (2015). This required apportionment, by the statute's plain terms, applies fully when both an intentional actor and an allegedly negligent actor are partly responsible for the plaintiff's injury. As this Court explained:

> The rules of statutory construction, including reliance on ordinary word meanings, dictate that [a criminal assailant/intentional tortfeasor who assaults the plaintiff] is, at the very least, partially at 'fault' for the brutal injuries inflicted by the assailant on that guest. As a party at fault, such an assailant must be included with others who may be at fault, e.g., the property owner in a premises liability action, for purposes of apportioning damages among all wrongdoing parties. This is the clear

> directive of OCGA § 51-12-33, the intent of which is easily discernable from the straightforward text of the statute.

Couch, 291 Ga. at 359; *Goldstein, Garber & Salama, LLC v. J.B.*, 335 Ga. App. 416, 440 (779 S.E.2d 484) (2015) (Ray, J., dissenting)[1] ("Georgia law allows the allocation of fault between an intentional actor and a negligent actor.").

Georgia, in enacting this apportionment statute, adopted the "strong public policy" that "a party should only be liable for the portion of harm that it personally caused." *Goldstein*, 335 Ga. App. at 440-41 (Ray, J., dissenting). Before Georgia reformed its fault system in 2005, it operated under a rule of joint and several liability. *McReynolds v. Krebs*, 290 Ga. 850, 850 (725 S.E.2d 584) (2012) ("OCGA § 51-12-33, as amended by the Tort Reform Act of 2005, . . . abolished joint and several liability and replaced [it] with a process of apportionment of damages among multiple tortfeasors.").

The joint and several liability system, which allowed a plaintiff to recover for 100% of her injuries from a partially-responsible defendant, led to "inequitable verdicts aimed at deep-pocketed defendants." *Pamela B. v. Hayden*, 31 Cal. Rptr. 2d 147, 160 (Cal. Ct. App. 1994); *Overground Atlanta, Inc. v. Dunn*, 191 Ga. App. 188, 191 (381 S.E.2d 137) (1989) (applying the pre-2005 system of fault in Georgia and

[1] This Court reversed the Court of Appeals' decision in *Goldstein*, discussed further in this brief. *See* 300 Ga. 840 (797 S.E.2d 87) (2017). Although this Court granted certiorari on the apportionment issue addressed in Judge Ray's dissent, it reversed the Court of Appeals' decision on other grounds and did not reach the apportionment issue. *Id.*

explaining that "the injured party [is] entitled to recover against either [negligent actor] for his full damages" (emphasis omitted)); *see also Pamela B.*, 31 Cal. Rptr. 2d at 161 (Ortega, J., concurring) (explaining that joint and several liability is an "artificial scheme designed not to fairly assess culpability, but to reach into the deepest pocket"). This system, our lawmakers decided, ran contrary to the "common sense proposition that when two individuals are responsible for a loss, but one of the two is more culpable than the other, it is only fair that the more culpable party should bear a greater share of the loss." *Am. Motorcycle Assn. v. Superior Ct. of Los Angeles Cnty.*, 20 Cal. 3d 578, 593 (1978).

That legislative choice, which just this year was reaffirmed and fine-tuned through an amendment to the original legislation package, is the governing law in Georgia. *See* OCGA § 51-12-33 (2022).[2] It should have foreclosed any possibility that a jury would assign fault 95% to a store, 5% to a victim, and 0% to a criminal assailant. But that is exactly what happened here.

The jury clearly did not "consider the fault of all persons or entities who contributed to the alleged injury" and "apportion its award of damages among the

[2] As discussed more fully later, subsection (b) of the apportionment statute was amended in 2022 to clarify the legislature's intent that apportionment is required in cases brought against a single defendant. However, the jury below was instructed from and decided this case under the pre-2022-amendment version of the apportionment statute, which is the relevant version to resolve this case on appeal.

person or persons who are liable according to the percentage of fault of each person," as the statute requires. *See* OCGA § 51-12-33(b)-(c) (2005).

There is no dispute that Mr. Carmichael was shot multiple times in the stomach, back, and shoulder by an unidentified shooter in Mr. Carmichael's car in the CVS parking lot during an attempted robbery, which caused him to be comatose for about a month, required multiple surgeries, and left him with permanent damage and pain. *Georgia CVS Pharmacy*, 362 Ga. App. at 60. Yet the jury found the shooter 0% at fault for Mr. Carmichael's injuries. *Id.* at 62. How can the man that shot Mr. Carmichael be 0% liable for his injuries? "To ask the question compels the answer. He cannot." *Pamela B*, 31 Cal. Rptr. 2d at 160. This Court is not required to "leave [its] common sense on the courthouse steps, which is what [it] would have to do to affirm the allocation made by the jury in this case." *Id.* (overturning a jury verdict apportioning only 5% fault to the criminal actors in a premises liability case); *see also Goldstein*, 335 Ga. App. at 440 (Ray, J., dissenting) ("Although the jury could rationally have chosen to assign a lower percentage than 100 percent to [the criminal assailant], the evidence does not support a finding of zero percent fault."); *Couch*, 291 Ga. at 359 (explaining that the criminal assailant was, "at the very least, partially at 'fault'" for the injuries the plaintiff suffered).

A verdict that assigns 0% fault to the intentional tortfeasor is, on its face, contradictory. If it is true that the intentional tortfeasor is not at fault, then the

premises owner had nothing to protect the plaintiff from. The jury's verdict here would decouple that central relationship between the intentional tort and the negligence claim, converting the obligations of a landowner into strict liability and divorcing the claims entirely from the statutory design.

Intentional tortfeasors, like Mr. Carmichael's shooter, "should be held fully responsible for their acts, both in the criminal and civil justice system." *Goldstein*, 335 Ga. App. at 440 (Ray, J., dissenting). And business owners, like CVS, should not be held responsible for more than their portion of fault for a customer's injuries simply because they may have deep pockets. When a jury clearly defies these mandates, and renders a verdict wholly unsupported by evidence, the appellate courts serve as a backstop for justice. The Court of Appeals, while acknowledging that the apportionment could "be considered unusual," *Georgia CVS Pharmacy*, 362 Ga. App. at 72, failed to serve as that backstop. Rather, it attempted (but failed) to rationalize the jury's irrational apportionment in this case.

B. The Court of Appeals' efforts to rationalize the jury's unlawful apportionment fail.

In attempting to find an interpretation to uphold the apportionment, the Court of Appeals opined that "some possible interpretations" of the verdict could have been supported by evidence. *Id.* at 71. But neither of the Court of Appeals' hypothesized interpretations of the apportionment rationale salvage the jury's verdict.

1. The Court of Appeals' first theory is that the jury could have determined, based on evidence presented that Mr. Carmichael pulled out his own gun during the altercation, that the shooter was not at fault because he was acting in self-defense. *Id.* at 71 ("[I]t is possible that the jury . . . found that the robber ended up shooting in self-defense and was worthy of no fault."). This theory ignores two vital facts.

First, even if the jury believed Mr. Carmichael was an instigator, the evidence still does not support a 95% fault apportionment to CVS over its alleged negligence and only a 5% fault apportionment to the "instigator" of the shooting. *See Pamela B,* 31 Cal. Rptr. 2d at 159-60 (holding that allocating 95% fault to the landowner and only 5% fault to the rapist and his accomplice was not supported by substantial evidence); *Knott v. California*, 28 Cal. Rptr. 2d 514, 528 (Ct. App. 1994) (noting that when one defendant's conduct was intentional and another defendant's conduct was negligent, it is reasonable to assume the jury will apportion fault so that the one who acted intentionally should bear "most if not all of the blame"); *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So. 2d 712, 727 (La. 1995) (Hall, J., dissenting) ("[A] jury ordinarily will apportion the lion share of the fault to the intentional tortfeasor and the remaining fault to the negligent parties according to their level of culpability."); *Mayer v. Town of Hampton*, 497 A.2d 1206, 1209 (N.H.

1985) ("The law of torts recognizes that a defendant who intentionally causes harm has greater culpability than one who negligently does so.").[3]

Second, and even more bewildering, the Court of Appeals' first theory ignores the fact that a jury determination that the shooter was blameless totally undermines Mr. Carmichael's theory of liability that CVS endangered him by not protecting him from criminals like the unidentified shooter. How can CVS be liable if the shooter is not responsible? Judge Ray confronted this situation, and noted its illogicality, in *Goldstein*. 335 Ga. App. at 440 (Ray, J., dissenting). He aptly explained that the jury's finding that a nurse who sexually abused an unconscious patient was not at fault but the dental practice who failed to protect the patient from the nurse was fully at fault was unsupported by evidence. *Id.* (Apportioning 0% fault to the nurse "would logically be a finding that [the nurse] did nothing wrong," and "[i]f [the nurse] did nothing wrong by molesting [the patient], how then can [the dental practice defendant] be liable for negligently placing him in the position to molest her? A finding of no fault on [the nurse's] part would seemingly equate to a finding of no

[3] This Court's decision in *Six Flags* is not contrary to the proposition that in most cases a negligent tortfeasor should be found less culpable than an intentional tortfeasor for a plaintiff's injuries. 301 Ga. 323. In *Six Flags*, this Court did not consider the argument that a jury verdict allocating 92% fault to the allegedly negligent business owner and 8% fault to the criminal assailants was void because this Court ordered retrial on apportionment due to missing non-parties on the verdict form. *Id.* at 341. Further, *Six Flags* is factually distinguishable because, unlike here, there was a remarkable amount of evidence as to Six Flag's superior knowledge of specific risks, which it not only "understood," but "even tried to obscure from its patrons" and "keep . . . from the public" *Id.* at 329, 332.

fault on [the dental practice's] part."). The same is true here. If the shooter is not at fault, what is CVS's negligence? What did CVS fail to exercise sufficient caution to prevent? The jury's apportionment of 95% fault for Mr. Carmichael's gunshot wound to CVS cannot be squared with its finding of zero fault as to the person who fired the gun.

2. The Court of Appeals' second attempt to make sense of the jury's apportionment also fails. The Court of Appeals theorized that the jury could have "assigned the amount of fault it would have assigned to the shooter to Carmichael instead." *Georgia CVS Pharmacy*, 362 Ga. App. at 71. This theory likewise crumbles because, as explained above, CVS's fault and the shooter's fault are inextricably linked. Without any fault on the shooter's part, CVS was not at fault for failing to take precautions to protect Mr. Carmichael from the shooter.

But even more, this theory fails because the apportionment statute, by its plain text, does not allow the jury to assign the shooter's fault to the plaintiff (or to CVS). Rather, it requires the jury to "apportion its award of damages among the person or persons who are liable *according to the percentage of fault of each person*." OCGA § 51-12-33(b)-(c) (emphasis added). Thus, under the plain mandate of the apportionment statute, if the jury found the shooter was at fault for Mr. Carmichael's injury, it was not entitled to assign that fault "to Carmichael instead." *Georgia CVS Pharmacy*, 362 Ga. App. at 71. The jury isn't entitled to apportion fault to someone

other than the person it actually finds to be responsible, including the plaintiff. *See Zaldivar*, 297 Ga. at 593 ("Subsection (a) [of the apportionment statute, not subsection (b),] specifies exactly what is to be done with the 'fault' of the plaintiff.").

Put another way, the statute forbids a world in which a *negligent tortfeasor* can be 95% at fault while an *intentional tortfeasor* escapes fault entirely. Such a finding would be contradictory and irrational, and nothing in the decision below justifies such an absurd conclusion.

C. The Court of Appeals' alternative holding, based on *Alston & Bird, LLP v. Hatcher Management Holdings, LLC*, ignores the plain text of the apportionment statute.

The Court of Appeals' alternative holding also fails to resolve the irrational apportionment in this case. The Court of Appeals held that even if there was insufficient evidence to support the jury's apportionment of 0% fault to the shooter, such error would be harmless under this Court's decision in *Hatcher* because only one defendant, CVS, was remaining in the case at the time of the underlying trial. *Georgia CVS Pharmacy*, 362 Ga. App. at 71.

Before the 2022 Georgia legislative session, the relevant subsection of the apportionment statute, OCGA § 51-12-33(b) (2005), required damages to be apportioned among all liable parties "[w]here an action is brought against more than one person." In *Hatcher*, this Court interpreted this provision, according to its plain text, to mean that a jury was not required to apportion fault to nonparties in "tort

actions *brought* against a *single* defendant." 312 Ga. at 359 (emphasis added). While acknowledging that the purpose of the Georgia legislature may well have been to require apportionment even in single defendant cases, the text of the statute unambiguously required mandatory apportionment only "where an action is brought against more than one person." *Id.* at 350-51 ("[W]hen we interpret unambiguous statutory text that appears not to serve the purpose we imagine the statute to have, we must follow the path of the text, not the apparently different path of the 'purpose.'").

The Court of Appeals' alternative holding in this case again calls this Court to interpret OCGA § 51-12-33(b) according to its plain and unambiguous text. The Court of Appeals failed to acknowledge that this case is importantly distinct from *Hatcher*. Mr. Carmichael *brought* this case against multiple defendants. *Georgia CVS Pharmacy*, 362 Ga. App. at 60 n.1 ("Carmichael also initially sued various companies that owned the land, as well as two fictitious CVS employees, but these other defendants were apparently dismissed before trial."). Although those other defendants were later dismissed from the action before trial, the plain text of the then-in-effect apportionment statute still requires that a jury consider and apportion fault to all persons (including non-parties) who were partially responsible for Mr. Carmichael's injury. OCGA § 51-12-33(b)-(c) (2005).

The statute does not say apportionment is required only in cases "tried" against more than one person, or some similar language. Rather, it requires apportionment in cases "brought" against multiple defendants. The plain meaning of the phrase "action brought against," used in OCGA § 51-12-33(b) (2005), which the Court of Appeals notably did not consider, is to sue or initiate legal proceedings against. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "bring an action" as "[t]o sue; institute legal proceedings"); BLACK'S LAW DICTIONARY (6th ed. 1990) ("To 'bring' an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit."); MERRIAM-WEBSTER ONLINE DICTIONARY (2020) (defining "bring" as "to cause to exist or occur" such as "institute" as in "bring legal action").[4]

[4] *See also CL SNF, LLC v. Fountain*, 355 Ga. App. 176, 182-83 (843 S.E.2d 605) (2020), *reversed on other grounds*, 863 S.E.2d 116 (Sept. 21, 2021) ("To 'bring' an action 'has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit.'" (quoting BLACK'S LAW DICTIONARY (6th ed. 1990))); *Wesley Chapel Foot & Ankle Ctr., LLC v. Johnson*, 286 Ga. App. 881, 883 (650 S.E.2d 387) (2007) ("Generally speaking, a civil 'action' is 'brought' when a plaintiff files a complaint praying for a judgment against a defendant, thus initiating legal proceedings."); *Jordan v. Bosworth*, 123 Ga. 879, 880 (51 S.E. 755) (1905) ("There is no substantial difference between bringing a suit and commencing a suit."); *Cho v. Surgery Partners, Inc.*, 30 F.4th 1035, 1040 (11th Cir. 2022) ("We have held several times that the key phrase—to 'bring' an 'action'—'has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit.'" (quotations omitted)); *EEOC v. E. Airlines, Inc.*, 736 F.2d 635, 639 (11th Cir. 1984) (explaining that "the words 'to bring' mean only 'to commence,' rather than to 'commence or maintain'"); *Goldenberg v. Murphy*, 108 U.S. 162, 163 (1883) ("[W]e see no significance in the fact that in the legislation . . . the word 'commenced' is sometimes used, and at other times the word 'brought.' In this connection the two words evidently mean the same thing, and are used interchangeably."); *Soileau v. Smith True Value and Rental*, 144 So. 3d 771, 778 (La. 2013) ("[T]he legislature used the word 'brought' as in 'initially filed' or 'commenced.'").

Because Mr. Carmichael "brought" this action against "more than one person," the Court of Appeals erred in determining the apportionment statute did not apply. Accordingly, this Court should reverse the Court of Appeals' decision and hold the jury's verdict void.

II. The foreseeability standard should only consider substantially similar crimes on the premises.

As explained in CVS's brief, the foreseeability standard, which is an important aspect of a plaintiff's burden to prove both the duty and proximate cause elements of his negligent security case, is in great need of clarification to provide Georgia business owners with a more predictable understanding of when a third-party criminal act is foreseeable. After all, the general rule is that "[a]n intervening criminal act by a third party . . . insulates a landowner from liability" because business owners, like CVS, are not the "insurer[s] of [an] invitee's safety." *Camelot Club Condo. Ass'n, Inc. v. Afari-Opoku*, 340 Ga. App. 618, 620-21 (798 S.E.2d 241) (2017) (quotation omitted); *see also Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 56 (Tex. 1997) (Owen, J., concurring) ("[I]n an increasingly violent society, in which crime may be visited upon virtually anyone at any time or place, there should be some certainty and predictability about what actions will satisfy the duty of care.").

The decision below, in holding that the crime was foreseeable to CVS, first considered prior crimes at the Moreland Avenue CVS. *See* CVS's Opening Brief at 24-25 (explaining these crimes failed to meet the "substantial similarity"

requirement first articulated in *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785, 786 (482 S.E.2d 339) (1997)). Then, it considered that the CVS store "was located in a high-crime area." *Georgia CVS Pharmacy*, 362 Ga. App. at 64. That consideration is both legally inappropriate and dangerously consequential for multiple reasons. Whatever the foreseeability standard is, it should not consider conditions that are not specific to the premises—in either the duty or proximate cause elements of the plaintiff's case.

After all, a landowner's duty of care to an invitee is a duty to make "*conditions on the land* reasonably safe." Dan B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, *Duty Owed Invitees*, The Law of Torts § 276 (2d ed.) (collecting cases) (emphasis added); *see also* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "premises liability" as "[a] landowner's or landholder's tort liability for *conditions or activities on the premises*" (emphasis added)). Fighting general crime in our communities is a duty we entrust to our police force, not our business owners. *See Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 169 (Minn. 1989) ("If a business is located in a 'high crime area,' this may be an indictment of the community's response to crime[,] but . . . it is not a reason to impose tort liability on the business owner for the abdication by the community of its responsibility."); Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 WHITTIER L. REV. 409, 459 (2006) ("Courts should not attempt to assist crime-fighting efforts by

enlisting property owners in the battle through the threat of tort liability." (internal quotation marks omitted)).

Considering off-premises factors in determining whether a crime on the premises was foreseeable should also be prohibited in determining whether a business owner's negligence was the proximate cause of the plaintiff's injury. Considering such factors effectively makes landowners responsible for premises that they do not control. This upends the purpose of the proximate causation requirement—to deter negligence and ensure liability is imposed on the wrongdoers who have the capability to do something about the harm their negligence causes. *See Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1306 (11th Cir. 2017) ("After all, imposing liability to deter acting, or failing to act, in a way that causes foreseeable harm is one of the functions of tort law."); *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917 (Ind. Ct. App. 2001) ("The policy underlying proximate cause is that we, as a society, only assign legal responsibility to those actors whose acts are closely connected to the resulting injuries, such that imposition of liability is justified."); *see also* OCGA § 51-3-1 (codification of the common law rule that an owner or occupier of land is liable to an invitee for injuries "*caused by* his failure to exercise ordinary care in keeping *the premises and approaches safe*" (emphasis added)). Because a premises owner "has no control over the condition of surrounding properties or the illegal behavior of unknown assailants who come onto its property at different times

and injure invitees there," the crime statistics of the neighborhood are an inappropriate consideration in the foreseeability analysis. *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 864 n.3 (596 S.E.2d 604) (2004).

Other Court of Appeals' decisions, in line with the traditional understanding of premises liability, have previously disallowed reliance on such evidence. *See Wallace v. Boys Club of Albany*, 211 Ga. App. 534, 536 (439 S.E.2d 746) (1993) ("In a premises liability case the landowner can only be held liable for what occurs *on the premises*," and "in order to hold the landowner liable despite the intervening criminal act of a third party, the plaintiff must show that the landowner had notice of a danger *specific to the premises*." (emphasis added)); *see also Med. Ctr. Hosp. Auth. v. Cavender*, 331 Ga. App. 469, 476 (771 S.E.2d 153) (2015) ("[R]eliance on generalized information like crime statistics does not create [an] issue of fact concerning foreseeability[.]" (citation omitted)).

This Court should clarify that off-premises factors, like crime statistics, are improper in determining whether a particular crime on a premises is foreseeable—both in the duty and proximate cause elements of the plaintiff's case.

III. The Court of Appeals' decision ultimately harms underprivileged communities and Georgia consumers and businesses.

Not only is the Court of Appeals' decision incorrect as a matter of law, it will have far reaching ramifications for underprivileged communities and Georgia consumers and businesses. The increased liability expenses from allowing the

unlawful apportionment of damages and the increased litigation expenses resulting from an unpredictable foreseeability standard that takes into consideration whether the business is located in a high crime area (1) will incentivize businesses to close or never open in high crime communities, and (2) will be passed on to Georgia consumers or drive firms out of business altogether.

First, the Court of Appeals' decision, with its attendant increased liability and litigation expenses for businesses, disincentivizes business from operating in high crime communities altogether. *See Stafford v. Church's Fried Chicken, Inc.*, 629 F. Supp. 1109, 1110 (E.D. Mich. 1986) ("To hold [business] owners responsible for providing police protection against the criminal conduct of third parties . . . , especially those in 'high crime' areas, may drive businesses out of those neighborhoods"). And high crime communities are often in the greatest need of the resources Georgia businesses, like the pharmacy in this case, provide. *See* Alyssa W. Chamberlin & Lyndsay N. Boggess, *Why Disadvantaged Neighborhoods are More Attractive Targets for Burgling than Wealthy Ones*, LONDON SCH. OF ECON. AND POL. SCI. (Sept. 26, 2016), http://bit.ly/2dtwZJh ("It's a fact that crime in the United States is concentrated in impoverished urban areas."); Nathan Solomon, *Crime and Grocery Store Density Using Spatial Statistics in ArcGIS*, VAND. UNIV. YOUNG SCI. J. (May 7, 2022), https://bit.ly/3tNZp9a ("Food deserts are more likely to occur in poorer areas that have higher rates of crime."); Amarica Rafanelli, *Pharmacy*

Closures More Likely to Affect Low-Income, Minority Neighborhoods. Here's Why, DIRECTRELIEF.ORG (Dec. 22, 2021), https://bit.ly/3Eqtkcb ("[L]ow-income communities are . . . more vulnerable to losing the pharmacies they do have."); Frederick D. Baker & Denise A. Cole, *Property Owners' Liability for Criminal Acts on Their Premises: Are There Foreseeable Limits?*, WLF CONTEMP. LEGAL NOTES, Nov. 1, 1997, at 27 ("In areas that are impoverished, the loss of small local businesses will further diminish the quality of life.").

Second, research confirms what common sense suggests—consumers ultimately bear litigation costs. *See* Baker & Cole, *Property Owners' Liability for Criminal Acts on Their Premises*, at 26-27 ("The expenses of (1) defending the lawsuit and paying any damages awarded, (2) paying increased insurance premiums, and (3) hiring increased security to reduce the likelihood of future lawsuits (whether or not this has any practical effect on criminal activity) will, of course, be paid by consumers."); Michelle Smith, *Effects of Liability Cases Are Felt Beyond Business*, ORLANDO POL. OBSERVER (May 30, 2020), https://bit.ly/3OsGwBV (encouraging the use of "smart and forward-thinking limits" in premises-liability suits to avoid "[h]olding [businesses to an] impossible standard [that] is not only unfair, [but] threatens their business, employees and wider community as well"). These costs are passed on to consumers in an economic climate where Americans already are struggling to afford their basic needs. *See* Jessica Dickler, *'Life is Getting More*

Expensive by the Day.' Amid Inflation, 32% of Americans are Struggling to Pay Their Bills, CNBC (Oct. 10, 2022), https://cnb.cx/3UVZwLH ("The rising cost of living is causing more consumers to fall behind on their monthly bills.").

Not only will Georgia consumers ultimately bear the brunt of the Court of Appeals' wayward decision, but the resulting increased litigation and liability costs may drive firms out of business altogether, especially in high crime areas—regardless of the merits (or lack thereof) of the litigation. *See* Baker & Cole, *Property Owners' Liability for Criminal Acts*, at 26-27; *see also Williams v. Cunningham Drug Stores, Inc.*, 379 N.W.2d 458, 460 (Mich. Ct. App. 1985) ("[H]olding businessmen, especially those in 'high crime areas,' responsible for policing the criminal conduct of third parties carries the economic potential for driving store owners out of business.").

Against that backdrop, the critical importance of enforcing Georgia's apportionment statute as written and a predictable, cabined reasonable foreseeability standard in line with the traditional notion of *premises* liability becomes clear. To avoid these unintended consequences, this Court should restore the limits Georgia law sensibly imposes on a jury's apportionment of damages and a business owner's duty in a premises-liability action.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals' decision, direct an entry of judgment in favor of CVS, or at the very least remand this case to the trial court for a new trial.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served this **BRIEF OF GEORGIANS FOR LAWSUIT REFORM AS *AMICUS CURIAE* IN SUPPORT OF GEORGIA CVS PHARMACY, LLC** upon the following counsel of record by filing it with the Clerk of Court using the Court's electronic filing system and by mailing printed copies, addressed as follows:

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