IN THE SUPREME COURT
STATE OF GEORGIA

GEORGIA CVS PHARMACY, LLC, Petitioner v. JAMES CARMICHAEL, Respondent	CASE NO. S22G0527

BRIEF OF AMICI CURIAE RETAIL LITIGATION CENTER, INC., NATIONAL RETAIL FEDERATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND STATEMENTS OF INTEREST

The Retail Litigation Center, Inc. ("RLC"), National Retail Federation ("NRF"), and National Federation of Independent Business ("NFIB") file this brief as amici curiae in support of the appeal by Georgia CVS Pharmacy, LLC ("CVS") with respect to the November 1, 2021 decision by the Georgia Court of Appeals in *Georgia CVS Pharm., LLC v. Carmichael*, Case No. A21A0677 (Ga. Ct. App. Nov. 1, 2021) (the "Decision"). By disregarding well-established public policy considerations that have long guided Georgia's premises liability common law, the Decision creates an unpredictable and treacherous framework. Common law is inherently retrospective and prospective, with past determinations about the kinds of conduct (or lack thereof) that result in liability necessarily informing rational actors in their conduct going forward.

Without this Court's guidance, the Decision adds to Georgia's common law a striking degree of risk for premises owners of all kinds, including small businesses, churches, and private schools. The Decision holds a premises owner liable for the consequences of private and criminal activity, wholly unrelated to the premises owner, and wholly unknowable by the premises owner, unless extraordinary and intrusive steps are taken to attempt to prevent such conduct. The lesson of the Decision, and the decisions that will build upon it, is that liability might be avoided only with significant security and surveillance on landowners'

premises. The consequence will be a reluctant but real embrace by premises owners of increased security (armed and unarmed) and surveillance that would transform Georgia for the worse.

The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, 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 RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 200 judicial proceedings of importance to retailers. Its amicus briefs have been favorably cited by multiple courts, including the Supreme Court of the United States and the Tennessee Supreme Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (U.S. 2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1365 (U.S. 2013); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020). Nearly all the RLC's members operate retail locations in Georgia and around the United States.

NRF is the world's largest retail trade association, representing diverse retailers from the United States and more than 45 countries. 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 members who operate in Georgia include major grocery and big-box stores as well as numerous Main Street businesses. Since its inception, NRF has submitted amicus curiae briefs in cases raising significant legal issues for the retail community, on topics including, *inter alia*, workplace liability, premises liability, wage and hour laws, taxation, and COVID-related regulation.

The National Federation of Independent Business (NFIB) is the nation's leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB's members include many Georgia small businesses, which will suffer significant liability and an increased financial burden if this Court affirms the lower court opinion.

ARGUMENT

Amici share herein the concerns of premises owners of all kinds, including retailers, small businesses, schools, churches, and nonprofits, arising from the Decision. These concerns raise myriad public policy considerations for this Court. Often and properly, this Court weighs public policy considerations, particularly as they relate to tort claims and the scope of liability that reasonably applies in premises liability matters. We observe that the public policy considerations outlined below dovetail with the stated public policy of the legislature, as expressed in O.C.G.A § 53-3-1, that premises owners ought to exercise "ordinary care" with respect to their invitees. As discussed below, the Decision will force premises owners to act in ways far beyond what is "ordinary," and yet the result of such "care" is of dubious effect.

I. Public Policy Considerations Properly Guide This Court When Interpreting Georgia's Premises Liability Statutes

The bounds of the common law duty of care of a landowner to invitees are deeply informed by public policy. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 (2012) (noting that landowner obligations "reflect[] a policy-based modification of the duty of land possessors to those on the land whose presence is antithetical to the rights of the [owner]"); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 (2012) (observing that Section 7(b)

"provides exceptions to the reasonable-care duty when overriding concerns of principle or policy exist such that tort liability should be withdrawn or limited").

This is equally true in Georgia. The common law duty has been codified as a legislative recognition of the way that premises liability arises from the twin goals of incentivizing private property ownership and maximizing public safety. O.C.G.A. §§ 51-3-1; *see also Cham v. ECI Mgmt. Corp.*, 311 Ga. 170, 172-73 (2021) (citing the common law duty of a landowner to keep its premises safe for visitors, and observing that this common law duty is codified, in relevant part, in, O.C.G.A. §§ 51-3-2, and 51-3-3); *Horace Mann Ins. Co. v. Drury*, 213 Ga. App. 321, 323(2) (1994) ("The public policy of this state is created by our Constitution, laws and judicial decisions."); *Sturgess v. OA Logistics Servs*., 336 Ga. App. 134, 139 & n. 17 (2016) (invoking "clear public policy" in addressing the scope of liability for sexual harassment, notwithstanding the Georgia Workers Compensation Act).

As this Court recently observed, "[p]olicy considerations 'play an important role' in 'fixing the bounds of duty.'" *Maynard v. Snapchat, Inc*., 313 Ga. 533, 550–51 (2022) (quoting *CSX Transp., Inc. v. Williams*, 278 Ga. 888, 890 (2005)). Georgia courts—and this Court in particular—thus have a "responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are

limited to a controllable degree." *Id.* Appropriate considerations of policy-driven legal obligations include whether, for example, a duty "cannot feasibly be implemented or, even if implemented, would . . . be poor public policy." *Id.*

There are material public policy considerations involved in the realm of premises liability. *Sims v. Am. Cas. Co.*, 131 Ga. App. 461, 478 (1974) (additionally noting that "the issue of public policy is a complex one"). As a result, Georgia courts have not shied away from imposing limitations and, as needed, issuing "course corrections" on the legal considerations for premises liability. *Am. Multi-Cinema, Inc. v. Brown*, 285 Ga. 442, 444 (2009) (describing this Court's corrections on the burdens of proof for slip and fall cases).

Amici demur on the best policy to address the many concerns of premises owners as they seek to keep their locations safe: there are no doubt a variety of means to balance the interests of premises owners and tort victims. Instead, Amici respectfully offer the considered perspectives of our members on the real-world consequences of the Decision. We outline many of those consequences below. Other jurisdictions have considered the same kinds of policy concerns attendant in this case, in which the underlying decision threatened to significantly expand the concept of foreseeability. Those jurisdictions agree that there is a degree to which the scales are too far tipped away from the real-world effects on property owners.

For example, in *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381 (Mich. 1988), the Michigan Supreme Court considered whether a merchant's duty to exercise reasonable care included "providing armed, visible security guards to protect invitees from the criminal acts of third parties." *Id.* at 500. The court observed that typically, "the court decides the questions of duty and the general standard of care, and the jury determines what constitutes reasonable care under the circumstances," but "in cases in which overriding public policy concerns arise, the court determines what constitutes reasonable care." *Id.* at 500-01.

The theory advanced by the plaintiff in *Williams*, just as Carmichael does here, was "essentially a duty to provide police protection." *Id.* at 501. The court rejected this position, noting that the duty to provide police protection "is vested in the government by constitution and statute," and observed that "neither the Legislature nor the constitution has established a policy requiring that the responsibility to provide police protection be extended to commercial businesses." *Id.* at 501-02. The court explained:

> The inability of government and law enforcement officials to prevent criminal attacks does not justify transferring the responsibility to a business owner such as defendant. To shift the duty of police protection from the government to the private sector would amount to advocating that members of the public resort to self-help. Such a proposition contravenes public policy.

Id. at 503-04.

Similarly, in *Colarossi v Univ. of Rochester*, 2 A.D. 3d 1272, 1273-74 (N.Y. App. Div. 2003), the court concluded that even if the defendant owed a duty to a student who was shot by a third party, and even if the defendant breached that duty, the theory of culpability was too attenuated to support admission of expert testimony that more lighting and security would have prevented the shooting. The court held, "[a]lthough it is conceivable that a greater security presence may have prevented the incident, 'conceivability is too slim a reed, standing alone, to support the conclusion that [defendant's] alleged negligence proximately resulted in [plaintiff's] injuries." *Id*.

As another court observed, "a landowner is not the insurer of crime victims." *Trammell Crow Cent. Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9, 17 (Tex. 2008); *see also id*. at 19 ("Life in a free society carries a degree of risk. That risk can be virtually eliminated by a pervasive military presence, but the burdens—both in terms of the economic cost to premises owners and in the oppressive climate a police state spawns—would be prohibitive.") (concurring opinion.)

This Court can, and should, meaningfully weigh the consequences that will flow from the Decision. Left undisturbed, the Decision will be integrated into Georgia's canon of premises liability law, and it will inform property owner obligations in Georgia going forward.

II. The Decision's Strict-Liability Framework Will Incentivize Heavily Surveilled and Guarded Private Property and Create Prohibitive Barriers to Commercial Property Ownership

The Decision sets the bar for foreseeability so low that it creates a functional strict liability environment that will leave property owners with little choice but to fortify their premises, or make hard economic decisions if they cannot provide for the level of security personnel, surveillance, and lighting that the Decision effectively requires.

Forcing such decisions on property owners is misguided because the Decision's premise, which is that more security personnel, surveillance, and lighting would have prevented Carmichael's injury, is utterly speculative. Such measures are not proven to prevent specific instances of crime. Moreover, they have the potential for distinctly negative effects on communities by forgoing the hard-earned gains of community policing in favor of an expanded private security state. These issues will affect not just retailers, but small and family-owned businesses of all kinds, as well as institutions like churches, schools, and hospitals. *See, e.g.*, *Small Business and Its Impact on Georgia* 4, (Univ. of Ga. Small Bus. Dev. Ctr., 2019), https://issuu.com/ugasbdc/docs/small_business_impact (detailing how small businesses comprise 99.6% of all Georgia businesses and employ nearly half of all Georgians).

A. The Decision Effectively Subjects Premises Owners to Strict Liability

One consequence of the Decision is that it effectively creates a strict liability scheme holding landowners liable for the violent attacks of third-parties over whom they have no control. The appeals court held that the attack on Carmichael was reasonably foreseeable by the Defendant, in part, because lay witnesses testified that "the store was located in a high crime area." (Decision at *4.)

The admission of testimony about the perceived crime rate in a given area, admitted to support the foreseeability of an unrelated crime among individuals who were not patrons of the retail facility, creates a dangerously amorphous standard that drifts swiftly into strict liability. As this Court explained in *Martin v. Six Flags over Georgia. II, L.P.*, "[i]f there is reason to anticipate some criminal conduct, the landowner must exercise ordinary care to protect its invitees from injuries caused by such conduct . . . ." 301 Ga. 323, 328 (2017); *see also Piggly Wiggly Southern, Inc. v. Snowden*, 219 Ga. App. 148, 150 (1995) (upholding trial court's exclusion of police statistics for the City of Albany, which plaintiff wanted admitted to show the premises at issue there was in a high crime area).

"[L]andowners need not guard against imagined dangers." *Martin*, 301 Ga. at 328. Public policy considerations dictate that constructive knowledge of imagined dangers cannot fairly be used to establish liability. Imagined dangers feature prominently in today's social media, where perception distorts reality and

where alarmism is the currency driving more internet user traffic. A casual perusal of Nextdoor posts or Ring "alerts" about allegedly suspicious activity in nearly any area within Georgia showcases the kinds of hyperbolic and factually-suspect accounts of alleged crimes and "suspicious" people that we might hear in Georgia's courtrooms. *See, e.g.*, *Rani Molla*, *The Rise of Fear-Based Social Media Like Nextdoor, Citizen, and Now Amazon's Neighbor*, Vox Recode (May 7, 2019 12:30 PM).[1] If foreseeability is established, in part, by this kind of testimony, the bar has been set so low that it is no standard at all.

The Decision not only stands for the dubious propriety of lay testimony to establish foreseeability, it also stands for the proposition that generalized crime statistics are now admissible to establish foreseeability. But generalized crime statistics cannot establish foreseeability under Georgia law. *See, e.g.*, *Agnes Scott College, Inc. v. Clark*, 273 Ga. App. 619, 623 (2005) (rejecting use of "general crime statistics" to support determination of foreseeability). Personal accounts of perception of crime are even further removed from general crime statistics, and if relied upon to establish foreseeability, Georgia's law will effectively be a strict liability scheme for premises owners.

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[1] https://www.vox.com/recode/2019/5/7/18528014/fear-social-media-nextdoor-citizen-amazon-ring-neighbors (detailing how social media sites and apps like Nextdoor and Ring are creating public perception of crime rates that do not match actual crime rates)

B. The Principal Consequence of the Decision Will Be Hardening of Private Property, with Little Guarantee of Greater Safety as a Result

The Decision will subject property owners to liability for third-party criminal conduct based on mere speculation. Here, that speculation was that more lighting and a security guard would have prevented Carmichael from being shot. This case exemplifies the problem: the entire Carmichael incident occurred inside Carmichael's vehicle, hidden from public view (although within a lighted part of the parking lot that had camera surveillance). Here, Carmichael coordinated with another person (Frankie Gray) to meet at the CVS parking lot to undertake, from inside Carmichael's truck, a transaction where Carmichael would sell an iPad to Gray. V.13/T.331-32.

Upon arriving, Carmichael and Gray commenced their transaction, with Carmichael in his driver's seat and Gray in the passenger seat. V.13/T.331-33, 370. Unable to come to terms about the price for the iPad, Gray left the car leaving Carmichael's "passenger door wide open." V.13/T. 378. Carmichael conceded that he himself did not "typically forget to close [his] door" upon exiting his vehicle, and that he did not think that Gray "just forgot to close [Carmichael's] door." V.13/T.378-79. Just after Gray's exit—intentionally leaving the door open—a third party entered Carmichael's truck and held up Carmichael at gunpoint. V.13/T.381-83. The two then exchanged gunfire inside the truck. V.13/T.335-36, 390.

It is hard to imagine any kind of private security person being able to see, much less engage with, private activity occurring inside a vehicle parked in a retailer's parking lot.[2] The unmistakable message to property owners, then, is that having standard security measures in place is insufficient; only a wholesale investment in wrap-around klieg lighting and surveillance along with 24/7 armed security will mitigate the risk of a similarly large verdict resulting from private criminal behavior. And even *this* may not be enough, depending on what after-the-fact testimony a plaintiff may present to a jury in any given case.

Although it is highly questionable whether security guards would have prevented Carmichael's injury, the $42 million awarded against CVS necessarily assumes that it would have. This will inevitably compel property owners to harden their premises with private security and surveillance. This is neither a desirable nor sensible outcome for at least two reasons. First, reduction in crime is not at all

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[2] Indeed, until the shooting took place, two people engaged in a conversation in a vehicle parked in a retail parking lot, even in a so-called "high crime" neighborhood, may not have even been appropriate for *police* to investigate. *See, e.g.*, *United States v. Flowers*, 6 F.4th 651, 660 (5th Cir. 2021) (Elrod, J., dissenting) (observing that "[t]wo men sitting in a parked car outside an open convenience store during the early evening for a mere ten seconds . . . is not suspicious behavior, nor does it transform into suspicious behavior because the convenience store was located in a high crime area"); Petition for Writ of Certiorari at 19, *Flowers v. United States*, No. 21-835 (U.S. 2021) (citation omitted) (observing that the Fifth Circuit's *Flowers* opinion contradicted Supreme Court precedent from long ago that "an individual's presence in a high-crime area alone 'is not enough to support a reasonable, particularized suspicion'").

guaranteed. Second, private properties awash in private security and surveillance have societal consequences, some of which are indisputably negative.

As to the first concern, private police are not the panacea that courts or juries sometimes suppose. This is self-evident from the Decision itself, as the order and underlying briefing give no indication that Carmichael or his assailant knew whether there was a security guard on duty that night. There was simply no evidence presented suggesting that a security officer would have prevented the shooting from occurring. This is not surprising based on a survey of the news[3] and the literature.

One of the few studies using scientific methodologies to assess private security observed as follows:[4]

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[3] The presence of armed security guards has done little to prevent crime in Atlanta. *See, e.g.*, Alexis Stevens, *13 Security Guards Shot, 4 fatally, in metro Atlanta in Recent Months*, THE ATLANTA JOURNAL-CONSTITUTION (Oct. 25, 2022), available at https://www.ajc.com/news/crime/9-security-guards-shot-5-fatally-in-metro-atlanta-in-18-months/SGELUHYWEZADRG4SPWDJEFRG5M/; *see also* Mihir Zaveri, et al, "*All These Innocent Lives: These Were the Victims in the Buffalo Attack*, THE NEW YORK TIMES (May 15, 2022) (one of the dead included 30-year Buffalo police retiree, working as a private security guard at the Tops supermarket in East Buffalo, where 10 people were murdered), *available a*t https://www.nytimes.com/2022/05/14/nyregion/victims-buffalo-shooting.html

[4] Barak Ariel, Matthew Bland, & Alex Sutherland, *'Lowering the Threshold of Effective Deterrence'—Testing the Effect of Private Security Agents in Public Spaces on Crime: A Randomized Controlled Trial in a Mass Transit System,* 5 (PLoS ONE, 2017), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0187392.

> Some commentators have remarked that we 'must be careful not to exaggerate either the extent or …impact…of [the] fragmentation of policing', and we think they are correct. Despite the massive growth in private security agencies, there have not been enough rigorous impact evaluations conducted of these entities.

Id. Later the authors added that "we do not fully comprehend when policing will 'work,' and when it will result in adverse or nil effects." *Id*. at 6. Although such studies may support decisions by a property owner, or even a legislature, the literature does not support holding property owners liable for crimes simply because they did not engage specific types of private security. *See* Lauren J. Krivo, Christopher J. Lyons, & María B. Vélez, *The U.S. Racial Structure and Ethno-Racial Inequality in Urban Neighborhood Crime, 2010–2013*, 7(3) Sociology of Race and Ethnicity 350 (2021), https://journals.sagepub.com/doi/full/10.1177/2332649220948551.

In another study, the authors determined that adding security patrols in a neighborhood of Oakland, California initially reduced crime, but "this decline disappeared within six months." Marco Fabbri & Jonathan Klick, *The Ineffectiveness of 'Observe and Report' Patrols on Crime*, 65 Int'l Rev. of Law and Econs. 1, 2 (2021), https://www.law.upenn.edu/live/files/11580-65irle105972pdf. The authors observed that the results suggest that "conspicuous monitors [like private security guards] are insufficient to generate the deterrent effect associated with police":

> The hope that lower cost observe-and-report security patrols might prove to be lower cost substitutes for police officers is not borne out. For private security to generate comparable deterrence, it appears as though something like the armed patrols with arrest powers studied in MacDonald, Klick, and Grunwald (2016) might be necessary.

Id. at 2.

Another study observed that "efforts to reduce or deter crime are complex (as are the causes of crime) and that pointing to one method of reducing crime is an erroneous path." Frances Adams-O'Brien, *Is There Empirical Evidence that Surveillance Cameras Reduce Crime?*, (MTAS Research and Information Center, 2016), https://www.mtas.tennessee.edu/knowledgebase/there-empirical-evidence-surveillance-cameras-reduce-crime. This same study concluded that surveillance cameras can reduce crime, but not *violent* crime. (Amici observe that CVS had surveillance cameras in place.)[5]

As to the second concern, although private security guards undergo training and can be usefully deployed under the correct circumstances, they are not accountable to the public in the same way as police. Put simply, there are good reasons that society seeks law enforcement from publicly-employed police rather

[5] A multi-country, multi-year study confirmed that video surveillance has a moderate effect on property crime, and no effect on the kind of violent crime Carmichael experienced. *See* Eric Piza, *CCTV Surveillance for Crime Prevention: A 40-Year Systematic Review with Meta-Analysis* (Dec. 2, 2020), available at https://ericpiza.net/2020/12/02/cctv-review/.

than from private forces. *See* Amelia Pollard, *The Dangers of Private Policing: Lessons from South Africa*, The Yale Review of International Studies (Jan. 2021), http://yris.yira.org/comments/4633.

The ongoing national conversations in the United States around the intersection of law enforcement and racism also illustrate the potential downsides of an increased private police presence. For example, retailers with private security in place to prevent shoplifting are navigating concerns that such efforts may lead to racial profiling. *See* Rachel Rosenfeld & Shahenaz Yates, *Shoplifter Profiling: Is It a Preventive Tool or Racism at Play?*, JD Supra (June 2, 2021), https://www.jdsupra.com/legalnews/shoplifter-profiling-is-it-a-preventive-7447245/. Shifting the complex decisions about who, what, when, where, and how to engage private security into the hands of a patchwork of individual jury verdicts will only exacerbate these issues.

In sum, while the Decision would push property owners to invest heavily in amped-up private security to prevent legal liability, there is little evidence these efforts will actually reduce crime. Nor will they necessarily reduce legal liability. Here, there was lighting and surveillance at CVS but it was deemed insufficient. It is thus likely that, regardless of the measures property owners implement, they will be subject to whack-a-mole type claims that whatever the property owner did, it was insufficient. Courts will hear continually shifting arguments, each pointing to

some additional measures that could have been taken (e.g., hiring armed security, or posting security in a particular location). Based on the Decision and its antecedents, courts will have little basis to exclude such hypotheses from evidence. All but the most fortified property owner or lessee will remain vulnerable to liability, and the result will be an effective arms-race of security and surveillance that will likely still be insufficient to prevent the type of private criminal activity that occurred in the CVS parking lot. To the extent that such fortification is cost-prohibitive, stores and small businesses will have no choice but to close.

A related consequence of the Decision is that juries are functionally legislating how private property owners should secure their property, not just for the safety of their customers but also, as here, for noncustomers who happen to be in their parking lots. As is typical of complex issues that are effectively legislated by juries via individual verdicts, the actual contours of what is required of any specific property owner are wholly unclear and unpredictable. The requirements of securing premises should, in the first instance, be left to a property owner's reasonable discretion, but failing that, then they should be defined in the legislative arena, where facts, studies, and information can be vetted and, where appropriate, amended through the same process.

C. Local Police Are Vastly Better Able to Prevent and Address Crime than Expanded Private Security

It is poor public policy to shift to private enterprise the responsibility of policing against criminal conduct that happens to occur on private property. Intercepting and apprehending the kind of criminal activity that occured in the CVS parking lot is best left to carefully trained and armed police and authorities employed by the government, not property owners.

Police have the training, certification requirements, experience, technology, and evolving policing strategies (such as "proactive policing") that are designed to make communities safer by assessing incidents exactly like this one. *See, e.g.*, Mike Gelles, Alex Mirkow, & Joe Mariani, *Policing Strategies to Meet the Challenges of Evolving Technology and a Changing World*, Deloitte Insights (October 22, 2019), https://www2.deloitte.com/us/en/insights/focus/defense-national-security/future-of-law-enforcement-ecosystem-of-policing.html. By contrast, regardless of how well-trained they are, private security guards (even those who might have formerly served as police officers) are not generally tasked with preventing crime or apprehending criminals. They are also often, and understandably, limited in the scope of their powers, and are usually instructed simply to call the police. *See, e.g.*, *Med. Ctr. Hosp. Auth. v. Cavender*, 331 Ga. App. 469, 479 (2015) (recognizing that security guard was not permitted to confront or attempt to arrest perpetrator of criminal activity at hospital, but rather

was required to report any activity to law enforcement authorities). In sum, local police are the proper backstop against criminal activity, not private property owners.

D. The Decision Will Affect Small and Large Businesses and Other Private Property Owners and Lessees

Except for those with clear immunity under the law, all kinds of property owners now face the risk in Georgia that a private person can enter private property, engage in criminal activity unrelated to the premises owner, and then shift the liability for the negative consequences of that activity to the property owner.

The burden of the Decision and the risks it poses extend not just to large corporations like CVS, but also to small businesses and family-owned businesses (e.g., restaurants, franchisees, independent grocers), as well as to charities that own or lease property, including churches, schools, and hospitals. The effect on small and family-owned businesses will be predictably onerous. Small businesses, particularly those in high-crime areas (which, under the Decision, are any areas that any lay person is willing to testify is high-crime) must either undertake costly efforts to fortify their premises or risk a business-ending verdict like the one here. We can expect small businesses to struggle with decisions about hours, location, expansion, and personnel to account for the increased obligation for capital

improvements (e.g., more extensive lighting and surveillance) and the ongoing cost of security.

The burdens of the Decision will also extend to charities, who similarly have narrow economic bandwidth to fortify their premises or absorb large verdicts. Georgia courts have modified the common law doctrine that used to extend immunity to charities for tort liability, making it subject to many exceptions that may place charities at risk. Today, in relevant part, a charity is immune from liability for negligence except: (1) for failing to exercise ordinary care in the selection of its officers and employees, and (2) to the extent of any non-charitable assets, which include liability insurance. Some Georgia Court of Appeals decisions have interpreted the first exception to include the failure to retain sufficient personnel. *See Harrell v. Louis Smith Mem'l Hosp.*, 197 Ga. App. 189, 191 (1990) (holding that charitable immunity would not extend to a hospital's negligence "in failing to provide a sufficient number of competent and adequately instructed employees for its staff"); *YMCA v. Bailey*, 107 Ga. App. 417, 420 (1963) (holding that charitable immunity would not extend to the YMCA's failure to provide a "[]sufficient number of life guards or other trained personnel to supervise" children at the pool). Marrying *Harrell* and *YMCA* with the Decision yields a pathway to liability for a charity's failure to retain security guards.

Insurance, meanwhile, for premises owners of all kinds, continues to have stark increases in premiums, in substantial part because of "nuclear" verdicts like the one upheld in the Decision. *See, e.g.*, *Social Inflation Is Complicated and Costly: A Five-Part Series Examining Social Inflation and Its Impact on Insurers*, The National Association of Mutual Insurance Companies (Sept. 2021), *available at* https://www.namic.org/pdf/publicpolicy/210920_socialinflation_full.pdf

The Decision thus presses onto property owners of all kinds, including small businesses and charities, difficult decisions that will in turn affect the communities in which they are located.

CONCLUSION

For the foregoing reasons, amici urge this Court to address the concerns of Appellant and correct the ways in which the Decision harms shared goals of crating safe premises and stronger communities.

DATED: December 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2022, I have served the foregoing **BRIEF OF AMICI CURIAE RETAIL LITIGATION CENTER, INC., NATIONAL RETAIL FEDERATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS** upon the following counsel of record by filing a true and correct copy thereof with the Clerk of Court using the Court's electronic filing system, as permitted by Supreme Court of Georgia Rule 13, as well as by email, addressed as follows:

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