No. 13-0136

IN THE SUPREME COURT OF TEXAS

NABORS WELL SERVICES, LTD. F/K/A POOL COMPANY TEXAS, LTD. AND LAURO BERNAL GARCIA,
Appellants/Defendants

v.

ASUNCION ROMERO, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF AYDEE ROMERO, DECEASED, AND AS NEXT FRIEND OF EDGAR ROMERO AND SAUL ROMERO; ESPERANZA SOTO, INDIVIDUALLY AND AS NEXT FRIEND OF ESPERANZA SOTO, GUADALUPE SOTO, MARIA ELENA SOTO; AND MARTIN SOTO,
Respondents/Plaintiffs

On Review from the Eighth District Court of Appeals,
No. 08-09-00319-CV

BRIEF OF AMICI CURIAE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS/DEFENDANTS

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STATEMENT OF THE CASE

Amici adopt the Appellants/Defendants' statement of the case to the extent applicable to this *Amici* brief.

STATEMENT OF JURISDICTION

Amici adopt the Appellants/Defendants' statement of jurisdiction.

ISSUE PRESENTED

Under Texas' comparative fault system, should seat belt use evidence relevant to a plaintiff's injuries be admissible?

INTEREST OF *AMICI CURIAE*

Amici are non-profit trade associations whose members operate in Texas, throughout the United States, and in many other countries.[1]

The Alliance of Automobile Manufacturers, Inc. ("the Alliance"), formed in 1999 and incorporated in Delaware, has twelve members: BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car Corporation. Alliance members are responsible for 77% of all car and light truck sales in the United States. The Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to meet emerging challenges associated with the manufacture of new automobiles. The Alliance files *amicus curiae* briefs in cases such as this one that are important to the automobile industry.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. TEX. R. APP. P. 11.

professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive agencies. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the business community.

Accordingly, *Amici* the Alliance and the U.S. Chamber have an interest in ensuring that Texas tort law and evidentiary rules are fair and reflect sound public policy. *Amici's* members would be adversely impacted were this Court to determine that juries are to be denied access to relevant evidence regarding the use or non-use of seats belts in cases in which plaintiffs seek compensation for injuries arising out of car accidents.

SUMMARY OF ARGUMENT

Texas's evidentiary bar on seat belt use in car accident cases endured until 2003 because it was held in place by legislation. This Court had initially adopted a common law bar on seat belt use evidence in 1974 based on the laws in effect at that time. *See Kerby v. Abilene Christian College,* 503 S.W.2d 526 (Tex. 1974); *Carnation Co. v. Wong,* 516 S.W.2d 116 (Tex. 1974). The Legislature codified that rule in 1985 and repealed it in 2003. *See* H.B. 4, 78th Leg., ch. 204 § 8.01 (2003) (repealing Tex. Transp. Code Ann. §§ 545.412(d) and 545.413(g)). By

2003, though, the common law had fundamentally changed since the Court's 1974 rulings: each pillar upon which this Court built its common law ban on seat belt use evidence thirty years earlier had fallen.

First, during those thirty years, Texas moved from a tort liability system based on contributory negligence to proportionate responsibility. As a result, Texas juries were to consider all factors contributing to a plaintiff's injuries, not just which driver caused the accident. Seat belt use can be highly relevant to this inquiry. Second, in those thirty years, Texas courts recognized there is a "secondary collision" in car accidents apart from the collision between vehicles. In these cases, juries have demonstrated that they are competent at considering the appropriate factors and that there are no evidentiary deficiencies with apportioning fault. Third, in those thirty years, Texas law, custom and public policy changed: Texas law required the use of seat belts, the value and effectiveness of seat belts had become well-established, and people overwhelmingly used seat belts. A jury assessing facts and circumstances of an accident could determine that a person's failure to use a seat belt qualified as plaintiff negligence.

As a result, when the Legislature repealed the bar on seat belt use evidence in 2003 and the collision at issue occurred in 2004, Texas law and public policy already provided the basis for the admissibility of competent evidence as to whether Plaintiffs' failure to use available seat belts legally caused some of their

injuries. Contrary to the El Paso Court of Appeals' implication in its holding, the Legislature did not have to affirmatively state that seat belt use evidence would be admissible to overcome the Court's common law precedent. *See Nabors Wells Servs., Ltd. v. Romero*, 408 S.W.3d 39, 41 (Tex. App.—El Paso 2013, pet. filed) (suggesting "the Legislature had the opportunity to mandate admissibility, but it chose to remain silent on the issue"). Courts applying the law of 2004 should have provided for such admissibility. *Amici* urge this Court to now follow the principles of current law and public policy and overturn the case below: seat belt use evidence should be admissible when relevant to a plaintiff's injuries.

ARGUMENT

Stare decisis is the long-standing tradition of adhering to precedent and an important guardian for providing stable and predictable common law jurisprudence, but following precedent is "not absolute." *Southwestern Bell Telephone Co. v. Mitchell*, 276 S.W.3d 443, 447 (2008).[2] In Texas and elsewhere, a core common law principle is that "when the reason of the rule fails, the rule itself should cease." *Texas Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 456 (Tex. 2012) (Willett, J., concurring) (citation omitted).

Here, the lower court concluded it was duty-bound to bar all evidence related to Plaintiffs' injuries attributable to their failure to use seat belts because

[2] *See generally*, Victor E. Schwartz, Cary Silverman & Phil Goldberg, *Toward Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. Rev. 317 (2006).

there was "well established" Texas precedent that such evidence is inadmissible. *See Nabors Wells Servs.*, 408 S.W.3d at 45 ("As an intermediate appellate court, it is not within our province to overturn prior Supreme Court authority."). The lower court cited *Kerby v. Abilene Christian College,* 503 S.W.2d 526 (Tex. 1974) and *Carnation Co. v. Wong,* 516 S.W.2d 116 (Tex. 1974). In relying on these cases, the lower court failed to recognize that the Court's rejection of seat belt use evidence in the 1970s was inextricably tied to the then-in-effect contributory negligence regime. *See Kerby*, 503 S.W.2d at 528 ("driving without use of available seat belts has been held not to be contributory negligence such that would bar recovery"); *Carnation*, 516 S.W.2d at 116 ("We reject [seat belt use evidence] cases barring completely plaintiff's recovery based on contributory negligence.").

In the 1970s, the Court concluded that under contributory negligence all evidence a jury considers "must have the causal connection with the accident that but for the conduct the accident would not have happened." *Kerby*, 503 S.W.2d at 528 (emphasis added). To underscore this point, the *Kerby* Court wisely appreciated that failure to use a seat belt may constitute negligent conduct, but held that under contributory negligence it was not "actionable negligence." *Id.* Otherwise, the lack of seat belt use could negate a plaintiff's entire recovery, even though it had nothing to do with causing the accident. Such a result would be unfair to a plaintiff who did not cause the collision and create a windfall for a

culpable defendant. *Id.*[3] Given these dynamics, the Court excluded evidence, including on seat belt use, speaking only to a plaintiff's injuries and not who caused the collision that led to the plaintiff being injured. *Id.* at 528.

As discussed below, under the proportionate responsibility regime, juries are now charged with assessing all factors contributing to a plaintiff's injuries, not just the collision. By distinguishing between "negligence contributing to the damages sustained," and "negligence contributing to the accident," therefore, *Kerby* actually laid the foundation for the view that seat belt use evidence should be admissible now. *See id.* Thus, while such a ruling would require the Court to overturn the technical holding of its precedent, it does not require this Court to abandon the rationale of its precedent.

I. EVIDENCE OF FAILURE TO USE A SEAT BELT IS ADMISSIBLE UNDER PRINCIPLES OF CURRENT TEXAS LAW

In car accident cases, including the one at bar, seat belt use evidence can be highly relevant to a jury when performing its obligation to apportion responsibility for a plaintiff's harm. There is no reason for this Court to keep the blinders on Texas juries by denying them evidence as to whether a plaintiff was using a seat belt and what impact that the failure to use a seat belt may have had on the injuries

[3] The rule against admissibility of seat belt use evidence was in concert with law in other contributory negligence jurisdictions. *See* Michelle R. Mangrum, *The Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt*, 50 Mo. L. Rev. 968, 968-69 (1985).

alleged. *See* Steven B. Hantler, Victor E. Schwartz, Cary Silverman & Emily J. Laird, *Moving Toward the Fully Informed Jury*, 3 Geo. J. L. & Pol'y 21, 32 (2005).

A. Car Accident Liability in Texas Is No Longer Limited to Who Is at Fault for the Collision, But is Based on Apportioning Responsibility for All Injuries Resulting from the Collision

The first pillar of the Court's rulings in *Kerby* and *Carnation* to fall resulted from the shift in Texas law from contributory negligence to proportionate responsibility. At the time of the collisions in *Kerby* and *Carnation*, tort liability in Texas, including for car accidents, was based on contributory negligence, meaning that even the slightest amount of negligence by the plaintiff in contributing to his or her injuries would negate his or her entire recovery. *Parrott v. Garcia*, 436 S.W.2d 897, 901 (Tex. 1969) (noting the "well established common law principle that contributory negligence proximately causing injury is a bar to recovery against a negligent defendant").

In 1973, the Legislature adopted the tenets of a comparative negligence regime for tort cases, including lawsuits from car accidents. H.B. 88, 63rd Leg., R.S. (1973); H.B. 88, 63rd Leg., R.S., Bill Analysis (1973). Under this system, a plaintiff could recover so long as his or her own negligence was "not greater than" the parties against whom recovery was sought, but in exchange, "any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering." *Id.* If defendants raised the issue, as attempted

here, juries had to assess a plaintiff's negligence that contributed to his or her injuries. As a result, the charge to the jury shifted from who caused the collision to what factors contributed to injuries for which a plaintiff seeks recovery. This Court fully appreciated that this legislation "evidenced a clear policy purpose to apportion negligence according to the fault of the actors." *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 518 (Tex. 1978).

By the time the accident in this case occurred in 2004, the Legislature had expanded and refined these rules several times to underscore the importance of assessing all factors contributing to a plaintiff's injuries. *See*, *e.g.*, S.B. 5, 70th Leg., 1st C.S., ch. 2, § 1.01(a)(2)-(5) (1987) (recognizing there was a "serious liability insurance crisis" in Texas requiring "meaningful tort reform measures"). This new regime required the trier-of-fact to determine the percentage of responsibility for each plaintiff, defendant, and person who settled prior to trial. *Id*. § 2.06 (adding Tex. Civ. Prac. & Rem. Code Ann. § 33.003). The percentage of responsibility would take into account any conduct that "caus[ed] or contribut[ed] to cause in any way, whether by negligent act or omission" the injuries for which the plaintiff sought recovery. *Id.* § 2.07 (adding Tex. Civ. Prac. & Rem. Code Ann. § 33.011(4)). As part of this assessment, juries were to be informed of any plaintiff conduct or omission that is "violative" of legal standards. *Id.*; *see also* H.B. 4, 78th Leg., R.S. (2003). When a car's occupants, such as

Plaintiffs in this case, might bear responsibility for contributing to his or her own injuries, even when not at fault for the collision, recovery is to be reduced "by a percentage equal to [that] percentage of responsibility." *Id.* § 2.08 (adding Tex. Civ. Prac. & Rem. Code Ann. § 33.012(a); *see also* Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 Md. L. Rev. 701, 729 (2014) ("The injured victim must accept responsibility for her own portion of fault in the form of the injury suffered."). Texas law became premised on personal responsibility.

In order to give effect to this new proportionate responsibility system, Texas courts soon began eliminating some rules that were particular to contributory negligence. Many of these rules, including the seat belt evidence rule and the last clear chance doctrine, were meant to avoid unfairly denying a plaintiff all recovery from an accident he or she did not cause. *See generally* Richard L. Durbin, Mark S. Pullman & Michael J. Thibodeaux, Special Project, *Texas Tort Law in Transition*, 57 Tex. L. Rev. 381 (1979). But, under the new comparative fault system, these rules interfered with the ability of the courts to fully consider the factors that contributed to the injuries alleged and fairly apportion responsibility for them. The seat belt use evidence rule did not meet this same fate; the Legislature maintained the ban on seat belt use evidence through legislation from

1985 until 2003. *See* Tex. Transp. Code Ann. § 545.413(g) (repealed 2003). The ban's ultimate repeal was consistent with the broader trend in Texas law to update fault-apportionment rules in response to the shift to a comparative fault regime.

As the Supreme Court of Arizona explained in allowing seat belt use evidence to be admissible, a liability regime based on proportionate responsibility minimizes moral imbalance: "although some tortfeasors may pay less than they otherwise *would*, they will not pay less than they *should*." *Law v. Superior Court*, 755 P.2d 1135, 1144 (Ariz. 1988) (emphasis in original). These are neutral principles for assuring just and accurate litigation results. *See* Restatement (Second) of Torts, § 465 cmt. c (1965) ("The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others.").

B. Under Proportionate Responsibility, Juries Already Consider Many Factors, Including Plaintiff's Own Negligence, that May Contribute to Injuries and Are Competent to Evaluate Seat Belt Use Evidence

Since the 1970s, apportioning responsibility in car accident cases has included assessing competent expert evidence as to each cause of a car occupant's injuries, which includes a plaintiff's own negligence. In fact, in *Carnation* this Court expressed concern that, at the time, scientific evidence had not progressed to the point where jurors could determine "that had plaintiff been wearing seat belts,

the injuries suffered would have been less than those actually sustained." *See Carnation*, 516 S.W.2d at 117. Other courts expressed the same concern back then. Since that time, though, judges and juries have been making comparable determinations regularly under Texas's proportionate responsibility laws, including in car accident cases.

For example, in 1979 Texas started conceptualizing car accidents as involving two incidents: (1) the collision between the cars, and (2) the impact on a plaintiff when he or she is moved in a way that causes injury, such as hitting the car's interior or being thrown from the car. *See Turner v. Gen. Motors Corp*., 584 S.W.2d 844, 848 (Tex. 1979). This notion of a "second collision" is the basis upon which the Court adopted the crashworthiness doctrine, which subjects car manufacturers to liability if a defect in the car, while it does not cause the collision, "is the cause of injuries only." *Id*. at 847.

This Court has concluded that "comparative causation" is "especially appropriate" in such accidents because certain acts or omissions may "cause[] or enhance[] injuries" but not "cause the accident." *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428 (Tex. 1984) (applying comparable law to a plane crash); Restatement (Third) of Torts: Apportionment of Liability § 8 (courts should assess "the causal connection between the person's risk-creating conduct and the harm"). In *Duncan*, this Court instructed jurors to look at both what caused the injuries and

what could have reasonably "prevent[ed] the harm." *Id.* at 425. If a design defect in a plane, car or other product unreasonably caused harm, the manufacturer could be subject to liability. Similarly, if a seat belt was defective and failed to hold an occupant in place, juries are to apportion to the responsible party the amount of a plaintiff's damages caused by the non-functioning seat belt.

In this regard, Texas jurors are already assessing factors that caused a plaintiff's injuries separately from the factors that caused the collision. Part of this calculation is allocating responsibility for a plaintiff's own misconduct that may have contributed to his or her injuries. *See id*. at 418 (requiring courts to break down "the plaintiff's damages according to the plaintiff's, defendants', and third parties' respective percentages of causation of those damages"); *Gen. Motors Corp. v. Hopkins*, 548 S.W.2d 344, 352 (Tex. 1977) (requiring juries to assess percentages of responsibility for plaintiff's unforeseeable misuse of a product so that the manufacturer's liability is limited to the proportion of the harm caused by its product). The laws applying to defects can be readily applied to a plaintiff's use or non-use of a seat belt. "[T]he failure to use a seat belt often causes an enhanced injury that is a foreseeable consequence of the failure to use a seat belt, just as an unsafe automobile design foreseeably enhances injuries resulting from a collision in 'crashworthiness' cases." *See* Gifford & Robinette, *Apportioning Liability*,

supra, at 767. Thus, there is no legal or evidentiary reason for withholding seat belt use evidence from a jury.

C. A Jury Should Be Able to Consider Whether Failure to Use a Seat Belt Is Plaintiff Negligence Under the Facts and Circumstances of a Case So that It can Fairly Apportion Responsibility for Injuries Alleged

The question then becomes whether failure to use a seat belt violates the long-standing obligation that people in Texas have "to use ordinary care in regard to his or her own safety." *Kroger Co. v. Keng*, 23 S.W.3d 347, 351 (Tex. 2000); *20801, Inc. v. Parker*, 249 S.W.3d 392, 398 (Tex. 2008) (defining ordinary care as what a person of normal prudence in that time and under those circumstances would do); *Jackson v. Associated Developers of Lubbock*, 581 S.W.2d 208, 211 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.). Again, the laws and customs surrounding seat belt usage fundamentally changed between the Court's rulings in *Kerby* and *Carnation* in 1974 and when the Legislature repealed its bar on seat belt use evidence in 2003. As courts in other jurisdictions have concluded, a car's occupants must exercise reasonable ordinary care for his or her own safety when traveling in a car and that includes using an available seat belt. *See Bentzler v. Braun*, 149 N.W.2d 626, 640 (Wis. 1967) ("A person riding in a vehicle driven by another is under the duty of exercising such care as an ordinarily prudent person would exercise under similar circumstances to avoid injury to himself.").

Non-use of a seat belt was arguably not violative of reasonable ordinary care in many circumstances when this Court ruled in *Kerby* and *Carnation*. Seat belts had been introduced only a little more than a decade before the accidents in these cases. *See* John K. Teahen Jr., *Ford, Chevy Battle Yearly in The Great Race*, Automotive News (June 16, 2003) (reporting Ford and Chrysler offered lap belts as options starting in 1955). Consumers initially resisted using seat belts because they did not "want to think about dangers associated with driving or riding in the most liberating consumer product ever created." Harry Stoffer, *Results of '50s Effort Led to Pullback on Safety*, Automotive News (June 16, 2003). Seat belt use remained low for a couple of decades even though the federal government required all car manufacturers to install seat belts for each occupant and lap belts with shoulder harnesses in the two main front seats in 1968. *See* 15 U.S.C. § 1392 (1968) (repealed 1994); Federal Motor Vehicle Safety Standards No. 208, 49 C.F.R. § 571.208 (2011). Well into the 1970s, the public still generally opposed mandatory seat belt use. *See* William J. Holdorf, *The Fraud of Seat-Belt Laws, Foundation for Economic Education* (Sept. 1, 2002) (reporting a 1977 Gallup poll that 78 percent of respondents opposed enforcement for failure to use seat belts).

As a result, courts of that era, including this Court, were hesitant to conclude that ordinary prudence for drivers and passengers included using seat belts. The courts expressed the view that there was a societal belief that a driver should have

a reasonable expectation of safety on the road and not have to "truss himself up" before driving. *Nash v. Kamrath*, 521 P.2d 161, 163 (Ariz. Ct. App. 1974). People "could assume that all who use the highways will drive with care" and that there is no need for someone in a car "to anticipate injury." *Law*, 755 P.2d at 1140 (citing to such older case law).

By the mid-1980s, courts began to observe that "seat belts were no longer the relatively new safety devices that they had been" in the 1960s. *See Dunn v. Durso*, 530 A.2d 387, 392 (N.J. Super. Ct. Law. Div. 1986). As part of a national effort to require seat belt use, the Texas Legislature enacted a law in 1985 requiring all front seat passengers older than fifteen years of age to wear a seat belt.[4] *See* Tex. Transp. Code Ann. § 545.413. Texas, as other States did, included a provision in this legislation that banned seat belt use evidence in car accident cases. S.B. 500, 69th Leg., R.S. (1985). Since 1985, the Legislature has expanded the seat belt laws and deemed the failure to use them a primary offense. The law is applicable to all occupants over age eight, and requires children below certain ages and heights to use child safety seats. *See* Tex. Transp. Code Ann. § 545.412.

These changes in law were augmented by a "massive educational campaign urging occupants to 'buckle up.'" *Dunn*, 530 A.2d at 392. The first statewide "Click It or Ticket" campaign began in North Carolina in 1993 with checkpoints,

[4] The first State to enact a mandatory seat belt law was New York in 1984. *See* N.Y. Veh. & Traf. § 1229-c (2010).

paid advertising, and a media campaign to build public awareness of seat belt use. *See* Campaign History Fact Sheet, Click It or Ticket, Nat'l Highway Traffic Safety Admin. (NHTSA). The federal government also participated in national advertising campaigns, and private organizations, including the nonprofit National Safety Council, helped raise public awareness that seat belt use can save lives. Traffic Safety Facts Research Note, NHTSA, DOT HS 811 140 (May 2009), http://www-nrd.nhtsa.dot.gov/Pubs/811140.PDF. Texas's "Click It or Ticket" campaign has been remarkably successful. This State now ranks seventh in the nation for overall seat belt use at 94 percent. *See Who Still Won't Click It?*, Texas Department of Transportation Traffic Safety (May 12, 2014), http://www.texasclickitorticket.com. The result in Texas and other States has been a "significant change in public sentiment as to the effectiveness of seat belts for driver safety." *See Dunn*, 530 A.2d at 392.

Failure to use a seat belt now violates both Texas law and custom. At the time of the accident in this case, persons exercising reasonable care used a seat belt. Dan B. Dobbs, The Law of Torts § 206 (West 2001) (reporting that reasonable care now includes using a seat belt). This Court should affirm that when such violative conduct is relevant to a plaintiff's injuries, as is likely here, defendants should be allowed to present that information so that damages can be properly apportioned. *See Law*, 755 P.2d at 1140 ("Rejection of the seat belt

defense can no longer be based on the antediluvian doctrine that one need not anticipate the negligence of others.").

D. When the Legislature Repealed the Bar on Seat Belt Use Evidence, Each Basis for Allowing Seat Belt Use Evidence Was in Place and Legislative History Indicates Seat Belt Use Evidence Was Intended To Be Admissible.

Each transformation above had taken place by the time the Texas Legislature repealed its bar on seat belt use evidence in 2003: (1) Texas law was to allocate liability based on a percentage of responsibility for the Plaintiff's harms, including his or her own contributions to the harms; (2) jurors were assigning such liability in car accident cases, including when a plaintiff failed to take reasonable measures that could have prevented his or her injuries; and (3) failure to use a seat belt was violative of a plaintiff's duty of ordinary care in preventing his or her injuries. *See* H.B. 4, 78th Leg., R.S. (2003).

Thus, when the Legislature repealed the statutory bar on seat belt use evidence in 2003, the Legislature did not have to statutorily dictate that seat belt use evidence was admissible. This evidence should have been ruled admissible under the laws and rules in place at that time. Legislative history from the 2003 repeal affirms this point. The bill analysis the House Research Organization provided to legislators stated: "*Evidence relating to seat belts*. CSHB 4 would repeal Transportation Code, sec. 545.413(g), <u>making the use or nonuse of seatbelts</u>

admissible in evidence in civil trials." House Research Org., Bill Analysis, H.B. 4, 78th Leg. R.S. (2003), at 38 (emphasis added).

In a lengthier description of the seat belt evidence provision, the official House Report elaborated further: "CSHB 4 would ensure fairness at trial by allowing the use or nonuse of seatbelts to be admissible in evidence. Jurors must be able to hear appropriate evidence to assign fault appropriately." *Id.* (emphasis added). The Report was also clear on the consequences, stating that "CSHB 4 would give people an additional reason to wear their seatbelts, because if they were injured, they would bear some responsibility for failing to obey the law." *Id.* at 46. Thus, legislators reviewing the official House summary of the bill were led to believe they were voting to allow seat belt use evidence to be admissible when relevant to the injuries sustained in a car accident.

Accordingly, *Amici* respectfully urge the Court to set aside the anachronistic holdings in *Kerby* and *Carnation* and assess the admissibility of seat belt use evidence anew under the laws and customs when the accident in this case occurred in 2004. As indicated, the law applying to this case requires juries to assess all factors that contribute to the injuries for which a plaintiff seeks recovery, not the collision alone.

II. TEXAS SHOULD JOIN OTHER STATES, INCLUDING THOSE WITH MODIFIED COMPARATIVE FAULT REGIMES, AND ALLOW RELEVANT SEAT BELT USE EVIDENCE TO BE ADMISSIBLE

"The acknowledged effectiveness of belt-type restraints in reducing fatalities and minimizing injuries has prompted the legislatures and courts in a growing number of states" to allow relevant evidence of a car occupant's use or non-use of an available seat belt. *See* Karin E. Geissl & S. Mark Varney, *Admissibility of Seat Belt Nonuse Evidence*, For the Defense, at 75 (Dec. 2009) (discussing cases and statutes in a number of jurisdictions); *see also* Lindsay M. Harris, Note, *North Dakota's Seat Belt Defense: It's Time for North Dakota to Statutorily Adopt the Doctrine of Avoidable Consequences*, 87 N.D. L. Rev. 139, 162-65 (2011) (providing a 50-state survey). Several of these States, as with Texas, have liability systems based on modified comparative fault. *See id*. In the forty-plus years that States have allowed seat belt use evidence, *Amici* are not aware of any State that has retreated from trusting juries with this information.[5]

Among the reasons States with contributory negligence regimes excluded seat belt evidence was that, as discussed above, few people wore seat belts at the

[5] The issue of seat belt use evidence in car accident cases first arose in the 1960s. *See* David A. Westenberg, *Buckle Up or Pay: The Emerging Safety Belt Defense*, 20 Suffolk U. L. Rev. 867, 869 (1986). As discussed above, seat belts were becoming standard features in cars during that decade. A few courts, starting in Wisconsin, allowed the evidence and a subsequent reduction of the plaintiff's damages. *Id.* at 869.

time and forfeiting plaintiffs' entire recoveries over such nonuse was viewed as a harsh penalty, particularly because failure to use seat belts generally had nothing to do with causing collisions. Many legislatures, such as Texas in 1985, codified common law bars on seat belt use evidence at the same time that they mandated the use of seat belts. However, changes in seat belt usage and customs in the late 1980s and 1990s prompted many policymakers to allow this evidence. *See* Katherine Nielsen, *The New Case for the "Seat Belt Defense" – Norwest Bank New Mexico, N.A. v. Chrysler Corporation*, 30 N.M. L. Rev. 403, 403-07 (2000).

In States that allow seat belt use evidence, use or non-use of a seat belt becomes merely one more factor for judges and juries to consider as to the reasonableness of a plaintiff's behavior, along with, for example, how fast the plaintiff was driving, whether the driver was engaging in reckless conduct, or whether the driver was drunk. *See Pool v. Ford Motor Co.*, 715 S.W.2d 629, 630 (Tex. 1986). As explained above, modified and pure comparative fault jurisdictions "contemplate[] the inclusion of all relevant factors in arriving at the appropriate damage award and non-use of a seat belt is a relevant factor for apportioning damages." *Hutchins v. Schwartz*, 724 P.2d 1194, 1199 (Alaska 1986). As with the other factors, there must "be satisfactory evidence to support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation." *Dunn*, 530 A.2d at 390. "[I]f the defendant is

unable to show that the seat belt would have prevented some of the plaintiff's injuries, then the trial court ought not submit the issue to the jury." *Spier v. Barker*, 323 N.E.2d 164, 169 (N.Y. 1974).

New Jersey and North Dakota, like Texas, both have modified comparative fault systems for liability and neither State has a statute barring the admissibility of seat belt use evidence. *See Dunn v. Durso*, 530 A.2d 387 (N.J. Super. Ct. Law. Div. 1986); *Day v. Gen. Motors Corp.*, 345 N.W.2d 349 (N.D. 1984). Yet, unlike the lower court in this case, both States have not artificially limited evidence to only that which speaks to the cause of an accident or a plaintiff's post-accident duty to mitigate damages. *See Dunn*, 530 A.2d at 389. Rather, in those States, juries can and must "distinguish between negligence contributing to the accident and negligence contributing to the injuries sustained." *Id.* A jury decides whether failing to use a seat belt was unreasonable under the circumstances and whether any such unreasonable conduct "demonstrably caused, or increased, the bodily injury for which compensation is sought." *Id.* The jury then reduces "the resulting damage percentagewise by the percentage attributed to the plaintiff." *See Day*, 345 N.W.2d at 357. Allowing this evidence "expresses and effectuates the long-standing principle that a defendant should not be liable for injuries (s)he did not proximately cause." *Dunn*, 530 A.2d at 389.

Also, as other courts have clarified, the seat belt evidentiary rule "merely allow[s] the jury to consider the information." *Pasakarnis*, 451 So.2d at 454; *Wemyss v. Coleman*, 729 S.W.2d 174, 177 (Ky. 1987) ("The issue is not whether our Court believes that the law should require automobile occupants to wear seat belts, or should not. The issue is an evidentiary one."). To call it the "seat belt defense" is a misnomer. Allowing seat belt use evidence is not a "defense" to liability and does not "create a duty" to use a seat belt. *See Ins. Co. of N. Am. v. Pasakarnis*, 451 So. 2d 447, 454 (Fla. 1984); *Law*, P.2d at 1141 ("Nonuse of a seat belt is not a question of duty but rather a matter of conduct which only occasionally impinges on others."). The defendant must prove "the plaintiff did not use an available and operational seat belt, that the plaintiff's failure to use the seat belt was unreasonable under the circumstances, and that there was a causal relationship between the injuries sustained by the plaintiff and plaintiffs' failure to buckle up." *Id.* at 454.

"Excluding evidence of a party's failure to wear a seat belt [has been] particularly unfair in rollover cases in which a vehicle overturns after a severe driving maneuver or collision, often resulting in the ejection of unbelted occupants." *See* Geissl & Varney, *Admissibility of Seat Belt Nonuse Evidence*, *supra*, at 76. In order for a jury to reach a just decision on damages, it needs to be informed through responsible expert evidence of the impact that not using a seat

belt had on the plaintiff's injuries. Here, it is possible that the tragic events related to plaintiffs being thrown from their vehicle could have been avoided. These are the types of decisions that other States allow their juries to make.

III. TEXAS LIABILITY LAW SHOULD REINFORCE THE IMPORTANT PUBLIC POLICY OF ENCOURAGING SEAT BELT USE

Federal law, state law and sound public policy all strongly favor seat belt use. Seat belts save lives. The Centers for Disease Control and Prevention has reported that seat belts "are the most effective intervention for protecting motor vehicle occupants." See *Vital Signs: Nonfatal, Motor Vehicle – Occupant Injuries (2009) and Seat Belt Use (2008) Among Adults – United States*, Morbidity and Mortality Weekly Report, CDC, Jan. 7, 2011 (finding seat belts reduce the risk for fatal injuries by approximately 45 percent and serious injuries by approximately 50 percent). The universal public policy of encouraging seat belt use should not stop at the water's edge of this State's tort law.

Seat belts are easy to use and they work. In Texas, which has among the highest seat belt usage rates in the country at 94 percent, *see Who Still Won't Click It*?, Texas Department of Transportation Traffic Safety (May 12, 2014), seat belts save about 1,500 lives each year. *See* Traffic Safety Facts Research Note, Lives Saved in 2008 by Restraint Use and Minimum Drinking Age Laws, NHTSA, DOT HS 811 153 (May 2010) (reporting that 1,477 people age five and older were saved

in Texas by seat belt use). Yet, NHTSA estimates that 100 percent compliance would save about another 300 lives per year. *See id.* The briefs submitted by Appellants/Defendants and *Amicus* Texas Association of Defense Counsel provide a number of stark examples and statistics for how effective seat belts are in protecting people of all ages and sizes.

The importance of seat belt use has been further underscored by the innovative features that car manufacturers continually introduce to protect passengers. Over the past thirty years, many safety features that car manufacturers have developed can be highly effective only when coupled with seat belt use. For example, seat belts, air bags, and head restraints all work together to protect a car's occupants in a crash. These passive safety features create a "life space," which is "a protected area around vehicle occupants within which the chances of escaping a crash with minimal injuries are more likely." *See Passive Safety Features*, Brain on Board, http://brainonboard.ca/safety_features/passive_ safety_features.php (noting that un-belted drivers will not stay in this safe space).

Air bags, in particular, have been designed to factor in seat belt use when the sensors decide when and how much to deploy. *See* Advanced Frontal Air Bags, NHTSA, http://www.safercar.gov/Vehicle+Shoppers/Air+Bags/Advanced+Frontal +Air+Bags:+Know+The+Facts+-+They+Should+Save+Your+Life (describing air bags as "a supplemental restraint system" to seat belts). Frontal air bags have been

a huge success and are credited with preventing between 2,200 and 2,500 deaths each year. *See* Traffic Safety Facts: Lives Saved in 2012 by Restraint Use and Minimum Drinking Age Laws, NHTSA, DOT HS 811 851, at 1 (Nov. 2013).[6] In Texas, air bags save more than 200 lives each year. *See* Traffic Safety Facts, DOT HS 811 153. However, air bags cannot be as effective if a person is not being held firmly in this "life space" by a seat belt.[7]

Car manufacturers are continuing to work diligently to further reduce injuries, but these and other such improvements will be most effective only when people follow their obligation to use a seat belt. *See, e.g.*, Lei Zhou, *The Rise of Safety Innovations in Intelligent Mobility*, Deloitte Rev., at 147 (2013) (discussing developing technology to help seat belts and air bags become "predictive" so they can react differently to different types of crashes); Intelligent Passive Safety Technologies: Best Possible Protection for Everyone, Continental Chassis & Safety Division, at 8, http://www.continental-automotive.cn/www/download/automotive_de_de/general/chassis/presse/download/passive_safety_en.pdf (highlighting research that might allow technology, within milliseconds, to send signals "whether to tighten the safety belts or activate the airbags, and if so, how

[6] *See also* Lives Saved FAQs, NHTSA, DOT HS 811 105, at 4 (Dec. 2009); Donna Glassbrenner, *Estimating the Lives Saved By Safety Belts and Air Bags*, NHTSA, Paper No. 500, at 1.

[7] Seat belt use evidence has been admissible in other States when a plaintiff was not using a seat belt and alleged that the air bag caused injuries. *See Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439 (4th Cir. 2001); *Gable v. Gates Mills*, 816 N.E.2d 1049 (Ohio 2004).

much force [they need] to exert"); Alex Nishimoto, *The ABCs of Vehicle Safety: Tech That Keeps Your Car Shiny Side Up*, MotorTrend (Apr. 4, 2013), http://www.motortrend.com/features/consumer/1304_the_abcs_of_vehicle_safety/ (reporting that inflatable seat belts that can spread the force of a crash over a larger area to reduce injuries are almost on the market). Tort law's promotion of public safety should reinforce the obligation to use a seat belt, not contradict it.

PRAYER

For the foregoing reasons, *Amici* request that this Court reverse the El Paso Court of Appeal and allow seat belt use evidence to be admissible when relevant to the harms alleged.

Respectfully submitted,

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