IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

NO.: S22G0527

GEORGIA CVS PHARMACY, LLC
PETITIONER-DEFENDANT

v.

JAMES CARMICHAEL
RESPONDENT-PLAINTIFF.

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE GEORGIA CHAMBER OF COMMERCE

Jonathan D. Urick
Andrew R. Varcoe
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062
Telephone: (202) 463-5337

Judson H. Turner
Georgia Bar No. 719485
GILBERT HARRELL SUMERFORD & MARTIN, P.C.
777 Gloucester Street, Suite 200
Brunswick, Georgia 31520
Telephone: (912) 265-6700
Facsimile: (912) 264-0244
jturner@ghsmlaw.com

Val Leppert
Georgia Bar No. 864440
Martha Banner Banks
Georgia Bar No. 127281
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100
vleppert@kslaw.com
bbanks@kslaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Georgia Chamber of Commerce, Inc. ("Georgia Chamber") serves the unified interests of its nearly 50,000 members—ranging in size from small businesses to Fortune 500 corporations—covering a diverse range of industries across all of Georgia's 159 counties. The Georgia Chamber is the State's largest business advocacy organization and is dedicated to representing the interests of both businesses and citizens in the State. Established in 1915, the Georgia Chamber's primary mission is creating, keeping, and growing jobs in Georgia. The Georgia Chamber pursues this mission, in part, by aggressively advocating the business and industry viewpoint in the shaping of law and public policy to ensure that Georgia is economically competitive nationwide and in the global economy.

Many members of the U.S. Chamber and all members of the Georgia Chamber (collectively, the "Chambers") are businesses operating in Georgia. In this case, the

Court of Appeals' conclusions regarding the scope of premises liability and application of Georgia's apportionment law are particularly troubling for businesses. Such rulings would effectively require commercial establishments to bear near-total fault for injuries that directly result from intentional crimes, prohibiting any apportionment of damages to the criminal assailant. This result is untenable: it disregards the apportionment statute's text and purpose and poses grave fairness concerns. Accordingly, the Chambers urge this Court to reverse.

INTRODUCTION AND SUMMARY OF ARGUMENT

James Carmichael brought this premises-liability action against Georgia CVS Pharmacy ("CVS") and other defendants after an unknown criminal assailant robbed and shot him in a CVS parking lot. The other defendants were eventually dismissed, and the case proceeded to trial only against CVS. The jury awarded Mr. Carmichael $45 million, apportioning 0% fault to Mr. Carmichael's assailant, 5% fault to Mr. Carmichael, and 95% fault to CVS. The trial court entered judgment against CVS for $42,750,000, and the Court of Appeals affirmed. As relevant here, the Court of Appeals concluded that (i) the criminal attack on Mr. Carmichael was reasonably foreseeable, such that CVS could be held liable for it; (ii) the jury's decision to apportion no fault to the assailant was consistent with the evidence, and (iii) alternatively, even if the jury's apportionment lacked evidentiary support, any resulting error was harmless because Georgia's apportionment statute does not apply to this case anyway.

All three rulings are erroneous. But given that other amici curiae will address the first point, the Chambers focus their briefing on the second and third issues presented. As to the second issue, a jury cannot reasonably find that a criminal assailant bears no fault where, as here, undisputed evidence establishes that the assailant initiated a violent confrontation and shot the plaintiff, directly causing his injuries. The Court of Appeals' rationale for upholding the jury's assignment of 0% fault to the assailant was that the jury "either found that the [assailant] ended up shooting in self-defense and was worthy of no fault or that the jury instead assigned the amount of fault it would have assigned to the [assailant] to Carmichael instead." *Georgia CVS Pharmacy, LLC* v. *Carmichael*, 362 Ga. App. 59, 71 (2021).

This explanation is incompatible with (A) the law of self-defense, (B) the law of premises liability, (C) this Court's precedent and the weight of authority from other jurisdictions, and (D) the public policy of Georgia. To be clear, the evidence is undisputed that the assailant initiated a violent attack against Mr. Carmichael. The assailant thus cannot be found to have acted in self-defense, let alone avoid all blame for shooting Mr. Carmichael. But even assuming *arguendo* that the assailant was indeed blameless, as the Court of Appeals suggested, then CVS had no duty to protect Mr. Carmichael from the assailant under premises-liability law. This Court and many other courts have rejected the notion that a criminal assailant can be found without blame in similar scenarios. Indeed, in *Couch v. Red Roof Inns, Inc.*, this Court explicitly stated that an assailant who intentionally robs and assaults a victim "is, at the very least, partially

'at fault' for the brutal injuries inflicted" as a result. 291 Ga. 359, 359 (2012). Allowing the jury's bizarre apportionment to stand would sanction injustice, forcing businesses to bear a disproportionate share of damages caused by intentional criminal misdeeds, and ultimately harm Georgia businesses and consumers alike.

This Court should also reverse the Court of Appeals' alternative holding that apportionment of damages based on nonparty fault was unavailable anyway because the case went to trial against only one defendant. This conclusion overlooks the plain language of Georgia's apportionment statute, O.C.G.A. § 51-12-33, which provides for apportionment in all cases "brought," *i.e.*, initiated, against multiple defendants, regardless of whether those parties remain in the case at the time of trial. The Court of Appeals' atextual holding licenses gamesmanship and poses grave fairness concerns. It permits plaintiffs to reinstate joint and several liability, despite the General Assembly's severe restriction of that concept in prior amendments to the apportionment statute, leaving deep-pocketed defendants holding the bag for the entire damages verdict, even when those defendants caused only a small fraction of the harm.

ARGUMENT AND CITATION OF AUTHORITIES

I. No Rational Jury Could Assign 0% Fault to an Intentional Tortfeasor Whose Criminal Acts Directly Caused the Plaintiff's Injuries

The jury's verdict apportioning no fault to the assailant who shot Mr. Carmichael is irrational, and the Court of Appeals' attempt to explain the verdict defies logic. While acknowledging that "the jury's decision to apportion no fault to the assailant may well

be considered unusual," the Court of Appeals grasped for "some possible interpretation[]" consistent with the evidence presented in this case. *Carmichael*, 362 Ga. App. at 71, 72. Noting that Mr. Carmichael "attempted to shoot the robber first," the Court of Appeals theorized that the jury "either found that the [assailant] ended up shooting in self-defense and was worthy of no fault or that the jury instead assigned the amount of fault it would have assigned to the [assailant] to Carmichael instead." *Id.* at 71.

There are multiple problems with the Court of Appeals' justifications for the jury's verdict.

A. The Court of Appeals' theory contradicts the law of self-defense.

The Court of Appeals' own description of the incident and the evidence presented at trial contradict the notion that the assailant could be blameless because he shot Mr. Carmichael in "self-defense." As the Court of Appeals explained, the attack began when the assailant "jumped into Carmichael's car, put a 'big' gun to Carmichael's head, threatened to kill him, and said, 'Give me your money.'" *Id.* at 60. In response to this armed threat, Mr. Carmichael "'took everything out' and pleaded for his life" before "grabb[ing] his own pistol and attempt[ing] to shoot [the assailant], but the gun jammed." *Id.* After that, "[t]he perpetrator then fired several rounds into Carmichael's stomach, back, and shoulder." *Id.* at 60. These facts do not allow the conclusion that the assailant bears no fault because he merely acted in self-defense.

Under Georgia law, "[a] person is not justified in using force [to defend himself against another] if he . . . [w]as the aggressor." O.C.G.A. § 16-3-21(b). Because the undisputed evidence presented at trial demonstrates that the assailant was the aggressor who initiated a violent confrontation, his shooting of Mr. Carmichael cannot be justified as self-defense. *See id.*; *Wainwright v. State*, 305 Ga. 63, 72 (2019) (concluding that a defendant was not entitled to a jury instruction on self-defense when "the evidence show[ed] [he] initiated the assault and robbery of the victims by aggressively approaching [one victim] and pointing a gun in his face before demanding [the other victim] to empty his pockets at gunpoint").

Beyond that, the Court of Appeals' explanation for the jury's verdict is also irreconcilable with Mr. Carmichael's own right to defend himself. After all, the assailant attacked Mr. Carmichael and threatened his life with a "big gun." *Carmichael*, 362 Ga. App. at 60. Georgia permits the use of deadly force in self-defense when a person "reasonably believes that such force is necessary to prevent death or great bodily injury to himself." O.C.G.A. § 16-3-21(a); *see also id.* § 16-3-23.1 (providing that a person entitled to use "deadly force" "has no duty to retreat and has the right to stand his or her ground"). Once the assailant put a gun to Mr. Carmichael's head and threatened to kill him, Mr. Carmichael was entitled to defend himself using his own weapon. *See* §§ 16-3-21(a), 16-3-23.1; *State v. Green*, 289 Ga. 802, 802–04 & n.1 (2011) (concluding that a defendant was immune from criminal prosecution for murder based on self-defense when he stabbed his assailant in response to a violent attack).

Contravening these principles, the Court of Appeals suggested that the jury could rationally "assign[] the amount of fault it would have assigned to the shooter to Carmichael instead." *Carmichael*, 362 Ga. App. at 71. In other words, Mr. Carmichael was at fault because he defended himself against the attack, and the assailant was blameless. This conclusion turns the law upside down. Defending oneself from a violent, armed assailant does not render that assailant blameless and transpose liability to the victim. *See* O.C.G.A. § 16-3-24 (providing that a person who acts in self-defense is "justified" and "shall be immune from criminal prosecution therefor").

B. The Court of Appeals' theory contradicts the law of premises liability.

The Court of Appeals' affirmance of apportionment also contradicts the law of premises liability. Under that doctrine, a business owner "is not an ensurer of an invitee's safety." *Agnes Scott Coll., Inc. v. Clark*, 273 Ga. App. 619, 621 (2005). Business owners have a duty to protect customers from "dangers" posed by third-party criminals only when those dangers are reasonably foreseeable based on the occurrence of substantially and qualitatively similar prior crimes. *See, e.g., Tyner v. Matta-Troncoso*, 305 Ga. 480, 485 n.7 (2019) ("[P]laintiffs must show that the landlord has a reason to anticipate or foresee the harmful acts of others based on prior experience with similar types of acts that have the landlord superior knowledge of the danger posed."); *Se. Stages, Inc. v. Stringer*, 263 Ga. 641, 644 (1993) (rejecting liability when "prior incidents alerted [the defendant] that violent passengers presented a possible source of danger to

other passengers, [but] there was no evidence that conditions existing on the . . . route travelled by the decedent were likely to expose passengers to a reasonably foreseeable danger.").

Here, the jury found Mr. Carmichael's assailant blameless. But if the assailant was indeed blameless, he cannot be a "dangerous character[]" from whom CVS had a duty to protect its customers. *Retail Prop. Tr. v. McPhaul*, 359 Ga. App. 345, 348 (2021). And if CVS had no duty to protect Mr. Carmichael from the assailant, CVS cannot be liable to Mr. Carmichael under a theory of premises liability. *See id.*; *Tyner*, 205 Ga. at 485 n.7; *Stringer*, 263 Ga. at 643. A finding of no fault by the assailant should thus necessitate a finding of no fault by CVS.

At least one Georgia jurist has recognized this absurdity. In *Goldstein, Garber & Salama, LLC v. J.B.*, the Court of Appeals considered a jury verdict apportioning no fault to a nurse anesthetist who assaulted a patient under anesthesia and 100% fault to the nurse's employer. 335 Ga. App. 416, 416–17 (2015), *rev'd*, 300 Ga. 840 (2017). Writing in dissent, Judge Ray criticized the majority's conclusion that the employer had waived appellate review of its apportionment challenge. *Id.* at 437–41 (Ray, J., dissenting). Concluding that the apportionment was unsupported by the evidence and required a new trial, Judge Ray observed:

> A finding that [the nurse] did not contribute to [plaintiff's] injuries is wholly incomprehensible. A finding that [the nurse] was not at fault would logically be a finding that he did nothing wrong. If he did nothing wrong by molesting [plaintiff], how then can [the employer] 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 fault on [the employer's] part.

Id. at 440. This Court reversed the Court of Appeals in *Goldstein* on other grounds and consequently declined to address apportionment, leaving the issue unresolved. *See* 300 Ga. at 847. But the instant action presents the issue yet again. If this Court concludes (or assumes without deciding) that the evidence presented at trial allows a finding that the assailant was blameless, the Court should make clear that a landowner has no duty to protect an invitee from a blameless person.

Similarly, this Court should hold that business owners are not required to protect patrons from themselves. If, as the Court of Appeals suggested, Mr. Carmichael's own actions prompted the shooting, apportioning near-total fault to CVS makes little sense. Such apportionment essentially holds CVS liable for failing to prevent Mr. Carmichael's own conduct, imposing on businesses a duty to protect customers from the consequences of their own violent actions. This result is incompatible with premises liability law and must be rejected.

C. The Court of Appeals' theory contradicts this Court's precedent and the weight of authority from other jurisdictions.

The jury's apportionment also conflicts with this Court's case law, which suggests that an intentional actor is responsible for harms directly resulting from his conduct. In *Couch v. Red Roof Inns, Inc.*, this Court addressed whether a jury could consider the fault of a criminal assailant when apportioning damages to a property owner charged with negligently failing to prevent the assault. 291 Ga. 359, 359 (2012). Answering in

the affirmative, this Court indicated that such assailants *should* bear some fault for injuries they inflict: an "assailant who evades hotel security to intentionally abduct, rob, and assault a hotel guest 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 . . . for purposes of apportioning damages among all wrongdoing parties." *Id.* at 359. So too here. Because the undisputed evidence demonstrated that the assailant committed a robbery and intentionally fired his gun at Mr. Carmichael, directly causing severe injuries, the assailant must be at fault to some degree.

Other jurisdictions permitting apportionment between intentional and negligent actors have reached a similar conclusion. These courts have held that intentional tortfeasors who directly cause plaintiffs' harm must be assigned fault, and they have flatly rejected apportionments finding otherwise. In *Goldstein v. Chateau Orleans, Inc.*, for example, the Louisiana Court of Appeal considered an apportionment of full fault to the operator of a timeshare facility where the plaintiff was attacked by three unknown assailants and no fault to the attackers. 331 So.3d 1027, 1040–43 (La. App. 4 Cir. 2021). Vacating this apportionment, the court observed that "an intentional tortfeasor must be assigned some portion of fault," and "[s]ince no fault was assigned to the assailants in the current case, the jury's allocation of fault was clearly wrong." *Id.* at 1041.

Similarly, in *Blazovic v. Andrich*, the New Jersey Supreme Court analyzed a jury verdict apportioning 30% fault to a plaintiff assaulted in a bar's parking lot and 70%

percent fault to the bar. 590 A.2d 222, 224 (N.J. 1991). The court held this verdict "incomplete because the jury's apportionment of fault excluded the intentional tortfeasors" who attacked the plaintiff and thereby "ignored the fault of parties that obviously shared the blame for plaintiff's injuries." *Id.* at 232.

Likewise, in *Dep't of Health & Soc. Servs. v. Mullins*, the Alaska Supreme Court vacated judgment on a jury verdict that apportioned 0% fault to grandparents who molested young children and 95% fault to the state agency that held legal custody and failed to prevent the abuse. 328 P.3d 1038, 1041–42 (Alaska 2014). The court concluded, "[I]t is irrational to assign the majority of fault to a negligent tortfeasor when both negligent and intentional tortfeasors are responsible for harm suffered by a plaintiff." *Id.* at 1042.

Numerous other courts have reached similar conclusions. *See, e.g., Scott v. Cnty. of Los Angeles*, 27 Cal. App.4th 125, 147–49 (Cal. Ct. App. 1994) (when vacating apportionment of 1% fault to a child abuser and 99% to the county and its social worker, holding that "the evidence cannot be stretched to support an apportionment of 99 per cent of the fault to the negligent defendants and only 1 per cent to the [abuser]"; "no reasonable jury could conclude [the abuser's] fault was as trifling as the jury's allocation would suggest"); *Pamela B. v. Hayden*, 31 Cal. Rptr.2d 147, 159–60 (Cal. Ct. App. 1994) (vacating, on similar grounds, apportionment of 4% fault to rapist, 1% fault to aider and abettor, and 95% fault to the owner of the property where assault occurred), *review granted*, 880 P.2d 112, *review dismissed*, 889 P.2d 539 (Cal. 1995); *Roseboro*

v. N.Y.C. Transit Auth., 10 A.D.3d 524, 525–26 (N.Y. App. Div. 2004) (when vacating apportionment of 20% fault to intentional assailants who beat plaintiff and chased him onto subway tracks and 80% fault to transit authority whose clerk who was asleep at his post and failed to call for police assistance, observing that "[h]owever blameworthy its sleeping clerk may have been, defendant's share of the responsibility cannot approach the degree of culpability of decedent's attackers"); *Stevens v. N.Y.C. Transit Auth.*, 19 A.D.3d 583, 584–85 (N.Y. App. Div. 2005) (upon vacating apportionment of 40% fault to subway train operator who failed to stop train in time to avoid hitting plaintiff and 60% fault to assailant who pushed plaintiff onto the train tracks, noting that "[a]ny negligence by the train operator cannot approach the culpability of the perpetrator"); *Wallmuth v. Rapides Parish*, 813 So.2d 34, 345 n.2 (La. 2002) (when examining school board's fault for incident in which one student attacked another in school locker room, concluding that trial court committed "legal error" in apportioning 100% fault to school board and 0% fault to attacker).

Consistent with these decisions and with its holding in *Couch*, this Court should make clear in this case that an intentional—indeed criminal—wrongdoer whose actions directly caused the plaintiff's injuries must be assigned fault.

D. The Court of Appeals' theory contradicts Georgia public policy.

The Court of Appeals' decision to uphold the zero-fault apportionment in this case also has deleterious implications for Georgia businesses and consumers alike. For one, the apportionment is fundamentally unfair, subverting the very purpose of

Georgia's apportionment law. The statute was designed "to ensure that each tortfeasor responsible for the plaintiff's harm, including the plaintiff himself, be held responsible only for his or her respective share of the harm." *Wade v. Allstate Fire & Cas. Co.*, 324 Ga. App. 491, 494 (2013). Georgia's apportionment regime reflects the General Assembly's determination that a defendant should be liable only for the consequences of its own tortious act or omission, not for the tortious acts or omissions of others.

The apportionment here upends this intent. By assigning no fault to the assailant, and nearly all fault to CVS, it imposes sweeping liability on a party who was, at most, merely negligent (although, as other *amici* explain, CVS should not be held liable in this case at all, as Mr. Carmichael's injuries were not reasonably foreseeable). Shifting the blame from the criminal assailant that directly caused Mr. Carmichael's injuries, the apportionment forces CVS to shoulder a percentage of fault plainly disproportionate to its culpability.

If allowed to stand, this inequitable outcome would also create an unstable, adverse commercial climate for businesses operating (or considering operating) in Georgia and ultimately harm consumers themselves. Given the recent trend of massive damages awards in Georgia premises-liability cases, businesses risk substantial, unpredictable liability for injuries that occur on their properties. *See, e.g., Cheston-Thornton v. HACC Pointe S., Inc.*, No. 2014CV01498D (Ga. Super. Ct. Clayton Cnty. May 22, 2018) (awarding $1 billion to plaintiff in action against apartment complex where plaintiff was sexually assaulted); *Taylor v. The Kroger Co.*, No. 2015-A-57407-3 (Ga. State

Ct. Dekalb Cnty. Apr. 18, 2019) (awarding nearly $70 million to plaintiff in an action against grocery store in which parking lot plaintiff was shot); *Estate of Purdue v. Quick Stop and Deli Inc. d/b/a Quick and Cheap Food Mart*, No. 2018-EV-003807-L (Ga. State Ct. Fulton Cnty. Aug. 19, 2019) (awarding $52 million to plaintiff in action against convenience store where plaintiff was shot). Indeed, a new study reveals that in 2020, Georgia's tort costs totaled nearly $16 billion, representing the country's 9th highest tort costs as a percentage of state gross domestic product (2.56%) and the 7th highest tort costs per household ($4,157).[1] And according to a recent survey of corporate in-house counsel published by the U.S. Chamber's Institute for Legal Reform, the Georgia courts rank 41st out of the 50 states in terms of overall perceived fairness and reasonableness, and 44th on damages.[2]

Faced with the prospect of bearing total, or near-total, fault for serious injuries directly inflicted by third-party criminal assailants, businesses may well choose to operate elsewhere. Eighty-nine percent of corporate survey respondents reported that

---

1 *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System*, U.S. Chamber, Institute for Legal Reform 17, 19–20 (Nov. 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/11/Tort-Costs-in-America-An-Empirical-Analysis-of-Costs-and-Compensation-of-the-U.S.-Tort-System.pdf ("*Tort Costs in America*").

2 *2019 Lawsuit Climate Survey: A Survey of the Fairness and Reasonableness of State Liability Systems*, U.S. Chamber, Institute for Legal Reform 1-2, 16 (Sept. 2019), available at https://instituteforlegalreform.com/wp-content/uploads/2020/10/2019_Harris_Poll_State_Lawsuit_Climate_Ranking_the_States.pdf.

a state's litigation environment is likely to impact important business decisions, including where to locate or do business. *Tort Costs in America*, *supra*, at 4. This prospect is particularly grave for smaller, locally owned businesses more likely to be rendered insolvent by an enormous verdict. The same is true for businesses operating in areas disproportionately impacted by violent crime, which are more prone to face premises liability actions based on third-party criminal conduct. Upholding the present apportionment would expose these businesses to devastating tort liability for harms caused by others, thereby disincentivizing their operation and discouraging investment in under-resourced communities. This, in turn, harms consumers, narrowing their options for obtaining needed goods and services.

In sum, the apportionment of no fault to Mr. Carmichael's assailant, yet near-total fault to CVS, is not just "unusual," as the Court of Appeals conceded; it is untenable as a matter of law and a matter of fact. This Court should reverse.

II. The Court of Appeals Erred in Concluding That No Right to Apportionment Exists Under O.C.G.A. § 51-12-33(b) When a Case Is Filed Against Multiple Entities but Tried Against a Single Defendant

As an alternative holding, the Court of Appeals concluded that the jury's lack of apportionment to the assailant was harmless because Georgia's apportionment statute, O.C.G.A. § 51-12-33(b), does not even apply to this case. *See Carmichael*, 362 Ga. App. at 71–72. To that end, the Court of Appeals reasoned that nonparty fault apportionment is unavailable under the statute when a lawsuit is filed against multiple defendants but "proceed[s] to trial" against only a single defendant. *Id.* at 72. In other

words, the availability of nonparty fault apportionment depends on the number of defendants at the time of trial, not at the time the lawsuit is filed.

This was error. The Court of Appeals' alternative holding overlooks the plain language and statutory context of § 51-12-33(b), which make clear that the relevant inquiry is whether multiple defendants have been sued, not whether multiple defendants proceed to trial.

A. The Court of Appeals' interpretation disregarded the plain meaning of § 51-12-33(b), which unambiguously applies to all actions filed against multiple defendants.

The Court of Appeals vaguely referenced § 51-12-33(b), but did not quote, excerpt, or otherwise examine its text. *See Carmichael*, 362 Ga. App. at 71–72. In so doing, the Court of Appeals misapplied basic principles of statutory construction. "When determining the meaning of a statute, [Georgia courts] start with the statutory text itself," *Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC*, 312 Ga. 350, 353 (2021), and "must presume that the General Assembly meant what it said and said what it meant" by "afford[ing] the statutory text its plain and ordinary meaning," "view[ing] the statutory text in the context in which it appears," and "read[ing] the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would." *Plummer v. Plummer*, 305 Ga. 23, 26 (2019).

The text of the applicable version of § 51-12-33(b) states as follows:

> *Where an action is brought* against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant

> to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

O.C.G.A. § 51-12-33(b) (emphasis added).[3]

On its face, § 51-12-33(b) requires the jury to apportion damages in actions "brought" against multiple defendants. *Id.* "Brought" is the past tense and present participle of "bring," which means "to cause to occur as a consequence or concomitant." *Bring*, AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2004). To "bring an action," moreover, is "[t]o sue" or to "institute legal proceedings." *Bring an Action*, BLACK'S LAW DICTIONARY (11th ed. 2019). Accordingly, an action is "brought against more than one person" when it is initiated against multiple defendants through the filing of a complaint. *See* O.C.G.A. § 9-11-3(a) ("A civil action is commenced by filing a complaint with the court."); *Jordan v. Bosworth*, 123 Ga. 879, 880 (1905) ("There is no substantial difference between bringing a suit, and commencing a suit.").

---

3 Unless otherwise indicated, all citations to O.C.G.A. § 51-12-33 in part II refer to the version of the statute in effect while this case was pending before the Fulton County State Court and the Court of Appeals, and not the current version of the statute, which was amended in 2022 and does not apply to this appeal. *See* O.C.G.A. § 51-12-33(b) (2005), *amended by* Laws 2022, Act 876, § 1, eff. May 13, 2022 (H.B. 961); Laws 2022, Act 876 § 2, eff. May 13, 2022 ("This Act shall apply to all cases filed after the effective date of this Act."). The 2022 amendment made clear that apportionment based on non-party fault is available in all Georgia tort cases. *See* Laws 2022, Act 876, § 1, eff. May 13, 2022 (H.B. 961) (providing for such apportionment "[w]here an action is brought against *one or more persons* for injury to person or property" (emphasis added)).

Nothing in the text of § 51-12-33(b) indicates that apportionment is unavailable when a lawsuit proceeds to trial against a single defendant. Rather, the dispositive inquiry is whether an action is initiated, *i.e.*, whether a complaint is filed, against more than one defendant. Here, the complaint named multiple defendants. *See Carmichael*, 362 Ga. App. at 60 n.1. The Court of Appeals therefore erred when it concluded that the statute did not apply.

Instead of discussing the statutory language, the Court of Appeals relied on *Schriever v. Maddox*, 259 Ga. App. 558 (2003), to conclude that allocation to nonparties was not available because only CVS remained a defendant at trial. *Carmichael*, 362 Ga. App. at 72. But *Schriever* is inapposite—it analyzed a prior version of the statute that permitted apportionment only among "the persons who are liable," *i.e.*, defendants against whom the jury returned a verdict of liability. O.C.G.A. § 51-12-33(a) (2000), *amended by* Laws 2005, Act 1, § 12, eff. Feb. 16, 2005; *see* 259 Ga. App. at 561 (citing § 51-12-33(a)). In other words, at the time *Schriever* was decided, Georgia law did not even allow for nonparty apportionment. *See Universal Underwriters Grp. v. S. Guar. Ins. Co.*, 297 Ga. 587, 588 (2009) (explaining that "O.C.G.A. § 51-12-33(a) provided for apportionment only where the alleged third-party tortfeasor was a party to the action"); *Fraker v. C.W. Matthews Contracting Co., Inc.*, 272 Ga. App. 807, 810 (2005) (citing *Schriever* for the proposition that the apportionment statute "does not authorize a jury to apportion damages against a non-party"). *Schriever*'s holding is thus immaterial to version of § 51-12-33 applicable here, which expressly permits apportionment to

nonparties. O.C.G.A. § 51-12-33(c) ("In assessing percentages of fault, the trier of fact 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.").

Mr. Carmichael's additional contention is equally unavailing. He suggests that an action is "brought" against a single person when an amended complaint drops previously designated defendants and names just one defendant. *See* Opp. to Pet. for Cert. at 22. But Mr. Carmichael never filed an amended complaint. As a result, his argument does not apply here. And in any event, under the plain language of § 51-12-33(b), the dispositive inquiry is whether a plaintiff "brings an action"—that is, files a complaint—against multiple defendants at any point in the litigation. An action is brought against multiple defendants whenever the plaintiff names multiple defendants in a complaint, whether initial or amended. An amended pleading's subsequent removal of defendants, however, does not change the fact than an action was "brought" against them and does not, therefore, prevent apportionment to them.

B. The Court of Appeals' counter-textual interpretation also overlooked critical statutory context, generating unjust consequences that will improperly harm Georgia litigants and burden the courts.

The Court of Appeals also overlooked the broader legal context of § 51-12-33(b), which is another "critical consideration" in determining statutory meaning. *Olevik v. State*, 302 Ga. 228, 236 (2017). Viewed in full context, § 51-12-33(b) reveals the General

Assembly's intent to largely abolish joint and several liability, instead providing for proportional allocation of fault and damages in most tort actions. In 2005, the legislature revised the statute to provide for apportionment of damages according to "degree" or "percentage of fault." Laws 2005, Act 1, § 1, 12, eff. Feb. 16, 2005 (S.B. 3). As amended, the statute therefore rejected joint and several liability, along with contribution, for most cases. *Id.* § 12 ("Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution."); *see also McReynolds v. Krebs*, 290 Ga. 850, 852 (2012) ("[T]he statute reiterates this point by saying that damages 'shall not be a joint liability among the persons liable.'" (quoting § 51-12-33(b))).

This shift aimed for an equitable distribution of fault, intending "to ensure that each tortfeasor responsible for the plaintiff's harm . . . be held responsible only for his or her respective share of the harm." *Wade*, 324 Ga. App. at 494. "Simply put, fairness is the aim of Georgia's apportionment statute." Michael Koty Newman, *The Elephant in the Room: Apportionment to Nonparties in Georgia*, 50 GA. L. REV. 669, 671 (2016).

By holding § 51-12-33(b) inapplicable to actions filed against multiple entities but tried against a single defendant, the Court of Appeals effectively reinstated a scheme of joint and several liability in a significant subset of Georgia tort cases. This encourages gamesmanship, permitting plaintiffs to dictate whether a defendant can avail itself of apportionment. Under the Court of Appeals' regime, a plaintiff may sue multiple

parties—*e.g.*, to foreclose diversity jurisdiction and thwart removal to federal court—then dismiss all but one defendant before trial, thereby preventing that defendant from apportioning damages to others who contributed to the injury at issue. This procedural ploy leaves the remaining defendant responsible for the full damages award, even if it contributed only slightly to the harm. Such a result encourages plaintiffs to collect settlements from all but the most well-resourced defendant. *See* Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 VAND. L. REV. 257, 271 (2013) ("[T]raditional joint and several liability rules encourage plaintiffs to seek out a 'deep-pocket' defendant, even if that defendant contributed only modestly to causing the damages."); Gerald W. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 DAYTON L. REV. 267, 374 (1996) ("Tort law . . . should not encourage a suit only against well-heeled defendants. This is precisely what happens, however, when apportionment is unavailable and joint and several liability is imposed.").

If left uncorrected, the Court of Appeals' decision would not only undermine the legislature's intent and lead to unjust results, but also would consume judicial resources, spurring back-end litigation in cases brought against multiple parties but tried against a single defendant. Without apportionment, those remaining defendants would be left to seek contribution from non-parties who also caused the plaintiffs' damages. Contribution forces those defendants back to court, adding an additional phase to the lawsuit. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212 (1994) (observing that

requiring "the other defendant . . . to sue the settled defendant for contribution . . . burdens the courts with additional litigation"). Moreover, contribution claims can offer tenuous prospects of recovery—such claims "are often fruitless when the other tortfeasors lack resources." Shepherd, *supra*, at 271; *see also* Robert C. Riter, Jr. & David Pfeifle, *An Invittion for Lawyers' Participation in Civil Justice Reform*, 42 S.D. L. Rev. 243, 252 (1997) ("Traditional joint and several liability has been criticized because the right of contribution among joint-tortfeasors does not protect solvent defendants from bearing the risk of insolvent co-defendants or joint-tortfeasors.").

In short, this Court should reject the Court of Appeals' conclusion that O.C.G.A. § 51-12-33(b) does not provide for apportionment in cases tried against a single defendant. This holding is contrary to the statute's text and context, and it produces a flurry of undesirable consequences for Georgia's judicial system.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted this 1st day of December, 2022.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Jonathan D. Urick
Andrew R. Varcoe
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062
Telephone: (202) 463-5337

GEORGIA CHAMBER OF COMMERCE

Judson H. Turner
Georgia Bar No. 719485
GILBERT HARRELL SUMERFORD & MARTIN, P.C.
777 Gloucester Street, Suite 200
Brunswick, Georgia 31520
Telephone: (912) 265-6700
Facsimile: (912) 264-0244
jturner@ghsmlaw.com

KING & SPALDING LLP

/s/ Val Leppert
Val Leppert
Georgia Bar No. 864440
Martha Banner Banks
Georgia Bar No. 127281
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100
vleppert@kslaw.com
bbanks@kslaw.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America and Georgia Chamber of Commerce

CERTIFICATE OF SERVICE

It is hereby certified that on this 1st day of December, 2022, the foregoing **AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA** has been served upon:

Laurie Webb Daniel
Matthew D. Friedlander
WEBB DANIEL FRIEDLANDER LLP
1201 West Peachtree Street NW
Suite 2625
Atlanta, Georgia 30309

Peter Andrew Law
Brian Colty Kaplan
LAW & MORAN
563 Spring Street
Atlanta, Georgia 30308

Michael Brian Terry
Naveen Ramachandrappa
BONDURANT, MIXSON & ELMORE, LLP
1201 West Peachtree Street NW
Suite 3900
Atlanta, Georgia 30309-3417

Brian David Trulock
Carrie A. Moss
BENDIN SUMRALL & LADNER, LLC
1360 Peachtree Street NE
One Midtown Plaza, Suite 800
Atlanta, Georgia 30309

James Alexander Rice
THE RICE FIRM
563 Spring Street NW
Atlanta, Georgia 30308-1440

/s/ Val Leppert
Val Leppert
Georgia Bar No. 86440