

**IN THE SUPREME COURT
STATE OF GEORGIA**

GEORGIA CVS PHARMACY, LLC,

Petitioner

v.

CARMICHAEL,

Respondent

CASE NO. S22C0527

**BRIEF OF *AMICUS CURIAE*
RETAIL LITIGATION CENTER, INC. AND NATIONAL RETAIL
FEDERATION**

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INTRODUCTION AND STATEMENTS OF INTEREST

The Retail Litigation Center, Inc. (“RLC”) and National Retail Federation (“NRF”) file this brief as *amicus curiae* in support of the petition for certiorari by Georgia CVS Pharmacy, LLC (“CVS”) with respect to the November 1, 2021 decision by the Georgia Court of Appeals in *Georgia CVS Pharmacy, LLC v. Carmichael*, Case No. A21A0677 (Ga. Ct. App.) (the “Decision”). The Decision imposes extraordinary liability on a premises owner for the consequences of private and criminal activity, wholly unrelated to the premises owner, that the private actor nonetheless chose to undertake there. As a result, the verdict and its affirmance—all of which (except apportionment) are predicated upon common law—will affect almost any owner of private property (inclusive of small businesses, churches, and private schools) and will drive those who can afford to do so to significantly expand security and surveillance on their premises. Those who cannot afford the same will have to make hard decisions to address the risk of a private actor engaged in private activity shifting the liability for the consequences to the property owner.

In sum, there are myriad consequences of the Decision that will transform the way that Georgians shop, eat, pray and get an education, all of which in turn threaten to transform a state known for its Southern hospitality into one known for

a patchwork of private (armed and unarmed) security, but none that will guarantee a safer Georgia.

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 150 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 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (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

ARGUMENT

The Decision is of great concern, gravity, and importance to the public for several reasons. Setting aside apportionment, the Decision resulted from the trial court's misinterpretation of common law. Left undisturbed by this Court, the Decision will have unintended consequences for property owners of all kinds, as well as communities. The bar for foreseeability has been set so low that it creates a strict liability environment that will leave property owners with little choice but to fortify their premises or make hard economic decisions otherwise if they cannot provide for the level of security personnel, surveillance, and lighting that the Decision presumptively requires.

The basis for liability, meanwhile, is questionable: more security personnel, surveillance, and lighting are not proven to prevent any specific instance of crime,

and such measures have the potential for distinctly negative effects on communities. The hard-earned gains of community policing will be lost to an expanded private security state that offers little in the way of community accountability. Finally, while *amici* represent retailers, these issues will affect 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).

I. The Decision Effectively Subjects Premises Owners to Strict Liability

The appeals court held that the attack on Carmichael was reasonably foreseeable, in part, because lay witnesses testified that “the store was located in a high crime area.” (Decision at *4). The court’s consideration of this lay testimony was supposedly supported by the dicta in *Martin v. Six Flags Over Ga., II, L.P.*, 301 Ga. 323, 331 (2017), that “an establishment’s location in a high crime area may also support the finding of a duty . . . to guard against criminal attacks.” (citations omitted). The appeals court improperly treated unqualified lay testimony about generalized safety concerns as a separate consideration putatively supporting the claim that the Carmichael shooting was foreseeable.

Reliance on a lay person’s perception that a given property is in a “high crime” area is no standard at all for foreseeability. To be sure, an expert may sometimes be permitted to opine on a particular criminal risk after analyzing local crime reports, FBI statistics, and private databases that accumulate crime data.¹ The admission of any such testimony would properly be subject to the trial court’s gatekeeping. *See, e.g., Shadow v. Federal Express Corp.*, 359 Ga. App. 772, 780 (2021) (holding that an “expert’s opinion about inadequate security measures having an effect on the ability to carry out the attack are purely speculative”); *Brookview Holdings v. Suarez*, 285 Ga. App. 90, 96–97 (2007) (admitting expert testimony based on “study of the area surrounding [location of crime], the record of crime in that area, and their experience with crimes of [that] nature”).

The admission of *lay* testimony about the perceived crime rate in a given area, however, creates a dangerously amorphous standard that drifts swiftly into strict liability. As this Court explained in *Martin*, “[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. at 328. And while

¹ Such evidence is not relevant as a matter of law if that information was not known to the owner and does not address substantially similar crimes occurring sufficiently near the incident at issue.

“landowners need not guard against imagined dangers,” their duty extends to “foreseeable criminal acts.” *Id.*

But imagined dangers feature prominently in today’s social media, what with its propensity toward alarmism and where perception distorts reality. 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), <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). If foreseeability is established, in part, by this kind of lay testimony, the bar has been set so low that it is no standard at all.

The Decision also signals a material departure from Georgia law that has held that generalized crime statistics—much less lay testimony with no vetting or testing—cannot establish foreseeability. *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.

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

If left uncorrected, the Decision will subject property owners to liability for third-party criminal conduct based on mere speculation. Here, that speculation is that more lighting and a security guard would have prevented Carmichael from being shot. This is no overstatement: the crime occurred in a lighted part of the parking lot, and there is no evidence that either Carmichael or his assailant knew that the store did not have a designated security officer. The unmistakable message to property owners, then, is that having some 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 *ex post*, unqualified lay opinion a plaintiff may present to a jury in any given case.

Although it is highly questionable that a security guard would have prevented Carmichael's injury, the \$42 million awarded against CVS here will inevitably compel property owners to harden their premises with a patchwork of 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 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 do not suggest that Carmichael or his assailant knew there was not, in fact, 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 literature. One of the few studies using scientific methodologies to assess private security observed as follows:²

Some commentators have remarked that we ‘must be careful not to exaggerate either the extent or ...impact...of [the] fragmentation of policing’ [41], 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

² 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>.

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 Econ.* 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.)

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 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 struggling with 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 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.

Moreover, as discussed further, *infra*, it is an exceedingly questionable proposition for many reasons to expect private security guards to inspect cars or confront persons exiting or entering cars in a private property owner's parking lot. The problematic nature of assuming that a security guard would have made a difference here is highlighted by asking what a private security guard would have done if numerous gunshots were fired in a private vehicle? Most security guards are trained not to engage and instead are instructed to do exactly what happened here: call 911.

In sum, while the Decision now pushes 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.

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.

III. 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. 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.³ Intercepting and apprehending the criminal activity that

³ 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* (2021) (No. 21-835) (citation omitted)

occurred at the end of the conversation in Carmichael's truck is best left to carefully trained and armed police and authorities, 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 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., Medical Center Hosp. Authority 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

(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’”).

authorities). In sum, local police are the proper backstop against criminal activity, not private property owners.

IV. 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 in particular will have the Scylla and Charybdis choice of either undertaking costly efforts to fortify their premises or risking 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 (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.

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 "[s]ufficient 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.

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, we urge this Court to grant *certiorari* and to reverse the Decision.

DATED: January 10, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the forgoing BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. AND NATIONAL RETAIL FEDERATION by U.S. Mail on the following counsel of record:

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