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SUPREME COURT OF TEXAS
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No. 23-0704

IN THE SUPREME COURT OF TEXAS

Home Depot U.S.A.,
Petitioner,

v.

Rogelio Santander Sr. and Julia Garcia, Individually and as Co-Administrators of the Estate of Rogelio Santander Jr., and Crystal Almeida,
Respondent.

Original Proceeding
From the 192nd Judicial District Court, Dallas County, Texas
Cause No. DC-19-07132

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC., RETAIL INDUSTRY LEADERS ASSOCIATION, AND TEXAS RETAILERS ASSOCIATION IN SUPPORT OF HOME DEPOT U.S.A.'S PETITION FOR REVIEW

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Pursuant to TEX. R. APP. P. 11(b), (c), counsel for *Amici Curiae* certify that the following is a complete list of the persons or entities on whose behalf this brief is filed and the person or entities paying for preparation of this brief:

1. *Amicus Curiae*, Retail Litigation Center, Inc.;
2. *Amicus Curiae*, Retail Industry Leaders Association; and
3. *Amicus Curiae*, Texas Retail Association.

Counsel for *Amici Curiae* are being compensated for the preparation of this *amici curiae* brief by *Amici Curiae*.

STATEMENT OF INTEREST

This amicus brief is filed on behalf of the Retail Industry Leaders Association ("RILA"), the Retail Litigation Center, Inc. ("RLC"), and the Texas Retailers Association ("TRA") (collectively, "Amici Curiae").[1] RILA is the U.S. trade association for retailers that have earned leadership status by virtue of their sales volume, innovation, or aspiration. RILA advances the industry through public-policy advocacy and promotes operational excellence and innovation. One of RILA's most important programs is the Vibrant Communities Initiative, which is a public-private partnership to reduce unlawful activity and improve communities. RILA's members include the largest and fastest growing companies in the industry—including retailers, product manufacturers, and service suppliers—together accounting for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers.

The RLC is a 501(c)(6) organization that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC's members employ millions of people throughout the U.S., provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers retail-industry

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, other than Amici Curiae, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 200 amicus briefs on issues of importance to the retail industry. Its amicus briefs have been favorably cited by multiple courts, including the U.S. 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).

The TRA is an association of global, national, state, and local retail businesses dedicated to improving the lives of the consumers who power the Texas economic engine. The TRA supports industry through government advocacy and educational programs.

Amici Curiae and their members have a significant interest in the outcome of this case. Nearly all of their members operate retail locations in Texas and around the United States. Amici Curiae's members prioritize the safety of their customers and employees, and they are concerned that the outcome of this litigation could lead to harmful unintended consequences. As explained below, by suddenly expanding civil liability for Texas retailers who call the police for help and unexpectedly curtailing governmental immunity for police officers, the Court of Appeals' opinion would harm law enforcement and retail-level efforts to create safe premises for customers and

employees. Thus, this Court's decision to review the case will significantly affect Amici Curiae and their members.

BRIEF STATEMENT OF FACTS

Dallas Police Officer Chad Seward served as a private security guard when he was off duty. *Santander v. Seward*, No. 05-21-00911-CV, 2023 WL 4576015, at *6 (Tex. App.—Dallas July 18, 2023, pet. filed) ("COA Op."). On the day in question, Seward was working as a security guard at Home Depot when he was asked to issue a criminal trespass to Armando Luis Juarez based on Juarez's suspicious activity in the store. *Id.* at *6-7. Seward brought Juarez to an asset-protection office at Home Depot. *Id*. at *7. The parties dispute whether Seward frisked Juarez before detaining him. *Id.* at *8. Once in the asset-protection office, Seward called the Dallas Police Department dispatch and requested a warrant search for Juarez. *Id*. Seward also asked the Department to send a cover element of on-duty police officers to the store. *Id*. Officers Rogelio Santander Jr. and Crystal Almeida responded to Seward's call and entered the office where Juarez was held. *Id*. at *9. Seward then went to the officers' patrol car to use their laptop for the warrant search. *Id*. Upon verifying that Juarez had an outstanding arrest warrant, Seward relayed this information to Home Depot employee Scott Painter, who was with the officers and Juarez. *Id*. When Almeida approached Juarez to take him into custody, Juarez pulled a firearm from one of his pockets and shot Santander, Almeida, and Painter. *Id*. Santander did not survive. *Id*.

SUMMARY OF ARGUMENT

The Court of Appeals arbitrarily heightened the duty of care Texas retailers owe to responding police officers; misapplied governmental immunity for off-duty officers serving as retail security guards; and created a new waiver of governmental immunity for police officers engaged in law enforcement conduct on retail premises. If left unchanged, the Court's opinion would hinder public safety measures at stores across the State and create confusion about the level of security that retailers must provide to avoid civil liability for emergency responders who are injured on site.

This Court should grant the petition for review to correct these errors.

ARGUMENT

I. The Court Of Appeals Established A New, Heightened Duty Of Care For Texas Retailers.

Contrary to decades of precedent, the Court of Appeals created a new, heightened duty of care that retailers owe to police officers who arrive on business premises in response to criminal activity or threats to public safety. Based on the Court's opinion, the heightened duty applies to claims that sound in premises liability and negligence.

A. Premises Liability: The Court Of Appeals Viewed The Officers As Invitees In Contravention Of The Firefighter's Rule That Treats Officers As Licensees.

Under well-established Texas common law, the legal duties premises owners or tenants, like Home Depot, owe to public-safety officers are "the duties owed to an

ordinary licensee, including the duty to warn of known, dangerous conditions." *Thomas v. CNC Invs., L.L.P.*, 234 S.W.3d 111, 120 (Tex. App.—Houston [1st Dist.] 2007) (citations omitted); *see Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 788 (Tex. 2010) (J. Johnson, dissenting) ("The common law has recognized for a long time that the basis of a premises liability claim is a physical defect or condition on property."). "Under the common-law 'firefighter's rule,' . . . police officers are barred from recovering in premises-liability cases for injuries that result from risks inherent in responding to an emergency if the injuries are caused by only ordinary negligence." *Thomas*, 234 S.W.3d at 120. "The purpose of the rule is to limit the recovery of . . . police officers so that citizens will not be discouraged from relying on the skill, training, and expertise of these public servants." *Id.*

The Court paid lip service to the firefighter's rule, but effectively treated the officers as invitees owed a higher duty of care than the licensees to whom the firefighter's rule applies. Specifically, the Court of Appeals concluded that there is "a genuine fact issue whether Home Depot was aware of a dangerous condition that the officers were not and Home Depot failed to warn the officers" and that "detaining Juarez without having searched him constituted a dangerous condition[.]" COA Op. at *22. But the duty to investigate is a duty owed to an invitee, not a licensee. *Cath. Diocese of El Paso v. Porter*, 622 S.W.3d 824, 829 (Tex. 2021).

By treating the officers as invitees, the Panel required Home Depot "to exercise reasonable care to protect against danger from a condition on the land that creates an unreasonable risk of harm of which [Home Depot] knew or by the exercise of reasonable care would discover." *See id*. Holding Home Depot to such a high duty of care for police officers significantly expanded the duties that Texas retailers owe to law enforcement officials and other public servants who respond to calls for help. As a result, retailers across Texas could be held liable for not affirmatively seeking out dangerous conditions of which they were otherwise unaware and warning police officers about those conditions.

For instance, the Court of Appeals defined the dangerous condition here as "detaining Juarez without having searched him[.]" COA Op. at *22. The Panel stated that because Home Depot's employee Painter did not see Juarez searched while he was in the store, Home Depot knew that Juarez had not been searched for weapons before the officers arrived and therefore "knew" of a dangerous condition.

But Texas courts have never imposed an affirmative duty on businesses to search their customers for weapons.[2] Imposing a duty upon retailers to frisk or search every suspected shoplifter prior to calling law enforcement would not be reasonable and would raise its own extensive set of problems, including potential for injury to

[2] After a diligent search, undersigned counsel could not locate any cases or statutes *requiring* private businesses to search customers for weapons when there is no indication a customer possesses a weapon.

store employees and customers. While the Court had the advantage of viewing the facts in hindsight, the record is clear: no one knew Juarez had a gun until he pulled the gun from his pocket and fired it. And contrary to the Panel's conclusion, the unknown ***gun*** was the dangerous condition, not the failure to search.

B. <u>Negligence</u>: The Court Of Appeals Required Home Depot To Perform Tasks Traditionally Left To Police Officers In Order To Meet Its Duty Of Care.

The Court ***required*** Home Depot to search and restrain Juarez in order to satisfy its duty of care under a negligence analysis. But these tasks are traditionally performed by law enforcement professionals, not private businesses.

Specifically, the Court determined that there was "evidence that Home Depot acted negligently by actively detaining Juarez and keeping him on the premises without adequately searching him for weapons or restraining him so that he could not injure others." *Id*. at *19. Implicit in this finding is the assumption that Home Depot had a legal duty to search Juarez for weapons or physically restrain him to prevent him from injuring the officers. Because, if Home Depot did not owe this duty, then it could not be negligent. Yet, the Court does not explain why Home Depot owes such a duty or how such a duty would be reasonable for a retailer to assume.

Instead, the Court of Appeals simply concludes that a retailer should owe responding police officers the duty to search a suspect for weapons or physically restrain a suspect. The Court offers no reasons why the duties that it imposed on Home

Depot are reasonable. Nor can it. The Court has taken the tasks that police officers generally perform to provide for public safety and required Home Depot to perform these tasks before the police officers arrive on the premises. But it is the police officers, not retailers, who are highly skilled and trained in neutralizing threats to public safety. The Court's ipse dixit imposes a legal duty on retailers that requires them to perform tasks that are best reserved for law enforcement officers. Never have Texas retailers been held to such a high duty of care when they call officers to their stores to assist with potential threats to public safety. In fact, the Court freely admits that "[w]e have not found any cases closely on point." *Id*.

By raising the standard of care owed to police officers in this way, the Court of Appeals decision now requires retailers to take affirmative action to investigate all potential dangers and either neutralize those threats or warn the responding officers of the safety risks. In so doing, the Court forces retailers to either engage in police-type conduct and to act as law enforcement officials or to risk being held liable to responding police officers injured on their premises. Texas law has never imposed such an onerous burden on businesses.

II. The Court Of Appeals Failed To Apply Governmental Immunity Properly After Concluding That Seward Was Entitled To It.

The Court of Appeals failed to apply governmental immunity properly when it refused to dismiss the claims against Seward that arose out of the actions he took as a police officer. Instead, the Court applied governmental immunity in an unworkable

manner that both deprived Seward of the benefits of immunity and left the jury to somehow parse alleged liability against Seward for the shooting even though the Panel recognized immunity attached to him ***prior to the shooting***.

Rather than applying governmental immunity under Texas Civil Practice and Remedies Code § 101.106(f), as courts have consistently done to bar tort claims like the ones at issue in this case, the Court of Appeals kept all counts live and merely stated Seward is entitled to "dismissal of appellants' claims against him ***to the extent they were based on his call to determine Juarez' warrant status and his conduct during and after the call***." *Id*. at *24 (emphasis added). This partial, yet toothless, application of governmental immunity was never intended by the Legislature, contains no clear guidance for off-duty police officers engaging in traditionally police-type conduct (such as stop and frisk, described more below), and is unworkable in practice.

The purpose of governmental immunity is to avoid lawsuits against the State or certain governmental units, unless the Legislature expressly consents. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224-25 (Tex. 2004). Under the Texas Tort Claims Act, a defendant is entitled to dismissal if "he acted within the general scope of his [government] employment and suit could have been brought under the Act—that is, his claim is in tort and not under another statute that independently waives immunity." *Franka v. Velasquez*, 332 S.W.3d 367, 381 (Tex. 2011). When the suit is "against the employee in the employee's official capacity only, . . . the plaintiff

must promptly dismiss the employee and sue the government instead." *Id.* (internal quotations omitted).

Here, the Court said governmental immunity applied to Seward from the time that he called dispatch to run a warrant search on Juarez. COA Op. at *18. But if Seward was immune for his actions from the time he called the police department through the time that Juarez shot the responding officers, then neither Seward nor Home Depot can be held liable for Seward's actions from the time he called dispatch until Juarez fired the shots. *See Ogg v. Dillard's, Inc.*, 239 S.W.3d 409, 418 (Tex. App.—Dallas 2007, pet. denied) ("If the officer is performing a public duty, such as the enforcement of general laws, the officer's private employer incurs no vicarious responsibility for that officer's acts, even though the employer may have directed the activities."). Here, the shooting—which occurred after the event the Court of Appeals recognized as triggering immunity—is the entire harm alleged and any potential liability is directly linked to that harm. But for Seward's call to dispatch and request for a warrant search and a cover of on-duty officers, the police officers would not have come to Home Depot and would not have been shot. The Panel should have dismissed the entire suit against Seward because it found that governmental immunity applied to the relevant conduct at issue.

The Court's selective application of governmental immunity lacks a basis in law and sets a dangerous precedent for subjecting public officials to civil suits that would

otherwise be barred under Texas law. In addition, when governmental immunity is curtailed for public officials holding private jobs, the private company could be held liable for conduct that would otherwise trigger governmental immunity. The far-reaching consequences of such a sea change in governmental immunity jurisprudence must be reviewed by this Court.

III. The Court Of Appeals Offended The Separation Of Powers By Creating A New Waiver Of Governmental Immunity, A Task Reserved For The Texas Legislature.

The Court of Appeals offended the separation of powers and stepped into the role of the Legislature by creating a new waiver of governmental immunity. Namely, the Court failed to determine whether the decision to frisk or not to frisk Juarez was police conduct, and by refusing to make that determination, the Court gave itself leave to categorize the frisk question as a material fact issue that required the underlying suit to proceed against Seward and Home Depot. In doing so, the Panel created a waiver of immunity because it found a disputed issue of fact related to traditional police conduct and concluded that the suit must proceed even though governmental immunity would require dismissal. This unique waiver of immunity is both damaging to officers—who rely on immunity to freely respond to emergency situations—and to private companies who may be exposed to liability for law enforcement activity over which they have no control.

"The Texas Supreme Court has reiterated throughout the years that governmental immunity can only be waived by the Legislature." *Cnty. of Hidalgo v. Palacios*, No. 13-17-00447-CV, 2018 WL 6627323, at *3 (Tex. App.—Corpus Christi Dec. 19, 2018, no pet.) (citations omitted). "If the Legislature elects to waive immunity by statute, it must do so by clear and unambiguous language." *Id*. (citing TEX. GOV'T CODE § 311.034).[3] Because governmental immunity protects political subdivisions, like the City of Dallas, from suits seeking damages, clear statutory language regarding any waiver of that immunity is paramount. *See Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 344 (Tex. 2019).

Instead of applying governmental immunity to bar the suit, the Court of Appeals waived it. The Court concluded that fact issues exist about whether Seward frisked Juarez before he called dispatch, and as a result, Seward must continue to defend himself in this civil lawsuit in the event a trier of fact could somehow connect Seward's pre-call frisk (or failure to frisk) to the shooting. By forcing Seward to litigate the claims against him, the Court both concluded Seward was entitled to immunity, as discussed above, and then proceeded to waive that immunity.

Outside of statutes that waive immunity or instances where the government expressly consented to suit, undersigned counsel cannot find any other cases where a

[3] *See e.g.*, TEX. CIV. PRAC. & REM. CODE § 101.106(f); TEX. GOV'T CODE § 554.001-.035; TEX. LOC. GOV'T CODE § 271.151-.160.

Texas court determined governmental immunity applied to the events directly related to the harm and then allowed the claims to proceed.[4]

While the Court explained that the facts are not clear concerning whether Seward frisked Juarez, it failed to determine whether frisking is inherently a police activity. COA Op. at *14. But there is little double that frisking an individual to search for dangerous weapons is quintessential police conduct.[5] By failing to recognize that the decision to frisk or not to frisk an individual is police conduct, the Panel chose to

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[4] *See, e.g.*, *Garza v. Harrison*, 574 S.W.3d 389, 405 (Tex. 2019) (holding governmental immunity applied, warranting dismissal of the case, where the off-duty officer injured a criminal suspect while attempting to make an arrest); *Pardo v. Iglesias*, 672 S.W.3d 428, 433 (Tex. App.—Houston [14th Dist.] 2023), *reconsideration en banc denied*, No. 14-22-338-CV, 2023 WL 4188343 (Tex. App.—Houston [14th Dist.] June 27, 2023) (reversing the trial court's denial of the off-duty officers' motion to dismiss because governmental immunity applied to their conduct in escorting out a nightclub patron); *Rodriguez v. Duvall*, No. 14-20-00402-CV, 2022 WL 619710, at *4 (Tex. App.—Houston [14th Dist.] Mar. 3, 2022, no pet.) (affirming the trial court's dismissal based on governmental immunity because an off-duty police officer was acting within the scope of his employment when he injured a person while effectuating an arrest); *Moore v. Barker*, No. 14-17-00065-CV, 2017 WL 4017747, at *5 (Tex. App.—Houston [14th Dist.] Sept. 12, 2017) (reversing the trial court's denial of a motion to dismiss based on governmental immunity because an off-duty officer was acting within the scope of his employment when he injured a patron); *Kraidieh v. Nudelman*, No. 01-15-01001-CV, 2016 WL 6277409, at *5 (Tex. App.—Houston [1st Dist.] Oct. 27, 2016, no pet.) (reversing the trial court's denial of a motion to dismiss based on governmental immunity when an off-duty police officer detained a group of late-night revelers whose behavior had been disturbing the peace).

[5] *See* Dallas Police Department General Order § 330.02 (prohibiting police officers from conducting searches that violate citizens' constitutional rights) (Aug. 7, 2023), available at https://dallaspolice.net/resources/Shared%20Documents/General-Orders.pdf; *see also id*. § 330.08 (prohibiting police officers from conducting consensual strip or body cavity searches and any bias-based search); *id*. § 328.02(I) (defining "Enforcement Activity" as "Law Enforcement activity including . . . detaining, frisking, or searching a person").

waive governmental immunity so that the underlying suit could proceed against Seward and Home Depot.

The Court's disjointed view of the events does not excuse waiving governmental immunity without any legal basis. A straightforward application of governmental immunity would have required dismissal of the case against Seward on immunity grounds. The Court, instead, allowed the suit to proceed upon a novel, selective, and piecemeal application of immunity at various points of time—even though every harm to plaintiffs occurred after immunity attached. It is well-settled that a police officer "becomes an on-duty officer if he or she observes a crime" or has reasonable suspicion a crime was or is about to be committed, and an on-duty officer is entitled to immunity; yet, the Panel created a new waiver of immunity by allowing the case to proceed against Seward simply because it could not determine whether Seward actually frisked Juarez. COA Op. at *5 (citing *Garza v. Harrison*, 574 S.W.3d 389, 401 (Tex. 2019)); *Pardo v. Iglesias*, 672 S.W.3d 428, 436-37 (Tex. App.—Houston [14th Dist.] 2023), *reconsideration en banc denied*, No. 14-22-338-CV, 2023 WL 4188343 (Tex. App.—Houston [14th Dist.] June 27, 2023).

Creating a new waiver to governmental immunity is not the role of the courts. It is reserved for the lawmaking body: the Legislature. The Texas Constitution requires the judiciary to respect the purview of the Legislature:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § I. If the separation of powers means anything, it means that each branch of government performs a specific role to ensure that one branch does not become so powerful that it is no longer subject to the checks and balances intended by a three-branch system of government. And as this Court has confirmed, "[i]t is for the Legislature and not the courts to remedy defects or supply deficiencies in laws, and to give relief from unjust and unwise legislation." *Bd. of Ins. Comm'rs of Tex. v. Guardian Life Ins. Co. of Tex.*, 142 Tex. 630, 636 (1944).

The Court strayed from this longstanding mandate to apply the law as written by the legislature when the Court created a new governmental immunity waiver for a public official's conduct. Only the Legislature—not the courts—can alter the scope and purpose of governmental immunity. This Court should review this case to course correct and clarify the proper scope of governmental immunity.

IV. The Court Of Appeals Decision Would Disincentivize Retailers From Providing Store Security.

Retailers strive to provide safe premises for their customers and employees. But under the Court's opinion, those who choose to provide added security at their stores could face negligence claims for failing to ferret out every conceivable harm that could

befall an off-duty police officer. Conversely, those that do not have added protection may face premises liability claims for failing to neutralize public safety threats before law enforcement officials arrive on the scene. This places retailers in an impossible situation.

Maintaining safe stores helps both retailers and the general public. For example, RILA is currently engaging in its Vibrant Communities Initiative. *Vibrant Communities Initiative*, RETAIL INDUS. LEADERS ASSOC., available at https://www.rila.org/externallink/d4c1d465-9e51-4dad-b597-e19cf99e5baa (last visited October 12, 2023). The goal of this initiative is to reduce unlawful activity in and around retail environments that threatens the vibrancy of these areas and surrounding communities. *Id.* RILA is addressing safety concerns for both employees and consumers by confronting social and economic issues together with local district attorneys and police departments on a pilot project to identify habitual offenders, pursue prosecution of violent offenders, and divert qualified offenders to appropriate support services in order to reduce recidivism. *Id.* The Vibrant Communities Initiative seeks to tackle the very issues that are plaguing both businesses and the communities in which they serve. *Id.*

But, if the Panel's opinion is not reversed, retailers will be disincentivized—instead of encouraged—to provide security to protect their customers and employees.

CONCLUSION

By heightening the duty that premises owners owe to public servants, the Court of Appeals widely expanded civil liability exposure for Texas retailers who wish to hire or call police officers to handle threats to public safety in their stores. Such consequences discourage retailers from taking reasonable actions to maintain safe premises for their customers and employees.

The Court also failed to apply governmental immunity jurisprudence properly when it allowed claims against Seward to proceed even after concluding that governmental immunity attached. The Panel went on to infringe upon the Legislature's lawmaking authority by creating a new waiver to governmental immunity for a public official's conduct even when they are acting in an official capacity.

Amici Curiae respectfully urge this Court to grant the petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of Amici Curiae was prepared using Microsoft Word 2010, which indicated that the total word count (exclusive of those items listed in TEX. R. APP. P. 9.4(i)(1)) is 4,251 words.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon all counsel of record on October 13, 2023 via the Court's electronic filing system.

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