No. 23-0493

In the Supreme Court of Texas

WERNER ENTERPRISES, INC. AND SHIRAZ A. ALI,

Petitioners,

v.

JENNIFER BLAKE, INDIVIDUALLY AND AS NEXT FRIEND FOR NATHAN BLAKE, AND AS HEIR OF THE ESTATE OF ZACHERY BLAKE, DECEASED; AND ELDRIDGE MOAK, IN HIS CAPACITY AS GUARDIAN OF THE ESTATE OF BRIANA BLAKE,

Respondent.

On Petition for Review from the
14th Court of Appeals at Houston, Texas
No. 14-18-00967-CV

Brief of Amicus Curiae the Chamber of Commerce of the United States of America

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Statement of Interest

The Chamber of Commerce of the United States of America ("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.

No party's counsel authored this brief in whole or in part. No party, no party's counsel, and no person other than amicus, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

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TO THE SUPREME COURT OF TEXAS:

The Chamber writes to ensure that the view of tort law embodied in the opinion below does not prevail. Unjustified and expansive tort liability threatens all commercial enterprises, though some more than others. Commercial trucking is particularly vulnerable to outsized liability. This vulnerability even prompted the Texas Legislature recently to take action to protect commercial trucking in litigation.

For the tort system to provide efficient incentives to guard against harm, it requires careful consideration of the foreseeability of harm and the benefits and burdens of imposing duties. This Court has generally avoided creating new duties and closely policed the requirements of foreseeability and proximate cause.

The court of appeals in this case was less careful. Its opinion below did not seriously consider the foreseeability of the risk in the circumstances presented here. Based on its flawed analysis, it imposed multiple general and specific duties unknown to this Court. Those duties had no justification under the facts of this case, and they would not even have made the difference intended here—meaning proximate cause was also absent. The court's opinion falls far short of the standard for imposing any duty, much less the sweeping ones it did.

The opinion below threatens the trucking industry, but also commercial activity more generally. The flawed analysis breaks new ground and, if left to stand, will be used to establish further unnecessarily burdensome duties and expand already exploding liability.

The Chamber respectfully urges this Court to grant the petition for review and reverse.

ARGUMENT

I. The trucking industry is vital but particularly vulnerable to excessive "nuclear verdicts" like the one here.

The trucking industry is critical to the economy in Texas and America as a whole. Commercial tractor-trailers transport the essentials of daily living. Given its geography, Texas depends more on trucking than America generally—82% of Texas communities depend exclusively on trucking to supply them compared to 75% of American communities.[1] In Texas, 91.8% of manufactured tonnage is transported by trucks.[2] Most other businesses depend upon commercial trucking to operate.

The trucking industry employs a substantial portion of workers. Texas has over 750,000 trucking jobs, 1 out of every 14 in the State.[3] Trucking companies are often small and locally owned; there are 151,140 in Texas.[4]

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[1] U.S. CHAMBER OF COMMERCE INST. FOR LEGAL REFORM, ROADBLOCK: THE TRUCKING LITIGATION PROBLEM AND HOW TO FIX IT 2 (July 2023) ("ROADBLOCK"), https://instituteforlegalreform.com/wp-content/uploads/2023/07/Roadblock-The-Trucking-Litigation-Problem-and-How-to-Fix-It-FINAL-WEB.pdf; Tex. Trucking Ass'n, *Texas Trucking Fast Facts* (2022) ("TTFF"), https://www.texastrucking.com/txta/userfiles/uploads/Advocacy-FastFacts2022.pdf.

[2] TTFF, *supra* n.1.

[3] *Id.*

[4] *Id.*

Commercial trucking is also a responsible industry and has become increasingly safe. Between 1975 and 2019, the large truck fatal crash rate dropped 67.5%, and 34% since 2000.[5] Each year, the trucking industry invests at least $10 billion in safety, including safety technologies, safety training, driver safety incentive pay, and compliance with safety regulations.[6]

Despite this, verdicts against trucking companies have exploded in size and frequency, especially "nuclear verdicts"—jury awards of $10 million or more.[7] While this trend threatens other industries and commerce more generally, the trucking industry has suffered in even greater proportion.[8] For verdicts of more than $1 million, the average size of the verdict against trucking companies increased nearly 1,000% from 2010 to 2018, rising from $2.3 million to $22.3 million, with the increase accelerating later in that period.[9] Even larger verdicts, such as those around $50 million, have also increased in frequency.[10] Texas is

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[5] *Id.*; ROADBLOCK, *supra* n.1, at 8.
[6] Am. Trucking Ass'ns, *Trucking Safety Facts* (Mar. 2020), https://www.trucking.org/sites/default/files/2020-09/TruckingSafetyFacts.pdf.
[7] ROADBLOCK, *supra* n.1, at 6.
[8] *See id.*
[9] *Id.* at 6–7; Contessa Brewer & Katie Young, *Rise in 'Nuclear Verdicts' in Lawsuits Threatens Trucking Industry*, CNBC (Mar. 24, 2021), https://www.cnbc.com/2021/03/24/rise-in-nuclear-verdicts-in-lawsuits-threatens-trucking-industry.html.
[10] Bethan Moorcraft, *Nuclear Jury Verdicts Here to Stay in Commercial Auto*,

one of the top states for nuclear verdicts.[11] And such verdicts are especially prevalent against trucking companies in the State.[12] Over the last three years, Texas had the highest average awards in truck accident settlements and verdicts.[13]

Nuclear verdicts drive up the cost of doing business, with all the attendant harms. For one, they push up insurance rates, making insurance entirely unaffordable in some cases. Commercial trucking experienced a 47% increase in insurance premiums from 2010–2020 due largely to litigation.[14] But it has experienced "unprecedented" increases even more recently, with rate increases averaging 20%–25% annually in some years.[15] Deductibles have also gone up, and umbrella or excess liability markets passed on even larger increases of over 75% in two years.[16] Most trucking companies have purchased less insurance.[17]

INSURANCE BUSINESS (Feb. 24, 2022), https://www.insurancebusinessmag.com/us/news/auto-motor/nuclear-jury-verdicts-here-to-stay-in-commercial-auto-326574.aspx.

[11] ROADBLOCK, *supra* n.1, at 30.

[12] Eric Zalud, *Shutting Down the Texas Roadhouse Verdict Party (in Part); The Texas Legislature Takes Aim at Nuclear Verdicts*, JD SUPRA (Aug. 17, 2021), https://www.jdsupra.com/legalnews/shutting-down-the-texas-roadhouse-5253789/.

[13] ROADBLOCK, *supra* n.1, at 30.

[14] *Id.* at 13.

[15] Brewer, *supra* n.9.

[16] *Id.*

[17] *Id.*

Nuclear verdicts also have more systemic effects. They sap companies' ability to invest, including in safety and training budgets.[18] And they ultimately lead to higher consumer prices for all goods—i.e., inflation—because nearly all goods are transported by truck.[19]

The verdict against Werner at issue here—now well over $100 million—is one of the largest and most notable examples of excessive liability from nuclear verdicts.[20] Verdicts like it also grossly inflate settlement values, so much so that the average of verdicts and settlement in Texas now hovers around the size of the *Werner* verdict.[21] And such massive verdicts and settlements are only becoming more common.[22]

II. The court of appeals failed to carefully consider the risk and made sweeping and mistaken pronouncements of the elements of liability.

The court of appeals failed to seriously grapple with foreseeability—that is, whether the accident here falls within the scope of the risk posed by the truck driver's conduct. Cross-median collisions

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[18] AM. TRANSP. RESEARCH INST., UNDERSTANDING THE IMPACT OF NUCLEAR VERDICTS ON THE TRUCKING INDUSTRY 47 (June 2020), https://truckingresearch.org/2020/06/understanding-the-impact-of-nuclear-verdicts-on-the-trucking-industry/.
[19] ROADBLOCK, *supra* n.1, at 20.
[20] *See id.* at 24.
[21] *See id.* at 15–16, 30.
[22] *See id.* at 30.

are different in kind than regular accidents, and the law, statistics, and common sense demonstrate as much. This core deficiency in failing to consider the nature of the risk compromised the court's other conclusions, including on duty and proximate cause.

By not considering whether the risks match the harms in this novel circumstance, the court of appeals imposed duties that do not follow from the risk. All those duties are designed to ensure that Werner's driver Ali remained in control of his truck. But he did. The court of appeals cites nothing to show that any aspect of Ali's response to the sudden intrusion of the Blakes' truck was affected by the ice or would have differed had conditions been clear. Either the duties were irrelevant here or their intended effect—stopping all commercial travel—would be equally useful in clear conditions. The only way that the duties placed on Ali and Werner could be justified would be if icy conditions increased the likelihood of cross-median collisions so greatly that all commercial travel must be prohibited. The court of appeals' analysis is devoid of any consideration of that risk and whether it is in the "apprehension" of travelers—and therefore whether Ali or Werner proximately caused the

accident—much less whether the risk justifies the drastic duties the court placed on Werner and Ali.

Allowing the opinion below to stand threatens to greatly multiply unjustified duties and liability, impeding essential commerce.

A. The court of appeals failed to carefully consider foreseeability.

Foreseeability is the cornerstone of establishing duty and proximate cause, and therefore negligence liability.[23] In analyzing foreseeability, the court of appeals simplistically assumed that the specific collision here was foreseeable because automotive collisions in general are foreseeable. But that frames the risk at far too high a level of generality. Just and efficient tort liability requires careful analysis of the risks and harm that make an action negligent as to specific people. Practical experience, statistics, and case law all make clear that the type of collision here was fundamentally a new and rare circumstance. And it obligated the court of appeals to work more thoroughly before extending liability beyond that recognized by precedent.

[23] *See Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 659 (Tex. 1999).

All drivers know that travel on divided highways is a different experience than other types of driving. City driving presents many potential obstacles, pedestrians, and changing traffic patterns, while rural undivided highways have the ever-present threat of a head-on collision only feet away. But a divided highway allows drivers to focus on the vehicles traveling in the same direction. The difference is palpable.[24] The physical separation of traffic traveling in the opposite direction not only makes it difficult to see that traffic, but it also makes it negligent for drivers to pay significant attention to that other lane (as occurs in rubbernecking incidents). Drivers doubtlessly must take care not to enter or cross the median themselves. But by design, the prospect of vehicles invading from across the median rarely enters the mind of drivers on divided highways; a divided highway is designed to safely allow drivers to focus their attention on their own direction of travel.

This ubiquitous, practical experience matches the danger the opposite lane poses. The Texas Transportation Commission states that "[c]ross-median crashes are relatively rare,"[25] while the U.S. Department

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[24] *See Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 566 (Tex. 2015) (describing driving dangers from "the rural Texan who braves harrowing two-lane highways to the urban commuter who plans his route to avoid daily accident-related congestion").
[25] TEX. TRANSP. COMM'N, SOLUTIONS FOR SAVING LIVES ON TEXAS ROADS 17 (June

of Transportation considers them "very rare."[26] They are also generally unpredictable. For instance, a report cited by Respondents reveals that most cross-median crashes occur in clear conditions (with potentially very few in icy conditions) and with larger medians than at the crash in this case.[27] Discussions of cross-median crashes occur almost exclusively as part of assessing the need for and benefit of median barriers to reduce them.[28] To the extent cross-median collisions receive consideration, it is by road designers considering large-scale, long-term infrastructure investment and not at the level of situational traffic rules facing drivers or their employers.

The case law in Texas reflects this practical experience. Some cases seek to hold a driver liable for crossing the median of a divided highway.[29] Similarly, those injured by a median crossing have sued the State or municipalities under a variety of theories,[30] including for defects in road

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2016), https://ftp.dot.state.tx.us/pub/txdot-info/trf/trafficsafety/ saving-lives.pdf.

[26] U.S. DEP'T OF TRANS. FED. HIGHWAY ADMIN., SAFETY EVALUATION OF CABLE MEDIAN BARRIERS IN COMBINATION WITH RUMBLE STRIPS ON DIVIDED ROADS 6 (Aug. 2017), https://www.fhwa.dot.gov/publications/research/ safety/17070/17070.pdf.

[27] ROGER BLIGH ET AL., MEDIAN BARRIER GUIDELINES FOR TEXAS 32–33 (Aug. 2016), https://static.tti.tamu.edu/tti.tamu.edu/documents/0-4254-1.pdf.

[28] See sources cited *supra* nn.25–27.

[29] *See Sears Roebuck & Co. v. Stiles*, 457 S.W.2d 580, 581 (Tex. App.—Waco 1970, writ ref'd n.r.e.).

[30] *See Mogayzel v. Tex. Dep't of Transp.*, 66 S.W.3d 459 (Tex. App.—Fort Worth 2001); *Texas v. Jordan*, No. 05-95-01816-CV, 1996 WL 743624 (Tex. App.—Dallas Dec. 31,

design and for unsafe conditions on the roads, and they have even sued an automobile manufacturer.[31] But it is strikingly rare for a plaintiff in a vehicle that crossed a median to seek to impute liability to someone that was merely driving in his or her proper direction of travel. The parties in this case do not cite a single instance in Texas case law.

One of the few examples (and perhaps the only one) came out entirely differently than the case here. It too featured a vehicle traveling at 50 mph that encountered "unusually slick" conditions and careened across the median, striking a tractor-trailer on the other side going 50 mph.[32] (The conditions were so "unusually slick" that two vehicles in front of the crossing vehicle also skidded.[33]) But there, the jury had excused the truck driver and his trucking company from liability based on the collision being an "unavoidable accident."[34] Indeed, the jury went further, finding that even if the truck driver had been negligent, that negligence was still *not* a proximate cause of the accident.[35] The court of

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1996).

[31] *See Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004).

[32] *See Davis v. Thompson*, 581 S.W.2d 282, 283 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.).

[33] *Id.*

[34] *Id.*

[35] *Id*. at 284.

appeals upheld the verdict despite improper jury instructions because of the "ample" evidence of unavoidability.[36] The court had no reason to consider further limits based on foreseeability.

Cross-median collisions result in unavoidable accidents precisely because they are not like typical road incidents. Because they are unexpected, ordinary negligence is often irrelevant to whether they occur.[37] Even if a driver would avoid a collision with a more typical, expected obstruction (like a stopped vehicle), the sudden intrusion into the lane of travel (often coming *toward* the driver) can still result in a collision. Other courts have found no liability for precisely this reason.[38] While the driver must try to avoid the accident upon seeing the vehicle cross the median,[39] the driver need not consider this possibility while driving generally.

Yet reading the court's opinion below reveals none of this background. Instead, the court of appeals loosely paraphrased *Palsgraf*

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[36] *Id.* at 287.
[37] *See, e.g.*, *People v. Bergman*, 879 N.W.2d 278, 287 (Tex. 2015) (upholding no liability even when the defendant driver was intoxicated).
[38] *See Robinson v. Melton Truck Lines, Inc.*, 244 So. 2d 705, 706 (La. Ct. App. 1971); *Vargas v. Lancaster*, 48 Misc. 3d 1218(A), 2015 WL 4726493, at *3 (N.Y. Sup. Ct. Aug. 3, 2015).
[39] *See Ford v. Panhandle & Santa Fe Ry. Co.*, 252 S.W.2d 561, 562 (Tex. 1952).

to say that "[e]very individual has the duty to guard against foreseeable risks"[40] (incorrectly suggesting that foreseeability alone determines duty). The court paired this with a simple syllogism it constructed from this Court's dicta—"Texas has consistently held that foreseeability turns on the existence of a general danger, not awareness of the exact sequence of events that produces the harm," and "[t]he general danger of driving is obvious to everyone"—to conclude that the danger *here* was foreseeable.[41]

But that is not how this Court determines liability on a negligence claim. This Court has adopted *Palsgraf's* view of foreseeability,[42] yet *Palsgraf* described almost precisely the opposite view of liability as the court of appeals attributed to that opinion. Indeed, Chief Judge Cardozo even used negligence on the road to demonstrate how it depends on context, time, and space. "[O]ne who drives at reckless speed through a crowded city street is guilty of a negligent act" but "only because the eye of vigilance perceives the risk of damage."[43] The same act in another

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[40] *Werner Enterprises, Inc. v. Blake*, 672 S.W.3d 554, 572 (Tex. App.—Houston 2023) (citing *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928)).
[41] *Werner*, 672 S.W.3d at 575 (citing and quoting *Nabors*, 456 S.W.3d at 565).
[42] *See Mellon Mortg.*, 5 S.W.3d at 655.
[43] *Palsgraf*, 162 N.E. at 100.

context could "lose its wrongful quality."[44] "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others *within the range of apprehension*."[45]

By contrast, the mistaken view of foreseeability of the court of appeals neatly mirrors Judge Andrews' dissenting opinion in *Palsgraf*, disapproved by this Court. He rejected the idea that the plaintiff must be within the zone of foreseeable risk, stating that driving "at a reckless speed" is negligent as "a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large."[46] Even under the very case the court of appeals relied upon, assuming that driving can be dangerous does not suffice to demonstrate that a cross-median accident is the "natural and probable result"[47] of driving or driving too fast.

In fact, not even the consequences of an accident in one's *own* travel lane are always foreseeable. In *Bell v. Campbell*, this Court held that even if there was negligence in an initial accident on a highway, the defendants "could not reasonably foresee" that such negligence "might

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[44] *Id.*
[45] *Id.* (emphasis added).
[46] *Id.* at 102 (Andrews, J., dissenting).
[47] *Bell v. Campbell*, 434 S.W.2d 117, 120 (Tex. 1968).

lead to the serious injury or deaths of persons not even in the zone of danger as a result of their being struck by another automobile which was some distance away at the time."[48] Certainly a vehicle on the other side of a divided highway finds itself at even further remove. The "zone of danger" and "range of apprehension" for any normal driver does not encompass those traveling on the other side of a divided highway who are only in danger because of their own negligent driving.

While the court of appeals recited the basic counter-argument—that Ali and Werner had no duty to anticipate that a vehicle driving eastbound might lose control, cross the median, and come within the path of the Werner truck[49]—it failed to take that argument seriously. Instead, citing *Biggers v. Continental Bus System, Inc.*,[50] it simply stated that "[d]rivers' excessive highway speed may foreseeably lead to a collision with another vehicle that enters the wrong lane of traffic."[51] Even Chief Judge Christopher, though sympathetic to Werner's foreseeability argument, felt bound by *Biggers* in his dissent.[52] Yet in *Biggers* (decided

[48] *Id.* at 121.
[49] *Werner*, 672 S.W.3d at 575.
[50] 303 S.W.2d 359, 363 (Tex. 1957).
[51] *Werner*, 672 S.W.3d at 575.
[52] *Id.* at 619 (Christopher, J., dissenting).

before the interstate highway system), the collision occurred on a narrow (24-foot) undivided highway near a bridge in the rain, and the commercial driver (of a bus) failed to keep a proper lookout, failed to apply his brakes, and was driving over 55 miles per hour where there was not even a proper shoulder to pull off.[53] All of the other cases cited by the court of appeals similarly occurred on narrow, undivided highways.[54] None serve as apt comparisons.

The other sources the court noted also do not support foreseeability. While the court of appeals repeatedly cited a federal regulation and the Texas Commercial Driver's License Manual,[55] and the Blakes argue that these sources "[r]ecogniz[e] [the] risk" of a lane intrusion (implying that it is foreseeable),[56] nothing in them suggests that either were developed with an awareness, much less an intent, of protecting those who might cross the median of a divided highway.[57] The federal regulation speaks

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[53] *Biggers*, 303 S.W.2d 359 at 361–62.
[54] *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005); *Lofton v. Tex. Brine Corp.*, 777 S.W.2d 384, 387 (Tex. 1989); *Biggers*, 303 S.W.2d at 363–67; *Villarreal v. Zouzalik*, 515 S.W.2d 742, 745 (Tex. App.—San Antonio 1974, no writ).
[55] 672 S.W.3d at 571–72, 576.
[56] Respondents' Br. at 9.
[57] *See also Labbee v. Roadway Exp., Inc.*, 469 F.2d 169, 171–72 (8th Cir. 1972) ("Regulations of this nature are designed to protect against the possibility that as conditions become hazardous the truck driver will be more prone to lose control of his vehicle and cause an accident.")

of concerns with conditions "adversely affect[ing] visibility or traction."[58] If anything, that implies concerns with a commercial vehicle's *own* traction, which was not at issue here (nor was visibility). And the Texas Commercial Driver's License Manual evinces even more clearly that the motivating concern behind the caution to slow or stop was the commercial vehicle's own stability on ice.[59]

The court of appeals gave no reason to think that those sources were meant to guard against the loss of control of vehicles not in the truck's own direction of travel. And neither the court of appeals nor the Blakes have pointed to an authority demonstrating an awareness of cross-median collisions on divided highways, much less one suggesting that such collisions must be taken into account in any decision making.

B. The court of appeals failed to justify any duty.

The error in foreseeability directly produced the court of appeals' faulty analysis of duty. The court failed to establish, or even seriously

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[58] 49 CFR § 392.14.

[59] The manual in effect at the time of the accident, though cited often by the Blakes and the court of appeals, *see* 672 S.W.3d at 594, 602–05, was never admitted as evidence at trial and only described in testimony. It begins its discussion with, "You can't steer or brake a vehicle unless you have traction. Traction is friction between the tires and the road. There are some road conditions that reduce traction and call for lower speed." TEX. DEP'T OF PUB. SAFETY, TEXAS COMMERCIAL MOTOR VEHICLE DRIVERS HANDBOOK § 2.6.2 (2014) (6CR2940–41).

consider, how Ali and Werner owed the Blakes a duty to drive any particular way on Ali's own side of the divided highway.

With regard to Ali, the court found the duty already established as the "common law duty" to operate Ali's vehicle "at a speed at which an ordinarily prudent person would operate it under the same or similar circumstances."[60] Instead of careful analysis, the court merely repeated this same point after citing *Biggers*.[61]

For Werner, although the court of appeals acknowledged that the law established no clear duty, it recognized a new one based on a generalized assessment of risk and harm to others, not to those in Blakes's particular position. It stated that the "risk was astonishingly high" that Ali "would cause serious death or injury if confronted with a traffic scenario requiring quick reactions,"[62] but it failed to explain how that even mattered here. And when the court concluded that the risk was foreseeable because Werner should have reasonably anticipated that its acts "created unreasonable dangers for *other travelers* (including the

[60] *Werner*, 672 S.W.3d at 575.
[61] *Id.*
[62] *Id.* at 591.

Blakes),"[63] it failed to analyze that expansive and diverse set of "travelers."

By lumping the Blakes in with all "travelers" as those to whom Ali and Werner owed specific duties governing Ali's driving, the court all but inverted Chief Judge Cardozo's intention in its summary pronouncements. The court in essence imposed the opposite principle—a duty to all the world. But this Court is exacting: "What the plaintiff must show is 'a wrong' to herself; . . . and not merely a wrong to someone else."[64] This Court has also quoted the Restatement (Second) approvingly on that same point to the same effect:

> In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the other is a member. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.[65]

Regardless of how Ali and Werner related to others in Ali's lane of travel, the Blakes must demonstrate that they were owed a duty themselves as

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[63] *Id.* at 593.
[64] *Mellon Mortg.*, 5 S.W.3d at 655 (quoting *Palsgraf*, 162 N.E. at 100).
[65] *Id.* at 656 (quoting RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1965)).

being part of a distinct class of persons subject to a "recognizable risk of harm." The court of appeals failed to demonstrate a wrong to the *Blakes*.

By glossing over the difference between this context and those cases that have come before, the court of appeals shirked its obligations in establishing duty. The plaintiff bears the burden to establish that duty exists, including the requisite foreseeability when disputed.[66] By assuming that *Biggers* controlled, the court skipped the task for Ali entirely. And by putting all vehicles on both sides of the highway into the same general bucket of "travelers," the court short-circuited the requisite inquiry regarding Werner. It was only by doing so that the court could consider the relevancy of various purported inadequacies in Werner's conduct—Werner's not providing or allowing use of radios or gauges not required by law, not providing sufficient information about icy weather driving, and allowing new drivers to drive under time pressure. None of those specifically affected drivers on the other side of the highway. The court failed to explain how any duties to do differently were justified by a concern for such vehicles crossing the median.

[66] *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).

By contrast, when examining the countervailing social utility that could preclude establishing novel duties, the court of appeals used a microscope. It focused on the exact specifics of Werner's conduct, down to the type of delivery ("just in time"), that there was a Winter Storm Warning, Ali's individual evaluation record, and the specific information and devices to which he had access.[67] But broad duties set as a matter of law are not considered at this sui generis level of detail.[68]

The court of appeals also minimized the burden of the duties, stating that they merely required Werner drivers "to refrain from driving unreasonably fast."[69] But Respondents' view of duty required stopping *all* trucking on the day of the accident. The court discounted this burden by claiming to lack evidence demonstrating that "the magnitude of requiring all commercial drivers to cease operation whenever ice may be present would be momentous."[70] Yet the proposition is self-evident, and it was not Werner's burden to establish—the record must show the proposed duty is not burdensome.[71] Ultimately, the extreme disparity in

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[67] 672 S.W.3d at 597.
[68] *See Phillips*, 801 S.W.2d at 525 (Tex. 1990); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 312 (Tex. 1983).
[69] 672 S.W.3d at 594.
[70] *Id.*
[71] *Id.* at 620 (Christopher, C.J., dissenting).

the court's scope of evaluation between the factors stacked the deck in favor of novel duties.

In any event, even assuming some measure of foreseeability, the duty analysis missed the point. All the court's created duties were designed to ensure that a driver does not lose control of his vehicle due to black ice—that the driver can have "quick reactions," "reasonable responsiveness," and undertake "an immediate reduction of speed to avoid" collision.[72] But the court presented no reason to think Ali did not have control or that the black ice made any difference at all to how his vehicle behaved. The only change in risk between ice and no ice justifying a duty, then, would be on the Blakes' side—how likely vehicles like theirs were to slip and cross the median. But the court of appeals did not even consider this. And this Court has suggested that icy conditions "pose the same risk of harm" as more common ones like mud.[73] No demonstrated basis exists to impose any costs, much less the massive ones that the court glossed over. Even if drivers must comprehend the risks of cross-median collisions in icy conditions—a proposition not established—that still does not prove they must stop all travel.

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[72] *Id.* at 591–93.
[73] *Scott & White Mem'l Hosp. v. Fair*, 310 S.W.3d 411, 414 (Tex. 2010).

C. The court of appeals did not establish proximate cause.

The errors the court of appeals made regarding foreseeability also taint the proximate cause analysis. Foreseeability is as necessary an element for proximate cause as it is for duty, and it is the same inquiry in both.[74] While the lack of proven foreseeability precludes finding proximate cause, the court's causation analysis illuminates additional problems with the liability finding.

As this Court recognized in *Lear Siegler*, while negligence may "expose[] another to an increased risk of harm by placing him in a particular place at a given time," even then "the happenstance of place and time [can be] too attenuated from the defendant's conduct for liability to be imposed."[75] Here, Ali's and Werner's alleged negligence had nothing to do with the Blakes being in the danger in which they found themselves—that resulted solely from Salinas's actions. The court's discussion also leaves unclear even whether Ali's speed contributed to the accident only by "happenstance." Although the court recited testimony that the collision would not have happened if Ali were going "15 miles per

[74] *Mellon Mortg.*, 5 S.W.3d at 659.
[75] *Id.*

hour and in the same location" as "a mathematical fact,"[76] the court did not establish whether that was any more than a mere coincidence. Whether Ali had been traveling 15 or 100 miles per hour, his vehicle would not have been in the "same location"—the Blakes might have instead hit other vehicles traveling the same speed as Ali in the same lane. Had the Blakes been only slightly closer upon crossing, even 15 miles per hour would not have prevented the accident. And unlike with typical obstructions, here the Blakes' vehicle was headed *toward* Ali. At some point, no degree of traction or stopping distance matters. Even if Ali's speed could matter, the court still did not demonstrate that it was a significant enough cause to impart liability.

Moreover, the negligence of an actor closer to the Blakes further illustrates the comparatively minimal effect of Ali's and Werner's conduct. Although there can be more than one proximate cause, this Court recognizes that the negligence of one actor can loom so large as to be the only one.[77] Indeed, even *Palsgraf* reduced to this—the wrongdoer

[76] 672 S.W.3d at 577.
[77] *See generally Bell*, 434 S.W.2d at 121 (collecting cases).

to the plaintiff was "the man who carries the bomb, not the one who explodes it without suspicion of the danger."[78]

Here, the Blakes were going even faster than Ali—approximately 55-60 mph, apparently like most other vehicles ("surrounding traffic").[79] It is already a stretch to pick out Ali and Werner as a proximate cause when traffic was traveling the same speed in both directions. But Salinas presented the mortal threat to the Blakes regardless of whether Ali was on the opposite side of the road or going any particular speed. Whether any accident happened at all was within Salinas's control. It is difficult to see how the driver who actually lost control was not the real, and only substantial, cause of the accident. Though the court of appeals failed to justify submission of liability to the jury, the jury still correctly perceived that liability fell on Salinas more than Ali or Werner (except for when the multitude of irrelevant duties confused the issue). This should have prompted at least some more searching analysis of proximate cause and whether Ali's and Werner's conduct was truly a "substantial factor"[80] in bring about the injuries.

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[78] *Palsgraf*, 162 N.E. at 100.
[79] Respondents' Br. at 7.
[80] *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004).

Finally, even assuming Ali and Werner should have comprehended the risk of a cross-median incursion, the court of appeals' analysis still falls short. Nothing suggests that ice made any difference at all for how Ali's vehicle reacted. Again, the only way Ali and Werner contributed in any meaningful sense was by not comprehending and acting upon the increased risk of the Blakes losing control—a differential risk that no one has acknowledged, much less quantified, and a risk that was squarely within Salinas's control. To say that this represents a sufficiently grave fault of Ali's and Werner's to attribute to them massive liability on the analysis presented by the court of appeals strains legal logic.

III. This case presents every reason for preserving the admission rule and for not allowing direct liability.

Petitioners and other amici have ably explained the multitude of problems with the duties and direct liability that the court of appeals created as well as why the admission rule should apply.[81] The Chamber agrees that direct liability is unjustified and that the admission rule should govern, if necessary. But this case presents an especially poor

[81] Petitioners' Br. at 40–64; Br. of Amicus Curiae Am. Trucking Ass'n at 5–7, 10–17; Brief of Amici Curiae The Tex. Trucking Ass'n and Trucking Indus. Def. Ass'n at 6–12; Brief of Amici Curiae Tex. Ass'n of Def. Counsel.

vehicle for resolving these significant questions in favor of direct liability or against the admission rule.

Despite filling hundreds of pages of briefing and opinion, the duties and purpose of direct liability here all amount to the idea that Werner should have ensured that Ali appropriately looked out for ice and, if he found it, slowed and then stopped to avoid losing control. Yet the court of appeals made clear that Ali was already obligated to do as much by virtue of having a commercial driver's license, and nothing obligated Werner to do more.[82] Putting it this simply makes plain that additional duties and liabilities are at best "superfluous" and at worse grossly prejudicial to the defendants and confusing to the jury.[83]

Yet here, those expansive duties also make no difference under anything the court of appeals analyzed. Ali never lost control of his vehicle. Nothing shows that the collision would have proceeded differently without ice. More duties and liability on Werner would not have accomplished the purpose of helping Ali to maintain control of his vehicle. The additional liability theories served exclusively to enlarge Ali's and Werner's total liability (once liability was improperly allowed at

[82] *See Werner*, 672 S.W.3d at 576, 594.
[83] *See id.* at 633–34 (Wilson, J., dissenting).

all)—from 45% to 84%.[84] And by doing so, these theories all but eliminate liability for Salinas—the party with the most control over whether any accident happened that day. The court's opinion effectively transforms a commercial entity into an insurer while relieving the obligations on the person who could have most effected change.

Allowing this particular case to establish direct liability and vitiate the admission rule would be especially absurd because the Texas Legislature has acted to try to strictly limit the former and adopt the latter in future trucking cases. Responding to the explosion of liability for commercial trucking, the Texas Legislature passed House Bill 19 in 2021. According to the House Committee Report, "[e]xcessive commercial motor vehicle litigation has been a concern of businesses of all sizes, employees, and drivers across Texas."[85] House Bill 19 sought to "streamline and create a fair framework for such litigation" by

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[84] *See id.* at 634 (Wilson, J., dissenting) ("Thus, the jury's consideration of all derivative theories effectively increased Werner's total percentage of responsibility by 39%, and by pushing Werner's percentage over 50% effectively made Werner liable for 100% of the damages recoverable by the Blake Parties....").

[85] *Bill Analysis for H.B. 19*, 87th Leg. R.S. (Apr. 8, 2021), https://capitol.texas.gov/tlodocs/87R/analysis/pdf/HB00019H.pdf#navpanes=0.

"protecting commercial motor vehicle operators from unjust and excessive lawsuits."[86] Support for the bill was bipartisan.

The law makes several helpful changes. *First*, it allows commercial vehicle defendants in accident lawsuits to bifurcate trial.[87] Phase one determines liability for and establishes the amount of compensatory damages, while phase two focuses on exemplary damages.[88] *Second*, the law largely adopts the admission rule. Provided the employer defendant admits to respondeat superior liability, phase one of the trial focuses on whether the defendant driver was negligent—with limited exceptions, no direct liability theory may be introduced and no evidence of the trucking company's negligence may be admitted if it depends on the driver's negligence.[89] Only if the driver is held liable may other evidence of the company's gross negligence be presented in phase two.[90] *Third*, the law renders evidence of a defendant's failure to comply with a governmental regulation or standard inadmissible in phase one unless 1) the evidence

[86] *Id.*
[87] TEX. CIV. PRAC. & REMEDIES CODE § 72.052.
[88] *Id.* § 72.052.
[89] *Id.* § 72.054.
[90] *Id.*

tends to prove that the failure was a proximate cause of the accident and 2) the regulation or standard is specific and governs the defendant.[91]

The statute limits the admissibility of company-wide evidence to prevent unfair prejudice. It precludes use of "reptile" tactics, in which plaintiffs' attorneys attempt to confuse jurors with irrelevant evidence about the danger of the defendant company to the jurors and community to obtain an oversized verdict based on a primitive fear response.[92]

By making these changes, the Texas Legislature expressed a clear policy of limiting expansive liability against commercial trucking companies, particularly liability based on minimal evidence of unique corporate wrongdoing. And it affirmed the importance of the admission rule. Nevertheless, defendants have had limited use of the statute so far, and federal courts (seeing the right as only procedural) have not required bifurcation.[93] It remains unclear how the statute will affect settlements if defendants are justifiably hesitant to test it or cannot rely on it. Apart from this legislative adjustment, the remainder of the opinion of the court

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[91] *Id.* § 72.053.
[92] ROADBLOCK, *supra* n.1, at 23–24.
[93] *See Sweeney v. DD&S Express, Inc.*, No. 6:23-cv-233, 2024 WL 502312, at *1 (W.D. Tex. Jan. 31, 2024) (collecting cases).

of appeals works harm not only to the trucking industry but also to tort law governing all commerce.

IV. The many errors in the opinion below will cause further and broader harm.

The effect of the decision below impairs a vital industry by itself. Even if House Bill 19 precludes application of the new duties the court established and reduces liability accordingly—a hypothesis yet to be tested—the court of appeals still essentially imposed the same duties on drivers, too. The expansive view of foreseeability and duty embodied in the opinion will effectively create strict liability for trucking companies that operate during winter conditions.

Yet the wrong views of foreseeability, duty, and proximate cause embodied in the opinion can work great mischief outside of the particular context of trucking or cross-median collisions. By failing to carefully consider the specific circumstances, pulling rare risks into the same general category as established risks, and placing those ordinarily remote from danger in with everyone else, the court of appeals moves much closer to a general duty to all the world that this Court has rejected. And by forcing the defendant to demonstrate the burden of a proposed duty while evaluating it in the narrowest way possible, the court's

general approach sets the stage for duties to be multiplied with flimsy justification. Under the common law, this case will be used by analogy to force open new, burdensome duties.

Indeed, this case has already multiplied duties, breaking new ground on specific direct theories of liability to micromanage trucking companies' operations and general theories of training and supervision never acknowledged by this Court. Those theories will wrongly burden commerce in the State as they creep into other areas. An approach that allows them to be so easily established threatens to entangle the courts in administering commercial enterprises and to turn those enterprises into general insurers. The State and its businesses, workers, and consumers cannot afford this.

CONCLUSION

For these reasons, the Chamber respectfully urges this Court to grant the petition and reverse.

Respectfully submitted,
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