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January 19, 2022

Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

Re: No. 20-0923; *Jesus Virlar, M.D. and GMG Health Systems Associates, P.A., A/KA and D/B/A Gonzaba Medical Group v. Jo Ann Puente*

**To the Honorable Members of the Texas Supreme Court:**

Pursuant to Rule 11, Texas Rules of Appellate Procedure, *amicus curiae* Texas Civil Justice League files this letter in the above-referenced cause in support of the petition for review.

### **Statement of Interest**

The Texas Civil Justice League (“TCJL”) is a non-profit association of businesses, health care providers, professional and trade associations, and individuals dedicated to maintaining a fair and efficient civil justice system. TCJL participates as *amicus curiae* in matters that have the potential for broad and substantial impact on the business community and the economic climate of this state. The opinion of the court of appeals with respect to the application of Chapter 33, Civil Practice & Remedies Code, has effects far beyond the health care liability

context. As leading proponents of both the 1995 and 2003 civil justice reform efforts in the Texas Legislature that in large part produced Chapter 33, TCJL has a fundamental interest in upholding the Legislature's ability to modify the common law for just and sound policy reasons.

This letter has been prepared in the ordinary course of TCJL's operations. No fee has been paid for the preparation or filing of this brief.

### **ARGUMENT**

*Amici* Texas Association of Defense Counsel, Texas Alliance for Patient Access, Texas Medical Association, Texas Osteopathic Medical Association, and Texas Hospital Association have already succinctly and persuasively argued that the court of appeals' Open Courts analysis of the Chapter 33 settlement credit provisions badly misses the mark. Their brief further points out several examples of statutes that in some form or fashion "restrict" common law causes of action. *Amicus curiae* brief of Texas Association of Defense Counsel, et al. at 7-8.

TCJL only adds its voice to question the court of appeals' premise that the definition of "claimant" in § 33.011(1), TEX. CIV. PRAC. & REM. CODE, "restricts a common law cause of action" and thus triggers an Open Courts analysis to begin with. *Virlar*, 613 S.W.3d at 694. How does defining a "claimant" to include derivative claims arising from the underlying plaintiff's injury "restrict a common law cause of action"? The statute does not limit causes of action in any way. The

entirety of the court of appeals' analysis of the question appropriates this Court's reasoning in *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) without the slightest attempt to examine whether *Lucas* is even apposite in this case (assuming that *Lucas* remains good law).

Specifically, Chapter 33 has nothing to do, as the court of appeals seems to think, with “impos[ing] the burden of supporting the medical care industry solely upon those persons who are the most severely injured and therefore most in need of compensation.” *Vilar*, 613 S.W.3d at 690. Chapter 33 establishes a comprehensive scheme for implementing the Legislature's policy decision, first taken in 1987 and extended in 1995, to adopt a proportionate liability system and to limit a defendant's joint and several liability. *See* § 33.013(b)(1), TEX. CIV. PRAC. & REM. CODE.<sup>1</sup> In 2003 the Legislature took the additional step of allowing a defendant to designate *any* responsible third party, including the claimant's employer in a worker's compensation and a debtor in bankruptcy. *See* Acts 2003, 78th Leg., ch. 204, Sec. 4.10(2). These legislative policy decisions, along with others (including the settlement credit and, for example, the paid or incurred rule<sup>2</sup>) could all in some way

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<sup>1</sup> S.B. 28 amended § 33.013(b) to raise the threshold for joint and several liability from 20 to 50 percent. *See* Acts 1987, 70th Leg., 1st C.S., ch. 2, Sec. 2.09, eff. Sept. 2, 1987. We further note that in enacting § 33.013, the Legislature overturned this Court's decision in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984), which adopted a pure comparative causation rule in product liability cases. That, too, might be construed as “limiting a cause of action” in violation of the Open Courts provision.

<sup>2</sup> § 41.0105, TEX. CIV. PRAC. & REM. CODE.

effect the amount of economic damages recoverable by a claimant when compared to prior law. If the court of appeals' analysis is permitted to stand, we can expect to see similar Open Courts attacks all up and down the line.

The purpose of the Chapter 33 reforms was simply to bring all potentially responsible parties into the lawsuit so that the finder of fact could assess each party's percentage of fault and require a liable defendant to pay only for the portion of damages attributed to that defendant. The court of appeals' commentary on the "one-satisfaction rule" entirely misses the point. The ultimate test has to do with the fairness of the system *as a whole*, not its effect on individual parties in individual lawsuits. Therein lies the problem with the court of appeals' whole premise.

### **CONCLUSION AND PRAYER**

TCJL respectfully prays that this Court grant the petition for review for the purpose of correcting the court of appeals' erroneous holding that § 33.012 offends the Texas Constitution's open courts guarantee.

Respectfully submitted,

*/s/ George S. Christian*  
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**CERTIFICATE OF COMPLIANCE**

I certify that this document contains 749 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

*/s/ George S. Christian*

**CERTIFICATE OF SERVICE**

I certify by my signature below that a true and correct copy of the above and foregoing has been served via electronic court filing and electronic mail on all attorneys of record as listed below on July 8, 2021:

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