NO. CV-20-492

BEFORE THE ARKANSAS SUPREME COURT

SAMANTHA EDWARDS, INDIVIDUALLY,
AND AS SPECIAL ADMINISTRATRIX OF THE
ESTATE OF WILLIAM ROBBY WRAY EDWARDS,
DECEASED; AND ARLEIGH GRAYCE EDWARDS,
DECEASED; AND AS PARENT AND
NEXT OF FRIEND FOR PEYTON HILL, A MINOR — PETITIONER

v.

ERIC JAMES CORNELL THOMAS AND
MCELROY TRUCK LINES, INC. — RESPONDENTS

On Certified Question from the United States District Court
for the Western District of Arkansas

Honorable Susan O. Hickey, Presiding Judge

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

This case comes to this Court on certified question from the United States District Court for the Western District of Arkansas. (Add. 1-8). The underlying wrongful-death and survival action arises from a two-vehicle automobile accident in Howard County, Arkansas. (Add. 2). A pickup truck driven by William Bobby Wray Edwards ("Mr. Edwards"), and occupied by his daughter Arleigh Edwards, and his step-son Peyton Hill (Add. 2) was struck by a tractor-trailer driven by Respondent Eric James Cornell Thomas during the course of his employment with Respondent McElroy Truck Lines, Inc. (Add. 2, 22-24). Petitioner Samantha Edwards is the special adminstratrix for the separate estates of her husband Mr. Edwards and daughter Arleigh and next of friend to her son Peyton. (Add. 9-10).

Pertinent to this case is the constitutionality of the prohibition in Arkansas's Child Passenger Protection Act ("CPPA"), Ark. Code Ann. § 27-34-106(a), that forbids a court from allowing evidence of the failure to restrain a child in a child passenger safety seat in a civil action involving negligence. (Add. 2).

The accident happened when Thomas failed to observe a stop sign and his tractor struck the pickup truck driven by Mr. Edwards. (Add. 2). After the initial impact, the pickup truck traveled off the road and then struck a tree. Arleigh was then ejected from the pickup and died. (Add. 2). Due to her age at the time of the accident (Add. 2) Arleigh was required to have been restrained in a child passenger safety seat. (Add. 3; Ark. Code Ann. § 27-34-104(b)). While a "Cosco Scenera Next" brand child safety seat was attached to the pickup's backseat, Arleigh was not restrained in it or by any other passenger restraint system. (Add. 2). Her teenage brother Peyton, who was restrained in a seat belt, survived the accident with only moderate injuries. (Add. 44).

In their answer to the complaint, Thomas and McElroy Truck Lines admitted that Thomas was negligent in failing to abide the stop sign prior to his collision with Edwards's pickup and that, at the time of the accident, Thomas was acting as McElroy's employee. (Add. 22-24). They also asserted the affirmative defense of comparative negligence and apportionment of fault under Ark. Code Ann. § 16-61-201 and 202 as a result of Mr. Edwards's failure to restrain Arleigh in a child safety seat in violation of CPPA, Ark. Code Ann. § 27-34-104. (Add. 28).

Respondents subsequently raised the defense of failure to mitigate damages and the doctrine of avoidable consequences. (Add. 44). Petitioner does not dispute that Arleigh was wholly unrestrained at the time of the accident. (Add. 2, 44).

If allowed, Respondents will present expert proof through a Ph.D.-level biomechanical engineer that, if Arleigh had been restrained at the time of the collision, she would not have been ejected from the pickup and that she would not only have survived the collision but that her outcome would have been better than Peyton's. (Add. 44).

Petitioner moved for partial summary judgment on Respondents' defense that Mr. Edwards was at fault for failing to put Arleigh in a child safety seat. She relied on Ark. Code Ann. § 27-34-106(a) which bars evidence of failure to use a child passenger safety seat in civil negligence actions, stating: "Failure to provide or use a child passenger safety seat shall not be considered, under any circumstances, as evidence of comparative or contributory negligence, nor shall failure be admissible as evidence in the trial of any civil action with regard to negligence." (Add. 30-37)

In their response, Respondents argued that section 27-34-106(a) violates the separation-of-powers doctrine because Amendment 80, section 3 to the Arkansas Constitution does not permit legislative intrusion—either directly or indirectly—upon evidentiary issues. (Add. 40-59).

Finding that no controlling Arkansas authority had resolved the issue of whether section 27-34-106(a)'s foreclosure of evidence is constitutionally enforceable in light of article 4, section 2 and Amendment 80, section 3, the district court denied Petitioner's motion for summary judgment and certified the question to this Court for resolution. (Add. 1-7, 86-88).

ARGUMENT

The certified question posed to this Court is: "whether Ark. Code Ann. § 27-34-106(a) violates the separation-of-powers doctrine under article 4, section 2 and Amendment 80, section 3, of the Arkansas Constitution." (Add. 2). Because the statute limits evidence that may be introduced and thereby dictates admissibility, the answer to that question is "yes."

In the 20 years since Amendment 80 was adopted, this Court has been unequivocal in its position that "rules regarding pleading, practice, and procedure are solely the responsibility of this Court." *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 8, 308 S.W.3d 135, 141. This Court has also stressed that "[i]t is undisputed that the rules of evidence are 'rules of pleading, practice, and procedure'" and that a statute that "dictates" what evidence is admissible is an unconstitutional legislative encroachment on the judiciary's domain. *Id.* at 10, 308 S.W.3d at 142; *see also*, *Mendoza v. WIS International, Inc.*, 2016 Ark. 157, 5, 490 S.W.3d 298, 301; *Broussard v. St. Edward Mercy Health System*, 2012 Ark. 14, 6, 386 S.W.3d 385, 389.

Section 27-34-106(a) does just that—it dictates how a court must address the admissibility of specific evidence in a civil action. Contrary to petitioner's contention, it is not a statute that defines the elements of a claim or the defenses thereto. Nor does it merely define negligence. Instead, it absolutely forecloses the trial court's ability to allow the use of certain proof. Petitioner's primary authority for arguing against the separation-of-powers infirmity did not pertain to, much less *apply*, a separation-of-powers analysis. Indeed, it was decided before Amendment 80 even set up the current Arkansas constitutional scheme. In sum, while Petitioner makes creative arguments to construe and preserve the statute, there is simply no legitimate way to characterize section 27-34-106(a) so that it passes muster under Amendment 80 and this Court's current jurisprudence.

Therefore, because section 27-34-106(a) violates the separation-of-powers doctrine, this Court should answer the certified question in the affirmative and declare section 27-34-106(a) unconstitutional.

I. Arkansas Code Annotated § 27-34-106(a) violates the separation-of-powers doctrine under article 4, section 2 and Amendment 80, section 3 of the Arkansas Constitution.

While statutes are normally presumed to be constitutionally valid, there can be no "presumptive" validity of one branch's intrusion into another branch's domain. Ark. Const. art. 4, section 7. Thus, if a statute is incompatible—either directly or indirectly—with the judiciary's exclusive authority to determine the relevancy and admissibility of evidence then it must be struck down. *Mendoza,* 2016 Ark. 157 at 9; 490 S.W.3d at 303. *See also Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 6-7, 11, 308 S.W.3d 135, 140, 142.

A law is substantive if it "'creates, defines, and regulates the rights, duties, and powers of the parties.'" *Id.* at 8, 308 S.W.3d at 141 (quoting *Summerville v. Thrower*, 369 Ark. 231, 237, 253 S.W.3d 415, 419-20 (2007)). However, a statue is procedural if it "prescribe[s] the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.'" *Id.*

As this Court has repeatedly explained since the adoption of Amendment 80, a legislatively created rule of evidence—whether it mandates or forecloses consideration of certain evidence—is procedural

and therefore unconstitutional. *See Johnson*, 2009 Ark. at *10-11; 308 S.W.3d at 142.

This case is no different. Section 27-34-106(a) is not subtle. Rather it directly dictates to courts what evidence can—or, actually, *cannot*—be used in the process of proving the parties' claims and defenses. Because it encroaches on the judiciary's authority, Arkansas's constitution requires that it be invalidated.

A. The Arkansas Constitution denies the legislature authority to impose rules of evidence on the judiciary.

This Court's approach to the separation-of-powers doctrine had evolved significantly over the 35 years before undergoing a definitive transformation with the adoption of Amendment 80 in 2000. Prior to Amendment 80's passage, Arkansas separation-of-powers decisions under Article 4, section 7 were inconsistent. Indeed, in as late as 1984, this Court held that it lacked "exclusive authority to set rules of court procedure," and that only those statutes that were in direct conflict with one of the Court's rules of procedure would be found unconstitutional. *Jackson v. Ozment,* 283 Ark. 100, 101, 671 S.W.2d 736, 737-38 (1984).

But *State v. Syphult*, decided in 1990, signaled the start of a sea change. There, the Court declared that it would continue to "defer to the

General Assembly, when conflicts arise, only to the extent that the conflicting court rule's primary purpose and effectiveness are not compromised; otherwise, our rules remain supreme." 304 Ark. 5, 7, 800 S.W.2d 402, 404 (1990). Two years later, in *Weidrick v. Arnold*, this Court definitively acknowledged the mistakes it had made in *Jackson* and formally overruled it. 310 Ark. 138, 142, 835 S.W.2d 843, 845 (1992) (asserting the judiciary's preeminence over court procedure).

Then came Amendment 80 in 2000, which for the first time in the Arkansas Constitution's history, confirmed that the judiciary possesses the *exclusive* authority for creating and applying rules of practice and procedure:

> The Supreme Court shall prescribe the rules of pleading, practice, and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right to trial by jury as declared in this Constitution.

Arkansas Constitution, Amendment 80, § 3.

Next came *Johnson v. Rockwell Automation, Inc.*, 2009 Ark 241, 308 S.W.3d 135 (2009). In *Johnson* this Court invoked Section 3 of Amendment 80 for two major propositions: first, to clarify that "rules regarding pleading, practice, and procedure are *solely* the responsibility

of this court"; and second, to make clear that both direct *and indirect* intrusions into the judiciary's domain are unconstitutional. *Id.* at 8, 308 S.W.3d at 141 (emphasis added). As the Court pointed out, if "a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional." *Id.* at 8, 308 S.W.3d at 141.

Johnson further clarified that "the rules of evidence 'are rules of pleading, practice, and procedure'" and that therefore "the rules of evidence are rules falling within this Court's domain." *Id.* at 10, 308 S.W.3d at 142 (citing *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986)). Relying on these points—that rules of evidence are procedural and that a statute that encroaches upon procedure, even indirectly, violates the separation of powers—this Court struck down a statute that partly circumscribed the collateral source rule. The statute at issue, Ark Code Ann. §16-55-212(b), provided:

> Any evidence of damages for the costs of any necessary medical care, treatment, or services received shall include only those costs actually paid by or on behalf of the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible.

Like the Petitioner in the case at bar, respondents in *Johnson* attempted to preserve the statute by suggesting that it merely defined a plaintiff's rights. They averred that section 16-55-212(b) did not *mandate* receipt of certain evidence and instead simply re-defined a plaintiff's expenses to amounts that had been actually paid. As such, respondents contended that the statute did not conflict with the court-made "collateral source rule." *Id*. at 10, 308 S.W.3d at 142.

But that argument failed. Even if section 16-55-212(b) simply re-defined what constitutes the reasonable value of medical services, it violated the separation-of-powers doctrine since the section still controlled the admissibility of evidence. *Id*. at 11, 308 S.W.3d at 142. This was because the provision "*clearly limits the evidence that may be introduced* relating to the value of medical expenses to the amount of medical expenses paid or the amount to be paid by a plaintiff or on a plaintiff's behalf, *thereby dictating what evidence is admissible*." *Id*. at 11-12, 308 S.W.3d at 142 (emphasis added). In short, *Johnson* set out the controlling test: does the legislation limit the evidence that may be introduced and thereby dictate what evidence is admissible? If so, then it is unconstitutional.

This Court next struck down provisions of the medical malpractice act in *Broussard v. St. Edward Mercy Health System, Inc.*, 2012 Ark. 14, 386 S.W.3d 385. There, the challenged statute, Ark. Code Ann. § 16-114-206, required that a plaintiff offer testimony from an expert in the same specialty as the defendant physician in order to prove the standard of care for medical negligence. The defendant argued that section 16-114-206 simply set out the burden of proof that a party must meet in a medical malpractice action. *Id.* at 6, 386 S.W.3d at 389. However, because the statute also set qualifications that an expert must possess in order to testify in court—a procedural matter solely reserved for the courts pursuant to Amendment 80 and the common law—this Court held it unconstitutional. *Id.* at 6-7, 386 S.W.3d at 389. In doing so, the Court underscored that the General Assembly lacks authority to create procedural rules "even where the procedure it creates does not conflict with already existing court procedure." *Id.* at 5-6, 386 S.W.3d at 389.[1] The Court acknowledged that a statute may be

[1] In so ruling, the Court went farther than it had in a criminal case, *Nelson v. State*, 2011 Ark. 429, 384 S.W.3d 534. In *Nelson*, the Court

considered "substantive" to the extent that it sets forth a burden of proof or otherwise regulates "the party's right to recovery," but that status will not save the statute from succumbing to the separation-of-powers doctrine if it attempts to foreclose or impose conditions on admission of proof. *Id.* at 6, 386 S.W.3d at 389.

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had addressed the Arkansas Rape Shield Statute, Ark. Code Ann. § 16-42-101, ruling that it survived a separation-of-powers challenge because it did not impose a "total ban on admissibility". (*Compare* section 27-34-106(a) (imposing a total ban on admissibility)). The Court stressed that, since the circuit court retained "wide discretion" to determine the admissibility of the victim's sexual conduct, the Rape Shield Statute skirted Article 4, section 2. Justice Hannah, in concurrence, did urge the Criminal Practice Committee to develop a rule of evidence (which now exists as Ark. R. Evid. 411). Notably, in his subsequent majority opinion in *Broussard*, Justice Hannah framed the rule that applies to this day: the legislature lacks authority "to create procedural rules… even where the procedure it creates does not conflict with already existing court procedures." 2012 Ark. 14, at 5-6, 386 S.W.3d at 389.

Finally came *Mendoza v. WIS International, Inc.*, 2016 Ark. 157, 490 S.W.3d 298, a case in which this Court struck down a provision of the Arkansas Motor Vehicle and Safety Act that was analogous to the section of CPPA at issue here. The statute at issue in *Mendoza* provided that: "The failure of an occupant to wear a properly adjusted and fastened seat belt shall not be admissible into evidence in a civil action." Ark. Code Ann. § 27-37-703(a)(1). The plaintiff in that case, like Petitioner here, urged that the statute should be upheld, arguing it was substantive and simply "defin[ed] what is negligence for purposes of comparative fault." *Id*. at 5, 490 S.W.3d at 301.

But this Court, disagreed. Drawing upon *Johnson* it held that because the seat-belt statute expressly limited what evidence was admissible at trial it necessarily was a rule of evidence. *Id*. at 8, 490 S.W.3d at 303. And since the statute had the effect of "depriving the trial courts of their exclusive authority to determine the relevancy of evidence" *Id*. at 9, 490 S.W.3d at 303, the seat belt statute violated the separation-of-powers doctrine and Amendment 80. *Id*. at 9, 490 S.W.3d at 304.

B. By foreclosing evidence that may be introduced, Arkansas Code Annotated § 27-34-106(a) impermissibly divests the judiciary of its role in determining what evidence is admissible.

If the arguments unsuccessfully advanced in *Mendoza* sound familiar, then that is because petitioner's arguments here are essentially a judicial déjà vu. As with the seat belt statute in *Mendoza*, section 27-34-106(a) marks the legislature's attempt to deprive trial courts of their authority to control the admission of evidence at trial. By limiting—indeed, entirely foreclosing—the evidence that may be introduced relating to use of child passenger restraints it intrudes upon the judiciary's exclusive authority.

When determining the constitutionality of statutes, this Court looks to the rules of statutory construction. *Johnson* at 5, 308 S.W.3d at 139. "In considering the meaning of a statute, we construe it just as it reads, giving the words and usually accepted meaning in common language." *Id.* If the proponent of a challenged statute glosses over key words in order to urge a particular meaning, it reveals a staggering weakness to the proponent's argument. For, as pointed out in *Arkansas Dep't of Human Services v. Howard*, a court must "construe the statute so that no word is left void, superfluous or insignificant, and … give

meaning to every word in the statute, if possible." 367 Ark. 55, 62, 238 S.W.3d 1 (2006) (in promulgating regulation, Board effectively "infringed upon a legislative function" which violated separation of powers) (quoting *Rose v. Arkansas State Plant Board*, 363 Ark. 281, 288-89, 213 S.W.3d 607, 615 (2005)).

Yet Petitioner's construction of the child seat statute, ignores the mandate of *Howard* and *Rose.* Truncating the language of Section 27-34-106(a), she deftly jettisons key language to render it down to the following proposition—that "the failure to use a child safety seat is not negligent." (Arg. at p. 4). But that abbreviated version ignores pivotal language that also lurks within subsection 27-34-106(a). In full, it reads:

> The failure to provide or use a child passenger safety seat *shall not be considered, under any circumstances, as evidence* of comparative or contributory negligence, nor shall failure *be admissible as evidence* in the trial of any civil action with regard to negligence.

Ark. Code Ann. § 27-34-106(a) (emphasis added). Such a drastic distillation of section 27-34-106(a) defies the plain language of the

statute by neglecting to give meaning to every word in it.[2] And it likewise reveals the fatal flaw in her argument.

It also simultaneously contradicts the well-established definition of "negligence." For the last century, negligence has been defined in general terms as the failure to do something which a reasonably careful person would do. *See* AMI Civil 302 (2020). *See also Coca Cola Bottling Co. v. Shipp*, 174 Ark. 130,143 (1927). Assuming *arguendo* that the legislature could or would have intended to re-define negligence in the context of CPPA, then presumably it would have plainly stated as much in the statute. (For example, "Failure to provide or use a child safety seat is not negligence.") But that is not what the legislature did. Nor did the legislature otherwise "define" negligence; rather, it sought to

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[2] As the distinction between AMI Civil 901 and 903 illustrates, there is a significant difference between conduct that is "negligence" and conduct that is mere "evidence of negligence." An act that *is* negligence leaves virtually nothing left to be decided; whereas an act that is "*evidence of* negligence" requires a weighing of various factors. This dichotomy underscores the impropriety of Petitioner's selective editing.

limit—indeed, bar—what proof a court might consider as evidence. Lest there be any doubt, the legislature's *actual* word choice speaks volumes: the statue expressly states that it governs what is "admissible as evidence" at trial, using the term "evidence" not once but twice. *See* Ark. Code Ann. § 27-34-106(a).

In short, if we give "meaning to every word in the statute," then section 27-34-106(a) plainly imposes on the judiciary a procedural rule of evidence. After all, it precludes judges from deciding what evidence may be admitted at trial. *Baker v. Morrison*, 309 Ark. 457, 829 S.W.2d 421 (1992), recognized a common law duty to use passenger restraints. Sections 27-37-703 and 27-34-104 statutorily underscored that duty. But it is only through the admission of evidence at trial that such a duty (or, in the case of a child, the child's right to be protected) can be enforced.[3] And yet the child-seat statute says, point-blank, that any

[3] Petitioner argues further that the statute is not procedural because nowhere does it prescribe steps for having a right judicially enforced. (Arg. at pp. 3-4). But that slyly begs the question. As an initial matter, it may not *prescribe* a step; but that is only because it *obliterates* any

and all evidence of failure to fulfill that duty can never be admitted at trial. The impact of section 27-34-106(a) is plain—it "depriv[es] the trial courts of their exclusive authority to determine the relevancy of evidence," which is precisely what *Mendoza* expressly forbids.

It should be noted that petitioner's argument (that the child-seat statute "simply defines what constitutes negligence") is hardly novel. Rather, it is reminiscent of arguments that this Court previously rejected in *Johnson*, *Broussard*, and *Mendoza*. In the face of arguments that each statute established a substantive standard this Court determined that, because the language dictated what evidence would be admissible at trial, the statutes intruded upon the judiciary's

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step. Moreover, in this context the question is not exclusively what *right* is being enforced; rather it is also what *duty* is being enforced. Here, the duty is for the motorist to protect child passengers by using child car seats. Whether the duty arises by statute or by common law, it becomes the job of the courts to determine how that duty is enforced though evidence/proof presented in the courtroom.

rulemaking authority or on the discretion of the trial court judges and therefore violated separation-of-powers principles.

C. Petitioner's reference to the Dram Shop Act and the Medical Malpractice Act is unavailing.

Even more confounding is Petitioner's lengthy attempt to portray section 27-34-106(a) as a substantive statute by comparing it to statutes like the Arkansas Dram Shop Act and Medical Malpractice Act. (Arg. at pp. 9-17). The same arguments were advanced by the petitioner (as well as by amici) in *Mendoza*. But neither the majority opinion nor any of the dissents found them to be worthy of comment, much less decisive. Respectfully, those arguments haven't improved with age. Consequently, the same result should apply here. Nevertheless, respondent will address them here.

Petitioner argues that statutes commonly control what evidence is relevant either by defining the elements of (or defenses to) a cause of action. (Arg. at 10). But there is a stark difference between "elements" and the precise evidence that goes into proving them up. And while sections of the Dram Shop Act and the Medical Malpractice Act do define substantive standards of care that must be met to either prove or defend a claim under the respective Acts, neither dictates what

evidence can or cannot be admitted to meet that standard. For example, the Dram Shop Statute reads:

> In cases where it has been proven that an alcoholic beverage retailer knowingly sold alcoholic beverages to a person who was clearly intoxicated at the time of such sale or sold under circumstances where the retailer reasonably should have known the person was clearly intoxicated at the time of the sale, a civil jury may determine whether or not the sale constitutes a proximate cause of any subsequent injury to other persons. For purposes of this section, a person is considered clearly intoxicated when the person is so obviously intoxicated to the extent that, at the time of such sale, he or she presents a clear danger to others. It shall be an affirmative defense to civil liability under this section that an alcoholic beverage retailer had a reasonable belief that the person was not clearly intoxicated at the time of such sale or that the person would not be operating a motor vehicle while in the impaired state.

Ark. Code Ann. § 16-126-104.

This language sets out the standard of care that must be proven in order to establish a claim or affirmative defense under the Dram Shop Act—a knowing sale of alcoholic beverages to a clearly intoxicated person, or lack thereof. But that proves nothing about the separation-of-powers issue at hand. Granted, the legislature may set out the parameters for a cause of action by identifying its elements or defenses in the statute. And, ultimately, identifying those elements of (and defenses to) a statutory claim, might effectively render some proof more

relevant or less relevant. But the ascertainment of relevancy lies exclusively within the province of the judiciary. The legislature simply cannot establish rules of evidence for *how* a cause of action (or defense) so defined is to be proven in court.

And such is the case with the Dram Shop statute, which rightfully, leaves the question of what proof is admissible as evidence to the discretion of the presiding judge. In arguing otherwise, Petitioner fails to acknowledge that, in contrast with section 27-34-106(a), the Dram Shop Act's language does not specify what evidence can or cannot be admitted to establish a claim or defense under that Act.

Indeed, one passage of Petitioner's brief brilliantly highlights the very separation-of-powers problem inherent in CPPA. Petitioner errs to the extent she claims, (Arg. at 12), that the Dram Shop Act "defines what evidence is relevant." It does not. But in making that argument, Petitioner notes:

> Proof that a purchaser was staggering or slurring speech is relevant and admissible because it supports the proposition that the purchaser was clearly intoxicated at the time of the purchase, or that a seller ought to have known that he or she was clearly intoxicated at the time.

(Arg. at 12). Often, that will prove true. But notably, the Dram Shop Act's text does not specify such evidentiary minutia. Instead, the admissibility of such proof is left to the trial court's discretion. Nor does that Act parrot section 27-34-106(a)'s language by saying:

> a purchaser's staggering or slurred speech shall not be considered, under any circumstances, as evidence of intoxication, nor shall it be admissible as evidence in the trial of any civil action with regard to Dram Shop liability.

Why not? It's because if it *did*, then the Dram Shop Act would face the same fate as section 27-34-106(a) now deserves. After all, that would be legislative meddling into the judiciary's domain.

Petitioner's reference to the standard-of-care proof requirements under the Medical Malpractice Act, Ark. Code Ann. § 16-114-206(a), fares no better.[4] As Petitioner acknowledges, the language of section

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[4] The cases that Petitioner cites in support of her argument concerning section 16-114-206 all pre-date *Broussard* and all address failures of a party to present expert proof sufficient to establish the standard of care—not questions of whether specific proof was admissible under the statute. *See Gilbow v. Richards*, 2010 Ark. App. 780, 2010 WL 4638319; *Williamson v. Elrod*, 348 Ark. 307, 310, 72

16-114-206(a) that set requirements for who could, or could not, testify as an expert to prove the applicable standard of care was stricken down by this Court in *Broussard* for violating the separation-of-powers. *See supra*, Section I.A. (Arg. at p. 13-14).

The upshot is this: a statute that defines standard of care is fundamentally different from a statute, like section 27-34-106(a), that attempts by its express language to control the evidence admitted in support of a claim or defense. Often, the statutorily defined elements of a cause of action or defense will influence what evidence a presiding judge determines to be relevant in an admissibility analysis. But a statute like section 27-34-106(a), by its express language, wrests the admissibility analysis out of the judge's hands by erecting an absolute bar on certain types of evidence.

That is why this Court held in *Johnson*, *Broussard*, and *Mendoza*, that statutes that dictate what evidence is admissible offend the principles of separation of powers and the exclusive constitutional

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S.W.3d 489, 491 (2002); *Skaggs v. Johnson*, 323 Ark. 320, 915 S.W.2d 253 (1996).

authority of this Court. And for that same reason, the Court should hold section 27-34-106(a) unconstitutional here.

D. The *Potts* decision offers nothing useful to this Court's separation-of-powers analysis.

In support of her position that section 27-34-106(a) is substantive, and therefore does not violate the separation-of-powers doctrine, petitioner relies most heavily upon *Potts v. Benjamin*, an Eighth Circuit decision interpreting the child-seat statute. 882 F.2d 1320 (8th Cir. 1989). Obviously, as a federal decision, *Potts* is not controlling on this Court. But three even more significant reasons reveal its weakness as authority for what this Court must decide.

First, *Potts* had nothing to do with Arkansas's separation-of-powers doctrine. Instead, the Eighth Circuit was grappling with a facet of the *Erie* doctrine, an inherently different analysis.[5] That doctrine

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[5] Petitioner does not deny that *Potts* was based upon an *Erie* question but contends that the federal courts' *Erie* analysis is no different from this Court's separation-of-powers analysis, and that therefore *Potts* definitively decides the issue of whether section 27-34-106(a) is substantive law. (Arg. at 8). Petitioner argues that "[w]hy

rests on federalism principles meant to prevent a federal court, sitting in diversity, from ignoring applicable state law in lieu of federal law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). It has no bearing on the separation-of-powers within a state's constitutional structure.

Petitioner asserts that it makes no difference that *Potts* arose strictly in the *Erie* context. She boldly asserts that "how a particular law is characterized, as procedural or substantive [does not vary] depending on the context in which the characterization is made. A law is either procedural or it is not." (Arg. at 8).

This is a remarkable pronouncement. And it is belied by at least 75 years of jurisprudence, which underscores why context *does matter*

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federal courts deem it necessary to distinguish between procedural laws and substantive laws is not determinative. How the law is characterized, as procedural or substantive, is." Yet, Petitioner provides no reasoning or support for this assertion. (*Id.*). And, as discussed below, the leading authorities soundly reject such a position since context and rationale *do* matter.

and why *Potts* is of no use here. Justice Frankfurter pointed out long ago in *Guaranty Trust Co. of N.Y. v. York*,

> Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and procedure are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. *Each implies different variables depending upon the particular problem for which it is used.*

326 U.S. 99, 108, 65 S.Ct. 1464, 1469 (1945) (emphasis added).[6] Justice Frankfurter's observations in *York* have been echoed more recently by the leading treatises, which warn of the danger of over-simplification, and note that, even *within* the realm of *Erie* analyses, the terms

[6] As Justice Frankfurter explained, *Erie* "expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts." *Id.* "In essence, the intent of that decision was to ensure that, in all … diversity of citizenship [cases]…, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in State court." *Id.*

"substantive" and "procedural" take on different meanings. For example, as Wright & Miller's *Federal Practice & Procedure* explains:

> A particular issue may be classified as substantive or procedural in three different decisional contexts: when determining whether the matter is within the scope of the federal courts' rulemaking power; when resolving questions of conflict of laws; or when determining whether to apply state law or federal law. These three contexts present three very different kinds of analytical problems. *Factors that are of decisive importance in making the substance-procedure classification for one context may be irrelevant in the others*.

The Erie Doctrine, Rules Enabling Act, and Federal Rules of Civil Procedure—Matters Covered by the Civil Rules, 19 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 4508 (3d ed. 2016) (emphasis added).

This is why, in the context of an *Erie* analysis, state rules of evidence (rather than the federal rules) are sometimes applied if those rules are closely connected to a substantive state policy. *See, e.g.*, *Feldman v. Allstate Ins. Co*., 322 F.3d 660, 666 (9th Cir. 2003) ("Moreover, some state law rules of evidence 'in fact serve substantive state policies and are more properly rules of substantive law within the meaning of *Erie*.'"). And where the issue is a close one, "the proponent

is entitled to the benefit of the more favorable rule." *Adams v. Fuqua Industries, Inc.*, 820 F.2d 271, 273 (8th Cir. 1987).

While the federal courts' *Erie* analysis and this Court's separation-of-powers analysis might use the same terms of "substantive" and "procedural", that is where the similarity ends. *Johnson* points out:

> [S]o long as a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional. This is because rules regarding pleading, practice, and procedure are solely the responsibility of this court.

Johnson at 8, 308 S.W.3d at 141. Unlike in an *Erie* analysis, under *Johnson* there is no weighing of relative importance or prudence and no declaring that a tie goes to the proponent of a certain rule. Rather, *Johnson* imposes a strict up-or-down standard. Even if the state statute touches on an inherently substantive issue (like a measure of damages or a determination of fault), Amendment 80 and *Johnson* forbid it if any component would represent a legislative intrusion into the judiciary's domain.

The second reason why Petitioner's reliance on *Potts* fails is that no basis exists to infer that, in addressing its *Erie* issue, the Eighth Circuit was simultaneously considering and aiming to resolve the

separation-of-powers issue that this Court is now deciding. After all, *Potts* was decided long before Amendment 80 was adopted; and even longer before this Court laid out the now-controlling separation-of-powers analysis in *Johnson*. Indeed, *Jackson v. Ozment,* 283 Ark. 100, 671 S.W.2d 736 (1984), was still controlling the separation-of-powers doctrine in Arkansas. *See* discussion in Part I.A. Thus, *Potts* arose under a completely different constitutional scheme; one in which this Court shared its rulemaking authority with the General Assembly and gave considerable deference to the legislature in matters of evidence and other procedure. It is jurisprudentially unsound to ascribe precedential status to a case that (1) addressed a different issue and (2) arose under a-vastly different and now-repudiated constitutional scheme.

Third, Petitioner may *wish* that *Mendoza's* discussion of *Potts* somehow rises to the level of a *holding* that controls this case, but it is no more than *obiter dictum*. While *Mendoza* does discuss *Potts*, this Court did not hold that section 27-34-106(a) was substantive law for purposes of the separation-of-powers. At most, *Potts* was raised, and the *Mendoza* court discarded it as inapplicable.

Nor does the analysis change when one considers that the language in the seat belt statute in *Mendoza* differs from the language of section 27-34-106(a).[7] The statutory language at issue in *Mendoza*

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[7] Petitioner sees significance in the fact that language dropped from the seat belt statute in 1995 was not also deleted from section 27-34-106(a). (Arg. at 6). Petitioner claims that, by maintaining the analogous language in the child seat statute, the legislature thereby established the latter as a rule of substantive law while transforming section 703 into a rule of evidence. (Arg. at 6). But that theory ignores what actually happened. The legislature didn't seek to alter the separation-of-powers status of either provision. Rather, the legislature simply felt compelled to respond to an emerging area of products liability litigation targeting seat belts and created an exception for such seat belt suits. *See* Ark. Code Ann. § 27-37-703(a)(2). Once that exception was inserted, it no longer made sense for section 703 to retain its first clause barring consideration "*under any circumstances*" of evidence of seat belt *non-use* because there now *was* a circumstance—products liability cases. The legislature might be faulted for not acting more comprehensively—that

was that: "The failure of an occupant to wear a properly adjusted and fastened seat belt shall not be admissible into evidence in a civil action." Ark. Code Ann. § 27-37-703; *Mendoza* at 4, 490 S.W.3d at 301. That statutory language might be simpler. But under this Court's separation-of-powers analysis the result here is no different. That is because in both the seat-belt statute in *Mendoza* and the child-seat statute at issue here, the legislation's effect is to control the evidence that could be admitted at trial. Moreover, the separation-of-powers doctrine does not distinguish between legislation that would exclude certain evidence entirely or exclude it just for a certain purpose. As explained in

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is, for not extending the same exception to products liability suits that subsequently began targeting child seats. But that is a far cry from the legislature deciding *sub silentio* to transform section 27-34-106(a) into "a rule of substantive law." To be sure, the majority opinion in *Mendoza* observed the variance in language between the two statutes. But it drew no conclusions from that variance, which makes perfect sense given the historical context in which the seat belt statute had been amended.

Johnson, even where the language of the legislation is more nuanced, so long as it dictates the admissibility of certain proof at trial, the statute intrudes upon this Court's exclusive authority over practice and procedure and therefore offends the principles of separation of powers. *Johnson* at 8, 308 S.W.3d at 141.

CONCLUSION

This Court should answer the certified question in the affirmative. Under Amendment 80 and Arkansas's current separation-of-powers jurisprudence, the language of Ark. Code Ann. § 27-34-106(a) directly blocks the judiciary's ability to address questions of evidence and to determine what proof is relevant to prove breach of a duty. It therefore improperly intrudes on the judiciary's exclusive authority over rules of practice and procedure. Thus, section 27-34-106 should be held unconstitutional.

Respectfully submitted:

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CERTIFICATE OF SERVICE

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