IN THE SUPREME COURT OF TEXAS

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No. 13-0319

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OLIVER ALAN HUNT and JOHN WILLIAM DEAVER,
Petitioners,

v.

ELIZABETH HELBING,
Respondent.

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Petition from Case No. 01-11-00590-CV in the First District Court of Appeals at Houston and Cause No. 2009-31060-A in the 281st Judicial District Court of Harris County, Texas

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# BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioners Oliver Alan Hunt and John William Deaver, pursuant to Texas Rule of Appellate Procedure 11.

## IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is the oldest and largest public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals across the country, including residents of Texas, support PLF, as do numerous organizations and associations nationwide.

In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation created its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in state civil justice system, and barriers to the freedom of contract. PLF has participated in cases before this Court and

others on matters affecting the public interest, including issues of the limits of tort duties. *See, e.g.*, *Bostic v. Georgia Pacific* (pending docket no. 10-0775); *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401 (Tex. 2009); *New Texas Auto Auction Services, L.P. v. Gomez De Hernandez*, 249 S.W.3d 400 (Tex. 2008); *Western Invs., Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005). PLF attorneys also have published on the impact of tort liability in general, and premises liability in particular. *See, e.g.*, Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003). Amicus is familiar with the issues presented in this case and after reviewing the briefs, Amicus believes that its public policy perspective and litigation experience will provide a necessary additional viewpoint on the issues presented.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Elizabeth Helbing was a freshman at Texas A&M. During freshman orientation, she was grouped with other freshmen at "Fish

Camp," a group led by two upperclassmen, Oliver Hunt and John Deaver. After orientation, Hunt and Deaver extended periodic invitations to the Fish Camp group to go on social outings. Weeks into the semester, they invited Ms. Helbing to join the group on a late-night expedition to a concrete platform under the railroad tracks, to watch the train pass overhead. She agreed to go. *Helbing v. Hunt*, 402 S.W.3d 699, 701 (Tex. App. - Houston 2012). The platform can be reached only by climbing down from the tracks, as it is over a dry streambed 30 feet below. The area is off the road and unlit. The students used cellphones for light. Ms. Helbing and the others successfully climbed down from the tracks to the platform and watched the train, then climbed back up onto the tracks to hike back to the main road. After climbing back on the tracks, Ms. Helbing fell through a gap in the ties to the streambed below, and was partially paralyzed as a result. *Id*. at 701, 704. Ms. Helbing sued, claiming in part that Messrs. Hunt and Deaver owed her a duty of care.

The trial court granted summary judgment in favor of Messrs. Hunt and Deaver, but the court of appeals reversed and remanded, holding that if Ms. Helbing's allegations are believed, then Messrs. Hunt

and Deaver owed her a duty. *Id.* at 704. The court below did not, however, define the nature and scope of that duty, although it based its ruling on the alleged distinction between Hunt and Deaver, as occupying positions of "leadership," and "trust" and Ms. Helbing, who felt "guilty" about studying instead of "hanging out" with the other students. *Id*.

The decision below is wrong because it improperly expands the concept of duty such that any adult plaintiff can avoid summary judgment and go to trial by alleging facts demonstrating some disparity between the parties whereby the adult plaintiff can claim the defendants compromised her freedom to assess risks and make choices. This cannot be squared with this Court's longstanding jurisprudence that adults, including college students, are competent to make choices to engage in dangerous behavior, and that other adults—not their parents, not their teachers, not their friends—have no legal duty to protect them from harm. A duty to protect adult peers from harm knows no boundaries, implicating other relationships that may be disparate, but not "special," such as between a young adult and an elderly person, or between club members and those who seek to be accepted by the group. This Court should grant the petition and reverse the court below.

# I

## ADULTS OWE NO GENERAL LEGAL DUTY TO PROTECT OTHER ADULTS

### A. Adult College Students Have the Same Rights and Responsibilities as All Other Legal Adults

The age of majority in Texas is 18 years. Tex. Civ. Prac. & Rem. Code § 129.001. That pithy statutory declaration encompasses a wide range of legal rights and responsibilities that every person over the age of 18 enjoys.[1] *Smith v. Merritt*, 940 S.W.2d 602, 606 (Tex. 1997) ("[P]ersons eighteen years of age or older are adults and have the right and corresponding responsibility to make their own choices."). They enjoy full participation rights as citizens, able to vote (U.S. Const. amend. XXVI; Tex. Elec. Code § 11.002(1); and serve in public office. *See, e.g.*, Tex. Local Gov't Code § 281.022 (act as a director on the board governing municipal civic centers), Tex. Water Code § 53.063 (same for water supply districts). They have full power to enter into contracts, *Kargar v. Sorrentino*, 788 S.W.2d 189, 191 (Tex. App. -

[1] *See* Tex. Civ. Prac. & Rem. Code § 129.002 ("A law, rule, or ordinance enacted or adopted before August 27, 1973, that extends a right, privilege, or obligation to an individual on the basis of a minimum age of 19, 20, or 21 years shall be interpreted as prescribing a minimum age of 18 years.").

Houston [14th Dist.] 1990, no writ), including contracts for real property. *Neill v. Pure Oil Co.*, 101 S.W.2d 402 (Tex. Civ. App. - Dallas 1937, writ ref'd). They are entitled to assume control of their educational choices, Tex. Family Code § 31.006; and get married without anyone's permission, Tex. Family Code § 2.101. An adult of 18 years is presumed to be able to care for himself or herself, and is no longer entitled to receive child support, Tex. Family Code § 154.001, nor are parents liable for the torts of their children once they reach the age of majority. Tex. Family Code § 41.001(2). The only real exception to this personal freedom is that 18 year old adults may not legally purchase alcoholic beverages. *Fuller v. Maxus Energy Corp.*, 841 S.W.2d 881, 885 (Tex. App. - Waco 1992, no writ); Tex. Civ. Prac. & Rem. Code § 129.003. *See also Bradshaw v. Rawlings*, 612 F.2d 135, 140 (3d Cir. 1979) ("[S]ociety considers the modern college student an adult, not a child of tender years."); *Smith v. Day*, 148 Vt. 595, 599 (1987) ("[M]ost college students . . . are adults and must take full responsibility for their actions."); *Mazart v. State*, 441 N.Y.S.2d 600, 606-07 (Ct. Cl. N.Y. 1981) ("It is clear from a reading of the published

cases dealing with the rights of college students that the Courts uniformly regard them as young adults and not children.").

Thus, by and large, legal adults of any age, whether enrolled in college, employed full-time, living alone, in a dormitory, or in their parents' home, "have the right and corresponding responsibility to make their own choices." *Smith v. Merritt*, 940 S.W.2d 602, 606 (Tex. 1997). Today's "college student is considered an adult capable of protecting his or her own interests; students today demand and receive increased autonomy and decreased regulation on and off of campus." *Fox v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 576 So. 2d 978, 982 (La. 1991) (*quoting University of Denver v. Whitlock*, 744 P.2d 54, 59-60 (Colo. 1987)).

In keeping with the individual right to make personal choices, "one adult has no general duty to control the behavior of another adult." *Ryan v. Friesenhahn*, 911 S.W.2d 113, 118 (Tex. App. - San Antonio 1995). For example, if an adult chooses to sit on a hotel balcony railing, he alone bears responsibility when he falls to the street below. *Eldridge v. Downtowner Hotel*, 492 So. 2d 64, 65 (La. Ct. App. 1986) (Regardless of the "wild atmosphere" of Mardis Gras, plaintiff's fall was

"caused by his own want of skill, that is, in exercising bad judgment by sitting on the railing and in losing his balance."). *See also Sw. Key Program, Inc. v. Gil–Perez*, 81 S.W.3d 269, 272 (Tex. 2002) ("[C]o-participant and nonparticipant defendants owe no duty to protect a participant from risks inherent in the sport or activity in which he has chosen to take part.").

An adult is therefore "responsible for his own behavior and any civil liability resulting therefrom." *Smith*, 940 S.W.2d at 606 (One 19 year old is not responsible for preventing another 19 year old from driving while intoxicated.)[2] This is so even when the more responsible adult is the parent of the young adult making poor choices. For example, a mother can neither consent nor withdraw consent to a police search of her son's belongings. *State v. Nadeau*, 1 A.3d 445, 457 (Me. 2010) ("Although a college student, Nadeau was an adult at the time of these events. There is no presumption at law that the parent of an adult child is acting as the child's authorized agent in matters affecting the child.").

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[2] For that matter, a 17-year old similarly owes no duty to his same-aged friend to prevent him from driving while intoxicated. *Lather v. Berg*, 519 N.E.2d 755, 766-67 (Ind. App. 1988).

Adult college students do not assume any particular characteristics, legally distinguishable from other adults in the world. For this reason, many federal courts have held that college students are not a "distinctive group" whose exclusion from a jury would establish a prima facie violation of the Sixth Amendment requirement that a jury be selected from a fair cross section of the community. *See, e.g.*, *Ford v. Seabold*, 841 F.2d 677, 682 (6th Cir.), *cert. denied*, 488 U.S. 928 (1988) (citing cases). The Sixth Circuit commented on the diversity among college students that counsels against finding that they comprise a distinctive class of people:

> There is no "common thread or basic similarity in attitude, ideas or experiences" sufficient enough to consider college students a distinctive group. Although the experience of attending college is shared, this slight similarity is of minimal import in light of the differing attitudes and ideas of those attending college. The present emphasis at most college campuses today in maintaining a balanced student body comprised of students of differing races, nationalities, and socio-economic backgrounds invalidates any hint of homogeneity.

*Id.* at 682-83 (citation omitted).

### B. Lacking a Legally Recognized "Special Relationship," Caselaw Rejects Young Adults' Duty To Protect Their Friends and Classmates

In light of the foregoing principles, this Court should conclude that Ms. Helbing was simply a peer, a casual acquaintance, or even a friend, of Messrs. Hunt and Deaver, such that no special relationship exists that would require a duty to protect her. The Tennessee Supreme Court's decision in *Downs ex rel. Downs v. Bush*, 263 S.W.3d 812, 816-17 (Tenn. 2008), provides appropriate guidance. There, 18-year-old Ryan Downs was drunk and behaving badly when his friends urged him into the bed of a pick-up truck for the ride home. Unbeknownst to his friends in the cab, somewhere en route, he exited the truck, and was killed by traffic. His mother sued the friends, arguing that one in particular (Ryan Britt) had an "affirmative relationship" and "affirmative duty to protect" Mr. Downs because "of their close relationship as best friends and roommates."[3] *Id.* at 823. The court flatly rejected this proposed duty, holding that "it is not in the public's best interest to impose on Mr. Britt an affirmative duty to aid or protect" an adult solely

[3] All the young men in this case were high school graduates, enrolled at Nashville Auto Diesel College.

because of their status as friends and roommates. *Id.* *See also Rocha v. Faltys*, 69 S.W.3d 315, 321 (Tex. Ct. App. - Austin 2002) (Fraternity brother Faltys owed no general legal duty to prevent Rocha's death.); *Lenoci v. Leonard*, 189 Vt. 641, 643 (2011) (declining to find that a friendship creates a legal special relationship, even when one friend is three years older, and even when the younger friend is under 18).

It makes no difference to the duty analysis that Ms. Helbing was a freshman, while Mr. Hunt and Mr. Deaver were upperclassmen. Maturity and wisdom are not necessarily age-based. *Cf.* Tex. Family Code § 33.003(i) ("mature and sufficiently well informed" minor need not notify her parents of her abortion); *In re Doe*, 19 S.W.3d 249, 257 (Tex. 2000) (maturity is not dependant on educational background, grades in school, participation in extracurricular activities, or socio-economic status). Nor are all freshman younger than juniors or seniors.[4]

[4] The national census counted 20,928,000 students in 2007-08. Of those, almost 60% were under 24 years old, 17% were 24-29 years old, and 23% were 30 or older. Some of the 8,371,200 college students 24 years old and older were freshmen. http://www.census.gov/compendia/statab/2012/tables/12s0286.pdf, (last visited Apr. 1, 2014). Some freshman, of course, are actually younger than 18, though some courts find the fact that a student is attending college is more important than the age of the student. *See Hartman v. Bethany College*, 778 F. Supp. 286, 294 (N.D.W.V. 1991) ("It is not reasonable to conclude today that seventeen year old college students necessarily require parental protection and supervision. If they did, society might (continued...)

Most of the cases in which college students sue other college students arise in the context of fraternities and sororities. Yet even given the alcohol consumption and peer pressure pervasive in those cases, courts are loathe to find that college students lack the free will to decide what risks they choose to undertake. In *Grenier v. Comm'r of Transportation*, 306 Conn. 523, 546 (2012), the Connecticut Supreme Court held that a national fraternity and the local chapter were not liable in common law negligence for death of a deliberately sleep-deprived pledge member on the drive back from a fraternity event. Starting with the premise that the freshman pledge member was a legal adult, *id.* at 545, the court found no evidence of a "special relationship of custody or control between the voluntary association and its adult student members." There is no special relationship even in this situation, where a freshman pledge is expected and willing to abase himself to win the approval of established members of the fraternity. The court held that the fraternity's policy objective of encouraging participation in activities

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[4] (...continued)
place many more limitations upon the ability of a minor to attend college than currently exist. A college freshman is just that; whatever his or her age.") This suggests that the trend is to assume an adult level of maturity in college students, commensurate with the expectations of pursuing postgraduate study.

(not dissimilar to the post-Fish Camp invitation in this case) while promoting the safety of the participants is insufficient to overcome the proposition that, generally, there is no duty to protect, or ensure the safety of, another individual. *Id.* at 546.

In *Ex parte Barran*, 730 So. 2d 203 (Ala. 1998), the Alabama Supreme Court considered whether a national fraternity, local chapter, and several individual fraternity brothers, were liable for the plaintiff's injuries allegedly resulting from assault and battery, and "negligent and wanton hazing." The court noted that the plaintiff "voluntarily chose to continue his participation in the hazing activities," rejecting expressions of concern and offers of assistance from university personnel and his parents. Relying on cases that emphasize college students' age of majority, the court refused to accept the plaintiff's argument that "peer pressure created a coercive environment that prevented him from exercising free choice." *Id.* at 207. The court concluded: "College students and fraternity members are not children. Save for very few legal exceptions, they are adult citizens, ready, able, and willing to be responsible for their own actions. . . . Thus, even for college students, the privileges of liberty are wrapped in the obligations of

responsibility." *Id.* (citation omitted). As peers, there existed no special relationship between Ms. Helbing and Messrs. Hunt and Deaver, and the latter therefore had no duty to protect Ms. Helbing from the consequences of her choices.

## II

## A NEWLY CREATED DUTY TO PROTECT YOUNG ADULTS OPENS THE DOOR TO TORT LIABILITY IN MANY OTHER CONTEXTS

Before expanding tort duties, or creating a new cause of action, this Court performs a cost-benefit analysis to consider who will bear the burden of the new duty, how far the duty might reach, and whether the breadth and cost of the new duty can be justified in light of competing public policies. *Strickland v. Medlen*, 397 S.W.3d 184, 194 (Tex. 2013). The "open-ended nature" of potential liability is a key factor militating against new duties, *id.*, as is the invitation to "seemingly arbitrary judicial line-drawing." *Id.* at 195. A duty to protect based on an adult's purported inability to exercise good judgment offers "no cogent stopping point, at least none that doesn't resemble judicial legislation." *Id.*

The idea, advanced by Plaintiff, and accepted by the court below, that adult college students owe a duty to protect others from the consequences of their own choices cannot be accepted. As noted previously, all competent[5] adults have legal rights and responsibilities. Such rights and responsibilities do not depend on formal education, demonstrated cleverness, whether one's friends are a good or bad influence, socio-economic status, physical abilities, or any other of the many variables that shape an adult person's maturity and wisdom. Nevertheless, the plaintiff argues that her youth, relative to her peers, is sufficient reason to impose a duty upon those who are presumed to be older and wiser to protect her. But this must fail, for the same reason that younger adults have no duty to protect older adults who are self-sufficient enough to live alone and participate in many of life's

[5] As a legal matter, "competence" is broadly defined. *See Shea v. State*, 167 S.W.3d 98, 101 (Tex. App. - Waco 2005) (relying on dictionary definition of "competent" to mean "legally qualified or adequate"); *Dyer v. Wall*, 645 S.W.2d 317, 318 (Tex. App. - Corpus Christi 1982) (Defining "legally competent" person to be the antithesis of "[P]ersons non compos mentis, idiots, lunatics, insane persons, common or habitual drunkards, or other persons who are mentally incompetent to care for themselves or to manage their property and financial affairs.") (citing Tex. Prob. Code Ann. § 3(p).).

opportunities, but who may lack the physicality or mental sharpness of their younger days.[6]

In *Stephens v. Pacific Employers Ins. Co.*, 525 So. 2d 288, 291 (La. App. 1988), the court rejected an enhanced duty of care for the elderly. The case involved a 72-year-old woman aboard a ship, who fell down the stairs between the main deck and the wheelhouse and was fatally injured. Her estate argued that because the woman was elderly, and suffered from heart problems and bursitis, that the vessel and crew were "under an obligation to protect her from herself." The court disagreed: "The mere fact that a plaintiff is elderly does not mean that he is entitled to greater care and assistance, just as the age of a plaintiff does not in and of itself affect the standard of care applied in determining contributory negligence." *Id.* at 291. *See also Stinson v. Cleveland Clinic Foundation*, 37 Ohio App. 3d 146, 148 (1987) (Refusing to place higher standard of care on hospital in a premises

[6] Where public policy supports protection of the elderly, the legislative process works. Texas law criminalizes elder abuse, V.T.C.A. Human Res. Code § 48.002 *et seq*., and allows for conservatorship of an incapacitated elderly person's finances and healthcare. *See* V.T.C.A. Human Res. Code § 102.003. This is the proper role of the Legislature to consider views from a range of perspectives and balance competing concerns. *Medlen*, 397 S.W.3d at 196.

liability case "simply because some persons going to the hospital are elderly, sick or otherwise inform to varying degrees.") The elderly do not *per se* belong to those classes of individuals who must be protected from themselves, such as infants, inebriates, interdicts, or drug addicts. *See* Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 Hastings L. J. 683, 685 (1991) ("Merely being old in years does not signify that one has lost physical or mental capacity. As a generalization about the old, it is false as to many particular individuals and is, therefore, a particularly pernicious generalization."). Protection comes at the cost of individual freedom of autonomy, *id.* at 706, and courts therefore must tread lightly in creating new duties to protect. Similarly, in this case, merely being young in years does not signify any deficiency in physical or mental capacity, and no duty should apply.

The expansion of adult protection duties Ms. Helbing seeks in this case also parallels failed arguments urged in favor of an expanded duty to protect in the social host context. In *Graff v. Beard*, 858 S.W.2d 918, 921 (Tex. 1993), this Court noted that, in an ideal world, social hosts would notice if a guest had too much to drink, and the guest would

welcome an offer by the host to call a cab, or to stay for the night. But lawsuits never arise when these ideals are met, and in the messy realities of life, this Court firmly places upon each person who makes a social visit and drinks alcohol "the ultimate power and thus the obligation to control his own behavior: to decide to drink or not to drink, to drive or not to drive." *Id.* at 921-22. The drinker is "the person primarily responsible for his own behavior and best able to avoid the foreseeable risks of that behavior." *Id.* at 922.

It is important to remember that the common law duty to protect is a *narrow exception* limited to those parties who share a special relationship. *Van Horn v. Chambers*, 970 S.W.2d 542, 547 (Tex. 1998). This is consistent with this Court's general adherence to the public policy that protects individual freedom to choose the level of risk each person finds acceptable. The fact that an accident happened is not evidence of negligence, *Thoreson v. Thompson*, 431 S.W.2d 341, 344 (Tex. 1968), and "[t]ort law . . . cannot remedy every wrong." *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003). The court below flouted these established principles in adopting an undelineated duty that requires adults to anticipate and protect against harm that might

occur to other adults, who undertake risky endeavors of their own volition.

"History demonstrates that severing liberties from responsibilities invites social and legal disorder." *Foremost Insurance Co. v. Parham*, 693 So. 2d 409, 437 (Ala. 1997) (See, J., concurring). Elizabeth Helbing was an adult at the time of her accident. The fact that other adult students instigated and participated in the outing does not relieve Ms. Helbing of the legal requirement to take responsibility for her own voluntary choices. The duty adopted by the court below, to protect peers from poor judgment, is so "imprecise, unbounded, and manipulable" that the Texas "tort system cannot countenance" it. *Medlen*, 397 S.W.3d at 196.

## CONCLUSION

This Court should grant the petition and reverse the decision below.

DATED: April 3, 2014.

Respectfully submitted,

/s/ J. David Breemer
J. DAVID BREEMER

Attorney for Amicus Curiae
Pacific Legal Foundation

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2) because it contains 3,951 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(l).

/s/ J. David Breemer
J. DAVID BREEMER

## CERTIFICATE OF SERVICE

I certify that pursuant to the Texas Rules of Appellate Procedure, I have served a true copy of the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS electronically on April 3, 2014.

/s/ J. David Breemer
J. DAVID BREEMER