Nos. S24G1387 and S24G1388

In the

Supreme Court of the State of Georgia

Kiara Burroughs,

Appellant-Plaintiff,

v.

L'Oréal USA, INC., et al.

Appellees-Defendants.

On Appeal from the Court of Appeals Case Nos. A24A0313, A24A0314

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE COALITION FOR LITIGATION JUSTICE, INC., AND THE GEORGIA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("the 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 on issues of concern to the nation's business community.

The Coalition for Litigation Justice, Inc. ("the Coalition") was formed by insurers in 2000 as a nonprofit association to address and improve the litigation environment for asbestos and other toxic tort claims. The Coalition has filed over 200 amicus briefs in cases that may have a significant impact on the toxic tort litigation environment.[1]

[1] The Coalition includes Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

The Georgia Chamber of Commerce, Inc. ("Georgia Chamber") serves the unified interests of its nearly 50,000 members—ranging in size from small businesses to Fortune 500 corporations—covering a diverse range of industries across all of Georgia's 159 counties. The Georgia Chamber is the State's largest business advocacy organization and is dedicated to representing the interests of both businesses and citizens in the State. Established in 1915, the Georgia Chamber's primary mission is creating, keeping, and growing jobs in Georgia. The Georgia Chamber pursues this mission, in part, by aggressively advocating the business and industry viewpoint in the shaping of law and public policy to ensure that Georgia is economically competitive nationwide and in the global economy.

Amici membership includes many product manufacturers (and their insurers) whose products are first purchased, used, and consumed in Georgia. The first three quarters of the twentieth century, a manufacturer's liability for injuries caused by its products expanded rapidly throughout the United States and Georgia. Manufacturers need stability and predictability in tort litigation in order to obtain necessary liability insurance. And manufacturers are not supposed to be the

underwriters of their products in perpetuity. Facing expanding theories of open-ended liability, many manufacturers—particularly small businesses—saw business erode.

In the 1970s, many states, including Georgia, adopted sensible measures to limit the expanding nature of product-liability litigation. The most popular of those measures was the enactment of a reasonable statute of repose. Indeed, when Georgia reformed its product-liability statute in 1978, leading plaintiffs' lawyers testified to a Senate committee that a statute of repose would have the "least penalizing effect on potential plaintiffs" relative to other tort reform proposals. *See* Report, cited *infra*, at 20.

By enacting the statute of repose, the General Assembly conferred a benefit of predictability, stability, and fairness upon all product manufacturers whose goods are used and consumed in Georgia. The Appellant here attempts to strip away that benefit—enjoyed by the Georgia business community for over 45 years—from all manufacturers of consumable goods.

This Court should not inject chaos back into product-liability law. If Appellant's strained interpretation is correct, then the statute of

repose confers no functional benefit on manufacturers of consumable goods because the aggrieved plaintiff can always just purchase the product again to reset the repose period. Manufacturers of consumable goods, whose interests Amici serve, want to enjoy the benefits of the statute of repose created by the General Assembly.

INTRODUCTION

Amici agree with the Court of Appeals' and Appellees' sound reasoning. The plain meaning of "first sale" in Georgia's product-liability statute of repose refers to just that: the first time a plaintiff purchases a product for use or consumption that played a role in bringing about her injury. The General Assembly's careful word choice elsewhere in the statute confirms this plain meaning. Inclusion of the word "consumption" denotes application of the plain meaning of "first sale" in the context of non-durable goods consumed repeatedly over time. And inclusion of the phrase "otherwise bringing about the injury" denotes some correlation less than proximate cause that, once again, suggests that "first sale" refers to the first time a plaintiff purchased a product that played a role in contributing to her injury.

The historical context in which the General Assembly enacted the statute of repose also supports the plain-meaning interpretation of "first sale." And nearly every court to address the issue agrees that the statute of repose begins to run from the "first" sale of a non-durable good rather than the "last" sale of that same good.

ARGUMENT

This appeal concerns the plain meaning of Georgia's product-liability statute of repose, which provides:

> No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.

O.C.G.A. § 51-1-11(b)(2).

I. The Court of Appeals correctly interpreted the plain meaning of Georgia's product-liability statute of repose.

Amici agree with the plain-language analysis of the Court of Appeals and Appellees regarding the General Assembly's use of the phrase "first sale." *See* Op. at 15-16; Appellee Br. at 13-15. The General Assembly's careful inclusion of additional words and phrases confirms this interpretation.

A. The word "consumption" supports the Court of Appeals' plain-language analysis.

The General Assembly's inclusion of the word "consumption" is significant. *See Pafford v. Biomet*, 264 Ga. 540, 542 (1994) ("The phrase 'first sale for use or consumption' as employed in subsection (b)(2) of OCGA § 51-1-11 must be construed in pari materia with the concepts of 'use' and 'consumption' as employed in the other subsections of that statutory provision."). Like the word "first," inclusion of the word "consumption" was neither an accident nor redundant surplusage. A potential plaintiff would typically "use" a durable good, such as a tractor, but "consume" a non-durable good, such as a hair relaxer, over a period of time. *See* "Consume," Black's Law Dictionary 395 (11th ed. 2019) ("To destroy the substance of . . .; to use up or wear out gradually.").

According to Appellants, the statute of repose is "less straightforward" when applied to the consumption of non-durable goods over a period of time. In granting certiorari, the Court expressed particular concern over whether that proposition is correct—i.e., whether the statute of repose has a unique application "in a tort action alleging an injury caused by the use of multiple units of a consumable

product over time." *See* Or. on Pet. for Certiorari. But the plain meaning of statutory language cannot change based on the perceived hardship of certain applications. *See Rite-Aid Corp. v. Davis*, 280 Ga. App. 522, 524, (2006) ("Where a statute is susceptible of one and only one construction, [] court[s] cannot adopt a different construction merely to relieve the parties of some real or imagined hardship."). Moreover, the General Assembly's inclusion of the word "consumption" suggests that the statute of repose does not take on some special, different, or "less straightforward" meaning when applied to a plaintiff's consumption of non-durable goods, as opposed to the "relative[] eas[e]" with which the statute applies to a plaintiff's use of a durable good. *See* Appellant Br. at 17-18.

The General Assembly's careful inclusion of the word "consumption" means that the statute of repose necessarily contemplates application in a scenario, like here, where a plaintiff bases her strict-liability claim on allegations involving the continuous use of a non-durable, consumable product. And when that situation arises, the statute is clear: the claim evaporates ten years after the "first sale for . . . consumption" of the product." *See* O.C.G.A. § 51-1-11(b)(2).

The most problematic part of Appellant's analysis is that her interpretation of the phrase "first sale for use or consumption" writes out the plain chronological meaning of the word "first" and confusingly replaces it with the phrase "as new." *See* Appellants' Br. at 22 ("'First' in 'first sale' simply means 'as new.'"). If the General Assembly included the word "first" to exclude upstream sales to suppliers or wholesalers, such inclusion constitutes unnecessary surplusage because the phrase "sale for use or consumption" sufficiently excludes intermediate sales.

Moreover, inclusion of the word "consumption" negates Appellant's interpretation. *See* Appellant Br. at 19. Consumable goods typically do not have multiple end users via reselling. Nobody is buying used Tylenol. If "first" just means "as new," then Appellant's interpretation reduces the meaning of "first" to redundant surplusage with respect to the tolling period of consumable goods—a construction this Court should avoid.

B. The phrase "otherwise bringing about the injury" supports the Court of Appeals' plain-language analysis.

The General Assembly's inclusion of the phrase "otherwise bringing about the injury" is also significant. Used in the disjunctive

after the word "causing," the General Assembly included the phrase "or otherwise bringing about the injury" not as redundant surplusage, but to indicate a relationship between the product and the injury indicative of something broader than legal proximate cause. *C.f. JNJ Found. Specialists, Inc. v. D.R. Horton, Inc.*, 311 Ga. App. 269, 270, (2011) ("[T]he term 'arising out of' does not mean proximate cause in the strict legal sense, nor does it require a finding that the injury was directly and proximately caused by the insured's actions. Almost any causal connection or relationship will do.").

Appellant suggests that post-discovery summary judgment will flesh out the "tricky undertaking" of whether those specific units of hair relaxer purchased during the repose period were the proximate cause of her injuries. *See* Appellant Br. at 26-27. But the General Assembly did not contemplate such a precise fact-finding procedure for determining the repose period. The relevant question is not which precise unit or units of hair relaxer product proximately caused her injuries, but whether any product consumed by Appellant contributed to or "otherwise brought about" her injury. Just as it included the word "consumption," the General Assembly included the phrase "otherwise

bringing about the injury" to make clear that the statute of repose applied to claims involving prolonged use of consumable goods over a period of time. And in those cases, a claim expires ten years after the "first sale" of the product that proximately causes *or* "otherwise bring[s] about the injury," which, in this case, is the first hair-relaxer product Appellant ever purchased for consumption.

II. The history of Georgia's statute of repose confirms its plain meaning.

The General Assembly enacted Georgia's first strict product-liability statute in 1968. "The paramount purpose of strict liability is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them." *Johns v. Suzuki Motor of Am., Inc.*, 310 Ga. 159, 163 (2020). "To advance these goals, strict products liability imposes liability irrespective of negligence." *Id.*

During the 1977 General Assembly Session, the Georgia Senate passed a resolution creating the Senate Product Liability Study Committee. *See* Senate Resolution 136 of the 1977 General Assembly Session. The Senate observed that emerging trends in product-liability litigation, including the emergence of strict product liability, threatened

to "erode the competitive position of small businesses," which required remedial legislative intervention. *See d.* Following "intensive efforts" to "assimilate the myriad of information," the Committee published a report in January of 1978 (the "Report"). *See* 1978 Report of the Senate Products Liability Study Committee at 1.[2] This Court has cited the Report when interpreting the product-liability statute of repose. *See, e.g.*, *Love v. Whirlpool Corp.*, 264 Ga. 701, 703 (1994).

The Committee observed that "the evolution of strict liability" and other factors "contributed to the unpredictable and unstable climate" of tort litigation. Report at 7. The Committee reviewed legislative enactments of several states and found that the "most popular" modification to tort systems was adopting "limitations on the amount of time a product is exposed to liability,"—*i.e.* a "statute of repose." *Id.* at 3.

The Committee found that "[t]he instability and unpredictability associated with product-liability litigation on a national level must be reduced." *Id.* at 17. To that end, the Committee recommended a "ten-

[2] A copy of the Report is available at the University of Georgia's Alexander Campbell King Law Library at call number KFG11.72.P76 1978.

year statute of repose" where the "defendant's period of liability would be ten years beginning from the date of sale to the ultimate consumer."

In response to the Report, the General Assembly amended the strict-liability statute "to require that strict liability actions against manufacturers be instituted within ten years from the date of the first sale for use or consumption of a product." *Stiltjes v. Ridco Exterminating Co. Inc.*, 256 Ga. 255, 258, n.2 (1986). "The ten-year statute of repose was enacted in order to address problems generated by the open-ended liability of manufacturers so as to eliminate stale claims and stabilize products liability underwriting." *Chrysler Corp. v. Batten*, 264 Ga. 723, 725 (1994).

Notably, the Report only makes general recommendations for a ten-year statute of repose from the "date of sale" and notes that such statute would be particularly beneficial to manufacturers of durable goods, whose products are often used for decades longer than the "average consumer products." *See* Report at 14-15, 19. This makes the General Assembly's inclusion of the words "first" and "consumption" all the more significant. Informed by the Committee's findings regarding much-needed limitations on open-ended liability in the context of both

durable and non-durable goods, the General Assembly enacted clear and specific language that went beyond the Committee's general recommendation. Rather than adopt the Committee's recommendation of a 10-year statute of repose from the "date of sale to the ultimate consumer" of any general product, the General Assembly specified that the repose period would run from the *first* sale of a good used for *consumption*. In other words, given the dire need for limitations on open-ended product liability, the General Assembly went beyond the Committee's general recommendation and adopted a more precise statute of repose by including plain, clear, and precise language indicating that the repose period runs from the *first* sale of *any* type of injury-inducing product.

III. Multiple federal district court judges have adopted the Court of Appeals' plain-language analysis.

"Most products liability statutes of repose," like Georgia's, "begin to run at the date of manufacture or first sale to a consumer and extinguish a cause of action after a set number of years." Mark W. Peacock, *An Equitable Approach to Products Liability Statutes of Repose*, 14 N. Ill. U. L. Rev. 223, 226 (1993) (listing ten states). Though many states have had "first sale" statutes of repose enacted for decades,

there does not appear to be foreign appellate authority—state or federal—directly analyzing the question presented by the Court in this case. Perhaps that is because the statute's meaning is sufficiently clear that it has not garnered controversy in those jurisdictions.

Several federal district court cases addressing similar statutes of repose in the context of consumable products conclude, based on the plain and unambiguous language in the statute, that the period of repose begins running from the initial purchase of the consumable good. *See, e.g.*, *Daughetee v. Chr. Hansen, Inc.*, 960 F. Supp. 2d 849, 878 (N.D. Iowa 2013) (where plaintiff developed lung damage after "consuming multiple bags of microwave popcorn daily for several years," a complaint filed in 2009 was time-barred under Iowa's fifteen-year statute of repose because the plaintiff "first consumed or purchased the [popcorn] in 1992."); *Sledge v. Sanofi-Aventis U.S., LLC*, No. 3:23-CV-01770-AA, 2024 WL 2896302, at *2 (D. Or. June 10, 2024) (where plaintiff suffered "permanent alopecia and hair damage after taking Taxotere . . . between January 29, 2009, and May 2009," a complaint filed on October 9, 2020 was time-barred under Oregon's ten-year statute of repose because the plaintiff "first used Taxotere on January

29, 2009."); *Fussell v. Sanofi-Aventis U.S. LLC*, No. 1:23-CV-00142-MR-WCM, 2024 WL 1365067, at *3 (W.D.N.C. Mar. 12, 2024) (where plaintiff suffered permanent hair loss after using defendant's product throughout 2008, North Carolina's six-year statute of repose extinguished her claim six years after plaintiff's "initial purchase."); *Hadley v. AstraZeneca Pharms. PLC*, No. 18-CV-1068-JPG-DGW, 2018 WL 4491184, at *1 (S.D. Ill. Sept. 19, 2018) (where plaintiff ingested Seroquel from 2002 to 2008 and developed a heart condition, Illinois' ten year statute of repose time-barred any complaint filed after 2012, which was ten years from the "first delivery" of Seroquel to the plaintiff).

The two cases cited by Appellants—*Marshall v. WRGHT Med. Tech., Inc.*, No. 3:21-CV-212-TCB, 2022 WL 18779993 (N.D. Ga. Feb. 7, 2022) and *Paulsen v. Abbott Labs.*, 563 F. Supp.3d 787 (N.D. Ill. 2021)—do not involve habitual use of consumable goods over a period of time. *Marshall* involved the surgical implantation of two separate hip devices and each claim expired 10 years after each respective surgical implantation. *Marshall*, 2022 WL 18779993, at *4. And *Paulsen*, which

is distinguishable for other good reasons, *see* Op. at 14 n.6, involved only two injections of a drug in close temporal proximity.

Of course, this Court is not bound by orders issued by federal district courts sitting in other states. But these cases do show that when other courts have looked to similar statutes of repose in the context of habitual use of consumable goods, they readily concluded that the statute simply means what it says: the repose period tolls from the date of the "first sale" of the consumable good. At the very least, they demonstrate that Appellant's unusual interpretation of the meaning of "first" is novel. And it is not novel because prior litigants and judges have simply overlooked it. It is novel because it is contrary to the plain meaning of the words used by the General Assembly.

CONCLUSION

The Court should affirm.

Respectfully submitted this 14th day of March, 2025.

This submission does not exceed the word-count limit imposed by Rule 20.

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CERTIFICATE OF SERVICE

I hereby certify that on this March 14, 2025, I served the foregoing **BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE COALITION FOR LITIGATION JUSTICE, INC., AND THE GEORGIA CHAMBER OF COMMERCE AS AMICI CURIAE IN SUPPORT OF APPELLEES** via United States Postal Service upon the following counsel of record:

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