

IN THE SUPREME COURT OF OHIO

Ross J. Linert, et al.,

Plaintiffs-Appellees,

v.

Ford Motor Company,

Defendant-Appellant.

SUPREME COURT NO. 2014-1940

On Appeal From The Seventh
District Court Of Appeals

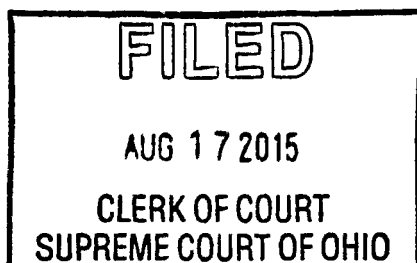
Appellate Case No. 2011 MA 00189

MERIT BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, OHIO CHAMBER OF COMMERCE, AND OHIO MANUFACTURERS' ASSOCIATION IN SUPPORT OF APPELLANT FORD MOTOR COMPANY

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R.C. 2307.75.....	19
R.C. 2307.76.....	<i>passim</i>
 OTHER AUTHORITIES	
<i>2015 Best and Worst State Rankings</i> , Chief Executive (June 1, 2015), http://chiefexecutive.net/best-worst-states-business	17
American Bar Association, <i>Post-Sale Duty to Warn, A Report of the Products Liability Committee</i> (2004), available at <a href="http://www.productliabilityprevention.com/images/5-
PostSaleDutytoWarnMonograph.pdf">http://www.productliabilityprevention.com/images/5- PostSaleDutytoWarnMonograph.pdf	<i>passim</i>
Badenhausen, <i>Ranking The Best States For Business 2014: Behind The Numbers</i> , Forbes (Nov. 12, 2014), <a href="http://www.forbes.com/sites/kurtbadenhausen/2014/11/12/ranking-the-best-
states-for-business-2014-behind-the-numbers">http://www.forbes.com/sites/kurtbadenhausen/2014/11/12/ranking-the-best- states-for-business-2014-behind-the-numbers	17
Black’s Law Dictionary 554 (Pocket Ed. 1996).....	6

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Brooks, <i>States with the Best and Worst Legal Climates for Starting a Business</i> , Business News Daily (Sept. 11, 2012), http://www.businessnewsdaily.com/3115-states-with-the-best-and-worst-legal-climates-for-starting-a-business.html	17
Higgins, <i>Gone But Not Forgotten: Manufacturers' Post-Sale Duties to Warn or Recall</i> , 78 Mich. B.J. 570 (1999).....	9, 14, 16
JobsOhio, <i>2012 Annual Report, 2013 Strategic Plan</i> , http://jobs-ohio.com/images/13-0305_JO_Report_Full.pdf	17
Kam, <i>NHTSA Safety Defect Investigations 1</i> (July 17, 2001), http://www.htsassociates.com/documents/NHTSA-Safety-Defect-Investigations.pdf	19
Lens, <i>Warning: A Post-Sale Duty to Warn Targets Small Manufacturers</i> , 2014 Utah L.Rev. 1013 (2014).....	11, 15
Madden, <i>Modern Post-Sale Warnings and Related Obligations</i> , 27 Wm. Mitchell L.Rev. 33 (2000).....	20
Restatement of the Law 3d, Torts: Product Liability, Section 10 (1998)	<i>passim</i>
Richmond, <i>Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall</i> , 36 Idaho L.Rev. 7 (1999)	14, 15
Ross & Prince, <i>Post-Sale Duties: The Most Expansive Theory in Products Liability</i> , 74 Brook. L.Rev. 963 (2009)	14
Selko, <i>Ohio's Job Losses in 2000s Worst Since Great Depression</i> , Industry Week (Feb. 21, 2008), http://www.industryweek.com/global-economy/ohios-job-losses-2000s-worst-great-depression	17
Stilwell, <i>Warning: You May Possess Continuing Duties After the Sale of Your Product! (An Evaluation of the Restatement (Third) of Torts: Products Liability's Treatment of Post-Sale Duties)</i> , 26 Rev. Litig. 1035 (2007)	7, 8, 10

TABLE OF AUTHORITIES
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Vlasic, *Fiat Chrysler Gets Record \$105 Million Fine for Safety Issues*, The New York Times (July 26, 2015), available at http://www.nytimes.com/2015/07/27/business/flat-chrysler-faces-record-105-million-fine-for-safety-issues.html?_r=0..... 20

Wilson, *Competing for Jobs: Local Taxes and Incentives*, Federal Reserve Bank of San Francisco (Feb. 23, 2015), <http://www.frbsf.org/economic-research/publications/economic-letter/2015/february/jobs-state-tax-incentives-economic-growth>..... 17

INTRODUCTION

As leaders of the American and Ohio business communities, amici curiae Chamber of Commerce of the United States of America, National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, Ohio Chamber of Commerce, and Ohio Manufacturers' Association are deeply familiar with the highly regulated environment in which American manufacturers operate. Federal and state regulators impose a range of safety, production, and sales requirements on manufacturers. In addition, manufactures face obligations imposed through state products liability law. Those obligations include duties to design and manufacture products to make them safe to the consumer as well as the duty to notify consumers, both pre-sale and post-sale, of the likelihood of substantial harm from use of the manufacturer's product.

Like many states, Ohio has implemented a regime of products liability law that aims to balance the costs state law imposes on manufacturers with the resulting benefits to consumers. For instance, with respect to a manufacturer's post-sale duty to warn, Ohio imposes a duty on manufacturers to act as would a "reasonable" manufacturer in the same circumstance. Despite this straightforward, seemingly settled approach to imposing a duty on manufacturers post-sale, the Seventh District Court of Appeals radically heightened that duty to a level unknown in any other American court. Indeed, the decision below requires manufacturers selling products in Ohio to warn consumers post-sale of *any* known risk in using a product, even if the product is not defective, even where the risk of harm from using the product is unlikely and insubstantial, and even when the asserted risk in the product is merely the difference between that product and a newer product model that includes a manufacturer's improvement.

The setting in which this case arose is heartbreaking—a police officer injured in the line of duty. That injury, however, is attributable to a reckless driver crashing into the officer’s Ford Crown Victoria Police Interceptor (“CVPI”) at 100 miles per hour. The CVPI met all federal safety rules and regulations, surpassed the safety levels of competitor vehicles, and was found to be non-defective by the jury.

Despite these features of the vehicle and the jury’s rejection of three theories of tort liability against Ford, the Seventh District authorized yet a fourth bite at the liability apple, requiring that the jury also consider whether Ford violated Ohio law governing a manufacturer’s post-marketing duty to warn. The court of appeals’ interpretation of Ohio’s governing statute, R.C. 2307.76, is not only contrary to the plain language of the statute, but also to the substantial weight of authority from courts around the country that have addressed post-sale duties to warn. Although those states have adopted varying standards governing these types of claims, no state uses the “any known risk” approach adopted by the Seventh District. Nor has any other state triggered a manufacturer’s obligation to warn based upon a post-sale product safety improvement, as did the court below here.

In addition to being out-of-step with American jurisprudence, the decision below also has dramatic policy implications for Ohio’s business environment. Indeed, the Seventh District’s decision to penalize consumers with mandatory warnings for any product improvement amounts to a court-crafted “innovation tax” imposed through Ohio tort law. Manufacturers now have a disincentive against selling to Ohio consumers, when any subsequent product improvement triggers a duty to warn every prior purchaser of the product, regardless of the likelihood or seriousness of the “risk” posed by the product. The decision below likewise discourages manufacturers from making product improvements where the cost of issuing warnings would

outweigh the benefit of the improvement. These new costs are especially burdensome to smaller and start-up manufacturers, who, given their delicate financial condition, must carefully weigh the costs and benefits of where to sell and whether to invest in product innovations. Ohio consumers in turn may lose the benefit of improved products, and access to some products altogether. And Ohio itself is portrayed not as a sensible, business-welcoming jurisdiction, but instead as a place where manufacturers face post-sale duties that exceed those in any other state, where manufacturer product improvements trigger even further duties, and where the Ohio courts have free reign to expand tort duties circumscribed by statute.

While consumer protection is an important consideration underlying a state's products liability regime, the decision below does not achieve any additional means of consumer protection. Where, as here, a product meets all federal safety rules and regulations, surpasses the safety levels of competitor products, and is non-defective (as found here by the jury), it is highly speculative that further "warnings" will have a significant impact on consumer choices. What is more, the wave of new but unnecessary warnings required by the Seventh District's holding may well drown out more significant warnings regarding true product defects that present actual, serious risks to consumers. Finally, in addition to traditional tort law protections, consumers also benefit from long-standing federal regulation of manufacturers. In the automotive industry in particular, safety-related automobile performance failures are subject to mandatory consumer notifications and recalls. Similar laws govern other consumer products too, often in a manner far more beneficial to consumers than imposing unwarranted warnings, as the Seventh District did here.

For these reasons, amici curiae urge the Court to reverse the decision below and confirm the measured approach to post-sale duties articulated by the General Assembly in R.C. 2307.76.

STATEMENT OF INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 members as well as 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. To protect these interests, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, and accounts for two-thirds of private-sector research and development. The NAM likewise regularly participates in court proceedings via amicus curiae briefs to voice the interests of American manufacturers and foster a legal environment that encourages economic growth.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing its 350,000 members in Washington, D.C., and all 50 state capitals. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus

briefs in cases that will impact small businesses. The Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. The Ohio Chamber works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. The Ohio Chamber's advocacy efforts, in the legislature and the courts, are dedicated to promoting an Ohio business climate favorable to expansion and growth.

The Ohio Manufacturers' Association ("OMA") is a statewide nonprofit trade association whose membership consists of over 1,400 manufacturing companies employing approximately 660,000 Ohioans. The OMA aims to enhance the competitiveness of manufacturers and improve living standards of Ohioans by shaping a legislative and regulatory environment conducive to economic growth in Ohio.

STATEMENT OF THE FACTS

Amici adopt the statement of the facts presented in appellant Ford Motor Company's merit brief.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A "risk" that triggers a post-marketing duty to warn under Ohio Revised Code § 2307.76 is not merely any "known danger," but must be a risk about which a reasonable manufacturer would warn in light of the likelihood and likely seriousness of the harm.

Proposition of Law No. 2: A product manufacturer's implementation of a post-marketing product improvement does not trigger a post-marketing duty to warn.

A. THE COURT OF APPEALS DECISION IS CONTRARY TO THE WEIGHT OF AUTHORITY IN AMERICAN COURTS.

The Seventh District's decision breaks new ground by expanding the scope of the post-marketing duty to warn beyond that in every other state.

1. All courts (save for the Seventh District) require consideration of the likelihood and seriousness of the risk in assessing whether to impose a post-sale duty to warn.

Ohio law imposes upon manufacturers a post-marketing duty to warn of a risk if, *and only if*, a “reasonable” manufacturer would have provided the warning “in light of the *likelihood* that the product would cause harm . . . and in light of the likely *seriousness* of that harm.”

(Emphasis added.) R.C. 2307.76(A)(2)(b). The Seventh District, however, held that “Ford’s failure to warn of a *known risk*” could make it liable under a post-marketing duty to warn theory without considering the “likelihood” or “seriousness” of that risk, as required by R.C.

2307.76(A)(2). (Emphasis added.) *Linert v. Foutz*, 2014-Ohio-4431, 20 N.E.2d 1047, ¶ 25 (7th Dist.). In holding that liability could be imposed for the failure to warn of any “known risk,” the appellate court ignored the text of R.C. 2307.76 in favor of Black’s Law Dictionary, which broadly defines “risk” as “a known danger to which a person assents, thus foreclosing recovery for injuries suffered.” *Id.*, quoting Black’s Law Dictionary 554 (Pocket Ed. 1996). Based upon that inapposite authority, the appeals court concluded that “a jury instruction on post-marketing failure to warn [is] warranted” where a manufacturer fails to warn consumers of any “known danger.” *Id.*

As more fully addressed in Ford’s merit brief, the appellate court’s interpretation of R.C. 2307.76 ignored any consideration for the likelihood and seriousness of the risk at issue, as mandated by statute. *See also Brown v. McDonald’s Corp.*, 101 Ohio App.3d 294, 300, 655 N.E.2d 440 (9th Dist. 1995) (explaining that R.C. 2307.76(A)(1)(b), which uses same language as (A)(2)(b) “introduces the quantitative element”—“[i]t asks whether a manufacturer exercising reasonable care would warn of that risk in light of both the *likelihood* and seriousness of the potential harm”).

Amici add that the Seventh District's decision is likewise contrary to authority in every other state as well. Indeed, while states have taken varied approaches to post-marketing duties to warn, amici have been unable to identify a single appellate court decision in any other state that adopts the Seventh District's rule. See American Bar Association, *Post-Sale Duty to Warn, A Report of the Products Liability Committee* (2004), available at <http://www.productliabilityprevention.com/images/5-PostSaleDutytoWarnMonograph.pdf> (accessed Aug. 12, 2015); Stilwell, *Warning: You May Possess Continuing Duties After the Sale of Your Product! (An Evaluation of the Restatement (Third) of Torts: Products Liability's Treatment of Post-Sale Duties)*, 26 Rev. Litig. 1035, 1039-40 (2007).

"The majority of jurisdictions" impose a post-sale duty to warn only where there is a latent product *defect*, not just a *risk*, that the seller discovers after the sale. Stilwell, 26 Rev. Litig. at 1040; see, e.g., *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959). In those states, liability attaches only where the product contained an actual defect at the time of the sale. See American Bar Association, *Post-Sale Duty to Warn* at 15-16; *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 759-60, 861 P.2d 1299 (1993). Absent a latent product defect, those states have concluded, there is too great a risk of "holding a manufacturer liable for postmanufacture improvements." *Gregory v. Cincinnati Inc.*, 450 Mich. 1, 10, 538 N.W.2d 325 (1995).

The Ohio General Assembly has codified the more expansive minority approach in R.C. 2307.76(A)(2)(b), imposing liability for a failure to issue a post-sale warning, even if the product was not defective at the point of sale, but only where "a manufacturer exercising reasonable care would have provided" a warning "in light of the likelihood that the product would cause harm . . . and in light of the likely seriousness of that harm." The Ohio rule is similar to the Third

Restatement of Torts, which explains that “[a] reasonable person in the seller’s position would provide a warning after the time of sale” where four criteria are met:

- (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
- (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
- (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
- (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Restatement of the Law 3d, Torts: Product Liability, Section 10(b) (1998); *see also Lewis v. Ariens Co.*, 434 Mass. 643, 751 N.E.2d 862 (2001) (adopting Restatement); *Lovick v. Wil-Rich*, 588 N.W.2d 688, 695-96 (Iowa 1999) (same).

Other approaches to post-sale duties less pertinent here have been adopted in a handful of states. Some impose a duty to warn under certain circumstances even when the product is not used as intended. *See* American Bar Association, *Post-Sale Duty to Warn* at 23-24; *see, e.g., Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 700 N.E.2d 303 (1998). Others impose a continuing obligation to warn where the seller has an ongoing relationship with the consumer and “voluntarily assumed a duty with regard to the product, its maintenance, or its upkeep.” *Stilwell*, 26 Rev. Litig. at 1044; *see, e.g., Calderon v. Machinenfabriek Bollegraaf Appingedam BV*, 285 N.J. Super. 623, 667 A.2d 1111 (1995). And still others have rejected post-sale duties to warn altogether. *See, e.g., Modelski v. Navistar Internatl. Transp. Corp.*, 302 Ill.App.3d 879, 889, 707 N.E.2d 239 (1999).

No state, however, imposes a duty to warn consumers of *any* known risk, no matter how minor the risk or how unlikely that it will lead to injury. The Restatement’s reasonable person

standard, for instance, explicitly takes into account both the likelihood of the harm—“the risk of harm is sufficiently great”—and the seriousness of the harm—“a substantial risk of harm.”

Restatement, Section 10(b). The American Bar Association likewise agrees that this “emphasi[s] [on] the centrality of considering the severity of the potential injury . . . is in agreement with the decisional law.” American Bar Association, *Post-Sale Duty to Warn* at 20, citing, e.g., *Crowston v. Goodyear Tire & Rubber*, 521 N.W.2d 401, 405 (N.D. 1994). Thus, “[c]ase law around the country has developed a set of criteria to be balanced in determining the existence and nature of a manufacturer’s post-sale duty in any given case,” including “[t]he seriousness of the hazard” (Emphasis deleted.) Higgins, *Gone But Not Forgotten: Manufacturers’ Post-Sale Duties to Warn or Recall*, 78 Mich. B.J. 570, 571 (1999)).

Ohio’s and the Restatement’s reasonable person standard requires courts to weigh both the costs of warnings on manufacturers and the benefits to consumers. “[P]ost-sale warnings are invariably costly to provide, and post-sale increases in knowledge of risks are to some extent inevitable.” Restatement, Section 10, Comment d. Accordingly, “no duty arises after the time of sale to issue warnings regarding product-related accidents that occur infrequently and are not likely to cause substantial harm.” *Id.* Yet the Seventh District interpreted R.C. 2307.76(A)(2) as *ignoring* these central elements, leaving Ohio as the lone state that imposes a post-sale duty to warn for any “known risk.” See *Linert*, 2014-Ohio-4431, 20 N.E.2d 1047, ¶ 25. That holding should be reversed.

2. Manufacturers generally have no duty to warn consumers based on post-sale safety improvements.

The Seventh District’s imposition of a duty based upon Ford’s post-sale safety improvements is no less of an aberration, and would have pernicious policy consequences. In holding that the jury should have been instructed on the post-marketing duty to warn claim, the

court emphasized Ford's Crimp Tooling Project, which Ford undertook two years after the sale of the vehicle at issue here in an effort to strengthen the joining of the sender ring and the fuel tank. *Id.* at ¶ 2, 26-29. But "[t]he majority of jurisdictions have held that the manufacturer of a non-defective product has *no* duty to warn prior purchasers of new safety devices that are employed by the manufacturer." (Emphasis added.) American Bar Association, *Post-Sale Duty to Warn* at 18. Rather, "[t]he majority of jurisdictions" take a more common sense approach by "distinguish[ing] between warning of hazards discovered after the sale of the product and providing notice of improvements or safety devices developed for the product." Stilwell, 26 Rev. Litig. at 1048; *Mandile v. Clark Material Handling Co.*, 131 F.App'x 836, 840 (3d Cir. 2005). Indeed, there is "ample authority that a reasonable seller is not obligated to advise purchasers or others regarding advancements in safety," particularly where "the product . . . conformed to established industry standards." American Bar Association, *Post-Sale Duty to Warn* at 19; *see also* Higgins, 78 Mich. B.J. at 572 ("most courts . . . have declined to require manufacturers to provide product users with updates on the evolving state of the art concerning safety features"); *Wilson v. United States Elevator Corp.*, 193 Ariz. 251, 256-57, 972 P.2d 235 (Ariz.Ct.App. 1998).

Any other approach would impose a duty to warn "for products that are not defective or unreasonably dangerous as built." Stilwell, 26 Rev. Litig. at 1048, quoting *Rogers v. Clark Equip. Co.*, 314 Ill.App.3d 1128, 744 N.E.2d 364 (2001). That outcome would be devastating for manufacturers. After all, "[i]f every post-sale improvement in a product design were to give rise to a duty to warn users of the risks of continuing to use the existing design, the burden on product sellers would be unacceptably great." Restatement, Section 10, Comment a; *see also id.*, Reporters Notes ("in most cases it will be difficult to establish . . . [the] necessary predicate for a

post-sale duty to warn if the warning is merely to inform of the availability of a product-safety improvement”). That is especially true for smaller and start-up manufacturers, who generally face tighter profit margins, and thus would likely forego many product improvements, concluding that the cost of issuing warnings outweighs the benefit of making the improvements. *See generally* Lens, *Warning: A Post-Sale Duty to Warn Targets Small Manufacturers*, 2014 Utah L.Rev. 1013, 1013-1014, 1023-1029, 1045-47 (2014). Yet the Seventh District ignored these widely accepted considerations. For this reason too, the decision below should be reversed.

3. No other court would find the potential for liability on this record.

In permitting the jury to find liability based largely on Ford not issuing a warning after making purported safety improvements to later models of the CVPI, the Seventh District reached a result out-of-step with the views of courts around the country. Indeed, none of the various approaches employed by other American courts would justify liability in the circumstances of this case.

For instance, the latent defect rule utilized by a majority of states would fail here, as the jury determined that the vehicle (including the fuel tank crimp) was *not* defective, *Linert*, 2014-Ohio-4431, 20 N.E.2d 1047, at ¶ 59.

Nor would the “reasonable manufacturer” standard lead to liability, as a reasonable manufacturer would not have issued a warning in this circumstance. The CVPI passed the most severe crash testing in the industry, tests other police vehicles failed. *Id.* at ¶ 131. The vehicle complied with the governing federal safety regulations. *See* Appellee’s Response to Ford’s Mem. in Support of Jurisdiction at 11-12. And the risk of a rear-end, post-collision fire for police vehicles is rare. *Linert* at ¶ 130. That risk, moreover, is not unique to the CVPI. All vehicles, after all, carry a risk of a post-collision fire (particularly when struck at 100 miles per hour), as it is impossible to design a fuel system to survive every crash. *Id.* While Ford made changes to

the fuel tank crimp, the new design did not affect the results of “burst tests,” a safety test used to determine the failure point for fuel tanks. *See* Trial Tr. at 975-76, 2194-95. Against the evidentiary backdrop of an unlikely and speculative risk like this one, no reasonable manufacturer would feel compelled to issue a warning.

An Arizona court declined to impose a duty to warn in a similar case. *See Wilson*, 193 Ariz. 251, 972 P.2d 235. There, elevator doors closed on the plaintiff’s hands, causing permanent injury. *Id.* at 253. After the accident, the doors’ safety mechanism was upgraded from the originally installed rubber bumpers to a new shield sensor that offered superior protection. *Id.* The court upheld summary judgment for the manufacturer on the plaintiff’s post-sale duty to warn claim. *Id.* at 257. The court noted that although the shield sensor was superior, the bumper system complied with safety codes and was “far from obsolete.” *Id.* at 256. Thus, “the mere subsequent development and production of an allegedly superior safety device [did not] render[] the elevator . . . unreasonably dangerous and [did not] impose[] a duty . . . to issue warnings to all past purchasers of its elevators.” *Id.* at 257. Holding otherwise, the court noted, would negatively impact consumers by “inhibit[ing] manufacturers from developing improved designs”:

The clear effect of imposing a continuing duty under these circumstances would be to inhibit manufacturers from developing improved designs that in any way affect the safety of their products, since the manufacturer would then be subject to onerous, and oftentimes impossible, duty of notifying each owner of the previously sold product . . . , despite the fact that the already sold products are, to the manufacturer’s knowledge, safe and functioning properly.

(Quotation and bracket omitted.) *Id.*

Similarly, a Pennsylvania court rejected the imposition of a duty to warn on an escalator manufacturer based on safety improvements to later models. *See Lynch v. McStome & Lincoln*

Plaza Assocs., 378 Pa.Super. 430, 441, 548 A.2d 1276 (1988). There, the plaintiff was injured when an escalator stopped abruptly. *Id.* at 431. In the appeal of her suit against the escalator manufacturer, the plaintiff argued she should have been permitted to introduce evidence that the manufacturer had implemented a new braking system on later models to demonstrate the manufacturer should have issued warnings or retrofitted the escalator at issue. *Id.* at 437. Noting that the jury determined the manufacturer had exercised due care in manufacturing the escalator and that it had functioned properly until the incident, the court rejected the plaintiff's theory. *Id.* at 440. Imposing a duty to warn "of changes in the state of the art" for "a machine faultlessly designed and manufactured" would "inhibit manufacturers from developing improved designs that in any way affect the safety of their products." (Quotations omitted.) *Id.* at 440-41.

So too here. Ford manufactured a vehicle that was not defective and complied with safety standards. Its subsequent product improvement efforts, moreover, did not render the prior model unreasonably dangerous. Equally true, any heightened duty to warn may well have forestalled any attempted improvement to the product.

In short, the Seventh District's articulation of Ohio's post-sale duty to warn is both inconsistent with the Revised Code and out-of-step with American jurisprudence.

B. THE COURT OF APPEALS' EXPANSION OF MANUFACTURER LIABILITY NEGATIVELY IMPACTS MANUFACTURERS, CONSUMERS, AND OHIO'S BUSINESS CLIMATE.

In addition to being contrary to Ohio law and the weight of authority elsewhere, the court of appeals' decision also has dramatic policy implications for Ohio. The court's expansion of the post-marketing duty to warn imposes untold new costs (and liability) on manufacturers selling in Ohio, which hurts not only manufacturers, in particular, small businesses and start-ups, but consumers as well, and, ultimately, Ohio's business environment.

Post-sale duties to warn are the “most expansive area in the law of products liability,” imposing a “monster duty” on manufacturers. (Quotation omitted.) Ross & Prince, *Post-Sale Duties: The Most Expansive Theory in Products Liability*, 74 Brook. L.Rev. 963, 965 (2009). Appropriate limits on the scope of this “monster duty” are thus critical, as an otherwise “unbounded post-sale duty to warn would impose unacceptable burdens on product sellers.” Restatement, Section 10, Comment a. Chief among those burdens are “[t]he costs of identifying and communicating with product users years after sale[, which] are often daunting.” *Id.* These “daunting” burdens require that courts proceed cautiously before “imposing a duty to provide a post-sale warning in a particular case.” *Id.*

A post-sale warning, in fact, is “inherently far more burdensome to a manufacturer than a point-of-sale warning.” Higgins, 78 Mich. B.J. at 573-74. That is so because post-sale duties to warn “exponentially increase[] the manufacturer’s burden in warning consumers,” given the need to identify purchasers and the fact that post-sale risks develop when the product is out of the manufacturers control despite safety precautions in design and manufacturing. *See Richmond, Expanding Products Liability: Manufacturers’ Post-Sale Duties to Warn, Retrofit and Recall*, 36 Idaho L.Rev. 7, 18 (1999). Accordingly, courts “balance the magnitude of the potential hazard against the feasibility of providing an effective warning” before imposing a “post-sale duty to warn” and determining the extent of that duty. Higgins, 78 Mich. B.J. at 573-74.

By imposing a duty to warn for any known risk, irrespective of its likelihood or seriousness, the Seventh District eliminated altogether the necessary balancing of costs and benefits. Were courts to agree with the Seventh District that “post-sale acquisition of knowledge of adverse outcomes that are both infrequent and insubstantial [could] trigger a post-sale duty to warn, sellers would face costly and potentially crushing burdens.” Restatement, Section 10,

Comment d. This is precisely why most states (unlike the court below) “have adopted a post-sale duty that . . . will exist only if a reasonable manufacturer would have warned” in the same circumstance. Lens, 2014 Utah L.Rev. at 1014. A rule that imposes “an obligation upon manufacturers to identify, locate and warn all users of safety improvements,” on the other hand, “would unreasonably burden a manufacturer.” American Bar Association, *Post-Sale Duty to Warn* at 19. Rather than balancing the costs and benefits of imposing liability for a specific improvement, as the Revised Code requires, the Seventh District essentially imposed a new “innovation tax” through Ohio tort law by mandating costly warnings for each and every product improvement.

The unnecessary burdens imposed on manufacturers by the Seventh District’s expansion of products liability law is enough reason to reject the rule below, as have other states. But it is not only manufacturers who suffer under an expansive post-sale duty regime. Consumers too lose out, and in myriad ways. *First*, the additional tidal wave of warnings necessitated by the rule below would overwhelm consumers, undercutting the force of truly necessary warnings. Indeed, such “[o]verwarning causes consumers and users to discount or ignore valid warnings,” Richmond, 36 Idaho L.Rev. at 19. Inundating consumers with warnings for every known “risk,” no matter the severity, thus hurts more than it helps in keeping consumers safe.

Second, imposing expanded duties “flowing from the evolution of safer products certainly makes for bad social policy.” *Id.* at 22-23. All agree that safety is a paramount concern in the manufacturing and sale of goods. But heightened post-sale duties lead to less safety, not more. After all, imposing costs and liability based on safety improvements means manufacturers “would have no incentive to improve their products.” *Id.* at 23. Recognizing “such a duty would serve to discourage manufacturers from striving to improve the safety of their designs for fear

that they would then be obligated to locate and notify present users of each new development.” Higgins, 78 Mich. B.J. at 572. For minor product improvements, the cost of notification would easily outweigh the benefits for minor improvements. And for small and regional manufacturers, their more limited financial resources to cover the costs of additional warnings could easily prevent them from implementing many product improvements altogether. Imposing unwarranted post-sale duties to warn will harm consumers by depriving them of the benefits of improved products.

To understand the negative ramifications of the rule below on consumers, one need look no further than the automotive industry, where manufacturers are constantly seeking to improve vehicle safety. Ford’s Crimp Tooling Project is a perfect example. Although its design complied with the governing standards of a heavily regulated industry, the court found that Ford attempted to make its vehicles even safer in the event of a high-speed rear-end collision, *Linert*, 2014-Ohio-4431, 20 N.E.2d 1047, at ¶ 28—something any driver would recognize as highly dangerous regardless of vehicle design. Ford made an incremental change to its fuel tank crimp, folding an additional millimeter to a millimeter and a half of metal over the sender ring. *Id.* Despite the change, Plaintiffs’ own expert could not say whether the minor change made to the vehicle would affect the fuel tank in an accident. *Id.* at ¶ 111. If this type of minor improvement can trigger a duty to warn, as the court below found, the result would be to discourage many safety efforts altogether, to the consumer’s detriment.

* * * * *

While both manufacturers and consumers lose out under the Seventh District’s new post-sale duty rule, perhaps the biggest loser is the State of Ohio and its over 11 million residents. In our modern economy, states strive to foster a welcoming business environment, one that will

attract employers—and the critical jobs and tax revenue they bring with them. See Wilson, *Competing for Jobs: Local Taxes and Incentives*, Federal Reserve Bank of San Francisco (Feb. 23, 2015), <http://www.frbsf.org/economic-research/publications/economic-letter/2015/february/jobs-state-tax-incentives-economic-growth> (accessed Aug. 13, 2015). This is especially true for a state like Ohio, which continues its efforts to revamp its economy in the face of dramatic job losses just a decade ago. See Selko, *Ohio's Job Losses in 2000s Worst Since Great Depression*, Industry Week (Feb. 21, 2008), <http://www.industryweek.com/global-economy/ohios-job-losses-2000s-worst-great-depression> (accessed Aug. 13, 2015) (“According to the U.S. Bureau of Labor Statistics, manufacturing employment in Ohio dropped from 1,013,200 at the end of 2000 to 777,200 at the end of 2007, . . . a 23.3% decline in employment.”). In these days of economic competition between states, states are assessed and “ranked” on their attractiveness to new businesses, rankings business leaders consult in deciding where to do business. See, e.g., *2015 Best and Worst State Rankings*, Chief Executive (June 1, 2015), <http://chiefexecutive.net/best-worst-states-business> (accessed Aug. 13, 2015) (survey results “clearly show that CEOs favor states that foster growth”); JobsOhio, *2012 Annual Report, 2013 Strategic Plan*, http://jobs-ohio.com/images/13-0305_JO_Report_Full.pdf (accessed Aug. 13, 2015) (explaining Ohio’s efforts “to make Ohio’s business landscape more attractive,” including through tax and regulatory reform). Chief among the factors weighed in such rankings are a state’s regulatory and legal environment and the hurdles they place on expanding business and jobs. See Badenhausen, *Ranking The Best States For Business 2014: Behind The Numbers*, Forbes (Nov. 12, 2014), <http://www.forbes.com/sites/kurtbadenhausen/2014/11/12/ranking-the-best-states-for-business-2014-behind-the-numbers> (accessed Aug. 13, 2015); see also Brooks, *States with the Best and Worst Legal Climates for Starting a Business*, Business News Daily

(Sept. 11, 2012), <http://www.businessnewsdaily.com/3115-states-with-the-best-and-worst-legal-climates-for-starting-a-business.html> (accessed Aug. 13, 2015) (“More than ever, businesses are looking at a state’s legal environment when deciding where to locate or expand their operations, new research shows.”). These are the realities of the modern, versatile, information-based economy in which businesses, states, and nations all compete.

But rather than promoting Ohio as a sensible, business-welcoming jurisdiction, the Seventh District’s decision has the opposite effect. It tells manufacturers who seek to do business in Ohio that their post-sale duty to warn exceeds that of any other state, that product improvements for products sold in Ohio trigger even further duties, and that the Ohio courts have free reign to expand tort duties circumscribed by statute. If the decision below is affirmed, American and international businesses alike will take note of this development, to Ohio’s detriment. In particular, smaller businesses and start-up companies, who are more nimble and selective in where they do business, may forego Ohio altogether in favor of states with more sensible product liability regimes.

C. FEDERAL REGULATIONS ARE ALREADY IN PLACE TO PROTECT CONSUMERS FROM UNREASONABLE PRODUCT RISKS.

Expanding post-sale duties to the previously unknown level recognized below likewise makes little sense when consumers are already adequately protected in the post-sale environment through federal regulation. Both in the automotive industry and beyond, federal regulations protect consumers from unreasonable risks, and do so more comprehensively than would adoption of the Seventh District’s rewriting of products liability law.

In the automotive industry specifically, the National Highway Traffic Safety Administration (NHTSA) has sweeping authority to regulate safety issues involving automobile manufacturers. Federal law directs the Secretary of Transportation, who has delegated that

authority to NHTSA, to “prescribe motor vehicle safety standards.” 49 U.S.C. 30111(a); Kam, *NHTSA Safety Defect Investigations* 1 (July 17, 2001), <http://www.htsassociates.com/documents/NHTSA-Safety-Defect-Investigations.pdf> (accessed Aug. 13, 2015). Manufacturers in turn must notify the Secretary *and consumers* when a vehicle fails to comply with those standards or otherwise contains a safety-related defect. 49 U.S.C. 30118(c). NHTSA likewise has authority to conduct its own investigations for noncompliance or defects, and to order consumer notifications. Kam, *NHTSA Safety Defect Investigations* at 2.

Notification, however, is not the end of line for NHTSA. Unlike a post-marketing duty to warn, which requires manufacturers to issue warnings only (but not remedy an existing defect), when NHTSA issues a notification, the manufacturer at issue must remedy the noncompliance or defect by way of a recall (followed by repairing or replacing the vehicle, or refunding the purchase price). *See* 49 U.S.C. 30120(a).

What is more, a “defect” in the federal regulatory context is broader than a “defect” under R.C. 2307.74 or R.C. 2307.75. In the product liability setting, Ohio law defines a defect as a problem that existed in manufacturing or design when the product “left the control of its manufacturer.” R.C. 2307.74 and 2307.75(A). Motor vehicle defects under federal law, however, also include “defect[s] in performance,” 49 U.S.C. 30102(a)(2), which courts have interpreted to mean any vehicle or component that ““is subject to a significant number of failures in normal operation.”” Kam at 4, quoting *United States v. General Motors Corp.*, 518 F.2d 420, 427 (D.C. Cir. 1975). Thus, where a vehicle suffers a significant number of failures that pose an “unreasonable risk” to consumers, 49 U.S.C. 30102(a)(8), the manufacturer must notify consumers and conduct a recall.

Failure to do so results in serious penalties. Just last month, NHTSA levied a record penalty of \$105 million against Chrysler for violating federal rules on recalls and notifications. Vlastic, *Fiat Chrysler Gets Record \$105 Million Fine for Safety Issues*, The New York Times (July 26, 2015), available at http://www.nytimes.com/2015/07/27/business/fiat-chrysler-faces-record-105-million-fine-for-safety-issues.html?_r=0 (accessed Aug. 13, 2015). That comes on the heels of the previous record penalty of \$70 million that NHTSA imposed on Honda in January 2015 for airbag defects. *Id.* Among the defects that lead to Chrysler's fine, it bears noting, were Jeeps with rear-mounted gas tanks prone to fires in accidents. *Id.* Plaintiffs here made similar allegations, but the jury rejected their defect claims, *Linert*, 2014-Ohio-4431, 20 N.E.2d 1047, at ¶ 59, and NHTSA has never taken action against Ford over the vehicle.

Consumer products more broadly are also within the scope of federal regulation through the Consumer Product Safety Act (CPSA). The CPSA requires manufacturers to report to the Consumer Product Safety Commission any consumer product that may create a "substantial product hazard." Madden, *Modern Post-Sale Warnings and Related Obligations*, 27 Wm. Mitchell L.Rev. 33, 66 (2000). If the Commission determines that a product does in fact constitute a substantial product hazard, it can require the manufacturer to notify consumers and conduct a recall. *Id.*

That these federal consumer protection laws reach beyond the Seventh District's expansion of tort liability for post-marketing duty to warn is further evidence why the Court should reject the decision below as a necessary means for consumer protection. The lone "protection" the decision below adds to the regulatory mix is a private tort claim for failing to warn of unlikely and speculative risks. In view of the state tort regime already in place and the

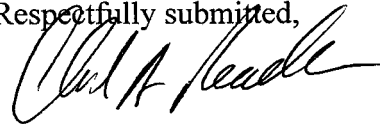
federal overlay that further protects purchasers, expanding tort liability is unnecessary and unwise.

II. CONCLUSION

For the reasons set forth above, amici urge the Court to reverse the court of appeals' decision.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of Amicus Curiae Chamber of Commerce of the United States of America, National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, Ohio Chamber of Commerce, and Ohio Manufacturers' Association in Support of Appellant Ford Motor Company was served via regular U.S. Mail, postage prepaid, this 17th day of August, 2015, upon the following:

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