IN THE SUPREME COURT OF OHIO

NICOLETTE SIMON, et al., Plaintiffs-Appellees,	*	Case No. 2022-0878
v.	*	On Appeal from the Court of Appeals Second Appellate District
PATRICK A. LARREATEGUI, et al., Defendants,	*	Miami County, Ohio
and	*	Court of Appeals Case No. 21-CA-41
ETHICON ENDO-SURGERY, INC., Defendant-Appellant.	*	

MEMORANDUM OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE OHIO CHAMBER OF COMMERCE, THE AMERICAN TORT REFORM ASSOCIATION, AND THE OHIO ALLIANCE FOR CIVIL JUSTICE IN SUPPORT OF APPELLANT ETHICON ENDO-SURGERY, INC.'S JURISDICTIONAL APPEAL

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INTEREST OF *AMICI CURIAE*[*] AND EXPLANATION WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Founded in 1893, the Ohio Chamber of Commerce ("Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization representing businesses ranging in size from small, sole proprietorships to some of the largest U.S. companies. It works to promote and protect the interests of its more than 8,000 business members while building a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. By promoting its pro-growth agenda with policymakers and in courts across Ohio, the Ohio Chamber seeks a stable and predictable legal system which fosters a business climate where enterprise and Ohioans prosper.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance,

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[*] No party's counsel authored this brief in whole or in part, nor did any party or other person or entity other than *amici*, their members, or their counsel make a monetary contribution intended to fund the brief's preparation or submission.

and predictability in civil litigation. For more than three decades, ATRA has filed *amicus curiae* briefs in cases involving important liability issues.

The Ohio Alliance for Civil Justice ("OACJ") is a group of small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others.[1] OACJ members support a balanced civil justice system that will not only award fair compensation to injured persons, but will also impose sufficient safeguards to ensure that defendants are not unjustly penalized and plaintiffs not unjustly enriched. The OACJ also supports stability and predictability in the civil justice system in order that Ohio's businesses and others may know what risks they assume as they carry on commerce in this state.

Amici are deeply concerned about the impact of excessive tort costs on business activity in Ohio, which already exceed $25 billion per year. *See* Perryman Group, *Economic Benefits of Tort Reform* 69 (Dec. 2021). This case presents a question of great importance to *amici* and their members in this area, regarding proper limitations on strict liability: whether, as this Court held in *State Farm Fire & Casualty Co. v. Chrysler Corp.*, 37 Ohio St.3d 1, 9–10 (1988), a plaintiff can only establish circumstantial evidence of a manufacturing defect if the plaintiff excludes reasonable alternative causes. This common-law rule is not unique to Ohio. The Restatement of the Law (Third) on Torts embraces it, and thus unsurprisingly it has been adopted by states across the nation. Yet, the decision of the court appeals interprets the Ohio Products Liability Act, R.C. 2307.73(B), to apparently eliminate this common-law rule *sub silentio*.

[1] The OACJ leadership includes members from the NFIB Ohio, the Ohio Chamber of Commerce, the Ohio Association of Certified Public Accountants, the Ohio Hospital Association, the Ohio Medical Association, the Ohio Manufacturers' Association, other organizations, businesses, and professionals.

The elimination of this bedrock common-law rule presents an error of public and great general interest. First and foremost, it finds zero support in the statutory text or judicial precedent. And with good reason. After all, the decision of the court of appeals transforms manufacturers into insurers of their product's performance—even in circumstances when the injury occurs because the consumer or a third party alters, misuses, or abuses the product. Such an outlier products-liability rule is harmful to American businesses, customers (due to higher prices and reduced availability of goods), and the national economy. And it would have a detrimental effect on all products that make their way to the State of Ohio—from life-saving medical devices and computers and other electronics to construction materials and automobiles.

Amici and their members are uniquely situated to articulate the public and great general interest in preserving the proper guardrails on strict liability. For instance, the U.S. Chamber's Institute for Legal Reform has published a number of reports that detail the harmful consequences of such expansion of tort law. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Costs and Compensation of the U.S. Tort System* (Oct. 2018). And the U.S. Chamber routinely files *amicus curiae* briefs addressing state tort and products-liability law,[2] including with ATRA and the Ohio

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[2] *See, e.g.*, Br. of *Amici Curiae* Pa. Coal. for Civil Justice Reform et al., *Gregg v. Ameriprise Fin.*, No. 29-WAP-2019 (Pa. Sept. 5, 2019) (strict liability); Br. of *Amici Curiae* Chamber of Commerce of U.S. et al., *Baptiste v. Bethlehem Landfill Co.*, No. 19-1692 (3d Cir. Aug. 12, 2019) (nuisance under Pennsylvania law); Ltr. Br. of Chamber of Commerce of U.S., *Sherman v. Hennessy Indus.*, No. S228087 (Cal. Sept. 11, 2015) (strict liability); Br. of *Amici Curiae* Chamber of Commerce of U.S. et al., *Aubin v. Union Carbide Corp.*, No. SC12-2075 (Fla. Oct. 25, 2013) (strict liability); *Amici Curiae* Br. of Pa. Bus. Council et al., *Tincher v. Omega Flex, Inc.*, No. 17-MAP-2013 (Pa. June 4, 2013) (strict liability).

Similarly, the OACJ strongly supported the comprehensive tort-reform measures contained in Amended Substitute Senate Bill 80, including the limitations on noneconomic damages, codified in R.C. 2315.18, which were critical to the General Assembly's 2005 tort-reform effort. The OACJ filed *amicus curiae* briefs in support of Senate Bill 80 when several of its provisions were challenged as being facially unconstitutional in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468 (2007), and when the noneconomic damage cap was challenged as unconstitutional as applied

Chamber in this Court. *See* Br. of *Amici Curiae* U.S. Chamber of Commerce, ATRA, et al., *Brandt v. Pompa*, No. 2021-0497 (Ohio Nov. 23, 2021); Br. of *Amici Curiae* U.S. Chamber of Commerce & Ohio Chamber of Commerce, *Stiner v. Amazon.com*, No. 2019-0488 (Ohio Dec. 12, 2019); *see also Stiner v. Amazon.com*, 162 Ohio St.3d 128, 135 (2020) ("Under the facts of this case, we find that Amazon is not a supplier, as defined in R.C. 2307.71(A)(15)(a), for the purposes of the Ohio Products Liability Act.").

STATEMENT OF CASE AND FACTS

This case arises from a medical-malpractice lawsuit brought for injuries suffered during a colon-resection surgery. Plaintiffs originally sued the surgeon for negligence, and later amended their complaint to also sue the manufacturer of the surgical stapler, Defendant-Appellant Ethicon Endo-Surgery, Inc. ("Ethicon"). The trial court allowed Plaintiffs to pursue an "either/or" strategy at trial: presenting evidence of the surgeon's negligence in their case-in-chief, while insisting that, if the surgeon's self-serving denials were believed, Ethicon's surgical stapler must have had some unspecified manufacturing defect that no expert could identify. At trial, Plaintiffs' own medical expert testified that the stapler's misfire was most likely the result of the surgeon's misuse, *not* a manufacturing defect in the product.

Overruling Ethicon's motions for summary judgment, directed verdict, and judgment notwithstanding the verdict, the trial court refused to require Plaintiffs to rule out reasonable alternative causes—other than a manufacturing defect—for the injuries, as required by Ohio law when attempting to prove a manufacturing defect through circumstantial evidence. Instead, the trial court allowed the jury to speculate whether a defect was present in the surgical stapler at issue when it left the manufacturer based on the self-serving testimony of the defendant surgeon and his

in *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307 (2016). In both cases, the constitutionality of R.C. 2315.18's noneconomic damage cap was upheld.

surgical team who claimed the surgeon followed all of the product instructions and otherwise acted with due care. The jury ultimately found only Ethicon liable for the injuries, awarding roughly $10 million in damages. The court of appeals affirmed.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

For the reasons that follow, *amici* support Ethicon's jurisdictional appeal and urge this Court to review Ethicon's proposed Proposition of Law:

> **A plaintiff can prove a product defect with circumstantial evidence when direct proof of a specific defect is unavailable. Testimony that a product malfunctioned is circumstantial evidence of a defect. But a defect is not proven with circumstantial evidence if the plaintiff's case-in-chief fails to eliminate other reasonable alternative causes of the event, including that the product was used in violation of its instructions or warnings. (R.C. 2307.73(B), construed; *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 37 Ohio St.3d 1 (1998), explained and followed.)**

I. THE DECISION OF THE COURT OF APPEALS DISLODGES LONGSTANDING OHIO PRODUCTS LIABILITY LAW.

To establish a manufacturing defect under Ohio law, the plaintiff must prove that, "when it left the control of its manufacturer, [the product] deviated in a material way from the design specifications, formula, or performance standards of the manufacturer, or from otherwise identical units manufactured to the same design specifications, formula, or performance standards." R.C. 2307.74. If the product is found defective, the manufacturer is strictly liable. *See id.* ("A product may be defective in manufacture or construction as described in this section even though its manufacturer exercised all possible care in its manufacture or construction."). Ohio law generally requires that the plaintiff "establish by direct evidence that the manufacturer's product in question was defective." R.C. 2307.73(B). The plaintiff may rely on "circumstantial or other competent evidence," however, in two narrow circumstances: (1) when "the manufacturer's product in

question was destroyed" or (2) if the plaintiff "otherwise is unable to establish by direct evidence that the manufacturer's product in question was defective." *Id.*[3]

In its seminal decision in *State Farm Fire & Casualty Co. v. Chrysler Corp.*, 37 Ohio St.3d 1 (1998), this Court articulated a fundamental common-law limitation on the use of circumstantial evidence to prove a manufacturing defect. There, like here, the plaintiffs pursued an either/or strategy at trial: arguing that an automobile repair company negligently caused the automobile to catch fire, while also arguing for strict liability against the automobile manufacturer due to an unspecified manufacturing defect. This Court rejected that strategy, holding that the plaintiffs must eliminate "other possible causes" of the injury. *Id.* at 8–9. The manufacturing defect claim could not go to the jury, the Court held, because "[i]t is equally likely that the defect arose as a result of negligent repair," such that the jury would have to "speculate as to whether the [product] defect was present when the [plaintiffs'] vehicle left the hands of the manufacturer." *Id.* 9, 10.

In affirming the trial court's rulings, the decision of the court of appeals here cannot be squared with *State Farm*. The court of appeals refers to *State Farm*, quoting it for the proposition that "[p]roduct defects may be proven by direct or circumstantial evidence." *Simon v. Larreategui*, 2022-Ohio-1881, ¶ 24 (Ohio Ct. App.2d) (quoting *State Farm*, 37 Ohio St.3d at 6). But it then ignores *State Farm*'s core holding that plaintiffs must eliminate other possible causes of injury in

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[3] *Amici* take no position on whether the trial court erred in allowing Plaintiffs to attempt to prove the manufacturing defect by circumstantial evidence, when the stapler used in the surgery was not destroyed and Plaintiffs' expert had an opportunity to examine it. *See* Ethicon Memo. in Support of Jurisdiction at 7. But *amici* underscore that the second catchall clause in R.C. 2307.73(B) must be read narrowly so as to not render the first clause superfluous. *See, e.g.*, *State v. Pettus*, 163 Ohio St.3d 55, 59 (2020) ("This reading, however, renders a portion of the statute redundant, and we generally will not approve of a reading of a statute that renders its words superfluous."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) ("If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

order for a manufacturing-defect claim based on circumstantial evidence to be sent to the jury. It is undisputed that Plaintiffs here deliberately chose *not* to eliminate another possible cause of injury, by also pursuing a negligence claim against the surgeon.

Indeed, the facts are strikingly similar to *State Farm*. Plaintiffs' own medical expert testified that he was "more concerned about the possibility the stapler wasn't properly utilized than [he] was about the stapler malfunction." *Id.* ¶ 27. When pressed by Plaintiffs' own counsel to opine on the preponderance of the evidence, their expert testified: "[I]f I had to go fifty-one percent/forty-nine percent, I would have to lean towards that scenario, as maybe it was not properly utilized, rather than a malfunction." *Id.*

To allow the claim to go to the jury, the trial court (and the court of appeals) relied largely on the self-serving testimony of the defendant surgeon (and his surgical team) who testified that the surgeon used the Ethicon surgical stapler correctly—concluding that "there was at least *some* evidence of substantive probative value that favored the position" against Ethicon. *Id.* ¶ 31 (emphasis in original); *see also* Ethicon Memo. in Support of Jurisdiction at 14–15 (summarizing Plaintiffs' scant circumstantial evidence to prove a manufacturing defect). That is not how Ohio products-liability law works under R.C. 2307.73(B) and *State Farm*. In affirming the trial court, the court of appeals plainly misunderstood its role.

Consider, for instance, the erroneous conclusion from the court of appeals about allowing the either/or theory to go to the jury: "To be sure, Ethicon presented experts who discounted [the defendant surgeon's] version of events, stating generally that the physical evidence pointed to misuse by the surgeon, but it is not our province to put our finger on the scale one way or the other." *Simon*, 2022-Ohio-1881, ¶ 31. Under *State Farm*, this is about the court's role in deciding which evidence and claims make it to the jury, *not* exerting influence over a decision that the jury

is making. The *State Farm* Court made abundantly clear that it is the province of the court to play a gatekeeping role when it comes to circumstantial evidence in a product manufacturing-defect claim. The court must require a plaintiff to eliminate "other possible causes" of the injury before sending the claim to the jury. *State Farm*, 37 Ohio St.3d at 8–9.

II. THE DECISION OF THE COURT OF APPEALS CREATES AN OUTLIER RULE FOR CIRCUMSTANTIAL EVIDENCE OF MANUFACTURING DEFECTS.

It is imperative that this Court make clear that *State Farm* remains good law. The decision of the court of appeals is not merely a fact-bound misapplication of *State Farm*. Plaintiffs argued in their briefing before the court of appeals that the Ohio Products Liability Act somehow eliminated *State Farm*'s common-law limitations on the use of circumstantial evidence to prove a manufacturing defect. *See* Br. of Plaintiffs-Appellees at 11 (arguing that Ethicon relies on "cases that predate R.C. 2307.74"). That argument is meritless, but it seems to have swayed the court of appeals. Unless corrected, the decision below risks introducing uncertainty and confusion in an area of the law where certainty and clarity are essential.

It is true, as one leading commentator on the Ohio Products Liability Act has observed, that *State Farm* is "a well known decision decided prior to the statutory rule" on circumstantial evidence. Stephen J. Werber, *An Overview of Ohio Product Liability Law*, 43 Clev. St. L. Rev. 379, 443 (1995) (discussing R.C. 2307.73(B)). But that does not mean the subsequent statute trumps the common law. To the contrary, it is a cardinal principle of statutory interpretation that "[a] statute will be construed to alter the common law only when that disposition is clear." Scalia & Garner, *supra*, at 318. Indeed, statutes are presumed to incorporate the existing common-law backdrop. As this Court has explained, "[s]tatutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment." *Mann v. Northgate Investors, L.L.C.*, 138 Ohio St.3d 175, 179 (2014) (internal

quotation marks omitted). When construing statutes, the Court continued, "the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law *unless the language employed by it clearly expresses or imports such intention*." *Id.* (internal quotation marks omitted; emphasis in original).

Nothing in the text or structure of the Ohio Products Liability Act or any of its amendments suggests that the legislature intended to repeal *State Farm*'s common-law rule on the use of circumstantial evidence. R.C. 2307.73(B) currently reads in full:

> If a claimant is unable because the manufacturer's product in question was destroyed to establish by direct evidence that the manufacturer's product in question was defective or if a claimant otherwise is unable to establish by direct evidence that the manufacturer's product in question was defective, then, consistent with the Rules of Evidence, it shall be sufficient for the claimant to present circumstantial or other competent evidence that establishes, by a preponderance of the evidence, that the manufacturer's product in question was defective in any of the four respects specified in [the statute].

The statute contains no express repeal of the common-law rule recognized in *State Farm*. To the contrary, this Court has already recognized that, "[i]n enacting the Ohio Products Liability Act, the General Assembly codified this analytic approach" of *State Farm*. *Perkins v. Wilkinson Sword, Inc.*, 83 Ohio St.3d 507, 508 (1998). As far as *amici* are aware, Plaintiffs are the first to suggest that the statute abrogates *State Farm* on this point; in the briefing below, they cited no judicial decision or other source to support such a statutory repeal of existing common law. None exists.

Moreover, the Ohio General Assembly knows how to expressly repeal common law. In amendments to the Ohio Products Liability Act, it subsequently did so as to a distinct common-law doctrine applied in *State Farm*, 37 Ohio St.3d at 6–8. *See* Werber, *supra*, at 384 (discussing R.C. 2307.74 and how it expressly eliminates the consumer-expectancy test for manufacturing defects); *see also Perkins*, 83 Ohio St.3d at 508 n.1 ("An amendment after this case arose eliminated the consumer-expectation test, leaving this section of the statute otherwise

substantively the same."). As Professor Werber observed, R.C. 2307.73(B) is "[c]onsistent with judicial precedent," primarily *State Farm*, which "utilized this [statutory] principle and expressed its limitations as to the totality of the plaintiff's burden of proof." Werber, *supra*, at 443. When it comes to manufacturing-defect claims under R.C. 2307.73(B), Professor Werber continued, the "plaintiff must present additional evidence to prove the defect existed at the time of manufacture and to establish proximate cause." *Id.* at 444.

Not only does the decision of the court of appeals contradict Ohio law; it also departs from the prevailing rule in states across the nation—as captured by the Restatement of the Law (Third) on Torts. *See* Restatement of the Law 3d, Torts: Products Liability, § 3, Comm. d & Illus. 7 (1998). Consider, for instance, an illustration accompanying the Restatement on circumstantial evidence supporting an inference of product defect. The Restatement illustration concludes that "[a]n inference that the [product] was defective at the time of sale cannot be drawn" when the plaintiff's "expert admits it is equally probable that the problem with the [product] was introduced by" the repair shop. *Id.*, Illus. 7. Here, Plaintiffs' own expert did not merely testify that the surgeon's negligence was an equally probably cause. He said the surgeon's negligence was the *more likely* cause of the injury than any potential, unspecified manufacturing defect in the surgical stapler.

Given this illustration from the Restatement, it is no surprise that common-law courts and statutes in states across the nation have adopted this limitation on the use of circumstantial evidence to prove a malfunction or manufacturing defect. The states that have adopted some version of the *State Farm* rule are wide ranging and diverse, from Connecticut, New York, and Pennsylvania; to Arkansas, Kansas, and Minnesota; and to Idaho and Wyoming—just to name a

few.[4] This Court should intervene to ensure that the decision of the court of appeals does not make the State of Ohio an extreme outlier when it comes to strict liability for manufacturing defects based on circumstantial evidence. That would be inconsistent with this Court's longstanding precedent, as well as the wishes of the General Assembly that has enacted and amended the Ohio Products Liability Act over the last few decades.

III. THE DECISION OF THE COURT OF APPEALS HARMS AMERICAN BUSINESSES, CONSUMERS, AND THE NATIONAL ECONOMY.

The new rule announced by the court of appeals introduces great uncertainty and costs for manufacturers that do business in the State of Ohio as well as for the consumers (in Ohio and across the nation) who will have to either pay more for those products or perhaps lose access to them entirely. The reach of this new rule is not limited to the medical-device context. It will affect

[4] *See, e.g.*, *Pilcher v. Suttle Equip. Co.*, 223 S.W.3d 789, 794 (Ark. 2006) ("In the absence of direct proof of a specific defect, it is sufficient if a plaintiff negates other possible causes of failure of the product not attributable to the defendant."); *Metro. Prop. & Cas. Ins. Co. v. Deere & Co.*, 25 A.3d 571, 585 (Conn. 2011) ("The plaintiff therefore must present sufficient evidence to negate a reasonable possibility that something or someone besides the manufacturer caused the defect in the product."); *Farmer v. Int'l Harvester Co.*, 553 P.2d 1306, 1311 (Idaho 1976) ("A prima facie case may be proved by direct or circumstantial evidence of a malfunction of the product and the absence of evidence of abnormal use and the absence of evidence of reasonable secondary causes which would eliminate liability of the defendant."); *Mays v. Ciba-Geigy Corp.*, 661 P.2d 348, 360 (Kan. 1983) ("For circumstantial evidence to make out a prima facie case, it must tend to negate other reasonable causes, or there must be an expert opinion that the product was defective."); *Schafer v. JLC Food Systems, Inc.*, 695 N.W.2d 570, 576 (Minn. 2005) (holding that "when the specific harm-causing object is not known circumstantial evidence should be available, if such evidence is sufficient and other causes are adequately eliminated, for purposes of submitting the issue of liability to the jury"); *Speller ex rel. Miller v. Sears, Roebuck & Co.*, 790 N.E.2d 252, 254–55 (N.Y. 2003) ("In order to proceed in the absence of evidence identifying a specific flaw, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendants."); *Barnish v. KWI Bldg. Co.*, 980 A.2d 535, 547 (Pa. 2009) ("[A] plaintiff who admits that the product functioned properly in the past must present some evidence explaining how the product could be defective when it left the manufacturers control and yet still function properly for a period of time."); *Sims v. General Motors Corp.*, 751 P.2d 357, 361 (Wyo. 1988) ("[M]ere proof that the seat belt buckle malfunctioned was not sufficient to create an inference of a defect. It was plaintiffs' additional burden to present evidence that there was no abnormal use and no reasonable secondary causes for the malfunction.").

all manufacturers seeking to do business in the state, with ripple effects throughout the national economy.

If plaintiffs can establish a circumstantial-evidence claim for manufacturing defects without excluding reasonable alternative causes, including that the product was used in violation of product instructions and warnings, plaintiffs can and will pursue the either/or strategy against manufacturers and intermediaries in countless contexts. We will see more medical-malpractice lawsuits where plaintiffs sue the doctors and the medical-device manufacturer, leaving it to the jury to speculate which caused the injury. Similar suits will be filed against other manufacturers and the professionals who use their products—from hair dressers to food-service providers. The decision of the court of appeals will also extend to manufacturers and the professionals who install those products, such as to the diverse range of contractors, workers, and specialists in the construction industry. And, like in the Restatement illustration and *State Farm* itself, this new rule will encourage the either/or strategy in contexts where products are maintained or repaired, such as automobiles, watercraft, electronic devices, appliances, and heavy machinery.

Simply put, under this new rule, whenever a third party handles a product and, in the process, alters, misuses, or abuses it, plaintiffs will be able to also sue the manufacturer without any direct evidence for a strict-liability manufacturing defect. Indeed, if direct evidence of a malfunction is direct evidence of an unidentified defect, plaintiffs could pursue a defect claim without even excluding their own misuse or alteration of the product as the cause of injury. In this way, the outlier rule adopted by the court of appeals turns manufacturers into insurers of their product's performance—a concern that applies to all manufacturers and is contrary to basic principles of products-liability law. *See, e.g.*, *State Farm*, 37 Ohio St. 3d at 8 ("Manufacturers are not insurers of their products.").

For these reasons, it is no surprise that this Court in *State Farm* recognized a rule contrary to the decision below and that the Ohio General Assembly incorporated that backdrop common-law doctrine when it enacted (and amended) the Ohio Products Liability Act. To restore predictability and certainty to products-liability law in Ohio, the Court should grant Ethicon's jurisdictional appeal and confirm the Proposition of Law that a plaintiff asserting a products-liability claim must either introduce direct proof of a specific defect or produce circumstantial evidence that also eliminates other reasonable alternative causes of the injury, including that the product was used in violation of its instructions or warnings.

CONCLUSION

For these reasons, the Court should accept Defendant-Appellant Ethicon Endo-Surgery, Inc.'s jurisdictional appeal.

Respectfully submitted,

July 18, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2022, an electronic copy of the foregoing memorandum of *amici curiae* was served by email per S. Ct. Prac. R. 3.11(C)(1) to:

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