IN THE

SUPREME COURT OF INDIANA

No. 49S00-1502-MI-119

LARRY MYERS and LOA MYERS,	}	
	}	Appeal from the Marion Superior Court
Appellants (Plaintiffs Below),	}	
v.	}	
	}	Trial Court No. 49D02-1405-MI-14372
CROUSE-HINDS DIVISION OF COOPER INDUSTRIES, INC., LORILLARD TOBACCO CO. and HOLLINGSWORTH & VOSE,	}	
	}	The Honorable Timothy W. Oakes, Judge
Appellees (Defendants).	}	

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INDIANA CHAMBER OF COMMERCE, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

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INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation, representing the interests of 300,000 direct members, and indirectly representing the interests of over 3,000,000 businesses and professional organizations of every size, in every industry sector, and from every region of the country, including Indiana. Over 96 percent of the U.S. Chamber's members are small businesses with 100 or fewer employees. The U.S. Chamber advocates on issues of vital concern to America's business community, and regularly participates as *amicus curiae* before courts throughout the nation.

The Indiana Chamber of Commerce ("Indiana Chamber") has served Indiana's business community since 1922, now serving over 26,000 members and customers annually. The Indiana Chamber advocates on behalf of its members in matters affecting Indiana's business climate, including in the areas of employee relations, human resources, good government, state taxes, economic development and the concerns of small business owners.

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 such businesses. The National Federation of Independent Business ("NFIB") is the country's leading small business association, representing members in Washington, D.C. and all 50 State capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB's 350,000 member businesses nationwide span the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. The typical NFIB

member employs 10 people and reports gross sales of about $500,000 a year. NFIB's membership is a reflection of American small business.

The U.S. Chamber, Indiana Chamber and NFIB Legal Center have vital interests in legal and policy developments that affect American businesses, including the countless enterprises in Indiana and throughout the nation whose interests they represent. For the reasons set forth in this Brief, these *amici curiae* believe this Court's well-established statute of repose jurisprudence is constitutionally correct, and enhances the ability of Indiana manufacturers and other businesses to meet the needs of the millions of Hoosiers and other consumers they serve.

SUMMARY OF ARGUMENT

This Court has repeatedly upheld the General Assembly's authority to balance affected interests and make the legislative policy choices entailed in enacting statutes of repose. These are not ancient decisions from a bygone age, now in need of revisiting. They are a consistent body of precedent developed in the modern industrial era, in which the Court has considered, addressed and (at times) debated the constitutional and other issues. On each occasion—including a recent case involving the precise situation presented in the instant case and its companions—the Court has reaffirmed that statutes of repose do not violate our Constitution.

Other briefing, including the Indiana Legal Foundation's *amicus* brief in a companion case, shows that the Court's *stare decisis* jurisprudence commands adherence to this established precedent, notwithstanding respectful divisions among the Justices in some of the prior cases. *Amici curiae* here demonstrate that other important factors strongly support the same result. These include that this Court's repose precedent is the majority view; that limitations concepts, such as discovery rules and tolling, are incompatible with statues of repose; that repose statutes serve important policy objectives; and that such policy choices are indeed legislative ones.

ARGUMENT

I. The Court's Statute Of Repose Jurisprudence Is Now Firmly Established.

The Court has consistently upheld the constitutionality of statutes of repose, yielding a well-grounded and reliable body of jurisprudence.

In 1981, the Court reaffirmed that (1) "our legislature clearly has the power to abrogate or modify common law rights and remedies;" (2) "there is no vested or property right in any rule of the common law;" and (3) "the right to bring a common law action is not a fundamental right." *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 529, 418 N.E.2d 207, 213 (1981). Under these baseline principles, the Products Liability Act's statute of repose does not violate Article 1, § 12 because no "vested right [is] taken from" a plaintiff whose "cause of action had not yet accrued" when the statute took effect. *Id.* (citing *inter alia Sidle v Majors*, 264 Ind. 206, 209, 341 N.E.2d 763, 766 (1976) ("this Court and the United States Supreme Court have upheld the right of states to abolish or modify the common law;" rejecting claim that Guest Statute violated Article 1, § 12 on theory that it eliminated remedy guaranteed by the Indiana Constitution)).

In 1992, the Court reiterated *Dague*'s holding that the Product Liability repose statute "does not violate Article 1, § 12 because the cause of action had not accrued at the time the provision became effective and, therefore, no vested right was taken from the plaintiff." *State v. Rendleman*, 603 N.E.2d 1333, 1336 (Ind. 1992). "Indiana courts have uniformly held that, in cases involving injury to person or property, Article 1, § 12 does not prevent the legislature from modifying or restricting common law rights and remedies." *Id.* Citing *Dauge*, *Sidle* and other cases, the Court rejected a challenge to the Tort Claims Act's immunity provisions. *Id.*

Among the cases *Rendleman* relied upon was *Beecher v. White*, 447 N.E.2d 622 (Ind. Ct. App. 1983), which upheld the statute of repose for construction defect actions. The challengers

cited cases from other States finding such statutes violated "open court clauses similar to Indiana's." *Id.* at 628. The Court of Appeals rightly responded that "these arguments were laid to rest in *Dague*," which "held there was no right in a plaintiff for the continuation of a common law action which had not vested, and the legislature had the power to alter or abolish it."

In 2002, the Court rebuffed another challenge to the Products Liability statute of repose, this one claiming it violated Article 1, Section 12's provision that "every person, for injury done to him in his person ... shall have remedy by due course of law." The Court disagreed. "'[T]he constitutional assurance of a remedy for injury does not create any new substantive rights to recover for particular harms. Rather, the clause promises that, for injuries recognized elsewhere in the law, the courts will be open for meaningful redress.'" *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 977 (Ind. 2000) (Boehm, J., joined by Shepard, C.J.) (quoting JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW § 6–2(c) (2d ed.1996)). "[T]he authority to determine what constitutes a legally cognizable injury" is the Legislature's. *Id.* (citation & internal quotation marks omitted). As "the General Assembly has determined that injuries occurring ten years after the product was delivered to a user are not legally cognizable claims for relief," plaintiffs were "not entitled to a 'remedy' under Section 12." *Id.* at 978. Justice Sullivan's separate concurrence found *Dague* and *Beecher* controlling: "[T]hose precedents dictate that the Product Liability Act's statute of repose violates neither art. I, § 12, nor art. I, § 23 of the Indiana Constitution." *Id.* at 985.

In 2003, the Court reaffirmed the validity of the Products Liability statute of repose in the context presented here---plaintiffs claiming latent harm from exposure to asbestos. *AlliedSignal, Inc. v. Ott*, 785 N.E.2d 1068, 1076 (Ind. 2003) (the statute, "as we have previously held, does not violate" Article 1, § 12's "open courts" or "remedy by due course of law" provisions).

Under these cases, the constitutionality of statutes of repose is settled Indiana law.

II. The Court Should Adhere To Its Settled Statute Of Repose Jurisprudence.

As other briefing shows, *stare decisis* alone commands adherence to this consistent precedent upholding statues of repose. Other important factors support the same result.

A. The Court's Consistent Precedent Is Also The Majority View.

This Court's precedent upholding the constitutional validity of statutes of repose is the majority view. This was true in the decade *Dauge* was decided. *See* Josephine H. Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 639 (1985) ("majority of courts applying the rational basis test to an equal protection challenge have upheld the statutes of repose"); *id.* at 645 ("most courts have found that statutes of repose do not violate open courts provisions").

It remained true in the decade *McIntosh* and *Ott* were decided. *See* Andrew A. Ferrer, *Excuses, Excuses: The Application of Statutes of Repose to Environmentally-Related Injuries*, 33 B.C. ENVTL. AFF. L. REV. 345, 350 (2006) ("state courts usually … apply[ ] the lenient rational basis review in the absence of any fundamental right or suspect classification," and "have not had much difficulty in concluding that statutes of repose serve their intended legislative purposes"); *id.* at 352 ("statutes of repose have been held to be constitutional by many jurisdictions" with open courts provisions, including "jurisdictions [that] view their open courts provisions as protecting only vested rights so that 'a citizen's constitutional right to a day in court is not violated by a repose time bar because a right to a cause of action cannot vest after the time period runs'") (citation omitted). This is precisely what this Court has repeatedly held.

The Court's position remains the clear majority view today. *See* 2 LAW OF TOXIC TORTS § 12:12 (2015) ("for the most part, such statutes [of repose] have not been found to violate due process or other state of federal constitutional provisions"); *compare* Jay M. Zitter, Annotation,

Validity and Construction of Statute Terminating Right of Action for Product–Caused Injury at Fixed Period After Manufacture, Sale, or Delivery of Product, 30 A.L.R.5th 1, § 3[a] (1995 & Cum. Supp. 2015) (citing over 40 cases from 15 jurisdictions holding that statutes of repose "did not violate state constitutional provisions guaranteeing rights of unrestricted access to courts of law and rights of redress for injuries") *with id.* § 3[b] (citing only nine cases from nine jurisdictions finding such statutes "violated state constitutional provisions guaranteeing an opportunity to seek redress for wrongs in a court").

Indeed, this overstates the number in the minority. The supplement overlooks that South Dakota's Supreme Court "set aside" the 1984 decision cited in the initial 1995 Annotation as invalidating a statute of repose, saying it "can no longer be supported as a correct interpretation of" the State constitution. *Cleveland v. BDL Enter.*, 663 N.W.2d 212, 224 (S.D. 2003).[1]

Finally, there is no new trend or tendency to view statutes of repose with skepticism. Just last year, the United States Supreme Court held that CERCLA's "discovery rule" for federal environmental actions preempted State statutes of limitations, but did *not* preempt statutes of repose. *CTS Corp. v. Waldburger*, ___ U.S. ___, 134 S. Ct. 2175, 2183-87 (2014) (discussing differences between effects and purposes of the two types of statutes).

Just this April, Missouri's Supreme Court upheld that State's medical malpractice statute of repose, under analysis parallel to this Court's. *Ambers-Phillips v. SSM DePaul Health Ctr.*, 459 S.W.3d 901, 909 (Mo. 2015) (equal protection challenge fails under "rational basis test under which 'the statute will be [held] valid as long as it bears a reasonable relationship to a legitimate state purpose'") (citation omitted; alteration in original); *id.* at 910-11 ("open courts guarantee applies only to recognized causes of action; it does not guarantee access to the courts

[1] The Annotation also includes cases from Florida and Ohio in both groups, reflecting that decisions in those States have arrived at differing results in different contexts.

once the statute of repose extinguishes the cause of action;" constitutional provision "applies only to causes of action that have accrued," not one "barred before it had a chance to arise").

B. Discovery Rules And Tolling Are Incompatible With Repose Statutes.

The Court's precedent is also analytically correct, recognizing the different purposes and effects of statutes of limitations and statutes of repose.

"Although there is substantial overlap between the policies of the two types of statute, each has a distinct purpose and each is targeted at a different actor." *CTS*, 131 S. Ct. at 2183. "Statutes of limitations require plaintiffs to pursue 'diligent prosecution of known claims.'" *Id.* (citation omitted). But "[s]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Id.* (citation omitted).

Hence, "a statute of repose can prohibit a cause of action from coming into existence," and "may preclude an alleged tortfeasor's liability before a plaintiff is entitled to sue, before an actionable harm ever occurs." *Id.* at 2187. "Statutes of limitations limit the time in which a plaintiff may bring suit *after* the cause of action accrues, whereas statutes of repose potentially bar the plaintiff's suit *before* the cause of action arises." Hicks, *Constitutionality of Statutes of Repose*, 38 VAND. L. REV. at 629 (original emphasis).

As Missouri's Supreme Court observed earlier this year, "unlike statutes of limitations, statutes of repose 'by their nature reimpose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists.'" *Ambers-Phillip*, 459 S.W.3d at 907 (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30, at 168 (5th ed. 1984)). "A statute of repose eliminates the cause of action altogether after a certain period of time following a specified event .... [T]he cause of action is eliminated before

the plaintiffs' injury and thus before plaintiffs' cause of action accrues." *Id.* (citation & internal quotation indentation omitted).

That is why discovery rules and tolling, which may prevent running of limitations after a cause of action has otherwise accrued, have no bearing on statutes of repose. "Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to 'pursu[e] his rights diligently,' and when an 'extraordinary circumstance prevents him from bringing a timely action,' the restriction imposed by the statute of limitations does not further the statute's purpose." *CTS*, 131 S. Ct. at 2183 (citation omitted; alteration in original).

"Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* This is because "a statute of repose is a judgment that defendants should 'be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.'" *Id.* (citation omitted); *accord* 2 LAW OF TOXIC TORTS § 12:12 ("Unlike statutes of limitation, however, statutes of repose focus exclusively on the conduct of the defendant and bar claims raised more than a certain number of years from the date that conduct was engaged in, regardless of the reason that the claim was not prosecuted earlier. Issues such as discovery, manifestation, tolling, etc., simply do not arise under such repose statutes.")

This Court's jurisprudence fully comports with these baseline principles, inherent in the very nature of statutes of repose. As *McIntosh* accurately summarized, "the statute of repose does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action from ever arising. ... The injured party literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress." 729 N.E.2d at 978 (citations & internal quotation marks omitted; emphasis & ellipsis in original).

C. Statutes of Repose Serve Important Policy Objectives.

There is no question that "[s]tatutes of repose are highly controversial and have become a subject of much litigation and commentary." Hicks, *Constitutionality of Statutes of Repose*, 38 VAND. L. REV. at 628. "The debate most fundamental to the applicability of statutes of repose ... embodies 'the conflict that arises between the policy goals of statutes of repose and the policy goals of recovery.'" Ferrer, *Application of Statutes of Repose*, 33 B.C. ENVTL. AFF. L. REV. at 380 (citation omitted). The "goals of recovery" side was well articulated by Justice Dickson, joined by Justice Rucker, dissenting in *Ott* and *McIntosh*. *See* 758 N.E.2d at 1078-83; 729 N.E.2d at 985-94.

But important policy goals are also served by statutes of repose, the side of the debate adopted and endorsed unanimously in *Dague* and *Rendleman*, and reaffirmed as Indiana law by the *McIntosh* and *Ott* majorities.

Some of these parallel the goals of limitation statutes, reflecting the "substantial overlap between the policies of the two types of statute," *CTS*, 131 S. Ct. at 2183. Limitations statutes "'promote justice by preventing ... revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* (quoting *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). "Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons." *Id.*

"Unlike statutes of limitations," however, "statutes of repose create 'a substantive right in those protected to be free from liability after a legislatively-determined period of time,'" thereby "acting as an absolute bar to a cause of action." Ferrer, *Application of Statutes of Repose*, 33 B.C. ENVTL. AFF. L. REV. at 349. As shown, this is so "[d]espite the possibility that plaintiffs

may be left without recompense for injuries," *id.*, even "before a plaintiff is entitled to sue, before an actionable harm ever occurs," *CTS*, 131 S. Ct. at 2187. Thus, the legislative choice to adopt a statute of repose furthers independent policy goals.

This Court delineated some of these in *McIntosh*. The "determination by the General Assembly that an injury occurring ten years after the product has been in use is not a legally cognizable 'injury' ... was based on its apparent conclusion that after a decade of use, product failures are 'due to reasons not fairly laid at the manufacturer's door.'" 729 N.E.2d at 980 (quoting *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 278 (Ind. 1999)). Statutes of repose "serve the public policy concerns of reliability and availability of evidence after long periods of time" (as do limitations statutes); but they also protect "the ability of manufacturers to plan their affairs without the potential for unknown liability." *Id.* "The statute of repose is rationally related to meeting these legitimate legislative goals," including because it "provides certainty and finality with a bright line bar to liability ten years after a product's first use." *Id.*; *see also* Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1186 (1950) ("the certainty of the fixed time periods clearly serves the interests of everyone, for even plaintiffs benefit from a sure knowledge of the time after which a suit would be futile").

Commentators and other courts have agreed, citing these and other important policies served by statutes of repose. "On a broad level, statutes of repose have derived justification from considerations relating to the best economic interests of the public as a whole, and represent 'substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.'" Ferrer, *Application of Statutes of Repose*, 33 B.C. ENVTL. AFF. L. REV. at 354 (citation omitted). Thus, "legislatures have recognized a public interest in granting defendants

immunity after a certain period of time has elapsed so that they may conduct their activities with the 'reasonable expectation' that they will not be liable for 'ancient obligations.'" *Id.* at 354-55 (citation omitted); *see Amber-Phillips*, 459 S.W.3d at 913 ("10–year statute of repose reflects a reasonable balance struck by the legislature between the right of those injured by medical malpractice to discover their injuries and the concern that medical defendants should be free from worry about liability for past acts after a reasonable period of time").

Statutes of repose also "alleviate the insurance problem facing manufacturers, the medical profession, and the construction industry. Responsibility for older products, latent medical problems, and 'permanent' or durable improvements expose these groups to abnormally long periods of potential liability and unusually large numbers of potential plaintiffs." Hicks, *Constitutionality of Statutes of Repose*, 38 VAND. L. REV. at 632 (citations omitted). "More certain liability and stabilized insurance rates in turn facilitate efficient business planning and ultimately benefit businessmen, professionals, consumers, and the economy." *Id.* at 633.

Repose statutes likewise guard against the danger that "jurors will unjustly and improperly evaluate defendant liability by holding defendants to safety standards and expectations that are based upon current technology and practices rather than those which existed at the time the defendants' actions occurred." Ferrer, *Application of Statutes of Repose*, 33 B.C. ENVTL. AFF. L. REV. at 355.

Indeed, such statutes "are particularly important in asbestos litigation," which "has been termed 'the mother of all mass torts.'" *Id.* at 364 (citations omitted). "Practices that may have previously been considered safe in an industry may later be found to carry grave environmental consequences." *Id.* at 366. Juror attitudes "may reflect safety and environmental considerations that were once thought unnecessary or even unforeseeable." *Id.* at 367. Business "may not be

able to trust that taking appropriate environmental safety measures by today's standards would adequately defend them against future liability," causing "'great difficulty in predicting and planning for future liabilities.'" *Id.* at 367.

There are differing views about such policy considerations, and about how the balance should be struck between these and countervailing policies involving the law's interest in compensating injury. Reasonable persons will disagree on whether a given statute of repose is appropriate and (if so) what the repose period should be. But the policy considerations furthered by respose statutes are important ones; and Indiana's Product Liability "statute of repose is rationally related to meeting [such] legitimate legislative goals." *McIntosh*, 729 N.E.2d at 980.

D. Statutes of Repose Policy Decisions Are Legislative Choices.

The balancing of interests and other policy choices involved in determining whether to adopt a given statute of repose are quintessentially legislative ones. The Legislature can also revoke or revise such choices if it later determines that different balance is appropriate.

The Court's statute of repose jurisprudence reflects its deep respect for separation of power and the prerogatives of the Legislative Branch. "An act of the General Assembly is clothed with a strong presumption of constitutionality. All reasonable doubts must be resolved in favor of constitutionality, and neither the parties nor this Court can merely question the wisdom or desirability of legislation." *Dague*, 275 Ind. 530, 418 N.E.2d at 213 (citations omitted). "Whatever the wisdom of [the Product Liability statute or repose], in our view it is a matter well within the legislature's ability to regulate." *McIntosh*, 729 N.E.2d at 980.

In upholding the construction statute of repose in *Beecher*, the Court of Appeals followed these principles. "[W]e must be ever mindful that we are not engaged in the fabrication or selection of the wisest, or most desirable of a number of possible courses in the common law."

447 N.E.2d at 627. "[I]t makes no difference whether we agree with the wisdom of the legislature's action." *Id.*

As with the Tort Claims Act immunity provisions unanimously upheld in *Rendleman*, that a repose statute "may result in [a plaintiff] bearing the full economic burden of his injuries … is a matter of policy for the legislature, not this Court, to address." 603 N.E.2d at 1337.

State legislatures have in fact acted to alter or adjust statute of repose policy choices. A very recent example involves the North Carolina statute at issue in *CTS*, which the Supreme Court held was not preempted by CERCLA because it was a statute of repose, not a statute of limitations. After that decision, North Carolina's legislature disagreed with the Supreme Court's view of the statute's impact, promptly adopting a new law stating that (1) "'it was the intent of the General Assembly to maximize under federal law the amount of time a claimant had to bring a claim predicated on exposure to a contaminant regulated by federal or State law;" (2) the Supreme Court decision was "'inconsistent with the General Assembly's intentions and the General Assembly's understanding of federal law;'" and (3) "'it never intended the statute of repose … to apply to claims for latent disease caused or contributed to by groundwater contamination, or to claims for any latent harm caused or contributed to by groundwater contamination.'" *Bryant v. United States,* 768 F.3d 1378, 1384 (11th Cir. 2014) (quoting law).

The Indiana General Assembly is likewise free to adopt new legislation if it changes its views on the legislative policy choices embodied in the Product Liability Act's statute of repose, or dislikes the impact of the statute on plaintiffs claiming latent injury, whether from exposure to asbestos or some other cause. It has not done so, though it has been over three decades since the Court upheld the Product Liability repose statute, and a dozen years since it reaffirmed and applied the repose statute, in conjunction with pertinent statutory provisions involving asbestos

litigation, to bar claims of latent injury from asbestos exposure. Indeed, legislation was introduced in the most recent legislative session proposing a number of changes affecting asbestos litigation, but leaving untouched the statutory provisions at issue in *Ott*. *See* H.B. 1400, 119th Gen. Assemb., 1st Sess. (2015).[2]

CONCLUSION

Unless and until the General Assembly makes different legislative policy choices, the Product Liability statute of repose remains Indiana law. The Court should reaffirm its consistent, long-established precedent upholding the validity of that statute, including in its application to plaintiffs claiming latent harm from exposure to asbestos.

Respectfully submitted,

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[2] The bill is found at https://iga.in.gov/legislative/2015/bills/house/1400#document-3989a540.

CERTIFICATE OF SERVICE

Pursuant to Indiana Appellate Rule 24, I certify that on July 20, 2015 I caused copies of the foregoing Brief to be served upon the following by United States mail, first-class postage prepaid:

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