IN THE SUPREME COURT OF OHIO

DOUGLAS GROCH, *et al.*,	)	On Questions Certified by
	)	the United States District Court
Petitioners,	)	for the Northern District
	)	of Ohio, Western Division
v.	)	
	)	Case No. 2006-1914
GENERAL MOTORS CORPORATION, *et al.*,	)	
	)	U.S. District Court Case
Respondents.	)	No. 3:06 CV 1604

AMICI CURIAE BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN CHEMISTRY COUNCIL, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, NPES THE ASSOCIATION FOR SUPPLIERS OF PRINTING, PUBLISHING AND CONVERTING TECHNOLOGIES, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND ASSOCIATION OF EQUIPMENT MANUFACTURERS IN SUPPORT OF RESPONDENTS

Victor E. Schwartz (0009240)
(COUNSEL OF RECORD)
Mark A. Behrens
SHOOK, HARDY & BACON, L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005-2004
Tel: (202) 783-8400
Fax: (202) 783-4211
Counsel for Amici Curiae

Robert H. Eddy (0030739)
GALLAGHER SHARP
420 Madison Avenue, Suite 50
Toledo, OH 43604
Tel: (419) 241-4800
Fax: (419) 241-4866
Counsel for Respondents, Kard Corp. and Racino Federated, Inc.

Stephen Paul Carney (0063460)
Elise W. Porter (0055548)
OFFICE OF THE ATTORNEY GENERAL
30 East Broad Street, 17th Floor
Columbus, OH 43215
Tel: (614) 466-8980
Fax: (614) 466-5807
Counsel for Respondent, State of Ohio

Kimberly A. Conklin (0074726)
KERGER & ASSOCIATES
33 S. Michigan Street, Suite 100
Toledo, OH 43604
Tel: (419) 255-5990
Fax: (419) 255-5997
Counsel for Respondent, General Motors Corp.

Kevin T. Boissoneault (0040180)
Theodore A. Bowman (009159)
Russell Gerney (0080186)
Bonnie E. Harris (0072465)
GALLON, TAKACS, BOISSENEAULT & SCHAFFER CO. L.P.A.
3516 Granite Circle
Toledo, OH 43617
Tel: (419) 843-2007
Fax: (419) 843-6665
Counsel for Petitioner, Douglas Grouch

David C. Vogel (MO #45937)
Patrick Fanning (MO #47613)
LATHROP & GAGE L.C.
2345 Grand Boulevard, Suite 2800
Kansas City, MO 64108
Tel: (816) 292-2000
Fax: (816) 892-2001
Of Counsel for Respondent, General Motors Corp

(Of Counsel Listed on Next Page)

Of Counsel

Karen R. Harned
Elizabeth A Gaudio
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
(202) 682-1163

Ann W. Spragens
Robert J. Hurns
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Arthur E. Schwartz
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS
1420 King Street
Alexandria, VA 22314
(703) 684-2845

Mark J. Nuzzaco
NPES THE ASSOCIATION FOR SUPPLIERS OF PRINTING, PUBLISHING AND CONVERTING TECHNOLOGIES
1899 Preston White Drive
Reston, VA 20191
(703) 264-7235

George W. Keeley
KEELEY, KUENN & REID
150 North Wacker Drive, Suite 1100
Chicago, IL 60606
(312) 782-1829
Counsel for the Association of Equipment Manufacturers

TABLE OF CONTENTS

		Page
STATEMENT OF INTEREST		2
STATEMENT OF FACTS		5
INTRODUCTION AND SUMMARY OF THE ARGUMENT		6
ARGUMENT		7
I.	The Role of the Legislature in Setting Liability Law	7
	A. The "Reception Statutes"	7
	B. Ohio's Reception Statute and Constitution	8
II.	The Legislature and Courts Have Different Strengths	10
III.	This Court Should Respect the Role of the Legislature in the Development of Tort Law	12
	A. Most Legislative Tort Policy Decisions Have Been Upheld	12
	B. The Sound Policy Basis for Statutes of Repose	14
	C. The Mistake of *Lochner* Should Not Be Repeated	17
CONCLUSION		19
APPENDIX		
CERTIFICATE OF SERVICE		

TABLE OF AUTHORITIES

CASES **Page**

1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 29 P.3d 1249 (Wash. 2001) ..... Appendix

Adams v. Richardson, 714 P.2d 921 (Colo. App. 1986) ..... Appendix

Adcock v. Montgomery Elev. Co., 654 N.E.2d 631 (Ill. App.), *appeal denied*, 660 N.E.2d 1265 (Ill. 1995) ..... Appendix

AlliedSignal, Inc. v. Ott, 785 N.E.2d 1069 (Ind. 2003) ..... Appendix

Allstate Inc. Co. v. Furgerson, 766 P.2d 904 (Nev. 1988) ..... Appendix

Anderson v. M.W. Kellogg Co., 766 P.2d 637 (Colo. 1988) ..... Appendix

Arbino v. Johnson & Johnson, 110 Ohio St. 3d 1462, 852 N.E.2d 1212 (Table) (2006) 12

Arsenault v. Pa-tek Spring Co., Inc., 523 A.2d 1283 (Conn. 1987) ..... Appendix

Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544 (Tex. App. 2004) .... Appendix

Baugher v. Beaver Constr. Co., 791 So. 2d 932 (Ala. 2001) ..... Appendix

Beecher v. White, 447 N.E.2d 622 (Ind. App. 1983) ..... Appendix

Bellemare v. Gateway Builders, Inc., 420 N.W.2d 733 (N.D. 1988) ..... Appendix

Best v. Lakeland Reg'l Med. Center, 899 So. 2d 424 (Fla. App. 2005) ..... Appendix

Billman v. Crown-Trygg Corp., 563 N.E.2d 903 (Ill. App. 1990) ..... Appendix

Bissell v. Kommareddi, 509 N.W.542 (Mich. App. 1993), *appeal denied*, 521 N.W.2d 611 (Mich. 1994) ..... Appendix

Blackwood v. Rusk, 500 N.E.2d 69 (Ill. App. 1986) ..... Appendix

Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822 (Mo. 1992) ..... Appendix

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) 12

Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc., 507 N.W.2d 405 (Iowa 1993) ..... Appendix

Braden v. Bell, 473 S.E.2d 523 (Ga. App. 1996) ..... Appendix

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Brenneman v. R.M.I. Co., 70 Ohio St. 3d 460, 639 N.E.2d 425 (1994) 13-14

Burris v. Ikard, 798 S.W.2d 246 (Tenn. App. 1990) ..... Appendix

Calumet Country Club v. Roberts Envtl. Control Corp., 483 N.E.2d 613 (Ill. App. 1985) ..... Appendix

Carr v. Broward County, 541 So. 2d 92 (Fla. App. 1989) ..... Appendix

Cates v. Graham, 451 So. 2d 475 (Fla. 1984) ..... Appendix

Cheswold Vol. Fire Co. v. Lambertson Const. Co., 489 A.2d 413 (Del. 1983) ..... Appendix

Cleveland v. BDL *Enter., Inc.*, 663 N.W.2d 212 (S.D. 2003) ..... Appendix

Cliffs Forest Prods. Co. v. Al Disdero Lumber Co., 375 N.W.2d 397 (Mich. App. 1985), *appeal denied*, 384 N.W.2d 8 (Mich. 1986) .... Appendix

Coleman v. United Eng'rs & Constructors, Inc., 878 P.2d 996 (N.M. 1994) ..... Appendix

Colony Hill Condo. I Ass'n v. Colony Co., 320 S.E.2d 273 (N.C. App. 1984), *rev. denied*, 325 S.E.2d 485 (N.C. 1985) ..... Appendix

Columbia Gas of Pa., Inc. v. Carl E. Baker, Inc., 667 A.2d 404 (Pa. Super. 1995) ..... Appendix

Costello v. Unarco Indus., Inc., 473 N.E.2d 96 (Ill. App. 1984), *overruled on other grounds*, 490 N.E.2d 675 (Ill. 1986) ..... Appendix

Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194 (Utah 1999) ..... Appendix

Craven v. Lowndes County Hosp. Auth., 437 S.E.2d 308 (Ga. 1993) ..... Appendix

Crawford v. Chapman, 17 Ohio 449 (1848) 8

Crier v. Whitecloud, 496 So. 2d 305 (La. 1986) ..... Appendix

Cross v. Ainsworth Seed Co., 557 N.E.2d 906 (Ill. App. 1990) ..... Appendix

Cummings v. X-Ray Assocs. of N.M., P.C., 918 P.2d 1321 (N.M. 1996) ..... Appendix

Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981) ..... Appendix

Daily v. New Britain Mach. Co., 512 A.2d 893 (Conn. 1986) .....Appendix

Davis v. Mobilift Equip. Co., 320 S.E.2d 406 (N.C. App. 1984), *rev. denied*, 329 S.E.2d 385 (N.C. 1985).....Appendix

Dighton v. Federal Pac. Elec. Co., 506 N.E.2d 509 (Mass.), *cert. denied*, 484 U.S. 953 (1987).....Appendix

Drake v. Rogers, 13 Ohio St. 21 (1861) 8

Evans ex rel. Kutch v. State, 56 P.3d 1046 (Alaska 2002) .....Appendix

Fennell v. Nesbitt, 398 N.W.2d 481 (Mich. App. 1987).....Appendix

Flour Corp. v. Cook, 551 So. 2d 897 (Miss. 1989) .....Appendix

Freezer Storage, Inc. v. Armstrong Cork Co., 382 A.2d 715 (Pa. 1978) ....Appendix

Galayda v. Lake Hosp. Sys., Inc., 71 Ohio St. 3d 421, 644 N.E.2d 298 (Ohio 1994).....14

Gaines v. Preterm-Cleveland, Inc., 33 Ohio St. 3d 54, 514 N.E.2d 709 (1987) 14

Garrett v. Winfree, 463 S.E.2d 411 (N.C. App. 1995) .....Appendix

Gibson v. West Virginia Dept. of Highways, 406 S.E.2d 440 (W. Va. 1991) .....Appendix

Gillam v. Firestone Tire & Rubber Co., 489 N.W.2d 289 (Neb. 1992).....Appendix

Goetzman v. Domestic Dev., Inc., 2007 WL 446914 (Minn. App. Feb. 13, 2007) .....Appendix

Golden v. Johnson Mem. Hosp., Inc., 785 A.2d 234 (Conn. App). *cert. denied*, 789 A.2d 990 (Conn. 2001) .....Appendix

Gray v. Daimler Chrysler Corp., 821 N.E.2d 431 (Ind. App. 2005).....Appendix

Hardy v. VerMeulen, 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987), *cert. denied*, 484 U.S. 1066 (1988)..... *passim*

Harlfinger v. Martin, 754 N.E.2d 63 (Mass. 2001).....Appendix

Harmon v. Angus R. Jessup Assocs., Inc., 619 S.W.2d 522 (Tenn. 1981).....Appendix

Hess v. Snyder Hunt Corp., 392 S.E.2d 817 (Va. 1990).....Appendix

Hoffman v. Powell, 380 S.E.2d 821 (S.C. 1989) .....Appendix

Hoffner v. Johnson, 660 N.W.2d 909 (N.D. 2003) ..... Appendix

Holeton v. Crouse Cartage Co., 92 Ohio St. 3d 115, 748 N.E.2d 1111, *reconsid. denied*, 93 Ohio St.3d 1434, 755 N.E.2d 356 (Ohio 2001) 12

Johnson v. Catalytic, Inc., 1986 WL 2844 (Del. Super. Jan. 22, 1986) ..... Appendix

Jones v. Five Star Eng'g, Inc., 717 S.W.2d 882 (Tenn. 1986) ..... Appendix

Kanne v. Bulkley, 715 N.E.2d 784 (Ill. App.), *appeal denied*, 720 N.E.2d 1094 (Ill. 1999) ..... Appendix

Kerwhaker v. Cleveland, Columbus & Cincinnati R.R. Co., 3 Ohio St. 172 (1854) 9

King-Bradwell P'ship v. Johnson Controls, Inc., 865 S.W.2d 18 (Tenn. App. 1993) ..... Appendix

Kish v. A.W. Chesterton Co., 930 So. 2d 704 (Fla. App.), *rev. denied*, 944 So. 2d 345 (Fla. 2006) ..... Appendix

Kohn v. Darlington Cmty. Schools, EMC, 698 N.W.2d 794 (Wis. 2005) ..... Appendix

Krull v. Thermogas Co. of Northwood, Iowa, a Div. Of Mapco Gas Prods. Inc., 522 N.W.2d 607 (Iowa 1994) ..... Appendix

Lamb v. Wedgewood South Corp., 302 S.E.2d 868 (N.C. 1983) ..... Appendix

Leeper v. Hillier Group, Architects Planners, P.A., 543 A.2d 258 (R.I. 1988) ..... Appendix

Lessee of James P. Merritt v. Horne, 5 Ohio St. 307 (1855) 8

Lochner v. New York, 198 U.S. 45 (1905) 17-18

Love v. Whirlpool Corp., 449 S.E.2d 602 (Ga. 1994) ..... Appendix

Magee v. Blue Ridge Prof. Bldg. Co., Inc., 821 S.W.2d 839 (Mo. 1991) ..... Appendix

Mahoney v. Ronnie's Road Serv., 468 S.E.2d 279 (N.C. App.), *rev. denied*, 476 S.E.2d 118 (N.C. 1996) ..... Appendix

Matayka v. Melia, 456 N.E.2d 353 (Ill. App. 1983) ..... Appendix

Mayer v. Bristow, 91 Ohio St. 3d 3, 740 N.E.2d 656 (2000), *reconsid. denied*, 91 Ohio St. 3d 1433, 741 N.E.2d 896 (Ohio 2001) 10

McIntosh v. Melroe Co., 729 N.E.2d 972 (Ind. 2000) ..... 15, Appendix

Mega v. Holy Cross Hosp., 490 N.E.2d 665 (Ill. 1986) ..... Appendix

Mercado v. Baker, 792 P.2d 342 (Idaho 1990) ..... Appendix

Mominee v. Scherbarth, 28 Ohio St. 3d 270, 503 N.E.2d 717 (1986) 14, 17

Moore v. Jesco, Inc., 531 So. 2d 815 (Miss. 1988) ..... Appendix

Morin v. Coral Swimming Pool Supply Co., 867 P.2d 494 (Okla. App. 1993) ..... Appendix

Morris v. Savoy, 61 Ohio St. 3d 684, 576 N.E.2d 765 (Ohio 1991) 9

Nelms v. Georgian Manor Condo. Ass'n, Inc., 321 S.E.2d 330 (Ga. 1984) ..... Appendix

Northbrook Excess and Surplus Ins. C. v. J.G. Wilson Corp., 300 S.E.2d 507 (Ga. 1983) ..... Appendix

O'Brien v. Hazelet v. Erdal, 299 N.W.2d 336 (Mich. 1980) ..... 17, Appendix

Olsen v. J.A. Freeman Co., 791 P.2d 1285 (Idaho 1990) ..... Appendix

Partin v. St. Francis Hosp., 694 N.E.2d 574 (Ill. App.), *appeal denied*, 705 N.E.2d 440 (Ill. 1998) ..... Appendix

Pendzsu v. Beazer East, Inc., 557 N.W.2d 127 (Mich. App. 1996), *appeal denied*, 586 N.W.2d 918 (Mich. 1998) ..... Appendix

Phipps v. Irby Constr. Co., 636 So. 2d 353 (Miss. 1994) ..... Appendix

Pigg v. Barge, Waggoner, Sumner, 1988 WL 92523 (Tenn. App. Sept. 9, 1988) ..... Appendix

Pisut v. Sichelman, 455 So. 2d 620 (Fla. App. 1984) ..... Appendix

Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla.), *reh'g denied*, 482 So. 2d 1352 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986) ..... Appendix

Qualitex, Inc. v. Coventry Realty Corp., 557 A.2d 850 (R.I. 1989) ..... Appendix

Radke v. H.C. Davis Sons' Mfg. Co., Inc., 486 N.W.2d 204 (Neb. 1992) ..... Appendix

Reich v. Jesco, Inc., 526 So. 2d 550 (Miss. 1988) ..... Appendix

Riley v. Brown & Root, Inc., 836 P.2d 1298 (Okla. 1992) ..... Appendix

Sandoe v. Lefta Assocs., 558 A.3d 732 (D.C. 1989) ..... Appendix

Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988) ..... Appendix

Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind. App. 1983) ..... Appendix

Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc., 108 Ohio St. 3d 494, 844 N.E.2d 1160 (2006) 11

Sedar v. Knowlton Constr. Co., 49 Ohio St. 3d 193, 551 N.E.2d 938 (1990). *passim*

Shields v. Buchholz, 515 So. 2d 1379 (Fla. App. 1987), *rev. dismissed*, 523 So. 2d 578 (Fla. 1988) ..... Appendix

Sills v. Oakland Gen. Hosp., 559 N.W.2d 348 (Mich. App. 1996), *appeal denied*, 572 N.W.2d 661 (Mich. 1997) ..... Appendix

Skinner v. Hellmuth, Obata & Kassbaum, Inc., 500 N.E.2d 34 (Ill. 1986) ..... Appendix

Snavely v. Perpetual Fed. Sav. Bank, 412 S.E.2d 382 (S.C. 1991) ..... Appendix

Spilker v. City of Lincoln, 459 N.W.2d 546 (Neb. 1991) ..... Appendix

Square D Co. *v. C.J. Kern Contractors, Inc.*, 334 S.E.2d 63 (N.C. 1985) ..... Appendix

St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 782 P.2d 915 (Okla. 1989) ..... Appendix

State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N.E. 602 (1912) 10

Stein v. Katz, 567 A.2d 1183 (Conn. 1989) ..... Appendix

Strock v. Pressnell, 38 Ohio St. 3d 207, 527 N.E.2d 1235 (Ohio 1988) 9

Tetterton v. Long Mfg. Co., Inc., 332 S.E.2d 67 (N.C. 1985) ..... Appendix

Tomczak v. Bailey, 578 N.W.2d 166 (Wis. 1998) ..... Appendix

Tomlinson v. Celotex Corp., 770 P.2d 825 (Kan. 1989), *overruled on other grounds, Gilger v. Lee Const., Inc.*, 820 P.2d 390 (Kan. 1991) ..... Appendix

Trinity River Auth. v. URS Consultants, Inc.--Texas, 889 S.W.2d 259 (Tex. 1994) ..... Appendix

Trustees of the McIntire Poor School v. Zanesville Canal & Mfg. Co., 9 Ohio 203 (1839) 8

Turner v. Nama, 689 N.E.2d 303 (Ill. App. 1997), *appeal denied*, 698 N.E.2d 549 (Ill. 1998) ..... Appendix

United States v. Butler, 297 U.S. 1 (1936) 12

Valentine v. Thomas, 433 So. 2d 289 (La. App. 1983), *writ denied*, 440 So. 2d 728 (La. 1983) ..... Appendix

Walker v. Santos, 320 S.E.2d 407 (N.C. App. 1984) ..... Appendix

Walsh v. Gowing, 494 A.2d 543 (R.I. 1985) ..... Appendix

Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006) ..... Appendix

Whiting-Turner Contracting Co. v. Coupard, 499 A.2d 178 (Md. 1985) ... Appendix

Winnisquam Reg'l School Dist. v. Levine, 880 A.2d 369 (N.H. 2005) ..... Appendix

Wise v. Bechtel Corp., 766 P.2d 1317 (Nev. 1988) ..... Appendix

Worden v. Village Homes, 821 P.2d 1291 (Wyo. 1991) ..... Appendix

Wright v. Oberle-Jordre Co., Inc., 910 S.W.2d 241 (Ky. 1995) ..... Appendix

Wyatt v. A-Best Prods. Co., Inc., 924 S.W.2d 98 (Tenn. App. 1995) ..... Appendix

Zapata v. Burns, 542 A.2d 700 (Conn. 1988) ..... Appendix

Zaragosa v. Chemetron Inv., Inc., 122 S.W.3d 341 (Tex. App. 2003) ..... Appendix

CONSTITUTION AND STATUTES

Act of January 2, 1806, ch. 122 8

Northwest Territorial Government, § 5 (adopted July 13, 1787) 8

Ohio Const. art. II, § 1 (1912) 10

R.C. § 2305.10 ..... *passim*

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AMICI CURIAE BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN CHEMISTRY COUNCIL, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, NPES THE ASSOCIATION FOR SUPPLIERS OF PRINTING, PUBLISHING AND CONVERTING TECHNOLOGIES, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND ASSOCIATION OF EQUIPMENT MANUFACTURERS IN SUPPORT OF RESPONDENTS

The National Federation of Independent Business Legal Foundation, Chamber of Commerce of the United States of America, National Association of Manufacturers, American Tort Reform Association, Property Casualty Insurers Association of America, American Chemistry Council, National Society of Professional Engineers, NPES The Association for Suppliers of Printing, Publishing and Converting Technologies, National Association of Mutual Insurance Companies, and Association of Equipment Manufacturers — collectively "*amici*" — respectfully request that this Court declare Ohio's ten-year product liability statute of repose, R.C. § 2305.10, to be constitutional.[1] *Amici* support the Respondents in other issues relating to

[1] R.C. § 2305.131, a ten-year statute of repose for claims involving improvements to real property, is not directly at issue here, but would likely be affected by the Court's ruling.

this appeal, but the viability of the workers' compensation subrogation statutes, R.C. §§ 4123.93 and 4123.931, and the "single subject" challenge are not discussed herein.

STATEMENT OF INTEREST

As organizations that represent Ohio companies and their insurers, *amici* have a significant interest in ensuring that the civil litigation environment in Ohio is just and balanced. *Amici* believe there is a vital need to preserve the appropriate balance of power between the Ohio legislature and the Ohio courts in formulating tort law. This Court should respect efforts by the General Assembly to declare the public policy of the State and, where necessary, to enact civil justice reform legislation to meet the needs of Ohio's citizens.

The National Federation of Independent Business Legal Foundation (NFIB), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. NFIB members own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business 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 court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of more than 300 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, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The Property Casualty Insurers Association of America (PCI) is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. In light of its involvement in Ohio, the PCI is

particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The National Society of Professional Engineers (NSPE) is an individual membership organization with 53 state and territorial societies and over 500 chapters serving nearly 50,000 members in industry, private practice, education, construction and government. NSPE is the recognized voice and advocate of licensed Professional Engineers. Founded in 1934, NSPE strengthens the engineering profession by promoting engineering licensure and ethics, enhancing the engineer image, advocating and protecting PEs' legal rights at the national and state levels.

NPES The Association for Suppliers of Printing, Publishing and Converting Technologies (NPES) is a United States national trade association comprised of 460 member companies engaged in the manufacture and distribution of machinery, software and supplies used in all phases of the printing, publishing and converting industries that are found in every community throughout America. NPES is a strong advocate for an equitable and predictable civil justice system that fosters safety in the workplace.

Founded in 1895, National Association of Mutual Insurance Companies (NAMIC) is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent

of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

The Association of Equipment Manufacturers (AEM) is a nonprofit corporation. Its members include the major manufacturers of equipment used worldwide in the construction, mining, forestry, and utility industries. AEM members produce a wide variety of equipment, from large earthmovers and agricultural equipment to smaller hand-held, portable and walk-behind machinery designed to handle a wide variety of specialized tasks. Its members also produce components use by these equipment manufacturers, such as engines, transmissions, hydraulic equipment, and electronic controls; as well as provide services to these dynamic industries.

STATEMENT OF FACTS

Amici adopt the Respondents' Statement of Facts. In a nutshell, Petitioner allegedly sustained injuries to his arm and wrist at work while operating an approximately thirty-year old hydraulic drill press used to trim dye-cast metal parts. Petitioner filed an intentional tort action against his employer, General Motors Corp., and a product liability action against Kard Corporation and Racine Federated, Inc. Because Petitioner's product liability claim is time-barred under Ohio's ten-year statute of repose, Petitioner has challenged the constitutionality of the law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Increasingly, one of the most frequently raised questions in the public dialogue about civil justice reform is whether courts or legislatures should make tort law. Tort law affects people's lives every day. It can discourage misconduct and help remove truly defective products from the marketplace. On the other hand, unchecked and unbalanced liability can discourage innovation, limit the availability of affordable health care, slow economic growth, result in loss of jobs, and unduly raise costs for consumers. It is, thus, very appropriate to ask, who should decide tort law – courts or legislatures?

The vast majority of tort law has been, and should continue to be, decided by state courts. *See generally* Victor E. Schwartz *et al.*, *Prosser, Wade and Schwartz's Cases and Materials on Torts* (11th ed. 2005). But, state legislatures also have an important, overlapping role to play in the development of tort law. As a matter of history and sound public policy, neither branch of government should have a tort law "monopoly." *See* Hon. Richard H. Finan & April M. Williams, *Government Is a Three-Legged Stool*, 32 U. Tol. L. Rev. 517 (2001). If that were true — if only "one voice" could be heard to the exclusion of all others — the public would lose out in the long run. The balanced development of tort law would suffer, and so would the public's perception of the judiciary.

This brief will demonstrate that the prerogative of the General Assembly to decide broad public policy is deeply rooted in Ohio history and law. The brief will then discuss the balance of power between the General Assembly and the courts in developing Ohio law. The brief concludes that, as a matter of both legal history and sound public policy, this Court should declare R.C. § 2305.10 to be constitutional.

ARGUMENT

I. THE ROLE OF THE LEGISLATURE IN SETTING LIABILITY LAW

A. The "Reception Statutes"

A fundamental part of legal history has been largely overlooked in the debate about whether courts or legislatures should develop state tort law. State legislatures, not courts, were the first to create state tort law. When colonies and territories became states, one of the first acts of state legislatures was to "receive" the common and statutory law of England as of a certain date and have that provide a basis for state tort law. *See* Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. Miami L. Rev. 351, 363 (1983). These "reception statutes" *delegated* to state courts the authority to develop the common law in accordance with the public policy of the state. These laws were the basic vehicles through which legislative power was vested in state judiciaries. *See* Kent Greenwalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621, 649 (1987).

Early state legislatures delegated the task of developing tort law to state judiciaries because the legislatures did not have the time (or perhaps the inclination) to formulate an extensive "tort code." They faced more extensive and pressing tasks, such as formulating the basic needs for the "new society." Most "reception statutes" made clear, however, that the power delegated to the courts could be retrieved by the legislature at any time, and the legislature has done so in contract and property law, among other topics. Tort law, however, has generally remained part of the common law except in a few areas, such as those at issue here, where the law has been developed by the General Assembly.

B. Ohio's Reception Statute and Constitution

In Ohio, the legislature historically has had a preeminent role in developing public policy. The Northwest Ordinance, which created the Ohio territory, provided:

> *The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil*, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district *until the organization of the general assembly therein*, unless disapproved of by Congress; but *afterwards the legislature shall have authority to alter them as they shall think fit.*

Ordinance of 1787: Northwest Territorial Government, § 5 (adopted July 13, 1787 (emphasis added)). Shortly thereafter, the territorial legislature adopted a "reception statute" from Virginia which declared the common law of England to be the law within the territory *until repealed by the legislature.*[2] This legislation confirmed the legislature's authority to decide the law of the territory, and later the state.

After the English common law was "received," the General Assembly apparently saw little need to maintain the "reception statute," and it was repealed in 1806. *See* Act of January 2, 1806, ch. 122 (cited in *Drake v. Rogers*, 13 Ohio St. 21, 28 (1861)). By repealing the statute, however, the General Assembly was not abdicating its position as the chief policymaking branch of state government. Rather, the General Assembly was exercising its authority to *delegate* to the Ohio courts the task of developing the common law until such time that the General Assembly would choose to alter the common law by statute, as it has done in R.C. § 2305.10.

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[2] Citations to declaratory "reception" laws in the early period of the State are found in *Drake v. Rogers*, 13 Ohio St. 21, 28 (1861); *Lessee of James P. Merritt v. Horne*, 5 Ohio St. 307, 313 (1855); *Crawford v. Chapman*, 17 Ohio 449, 452 (1848); *Trustees of the McIntire Poor School v. Zanesville Canal & Mfg. Co.*, 9 Ohio 203, 255 (1839).

See Strock v. Pressnell, 38 Ohio St. 3d 207, 214, 527 N.E.2d 1235, 1241 (Ohio 1988) (declaring statute abolishing common law amatory actions to be constitutional and stating, "there is no property or vested right in any of the rules of the common law, as guides of conduct, and they may be added to or repealed by legislative authority."); *Morris v. Savoy*, 61 Ohio St. 3d 684, 698, 576 N.E.2d 765, 775 ((Ohio 1991) ("[T]he General Assembly may limit, modify, or abolish common law causes of action. . . . 'Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.'") (citations omitted) (Homes, J., concurring and dissenting in part).

Historically, this Court has respected the prerogative of the General Assembly to develop rules governing conduct, property, and other key policy issues for the state. *See* Michael L. Stokes, *Judicial Restraint and the Presumption of Constitutionality*, 35 U. Tol. L. Rev. 347 (2003). For example, in *Drake v. Rogers*, 13 Ohio St. 21, 29-30 (1861), the Court stated:

> *[W]herever the legislature has by statutory law assumed to establish either rules of property or conduct, it has always been the policy of the law in this state, or at least such is the generally received understanding, that the common law can neither add to nor take from the statutory rules so established.* The office of the common law in such cases, is only to minister aid, and facilitate the application of the statutory rule and remedy; not to supply any other or different one. *** *The same remark holds equally true in relation to the application of the common law in civil cases wherever the legislature has assumed to establish a statutory rule.* (Emphasis added.)

See also Kerwhaker v. Cleveland, Columbus & Cincinnati R.R. Co., 3 Ohio St. 172 (1854) ("[H]aving been adopted in the original States of the Union, and introduced into Ohio, at an early period, the common law has continued to be recognized as the rule of decision in our courts, in the absence of legislative enactments.").

In *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 397, 97 N.E. 602, 606 (1912), this Court recognized the General Assembly's power to modify Ohio tort law in the context of workers' compensation, holding that a "person has no property, no vested interest, in any rule of the common law." In reaching this conclusion, the Court emphasized the General Assembly's authority to develop public policy:

> It is suggested that this legislation marks a radical step in our governmental policy not contemplated by the Constitution, and which it is the duty of the court to condemn. But it creates no new right, or new remedy for wrong done. It is an effort to in some degree answer the requirements of conditions which have come in an age of invention and momentous change. *The courts of the country, while firmly resisting encroachment on the Constitutions in the past, have yet found in their ample limits sufficient to enable us to meet the emergencies and needs of our development, and we do not find that this statute goes beyond the bounds put upon the legislative will.*

85 Ohio St. at 405-406, 97 N.E. at 608 (emphasis added).[3]

The legislature's role in establishing public policy for the state is reinforced by Ohio Constitution art. II, § 1 (1912), which provides, "The Legislative power of the state shall be vested in a General Assembly. . . ." A decision by this Court to trump the legislature's overlapping authority to set liability policy would violate this basic principle.

II. THE LEGISLATURE AND COURTS HAVE DIFFERENT STRENGTHS

The Court's long-standing recognition of the separation of powers derives logical and factual support from the inherent strengths of the legislative process. This is particularly true with respect to tort law, because the impacts on Ohio's citizens go far beyond who should win a

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[3] *See also Mayer v. Bristow*, 91 Ohio St. 3d 3, 740 N.E.2d 656 (2000) (vexatious litigator statute did not violate open courts or separation of powers), *reconsid. denied*, 91 Ohio St. 3d 1433, 741 N.E.2d 896 (Ohio 2001).

particular case. The General Assembly can focus more broadly on how tort law impacts the availability and cost of goods and services. It has the unique ability to weigh and balance the many competing societal, economic, and policy considerations involved.

Legislatures are uniquely well equipped to reach fully informed decisions about the need for broad public policy changes in the law. Through the hearing process, the General Assembly is "the best body equipped" to hold a "full discussion of the competing principles and controversial issues," *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc.*, 108 Ohio St. 3d 494, 514, 844 N.E.2d 1160, 1178 (2006) (Lanzinger, J., dissenting), of tort liability, because it has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, an additional witness can be called to testify or a prior witness can be recalled. This process allows legislatures to engage in broad policy deliberations and to formulate policy carefully. As we have explained:

> The legislature has the ability to hear from everybody — plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. * * * [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 689 (2001).

A similar point was made by United States Supreme Court Justice Harlan Stone, who cautioned, "the only check upon [the Court's] exercise of power is [the Court's] own sense of self-restraint. For the removal of unwise laws from the statute books *appeal lies, not to the*

courts, but to the ballot and to the processes of democratic government." *United States v. Butler*, 297 U.S. 1, 79 (1936) (quoted in *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 136, 748 N.E.2d 1111, 1129 (Moyer, C.J., dissenting) (emphasis added), *reconsid. denied*, 93 Ohio St.3d 1434, 755 N.E.2d 356 (Ohio 2001)).

Furthermore, legislative development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As the United States Supreme Court noted in a landmark decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added).

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies." This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law may not provide prospective "fair notice" to everyone potentially affected.

III. THIS COURT SHOULD RESPECT THE ROLE OF THE LEGISLATURE IN THE DEVELOPMENT OF TORT LAW

A. Most Legislative Tort Policy Decisions Have Been Upheld

Petitioner's attack on R.C. § 2305.10 is not an isolated filing, but is part of a nationwide effort to have courts nullify legislatures' overlapping authority to develop state tort law. For instance, another case now before this Court, *Arbino v. Johnson & Johnson*, No. 2006-1212, will

address the constitutionality of several other "tort reform" provisions within Senate Bill 80, effective, April 7, 2005. *See Arbino v. Johnson & Johnson*, 110 Ohio St. 3d 1462, 852 N.E.2d 1212 (Table) (2006) (reviewing R.C. §§ 2315.18, 2315.20, 2315.21).

Most courts have rejected invitations to abrogate the function of the General Assembly and the electorate "under the guise of judicial interpretation." *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 55, 512 N.E.2d 626, 635 (1987) (Wright, J., concurring in judgment only and dissenting in part), *cert. denied*, 484 U.S. 1066 (1988); *see also* Victor E. Schwartz *et al.*, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000).

In fact, the "vast majority of cases have concluded that statutes of repose do not violate 'open court' provisions of state constitutions," *Hardy*, 32 Ohio St. 3d at 54-55, 512 N.E.2d at 634-35 (Wright, J., concurring in judgment only and dissenting in part), and "a substantial majority of states have found no due process violations in [such] statutes." *Sedar v. Knowlton Constr. Co.*, 49 Ohio St. 3d 193, 201, 551 N.E.2d 938, 945 (1990) (overruled in *Brenneman v. R.M.I. Co.*, 70 Ohio St. 3d 460, 639 N.E.2d 425 (1994); *see also* Appendix A (listing state court cases going back almost twenty-five years upholding statutes of repose).[4]

This Court should rejoin the legal mainstream and restore respect for the separation of powers principle and the doctrine of *stare decisis* that we submit was lost in the majority

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[4] *See generally* Jay M. Zitter, *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 (1995); Martha Ratnoff Fleisher, *Validity, as to Claim Alleging Design or Building Defects, of Statute Imposing Time Limitations Upon Action Against Architect, Engineer, or Builder for Injury or Death Arising out of Defective or Unsafe Condition of Improvement to Real Property*, 5 A.L.R. 6th 497 (2005).

opinions in *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 503 N.E.2d 717 (1986); *Hardy, supra*; *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 514 N.E.2d 709 (1987); and *Brenneman, supra. See Brenneman*, 70 Ohio St. 3d at 468, 639 N.E.2d at 431 (Moyer, C.J., concurring in part and dissenting in part) ("A mere four years ago this court affirmed the constitutionality of [a statute of repose for improvements to real property] in *Sedar v. Knowlton Constr. Co.* (citation omitted). However, once gain, the majority ignores the doctrine of *stare decisis* and the policy of consistency underlying it, to strike down a valid exercise of the General Assembly's power."); *Hardy*, 32 Ohio St. 3d at 54, 512 N.E.2d at 634 (Wright, J., concurring in judgment only and dissenting in part) ("The Ohio Supreme Court has long held that causes of action may be abolished.").[5] This Court should apply the reasoning in *Sedar, supra*, where it upheld a statute similar to the one at issue here.

B. The Sound Policy Basis for Statutes of Repose

Statutes of repose place an outer time limit on liability. They strike a balance between the interests of injured parties and the need for potential defendants to be protected from the heavy burdens that can arise from unlimited long-tail liability, including "faded memories, lost evidence, the disappearance of witnesses, and the increased likelihood of intervening negligence." *Sedar*, 49 Ohio St. 3d at 200, 551 N.E.2d at 945. "The statute of repose guards against this risk of stale litigation." *Brenneman*, 70 Ohio St. 3d at 469, 639 N.E.2d at 432 (Moyer, C.J., concurring in part and dissenting in part).

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5 *Cf. Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St. 3d 421, 436, 644 N.E.2d 298, 309 (Ohio 1994) (Moyer, C.J., dissenting) (describing health care liability reform law as "simply an economic regulation. . . entitled to wide deference."), *cert. denied*, 516 U.S. 810 (1995).

Furthermore, common sense experience indicates that if a product has performed as intended for over a decade and harm occurs, the most likely explanation is that the product wore out, was not properly maintained, or was misused. It would be highly unusual for the harm to be the result of a product defect after many years of reliable use. Not surprisingly, manufacturers often win cases involving old products. The cost of defending such claims, however, can be substantial, both in terms of money spent and "person power" lost while company employees respond to discovery, have their depositions taken, and are forced to sit through lengthy trials. The result is a great incentive for manufacturers to settle even the flimsiest cases, so long as the settlement is less than or approximately equal to defense costs.

The Indiana Supreme Court in *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000), summarized these issue well when it upheld Indiana's ten-year product liability statute of repose against various constitutional challenges. The court said:

> The statute of repose represents a determination by the General Assembly that an injury occurring ten years after the product has been in use is not a legally cognizable "injury" that is to be remedied by the courts. This decision 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." The statute also serves the public policy concerns of reliability and availability of evidence after long periods of time, and the ability of manufacturers to plan their affairs without the potential for unknown liability. The statute of repose is rationally related to meeting these legitimate legislative goals. It provides certainty and finality with a bright line bar to liability ten years after a product's first use. It is also rationally related to the General Assembly's reasonable determination that, in the vast majority of cases, failure of products over ten years old is due to wear and tear or other causes not the fault of the manufacturer, and the substantial interests already identified warrant establishing a bright line after which no claim is created.

Id. at 980 (citations omitted).

Our nation's principal international competitors — the European Community, Australia, and Japan — have adopted ten-year product liability statutes of repose.[6] These laws reinforce a significant competitive disadvantage that Ohio and other American manufacturers face in the global marketplace. Foreign manufacturers are not subject to liability claims based on old products in their home markets, where most of their sales occur, and many do not face claims in the United States involving very old products because many of them have not been in the American market that long. With a lower-cost home market as their base and fewer transaction costs here in the United States, foreign manufacturers have greater resources available to pursue new technology and are able to offer goods in the United States for less than their American competitors. Statutes of repose can help level the playing field between Ohio manufacturers and their foreign competitors.

An example of the usefulness and sound policy behind statutes of repose is found in the federal General Aviation Revitalization Act of 1994 (GARA), Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101), which set an eighteen-year limit on lawsuits against manufacturers of fixed-wing aircraft, engines, avionics, and components. "By the time GARA was enacted, the general aviation industry had experienced a ninety-five percent 95 percent decline in production and a loss of more than 100,000 jobs during the preceding decade. Since

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6 *See* Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability For Defective Products, 28 O.J. EUR. COMM. (No. L210) 29, art. 11 (July 25, 1985); Product Liability Law, Law No. 85 of 1994, art. 5(1) (Japan). Australia has adopted the EC Product Liability Directive. These reforms are discussed in Mark A. Behrens & Daniel Raddock, *Japan's New Product Liability Law: The Citadel Of Strict Liability Falls, But Access To Recovery Is Limited By Formidable Barriers*, 16 U. Pa. J. Int'l Bus. Law 669 (1996).

the passage of GARA, general aviation production lines have opened and expanded. More than 25,000 manufacturing jobs have been created. Thousands of additional jobs have been created in other segments of the general aviation industry and the industries that support it." Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. Air L. & Com. 1269, 1282 (2002). GARA has been repeatedly upheld against constitutional challenges. *See id.* at 1328-1340.

R.C. § 2305.10, like GARA, clearly serves "the permissible legislative objective of relieving defendants of the burden of defending claims brought after the time so established." *O'Brien v. Hazelet v. Erdal*, 299 N.W.2d 336, 340 (Mich. 1980) (upholding statute of repose for improvements to real property). It should be upheld by this Court.

C. The Mistake of *Lochner* Should Not Be Repeated

Courts that have nullified legislative policy decisions about tort law have done so under the false assumption that state courts have the preeminent right to make state tort law. These decisions are reminiscent of a highly discredited period in the United States Supreme Court's history that began around the turn of the century and ended in the mid-1930s. *See Mominee*, 28 Ohio St. 3d at 296, 503 N.E.2d at 737 (Wright, J., dissenting) . During this period, known as the "*Lochner* era" (after the unsound decision, *Lochner v. New York*, 198 U.S. 45 (1905)), the Court nullified Acts of Congress that it disagreed with as a matter of public policy, using the United States Constitution as a cloak to cover its highly personalized decisions. In *Lochner*, the Supreme Court invalidated a New York law that limited the number of hours bakers could work. Justice Holmes argued that, unless legislation violates a fundamental right, the Court should respect legislation that is rationally related to a legitimate goal:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because *I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.*

198 U.S. at 75 (Holmes, J., dissenting) (emphasis added).

Just as plaintiffs during the *Lochner* era implored the United States Supreme Court to use an expansive view of the United States Constitution to override the Congress and impose their own economic policy views upon the nation, Petitioner seeks to convince this Court to use an expansive view of the Ohio Constitution to sit "as a super legislative body usurping the very constitutional prerogatives of the General Assembly." *Hardy*, 32 Ohio St. 3d at 57, 512 N.E.2d at 636 (Holmes, J., concurring in judgment, but dissenting to the syllabus law and the opinion); *see also* Jonathan Tracy, Note, *Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward: The End Must Justify the Means*, 27 N. Ky. L. Rev. 883 (2000). This Court should reject Petitioner's invitation.[7]

Lochner-like decisions by state courts ignore both legal history and sound public policy. Such decisions also create unnecessary tension between the legislative and judicial branches, undermine public confidence in the courts, and may raise potential problems under the United States Constitution. *See* Comment, *State Tort Reform - Ohio Supreme Court Strikes Down State*

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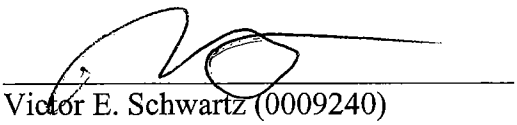
[7] *See* M. Margaret Branham Kimmel, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. Rich. L. Rev. 95, 118, 118 n.161 (1987) ("Whether these measures are advisable as a policy matter is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.").

General Assembly's Tort Reform Initiative, State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999), 113 Harv. L. Rev. 804, 809 (2000) (concluding that decision by Ohio Supreme Court to strike down prior tort reform law drove "a deeper wedge between the Ohio judiciary and its legislature" and "may have undermined the Ohio Supreme Court's valued position as a defender of the constitution."); Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907 (2001).[8]

CONCLUSION

For these reasons, this Court should declare R.C. § 2305.10 to be constitutional.

Respectfully submitted,



Victor E. Schwartz (0009240)
(COUNSEL OF RECORD)
Mark A. Behrens
SHOOK, HARDY & BACON, L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005-2004
Tel: (202) 783-8400
Fax: (202) 783-4211

Counsel for Amici Curiae

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[8] *See also* Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 Seton Hall L. Rev. 649, 664 (2001) ("If too many state courts insist on preserving an ahistorical, illegitimate law-making power to frustrate civil justice reform, perhaps it is not too far-fetched to imagine a federal court solution to the problem.").

Karen R. Harned
Elizabeth A Gaudio
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS LEGAL FOUNDATION
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
(202) 682-1163

Ann W. Spragens
Robert J. Hurns
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Arthur E. Schwartz
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS
1420 King Street
Alexandria, VA 22314
(703) 684-2845

Mark J. Nuzzaco
NPES THE ASSOCIATION FOR SUPPLIERS OF PRINTING, PUBLISHING AND CONVERTING TECHNOLOGIES
1899 Preston White Drive
Reston, VA 20191

George W. Keeley
KEELEY, KUENN & REID
150 North Wacker Drive, Suite 1100
Chicago, IL 60606
(312) 782-1829
Counsel for the Association of Equipment Manufacturers

Of Counsel

Dated: April 16, 2007

APPENDIX A
STATE COURT DECISIONS SINCE 1983 UPHOLDING STATUTES OF REPOSE

- *Baugher v. Beaver Constr. Co.*, 791 So. 2d 932 (Ala. 2001) (statute of repose for improvements to real property did not violate open courts provision of State Constitution).
- *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (tort reform statute including statute of repose for actions for personal injury, death, or property damage did not violate right to jury trial, equal protection, or due process provisions of State or Federal Constitutions, the separation of powers doctrine, or access to the courts or special legislation provisions of State Constitution).
- *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637 (Colo. 1988) (statute of repose for new manufacturing equipment did not violate equal protection provision of State Constitution).
- *Adams v. Richardson*, 714 P.2d 921 (Colo. App. 1986) (medical liability statute of repose did not violate equal protection guarantees of State Constitution insofar as it applied to persons alleging claims of negligent treatment).
- *Stein v. Katz*, 567 A.2d 1183 (Conn. 1989) (dental liability statute of repose did not violate right to remedy provision of State Constitution).
- *Golden v. Johnson Mem. Hosp., Inc.*, 785 A.2d 234 (Conn. App.) (medical liability statute of repose did not violate open courts or equal protection provisions of State Constitution). *cert. denied*, 789 A.2d 990 (Conn. 2001).
- *Zapata v. Burns*, 542 A.2d 700 (Conn. 1988) (statute of repose for improvements to real property did not violate right to redress under State Constitution or equal protection provisions of State or Federal Constitutions).
- *Arsenault v. Pa-tek Spring Co., Inc.*, 523 A.2d 1283 (Conn. 1987) (product liability statute of repose did not violate equal protection provisions of State or Federal Constitutions or right to redress provision of State Constitution); *Daily v. New Britain Mach. Co.*, 512 A.2d 893 (Conn. 1986) (same).
- *Johnson v. Catalytic, Inc.*, 1986 WL 2844 (Del. Super. Jan. 22, 1986) (unpublished) (statute of repose for improvements to real property did not violate due process under State or Federal Constitutions); *Cheswold Vol. Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413 (Del. 1983) (statute did not violate due process under State Constitution).
- *Sandoe v. Lefta Assocs.*, 558 A.3d 732 (D.C. 1989) (statute of repose for improvements to real property did not violate due process or equal protection provisions of Federal Constitution).
- *Kish v. A.W. Chesterton Co.*, 930 So. 2d 704 (Fla. App.) (statute of repose for fraud claims did not violate access to courts provision of State Constitution), *rev. denied*, 944 So. 2d 345 (Fla. 2006).
- *Best v. Lakeland Reg'l Med. Center*, 899 So. 2d 424 (Fla. App. 2005) (medical liability statue of repose did not violate access to courts provision of State Constitution); *Carr v. Broward County*, 541 So. 2d 92 (Fla. App. 1989) (same); *Shields v. Buchholz*, 515 So. 2d 1379 (Fla.

App. 1987) (same), *rev. dismissed*, 523 So. 2d 578 (Fla. 1988) (same); *Cates v. Graham*, 451 So. 2d 475 (Fla. 1984) (same); *Pisut v. Sichelman*, 455 So. 2d 620 (Fla. App. 1984) (same).

- *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla.) (former products liability statute of repose did not deny equal protection under State Constitution), *reh'g denied*, 482 So. 2d 1352 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

- *Braden v. Bell*, 473 S.E.2d 523 (Ga. App. 1996) (medical liability statute of repose did not violate equal protection provisions of State or Federal Constitutions); *Craven v. Lowndes County Hosp. Auth.*, 437 S.E.2d 308 (Ga. 1993) (statute did not violate equal protection provision of Federal Constitution).

- *Love v. Whirlpool Corp.*, 449 S.E.2d 602 (Ga. 1994) (products liability statute of repose did not violate equal protection or due process provisions of State or Federal Constitutions).

- *Nelms v. Georgian Manor Condo. Ass'n, Inc.*, 321 S.E.2d 330 (Ga. 1984) (statute of repose for improvements to real property did not violate access to courts provision of State Constitution); *Northbrook Excess and Surplus Ins. C. v. J.G. Wilson Corp.*, 300 S.E.2d 507 (Ga. 1983) (statute did not violate single subject rule under State Constitution or equal protection provisions of State or Federal Constitutions).

- *Mercado v. Baker*, 792 P.2d 342 (Idaho 1990) (statute of repose creating rebuttable presumption that product's useful safe life expired after 10 years from time of delivery did not violate open courts provision of State Constitution); *Olsen v. J.A. Freeman Co.*, 791 P.2d 1285 (Idaho 1990) (statute did not violate open courts provision of State Constitution or equal protection provisions of State or Federal Constitutions).

- *Adcock v. Montgomery Elev. Co.*, 654 N.E.2d 631 (Ill. App.) (statute of repose for improvements to real property did not violate open courts provision of State Constitution), *appeal denied*, 660 N.E.2d 1265 (Ill. 1995); *Billman v. Crown-Trygg Corp.*, 563 N.E.2d 903 (Ill. App. 1990) (statute held not to violate equal protection provision of State Constitution); *Cross v. Ainsworth Seed Co.*, 557 N.E.2d 906 (Ill. App. 1990) (statute held not to be unconstitutional special legislation and did not violate due process or equal protection provisions of State Constitution).

- *Billman v. Crown-Trygg Corp.*, 563 N.E.2d 903 (Ill. App. 1990) (statute of repose for improvements to real property did not violate equal protection provisions of State or Federal Constitutions); *Cross v. Ainsworth Seed Co.*, 557 N.E.2d 906 (Ill. App. 1990) (statute did not violate special legislation provision of State Constitution and did not violate due process or equal protection provisions of Federal Constitution); *Skinner v. Hellmuth, Obata & Kassbaum, Inc.*, 500 N.E.2d 34 (Ill. 1986) (statute did not violate special legislation provision of State Constitution); *Blackwood v. Rusk*, 500 N.E.2d 69 (Ill. App. 1986) (statute did not violate special legislation provision of State Constitution and did not violate equal protection provision of Federal Constitution); *Calumet Country Club v. Roberts Envtl. Control Corp.*, 483 N.E.2d 613 (Ill. App. 1985) (statute did not violate special legislation provision of State Constitution and did not violate equal protection provision of Federal Constitution); *Matayka v. Melia*, 456 N.E.2d 353 (Ill. App. 1983) (statute did not violate special legislation provision of State Constitution or due process provisions of State or Federal Constitutions).

- *Kanne v. Bulkley,* 715 N.E.2d 784 (Ill. App.) (medical liability statute of repose did not violate right to remedy provision of State Constitution and did not violate due process or equal protection provisions of State or Federal Constitutions), *appeal denied*, 720 N.E.2d 1094 (Ill. 1999); *Partin v. St. Francis Hosp.*, 694 N.E.2d 574 (Ill. App.) (statute did not violate special legislation or right to remedy provisions of State Constitution), *appeal denied*, 705 N.E.2d 440 (Ill. 1998); *Turner v. Nama*, 689 N.E.2d 303 (Ill. App. 1997) (statute did not violate right to remedy provision of State Constitution), *appeal denied*, 698 N.E.2d 549 (Ill. 1998); *Mega v. Holy Cross Hosp.*, 490 N.E.2d 665 (Ill. 1986) (statute did not violate right to remedy provision of State Constitution).

- *Costello v. Unarco Indus., Inc.*, 473 N.E.2d 96 (Ill. App. 1984) (former product liability statute of repose did not violate prohibition against special legislation or right to remedy provisions of State Constitution, or due process or equal protection provisions of State or Federal Constitutions), *overruled on other grounds*, 490 N.E.2d 675 (Ill. 1986).

- *AlliedSignal, Inc. v. Ott*, 785 N.E.2d 1069 (Ind. 2003) (product liability statute of repose did not violate remedy by due course of law provision of State Constitution and statute of repose for commercial asbestos-related claims did not violate privileges and immunities provision of State Constitution); *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000) (statute did not violate remedy by due course of law or privileges and immunities provisions of State Constitution); *Scalf v. Berkel, Inc.*, 448 N.E.2d 1201 (Ind. App. 1983) (statute did not violate due process or equal protection provisions of Federal Constitution); *see also Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981) (statute did not violate open courts provision of State Constitution).

- *Beecher v. White*, 447 N.E.2d 622 (Ind. App. 1983) (statute of repose for improvements to real property did not violate equal protection, privileges and immunities, special laws, or open courts provisions of State Constitution or due process provision of Federal Constitution).

- *Gray v. Daimler Chrysler Corp.*, 821 N.E.2d 431 (Ind. App. 2005) (statute of repose governing occupational diseases from coal and silica dust did not violate privileges and immunities provision of State Constitution).

- *Krull v. Thermogas Co. of Northwood, Iowa, a Div. Of Mapco Gas Prods. Inc.*, 522 N.W.2d 607 (Iowa 1994) (statute of repose for improvements to real property did not violate equal protection provisions of State or Federal Constitutions); *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405 (Iowa 1993) (statute did not violate due process provisions of State or Federal Constitutions).

- *Tomlinson v. Celotex Corp.*, 770 P.2d 825 (Kan. 1989) (former products liability statute of repose for latent diseases did not violate equal protection guarantees of State or Federal Constitutions, or right to remedy provision of State Constitution), *overruled on other grounds*, *Gilger v. Lee Const., Inc.*, 820 P.2d 390 (Kan. 1991).

- *Wright v. Oberle-Jordre Co., Inc.*, 910 S.W.2d 241 (Ky. 1995) (former statute of repose for asbestos claims did not violate right to remedy provision of State Constitution).

- *Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986) (limit on medical malpractice claims did not violate due process or access to courts provisions of State Constitution, or equal protection

provisions of State or Federal Constitutions); *Valentine v. Thomas*, 433 So. 2d 289 (La. App. 1983) (statute did not violate access to courts provision of State Constitution or equal protection or due process provisions of State or Federal Constitutions), *writ denied*, 440 So. 2d 728 (La. 1983).

- *Whiting-Turner Contracting Co. v. Coupard*, 499 A.2d 178 (Md. 1985) (statute of repose for improvements to real property did not violate equal protection under State Constitution, did not constitute prohibited special legislation, and did not violate State Constitutional article which prohibits laws from embracing more than one subject).

- *Dighton v. Federal Pac. Elec. Co.*, 506 N.E.2d 509 (Mass.) (statute of repose for improvements to real property did not violate right to remedy provision of State Constitution or due process or equal protection provisions of State or Federal Constitutions), *cert. denied*, 484 U.S. 953 (1987).

- *Harlfinger v. Martin*, 754 N.E.2d 63 (Mass. 2001) (medical liability statute of repose did not violate right to remedy provision of State Constitution or due process or equal protection provisions of State or Federal Constitutions).

- *Pendzsu v. Beazer East, Inc.*, 557 N.W.2d 127 (Mich. App. 1996) (statute of repose for improvements to real property did not violate due process provisions of State or Federal Constitutions), *appeal denied*, 586 N.W.2d 918 (Mich. 1998); *O'Brien v. Hazelet v. Erdal*, 299 N.W.2d 336 (Mich. 1980) (same); *Fennell v. Nesbitt*, 398 N.W.2d 481 (Mich. App. 1987) (statute did not violate due process or equal protection provisions of State or Federal Constitutions); *Cliffs Forest Prods. Co. v. Al Disdero Lumber Co.*, 375 N.W.2d 397 (Mich. App. 1985) (same), *appeal denied*, 384 N.W.2d 8 (Mich. 1986).

- *Sills v. Oakland Gen. Hosp.*, 559 N.W.2d 348 (Mich. App. 1996) (medical liability statute of repose did not violate due process or equal protections provisions of State or Federal Constitutions), *appeal denied*, 572 N.W.2d 661 (Mich. 1997); *Bissell v. Kommareddi*, 509 N.W.542 (Mich. App. 1993) (same), *appeal denied*, 521 N.W.2d 611 (Mich. 1994).

- *Goetzman v. Domestic Dev., Inc.*, 2007 WL 446914 (Minn. App. Feb. 13, 2007) (statute of repose for improvements to real property did not violate due process provision of Federal Constitution); *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006) (statute did not violate due process or remedies clauses of State Constitution or due process under the Federal Constitution); *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988) (statute did not violate due process or right to remedy provisions of State Constitution).

- *Phipps v. Irby Constr. Co.*, 636 So. 2d 353 (Miss. 1994) (statute of repose for improvements to real property did not violate equal protection provisions of State or Federal Constitutions); *Flour Corp. v. Cook*, 551 So. 2d 897 (Miss. 1989) (same); *Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss. 1988) (same); *Moore v. Jesco, Inc.*, 531 So. 2d 815 (Miss. 1988) (same).

- *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. 1992) (statute of repose for improvements to real property did not violate equal protection or due process provisions of State or Federal Constitutions, did not constitute prohibited special legislation, and did not violate open courts provision of State Constitution); *Magee v. Blue Ridge Prof. Bldg. Co., Inc.*, 821 S.W.2d 839 (Mo. 1991) (same).

- *Radke v. H.C. Davis Sons' Mfg. Co., Inc.*, 486 N.W.2d 204 (Neb. 1992) (product liability statute of repose did not violate due process or equal protection provisions of the State or Federal Constitutions, or open courts provision of State Constitution); *Gillam v. Firestone Tire & Rubber Co.*, 489 N.W.2d 289 (Neb. 1992) (same); *Spilker v. City of Lincoln*, 459 N.W.2d 546 (Neb. 1991) (same).

- *Wise v. Bechtel Corp.*, 766 P.2d 1317 (Nev. 1988) (statute of repose for improvements to real property did not violate single subject provision of State Constitution); *Allstate Inc. Co. v. Furgerson*, 766 P.2d 904 (Nev. 1988) (statute did not violate equal protection provisions of State or Federal Constitutions).

- *Winnisquam Reg'l School Dist. v. Levine*, 880 A.2d 369 (N.H. 2005) (statute of repose for improvements to real property did not violate equal protection provision of State Constitution).

- *Coleman v. United Eng'rs & Constructors, Inc.*, 878 P.2d 996 (N.M. 1994) (statute of repose for improvements to real property did not violate equal protection or due process provisions of State Constitution).

- *Cummings v. X-Ray Assocs. of N.M., P.C.*, 918 P.2d 1321 (N.M. 1996) (medical liability actions statute of repose did not violate equal protection or access to courts provisions of State Constitution).

- *Mahoney v. Ronnie's Road Serv.*, 468 S.E.2d 279 (N.C. App.) (product liability statute of repose did not violate equal protection provisions of State or Federal Constitution, or provisions of State Constitution relating to open courts or prohibition against special legislation, and was not unconstitutionally vague), *rev. denied*, 476 S.E.2d 118 (N.C. 1996); *Tetterton v. Long Mfg. Co., Inc.*, 332 S.E.2d 67 (N.C. 1985) (same); *Davis v. Mobilift Equip. Co.*, 320 S.E.2d 406 (N.C. App. 1984), *rev. denied*, 329 S.E.2d 385 (N.C. 1985) (same).

- *Garrett v. Winfree*, 463 S.E.2d 411 (N.C. App. 1995) (statutes of limitations and repose for legal malpractice actions did not violate equal protection provisions of State or Federal Constitutions).

- *Walker v. Santos*, 320 S.E.2d 407 (N.C. App. 1984) (statute of repose as applied to health care liability actions did not violate open courts provision of State Constitution).

- *Square D Co. v. C.J. Kern Contractors, Inc.*, 334 S.E.2d 63 (N.C. 1985) (statute of repose for improvements to real property did not violate open courts provision of State Constitution and did not violate equal protection provisions of State or Federal Constitutions); *Colony Hill Condo. I Ass'n v. Colony Co.*, 320 S.E.2d 273 (N.C. App. 1984) (statute did not violate open courts provision of State Constitution, did not constitute prohibited special legislation, and did not violate equal protection provisions of State or Federal Constitutions), *rev. denied*, 325 S.E.2d 485 (N.C. 1985); *Lamb v. Wedgewood South Corp.*, 302 S.E.2d 868 (N.C. 1983) (same).

- *Bellemare v. Gateway Builders, Inc.*, 420 N.W.2d 733 (N.D. 1988) (statute of repose for improvements to real property did not violate equal protection provision or prohibition against special legislation in State Constitution).

- *Hoffner v. Johnson*, 660 N.W.2d 909 (N.D. 2003) (medical liability statute of repose did not violate equal protection provision in State Constitution).

- *Morin v. Coral Swimming Pool Supply Co.*, 867 P.2d 494 (Okla. App. 1993) (statute of repose for improvements to real property did not violate due process or equal protection provisions of State or Federal Constitutions or State Constitution's anti-abrogation prohibition); *Riley v. Brown & Root, Inc.*, 836 P.2d 1298 (Okla. 1992) (same); *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915 (Okla. 1989) (statute did not constitute prohibited special legislation, did not violate open courts provision of State Constitution, and did not violate State Constitution's prohibition against exclusive grant of privileges and immunities).

- *Columbia Gas of Pa., Inc. v. Carl E. Baker, Inc.*, 667 A.2d 404 (Pa. Super. 1995) (statute of repose for improvements to real property did not constitute prohibited special legislation and did not violate open courts provision of State Constitution) (citing *Freezer Storage, Inc. v. Armstrong Cork Co.*, 382 A.2d 715 (Pa. 1978)).

- *Qualitex, Inc. v. Coventry Realty Corp.*, 557 A.2d 850 (R.I. 1989) (statute of repose for improvements to real property did not violate right to remedy provision of State Constitution); *Leeper v. Hillier Group, Architects Planners, P.A.*, 543 A.2d 258 (R.I. 1988) (same); *Walsh v. Gowing*, 494 A.2d 543 (R.I. 1985) (same).

- *Hoffman v. Powell*, 380 S.E.2d 821 (S.C. 1989) (medical liability statute of repose did not violate equal protection or due process provisions of State or Federal Constitutions).

- *Snavely v. Perpetual Fed. Sav. Bank*, 412 S.E.2d 382 (S.C. 1991) (statute of repose for improvements to real property did not violate equal protection or due process provisions of State or Federal Constitutions).

- *Cleveland v. BDL Enter., Inc.*, 663 N.W.2d 212 (S.D. 2003) (statute of repose for improvements to real property does not violate open courts provision of State Constitution).

- *Wyatt v. A-Best Prods. Co., Inc.*, 924 S.W.2d 98 (Tenn. App. 1995) (product liability statute of repose did not violate equal protection provisions of State or Federal Constitutions); *King-Bradwell P'ship v. Johnson Controls, Inc.*, 865 S.W.2d 18 (Tenn. App. 1993) (same); *Jones v. Five Star Eng'g, Inc.*, 717 S.W.2d 882 (Tenn. 1986) (statute did not did not violate open courts provision of State Constitution or due process or equal protection provisions of State or Federal Constitutions).

- *Burris v. Ikard*, 798 S.W.2d 246 (Tenn. App. 1990) (medical liability statute of repose did not violate access to courts provision of State Constitution or equal protection provisions of State or Federal Constitutions).

- *Pigg v. Barge, Waggoner, Sumner*, 1988 WL 92523 (Tenn. App. Sept. 9, 1988) (citing *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522 (Tenn. 1981) (statute of repose for improvements to real property did not violate access to courts provision of State Constitution or equal protection provisions of State or Federal Constitutions).

- *Trinity River Auth. v. URS Consultants, Inc.--Texas*, 889 S.W.2d 259 (Tex. 1994) (statute of repose for improvements to real property did not violate open courts provision of State

Constitution, or due process or equal protection provisions of State or Federal Constitutions, and did not constitute prohibited special legislation).

- *Zaragosa v. Chemetron Inv., Inc.*, 122 S.W.3d 341 (Tex. App. 2003) (product liability statute of repose did not violate open courts provision of State Constitution, or equal protection provisions of State or Federal Constitutions, and did not constitute prohibited special legislation).
- *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544 (Tex. App. 2004) (Agricultural Code's statute of repose for nuisance actions did not violate takings provisions of State or Federal Constitutions).
- *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194 (Utah 1999) (statute of repose for improvements to real property did not violate open courts provision of State Constitution).
- *Hess v. Snyder Hunt Corp.*, 392 S.E.2d 817 (Va. 1990) (statute of repose for improvements to real property did not violate due process or equal protection provisions of State or Federal Constitutions).
- *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 29 P.3d 1249 (Wash. 2001) (statute of repose for improvements to real property did not violate access to courts provision of State Constitution or equal protection provision of Federal Constitution).
- *Gibson v. West Virginia Dept. of Highways*, 406 S.E.2d 440 (W. Va. 1991) (statute of repose for improvements to real property did not violate right to remedy provisions of State Constitution or due process or equal protection provisions of State or Federal Constitutions).
- *Tomczak v. Bailey*, 578 N.W.2d 166 (Wis. 1998) (statute of repose for actions involving engineers or land surveyors did not violate equal protection provisions of State or Federal Constitutions).
- *Kohn v. Darlington Cmty., EMC*, 698 N.W.2d 794 (Wis. 2005) (statute of repose for improvements to real property does not violate right to remedy provision of State Constitution or equal protection provisions of State and Federal Constitutions).
- *Bredthauer v. TSP*, 864 P.2d 442 (Wyo. 1993) (statute of repose for improvements to real property did not constitute prohibited special legislation and did not violate open courts provision of State Constitution); *Worden v. Village Homes*, 821 P.2d 1291 (Wyo. 1991) (same).

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing *Amici Curiae* Brief upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the U.S. Postal Service this 16th day of April, 2007, addressed as follows:

Stephen Paul Carney
Elise W. Porter
OFFICE OF THE ATTORNEY GENERAL
30 East Broad Street, 17th Floor
Columbus, OH 43215
Counsel for Respondent, State of Ohio

Kevin T. Boissoneault
Theodore A. Bowman
Russell Gerney
Bonnie E. Harris
GALLON, TAKACS, BOISSENEAULT & SCHAFFER CO. L.P.A.
3516 Granite Circle
Toledo, OH 43617
Counsel for Petitioner, Douglas Grouch

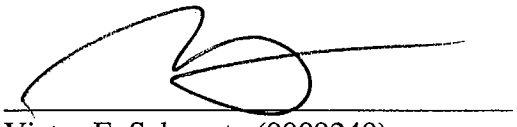
Stewart R. Jaffy
Marc J. Jaffy
STEWART, JAFFAY & ASSOCIATES CO., LPA
306 East Gay Street
Columbus, OH 43215
Counsel for Amicus Curiae, Ohio AFL-CIO

Paul W. Flowers
PAUL W. FLOWERS, CO., L.P.A.
50 Public Square, Suite 3500
Cleveland, OH 44113
Counsel for Amicus Curiae, Ohio Academy of Trial Lawyers

Robert H. Eddy
GALLAGHER SHARP
420 Madison Avenue, Suite 50
Toledo, OH 43604
Counsel for Respondents, Kard Corp. and Racino Federated, Inc.

Kimberly A. Conklin
KERGER & ASSOCIATES
33 S. Michigan Street, Suite 100
Toledo, OH 43604
Counsel for Respondent, General Motors Corp.

David C. Vogel
Patrick Fanning
LATHROP & GAGE L.C.
2345 Grand Boulevard, Suite 2800
Kansas City, MO 64108
Of Counsel for Respondent, General Motors Corp



Victor E. Schwartz (0009240)
SHOOK, HARDY & BACON, L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005-2004
Tel: (202) 783-8400
Fax: (202) 783-4211

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