**IN THE SUPREME COURT OF THE STATE OF OREGON**

THOMAS BROWN AND MARIA DEL CARMEN ESPINDOLA GOMEZ,
individually and as parents and natural guardians of M.B., a minor,
Plaintiffs-Appellants,
Respondents on Review,

v.

GLAXOSMITHKLINE, LLC,
Defendant,

and

PROVIDENCE HEALTH SYSTEM - OREGON
Defendant-Respondent,
Petitioner on Review.

Court of Appeals No. A169544

Supreme Court No. S070082

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# BRIEF ON THE MERITS OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE OREGON LIABILITY REFORM COALITION IN SUPPORT OF PETITIONER ON REVIEW

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On Review of a Decision of the Court of Appeals, Reversing the Judgment of the Multnomah County Circuit Court, by the Honorable Gregory F. Silver

Opinion filed December 14, 2022
Author: Judge Powers
Before: Presiding Judge Ortega, Judge Powers,
and Judge Shorr

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## INTERESTS OF *AMICI CURIAE*

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

The Chamber's membership includes a wide range of companies that depend on longstanding limits on the scope of the liabilities they face when conducting business with their customers. The Chamber has a strong interest in ensuring that the legal environment in which its members operate is consistent, predictable, and fair.

The Oregon Liability Reform Coalition ("ORLRC") was founded in 2006 to support public policy limiting adverse impacts on businesses, taxpayers, and communities. ORLRC represents a broad spectrum of

Oregon businesses that share an interest in limiting the expansion of tort liability and improving the fairness and certainty of the civil-justice system.

The Chamber and ORLRC are therefore well-suited to offer a perspective on the impact of the expansion of strict product liability to hospitals, pharmacies, and other healthcare providers who dispense medications as part of the life-saving services they provide. In addition, because the decision on appeal would affect all service providers—not just healthcare providers—*amici* are uniquely positioned to discuss the ramifications of imposing strict product liability on those businesses.

Hospitals, urgent care centers, medical clinics, and pharmacies are the foundation of Oregon's health care system. During the COVID-19 pandemic, these businesses bravely cared for the sick and saved innumerable lives. Yet these institutions cannot adequately service patients in need or comply with their legal obligations without dispensing medications, many of which unavoidably present a risk of adverse side effects. The imposition of strict product liability to healthcare providers who dispense these medications, as allowed by the Court of Appeals (Powers, J., joined by Ortega, J. and Shorr, J.), contradicts Oregon law, Oregon's public policy, and widely-accepted principles of tort liability. Allowing this ruling to stand

would establish Oregon as the only state to impose strict product liability on healthcare service providers who administer prescription medications, and would further exacerbate the state's shortage of hospitals and pharmacies. Such disruption threatens to cause grave adverse consequences for businesses and patients alike. Moreover, because the Court of Appeals' decision will affect all service providers who charge their customers for the cost of third-party products, the decision has the potential to have a substantial and unforeseen negative effect on businesses in every industry. The Chamber has previously filed amicus briefs in cases relating to product liability and healthcare access, and writes here with ORLRC on the merits to respectfully request that this Court reverse the Court of Appeals' decision.

## INTRODUCTION

The decision below threatens to impose new, unlimited tort liability on healthcare providers who dispense and administer medications, and all service providers that provide third-party products as part of their services. If the decision is allowed to stand, every pharmacist asked to fill a prescription will be risking a lawsuit with each medication they dispense. The wave of lawsuits that will inevitably result, and the resulting increase in insurance premiums for hospitals and pharmacies, will further increase

healthcare costs in this state and adversely impact health care access for all Oregonians. Because the decision is not limited to healthcare providers, it will impose substantial new tort liabilities on each service provider that includes incidental charges for the costs of materials. This will threaten the health of Oregon's businesses by subjecting them to burdensome tort liability beyond what the legislature intended.

The Court of Appeals ruled that, under ORS 30.920, anyone who transfers ownership of a product to another for consideration is a "seller" exposed to strict product liability, even if the sale of the product was incidental to a service being provided. The Court of Appeals thus allowed the plaintiffs in this case to pursue a strict product liability claim against a hospital that dispensed a single dose of a prescription medication as part of its treatment of a patient seeking emergency assistance.

The Court of Appeals' decision warrants reversal because it makes new law that departs from the language and purpose of both ORS 30.920 and the statute's cited comments to the Restatement (Second) of Torts § 402A; undermines Oregonians' constitutional right to affordable health care; contradicts Oregon case law and statutes; and contradicts the well-reasoned holdings of the majority of courts that have addressed similar issues.

Oregon businesses and citizens will face countless adverse consequences if the decision below is allowed to stand.

The Court of Appeals' decision, by greatly expanding the reach of strict product liability, has already opened the floodgates to sue hospitals, pharmacies, and pharmacists who offer healthcare services in Oregon. The decision is not limited to the healthcare industry, and will affect every business that includes the cost of third-party products in the services it provides, including myriad small businesses. Plumbers, electricians, general contractors, auto repair shops, and countless other businesses that provide professional services will be exposed to strict product liability even when product costs are incidental to the services they provide—even where these businesses are more properly characterized as buyers of these products rather than sellers. Far from yielding fair results that improve the quality of healthcare in Oregon, the Court of Appeals' decision will lead inexorably to higher insurance premiums for hospitals and to further financial strain on Oregon's beleaguered health care industry.

Absent reversal, the decision below will not only harm healthcare businesses and other service industries; it will harm the interests of the Oregon public by driving up the cost of healthcare, potentially reducing

access to life-saving medications, and by increasing the costs of innumerable services beyond healthcare. To avoid such consequences, *amici* respectfully request that this Court reverse the Court of Appeals' decision and hold that ORS 30.920 does not impose strict liability on hospitals and other service providers for alleged defects in products administered or provided in the course of service.

## ARGUMENT

### I. THE COURT OF APPEALS ERRED IN HOLDING THAT ORS 30.920 APPLIES TO HEALTHCARE SERVICE PROVIDERS

The Court of Appeals reached its erroneous decision through two fundamental errors of law. *First*, it disregarded language in ORS 30.920, relevant Oregon case law and statutes, and the relevant comments in the Restatement (Second) of Torts demonstrating that service providers—and particularly healthcare service providers—are not the types of "sellers" that the statute was intended to cover. *Second*, the Court of Appeals disregarded the vast majority of out-of-state decisions in which other courts determined that healthcare providers should not face strict product liability when dispensing medications as part of their healthcare services.

## A. The Court Of Appeals Improperly Expanded The Scope Of ORS 30.920

The Court of Appeals' foundational error was its holding that the ORS 30.920 establishes strict product liability for any person or business that receives compensation for an allegedly defective product, even where the person or business was primarily providing a service to which the sale was "incidental." *See Brown v. GlaxoSmithKline, LLC*, 323 Or App 214, 216 (2022). That erroneous holding is based on the Court of Appeals' misreading of ORS 30.920 and the Restatement (Second) of Torts section the statute expressly references.

ORS 30.920 states in relevant part:

> (1) One who sells or leases any product in a defective condition unreasonably dangerous to the user or consumer or to the property of the user or consumer is subject to liability for physical harm or damage to property caused by that condition, if: (a) The seller or lessor is engaged in the business of selling or leasing such a product; and (b) The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold or leased. . . .
>
> (3) It is the intent of the Legislative Assembly that the rule stated in subsections (1) and (2) of this section shall be construed in accordance with the Restatement (Second) of Torts sec. 402A, Comments a to m (1965).
>
> (4) Nothing in this section shall be construed to limit the rights and liabilities of sellers and lessors under principles of common law negligence or under ORS chapter 72.

ORS 30.920. Notably, the law incorporates comments (a) through (m) of Section 402A of the Restatement (Second) of Torts (1965), and states that it shall not be construed "to limit the rights and liabilities of sellers and lessors under principles of common law negligence or under ORS chapter 72 [codifying Article 2 of the Uniform Commercial Code]."

ORS 30.920 contains an explicit and specific scope limitation: it specifies that a seller must be "engaged in the business of selling" a product in order to be held liable. *See Docken v. Ciba-Geigy*, 86 Or App 277, 282 (1987) (claim under ORS 30.920 was properly dismissed because plaintiff failed to allege that defendants were in the business of selling the allegedly defective drug). At issue in this appeal is whether a healthcare service provider such as a hospital is a seller "engaged in the business of selling . . . such a product" where the hospital dispenses or administers a medication as an incidental part of its healthcare services. The Court of Appeals negated this limitation when it held that Petitioner's in-house pharmacy, which does not sell *any* medications to the general public, is "engaged in the business of selling" medications.

Comments to the Restatement (Second) of Torts section 402A confirm that, contrary to the Court of Appeals' reasoning, the meaning of

"seller" was not intended to capture all businesses that receive consideration in return for a product. Comment (f) states that the rule "applies to ***any manufacturer*** of such a product, to ***any wholesale or retail dealer or distributor***, and to the operator of a restaurant." Restatement (Second) of Torts § 402A (1965) (emphasis added); *see also* Comment 3 to ORS 72.3140 ("A person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply."). This limitation is designed to ensure that only manufacturers or merchants whose primary business involves the sale of the product in question are subject to strict product liability. Petitioner's in-house pharmacy, which does not sell to the public and dispenses medications only for administration at the hospital, is not a wholesale or retail dealer of pharmaceuticals.

Oregon courts interpreting ORS 30.920 have long recognized a dividing line between sellers "engaged in the business of selling" a product (who are subject to strict product liability) and service providers (who are not liable). "ORS 30.920 subjects sellers of a defective product, not service providers, to strict liability." *Watts v. Rubber Tree, Inc.*, 121 Or App 21, 24 (1993); *see also Brokenshire v. Rivas & Rivas, Ltd.*, 142 Or App 555, 561

(1996) ("Strict liability does not extend to service providers."); *Hoover v. Montgomery Ward & Co.*, 270 Or 498 (1974) (allegedly negligent mounting of non-defective tire could not subject the store to strict liability in tort). Here, the Court of Appeals does not dispute that hospitals and other healthcare providers are primarily in the business of providing healthcare services. Yet it erroneously disregarded this critical fact in holding that ORS 30.920 applies even where sales are "incidental" to the services provided.

The Court of Appeals' holding conflicts with prior Oregon cases limiting product liability where product sales are not the primary purpose of the transaction at issue. *See, e.g.*, *Coast Laundry, Inc. v. Lincoln City*, 9 Or App 521 (1972) (holding that municipal water company is not subject to implied warranty of merchantability under the Uniform Commercial Code ["UCC"]).

Cases interpreting the UCC are instructive, since both ORS 30.920(4) and Section 402A (comment f) reference UCC article 2. In *Coast Laundry*, the Court of Appeals held that a municipality supplying water was not subject to provisions of the UCC establishing implied warranties in sale of goods by a merchant in commercial transactions, despite its sales of water to municipal customers. 9 Or App 521. "A municipal corporation in

furnishing for compensation a supply of water to its inhabitants is not an insurer, or liable as guarantor of the quality of the water it furnishes to its customers, and cannot be held liable for injuries caused by impure water furnished by it unless it knew or ought to have known of the impurity; but it may be held liable for injuries resulting from its negligence in permitting its water supply to become contaminated or polluted, thereby causing illness or an epidemic." *Id*. at 529. This decision would be undermined if the Court of Appeals' decision on review is upheld, subjecting utility companies and other service providers to strict product liability.

The Court of Appeals' decision is also inconsistent with a large swathe of analogous cases involving application of the UCC to "mixed" or "hybrid" contracts involving both services and goods. In nearly every case, courts look to see whether services or the sale of goods were the "predominant" feature of the contract in order to determine whether the UCC applies. *See, e.g.*, *Mattoon v. City of Pittsfield*, 56 Mass. App. Ct. 124, 141–42 (2002) ("In contrast to the sale of goods, the rendition of services is not covered by art. 2 of the [UCC]. . . . Where a contract is for both sales and services as here, in order to determine whether art. 2 is applicable, the test is whether 'the predominant factor, thrust, or purpose of the contract is

... the rendition of service, with goods incidentally involved.'") (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)); *Hagman v. Swenson*, 47 N.Y.S.3d 324, 327 (2017) (same); *Vermillion State Bank v. Tennis Sanitation, LLC*, 969 N.W.2d 610, 620 (Minn. 2022) (same); *Heart of Texas Dodge, Inc. v. Star Coach, LLC*, 255 Ga. App. 801, 802 (2002) (same); *Tarrant Cnty. Hosp. Dist. v. GE Auto. Servs., Inc.*, 156 S.W.3d 885, 893 (Tex. App. 2005) (same). It would make little sense for Oregon courts to impose strict product liability under ORS 30.920 for circumstances, such as those here, where article 2 of the UCC would not apply. *See Coast Laundry*, 9 Or App at 529.

In light of the unambiguous statutory language demonstrating that ORS 30.920 is limited to wholesale and retail dealers of allegedly defective products, the Court of Appeals' decision imposing strict liability on healthcare service providers should be reversed. Oregonians have a constitutional right to affordable health care (Or. Const. art. I, § 47), and imposing undue tort liability on hospitals and pharmacies that provide life-saving healthcare services will undermine this right. In addition, the decision runs contrary to Oregon's public policy in favor of economic well-

being for Oregonians, *see Lilienthal v. Kaufman*, 239 Or 1, 10 (1964), since it will inevitably raise the cost of services in the state.

### B. The Overwhelming Majority Of Courts Have Held That Healthcare Providers Are Not Subject To Strict Product Liability

In a decision noting that there is "no definitive ruling from any Oregon appellate court as to the viability of a strict products liability claim against a hospital for an allegedly defective device implanted during the course of a procedure,", the U.S. District Court for the District of Oregon observed that "[t]he clear trend of other jurisdictions to ***disallow*** strict product liability claims against hospitals and medical practitioners." *Snyder v. Davol, Inc.*, No. CV 07-1081-ST, 2008 WL 113902, at *7 (D. Or. Jan. 7, 2008) (emphasis added) (explaining that, "although cases from a few jurisdictions allowed claims for strict products liability, those cases have either been overruled, turned on interpretation of a specific state medical malpractice statute supported by legislative history favoring such claims, or involved a defendant who was involved in the manufacturing process"); *see also* Linda A. Sharp, *Liability of Hospital or Medical Practitioner Under Doctrine of Strict Liability in Tort, or Breach of Warranty, for Harm Caused by Drug, Medical Instrument, or Similar Device Used in Treating Patient*,

65 ALR 5th 357 (originally published 1999) (cited in *Snyder*, 2008 WL 113902, at *7) (surveying cases and determining that "attempts to apply products liability principles to what would ordinarily be conventional malpractice actions against health–care providers have been unsuccessful").

Indeed, the vast majority of courts to consider claims of strict liability against healthcare providers for dispensing medications have rejected such claims. These courts have largely done so because doctors and pharmacists primarily provide professional healthcare services rather than sales. *See, e.g.*, *Carrozza v. CVS Pharmacy, Inc.*, 992 F.3d 44, 60–61 (1st Cir. 2021) (under Massachusetts law, a pharmacist's dispensation of prescribed medication is predominately the provision of services, and not the sale of goods); *Garza v. Endo Pharms*., 2012 WL 5267897, at *2 (C.D. Cal. Oct. 24, 2012) (under California law, strict liability for defective pharmaceutical products does not extend to the pharmacies that dispense drugs to patients); *Murphy v. E. R. Squibb & Sons, Inc.*, 40 Cal. 3d 672 (1985) (because a pharmacy primarily provides health services rather than sales, it could not be held strictly liable in tort for injuries caused by defective drug it dispensed); *Negrin v. Alza Corp*., 1999 WL 144507, at *5 (S.D.N.Y. Mar. 17, 1999) (under New York law, there is no basis to hold a retail pharmacy strictly

liable for injuries resulting from use of nicotine patch); *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 104 (1954) ("That the property or title to certain items of medical material may be transferred, so to speak, from the hospital to the patient during the course of medical treatment does not serve to make each such transaction a sale."); *Russo v. Kessler Inst. for Rehab., Inc.*, 2015 WL 2159068, at *5 (D.N.J. May 6, 2015) ("New Jersey does not generally apply strict liability to professionals providing medical care."); *Newmark v. Gimbel's Inc.*, 54 N.J. 585, 596–97 (1969) ("In our judgment, the nature of the services, the utility of and the need for [dentists and doctors], involving as they do, the health and even survival of many people, are so important to the general welfare as to outweigh in the policy scale any need for the imposition on dentists and doctors of the rules of strict liability in tort."); *Coyle by Coyle v. Richardson-Merrell, Inc.*, 526 Pa. 208, 217 (1991) ("[I]t would ill-serve the needs of the public to impose a duty on pharmacists under which, to avoid potential liability, they might refuse to fill prescriptions, notwithstanding decisions by licensed physicians that a particular drug was necessary and appropriate for their patients' medical treatment."); *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill. 2d 507 (1987) (holding that public policy dictates against the imposition of strict

liability in tort against hospital for injuries resulting from administering prescription drugs).

In its decision, the Court of Appeals largely disregards authorities from out of state, even though most of these other cases also interpret or reference Section 402A of the Restatement (Second) of Torts, the same section referenced in ORS 30.920. There is a broad nationwide consensus that healthcare providers, including hospitals, pharmacies, doctors, and pharmacists, are not engaged in "the business of selling" products. Instead, these professionals are engaged in the business of providing healthcare services to their patients. Oregon's statutes are in accord with this view. *See, e.g.*, ORS 442.015(15) (defining "medical" and "pharmacy" as two of the "health services" provided by hospitals). The Court of Appeals' disregard of these out-of-state authorities was error.

Extending strict product liability to service providers is also inconsistent with the policy rationale behind ORS 30.920 and Section 402A. "Generally, the imposition of strict liability hinges on the extent to which a party was 'responsible for placing products in the stream of commerce.'" *Hernandezcueva v. E.F. Brady Co.*, 243 Cal. App. 4th 249, 258 (2015) (quoting *Pierson v. Sharp Mem'l Hosp., Inc.*, 216 Cal. App. 3d 340 (1989)).

For this reason, "the doctrine of strict liability is ordinarily inapplicable to transactions 'whose primary objective is obtaining services,' and to transactions in which the 'service aspect predominates and any product sale is merely incidental to the provision of the service.'" *Id.*; *see also Stafford v. Int'l Harvester Co.*, 668 F.2d 142, 146 (2d Cir. 1981) (holding that both New York and Pennsylvania will not sustain a claim founded in strict liability if the transaction was predominantly a service contract with only an incidental transfer of goods). Service providers who pass along the incidental costs of third-party products are not in the same position as manufacturers, wholesale dealers, or retail dealers to avoid or assume liability for any alleged defects in those products.

This Court should reverse in order to establish, once and for all, that Oregon does not impose strict product liability on its hospitals and pharmacies when they dispense and administer prescription medications.

## II. REVERSAL WILL AVOID ADVERSE CONSEQUENCES TO OREGON HEALTHCARE PROVIDERS, PATIENTS, AND BUSINESSES

In addition to the above arguments for reversal based on settled precedent and statutory interpretation, the Chamber and ORLRC respectfully submit that reversal is warranted to avoid profound adverse consequences to

Oregon healthcare providers, patients, and businesses. Imposing strict product liability on healthcare providers who dispense or administer medications will raise healthcare costs for Oregonians and businesses, place a financial strain on Oregon hospitals and pharmacies, and potentially reduce healthcare access. The Court of Appeals' expansion of strict product liability will also exponentially increase litigation risks and costs for Oregon's service businesses, costs which will inevitably be passed to Oregon's consumers and negatively affect Oregon's economy.

### A. The Court of Appeals' Decision Will Place An Undue Financial Strain On Oregon Healthcare Providers And Other Service Providers

The Court of Appeals' expansion of strict product liability will unduly endanger many Oregon businesses. Oregon's hospitals and pharmacies are already under severe financial strain, with many having closed in the wake of the COVID-19 pandemic and others on the brink of insolvency. *See Hospitals Finish 2022 In The Red, No End In Sight For Losses,* OAHSS (April 4, 2023), available at https://www.oahhs.org/press-releases/hospitals-finish-2022-in-the-red-no-end-in-sight-for-losses/; Antonio Sierra, *Rural Oregon Pharmacies Fear Closure Without Further Health Care Industry Regulation*, Oregon Public Broadcasting (Feb. 3, 2023), *available at*

https://www.opb.org/article/2023/02/03/rural-pharmacy-oregon-bill-pbm/; Jamie Goldberg, *Closures, Staffing Shortages Make Pharmacies Less Accessible For Many Oregonians; Here's What The Data Says*, THE OREGONIAN (Jan. 24, 2022) *available at* https://www.oregonlive.com/data/2022/01/closures-staffing-shortages-make-pharmacies-less-accessible-for-many-oregonians-heres-what-the-data-says.html (noting that more than 40 pharmacies have closed in Oregon since 2017).

The Court of Appeals' unjustified expansion of the scope of healthcare providers' tort liability will increase this financial strain by changing the settled rules under which healthcare providers have long operated. The inevitable consequence is that Oregon hospitals, pharmacies, and patients will foot the bill. That is because new and unexpected claims for strict product liability will arise each time an individual brings a lawsuit based on adverse side effects from prescription medications. This will inevitably result in higher litigation and insurance costs for hospitals, pharmacies, pharmacists, and other healthcare providers in Oregon.

The outcome of this case is critical to the healthcare industry in Oregon, since the Court of Appeals' new and expanded theory of strict product liability will open the floodgates of litigation by enterprising

plaintiffs' lawyers. The Court of Appeals' decision, if allowed to stand, will lead the plaintiffs' bar to attempt to hold Oregon hospitals and pharmacies liable for millions or billions of dollars in damages claimed to result from allegedly defective medications, even where the manufacturer is immune from suit and where the prescriber and pharmacist had no reason to know that the medication potentially had a defect and no ability to prevent such a defect.

Moreover, litigation enabled by the Court of Appeals' decision will not be limited to claims against healthcare providers. The Court of Appeals' decision rests largely on its holding that ORS 30.920 applies whenever a product is transferred for compensation, even where the transfer is an incidental portion of a service contract. This holding potentially exposes every service provider in Oregon to strict product liability whenever it includes the cost of materials in its services. Plumbers, electricians, general contractors, auto repair shops, and countless other businesses large and small that provide services will be exposed to strict product liability even where product costs are incidental to the services they provide. Transactions that do not fall under the UCC's rules regarding a "sale of goods"—because the predominant purpose of the transaction is a provision of services—will

nonetheless subject the service provider to strict product liability as a "seller." This would open up *all* Oregon businesses, not just healthcare businesses, to massive, widespread, and uncertain liability. This dramatic expansion of tort liability is anathema to all businesses, and especially to healthcare companies whose entire business model involves the provision of medications that involve some risk of adverse side effects.

This tide of litigation will necessarily impose profound costs on Oregon service providers. To begin with, their insurers will need to price the risk of potentially ***unlimited*** product liability damage awards into their contracts, thus raising insurance premiums. Insurers set premiums based on their estimates of the likelihood and amount of future losses that may be covered by their policies when covered events occur. Calculating the appropriate premiums for insurance policies requires determining the nature, probability, and magnitude of any assumed risk. *See* 1 Steven Plitt et al., COUCH ON INSURANCE § 1:2 (3d rev. ed. 2010). To calculate premiums, an insurer thus relies on various factors, including the probability and amount of potential loss, policy limits, and the insurer's operational costs. *Id*. at §§ 1:2, 1:6. Expanding strict product liability, as the Court of Appeals did below, necessarily increases the risk involved in insuring hospitals,

pharmacies, and other service providers, and will necessarily increase their insurance premiums.

This tide of new tort litigation against service providers will also impose massive litigation costs and burdens on hospitals, pharmacies, and a host of other service-centered businesses. Depositions, document discovery, and trial in the Court of Appeals' newly-licensed strict product liability lawsuits would inevitably be far-ranging, fact-specific, time-consuming, and complex, involving discovery into whether the particular product at issue was "defective" or "unreasonably dangerous." ORS 30.920. And such incremental litigation costs will dramatically increase the pressure on Oregon hospitals, pharmacies, and other service providers to enter into extortionate settlements in cases where tort damages would otherwise not be warranted.

For all these practical reasons as well as the doctrinal reasons set forth above, this Court should reverse the Court of Appeals' decision, which, if left to stand, would gravely unsettle well-established product liability law in this State.

### B. The New Strict Product Liability Created By The Court Of Appeals Will Harm Oregon Patients and Consumers

Oregon healthcare providers and other businesses would not be the only ones to suffer from affirmance, for patients would ultimately bear the increased healthcare costs, and diminished options, resulting from litigation of the new strict product liability claims the Court of Appeals erroneously purported to authorize. Even beyond financial costs, the Court of Appeals' decision interferes with the professional judgment of prescribers and pharmacists, potentially leading these critical healthcare providers to reduce their liability by limiting the medications they prescribe or dispense, or by reducing their business activities in Oregon.

As the California Supreme Court observed over thirty years ago, "[i]f pharmacies were held strictly liable for the drugs they dispense, some of them, to avoid liability, might restrict availability by refusing to dispense drugs which pose even a potentially remote risk of harm, although such medications may be essential to the health or even the survival of patients. Furthermore, in order to assure that a pharmacy receives the maximum protection in the event of suit for defects in a drug, the pharmacist may select the more expensive product made by an established manufacturer when he has a choice of several brands of the same drug." *Murphy*, 40 Cal.

3d at 680–81 (holding that, because pharmacies are primarily service-oriented rather than sales-oriented, they cannot not be held strictly liable in tort for injuries caused by a defective drug); *see also* David B. Brushwood and Richard Abood, *Strict Liability in Tort: Appropriateness of the Theory for Retail Pharmacists*, 42 Food, Drug, Cosmetic L.J. 269 (1987) (reviewing the legal and policy reasons leading courts to decline to impose strict product liability on hospitals and pharmacies).

Any such chilling effects from the decision here would be profoundly harmful to the citizens of Oregon, for whom the availability of healthcare services is a life-and-death concern and a constitutional right. Rising costs for hospitals and pharmacies will inevitably increase insurance premiums for Oregonians, rendering insurance prohibitively expensive for low-income and middle-income families. It could even force some hospitals and pharmacies, among other service providers, out of the Oregon market altogether, reducing competition and access to affordable health care, harming Oregon's business climate, and further increasing healthcare costs for Oregon's businesses and patients. Even beyond healthcare, the decision will drive up the costs and diminish the availability of services in other businesses, since it potentially subjects all service providers to new, unexpected, and costly

litigation risks. These grave consequences for Oregon businesses and citizens underscore the importance of this Court's reversal of the Court of Appeals' decision.

**CONCLUSION**

This Court should reverse the Court of Appeals' decision and hold that healthcare providers are not subject to strict product liability under ORS 30.920 when they dispense or administer prescription medications.

Respectfully submitted,

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