IN THE SUPREME COURT OF OHIO

THE SHERWIN-WILLIAMS COMPANY,

Appellee,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, *et al.*,

Appellants.

CASE NO. 2023-0255

On Appeal from the Eighth District Court of Appeals

Eighth District Case No. CA-20-110187

MERIT BRIEF OF *AMICI CURIAE* THE OHIO MANUFACTURERS' ASSOCIATION, AVIENT CORPORATION, CLEVELAND-CLIFFS INC., EATON CORPORATION, GOJO INDUSTRIES, INC., THE GOODYEAR TIRE & RUBBER COMPANY, GREIF, INC., THE LINCOLN ELECTRIC COMPANY, MATERION CORPORATION, OWENS CORNING, STERIS CORPORATION, TIMKENSTEEL CORPORATION, and WORTHINGTON INDUSTRIES, INC.

David A. Schaefer (0014297)
Nicholas R. Oleski (0095808)
McCarthy, Lebit, Crystal & Liffman Co., LPA
1111 Superior Avenue East, Suite 2700
Cleveland, OH 44114
Phone: (216) 696-1422
Fax: (216) 696-1210
DAS@McCarthyLebit.com
NRO@McCarthyLebit.com

*Counsel for Appellants Certain Underwriters at Lloyd's London, et al.**

** Full list of attorneys for Appellants on Certificate of Service*

Matthew A. Chiricosta (0089044)
(Counsel of Record)
K. James Sullivan (0074211)
Robert F. Sohm (0097077)
Calfee, Halter & Griswold LLP
The Calfee Building
1405 E. 6th St.
Cleveland, OH 44114
Phone: (216) 622-8200
Fax: (216) 241-0816
MChiricosta@Calfee.com
KJSullivan@Calfee.com
RSohm@Calfee.com

Counsel for Amici Curiae

Richard M. Garner (0061734)
COLLINS ROCHE UTLEY & GARNER
655 Metro Place, Suite 200
Dublin, OH 43017
Phone: (614) 901-9600
Fax: (614) 901-2723
RGarner@CRUGLaw.com

Counsel for Amicus Curiae
The Ohio Insurance Institute

Patrick E. Winters (0085739)
PLUNKETT COONEY
716 Mt. Airyshire, Suite 150
Columbus, OH 43235
Phone: (248) 594-6321
PWinters@PlunkettCooney.com

Counsel for Amici Curiae American Property Casualty Insurance Association, Complex Insurance Claims Litigation Association, and National Association of Mutual Insurance Companies

The Ohio Manufacturers' Association, Avient Corporation, Cleveland-Cliffs Inc., Eaton Corporation, GOJO Industries, Inc., The Goodyear Tire & Rubber Company, Greif, Inc., The Lincoln Electric Company, Materion Corporation, Owens Corning, STERIS Corporation, TimkenSteel Corporation, and Worthington Industries, Inc.

Leon F. DeJulius, Jr. (PHV 27050-2023)
JONES DAY
250 Vesey Street
New York, New York 10281
Phone: (212) 326-3939
Fax: (212) 755-7306
LFDeJulius@JonesDay.com

Mark J. Andreini (0063815)
Amanda R. Parker (0086072)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Phone: (216) 586-3939
Fax: (216) 579-0212
MAndreini@JonesDay.com
AParker@JonesDay.com

Anderson T. Bailey (PHV 27048-2023)
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
Phone: (412) 391-3939
Fax: (412) 394-7959
ATBailey@JonesDay.com

Counsel for Appellee
The Sherwin-Williams Company

James R. Wooley (0033850)
HILLOW & SPELLACY
323 West Lakeside Avenue, Suite 200
Cleveland, OH 44113
Phone: (216) 344-9220
JWooley@MGHSLaw.com

Counsel for Appellee
The Sherwin-Williams Company

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus curiae The Ohio Manufacturers' Association (the "OMA") is a statewide association of approximately 1,300 manufacturing companies collectively employing more than 700,000 Ohioans. *Amici curiae* Avient Corporation, Cleveland-Cliffs Inc., Eaton Corporation, GOJO Industries, Inc., The Goodyear Tire & Rubber Company, Greif, Inc., The Lincoln Electric Company, Materion Corporation, Owens Corning, STERIS Corporation, TimkenSteel Corporation, and Worthington Industries, Inc. (collectively with OMA, "*Amici*") are Ohio-based businesses collectively employing thousands of Ohioans. *Amici* have a vital interest in ensuring that Ohio remains a desirable place to do business. The availability of insurance coverage in Ohio for hazards posed by a business's operations is one critical factor in ensuring that Ohio remains appealing to job-creating and revenue-producing manufacturers.

Amici urge affirmance of the decision of the Eighth District Court of Appeals, which properly applied this Court's insurance law precedents to hold that Sherwin-Williams is entitled to indemnification from the Appellant Insurers for its liability in the *Santa Clara* public nuisance case in California. Reversing the appellate court would thwart the longstanding expectations of business policyholders throughout Ohio about how their commercial general liability ("CGL") insurance functions; undermine Ohio's *stare decisis* doctrine; and cast doubt on the availability of insurance coverage in Ohio for high-stakes bodily injury and property damage litigation.

Amici seek to supplement the efforts of Sherwin-Williams' counsel by focusing on the broader implications of this case and why affirming the Eighth District's correctly reasoned decision is crucial to maintaining Ohio's viability as a commercially attractive state in which to do business.

INTRODUCTION

Liability insurance promises Ohio's businesses financial protection from the potentially ruinous impact of third-party claims for bodily injury and property damage. To protect themselves against these risks, Ohio businesses must be able to rely on the plain and ordinary meaning of the words in their insurance contracts, even if the ever-creative plaintiffs' bar brings bodily injury or property damage claims using novel theories of liability. Ohio businesses collectively pay millions of dollars in premiums to insurers for the protections spelled out in their policies.

The Insurers and their own *amici* ask this Court to vitiate these protections based not on the plain words of their policies, but on amorphous purported public policy concerns. But "rather than simply invoking the nebulous catch phrase of public policy," a court's "duty" is "to carefully review and apply the" policy language as written. *Stickovich v. Cleveland*, 143 Ohio App. 3d 13, 25, 757 N.E.2d 50 (8th Dist. 2001). Words matter—especially when it comes to determining the meaning of a contract, including insurance policies. Indeed, the first rule of contract interpretation is to give words their plain and ordinary meaning. And there is no better evidence of what parties to a contract mean than the words they choose to use or omit. Affirming the Eighth District's well-reasoned decision will ensure that in Ohio, like everywhere else in the U.S., businesses can rely on these basic contracting principles and count on the broad protection they seek when buying broad-form CGL insurance policies.

The Insurers issued Appellee Sherwin-Williams primary CGL and excess insurance policies for a 50-year period ("Policies"). Sherwin-Williams sought coverage under the Policies after it was sued in California state court on a public nuisance theory, eventually being ordered to pay to remediate certain homes built before 1951 containing lead exposures potentially injurious to children.

The Insurers now seek to evade their coverage duties under the language of their Policies, including by asking this Court to extend its recent decision in *Acuity v. Masters Pharmaceuticals, Inc.*, 169 Ohio St. 3d 387, 2022-Ohio-3092 to create a *per se* rule barring coverage for all public nuisance claims, with no regard for the actual insurance policy language or facts of a given case. But neither *Acuity* nor long-standing insurance law principles allow such an indiscriminate and unbounded outcome. As detailed below, *Acuity*'s central teaching is that the meaning of contracts turns on the words the parties use. Undeterred, the Insurers ask this Court to untether *Acuity* from its express textual moorings and link it instead to amorphous and fictitious public policy concerns. But reaffirming that words mean what they say—and that different words mean different things—matters for Ohio businesses. These businesses depend on courts to enforce the plain language of their insurance policies so they can account for the risks of liability they face. This Court should reject the Insurers' invitation to expand *Acuity* beyond its textual and factual foundations.

The Insurers alternatively ask this Court to upend decades of its own precedents by adopting an overbroad interpretation of the standard-form CGL policy exclusionary language relating to an "expected or intended injury." The gist of their argument is that an insured expects or intends an injury—and coverage is thus barred—whenever the insured actually ***knows of a hazard*** associated with a particular business activity. That is not the law. Nor can it be. For decades, this Court has held that torts based on actions "substantially certain to cause a particular result" ***are*** insurable. *Harasyn v. Normandy Metals, Inc.*, 49 Ohio St. 3d 173, 175, 551 N.E.2d 962 (1990); *Buckeye Union Ins. Co. v. New England Ins. Co.*, 87 Ohio St. 3d 280, 283, 720 N.E.2d 495 (1999). Only "'direct intent torts,'" where "the actor does something which brings about ***the exact result desired***," are uninsurable. *Harasyn* at 175 (emphasis added).

This Court should adhere to these precedents. Indeed, not only does the Insurers' position defy this Court's legal precedents, but it likewise defies common sense. Adopting the Insurers' rule would eviscerate CGL coverage in many (if not most) cases where a known hazard materializes. This makes no sense—none. The purpose of insurance—and especially broad coverage such as CGL coverage—is to transfer risks inherent to an insured's operations. The Insurers' rule would make it nigh-impossible for businesses to get coverage for many tort claims. If an insurer wants to exclude a specific known hazard, it can do exactly that, like the insurance industry has done via broad asbestos and pollution exclusions. But expected or intended injury exclusionary language is not meant to be a broad catchall to kill off all manner of known hazards. Rather, it is narrowly meant to exclude precisely what it says—losses that are either expected to occur or intended to occur. The Insurers' wide-ranging framework for this exclusionary language would imperil Ohio businesses and leave them exposed to potentially catastrophic exposure for risks they reasonably expected to be covered. The Insurers' proposed rule is as unworkable as it is ill-advised.

The Eighth District's decision should be affirmed.

STATEMENT OF THE CASE AND FACTS

Except as addressed in argument below, *Amici* generally incorporate by reference the Statement of the Case and Facts in Sherwin-Williams' Merit Brief.

ARGUMENT

I. ***Amici*'s Proposition of Law No. 1:** ***Acuity* does not preclude coverage because Sherwin-Williams' Policies do not contain the language present in the policies in *Acuity***

The Insurers' attempt to apply *Acuity* to bar coverage here is nothing short of jamming a square peg into a round hole. While both this case and *Acuity* involve disputes over whether CGL insuring agreements were triggered by underlying public nuisance claims, the (superficial) similarities end there. The facts and policy language here are markedly different from those in *Acuity* and require a different outcome. "Indeed, courts commonly consider the same legal issues over and over again but reach different outcomes because the cases involve different facts." *Reid v. Cleveland Police Dept.*, 151 Ohio. St. 3d 243, 2017-Ohio-7527, ¶ 10.

A. The policy language here materially differs from that in *Acuity*.

Acuity's core premise is that the specific words used in the policy matter. The Court explicitly said so and underscored that by conducting a granular analysis of three key aspects of the policies before it to conclude that ***those*** policies required particularized bodily injuries: (1) the repeated use of the phrase "***the*** bodily injury" in the coverage grant; (2) the policies' loss-in-progress provision; and (3) the policies' narrower definition of "bodily injury."

Amici focus here on the first of those three: the *Acuity* policies "repeated[ly] use[d] the phrase '***the*** bodily injury'" in the coverage grant, which in turn "suggest[ed]" the "need" for "a particular bodily injury" to trigger coverage. 2022-Ohio-3092 at ¶ 31 (emphasis in original).[1] The Court made clear that this more restrictive policy language was critical to its conclusion: "The repeated use of the phrase '***the*** bodily injury' suggests

[1] For brevity, *Amici* join Sherwin-Williams' arguments on the loss-in-progress and bodily injury definitions instead of repeating them here. *Amici* likewise join Sherwin-Williams' arguments on Proposition of Law No. 3 relating to "damages."

that the damages sought in the underlying suit need to be tied to a particular bodily injury" to "invoke coverage." *Id.* (emphasis in original).

In so holding, this Court gave substantive effect to the definite article "the" to modify the phrase "bodily injury" in the coverage grant. The "definite article 'the' particularizes the subject it precedes and is [a] word of limitation." *Black v. Ryan*, 11th Dist. Lake No. 2011-L-030, 2012-Ohio-866, ¶ 37; *Judy v. Ohio Bur. of Motor Vehicles*, 100 Ohio St. 3d 122, 2003-Ohio-5277, ¶ 22; *McWilliams v. S.E. Inc.*, 2009 WL 3625173, at *7 (N.D. Ohio Oct. 29, 2009). Thus, this Court read the specific policy language at issue as imposing the "particularizing" bodily injury requirement—which is what basic contract interpretation principles called for this Court to do. *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 2011-Ohio-2720, ¶ 54 ("In interpreting a contract, we are required, if possible, to give effect to every provision of the contract."). Notably, this Court underscored the significance of "the" as the critical limiting modifier by repeatedly emphasizing it in the *Acuity* analysis:

> The repeated use of the phrase "***the*** bodily injury" suggests that the damages sought in the underlying suit need to be tied to a particular bodily injury sustained by a person… to invoke coverage under the policies. If the phrase were interpreted as broadly as [the insured] argues it should be, it would be rather difficult to determine whether ***the*** bodily injury occurred during the policy period, was caused by

> an occurrence in the coverage territory, or had occurred in whole or in part prior to the policy period.

2022-Ohio-3092 at ¶ 31 (both emphases in original).

The Insurers' attempt to extend *Acuity* beyond its textual and factual limits misses the mark for a simple reason: the same limiting language is wholly absent here. Unlike the *Acuity* policies, the Policies here do not "repeated[ly] use… the phrase '***the*** bodily injury.'" *Id.* (emphasis in original). Rather, the coverage grants in the Policies generally require the Insurers to "pay on behalf of [Sherwin-Williams] all sums which [Sherwin-Williams] shall become legally obligated to pay as damages because of: bodily injury or property damage to which this insurance applies, caused by an occurrence." Joint Ex. 21 at 3. "The" is conspicuously absent.[2] Because the Policies lack this limiting modifier, *Acuity*'s "particular bodily injury" requirement does not apply. This makes sense, because in contract interpretation, every word matters. And this is no immaterial semantic trifle. As the *Acuity* opinion's emphasis of "the" in its analysis reflects, even one word as seemingly small as a definite or indefinite article can mean the difference between coverage and no coverage.

To be sure, other insurance coverage cases likewise have hinged on the presence or absence of one word or article. Take, for example, cases applying the standard-form

[2] The sole Policy where "the" modifies "bodily injury or property damage" is the 1995-1998 National Union policy. See Supp. at 4. But *Amici* do not understand that Policy to be at issue in this appeal, and so do not address it.

CGL policy employer's liability exclusion. This standard exclusion bars coverage for bodily injury to "an employee of ***the*** insured." When an employee of one entity is injured on the job and sues both the employing entity and one or more other parties who are also insureds under the same policy, courts decline to apply the exclusion to completely bar coverage, even if the employer is ***an*** insured. These courts recognize that the exclusion's use of "***the***" to modify "insured" limits the exclusion to claims made only against the insured employer, and does not bar coverage for other insureds who did not employ the claimant:

> "The" is an indefinite article that precedes the noun "insured" to refer to an insured whose employee suffers bodily injury "arising out and in the course of employment." The exception is thus limited to claims for bodily injury made by an employee against the insured who employs him. It does not apply to the same employee's claim against another insured by whom he is not employed.

Motorists Ins. Co. v. BFI Waste Mgmt., 133 Ohio App. 3d 368, 377, 728 N.E.2d 31 (2d Dist. 1999); *Mendoza v. Bishop*, 12th Dist. Butler No. CA2004–04–080, 2005-Ohio-238, ¶¶ 67-68 (same); *accord Mut. Benefit Ins. Co. v. Politsopoulos*, 115 A.3d 844, 852 fn. 5 (Pa. 2015) (adopting similar holding and collecting similar cases nationwide).

Declining to extend *Acuity* to the Policies' language comports not only with the general contract interpretation principle of giving effect to the words in (or not in) the contract, but also with the long-standing insurance law principle that when the policy's terms "clearly indicate the intention to provide coverage, its construction must be such as to effectuate rather than to defeat that intention." *Motorists Ins. Co.*, 133 Ohio App. 3d at 377; *Clark v. Scarpelli*, 91 Ohio St. 3d 271, 282, 744 N.E.2d 719 (2001) ("Where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured."); *Rankin v. U.S. Fid. & Guar. Co.*, 86 Ohio St. 267, 99 N.E. 314 (1912).

If the Insurers wanted to limit coverage in a manner similar to that seen in *Acuity*, they could have used the particularized "***the*** bodily injury" language in their policies. For the benefit of Ohio's insurance policyholders, and for the benefit of all other contracting parties in Ohio, this Court should reaffirm that words matter and that the language in their insurance policies and business contracts will be applied as written.

B. The facts here differ from those in *Acuity*.

Leaving aside the policy language distinctions, the Insurers' attempt to apply *Acuity* also fails on the facts. The Eighth District correctly held that the monies Sherwin-Williams paid into the abatement fund constituted damages "because of" or "on account of" "bodily injury" or "property damage," as defined by the Insurers' policies. *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 8th Dist. Cuyahoga No. 110187, 2022-Ohio-3031, ¶¶ 87-90.

While the Eighth District did not have the benefit of the *Acuity* opinion when it issued its initial decision, *Acuity* confirms the logic of the Eighth District's reasoning. In *Acuity*, this Court concluded that economic losses sought by the government entities in the national opioid MDL were not sufficiently tied to particular bodily injuries to trigger coverage. But this Court also carefully made clear that "[a] sufficient connection [to trigger coverage] will likely be found to exist" when, as here "the damages sought in the underlying suit are for losses asserted by * * * a person recovering on behalf of the injured person." 2022-Ohio-3092 at ¶ 36. Contrary to the Insurers' apparent wish, this Court did not create a *per se* rule that coverage is ***never*** available just because a governmental entity brought a public nuisance claim. Rather, if the requisite "sufficient connection" to bodily injury or property damage exists on the facts, then *Acuity* mandates a finding of coverage. *Id.*

And that "sufficient connection" exists here (and any case where a representative seeks recovery for bodily injury or property damage). As the Eighth District correctly held, the judgment against Sherwin-Williams satisfied this test because the California court ordered Sherwin-Williams to pay "into a specifically designated, dedicated, and restricted abatement fund" to "pay for remediation" of actual lead hazards in private properties "in accordance with the abatement plan." *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 132 (Cal. Ct. App. 2017); *People v. Atl. Richfield Co.*, 2014 WL 1385821, at *3-4 (Cal. Super. Ct. 2014). The abatement plan required a special master to identify specific properties to remediate, and the remediation was for or on behalf of each injured homeowner. Further reinforcing the "sufficient connection" to specific bodily injury or property damage, any funds not used for the sole purpose of remediating specific properties for injured homeowners had to "be returned to the paying defendants." *Atl.*

Richfield Co., 2014 WL 1385821, at *7. Unlike in *Acuity*, none of the money Sherwin-Williams was ordered to pay could be used to compensate the municipalities that sued for any alleged loss. Nor could any such monies be retained by the government if not used for the specific remediation activities identified in the plan.

The Insurers essentially ask this Court to hold that monies paid "into a specifically designated, dedicated, and restricted abatement fund" to "pay for remediation" of actual lead hazards in specific private properties are somehow ***not*** "sufficient[ly] connect[ed]" to bodily injury or property damage to trigger coverage under *Acuity*. But this abatement plan and others like it constitute "a person recovering on behalf of the injured person"—precisely a situation in which *Acuity* says coverage is triggered. 2022-Ohio-3092 at ¶ 36. The Insurers' logic ignores this reality.

At bottom, even under the *Acuity* framework, the requisite "sufficient connection" exists to trigger coverage in this and similar cases. To protect Ohio policyholders' expectations, this Court should make clear that if a policy's language implicates the *Acuity* framework, the requisite "sufficient connection" exists when a governmental entity (or other representative of an injured person) sues to establish a fund or plan that ultimately will be used to directly compensate the injured for bodily injury or property damage. That is precisely the type of legal liability for property damage or bodily injury that CGL policies are supposed to cover.

II. *Amici*'s Proposition of Law No. 2: **"Expected or intended injury" exclusionary language is triggered only if the actor intends to cause the harm.**

A. The Insurers' conception of expected or intended injury exclusionary language would gut CGL coverage for historically insurable hazards.

The Insurers' attempt to expand the reach of the standard-form CGL policy exclusionary language relating to an "expected or intended injury" would eviscerate coverage in virtually every conceivable case where a claim arises from a deliberate manufacturing or business activity that is known to pose some risk of harm to third parties.[3] Put differently, the Insurers' approach would sidestep and avoid the very risks CGL insurance companies routinely agree to take on in exchange for substantial premium payments.

Insurance was invented to transfer known risks. *See* Kenneth S. Abraham, *Insurance Law and Regulation* 3 (5th ed. 2010) (noting that insurance is a "risk transfer from

[3] The expected or intended injury exclusionary language is contained in the definitions section of some of the at-issue Policies and in the exclusions section of some of the others. In either case, exclusionary language in an insurance policy "will be interpreted as applying only to that which is ***clearly*** intended to be excluded." *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St. 3d 657, 665, 597 N.E.2d 1096 (1992) (emphasis in original). This interpretive rule applies whether the exclusionary language is set forth in an "express exclusion" in the policy or elsewhere in the policy. *Physicians Ins. Co. of Ohio v. Swanson*, 58 Ohio St. 3d 189, 191, 569 N.E.2d 906 (1991) (treating expected or intended injury exclusionary language in two policies "in like manner" even though one achieved the exclusion "by way of definition" and the other did so by "an exclusion"); *see also Astellas US Holding, Inc. v. Fed. Ins. Co.*, 66 F.4th 1055, 1061 (7th Cir. 2023) ("[T]hese [policy provisions] function as exclusions and should be construed as such even though they are not in the policy's list of exclusions.").

comparatively risk-averse to less risk-averse or risk-neutral parties"); *Koster v. Chowdhury*, 8th Dist. Cuyahoga No. 103489, 2016-Ohio-5704, ¶ 4 ("An insurance policy transfers risk entirely to the insurance company[.]"). Indeed, the origin story of insurance dates back to the 17th century, when shippers would visit the Lloyd's coffeehouse in London to purchase marine insurance on cargo and vessels from the earliest underwriters. Of course, both parties to those early insurance transactions understood the risk that cargo and vessels could be lost on the high seas, and mutually agreed to transfer that risk. *See generally* Jeremy A. Herschaft, *Not Your Average Coffeeshop: Lloyd's of London—A Twenty-First Century Primer on the History, Structure, and Future of the Backbone of Marine Insurance*, 29 Tul. Mar. L.J. 169 (2005). Today, in similar fashion, manufacturers—and businesses in all industries—prudently buy liability insurance to insure themselves against and transfer known risks, such as legal liabilities arising from their sale and manufacturing of products.

Obviously, if there were no risk, nobody would pay the substantial premiums to buy insurance. *See* 1 New Appleman on Insurance Law Library Ed. § 1.03 (2022) (noting that insureds who want to transfer a risk "will pay a premium to… the insurer to assume the risk and reimburse the individual for any loss suffered to the covered interest"). But it is precisely because foreseen risks exist that individuals and entities buy certain types of insurance. Indeed, many "commercial entities… could not engage in risky activities providing valuable products and services to consumers without" having "commercial general liability insurance." George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 Geo. Mason. L. Rev. 635, 637-38 (2017).

Contrary to what the Insurers ask of this Court, the very essence of liability insurance is to facilitate commercial entities—such as manufacturers—engaging in valuable, productive economic activities that pose known risks of liability by permitting them to insure against potential legal liabilities that may arise if those known risks materialize. In fact, "it is mishaps that are 'expected'—taken in its broadest sense—that are insured against." *City of Johnstown, N.Y. v. Bankers Std. Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989). When insureds buy insurance policies, they are, by definition, purchasing financial security against risks they know may flow from their business operations. 20-129 Appleman on Insurance Law & Practice Archive § 129.2 (2d ed. 2011) (noting that insurance aims to protect against risks "inherent in the business of the insured"). And by the same token, when they underwrite and sell insurance policies, insurers are agreeing to take on that risk with knowledge that it may materialize while their policies are in force.

The Insurers' expansive conception of expected or intended injury would effectively prevent insureds from having coverage for risks inherent in their business. If the only thing required to trigger expected or intended injury exclusionary language is that the insured knew it was engaged in activities or operations posing some potential risk of harm or hazard, there would seldom if ever be any CGL coverage when that potential risk materialized and caused bodily injury or property damage, rendering the vast majority of CGL insurance largely illusory.

Such a result does not square with the history and evolution of CGL policies as broad-form coverage against third-party bodily injury and property damage risks. By design, "CGL policies"—such as those the Insurers issued—"are broad, general policies meant to cover the insured for damages caused by covered injuries to third parties, including the general public, as a result of the insured's business operations." *Seger v. Yorkshire Ins. Co., Ltd.*, 503 S.W.3d 388, 402 (Tex. 2016). They aim "to protect the insured against losses to third parties arising out of the operation of the insured's business." *U.S. Liab. Ins. Co. v. Benchmark Constr. Servs., Inc.*, 797 F.3d 116, 122 (1st Cir. 2015).

The CGL policy insurance product evolved in the mid-1900s from the then-prevailing form of liability insurance—Public Liability Insurance Policies. Public Liability Insurance Policies generally required insureds to "purchase" bespoke "individual policies separately scheduling or covering" specific risks that might be posed by their operations. Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 Va. L. Rev. 85, 88 (2001). For example, before the advent of CGL policies, an insured may have had to separately purchase "individual policies separately scheduling" coverage for different risks, such as "elevator liability, products liability, [and] premises liability." *Id.* at 88. CGL policies emerged to streamline this tedious process. Around

1941, insurers began selling "general-purpose" CGL policies that "could be used by any business." *Id.* at 89. The idea was for them to be broad and to cover all risks besides those specifically carved out by exclusions. Indeed, CGL policies were for many years known as "comprehensive general liability" insurance before the insurance industry adopted the current "commercial general liability" moniker. The broad nature of the CGL form allowed insurers "to vary the premiums charged to take account of the risk level posed by the policyholder, and to encourage the purchase of special-purpose coverage where it was needed, by excluding identifiably special or unusual risks from coverage provided by the general liability insurance." *Id.*

Stated simply, CGL policies from their birth to now are supposed to provide broad coverage, narrowly excluding only those risks that are expressly and unambiguously stated via written exclusion to be uncovered. Adopting the Insurers' staggeringly broad interpretation of expected or intended injury exclusionary language would turn this entire regime on its head by excluding a wide swath of business risks just because there was some general knowledge of a potential harm or hazard materializing.

This is no novel concern. Courts have long harbored similar concerns and have adopted correspondingly narrow interpretations of expected or intended injury exclusionary language. *See, e.g.*, *City of Johnstown, N.Y.*, 877 F.2d at 1150 ("To exclude all losses or damages which might in some way have been expected by the insured, could expand the field of exclusion until virtually no recovery could be had on insurance.");

Markel Am. Ins. Co. v. Jones, 2007 WL 9735372, at *9 (N.D. Fla. Sept. 6, 2007) (rejecting insurer's reliance on exclusionary language and observing that "protecting themselves against liability for occurrences of this type is precisely why people buy insurance").

The impact of the Insurers' approach—essentially foreclosing insureds from transferring risks inherent in their business—would have perhaps the most severe impact on Ohio's small business community. Ohio's small business community is of integral importance to Ohio's economy. Indeed, by one recent count, Ohio is home to 996,693 small businesses—99.6% of Ohio's businesses. *See* 2022 Small Business Profile, U.S. Small Business Admin. Office of Advocacy, *available at* https://advocacy.sba.gov/wp-content/uploads/2022/08/Small-Business-Economic-Profile-OH.pdf (last accessed 9.2.23).

It is not a stretch to see that the hundreds of thousands of small business owners in Ohio contemplate that the broad-form CGL policies they buy will protect them against the potentially catastrophic financial risk posed by liability to third parties arising from risks inherent to the insured's business. In particular, Ohio's small manufacturers—of which there are some 24,457—expect that their broad CGL policies will protect them against the potential risks that the products they manufacture or promote will cause third-party bodily injury or property damage, as they are written. *Id.* at 2.

The notion that an insured somehow forfeits coverage whenever a foreseeable risk inherent to operating its business materializes would thwart these expectations. Indeed, it is "well settled" that "if an insurer does not intend to insure against a risk which is likely to be inherent in the business of the insured, it should specifically exclude" that risk. *See* 20-129 Appleman on Insurance Law & Practice Archive § 129.2 (2d ed. 2011). And, to be sure, specifically excluding risks is precisely what the insurance industry has historically done in the CGL policy context for risks it deems unprofitable or unpredictable, such as asbestos and pollution:

> In crafting the CGL product[], the insurance industry tailors the product to provide broad coverage to make it attractive to policyholders and to command larger premiums than could be charged for a narrower product. However, to protect themselves from risks that would make the CGL unprofitable or its claims exposure insufficiently predictable, insurers have also tailored the product by exempting from coverage particular risks that are either thought to be too difficult, at least at the prices policyholders are willing to pay, or better addressed by other policies. The exclusion for all asbestos-related claims, added in 1986, is an example of a difficult risk excised from coverage.

Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 Wm. & Mary L. Rev. 1489, 1542 (2010). The Insurers do not have the benefit of a specific risk exclusion here for lead. So, they are left grasping onto a legal theory that would have devastating ripple effects for CGL insurance policyholders and Ohioans statewide. What is more, as detailed in the next section, this theory is precluded under this Court's settled precedents.

B. *Stare decisis* disallows the Insurers' attempt to expand expected or intended injury exclusionary language.

Beyond neglecting the clear expectations of both parties to the CGL insurance relationship, the Insurers' theory also spurns controlling Ohio law and tramples principles of *stare decisis*. This Court recognized more than three decades ago that Ohio public policy permits insurance coverage for actions "substantially certain to cause a particular result." *Harasyn v. Normandy Metals, Inc.*, 49 Ohio St. 3d 173, 175, 551 N.E.2d 962 (1990); *Buckeye Union Ins. Co. v. New England Ins. Co.*, 87 Ohio St. 3d 280, 283, 720 N.E.2d 495 (1999). Only "direct intent torts"—those where the "actor does something which brings about the exact result desired"—are uninsurable as a matter of public policy. *Harasyn* at 175; *Buckeye Union* at 283; *Hoyle v. DJT Enters., Inc.*, 143 Ohio St. 3d 197, 2015-Ohio-843, ¶ 28 (reaffirming that "intentional torts based solely on the substantial certainty of injury" are insurable). The Insurers and their own *amici* incorrectly assert that these holdings are confined to the employer intentional tort context. But neither *Harasyn* nor *Buckeye Union* nor *Hoyle*'s holdings are so limited.

Indeed, this Court's subsequent decision in *Allstate Ins. Co. v. Campbell*, 128 Ohio St. 3d 186, 942 N.E.2d 1090 (2010), reinforced these principles in a non-employer intentional tort context. In *Campbell*, this Court held that Ohio courts cannot ***infer*** that the insured "expected or intended" harm unless the harm was intrinsically tied to the insured's conduct. In *Campbell*, youths put a Styrofoam target deer on a country road at night so they could watch drivers react. While some drivers dodged the fake deer, one lost control of his vehicle, seriously injuring him and his passenger. The *Campbell* Court concluded that expected or intended injury exclusionary language did not apply. While acknowledging the obvious—putting the deer in the road was an "ill-conceived and irresponsible act"—this Court correctly held that the act did not "as a matter of law… necessarily result[] in harm" for purposes of applying the exclusionary language. *Id.*

So too here. As the Eighth District correctly held, actually promoting lead paint for residential use would not necessarily result in harm. *Sherwin-Williams Co.*, 2022-Ohio-3031 at ¶ 80 ("Following the reasoning in *Campbell*, finding actual knowledge of a hazard is not the same as finding that Sherwin-Williams' intentional conduct and the resulting injuries were so intrinsically tied that Sherwin-Williams' conduct necessarily resulted in the harm."). That conclusion is buttressed by the fact that the California court did not require removal of lead paint from all the residences at issue. But the Insurers seek to overturn *Campbell* by imposing a regime where insurers can deny coverage for torts because the underlying plaintiff alleges the insured knew of the ***risk of harm***. That, again, is not the settled law in Ohio. *Id.* at ¶ 81 ("The question here is whether Sherwin-Williams' act necessarily resulted in the harm, not whether Sherwin-Williams knew that its act was substantially certain to result in the harm.").

The only way the Insurers can avoid these precedents is for this Court to overrule itself, reversing 30-plus years of its own jurisprudence. But the Insurers offer no compelling basis to flout *stare decisis* in this manner. Indeed, "it is the policy of courts to stand by precedent and not to disturb a point once settled. The doctrine of *stare decisis* is one of policy which recognizes that security and certainty require that an established legal decision be recognized and followed in subsequent cases where the question of law is again in controversy." *Clark v. Snapper Power Equip. Inc.*, 21 Ohio St. 3d 58, 60, 488 N.E.2d 138 (1986).

None of the factors this Court balances when deciding whether to overrule a precedent weigh in favor of overruling this Court's "expected or intended injury" line of cases. When faced with a plea to set aside precedent, this Court considers whether (1) the prior decision was wrongly decided or whether circumstances no longer justify continued adherence to it, (2) the prior decision defies practical workability, and (3) abandoning the precedent would create an undue hardship for those who have relied upon it. *Cleveland Bar Ass'n v. CompManagement, Inc.*, 111 Ohio St. 3d 444, 2006-Ohio-6108, ¶ 15.

Start with the first factor. *Harasyn*, *Buckeye Union*, and *Campbell* were not wrongly decided. Their approach to insurability comports with general principles of CGL insurance coverage, and there are no present circumstances that justify a departure from adhering to these precedents. The basic risk-shifting function of insurance—and the correspondingly narrow approach to expected or intended injury exclusionary language—continue to make good sense for society at large. Insurance "expands the opportunities for all to enrich their lives" because it "vastly increases the opportunities of a society to enhance the lives and the positions of its citizens." Priest, 24 Geo. Mason. L. Rev. at 638. In particular, "commercial entities" need CGL coverage so they can "engage in risky activities providing valuable products and services to customers" that will better society and its citizens. *Id.*

Likewise, ensuring CGL coverage remains available to insureds when risks inherent to their business materialize also protects successful ***claimants***, who may not be able to collect a judgment from a tortfeasor in the absence of insurance. "The predominate social purpose of liability insurance is to compensate injured persons"—which "is precisely why liability insurance is sometimes compulsory." *Stickovich v. Cleveland*, 143 Ohio App. 3d 13, 25, 757 N.E.2d 50 (8th Dist. 2001). That is why, in the insurance context, "one is more apt to encounter public-policy arguments to require coverage or to override policy exclusions, rather than to invalidate coverage." *Id.* None of these basic realities have changed since the key precedents were decided.

Turning to the second factor, nothing about these precedents defies practical workability. The rule they espouse is simple: actual knowledge of a hazard is not enough to trigger expected or intended injury exclusionary language; rather, the insured must have expected or intended to cause the specific harm. Whatever the Insurers might argue about the merits of this rule, the rule is straightforward to apply.

As for the third and final factor, abandoning these precedents would create undue hardship for Ohio policyholders. For more than 30 years, Ohio insurance policyholders have relied on the clarity afforded by *Harasyn*, *Buckeye Union*, and *Campbell*. And rightly so, because their holdings comport with the general principles and aims of CGL insurance coverage. The Insurers ask this Court to upend this settled law because they do not want to pay this claim or others like it. But that is not how *stare decisis* works. These precedents protect policyholders' well-settled expectations that their broad-form CGL coverage will protect them against risks inherent to their businesses. Again, if the Insurers want to exclude coverage for a particular business risk when underwriting a policy, they have a simple solution: "specifically exclude [those]… risk[s] from" coverage under the policy. 20-129 Appleman on Insurance Law & Practice Archive § 129.2 (2d ed. 2011). The Insurers did not do that here. So, they are now asking this Court to solve their conundrum by taking the drastic steps of overruling settled, practically workable precedents and dramatically broadening a historically narrow standard CGL exclusionary concept. This Court should reject this overture not only on *stare decisis* grounds, but also because it would fundamentally devalue CGL coverage for Ohio's policyholders and tort claimants alike.

CONCLUSION

Boiled down to the essentials, the broad rules the Insurers ask this Court to adopt would jeopardize insurance coverage for many claims for which coverage otherwise should be (and historically has been) afforded in which bodily injury or property damage is the *sine qua non* of recovery. It is not hyperbole to predict that such a stark narrowing of CGL protections under Ohio law would likely lead many Ohio businesses—including

OMA's member manufacturers—to move or close down or, for those who cannot do so, to be much less likely to engage in societally beneficial but risky innovation.

The Insurers' attempt to establish a *per se* bar against coverage in public nuisance cases is problematic because it leaves insureds at the mercy of arcane legal technicalities that might arise when creative plaintiffs' counsel assert novel theories of recovery that actually seek recovery for bodily injury or property damage. Indeed, "the plaintiff's bar" is "marvelously creative" in "concoct[ing] new theories of liability in the… products liability" context—such as the nuisance theory at play here. *See* Duncan E. Osborne and Steven J. Hare, 1 Asset Protection: Domestic and International Law and Tactics, § 5.5; Ian Gallagher, *Hazardous Substance Litigation in Maryland: Theories of Recovery and Proof of Causation*, 13 J. Contemp. Health L. & Pol'y 423, 423 (1997) (noting the "ingenuity of the plaintiff's bar in developing new theories of recovery" in "lawsuits concerning exposure to hazardous substances").

Ohio policyholders should be able to count on their broad CGL insurance coverage when an underlying action seeks money for bodily injury or property damage, no matter what legal clothing a creative plaintiff's lawyer might place on the claim. And conversely, insurers should not get a windfall—avoiding coverage they agreed to extend—just because a bodily injury or property damage-related judgment is awarded under a novel legal theory.

In sum, the Eighth District properly applied this Court's precedents, including *Acuity* and *Campbell*. This Court should affirm.

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Respectfully submitted,

/s/ Matthew A. Chiricosta
Matthew A. Chiricosta (0089044)
(Counsel of Record)
K. James Sullivan (0074211)
Robert F. Sohm (0097077)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 E. 6th St.
Cleveland, OH 44114
Phone: (216) 622-8200
Fax: (216) 241-0816
MChiricosta@Calfee.com
KJSullivan@Calfee.com
RSohm@Calfee.com

Counsel for Amici Curiae
The Ohio Manufacturers' Association, Avient Corporation, Cleveland-Cliffs Inc., Eaton Corporation, GOJO Industries, Inc., The Goodyear Tire & Rubber Company, Greif, Inc., The Lincoln Electric Company, Materion Corporation, Owens Corning, STERIS Corporation, TimkenSteel Corporation, and Worthington Industries, Inc.

CERTIFICATE OF SERVICE

I certify that under S.Ct.Prac.R. 3.02(A)(3) and S.Ct.Prac.R. 3.11(C)(1), the foregoing, *Merit Brief of Amici Curiae*, was filed electronically on September 5, 2023 with the Ohio Supreme Court via the Court's E-Filing Portal and served via email on September 5, 2023 on the following:

David A. Schafer
Nicholas R. Oleski
MCCARTHY, LEBIT, CRYSTAL & LIFFMAN CO., LPA
das@mccarthylebit.com
nro@mccarthylebit.com

Carl S. Kravitz
Jason M. Knott
Nicholas M. DiCarlo
ZUCKERMAN SPAEDER LLP
ckravitz@zuckerman.com
jknott@zuckerman.com
mdicarlo@zuckerman.com

Counsel for Appellants Certain Underwriters at Lloyd's, London; World Marine and General Insurance Corporation Ltd.; World Auxiliary Insurance Company Ltd.; The Victory Insurance Company Ltd.; New London Reinsurance Company Ltd.; Scottish Lion Insurance Company Ltd.; Winterthur Swiss Insurance Company; Yasuda Fire & Marine Insurance Company (UK) Ltd.; Yasuda, UK; Yasuda Fire & Marine Insurance Company (UK) Ltd.; Government Employees Insurance Company; and Berkshire Hathaway Direct Insurance Company (formerly known as American Centennial Insurance Company)

Gary W. Johnson
WESTON HURD, LLP
gjohnson@westonhurd.com

Counsel for Appellant Allstate Insurance Company, solely as successor in interest to Northbrook Excess and Surplus Insurance Company, formerly known as Northbrook Insurance Company, Appellant American Alternative Insurance Corporation, and Appellants North River Insurance Company, TIG Insurance Company, Mt. McKinley Insurance Co., and United States Fire Insurance Co.

Mitchell S. Goldgehn
Daniel J. Berkowitz
ARONBERG GOLDGEHN
mgoldgehn@agdglaw.com
dberkowitz@agdglaw.com

Counsel for Appellant Allstate Insurance Company, solely as successor in interest to Northbrook Excess and Surplus Insurance Company, formerly known as Northbrook Insurance Company

Clifford C. Masch
Brianna M. Prislipsky
Reminger Co., L.P.A.
CMasch@Reminger.com
BPrislipsky@Reminger.com

Edward J. Tafe
CNA CORPORATE LITIGATION
Edward.tafe@cna.com

Keith Moskowitz
Shannon Y. Shin
DENTONS US LLP
Keith.moskowitz@dentons.com
Shannon.shin@dentons.com

Counsel for Appellants American Casualty Company of Reading Pennsylvania, Columbia Casualty Company, Continental Casualty Companies, The Continental Insurance Company, for itself and as successor in interest to certain insurance policies issued by Harbor Insurance Company

Maribeth Meluch
KOHRMAN, JACKSON & KRANTZ, LLP
mm@kjk.com

Matthew B. Anderson
MENDES & MOUNT, LLP
Matthew.Anderson@mendes.com

Counsel for Appellants Certain London Market Companies (specifically, Agrippina Versicherungs AG, Alba General Ins. Co. Ltd, Am. Home Ins. Co., Ancon Ins. Co. (UK) Ltd, Anglo-French Ins. Co. Ltd, The Anglo Saxon Ins. Assc., Argonaut Northwest

Anna M. Sosso
WILLMAN & SILVAGGIO
asosso@willmanlaw.com

Counsel for Appellant Employers Mutual Casualty Company

Daniel F. Gourash
Robert D. Anderle
SEELEY, SAVIDGE, EBERT & GOURASH CO., LPA
dfgourash@sseg-law.com
rdanderle@sseg-law.com

Jonathan D. Hacker
O'MELVENY & MYERS LLP
jhacker@omm.com

Counsel for Appellants Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America, and as successor to Cigna Specialty Insurance Co., formerly known as California Union Insurance Company; Westchester Fire Insurance Company (with respect to certain policies allegedly issued by U.S. Fire Insurance Company); and Federal Insurance Company

Lawrence A. Levy
Michael Kotula
RIVKIN RADLER
Larry.Levy@Rivkin.com
Michael.Kotula@Rivkin.com

Counsel for Appellants National Surety Corporation; Allianz Global Risks US Insurance Company f/k/a Allianz Insurance

Ins. Co., Assicurazioni Generali SPA (UK Branch), The Baloise Fire Ins. Co. Ltd, Bishopsgate Ins. Co. Ltd, The British Aviation Ins. Co., Ltd, British Merchants' Ins. Co. Ltd, Brittany Ins. Co. Ltd, Delta-Lloyd Non-Life Ins. Co. Ltd, The Dominion Ins. Co. Ltd, Catalina Worthing Ins. Ltd. f/k/a HFPI (as Part VII transferee of Excess Ins. Co. Ltd. and London & Edinburgh Ins. Co. (as successor to London & Edinburgh General Ins. Co. Ltd.)), Fidelidade Ins. Co. of Lisbon, Guildhall Ins. Co. Ltd, Helvetia Accident Swiss Ins. Co., London & Edinburgh Per HUA Pool and Per Tower X, National Cas. Co., National Cas. Co. of Am. Ltd, River Thames Ins. Co. Ltd. (as successor in interest to Unionamerica Ins. Co. Ltd., which in turn is successor in interest to certain business of St. Katherine Ins. Co. Plc.), The Royal Scottish Ins. Co. Ltd, Southern Ins. Co. Ltd, Swiss Nat. Ins. Co. Ltd, Swiss Re Int., Terra Nova Ins. Co. Ltd, Trent Ins. Co. Ltd, and Cavello Bay Reinsurance Ltd (as successor by merger to Harper Ins. Ltd. f/k/a Turegum Ins. Co.))

Kevin C. Alexandersen
Burns White LLC
KCAlexandersen@BurnsWhite.com

Charles E. Spevacek
Meagher & Geer, P.L.L.P
CSpevacek@Meagher.com

Counsel for Appellant Great American Insurance Co.

Matthew C. O'Connell
SUTTER O'CONNELL CO.
moconnell@sutter-law.com

Company; and American Insurance Company, sued incorrectly herein as Fireman's Fund Insurance Company

Gregory E. O'Brien
CAVITCH FAMILO & DURKIN
gobrien@cavitch.com

James P. Ruggeri
Joshua D. Weinberg
Joshua P. Meyer
RUGGERI PARKS WEINBERG LLP
jruggeri@ruggerilaw.com
jweinberg@ruggerilaw.com
jmayer@ruggerilaw.com

Counsel for Appellants First State Insurance Company, Nutmeg Insurance Company, and Twin City Fire Insurance Company

Laura M. Faust
Ronald B. Lee
ROETZEL & ANDRESS, LPA
lfaust@ralaw.com
rlee@ralaw.com

Charles J. Scibetta
Ted DeBonis
CHAFFETZ LINDSEY LLP
Charles.Scibetta@chaffetzlindsey.com
Ted.DeBonis@chaffetzlindsey.com

Counsel for Appellants American Home Assurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa. and The Insurance Company of the State of Pennsylvania

Robert Joyce
LITTLETON PARK JOYCE UGHETTA & KELLY LLP
Robert.joyce@littletonpark.com

Counsel for Appellant Royal Indemnity Insurance Company

Crystal L. Maluchnik
JANIK LLP
Crystal.Maluchnik@Janiklaw.com

James H. Kallianis, Jr.
SKARZYNSKI MARICK & BLACK LLP
jkallianis@skarzynski.com

Counsel for Appellant Zurich American Insurance Company

Leon F. DeJulius, Jr.
Mark J. Andreini
Amanda R. Parker
Anderson T. Bailey
JONES DAY
lfdejulius@jonesday.com
mandreini@jonesday.com
aparker@jonesday.com
atbailey@JonesDay.com

James R. Wooley
HILLOW & SPELLACY
jwooley@mghslaw.com

Counsel for Appellee
The Sherwin-Williams Company

Laura Foggan
CROWELL & MORING LLP
LFoggan@crowell.com

Counsel for Appellants North River Insurance Company, TIG Insurance Company, Mt. McKinley Insurance Co., and United States Fire Insurance Co.

Bryce L. Friedman
SIMPSON THACHER & BARTLETT LLP
bfriedman@stblaw.com

Counsel for Appellants Travelers Casualty and Surety Company, St. Paul Fire & Marine Insurance Company, and Gulf Insurance Company

Emily K. Anglewicz
Bradley L. Snyder
ROETZEL & ANDRESS, LPA
eanglewicz@ralaw.com
bsnyder@ralaw.com

Alla Cherkassky Galati
Arthur J. McColgan
WALKER WILCOX MATOUSEK LLP
agalati@walkerwilcox.com
amccolgan@walkerwilcox.com

Counsel for Appellant Westport Insurance Corporation, previously known as Employers Reinsurance Corporation

Richard M. Garner
COLLINS ROCHE UTLEY & GARNER
rgarner@cruglaw.com

Counsel for Amicus Curiae The Ohio Insurance Institute

Patrick E. Winters
Plunkett Cooney
pwinters@plunkettcooney.com

Counsel for Amici Curiae American Property Casualty Insurance Association, Complex Insurance Claims Litigation Association, and National Association of Mutual Insurance Companies

/s/ *Matthew A. Chiricosta*
Counsel for Amici Curiae The Ohio Manufacturers' Association, Avient Corporation, Cleveland-Cliffs Inc., Eaton Corporation, GOJO Industries, Inc., The Goodyear Tire & Rubber Company, Greif, Inc., The Lincoln Electric Company, Materion Corporation, Owens Corning, STERIS Corporation, TimkenSteel Corporation, and Worthington Industries, Inc.