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NO. 18-1181

IN THE
SUPREME COURT OF TEXAS

EMERSON ELECTRIC CO., D/B/A FUSITE, AND EMERSON CLIMATE TECHNOLOGIES, INC., *Petitioners*,

V.

CLARENCE JOHNSON AND UNITED STATES LIABILITY CO., *Respondents*.

BRIEF OF AMICI CURIAE

THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND TEXAS ASSOCIATION OF BUSINESS

URGING THE COURT TO GRANT REVIEW

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INTEREST OF AMICI

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies 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 Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Texas Association of Business is the leading employer organization in Texas. It is the state's chamber of commerce. Representing companies from large

multi-national corporations to small businesses in nearly every community of Texas, Texas Association of Business works to improve the Texas business climate and to help make the state's economy the strongest in the world. For more than 95 years, Texas Association of Business has fought for issues that impact business to ensure that employers' opinions are heard.

Amici have no direct financial interest in the outcome of this litigation. No counsel for any party authored this brief in whole or in part; and no entity or person, aside from amici curiae, their members, and amici's counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT OF AMICI

Amici urge the Court to grant review, hold that the jury in a design-defect case should be instructed on the five risk-utility balancing factors, and reverse the court of appeals' unwarranted expansion of a manufacturer's duty to warn licensed professionals of known risks.

I. This Court should revisit its 40-year old decision in *Turner* and hold that the jury in a design-defect case should be instructed on the five risk-utility balancing factors.

Four decades ago, in *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 847 n.1 (Tex. 1979), this Court approved a jury charge for design-defect cases. The Court rejected inclusion of an instruction listing factors for the jury to consider in balancing the product's risk versus its utility. *Id.*at 847; *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 115-16 (Tex. 1984) (Court held in *Turner* "in strict liability cases the jury is not to be instructed with balancing factors").

For 40 years, *Turner* has stood as a bar to instructing the jury on the risk-utility balancing factors in a design-defect case. As the court of appeals held here, only this Court can revisit and alter *Turner*:

> The Supreme Court of Texas has made itself abundantly clear on this issue. If there is to be a change in the jury charge for design defect claims, it must come from that court.

Emerson Elec. Co. v. Johnson, Slip Op. at 43-44 ("Op.").

Now is the time for the Court to make that change.

A. The context in which *Turner* was decided.

Products liability based on design defect was in its infancy when *Turner* was decided in 1979. Design-defect liability was "relatively infrequent" before the late 1960s and early 1970s. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (2012). Courts were struggling with whether Section 402A of the Second Restatement, addressing manufacturing defects, could accommodate design-defect claims. *Id.* They were split on whether to frame the unreasonably-dangerous inquiry for design defect in terms of what a prudent manufacturer would do, what an ordinary consumer would expect, or whether the product's risk outweighed its utility. *Turner*, 584 S.W.2d at 850-51. This Court chose the latter formulation, with the jury to be charged as follows:

> Do you find from a preponderance of the evidence that at the time the (product) in question was manufactured by (the manufacturer) the (product) was defectively designed?
>
> By the term "defectively designed" as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

Id. at 847 n.1.

As *Turner* recognized, at that time there was no consensus on the risk-utility balancing factors. "The difficulty of formulating a series of specific factors which the fact finder will be instructed to balance is obvious." *Id.* at 849. One of Texas's preeminent tort scholars, Dean Page Keeton, advocated a four-factor test; Dean John

Wade, another prominent scholar, proposed a seven-factor inquiry. *Id.* Other commentators urged four, five, and even thirteen and fifteen factors for weighing risk versus utility. *Id.* The court of appeals' panel that decided *Turner* split on whether there should be four or five factors. *Id.* In short, the law was unsettled on how many and which factors were relevant to a risk-utility analysis – there was no clear law to support an instruction. This Court thus held that, while trial court could admit evidence on the factors "such as" the four enumerated by the court of appeals' majority plus consumer expectations, the jury should not be instructed to balance specific factors, whether those listed by the court of appeals or otherwise. *Id.* at 847.

Shortly after *Tuner*, this Court rejected two additional instructions in design-defect cases. In *Fleishman v. Guadiano*, 651 S.W.2d 730 (Tex. 1983), the plaintiff sought an instruction that his negligence should not be considered. The Court held that the trial court had properly used the *Turner* charge and the requested instruction was unnecessary, confusing, and failed to enable the jury to render a verdict. *Id.* at 731. In *Acord*, 669 S.W.2d at 113, the defendant obtained a favorable instruction that a manufacturer was not an insurer of the product. The Court reversed, emphasizing that *Turner* "disapprove[d] the addition of any other instructions in such cases, however correctly they may state the law under § 402A." *Id.* at 116. In neither case did a party submit a full list of factors; in both, they sought to tilt the balance in their own favor. Not surprisingly, the Court disallowed the instructions.

B. The law has developed in the 40 years since Turner.

The law of design defect has not remained static in Texas. The five non-exclusive evidentiary factors discussed in *Turner* evolved into a requirement rather than a suggestion.

Eighteen years after *Turner*, these five "evidentiary factors" were listed in *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 432 (Tex. 1997). Two years later, in *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 256 (Tex. 1999), the Court again listed the five factors, this time as "consideration[s]" in a risk-utility analysis.

Thirty years after *Turner*, the Court resolved the uncertainty about how many and which factors were relevant to a risk-utility analysis. In 2009, the Court made clear that consideration of five specific factors is "required" in a design-defect case:

> To determine whether a product was defectively designed so as to render it unreasonably dangerous, Texas courts apply a risk-utility analysis that requires consideration of the following factors: (1) the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use; (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive; (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs; (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and (5) the expectations of the ordinary consumer.

Timpte Indus., Inc. v. Gish, 286 S.W.3d 306, 311-12 (Tex. 2009). Most recently, Justice Boyd listed the *Timpte* factors as "relevant to the jury's risk-utility balancing

determination." *Genie Indus., Inc. v. Matak*, 462 S.W.3d 1, 9-10 (Tex. 2015) (Boyd, J., dissenting).[1]

Not only have the five factors crystallized in the 40 years following *Turner*, the Texas Legislature has made clear the plaintiff's burden to establish a safer alternative design. TEX. CIV. PRAC. & REM. CODE § 82.005(a)(1) ("TCPRC").

The law on how many and which factors bear on a risk-utility analysis, uncertain when *Turner* was decided, is now clear. The jury should be instructed on that law.

C. A risk-utility balancing is not an intuitive question that should be left to the good sense of the jury without guidance.

In holding that the jury should not be instructed on the risk-utility balancing factors, *Turner* cited and relied on commentary, not case law. But commentators drew a sharp distinction between a risk-utility test for design defect and a test framed in more traditional "reasonable man" negligence terms. Many viewed the risk-utility test as a threshold inquiry purely for the court, not the jury, to decide; the risk-utility

[1] Justice Boyd has opined that it is an open question whether an appellate court considers the five risk-utility balancing factors in a legal-sufficiency challenge of a jury verdict as opposed to a summary judgment. *Id.* at 15 n.2. The substantive legal standard for design defect, as opposed to procedural standards like burden of proof, do not suddenly change when submitted to a jury. Amici have not been able to find a single instance in Texas where the substantive law was different when decided by a jury rather than a trial judge. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 29 n.26 (Tex. 1994) ("Texas jurors are instructed on the factors set forth in *Kraus*, 616 S.W.2d at 910, and thus determine the amount of the [exemplary-damage] award based on the same criteria that the trial and appellate courts use ….").

inquiry was viewed as one primarily of policy, not fact. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. J. 825, 836 (1973) ("Wade"); Leon Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1204 n.34 (1976) ("Green").[2]

Instead, these commentators would submit a jury issue using traditional negligence terms, focusing on how a reasonable man, prudent manufacturer, or ordinary consumer would behave. Wade, 44 MISS L. J. at 839-40; William A. Donaher, Henry R. Piehler, Aaron D. Twerski, & Alvin S. Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303, 1308 n.29 (1974) ("Donaher"). "When the issue is submitted to the jury for its consideration under the 'reasonable man' test, society seeks the panel's intuitive judgment concerning the acceptability of the defendant's conduct." Donaher, 52 TEX. L. REV. at 1308-09 n.29. "The decision not to instruct on risk-utility considerations proceeds from a fear that the jury might lay aside its own intuitive judgment." *Id.* Dean Green similarly observed that courts must rely on the good sense of jurors if there is no standard available. Green, 54 TEX. L. REV. at 1203.

[2] Nor did these commentators lay down an absolute bar to instructing the jury on the risk utility factors. *See* Wade, 44 MISS. L. J. at 840 (factors should not "ordinarily" be given to the jury but the jury should be instructed when "one of the factors has especial significance"); Green, 54 TEX. L. REV. at 1203 ("There is no objection to the use of a standard if one is available.").

In contrast, Dean Keeton advocated submitting the risk-utility balancing to the jury. This Court in *Turner* agreed, holding that the risk-utility inquiry was for the jury to decide and not a threshold issue solely for the trial court. Unlike the reasonable-man standard, there is nothing intuitive in a risk-utility analysis that should rest on the "good sense" of juries to determine acceptability of conduct. As Justice Boyd recognized in *Genie*, "neither the determination of a product's utility and risks nor the weighing of the two is that simple." *Genie*, 462 S.W.3d at 16 (Boyd, J., dissenting). Deans Wade and Green believed that courts must consider some version of the *Wade* factors in balancing risk versus utility in a design-defect case. The same should be more true of juries, who are even less familiar than a trial judge with these terms and the policy issues they raise. As Dean Keeton wisely predicted, "I remain convinced … that a 'pattern instruction' on the factors could be developed that would not be misleading or erroneous and would contribute to the jury's understanding." Page W. Keeton, *Torts*, 34 S.M.U. L. REV. 1, 10 (1980). This Court has done just that in *Timpte*.

D. The Restatement leaves to local law whether to instruct the jury on the factors.

As the Restatement recognizes, a "broad range of factors may be considered in determining whether a product is not reasonably safe." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f. Nothing in the Restatement precludes

instructing the jury on these factors. To the contrary, the Restatement makes clear that whether the jury charge should list specific factors is controlled by local law:

> The Restatement takes no position on how a jury should be instructed. So long as jury instructions are generally consistent with the rule of law set forth in subsection (b), their specific form and content are matters of local law.
>
> ... Whether instructions to the trier of fact should include specific reference to these factors ... should be determined under local law.

Id. cmt. f & illus. 6. In other words, instructions to the jury on the factors should receive the same treatment as any other instructions under Texas jury charge law.

E. Texas jury charge law dictates that the jury be informed not ignorant.

Under Texas jury charge law, the jury should be instructed on the five factors. TEX. R. CIV. P. 277 mandates that the trial court "submit such instructions and definitions as shall be proper to enable the jury to render a verdict." And, as this Court has held, an "instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence." *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 855-56 (Tex. 2009). Getting the jury charge right is not just a procedural nicety. "It is fundamental to our system of justice that the parties have the right to be judged by a jury properly instructed in the law." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000).

A jury instruction listing the five risk-utility factors recognized by this Court accurately states the law, assists the jury, and finds support in the pleadings and the

evidence. Were it not for *Turner*, there is no question that trial court would – and must – provide this instruction to the jury.

F. Texas juries are routinely instructed on balancing factors in a host of contexts; there is no reason to treat design defect differently.

The absence of an instruction in the Pattern Jury Charges on the five risk-utility balancing factors in a design-defect case is an aberration attributable solely to this Court's decision in *Turner*. Elsewhere, the Pattern Jury Charges list factors for the jury to weigh under common-law decisions and statutes. The listing of factors in pattern jury instructions covers a broad spectrum of issues, including the *Mustang Pipeline* factors for material breach,[3] the *Moriel*[4] and statutory factors for exemplary damages, the *Arthur Andersen*[5] and statutory factors for attorney's fees, and the *Reagan v. Vaughn* factors for loss of consortium.[6] These are only a few examples where the jury is entrusted with factors; the chart on the following page lists these and others – but not all – where the jury is instructed to weigh factors:

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[3] *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 199 (Tex. 2004) (per curiam).

[4] *Moriel*, 879 S.W.2d at 29 n.26. These are sometimes called the *Kraus* factors, as *Moriel* approved the factors listed in *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981).

[5] *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

[6] *Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990).

TEXAS PATTERN JURY CHARGES Volume	Section	Factors for the jury
General Negligence, Intentional Personal Torts & Workers' Compensation (2016)	27.1	TEX. LABOR CODE § 408.221(d) factors for attorney's fees
	28.7	*Moriel* and TCPRC § 41.011(a) factors for exemplary damages
	28.12	*Reagan* factors for child's loss of consortium
	29.7	*Moriel* and TCPRC § 41.011(a) factors for exemplary damages
	30.4	*Moriel* and TCPRC § 41.011(a) factors for exemplary damages
Business, Consumer, Insurance & Employment (2016)	101.2	*Mustang Pipeline* factors for material breach
	105.25	TEX. BUS. & COM. CODE § 24.005(a)(1), (b) factors for actual intent in fraudulent transfer case
	115.38	TCPRC § 41.011(a) factors for exemplary damages
	115.60	*Arthur Andersen* factors for attorney's fees
Malpractice, Premises & Products (2016)	51.18C-D	TCPRC § 74.154 factors for emergency care liability
	80.12	*Reagan* factors for child's loss of consortium
	85.3	*Moriel* and TCPRC § 41.011(a) factors for exemplary damages
Oil & Gas (2016)	305.20	Factors for whether prudent operator would continue to operate a well
	305.3	*Mustang Pipeline* factors for material breach
	313.33	*Arthur Andersen* factors for attorney's fees

The five risk-utility balancing factors in a design-defect case should not be treated differently than the *Mustang Pipeline*, *Moriel*, *Arthur Andersen*, *Reagan*, and other factors that ensure that the jury is correctly instructed on the law.

G. The failure to instruct the jury on the risk-utility balancing factors leads to unpredictable and inconsistent results and impedes – if not precludes – appellate review of a jury verdict in a design-defect case.

Under *Turner*, a jury is instructed to balance the risk and utility of the product but is given no guidance on the five factors that this Court has held are critical to that process. The lack of guidance has severe consequences.

Juries are left free to roam through the evidence and choose factors at will, leading to unpredictable and inconstant verdicts because there is no uniform standard. *See* Hans-Viggo von Hulsen, *Design Liability and State of the Art: The United States and Europe at a Crossroads*, 55 ST. JOHN'S L. REV. 450, 454-55 (1981) ("because many courts appear to instruct juries to generally 'consider' such factors without actually providing concrete guidelines for evaluating them, results are often unpredictable and sometimes conflicting"). Uncertainty, in turn, affects the availability and affordability of insurance, impedes the ability of attorneys to advise clients, and erects an impossible challenge for engineers to meet unknown standards when designing new products. *Id.* at 455-57.

The lack of instruction also makes jury verdicts in design-defect cases unreviewable. Charge error is reversible error when it prevents a party from properly

presenting its case on appeal. TEX. R. APP. P. 44.1(a)(2); 61.1(b); *Casteel*, 22 S.W.3d at 388. The appellate court, in determining the legal sufficiency of the evidence of design defect, looks to whether there is some evidence to support the five risk-utility balancing factors. *Timpte*, 286 S.W.3d at 311. Even if such evidence is in the record, it does not measure the legal sufficiency of what the jury actually considered. There is no way to know if the jury considered only the five factors delineated by this Court, whether it considered only one – safer alternative design, proof of which is required by statute and is now included in the standard charge, or whether it considered three, eight, or twenty-one factors. It is also impossible for the appellate court to know how the jury would have balanced the factors if it had been properly directed to the five endorsed by this Court.

Turner permits the lawyers to argue factors and expert witnesses to testify about them, 584 S.W.2d at 847, but that does not cure the failure to instruct. As this Court has recognized, the jury is admonished to follow the charge and the charge, not argument of counsel, is determinative. *Columbia Rio Grande*, 284 S.W.3d at 862 ("Statements from lawyers as to the law do not take the place of instructions from the judge as to the law. It is the trial court's prerogative and duty to instruct the jury on the applicable law."). This Court in *Columbia Rio Grande* emphasized the perils of failing to instruct the jury on an established legal standard: "The instruction would have given the jury the standard it was required by law to apply in

making its finding on a hotly-contested issue .... It asks too much of lay jurors, untrained in the law, to distill the correct Texas legal standard ... from the general ... instruction given by the trial court." *Id.* The same is true here. It asks too much of Texas juries to identify and weigh the proper legal factors for balancing risk against utility in a design-defect case. As discussed above, the balancing inquiry is not a simple task, is policy-based, and is not an intuitive question that should be left to the good sense of the jury without guidance.

As *Columbia Rio Grande* demonstrates, in any other similar situation the jury would be instructed on the law. Design-defect cases should not be singled out for unique treatment.

H. The disjunct between the legal standard on appeal and the jury charge – highlighted in Justice Boyd's dissent in *Genie* – should be eliminated by enlightening the jury rather than blindfolding the appellate court.

Justice Boyd pointed out the gap between the jury charge and the legal standard in his dissent in *Genie*: "**It makes little sense for appellate courts to utilize specific factors to determine whether evidence supports a jury's verdict when the jury was not instructed to consider those factors**." *Genie*, 462 S.W.3d at 15 n.2 (Boyd, J., dissenting) (emphasis added). Amici agree. It makes no sense for the lawyers, the experts, the trial judge, and the appellate court to know the legal standard but to keep that standard from the jury.

But, with due respect to Justice Boyd, Amici disagree with his proposed solution: "appellate courts, when reviewing a jury verdict, should consider whether any evidence supports the jury's finding when measured against the jury instructions [which, as Justice Boyd notes, cannot include the five factors because of *Turner*], whether that evidence fits within the factors or not." *Id.* In other words, rather than informing the jury of the applicable factors and pinning any appeal of a verdict to those factors, the proposal would leave the risk-utility balancing in design-defect cases absolutely standardless. *Compare Moriel*, 879 S.W.2d at 29 n.26 ("Texas jurors are instructed on the factors set forth in *Kraus*, 616 S.W.2d at 910, and thus determine the amount of the [exemplary-damage] award based on the same criteria that the trial and appellate courts use").

Justice Boyd's dilemma underscores the fundamental problem – *Turner* stands as an impediment to a jury properly instructed on the law and to a proper substantive appellate review of the jury's verdict. In *Columbia Rio Grande*, the Court correctly determined that the solution to this type of problem is to instruct the jury on the law. The same is true here.

I. Conclusion: Amici urge this Court to hold that the jury in a design-defect case should be instructed on the five risk-utility balancing factors.

In the words of Justice Boyd, it "makes little sense for appellate courts to utilize specific factors to determine whether evidence supports a jury's verdict when

the jury was not instructed to consider those factors." *Genie*, 462 S.W.3d at 15 n.2 (Boyd, J., dissenting). This Court's decision in *Turner* is what stands between a jury charge that makes little sense and a jury properly instructed on Texas law. The Court should grant review, revisit *Turner*, and hold that the jury in a design-defect case should be instructed on the five risk-utility balancing factors.

II. The Court should reverse the court of appeals' unsupported expansion of the duty of a manufacturer to warn licensed professionals of known risks.

The court of appeals erroneously expanded a manufacturer's duty to warn licensed professionals of known risks. Plaintiff Johnson is a licensed HVAC professional with over 30 years of experience, including installing and servicing AC compressors. Op. at 3. Not only was Johnson indisputably "aware that it is possible for compressors to vent," Johnson actually warned his assistant of the danger of terminal venting at the accident site. *Id.* at 20. Additionally, the compressor displayed a universal warning symbol for explosions. *Id.* at 23.

Because terminal venting was a known risk, Emerson had no duty to warn Johnson. When "the foreseeable users of a product have special training, a supplier has no duty to warn of risks that should be obvious to them." *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 183 (Tex. 2004); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j.

Rather than apply this well-established law, the court of appeals redefined the risk, holding that "Emerson had a duty to warn Johnson of the risk of an **imminent terminal vent** should he hear the Emerson compressor emit **unusual noises**." Op. at 24 (emphasis added). As a result, the court of appeals did not examine whether Johnson knew of the risk of terminal venting – the issue the jury was asked to decide – but instead looked at whether Johnson knew the risk of terminal venting was imminent. This was error. Amici endorse the arguments in the Petition for Review showing that the redefining of the risk is legally unsupportable. Amici will not repeat those arguments here but will focus on two aspects of the decision below that adversely impact manufacturing.

First, by dissecting the risk into smaller units, the court of appeals created an unpredictable and impossible standard. As Zeno's Paradox demonstrates, any process can be subdivided into an infinite number of smaller steps. The court of appeals' opinion creates a similar paradox. An expert witness can always subdivide the risk of an occurrence into smaller units – inoperability, power interruption, noise, pressure release, seal breakage, fluid release, etc. But these comprise one risk – here, terminal venting. Texas law does not slice the duty to warn so narrowly. In analogous contexts, this Court has refused to expand the duty to warn by subdividing a risk event into smaller component parts. *See Brookshire Groc. Co. v. Taylor*, 222 S.W.3d 406, 407 (Tex. 2006) (premises owner had duty to warn of ice on floor not

"some antecedent situation that produced the condition"); *Henkel v. Norman*, 441 S.W.3d 249, 252 (Tex. 2014) (per curiam) (general warning "don't slip" was sufficient to warn mail carrier of specific risk of slipping on icy sidewalk). In contrast, a manufacturer could never meet the court of appeals' requirement to warn of every possible step in the infinite chain that comprises the risk.

Second, manufacturers cannot effectively implement the newly-minted noise warning. The court of appeals twice relied on a competitor's warning to be alert for "'sounds of arcing[,] sizzling, sputtering, or popping inside the compressor.'" Op. at 5, 18. Yet that warning would not have sufficed here because Johnson described the sound as "rumbling" and "unusual." *Id*. at 4, 17. So the court of appeals invented a new duty – to warn of "unusual noises." *Id.* at 24. But without explaining what would be a "usual" noise or emptying the Thesaurus to describe every noise that might be "unusual," a manufacturer could never satisfy the court of appeals' new duty. *See* Aaron D. Twerski & James A. Henderson Jr., *Fixing Failure to Warn*, 90 IND. L. J. 237, 254 (2015) (there should be no liability absent a reasonable alternative warning; manufacturers should not "be forced to set forth a laundry list of various scenarios" leading to hazard).

The court of appeals' opinion sets bad precedent and imposes on manufacturers a new and expanded duty to warn that is impossible to meet.

CONCLUSION AND PRAYER

Amici The National Association of Manufacturers, The Chamber of Commerce of the United States of America, and Texas Association of Business urge this Court to grant review, hold that the jury in a design-defect case should be instructed on the five risk-utility balancing factors, and reverse the court of appeals' unsupported expansion of the duty of a manufacturer to warn licensed professionals of known risks.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that: (1) the word count of this document is 4,423 words according to Microsoft Word 2010 and excluding those parts of the document specified in TEX. R. APP. P. 9.4(i)(1); and (2) this document has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes.

/s/ Pamela Stanton Baron

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