SUPREME COURT OF LOUISIANA

DOCKET NO. 2021-C-00811

IRENE BREAUX, INDIVIDUALLY, AND ON BEHALF OF HER MINOR CHILDREN, TABITHA CAROLINE BREAUX AND ELWOOD JAMES BREAUX, III, CANDACE MARIE BREAUX, BRANDON BREAUX, ERICKA BREAUX, AND JAMIE BREAUX, Respondent

Versus

THE GOODYEAR TIRE & RUBBER COMPANY, ET AL., Applicant

A CIVIL PROCEEDING

ON APPLICATION FOR WRIT OF CERTIORARI OR REVIEW
TO THE COURT OF APPEAL, FOURTH CIRCUIT, DOCKET No. 2020-CA-0477, AND THE 25TH JUDCIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES, NO. 61-964, THE HONORABLE MICHAEL D. CLEMENT, PRESIDING

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPLICANT'S WRIT OF CERTIORARI OR REVIEW

Respectfully submitted,

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Of Counsel for the National Association of Manufacturers

NOW INTO COURT, through undersigned counsel, comes the National Association of Manufacturers ("NAM"), who moves the Court for leave to file the attached *Amicus Curiae* Brief in this matter, as follows.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states, including manufacturers of component parts. Manufacturing employs more than 12 million men and women, contributes $2.3 trillion to the U.S. economy annually, the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the national manufacturing community, representing its members' policy interests and advocating on behalf of manufacturers in the courts. To that end, the NAM regularly files *amicus curiae* briefs in cases, such as this one, that raise issues of concern for manufacturers across the country.

The NAM and its members are deeply concerned by the Louisiana Fourth Circuit Court of Appeal's departure from the sophisticated user doctrine that has long existed in Louisiana and around the country. The Court of Appeal's ruling subjects a manufacturer of a non-defective product to liability when the risk at issue—zipper ruptures associated with commercial truck tires—is widely known among those who repair truck tires. The Louisiana State Legislature, in enacting the sophisticated user doctrine, made clear that the party responsible for protecting employees from such known risks is their employer. By misapplying this statute, the Court of Appeal's ruling places manufacturers at risk of extraordinary liability for user risks they cannot control and harm they did not cause. The NAM's brief as *amicus curiae* will assist this Court by explaining the errors of the Court of Appeal's ruling, providing an additional perspective on Louisiana's Products Liability Law and explaining how other states have applied the sophisticated user doctrine in comparable situations.

The NAM files its *amicus curiae* brief herewith, conditioned upon this Court's grant of leave. By service of this motion and brief, the NAM served notice on all counsel of record.

WHEREFORE, the National Association of Manufacturers respectfully requests leave of Court to file the attached brief as *amicus curiae*.

Respectfully submitted,

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Of Counsel for the National Association of Manufacturers

DATED this 18th day of June, 2021.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing brief has been served upon the following via email, Federal Express, and/or by placing same in the United States mail, properly addressed and postage prepaid, this 18th day of June, 2021, as specified below:

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SUPREME COURT OF LOUISIANA

DOCKET NO. 2021-C-00811

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THE HONORABLE MICHAEL D. CLEMENT, PRESIDING

ORDER

HAVING CONSIDERED the foregoing Motion for Leave to File Amicus Curiae Brief on Behalf of the National Association of Manufacturers;

IT IS HEREBY ORDERED THAT the National Association of Manufacturers is granted leave to file an *amicus curiae* brief in this matter.

New Orleans, Louisiana, this ____ day of _____, 2021.

_____

SUPREME COURT OF LOUISIANA

DOCKET NO. 2021-C-00811

IRENE BREAUX, INDIVIDUALLY, AND ON BEHALF OF HER MINOR CHILDREN, TABITHA CAROLINE BREAUX AND ELWOOD JAMES BREAUX, III, CANDACE MARIE BREAUX, BRANDON BREAUX, ERICKA BREAUX, AND JAMIE BREAUX, Respondent

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ISSUE PRESENTED

Whether a manufacturer or seller of a product in Louisiana has a duty to warn a user who knows or reasonably should know of the product's potential dangers.

STATEMENT OF INTEREST

Amicus is the National Association of Manufacturers ("NAM"), whose members include thousands of businesses, many of whom manufacture products, component parts, and replacement parts sold to sophisticated users. The NAM and its members are deeply concerned by the Fourth Circuit Court of Appeal's departure from the sophisticated user doctrine that has long existed in Louisiana and around the country. The Court of Appeal's ruling subjects a manufacturer of a non-defective product to liability when the risk at issue—zipper ruptures associated with commercial truck tires—is widely known among those who repair truck tires. The Louisiana State Legislature, in enacting the sophisticated user doctrine, made clear that the party responsible for protecting employees from such known risks is their employer. By misapplying this statute, the Court of Appeal's ruling places manufacturers at risk of extraordinary liability for user risks they cannot control and harm they did not cause.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states, including manufacturers of component parts. Manufacturing employs more than 12 million men and women, contributes $2.3 trillion to the U.S. economy annually, the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the Nation. 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 Manufacturers' Center for Legal Action—the litigation arm of the NAM—advocates on behalf of manufacturers in the courts.

The NAM regularly appears as *amicus curiae* in cases, such as this one, that raise issues of concern for manufacturers in Louisiana. The NAM believes this brief will provide an additional perspective that may assist the Court.

STATEMENT OF THE CASE

Amicus adopts and incorporates Applicant's Statement of the Case to the extent needed to support the arguments in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arose out of a tragic accident. Elwood Breaux Jr., employed by the Plaquemines Parish Government ("PPG") as a garbage truck driver, died after attempting to repair a commercial truck tire without proper training or the right equipment. Commercial truck tires, including the tire Mr. Breaux was inflating, have steel cords in their sidewalls to support the heavy weight of commercial trucks and their payloads. It is well known that if commercial truck tires are driven while underinflated, the pressure on the cords can create a "zipper rupture" as the tire is being inflated. As detailed in the Application, the Occupational Safety and Health Administration ("OSHA"), the Rubber Manufacturers Association, and Goodyear all publish warnings on how mechanics can safely inflate commercial truck tires to avoid zipper rupture injuries. PPG owned and operated its own commercial vehicle repair shop, but neither trained its employees with respect to zipper ruptures nor had the required equipment that would have kept Mr. Breaux safe when the tire experienced a zipper rupture.

The Louisiana State Legislature enacted the Louisiana Products Liability Act ("LPLA") to assign liability to the entity best positioned to prevent the exact type of harm that occurred in this case. When a product has a known danger, entities that regularly purchase or use a product are responsible for learning about and managing those risks so they can protect their employees and others from harm. Here, commercial truck tires have a known danger of zipper ruptures, and truck repair shops have knowledge and expertise in the use of commercial tires. In these situations, the LPLA treats the truck repair shop as a sophisticated user, *i.e.*, someone who knows or should know about the known risks associated with commercial truck tires. When harm occurs, the law places liability on the sophisticated user, not the product's supplier, because they are the ones responsible for preventing the harm. The sophisticated user doctrine primarily considers the characteristics of the *user*—whether the user is required to have the expertise or knowledge of the product and its known risks.

In this case, the Court of Appeal made three fundamental errors in failing to apply the LPLA's sophisticated user doctrine correctly. First, it improperly conflated the sophisticated user doctrine with the "open and obvious" risk doctrine. These doctrines focus on distinct issues. The sophisticated user doctrine looks at who the purchaser is and whether it is in a category of purchasers who should know about certain risks, particularly when associated with specialized products for a trade or profession. The open and obvious doctrine considers the product's characteristics and which risks are open and obvious to ordinary users.

Second, the Court of Appeal incorrectly applied the sophisticated user doctrine as a subjective standard, assessing whether PPG actually knew of the risk that zipper ruptures pose. As courts around the country have long explained, the sophisticated user doctrine is an objective standard as to what PPG should have known about product risks in acting as its own truck repair and maintenance facility.

Third, the court erred in creating an exception to the sophisticated user doctrine for governments because they are not solely in the commercial truck industry. Here, instead of outsourcing the installation, maintenance, or repair of its garbage trucks (as other government entities do), PPG acted as its own commercial truck tire and maintenance facility. As detailed in the Application, PPG changed and repaired hundreds of commercial truck tires per year, just as if it were a privately owned shop. By taking on the responsibilities of an entity in the vehicle repair industry, PPG acted exactly as the sophisticated user the Louisiana State Legislature envisioned when it adopted the sophisticated user doctrine. This law does not allow employers—public or private—to shift their responsibility for protecting employees to product manufacturers who have no control over their operations.

Amicus respectfully urges this Court to grant the writ of certiorari. Manufacturers and others that supply products in Louisiana and people who work in the state, particularly for the government, must be able to rely on Louisiana courts to apply the law correctly, even in difficult cases. If not corrected, the Court of Appeal's holding will thwart the purpose of the LPLA, create confusion among Louisiana courts, and, most importantly, insulate employers from liability even when they fail to safeguard their employees from well-known risks.

ARGUMENT

1. THE COURT SHOULD GRANT REVIEW TO ENSURE THE SOPHISTICATED USER DOCTRINE IS APPLIED AS ENACTED BY THE STATE LEGISLATURE

As the Court of Appeal noted, under the LPLA, a manufacturer or supplier of a product is not subject to liability for failure to warn of a risk if the purchaser is a sophisticated user of that product. *See Breaux v. Goodyear Tire & Rubber Co.*, 2021 WL 1917779 *5 (La. App. 4 Cir. 5/12/21). The duty to warn inquiry that followed should have focused on what PPG, as an operator of a truck repair and maintenance facility, should have known about zipper ruptures. Instead, the court looked at whether zipper ruptures were "an open and obvious danger," whether PPG was actually "aware of zipper ruptures," and whether governments are exempted from the sophisticated user doctrine because they engage in an "array" of functions other than repairing truck tires. *Id.* at *6. However, none of these factors are relevant to the application of the sophisticated user doctrine.

Louisiana's sophisticated user doctrine traces its origins to the Restatement (Second) of Torts. The American Law Institute's adoption of the Restatement (Second) of Torts § 402A was a major development in products liability law; it subjected product manufacturers to liability for injuries caused by defective products, regardless of privity. For failure to warn defect claims, the key inquiry was whether the manufacturer or seller warned about the risks it knew or should have known about the product. *See* 402A cmt. j. The purpose of this requirement is to inform consumers about a product's hazards so they can refrain from using the product or evade the danger by careful use. The ALI also created an exception to this warning obligation when selling to a sophisticated user. As Section 388 of the Restatement (Second) explains, a product warning is unnecessary when the supplier has "reason to believe that those who will use it will have such special experience as will enable them to perceive the danger." Restatement (Second) of Torts § 402A cmt. k.[1] Courts quickly interpreted this provision to mean that if a manufacturer reasonably believes the user will

[1] *See, e.g., Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 561 (W.D. Va. 1984) ("when the supplier has reason to believe that the purchaser of the product will recognize the dangers associated with the product, no warnings are mandated"), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

know or should know about a product risk, the manufacturer does not need to warn that user about that risk. *See*, *e.g.*, *Martinez v. Dixie Carriers, Inc.*, 529 F. 2d 457, 464–465 (5th Cir.1976); *Lockett v. General Electric Company*, 376 F.Supp. 1201 (E.D.Pa.1974). Early rulings in Louisiana followed this approach, laying the basis for the sophisticated user doctrine here. *See*, *e.g.*, *Gary v. Dyson Lumber & Supply Co.*, 465 So.2d 172, 175 (La. App. 3d Cir. 1985).

In 1988, the Louisiana State Legislature enacted the LPLA and adopted the approach of the Restatement (Second) by officially incorporating the sophisticated user doctrine as an exception to the duty to warn. *See* La. Rev. Stat. § 9:2800.57 (B)(1); Dwight C. Paulsen III & David E. Redman, Jr., *Products Liability Defenses: A State-By-State Compendium (Louisiana)*, DRI Defense Library Series, at 5. The LPLA provides manufacturers with two distinct statutory defenses to a claim for failure to warn. The first, which is not at issue here, is generally referred to as the "open and obvious" doctrine. This provision focuses on risks that are "common knowledge or which are obvious to the ordinary user." *Mallory v. International Harvester Co.*, 96-321, p. 3 (La. App. 3 Cir. 11/6/96), 690 So. 2d 765, 768. There is no duty to warn when the "product is not dangerous to an extent beyond that which would be contemplated by the *ordinary* user or handler of the product, with the *ordinary* knowledge common to the community as to the product's characteristics." La. Rev. Stat. § 9:2800.57 (B)(1) (2017) (emphasis added). Because this doctrine applies to sales to the general public, it was error for the Court of Appeal to assess whether a zipper rupture in commercial tires is an open and obvious risk in applying the sophisticated user doctrine.

The second exception is the sophisticated user doctrine. This provision applies to specialized purchasers such as those in a trade or profession, including mechanics, electricians and medical personnel. In these situations, the "user or handler of the product already knows or *reasonably should be expected to know* of the characteristic of the product that may cause damage and the danger of such characteristic." La. Rev. Stat. § 9:2800.57 (B)(2) (2017) (emphasis added). In contrast to the open and obvious doctrine, Louisiana courts have defined a sophisticated user "as one who is 'familiar with the product' or as one who 'possesses more than a general knowledge of the product and how it is used.'" *Roux v. Toyota Material Handling, U.S.A., Inc.*, 19-75, p. 7 (La. App. 5 Cir. 10/23/19), 283 So. 3d 1068,

1074, *writs denied*, 295 So. 3d 953 (La. 5/1/20) (citations omitted). Further, this standard is objective based on the purchaser's involvement in the trade or profession, as the purchaser is presumed to know dangers presented by certain products. *See Hines v. Remington Arms Co.*, 522 So. 2d 152, 156 (La. App. 3d Cir. 1988) (a sophisticated user is one who has sufficient education or experience that he knows or ought to know of the danger).

Like Louisiana, most states began incorporating a sophisticated user defense into their state products liability laws based on the Restatement (Second). When the ALI began work on the Restatement, Third of Torts: Products Liability in the early 1990s, the doctrine was entrenched in the nation's jurisprudence. *See* Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability—The American Law Institute's Process of Democracy and Deliberation*, 26 Hofstra L. Rev. 743, 751-59 (1998). A key focus of the Restatement, Third was clarifying failure-to-warn liability given thirty years of case law. *See* William E. Westerbeke, *The Sources of Controversy in the New Restatement of Products Liability: Strict Liability Versus Products Liability*, 8 Kan. J.L. & Pub. Pol'y, at 1 (Fall 1998). The result was a reinforcement of the sophisticated user doctrine. *See* Jeffrey W. Kemp & Lindsy Nicole Alleman, *The Bulk Supplier, Sophisticated User, and Learned Intermediary Doctrines Since the Adoption of the Restatement (Third) of Torts*, 26 Rev. Litig. 927, 933, 947 (2007).

The Restatement, Third explained the obligation as a matter of reasonableness, which can depend on the purchaser or user. *See* Restatement, Third of Torts: Products Liability § 2 cmt. i. Under the sophisticated user doctrine, a duty to warn does not extend to purchasers or users who know or *should know* of a risk because it is reasonable for a manufacturer to rely on the sophisticated user to gain the expertise or knowledge of a product that a person in that position should have. *See, e.g., Hoffman v. Houghton Chem. Corp.*, 751 N.E.2d 848, 854 (Mass. 2001). By contrast, the open and obvious defense relieves the duty to warn against known or obvious product risks because it is reasonable for a manufacturer to rely on the product's openly dangerous nature. Accordingly, the two doctrines continue to avoid or prevent harm in complementary, yet distinct ways.

The Court should grant the writ to ensure that the sophisticated user doctrine the State Legislature enacted is given its full effect. The statute clearly assigns liability to

knowledgeable users, here PPG, who know or should know a product's non-obvious danger because they are in the best position to warn users such as Mr. Breaux who may not be aware of these risks. *See, e.g., In re TMJ Implants Prods. Liab. Litig.*, 872 F. Supp. 1019, 1029 (D. Minn. 1995), *aff'd*, 97 F.3d 1050 (8th Cir. 1996) ("[A] manufacturer should be allowed to rely upon certain knowledgeable individuals to whom it sells a product to convey to ultimate users warnings regarding any dangers associated with the product."). Commercial truck tire repair and maintenance requires expertise. Companies that make and sell commercial truck tires, as well as other parts, must be able to reasonably rely on entities that undertake these specialized activities to gain basic knowledge, properly train employees, purchase required safety equipment, and safeguard against injuries from known risks.

2. THE COURT OF APPEAL FAILED TO APPLY THE SOPHISTICATED USER DOCTRINE AS A DISTINCT, OBJECTIVE EXCEPTION TO THE DUTY TO WARN

More than thirty states, including neighboring Texas and Mississippi as well as nearby Alabama and Tennessee, have adopted the sophisticated user doctrine by statute or under the common law.[2] Jurisprudence in these other states is instructive to the case at bar. In addition to being distinct from the open and obvious risk doctrine, these states have affirmed that the sophisticated user doctrine is an objective standard based on what a manufacturer can expect a reasonable purchaser of the specialized equipment should know. Thus, it was error for the Court of Appeal to deny the defense because "[t]here was no testimony and/or evidence introduced at trial that would suggest that Mr. Breaux or other PPG employees were aware of zipper ruptures." *Breaux*, *supra*, at *6.

The development of Mississippi's sophisticated user doctrine, for example, is comparable to the doctrine's history here. Mississippi courts had recognized aspects of the doctrine prior to enactment in its Product Liability Act.[3] The statute includes much of the

[2] Notably, these other states maintain a separate and distinct open and obvious doctrine, which focuses on the product's characteristics. *See* Miss. Code Ann. §11-1-63(e); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995); *Ford Motor Co. v. Rodgers*, 337 So. 2d 736, 740 (Ala. 1976); Tenn. Code Ann. §29-28-105(d).

[3] *See Mississippi Valley Silica Co., Inc. v. Eastman*, 92 So. 3d 666, 671-73 (Miss. 2012) ("Mississippi recognizes both a statute and common-law sophisticated user defense"), and both trace the doctrine's origins to the Restatement, *see Swan v. I.P., Inc.*, 613 So. 2d 846, 855-56 (Miss. 1993) (discussing the doctrine and origins in § 388 of the Restatement).

same language as the LPLA and explains that courts are to "tak[e] into account the characteristics of, and the ordinary knowledge common to, *the persons who ordinarily use or consume the product*." Miss. Code Ann. § 11-1-63(e) (Rev.2004) (emphasis added); *Union Carbide Corp. v. Nix, Jr.*, 142 So.3d 374, 386 (Miss. 2014). This objective standard does not depend on a plaintiff's subjective knowledge. As other state courts have explained, it would be impossible for a manufacturer to determine which members of a sophisticated group have actual knowledge of the risks. *See Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 183 (Tex. 2004). Rather, courts are to assess the knowledge a "reasonable professional would apply in using the product." *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 430 (Tenn. 1994); *see also Koonce Quaker Safety Products & Mfg. Co.*, 798 F.2d 700, 719 (5th Cir. 1986) ("A manufacturer may rely on a product user's special expertise or knowledge."). Thus, here, the question is not what PPG or its employees knew or whether a parish government in general is a sophisticated user of commercial truck tires. Rather, the court's inquiry should have focused on whether entities that purchase truck tires, which include truck repair and maintenance entities such as the one PPG operated, are sophisticated users of truck tires. It is irrelevant whether PPG chose to ignore knowledge it should have when buying, maintaining, and repairing these tires.

This objective, reasonable purchaser standard makes sense. Manufacturers, including Goodyear in this case, must be able to develop uniform business practices with regard to warning about product risks. This is particularly true when manufacturers are selling specialized products to professionals "who should be aware of the characteristics of the product." *Strong v. E.I. Du Pont de Nemours Co., Inc.*, 667 F.2d 682, 687 (8th Cir. 1981) (manufacturer of natural gas pipes had no duty to warn a natural gas utility or its employee of well-known gas line risks); *see also Antcliff v. State Employees Credit Union*, 327 N.W.2d 814 (Mich. 1982) (scaffolding manufacturer had no duty to warn about safety procedures to professional painter). As the California Supreme Court has appreciated, under this objective standard "there will be some users who were actually unaware of the dangers." *Johnson v. Am. Standard, Inc.*, 179 P.3d 905, 914 (Cal. 2008). But, because "sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those

dangers is not the legal cause of any harm that product may cause." *Id*. at 911. "[T]hat fact should not give rise to liability on the part of the manufacturer." *Id*. at 914.

The U.S. Court of Appeals for the Eleventh Circuit explained how the sophisticated user doctrine applies to a case comparable to the one at bar. *See Reynolds v. Bridgestone/ Firestone, Inc.,* 989 F.2d 465 (11th Cir. 1993) (applying Alabama law). There, a tire manufacturer asserted the sophisticated user defense, stating it had no duty to warn the employee of a tire repair service of risks of repairing a tire with multi-piece truck rims. *Id.* at 471. As in this case, the mechanic was fatally injured when an explosion occurred while he was mounting the tire. *Id*. at 467. The court explained that the "purpose in placing a duty to warn on the manufacturer is to familiarize the user with dangers of which he may be unaware." *Id.* at 471. But, sophisticated users such as tire repair services are required to be aware of and train their employees of these dangers. *See also Cook v. Branick Mfg., Inc.*, 736 F.2d 1442 (11th Cir. 1984) (tire manufacturer had no duty to warn tire-fitting employees of tire risks because employer was a sophisticated user). Therefore, the tire manufacturer did not owe a duty to warn the mechanic, regardless of his or her individual expertise.

Here, as detailed in the Application, Goodyear, trade associations and government agencies all publish warning materials on zipper ruptures. It is reasonable for tire manufacturers to rely on tire repair and maintenance shops, including shops operated by the government, to be educated on those risks and take proper precautions. Manufacturers should not be made insurers against product risks when purchasers of the product should know of the dangers involved with those products.

3. FAILURE TO GRANT REVIEW WILL REWARD GOVERNMENTS THAT FAIL TO PROPERLY SAFEGUARD EMPLOYEES FROM KNOWN PRODUCT RISKS

Finally, the Court of Appeal also erred in exempting PPG and, presumably any government or large entity, from the sophisticated user doctrine. *See* Breaux, *supra*, at *6. The Court found the "PPG is a local government entity" and "its business is to service the citizens of Plaquemines Parish, not to repair and perform maintenance of tires." *Id.* Under this theory, any government or company that engages in an array of activities can be excused from the sophisticated user doctrine if the product at issue is not central to its mission,

threatening the safety of tradespeople. Governments often employ mechanics, electricians, medical personnel, and other tradespeople who perform specialized functions or service their facilities and operations. A governmental entity engaged in these activities is considered a sophisticated user and must take responsibility for training and warning its employees of product risks. It is not relevant what *else* that entity does.

As detailed in Applicant's writ of certiorari at pp. 3-4, PPG chose to act as its own truck tire repair and maintenance center. Thus, PPG must be held to the same industry standards as individual, private companies that engage solely in this business. It is not unusual to subject employers, including government agencies, to reasonable standards of care when engaging in market activities. As well established under constitutional law, when a government entity engages in a business endeavor, it steps outside its governmental role and is treated like any other market participant. *See South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). When a government receives the benefits of acting as a private company—as PPG does in acting as its own truck repair and maintenance facility—it should be subject to rules applicable to private companies unless the State Legislature explicitly exempts them from such laws. Otherwise, government employees would have fewer protections than private sector workers, and government agencies could undercut the private companies who might otherwise be contracted to provide the service. Here, PPG might decide it is more efficient to act as its own truck repair and maintenance facility, but doing so should not absolve them of responsibility for basic worker safety precautions.

The sophisticated user doctrine properly places the duty to warn workers of known product risks on the party best situated to ensure their safety: their employers. *See*, *e.g.*, *Singleton v. Manitowoc Co.*, 727 F. Supp. 217, 226 (D. Md. 1989) (holding the employer was in a better position to give warnings to the ultimate users of the product—its employees—based on product use). The product manufacturer has no control over how a user conducts its business operations. Thus, it would be prohibitively expensive, unduly burdensome and a practical impossibility to require manufacturers to warn each worker and continually monitor them to make sure they are handling a truck tire or other product properly. Further, making the manufacturer the insurer of its product removes the incentives that encourage

employers to protect the safety of their employees. *See* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38 (1983); *see also* Joel Slawotsky, *The Learned Intermediary Doctrine; The Employer as Intermediary*, 30 Tort & Ins. L. J. 1059, 1060 (1995). Put simply, employee welfare cannot be protected if their employers can shift their responsibilities to safeguard worker safety to those who have no control or input on their operations.

The employer can ensure workplace safety through training, supervision and the use of proper safety equipment. As the Mississippi Supreme Court observed, the "relationship between employer and employee probably provided the basis for the [sophisticated user] defense." *Mississippi Valley Silica Co., Inc. v. Eastman*, 92 So. 3d 666, 671 (Miss. 2012). "As a general rule, an employer has a duty to maintain a safe workplace for its employees, including maintenance of safe equipment and warning of any dangers present in the workplace." *Id.* In cases where manufacturers and employers are charged with having substantially equivalent knowledge of product risks and the employer controls how the product will be used and who will use it, the duty to warn is properly assigned to the employer. *See Vines v. Beloit Corp.*, 631 So. 2d 1003, 1005 (Ala. 1994) (refusing to impose duty on a manufacturer to warn a product user's employees of the risks with its machinery).

Courts in Louisiana and across the country have long held it is the employer's duty to train and warn its employees of product risks. *See Morgan v. Gaylor Contain Corp.*, 30 F.3d 586, 591 (5th Cir. 1994) (The employer is responsible for the product and employee safety, therefore the manufacturer had no duty to warn plaintiff.); *Davis v. Avondale Indus., Inc.*, 975 F.2d 169, 174 (5th Cir. 1992) ("the product manufacturer owes no duty to the employee of a purchaser"); *Fernandez v. Tamko Bldg. Prods.*, 2 F. Supp. 3d 854, 864 (M.D. La. 2014) ("manufacturers have no duty to warn an end-user of a product's dangers when the product is initially purchased by a sophisticated user that would have the duty to warn the end-user"); *Damond v. Avondale Indus.*, 98-1275, pp. 3-4 (La. App. 4 Cir. 8/19/98), 718 So. 2d 551, 553 (no duty to warn employee when employer "was a 'sophisticated user' who was presumed to know of the dangers in the use of the product"). When these duties are coupled

with practical considerations, an employer's duty to warn its employees of product dangers must be paramount, particularly under the sophisticated user doctrine.

The Court should grant the writ to enforce the sophisticated user doctrine in Louisiana as it was intended and clarify it applies to governments and private sector entities alike. Government agencies, like other employers, must be treated as sophisticated users and have the same incentive to provide employees with proper safety training and equipment.

CONCLUSION

For all of these reasons, the National Association of Manufacturers respectfully requests that this Court grant Applicant's writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing brief has been served upon the following via email, Federal Express, and/or by placing same in the United States mail, properly addressed and postage prepaid, this 18th day of June, 2021, as specified below:

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