IN THE SUPREME COURT OF OHIO

Edward Deditch, Petitioner, v. Lyft, Inc., Uber Technologies, Inc., Raiser, LLC, and Portier, LLC, Respondents.	:	Case No. 2025-0951 On Review of Certified Question of State Law from the United States District Court for the Northern District of Ohio, Eastern Division; No. 1:24-cv-01488-JPC

MERIT BRIEF OF *AMICI CURIAE* OHIO ASSOCIATION FOR JUSTICE AND AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals may have justice and wrongdoers are held accountable. The OAJ comprises approximately one-thousand five-hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and to promote public confidence in the legal system.

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including product liability claims. Throughout its 79-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

The OAJ and AAJ urge this Court to decline to answer the certified question or, in the alternative, to answer the certified question in the negative and declare that the Ohio Product Liability Act, R.C. 2307.71, *et seq.*, does not abrogate common-law claims that are not based upon the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a "product," as that term is defined by the Act. To hold otherwise, would leave the State of Ohio without a legal framework to regulate harms caused by digital software applications, resulting in Ohio citizens being arbitrarily denied redress without any evidence that was the legislature's intent.

INTRODUCTION

At the time the Ohio Product Liability Act ("OPLA" or "Act") was adopted in 1988 and last amended in 2007, digital software applications, as we know them today, either did not exist at all or were in their infancy. The Ohio General Assembly, thus, could not have contemplated, much less intended, the technology at issue in this case to fall within the framework of the OPLA. And that is reflected by the Act's definition of a "product," which is defined, in relevant part, to include "any object, substance, mixture, or raw material that constitutes tangible personal property. . . ." R.C. 2307.71(A)(13). As written, this definition clearly excludes intangible things, like digital software applications, and, as a result, so does the definition of a "product liability claim," which includes only claims that are based upon a "product." Yet, Respondent Lyft, Inc. ("Respondent" or "Lyft")[1] nonetheless seeks to contort the text of the OPLA to abrogate all common law claims involving digital software applications while, at the same time, urging that these same claims do not fall within the ambit of the OPLA for purposes of providing a potential remedy because digital software applications do not meet the definition of a "product." In other words, Respondent seeks to immunize itself (and all other providers of digital software applications) from any potential liability arising from its negligence in connection with its digital software applications.

But nothing in the text or legislative history of the OPLA demonstrates an intent by the General Assembly to effectively eliminate a remedy for all Ohio citizens harmed in connection with digital software applications. Since the latest amendment to the OPLA in 2007 (the same year the first modern smart phone was released), digital software applications—including the potential harms they may cause to Ohio citizens—have proliferated. It is thus imperative for Ohio law to

[1] While Petitioner asserts the exact same claims against Defendants Uber Technologies, Inc. ("Uber"), Raiser, LLC, and Portier, LLC, those Defendants did not move to dismiss Petitioner's claims on the grounds that they are abrogated by the OPLA.

provide a legal framework under which such potential harms may be redressed. And, because the OPLA excludes digital software applications from the definition of a "product liability claim," that framework is currently Ohio's common law. It is not the role of this Court to rewrite the OPLA to encompass a class of intangible items that the General Assembly did not intend to include within the framework of the Act. That role is reserved solely for the legislature.

To the extent this Court were to answer the certified question in the affirmative, however, the OPLA, as applied, would also run afoul of the due process clause of the Ohio Constitution. That is, the OPLA would abrogate common law claims for which it provides *no* potential remedy (and for which no alternative remedy may be available)—arbitrarily and unreasonably denying aggrieved citizens their constitutional rights to a remedy, access to open courts, and to a jury trial without *any* legitimate relation to the expressed purpose of the OPLA. Indeed, abrogating all common law claims based upon digital software applications, while providing no alternative common law or statutory legal framework solely because they are intangible, bears no reasonable relation to the improvement of Ohio's tort system nor provides *any* corresponding benefits to the general public that have been expressed by the legislature.

For these reasons and the reasons that follow, to the extent the Court accepts the certified question for review, it must answer it in the negative.

STATEMENT OF THE CASE AND FACTS[2]

Petitioner Edward Deditch ("Petitioner") alleges he suffered injuries as a result of a car accident caused by an individual employed by Lyft and/or Uber. Complaint, ECF No. 1-1 at ¶¶ 28-30, 38-40. Petitioner alleges that Lyft and Uber require and incentivize their drivers to use their

[2] *Amici* adopt and incorporate the statement of the case and facts offered in the Merit Brief of Petitioner, Edward Deditch, filed on September 22, 2025.

digital software applications while driving on public roadways in a manner that causes their drivers to become distracted. *Id.* at ¶¶ 25-27, 37-39. Despite having knowledge that their digital software applications cause driver distraction and inattention that leads to automobile accidents, Lyft and Uber failed to restrict the use of their digital software applications while driving and even had policies that punished their drivers for not using the applications in a manner that is unsafe while driving. *Id.* at ¶¶ 44-51, 55-58.

On September 6, 2024, Lyft filed a motion to dismiss Petitioner's Complaint, asserting that the OPLA abrogates Petitioner's claims even though they indisputably do not meet the definition of a "product" under the Act. Motion to Dismiss, ECF No. 9-1. On February 28, 2025, Petitioner filed his opposition to Lyft's motion to dismiss, asserting that Lyft's digital software application does not meet the definition of a "product" under the OPLA and, therefore, his claims do not meet the definition of a "product liability claim" for purposes of the OPLA's abrogation provision. Brief in Opposition, ECF No. 15. On July 14, 2025, Judge J. Philip Calabrese of the United States District Court for the Northern District of Ohio ("District Court") certified the following question to this Court:

> Does the Ohio Product Liability Act abrogate common-law claims alleging personal injuries from the use of a digital app, which is not a "product" within the meaning of the Act?

Certification Order, ECF No. 18 at 7.

ARGUMENT

This Court should decline to answer the certified question because it is governed by basic principles of statutory construction for which the Ohio Supreme Court has a robust body of jurisprudence to guide the District Court. To the extent this Court is nonetheless inclined to accept review, however, the Court should answer the certified question in the negative. Under the clear

and unambiguous text of the OPLA, "product liability claims" do not encompass claims that are not based upon the design, manufacture, or sale of a "product," as that term is defined by the Act. And, because the Petitioner's claim against Respondent does not constitute a "product liability claim," it is not abrogated by the Act. Further, since the text of the OPLA is clear and unambiguous, it is improper to resort to extraneous materials, like legislative history, in interpreting the Act. But even assuming for the sake of argument that the text of the OPLA is ambiguous (which it is not), the legislative history of the OPLA does not reveal any intent by the General Assembly for the OPLA to apply to claims that are based upon non-products, like digital software applications. Finally, if this Court were to answer the certified question in the affirmative, the OPLA would be unconstitutional, as applied to Petitioner, because applying the Act to abrogate common law claims for which the Act indisputably does not provide *any* potential remedy would arbitrarily and unreasonably deny aggrieved victims a remedy altogether without *any* relation to the expressed purpose of the OPLA in violation of the due process clause of the Ohio Constitution.

I. This Court Should Decline to Answer the Certified Question.

As a threshold matter, this Court should decline to answer the certified question because the plain language of the OPLA is unambiguous and its meaning is governed by well-established principles of basic statutory interpretation. This Court should answer questions of state law certified by a federal court only if "there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." S. Ct. Prac. R. 9.01(A). The Supreme Court of Ohio, however, has a well-developed body of jurisprudence concerning principles of basic statutory interpretation that the District Court can apply to resolve the dispute between the parties to this case. *See D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 254 (2002) ("As in all cases involving statutory

interpretation, we are guided by several well-established rules."). There is, therefore, no need for this Court to intervene to answer the certified question.

Indeed, in its Certification Order, the District Court properly began its analysis with the text of the OPLA. *See* Certification Order, ECF No. 18 at 3-4. The District Court correctly found that the OPLA ties abrogation of common law claims to the defined term "product liability claim," which, in turn, is predicated upon allegations involving a "product." *Id.* The District Court concluded that "the text of the statute does not appear to abrogate a common-law negligence claim based on a design defect theory for something that is not a 'product' within the meaning of the Act." *Id.* at 4. That should have been the end of the analysis under Ohio's well-established rules of statutory interpretation. *See Stewart v. Vivian*, 151 Ohio St.3d 574, 579 (2017) ("When the statutory language is plain and unambiguous, and conveys a clear and definite meaning, we *must* rely on what the General Assembly has said."), quoting *Jones v. Action Coupling & Equip., Inc.*, 98 Ohio St. 3d 330, 332 (2003) (emphasis added). Accordingly, because there is ample controlling precedent in the decisions of this Court, the requirements of Rule 9.01 of the Ohio Supreme Court Rules of Practice are not satisfied and this Court should, therefore, decline to answer the certified question.

II. <u>Proposition Of Law</u>: The OPLA Does Not Abrogate Common Law Claims That Are Not Based Upon the Design, Manufacture, Supply, Marketing, Distribution, Promotion, Advertising, Labeling, or Sale of a "Product."

A. The plain language of the OPLA is unambiguous that a "product liability claim" must be based upon the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a "product."

This Court must apply the plain text of the OPLA, as written, because the text of the statute is clear and unambiguous. The intent of the General Assembly "is primarily determined from the language of the statute itself." *Stewart v. Trumbull Cty. Bd. of Elections*, 34 Ohio St.2d 129, 130

(1973). And when, like here, "a statute's language is unambiguous, there is no interpretation required: the court *must* simply apply the statute as written." *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Schools*, 163 Ohio St.3d 314, 317 (2020) (emphasis added). Ambiguity exists only if the language of a statute is susceptible to more than one reasonable interpretation, and the facts and circumstances of a case do not permit a court to read ambiguity into a statute. *Dunbar v. State*, 136 Ohio St.3d 181, 186 (2013). Indeed, the Supreme Court of Ohio "will not insert language to modify an unambiguous statute under the guise of statutory interpretation." *Id.* Here, the plain text and structure of the Act evidences an intent to abrogate only product-based claims and a digital software application is indisputably not a "product," as that term is defined by the Act.

The OPLA defines a "product," in relevant part, as "any object, substance, mixture, or raw material that constitutes tangible personal property. . . ." R.C. 2307.71. A "product liability claim" is, in turn, defined as "a claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the *product in question*, that allegedly arose from any of the following:

(a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing *of that product*;

(b) Any warning or instruction, or lack or warning or instruction, associated *with that product*;

(c) Any failure *of that product* to conform to any relevant representation or warranty.

R.C. 2307.71(A)(13) (emphasis added). The definition of "product liability claim" also includes "any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale *of a product* unreasonably interferes with a right common to the general public." *Id.* (emphasis added). And the OPLA provides that the Act intended to abrogate only "common law product liability claims or causes of action." R.C. 2307.71(B).

Under the plain language of the Act, *every* aspect of the term "product liability claim" is expressly tied to allegations concerning a "product." First, the definition of "product liability claim" expressly requires a "product in question." R.C. 2307.71(A)(13). Second, each available theory under the Act involves a "product." *See* R.C. 2307.71(A)(13)(a) (defective design "of that product"); R.C. 2307.71(A)(13)(b) (failure to warn "associated with that product"); R.C. 2307.71(A)(13)(c) (failure "of that product" to conform to a representation). Third, a public nuisance claim is a "product liability claim" when "a product" unreasonably interferes with a right common to the general public. R.C. 2307.71(A)(13). And, while this Court has recently held that allegations of a "product defect" are not required to satisfy the definition of a "product liability claim," it has concluded that the plain text of the OPLA requires the claim to be "product-based":

> What's more, the OPLA's limitation on product-liability theories to those involving a defect by no means demands the conclusion that the definition of "product liability claim" is equally limited. Another possibility is that "product liability claim" is defined broadly enough to eliminate all ***product-based*** common-law claims while the rest of the OPLA is narrowly tailored to resurrect only some of the common-law theories into statutory form. Such an understanding of the OPLA is consistent with the plain text of R.C. 2307.71.

In re Natl. Prescription Opiate Litig., 2024-Ohio-5744, ¶ 26 (emphasis added).

To read the OPLA's abrogation provision to encompass claims involving non-products, like digital software applications, would require this Court to ignore the express language of the

term "product liability claim," which is plainly tied to allegations involving a "product." Such a construction would violate the well-established rule against surplusage, which precludes an interpretation that renders a portion of a statute meaningless or superfluous. *See State ex rel. Parikh v. Berkowitz*, 2024-Ohio-4686, at ¶ 49 (1st Dist.) ("The rule against surplusage is a well-established rule of statutory interpretation that precludes an interpretation that renders a portion of a statute meaningless."), citing *State ex rel. McQueen v. Cuyahoga Cty. Court of Common Pleas*, 135 Ohio St.3d 291, 296 (2013); *State v. Wilson* (1997), 77 Ohio St.3d 334, 336 ("It is a basic tenet of statutory construction that 'the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose.'"), quoting *State ex rel. Cleveland Elec. Illum. Co. v. Euclid*, 169 Ohio St. 476, 479 (1959).

Further, the definition of a "product liability claim" defines such a claim as one that is asserted in a civil action "pursuant to sections 2307.71 to 2307.80 of the Revised Code. . . ." R.C. 2307.71(A)(13)). But claims involving non-products cannot, as a matter of law, form the basis of a claim "pursuant to sections 2307.71 to 2307.80 of the Revised Code." In analyzing the broader structure of the OPLA, there is no language in the statute that evidences an intent for the OPLA to apply, under any circumstances, to claims that do not meet the definition of a "product liability claim," which, again, requires the claim to be based upon a "product." *See* R.C. 2307.711 (providing for assumption of the risk as an affirmative defense to product liability claim); R.C. 2307.72 (providing recovery of damages, other than economic damages, "based on" and "in connection with" a "product liability claim" are subject to the Act); R.C. 2307.73 (requiring claimant to establish that: (1) "product in question" was defective; (2) defective aspect of the "product in question" was a proximate cause of harm; and (3) the manufacturer designed,

formulated, produced, constructed, created, assembled, or rebuilt the "actual product" that was the cause of harm); R.C. 2307.74 (explaining when a "product" is defective in manufacture or construction); R.C. 2307.75 (explaining when a "product" is defective in design or formulation); R.C. 2307.76 (explaining when a "product" is defective due to inadequate warning or instruction); R.C. 2307.77 (explaining when a "product" fails to conform to representations); R.C. 2307.78 (explaining when a "supplier of a product" is subject to liability for compensatory damages based on a product liability claim); R.C. 2307.79 (explaining the types of damages a claimant is entitled to recover from a manufacturer and supplier due to the "product in question"); R.C. 2307.80 (providing for punitive damages when the manufacturer's or supplier's conduct manifested a flagrant disregard of the safety of persons who might be harmed "by the product in question").

In sum, the plain text and structure of the statute evidences an intent to abrogate only product-based claims. *See In re Natl. Prescription Opiate Litig.*, 2024-Ohio-5744, at ¶ 26. And the General Assembly will not be presumed to have intended to abrogate the common law unless the language used in the statute clearly shows that intent. *State ex rel. Morris v. Sullivan*, 81 Ohio St. 79, 96 (1909). Thus, in the absence of statutory language clearly demonstrating the legislature's intent to supersede the common law with respect to non-products, like digital software applications, the existing common law is not affected by the statute, but continues in full force. *Id.* In other words, "[t]here is no repeal of the common law by mere implication." *Frantz v. Maher*, 106 Ohio App. 465, 472 (1957). Accordingly, the OPLA does not abrogate common law claims that are not based upon the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a "product" because the legislature has expressed no such intention in the statutory language itself. The District Court correctly found as much, *see* Certification Order, ECF No. 18 at 4, and, because the text of the Act is unambiguous, that is the end of the inquiry.

See In re Natl. Prescription Opiate Litig., 2024-Ohio-5744, ¶ 32 ("But even for those who believe that resorting to legislative history is sometimes appropriate, 'if the text of a statute is unambiguous, it should be applied by its terms without recourse to policy arguments, legislative history, or any other matter extraneous to the text.'"), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, at 436 (2012).

B. The Ohio General Assembly did not intend for the OPLA to abrogate common law claims that are not based upon the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a "product."

Even if this Court were to find that the plain language of the OPLA is susceptible to more than one reasonable interpretation (which it is not), there is no extra-statutory evidence that the legislature intended to abrogate common law claims that do not arise out of or relate to the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a "product." Only when a statute is unclear and ambiguous, may the court interpret it to determine the legislature's intent. *In re Natl. Prescription Opiate Litig.*, 2024-Ohio-5744, at ¶ 32 (finding legislative history is "irrelevant" when the statute is unambiguous). "In determining legislative intent when faced with an ambiguous statute, the court may consider several factors, including the object sought to be obtained, circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction." *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40 (2001), citing R.C. 1.49.

The OPLA was enacted in 1988 and was primarily intended to codify and streamline the preexisting common law of products liability, while excluding inconsistent common law theories. *See* Stephen J. Werber, *An Overview of Ohio Product Liability Law*, 43 Clev.St.L.Rev. 379, 381-382 (1995); *Long v. Tokai Bank of California*, 114 Ohio App.3d 116, 123 (2d Dist. 1996); *see also* Am.Sub.S.B. No. 330, 141 Ohio Laws, Part III, 6389, 6413 ("The provisions of sections 2307.71

to 2307.79 of the Revised Code shall be construed to state the common law of this state as of the effective date of this section, unless any provision in any of those sections clearly indicates that a change in that common law is intended."). While it was the legislature's intent to create an exclusive statutory basis for all tort-based product liability claims, (*id.*), at the time of its enactment, the OPLA did not explicitly state that it was intended to supersede all common law theories of product liability. Consequently, in *Carrel v. Allied Prods. Corp.*, this Court concluded that the OPLA did not expressly eliminate common law causes of action sounding in negligence—such as negligent design. *See Carrel v. Allied Prods. Corp.*, 78 Ohio St.3d 284 (1997); *see also In re Natl. Prescription Opiate Litig.*, 2024-Ohio-5744, at ¶ 11. Following *Carrel*'s limitation of the OPLA's abrogating effect on common law product liability claims, this Court "expanded opportunities for product-based lawsuits at common law." *In re Natl. Prescription Opiate Litig.*, 2024-Ohio-5744, at ¶ 12. For example, in *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416 (2002), this Court endorsed "an unorthodox use of the tort of public nuisance," holding that a public nuisance suit could proceed based upon the manufacture, marketing, distribution, and sale of firearms. *See In re Natl. Prescription Opiate Litig.*, 2024-Ohio-5744, at ¶ 12.

Several years later, the General Assembly enacted amendments to the OPLA in an apparent response to *Carrel* and *Beretta*. *Id.* at ¶ 13. In 2005, an amendment added language to the definition of "product liability claim" to specify that such a claim is "asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code." R.C. 2307.71(A)(13); *see also* Am.Sub.S.B. No. 80, 150 Ohio Laws, 7915, 7954. It also added a new subsection, stating "Section 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability causes of action." Former R.C. 2307.71(B), Am.Sub.S.B. No. 80, 150 Ohio Laws, 7915, 7955.

The next year, in 2006, the General Assembly enacted a further amendment to the definition of "product liability claim," creating the version of R.C. 2307.71 that remains in effect today. Specifically, in response to *Beretta* and its progeny, a new paragraph was added addressing public nuisance claims, defining "product liability claim" to include public nuisance claims alleging the "design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public." Am.Sub.S.B. No. 117, 151 Ohio Laws, Part II, 2274, 2279. In doing so, the General Assembly stated that:

> The General Assembly declares its intent that the amendments made by this act to sections 2307.71 and 2307.73 of the Revised Code are not intended to be substantive but are intended to clarify the General Assembly's original intent in enacting the Ohio Product Liability Act, sections 2307.71 to 2307.80 of the Revised Code, as initially expressed in Section 3 of Am. Sub. S.B. 80 of the 125th General Assembly, to abrogate all common law product liability causes of action including common law public nuisance causes of action, regardless of how the claim is described, styled, captioned, characterized, or designated, including claims against a manufacturer or supplier for a public nuisance allegedly caused by a manufacturer's or supplier's ***product.***

Am.Sub.S.B. No. 117, Section 3, 151 Ohio Laws, Part II, 2274, 2291 (emphasis added).

This legislative history strongly implies that, in enacting the OPLA, the General Assembly intended to codify preexisting common law with respect to product liability and create an exclusive statutory framework for all ***product-based*** common law claims, regardless of how they are pled. In contrast, nothing in the legislative history of the OPLA expresses *any* intent to abrogate common law claims that neither arise out of nor relate to a "product," like claims involving digital software applications that were not in existence at the time the OPLA was last amended. Coupled with the OPLA's clear statutory language that defines a "product liability claim" as a claim that is connected to a "product," there is simply no reasonable basis to conclude that the legislature intended the OPLA to abrogate common law claims that do not involve a "product."

It is anticipated that Respondent will assert that the definition of a "product" at common law encompassed intangible things, like digital software applications, and, therefore, the legislature intended for such non-products to be included within the framework of the Act. However, not only is the common law definition of a "product" irrelevant because it has been expressly superseded by the definition contained in the OPLA, but Ohio common law followed the principles of strict liability under Section 402A of the Restatement of Torts, which traditionally applied only to physical goods placed in the stream of commerce. *See Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 322(1977). And, because the OPLA's definition of a "product" is clear and unambiguous, this Court must interpret the statute consistently with the written text in a manner that avoids injustice because an unjust result cannot be presumed to be the legislature's intent, absent clear evidence to the contrary. *See Moore v. Given*, 39 Ohio St. 661, 663 (1884). Therefore, without a clear manifestation of intent, it is beyond this Court's authority to regulate claims involving digital software applications that plainly do not meet the definition of a "product liability claim" under the OPLA. *See In re Natl. Prescription Opiate Litig.*, 2024-Ohio-5744, at ¶ 34.

C. The OPLA is unconstitutional, as applied to parties harmed by digital software applications.

If this Court were to answer the certified question in the affirmative, the OPLA would be unconstitutional, as applied to Petitioner, because it would run afoul of the Ohio Constitution's due process clause. In an "as applied" challenge, the party challenging the constitutionality of a statute contends that the "application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106,

109 (2004), quoting *Ada v. Guam Soc. of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting)).

The Ohio Constitution guarantees that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have a remedy by due course of law, and shall have justice administered without denial or delay." Ohio Const., art. I, § 16. Section 16 contains several distinct guarantees, including a right to a remedy, access to open courts, and due process. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 287 (2010). While causes of action as they existed at common law or the rules that govern such causes are not immune from legislative action, *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 49 (1987), legislative enactments may restrict individuals' rights only "by due course of law," a guarantee that is equivalent to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 210 (2008).

A legislative enactment will thus be deemed valid on due process grounds only if it: (1) bears a real and substantial relation to the public health, safety, morals, or general welfare of the public; and (2) if it is not unreasonably arbitrary.[3] *Benjamin v. City of Columbus*, 167 Ohio St. 103, 110 (1957); *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 59 (1987); *Burgess v. Eli Lilly & Co.*, 66 Ohio St.3d 59, 63 (1993). As this Court once explained:

> It must be remembered that neither the state in the passage of general laws, nor the municipality in the passage of local laws, may make any regulations which are unreasonable. The means adopted must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation.

[3] When, like here, a statute restricts the exercise of fundamental rights, including the right to a remedy, access to open courts, and the right to a jury trial, strict scrutiny applies when reviewing a statute on due-process grounds. *Arbino*, 116 Ohio St.3d at 478. Even if the Court were to apply a rational-basis test, however, the Act, as applied, still violates the due process clause.

Froelich v. Cleveland, 99 Ohio St. 376, 391 (1919); *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115 (2001).

And due process of law applies not just to the manner in which a claim is litigated, but also to the remedy that is available:

> [I]t is not competent for the legislature to give one class of citizens legal exemption for wrongs not granted to others; and it is not competent to authorize a person, natural or artificial, to do wrong to others without answering *fully* for the wrong.

Byers v. Meridian Printing Co., 84 Ohio St. 408, 423 (1911), quoting *Park v. The Detroit Free Press Co.*, 72 Mich. 560 (1888) (emphasis in original). Here, as applied to Petitioner, the OPLA would violate the due process clause of the Ohio Constitution because it would permit providers of digital software applications to commit harms to Ohio citizens without redress, even though the elimination of a remedy for such harms does not bear a real and substantial relation to the purpose of the OPLA and would, therefore, be unreasonably arbitrary.

As discussed above, the General Assembly neither contemplated nor intended for the OPLA to apply to non-product-based common law claims, like those based upon harms caused by intangible digital software applications. *See supra* Sections II.A-B. Indeed, at the time of the OPLA's latest amendment in 2007 (authored in 2006), modern day digital software applications, like those at issue in this case, did not even exist.[4] Eliminating a remedy for harms caused by digital software applications could, thus, not have been the legislature's intent. And the General Assembly's goal of streamlining Ohio product liability law by providing a statutory framework to govern product-based claims is not furthered by effectively eliminating any remedy for claims

[4] The first smart phone device to include modern digital software applications, like those at issue in this case, was the iPhone, which was first released in 2007. *See* Digital Trends, *Every iPhone release in chronological order: 2007-2025* (Sept. 9, 2025), https://www.digitaltrends.com/phones/every-iphone-release-in-chronological-order/ (accessed Sept. 10, 2025). The first Android smart phone was not released until 2008. *See* CNET, A Brief History of Android Phones (Aug. 2, 2011), https://www.cnet.com/tech/mobile/a-brief-history-of-android-phones/ (accessed Sept. 9, 2025).

based upon harms caused by intangible things or services, like digital software applications, that do not meet the General Assembly's definition of a "product." Without *any* legitimate basis or purpose for denying aggrieved citizens harmed by digital software applications a remedy, open access to the courts, and a right to a jury trial, the OPLA, as applied, is also unreasonably arbitrary. Application of the OPLA to abrogate non-product-based common law claims, therefore, cannot survive constitutional scrutiny.

CONCLUSION

For all of the foregoing reasons, this Court should decline to answer the certified question or, in the alternative, answer the certified question in the negative and declare that the Ohio Product Liability Act, R.C. 2307.72, *et. seq.*, does not abrogate common law claims that are not based upon the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a "product," as that term is defined by the Act.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via electronic mail and was filed electronically using the Court's electronic filing system, which will also send notification of such filing to all counsel of record on this 22nd day of September, 2025.

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