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In the
Supreme Court of Ohio

PAUL RISNER, Co-Admr., et al., Plaintiffs-Appellees, v. OHIO DEPARTMENT OF TRANSPORTATION, Defendant-Appellant.	:	Case No. 2014-0862 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 12AP-828

REPLY BRIEF OF DEFENDANT-APPELLANT OHIO DEPARTMENT OF TRANSPORTATION

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REPLY

Governance is not insurance. But Risner's brief and the supporting amicus propose rules that would turn Ohio (or at least its Department of Transportation) into an insurer for all practical purposes. The only exception under the proposed rules is for ODOT not to act. But ODOT is committed to the safety of the roadways and will continue to fulfill that mission. Its choices about how to make the roads safer should flow from engineering and executive expertise, not judge-made tort law. Preserving ODOT's discretion here requires reversing the Tenth District.

Every point in Risner's brief and the supporting amicus is rebutted by noting that the briefs pose a single, but unanswered, question and observing that the answer Risner and the amicus propose would subject Ohio to perhaps the most expansive tort duty in the country. The unanswered question is: What counts as the "road around" an improvement (or whether "safety issues" are "rectif[ied]" by an improvement)? *See* Amicus Br. at 2; Risner Br. at 10. Does that include a guardrail when an intersection is added; does it include the traffic light when a road is regraded; does it mean new traffic-control patterns on a road when a bridge is reconstructed over it? Risner and the amicus do not say. But the answer makes all the difference. If the scope of this proposed duty means that replacing a sign also means replacing the support post to which it is attached, it is no different from what ODOT has said by describing its duty on road projects in terms of the work actually done. If, on the other hand, the "road around" standard means *relocating* a roadway when ODOT installs a sign, then it expands tort liability beyond anything that ODOT is aware of anywhere in the country. The rule Risner and the amicus propose makes the State an insurer, not a sovereign.

In the opening brief, ODOT explained that Ohio law contains a discretionary-function doctrine for certain state actions (at 8-13), canvassed the reasons for that immunity (at 13-16), and demonstrated why roadway-improvement decisions, including the decisions made about the

intersection here, are discretionary policy choices (at 17-23) for which the government enjoys immunity. ODOT also elaborated the proper test for this immunity: Does the suit seek to hold the State liable for a decision that requires a policy choice (at 17)? Next, ODOT pointed out that it would not be liable for this accident even without the discretionary-function doctrine, and illustrated why through several analogies (at 23-26). Finally, ODOT explained why the Tenth District's approach to the liability question is flawed (at 27-32). Risner and the amicus gloss over or ignore most of these points. And the responses they do make simply highlight the error in the Tenth District's judgment.

Risner and the amicus respond with their own (flawed) rule, and several minor points. Start with the big-picture point. They propose a test of breathtaking liability for ODOT action that lacks grounding in any principle of State liability or any caselaw of which the State is aware. The minor points are criticisms of ODOT's rule that offer no affirmative theory about the proper rule of law for this case. We address these issues in turn.

A. The rules Risner and the amicus propose have no limiting principle and invite maximum judicial interference with ODOT decision-making

Risner and the amicus propose a rule of ODOT liability that is both unprecedented and unlimited. Risner and the amicus would make ODOT responsible either for upgrading the "road around" a given project or for ensuring that "safety issues" are "rectif[ied]" (all determined by the judiciary). *See* Amicus Br. at 2; Risner Br. at 10. Both standards apply no matter how minimal the ODOT project or how maximal the hypothetical additional work. The proposed rules invite maximum judicial involvement in ODOT projects while offering minimal guidance to ODOT about how it should change the scope of a project beyond what it would have otherwise done. This case illustrates the breadth: Either standard means that installing a sign

triggers a duty to redesign, reconstruct, or even move an intersection. Consider each formulation.

Risner's rule imposes liability unless a given improvement corrects safety issues on an undefined section of roadway. Risner's rule is flawed for two distinct reasons.

First, the Risner rule avoids the only question that matters to this appeal—does the scope of ODOT's tort duty encompass potential roadway improvements beyond the project ODOT undertakes? A rule that asks whether an improvement "rectif[ied]" a safety issue does not provide guidance about whether the improvement itself is defined as the work actually performed, or reaches out to all *possible* work that could have been performed. The difference is no quibble. Asking whether a new guardrail will rectify a safety issue is not the same as asking whether adding a guardrail *and* erecting a warning sign *and* reconstructing the embankment *and* rerouting a nearby road will rectify the perceived problem. The gulf between these possibilities is wide. In this case, Risner seeks a rule that would require ODOT to *move a road* or *close an intersection* because it put up warnings at that intersection. Worse, the Risner rule would let courts expand the scope of ODOT projects such that the work triggered other obligations, such as environmental-impact statements. The Risner rule puts courts in the position of (even unknowingly) expanding projects exponentially, not just linearly. The opportunities for second guessing are infinite.

Second, Risner's rule eliminates the discretionary-function doctrine by measuring liability with an ever-fluctuating yardstick that asks whether a roadway improvement reduced "safety issues." Br. at 10. If the State's liability turns on whether its actions actually eliminate accidents, it has no discretion to make policy choices if those choices turn out to be wrong. That is the exact opposite of the discretionary-function doctrine. *See, e.g.*, *Dunlap v. W.L. Logan*

Trucking Co., 161 Ohio App. 3d 51, 2005-Ohio-2386 ¶ 42 (10th Dist.) (French, J.) (immunity applies even when a court "cannot say with certainty whether any additional or alternate safety devices would have prevented the accident"); *Dalehite v. United States*, 346 U.S. 15, 32 (1953) (Federal Tort Claims Act "protect[s] the Government from claims, *however negligently caused*, that affected the governmental functions") (emphasis added); *Fed. Sav. & Loan Ins. Corp. v. Williams*, 599 F. Supp. 1184, 1197 (D. Md. 1984) (discretionary immunity "insulates the government from liability, in tort, for errors made in its administrative, regulatory, or quasi-legislative (rulemaking) capacity"); *cf.* R.C. 2307.75 (in products cases, evaluation of risk and design does not weigh actual accident reduction, but weighs likelihood of harm versus feasibility of alternatives). Ultimately, no improvement—no matter how imaginative—would "rectify" all dangers. Risner Br. at 10. To insist otherwise makes the State a guarantor, not a sovereign.

Risner confirms the expansiveness of his view when he restates (at 12) the rule with a slight twist, noting that the improvements ODOT made to this intersection did not "ensure the intersection complied with" sight-distance standards. That shows that Risner's rule requires that any change to a roadway also requires that all elements of the roadway must be upgraded to current standards. The further restatements of this point that "reasonable minds" could conclude that ODOT's actions did not make the road safe enough (Br. at 12) or that the improvements did not "address" a safety issue (*id.* at 13) are simply other ways of inviting judicial review of ODOT's policy choices to improve the safety of this intersection in one way instead of another. At bottom, Risner asks the Court to impose a duty to make every possible improvement to a roadway when any minor improvement is made to that roadway. It is hard to imagine a rule that would insert judges (and litigants) *more* into executive choices about roadway policy. And that says everything that needs said about why the proposed rule is wrong.

For its part, the amicus suggestion (at 1, 13, 14, 15, 16, 17) that ODOT must improve the "road around" any other improvement is equally standardless. Does the road around include the shoulder when the improvement is to the surface? Does it include the road when the improvement is to the median? Does it encompass signage when the improvement is to the road or the shoulder; if so, how far away must the signs be upgraded? Does it include an intersecting road; if so, how near to the actual improvement? Does it expand a project's scope to trigger a new focal point for yet another "road around" inquiry (and where does that stop)? Does it—as these facts ask—include rerouting a road when the improvement is adding a sign and a light? The questions provide the answer: the "road around" rule is too malleable, ductile, and plastic. If that is the standard, it raises the exact laundry list of problems that ODOT detailed in its brief regarding the Tenth District's current divide between improvements and maintenance. It leaves ODOT without guidance about what it must do on a roadway project to satisfy this duty (ODOT Br. at 27-28). It invites litigation after any roadway accident because the rule has no inherent limit (ODOT Br. at 30-31). And it invites—practically *mandates*—judicial review of the policy choice about how to make a stretch of roadway safer (ODOT Br. at 31).

The amicus offers two purported limits—ODOT retains discretion to do nothing to improve the safety of a roadway, and ODOT's duty is set by engineering manuals that it authors. Those are phantom limits. As to the first, ODOT would never deliberately avoid safety improvements to Ohio's roadways. Any rule that points in that direction should be rejected. It is no answer to ODOT's concerns about safety (ODOT Br. at 1, 20, 22) to suggest that it can avoid judicial interference by *abandoning* all efforts at improving safety. The amicus rule would *require* waiting to install a safety-improving sign until a broader project could be approved and commenced. As to the second, the "road around" rule entirely swallows the limits of the

manuals. This case illustrates. Nothing in any ODOT manual requires the kinds of intersection reconstruction the amicus rule would mandate as part of the improvements accomplished by adding the sign and flashing light. The amicus rule—while claiming a limit in the ODOT manuals—actually imposes duties found nowhere in them. That is a problem with the rule and the Tenth District's holding.

Not surprisingly, Risner and the amicus cannot muster a single case that adopts their proposed rules. Most telling, the Tenth District lineage that they defend (*see, e.g.*, Risner Br. at 5-8; Amicus Br. at 18-21 (cataloguing Tenth District cases)) *rejects* these rules. The Tenth District has recognized ODOT's authority to choose some traffic-control options over others, even if the option not chosen might have reduced accidents. In one case, the Tenth District concluded that "ODOT [was] immune from liability arising from its discretionary decision to use [one traffic-control device] . . . instead of any other device." *Dunlap*, 2005-Ohio-2386 ¶ 24. That choice enjoyed immunity even though the "other option" might "have prevented the accident." *Id*. ¶ 22 (quotation marks omitted). In an earlier case, the Tenth District refused to "impose liability" on ODOT for "exercising its discretion to select one available reasonable [traffic control] option over another," even if a choice of other options might have "prevented the accident." *Pottenger v. Ohio Dep't of Transp*., No. 88AP-832, 1989 WL 147998, at *4 (10th Dist. Dec. 7, 1989). *Pottenger* offers a striking example because ODOT there chose "advance intersection signs[,] . . . pavement markings[,] and . . . lights" to "identify the intersection" while *bypassing* other options such as to "(1) reconstruct the hill so as to remove the crest; (2) install a four-way stop; (3) relocate the intersection so that it is not on the crest of the hill; (4) prohibit left-hand turns . . . for northbound drivers; (5) reduce the speed . . . [of traffic]; (6) install a limited sight distance sign; or (7) install a flasher unit." *Id.* at *5, 3. ODOT's choices about *how*

to make a roadway safer are quintessential policy decisions grounded in engineering and resource considerations. Those choices trigger no tort duty. Those decisions are immune from judicial review.

Switching from offense to defense, Risner and the amicus criticize ODOT's rule as lacking an "anchor[]." *See* Amicus Br. at 15. The anchor—really more of a dock—is that ODOT's duty to meet current standards is defined by the scope of the project. A sign must meet current standards. A new intersection as well. But installing a sign does not mean reconstructing an intersection. The proposed "road around" standard is comparatively adrift. It cannot answer, other than through case-by-case judicial review of ODOT's policy choices about the scope of a project, whether ODOT did enough to upgrade the road around (near? adjacent? close by? under? over?) its chosen project. Instead the proper rule is the one that ODOT elaborated in its opening brief. The rule recognizes that ODOT defines the scope of a roadway improvement and then evaluates whether ODOT carried out that project in accordance with its own manuals. But the rule does not invite courts to challenge the scope of the project. *See, e.g.*, *Pottenger*, 1989 WL 147998 at *5 (no liability where all safety devices "were apparently located in accordance with the manual"). Only that rule respects ODOT's discretion, respects separation of powers, and respects the constitutional limits on court intervention in executive functions.

B. Immunity and scope-of-duty are the same in this context

Risner and the amicus mostly dodge a discussion about the discretionary-function doctrine with the argument that ODOT has conflated immunity and duty. *See* Amicus Br. at 6-7. That is a distinction with no difference in this case. If the State's actions involve discretionary functions, the State has no duty to the injured plaintiff. Said another way, the State is immune from liability. To be sure, in some contexts, immunity and duty address different questions because immunity voids liability for negligent acts, *see, e.g.*, R.C. 9.86 (public employee

immune unless acting at least "reckless[ly]"); *Griffith v. Kemba Fin. Credit Union, Inc.*, 567 Fed. App'x 339, 342 (6th Cir. 2014) (Kethledge, J.) (negligence "insufficient to defeat" qualified immunity), but in this context they address the same question. Because the State's waiver of immunity turns on analogous duties of private parties, it makes sense to say that discretionary-function immunity is a rule of no duty. It is a rule about the scope of the State's duty.

Abundant authority recognizes that immunity and scope of duty address the same question. *See, e.g.*, *Pauley v. Circleville*, 137 Ohio St. 3d 212, 2013-Ohio-4541 ¶¶ 20-21 (describing "recreational-user *immunity* statutes" as creating a rule of "no duty") (emphasis added); *LiCause v. City of Canton*, 42 Ohio St. 3d 109, 113 (1989) (statutory immunity meant that city "owe[d] no duty" to plaintiff); *In re Harris*, 170 Ohio St. 151, 157 (1959) (describing cases in the "negligence field" as holding that a defendant is "immune from liability" where it "is under no duty to act"); *Treese v. City of Delaware*, No. 96API05-681, 1997 WL 52920, at *3 (10th Dist. Feb. 6, 1997) ("Since an upgrade of the guardrail involves a planning decision entitled to immunity, ODOT had no duty to upgrade the guardrail."); *Gregory v. Ohio Dep't of Transp.*, 107 Ohio App. 3d 30, 33-34 (10th Dist. 1995) ("The issue of whether an act constitutes a mandatory *duty* or a *discretionary* act determines the scope of the state's liability because ODOT is *immune* from liability for damages resulting from not performing a discretionary act.") (emphasis added); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811 (1984) (describing earlier precedent as holding that, because "allegedly negligent acts were governmental duties," they were "protected by the discretionary function exception [i.e., immune]"); *Ugrin v. Town of Cheshire*, 54 A.3d 532, 550 n.7 (Conn. 2012) ("if the town was entitled to municipal immunity, it would owe no duty of care to the plaintiffs"); 1 D. Dobbs, The Law of Torts § 225, at 577 (2001) ("The similarities between no-

duty rules and immunity rules are so great that the two terms can often be used interchangeably . . . .”). The Vermont Supreme Court has perhaps said it best: “[N]o-duty rules and immunity rules are often two sides of the same coin.” *Kane v. Lamothe*, 936 A.2d 1303, 1307 n.3 (Vt. 2007). When ODOT speaks of discretionary immunity in this case, it is discussing the scope of its duty. In the end, Risner and the amicus devote pages to this distinction that makes no difference in this case. And they do so without explaining why it should matter and at the expense of ever rebutting the statutory, constitutional, and caselaw foundations of the discretionary-function doctrine and why the doctrine requires reversal here.

C. Risner’s remaining arguments do not support affirming the Tenth District’s judgment

Risner raises two additional points, but neither supports the judgment below.

Risner first turns (at 9) to Tenth District cases as evidence that ODOT has a duty of care measured by its own design standards when it redesigns or reconstructs a roadway. That is true, but irrelevant. ODOT *agrees* that reconstruction projects must be conducted in line with ODOT’s current standards for whatever the project involves (*see* ODOT Br. at 7, 28). Bridge reconstruction must follow current bridge guidelines; new guardrail installations must meet current design standards. The question in this case is whether the duty to upgrade a roadway to current standards extends *beyond* the discrete project to *other* elements of the roadway *not* involved in ODOT’s plan for the redesign or reconstruction. Placing flashing lights and a warning sign are not, and never have been, reconstruction or redesign.

The same line of Tenth District cases that Risner cites rebuts the suggestion that any improvement equals design or reconstruction. In *Rahman*, the court concluded that “a resurfacing and widening project” did not involve redesign or reconstruction even though it “changed the width, grade and surface” of a median and “reconfigure[ed]” it. *Rahman v. Ohio*

Dep't of Transp., No. 05AP-439, 2006-Ohio-3013 ¶¶ 12, 30, 36 (10th Dist.). In *Hurier*, the court reasoned that resurfacing without regrading did not trigger a duty to remove obstacles (there a brick wall) according to then-current standards. *Hurier v. Ohio Dep't of Transp.*, No. 01AP-1362, 2002-Ohio-4499 ¶ 28 (10th Dist.). Even the Tenth District's (erroneous) distinction between maintenance and improvement does not stretch so far as to include a duty to upgrade all elements of the roadway *near* a given improvement.

Risner next begs (at 9-10) a question by suggesting that economic considerations do not relieve ODOT from its duty towards the motoring public. This entire appeal is about whether there is a duty, not whether certain factors might provide *defenses* to that duty. The lone citation in this part of the argument shows that Risner is off base. The Tenth District's comments that Risner cites (at 10) from *Knickel v. Department of Transportation*, 49 Ohio App. 2d 335, 340 (10th Dist. 1976) relate to *maintenance*, not reconstruction or improvement. ODOT does not here contest the precedent finding a duty to *maintain* the roads. *See* R.C. 5501.11; *Garland v. Ohio Dept. of Transp.*, 48 Ohio St. 3d 10, 13, (1990) (Resnick and Sweeny JJ., dissenting); *Dunlap*, 2005-Ohio-2386 ¶ 25. All *Knickel* holds is that small budgets do not trump the maintenance duty. That says nothing about whether the State has discretionary immunity when it chooses how and where to use its budget to *improve* Ohio's roadways. *See Christian v. Ohio Dep't of Transp.*, No. 08AP-651, 2009-Ohio-1544 ¶ 15 (10th Dist.) ("'the state, of necessity, must allocate resources'") (quoting trial court).

D. The amicus likewise gives no justification for affirming

For its part, the amicus proposes some additional criticisms of the ODOT rule, but none justify the judgment or legal rule announced in the Tenth District. The amicus misapprehends the public-duty rule, the rule ODOT proposes, and ODOT's tort analogies.

1. The public-duty rule is a distinct concept that does not affect this appeal

The amicus suggests (at 10, 12) that this Court has already rejected the idea that Government is not immune when it takes acts that only the State can take. That argument misreads cases like *Wallace* and confuses the public-duty rule with the discretionary-function doctrine. In 2002, this Court held that the statute imposing liability on the State according to the same principles as apply to private parties left no room for a public-duty rule. That is, a rule that excuses State liability even where it was negligent under the principles that apply to private parties cannot square with the statute imposing liability on the State just like private parties. *See Wallace v. Ohio Dep't of Commerce*, 96 Ohio St. 3d 266, 2002-Ohio-4210. The General Assembly promptly overruled *Wallace*. *See* 2004 H.B. 316; Final Bill Analysis of 2004 H.B. 316 (noting that *Wallace* invited the General Assembly to step in and add a public-duty rule to the statute); R.C. 2743.02(A)(3)(a) (accepting invitation). What *Wallace* said—and the amicus does not recognize—is that a public-duty rule prevents liability *despite* analogous private-party duties while the discretionary-function doctrine says that there is no duty *because* no private party could have a similar duty (e.g., to improve the State's roadways). *Wallace* described the public-duty rule as excusing liability even though the State "owes a duty" to the general public. 2002-Ohio-4210 ¶ 13; R.C. 2743.02(A)(3)(a) (granting immunity for the "performance or nonperformance of a public duty"). But, even when rejecting the public-duty rule, the Court was "careful to distinguish it from the defense of sovereign immunity." *Id.* ¶ 15. *Wallace* thus "reaffirm[ed]" the discretionary-function exception that affords the State "some measure of qualified immunity" tied to its "public status" and cited that immunity as a reason to jettison the public-duty rule. *Id.* ¶ 36. Indeed, after remand, the State prevailed in *Wallace* on "*discretionary immunity*." *Wallace v. Ohio Dep't of Commerce, Div. of State Fire Marshal*, No. 99AP-1303, 2003-Ohio-6935 ¶ 17 (10th Dist.) (emphasis added).

Further proof that the amicus is wrong about *Wallace* is that the consequence of its reading would *overrule Reynolds* and all other discretionary-function cases. *Wallace* itself rejected that idea. *See id*. at ¶ 36 (reaffirming *Reynolds*). If this Court had decided that the "unique sovereignty of the State" is no factor for discretionary-function immunity, Amicus Br. at 12, *Reynolds* could not have declared that the State is immune for "basic policy decision[s]," 14 Ohio St. 3d. 68, syl. ¶ 1. Nor could the Court have said that immunity extends to certain acts *because* they "are not engaged in by private parties." *Semadeni v. Ohio Dep't of Transp*., 75 Ohio St. 3d 128, 132 (1996). And subsequent cases could not have applied that principle to immunize the State's policy decisions from tort liability. *See, e.g.*, *Dunlap*, 2005-Ohio-2386 ¶ 24 (10th Dist.) (French, J.) (ODOT immune for "discretionary decision" about traffic control in construction zone). The unique functions of the State play a role in the discretionary-function calculus, even though they did not (between *Wallace* and its legislative overruling) play a role in the public-duty calculus. The amicus misreads *Wallace* by mixing up the public-duty rule and the discretionary-function exception. The discretionary-function exception remains good law (indeed, it is constitutionally required, *see* ODOT Br. at 14-16). The doctrine necessarily means that the State is immune for policy decisions that only the State can make. *Wallace* reaffirmed that principle.

The public duty-rule relieves the State of liability *even where it has a duty to act*; discretionary-function immunity declares that the State has *no duty* in the first place. *Compare* R.C. 2743.02(A)(3)(a) (State is "immune from liability" for "perform[ing] . . . a public duty") (i.e., the State is immune for *complying* with its duty) *with Reynolds v. State, Div. of Parole & Cmty. Servs*., 14 Ohio St. 3d 68, 70 (1984) (State "cannot be sued" for the "making of a basic policy decision") (i.e., the State is immune because it has no duty).

2. ODOT's proposition of law does not draw on any distinction between maintenance and improvement

The amicus next strains (at 25-27) to defend the Tenth District's maintenance-improvement distinction, but never engages ODOT's critique that the distinction bears little relation to the "basic policy choice" inquiry for immunity, has been rejected by several courts, is unworkable, and is manipulable. (ODOT Br. at 27-32). Rather than engage these points, the amicus says (at 25-26) that the distinction is "common sense," is analogous to a distinction in municipal-immunity law, is comprehensive, and can be developed through caselaw. None of these is entirely accurate, and none saves the distinction from its most basic problem: that it removes the State's discretionary-function immunity where it matters most—setting basic policy.

Common sense. Appealing to common sense, the amicus says the distinction reflects the difference between ongoing and one-time projects. Common sense and cases disagree. Maintenance certainly involves activities like repaving on a set schedule, *see, e.g.*, *Wiebelt v. Ohio Dep't of Transp.*, No. 93AP-117, 1993 WL 238846, at *2 (10th Dist. June 24, 1993) (noting schedule), but what about installing signs, *compare, e.g.*, App. Op. ¶ 14 (new signs are an improvement), *with* Trial Op. at 5 (same signs were maintenance). Or widening a road. *See Rahman*, 2006-Ohio-3013 ¶ 30 ("resurfacing and widening" was not "redesign[ing] or reconstruct[ing]"). Or regrading. *See Hurier*, 2002-Ohio-4499 ¶ 28 (suggesting that duties accompanied regrading, but not classifying the work as improvement or maintenance). Add to the problem of deciding whether—for example—widening the road is maintenance or improvement, the Tenth District's acknowledged struggle with this distinction. As it said in this case, there is a "dearth of case law" defining these concepts and the court had in the past distinguished maintenance from "substantial" improvements. App. Op. ¶¶ 12, 15. There is nothing straightforward about the maintenance-improvement dichotomy.

Municipal liability analogy. The amicus next points to a mistaken analogy in support of this distinction. That argument is that, for sewer systems, the General Assembly has distinguished maintenance and construction, so the distinction for roads can similarly distinguish maintenance and improvement. The analogy founders on three points. First, construction and improvement is not the same. The appellate court here called the sign installation an improvement. Could it have plausibly called it construction? Second, the same municipal-liability statute does *not* distinguish maintenance and construction for several non-sewer public works, including *roads*. *See* R.C. 2744.01(C)(2)(g) (government buildings), (h) (jails), (e) (roads). Finally, reference to local immunity is no help because the State is liable for both maintenance and design. The distinction does different work for the State and municipalities. For the State, the distinction is used (for now) to define the scope of a duty. For localities, it divides categorically immune and non-immune activity (like the codified public-duty rule does now for the State).

Ease. The amicus then appeals to ease-of-use to promote the distinction. As we show, cases and common sense reveal that the distinction is far from straightforward. As part of this point, the amicus contrasts what it believes is ODOT's rule (at 26) of maintenance/improvement/substantial improvement. But that is not what ODOT has said at all. ODOT *criticizes* either the distinction between maintenance and improvement or the three-way divide between maintenance and improvement and substantial improvement (ODOT Br. at 27-33 & 32). What ODOT said throughout its brief is that the relevant question is whether the State action involved a basis policy choice. (*E.g.*, ODOT Br. at 7, 17, 20, 22, 23, 33). Even if the "basic policy" question is occasionally difficult, it is *easier* for a court than the maintenance-improvement distinction. Detecting policy is something courts do. *See, e.g.*, *Garland*, 48 Ohio

St. 3d at 11 (identifying agency's "decision-making process" as setting policy). Parsing engineering between maintenance and improvement is something agencies do. *See Dunlap*, 2005-Ohio-2386 ¶¶ 22-24 (deferring to ODOT's engineering judgment) (French, J.).

Caselaw development. A last point the amicus thinks favors the maintenance-improvement distinction is that it will become "brighter" "over time." Maybe, maybe not. That speculation hardly makes the distinction preferable to the distinction between setting policy and not. The policy distinction has all of these advantages: It taps into judicial competence (the maintenance distinction does not), it derives from the constitutional and statutory imperative of the discretionary-function exception (not so, the maintenance distinction), and it squares with the vast bulk of authority in other courts (the maintenance distinction conflicts with these authorities). If future development in the cases is a relevant criterion, the policy distinction is superior to the maintenance distinction because it is more judicially manageable and draws on legal rather than engineering considerations.

Worse, the maintenance-improvement rule would *reduce* clarity for ODOT decision-making. If that rule is the law, ODOT planning will be based on guessing what a court thinks the scope of a project should be, not what engineering and public-safety considerations dictate the scope should be. ODOT planning will turn from a focus on engineering and safety to a prediction about whether a court will later agree that the scope of the project ended exactly where ODOT ended it.

3. ODOT's tort analogies show that it is not liable here even without a discretionary-function doctrine

As a parting shot, the amicus wrongly faults (at 27-30) ODOT's tort analogies with the accusation that ODOT "inconsistently assumes[s]" both that there is and is not a discretionary-function doctrine. Amicus Br. at 7. It is hard to read ODOT's brief, which, among other things

argues that the discretionary-function doctrine is *constitutionally required* as saying "there is no discretionary-function doctrine." *Id.* What ODOT says, emphatically, is that the discretionary-function doctrine exists, but that "even setting [it] aside" for the sake of argument, ODOT would not be liable here under the closest analogies in tort law. (ODOT Br. at 24). The brief contains no contradiction. It instead applies a principle that the Tenth District flouted, plus offers analogies to show that, even *without* any immunity, ODOT would not be liable under general negligence principles. The amicus continues in this vein (at 27-29) by critiquing the analogies, but its efforts are as misguided as the general fiction that the ODOT position is a contradiction.

ODOT explained that, even in the strict liability world, where actors have far *fewer* defenses than in negligence, the facts of this case would not equal liability. The comparison is to the defense of state of the art, relieving product sellers from anticipating future standards. (ODOT Br. at 24). The amicus responds that the analogy is "unprecedented," "poor," and contrary to ODOT's own manuals. (Amicus Br. at 27-28). As in other parts of its brief, the amicus is wide of the mark.

The point of the analogy is that, even though strict products liability is *less* solicitous of defenses, it would still not impose liability as the amicus suggests here—for failure to upgrade all aspects of the roadway to current standards. *See R.H. Macy & Co. v. Otis Elevator Co.*, 51 Ohio St. 3d 108, 111 (1990) (strict liability is "a separate body of products liability law [that] has evolved apart from the law of negligence"; "the negligence concept of ordinary care is not a part of the products liability doctrine") (quotation marks omitted); *Grover v. Eli Lilly & Co.*, 63 Ohio St. 3d 756, 765 (1992) ("duty and foreseeability are of diminished significance" in strict-liability cases). If it is a defense to strict liability it should be a defense to negligence.

It is no answer to quote (Amicus Br. at 27) an inapplicable part of the Michigan Supreme Court's decision in *Hickey v. Zezulka*. The part of that decision that the amicus quotes involved an argument about ordinary negligence, while the portion that ODOT quoted in its opening brief involved a request that the failure to use "state-of-the-art" equipment triggered State liability. *See* 487 N.E.2d 106, 113 (Mich. 1992); *see id*. at 112 (listing plaintiffs' theories). The point of the holding there is that a government-immunity defense that insulated the State from liability was not lost for failure to use state-of-the-art facilities. That is exactly what ODOT's brief argues—governments are not liable for failing to have all government projects and property implement cutting-edge practices.

The amicus suggestion (at 28) that a better analogy can be found in the zoning principle of "grandfathering" is wrong. As a recent decision explains, the grandfathering exception to new zoning regulations prohibits regulations that restrict a use allowable *at the time of purchase*. *See Boice v. Ottawa Hills*, 137 Ohio St. 3d 412, 2013-Ohio-4769 ¶ 17. By analogy, roads in compliance at the time of construction remain in compliance. The grandfathering doctrine sweeps widely and is not a useful guide to the question before the Court in this appeal.

Nor are the amicus's total traffic-accident statistics useful to distinguish the products-liability analogy. The amicus cites *total* traffic accidents for the year, not the fraction of those accidents where any actor other than the driver played a role. No one would seriously argue that the millions of exercise-related injuries Americans suffer each year puts exercise equipment on par with asbestos as a defective product. Likewise, the thousands of traffic accidents a year attributable to negligent drivers, drunk drivers, weather, or other factors do not impugn ODOT's design and maintenance decisions. The same study the amicus cites reveals that almost 30% of fatal accidents involved "alcohol impaired drivers" and more than 45% of fatalities were caused

by the victim failing to wear a seatbelt. *See* Ohio Dep't of Public Safety, Ohio Traffic Crash Facts, 2013 at cover memo (May 15, 2014) (URL available at Amicus Br. at 28 n.5); *see also id*. at Table 2.08 (88.8% of fatalities classified as "motorist in error"). The comparison to other products is inapt.

The amicus responses to ODOT's other two analogies are equally off base. As to the duty to upgrade, the amicus responds that it is only triggered when ODOT decides to act. That eludes the question of what ODOT must do when it acts. When ODOT decides to improve the safety of a stretch of roadway, *may* it use its best judgment to improve safety by, for example, installing signs, or *must* it, in addition, reconstruct the entire intersection once it makes the decision to act at all. It is simply no answer to say that the duty to upgrade is only triggered when ODOT acts, because ODOT is constantly acting to improve the safety of Ohio's roadways through thousands of projects all across the state. The question in this case is whether ODOT's discretion to act will be defeated by judicial second guessing. The analogy to the common law about upgrade duties points to an answer that ODOT should retain maximum discretion.

Finally, the amicus misreads the analogy to subsequent remedial measures as a suggestion that ODOT would "withhold" safety measures. Amicus Br. at 29. The point of the analogy is not that ODOT will avoid safety enhancements, but that it must—inevitably—choose *what* safety enhancements to make on a given stretch of roadway. Unavoidable laws of scarcity mean that, if ODOT *must* do everything to any roadway where it does anything, then it *cannot* do anything to other roadways. The analogy to subsequent remedial measures teaches that tort law should not restrict the ability to enhance safety. The amicus rule here would do exactly that by forcing ODOT to gold plate any intersection it touches and prohibit it from making some improvements to many other roadways. The point is that the amicus suggestion puts ODOT in a

position of not knowing what a court will later say is the "road around" a given improvement. That is not a matter of withholding, but prioritizing. *See Christian*, 2009-Ohio-1544 ¶ 15 ("'the state, of necessity, must allocate resources'") (quoting trial court). Prioritizing is inevitable. ODOT, and its team of professional engineers and planners, and its Director, should make that call, not the courts.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Tenth District below.

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CERTIFICATE OF SERVICE

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