No. S283862

In the Supreme Court of the State of California

GILEAD SCIENCES, INC.,
Petitioner,

v.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent;

and

PLAINTIFFS IN JCCP NO. 5043,
Real Parties in Interest.

REVIEW OF A DECISION FROM THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR, NO. A165558
SAN FRANCISCO COUNTY SUPERIOR COURT NO. CJC-19-005043
(HON. ANDREW Y.S. CHENG)

APPLICATION BY VIASAT, INC., ET AL., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

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APPLICATION OF VIASAT, INC., ET AL., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

To the Honorable Patricia Guerrero, Chief Justice:

Viasat, Inc.; Textron Inc.; Uber Technologies, Inc.; VIZIO, Inc.; and Lyft, Inc., respectfully move for leave to file a brief as amici curiae in this matter in support of petitioner.

AMICI CURIAE

Viasat is a global communications company founded and based in Carlsbad, California. From its founding in a spare bedroom in 1986, Viasat has grown into a publicly traded, multibillion-dollar provider of high-speed satellite broadband services and secure networking systems for commercial and military markets. In addition to offering satellite internet for a wide range of customers, from Air Force One to backcountry cabins, Viasat engineers develop cutting-edge cybersecurity solutions, machine-learning platforms, aviation antennas, and networking equipment (such as routers and modems).

Textron is a multi-industry technology company composed of a global network of aircraft, defense, industrial, and finance businesses. Founded as a small New England business in 1923, Textron has grown into a $13.6 billion company supported by 35,000 employees in more than 25 countries, with brands including Bell, Cessna, Beechcraft, E-ZGO,

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and Arctic Cat. Textron has been responsible for major advances in the evolution of aircraft, rotorcraft, armored vehicles, electrical vehicles, and automotive systems.

Uber is a technology platform that operates marketplaces connecting customers with drivers, courier services, food delivery, and other service providers. Headquartered in San Francisco, Uber is now the largest ridesharing company in the world, with hundreds of millions of users, millions of active service providers, and tens of thousands of employees. To facilitate use of its marketplaces, Uber creates innovative digital software applications and features for consumers, service providers, and businesses. Although Uber's apps provide services and are not products for purposes of product liability, several plaintiffs have attempted to impose liability on Uber on product-liability theories.

VIZIO, Inc. is a technology company, founded and headquartered in Orange County, California, that strives to deliver immersive entertainment and compelling lifestyle enhancements that make its products the center of a connected home. Vizio is driving the future of televisions through its integrated platform of cutting-edge Smart TVs and powerful operating systems and also offers a portfolio of innovative sound bars that deliver consumers an elevated audio experience. Its platform gives

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content providers more ways to distribute their content and advertisers more tools to connect with the right audience.

Founded in 2012, Lyft became the first American company to establish a peer-to-peer, on-demand transportation network—what the world now knows as "ridesharing." That network, accessible through a digital application, created a marketplace that enables people who seek transportation to be matched with people providing rides. Although Lyft's apps provide services and are not products for purposes of product liability, several plaintiffs have attempted to impose liability on Lyft on product-liability theories.

INTEREST OF AMICI CURIAE

Amici seek permission to file this brief to assist the Court in understanding the perspective of businesses in the technology industry on the potential harms of imposing tort liability for failure to bring to market marginal safety improvements for existing, non-defective products. This proceeding may have a widespread and significant impact on research and product development in all business sectors that have until now relied on a long-settled understanding that tort liability is limited to the manufacturing and marketing of defective products. As prominent participants in California's world-renowned technology industry, amici are uniquely positioned to explain the potential consequences of the

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Court of Appeal's newly expanded theory of liability for that industry and its consumers.

CONCLUSION

The application for leave to file the attached brief as amici curiae should be granted.

Respectfully submitted,

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208, the following brief is submitted by Viasat, Inc.; Textron, Inc.; Uber Technologies, Inc.; VIZIO, Inc.; and Lyft, Inc., none of which is a party to this action. Viasat, Textron, Uber and their counsel certify that they know of no entity or person that must be listed under Rule 8.208.

VIZIO Holding Corp. has a 100 percent ownership stake in VIZIO, Inc. Based on Lyft's knowledge from publicly available U.S. Securities and Exchange Commission filings, entities affiliated with FMR LLC beneficially own more than ten percent of Lyft's outstanding common stock.

CALIFORNIA RULE OF COURT 8.200(c)(3) STATEMENT

Counsel for Viasat, Inc.; Textron, Inc.; Uber Technologies, Inc.; VIZIO, Inc.; and Lyft, Inc., certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than Viasat, Textron, Uber, Vizio, Lyft, or their counsel has made a monetary contribution to the preparation or submission of this brief.

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INTRODUCTION

Traditional principles of tort law obligate manufacturers to produce non-defective products and market those products in ways that ensure their safe use—nothing more. Contrary to those basic principles, the Court of Appeal concluded in the decision below that manufacturers *also* owe a duty to exercise reasonable care that can "extend beyond" the duty not to market a defective product. Op. 3. In the Court of Appeal's view, that expanded duty can potentially include an affirmative obligation to bring to market marginal safety improvements for existing products even when those existing products are concededly not defective. Liability is thus "not foreclosed" even where a plaintiff "forgo[es] any attempt to prove" that the challenged product "is defective." Op. 34.

This Court's adoption of the Court of Appeal's novel rule would have severe consequences for industries that rely on research and development to bring innovative products to consumer markets. Although the court below conceived its rule in the context of pharmaceuticals, it is all but certain that future plaintiffs would push to apply its expanded theory of liability for non-defective products to manufacturers in other industries, including technology companies like amici. Should that occur, it would dramatically alter companies' decision-making with respect to research and innovation. Rather than prioritizing the development of the

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most innovative potential products, companies will be obligated to prioritize developing different versions of existing products whenever those new versions offer even marginal safety improvements to any subset of users. Because this new theory of liability attaches at the point of discovering a possible improvement, the rule would have strong chilling effects on research and innovation.

Ultimately, the harmful effects of the new rule would be borne by consumers. The innovative work of companies such as amici generates products capable of better serving consumers' needs. Under the Court of Appeal's new liability regime, those needs may well go unmet because of the risks companies would face each time they started down the path of innovation. And that risk would adhere to the development not only of primary products, but also of custom subcomponents and complementary products that enhance those primary products. To avoid these anticipated harms to companies and consumers alike, this Court should decline to adopt the Court of Appeal's novel theory of liability for non-defective products.

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ARGUMENT

THE COURT OF APPEAL'S NOVEL RULE THREATENS INNOVATION ACROSS INDUSTRIES IN CALIFORNIA

In the decision below, the Court of Appeal recognized an unprecedented theory of tort liability that upends traditional principles of tort law and redefines a manufacturer's duty of care toward its customers. Under traditional principles of tort law, a manufacturer's duty of care toward its customers requires only that the manufacturer design, produce, and sell non-defective products and market those products in a manner that ensures their safety. See *Brown* v. *Superior Court* (1988) 44 Cal.3d 1049, 1057. The Court of Appeal's novel theory would transform that limited duty into something much more sweeping: an affirmative obligation to bring to market any product the manufacturer knows (or perhaps even should have known) would improve the safety of an existing non-defective product for at least some consumers. *See* Op. 11 & n.5. Nowhere does the decision below truly reckon with the costs of fully developing and marketing the new version of the product. To the contrary, the Court of Appeal dismissively reasoned that, even "assum[ing] that there will be some circumstances in which the duty . . . result[s] in some failed or wasted efforts," "that loss must be weighed against the

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benefit to the community" of obligating manufacturers to prioritize the production of marginally safer products. Op. 51.

The potential consequences of such a rule would be extraordinarily detrimental both to companies and to consumers in California. Although the Court of Appeal made its decision in the context of the pharmaceuticals industry, should this Court affirm, future plaintiffs are all but certain to assert analogous claims against companies in other industries that similarly engage in research and development of new products. The mere threat of such claims would pose a particularly severe risk to technology companies, which—like pharmaceutical companies—systematically engage in high levels of research and development in order to bring innovative new products to market. The chilling effects of that risk, which would both slow down and add cost to the process of innovation, would ultimately harm the consumers who would otherwise benefit from new, innovative products.

A. Liability For Failing To Develop Marginally Safer Products Would Add Risk And Cost To The Process Of Innovation

The Court of Appeal's novel expansion of liability for product manufacturers poses potentially severe challenges for companies in the technology industry that engage in high levels of innovation. Until now, companies have been able to prioritize bringing their most innovative and

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impactful new products to market. But under the Court of Appeal's expanded theory of liability, companies would have an affirmative obligation to bring to market any product they discover that would improve the safety (at least, for some consumers) of any non-defective product they already produce. That new obligation would substantially and harmfully distort technology companies' research and development priorities.

1. Because innovation in the technology industry is fast-moving and unpredictable, companies often have multiple products nearing commercialization around the same time. In light of limited resources, companies must make considered decisions as to the order in which they bring each product to market, prioritizing those which are most innovative and impactful. The Court of Appeal's new tort duty would essentially require companies immediately to commercialize certain products at the expense of others, for no reason other than that the company has previously produced a different version of that product. As a result, potentially life-changing products will be stuck in the development line behind those that offer only marginal improvements over products already available to consumers.

This problem is not limited to the final stages of new product development. Companies have finite budgets to allocate for research, development, and market testing. If compelled to commercialize products

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that provide marginal safety improvements over existing products, technology companies will have no choice but to allocate resources away from early-stage research projects that could result in more radical innovations. As a purely economic matter, the Court of Appeal's new rule would obligate technology companies to sacrifice efforts to create truly innovative products in favor of low-impact, marginal improvements to existing, non-defective products.

That is no abstract concern. Technology companies must make difficult choices on a daily basis between commercializing minor improvements or conducting research and development on potentially major breakthroughs. Facing the specter of liability under the Court of Appeal's new rule, a company such as Viasat could be forced to devote resources to tweaking its existing commercial modems rather than investing in new communications systems crucial to national security, such as those it supplies to the United States military. Textron could be forced to finance minor adjustments to aircraft that already meet stringent FAA certification requirements instead of investing in groundbreaking research in other areas that affect safety or sustainable power generation. Technology companies that offer services through software could be forced to prioritize pushing out updates that marginally improve safety over conducting research that might dramatically enhance user

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experience. Cellphone companies could be forced to pivot from innovations in secure fiber network connectivity to focusing on minor adjustments of safety features. And biotechnology companies could be forced to forgo discoveries in gene editing and regenerative medicine to focus attention on reducing the side effects of existing drugs, even those for minor illnesses. Overall, the new rule would upend companies' development aims, artificially prioritizing marginal safety benefits at the cost of truly innovative work.

2. In addition to affecting companies' financial decisions, the Court of Appeal's rule also creates strong incentives for companies to abandon their research prematurely. As articulated by the Court of Appeal, the new rule creates liability that attaches at the point of discovery: once a company becomes aware of a possible improvement to an existing product, the company's duty of care to consumers requires that it bring that improvement to market. *See* Op. 11. That rule effectively weaponizes the very act of innovation.

One strategy to avoid liability would be for technology companies to avoid acquiring knowledge altogether. Unless they are highly confident that potential products will be sufficiently cost-effective to bring to market—and worth prioritizing over other possible innovations—companies may well terminate research and development efforts to ensure they

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cannot be accused of having failed to commercialize identified, marginally safer alternatives to existing products. Companies may also be far more hesitant to acquire intellectual property that could trigger the duty, and far less likely to develop internally competing products to test for the best available option. Indeed, they may choose to simply forgo collecting data about their products in order to insulate themselves from liability.

At a minimum, the need to avoid this new form of liability would force companies to increase the involvement of their lawyers in making decisions about innovation. At every stage of the research and development process, companies could attempt to avoid liability by letting attorneys weigh in on the issue before any research idea or potential product is allowed to progress down the pipeline. Doing so would both add expense (which would need to be passed on to consumers) and bog down the innovation process. Under those conditions, innovation could proceed at only a glacial pace—that is, if it does not grind to a complete halt.

B. The Effects Of The New Rule Would Harm Consumers

Ultimately, the people who stand to suffer most from the Court of Appeal's expanded theory of liability are those whom the court ostensibly sought to protect: consumers. Consumers rely on technology companies such as amici to develop products capable of better serving their needs,

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including by improving safety. The Court of Appeal's new rule would hamper that process, in terms of the development both of primary products and of custom subcomponents or complementary products that enhance those primary products.

1. The Court of Appeal's decision fails to account for how innovation actually happens. The work of innovation is iterative; one improvement leads to the next. The new rule threatens to turn that central tenet of research and development into a source of liability. Each iterative step could become the basis of a negligence claim. Indeed, for some products that undergo rapid iteration, there may always be another safety feature in the pipeline. Consider, for example, software companies that constantly seek to push out updates to improve user experience as well as software security. That means that, even as one new safety feature is being brought to market, another will be lingering in the development process, getting ready to go to market. The new rule would place any company facing that circumstance in an impossible situation as it attempts to allocate resources between the two potential new products: face liability for failing to market the first new safety feature (if it chooses to prioritize developing the second), or face liability for failing more rapidly to develop the second (if it chooses to prioritize marketing the first).

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Rather than bear the risk of failing to innovate in the right way at the right time, technology companies may instead choose to halt development altogether. For the reasons articulated above in Part A, pausing research is arguably the only way to avoid liability entirely: after all, even under the Court of Appeal's expansion of the duty of care, companies are not liable for failing to develop and market new safety improvements that they have not yet discovered. As the ultimate beneficiaries of innovation, consumers would be harmed by that chilling effect, losing out on the opportunity to benefit from both new products and improvements to existing products. That harm may fall most heavily on subsets of consumers whose specific needs are not met by products already on the market.

It is particularly concerning that this new liability will often come to bear on a company at the point of introducing a newly improved product to the market. Much of research and development is done privately, such that the public may first become aware of a new product's existence (or even the possibility thereof) at the point of its introduction. A product's debut would therefore serve as a signal to potential plaintiffs of an opportunity to sue on the theory that the manufacturer had an obligation to bring the improved product to market sooner. As Gilead describes (Br. 16-17), that is precisely what happened here.

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The Court of Appeal's new rule would thus create the strongest chilling effects in precisely those situations in which plaintiffs have the most to gain: when a company has discovered and developed a potential improvement to an existing product that would benefit that product's users, and the company must decide whether to actually bring it to market. If the same users can turn around and sue the company for failing to introduce the same improvement sooner, it will only serve to deter companies from marketing those improvements in the first place.

2. Recognition of a duty to improve already non-defective products would be particularly harmful to consumers in the context of the technology industry because of the intricacies of the products and services that industry offers. Many technology companies design and build complex products with multiple subcomponents, each of which benefits from innovation. Other companies primarily offer technological services through software and apps, but also internally develop products that support those service offerings. In both circumstances, the decision to produce a custom-built subproduct or component can be essential to ensuring positive outcomes for consumers.

Each of those decisions, whether it be to develop a customized piece of software or a purpose-built component of a physical product, would be burdened by the Court of Appeal's novel rule. For some companies, this

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new form of liability could most readily be avoided by purchasing generic products or subcomponents on the market, rather than pursuing the in-house development of custom solutions. But that decision would also tend to decrease the efficacy of the ultimate consumer products. Rather than having software or components specifically designed to integrate into the whole, products would be constructed of generic pieces that might not function well together and so fail to offer the same level of effectiveness as custom pieces.

For example, consider the products and services marketed by amici. To complement its commercial airline satellite service, Viasat produces airplane antennas—as well as routers and modems—that facilitate wireless internet access. Each of those individual products is specifically designed to support Viasat's primary service offering uninterrupted communications to planes flying around the globe. Similarly, companies that manufacture complex technological products such as electric vehicles or computers may also produce parts that integrate into those final products. Thus, the ultimate service or product sold to consumers represents a whole bundle of innovative components developed by each company.

Until now, each company's decision to develop complementary or component products in-house focused on weighing the benefits of

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producing superior services or products against the cost increases that come with devoting resources to develop and market those custom parts, which can result in higher prices for consumers. But should the Court of Appeal's expansive liability rule become the law in California, that calculus would change significantly. In calculating the costs of in-house development of component parts, companies would have to consider not only the basic costs of development and marketing but also the additional risk of this new form of liability (and litigation costs) that would now surround the innovation process. The same risks that would attach to the introduction of any improved product would also attach to the improvement of subcomponents and complimentary products.

That result is both unfair and detrimental to the public interest. Pioneering breakthrough services are often vastly improved by integration with custom-built, reliable products. A cutting-edge satellite designed to deliver high-speed Internet aboard an aircraft amounts to little if the hardware through which the Internet is accessed is subpar and incapable of facilitating high-speed service. Technology companies and users alike are therefore best served when services providers remain free to optimize associated products and pursue new ones. Because the Court of Appeal's new liability rule would unjustifiably restrain that freedom, this Court should reject it.

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CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, certify, pursuant to California Rule of Court 8.504(d)(1), that the attached Answer of Respondents to Petition for Review is produced using 13-point Century Schoolbook font, including footnotes, and contains 2,731 words. Counsel relies on the word count of the computer program used to prepare this brief.

S/ Kannon K. Shanmugam
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PROOF OF SERVICE

I am employed in Washington, the District of Columbia. I am over the age of eighteen years and not a party to the within action; my business address is 2001 K Street, N.W., Washington, DC 20006.

On November 4, 2024, I caused true and correct copies of the following document(s):

Brief of Amici Curiae

to be served by submitting an electronic version of the document(s) via TrueFiling, which provides e-service to all indicated recipients at the e-mail address(es) set forth below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 4, 2024, in Washington, DC.

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