

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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AIR AND LIQUID SYSTEMS CORP.,            )  
ET AL.,                                        )  
  Petitioners,                        )  
  v.                                        ) No. 17-1104  
ROBERTA G. DeVRIES, INDIVIDUALLY        )  
AND AS ADMINISTRATRIX OF THE ESTATE) )  
OF JOHN B. DeVRIES, DECEASED,            )  
ET AL.,                                        )  
  Respondents.                        )  
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11                                    Respondents.            )  
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14                                    Washington, D.C.  
15                                    Wednesday, October 10, 2018  
16

17           The above-entitled matter came on for  
18   oral argument before the Supreme Court of the  
19   United States at 11:09 a.m.  
20   APPEARANCES:  
21   SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of  
22           the Petitioners.  
23   THOMAS C. GOLDSTEIN, ESQ., Bethesda, Maryland; on  
24           behalf of the Respondents.  
25

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P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-1104, Air and Liquid Systems versus DeVries.

Mr. Dvoretzky.

ORAL ARGUMENT OF SHAY DVORETZKY

ON BEHALF OF THE PETITIONERS

MR. DVORETZKY: Mr. Chief Justice, and may it please the Court:

Petitioners had no duty to warn about asbestos added to their equipment years or even decades after its sale. That follows from a well-established tort law principle: manufacturers are not liable for injuries caused by third-party goods.

That tort law principle --

JUSTICE GINSBURG: Counsel, their product would not be salable absent the addition of the asbestos insulation, whatever it is. They're making a product that is useless unless the asbestos is added. And doesn't that make a difference?

MR. DVORETZKY: No, it doesn't, Justice Ginsburg.

1                   First, the -- the Respondent -- the  
2                   Petitioners, of course, knew that the Navy was  
3                   going to use asbestos because the Navy  
4                   determined that asbestos met its  
5                   specifications. That doesn't mean that the  
6                   Petitioners' products were useless without  
7                   asbestos. Today, those same products are used  
8                   without asbestos on Navy ships.

9                   CHIEF JUSTICE ROBERTS: Why is that?  
10                  Did they discover something new that's better  
11                  than asbestos?

12                  MR. DVORETZKY: They did, in fact.  
13                  Technology advanced and there were different  
14                  forms of insulation, and the Navy eventually  
15                  transitioned to those forms. And our equipment  
16                  today is used with non-asbestos forms of  
17                  insulation.

18                  JUSTICE GINSBURG: But at least at the  
19                  time of these sales in question, the  
20                  manufacturers have a product that, to be used,  
21                  requires the addition of asbestos. So they  
22                  know that their sale of this equipment is  
23                  dependent upon asbestos being incorporated into  
24                  it.

25                  MR. DVORETZKY: They -- they do know

1 that asbestos will be incorporated by the Navy.  
2 However, when the Navy chooses to use a  
3 third-party's asbestos with our product, our  
4 products are not the cause of the injury. And  
5 -- and you can look at --

6 JUSTICE SOTOMAYOR: I'm sorry --

7 CHIEF JUSTICE ROBERTS: What about  
8 this --

9 JUSTICE SOTOMAYOR: -- how is your  
10 product not the cause of the injury? The  
11 asbestos as sold is perfectly safe. It's  
12 integrated. It's whole. It doesn't release  
13 molecules. What causes it to degrade is your  
14 ship, is your product. Your product heats up  
15 to such an extreme degree that it degenerates  
16 the asbestos.

17 So it's somewhat incongruous for me to  
18 think that you're saying that the harm's caused  
19 by the asbestos. The asbestos is in this shape  
20 because of what you did to it, meaning your  
21 product did to it. It's an integrated product.  
22 It's not standing alone.

23 MR. DVORETZKY: Two responses to that,  
24 Justice Sotomayor. First, our product does not  
25 cause the asbestos to degrade in any unique

1 way. This is just what happens to asbestos  
2 when it's used, just as gasoline is used in a  
3 car and eventually needs to be replaced. But  
4 our product is not contributing to the harm in  
5 any way that is different than what otherwise  
6 happens to asbestos.

7 Second, even if you think --

8 JUSTICE SOTOMAYOR: In -- in normal  
9 tort law, if you create a car that has a spark  
10 in the tank, and the gasoline, which is what  
11 explodes the car, explodes, the consumer is not  
12 going to sue the gasoline company. It's going  
13 to sue you because you, the car manufacturer,  
14 produced a defective product that caused an  
15 injury that the gasoline would otherwise not  
16 cause.

17 Why are you any different than the  
18 bare-metal car seller?

19 MR. DVORETZKY: Because, in that  
20 situation, the consumer might well sue both the  
21 car manufacturer and the gasoline manufacturer  
22 because both products contributed together to  
23 the harm, where -- whereas in --

24 JUSTICE SOTOMAYOR: That's the fault  
25 --

1 CHIEF JUSTICE ROBERTS: No, that's not  
2 -- he wouldn't see the gasoline manufacturer.  
3 I mean, normally -- you normally run a car with  
4 gasoline and it's normally perfectly safe.  
5 Here, you normally run your product with  
6 asbestos and it's not perfectly safe.

7 MR. DVORETZKY: Well, here, you run  
8 our product and our product is safe. It's the  
9 asbestos that is causing the harm. Now the  
10 asbestos naturally degrades with use, and then  
11 replacing it can be dangerous. That's true.

12 But, unlike the defective car, which  
13 is creating a spark that a properly operating  
14 car should not create, and thereby causing the  
15 injury with the gasoline, our equipment is not  
16 making the asbestos any more dangerous than it  
17 would be.

18 CHIEF JUSTICE ROBERTS: If -- if --

19 MR. DVORETZKY: The other --

20 CHIEF JUSTICE ROBERTS: I'm sorry.  
21 But if -- are you arguing that this is a  
22 special rule in admiralty, or are you arguing  
23 that this is the normal tort rule?

24 MR. DVORETZKY: We're arguing that  
25 it's the normal tort rule that ought to be



1 adopted as a matter of general admiralty law.  
2 As a matter of ordinary tort law, product  
3 liability defendants, of course, may be liable  
4 for injuries that their products cause, so the  
5 defective car that causes a spark is causing an  
6 injury. But they're not liable for the  
7 injuries that are caused by third-party  
8 products foreseeably used with their own.

9 Consider, for example, a tire  
10 manufacturer that designs a tire to be used  
11 specifically with a multi-piece wheel, and the  
12 multi-piece wheel may explode when the tire is  
13 installed on it. The wheel manufacturer in  
14 that situation can be sued, but the tire  
15 manufacturer, even knowing that its tire is  
16 going to be used with the dangerous wheel, is  
17 not liable.

18 Likewise, a jet manufacturer isn't  
19 liable when the seats that are later installed  
20 in the plane can cause blood clots, even though  
21 you might think of the jet with the seats, in  
22 common parlance, as an integrated product or --

23 JUSTICE SOTOMAYOR: But in those -- in  
24 those situations, it wasn't foreseeable. They  
25 didn't know it was going to cause a blood clot.

1           I -- I think you -- what do I make of  
2 the fact that this is maritime law, which is  
3 different, and that you claim there's a uniform  
4 tort principle, but not every state has the  
5 absolute rule that you tout?

6           There's a split of authorities among  
7 states as to the extent of liability, if any,  
8 for bare-metal providers. So what do I do if  
9 I'm in a special area with a solicitude for  
10 sailors and I don't buy your argument that we  
11 should ignore that principle or overturn it  
12 after two centuries of case law on it?

13           Assume I accept the principle.

14           MR. DVORETZKY: So, Justice Sotomayor,  
15 I think there are a few questions embedded in  
16 there. Let -- let me try to tease them out.

17           First, in the tire case and the jet  
18 case, you say it's not foreseeable. Quite the  
19 contrary, the jet manufacturer makes a  
20 passenger jet, of course, knowing that seats  
21 are going to be used and it's common knowledge  
22 that you can -- that can cause blood clots.

23           The -- the tire manufacturer in the  
24 Reynolds case that I'm referring to  
25 specifically manufactured the tire to be used

1 with this particular kind of wheel that was  
2 dangerous.

3 So there is foreseeability, but the  
4 point is that, as a matter of ordinary tort  
5 law, foreseeability alone is not enough to  
6 create a duty when you're talking about the  
7 foreseeable use of your product with somebody  
8 else's product.

9 The second question --

10 JUSTICE BREYER: So --

11 MR. DVORETZKY: Sorry, Justice Breyer.

12 Well, the second question, Justice  
13 Sotomayor, that I think you asked is about the  
14 state of tort law.

15 If you look only at asbestos-specific  
16 cases, then there's a split of authority. But  
17 there's no reason that you would look only at  
18 asbestos-specific cases. You ought to look at  
19 the body of tort law as a whole. And when you  
20 do, Respondents haven't found a single case,  
21 not even one, outside of the asbestos context  
22 holding that a defendant is liable for injuries  
23 caused by a third-party product used with its  
24 own.

25 If that were the law, drywall

1 manufacturers would be responsible for warning  
2 about the dangers of paint. The airplane and  
3 the seats, the tire and the wheel. Toy  
4 manufacturers would be responsible --

5 JUSTICE GINSBURG: No, but there's no  
6 -- no one --

7 MR. DVORETZKY: -- for warning about  
8 leaking batteries.

9 JUSTICE GINSBURG: This is different  
10 from those in that no one would buy your  
11 product but for the use of asbestos with it.

12 MR. DVORETZKY: Well --

13 JUSTICE GINSBURG: And that's not true  
14 of the other examples that you've given.

15 I mean, what makes the product  
16 desirable is when the asbestos is incorporated,  
17 it works in a certain way. Without the  
18 asbestos, it doesn't work.

19 MR. DVORETZKY: Justice Ginsburg, I  
20 think that is true of the other examples.  
21 Nobody would buy a commercial passenger jet  
22 without the availability of seats to be  
23 installed in it later by a third-party.

24 Nobody would buy drywall without the  
25 availability of paint or -- or wallpaper in

1 order to cover it. And so I don't think that  
2 our situation is any different from the  
3 ordinary tort rule.

4 JUSTICE BREYER: It is somewhat. I  
5 mean, this is an area where I had to go back  
6 and read the Restatement of Torts about 50  
7 times -- not 50, but -- because this is a  
8 negligence case.

9 So I -- I don't know that there are  
10 special rules here. At least I haven't been  
11 convinced of that. So, if you look at it as a  
12 negligence case, then you look at the  
13 restatement, and then you look at what the  
14 court ordered below, I do have trouble with one  
15 of the things.

16 But do you really have a problem if  
17 the manufacturer specifically directed that the  
18 product be used with an asbestos-containing  
19 material, where he knew that it was dangerous?  
20 That's one of the things they want to show.

21 I don't see what your problem is with  
22 that, or, that the product was originally  
23 equipped with an asbestos-containing part that  
24 you could reasonably expect will be replaced,  
25 because simply, when people do replace things,

1 they do tend to use the kind of equipment that  
2 was there before. What's wrong with that one?

3 Now containing an -- I might -- the  
4 third one, I don't know, because there's  
5 conflict sort of within the restatement, so I  
6 thought maybe you should phrase it in your  
7 favor somewhat and say, well, he could be  
8 liable to where the manufacturer functionally  
9 requires, you see, he puts out a product that  
10 to work, that to work, you have to use the  
11 dangerous thing.

12 I'm pretty sure he should be liable  
13 there, but I can see that C in the -- the court  
14 of appeals may be read to go beyond that. All  
15 right. It's a long question.

16 But, really, it comes down to what's  
17 wrong with A and B, and what's wrong with C if  
18 we interpret it as I suggested?

19 MR. DVORETZKY: So let's take A, B,  
20 and C. I think A was required, B was directed,  
21 and C was replacement parts.

22 The problem with required is that  
23 required just really means foreseeable. Just  
24 like --

25 JUSTICE BREYER: No, it doesn't.

1 Required means you tell the person that he  
2 better use this product, which is very  
3 dangerous, by the way, and you know it, or it  
4 won't work. It's like telling people if you  
5 have one of those hammers, you know, that  
6 shoots nails, and you know the nails are -- are  
7 absolutely defective, and you say: You've got  
8 to use this product, says the manufacturer,  
9 with Smith's nails, which he knows work  
10 backwards. Okay?

11 I mean, that's what it seems to me  
12 this says. The manufacturer specifically  
13 directed that the product be used with an  
14 asbestos-containing part.

15 MR. DVORETZKY: First, we did not  
16 specifically direct the Navy to do anything,  
17 nor -- nor -- nor could we have.

18 JUSTICE BREYER: Oh, well, that's what  
19 you say. The other side may say the opposite.  
20 And there we looked through the record briefly,  
21 I'm not an expert there, but I think we only  
22 have to -- it did seem to me maybe there's some  
23 evidence on their side there, and -- and I  
24 don't think that's -- I -- I can't read the  
25 whole record and know if there's evidence there

1 or not. This isn't a summary judgment case  
2 here.

3 MR. DVORETZKY: You don't need to read  
4 the whole record. But if you look, for  
5 example, at Joint Appendix 27, it tells you  
6 that the Navy was the one that specified the  
7 asbestos.

8 JUSTICE BREYER: Okay. Fine. Then  
9 you'll win.

10 MR. DVORETZKY: But --

11 JUSTICE BREYER: Then the jury will  
12 decide in favor of you. And if they come up  
13 with some evidence that says it is specifically  
14 directed, they will win if the jury believes  
15 them. All right? Fine. End of case for us.  
16 Anything wrong with that?

17 MR. DVORETZKY: So -- yes.

18 (Laughter.)

19 MR. DVORETZKY: Even -- even if a  
20 manufacturer "directs" somebody else to do  
21 something, the manufacturer doesn't control the  
22 Navy. It's ultimately the Navy's choice what  
23 to do. It's an asbestos manufacturer's choice  
24 whether to supply the asbestos that is  
25 dangerous or whether --



1 JUSTICE SOTOMAYOR: That's a separate  
2 defense. Forget the Navy. Let's assume the  
3 Navy was not involved --

4 MR. DVORETZKY: So any --

5 JUSTICE SOTOMAYOR: It was a private  
6 -- any private person.

7 MR. DVORETZKY: -- any third -- any  
8 third-party, even if you're talking about a  
9 private user of ship components, the  
10 manufacturers don't have the power to direct  
11 them to do anything. They make the choice what  
12 equipment to use. And a later asbestos  
13 manufacturer or, as the Chief Justice asked  
14 earlier on, a later manufacturer of an  
15 alternative form of insulation.

16 JUSTICE GINSBURG: And, by the way,  
17 and what is the Navy's -- what is the Navy's  
18 liability? What is the Navy's exposure to  
19 these widows to seamen who died of cancer?

20 MR. DVORETZKY: The Navy is immune  
21 under Feres, but there is a worker's  
22 compensation system that the Navy administers  
23 that can provide some form of compensation.

24 JUSTICE GINSBURG: Very little.

25 MR. DVORETZKY: Going back to Justice

1 Breyer --

2 JUSTICE KAGAN: Mr. Dvoretzky -- and  
3 this follows on Justice Breyer's -- when you  
4 say that even when this manufacturer is -- or  
5 the Navy or whoever else it is, is directed to  
6 use asbestos, you are not liable, are you  
7 making a fairness argument? Are you making an  
8 efficiency argument? What kind of argument is  
9 that?

10 MR. DVORETZKY: It's -- it's both a  
11 doctrinal argument and a policy argument. As a  
12 doctrinal argument, tort law draws -- draws the  
13 line of liability at the chain of distribution.

14 JUSTICE KAGAN: Okay. I mean, we  
15 could read the restatement and contest that.  
16 So -- so I guess what I'm asking is, like what  
17 -- what -- what sense would that rule make?

18 If -- if you think that that's what  
19 the doctrine says, tell me why the doctrine  
20 says that, because -- because I can't think of  
21 a reason, and that makes me think that the  
22 doctrine doesn't say it.

23 So here's -- this is your opportunity  
24 to tell me what sense would it make to say,  
25 even though you direct the use of asbestos, you

1 can't be liable for its harms?

2 MR. DVORETZKY: Because tort law  
3 places the duty to warn and also places  
4 liability on the party that is in the best  
5 position to control or avoid the harm.

6 And it is the -- well, the subsequent  
7 manufacturer of asbestos or of the Chief  
8 Justice's alternative to asbestos that is in  
9 the best position to control the harm in this  
10 situation.

11 That party is also in the best  
12 position --

13 JUSTICE KAGAN: But why is that?

14 MR. DVORETZKY: Once we put our  
15 product out there, we don't control what some  
16 third-party develops or sells as insulation.

17 JUSTICE KAGAN: You've directed it to  
18 use asbestos, so they're going to use asbestos.

19 MR. DVORETZKY: The fact that we -- if  
20 we had directed something, that still doesn't  
21 obligate the insulation manufacturer to sell  
22 asbestos. If the insulation manufacturer  
23 learns, gee, asbestos is dangerous, I either  
24 shouldn't sell this or I ought to warn about it  
25 or I ought to put money --

1 CHIEF JUSTICE ROBERTS: What --

2 MR. DVORETZKY: -- into R&D in order  
3 to come up with an alternative, that's all  
4 within their control, not ours. And the tort  
5 --

6 CHIEF JUSTICE ROBERTS: What if --  
7 what if you are the only one who knows about  
8 it? I mean, the asbestos manufacturer, their  
9 -- their scientists haven't discovered yet that  
10 it's going to kill you, but you have, and it's  
11 the same case, you still don't have a duty to  
12 warn?

13 MR. DVORETZKY: I don't think you have  
14 a duty to warn in that situation, but that's  
15 also far from this case. There's -- there is  
16 no --

17 CHIEF JUSTICE ROBERTS: No, no, I know  
18 it's not this case. But your position is even  
19 if you, the manufacturer, is telling people to  
20 use asbestos with your product, they don't know  
21 that it's harmful, but you do, you have no duty  
22 to warn?

23 MR. DVORETZKY: Perhaps you might in  
24 that situation on a different theory have some  
25 sort of a fraud claim, but that's not what's

1       alleged here.

2                   There's no question here that the Navy  
3       knew about the dangers of asbestos and that,  
4       over time, asbestos manufacturers knew about  
5       the dangers of asbestos and, again, companies  
6       came up with alternatives.

7                   So the policy rationale here is to  
8       place the burden on the party that has the  
9       ability to control the harm, and, moreover, the  
10      asbestos component manufacturers are the ones  
11      that are in the best position to warn.

12                   If we had put some sort of a plate on  
13      our equipment, first, who knows if it would  
14      have been seen down the road as opposed to the  
15      package of new insulation that has to be opened  
16      and applied.

17                   And, second, as technology changes,  
18      our warning from 1945 might well have become  
19      outdated and inconsistent with a  
20      state-of-the-art warning provided later.

21                   And so that's why tort law puts the  
22      liability on the party that actually has the  
23      ability to control the harm. Getting back --

24                   JUSTICE GORSUCH: Besides -- besides  
25      the costs of having an additional warning, do

1 you see any other downsides to expanding the  
2 scope of the duty to warn in this way?

3 MR. DVORETZKY: Well, I think --

4 JUSTICE GORSUCH: I'm really not  
5 interested in asbestos and bare metal. I'm  
6 talking, as Justice Kagan was, as a matter of  
7 doctrine and policy. What costs, what  
8 downsides are there associated with expanding  
9 the duty to warn, at least insofar as we're  
10 talking about things that are directed or  
11 necessary or inevitably used? Forget about  
12 foreseeability for a moment.

13 We -- we normally do, you're right,  
14 put the duty to warn with the lowest-cost  
15 avoider. But sometimes it's expanded and, in  
16 some cases, it has been expanded in this area,  
17 it looks like, and I'm just wondering what --  
18 what are the negatives associated with that?  
19 Why is that bad?

20 MR. DVORETZKY: So, again, outside the  
21 asbestos context, I don't think it has been.  
22 But, to answer your -- your policy question,  
23 it's bad, first, because, if you believe that  
24 the incentive ought to be placed on the -- the  
25 party that can avoid the harm, you dilute that

1 -- that incentive by spreading the liability  
2 around and you lead to over --

3 JUSTICE GORSUCH: No, that incentive  
4 remains. I mean, that still -- we're expanding  
5 the duty to warn. We're not contracting it.  
6 Okay? So that doesn't work.

7 MR. DVORETZKY: You lead to  
8 over-warning, which will lead people just to be  
9 deluged with warnings and to ignore them. You  
10 create a situation where there really isn't any  
11 clarity from manufacturers about what they do  
12 or don't have to warn about, because we're  
13 talking about tests like directed and required,  
14 but what do those really mean?

15 If we talk about required, really,  
16 what that means is it's really foreseeable, but  
17 at some point, there can be another alternative  
18 that maybe is 10 percent less effective and  
19 10 percent more expensive.

20 At that point, is asbestos or whatever  
21 product we're talking about still required, or  
22 can we say, well, the equipment will run with  
23 this alternative, it just won't run quite as  
24 well?

25 Is -- when you put your product into

1 the market and say it requires asbestos, that  
2 doesn't even hold as technology changes. So  
3 "required" and "specified" are indeterminant  
4 terms, and one of the costs, to answer your  
5 question, Justice Gorsuch, is you're leaving  
6 manufacturers at sea, whether we're talking  
7 about maritime law or on land --

8 JUSTICE SOTOMAYOR: I'm sorry, why --

9 MR. DVORETZKY: -- about what warnings  
10 they need to provide.

11 JUSTICE SOTOMAYOR: I'm sorry. I -- I  
12 don't understand your point about the future  
13 and a change. If you've warned that asbestos  
14 products are dangerous and you should exercise  
15 care in removing them, then it's the people  
16 down the line who choose to continue doing it,  
17 you're off the hook because you gave them a  
18 warning. This is a failure to warn claim.

19 If you did what you were supposed to  
20 do, that doesn't take away their incentive to  
21 change to a less dangerous product if it's  
22 cheaper or if it's easier to deal with. I'm  
23 not sure what that -- why that increases cost  
24 in some meaningful way.

25 MR. DVORETZKY: Well, I -- it



1 increases costs if you're looking after the  
2 fact at a party that didn't think that the law  
3 required it to provide a warning and imposing  
4 liability.

5 It dilutes the effectiveness of  
6 warnings to have too many of them. If you just  
7 have warnings about everything, people ignore  
8 them. And, again, moreover, you may end up  
9 with inconsistent warnings.

10 If the company -- if a company  
11 provides a warning about how to handle  
12 insulation based on what's known in 1945, that  
13 may be inconsistent, it may be the wrong way to  
14 handle insulation in whatever form it takes 20  
15 years later. And so --

16 CHIEF JUSTICE ROBERTS: Well, but  
17 that's -- I don't understand your -- your  
18 technology argument. I mean, we're talking  
19 about people who were injured at a time where  
20 this was what you use, asbestos, right?

21 And you're saying, well, a warning  
22 would be bad because 20 years later maybe  
23 there's something better. Is that the  
24 argument?

25 MR. DVORETZKY: Well, no. We're

1 saying a warning at that point -- the warning  
2 is best provided by the asbestos manufacturer.  
3 We're not saying that there shouldn't be a  
4 warning by somebody and that there shouldn't be  
5 somebody to sue. You can sue the asbestos  
6 manufacturer if it didn't provide the warning  
7 and setting aside any government contractor  
8 defense or anything.

9 But the -- the problem is, if you have  
10 multiple warnings, it dilutes the value of them  
11 and it can also lead to contradictory warnings.  
12 Once we put, let's say, a plate on our  
13 equipment that provides instructions about what  
14 to do in 1945 based on the state of insulation  
15 then, a few years later when an alternative  
16 comes on the market, that may have to be  
17 handled very differently.

18 JUSTICE KAGAN: No, but the warning --

19 MR. DVORETZKY: And it may be  
20 counter-productive.

21 JUSTICE KAGAN: -- presumably would  
22 say when this product is used with asbestos, it  
23 creates the following dangers. So, if 20 years  
24 from now the product is not used with asbestos,  
25 everybody knows to ignore the warning. But the

1 warning is good for all the time in which the  
2 product is used with asbestos.

3 MR. DVORETZKY: That -- not  
4 necessarily. What -- what if five years down  
5 the road there is different thinking about how  
6 best to handle asbestos itself?

7 JUSTICE BREYER: Then they're not  
8 negligent. I mean, that's -- see, I've been --  
9 tell me if I'm -- where I'm wrong on this. I  
10 found it easier to think about this case once I  
11 forgot about warnings.

12 And I said the case is not that  
13 complicated a case. It's the case in the  
14 Restatement. Judy loans her car for the  
15 evening to Grant, whom she knows is a very  
16 dangerous driver. The least-cost avoider, of  
17 course, is Grant. But, nonetheless, Judy is  
18 negligent.

19 And the negligence that they're  
20 claiming here is taking a thing, a physical  
21 thing which the manufacturer knows is dangerous  
22 and unreasonably putting it out into interstate  
23 commerce, perhaps on a boat, perhaps somewhere  
24 else. And that's why if you tell the user he's  
25 got to use asbestos, knowing all the relevant

1 things, that's a negligent act. Okay.

2 And, similarly, if you use asbestos in  
3 it on a part that will wear out easily, because  
4 people do use the past to judge the present,  
5 he'll replace it with asbestos material, and  
6 that's an unreasonable act.

7 And the third thing is if you  
8 functionally -- that's why I thought this third  
9 was better for you -- you know, you  
10 functionally require the use of asbestos in one  
11 way or another, then you have performed an  
12 unreasonable act.

13 Whether you could cure the problem  
14 with a warning or not cure the problem with a  
15 warning is a question of what makes it  
16 unreasonable and what should a remedy be. All  
17 right. I was thinking of it and now I've  
18 listened to you and I'm not sure I'm thinking  
19 of it correctly. So I -- I would like to know  
20 what you think.

21 MR. DVORETZKY: Well, I think the  
22 problem with all of those standards is that  
23 they don't give manufacturers clear guidance  
24 about what they need to warn about.

25 Does a manufacturer of a device that

1 takes batteries -- and batteries can leak, does  
2 the manufacturer in that situation have to  
3 include a warning? Just in case the battery  
4 manufacturer doesn't tell you that its battery  
5 can leak, I'm going to tell you this battery  
6 can leak because I'm telling you to use  
7 batteries in my product.

8 Does the manufacturer need to do that?  
9 Has it directed the use of batteries? The --  
10 there's no tort case in which, in that  
11 situation, people have gone beyond suing the  
12 battery manufacturer and actually sued the  
13 electronic products manufacturer because,  
14 again, tort law places the burden on the  
15 battery manufacturer. It's their product  
16 that's actually causing the harm.

17 The duty doesn't extend beyond your  
18 own product and the harm is caused by somebody  
19 else's product. So whether it's viewed as a  
20 question of duty or causation, tort law puts  
21 the liability on the manufacturer, distributor,  
22 or seller of the product that actually causes  
23 the harm. Not just any product downstream that  
24 is used with it and in a but-for way can be  
25 said to contribute to the harm.

1 JUSTICE KAVANAUGH: Why are too many  
2 warnings bad?

3 MR. DVORETZKY: Why are too many --

4 JUSTICE KAVANAUGH: Why is that bad?  
5 You said too many warnings. Why are too many  
6 warnings -- explain that to me.

7 MR. DVORETZKY: For a couple of  
8 reasons. One is that over-warning just dilutes  
9 the value of warnings. When -- when you get a  
10 product that is just plastered with warnings,  
11 it leads people not to pay any attention to the  
12 warnings that they actually should pay  
13 attention to.

14 JUSTICE KAGAN: Well, at most, you  
15 have two warnings here. You have the equipment  
16 warning and the asbestos warning. Does that  
17 really -- I would think that that's kind of  
18 good. You know, it's two warnings. You take  
19 it pretty seriously.

20 MR. DVORETZKY: Well, but, if you  
21 follow this rule to its logical conclusion, you  
22 would have multiple warnings essentially on  
23 every part that's connected to every other part  
24 within the ship. The propeller manufacturer  
25 knows that, in order for that propeller to

1 operate, it needs to be connected to a  
2 steam-generating propulsion system that uses  
3 asbestos down the line.

4 Does each manufacturer at each step of  
5 that process need to slap on a warning not only  
6 about asbestos but about every solvent that is  
7 used down the line in the ship? About weapons  
8 that are on the ship? All of these things are  
9 interconnected, and, in a sense, the propeller  
10 requires them; otherwise, the propeller's not  
11 going to operate.

12 But, if you have warnings all the way  
13 down the line, it dilutes the value of the  
14 warnings. It can also lead to inconsistent  
15 warnings, because the party that's in the best  
16 position to provide an accurate warning is the  
17 party that actually provides the  
18 injury-producing good, not the propeller  
19 manufacturer down the line.

20 If I could, I'd reserve the rest of my  
21 time.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Mr. Goldstein.

25

1 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN  
2 ON BEHALF OF THE RESPONDENTS

3 MR. GOLDSTEIN: Thank you, Mr. Chief  
4 Justice, and may it please the Court:

5 This is a failure to warn case under  
6 Section 388 of the Second Restatement. That's  
7 where the principle is embodied, and that says  
8 something that ought to be uncontroversial, and  
9 that is, if you make a product and the ordinary  
10 use or maintenance of that product is going to  
11 cause a harm that you know about, then you need  
12 to warn about that.

13 And the court of appeals here quite  
14 explicitly limited its holding to situations in  
15 which you have a product that has a part and  
16 that part is required for it to operate.

17 And so if I could just point us to the  
18 first operative sentence of the court of  
19 appeals' opinion. It's at 2a of the Joint  
20 Appendix. It's not that long. "The defense's  
21 basic idea" -- this is bare-metal -- "is that a  
22 manufacturer who delivers a product,  
23 bare-metal, that is, without the insulation or  
24 other material that must be added for the  
25 product's proper operation."



1           And so it is concerned only there with  
2     the case in which you just -- these machines  
3     will not work if they don't have asbestos in  
4     them. But it's worse for that -- for the  
5     defendants in terms of their liability, because  
6     as been -- as has been suggested, it is the  
7     operation and maintenance of the machine that  
8     makes the danger worse.

9           So Justice Breyer or -- and Justice  
10    Sotomayor discussed a situation of how it is  
11    that asbestos can be on a shelf and it's not at  
12    all dangerous, but if you put it in the machine  
13    and you subject it to the temperature of 100 --  
14    850 degrees and you compress it and you leave  
15    it there over time, it will degrade to the  
16    point that, when you have ordinary maintenance,  
17    which is specified in the manual for the  
18    machine, and you are digging it out and  
19    chopping it up, that creates asbestos dust.

20           Asbestos dust is a distinct danger  
21    that causes a distinct harm from asbestos as a  
22    part. And that is the concern here. And that  
23    is when you are maintaining the machine as  
24    you're supposed to, as you are directed to by  
25    the manual created by the Defendants here, you

1 have an injury to which you are subjected.

2           There's a pretty good illustration of  
3 that, and that's their own concession that when  
4 they ship the machine with the original gasket  
5 in it or when they provide the 992 replacement  
6 gaskets that Foster Wheeler did, who's one of  
7 the Defendants, they're liable. They recognize  
8 it's part of their machine. Maintaining their  
9 machine is creating the risk.

10           Their responsibility for that, for  
11 warning us, telling us wear a mask in the  
12 manual, doesn't change when we get to the 993rd  
13 gasket.

14           Now I take the kind of law and  
15 economics take on this to be, well, who's the  
16 most efficient party to warn? And I want to  
17 explain why it is that they are.

18           But just to pause for a second, that,  
19 I think, is probably the function of maritime  
20 law here, and that is even if you disagreed  
21 with us and believed that there was a division  
22 in how the common law was applied in these  
23 circumstances, there is a special solicitude  
24 for sailors that you would say requires the  
25 warning by the manufacturers here. And if the

1 Navy believed there was over-warning, the Navy  
2 would prohibit giving this warning.

3 Now why are they the most efficient  
4 party to give the warning? First, it's their  
5 machine. They're much more familiar with how  
6 the parts work than the part manufacturer  
7 because the parts can be used for lots of  
8 different machines.

9 What happens with a gasket, for  
10 example, is we'll get shipped a set of asbestos  
11 board, and it will be cut out to fit inside  
12 whatever flange or whatever pipe connection is  
13 inside the machine. The people who know how  
14 that's going to operate, how much pressure is  
15 going to be on it, is the maker of the machine.

16 The asbestos packing, it comes off a  
17 shelf. It gets put in the machine. Now who  
18 knows how the machine will affect the asbestos?  
19 The maker of the machine.

20 The real manufacturer that's going to  
21 point to the cases that he's citing are the  
22 makers of the asbestos replacement parts,  
23 because he says examples like, well, you know,  
24 this could be used for lots and lots of  
25 different applications.

1           So take a maker in their mind of the  
2    asbestos gasket material or the asbestos  
3    packing. It's not necessarily going to be used  
4    on a Navy destroyer in a GE turbine.

5           The people who know the effects of a  
6    Navy destroyer GE turbine are GE, who made the  
7    turbine. In addition --

8           JUSTICE ALITO: Well, what if they did  
9    know? What if -- how far up the supply chain  
10   does this go? And suppose that the  
11   manufacturers of these component parts knew  
12   this was a custom-made part for the -- the  
13   equipment that the -- these manufacturers were  
14   going to supply. Would they be liable as well?

15          MR. GOLDSTEIN: Likely not because --  
16   and this is a question in the common law that  
17   is dealt with by the Integrated Product  
18   Doctrine, and that is, if the component  
19   manufacturer advises the manufacturer of the  
20   product and it's being used as intended, then  
21   the duty to warn is taken on by the  
22   manufacturer of the integrated product here,  
23   which is what makes this case quite different  
24   from a lot of the hypotheticals that we can get  
25   to.

1 I did want to just, if we could --

2 JUSTICE ALITO: What is the reason for  
3 drawing the line there? What is the policy  
4 reason for drawing the line at that point?

5 MR. GOLDSTEIN: Along the lines of  
6 what I've just described, and that is the  
7 manufacturer of the integrated product knows  
8 how its product is operating, knows what effect  
9 will happen on the parts, and it centralizes  
10 the warnings there.

11 And so I could probably put it in very  
12 precise terms for you, and that is if we could  
13 stop talking about putting signs on things for  
14 just a moment and talk about how this actually  
15 operates.

16 They provide a manual on how to  
17 maintain their machine, okay? It has pages in  
18 it. And it will say disconnect the flange and  
19 take out the asbestos and the like.

20 That is where the warning should be  
21 because that's what we're going to look at.  
22 You know, when we're -- we're talking about the  
23 harm that comes from asbestos that you are  
24 taking out of it, and so, when my friend was  
25 talking about put the warning on the gasket, I

1 actually thought about it and wrote it down and  
2 it says warning.

3 Now what will this look like in 10  
4 years after it's been, you know, subjected to  
5 850 degrees and is being dug out with a  
6 screwdriver? You're not going to see it at all  
7 on the actual gasket itself when you're digging  
8 it out.

9 CHIEF JUSTICE ROBERTS: I'm sorry. I  
10 missed the point. What is the piece of paper?

11 MR. GOLDSTEIN: Sorry. I'm sorry.  
12 The piece of paper is the gasket.

13 (Laughter.)

14 MR. GOLDSTEIN: My friend says --

15 CHIEF JUSTICE ROBERTS: That's a  
16 gasket?

17 MR. GOLDSTEIN: Yes. My friend says  
18 to put the warning on the gasket. And my point  
19 is this looks great today. But, when I'm going  
20 to tear it out of the machine and it's going to  
21 get ripped up and torn up and turned into dust,  
22 which is what our case is about, this turns  
23 into dust. It is extremely difficult to read  
24 in that circumstance.

25 So the -- the natural party who would

1 provide this warning to us is, at the very  
2 least, the manufacturer knows I'm going to  
3 operate the machine and I'm going to maintain  
4 the machine by digging this out of its machine  
5 is going to tell me.

6 Now you can have other cases that are  
7 much more marginal cases, but I don't think  
8 it's an excuse to say, well, we're 100 percent  
9 certain that this machine is going to require  
10 asbestos, but if it only was -- if we were  
11 10 percent certain, you wouldn't hold us to  
12 having a duty to warn, the common law is  
13 smarter than that. It's much more practical  
14 than that. And the easy case is when you know  
15 as a matter of fact and it's the premise of  
16 liability that the machine won't operate  
17 without this.

18 JUSTICE GORSUCH: Well, Mr. Goldstein,  
19 that's where I guess I'm having trouble  
20 figuring out where the line is. The Third  
21 Circuit, as I read it, adopted a foreseeability  
22 analysis, which is quite generous. And it  
23 could be that 10 percent possibility.

24 MR. GOLDSTEIN: Okay. Could I just  
25 disagree with that premise or --

1 JUSTICE GORSUCH: Well, at the end of  
2 the question you may do with it what you wish.

3 (Laughter.)

4 JUSTICE GORSUCH: You can answer it.  
5 You can choose not to answer it. We've seen  
6 plenty of that on this bench. You can choose  
7 to answer another question. Entirely up to  
8 you.

9 (Laughter.)

10 JUSTICE GORSUCH: But a foreseeability  
11 analysis might be a 10 or a 30 percent, we can  
12 quibble, okay, but some chance.

13 Then there is in the case law a  
14 suggestion of inevitability, okay, certitude,  
15 we know it's going to be used.

16 And then there is the third possible  
17 rule, which seems to be the traditional  
18 products liability rule, which is you warn for  
19 your own thing and not for someone else's,  
20 okay? Those are the three choices between us.

21 And I think we've been aligning the  
22 first two a little bit here in this discussion.  
23 And I'm just curious, which is it that you are  
24 asking this Court to adopt?

25 MR. GOLDSTEIN: It is the --



1 JUSTICE GORSUCH: And why?

2 MR. GOLDSTEIN: Okay. It's the  
3 second, because that's the actual rule of the  
4 Third Circuit. That's actually why I started  
5 with the opinion. So the --

6 JUSTICE GORSUCH: Right.

7 MR. GOLDSTEIN: -- what the court of  
8 appeals did is it said the common law  
9 recognizes reasonable foreseeability. And my  
10 friend likes reasonable foreseeability, despite  
11 all the complaints about it.

12 So take the original gasket in the  
13 machine. He wants to be held liable only, of  
14 course, for reasonably foreseeable disease from  
15 the original gasket. What the Third Circuit  
16 said is we are going to adopt the common law  
17 rule that you have a duty to warn about your  
18 own machine, and that's going to include parts  
19 and replacement parts that must be there, that  
20 are required and the machine will not operate  
21 without them.

22 Then you are responsible for the  
23 reasonably foreseeable harm that comes from  
24 that. It did not say that you are responsible  
25 for replacement parts that are reasonably

1       foreseeable to be used with your machine.

2                   And so --

3                   JUSTICE GORSUCH: I'm not talking  
4       about the replacement parts portion of the  
5       opinion right now.

6                   MR. GOLDSTEIN: Yes.

7                   JUSTICE GORSUCH: I'm just talking  
8       about the bare-metal portion of the opinion.

9                   MR. GOLDSTEIN: Yes.

10                  JUSTICE GORSUCH: Put aside the  
11       replacement parts. I think we're -- we have  
12       three possibilities before us. And you're  
13       still -- you're saying the second one is the  
14       one you'd have us adopt?

15                  MR. GOLDSTEIN: And that is it is  
16       inevitable. So I do want to say that I do  
17       disagree, respectfully, with your understanding  
18       that the ordinary rule is that you're  
19       responsible only for the thing that you, you  
20       know, you make alone without regard to  
21       replacement parts.

22                  And my friend, I think, is just  
23       confused. He says we haven't cited any cases.  
24       We've cited the Huynh case, for example, and  
25       that's a situation in which you have an

1 asbestos grinder and you have a wheel on it and  
2 the wheel runs out, and you replace it with an  
3 identical wheel, and there is a risk that the  
4 wheel will explode.

5 Of course, your duty to warn that,  
6 hey, my machine, you know, it tends to blow up  
7 the wheel is -- remains your duty even if you  
8 replace the wheel.

9 We also have the Macias case. So the  
10 first one was from the California court of  
11 appeals. The Macias case is from the  
12 Washington supreme court. That's a respirators  
13 case.

14 So you make a respirator and it  
15 exposes people to the thing that -- benzene or  
16 asbestos or whatever it is that you're trying  
17 to protect against. You have a duty to warn  
18 that you know that that machine -- that device  
19 is only going to operate when it is that it's  
20 exposed to the hazardous chemical. That duty  
21 exists just as in the gasoline in the car.

22 JUSTICE BREYER: But let's -- can I go  
23 back for a second? Because now I -- I did have  
24 this kind of question. I suddenly went back to  
25 the court of appeals' opinion, and it says the

1 -- the product may be held liable -- you know,  
2 the manufacturer, if the facts show the  
3 plaintiff's injuries were a reasonably  
4 foreseeable result of the failure to provide a  
5 warning.

6 MR. GOLDSTEIN: Yes.

7 JUSTICE BREYER: Then it gives three  
8 examples.

9 MR. GOLDSTEIN: Yes.

10 JUSTICE BREYER: Well, I don't have  
11 any problem -- or I probably don't have a  
12 problem with the three examples.

13 MR. GOLDSTEIN: Yes.

14 JUSTICE BREYER: But it doesn't say  
15 they're exclusive.

16 MR. GOLDSTEIN: Oh.

17 JUSTICE BREYER: And so I think  
18 perhaps one of the other things that the other  
19 side is worried about is, if you read that  
20 sentence without limiting it to the three  
21 examples, it would create the horrors that  
22 they show -- that they agree with.

23 MR. GOLDSTEIN: I understand.

24 JUSTICE BREYER: Yes.

25 MR. GOLDSTEIN: And I think you can

1 take some comfort from my reading from the  
2 first operative sentence of the court of  
3 appeals' opinion that it's talking about only  
4 parts that have to be there for the machine to  
5 operate.

6           When the court of appeals -- and this  
7 is going to be at 16A of the Petition Appendix  
8 -- says we've given you three, we're not saying  
9 these are, you know, all of the possible  
10 examples. I just think it was being sensible  
11 in a very common law way. But it was  
12 excluding --

13           JUSTICE ALITO: But where we --

14           MR. GOLDSTEIN: If I could just be  
15 precise about one thing it was excluding, and  
16 it didn't, and so you would know what the  
17 actual consequences of this are.

18           There is a leading district court  
19 opinion that gets cited here by the court of  
20 appeals, and it had a fourth, and that is  
21 knowledge. If you know that the part, the  
22 asbestos part will be in it, but you didn't  
23 require it, and it wasn't absolutely necessary  
24 for the machine to work -- and the court of  
25 appeals, I think, was avoiding passing on that

1 question, which isn't in the case, and I think  
2 you fairly can too.

3 JUSTICE KAGAN: One of the horribles  
4 that Mr. Dvoretzky threw out at the end of his  
5 argument was like a flashlight with batteries.

6 What -- how should that come out?

7 MR. GOLDSTEIN: If the flashlight is  
8 designed in a way that it punctures the  
9 battery, okay, in the same way that maintaining  
10 this machine causes the asbestos to turn into  
11 dust --

12 JUSTICE KAGAN: No, you just put the  
13 batteries in, a normal flashlight, but it  
14 doesn't work. You can turn it on, it doesn't  
15 work, unless the batteries are in there.

16 MR. GOLDSTEIN: No, I think that, in  
17 that situation, the mere fact that batteries  
18 are intrinsically dangerous doesn't create the  
19 duty to warn. It is, I think, a special  
20 feature of this case that the machine itself  
21 contributes to the liability. It ships with,  
22 very frequently, asbestos gaskets and other  
23 material, and it cannot operate without it.  
24 It's the combination of those things.

25 JUSTICE GORSUCH: Well, I guess I'm

1 confused then, because I -- I haven't used a  
2 flashlight without a battery very often. I  
3 mean, you know, it seems inevitable. The other  
4 example that we're given is the manufacturer of  
5 the ashtray --

6 MR. GOLDSTEIN: Yeah.

7 JUSTICE GORSUCH: -- who inevitably  
8 knows that it's going to be used with some sort  
9 of tobacco product, hopefully. And extending  
10 the duty to warn in those cases, some of the  
11 concerns that your colleague has raised about  
12 over-warnings, contradictory warnings, and the  
13 costs associated with that, that might deter  
14 innovation and raise consumer cost needlessly,  
15 seem to have some purchase to me.

16 So help me out.

17 MR. GOLDSTEIN: Sure. Okay.

18 JUSTICE GORSUCH: I'm -- I'm stuck  
19 where Justice Kagan is.

20 MR. GOLDSTEIN: Okay. I think their  
21 better example is flashlights, rather than  
22 ashtrays, because you can use ashtrays for  
23 other things. So I don't want to avoid the  
24 harder hypothetical.

25 And that is, if you have a -- a

1 flashlight and you know as the manufacturer  
2 that the batteries in them are going to leak  
3 out and put acid on your hands, I actually do  
4 think on reflection that that manufacturer  
5 needs to warn about that. Right?

6 So it -- it is technically the case  
7 that the battery inside is leaking, but you're  
8 operating a flashlight and you're going to be  
9 exposed to that risk. I would think that you  
10 would want the manufacturer of the light to  
11 warn people while you're holding this  
12 flashlight you could be exposed to acid.

13 Now you may have --

14 JUSTICE KAVANAUGH: So you just  
15 changed the answer.

16 MR. GOLDSTEIN: I did.

17 JUSTICE KAVANAUGH: Okay.

18 MR. GOLDSTEIN: So --

19 JUSTICE KAVANAUGH: Just making sure.

20 (Laughter.)

21 MR. GOLDSTEIN: Absolutely. Now I --  
22 I will say that another part of my answer is  
23 that this is the easier case because the  
24 product can -- actually contributes to the  
25 injury. You may have lots of defenses there,



1 including that there were other warnings that  
2 were already given, you have a sophisticated  
3 user that already knows about it, that sort of  
4 thing. But I actually think that, in that  
5 precise hypothetical, it ought to come out that  
6 way.

7 JUSTICE SOTOMAYOR: Mr. Goldstein --

8 MR. GOLDSTEIN: I would want to know  
9 --

10 JUSTICE SOTOMAYOR: -- I -- I --  
11 having just recently bought a battery --

12 MR. GOLDSTEIN: Yes.

13 JUSTICE SOTOMAYOR: -- the flashlight  
14 told me to not store it with the battery.

15 MR. GOLDSTEIN: Okay.

16 JUSTICE SOTOMAYOR: So now --

17 JUSTICE KAGAN: Did you feel  
18 overwarned?

19 JUSTICE SOTOMAYOR: -- can you show me  
20 why they --

21 (Laughter.)

22 JUSTICE SOTOMAYOR: Can you show me a  
23 case that would have suggested --

24 MR. GOLDSTEIN: Sure. There are two.  
25 The two that --

1 JUSTICE SOTOMAYOR: -- that would have  
2 come out to the -- to that conclusion? I  
3 always assume that when manufacturers do  
4 things, it's because somebody sued them.

5 (Laughter.)

6 MR. GOLDSTEIN: Somebody told them to.  
7 And sometimes they are over-protective. It's  
8 true.

9 JUSTICE SOTOMAYOR: Occasionally.

10 MR. GOLDSTEIN: So I -- the two I  
11 think that are -- are quite on point are the  
12 Huynh case and the Macias case that I gave, so  
13 the California Court of Appeals and the  
14 Washington Supreme Court.

15 And I -- I do think I should, you  
16 know, to be fair to my friend, address the  
17 other examples. And so he gives the airplane,  
18 okay?

19 So you -- you manufacture an airplane.  
20 It is -- a few things about that. First,  
21 airplanes actually do work without seats. You  
22 know, some -- if not, somebody better tell  
23 FedEx, which is shipping things all over the  
24 country. But at the very least, they work with  
25 lots of different kinds of seats. That's why

1 some people fly Emirates and not Spirit,  
2 because some of the seats will be much, much  
3 closer in and have a much greater risk of  
4 injury for them.

5 And that's why we don't say, as the  
6 court of appeals did here, that the airplane  
7 will only work in a situation in which you are  
8 going to be exposed to it.

9 But I'll give you another airplane  
10 hypothetical that I would hope come out this  
11 way, and that is the airplane manufacturer  
12 attaches Rolls Royce engines. You know that  
13 working on the engine can expose you to  
14 terrible shock and being killed or gasoline  
15 will pour out of it or oil will pull out --  
16 pour out of it.

17 I hope that they -- we want the  
18 airplane manufacturer to warn about that  
19 because that -- that plane will not operate  
20 without those engines and you are going to be  
21 exposed to that risk in the course of  
22 maintaining that machine.

23 That's the much more analogous  
24 hypothetical of ours.

25 JUSTICE ALITO: What about the

1 ashtray? You didn't answer the question.

2 MR. GOLDSTEIN: Oh, I'm sorry. I had  
3 said that the ashtray could be used for a lot  
4 of different things.

5 JUSTICE ALITO: That's -- I mean,  
6 that's -- your answer is, well, you know, the  
7 manufacturer of the ashtray is off the hook  
8 because it's possible somebody might use it for  
9 some purpose other than -- than smoking?

10 MR. GOLDSTEIN: No, I -- I just tried  
11 to give -- among the distinctions is certainly  
12 that. And so it wouldn't fit within the Third  
13 Circuit's --

14 JUSTICE ALITO: What if I don't think  
15 that's much of a distinction?

16 MR. GOLDSTEIN: Okay. Then there are  
17 -- there are others, and that is the ashtray  
18 does not give you cancer. Okay? The ashtray  
19 does not actually contribute to your injury.

20 What you have is you have a toxic  
21 product that you're making a choice to use that  
22 you are putting down. It would be like saying  
23 this -- and I think it's a great example for us  
24 because it highlights why we are not saying  
25 they're responsible for every harm from

1 asbestos, including this asbestos. It would be  
2 like us saying: Your machine only works with  
3 asbestos; you're liable because I got sick  
4 because the storage room had the asbestos in  
5 it.

6 We're not just saying kind of but-for  
7 causation that there was a relationship between  
8 them. You can put your cancer-causing  
9 cigarette down in the ashtray and not be liable  
10 for it, but if it is the case -- I'll give you  
11 an example.

12 What if the ashtray is made of paper?  
13 Okay? If the ashtray is made of paper, so that  
14 if you put something lit in it, they will cause  
15 -- it will cause combustion and it will burn --

16 JUSTICE ALITO: No, but that's  
17 different because then your product, the actual  
18 product that you're manufacturing, is  
19 dangerous.

20 MR. GOLDSTEIN: Well, Your -- Your  
21 Honor, none of this is about the product --

22 JUSTICE ALITO: In and of itself.

23 MR. GOLDSTEIN: I don't -- I don't --  
24 I mean, kids make paper ashtrays, and we all --  
25 the world goes on. I don't think they are

1 intrinsically dangerous -- I'm -- probably,  
2 kids shouldn't be making ashtrays. But --

3 (Laughter.)

4 JUSTICE ALITO: Well --

5 MR. GOLDSTEIN: -- I'm just saying I  
6 could.

7 JUSTICE KAVANAUGH: The difference --  
8 the difference --

9 MR. GOLDSTEIN: It may not be as good  
10 as my gasket.

11 JUSTICE KAVANAUGH: Just so I can  
12 follow, the difference between the flashlight  
13 and ashtray example?

14 MR. GOLDSTEIN: The -- the difference  
15 between the flashlight and the ashtray example  
16 is that in the course -- in the necessary  
17 course of using it, if you are going to be  
18 exposed to harm. And so I suppose on that  
19 axis, it is the case that the ashtray can be  
20 used for other things.

21 But we are -- I did think that it was  
22 quite important that we aren't saying that they  
23 are -- they have a duty to warn that kind of  
24 encompasses everything that the asbestos  
25 manufacturer would, because the asbestos

1 manufacturer may have other warnings and other  
2 harm that it causes.

3 Our harm is one that comes distinctly  
4 from the fact that this machine is just -- it's  
5 not bare-metal; it's dead metal. It is just  
6 sitting there as dead weight. And if -- and it  
7 may help --

8 JUSTICE GORSUCH: What if -- what if  
9 -- let's just take a hypothetical.

10 MR. GOLDSTEIN: Sure.

11 JUSTICE GORSUCH: Okay. The -- the  
12 ashtray, a jury will find in my hypothetical  
13 case that the particular nature of its design  
14 meant that the manufacturer knew it would be  
15 used with tobacco products inevitably, okay?  
16 Then what?

17 MR. GOLDSTEIN: So there are a lot of  
18 different defenses as well, including the  
19 sophistication --

20 JUSTICE GORSUCH: Well, just stick  
21 with the -- the hypothetical.

22 MR. GOLDSTEIN: I am sticking with the  
23 hypothetical.

24 JUSTICE GORSUCH: All right. All  
25 right.

1           MR. GOLDSTEIN: I mean, I took the  
2 hypothetical to be, you know, will the ashtray  
3 maker be liable --

4           JUSTICE GORSUCH: I know there are  
5 defenses, and there are going to be defenses --

6           MR. GOLDSTEIN: Yeah.

7           JUSTICE GORSUCH: -- for General  
8 Electric or whomever in this case too. I --  
9 I'm not asking about that.

10           Is there a duty, is what I'm asking,  
11 okay? That -- that you could get to a jury on  
12 duty?

13           MR. GOLDSTEIN: Yeah.

14           JUSTICE GORSUCH: That's my question.

15           MR. GOLDSTEIN: The ashtray -- I think  
16 that there is not a duty. I think that the  
17 important distinctions are that, here, the  
18 actual machine creates the special and distinct  
19 risk, and, in addition, there is in the common  
20 law this understanding about whether you would  
21 be an efficient party or there's a much better  
22 party to warn.

23           And there we have obviously the  
24 situation -- I think the -- the hypothetical  
25 resonates because there's so much knowledge in



1 the community about the harms from cigarettes  
2 that come from warning about cigarettes.

3 But, you know, to take the battery  
4 example from the flashlights, there are other  
5 sensible instances in which we say: Look, if  
6 using the machine is going to expose you to a  
7 distinct risk, or at the very least, when using  
8 the machine is going to create the risk, what  
9 is it that we think the actual -- you know, the  
10 asbestos manufacturer, not knowing that it's  
11 going to be used in this GE machine, not  
12 knowing that it's going to be 850 degrees, that  
13 this certain pressure will be at, not knowing  
14 that GE will instruct to how to maintain the  
15 machine, so to give it, you know, again --

16 JUSTICE ALITO: But, if the question  
17 is who is the -- the best party to warn, in  
18 this case, why isn't that the Navy? Now I know  
19 the Navy isn't liable because of the separate  
20 doctrine, but why isn't the Navy -- why wasn't  
21 the Navy the best party to -- to warn?

22 The Navy was aware of the hazards long  
23 before the ships were built. It wanted to use  
24 asbestos. It ordered these products knowing  
25 that they would have to have asbestos on it.

1 It had control of the sailors.

2 MR. GOLDSTEIN: Yeah. So what the  
3 Navy did -- and so I -- it is a very specific  
4 question about the Navy -- what the Navy did is  
5 it required the manufacturers to provide  
6 manuals on how the machines are maintained. It  
7 said to the manufacturer: You know how to  
8 maintain your machine.

9 The Navy isn't the party that's most  
10 expert about that. It's not the one that  
11 tested the machine and the like. Yes, there  
12 were specifications that it had to meet, but  
13 the party that would produce the manual, the  
14 party that would know that this was going to  
15 degrade, the party that -- that -- and if I  
16 could just give you another precise example  
17 because I'm not sure the briefs, you know,  
18 elucidate this enough.

19 What happens here is you have two  
20 pieces of metal -- that's why it's called the  
21 bare-metal defense -- and in between them is a  
22 gasket, just like a washer in something in your  
23 house, okay?

24 This thing cannot operate unless it's  
25 sealed with something that has a little bit

1 more flexibility to it, and that's why you have  
2 a gasket and that's why -- the reason it's  
3 asbestos is it's the only thing in the relevant  
4 period of time that would work.

5 And so, in that situation when you,  
6 the manufacturer, are designing your machine  
7 and knowing what kind of gasket will I be able  
8 to use, it's going to have to be an asbestos  
9 one, but not just that, I know that when you  
10 break the machine open, right, to do  
11 maintenance on the machine, we have to get  
12 inside it, I know you're going to have to  
13 scrape that off and make it perfectly clean in  
14 order to reseal it, given the tolerances of my  
15 machine.

16 CHIEF JUSTICE ROBERTS: Counsel, I --  
17 I've been thinking about your plane and the  
18 Rolls Royce engine.

19 MR. GOLDSTEIN: Yes.

20 CHIEF JUSTICE ROBERTS: I want to make  
21 sure I understand it. The engine can cause all  
22 sorts of dangers when it's running.

23 MR. GOLDSTEIN: Yes.

24 CHIEF JUSTICE ROBERTS: And your  
25 theory was that the plane manufacturer is

1     liable to the -- when those dangers injure  
2     someone?

3             MR. GOLDSTEIN: Your Honor, what I was  
4     -- the example I was giving is if you are doing  
5     maintenance on the engine, okay, under the  
6     integrated product doctrine, the responsibility  
7     there is of the airline manufacturer.

8             It may provide another manual from the  
9     Rolls Royce company, but if the airline is  
10    providing a manual on how to maintain the  
11    machine and it includes the engines, we want it  
12    to warn about the dangers of --

13            CHIEF JUSTICE ROBERTS: I would have  
14    thought in that case -- it's a point your  
15    friend on the other side made -- it does seem  
16    to me that it would make a lot more sense for  
17    the engine manufacturer to be the one giving  
18    warnings about how its product works.

19            Now I'm not quite sure why that's  
20    different than the case before us, but it does  
21    strike me as -- as a different situation.

22            MR. GOLDSTEIN: Well, I do think that  
23    the -- the way the integrated product doctrine  
24    has worked, and I think we can also cut through  
25    the ambiguities and what the marginal cases

1 are, because they concede liability as to the  
2 gaskets that shipped with it originally.

3 So we know we're dealing with an  
4 integrated product there. The integrated  
5 product doctrine works as saying if you build  
6 something into your machine and it is going to  
7 operate as intended, it is the manufacturer of  
8 the integrated product, the turbine, the pump,  
9 in our examples, that has the -- the common law  
10 duty to warn.

11 JUSTICE KAVANAUGH: Is the -- is a  
12 flashlight an integrated product then with the  
13 batteries? Is it --

14 MR. GOLDSTEIN: I -- I think it's  
15 probably --

16 JUSTICE KAVANAUGH: Or what's the  
17 theory?

18 MR. GOLDSTEIN: I -- I think it is  
19 because we're talking about wear parts here --

20 JUSTICE KAVANAUGH: And the ashtray is  
21 not an integrated product with the --

22 MR. GOLDSTEIN: With the --

23 JUSTICE KAVANAUGH: -- tobacco?

24 MR. GOLDSTEIN: Exactly.

25 JUSTICE KAVANAUGH: Is that the -- I

1 just want to make sure -- is that the  
2 distinction, so I understand?

3 MR. GOLDSTEIN: That is among the  
4 distinctions, that's right. And part of it  
5 would be probably whether it is the case that  
6 these things ordinarily ship with batteries.  
7 Okay?

8 If it's the case that these products  
9 come with batteries, so, you know, they're  
10 perceived as being one integrated thing. If  
11 they are instead understood to be two separate  
12 things, it would be a different matter.

13 The easy case, I would say -- we --  
14 we're having the struggle that the common law  
15 has had.

16 JUSTICE KAVANAUGH: So shipped with,  
17 not inevitably used with?

18 MR. GOLDSTEIN: No. I think that it  
19 is shipped with because it is inevitably used  
20 with. It's no accident. It just -- it wasn't  
21 like we love asbestos. I mean, there is  
22 nothing else --

23 CHIEF JUSTICE ROBERTS: Well, but here  
24 -- here, they -- they didn't ship the asbestos  
25 with it.

1 MR. GOLDSTEIN: That is --

2 CHIEF JUSTICE ROBERTS: Other than  
3 your gasket part. I mean, the insulation was  
4 added later.

5 MR. GOLDSTEIN: That is -- so just to  
6 be clear, our -- our case rests quite heavily  
7 on the internal gasket that turns to dust and  
8 the internal packing that turns to dust. That  
9 was overwhelmingly provided with the machine  
10 because, especially as to the gaskets, you  
11 know, the metal will just rub up against it.

12 There is the question of the  
13 non-replacement external insulation. And so  
14 this could be looked at differently. We do  
15 think the result is the same, because the  
16 machine will not operate as intended without  
17 the external insulation for two reasons.

18 The most important one is the machine  
19 is built to keep heat in the system. If you  
20 don't have asbestos insulation, all the heat  
21 goes out of it. Everybody knows the machine  
22 will be covered in insulation.

23 The reason it doesn't ship with it is  
24 because it is just very, very difficult to  
25 pre-install blanket insulation rather than

1 hanging it on once it gets to the ship itself.

2 I -- I will say there is also a  
3 marginal case that my friend sometimes points  
4 to, and that is you ship the parts of the  
5 machine and there's where you put in the gasket  
6 and the packing.

7 That's because some -- these machines  
8 can be so big that the Navy can require that  
9 they be assembled shipboard, but that doesn't  
10 make them any less part of the original  
11 machine.

12 JUSTICE BREYER: The part there that I  
13 started off, whatever my track was, is -- is in  
14 the restatement where it says on -- you're  
15 talking about this case that you're talking  
16 about, I think, right now.

17 "The law itself must take care to  
18 avoid requiring excessive precautions of actors  
19 relating to harms that are immediately due to  
20 the improper conduct of third-parties, even  
21 when that improper conduct can be regarded as  
22 somewhat foreseeable."

23 So that says, oh, well, we have to  
24 figure it out. And that's why I sort of see,  
25 but I thought, well, maybe that should be



1 interpreted as to require, in your third  
2 situation, not the first two, that -- that the  
3 manufacturer functionally requires that a  
4 dangerous item be put to work.

5 MR. GOLDSTEIN: All right. The only  
6 change I would give --

7 JUSTICE BREYER: And you all can argue  
8 about whether that's true.

9 MR. GOLDSTEIN: Sorry. I might not  
10 say the manufacturer functionally requires,  
11 that is, it is functionally required.

12 JUSTICE BREYER: What would you say?

13 MR. GOLDSTEIN: It is -- in the  
14 passive voice, because I just -- if they are  
15 making a machine to a Navy specification and  
16 the machine will only operate with asbestos, I  
17 don't think that gets rid of the duty to warn  
18 unless the Navy tells them not to warn. That's  
19 the Boyle defense.

20 So I do want to be clear that I think  
21 that there are a couple defenses, government  
22 contractor and superseding cause, that  
23 essentially the other side's argument is, you  
24 know, we got halfway there, you know, we didn't  
25 actually have the Navy forbidding us from

1 giving warnings and we didn't actually have an  
2 unforeseeable superseding cause, but kind of  
3 the mix of those as a policy matter is enough  
4 to put the liability off on someone else.

5 There should be a real consequence to  
6 the fact that they can't meet the standards of  
7 the Court's decision in Exxon versus Sofec on  
8 superseding cause or the government contractor  
9 defense.

10 When those requirements aren't met,  
11 that's because we want the liability on the  
12 original party here. And that's this party.  
13 It is creating the danger.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Four minutes, Mr. Dvoretzky.

18 REBUTTAL ARGUMENT OF SHAY DVORETZKY  
19 ON BEHALF OF THE PETITIONERS

20 MR. DVORETZKY: Thank you, Mr. Chief  
21 Justice.

22 I think that one of the challenges --  
23 one of the challenges of this argument is  
24 creating an administrable rule based on these  
25 terms like required, directed, inevitable.

1           And I think the back and forth shows  
2           that those terms, when you actually try to  
3           apply them, are very difficult to apply and  
4           will not lead to predictable rules that will  
5           tell manufacturers what they need to do and  
6           that will promote the interests of maritime  
7           commerce.

8           When you talk about the machine not  
9           operating without it, in our case, the machines  
10          would operate without asbestos. They just  
11          would not operate as efficiently.

12          And Joint Appendix 104 and 128 discuss  
13          a couple of alternatives that maybe did not  
14          meet the Navy's specs but that would have  
15          allowed the machines to operate, and, again,  
16          they operate without asbestos today.

17          If we're talking about directed, I  
18          think it's helpful to look at what an example  
19          of a manual in this case actually is, and it's  
20          in the Third Circuit Joint Appendix at 372 to  
21          404.

22          All it is is a series of sketches that  
23          show where the asbestos would go. In other  
24          words, this shows the foreseeable use of  
25          asbestos by the Navy, but it's not providing

1 specific step-by-step directions saying you  
2 must use asbestos and here's how to use it.

3 So, when we talk about directed, what  
4 does that mean? And it's important in maritime  
5 law in particular to have predictable rules in  
6 order to promote maritime commerce.

7 Second point: My friend talks about  
8 how our machines created the risk. This is not  
9 a combined use sort of case where a flashlight  
10 might puncture a battery. And in that  
11 situation, of course, the flashlight  
12 manufacturer would be liable for contributing  
13 to the harm.

14 It was not argued below. There's no  
15 evidence in the record that our -- that our  
16 machines contribute to the harm in this way.  
17 And it's also not true, first, because of the  
18 point I made earlier that this is just the  
19 natural degradation of asbestos when it's used,  
20 not any unique harm caused by our machine.

21 JUSTICE GINSBURG: And what you just  
22 said, it sounds to me like -- that those would  
23 be an issue -- issues for trial, but you say  
24 you should have summary judgment and no trial  
25 based on the, what is it, the bare something

1 doctrine?

2 MR. DVORETZKY: Well, if -- if the  
3 theory -- if it were argued in this case that  
4 there was a genuine issue of fact about whether  
5 our equipment contributed to the harm in the  
6 way that a flashlight punctures a battery, that  
7 might well be a fact question, but that's not  
8 been pled or argued, and there's no genuine  
9 issue of fact on this record because that's  
10 simply not what's been argued below.

11 Moreover, if you look at our system,  
12 while the system as a whole generates heat, not  
13 all equipment in the system even does that.  
14 The -- the turbine, for example, spins around  
15 but isn't generating any appreciable amount of  
16 heat.

17 And so the idea that every  
18 manufacturer in this integrated system is  
19 liable for warning would just -- would, again,  
20 lead to over-warning and excessive liability.

21 With respect to the cases that Mr.  
22 Goldstein cited, the Huynh case is one in which  
23 the grinder caused the wheel to explode because  
24 the particular wheel was incompatible with the  
25 grinder.

1           And so, in that situation, there, of  
2           course, might well be a duty on the part of the  
3           grinder manufacturer to say: Don't use this  
4           wheel.

5           The Macias case did not involve later  
6           added components. And the same state supreme  
7           court there reaffirmed its earlier decisions in  
8           the Braaten and Simonetta cases, which did  
9           involve later added components.

10           And it's also worth emphasizing that  
11           both of those cases -- both of those cases are  
12           asbestos-related cases. And Mr. Goldstein  
13           hasn't cited a single case from outside the  
14           asbestos made context involving, say, a  
15           flashlight manufacturer that needs to warn  
16           about the batteries.

17           The fact that flashlight manufacturers  
18           might do that as a matter of being overly  
19           cautious doesn't mean that the law requires it  
20           and doesn't mean that tort law policy is well  
21           served by it.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23           counsel. The case is submitted.

24           (Whereupon, at 12:06 p.m., the case  
25           was submitted.)

## Official - Subject to Review

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