

IN THE THIRD DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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FLOWSERVE CORPORATION (F/K/A DURAMETALLIC, INC.),

Defendant-Petitioner,

versus

THOMAS J. BONILLA and ANA BONILLA,

Plaintiffs-Respondents.

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CASE NO. \_\_\_\_\_

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ON PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT  
COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR  
DADE COUNTY, FLORIDA  
(Circuit Court Case No. 02-21139 CA 42)

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MOTION OF THE ASSOCIATED INDUSTRIES OF FLORIDA,  
AMERICAN INSURANCE ASSOCIATION, CHAMBER OF COMMERCE OF  
THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM  
ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND NATIONAL  
ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE *AMICI  
CURIAE* BRIEF IN SUPPORT OF DEFENDANT FLOWSERVE  
CORPORATION'S PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, the  
Associated Industries of Florida, American Insurance Association, Chamber of  
Commerce of the United States of America, American Tort Reform Association,  
American Chemistry Council, and National Association of Manufacturers—  
collectively “*amici*”—hereby move for leave to file the accompanying brief in

support of Defendant Flowserve Corporation’s Petition for Writ of Certiorari in the above-captioned case. In support of their motion, *amici* state as follows:

1. *Amici* urge this Court to reverse the August 7, 2006, Order of the Circuit Court of the Eleventh Judicial Circuit and find that the Asbestos and Silica Compensation Fairness Act (“the Act”), 2005 Fla. Laws ch. 274, Fla. Stat. §§ 774.201 through 774.209, is constitutional and dismiss without prejudice all claims that fail to meet the Act’s procedural requirements.

2. As organizations that represent companies doing business in Florida and their insurers, *amici* have a substantial interest in ensuring that Florida’s tort liability system is balanced and reflects sound public policy. In that regard, our brief will provide an overview of the litigation environment that led the Florida Legislature to enact the subject Act. The brief will describe how mass filings by plaintiffs who are not sick—typically generated through mass screenings that have no valid medical purpose—are having devastating impacts on the truly sick, defendant companies, and affected communities. The brief will show that the Act represents a sound and fair procedural response to these serious problems.

3. Founded in 1920, Associated Industries of Florida (“AIF”) is a broad-based trade association, advocating on behalf of the Florida business community before the legislative, executive, and judicial branches of Government. AIF’s mission has always included any means to encourage and support the business and

industrial enterprises of Florida and afford a medium for their cooperation in support of constructive policies relating to all matters affecting them. For decades, AIF has submitted *amicus curiae* briefs in a wide spectrum of cases impacting the business community and has become commonly known as “The Voice of Florida Business.”

4. The American Insurance Association (“AIA”), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

5. The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in

court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal court.

6. Founded in 1986, the American Tort Reform Association (“ATRA”) is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state supreme courts that have addressed important liability issues.

7. The American Chemistry Council (“ACC”) represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation’s economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

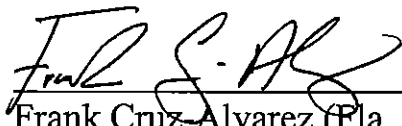
8. The National Association of Manufacturers (“NAM”) is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM’s mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding

among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

9. Counsel for Defendant has consented to the filing of the proposed brief, but plaintiffs' counsel has refused.

10. For these reasons, *amici* request that the Court grant their Motion for Leave to file a brief in this case.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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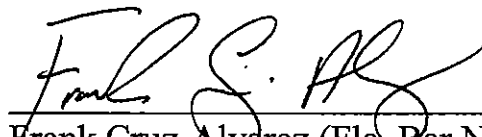
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## **STATEMENT OF INTEREST**

As organizations that represent companies doing business in Florida and their insurers, *amici* have a substantial interest in ensuring that Florida's tort liability system is balanced and reflects sound public policy.

### **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The United States Supreme Court has described asbestos litigation as a "crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). At least 322,000 asbestos claims may be pending, and claims continue to be filed at an extraordinary rate. Recent studies indicate that *up to ninety percent* of plaintiffs filing claims today *have no physical impairment* that affects their daily activities.

The presence of unimpaired claimants "on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now." Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 393 (1993) [hereinafter Edley & Weiler]. Sick plaintiffs and asymptomatic claimants are now forced to compete for diminishing, scarce resources. See Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the*

*Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001). Already, asbestos lawsuits have forced an estimated eighty-five employers into bankruptcy, and the litigation is spreading. Claims by the non-sick also cause unwelcome delays for asbestos claimants with fatal diseases and other civil plaintiffs with actual injuries.

State legislatures, such as in Florida, and courts are acting to address filings by unimpaired asbestos claimants and the adverse ripple effects such claims produce. See James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 20:23 Mealey's Litig. Rep.: Asbestos 19 (Jan. 10, 2006). It is against this background that the instant appeal should be considered.

In June 2005, the Florida Legislature enacted the Asbestos and Silica Compensation Fairness Act, 2005 Fla. Laws ch. 274, Fla. Stat. §§ 774.201 through 774.209, to respond to the problems outlined above, and to address a recent increase in silica-related filings. The core of the new procedural statute embodies the sound public policy that: (1) plaintiffs with asbestos-related or silica-related impairments should be given priority and should not be forced to wait for justice behind earlier-filing individuals who are not sick; and (2) the statute of limitations should be tolled for persons who have been exposed to asbestos or to silica, but who are not presently sick, so that these individuals' claims will not be time-barred if they develop an asbestos-related or silica-related impairment in the future. See

Fla. Stat. § 774.202. *Amici curiae* ask this Court to hold the Act constitutional and dismiss without prejudice all claims that fail to meet its procedural requirements.

## **ARGUMENT**

### **I. AN OVERVIEW OF THE LITIGATION ENVIRONMENT IN WHICH THE SUBJECT APPEAL MUST BE CONSIDERED**

#### **A. The Current Asbestos Litigation Crisis: An Overview**

Courts and commentators have recognized since the early 1990s the extraordinary problems created by the “elephantine mass” of asbestos cases. *Norfolk & W. Ry. Co., v. Ayers*, 538 U.S. 135, 166 (2003) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)). At least 322,000 asbestos claims may be pending. See Am. Acad. of Actuaries, *Current Issues in Asbestos Litigation* (Feb. 2006), at [http://www.actuary.org/pdf/casualty/asbestos\\_feb06.pdf](http://www.actuary.org/pdf/casualty/asbestos_feb06.pdf).

#### **1. Asbestos Litigation Is Driven by Mass Filings by Unimpaired Claimants**

The vast majority of new asbestos claimants—up to ninety percent—are “people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be.” *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106<sup>th</sup> Cong., at 5 (July 1, 1999) (statement of

Christopher Edley, Jr., Professor, Harvard Law School).<sup>1</sup> The RAND Institute for Civil Justice recently concluded that “a large and growing proportion of the claims entering the system in recent years were submitted by individuals who had not at the time of filing suffered an injury that had as yet affected their ability to perform the activities of daily living.” Stephen J. Carroll *et al.*, *Asbestos Litigation* 76 (RAND Inst. for Civil Justice 2005), available at <http://www.rand.org/publications/MG/MG162> [hereinafter RAND Rep.]. Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said, “the ‘asbestos litigation crisis’ would never have arisen and would not exist today” if not for the claims filed by unimpaired claimants. Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Env’tl. L. & Pol’y Rev. 243, 273 (2001).

## 2. Lawyers Generate Plaintiffs Through Notoriously Unreliable Screenings

Mass screenings conducted by plaintiffs’ lawyers and their agents have “driven the flow of new asbestos claims by healthy plaintiffs.” Hon. Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003)

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<sup>1</sup> See also Roger Parloff, *The \$200 Billion Miscarriage of Justice; Asbestos Lawyers Are Pitting Plaintiffs Who Aren’t Sick Against Companies that Never Made the Stuff – and Extracting Billions for Themselves*, *Fortune*, Mar. 4, 2002, at 158, available at 2002 WLNR 11958234.

[hereinafter Bell]; *see also* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833 (2005). These screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos.<sup>2</sup> *U.S. News & World Report* has described the claimant recruiting process:

To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'

Pamela Sherrid, *Looking for Some Million Dollar Lungs*, *U.S. News & World Rep.*, Dec. 17, 2001, at 36, *available at* 2001 WLNR 7718069. Professor Brickman has estimated that over one million workers have undergone attorney-sponsored screenings. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33, 69 (2003).

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<sup>2</sup> *See Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms."); *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. & S.D.N.Y. 2002) ("Claimants today are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media.").

The practice of mass litigation screenings has come under significant scrutiny. Attorney General Bell has pointed out, “[t]here often is no medical purpose for these screenings and claimants receive no medical follow-up.” Bell, *supra*, at 5. U.S. District Judge John Fullam recently said that many X-ray interpreters (called “B readers”) hired by plaintiffs’ lawyers are “so biased that their readings [are] simply unreliable.” *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005).

The American Bar Association Commission on Asbestos Litigation (“Commission”) explored these issues. With the help of the American Medical Association, the Commission consulted prominent occupational medicine and pulmonary disease physicians to craft legal standards for asbestos-related impairment. See ABA Comm’n on Asbestos Litig., *ABA Report to the House of Delegates* (2003), available at [http://www.abanet.org/leadership/full\\_report.pdf](http://www.abanet.org/leadership/full_report.pdf).<sup>3</sup> The Commission confirmed that claims filed by the non-sick generally arise from for-profit screening companies whose sole purpose is to identify large numbers of

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<sup>3</sup> As a result of its findings, the Commission proposed the enactment of federal legislation to codify the evidence that physicians recognize is needed to show impairment. The ABA’s House of Delegates adopted the Commission’s proposal in February 2003. See *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong., Appen. A (Mar. 5, 2003) (statement of Hon. Dennis Archer, President-Elect, Am. Bar Ass’n), available at 2003 WL 785387.

people with minimal X-ray changes “consistent with” asbestos exposure. “Some X-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars—in some cases, millions—in the aggregate by the litigation screening companies due to the volume of films read.” *Id.* at 8. The Commission also reported that litigation screening companies find X-ray evidence that is “consistent with” asbestos exposure at a “startlingly high” rate, often exceeding fifty percent and sometimes reaching ninety percent. *Id.*<sup>4</sup>

More recently, researchers at Johns Hopkins University compared the X-ray interpretations of B Readers employed by plaintiffs’ counsel with the subsequent interpretations of six independent B Readers who had no knowledge of the X-rays’

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<sup>4</sup> One of the earliest detailed reviews of B Reads in litigation arose out of information distributed to tire workers, which said that 94% of the workers screened at one location and 64% at another were found to have asbestosis. *See Raymark Indus., Inc. v. Stemple*, 1990 WL 72588 (D. Kan. May 30, 1990). In 1986, the National Institute for Occupational Safety and Health looked into the matter and found that only 0.2% of the workers they evaluated had physical changes consistent with asbestosis. *See J. Jankovic & R.B. Reger, Health Hazard Evaluation Report*, NIOSH Rep. No. HETA 87-017-1949 (Dep’t Health & Human Servs., NIOSH 1989). In 1998, an audit by the Manville Settlement Trust determined that 59% of X-ray readings relied upon by plaintiffs’ counsel to show asbestos-related abnormalities were inaccurate. *See In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d at 309. Another review of asbestos cases conducted by medical experts appointed by an Ohio federal judge found that 65% of the claimants reviewed had no asbestos-related conditions and 20% presented only pleural plaques. *See Hon. Carl Rubin & Laura Ringenbach, The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 37-39 (1991).



origins. See Joseph N. Gitlin *et al.*, *Comparison of “B” Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (2004). The study found that, while B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in 95.9% of the X-rays, the independent B Readers found abnormalities in only 4.5% of the same X-rays—a difference the researchers said was “too great to be attributed to inter-observer variability.” *Id.* at 852.

One physician explained the reason plaintiffs’ B Readers seem to see asbestos-related lung abnormalities on chest X-rays in numbers not seen by neutral experts: “the chest X-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker’s behalf.” David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 Pepp. L. Rev. 11, 13 (2003) (quoting Lawrence Martin, M.D.). Some attorneys reportedly even pass an X-ray around to numerous radiologists until they find one who is willing to say that the X-ray shows symptoms of an asbestos-related disease.<sup>5</sup>

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<sup>5</sup> See Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, Cleveland Plain Dealer, Nov. 5, 2002, at A1, available at 2002 WLNR 269888 (reporting that one expert medical witness for plaintiffs remarked, “I was amazed to discover that, in some of the screenings, the worker’s X-ray had been ‘shopped around’ to as many as six radiologists until a slightly positive reading was reported by the last one.”).

### 3. Impact of Unimpaired Claimants on Asbestos Litigation

#### a. The Truly Sick

Mass filings by unimpaired claimants have created judicial backlogs and are exhausting scarce resources that should go to “the sick and the dying, their widows and survivors.” *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (internal citation omitted).<sup>6</sup>

U.S. District Judge Charles Weiner, who managed the federal asbestos docket, explained this problem:

Oftentimes, [asbestos] suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.

*In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL 875, Admin. Order No. 8, 2002 WL 32151574, \*1 (E.D. Pa. Jan. 16, 2002).

Cancer victims now have a well-founded fear that they may not receive adequate or timely compensation unless trends in the litigation are addressed.

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<sup>6</sup> See also *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 23 (Mich. 1986) (“We believe that discouraging suits for relatively minor consequences of asbestos exposure will lead to a fairer allocation of resources to those victims who develop cancers.”).

Consider, for example, the litigation involving Johns-Manville, which filed for bankruptcy in 1982. It took six years for the company's bankruptcy plan to be confirmed. Payments to Manville Trust claimants were halted in 1990 and did not resume until 1995. According to the Manville trustees, a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever." Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6. The Trust is now paying out just *five cents on the dollar* to asbestos claimants. The trusts created through the Celotex and Eagle-Picher bankruptcies also have been forced to cut payments to claimants. See Mark Goodman *et al.*, Editorial, *Plaintiffs' Bar Now Opposes Unimpaired Asbestos Suits*, Nat'l L.J., Apr. 1, 2002, at B14.

For these reasons, lawyers who represent cancer victims have been highly critical of unimpaired claimant filings and have endorsed mechanisms to give trial priority to the truly sick.

- ✓ Steve Kazan of Oakland: "The current asbestos litigation system is a tragedy for our clients. We see people every day who are very seriously ill. Many have only a few months to live. It used to be that I could tell a man dying of mesothelioma that I could make sure that his family would be taken care of. That statement was worth a lot to my clients, and it was true. Today, I often cannot say that any more. And the reason is that other plaintiffs'

attorneys are filing tens of thousands of claims every year for people who have absolutely nothing wrong with them.”<sup>7</sup>

- ✓ Matthew Bergman of Seattle: “Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system . . . . [T]he genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims.”<sup>8</sup>
- ✓ Peter Kraus of Dallas: Plaintiffs’ lawyers who file suits on behalf of the non-sick are “sucking the money away from the truly impaired.”<sup>9</sup>
- ✓ Terrence Lavin, an Illinois State Bar President and Chicago plaintiffs’ lawyer: “Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an X-ray.”<sup>10</sup>

**b. Bankruptcies and the Economic  
Impact of Asbestos Litigation**

Asbestos has forced an estimated eighty-five employers into bankruptcy.

See Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29.

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<sup>7</sup> See *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Sept. 25, 2002) (statement of Steven Kazan), available at [http://judiciary.senate.gov/testimony.cfm?id=472&wit\\_id=12069](http://judiciary.senate.gov/testimony.cfm?id=472&wit_id=12069).

<sup>8</sup> Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, Seattle Post-Intelligencer, May 30, 2002, at B7, available at 2002 WLNR 2149929.

<sup>9</sup> Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1.

<sup>10</sup> Editorial, *ABA Backs Asbestos Reform*, Wash. Times, Feb. 16, 2003, at B2.

The process has accelerated due to the “piling on” nature of asbestos liabilities.<sup>11</sup> For instance, RAND found: “Following 1976, the year of the first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades.” RAND Rep., *supra*, at xxvii.

A study by Nobel Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues on the direct impact of asbestos bankruptcies on workers found that bankruptcies resulting from asbestos litigation put up to 60,000 people out of work between 1997 and 2000. *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003). Those workers and their families lost up to \$200 million in wages, *see id.* at 76, and employee retirement assets declined roughly twenty-five percent. *See id.* at 83.

Another study, which was prepared by National Economic Research Associates, found that workers, communities, and taxpayers will bear as much as

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<sup>11</sup> *See In re Combustion Eng’g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005) (“For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy.”); Edley & Weiler, *supra*, at 392 (each bankruptcy puts “mounting and cumulative” financial pressure on “remaining defendants, whose resources are limited.”).

\$2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos. See Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003). For every ten jobs lost directly, the community may lose eight additional jobs. See *id.* at 8. The shutting of plants and job cuts decrease per capita income, leading to declining real estate values, and lower federal, state and local tax receipts. See *id.* at 11-13.

RAND has estimated that \$70 billion was spent in asbestos litigation through 2002; future costs could reach \$195 billion. See RAND Rep., *supra*, at 92, 106. To put these vast sums in perspective, Attorney General Bell has pointed out that asbestos litigation costs will exceed the cost of “all Superfund sites combined, Hurricane Andrew, or the September 11<sup>th</sup> terrorist attacks.” Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 4 (Nat'l Legal Center for the Pub. Interest June 2002), available at <http://www.nlcpi.org>.

**c. Peripheral Defendants Are Being Dragged into the Litigation**

As a result of these bankruptcies, “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.” Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14; see also Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*,

Wall St. J., Apr. 12, 2000, at B1; Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1; Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1. As the Congressional Budget Office observed, asbestos suits have expanded “from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities.” Congress of the United States, Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003). One well-known plaintiffs’ attorney has described the litigation as an “endless search for a solvent bystander.” *Medical Monitoring and Asbestos Litigation’—A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey’s Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs). More than 8,500 defendants have been named. See Mark A. Behrens & Phil Goldberg, *Asbestos Litigation: Momentum Builds for State-Based Medical Criteria Solutions to Address Filings by the Non-Sick*, 20:6 Mealey’s Litig. Rep.: Asbestos 33 (Apr. 13, 2005). Nontraditional defendants now account for more than half of asbestos expenditures. See RAND Rep., *supra*, at 94.

As state legislatures have acted to stem abuses in asbestos litigation, some plaintiffs’ lawyers appear to have modified their “asbestos litigation kits” to bring

questionable silica claims using many of the same mass screening practices. The manager of the federal silica multi-district litigation docket recently recommended that all but one of the 10,000 claims on the docket should be dismissed on remand because the diagnoses were fraudulently prepared. *See In re Silica Prods. Liab. Litig. (MDL No. 1553)*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

**4. Florida's Experience Is in Line with National Trends**

The asbestos litigation environment in Florida has followed the same troubling national trends, as the “whereas” clauses in the preamble to the Act make clear. *See In re Asbestos Litig.*, 933 So. 2d 613 (Fla. 3rd DCA 2006). By the 1990s, South Florida had a reputation as a “mecca for asbestos lawsuits.” Mary McLachlin, *Asbestos Litigation Clogs State Courts in South Florida*, Palm Beach Post, July 4, 2004, at 1A, *available at* 2004 WLNR 3018505. In 2004, Broward County was handling 4,000 to 8,000 active cases, and Miami-Dade, Palm Beach, Hillsborough, and Duval Counties each had an estimated 800 to 1,750 asbestos cases. *See id.* In 2002, Palm Beach County alone had 3,200 asbestos cases. *See* Jane Musgrave, *Judge Suspends 500 Asbestos-Related Lawsuits*, Palm Beach Post, July 9, 2005, at 3B, *available at* 2005 WLNR 10907861. As recently as June 2006, this Court noted “the large volume of asbestos personal injury cases in Miami-Dade County.” *In re Asbestos Litig.*, 933 So. 2d at 619.



The inflow of cases—many of which involved *nonresident* plaintiffs with little or no connection to Florida—led the manager of the Palm Beach asbestos docket, Judge Timothy McCarthy, to comment: “It seems we have built a machine here. . . . It’s like building the Sawgrass Expressway in the middle of nowhere. Build it, and they will come.” McLachlin, *supra*.<sup>12</sup>

The surge in asbestos (and silica) lawsuits by unimpaired claimants, fueled by questionable mass screening practices, threatened payments to the truly sick in Florida, as elsewhere. These filings also clog the courts and delay justice for asbestos and other civil claimants with legitimate and serious injuries. As this Court said just a few months ago, if the Act were not enforced, “plaintiffs who cannot make the necessary prima facie showing would be permitted to proceed to trial, “clog up” the court’s busy trial docket, limit the access of current and future

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<sup>12</sup> Florida has also experienced the “double dipping” practices exposed in other jurisdictions. Prior to the Act’s effective date, 111 actions were filed in Broward County; 72% alleged asbestos and silica-related conditions, despite the extreme medical rarity of a person having both conditions. See Editorial, *Trial Bar Cleanup*, Wall St. J., Feb. 11, 2006, at A8, *abstract available at* 2006 WLNR 2515792. Broward County Circuit Judge David Krathen found that the involvement of a litigation screening firms also embroiled in the federal silica multi-district litigation scandal “reek[ed] of fraud” and criticized the plaintiffs’ shotgun approach to naming 80 defendants without identifying the specific products to which the claimants were exposed. Judge Krathen was “concerned about the good clients, the good cases, and . . . the economic well-being of our economy and our companies that support jobs here,” which is why he required the lawyers to submit more detailed information to support their cases. *Id.*; see also Peter Geier, *Wary Judge to ‘Ride Herd’ on Florida Silica Cases*, Nat’l L.J., Feb. 7, 2006, at 6.

plaintiffs who make the requisite prima facie showing, and deny those plaintiffs who do make the requisite showing priority in obtaining a trial setting.” *In re Asbestos Litig.*, 933 So. 2d at 617-18.

In addition, mass filings by the non-sick helped force key Florida employers into bankruptcy, such as Tampa homebuilder Walter Industries, and Celotex Corp., which was once one of the largest companies based in Tampa Bay with as many as 2,900 employees. See Scott Barancik, *Asbestos Specter Haunts Walter*, St. Petersburg Times, May 1, 2003, at 1E, available at 2003 WL 15673020; McLachlin, *supra*; Jerome R. Stockfish, *Tampa, Fla.-Based Building Products Firm Will Close*, Tampa Trib., July 25, 2001, available at 2001 WLNR 10005526. These were the broad public policy issues that the legislature appropriately considered in enacting the procedures in the Act.

## **II. THE ASBESTOS AND SILICA COMPENSATION FAIRNESS ACT WAS A REASONABLE PUBLIC POLICY RESPONSE**

The Legislature enacted the Asbestos and Silica Compensation Fairness Act (“the Act”), 2005 Fla. Laws ch. 274, Fla. Stat. §§ 774.201 through 774.209, as a surgical response to the problems described above. The law was a recognition “that there is an overpowering public necessity to defer the claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants’ ability to compensate people who develop cancer and other serious

asbestos-related and silica-related injuries and to safeguard the jobs, benefits, and savings of workers in this state and the well-being of the economy of this state.” 2005 Fla. Laws ch. 274 (legislative findings).

The law established fair procedures for the filing of asbestos and silica claims. The core of the new law is the adoption of procedures requiring the submission of evidence of actual impairment early in the case. *See Fla. Stat. § 774.204.* Absent such a submission, cases are required to be dismissed without prejudice. Presently unimpaired claimants are protected from having their claims time-barred should they develop an asbestos-related or silica-related impairing condition. *See Fla. Stat. § 774.206.*

Florida’s asbestos and silica claims procedure statute has a compelling public policy basis. *See, e.g., Robinson v. Crown Cork & Seal Co., Inc.*, 2006 WL 1168782 (Tex. App. May 4, 2006) (upholding Texas’s recent *and retroactive* successor asbestos-related liability law as a legitimate exercise of the legislature’s police power). The Florida Act fairly prioritizes the claims of the sick, while tolling the statute of limitations for the presently unimpaired to allow those individuals to file claims in the future if they develop an asbestos-related or silica-related impairment. The law will protect limited resources for sick claimants, help unclog court dockets, slow the rate of asbestos-related bankruptcies, and help stem

the spread of the litigation to an ever-growing list of attenuated defendants. *See* 2005 Fla. Laws ch. 274 (legislative findings).

### CONCLUSION

For these reasons, *amici curiae* ask this Court to hold that the Asbestos and Silica Compensation Fairness Act, 2005 Fla. Laws ch. 274, Fla. Stat. §§ 774.201 through 774.209, is constitutional and dismiss without prejudice all claims that fail to meet the Act's procedural requirements.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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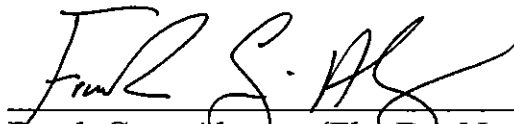
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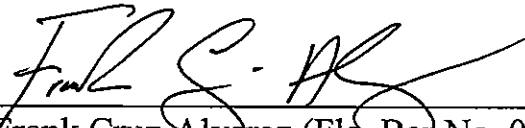
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**CERTIFICATE OF COMPLIANCE WITH RULE 9.210**

I certify that the foregoing Brief is submitted in Times New Roman 14-point font and comply with the requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.



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