THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0132

KEVIN BROWN, ET AL.

Plaintiffs-Appellants,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS, ET AL.

Defendants-Appellees.

On Review of Certified Questions from the United States District Court for the District of New Hampshire Pursuant to Rule 34

AMICI CURIAE BRIEF OF BUSINESS AND INDUSTRY ASSOCIATION, NEW HAMPSHIRE ASSOCIATION OF DOMESTIC INSURANCE COMPANIES, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, COALITION FOR LITIGATION JUSTICE, INC., AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AMERICAN TORT REFORM ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF DEFENDANTS

Mark A. Behrens (*pro hac vice*)
Christopher E. Appel (*pro hac vice*)
SHOOK HARDY & BACON L.L.P.
1800 K Street NW, Suite 1000
Washington, DC 20006
(202) 783-8400
mbehrens@shb.com
cappel@shb.com

Brandon L. Arber
(N.H. Bar No. 267863)
SHOOK HARDY & BACON L.L.P.
One Federal Street, Suite 2540
Boston, MA 02110
(617) 531-1672
barber@shb.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Stephen J. Carroll *et al.*, *Asbestos Litigation* (RAND Inst. for Civil Justice 2005), http://www.rand.org/publications/MG/MG162 25

Thomas M. Goutman, *Medical Monitoring: How Bad Science Makes Bad Law* (2001) 33

James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815 (2002) 25

W. Page Keeton *et al.*, *The Law of Torts* (5th ed. 1984) 16

Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am. J.L. & Med. 251 (1994) 32

Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum. J. Envtl. L. 121 (1995) 23-24, 36

Arvin Maskin *et al.*, *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize*?, 27 Wm. Mitchell L. Rev. 521 (2000) 18, 23, 36

Robert D. Mauk, Editorial, *McGraw Ruling Harms State's Reputation in Law, Medical Monitoring*, Charleston Gazette & Daily Mail, Mar. 1, 2003, at 5A 30

William Prosser, *Handbook on the Law of Torts* (4th ed. 1971) 14, 16

Paul F. Rothstein, *What Courts Can Do In the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001) 18

Victor E. Schwartz *et al.*, *Medical Monitoring – Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999) 16, 23

Victor E. Schwartz *et al.*, *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349 (2005) 33

David M. Studdert *et al.*, *Medical Monitoring for Pharmaceutical Injuries: Tort Law for the Public's Health?*, JAMA, Feb. 19, 2003 33

QUESTIONS PRESENTED

A. Does New Hampshire recognize a claim for the costs of medical monitoring as a remedy or as a cause of action in the context of plaintiffs who were tortiously exposed to a toxic substance?

B. If the answer to question A is yes, what are the requirements and elements of a remedy or cause of action for medical monitoring under New Hampshire law? In particular,

   1) Must a plaintiff prove a present physical injury caused by the toxic substance as a prerequisite for medical monitoring? Or, may a plaintiff bring a claim or seek a remedy for medical monitoring without proof of a present physical injury and, if so, what are the requirements or elements of that cause of action or remedy?

   2) What, if anything, must a plaintiff establish regarding the following or other pertinent factors?

      - the toxicity of the substance
      - exposure to the substance
      - the causal link between the defendant's activity and exposure
      - health risks associated with exposure to the substance
      - the availability, effectiveness, or other characteristics of medical testing

INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that represent companies doing business in New Hampshire and their insurers. Accordingly, *amici* have a substantial interest in ensuring that New Hampshire tort law continues to adhere to traditional legal principles and reflects sound public policy. Adoption of a medical monitoring cause of action or remedy in the absence of a present physical injury would radically alter New Hampshire tort law and subject *amici*'s members to unpredictable and potentially unbounded liability.

The Business and Industry Association (BIA) is New Hampshire's statewide chamber of commerce and leading business advocate. The BIA represents more than 400 members in a variety of industries, including advanced manufacturing, high technology, professional services, financial services, health care, hospitality and tourism, public utilities, higher education, and insurance. Member firms employ 89,000 people throughout the state, which represents one in seven jobs, and contribute $4.5 billion annually to the state's economy.

The New Hampshire Association of Domestic Insurance Companies is a non-profit insurance trade association formed in 1977 to participate in legislative, regulatory, and other public policy matters relating to insurance in New Hampshire.

---

[1] The parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; and no party, party's counsel, or other person or entity—other than *amici curiae*, their members, or their counsel—contributed money intended to fund preparing or submitting the brief.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases like this one that raise issues of concern to the nation's business community.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs 12.5 million people, contributes more than $2.7 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers in 2000 to address and improve the litigation

environment for asbestos and other toxic tort claims.[2] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the toxic tort litigation environment.

The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe.

Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of 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 over three decades, ATRA has filed *amicus* briefs in cases that have addressed important liability issues.

The American Chemistry Council (ACC) represents the leading companies engaged in the multibillion-dollar business of chemistry. ACC members apply the science of chemistry to make innovative products, technologies and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health, safety and security performance through Responsible Care®; common sense advocacy

---

[2] The Coalition includes Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

addressing major public policy issues; and health and environmental research and product testing. ACC members and chemistry companies are among the largest investors in research and development, and are advancing products, processes and technologies to address climate change, enhance air and water quality, and progress toward a more sustainable, circular economy.

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading pharmaceutical research and biotechnology companies, which are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. PhRMA companies are leading the way in the search for new cures. PhRMA's mission is to conduct effective advocacy for public policies that encourage discovery of important new medicines for patients by pharmaceutical / biotechnology research companies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For more than 200 years, a basic tenet of recovery in tort has been that liability should be imposed only when an individual has sustained an injury. *See* William Prosser, *Handbook on the Law of Torts* § 54, at 330-33 (4th ed. 1971). This bright-line rule exists to (1) prevent a flood of claims after an exposure that are either unripe (because the plaintiff is not sick yet) or meritless (because the plaintiff will never become sick); (2) provide faster access to courts for those with "reliable and serious" claims, *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 444 (1997); and (3) ensure that defendants are held liable only for objectively verifiable, genuine harm. Medical monitoring cases brought by asymptomatic

plaintiffs trample the long-established present injury requirement by permitting recovery based on the mere *possibility* of a future injury.

The U.S. Supreme Court in *Buckley* and most state supreme courts to consider the issue since *Buckley*,[3] as well as numerous state appellate courts and federal courts interpreting state law, have rejected medical monitoring absent a proven physical injury. These courts appreciated that awarding medical monitoring to the non-sick raises serious public policy concerns, including the potential for "unlimited and unpredictable liability" and the potential for unimpaired claimants to exhaust resources available to compensate claimants who are or will become sick. *Id.* at 433.

Further, adopting a medical monitoring remedy for the unimpaired would mark a major substantive change in New Hampshire law and impose substantial burdens on the judiciary. Medical monitoring claims require courts to answer many complex, policy-laden questions, including the conditions for which monitoring should be available and criteria that apply. Administering such claims may require substantial judicial resources.

This Court should answer the certified question in the negative and hold that New Hampshire does not recognize medical monitoring as a remedy or as a cause of action in the absence of a present physical injury.

---

[3] *See Berry v. City of Chicago*, 181 N.E.3d 679 (Ill. 2020); *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013); *Lowe v. Philip Morris USA, Inc.*, 183 P.2d 181 (Or. 2008); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005); *Wood v. Wyeth-Ayerst Labs. Div. of Am. Home Prods.*, 82 S.W.3d 849 (Ky. 2002); *Hinton v. Monsanto*, 813 So. 2d 827 (Ala. 2001); *Sinclair v. Merck & Co., Inc.*, 948 A.2d 587 (N.J. 2008) (limiting effect of earlier ruling allowing medical monitoring).

ARGUMENT

I. TRADITIONAL TORT LAW AND SOUND PUBLIC POLICY DO NOT SUPPORT THE RECOGNITION OF MEDICAL MONITORING ABSENT PRESENT PHYSICAL INJURY

The existence of a physical injury has been a linchpin for tort liability for centuries. *See* Prosser, *supra,* § 54, at 330-33. "The threat of future harm, not yet realized, is not enough." W. Page Keeton *et al., The Law of Torts* § 30, at 165 (5th ed. 1984) (footnote omitted). This Court has similarly acknowledged that "basic tort law prohibits recovery [w]here it cannot be shown with reasonable certainty that any damage resulted from the act complained of." *Witte v. Desmarais*, 136 N.H. 178, 188, 614 A.2d 116 (1992) (internal quotation marks omitted); *see also White v. Schnoebelen*, 91 N.H. 273, 274, 18 A.2d 185 (1941) ("[T]here is no cause of action unless and until there has been an injury."). The Court should not abandon that fundamental tort principle to allow recoveries based on exposure to a substance that is only *potentially harmful*.[4]

The U.S. Supreme Court and numerous state high courts have recognized the inherent and intractable problems with allowing a medical monitoring remedy for the unimpaired and with court-created medical monitoring programs. The same reasoning that supported those courts' rejection of medical monitoring absent a present injury applies here.

---

[4] *See* Victor E. Schwartz *et al., Medical Monitoring – Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999) (discussing significant problems surrounding medical monitoring awards absent physical injury that show the law should not be stretched to recognize such claims).

A. The U.S. Supreme Court's Reasons for Rejecting Medical Monitoring 25 Years Ago Remain Valid Today

In *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), the U.S. Supreme Court ruled 7-2 against allowing a medical monitoring claim brought under the Federal Employees' Liability Act (FELA), a statute that has often been construed in favor of plaintiffs. The federal common law decision marked an inflection point in medical monitoring jurisprudence because several state high courts allowed medical monitoring claims in the decade before the decision.[5] After *Buckley*, most high courts have rejected such claims, choosing instead to keep the traditional physical injury requirement in negligence and other tort actions.[6] The courts have found the United States Supreme Court's rationale to be persuasive.

In *Buckley*, the Supreme Court recognized the physical injury requirement as a mainstay of common law and closely considered the policy concerns that weigh against adoption of a medical monitoring cause of action. The Court appreciated that medical monitoring would permit literally "tens of millions of individuals" to justify "some form of substance-exposure-related medical monitoring." *Id*. at 442. Defendants could be subjected to unlimited liability and a "flood of less important

---

[5] *See Redland Soccer Club, Inc., v. Dep't of the Army*, 696 A.2d 137 (Pa. 1997); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987).

[6] *See Hinton*, 813 So. 2d at 827; *Badillo v. Am. Brands, Inc.*, 16 P.3d 435 (Nev. 2001); *Wood*, 82 S.W.3d at 849; *Henry*, 701 N.W.2d at 684; *Paz*, 949 So. 2d at 1; *Lowe*, 183 P.2d at 181; *Caronia*, 5 N.E.3d at 11; *Berry*, 181 N.E.3d at 679.

cases" that would drain the pool of resources available for meritorious claims by plaintiffs with serious injury. *Id*.

The Court rejected the argument that medical monitoring awards do not impose substantial costs, explaining how even modest annual monitoring costs can add up to significant sums over time, especially where claimants assert the need for lifetime monitoring. The Court also expressed concern that allowing medical monitoring claims could create double recoveries because alternative sources of monitoring are often available, such as employer-provided health plans. *See id.* at 443-44.[7]

The Court further acknowledged practical difficulties inherent in any judicial effort to "redefine 'physical impact' in terms of a rule that turned on … [the] nature of a contact that amounted to an exposure, whether to contaminated water, or to germ-laden air, or to carcinogen-containing substances." *Id.* at 437. These concerns include the difficulty in identifying which medical monitoring costs exceed the preventive medicine ordinarily recommended for everyone, conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments, and each plaintiff's unique medical needs. *See id.* at 441-42.

---

[7] Medical monitoring "may be an extremely redundant remedy for those who already have health insurance." Arvin Maskin *et al.*, *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize*?, 27 Wm. Mitchell L. Rev. 521, 528 (2000); *see also* Paul F. Rothstein, *What Courts Can Do In the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1, 23 (2001) ("medical monitoring awards are often totally unnecessary. Most workers today already receive access to medical check-ups through a health plan. A tort award would simply provide a windfall recovery.").

All of these considerations, the Court concluded, supported rejecting a "new, full-blown, tort law cause of action." *Id.* at 443.

B. Numerous State High Courts Have Followed the U.S. Supreme Court's Reasoning in *Buckley*

Since *Buckley*, most state high courts to consider the issue of medical monitoring for the unimpaired have rejected such awards. These courts have expressed similar concerns in the context of exposures ranging from toxins to cigarette smoke to prescription drugs to various types of water contamination.

The Alabama Supreme Court, in *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001), rejected a medical monitoring claim brought by a claimant exposed to a toxin allegedly released into the environment because of the absence of a "manifest, present injury." *Id.* at 829. The court stated, "To recognize medical monitoring as a distinct cause of action . . . would require this court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide" – a voyage on which the court was "unprepared to embark." *Id.* at 830. The court concluded, "we find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate [plaintiff's] concerns about what *might* occur in the future. . . . That law provides no redress for a plaintiff who has no present injury or illness." *Id*. at 831-32.

The Kentucky Supreme Court rejected medical monitoring in *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002), where plaintiffs sought a court-supervised medical monitoring fund to detect the possible onset of primary pulmonary hypertension from ingesting the "Fen-Phen"

diet drug combination. "To find otherwise," the court stated, "would force us to stretch the limits of logic and ignore a long line of legal precedent." *Id*. at 853-54. The court concluded, "[t]raditional tort law militates against recognition of such claims, and we are not prepared to step into the legislative role and mutate otherwise sound legal principles." *Id.* at 859.

The Michigan Supreme Court, in *Henry v. Dow Chemical Co.*, 701 N.W.2d 684 (Mich. 2005), rejected a request to establish a medical screening program for possible negative effects from dioxin exposure. The court concluded that a medical monitoring cause of action would "depart[] drastically from [the] traditional notions of a valid negligence claim" and that "judicial recognition of plaintiffs' claim may also have undesirable effects that neither [the court] nor the parties can satisfactorily predict." *Id*. at 694. The court further opined that this type of claim would "drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care," and questioned whether purported benefits of allowing a remedy "would outweigh the burdens imposed on plaintiffs with manifest injuries, our judicial system, and those responsible for administering and financing medical care." *Id.* at 694-95.

The Mississippi Supreme Court rejected medical monitoring in *Paz v. Brush Engineered Materials, Inc*., 949 So. 2d 1 (Miss. 2007), where a class of workers exposed to beryllium sought the establishment of a medical monitoring fund. The court held that "[t]he possibility of a future injury is insufficient to maintain a tort claim," and "it would be contrary to current Mississippi law to recognize a claim for medical monitoring costs for mere exposure to a harmful substance without proof of current physical or emotional injury from that exposure." *Id.* at 5.

The Oregon Supreme Court, in *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181 (Or. 2008), held that a smoker's allegation that her accumulated exposure to cigarette smoke required her to undergo periodic medical monitoring was insufficient to give rise to a claim. The court held that "negligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring does not give rise to a claim for negligence." *Id*. at 187.

The New Jersey Supreme Court, in *Sinclair v. Merck & Co.*, 948 A.2d 587 (N.J. 2008), rejected medical monitoring for a proposed national class of individuals who ingested the prescription drug Vioxx. The court held that the definition of "harm" under New Jersey's Products Liability Act (PLA) did not include the remedy of medical monitoring when no manifest injury is alleged. *See id.* at 588-89.

New York's highest court rejected a medical monitoring cause of action in *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013), where current and former smokers sought the establishment of a program to monitor for smoking-related disease. The court explained that the "physical harm requirement serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims." *Id.* at 14. The court reasoned, because it "is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease; allowing them to recover medical monitoring costs without first establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of

the exposure." *Id.* at 18. The court further highlighted the challenges and lack of framework for implementing a medical monitoring program, "including the costs of implementation and the burden on the courts in adjudicating such claims." *Id.*[8]

Most recently, the Illinois Supreme Court, in *Berry v. City of Chicago*, 181 N.E.3d 679 (Ill. 2020), dismissed a proposed class action against the City of Chicago on behalf of all city residents seeking the establishment of a trust fund to monitor for potential injuries related to lead exposure from the city's antiquated water lines. The court said, "an increased risk of harm is not an injury." *Id.* at 689. It also acknowledged the "practical reasons for requiring a showing of actual or realized harm before permitting recovery in tort," including that "such a requirement establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability." *Id.* at 688.

These jurisdictions demonstrate careful analysis and prudent decision making on the issue before this Court. The Court should follow the collective wisdom of the U.S. Supreme Court and these state high courts and reject a medical monitoring cause of action or remedy for the non-sick.

---

[8] Some courts interpreting *Caronia* have allowed medical monitoring as consequential damages associated with a separate tort. *See, e.g., Ivory v. Int'l Bus. Machs. Corp.*, 983 N.Y.S.2d 110, 118 (N.Y. App. Div. 2014); *but see Benoit v. Saint-Gobain Performance Plastics Corp*., 959 F.3d 491, 508 (2d Cir. 2020) (casting doubt on such interpretations).

C. Medical Monitoring Awards to Asymptomatic Claimants Encourage Unripe Claims and Deplete Resources that Would Be Better Used to Compensate the Injured

A core policy concern, discussed in many medical monitoring cases and torts scholarship, is that adoption of a remedy for unimpaired claimants would foster potentially unbounded litigation. Given the "reality of modern society that we are all exposed to a wide range of chemicals and other environmental influences on a daily basis," *Henry*, 701 N.W.2d at 696 n.15, there is a potentially limitless number of products or materials that could be argued warrant medical monitoring relief. *See* Arvin Maskin *et al.*, *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize*?, 27 Wm. Mitchell L. Rev. 521, 528 (2000).[9]

The Texas Supreme Court observed, "[i]f recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such recovery prophylactically, against the possibility of future consequences from what is now an inchoate risk." *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999). Because "we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances," Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum. J.

---

[9] "Approximately 73 million people live within 3 miles of a Superfund site (roughly 22% of the U.S. population)." U.S. Envtl. Protection Agency, Office of Land and Emergency Management, Office of Communications, Partnerships, and Analysis, *Population Surrounding 1,857 Superfund Remedial Sites* (updated Sept. 2020).

Envtl. L. 121, 131 (1995), plaintiff attorneys "could virtually begin recruiting people off the street to serve as medical monitoring claimants." Schwartz *et al.*, *supra*, at 1071.

Courts would be forced to decide claims that are premature (because there is not yet any physical injury) or actually meritless (because there never will be). The truly injured could be adversely impacted by the diversion of resources to the non-sick. As one court rejecting medical monitoring summarized,

> There is little doubt that millions of people have suffered exposure to hazardous substances. . . . There must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless.

Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (applying Virginia law), *aff'd*, 958 F.2d 36 (4th Cir. 1991); *see also Wood*, 82 S.W.3d at 857 (recognizing "defendants do not have an endless supply of financial resources" and that, in the absence of an injury, medical monitoring "remedies are economically inefficient, and are of questionable long term public benefit").

The asbestos litigation environment vividly illustrates this problem of scarcity of resources. An expert on the litigation, Professor Lester Brickman, has said, "the 'asbestos litigation crisis' would never have arisen" if not for the claims filed by the unimpaired. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of*

Aggregative Litigation, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 273 (2001); *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."). The asbestos litigation has bankrupted over 120 companies, shows no sign of abating, and may last several more decades. If the remaining available resources were directed to medical monitoring of the "[t]ens of millions of Americans [who] were exposed to asbestos in the workplace over the past several decades," rather than those whose exposure has caused an injury, the result could be devastating for the courts, defendant businesses, and deserving claimants with actual injuries. Stephen J. Carroll *et al.*, *Asbestos Litigation* 2 (RAND Inst. for Civil Justice 2005); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815 (2002).

This Court should recognize the importance of protecting limited assets, particularly in mass exposure cases, so that claims by individuals who have no injury and may never become sick do not take priority over, and exhaust resources needed by, the sick and their families.

II. MOST JURISDICTIONS HAVE REJECTED MEDICAL MONITORING ABSENT PRESENT PHYSICAL INJURY

This Court's decision to reject a medical monitoring cause of action or remedy would be in line with most other jurisdictions that have considered the issue. In addition to the state high court decisions discussed,

numerous state appellate courts[10] and federal courts interpreting or predicting state law[11] have rejected medical monitoring claims by asymptomatic claimants.

---

[10] *See Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984) (holding that a claim for medically-required surveillance expenses is not maintainable in the absence of a present, physical injury); *Boyd v. Orkin Exterminating Co., Inc.*, 381 S.E.2d 295, 298 (Ga. Ct. App. 1989) (rejecting medical monitoring claim where "there was no evidence that the appellants had sustained any specific injury"), *overruled on other grounds, Hanna v. McWilliams*, 446 S.E.2d 741 (Ga. Ct. App. 1994); *Curl v. American Multimedia, Inc.*, 654 S.E.2d 76, 81 (N.C. Ct. App. 2007) (refusing to create a "new cause of action" for medical monitoring and stating that it "is a policy decision which falls within the province of the legislature") (internal citation omitted); *Miranda v. DaCruz*, 2009 WL 3515196, at *8 (R.I. Super. Ct. Oct. 26, 2009) ("This Court is not persuaded to open the damages flood gates to indefinite future monitoring."); *Alsteen v. Wauleco, Inc.*, 802 N.W.2d 212, 223 (Wis. Ct. App. 2011) (refusing to "'step into the legislative role and mutate otherwise sound legal principles' by creating a new medical monitoring claim that does not require actual injury") (citation omitted).

[11] *See Nichols v. Medtronic, Inc.*, 2005 WL 8164643, at *11 (E.D. Ark. Nov. 15, 2005) ("Arkansas has not clearly recognized a claim for medical monitoring and would not where no physical injury is alleged."); *Pickrell v. Sorin Grp. USA, Inc.*, 293 F. Supp. 3d 865, 868 (S.D. Iowa 2018) ("[T]he Iowa Supreme Court, if confronted with the opportunity to recognize a medical monitoring cause of action, would either decline to do so or would require an actual injury."); *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629 (7th Cir. 2007) (rejecting claim for credit monitoring after finding no Indiana authority allowing medical monitoring in tort context); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000) (holding Nebraska law has not recognized a cause of action or damages for medical monitoring and predicting that Nebraska courts would not judicially adopt such a right or remedy), *abrogated on other grounds, Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Mehl v. Canadian Pac. Ry.*, 227 F.R.D. 505, 518 (D. N.D. 2005) ("[A] plaintiff [in North Dakota] would be

A. Of the States that Award Medical Monitoring Absent Physical Injury, Few Recognize an Independent Cause of Action

With respect to the minority of jurisdictions that have recognized a medical monitoring remedy absent physical injury, it is significant that no particular approach has taken root. Courts and scholars disagree on the basic nature of the tort theory, including whether to recognize medical monitoring as an independent cause of action or a form of recovery for an existing tort.[12]

---

required to demonstrate a legally cognizable injury to recover any type of damages in a newly recognized tort, including a medical monitoring claim."); *Cole v. Asarco Inc.*, 256 F.R.D. 690, 695 (N.D. Okla. 2009) ("Oklahoma law requires plaintiffs to demonstrate an existing disease or physical injury before they can recover the costs of future medical treatment that is deemed medically necessary."); *Rosmer v. Pfizer, Inc.*, 2001 WL 34010613, at *5 (D. S.C. Mar. 30, 2001) ("South Carolina has not recognized a cause of action for medical monitoring."); *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 668 (W.D. Tex. 2006) ("Texas appears unlikely to adopt medical monitoring as a cause of action if confronted with the issue."); *Ball*, 958 F.2d at 39 ("[Medical monitoring] is only available where a plaintiff has sustained a physical injury that was proximately caused by the defendant.") (Virginia law); *Krottner v. Starbucks Corp.*, 2009 WL 7382290, at *7 (W.D. Wash. Aug. 14, 2009) ("Washington has never recognized a standalone claim for medical monitoring."), *aff'd in part*, 406 F. App'x 129 (9th Cir. 2010).

[12] *Compare Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999) (recognizing cause of action) *with Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 717-18 (Mo. 2007) ("[M]edical monitoring does not create a new tort. It is simply a compensable item of damage when liability is established under traditional tort theories….").

Only five states appear to have judicially recognized a medical monitoring cause of action for asymptomatic claimants.[13] Were this Court to adopt a medical monitoring cause of action, it would represent a minority approach within a minority rule.

But the other approach adopted by some courts—to recognize medical monitoring as an item of damages for an existing tort—is flawed too. As this Court has consistently recognized, torts such as negligence include present injury as a necessary element. *See Smith v. Cote*, 128 N.H. 231, 241, 513 A.2d 341 (1986) (referring to injury as "the final element of a negligence action"); *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 168, 371 A.2d 170 (1977) ("injury is an element of a cause of action for negligence"). The entire concept of medical monitoring is that no such injury has presented itself.

B. The Experience of States that Have Adopted Medical Monitoring Shows Why New Hampshire Should Reject It

The experience of some states that have adopted medical monitoring for the non-sick also demonstrates why this Court should reject such claims.

For example, in *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424 (W. Va. 1999), West Virginia's highest court established a cause of action for medical monitoring that allows an uninjured plaintiff to recover

---

[13] *See Petito v. A.H. Robins Co. Inc.*, 750 So. 2d 103 (Fla. Dist. Ct. App. 1999); *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891 (Mass. 2009) (cause of action for subcellular changes); *Redland Soccer Club*, 696 A.2d at 137; *Hansen*, 858 P.2d at 970; *Bower*, 522 S.E.2d at 424.

an award even when testing is not medically necessary or beneficial. As explained in a strongly worded dissent:

> [The] practical effect of this decision is to make almost every West Virginian a potential plaintiff in a medical monitoring cause of action. Those who work in heavy industries such as coal, gas, timber, steel, and chemicals as well as those who work in older office buildings, or handle ink in newspaper offices, or launder the linens in hotels have, no doubt, come into contact with hazardous substances. Now all of these people may be able to collect money as victorious plaintiffs without any showing of injury at all.

Id. at 435 (Maynard, J., dissenting). Further, there is no requirement that the award must be spent on monitoring. *See id.* at 433-34. A person can buy anything with the money.

Since *Bower* was decided, thousands have pursued medical monitoring awards in West Virginia, often as part of a class.[14] The ruling

---

[14] *See Stern v. Chemtall, Inc.*, 617 S.E.2d 876, 887 (W. Va. 2005) (Starcher, J., concurring) ("[W]e have dumped an additional pile of medical monitoring cases into the circuit judge's lap."); *In re Tobacco Litig. (Medical Monitoring Cases)*, 600 S.E.2d 188 (W. Va. 2004) (affirming verdict denying medical monitoring claim in class involving some 270,000 present and former smokers); *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (W. Va. 2003) (medical monitoring class of approximately 5,000 users of drug); *State ex rel. E.I. DuPont de Nemours and Co. v. Hill*, 591 S.E.2d 318 (W. Va. 2003) (blood tests to approximately 50,000 individuals possibly exposed to material used to make fluoropolymers); *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 828-29 (W. Va. 2010) (upholding $130 million medical monitoring award to class of approximately 8,500 people exposed to hazardous substances, but reducing punitive damages award by

"cast[s] a shadow over [West Virginia's] reputation in the legal field. It affects West Virginia's jobs, taxes, health care and the public credibility of [the state's] courts." Robert D. Mauk, Editorial, *McGraw Ruling Harms State's Reputation in Law, Medical Monitoring*, Charleston Gazette & Daily Mail, Mar. 1, 2003, at 5A. Indeed, *Bower* contributed to West Virginia being named the only statewide "Judicial Hellhole" by the American Tort Reform Association for years following the decision. U.S. Chamber of Commerce studies also show that the state's legal climate suffered after *Bower*. *See* U.S. Chamber Inst. for Legal Reform, *2019 Lawsuit Climate Survey: Ranking the States*, (Sept. 2019), at 28.[15]

Louisiana provides another example. In *Bourgeois v. A.P. Green Industries, Inc.*, 716 So. 2d 355 (La. 1998), the Louisiana Supreme Court recognized medical monitoring as a cause of action. Claims flooded in.[16] In response, the legislature swiftly reversed *Bourgeois*, requiring a manifest injury to support monitoring claims. *See* La. Civ. Code Ann. § 2315.

---

roughly $80 million based on determination medical monitoring award cannot support punitive damages).

[15] In 2022, the West Virginia Senate passed a bill that sought to overturn the *Bower* decision. *See* S.B. 7 (W. Va. 2022).

[16] *See, e.g., Dragon v. Cooper/T. Smith Stevedoring Co., Inc.*, 726 So. 2d 1006 (La. Ct. App. 1999) (permitting a class action for medical monitoring for seamen exposed to asbestos); *Scott v. American Tobacco Co.*, 725 So. 2d 10 (La. Ct. App. 1998) (certifying as a medical monitoring class all Louisiana residents who were cigarette smokers on or before May 24, 1996, provided that each claimant started smoking on or before Sep. 1, 1988).

III. MEDICAL MONITORING LAWSUITS WOULD BURDEN NEW HAMPSHIRE'S JUDICIARY

Courts are designed to adjudicate disputes concerning discrete issues and parties. A medical monitoring system, in contrast, involves myriad complex scientific, medical, economic, and policy-laden questions. Implementing and then administering medical monitoring programs tailored to the circumstances of a given case alleging exposure to a toxic substance would impose an enormous burden on the judiciary.

A. Courts Are Ill-Equipped to Answer the Many Questions Involved in Medical Monitoring Claims

The certified questions in this case only touch the surface of issues implicated in a medical monitoring system. Devising such a system would require, at a minimum, identifying the types of substances and health conditions that may be monitored; the tests to be conducted as part of the program; the procedures for determining eligibility for monitoring, including the level of increased risk of an adverse health condition that may trigger monitoring and the measure of that increase; the likelihood that monitoring will detect the existence of disease and deciding whether the disease must be treatable; when eligible parties may join the program; the length of time the program will last; the frequency of any periodic monitoring and the circumstances in which the frequency can be changed based on individuals' unique medical situations; whether the benefit of the screening outweighs its risks, including health risks posed by proposed tests

and the risk of false positives;[17] whether testing will be formal or informal; whether the service provider is to be designated by the court or chosen by the claimant; how funds for monitoring will be administered, and whether unused funds will be returned. *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am. J.L. & Med. 251, 267-72 (1994).

Other issues raised by medical monitoring programs include the overlap with third-party health insurance plans, workers' compensation systems, or other "existing alternative sources of payment." *Buckley*, 521 U.S. at 443-44. These considerations may also implicate broader medical, scientific, and economic downsides to medical monitoring, including the effect of such programs on job growth and the economy.

Courts simply do not possess the "technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry and environmental science." *Henry*, 701 N.W.2d at 699. Additionally, as a medical monitoring program matures, its scope and administrative operation will inevitably require adjustments, particularly if the program's designers erroneously estimate funding needs or the number of eligible participants. *Cf. Petito*, 750 So. 2d at 107 ("Doubtless many perplexing questions will arise in the administration of such a program.").

---

[17] *See* Brief of Amici Curiae West Virginia State Medical Association in Support of Appellant E.I. Du Pont de Nemours and Company, *E.I. DuPont de Nemours & Co. v. Perrine*, 2008 WL 5692813 (W.Va. Nov. 12, 2008) (expressing concern regarding medical monitoring programs that risk placing plaintiffs at greater risk).

Courts that allow medical monitoring claims must make scientific and medical decisions that exceed their competencies about which treatment is proper for specific plaintiffs. In some cases, plaintiffs' lawyers deluge the court with a battery of diagnostic tests they would like to see the court authorize for their clients.[18] Commentators have suggested that "[t]he all-too-transparent method behind this madness is to inflate as much as possible the cost of yearly monitoring per plaintiff so as to maximize plaintiffs' damage award and their attorneys' contingent fees." Thomas M. Goutman, *Medical Monitoring: How Bad Science Makes Bad Law* 15 (2001). Courts must then decipher which of these suggested tests to channel the plaintiff toward by "[s]crutiniz[ing] the clinical efficacy of the [suggested diagnostic tests], and in some cases, even the treatments planned to follow identification of disease." David M. Studdert *et al.*, *Medical Monitoring for Pharmaceutical Injuries: Tort Law for the Public's Health?*, JAMA, Feb. 19, 2003, at 890. Adding complexity, this determination may change over time with emerging cures and treatments for current diseases and with the introduction of new types of diseases.

---

[18] For example, the plaintiffs in *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444 (3d Cir. 1997), requested the following tests for feared PCB exposure: amniocentesis, developmental and achievement testing, electrocardiography, pulmonary function tests, mammography, sigmoidoscopy, urine cytology, sputum cytology, basic immunotoxicology panel, chromosomal analysis, complete optomologic evaluation, complete cardiovascular evaluation, complete neurological evaluation, complete gastrointestinal evaluation, PCV detoxification, urinalysis, PSA, CBC, urine porphyrin, and male fertility evaluation. *See* Victor E. Schwartz *et al.*, *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349, 377 n.171 (2005).

In an attempt to confine claims, courts that have permitted recovery for medical monitoring have established certain threshold criteria for these claims, but they have not demonstrated an ability to articulate consistent eligibility requirements.[19] A review of the different approaches taken by states illustrates the difficulty in developing a cohesive standard on this basic issue. *See, e.g., Bower*, 522 S.E.2d at 432-33 (plaintiff only has to show that "he or she has, relative to the general population, been significantly exposed" and "is not required to show that a particular disease is certain or even likely to occur as a result of exposure"); *Redland Soccer Club*, 696 A.2d at 145 (plaintiff must show "significantly increased risk of contacting serious latent disease" as a result of "exposure [to] greater than normal background levels"); *Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 81 (Md. 2013) (plaintiff must show "*a reasonably certain* and significant increased risk of developing a latent disease") (emphasis added).[20]

States also have different standards for what medical basis is required for a medical monitoring claim. *See, e.g., Bower*, 522 S.E.2d at 433 (medical monitoring can be "based, at least in part, on a plaintiff's subjective desires . . . for information concerning the state of his or her health"); *Redland Soccer Club*, 696 A.2d at 146 ("prescribed monitoring

---

[19] *See, e.g., Potter*, 863 P.2d at 824-25 (five criteria for plaintiffs to satisfy); *Bourgeois*, 716 So. 2d at 360-61 (seven criteria); *Hansen*, 858 P.2d at 979 (eight criteria). When courts set forth generalized factors, they often do not specify whether each element must be separately established or whether all factors should be weighed together.

[20] *See also Potter*, 863 P.2d at 813-14 ("one jury might deem knowledge of a 2 or 5 percent likelihood of future illness or injury to be sufficient . . . while another jury might not").

regime [must be] reasonably necessary according to contemporary scientific principles").

Courts that try to address threshold issues and set parameters for medical monitoring claims inevitably leave many critical issues unresolved. *See* Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer Ex Re1. Cop1in v. Fluor Corp.: Sound Policy Should be Restored to a Vague and Unsound Directive*, 27 St. Louis U. Pub. L. Rev. 135, 154 (2007) (discussing Missouri Supreme Court's failure to establish parameters for the tort remedy it created, "leaving litigants and lower courts unguided to find their way in the tangle of medical, scientific, and policy issues involved in implementing the court's vague directive"). Furthermore, because courts do not have access to all the information that is needed to make sound decisions about appropriate medical monitoring, they cannot predict the full scope of adverse consequences that might flow from a decision recognizing a medical monitoring remedy. *See Henry*, 701 N.W.2d at 694.

B. Oversight of Medical Monitoring Programs Would Require Substantial Judicial Resources

Finally, adopting a medical monitoring cause of action or remedy for the unimpaired would impose an administrative burden on the courts—one that "could potentially devastate the court system." *Ball*, 755 F. Supp. at 1372; *see also Henry*, 701 N.W.2d at 689-99 ("[T]he day to day operation of a medical monitoring program would necessarily impose huge clerical burdens on a court system lacking the resources to effectively administer

such a regime."). "[T]he economic, manpower, and time costs for such programs are usually substantial." Martin & Martin, *supra*, at 143.

The alternative to some form of judicially-managed monitoring program would be to award medical monitoring as a "lump sum" payment to asymptomatic claimants with no assurance that the funds will be used for monitoring.[21] In such cases, "[t]he incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible." Maskin *et al.*, *supra*, at 540-41. "The far more enticing alternative, in most cases, will be to put the money towards a new home, car or vacation." *Id.* at 541; *see also* Behrens & Appel, *supra*, at 154-56 (discussing case examples where claimants who received lump sum monitoring awards did not use award for monitoring purposes).

Although a judicially-managed monitoring program would reduce the potential for windfall recoveries, it would require constant oversight over the life of the program. The administrative toll would also increase with each successful medical monitoring case.

New Hampshire's judiciary must already contend with scarce resources. Allowing claims by the unimpaired to enter the state's court system would invite judicial morass, frustrating the ability of the state's judges to fairly and timely adjudicate the tort claims of those with an actual injury. The Court should protect judicial resources from being depleted by

---

[21] Some courts have embraced this approach. *See Bower*, 522 S.E.2d at 434 (rejecting establishment of court-administered fund in favor of allowing lump sum monitoring award because court saw no "need to constrain the discretion of the trial courts to fashion appropriate remedies").

premature and unreliable claims, not open the door to them. *Cf. Buckley*, 521 U.S. at 443-44.

CONCLUSION

For these reasons, the Court should answer the certified question in the negative and hold that New Hampshire does not recognize medical monitoring as a remedy or as a cause of action in the absence of a present physical injury.

Respectfully submitted,

/s/ Brandon L. Arber
Brandon L. Arber
(N.H. Bar No. 267863)
SHOOK HARDY & BACON L.L.P.
One Federal Street, Suite 2540
Boston, MA 02110
(617) 531-1672
barber@shb.com

Mark A. Behrens (*pro hac vice*)
Christopher E. Appel (*pro hac vice*)
SHOOK HARDY & BACON L.L.P.
1800 K Street NW, Suite 1000
Washington, DC 20006
(202) 783-8400
mbehrens@shb.com
cappel@shb.com

Dated: July 8, 2022

Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that pursuant to Supreme Court Rule 26(7), this brief complies with Supreme Court Rule 26(2)-(4).

Counsel additionally certifies that the brief complies with the word limitations set forth in Supreme Court Rule 16(11) and contains 7,265 words.

/s/ Brandon L. Arber
Brandon L. Arber

CERTIFICATE OF SERVICE

I certify that on July 8, 2022, a copy of the forgoing was served on all counsel via the Court's electronic-filing system.

/s/ Brandon L. Arber
Brandon L. Arber