THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2022-0132

KEVIN BROWN ET AL.

V.

SAINT-GOBAIN PERFORMANCE PLASTICS CORP. ET AL.

BRIEF OF AMICI CURIAE CONSERVATION LAW FOUNDATION, INC., TESTING FOR PEASE NEW HAMPSHIRE SAFE WATER ALLIANCE, AND NEW HAMPSHIRE SCIENCE AND PUBLIC HEALTH IN SUPPORT OF PLAINTIFF

Counsel for Testing for Pease

Amy Manzelli, Esq. (No. 17128)
BCM Environmental & Land Law, PLLC
3 Maple Street
Concord, NH 03301
manzelli@nhlandlaw.com
(603) 225-2585

Counsel for New Hampshire Safe Water Alliance and New Hampshire Science and Public Health

Paul Twomey, Esq. (No. 2589)
Twomey Law Office
P.O. Box 623, Epsom, NH 03234
paultwomey@comcast.net
(603) 568-3254

Counsel for Conservation Law Foundation, Inc.

Heidi H. Trimarco, Esq. (No. 266813)
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
htrimarco@clf.org
(603) 225-3060

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QUESTION PRESENTED

Does New Hampshire recognize a claim for the costs of medical monitoring for plaintiffs who were exposed to a toxic substance as a result of defendants' tortious release of that substance into the environment, and who will have to undergo medical monitoring on a regular basis for years to come because of the long latency period of the potential health impacts of the toxic substance and the potential severity of those impacts?

CONSTITUTIONAL PROVISIONS

New Hampshire Constitution, Part 1, Article 14

[Legal Remedies to be Free, Complete, and Prompt.] Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

STATEMENT OF THE CASE

This matter addresses questions certified to this Court by the U.S. District Court for the District of New Hampshire regarding recognition under New Hampshire law of the remedy of the costs of medical monitoring for plaintiffs who were tortiously exposed to a toxic substance. (Order Certifying Questions at 3).[1] The underlying case arises out of the release of PFOA – a toxic chemical in the family of chemicals known as PFAS[2] – from Defendants' manufacturing plant in Merrimack, New Hampshire, resulting in the contamination of groundwater, including public and private sources of drinking water. (Mem. Order at 3-5).[3] Plaintiffs are residents of the area who drank the polluted water and thus ingested the toxic chemicals. *Id*. at 4. Defendants are Saint-Gobain Performance Plastics Corporation, the owner and operator of the plant, and Gwenael Busnel, the former plant manager. *Id*. at 1 Plaintiffs seek to recover, among other forms of relief, the costs they will incur to monitor their health to detect the onset

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[1] *Kevin Brown et al. v. Saint-Gobain Performance Plastics Corp. et al*., U.S. Dist. Ct., D.N.H., Civil No. 16-cv-242-JL, Order Certifying Questions to the New Hampshire Supreme Court (March 14, 2022).

[2] PFAS refers to any per- or polyfluoroalkyl substance. The specific substance used in Defendants' plant was ammonium perflurooctonoate (AFPO), a derivative of perfluorooctanoic acid (PFOA). *See Kevin Brown et al. v. Saint-Gobain Performance Plastics Corp., et al*., U.S. Dist. Ct., D.N.H., Civil No. 16-cv-242-JL, Memorandum Order (Dec. 6, 2017). This brief generally uses the broader term PFAS, except where referring to a specific PFAS such as PFOA.

[3] All citations in this brief to "Mem. Order" refer to *Kevin Brown et al. v. Saint-Gobain Performance Plastics Corp., et al.*, U.S. Dist. Ct., D.N.H., Civil No. 16-cv-242-JL, Memorandum Order (Dec. 6, 2017).

of latent diseases they may develop as a result of consuming PFAS-contaminated drinking water. *Id*.

Amici curiae Conservation Law Foundation, Testing for Pease, New Hampshire Science and Public Health, and New Hampshire Safe Water Alliance, submit this brief, with the parties' consent, to highlight the reasons this court should recognize medical monitoring as a remedy for tortious exposure to toxic chemicals.

Conservation Law Foundation (CLF) is a New England-wide environmental advocacy organization with offices in New Hampshire, Massachusetts, Maine, Vermont, and Rhode Island and more than 6,000 members, including 777 in New Hampshire. CLF has a long history of working to protect water resources and the public from toxic pollution, and has been active in New Hampshire and across the region in addressing the public health threat posed by PFAS. CLF petitioned the New Hampshire Department of Environmental Services (NHDES) in 2018 to establish a drinking water standard for PFAS that protects public health and has previously submitted an amicus curiae brief to this court, with Natural Resources Defense Council, Inc., addressing the enforceability of NHDES's Maximum Contaminant Levels for PFAS.[4]

Testing for Pease is an unincorporated community action group founded in 2015 in response to significant PFAS contamination identified in the drinking water at the Pease Tradeport (former Pease Air Force Base) in Portsmouth, New Hampshire. PFAS contamination at Pease has

[4] *Plymouth Village Water and Sewer District et al. v. Scott*, Docket No. 2020-0058 (2018).

impacted thousands of people including former and current military members, civilians, and children attending daycare centers on the Pease Tradeport. Testing for Pease's mission is to be a reliable resource for education and communication while advocating for a long-term health plan on behalf of those impacted by PFAS water contamination at the former Pease Air Force Base. Testing for Pease has successfully advocated for a PFAS blood testing program and two PFAS health studies for the Pease community to quantify the amount of PFAS in the community's blood and to learn more about how the community's PFAS exposure has impacted their health. Testing for Pease has also advocated for medical monitoring by writing op eds, presenting at the CDC's Public Health Grand Rounds, giving written feedback to the Agency for Toxic Substances and Disease Registry (ATSDR) (a federal public health agency within the United States Department of Health and Human Services) on their physician guidance document on PFAS, collaborating with the New Hampshire Congressional Delegation, partnering with Silent Spring Institute to create PFAS medical monitoring factsheets for communities and clinicians, and presenting to the National Academies of Science, Engineering, and Medicine committee convened to address Guidance on PFAS Testing and Health Outcomes.

New Hampshire Safe Water Alliance (NHSWA) is an advocacy organization with more than 1,800 followers. NHSWA's goals are to inform and promote awareness about environmentally triggered diseases and policy measures to address environmental concerns. NHSWA prioritizes informing the public and elevating the concerns of impacted communities on the most pressing environmental health issues of our time, including toxic chemical pollution from PFAS. NHSWA advocates for

protecting human health by focusing on ways to prevent environmental exposures to harmful substances such as PFAS. Since 2016, NHSWA has been directly involved with advocating for regulation of these dangerous PFAS chemicals in water, biosludge, soil, and air to protect public health. For this reason, NHSWA supports the need to provide medical monitoring for individuals who have had long-term exposure to PFAS.

New Hampshire Science and Public Health (NHSPH) is a not-for-profit corporation with a board consisting of scientists and physicians. NHSPH's mission is to promote science for the public good. NHSPH prioritizes, through its scientific work, generating science relating to the most pressing environmental health issues of our time, including toxic chemical pollution from PFAS. NHSPH believes that scientists have an important role in hearing the concerns of impacted communities and evaluating the science to protect human health from environmental exposures to harmful substances such as PFAS. In 2022, NHSPH founders authored a paper that was published in the peer-reviewed journal, *Environmental Health Insights,* entitled "Risk of Cancer in a Community Exposed to Per- and Poly-Fluoroalkyl Substances" that detailed the increased risk of at least four types of cancer experienced by the residents of Merrimack, New Hampshire. NHSPH recognizes that medical monitoring of individuals exposed to environmental contaminants is good public health practice. NHSPH understands that early detection of disease is often a key factor in a favorable outcome. Therefore, NHSPH wholeheartedly supports medical monitoring for citizens exposed to chemical contamination.

STATEMENT OF FACTS

In early 2016, Saint-Gobain reported the presence of elevated levels of PFOA in the municipal water supplied by the Merrimack Village District Water Works. (Mem. Order, p. 4). Following this report, the New Hampshire Department of Environmental Services ("NHDES") conducted an investigation and discovered the presence of PFOA in residential wells in the vicinity of the Saint-Gobain plant. As a result, NHDES recommended that water from certain wells in the area not be consumed. (Mem. Order, p. 4-5).

PFAS are used in hundreds of industrial and commercial processes and a wide variety of consumer products. They are a public health perfect storm because they are extremely persistent, are highly mobile in the environment, and build up in people over time (bioaccumulate).[5] There are over 12,000 different kinds of these dangerous chemicals.[6]

PFOA and many other PFAS are known to be toxic in concentrations at the parts-per-trillion level.[7] These chemicals are associated with cancer and have been linked to developmental effects or delays in children,

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[5] *See* U.S. Environmental Protection Agency, "Our Current Understanding of the Human Health and Environmental Risks of PFAS," available at https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas (last visited on May 23, 2022).

[6] PFAS Master List of PFAS Substances, EPA CompTox Chemicals Dashboard, available at: https://comptox.epa.gov/dashboard/chemical-lists/pfasmaster (listing a total of 12,034 PFAS chemicals across all EPA compiled lists to date) (last visited on May 23, 2022).

[7] *See* RSA 485:16-e (establishing maximum contaminant levels for drinking water for PFOA, PFOS, and two other PFAS in New Hampshire at the parts-per-trillion level).

fertility and pregnancy problems, interference with natural human hormones, increased cholesterol, and immune system problems.[8] Epidemiological studies identify the immune system as a target of PFAS toxicity.[9]

Defendants' conduct caused Plaintiffs to be exposed to PFAS. As a result, Plaintiffs will require medical monitoring over a period of years. Only with such monitoring will they be able to determine whether they have developed any of the diseases that PFAS are known to cause and arrange for prompt treatment. The question before this Court is whether these individuals are entitled to have the costs of this medical monitoring covered by the entities that contaminated their drinking water with PFAS.

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[8] U.S. Environmental Protection Agency, "Our Current Understanding of the Human Health and Environmental Risks of PFAS," available at https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas (last visited on May 23, 2022); *see also* U.S. Environmental Protection Agency, DRINKING WATER HEALTH ADVISORY FOR PERFLUOROOCTANOIC ACID (PFOA), MAY 2016, at 9 ("Human epidemiology data report associations between PFOA exposure and high cholesterol, increased liver enzymes, decreased vaccination response, thyroid disorders, pregnancy-induced hypertension and preeclampsia, and cancer (testicular and kidney)."), available at https://www.epa.gov/sites/production/files/2016-05/documents/pfoa_health_advisory_final_508.pdf (last visited on May 24, 2022).

[9] *See* U.S. Environmental. Protection Agency, DRINKING WATER HEALTH ADVISORY FOR PERFLUOROOCTANOIC ACID (PFOA), MAY 2016, at 39, available at https://www.epa.gov/sites/production/files/2016-05/documents/pfoa_health_advisory_final_508.pdf (last visited on May 24, 2022).

SUMMARY OF ARGUMENT

Although this is a case of first impression for this Court, the remedy of medical monitoring costs for plaintiffs who have been tortiously exposed to toxic chemicals is well established in other states and has been recognized in the New Hampshire Superior Court. The remedy is soundly supported by the New Hampshire Constitution and well-established principles of tort law in New Hampshire. It also is soundly supported from a public policy perspective. While PFAS are partially regulated by the Environmental Protection Agency ("EPA") and NHDES, those regulatory systems do not address or remedy the harm incurred by the Plaintiffs and do not provide a mechanism for Plaintiffs to protect their health (or their finances) from the impact they have already incurred as a result of Defendant's release of toxic substances into the environment.

ARGUMENT

I. Medical Monitoring is a Logical Extension of Tort Law in New Hampshire and Elsewhere.

A. Courts commonly recognize medical monitoring as a remedy for plaintiffs tortiously exposed to toxic substances.

Courts across the country have recognized medical monitoring as a remedy for plaintiffs tortiously exposed to a hazardous substance. *See* discussion *infra* at 15 -18. For decades, courts have recognized that compensation for medical monitoring is both consistent with well-accepted legal principles and consistent with important public health interests in the

early detection of disease in individuals with an increased risk of disease. *See, e.g.*, *Ayers v. Jackson Twp.,* 106 N.J. 557, 603 (N.J. 1987); *see also Sullivan v. Saint-Gobain Performance Plastics Corp.*, 431 F.Supp.3d 448, 463-66 (D. Vt. 2019) (collecting cases).

The Third Circuit explained in *In re Paoli Railroad Yard PCB Litigation* that medical monitoring is both a natural extension of traditional tort law as well as sound public policy:

> The policy reasons for recognizing this tort are obvious. Medical monitoring claims acknowledge that, in a toxic age, significant harm can be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm. Moreover, as we have explained, recognizing this tort does not require courts to speculate about the probability of future injury. It merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate. Allowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals by defendants and encourages plaintiffs to detect and treat their injuries as soon as possible. *These are conventional goals of the tort system as it has long existed* in Pennsylvania.

In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3rd Cir. 1990) (emphasis added).

The seminal case in this arena was decided almost 40 years ago, when the D.C. Circuit recognized that tort law in the District of Columbia encompassed recovery for the cost of diagnostic examinations for plaintiffs for years after the defendants' tortious conduct. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984). The plaintiffs in that case were infants who survived a plane crash but, as a result of the crash, were at risk of developmental neurological deficits. *Id*.

at 826. In the absence of governing precedent in the District of Columbia, the court relied on general principles of tort law, the Restatement (Second) of Torts, and the law of other jurisdictions to reason that allowing an action for diagnostic examinations "serves the two principal purposes of tort law – the deterrence of misconduct and the provision of just compensation to victims of wrongdoing." *Id*. at 824-25. The court noted that as a result of the defendants' conduct, the plaintiffs would need specific medical services, which it equated to "a cost that is neither inconsequential nor of a kind the community generally accepts as part of the wear and tear of daily life." *Id*. at 825. The court concluded that under the two principals of tort law – deterrence and compensation – a defendant should be required to pay for medical monitoring. *Id*.

Shortly thereafter, the New Jersey Supreme Court applied similar reasoning to a toxic exposure case. In *Ayers v. Jackson Township*, 525 A.2d 287 (NJ 1987), town residents sued the town for damages caused by toxic pollutants that leached from a Town-operated landfill into local water sources. On appeal, the New Jersey Supreme Court upheld the jury verdict in favor of plaintiffs, which included more than $8 million for the future cost of annual medical surveillance, noting that the cost of annual medical examinations to monitor plaintiffs' health and detect symptoms of disease at the earliest possible opportunity was neither speculative nor unquantified, given that medical intervention was "clearly reasonable and necessary" under the facts. *Ayers*, 525 A.2d at 312-13.

Similarly, twenty-five years ago in *Bower v. Westinghouse Electric Corporation*, 522 S.E.2d 424 (W.Va. 1999), the Supreme Court of Appeals of West Virginia held that plaintiffs could recover the anticipated costs of

long-term diagnostic testing needed to identify latent diseases that might develop as a result of tortious exposure to toxic substances. As that court recognized, "significant economic harm may be inflicted on those exposed to toxic substances, notwithstanding the fact that the physical harm resulting from such exposure is often latent." *Bower*, 522 S.E.2d at 429. The court noted that the "injury" that underlies a claim for medical monitoring is the tortious exposure to the toxic substances and the resulting need for testing. *Id*. at 430-31.

Even in 1999, the *Bower* court noted that at least six other states and at least six federal courts sitting in diversity had interpreted state law to allow such claims. *Id.* at 429, fns. 5 and 6 (states included Louisiana, Pennsylvania, California, Utah, Arizona, New Jersey, and Missouri; federal district court cases included decisions under the laws of Illinois, Kansas, Ohio, West Virginia, Colorado, and Pennsylvania.)

In considering this issue more than a decade ago, the Missouri Supreme Court noted that while the question of whether Missouri law permits recovery of medical monitoring damages was one of first impression in that jurisdiction, it could be decided based on "well-accepted principles." *Meyer v. Fluor Corp.*, 220 S.W.3d 712, 716-17 (Mo. 2007). The court's reasoning in that case centered on the basic concept that a plaintiff is entitled to full compensation for past or present injuries caused by the defendant. *Id*. at 717. As the court noted, and just as is the case for PFAS: "There is no dispute that lead is toxic. . . . There is also no dispute that injuries from lead exposure are often latent injuries; that is, a diagnosable physical injury or illness is not immediately apparent and years

may pass before symptoms are detected." *Id*. at 714. A long latency should not be a bar to a complete and just recovery under tort law.

More recently, in *Sullivan v. Saint-Gobain Performance Plastics Corp*, 431 F.Supp.3d 448 (D. Vt. 2019), the U.S. District Court for Vermont surveyed the many states to have considered this issue. In *Sullivan*, as in the present case, plaintiffs were exposed to PFAS because their groundwater was contaminated as a result of defendants' actions. While noting that a few courts have rejected claims for medical monitoring, the court concluded that those cases were readily distinguishable or decided based on questionable premises. *Sullivan*, 431 F.Supp.3d at 458-463. Instead, the court relied on the line of cases including *Ayers* and *Paoli* to conclude that medical monitoring is a permissible remedy under Vermont law. *Id.* at 463 – 466. In reaching this conclusion the *Sullivan* court stated: "The jurisdictions which allow the [medical monitoring] remedy value the potential saving of lives which may be achieved through early detection and treatment." *Id.* at 466.

B. New Hampshire law allows individuals to recover medical expenses incurred as a result of tortious conduct.

The only New Hampshire court to directly address the issue in this matter held that plaintiffs in New Hampshire may recover medical monitoring costs. *Hermens v. Textiles Coated Inc. d/b/a Textiles Coated Int'l*, 216-2017-CV-00524 (N.H. Super. Ct. Hillsborough Northern Div., March 20, 2018). Specifically, the *Hermens* court held that plaintiffs' allegations of PFOA exposure as a result of the defendant's negligence constituted sufficient injury to seek medical monitoring. *Id.* at 11. The court

adopted the standard in *Bower*, 522 S.E.2d at 424, and held that a plaintiff asserting a medical monitoring claim must demonstrate six elements:

> (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.

Id. at 12.

It should come as no surprise that the Superior Court reached the conclusion it did in *Hermens*, as it is supported by the New Hampshire Constitution. Part 1, Article 14 of the New Hampshire Constitution provides for remedies when a person is injured:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

N.H. Const. pt. 1, art. 14.

As described by this Court: "The purpose of this provision is to make civil remedies readily available, and to guard against arbitrary and discriminatory infringements upon access to the courts." *DeBenedetto v. CLD Consulting Eng'rs, Inc.*, 153 N.H. 793, 804-05 (2006). This Court has explained that, while Part 1, Article 14 "does not guarantee that all injured

persons will receive full compensation for their injuries . . .” it does “ . . . requir[e] a remedy that conforms to the statutory and common law rights applicable at the time of the injury.” *Trovato v. DeVeau*, 143 N.H. 523, 525 (1999) (internal quotations omitted). The right to recover from personal injuries is, according to this Court, “an important substantive right.” *DeBenedetto*, 153 N.H. at 805 (citations omitted).

The *Hermens* decision is also well supported by precedent from this Court in analogous cases. Like most other jurisdictions, New Hampshire allows individuals to recover medical expenses incurred as a result of tortious conduct. In *Champion v. Smith*, 113 N.H. 551 (1973), this Court upheld a jury verdict awarding damages to the plaintiff that included the cost of medical tests. The court held that it was not unreasonable for the damages to address not only the injuries suffered by the plaintiff, who had been hit in the face, but also the plaintiffs’ outpatient medical visits and x-rays, even though the x-rays did not reveal a broken bone. *Id.* at 552-53. A claim for medical monitoring is an extension of this well-accepted remedy: medical monitoring provides for medical tests, like the x-rays in *Champion*, that are necessary because of the tortfeasor’s actions. *See also Friends for All Children*, 746 F.2d at 826 (discussed *supra* at 15 – 16).

Medical monitoring is not speculative. Plaintiffs do not seek recovery for possible future injuries, but to address an existing harm – the plaintiffs’ need for medical monitoring, a medical certainty in light of the PFAS contamination in their water sources. As explained by the Third Circuit: “[T]he appropriate inquiry is not whether it is reasonably probable that plaintiffs will suffer harm in the future, but rather whether medical monitoring is, to a reasonable degree of medical certainty, necessary in

order to diagnose properly the warning signs of disease." *In re Paoli*, 916 F.2d at 851.

Because the Plaintiffs have an existing harm – the need for monitoring resulting from their exposure to PFOA – the remedy they seek is easily distinguished from those cases where the court held that a cause of action does not accrue unless and until an injury occurs. For example, in *White v. Schnoeblen,* 91 N.H. 273 (1941), this Court determined that a plaintiff's cause of action for a negligently installed lightning rod began to accrue when the building was struck by lightning and burned, six years after the lightning rod was installed. This Court reasoned that, because negligence is a breach of a duty that causes harm, the cause of action does not accrue until the harm occurs. *Id.* In contrast, a claim for medical monitoring does not ask the court to compensate plaintiffs for a harm that has not yet occurred. Rather, plaintiffs seek recovery for an existing harm: their increased risk of disease and the need for regular monitoring. Unlike the building in *White* that lasted six years before being struck by lightning, plaintiffs here have *already* been injured. They face an increased risk of disease and seek medical monitoring to address that existing injury. *See In re Paoli*, 916 F.2d at 851.

This Court has regularly looked to the Restatement (Second) of Torts for guidance. *See, e.g.*, *Bloom v. Casella Constr., Inc.*, 172 N.H. 625, 629-31 (2019); *Coan v. N.H. Dep't of Envt. Servs.*, 161 N.H. 1, 8-9 (2010); *Buckingham v. R.J. Reynolds Tobacco Co.*, 142 N.H. 822, 825-29 (1998); *Valenti v. NET Prop. Mgmt., Inc.*, 142 N.H. 633 (1998). Recovery for medical monitoring is consistent with the Restatement's broad definitions of injury and bodily harm. The Restatement (Second) of Torts defines

injury as "the invasion of any legally protected interest of another." Restatement (Second) of Torts §7 (1965). Relying on this standard definition of injury and general principles of tort law, the D.C. Circuit in *Friends for All Children* recognized a cause of action for medical monitoring, stating:

> The Restatement broadly defines injury as 'the invasion of any legally protected interest of another.' It is difficult to dispute that an individual has an interest in avoiding excessive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.

Friends for All Children, 746 F.2d at 827 (citations omitted).

II. Medical Monitoring is an Essential Tool for People Who Have Been Harmed by Tortious Exposure to Toxic Chemicals.

Medical monitoring is an essential remedy for people in the Plaintiffs' situation – that is, people who know they have been exposed to a toxic chemical that increases the risk of developing a dangerous or even deadly disease. For such people, regular medical monitoring is necessary to evaluate whether the exposure has caused them to develop a disease.

The benefits, value, and importance of medical monitoring begin with the improved health prospects for individuals who have been wrongfully exposed to toxic substances. Medical monitoring allows for "the earliest possible diagnosis of illnesses, which could lead to improved prospects for cure, prolongation of life, relief of pain, and minimization of disability." *Ayers*, 106 N.J. at 590; *see also Potter v. Firestone Tire &*

Rubber Co., 863 P.2d 795, 1008 (Cal. 1993) (noting that "the early detection of cancer [from medical monitoring] may improve the prospects for cure, treatment, prolongation of life and minimization of pain and disability").

Because of the long latency period of many of the diseases that can be triggered by toxic chemicals such as PFOA, the costs of medical monitoring, regularly conducted over a period of years, can have a significant financial impact for those affected. If medical monitoring is not recognized under state tort law, "significant economic harm may be inflicted on those exposed to toxic substances" – on top of the physical harm. *Bower*, 522 S.E.2d at 429; *see also Ayers*, 106 N.J. at 604-05 ("It is inequitable for an individual, wrongfully exposed to dangerous toxic chemicals but unable to prove that disease is likely, to have to pay his own expenses when medical intervention is clearly reasonable and necessary.").

In addition to shifting the economic burden of medical monitoring to the proper party, the remedy of medical monitoring "avoids the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another's negligence." *Redland Soccer Club, Inc. v. Dept. of the Army*, 696 A.2d 137, 145 (Pa. 1997) (citing *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 976-77 (Utah 1993)). Moreover, allowing an award for these costs eliminates the problematic situation of an innocently injured person who cannot afford the outlay for annual tests and therefore foregoes them, putting their health at further risk. *See Hansen*, 858 P.2d at 967-77. Refusing an award of the cost of medical monitoring would in effect deny some victims access to potentially life-saving treatment. *Id*. at 976; *Redland*, 696 A.2d at 145.

III. Recognizing Claims for Medical Monitoring Will Deter Tortious Conduct by Ensuring That Tortfeasors are Held Accountable to Those They Injured.

In addition to the essential fairness to parties who have been tortiously exposed to toxic chemicals, an award of the costs of medical monitoring also serves the important function of holding the responsible party financially accountable, thus deterring tortious conduct. The uncertainties inherent in establishing causality for any diseases that ultimately develop among the Plaintiffs create the possibility that those who polluted may not be held responsible for the diseases and other health conditions that ultimately result. Because there is certainty that Defendants caused the exposure, and certainty in the need for medical monitoring, Defendants should be held to account for the financial costs related to monitoring. *See Potter*, 863 P.2d at 1008; *Ayers*, 106 N.J. at 604. Allowing recovery of medical monitoring costs will deter future misconduct – a principal purpose of tort law. *Friends for All Children*, 746 F.2d at 825; *see also In re Paoli*, 916 F.2d at 852 ("Allowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals by defendants…").

IV. Regulation of PFAS by EPA and NHDES is not a Substitute for Medical Monitoring.

A tort remedy for medical monitoring is an essential aspect of the response to the public health threat that PFAS represent. Regulation of PFAS is in its infancy. EPA has announced its intent to establish drinking water standards for certain PFAS but has not yet issued a proposed

regulatory standard.[10] Although 176 PFAS chemicals have been recently added to the EPA's Toxic Release Inventory,[11] the reporting requirements triggered by inclusion on the list do not limit the use of PFAS nor their presence in the environment. EPA has not established an enforceable maximum contaminant limit for any PFAS chemicals.[12] Additionally, the EPA has been slow to address PFAS chemicals through other regulatory means.[13]

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[10] *See The Federal Role in the Toxic PFAS Chemical Crisis, Hearing on SD-342 Before the Subcommittee. on Homeland Security & Governmental Affairs*, Opening Statements of Chairman Rand Paul and Ranking Member Gary C. Peters, 115th Cong., September 26, 2018, available at https://www.hsgac.senate.gov/hearings/the-federal-role-in-the-toxic-pfas-chemical-crisis. Although EPA announced it was making a preliminary regulatory determination for PFOA and PFOS in drinking water in February of 2020, there has not been a final regulatory determination. 85 Fed Reg. 14,098, 14,098 (Mar. 10, 2020); U.S. Envtl. Prot. Agency, Drinking Water Regulations Under Development or Review, https://www.epa.gov/sdwa/drinking-water-regulations-under-development-or-review (last visited on May 16, 2022) (noting that drinking water rules related to PFAS are 'under development' but have not yet been promulgated).

[11] U.S. Envtl. Prot. Agency, TSCA Chemical Substance Inventory, Feb. 2, 2022, available at https://www.epa.gov/tsca-inventory/how-access-tsca-inventory (last visited May 16, 2022).

[12] *See* U.S. Envtl. Prot. Agency, National Primary Drinking Water Regulations, available at https://www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations (last visited May 16, 2022) (listing all substances for which EPA has set maximum contaminant limits, and no PFAS are included).

[13] The EPA has taken some action under the Toxic Substances Control Act ("TSCA") to regulate PFAS, by issuing a final rule in the Fall of 2020 that restricts the use of certain PFAS chemicals in manufacturing. *See* 85 Fed. Reg. 45,109 (Sept. 25, 2020) (finalizing a proposed rule from Jan. 21, 2015). Amendments to TSCA in 2016 mandated EPA action to list "high-

Similarly, NHDES has been unable to effectively address the harms caused by PFAS. Although New Hampshire has established binding drinking water and groundwater standards for four PFAS, RSA 485:16-e, in light of the ever-expanding class of PFAS chemicals, currently over 12,000,[14] NHDES Commissioner Scott has acknowledged that the problem cannot be addressed by New Hampshire regulators.[15]

However, even if the regulation of PFAS were more robust, it would not provide a remedy for individuals who have been tortiously harmed by

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priority substances" that would undergo risk-evaluations to determine if a rule regulating those substances is necessary, a time-consuming process. So far, EPA has initiated review of only 30 substances, none of which are PFAS chemicals. *See* Toxic Substances Control Act, 15 U.S.C. § 2605 (2016); U.S. Envtl. Prot. Agency, Final Scope Documents for Chemicals Undergoing Risk Evaluation, available at https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/final-scope-documents-high-priority-chemicals (last visited May 16, 2022) (listing the chemicals which EPA has designated 'high-priority,' and not including PFAS chemicals).

[14] PFAS Master List of PFAS Substances, EPA CompTox Chemicals Dashboard, available at: https://comptox.epa.gov/dashboard/chemical-lists/pfasmaster (last visited May 20, 2022).

[15] *Impact of Per- and Polyfluoralkyl Substances Contamination on New Hampshire's Environment Before the House Committee on Oversight and Reform, Subcommittee on Envir.,* (July 24, 2019) Testimony of Robert Scott, Commissioner NHDES (Despite the fact that "in New Hampshire we have been heavily engaged in PFAS investigation, response, remediation and regulation for the last four years," Commissioner Scott testified that "this challenge is only going to continue to grow as we continue to add unknown quantities of the thousands of known and numerous unnamed PFAS compounds into the environment. We will do our share, but *we need assistance* to slow this trend of contamination and to begin the process of ensuring that future generations are not impacted.") (emphasis added), available at: https://www4.des.state.nh.us/nh-pfas-investigation/wp-content/uploads/RRS-Testimony-USHouse-072419.pdf.

PFAS contamination. The regulatory efforts relating to PFAS are not designed to make harmed individuals whole. Rather, regulators are focused on regulating PHAS to *prevent* them from entering the environment and harming people. They are not focused on remedying harms already suffered by people who have been exposed. Even if more complete regulations are promulgated, there must also be an effective system of redress for individuals who have been tortiously exposed to PFAS. As noted by the D.C. Circuit in *Friends for All Children, Inc.,* 746 F.2d at 825, this is one of the fundamental purposes of the tort system. Since this class of chemicals causes harms that may manifest years after exposure, requiring the tortfeasor to provide medical monitoring is the most complete and appropriate remedy.

CONCLUSION

People who are tortiously exposed to toxic chemicals like PFOA and other PFAS – substances known to cause latent health effects – should be entitled, under fundamental tort principles as well as the New Hampshire Constitution, to recover the costs of medical monitoring. For the reasons discussed above, the Court should hold that medical monitoring is an appropriate remedy under New Hampshire law.

ORAL ARGUMENT

Amici Conservation Law Foundation, Testing for Pease, New Hampshire Science and Public Health, and New Hampshire Safe Water Alliance waive oral argument.

Respectfully submitted May 24, 2022

Conservation Law Foundation, Inc.

By: /s/ Heidi H Trimarco
Heidi H. Trimarco, Esq. (No. 266813)
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
htrimarco@clf.org
(603) 225-3060

Testing for Pease

By: /s/ Amy Manzelli
Amy Manzelli, Esq. (No. 17128)
BCM Environmental & Land Law, PLLC
3 Maple Street
Concord, NH 03301
manzelli@nhlandlaw.com
(603) 225-2585

New Hampshire Safe Water Alliance and New Hampshire Science and Public Health

By: /s/ Paul Twomey
Paul Twomey, Esq. (No. 2589)
Twomey Law Office
P.O. Box 623
Epsom, NH 03234
paultwomey@comcast.net
(603) 568-3254

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2022, this Brief of Amici Curiae Conservation Law Foundation, Inc., Testing for Pease, New Hampshire Science and Public Health, and New Hampshire Safe Water Alliance in support of Plaintiff will be sent electronically, as required by the Rules of the Supreme Court, through the court's electronic filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case. Copies will be sent by U.S. Mail to parties who have not entered electronic service contacts.

/s/ Heidi H. Trimarco

Heidi H. Trimarco, Esq. (No. 266813)
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
htrimarco@clf.org
(603) 225-3060

CERTIFICATE OF WORD COUNT

As required by the Rules of the Supreme Court, I hereby certify that this Brief contains 5,488 words, exclusive of the cover page, table of contents, table of authorities, signature block, certificate of service, and certificate of word count.

/s/ Heidi H. Trimarco
Heidi H. Trimarco, Esq. (No. 266813)
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
htrimarco@clf.org
(603) 225-3060