THE STATE OF NEW HAMPSHIRE
SUPREME COURT

KEVIN BROWN, individually and on behalf of all others similarly situated, et al.,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORP., et al.,

Docket No. 2022-132

On Certification Under Rule 34 from the United States District Court for the District of New Hampshire, No. 1:16-cv-00242-JL

RESPONSE BRIEF OF DEFENDANTS SAINT-GOBAIN PERFORMANCE PLASTICS CORP. AND GWENAEL BUSNEL

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July 8, 2022

30 minutes per side requested for argument

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STATEMENT OF THE CASE

Plaintiffs seek recovery of medical monitoring damages for a broad class of persons who they allege were exposed to the substance PFOA, but who admittedly sustained no physical injury. Mere exposure to a toxic substance—or even being at an increased risk of developing a medical condition in the future because of it—does not allege a legally cognizable injury for recovery under the negligence theories Plaintiffs plead here. This Court has long held that negligence requires, first, a present physical injury and, second, that the injury caused the plaintiff's damages. These two requirements provide principled and necessary boundaries on the reach of negligence actions that would otherwise be unpredictable, unlimited, and speculative. This Court should apply those two requirements to the medical monitoring relief Plaintiffs seek here.

New Hampshire has long recognized that recovery in negligence requires a present physical injury and that the possibility of injury is not injury itself. A plaintiff must thus show present objective physical harm to recover for the future expenses of medical monitoring. Plaintiffs concede they do not allege any present physical injury from their purported exposure to PFOA and do not seek to create a new cause of action. Pls.Br.11-12, 14, 29. They thus lack the essential predicate that this Court and other common-law courts have imposed to set the bounds of liability in tort.

When the United States Supreme Court was asked to recognize a similarly broad claim for medical monitoring under

the Federal Employers' Liability Act, it "canvassed the state law cases" and rejected a federal claim for medical monitoring from alleged toxic exposure "without disease or symptoms." *Metro-North Commuter R.R. Co. v. Buckley,* 521 U.S. 424, 439-40, 443 (1997). The Court recognized that permitting medical monitoring without physical injury would permit tens of millions of individuals who were exposed to toxic substances to seek medical monitoring, causing unlimited liability. Justice Breyer's opinion for the Court insisted on following the common-law physical injury requirement to forestall "the systemic harms that can accompany" a claim for medical monitoring in asymptomatic plaintiffs, including a "flood" of speculative cases that would drain resources from those currently injured. *Id.* at 442-44. Many other state high courts have followed *Buckley*'s lead, based on sound public policy, in requiring a showing of physical injury to recover for medical monitoring, and this Court should as well.

Because Plaintiffs concede they do not allege a physical injury, Pls.Br.14, 29, this Court may resolve the certified questions simply by upholding that requirement. If the Court reaches Question B.2 concerning other elements of proof for medical monitoring, it should uphold the fundamental requirements of but-for and proximate causation. Thus, beyond proving that the defendant is responsible for the alleged exposure, plaintiffs seeking to recover damages for future monitoring must first prove that the amount of one's level of exposure (*i.e.*, dose) is above-background and causes the diseases or medical conditions for which one seeks monitoring. Second,

the monitoring must be able to lead to early diagnosis and treatment of the disease. Third, the monitoring must differ from routine care that the plaintiff receives or should receive. Fourth, as with all medical interventions, the benefits of the monitoring must exceed its risks to the plaintiff.

Ignoring *Buckley* and its policy rationale, Plaintiffs' vision of medical monitoring tramples the traditional requirements of injury and causation. They seek monitoring based on mere exposure alone, with no manifest physical symptoms, without proving that their exposure is above-background and causes disease, and without showing that each plaintiff needs medical monitoring. That request is not, as they suggest, a simple application of existing remedial principles in tort. Rather, it radically subverts the present physical injury requirement that underlies the negligence law of this State and of many others. Plaintiffs have not cited any high court decision that permits a cause of action for medical monitoring based on mere exposure to a toxic substance.

The record here illustrates the difficulties of giving way to such open-ended and speculative liability. Plaintiffs do not submit any evidence from the record in support of their position—not even their expert reports—because that record shows just how far-reaching their theory of monitoring is. They seek monitoring for exposure to PFOA, a substance so common that it is found in the blood of nearly every American. Unlike cigarettes or asbestos, where a causal relationship to disease is well-established, no published study or medical organization has

concluded that PFOA causes ***any*** disease in humans. For instance, as to the conditions for which Plaintiffs seek medical monitoring, the federal government has concluded that "no causal relationship has been established" between PFOA exposure and cholesterol, thyroid effects, ulcerative colitis, cancers, and preeclampsia in human studies. Apx.III.135-136.[1] Nor does the federal government recommend medical monitoring for exposure to PFOA. Rather, it has concluded that "[f]or asymptomatic individuals …, insufficient evidence exists at this time" to warrant medical monitoring for PFOA exposure. Apx.III.137. The risks that Plaintiffs' experts ascribe to PFOA are so low—for example, just 0.04 or 0.06 extra cases per million people—that, even if true, one would have to monitor the entire state of New Hampshire for years to detect just one additional case of the many diseases for which they seek medical monitoring. Apx.IV.72.

Yet in pursuit of those *de minimis* risks, Plaintiffs seek to fundamentally change New Hampshire law and impose lifetime monitoring for Merrimack area residents, regardless of any individual's specific need for monitoring, and at a cost approaching a billion dollars. With the minimal benefit of those tests and the attendant psychological stress and other harms, Plaintiffs' request embodies the policy concerns that led the U.S. Supreme Court and other state high courts to reject medical

[1] Plaintiffs' appendix is Apx.I. Defendants' appendices are Apx.II to Apx.XI, with documents designated as confidential by the district court in sealed appendices S.Apx.I to S.Apx.III.

monitoring claims without physical injury. New Hampshire law allows Plaintiffs to obtain monitoring only when they can prove a present physical injury from their exposure that causes a need for future monitoring. In answering the certified questions, this Court should follow its long-established bright-line rule.

STATEMENT OF FACTS

PFOA (perfluorooctanoic acid) is a synthetic chemical that, owing to its unique stain and water-resistant properties, has been used in a wide variety of consumer and industrial applications for over fifty years. Apx.VIII.145. Because of its ubiquitous use and long half-life, PFOA is detectable in the blood of 99% of Americans, Apx.VIII.51, with the average level being 2.1 µg/L in blood serum as of 2013-2014. Apx.VIII.152. Regulators have set levels for PFOA in drinking water, but no medical organization or published study has concluded that PFOA causes any disease in humans. Apx.III.92-93; Apx.VII.139; Apx.V.79, 80; Apx.IV.23-25, 40.

Plaintiffs filed this action against Saint-Gobain based on its operation of a facility in Merrimack, New Hampshire. Apx.I.10. Saint-Gobain never manufactured PFOA, but used materials containing APFO (the ammonium salt of PFOA) in manufacturing other products. Apx.II.23.

Plaintiffs seek medical monitoring from Saint-Gobain under theories of negligence and negligent failure to warn.[2] But

[2] Plaintiffs' nuisance and trespass theories concern harm to property interests and are irrelevant to monitoring.

they do not allege any present objective physical injury from exposure to PFOA, and they exclude from their class anyone who does. Apx.II.138; Apx.IX.231. They wish to represent a class of 28,200 individuals who drank tap water in the Merrimack area with certain concentrations of PFOA over certain times, or, if blood tests are required, who drank that water and whose measured blood serum PFOA level exceeds 0.5 µg/L. Apx.II.179-180, 184; Apx.II.112; Apx.VIII.199. With that extremely low blood level, the proposed class embraces essentially everyone in the proposed class area—"one would expect to find a serum PFOA concentration of 0.5 µg/L or greater in 95 percent of all Americans," Apx.VIII.51, and the average blood serum level measured throughout southern New Hampshire in 2017 was about 4 µg/L. Apx.VIII.146; Apx.IV.228. They seek lifetime medical monitoring for many common medical conditions, ranging from elevated cholesterol, to thyroid disease, to certain cancers, even though Plaintiffs are not at a substantially increased risk of getting any such conditions or diseases caused by their exposure. Apx.IV.72; S.Apx.III.99. It is speculative at best whether any asymptomatic Plaintiff will ever contract any disease due to their alleged exposure.

Saint-Gobain moved to dismiss Plaintiffs' medical monitoring claims for failing to allege a cognizable physical injury under New Hampshire law. Apx.II.35-38. The district court (Laplante, J.) denied that motion without prejudice, stating its intent to certify the question to the Court, Apx.II.64, which it

determined to do on a full record. Apx.II.76; Apx.II.80.[3] The parties engaged in extensive discovery and briefing on Plaintiffs' motion to certify a class and motions to exclude expert testimony. The district court then certified questions to this Court. Apx.I.3. The district court has held the parties' motions in abeyance as to medical monitoring pending this Court's decision. Apx.XI.113.

SUMMARY OF ARGUMENT

The Court should answer the certified questions by holding that recovery of medical monitoring in New Hampshire requires proof of the elements of a negligence claim, including (1) present physical injury and (2) but-for and proximate causation of a need for future monitoring. These requirements are essential to prevent unlimited, unpredictable, and speculative liability in tort.

First, the common-law requirement of a present physical injury is well-settled in New Hampshire negligence law. Many states apply the physical injury requirement to limit medical monitoring recovery, as a matter of policy-driven line-drawing, to those who have present symptoms of bodily harm. When the

[3] Though Plaintiffs impermissibly cite materials on PFOA that are not part of the record, *see* Pls.Br.33, 35; N.H. S. Ct. R. 13(1); *Flaherty v. Dixey*, 158 N.H. 385, 387 (2009), they maintain that the only document necessary to answer the certified questions is their complaint. Yet the district court delayed certification of these questions to allow development of the record to aid this Court in its decision. Saint-Gobain has distilled the record to the parties' briefing on Saint-Gobain's motion to exclude Plaintiffs' medical monitoring experts. To avoid an unnecessarily large appendix, the exhibits have been excerpted here by omitting those passages not cited in the district court briefing.

New Hampshire legislature passed legislation to authorize recovery for medical monitoring without physical injury, Governor Sununu vetoed the legislation because it eliminated the fundamental limits on tort liability set by this Court. The record here shows exactly why the physical injury requirement is such an important boundary in tort law: to eliminate it would create a theory of potential recovery for thousands of asymptomatic plaintiffs and cost nearly a billion dollars in damages for life-long testing hoping to detect at best a few cases of extra disease. This Court should, as many others have, decline to open the floodgates of litigation that would flow out of such an expansive and radical theory of recovery. Moreover, this radical change in New Hampshire law would adversely affect public and private entities throughout the State. "It is a reality of modern society that we are all exposed to a wide range of chemicals and other environmental influences on a daily basis." *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 696 n.15 (Mich. 2005). There are an unlimited number of products and substances that, under Plaintiffs' theory, would require medical monitoring at enormous cost with limited, if any, benefits.

Second, if the Court reaches Question B.2 concerning the other elements for medical monitoring, it should do so with reference to the proof of but-for and proximate causation required by New Hampshire law. In addition to proving the defendant is responsible for the exposure, that requires proof that the plaintiff's level of exposure is above-background and causes future disease. It means the plaintiff must show the monitoring

can improve the plaintiff's prognosis. It demands proof that the monitoring differs from the ordinary care the plaintiff receives or should receive. And the benefits of monitoring must exceed its risks for the plaintiff.

ARGUMENT

I. NEW HAMPSHIRE LAW REQUIRES PROOF OF A PRESENT PHYSICAL INJURY.

Plaintiffs concede they "do not seek to create a new cause of action," Pls.Br.11-12, but purportedly seek to recover medical monitoring damages under "traditional tort theories." *Id.*26. Plaintiffs further admit they do not allege a "present physical injury," and argue that adhering to this common law requirement would nullify their requested remedy. *Id.*14-15, 22-23, 29. But as Plaintiffs' amici acknowledge, the New Hampshire Constitution demands "a remedy that conforms to the statutory and common law rights applicable at the time of the injury." CLF.Br.19-20 (quoting *Trovato v. DeVeau,* 143 N.H. 523, 525 (1999)). New Hampshire common law has not conferred a right to recover for future medical testing for mere exposure to a substance without a present physical injury. And the record illustrates why courts reject such unbounded theories of liability. This Court should hold that, under New Hampshire law, recovery of medical monitoring damages requires proof of a legally cognizable present physical injury.

A. New Hampshire Law Requires Present Physical Injury to Recover for Plaintiffs' Negligence Claims.

Injury is a threshold requirement of liability under the traditional negligence claims Plaintiffs advance. *Grady v. Jones*

Lang LaSalle Constr. Co., 171 N.H. 203, 207 (2018); *Trudeau v. Manchester Coal & Ice Co.*, 89 N.H. 83, 84 (1937). "It is black-letter law … that there can be no liability for negligence unless there exists a duty, whose breach by the defendant causes the injury for which the plaintiff seeks to recover." *Rounds v. Standex Int'l*, 131 N.H. 71, 76 (1988), *abrogated on other grounds by* N.H. RSA 281-A:8, I(b) (2010). That injury must be a present, physical injury. Prosser & Keeton on the Law of Torts § 92, at 656-57 (5th ed. 1984). "The threat of future harm, not yet realized, is not enough." *Id.* at 165. A "physical injury" may be understood as presenting with "physical impairment of the condition of another's body, or physical pain or illness," Restatement (Second) of Torts § 15 (1965), and as being based on a physical change that "must be detrimental." Restatement (Third) of Torts: Phys. & Emot. Harm § 4 & cmt. c (2010).

New Hampshire follows this fundamental common-law principle as a guardrail against unbounded liability. While a physical injury is not required for intentional torts such as battery or wrongful termination, this Court has never affirmed liability under a negligence claim except upon proof of a physical injury.[4] Plaintiffs rely on this Court's decision in *Silva v. Warden, N.H. State Prison*, but it is consistent with this rule: it allowed damages without physical injury following an intentional tort—i.e., assault—not negligence. 150 N.H. 372, 374 (2003).

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[4] *See, e.g.*, *Goodwin v. James*, 134 N.H. 579 (1991); *Vachon v. New Eng. Towing, Inc.*, 148 N.H. 429 (2002); *Carignan v. New Hampshire Int'l Speedway, Inc.*, 151 N.H. 409 (2004).

This Court has reinforced the physical injury requirement by insisting that it be a "present" injury. "The possibility of injury is not injury itself." *Dumas v. Hartford Acc. & Indem. Co.,* 92 N.H. 140, 141 (1942), *rev'd on other grounds, Dumas v. State Farm Mut. Auto. Ins. Co.,* 111 N.H. 43 (1971). This Court explained that requirement in *White v. Schnoebelen,* 91 N.H. 273 (1941), where a negligently installed lightning rod caused a fire. This Court rejected the notion that a tort claim accrued when the lightning rod was installed, despite the increased risk of injury at the time of installation. *Id.* at 274. Rather, the negligence claim arose at the time of the resulting fire—the physical injury:

> If, in a sense, there has been negligence, there is no cause of action unless and until there has been an injury. ... If twenty persons were endangered by an act having the possibility of injury, it would be absurd to say that rights of action accrued to all of them at the moment the defendant's act was completed, such rights of action to evaporate when it turned out that the harm was averted for some reason or other. ***Only if and when harm came*** to any one of the twenty would a right of action accrue …. The duty of the actor is to use care for the avoidance of future injuries, whether they be immediate or deferred. There is an actionable breach of the duty ***only*** when the injury happens.

Id. (emphasis added); *accord Draper v. Brennan*, 142 N.H. 780, 785 (1998). Thus, in New Hampshire, a negligence claim cannot rest on the possibility of future harm; it accrues "if and when" a

physical injury actually occurs. *White*, 91 N.H. at 274. This Court should continue to uphold this requirement for the negligence claims Plaintiffs advance.

The physical injury requirement is embedded in many aspects of New Hampshire law. For example, this Court's jurisprudence on negligent infliction of emotional distress to bystanders, under *Corso v. Merrill*, 119 N.H. 647 (1979), recognizes the same physical injury requirement. To recover, bystanders must show, *inter alia*, "serious mental and emotional harm" that is "accompanied by objective physical symptoms." *O'Donnell v. HCA Health Servs. of N.H., Inc.*, 152 N.H. 608, 611 (2005). This Court has "consistently required plaintiffs to demonstrate physical symptoms of their distress" with expert evidence. *Id.* at 611-12 (citing cases). Thus, even without a physical impact, New Hampshire law still requires a physical injury to recover in negligence.

Likewise, New Hampshire's economic loss rule recognizes the principle of physical injury. That rule provides that while "persons must refrain from causing personal injury and property damage to third parties," "no corresponding tort duty exists with respect to economic loss." *Plourde Sand & Gravel v. JGI E., Inc.*, 154 N.H. 791, 795 (2007) (citation omitted). In New Hampshire, "'a plaintiff may not ordinarily recover damages for purely economic loss in tort.'" *Schaefer v. Indymac Mortg. Servs.*, 731 F.3d 98, 103 (1st Cir. 2013) (citation omitted); *Wyle v. Lees*, 162 N.H. 406, 410 (2011). Thus, a claim that seeks economic compensation without physical injury (or before any physical

injury has occurred) is not cognizable under New Hampshire law.

This Court's decision in *Smith v. Cote*, relied upon by Plaintiffs, is consistent with these principles. 128 N.H. 231 (1986). There, this Court recognized a new "wrongful life" cause of action for the "negligent invasion of the parental right to decide whether to avoid the birth of a child with congenital defects." *Id.* at 242. The *Smith* claim still involves a physical injury—a congenital defect—yet like a derivative claim for loss of consortium, the physical injury is to a relative of the plaintiff, rather than the plaintiff herself. This Court has never recognized liability in negligence where, as here, ***no one*** has a present physical injury.

Yet Plaintiffs and their amici argue that their claims are not novel—rather than being no-injury claims, they are just based on a different injury founded on exposure and increased risk. Pls.Br.12. "Simply stated, this premise is false." James A. Henderson Jr. & Aaron D. Twerski,[5] *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 841 (2002). "From the beginnings of our negligence jurisprudence, 'injury' … connotes physical impairment or dysfunction, or mental upset, pain and suffering resulting from such harm." *Id.* at 841-42 (citing Restatement (Second) of Torts §§ 7, 282). That is exactly what this Court held in *White*, when it recognized that a claim accrues when harm occurs, not when the risk of harm is

[5] Professors Henderson and Twerski were the Reporters for the Restatement (Third) of Torts: Products Liability (1998).

created. 91 N.H. at 274. That standard "serves as a linchpin in determining the duties of care owed by defendants and both the validity and timeliness of plaintiffs' claims for fault-based recovery." Henderson & Twerski, *supra*, at 842. New Hampshire law is no different. *White*, 91 N.H. at 274.

For this reason, the New Hampshire cases that Plaintiffs and their amici rely on undermine, rather than support, their novel theory of injury. Plaintiffs suggest that expanding medical monitoring for exposure alone "is no more novel than allowing the recovery of the cost of an x-ray to determine harm from a tortiously caused auto collision, without regard to whether that x-ray is positive or negative." Pls.Br.12; CLF.Br.20 (citing *Champion v. Smith*, 113 N.H. 551, 552 (1973)). But those circumstances, unlike this case, involve a present physical injury—trauma from an automotive collision that makes testing necessary—and thus follow settled New Hampshire law.

Champion also involved a present physical injury—the defendant struck the plaintiff on the nose. 113 N.H. at 552. *Champion* upheld recovery for damages for the plaintiff's present injuries, there, the "cuts and bruises on his face and body, a swelling and disfiguration of his nose, headaches and spells of dizziness which lasted for several weeks and necessitated his remaining at home for four days." *Id.* But it also allowed recovery for an x-ray required by the injury, even though it "did not reveal a broken bone." *Id.*

The same is true of the other New Hampshire negligence cases Plaintiffs cite that allowed recovery of economic damages

for future harm: *State v. Exxon Mobil Corp.* involved a present physical injury to groundwater, 168 N.H. 211, 263 (2015), and *Kelleher v. Marvin Lumber & Cedar Co.* involved present physical injury to the plaintiff's home. 152 N.H. 813, 837 (2005). These decisions provide no ground to depart from New Hampshire's fundamental present physical injury requirement.

B. The Present Physical Injury Rule Bars Medical Monitoring Claims by Asymptomatic Plaintiffs.

As the U.S. Supreme Court observed, in general, "common-law courts have denied recovery to those who … are disease and symptom free." *Buckley*, 521 U.S. at 432. That requirement endures not just as a matter of precedent, but of public policy. *Buckley* best expressed those concerns when it rejected a federal cause of action for medical monitoring for asymptomatic plaintiffs. Justice Breyer explained for the Court that the potential class of Plaintiffs is immense: "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Id.* at 442. Monitoring for anyone with above-average PFOA levels would include 165 million people—half of the U.S. population—and if Plaintiffs' alternative blood-test criterion of 0.5 µg/L applies, it would include 313 million people—95% of the U.S. population. Apx.II.179-180, 184; Apx.II.112; Apx.VIII.51.

Such large groups of potential claimants, "along with uncertainty as to the amount of liability, could threaten … a 'flood' of less important cases." *Buckley*, 521 U.S. at 442. Such "unlimited and unpredictable liability" might drain "resources

better left available to those more seriously harmed," including "scarce medical resources" for testing. *Id.* Creating this expanded liability would affect "other potential plaintiffs … who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other." *Id.* at 443-44. Thus, as the Supreme Court subsequently explained, *Buckley*'s "categorical approach" "distinguishes asymptomatic … plaintiffs" from those with a physical injury, which "serves to reduce the universe of potential claimants to numbers neither 'unlimited' nor 'unpredictable.'" *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 156-57 (2003).

Many state high courts have followed both the holding and the policy of *Buckley*. Reiterating *Buckley*'s concerns, the state high courts that apply the physical injury rule have rejected medical monitoring claims that are indistinguishable from those that Plaintiffs press here.

Illinois: The Illinois Supreme Court recently held in a case involving lead in drinking water that mere increased risk from toxic exposure is not a cognizable injury. *Berry v. City of Chicago*, 181 N.E.3d 679 (Ill. 2020) (citation omitted). "Until the defendant's wrongful or negligent act produces injury to the plaintiff's interest by way of loss or damage, no cause of action accrues." *Id.* at 688. The physical injury 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.*

New York: New York's high court rejected a claim of medical monitoring for the risk of lung cancer from exposure to cigarette smoke. *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013). Allowing medical monitoring claims "absent any evidence of present physical injury … would constitute a significant deviation from our tort jurisprudence." *Id.* at 18. "[D]ispensing with the physical injury requirement could permit 'tens of millions' of potential plaintiffs to recover monitoring costs, effectively flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage." *Id.*

Oregon: The Oregon Supreme Court reached the same conclusion with regard to medical monitoring for the risk of cancer from smoking. *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181 (Or. 2008). Allegations that tests were "reasonable and necessary" given "exposure to toxic substances" do not state a claim without "present physical harm." *Id.* at 182-83, 187.

Mississippi: Mere "possibility of incurring an illness with no present manifest injury" "is insufficient to maintain a tort claim." *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1, 5 (Miss. 2007).

Michigan: Any medical monitoring relief is "wholly derivative of a *possible, future injury* rather than an *actual, present injury"* and thus "the medical expenses plaintiffs claim to have suffered (and will suffer in the future) are not compensable." *Henry*, 701 N.W.2d at 691. Using "mere exposure to a toxic substance as a sufficient trigger for tort liability could lead to a

stampede of litigation." *Id.* at 695.

Kentucky: "[R]ecovery on a theory of tort," like medical monitoring, "requires a plaintiff to show some present physical injury to support a cause of action." *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 851-52 (Ky. 2002). Plaintiff's argument that "'[h]arm' under the Restatement" occurs from "hav[ing] to pay … for comprehensive medical screening … is unsupported by either law or logic." *Id.* at 854. "[A]llowing recovery for increased risk and medical screening may be creating significant public policy problems." *Id.* at 857.

Alabama: Granting medical monitoring "based upon nothing more than an increased risk that an injury or an illness might one day occur would result in the courts of this State deciding cases based upon nothing more than speculation and conjecture." *Hinton v. Monsanto Co.,* 813 So.2d 827, 830 (Ala. 2001); *Houston Cty. Health Care Auth. v. Williams,* 961 So.2d 795 (Ala. 2006).[6]

While Plaintiffs ignore *Buckley*, they and their amici urge the Court not to follow the physical injury rule of these decisions and instead to heed the D.C. Circuit's ostensibly "seminal case recognizing the need for such diagnostic testing for toxic exposures." CLF.Br.18; Pls.Br.30 (citing *Friends for All Children,*

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[6] Many decisions of lower state courts and federal courts predicting state law agree. *See Bowerman v. United Illuminating,* 1998 WL 910271 (Conn. Super. Ct. 1998); *Parker v. Brush Wellman, Inc.,* 377 F. Supp. 2d 1290 (N.D. Ga. 2005), *aff'd*, 230 F. App'x 878 (11th Cir. 2007); *Norwood v. Raytheon Co.,* 414 F. Supp. 2d 659 (W.D. Tex. 2006); *Duncan v. Nw. Airlines, Inc.,* 203 F.R.D. 601 (W.D. Wash. 2001).

Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 825 (D.C. Cir. 1984)). But *Friends for All Children* does not involve toxic exposures, and it only reinforces the physical injury rule, since it involves a traumatic physical impact. A ***plane crashed*** after "the aft ramp and cargo doors" of the aircraft fell off in flight, causing "an explosive decompression and loss of oxygen." *Id.* at 819. Upon impact, "the aircraft shattered into four large pieces," killing nearly half of the 301 passengers. *Id.* The survivors were mostly orphaned infants, *id.*, and medical experts for both sides agreed they required "a comprehensive diagnostic examination." *Id.* at 825. *Friends* offers no coherent parallels to the claims advanced by Plaintiffs here.

The hypothetical in *Friends*, which Plaintiffs and their amici emphasize, also involves multiple physical traumas: a motorbiker runs a red light, "knock[s] down" a pedestrian, causing him to "land[] on his head with some force"—and likely causing contusions and lacerations. *Id.* at 825. "Understandably shaken," he then receives (and chooses to limit his claims to the costs of) tests for "internal head injuries," which were negative. *Id.*[7]

In *Buckley*, the U.S. Supreme Court distinguished *Friends*, because it involves "a traumatic physical impact" and is, thus, "beside the point" in a case alleging the risk of future injury from "negligent exposure to a toxic substance." 521 U.S. at 440. The

[7] The "internal" head injury was the "absent" physical injury in *Friends*—not injuries from initially being hit by the motorbike or external injuries from then hitting his "head with some force" and being "shaken." 746 F.2d at 825.

monitoring contemplated by *Friends* tracks this Court's recognition of monitoring following a physical assault in *Champion*, 113 N.H. at 552. But Plaintiffs' demand for monitoring without physical injury contradicts the common-law physical injury requirement set by this Court.

Plaintiffs then argue that the courts that applied the physical injury rule "failed to analyze injury according to the RESTATEMENT." Pls.Br.27. At the outset, the Restatement purports only to restate the law. It does not bind state high courts in interpreting their own law. And the Restatement definition of injury that Plaintiffs rely on is tautological: "the invasion of any legally protected interest of another." Restatement (Second) of Torts § 7(1). Plaintiffs' argument is circular because this case is about what interests are legally protected.

Nor does the Restatement support Plaintiffs' argument. The Restatement does not purport to protect Plaintiffs' purported interest in avoiding risk of future illness without present physical harm. Plaintiffs cite no provision of the Restatement that does so. To the contrary, the ALI acknowledged that it has not adopted any Restatement provision about medical monitoring, much less without physical injury. Principles Law Agg. Lit. § 2.04 (ALI 2010). Rather, it observed that recent years have "seen more states decline to recognize [medical monitoring] than adopt it." *Id.*

Plaintiffs allege nothing that warrants a different result. They concede they do not allege a physical injury. Pls.Br.13-16;

22-23, 29. Instead, they say their injury is having above-the-then-average nationwide exposure of 2.1 µg/L of PFOA—a characteristic they shared (by definition) with half of the U.S. population. Apx.II.179-180; *see Adams v. Cooper Indus., Inc.*, 2007 WL 1805586, at *4-5 (E.D. Ky. 2007).[8] That is certainly not enough. As the Fourth Circuit held in affirming the dismissal of tort claims based on PFOA accumulation, "[t]he presence of PFOA … in the plaintiffs' blood does not, standing alone, establish harm or injury." *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 95 (4th Cir. 2011). Rather, the "plaintiff also must produce evidence of a detrimental effect to the plaintiffs' health that actually has occurred or is reasonably certain to occur due to a present harm." *Id.*

In another case alleging PFOA exposure, the court held that merely having "blood tests show[ing] elevated levels of PFOA" is not a "'manifest, present injury.'" *W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co.,* 208 F. Supp. 3d 1227, 1233 (N.D. Ala. 2016). The presence of a chemical is not, by itself, a harm since "not every alteration of the body is an injury." *Dumontier v. Schlumberger Tech. Corp.,* 543 F.3d 567, 570 (9th Cir. 2008). Subclinical changes, if any, from a chemical are not "*bodily* or *physical* injuries." *June v. Union Carbide Corp.,* 577 F.3d 1234, 1249 (10th Cir. 2009). The same is true here.

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[8] Plaintiffs added a lower-than-average measured blood serum level of 0.5 µg/L, Apx.IV.118-119; Apx.II.184, after initially invoking a modeled blood serum value of 2.1 µg/L, based on the then-nationwide-average. Apx.II.179-180.

C. New Hampshire's Legislative Initiatives Reinforce the Present Physical Injury Rule and the Reasons for It.

New Hampshire's legislature has also recognized that the common-law physical injury rule bars the medical monitoring claims Plaintiffs advance here. It did so by trying (without success) to confer by statute the remedy the common law rejects. In 2020, the Legislature introduced legislation to create a statutory claim for medical monitoring "to deal with PFAs exposure." Summary of 6/24/20 Hrg. on HB1375 (testimony for Waste Management of N.H.). The bill provided what the common law does not: "[a] claim for medical monitoring damages … ***without proof of present physical injury or symptoms***." HB1375, N.H. 2020 Sess. (emphasis added). This legislative effort to supersede the physical injury rule proves the content of the common law it sought to displace. *See Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426, 429-30 (N.Y. 1991).

Governor Sununu vetoed this bill. 8/7/20 Veto Message re: HB1375. Echoing Justice Breyer's reasoning in *Buckley*, he stated that "[b]y not requiring proof of injury or symptoms … this bill could open the floodgates to new, less severe claims which would divert resources from those who truly need them." *Id.* While his background as an environmental engineer made him "familiar with exposure to toxic materials and the possibility for associated risks," he was concerned with the bill's impact "on businesses and consumers in the Granite State." *Id.* The bill would create a "pathway for almost anyone exposed to hazardous or toxic substances to prove a claim for medical monitoring damages, regardless of the level, risk or consequences of

exposure." *Id.* He vetoed the bill as "too broad," *id.*, and the legislature has enacted no other medical monitoring bill since then.

D. Medical Monitoring Without Present Physical Injury Is Contrary to Sound Public Policy.

Plaintiffs' invitation to abrogate the well-settled requirement of a present physical injury has severe and adverse public policy consequences. *Buckley* rejected a medical monitoring claim without physical injury, recognizing that "the potential systemic effects of creating a new, full-blown, tort law cause of action" for asymptomatic plaintiffs were too dire. 521 U.S. at 443-44.

Other state high courts have issued similar warnings. For instance, the New York Court of Appeals recognized in *Caronia* that "dispensing with the physical injury requirement could permit 'tens of millions' of potential plaintiffs to recover monitoring costs, effectively flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage. Moreover, it is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease." 5 N.E.3d at 18 (quotation omitted). Likewise, the Kentucky Supreme Court explained in *Wood* that "'[g]iven that negligently distributed or discharged toxins can be perceived to lie around every corner in the modern industrialized world, and their effects on risk levels are at best speculative, the potential tort claims involved are inherently limitless and endless.'" 82 S.W.3d at 857-58 (quoting Henderson & Twerski, *supra*, at 831). The Michigan Supreme Court in *Henry* similarly

cautioned that the prevalence of toxic agents in the environment required the court to be "wary of accepting plaintiffs' invitation to venture down the slippery slope that a medical monitoring cause of action would necessarily traverse":

> To recognize a medical monitoring cause of action would essentially be to accord carte blanche to any moderately creative lawyer to identify an emission from any business enterprise anywhere, speculate about the adverse health consequences of such an emission, and thereby seek to impose on such business the obligation to pay the medical costs of a segment of the population that has suffered no actual medical harm.

701 N.W.2d at 696 n.15, 703.

Here, too, Plaintiffs' proposal that this Court recognize liability in negligence without physical injury could lead to a flood of medical monitoring claims, thereby subjecting New Hampshire manufacturers, contractors, gas station owners, fast food operators, and utilities, among others, to potentially crushing exposure-based liabilities. Financially-strapped municipalities and other governmental entities could also be subjected to such unbounded claims. The Court should reject such a massive and limitless expansion of tort liability. This radical change would open the floodgates of litigation, at tremendous costs to public and private entities in New Hampshire.

The exposure is widespread. PFOA is ubiquitous. It was

used for more than fifty years in everything from clothing, to food packaging, carpeting, and furniture. Apx.VIII.145. Consequently, it is detectable in the blood of almost every American. Apx.VIII.51. And Plaintiffs' proposed measured-blood-level trigger for class membership of 0.5 µg/L includes 95% of Americans—313 million people. Apx.II.179-180, 184; Apx.II.112.

Any alleged risk is* de mimimis.** This is not a case, like monitoring for well-established risks like asbestos and smoking, where exposure is known to cause disease in humans. Although PFOA has received regulatory designations as "hazardous" in certain states, no medical organization or study has concluded that PFOA causes ***any disease in humans, much less all the conditions Plaintiffs seek to monitor for here: elevated cholesterol, kidney cancer, testicular cancer, ulcerative colitis, pregnancy-induced hypertension, and thyroid disease. Apx.III.92-93; Apx.VII.139; Apx.V.79-80; Apx.IV.23-25, 40; Apx.VIII.181-182.[9] In fact, Plaintiffs' assessment of the alleged risks from PFOA exposure is so minuscule that, even if true and even with 100% participation (though actual participation is often less than 10%), the proposed monitoring program, for a putative class of approximately 28,200 people, could run its course without ever identifying another case of disease attributable to PFOA exposure. Apx.VIII.216; Apx.VIII.199.

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[9] These common conditions not only have many different causes, but people have also been experiencing them for hundreds of years and long before PFOA was ever synthesized. *See* Apx.V.70-71; Apx.IV.224; Apx.IV.19; Apx.IV.139; S.Apx.II.69-72.

Here, Plaintiffs propose monitoring for individuals who, for at least one year, drank tap water with 70 ppt of PFOA. Apx.IV.83; Apx.IV.32. With such exposure, Plaintiffs' estimate of the added risk attributable to PFOA is as follows:

- ***0.04 extra cases*** of kidney cancer per year per 1,000,000 persons (annual national incidence 163 cases per 1,000,000 persons);
- ***0.06 extra cases*** of testicular cancer per year per 1,000,000 men (annual national incidence 59 cases per 1,000,000 men);
- ***0.1-0.3 extra cases*** of ulcerative colitis per year per 1,000,000 persons (annual national incidence 77-192 cases per 1,000,000 persons); and
- ***0.03-0.10 extra cases*** of thyroid disease per 1,000,000 persons per year (annual national incidence 2,000-6,000 cases per 1,000,000 persons).

Apx.IV.72. These "infinitesimal increased risks," Apx.IX.141, even if true, show no significant health disturbances warranting medical monitoring. S.Apx.III.99, 103.

As Plaintiffs' expert's published work acknowledges, "1 in 1 million" risks (or even "risks above th[at] threshold") are considered "de minimis" and, thus, to "risk managers and regulatory policies … are acceptable or insignificant from a societal perspective." Apx.XI.182. They are so minuscule that "a regulatory agency would look" at these risks "as showing that we're unable to show that there is any significant health disturbances caused by the PFAs exposure." S.Apx.III.99. It is for good reason that the federal government does not recommend medical monitoring for PFOA exposure. Apx.III.137.

The proposed monitoring is exorbitant. Plaintiffs say their proposed monitoring program will cost more than $780 million. Apx.VIII.203. They propose to monitor essentially everyone in the proposed class—around 28,200 people—for their entire lives. Apx.VIII.189, 199. They propose to do so with annual blood tests and other screenings for seven conditions they say are associated with PFOA exposure. Apx.V.43-57. All in the promise that, after several decades, they may detect a tiny number of additional cases of disease earlier than they otherwise would.

The proposed monitoring provides little benefit. The monitoring plan that Plaintiffs propose would do little to aid them. It consists primarily of blood tests, most of which are standard of care elements of a routine blood panel. Apx.VIII.205-207. Moreover, Plaintiffs have not sought from their physicians any additional monitoring they claim they need as a result of exposure in the six years since this case began, and their physicians have not recommended any. S.Apx.II.72-78. In fact, as part of routine healthcare, many of them already receive the tests they ask this Court to authorize. S.Apx.II.62-64, 67-68. Plaintiffs' bid for monitoring for asymptomatic plaintiffs is not supported by the law, the record, or sound policy.

II. THE COURT SHOULD REQUIRE PROOF OF OTHER ELEMENTS TO SHOW CAUSATION FOR MEDICAL MONITORING.

Because Plaintiffs concede they do not allege a physical injury, Pls.Br.14, 29, the Court may resolve this appeal on that ground and without answering Question B.2 as to the elements of medical monitoring. But should the Court wish to address those other elements, which vary considerably even among those courts

that have adopted this claim, it should do so with reference to the common-law requirement to prove causation.

"It is elementary that no action can be maintained upon an act of negligence unless the breach of duty has been the cause of the damage." *Deschenes v. Concord & M.R.R.*, 69 N.H. 285, 288 (1898); *Pritchard v. Town of Boscawen*, 78 N.H. 131, 132 (1916). This requires proof of "both cause-in-fact and legal cause." *Estate of Joshua T. v. State*, 150 N.H. 405, 407 (2003). Cause-in-fact, or "but for" causation, "requires the plaintiff to establish that the injury would not have occurred without the negligent conduct." *Id.* (quotation omitted). "The plaintiff must produce evidence sufficient to warrant a reasonable juror's conclusion that the causal link between the negligence and the injury probably existed.'" *Id.* at 407-08 (quotation omitted). To prove proximate cause, the plaintiff must "establish that the negligent conduct was a substantial factor in bringing about the harm." *Id.* at 408.

When a plaintiff experiences a physical injury from exposure to a substance, proving but-for and proximate causation of a need for medical monitoring following that exposure requires showing not only that the defendant is responsible for the exposure, but also that (A) the plaintiff's level of exposure is above-background and causes the disease for which plaintiff seeks monitoring; (B) monitoring can provide early diagnosis and treatment that will change the prognosis; (C) monitoring differs from the ordinary care the plaintiff does or should receive; and (D) the benefits of monitoring outweigh the risks of monitoring to the plaintiff.

A. Plaintiff's Exposure Must Cause the Disease for Which Monitoring Is Sought.

Several of the matters raised by Question B.2—such as "the toxicity of the substance," the "exposure to the substance," and the "health risks associated with exposure to the substance"—are assessed by what is known as the "general causation" requirement. "General causation" recognizes the fundamental need for a plaintiff alleging a disease from exposure to prove that the plaintiff's exposure causes the disease. So, too, where a plaintiff seeks monitoring for the risk of future disease, general causation demands proof that the exposure has been shown to cause the disease at the corresponding dose.

Even Plaintiffs' cases show that general causation—such as the well-established causal relationships for exposure to asbestos, cigarettes, or PCBs—is a predicate for monitoring. In *Hansen v. Mountain Fuel Supply Co.,* the Utah Supreme Court recognized that the plaintiffs "contend that because they have been exposed [to asbestos], they must undergo periodic medical tests to facilitate early diagnosis and treatment of diseases ***stemming from*** their exposure" to asbestos. 858 P.2d 970, 975-76 (Utah 1993) (emphasis added). So, too, in *Burns v. Jaquays Mining Corp.,* the Arizona appeals court noted that the plaintiffs "all have asbestos fibers in their lungs which are ***causing*** changes in the lung tissue. Sooner or later some of the residents, if they live long enough, will suffer from asbestosis and other asbestos-related diseases." 752 P.2d 28, 30 (Ariz. Ct. App. 1987) (emphasis added). Similarly, in *Ayers v. Jackson Township*, the New Jersey Supreme Court noted that a "claim for medical surveillance …

seeks to recover the cost of periodic medical examinations intended to monitor plaintiffs' health and facilitate early diagnosis and treatment of disease ***caused by*** plaintiffs' exposure to toxic chemicals." 525 A.2d 287, 308 (N.J. 1987) (emphasis added).[10] In *Bower v. Westinghouse Elec. Corp.*, the West Virginia high court addressed "future medical testing aimed at diagnosing potential ailments ***caused by*** the alleged toxic exposure." 522 S.E.2d 424, 428 (W. Va. 1999) (emphasis added). And in *Meyer ex rel. Coplin v. Fluor Corp.*, the Missouri Supreme Court allowed monitoring for "early detection and treatment of latent injuries ***caused by*** the plaintiff's exposure" to lead. 220 S.W.3d 712, 718 (Mo. 2007) (emphasis added). In all these decisions, general causation is the predicate that is baked into the courts' analysis.

Yet Plaintiffs' narrow focus on the enumerated elements of a medical monitoring claim in these cases, such as the need for "a significantly increased risk" of contracting a particular disease from the exposure (which, under the facts of these cases, rests on a causal relationship), ignores that "[j]udicial opinions must not be confused with statutes," *U.S. v. Skoien,* 614 F.3d 638, 640 (7th Cir. 2010), and that judicial language should be read and understood "against the backdrop of the particular controversy that the Court was resolving." *In re Plavix Mktg., Sales Pracs. & Prods. Liab. Litig.,* 974 F.3d 228, 235 (3d Cir. 2020). To avoid

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[10] The New Jersey Product Liability Act superseded *Ayers* for claims alleging harm from a product. *Sinclair v. Merck & Co.*, 948 A.2d 587, 593 (N.J. 2008); N.J. Stat. § 2A:58C-1(b).

medical monitoring for "phantom risks"—*i.e.*, "cause-and-effect relationships whose very existence is unproven," *Phantom Risk: Scientific Inference and the Law* 1 (Kenneth R. Foster, David E. Bernstein, Peter W. Huber, eds. (MIT 1993))—an established general causation relationship between the plaintiff's level of exposure and the disease at issue is an essential predicate to liability.

The record shows no such general causation relationship here. For instance, the CDC states that "no causal relationship has been established" between PFAS exposure and cholesterol, thyroid effects, ulcerative colitis, cancers, and preeclampsia in human studies. Apx.III.135-136. Even Plaintiffs' experts' published professional writings state that "causality between a PFAS chemical and a specific health outcome in humans has not been established in the current scientific literature." Apx.VIII.107; Apx.IX.172. Plaintiffs' experts recently wrote elsewhere that "the epidemiologic evidence remains limited," generally "does not" support "the conclusion that PFOA is carcinogenic for any given site," and has "become weaker" for ulcerative colitis and thyroid disease. Apx.IX.172-173, 175-176, 179.

In fact, Plaintiffs' brief stops short of asserting causation and contends only that PFOA is "associated with" certain health conditions. Pls.Br.35. But as Plaintiffs' experts know, Apx.IV.9; Apx.VII.181; Apx.IV.222-223; Apx.V.66, "[s]howing an *association* is far removed from proving *causation*." *Kilpatrick v. Breg, Inc.,* 613 F.3d 1329, 1338 (11th Cir. 2010) (emphasis in original;

citation omitted; cleaned up); *accord Huss v. Gayden,* 571 F.3d 442, 459 (5th Cir. 2009); *Norris v. Baxter Healthcare Corp.,* 397 F.3d 878, 885 (10th Cir. 2005); *Reference Manual on Scientific Evidence* 552 (3d ed. 2011). And the "proverbially small" risks that Plaintiffs assess—each below one in a million—cannot support the proposition that "reasonable physicians would prescribe a medical monitoring regime for the Plaintiffs." *Hirsch v. CSX Transp., Inc.*, 656 F.3d 359, 364 (6th Cir. 2011).

Plaintiffs cannot bypass the need to prove causation by relying on regulatory determinations that PFOA is "hazardous" or "toxic." Pls.Br.11. Such regulatory approaches are "*protective*"—not "*predictive*." *Williams v. Mosaic Fertilizer, LLC*, 889 F.3d 1239, 1247 (11th Cir. 2018) (emphasis in original). Given their important differences, the regulatory approach has "limited utility in a toxic tort case, especially for the issue of causation." *Rhodes v. E.I. du Pont de Nemours & Co.*, 253 F.R.D. 365, 377 (S.D.W. Va. 2008); *accord Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 198 (5th Cir. 1996); *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 781, 785 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

Plaintiffs say that "no particular level of quantification is necessary to satisfy the requirement of increased risk." Pls.Br.38. The law is to the contrary—"[d]ose matters." *In re Lipitor Marketing, Sales Practices & Prods. Liab. Litig.*, 892 F. 3d 624, 639 (4th Cir. 2018). General causation requires a showing that the plaintiff's level of exposure—that is, the dose—

is above-background and causes the disease at issue. Thus, "[s]cientific knowledge of the harmful level of exposure to a chemical plus knowledge that plaintiff was exposed to such quantities are minimal facts necessary to sustain the plaintiff's burden." *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1241 (11th Cir. 2005) (quoting *Allen*, 102 F.3d at 199); *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999).

Plaintiffs wish to treat any level of exposure as a harm, but this "flies in the face of the toxicological law of dose-response, that is, that 'the dose makes the poison.'" *Henricksen v. ConocoPhillips Co.,* 605 F. Supp. 2d 1142, 1165-66 (E.D. Wash. 2009) (quotation omitted); *Whiting v. Boston Edison Co.,* 891 F. Supp. 12, 25 (D. Mass. 1995); *see Sutera v. Perrier Group of Am. Inc.,* 986 F. Supp. 655, 666 (D. Mass. 1997); *Hostetler v. Johnson Controls, Inc.*, 2020 WL 5543081, at *4 (N.D. Ind. 2020). Rather, because medical monitoring concerns compensation "for past or present injuries caused by the defendant," it requires "quantifiable, reliable indicia" of an increase in risk, "particularized to a plaintiff." *Exxon Mobil Corp. v. Albright,* 71 A.3d 30, 79, *on reconsideration in part,* 71 A.3d 150 (Md. 2013). Thus, medical monitoring requires "individualized proof that … plaintiffs were exposed to contaminants sufficient to cause an increased risk of a specified disease," to show "that a reasonable physician would order medical monitoring." *Baker v. Chevron U.S.A. Inc.,* 533 F. App'x 509, 525 (6th Cir. 2013). That means "proof that the level of exposure could cause" the purported increased risk of disease. *Id.*

Dose matters here because individual exposure to PFOA varies. Even looking at drinking water alone, an individual's exposure to PFOA will vary based on the levels of PFOA in water and the amount of water consumed, Apx.IV.32; Apx.VII.116-117; Apx.V.93-94, as well as other sources of water, Apx.VII.117, and individual "rates of excretion of the chemical." Apx.IV.32; Apx.VII.117. Dose will also vary based on other exposures, including occupational and consumer exposures. Apx.III.95-99; Apx.III.196. Whether a plaintiff has sufficient exposure from the defendant to cause a substantially increased risk of some future disease is a highly variable question.

Just as Plaintiffs cannot prove causation with regulatory findings that a chemical is "hazardous," they cannot prove dose with risk assessments for regulatory levels set for PFOA in water, whether by recent EPA advisories or by others. "[T]he basic goal underlying risk assessments ... is to determine a level that will protect the most sensitive members of the population," and so the "resulting regulatory levels" are often built around "'worst case' assumptions" that "generally overestimate potential toxicity levels for nearly all individuals." *Rowe v. E.I. du Pont de Nemours & Co.,* 2008 WL 5412912, at *16 (D.N.J. 2008). "[R]egulatory standards for the population as a whole" do not determine the risk for any individual. *Gates v. Rohm & Haas Co.,* 655 F.3d 255, 268 (3d Cir. 2011). They are not a proxy for Plaintiffs' proof of causation.

B. Medical Monitoring Must Provide Early Diagnosis and Treatment to Change the Prognosis.

Addressing the "availability, effectiveness, or other characteristics of medical testing" in Question B.2 requires a showing about how the proposed monitoring will affect the plaintiff. Here, Plaintiffs acknowledge they must show "the testing proposed is reasonably medically necessary." Pls.Br.39. But even the courts that approve medical monitoring recognize that causation requires something more specific: monitoring procedures that "make the early detection and treatment of the disease possible and beneficial." *Bell v. 3M Co.,* 344 F. Supp. 3d 1207, 1225 (D. Colo. 2018); *accord Bower*, 522 S.E.2d at 432-33; *Exxon Mobil,* 71 A.3d at 81-82; *Redland Soccer Club, Inc. v. Dep't of the Army,* 696 A.2d 137, 145-46 (Pa. 1997); *Potter v. Firestone Tire & Rubber Co.,* 863 P.2d 795, 824-25 (Cal. 1993). While Plaintiffs argue that there need not be any treatment for the disease, Pls.Br.36, caselaw recognizes that monitoring is not "beneficial" unless "a treatment exists that can alter the course of the illness." *Hansen,* 858 P.2d at 979. Monitoring has no value to the plaintiff unless "early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury." *Donovan v. Philip Morris USA, Inc.,* 914 N.E.2d 891, 902 (Mass. 2009). For example, monitoring is of no avail for diseases, like testicular cancer, that, even if detected early, have the same prognosis and treatment as when they are detected later. S.Apx.II.53.

C. Medical Monitoring Must Differ From the Plaintiff's Routine Medical Care.

Because a reasonable physician would not prescribe a patient what one already receives, proper consideration of the characteristics of the testing under Question B.2 requires a plaintiff to show that the proposed monitoring differs from the ordinary medical care one does or should receive. Other state courts have expressly framed this under the lens of causation: the plaintiff must show she was "reasonably required to undergo medical monitoring beyond what would have been recommended had the plaintiff not been exposed to the negligent act of the defendant." *Sadler v. PacifiCare of Nev.,* 340 P.3d 1264, 1272 (Nev. 2014). A plaintiff must show that "as a direct consequence of the exposure in issue," one needs "specific monitoring beyond that which an individual should pursue as a matter of general good sense and foresight.'" *Potter*, 863 P.2d at 825. Thus, the proposed monitoring must be "different from that normally recommended in the absence of the exposure." *Petito v. A.H. Robins Co., Inc.,* 750 So.2d 103, 106-07 (Fla. Dist. Ct. App. 1999); *Hansen*, 858 P.2d at 980. Here, in contrast, the proposed monitoring consists primarily of standard blood tests that most people (including Plaintiffs) receive on a regular basis. Apx.VIII.205-207; S.Apx.II.62-64, 67-68. In fact, having nothing to do with alleged PFOA exposure, many of the Plaintiffs already receive the tests they ask this Court to authorize. S.Apx.II.62-64, 67-68.

D. Medical Monitoring Benefits Must Outweigh Risks to the Plaintiff.

Considering the characteristics of the testing under Question B.2 demands a risk/benefit balancing. Medical monitoring is not an unqualified good. Rather, like any medical intervention, its application entails a careful weighing of risks and benefits for the patient. Even for asymptomatic populations, the Congressionally-established U.S. Preventive Services Task Force considers it "critically important" to assess the magnitude of harm from screening to ensure that "the benefits exceed the harms prior to recommending implementation of screening or other preventive services." Apx.IX.206. Clinicians should "individualize decisionmaking to the specific patient and situation" because "clinical decisions about patents involve more complex considerations than the evidence alone." Apx.IX.200-201. Harms from monitoring include the tests themselves, as well as psychological harms, overdiagnosis, and opportunity costs. Apx.IX.207. As Plaintiffs' experts acknowledge, a false-negative test result can lead to a delay in diagnosis and treatment or to false reassurance. Apx.VII.194-195; Apx.V.86; Apx.IV.41. By contrast, a false-positive result can lead to unnecessary follow-up testing or treatment that may be invasive, uncomfortable, expensive, and even harmful. Apx.VII.194-195; Apx.IV.41-42; Apx.V.85-86.

Finding that the benefits of monitoring outweigh the risks to the plaintiff is part and parcel to finding that exposure caused the need for monitoring. "[I]t is not enough that early detection and treatment are shown to be theoretically beneficial. It also

must be shown that administration of the test to a specific plaintiff is medically advisable for that plaintiff." *Hansen*, 858 P.2d at 980. That showing is specific to the individual: "plaintiffs must offer 'evidence that a reasonable physician would order medical monitoring ***for them***.'" *Baker*, 533 F. App'x at 525 (emphasis added). That was the case in *Champion*: damages for the cost of x-rays were appropriate because the plaintiff's physician determined that the radiation risk of the x-ray did not outweigh the benefits of diagnosing possible broken bones from an assault (even though the x-ray was negative). 113 N.H. at 552. Here, too, this Court should hold that exposure causes a need for medical monitoring only if the benefits of monitoring outweigh the risks to the plaintiff.

CONCLUSION

For these reasons, the Court should answer the certified questions as follows:

Questions A and B.1: The Court should hold that New Hampshire law does not recognize a claim for medical monitoring costs for exposure to a substance without proof of a present physical injury.

Question B.2: If the Court elects to answer Question B.2 regarding the elements of medical monitoring, it should hold that, to prove causation for a medical monitoring theory, the plaintiff must show not only that the defendant is responsible for causing the exposure to the plaintiff, but also that (A) the plaintiff's level of exposure is above-background and causes the disease for which the plaintiff seeks monitoring; (B) monitoring

can provide early diagnosis and treatment that will change the prognosis; (C) monitoring differs from the ordinary care the plaintiff does or should receive; and (D) the benefits of monitoring outweigh the risks of monitoring to the plaintiff.

REQUEST FOR ORAL ARGUMENT

Saint-Gobain requests oral argument before the full court, with 30 minutes per side, given the important questions of New Hampshire law presented here.

CERTIFICATION OF WORD COUNT

The undersigned hereby certify that, pursuant to N.H. S. Ct. R. 16(11), this brief contains 9,469 words, exclusive of the cover, tables of contents and authorities, and other such matters.

Dated: July 8, 2022

Respectfully submitted,

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