

IN THE SUPREME COURT OF GEORGIA

Bio-Lab, Inc., KIK International LLC, KIK U.S. Holdings LLC, and
KIK Custom Products Inc.,

Defendants/Appellants,

v.

Fannie Tartt et al.,

Plaintiffs/Appellees.

On Certified Question by the
United States District Court for the Northern District of Georgia
Civil Action No. 1:24-CV-4407-SEG

AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA, GEORGIA CHAMBER OF COMMERCE,
COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION
OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION,
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION,
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,
AMERICAN COATINGS ASSOCIATION, ADVANCED MEDICAL
TECHNOLOGY ASSOCIATION, AND PHARMACEUTICAL
RESEARCH AND MANUFACTURERS OF AMERICA
IN SUPPORT OF DEFENDANTS/APPELLANTS

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QUESTIONS PRESENTED

1. Under Georgia law, may plaintiffs who have been exposed to toxic substances which may cause future disease, but who do not claim a present physical injury, obtain medical monitoring as a form of equitable relief in a tort action?
2. If the answer is yes, what is the legal standard for obtaining such a remedy?

INTEREST OF *AMICI CURIAE*¹

Amici are organizations that represent companies doing business in Georgia and their insurers. Adoption of a medical monitoring remedy in the absence of a present physical injury would radically alter Georgia personal injury law and subject *amici*'s members to unpredictable and potentially unbounded liability.

Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of over 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the

¹ No counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of the brief.

courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

Georgia Chamber of Commerce (Georgia Chamber) serves nearly 50,000 members—ranging in size from small businesses to Fortune 500 corporations—covering a diverse range of industries statewide. Established in 1915, the Georgia Chamber is the State's largest business advocacy organization and is dedicated to representing the interests of businesses and citizens in the State. The Georgia Chamber pursues its primary mission of creating, keeping, and growing jobs in Georgia, in part, by advocating the business and industry viewpoint in the shaping of law and public policy to ensure that Georgia is economically competitive.

National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes \$2.9 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Coalition for Litigation Justice, Inc. (CLJ) is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for asbestos and other toxic tort claims.² The CLJ files *amicus* briefs in cases that may have a significant impact on the toxic tort litigation environment.

American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over three decades, ATRA has filed *amicus* briefs addressing important liability issues.

American Property Casualty Insurance Association (APCIA) member companies are home, auto, and business insurers that underwrite a substantial portion of the liability insurance nationwide. APCIA's members represent approximately 66% of the U.S. property casualty insurance market and over 63% of Georgia's property casualty insurance market.

National Association of Mutual Insurance Companies (NAMIC) serves more than 1,300 companies in the property/casualty insurance industry, from local and regional insurers to some of the nation's largest carriers. NAMIC members

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

write \$383 billion in annual premiums, representing 61% of the homeowners and 48% of the automobile insurance markets.

American Coatings Association advances the needs of the paint and coatings industry through advocacy and programs that support environmental protection, product stewardship, health, safety, and the advancement of science and technology.

Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading innovative biopharmaceutical research companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates in such cases as an *amicus curiae*.

Advanced Medical Technology Association (AdvaMed) acts as the common voice for companies producing medical devices, diagnostic products, and digital health technologies. AdvaMed's over 640 member companies range from the largest to the smallest medical technology innovators.

SUMMARY OF THE ARGUMENT

For more than 200 years, a basic tenet of tort law—including in Georgia—has been that personal injury liability should be imposed only when a plaintiff has a present physical injury. This bright-line rule exists to (1) prevent a flood of post-

exposure claims that are either unripe (because the person is not yet sick) or meritless (because the person will never become sick); (2) provide faster access to courts for the truly sick; and (3) ensure that defendants are held liable only for objectively verifiable, genuine harm.

In *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), the Supreme Court of the United States rejected a claim for medical monitoring absent a proven physical injury under the Federal Employers' Liability Act (FELA), finding that such a claim lacked an adequate foundation in tort law. Post-*Buckley*, most state supreme courts to consider the issue have done the same, as have other courts. These courts understand that awarding medical monitoring to the non-sick raises serious public policy concerns, including the potential for "unlimited and unpredictable liability" and the possibility that unimpaired claimants will exhaust resources available to compensate those who are or will become sick. *Buckley*, 521 U.S. at 433. Further, allowing a medical monitoring remedy for the uninjured would impose substantial burdens on the courts, including the need to answer many complex, policy-laden issues, such as the conditions for which monitoring should be available and the medical or technical criteria to apply. Administering such claims would thus deplete judicial resources needed by plaintiffs who are sick and potentially entitled to a remedy.

ARGUMENT

I. TRADITIONAL TORT LAW AND PERSUASIVE DECISIONS BY THE UNITED STATES SUPREME COURT AND NUMEROUS STATE HIGH COURTS DO NOT SUPPORT ALLOWING RECOVERY FOR MEDICAL MONITORING ABSENT A PRESENT PHYSICAL INJURY

The existence of a physical injury has long been a linchpin for tort liability.

See William Prosser, *Handbook on the Law of Torts* § 54, at 330-33 (4th ed. 1971).

“The threat of future harm, not yet realized, is not enough.” W. Page Keeton et al.,

The Law of Torts § 30, at 165 (5th ed. 1984) (footnote omitted). This Court has

similarly acknowledged that “an injury to a person or damage to property is

required before tortious conduct is actionable.” *MCI Commc’ns Servs. v. CMES,*

Inc., 291 Ga. 461, 642 (2012); *Synalloy Corp. v. Newton*, 254 Ga. 174, 177 (1985)

(“[A] cause of action in tort does not vest until ... the person is injured....”).³ The

³ Plaintiffs rely on *Collins v. Athens Orthopedic Clinic, P.A.*, 307 Ga. 555 (2019), but that decision only reinforces that “before an action for a tort will lie, the plaintiff must show he sustained injury or damage as a result of the negligent act or omission to act in some duty owed to him.” *Id.* at 558 (quoting *Whitehead v. Cuffie*, 185 Ga. App. 351, 353 (1987)). While *Collins* allowed claims alleging an “imminent and substantial” risk of criminal identity theft to survive a motion to dismiss, its facts were dissimilar to those here. *Id.* at 563. Medical monitoring claims involve a *non-imminent* risk that an exposure-related illness is merely *possible* in the *future*, while *Collins* found that the allegations there “raise[d] more than a mere specter of harm.” 307 Ga. at 563. Also, Georgia courts have rejected remote data breach claims that are more akin to medical monitoring. See *Rite Aid of Georgia v. Peacock*, 315 Ga. App. 573 (2012) (plaintiff suffered no injury from sale of prescription information to another pharmacy); *Finnerty v. State Bank & Trust Co.*, 301 Ga. App. 569, 572 (2009) (“[A] wrongdoer is not responsible for a consequence which is merely possible,” but “only for a consequence which is probable....”); see also OCGA § 51-12-8 (“If the damage incurred by the plaintiff is only the imaginary or possible result of a tortious act .., such damage is too remote to be the basis of recovery against the wrongdoer.”).

Court should not abandon that fundamental tort principle to allow medical monitoring recoveries based solely on the mere *possibility* of a *future* injury.

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

A. The U.S. Supreme Court's Reasons for Rejecting Medical Monitoring Almost 30 Years Ago in *Buckley* Remain Valid

In *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), the U.S. Supreme Court ruled 7-2 against allowing a medical monitoring claim under the FELA. The federal common law decision marked an inflection point in medical monitoring jurisprudence because several state high courts allowed medical monitoring claims in the decade before the decision.⁴ After *Buckley*, most high courts have chosen to keep the physical injury requirement in tort actions.⁵

⁴ See *Redland Soccer Club, Inc., v. Dep't of the Army*, 696 A.2d 137 (Pa. 1997); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987). Pre-*Buckley* cases were often supported by the reasoning in *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 819 (D.C. Cir. 1984), in which the court upheld the creation of a medical monitoring fund for children who suffered a present physical injury ("neurological development disorder") from a plane crash (not an exposure).

⁵ See *Baker v. Croda Inc.*, 304 A.3d 191 (Del. 2023); *Brown v. Saint-Gobain Performance Plastics Corp.*, 300 A.3d 949 (N.H. 2023); *Berry v. City of Chicago*, 181 N.E.3d 679 (Ill. 2020); *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013); *Lowe v. Philip Morris USA, Inc.*, 183 P.2d 181 (Or. 2008); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002); *Hinton v. Monsanto*, 813 So. 2d 827 (Ala. 2001); *Badillo v. American*

In *Buckley*, the Supreme Court recognized the physical injury requirement as a mainstay of common law and closely considered the policy concerns that weigh against medical monitoring awards. The Court appreciated that “tens of millions of individuals” have had exposures that arguably could support “some form of substance-exposure-related medical monitoring.” *Id.* at 442. Defendants could be subjected to unlimited liability and a “flood of less important cases” would drain critical resources needed for meritorious claims by seriously injured plaintiffs. *Id.*

The Court rejected the argument that medical monitoring awards do not impose substantial costs, explaining how even modest annual monitoring costs can add up to significant sums over time, especially where claimants assert the need for lifetime monitoring. The Court also expressed concern that medical monitoring claims could create double recoveries because alternative sources of monitoring are often available, such as employer-provided health plans. *See id.* at 443-44.⁶

The Court further acknowledged the practical difficulties inherent in any judicial effort to “redefine ‘physical impact’ in terms of a rule that turned on ...

Brands, Inc., 16 P.3d 435 (Nev. 2001); *see also Sinclair v. Merck & Co., Inc.*, 948 A.2d 587 (N.J. 2008) (limiting effect of earlier ruling allowing medical monitoring).

⁶ Medical monitoring “may be an extremely redundant remedy for those who already have health insurance.” Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law’s Most Expensive Consolation Prize?*, 27 Wm. Mitchell L. Rev. 521, 528 (2000); *see also* Paul F. Rothstein, *What Courts Can Do In the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1, 23 (2001) (“[M]edical monitoring awards are often totally unnecessary. Most workers today already receive access to medical check-ups through a health plan. A tort award would simply provide a windfall recovery.”).

[the] nature of a contact that amounted to an exposure, whether to contaminated water, or to germ-laden air, or to carcinogen-containing substances.” *Id.* at 437. These concerns include the difficulty in identifying which medical monitoring costs exceed the preventive medicine ordinarily recommended for everyone, conflicting testimony as to the benefit and appropriate timing of particular tests or treatments, and each plaintiff’s unique medical needs. *See id.* at 441-42.

B. Since *Buckley*, Most State High Courts to Consider Medical Monitoring Claims Have Rejected Claims by the Unimpaired

In recent years, “a trend has emerged as courts throughout the country have repeatedly held that a toxic tort claim cannot proceed in the absence of a present physical injury.” *Smith v. Terumo BCT, Inc.*, 2025 WL 3029699, at *7 (Colo. Ct. App. Oct. 30, 2025). Medical monitoring claims have been rejected across a broad spectrum of exposures, including toxins, cigarette smoke, pharmaceuticals, and different types of water contamination.

In 2023, the New Hampshire Supreme Court in *Brown v. Saint-Gobain Performance Plastics Corp.*, 300 A.3d 949 (N.H. 2023), rejected a medical monitoring remedy for plaintiffs alleging exposure to perfluorooctanoic acid (PFOA) released by a manufacturing facility. The court said the “mere existence of an increased risk of future development of disease is not sufficient ... to constitute a legal injury for purposes of stating a claim for the costs of medical

monitoring as a remedy or as a cause of action in the context of plaintiffs who were exposed to a toxic substance but have no present physical injury.” *Id.* at 952.

The Delaware Supreme Court, in *Baker v. Croda, Inc.*, 304 A.3d 191 (Del. 2023), rejected a medical monitoring remedy for plaintiffs alleging exposure to ethylene oxide released by a chemical plant. The court stated that “an increased risk of illness without present manifestation of a physical harm is not a cognizable injury under Delaware law.” *Id.* at 192. “To hold otherwise,” the court explained, “would constitute a significant shift in our tort jurisprudence” with “far reaching” policy implications. *Id.* at 196. The court discussed the policy considerations expressed in *Buckley*, finding the “reality 26 years later remains much the same, and courts have rightfully expressed concern that recognizing an increased risk of illness, without more, as a cognizable injury could open the floodgates to ‘endless and limitless’ litigation.” *Id.* The court reiterated that “[d]ispensing with the physical injury requirement could ... diminish resources that are presently used for those who have suffered physical injury.” *Id.* at 196-97.

The Illinois Supreme Court, in *Berry v. City of Chicago*, 181 N.E.3d 679 (Ill. 2020), dismissed a proposed class action against the City of Chicago on behalf of all city residents seeking the establishment of a trust fund to monitor for potential injuries related to lead exposure from the city’s antiquated water lines. In concluding that “an increased risk of harm is not an injury,” the court explained

that the “long-standing and primary purpose of tort law is not to punish or deter the creation of ... risk but rather to compensate victims when the creation of risk tortiously manifests into harm.” *Id.* at 688, 689. The court also acknowledged the “practical reasons for requiring a showing of actual or realized harm before permitting recovery in tort,” including that “such a requirement establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability.” *Id.* at 688.

The Alabama Supreme Court, in *Hinton v. Monsanto Co.*, 813 So.2d 827 (Ala. 2001), rejected for lack of a “manifest, present injury” a medical monitoring claim brought by a claimant exposed to a toxin allegedly released into the environment. *Id.* at 829. The court found it “inappropriate ... to stand Alabama tort law on its head in an attempt to alleviate [plaintiff’s] concerns about what *might* occur in the future,” concluding the “law provides no redress for a plaintiff who has no present injury or illness.” *Id.* at 831-32. The court added that recognizing a medical monitoring remedy “would require this court to completely rewrite Alabama’s tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide”—a voyage on which the court was “unprepared to embark.” *Id.* at 830.

The Kentucky Supreme Court rejected medical monitoring in *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002), where plaintiffs sought a court-supervised medical monitoring fund to detect the possible onset of primary pulmonary hypertension from ingesting the “Fen-Phen” diet drug combination. “To find otherwise,” the court stated, “would force us to stretch the limits of logic and ignore a long line of legal precedent.” *Id.* at 853-54. The court concluded, “[t]raditional tort law militates against recognition of such claims, and we are not prepared to step into the legislative role and mutate otherwise sound legal principles.” *Id.* at 859.

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

The Michigan Supreme Court, in *Henry v. Dow Chemical Co.*, 701 N.W.2d 684 (Mich. 2005), rejected a request to establish a medical screening program for possible negative effects from dioxin exposure. The court concluded that a medical monitoring remedy for the unimpaired would “depart[] drastically from

[the] traditional notions of a valid negligence claim” and that “judicial recognition of plaintiffs’ claim may also have undesirable effects that neither [the court] nor the parties can satisfactorily predict.” *Id.* at 694. The court further opined that the requested relief would “drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care,” and questioned whether the purported benefits of a remedy “would outweigh the burdens imposed on plaintiffs with manifest injuries, our judicial system, and those responsible for administering and financing medical care.” *Id.* at 694-95.

The Oregon Supreme Court, in *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181 (Or. 2008), denied a plaintiff’s request for periodic medical monitoring stemming from accumulated exposure to cigarette smoke. The court held that “negligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring does not give rise to a claim for negligence.” *Id.* at 187.

The New Jersey Supreme Court, in *Sinclair v. Merck & Co.*, 948 A.2d 587 (N.J. 2008), rejected medical monitoring for a proposed national class of individuals who ingested a prescription drug. The court held that the definition of “harm” under New Jersey’s Products Liability Act did not include the remedy of medical monitoring when no manifest injury is alleged. *See id.* at 595.

New York’s highest court rejected a medical monitoring cause of action in *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013), where plaintiffs sought the establishment of a monitoring program for smoking-related disease. The court explained that the “physical harm requirement serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims.” *Id.* at 14. The court reasoned that, because it “is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease,” permitting “them to recover medical monitoring costs without first establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure.” *Id.* at 18. The court further highlighted the challenges and lack of framework for implementing a medical monitoring program, “including the costs of implementation and the burden on the courts in adjudicating such claims.” *Id.*⁷

⁷ Some courts interpreting *Caronia* have allowed medical monitoring absent a present injury as consequential damages associated with a separate tort. *See, e.g., Ivory v. Int’l Bus. Machs. Corp.*, 983 N.Y.S.2d 110, 118 (N.Y. App. Div. 2014); *but see Benoit v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 491, 508 (2d Cir. 2020) (casting doubt on such interpretations).

Numerous state appellate courts⁸ and federal courts interpreting or predicting state law⁹ have also rejected medical monitoring claims brought by asymptomatic claimants, recognizing that liability based solely on an increased risk of possible future harm contravenes basic tort law and sound policy. For example, in

⁸ See *Smith*, 2025 WL 3029699, at *7 (“[Plaintiff] cannot recover economic damages associated with a medical monitoring claim without first establishing that he has suffered an injury in fact.”); *Weatherly v. Eastman Chem. Co.*, 2023 WL 5013823, at *11 (Tenn. Ct. App. Aug. 7, 2023) (rejecting medical monitoring claim); *Alsteen v. Wauleco, Inc.*, 802 N.W.2d 212, 223 (Wis. Ct. App. 2011) (refusing to “‘step into the legislative role and mutate otherwise sound legal principles’ by creating a new medical monitoring claim that does not require actual injury”) (citation omitted); *Curl v. American Multimedia, Inc.*, 654 S.E.2d 76, 81 (N.C. Ct. App. 2007) (rejecting medical monitoring claim); see also *Miranda v. DaCruz*, 2009 WL 3515196, at *8 (R.I. Super. Ct. Oct. 26, 2009) (“This Court is not persuaded to open the damages flood gates to indefinite future monitoring.”).

⁹ See *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000) (holding that Nebraska law has not recognized a cause of action or damages for medical monitoring and predicting that Nebraska courts would not judicially adopt such a right or remedy), *abrogated on other grounds*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Pickrell v. Sorin Grp. USA, Inc.*, 293 F. Supp. 3d 865, 868 (S.D. Iowa 2018) (“[T]he Iowa Supreme Court, if confronted with the opportunity to recognize a medical monitoring cause of action, would either decline to do so or would require an actual injury.”); *Krottner v. Starbucks Corp.*, 2009 WL 7382290, at *7 (W.D. Wash. Aug. 14, 2009) (“Washington has never recognized a standalone claim for medical monitoring.”), *aff’d in part*, 406 F. App’x 129 (9th Cir. 2010); *Cole v. Asarco Inc.*, 256 F.R.D. 690, 695 (N.D. Okla. 2009) (“Oklahoma law requires plaintiffs to demonstrate an existing disease or physical injury before they can recover the costs of future medical treatment that is deemed medically necessary.”); *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 668 (W.D. Tex. 2006) (“Texas appears unlikely to adopt medical monitoring as a cause of action if confronted with the issue.”); *Nichols v. Medtronic, Inc.*, 2005 WL 8164643, at *11 (E.D. Ark. Nov. 15, 2005) (“Arkansas has not clearly recognized a claim for medical monitoring and would not where no physical injury is alleged.”); *Mehl v. Canadian Pac. Ry.*, 227 F.R.D. 505, 518 (D. N.D. 2005) (“[A] plaintiff [in North Dakota] would be required to demonstrate a legally cognizable injury to recover any type of damages in a newly recognized tort, including a medical monitoring claim.”); *Rosmer v. Pfizer, Inc.*, 2001 WL 34010613, at *5 (D. S.C. Mar. 30, 2001) (“South Carolina has not recognized a cause of action for medical monitoring.”); see also *Ball v. Joy Tech. Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (concluding that medical monitoring “is only available [under Virginia law] where a plaintiff has sustained a physical injury that was proximately caused by the defendant”).

Weatherly v. Eastman Chemical Co., 2023 WL 5013823 (Tenn. Ct. App. Aug. 7, 2023), a Tennessee appellate court rejected an invitation “to recognize the existence of [a medical monitoring] cause of action” in a case arising out of a pipeline that ruptured and caused “the release of a massive plume of steam, debris, and various contaminants and toxins into the air.” *Id.* at *1, *11.

The North Carolina Court of Appeals, in *Curl v. American Multimedia, Inc.*, 654 S.E.2d 76, 81 (N.C. Ct. App. 2007), declined to create a new cause of action or award medical monitoring damages with respect to the contamination of plaintiffs’ wells with certain toxic chemicals. The court said, “We conclude that balancing the humanitarian, environmental, and economic factors implicated by these issues is a task within the purview of the legislature and not the courts.” *Id.*

II. EXPANDING TORT RECOVERY TO UNINJURED PLAINTIFFS IS UNSOUND POLICY AND SHOULD BE LEFT TO THE LEGISLATURE

Recognizing a medical monitoring remedy in the absence of a present physical injury would invite unpredictable and potentially unlimited liability, diverting judicial and defendant resources away from sick individuals with potentially legitimate claims. Adjudicating such claims also would compel courts to address complex policy issues that extend beyond the judiciary’s expertise and

require substantial judicial resources to address. The legislature is best suited to decide whether to permit medical monitoring recoveries by the non-sick, if at all.¹⁰

A. Permitting the Non-Sick to Obtain Medical Monitoring Would Foster Potentially Limitless Claims And Drain Resources Needed to Compensate Sick Plaintiffs

It is the “reality of modern society that we are all exposed to a wide range of chemicals and other environmental influences on a daily basis.” *Henry*, 701 N.W.2d at 696 n.15. The number of exposures that plaintiffs may argue warrant medical monitoring relief is potentially limitless. *See Arvin Maskin et al., Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law’s Most Expensive Consolation Prize?*, 27 Wm. Mitchell L. Rev. 521, 528 (2000) (“[T]he enormity of the universe of potential medical monitoring plaintiffs is another very legitimate concern that should counsel caution in future judicial acceptance of such awards.”).¹¹

The Texas Supreme Court observed, “[i]f recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such

¹⁰ *See* Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349, 350 (2005) (“The legislature is better equipped to make any far-reaching changes in the law because of its information-gathering ability, prospective treatment of new laws, and broad perspective.”).

¹¹ For instance, according to the EPA, “[a]pproximately 78 million people live within 3 miles of a Superfund site (roughly 24% of the U.S. population),” including “24% of all children in the U.S. under the age of 5.” U.S. Environmental Protection Agency, Office of Land & Emergency Management, *Population Surrounding 1,877 Superfund Sites* (Updated July 2022).

recovery prophylactically, against the possibility of future consequences from what is now an inchoate risk.” *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999). Because “we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances,” Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum. J. Envtl. L. 121, 131 (1995), plaintiffs’ attorneys “could virtually begin recruiting people off the street to serve as medical monitoring claimants.” Victor E. Schwartz et al., *Medical Monitoring – Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057, 1080 (1999).

Courts would be forced to decide claims that are premature (because there is no physical injury) or meritless (because there never will be). The truly injured would be adversely impacted by the diversion of resources to the non-sick. As one court rejecting medical monitoring summarized,

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

Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (applying Virginia law), *aff’d*, 958 F.2d 36 (4th Cir. 1991); *see also Wood*, 82 S.W.3d at 857 (recognizing “defendants do not have an endless supply of financial resources” and

that, in the absence of an injury, medical monitoring “remedies are economically inefficient, and are of questionable long term public benefit”).

The asbestos litigation vividly illustrates this problem of scarcity of resources. Asbestos-related liabilities have bankrupted over 140 companies. The litigation shows no sign of abating and may last several more decades. If resources are spent on medical monitoring for the “[t]ens of millions of Americans [who] were exposed to asbestos in the workplace,” rather than those whose exposure has caused an injury, the result could be devastating for the courts, defendant businesses, and deserving claimants with actual injuries. Stephen J. Carroll et al., *Asbestos Litigation 2* (RAND Corp. 2005); see also James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815 (2002).

The experience of some states that have adopted medical monitoring for the non-sick also demonstrates why this Court should reject such claims. For example, in *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424 (W. Va. 1999), West Virginia’s highest court established a medical monitoring remedy that allows an uninjured plaintiff to recover an award, even when testing is not medically necessary or beneficial, and without any requirement that the award must be spent on monitoring. As explained in a strongly worded dissent:

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

Id. at 435 (Maynard, J., dissenting).

Since *Bower* was decided, thousands have pursued medical monitoring awards in West Virginia, often as part of a class, imposing a significant burden on the resources of the State's courts.¹²

Similarly, Louisiana experienced class action filings after the Louisiana Supreme Court recognized a medical monitoring remedy for the unimpaired in *Bourgeois v. A.P. Green Industries, Inc.*, 716 So. 2d 355 (La. 1998).¹³ In response, the legislature swiftly reversed *Bourgeois*, requiring a manifest injury to support

¹² See *Stern v. Chemtall, Inc.*, 617 S.E.2d 876, 887 (W. Va. 2005) (Starcher, J., concurring) (“[W]e have dumped an additional pile of medical monitoring cases into the circuit judge’s lap.”); *In re Tobacco Litig. (Medical Monitoring Cases)*, 600 S.E.2d 188 (W. Va. 2004) (class involving some 270,000 present and former cigarette users); *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (W. Va. 2003) (medical monitoring class of approximately 5,000 users of drug); *State ex rel. E.I. DuPont de Nemours and Co. v. Hill*, 591 S.E.2d 318 (W. Va. 2003) (approximately 50,000 individuals possibly exposed to material used to make fluoropolymers); *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 828-29 (W. Va. 2010) (class of approximately 8,500 people exposed to hazardous substances).

¹³ See, e.g., *Dragon v. Cooper/T. Smith Stevedoring Co., Inc.*, 726 So. 2d 1006 (La. Ct. App. 1999) (permitting a class action for medical monitoring for seamen exposed to asbestos); *Scott v. American Tobacco Co.*, 725 So. 2d 10 (La. Ct. App. 1998) (certifying as a medical monitoring class all Louisiana residents who were cigarette users on or before May 24, 1996, provided that each claimant started smoking on or before Sep. 1, 1988).

monitoring claims. *See* La. Civ. Code Ann. art. 2315(B) (“Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease.”).

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

B. Medical Monitoring Claims Exceed Courts’ Competencies

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

The certified questions in this case only touch the surface of issues implicated by a medical monitoring program. Devising a medical monitoring program would require, at a minimum, identifying the types of substances and health conditions that may be monitored; the tests to be conducted; the procedures for determining eligibility for monitoring, including the level of increased risk of an adverse health condition that may trigger monitoring and the measure of that

increase; the likelihood that monitoring will detect the existence of disease; deciding whether the disease must be treatable; when eligible parties may join the program; the length of time the program will last; the frequency of any periodic monitoring and the circumstances in which the frequency can be changed based on individuals' unique medical situations; whether the benefit of the screening outweighs its risks, including health risks posed by proposed tests and the risk of false positives;¹⁴ whether testing will be formal or informal; whether the service provider is to be designated by the court or chosen by the claimant; how funds for monitoring will be administered, and whether unused funds will be returned. *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am. J.L. & Med. 251, 267-72 (1994).

Even seemingly straightforward issues are quite complex on closer examination. For example, how far from a source of exposure must a plaintiff live to have a cognizable claim? Here, plaintiffs selected 25 miles as the boundary, but that would likely need to be studied for arbitrariness and to determine whether

¹⁴ For example, according to the National Cancer Institute,

The conversation about cancer screening is changing within the medical community. Overall, the recent trends have been towards recommending less routine screening, not more. These recommendations are based on an evolving—if counterintuitive—understanding that more screening does not necessarily translate into fewer cancer deaths and that some screening may actually do more harm than good.

Nat'l Cancer Inst., *Crunching Numbers: What Cancer Screening Statistics Really Tell Us*.

different distances might call for different, more intense, or more frequent tests. Relatedly, what evidence of exposure is required to support a claim? What medical research suffices to show that contact with a particular chemical—rather than the myriad other substances encountered in daily life—will give rise to a claim? Answering these questions means balancing trade-offs that are “more appropriate for a legislative than a judicial body.” *Henry*, 701 N.W.2d at 691.

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

Courts simply do not possess the “technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry and environmental science.” *Henry*, 701 N.W.2d at 699. Additionally, as a medical monitoring program matures, its scope and administrative operation will inevitably require adjustments, particularly if the program’s designers erroneously estimate funding needs or the number of eligible participants.

In some cases, plaintiffs' lawyers may deluge the court with a battery of diagnostic tests they would like to see the court authorize for their clients.¹⁵ This approach allows plaintiffs' counsel to inflate the cost of yearly monitoring per plaintiff, maximizing the recovery and, in turn, any contingent fees. Courts must then decipher which of the suggested tests to channel the plaintiff toward by "[s]crutiniz[ing] the clinical efficacy of the [suggested diagnostic tests], and in some cases, even the treatments planned to follow identification of disease." David M. Studdert et al., *Medical Monitoring for Pharmaceutical Injuries: Tort Law for the Public's Health?*, JAMA, Feb. 19, 2003, at 890. This determination may change over time with emerging cures and treatments for current diseases and with the introduction of new types of diseases, adding to the complexity.

Courts simply do not have access to all the information that is needed to make the best decisions about appropriate medical monitoring. They also cannot predict the full scope of adverse consequences that might flow from a decision recognizing a medical monitoring remedy. *See Henry*, 701 N.W.2d at 694.

C. Medical Monitoring Claims Strain Judicial Resources

It follows that adopting a medical monitoring remedy for the unimpaired would impose an administrative burden that "could potentially devastate the court

¹⁵ *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444 (3d Cir. 1997) (plaintiffs requested more than 20 different tests for feared PCB exposure).

system.” *Ball*, 755 F. Supp. at 1372; *see also Henry*, 701 N.W.2d at 689-99 (“[T]he day to day operation of a medical monitoring program would necessarily impose huge clerical burdens on a court system lacking the resources to effectively administer such a regime.”). “[T]he economic, manpower, and time costs for such programs are usually substantial.” Christopher P. Guzelian et al., *A Quantitative Methodology for Determining the Need for Exposure-Prompted Medical Monitoring*, 79 Ind. L.J. 57, 100 (2004).

Georgia’s judiciary must already contend with scarce resources. Allowing claims by the unimpaired to enter the state’s court system would invite judicial morass, frustrating the ability of the State’s judges to fairly and timely adjudicate tort and other claims involving an actual injury. The Court should protect judicial resources from being depleted by premature claims, not open the door to them.

CONCLUSION

For these reasons, this Court should answer the first certified question in the negative and hold that Georgia does not recognize a medical monitoring remedy in the absence of a present physical injury.

CERTIFICATION OF WORD-COUNT

This submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 20, 2026, I filed the foregoing Brief using the Court's e-filing (SCED) system. I also certify that there is a prior agreement among the parties to allow documents in a PDF format sent via e-mail to suffice for service under Supreme Court Rule 14. Pursuant to their agreement, I e-mailed the Brief to the following:

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