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On Appeal from: Jefferson County, Case No. 2019CV031822 | Hon. Lindsay L. VanGilder	▲**COURT USE ONLY**▲
Plaintiff-Appellant: EDWARD SMITH JR., individually and on behalf of all others similarly situated, **v.** **Defendants-Appellees:** TERUMO BCT, INC., and TERUMO BCT STERILIZATION SERVICES, INC. and, **Proposed Intervenors-Appellants:** PAULA JENSEN and GAY LANG.	Case No. 2024CA001393
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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES BY:

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ADVANCED MEDICAL TECHNOLOGY ASSOCIATION, AMERICAN COATINGS ASSOCIATION, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AMERICAN TORT REFORM ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., COLORADO CHAMBER OF COMMERCE, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements in these rules. Specifically, I certify:

- This *amicus* brief complies with the word limit in C.A.R. 29(d) because it contains [4,707] words (excluding the caption page, this certificate page, the table of contents, the table of authorities, and the signature block).

- This *amicus* brief also complies with the content and form requirements in C.A.R. 29(c).

I acknowledge that this brief may be stricken if it fails to comply with the requirements of C.A.R. 29 and C.A.R. 32.

s/ Frederick R. Yarger
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INTEREST OF *AMICI CURIAE*

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

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

Advanced Medical Technology Association ("AdvaMed") is the world's largest medical technology association, with more than 500 member companies that develop medical devices, diagnostic tools, and health information systems. Its members span every field of medical science and range from cutting-edge startups to multinational manufacturers, all dedicated to advancing clinician and patient

access to safe, effective medical technologies in accordance with the highest ethical standards. AdvaMed joins this brief to highlight that ethylene oxide is one of the most common ways to sterilize medical technology, crucial for preventing infection in patients undergoing surgical procedures and other medical treatments. This proven method takes place in specialized facilities nationwide to supply hospitals and clinics with the timely, abundant, sterile supplies they need to treat millions of patients. The sterilization of these medical devices and instruments is critical to patient health. Nearly 50 percent of all medical devices, 20 billion annually, are sterilized using ethylene oxide. Without ethylene oxide, patients would risk serious infection or lose access to lifesaving equipment. For many medical devices, no sterilization alternatives exist. The United States Food and Drug Administration and other global regulators play an important role in ensuring that manufacturers' sterilization methods are properly validated.

American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing more than 170 manufacturers of paints and coatings, raw materials suppliers, distributors, and technical professionals. As the preeminent organization representing the coatings industry in the United States, a principal role of ACA is to serve as an advocate for its membership on legislative, regulatory, and judicial issues at all levels. In addition, ACA undertakes programs

and services that support the paint and coatings industries' commitment to environmental protection, sustainability, product stewardship, health and safety, corporate responsibility, and the advancement of science and technology. Collectively, ACA represents companies with greater than 90 percent of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 67 percent of the U.S. property-casualty insurance market, including 66.4 percent of the Colorado property-casualty insurance market. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe.

American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil

litigation. For over three decades, ATRA has filed *amicus* briefs in cases that have addressed important liability issues.

Coalition for Litigation Justice, Inc. (the "Coalition") was formed by insurers in 2000 as a nonprofit association to address and improve the litigation environment for asbestos and other toxic tort claims. The Coalition has filed over 200 *amicus* briefs in cases that may have a significant impact on the toxic tort litigation environment.[1]

Colorado Chamber of Commerce (the "Colorado Chamber") is a private, non-profit, member-funded organization. Its mission is to champion a healthy business climate in Colorado. The four key objectives of that mission include: (1) maintaining and improving the cost of doing business; (2) advocating for a pro-business state government; (3) increasing the quantity of educated, skilled workers; and (4) strengthening Colorado's critical infrastructure (roads, water, telecommunications, and energy). The Colorado Chamber is the only business association that works to improve the business climate for all sizes of business from a statewide, multi-industry perspective.

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

National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a non-profit, public interest law firm established to provide legal resources and advocate for small businesses in the nation's courts on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), the nation's leading small business association. NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

SUMMARY OF ARGUMENT

For over two centuries, a basic tenet of tort law—including tort law in Colorado—has been that liability for personal injury should be imposed only when an individual has sustained a present physical injury. Plaintiff asks this Court to create a new medical-monitoring cause of action for asymptomatic plaintiffs, permitting recovery based solely on the mere *possibility* of *future* injury. This Court should decline to endorse such a dramatic departure from established law. This Court should instead confirm that Colorado does not recognize medical monitoring as either a remedy or a cause of action without present physical injury.

In *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 444 (1997), the U.S. Supreme Court considered and 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. *Id*. at 444. In the intervening 30 years, most state supreme courts to consider the issue under state tort law have done the same, as have other state courts and federal courts applying state law. As these courts appreciate, awarding medical monitoring in the absence of present injury raises serious public-policy concerns. Doing so would evoke the specter of "unlimited and unpredictable liability," *id*. at 433, enabling a flood of litigation by those who are not now—and may never become—ill or injured. These courts also recognize that a medical-monitoring remedy for the uninjured would impose massive burdens on the judiciary, requiring courts to answer complex, policy-laden questions, including the conditions for which monitoring should be available and the medical or technical criteria to apply. Administering these claims would thus deplete judicial resources needed for those who have in fact suffered illness and are potentially entitled to a remedy.

ARGUMENT

I. Traditional tort-law principles preclude medical monitoring as a claim or remedy without present physical injury.

Plaintiff seeks to hold Defendants liable for the risk of future disease or illness purportedly arising from his alleged exposure to ethylene oxide in the absence of any manifest illness or physical symptoms. This Court should adhere to established tort law principles and Colorado law by declining to create a new claim that would permit recovery for medical monitoring in the absence of present physical injury.

A. All of Plaintiff's theories contravene existing Colorado law and longstanding tort principles by seeking recovery absent present physical injury.

"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." *Berry v. City of Chicago*, 181 N.E.3d 679, 688 (Ill. 2020). Thus, a plaintiff "cannot recover without showing *actual harm* resulting from the defendant's conduct." Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *The Law of Torts* § 125 (2d ed.) (emphasis added). "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 has always been the rule in Colorado: a party "cannot pursue a tort claim for future death, future physical injury, or future property damage." *Open Door Ministries v. Lipschuetz*, 373 P.3d 575, 579 (Colo. 2016) (interpreting "injury" under the Colorado Governmental Immunity Act); *see also Isaac v. Am. Heritage Bank & Tr. Co*., 675 P.2d 742, 744 (Colo. 1984) (holding that "a party may not recover damages if he has not suffered an injury"); *Adams-Arapahoe Sch. Dist. No. 28-J v. GAF Corp.*, 959 F.2d 868, 873 (10th Cir. 1992) (applying Colorado law to reject a claim "based on risk of potential future harm").

Plaintiff attempts to skirt these bedrock principles through a series of artful pleading strategies. He alternatively asserts that his claimed need for medical monitoring alone constitutes injury, or that he has suffered some unspecified alteration of his body's structure or function, or that his potential exposure to ethylene oxide (for even this allegation amounts to a mere possibility in the Amended Complaint) constitutes a battery. Opening Br. [Corrected] at 31-32, 36, 38, 41. At base, however, each of these assertions reduces to the same unsupported proposition: namely, that tort liability may be imposed for the mere creation of a risk of harm, regardless of whether that risk ever manifests into injury.[2]

[2] Plaintiff's attempt to avoid the injury requirement by asserting a battery claim fails for other reasons as well. For one, it is highly questionable that mere exposure to a substance constitutes "contact" for purposes of battery. *See Metro-N.*

The Court should look beyond Plaintiff's clever pleading to the core of his claims. If such pleading tactics were enough to avoid the longstanding and fundamental tort rule requiring present physical injury, that rule would be meaningless. The Court should accordingly reject Plaintiff's invitation to break new ground in Colorado and vastly expand tort liability in this State.

B. Since the U.S. Supreme Court rejected medical-monitoring tort claims by asymptomatic plaintiffs in *Buckley*, most state high courts to consider the issue have done the same.

In *Buckley*, the U.S. Supreme Court rejected 7-2 a medical-monitoring claim brought under FELA, finding "insufficient support in the common law" for the creation of "a full-blown, traditional, tort law cause of action." 521 U.S. at 444. Since *Buckley,* most state high courts to have considered the issue have rejected claims for medical monitoring—whether in the context of alleged exposure to toxins, cigarette smoke, prescription drugs, or contaminated water—hewing to the traditional physical injury requirement in negligence and other tort actions.

Commuter R. Co. v. Buckley, 521 U.S. 424, 430 (1997) (finding that exposure did not amount to "physical impact"). For another, Plaintiff has failed to, and cannot, plead that Defendants intended any harm or offense in allegedly releasing ethylene oxide. *See White v. Muniz*, 999 P.2d 814, 819 (Colo. 2000) ("[A] plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act.").

Alabama. The Alabama Supreme Court rejected a medical-monitoring claim brought by a claimant allegedly exposed to a toxin released into the environment because of the absence of a "manifest, present injury." *Hinton ex rel. Hinton v. Monsanto Co*., 813 So. 2d 827, 829 (Ala. 2001). The court found it "inappropriate … to stand Alabama tort law on its head in an attempt to alleviate [the plaintiff's] concerns about what might occur in the future," concluding that relief was unavailable to "a plaintiff who has no present injury or illness." *Id*. at 831-32.

Kentucky. The Kentucky Supreme Court rejected claims seeking a court-supervised medical-monitoring fund to detect primary pulmonary hypertension in plaintiffs who had ingested the "Fen-Phen" diet drug combination. *Wood v. Wyeth-Ayerst Lab'ys*, 82 S.W.3d 849 (Ky. 2002). The court reasoned that recognizing the plaintiffs' claims would " stretch the limits of logic and ignore a long line of legal precedent." *Id*. at 854. "Traditional tort law militate[d]" against recognizing medical monitoring remedies absent a present injury, and the court thus declined to "step into the legislative role and mutate otherwise sound legal principles." *Id*. at 859.

Michigan. The Michigan Supreme Court concluded that recognizing a medical-monitoring claim absent present physical injury would "depart[ ]

drastically" from "traditional notions of a valid negligence claim." *Henry v. Dow Chem. Co*., 701 N.W.2d 684, 694 (Mich. 2005).

Mississippi. The Mississippi Supreme Court rejected claims seeking a medical-monitoring fund for a class of workers exposed to beryllium. *Paz v. Brush Engineered Materials, Inc*., 949 So.2d 1 (Miss. 2007). 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 5-6.

New York. The New York Court of Appeals, New York's highest court, rejected a medical-monitoring cause of action asserted by smokers seeking a monitoring program for smoking-related disease because it was "speculative, at best, whether [the] asymptomatic plaintiffs [would] ever contract a disease." *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11, 18 (N.Y. 2013).

Illinois. The Illinois Supreme Court dismissed a proposed class action seeking a trust fund to monitor for potential injuries related to lead exposure from the city's water lines. *Berry v. City of Chicago*, 181 N.E.3d 679 (Ill. 2020). The court reaffirmed that "an increased risk of harm is not, itself, an injury." *Id*. at 688.

"Almost anything that a person does … can create a risk of harm to others," the court observed, and tort law provides compensation only "once harm occurs." *Id*.

New Hampshire. The New Hampshire Supreme Court recently rejected claims for medical monitoring where the plaintiffs were allegedly at increased risk of health problems from exposure to perfluorooctanoic acid (PFOA). *Brown v. Saint-Gobain Performance Plastics Corp*., 300 A.3d 949 (N.H. 2023). Relying on "well-established" precedent, the court held that "there is no cause of action unless and until there has been an injury." *Id*. at 951.

Delaware. The Delaware Supreme Court recently concluded that an increased risk of illness, without more, "cannot be a cognizable injury." *Baker v. Croda Inc*., 304 A.3d 191, 196 (Del. 2023). The plaintiff sought damages for a medical-monitoring program, claiming an increased risk of "illness, disease or disease process" from exposure to ethylene oxide—the same substance at issue here. *Id*. at 193. The court held that to recognize an increased risk of illness as an actionable injury would "constitute a significant shift in [Delaware's] tort jurisprudence." *Id*. at 196.

Other courts. In addition to the state high courts discussed above, numerous state appellate courts[3] and federal courts interpreting or predicting state law[4] have

[3] *Alsteen v. Wauleco, Inc.*, 802 N.W.2d 212, 223 (Wis. Ct. App. 2011) (refusing to "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) (refusing to create a "new cause[] of action" for medical monitoring); *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."); *Boyd v. Orkin Exterminating Co.*, 381 S.E.2d 295, 297 (Ga. Ct. App. 1989) (rejecting medical-monitoring claim where "there was no evidence that the appellants had sustained any specific injury"), *overruled on other grounds*, *Hanna v. McWilliams*, 446 S.E.2d 741 (Ga. Ct. App. 1994).

[4] *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

rejected medical-monitoring claims by asymptomatic claimants, recognizing that liability based solely on an increased risk of possible future harm contravenes traditional tort law. For the sound policy and jurisprudential reasons discussed below, the Court should follow the collective wisdom of the U.S. Supreme Court and those courts and reject a medical-monitoring cause of action or remedy in the absence of present, provable injury.

II. Expanding tort recovery to uninjured plaintiffs leads to unbounded litigation and unwarranted burdens on the judicial system.

Recognizing a medical-monitoring remedy or claim without a current physical injury poses significant policy and jurisprudential challenges. These claims invite unlimited liability, diverting judicial and financial resources away from those who are genuinely injured and in need of compensation. Additionally, adjudicating these claims compels courts to address complex policy issues that are

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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."); *cf. Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629 (7th Cir. 2007) (rejecting claim for credit monitoring after finding no Indiana authority allowing medical monitoring in tort context); *see also Ball v. Joy Technologies, Inc*., 958 F.2d 36, 39 (4th Cir. 1991) (applying Virginia law and holding that medical monitoring "is only available where a plaintiff has sustained a physical injury that was proximately caused by the defendant").

both beyond the judiciary's expertise and require substantial judicial resources to address.

A. Permitting litigants to seek awards based on medical monitoring without injury encourages potentially limitless claims.

As many medical-monitoring cases and torts scholarship recognize, adopting a remedy for unimpaired claimants would foster potentially unbounded litigation. 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. "[T]ens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Buckley*, 521 U.S. at 442.[5]

Experience confirms that allowing the uninjured to sue for medical monitoring provokes a flood of burdensome litigation. Indeed, since West Virginia's high court recognized such a claim, *see Bower v. Westinghouse Elec. Corp*., 522 S.E.2d 424 (W. Va. 1999), thousands have pursued medical-monitoring

[5] *See also, e.g.*, U.S. Envtl. Protection Agency, Office of Land and Emergency Management, Office of Communications, Partnerships, and Analysis, *Population Surrounding 1,881 Superfund Remedial Sites* (updated Jul. 2023) ("Approximately 78 million people live within 3 miles of a Superfund site (roughly 23% of the U.S. population) ….").

awards in West Virginia, often as part of a class.[6] Louisiana is another example. After the Louisiana Supreme Court recognized medical monitoring as a cause of action in 1988, *Bourgeois v. A.P Green Indus., Inc.*, 716 So.2d 355 (La. 1998), claims flooded in, requiring swift intervention from the legislature. *See* La. Civ. Code Ann. § 2315.

Furthermore, the vast proliferation of claims by the non-sick (who may never become sick) could have devastating effects for those who are in fact suffering illness. "[D]efendants' pockets or bank accounts do not contain infinite resources." *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). Meanwhile, permitting claims or remedies for medical monitoring absent present injury, would threaten a flood of cases that would "potentially absorb[] resources better left available to those more seriously harmed." *Buckley*, 521 U.S. at 442; *see Henry*, 701 N.W.2d at 694 (noting such claims would "drain resources needed to compensate those with

[6] *See, e.g., 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. du Pont de Nemours & Co. v. Hill*, 591 S.E.2d 318 (W. Va. 2003) (blood tests to approximately 50,000 individuals possibly exposed to material used to make fluoropolymers); *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 828-29 (W. Va. 2010) (upholding $130 million medical-monitoring award to class of approximately 8,500 people exposed to hazardous substances).

manifest physical injuries and a more immediate need for medical care"); *Caronia*, 5 N.E.3d at 18 (finding that to allow claims for the non-sick would cause "the inequitable diversion of money away from those who have actually sustained an injury"); *Baker*, 304 A.3d at 196-97 (reasoning that to "open the floodgates" to claims by the non-sick would "diminish resources that are presently used for those who have suffered physical injury").

This is not hyperbole. As the U.S. Supreme Court recognized, even modest annual monitoring costs can add up to significant sums over time, especially where claimants assert the need for lifetime monitoring. *Buckley*, 521 U.S. at 442. Allowing today's non-sick plaintiffs to recover for speculative future injury could leave "tomorrow's generation of exposed and injured plaintiff's [*sic*] … remediless." *Ball*, 755 F. Supp. at 1372; *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2004) ("For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy."). In the face of such trade-offs, the "long term public benefit" of medical-monitoring awards for the non-sick is at best "questionable." *Wood*, 82 S.W.3d at 857.

B. Medical-monitoring claims exceed courts' and juries' competencies and strain judicial resources.

The present physical injury requirement serves "a number of important ends for the legal system." *Henry*, 701 N.W.2d at 690. At the most basic level, it

"defines more clearly who actually possesses a cause of action," *id*., and "establishes a workable standard for judges and juries who must determine liability," *Berry*, 181 N.E.3d at 688. By contrast, medical-monitoring claims pose "special difficulties" for judges and juries, who must identify not merely the purported need for medical monitoring, but the precise monitoring that is recoverable—i.e., monitoring over and above the preventative medicine ordinarily recommended for everyone. *See Buckley*, 521 U.S. at 441. This is particularly problematic when even medical professionals may disagree as to the benefit and appropriate timing of tests or treatments, in light of each plaintiff's unique medical needs. *See id*. at 441-42.

The present physical injury requirement also protects and "avoids compromising the judicial power." *Henry*, 701 N.W.2d at 691. Without that requirement, judges would be forced to engage in line-drawing that is "more appropriate for a legislative than a judicial body." *Id*. For example, how far from the source of contamination must a plaintiff live to have a cognizable claim? What evidence of exposure is required to support a claim? What medical research is sufficient to establish that exposure to a particular chemical, as opposed to the myriad other substances one encounters on a daily basis, will give rise to a cause of action? Answering these questions means balancing trade-offs, assessing the

tolerability of risk in light of the benefits to society of the products and services that result, and determining who merits redress if harm eventuates. These are policy questions, which are best suited for legislatures and regulators to address; not questions of law that judges applying neutral principles can predictably answer.

Furthermore, a medical-monitoring system involves myriad complex scientific, medical, and economic questions. Devising a medical-monitoring system would require courts to determine the tests to be conducted as part of the program; the procedures for determining eligibility for monitoring, including the level of increased risk of an adverse health condition that may trigger monitoring and the measure of that increase; the likelihood that monitoring will detect the existence of disease and whether the disease must be treatable; the frequency of periodic monitoring and the circumstances when the frequency can be changed based on individuals' unique medical situations; and many other answers to complex, technical questions. *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Program*, 20 Am. J.L. & Med. 251, 267-72 (1994).

Courts lack 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. Where medical-

monitoring claims are allowed, courts must make scientific and medical decisions about which treatment is proper for specific plaintiffs. In some cases, plaintiffs' lawyers deluge the court with a battery of diagnostic tests they would like the court to authorize for their clients.[7] Courts must then decipher which of these suggested tests to approve, and in some cases, even the treatments that should follow when disease is identified. David M. Studdert et al., *Medical Monitoring for Pharmaceutical Injuries: Tort Law for the Public's Health?*, JAMA, Feb. 19, 2003, at 890. Such decisions far exceed courts' competencies.

Adopting a medical-monitoring cause of action or remedy for the uninjured would also impose a severe administrative burden on the courts—one that "could potentially devastate the court system." *Ball*, 755 F. Supp. at 1372. As one court has recognized, "[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." *Henry*, 701 N.W.2d at 699.

[7] For example, here, Plaintiff claims to need screening procedures and testing for at least four different types of cancer. And in *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. *See* Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349, 377 n.171 (2005).

The alternative is to award medical monitoring as a "lump sum" payment to asymptomatic claimants with no assurance that the funds will be used for monitoring. In such cases, "[t]he incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible." Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 Wm. Mitchell L. Rev. 521, 540-41 (2000); *see also* Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer Ex Re1. Coplin v. Fluor Corp.: Sound Policy Should be Restored to a Vague and Unsound Directive*, 27 St. Louis U. Pub. L. Rev. 135, 154-56 (2007) (discussing instances where claimants who received lump sum monitoring awards did not use award for monitoring purposes).

Allowing claims by the unimpaired would invite judicial morass, frustrating the ability of judges to fairly and timely adjudicate the tort claims of those with actual injuries. The Court should protect judicial resources from being depleted by premature and unreliable claims, not open the door to them. *Cf. Buckley*, 521 U.S. at 443-44.

CONCLUSION

The Court should affirm the trial court's orders and hold that Colorado does not recognize medical monitoring as a remedy or claim absent a present physical injury.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 3, 2025, a true and correct copy of **AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES** was filed with the Court via Colorado Courts E-Filing System, with e-service to the following:

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