

POINTS AND AUTHORITIES

INTRODUCTION	1
ARGUMENT	2
I. PLAINTIFFS HAVE ALLEGED A PRESENT INJURY UNDER ILLINOIS LAW, ALLOWING THEM TO BRING A NEGLIGENCE CLAIM AND RECOVER MEDICAL MONITORING DAMAGES	2
A. The ingestion of lead-contaminated water is a present injury	2
<i>Dillon v. Evanston Hosp.</i> , 199 Ill.2d 483 (2002)	2
B. The need for medical monitoring due to toxic exposure is a present injury	2
C. Illinois precedence supports a ruling that the need for medical monitoring is a present injury	4
<i>Dillon v. Evanston Hospital</i> , 199 Ill.2d 483 (2002)	4
<i>Williams v. Manchester</i> , 228 Ill.2d 404 (2008)	4
<i>Lewis v. Lead Industry Ass'n</i> , 342 Ill.App.3d 95 (2003)	5
<i>Jensen v. Bayer AG</i> , 371 Ill.App.3d 682 (2007)	5
<i>Carey v. Kerr-McGee Chemical Corp.</i> , 999 F.Supp. 1109 (N.D. Ill. 1998)	5
<i>Muniz v. Rexnord Corp.</i> , 2006 WL 1519571 (N.D. Ill. May 26, 2006)	5
II. COURTS IN OTHER STATES PROVIDE SUPPORT FOR THIS TOXIC-TORT INJURY	6
A. Injury results when toxics invade a plaintiff's body and medical science supports a need for screening and monitoring	6
<i>Potter v. Firestone Tire & Rubber</i> , 6 Cal.4th 965 (1993)	6,8
<i>Sadler v. Pacificare</i> , 349 P.3d 1264 (2014)	6,8,10
<i>Schmidt v. Merchants Despatch Transportation Co.</i> , 270 N.Y. 287 (1936)	7

<i>Schwartz v. Hayden Newport Chem. Corp.</i> , 12 N.Y.2d 212 (1963).....	7
<i>Thornton v. Roosevelt Hosp.</i> , 47 N.Y.2d 780 (1979).....	7
<i>Reis v. Pfizer, Inc.</i> , 48 N.Y.2d 664 (1979).....	7
<i>Steinhardt v. Johns-Manville Corp.</i> , 54 N.Y.2d 1008 (1981).....	7
<i>Snyder v. Town Insulation, Inc.</i> , 81 N.Y.2d 429 (1993).....	7
<i>Consorti v. Owens Corning Fiberglas Corp.</i> , 86 N.Y.2d 449 (1995).....	7
<i>Rothstein v. Tennessee Gas Pipeline</i> , 87 N.Y.2d 90 (1995).....	7
<i>Baker v. Saint-Gobain Performance Plastics</i> , 232 F.Supp.3d 233 (N.D. NY 2017).....	7
<i>Friends for all Children v. Lockheed Aircraft Corp.</i> , 746 F.2d 816 (D.C. Cir. 1984).....	8
<i>Meyer ex rel. Coplin v. Fluor Corp.</i> , 220 S.W.3d 712 (Mo. 2007).....	8
<i>Bower v. Westinghouse Elec. Corp.</i> , 522 S.E.2d 424 (W.Va. 1999).....	8
<i>Exxon Mobil Corp. v. Albright</i> , 71 A.3d 30 (Md. 2013).....	9
<i>Hansen v. Mountain Fuel Supply</i> , 858 P.2d 970 (Utah 1993).....	9
<i>Burns v. Jaquays Mining Corp.</i> , 752 P.2d 28 (Ariz. 1987).....	9
<i>Petito v. A.H. Robins</i> , 750 So.2d 103 (Fla. 1999).....	9,10
<i>Ayers v. Township of Jackson</i> , 525 A.2d 287 (N.J. 1987).....	10
 B. Multiple tools are available to address toxic-tort claims.....	 10
 <i>Gates v. Rohm & Haas Co.</i> , 655 F.3d 255 (3d Cir. 2011).....	 11
<i>Paoli R.R. Yard PCB Litig.</i> , 35 F.3d 717 (3d Cir. 1994).....	11
<i>Ayers v. Township of Jackson</i> , 525 A.2d 287 (N.J. 1987).....	11
<i>Riva v. Pepsico, Inc.</i> , 82 F. Supp. 3d 1045 (N.D. Cal. 2015).....	11
<i>Potter v. Firestone Tire & Rubber</i> , 6 Cal.4th 965 (1993).....	12

	<i>Sadler v. PacifiCare of Nev.</i> , 340 P.3d 1264 (Nev. 2014)	12
III.	INVADING A PERSON’S BODY WITH TOXIC CHEMICALS LIKE LEAD CAUSES SIGNIFICANT PHYSICAL HARM	13
A.	Lead exposure results in significant injuries months, if not years, after the tortious conduct	13
	<i>Concerned Pastors for Social Action v Khouri</i> , 217 F.Supp.3d 960 (E.D. Mich. 2016)	14
	42 U.S.C. § 300f(4)(A)	14
	40 C.F.R. § 141.80(c)(1)	14
B.	Medical monitoring is a limited, but critical, form of relief for persons exposed to lead and other harmful toxins	15
	<i>Meyer ex rel. Coplín v. Fluor Corp.</i> , 220 S.W.3d 712 (Mo. 2007)	15
	<i>Baker v. Saint-Gobain Performance Plastics</i> , 232 F.Supp.3d 233 (N.D. NY 2017)	15,16
	<i>Donovan v. Philip Morris USA, Inc.</i> , 914 N.E.2d 891 (Mass. 2009)	15,16
	<i>Bower v. Westinghouse Elec. Corp.</i> , 522 S.E.2d 424 (W.Va. 1999)	16
	<i>Ayers v. Jackson Twp.</i> , 525 A.2d 287 (N.J. 1987)	16
	<i>In re Paoli R.R. Yard PCB Litig.</i> , 916 F.2d 829 (3d Cir. 1990)	16
	<i>Trujillo v. Ametek, Inc.</i> , 2015 WL 7313408 (S.D. Cal. Nov. 18, 2015)	17
	CONCLUSION	17
	CERTIFICATE OF COMPLIANCE	18
	CERTIFICATE OF SERVICE	19

INTRODUCTION

Public Justice submits this amicus brief to address issues raised by Plaintiffs' negligence claim (Count 1), which seeks medical monitoring and testing for latent diseases and ailments caused by the City of Chicago's conduct.

In the modern world, a tortfeasor can cause significant, often catastrophic, harm to individuals by exposing them to toxic substances. This is so, our medical science says, notwithstanding the delayed manifestation of that harm (as compared to some physical harms that are immediately realized). Once exposed, toxins invade a person's body. And over time, those introduced toxins often result in physical or mental ailments and life-threatening diseases. Courts throughout the nation have recognized the use of traditional tort theories when considering "toxic-tort" claims, permitting plaintiffs to recover medical monitoring costs that allow for early detection and treatment of diseases associated with toxic exposure. If ingesting lead-contaminated water is not itself a present injury—because it is an invasion of another's interest under the definition of "injury" in the Restatement (Second) of Torts—the "need for medical monitoring" as a result of toxic exposure is a sufficient injury that allows for a negligence claim against a tortfeasor.

Plaintiffs are Chicago residents that rely on the city's water delivery system to drink and cook in their homes. Actions taken by the City of Chicago to fix the system's infrastructure, which has aged and is now corroding, have contaminated city-residents' water with elevated levels of lead. Plaintiffs have alleged a need for medical monitoring and medical screening and testing will provide the relief they require. Plaintiffs' negligence claim, initially dismissed under section 2-615 of the Code of Civil Procedure, should thus stand and returned to the Circuit Court for further proceedings.

ARGUMENT

I. **Plaintiffs Have Alleged A Present Injury Under Illinois Law, Allowing Them To Bring A Negligence Claim And Recover Medical Monitoring Damages.**

A. The ingestion of lead-contaminated water is a present injury.

A plaintiff exposed to toxic substances has a present and actual injury that supports a negligence cause of action. The Restatement (Second) of Torts defines injury broadly to mean “the invasion of any legally protected interest of another.” A person drinking or otherwise ingesting lead-contaminated water certainly has had their body invaded with a foreign toxic substance, no different than a catheter fragment left in a patient’s heart after a medical procedure, as was the case in *Dillon v. Evanston Hosp.*, 199 Ill.2d 483, 487 (2002). When a toxin has entered a person’s body, the requisite invasion is present and the defendants should make the plaintiff whole again by paying for the medical procedures that the plaintiffs would not otherwise have had to go through. For this reason alone, Plaintiffs here have alleged a present injury in the case.

B. The need for medical monitoring due to toxic exposure is a present injury.

A well-developed body of medical science exists that shows people who ingest lead-contaminated water require medical testing and monitoring. The Environmental Protection Agency advocates for blood testing when known drinking water systems contain elevated lead levels: “A family doctor or pediatrician can perform a blood test for lead and provide information about the health effects of lead.”¹ The Center for Disease Control (CDC) informs those exposed as follows: “Most children and adults who are exposed to lead have

¹ Basic Information About Lead in Drinking Water, EPA.gov, <https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#health> (last visited December 3, 2019).

no symptoms. The only way to tell if you or your child has been exposed is with a blood lead test. Your health care provider can help you decide whether a blood lead test is needed...”²

The benefits of medical monitoring are significant, according to the CDC, because “[a]s levels of leads in the blood increase, adverse effects of lead may also increase.” *Id.* The federal Agency for Toxic Substances and Disease Registry similarly provides the public with the follow information: “A blood test is available to measure the amount of lead in your blood. Blood tests are commonly used to screen children for lead poisoning. Your doctor can draw blood samples and send them to appropriate laboratories for analysis.”³

It is this “need” for medical monitoring—as a consequence of toxic exposure through Defendant’s actions—that is itself a present injury. This injury is not dependent on a future diagnosis of a disease or a delayed manifestation of physical ailments. Nor can this injury be characterized as a potential risk of future harm, as the Circuit Court held. *See* App. 58.

Rather, the need for medical monitoring is a distinct injury, separate from whatever may result in the future. And here, Plaintiffs’ class-members credibly allege that they have been exposed to lead in their drinking water and that ingesting unsafe levels of lead is linked to multiple types of diseases, damaging numerous organ systems, and causing permanent and irreversible injuries to children’s brains.

C. Illinois precedence supports a ruling that the need for medical monitoring is a present injury.

² Childhood Lead Poisoning Prevention, Lead in Drinking Water, [cdc.gov, https://www.cdc.gov/nceh/lead/prevention/sources/water.htm?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fnceh%2Flead%2Fleadinwater%2Fdefault.htm](https://www.cdc.gov/nceh/lead/prevention/sources/water.htm?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fnceh%2Flead%2Fleadinwater%2Fdefault.htm) (last visited December 3, 2019).

³ Toxic Substances Portal, ToxFAQs for Lead, Agency for Toxic Substances and Disease Registry, <https://www.atsdr.cdc.gov/toxfaqs/TF.asp?id=93&tid=22> (last visited December 3, 2019)

The Illinois Supreme Court has not squarely addressed the issue presented in this appeal. *Dillon v. Evanston Hospital* (2002) and *Williams v. Manchester* (2008) are the two decisions that come the closest. In *Dillon*, the issue was about damages: whether plaintiff could recover damages for the risk of future injuries. *Dillon*, 199 Ill.2d at 496-97. There was no question that the plaintiff suffered a present injury and could bring a tort claim against the defendants—defendants’ negligence caused a portion of a catheter to become lodged in the plaintiff’s heart. *Id.* at 487-88. *See also Williams v. Manchester*, 228 Ill.2d 404, 425 (2008) (referring to *Dillon* as holding “[t]he present injury was the catheter embedded in the plaintiffs’ heart”). The court ruled that damages for the increased risk of future injury is recoverable too provided the plaintiff was able to show “to a reasonable degree of certainty that the risk was proximately caused by defendant’s negligence.” *Id.* at 501-02; *id.* at 504 (further noting that damages amount should reflect future injury’s probability). The *Dillon* court did not address, however, whether the need for medical monitoring is itself a present injury that can sustain a negligence claim.

Williams v. Manchester similarly does not answer the question. In that case, the plaintiffs conceded that merely exposing their unborn child to radiation from x-rays did not cause a present injury. *Williams*, 228 Ill.2d at 424. They instead claimed an increased risk of future harm from radiation exposure was the injury. *Id.* Considering the *Dillon* decision, the court noted it had ruled that “an increased risk of future harm” is an element of damages, but was not itself an injury, *id.* at 425-26, and, even if an increased risk is a present injury, plaintiffs lacked evidence that the child “was injured as a result of the increased risk,” *id.* at 426. Notably, the court did not address whether the need for medical monitoring could be a present injury.

Conversely, Illinois appellate courts—and federal courts forecasting how the Supreme Court would rule—agree that the need for medical monitoring due to toxic exposure is a present injury. In *Lewis v. Lead Industry Ass’n*, the court affirmed that an “increased risk of future harm” due to lead exposure, “standing alone,” is not a proper present injury. 342 Ill.App.3d 95, 101 (2003). But the court made clear that having to go through examinations and medical monitoring are present injuries. *Id.* The *Lewis* court explained: “a claim seeking damages for the cost of a medical examination is not speculative and *the necessity for such an examination is capable of proof within a reasonable degree of medical certainty.*” *Id.* (emphasis added). The court also rejected the notion that there must be some kind of separate, traditional form of physical injury, failing to find a difference between costs “to treat an actual physical injury” and costs “to determine if he or she has been physically injured.” *Lewis*, 342 Ill.App.3d at 101-02. *See also Jensen v. Bayer AG*, 371 Ill.App.3d 682, 692 (2007) (recognizing need for medical monitoring can be present injury, but that plaintiff could not prove such injury—“[p]laintiff’s own doctors testified that no future medical monitoring would be necessary”); *Carey v. Kerr-McGee Chemical Corp.*, 999 F.Supp. 1109, 1119-20 (N.D. Ill. 1998) (predicting Illinois Supreme Court would find present injury if “medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnosis properly the warning signs of disease”); *Muniz v. Rexnord Corp.*, 2006 WL 1519571, at *5 (N.D. Ill. May 26, 2006) (“Because diseases and injuries caused by the exposure of toxic substances are often latent, relief in the form of medical monitoring has developed as a means to compensate plaintiffs that have been wrongfully exposed to various toxic substances and require medical testing because of that exposure.”).

This Court should formally pronounce that the need for medical monitoring is an available type of present injury that supports traditional tort causes of action. Medical monitoring promotes public health, encouraging plaintiffs to detect and treat illnesses resulting from lead exposure as soon as possible. And such relief is consistent with traditional tort law principles: It holds the City of Chicago accountable for exposing its residents to lead and encourages the entity charged with managing public water systems to act responsibly.

II. Courts In Other States Provide Support For This Toxic-Tort Injury

A. Injury results when toxics invade a plaintiff's body and medical science supports a need for screening and monitoring.

Courts throughout the country have held that plaintiffs suffer a present injury when there is a “need,” supported by medical evidence, for initial diagnostic testing and regular medical monitoring after being exposed to toxic substances. This type of injury is common in toxic-tort litigation and allows for traditional tort claims to be brought. It also does not require establishing a new independent cause of action. *See Potter v. Firestone Tire & Rubber*, 6 Cal.4th 965, 1007 (1993) (“Recognition that a defendant’s conduct has created a need for future medical monitoring does not create a new tort.”); *Sadler v. Pacificare*, 349 P.3d 1264, 1267 (2014) (Nevada Supreme Court affirming prior holding that medical monitoring is not independent new tort).

State courts, and federal courts charged with interpreting and applying state law, have held that the “need for medical surveillance” is an injury because, if proven, there has been an invasion of a legally protected interest. For over eighty years, New York’s highest court has recognized that the invasion of the human body by a toxic chemical constitutes a physical injury at the time the invasion occurs, even though illness from that invasion may occur years

later. In *Schmidt v. Merchants Despatch Transportation Co.*, 270 N.Y. 287, 301 (1936), the court ruled that inhaling a toxic substance (asbestos) is an “injury” sufficient for a negligence action to accrue. *Schmidt* defined an “injury” as “complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust.” *Id.* at 301.⁴ Upon considering this line of state court cases, a federal district court in New York recently found “that the blood accumulation of PFOA [a type of PFAS chemical]...is sufficient to permit a claim for negligence seeking medical monitoring damages.” *Baker v. Saint-Gobain Performance Plastics*, 232 F.Supp.3d 233, 252 (N.D. NY 2017). The court summarized its ruling as follows: “a plaintiff may show an injury sufficient to seek medical monitoring damages through the accumulation of a toxic substance within her body.” *Id.* at 250.

Several decisions rely on the Restatement (Second) of Torts’ definition of injury. The leading case—*Friends for all Children v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir.

⁴ New York courts have not departed from this holding since. *See Schwartz v. Hayden Newport Chem. Corp.*, 12 N.Y.2d 212, 218 (1963) (“[W]e see no escape from the conclusion that we should follow *Schmidt* in a classic negligence case.”); *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 781 (1979) (“It is well established in this State that when chemical compounds are injected into a person’s body, the injury occurs upon the drug’s introduction, not when the alleged deleterious effects of its component chemicals become apparent.”); *Reis v. Pfizer, Inc.*, 48 N.Y.2d 664 (1979) (affirming dismissal of claim on statute of limitations grounds where plaintiff allegedly contracted poliomyelitis from a defective vaccine received more than three years prior to filing suit); *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 1010-1011 (1981) (holding rule that injury occurs at exposure is still controlling and that a remedy to reduce unfairness of its application is best left to the legislature); *Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 433-34 (1993) (“Disease was a consequence of the injury, we said, not the injury itself, and the injury was complete at the moment the dust was inhaled even though plaintiff may not have been aware of it then.”); *Consorti v. Owens Corning Fiberglas Corp.*, 86 N.Y.2d 449, 452 (1995) (“[A] bright line, readily verifiable rule was adopted in which, as a matter of law, the tortious injury is deemed to have occurred upon the introduction of the toxic substance into the body.”); *Rothstein v. Tennessee Gas Pipeline*, 87 N.Y.2d 90, 92 (1995) (“An unbroken string of this Court’s decisions from *Schmidt* in 1936 to *Consorti v. Owens Corning Fiberglas Corp.* this year upheld these benchmarks and consistently barred claims brought more than three years after exposure.” (internal citation omitted)).

1984)—noted the broad definition of injury in the Restatement and found that “an individual has an interest in avoiding expensive diagnostic examinations.” *Id.* at 826. “When a defendant negligently invades this interest,” the court added, “the injury . . . is neither speculative nor resistant to proof.” *Id.*

Following the D.C. Circuit Court’s lead, many state courts have rejected the notion that only physical injury is cognizable. The Missouri Supreme Court held: “Just as an individual has a legally protected interest in avoiding physical injury, so too does an individual have an interest in avoiding expensive medical evaluations caused by the tortious conduct of others.” *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 717 (Mo. 2007). The West Virginia Supreme Court similarly held that “injury” is not restricted to a physical injury, but can also be viewed as “avoiding expensive diagnostic testing,” which is “neither speculative nor resistant to proof.” *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430 (W.Va. 1999). The California Supreme Court explained in *Potter v. Firestone Tire & Rubber* that a “plaintiff is entitled to recover damages from the tortfeasor for all ‘harm’—as opposed to ‘physical harm.’” *Potter*, 863 P.2d at 822. In Nevada, when plaintiffs alleged they were exposed to infected blood, the Supreme Court held there was an existing injury, because a cognizable injury in an “invasion of *any legally protected interest* of another.” *Sadler v. PacifiCare of Nev.*, 340 P.3d 1264, 1270 (Nev. 2014) (emphasis in original). State courts in Maryland have expressly ruled that there is no need for a plaintiff to “sustain an actual physical harm” and that “the physical injury a plaintiff suffers in a claim for recovery for medical surveillance costs is the invasion of a legally-protected interest.” *Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 80 (Md. 2013). Utah’s Supreme Court ruled: “[T]hose exposed [to toxic substances] have suffered some legal detriment” and that is “consistent

with the definition of ‘injury’ in the Restatement of Torts.” *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 977 (Utah 1993). In Arizona, the state’s leading decision explains that “despite the absence of physical manifestation of any asbestos-related diseases,” when experts show “regular medical testing and evaluation” was “reasonably necessary,” an injury is properly alleged. *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. 1987). In Florida, courts have similarly held that plaintiffs who brought suit against a pharmaceutical manufacturer could recover expenses associated with medical monitoring. *Petito v. A.H. Robins*, 750 So.2d 103 (Fla. 1999). When confronted with defendants’ arguments about a lack of injury, the Florida court reasoned: “Although it is true that plaintiffs in cases such as these have yet to suffer physical injuries, it is not accurate to say that no injury has arisen at all.” *Id.* at 105.

All these cases have ruled that toxic exposure plus the need for medical monitoring is a present injury. In the 2013 Maryland Court of Appeals decision, the court held: “We agree now with other jurisdictions that recognize that exposure itself and the concomitant need for medical testing is the compensable injury for which recovery of damages for medical monitoring is permitted because such exposure constitutes an invasion of [a] legally protected interest.” *Exxon Mobil*, 71 A.3d at 75–76 (internal quotations and citations omitted). The Utah Supreme Court described the necessary present injury in a case involving workers exposed to asbestos as “the exposure itself and the concomitant need for medical testing.” *Hansen*, 858 P.2d at 977. In *Sadler*, the court held a plaintiff can successfully allege an injury if “he or she is *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*, 340 P.3d at 1272 (emphasis added). A Florida appellate court found that

recovery for medical monitoring expenses is appropriate when plaintiffs can show “such monitoring is reasonably necessary.” *Petito*, 750 So.2d at 105. *See also Potter*, 863 P.2d at 823 (recovery available when showing of exposure and “the need for monitoring is a reasonably certain consequence of the exposure”); *Ayers v. Township of Jackson*, 525 A.2d 287, 312-13 (N.J. 1987) (where well water was contaminated by toxic pollutants, New Jersey Supreme Court ruled damages available upon plaintiffs establishing that monitoring is “medically necessary”).

Accordingly, states throughout the country have adapted their tort jurisprudence to address the unfortunate fact that millions of Americans are exposed to numerous toxic substances and to recognize the reality that toxic exposure causes, over time, life-threatening diseases and illnesses. People want to know how they can remediate the toxics that have invaded their bodies. Medical monitoring programs allow people to take needed and appropriate actions that may alter their prognosis once they have been exposed to toxics.

B. Multiple tools are available to address toxic-tort claims.

The floodgates will not open should the Illinois Supreme Court affirmatively and clearly find that the “need for medical monitoring” is a present injury. This Court benefits by the experiences in other state courts. In states that have formally recognized this injury—many based on decisions that are over twenty years old—there is no evidence that frivolous toxic tort claims seeking damages for medical monitoring are clogging the courts. Nor is there evidence in those states that such claims against tortious conduct have left liable defendants unable to pay when victims become ill.

Courts have identified and employ several factors to ensure that those exposed to toxic chemicals can demonstrate that the need for medical monitoring is a present injury.

Pennsylvania courts, in particular, have developed a comprehensive list of factors, which other state courts have adopted to varying degrees, that help weed out inappropriate claims:

- (1) exposure greater than normal background levels,
- (2) to a proven hazardous substance,
- (3) caused by the defendant's negligence,
- (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease,
- (5) a monitoring procedure exists that makes the early detection of the disease possible,
- (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure, and
- (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.

Gates v. Rohm & Haas Co., 655 F.3d 255, 265 (3d Cir. 2011) (citing *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 145-46 (Pa. 1997)); *id.* at 264-65 (requiring proof of causal connection between defendant's tortious conduct and plaintiff's injury, and that the requested relief is appropriately tailored). *Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 788, 794-95 (3d Cir. 1994) (finding plaintiffs' claims survived summary judgment because they "presented evidence that their exposure was significant enough to cause them a significantly increased risk of contracting disease"); *Ayers*, 525 A.2d at 311-12 (discussing "recovery for reasonable pre-symptom, medical surveillances expenses" where there is proof of "causal connection between the tortious conduct and the plaintiffs' exposure").

A federal court interpreting California law declared that these factors "serve a critical gatekeeping function." *Riva v. Pepsico, Inc.*, 82 F. Supp. 3d 1045, 1061 (N.D. Cal. 2015); *id.* at 1055 (reciting California's Supreme Court reasoning that articulated factors "would prevent claims for medical monitoring damages from being brought based on potentially trivial exposures to toxic chemicals"). The limiting principles captured by these factors alleviate concerns about abusing the judicial process. In addition, courts have recognized

that plaintiffs have “substantial evidentiary burdens” for proving toxic tort claims. *Potter*, 863 P.2d at 825. They highlight the requirement to prove causation and that medical monitoring is needed to a reasonable degree of medical certainty, distinct from any general testing and screening, *Sadler*, 340 P.2d at 1271. All of these tools allow courts to carefully assess claims seeking medical monitoring damages and relief, so that a plaintiff alleging a toxic invasion has a proper cognizable injury.

Moreover, the courts, with help from litigants, have proven capable of assessing the validity of such claims on a case-by-case basis and of properly tailoring relief to address any reasonable concerns. *See* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1015 (2013) (showing why floodgate concerns are “best addressed through other means, such as through the use of procedural rules and case management practices”). Take for example the recent crisis with exposure to a class of chemicals known as per- and poly-fluoroalkyl substances (commonly referred to as PFAS; or sometimes colloquially as “forever chemicals”). As a result of a class-action lawsuit against a PFAS manufacturer (DuPont), a settlement resulted in a study of PFAS’s health effects. The panel conducting the study (known as the C-8 Science Panel) assessed nearly 65,000 exposed individuals and concluded that PFAS exposure leads to kidney cancer, testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension, and hypercholesterolemia. *See* U.S. Env’tl. Prot. Agency, EPA Doc. No. 822-R-16-005, Drinking Water Health Advisory for Perfluorooctanoic Acid (PFOA), at 39 (May 2016);⁵ C-8 Study Publications, C8 Science

⁵ Available at: https://www.epa.gov/sites/production/files/2016-05/documents/pfoa_health_advisory_final_508.pdf (last visited December 3, 2019).

Panel (Frequently Asked Questions).⁶ The study’s “probable-link” finding resulted in the establishment of a “Medical Panel” that develop a protocol for medical monitoring. *See* Med. Panel for the C-8 Class Members, Information on the C-8 (PFOA) Medical Monitoring Program Screening Tests 102 (2013).⁷ This program represents a critical tool for those exposed to PFAS chemicals detect, diagnose, and treat diseases that first begin when the toxins invade their bodies. It also represents an assurance that the parties and the courts can work to efficiently and effectively remedy tortious conduct.

III. Invading A Person’s Body With Toxic Chemicals Like Lead Causes Significant Physical Harm

A. Lead exposure results in significant injuries months, if not years, after the tortious conduct.

Lead is a powerful toxin that is a pervasive environmental health threat. The presence of lead in drinking water can cause serious health problems. A federal district court judge in Michigan summarized the undisputed adverse health effects of lead when reviewing a case concerning the Flint, Michigan lead-water crisis: “Most at risk to lead exposure are infants, young children, and pregnant women. Lead can cause permanent damage to the brain and kidneys and can interfere with the production of oxygen-carrying red blood cells that perfuse other organs. Lead poisoning has been linked with lowered mental functioning in children. And it can affect more severely adults with kidney ailments and high blood pressure.” *Concerned Pastors for Social Action v Khouri*, 217 F.Supp.3d 960, 970 (E.D. Mich. 2016).

⁶ Available at: <https://www.c8sciencepanel.org/publications.html> (last visited December 3, 2019).

⁷ Available at: https://www.c-8medicalmonitoringprogram.com/docs/med_panel_education_doc.pdf (last visited December 3, 2019).

The federal Safe Drinking Water Act governs public water systems throughout the country to ensure that the public is receiving water fit for human consumption. 42 U.S.C. § 300f(4)(A). Under this statutory regime, the Environmental Protection Agency established the maximum contaminant level goal for lead at zero because there is no safe level of lead in drinking water and “because lead is a toxic metal that can be harmful to human health even at low exposure levels [and]...[l]ead is persistent and it can bioaccumulate in the body over time.”⁸ EPA set an enforceable concentration limit—the maximum concentration level or MCL—at 15 parts per billion. 40 C.F.R. § 141.80(c)(1); 56 Fed. Reg. 26,460, 24,490 (June 7, 1991) (Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper). Under this statutory regime, tap water supplied by Defendant to Chicago residents, including the Plaintiffs, is unsafe to drink because lead levels exceed the Safe Drinking Water Act standard. *See, e.g.*, App. 86-87.

Despite its devastating impacts, it generally takes months or years before a person shows signs of disease or ailments associated with lead exposure. Lead poisoning shows up in a person’s blood soon after exposure. But the majority of lead absorbed by the body is stored in a person’s bones, where it can remain for years. Lead in bones can be released into the blood during times of physiological changes, like stress, pregnancy, lactation, fractures, and menopause. *Monograph on Health Effects of Low-Level Lead*, U.S. Dep’t of Health & Human Services, *National Toxicology Program* 7-18 (2012).⁹

⁸ Basic Information About Lead in Drinking Water, EPA.gov, <https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#health> (last visited December 3, 2019).

⁹ Available at: https://ntp.niehs.nih.gov/whatwestudy/assessments/noncancer/completed/lead/index.html?utm_source=direct&utm_medium=prod&utm_campaign=ntpgolinks&utm_term=36443 (last visited December 3, 2019)

For exposure to many toxic substances, the traditional types of “physical harms” caused by a defendant’s tortious conduct are not realized immediately after a person consumes lead contaminated water. *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 901 (Mass. 2009) (“Modern living has exposed people to a variety of toxic substances” and resulting illnesses “are often latent, not manifesting themselves for years or even decades after exposure.”). Yet there is no logical basis to require physical injury comparable to a broken arm or perforated lung when dealing with toxic exposure. The ingestion of lead-contaminated water causes, in the words of the Restatement, an invasion of a legally protected interest—a person’s body.

B. Medical monitoring is a limited, but critical, form of relief for persons exposed to lead and other harmful toxins.

Screening and medical monitoring are important health care tools. Medical testing and monitoring detect abnormal changes within the body before they develop into a disease. Early detection of latent harms ensures that tragic ailments and insidious diseases can be treated most effectively. *Meyer*, 220 S.W.3d. at 718. *See also Baker*, 232 F.Supp.3d at 250 (affirming that medical monitoring “provides testing used for early detection of the signs of disease, which in turn allows for earlier and more effective treatment”).

Cancer, for instance, may be at an advanced stage at which mortality rates are high by the time a person exhibits symptoms. An early diagnosis of cancer “greatly increases the chances for successful treatment.” *See* Early Detection of Cancer, World Health Organization.¹⁰ Monitoring can improve health outcomes by detecting “physiological changes” that serve as “warning signs to a trained physician.” *Donovan*, 914 N.E.2d at 901.

¹⁰ Available at: <http://www.who.int/cancer/detection/en/> (last visited December 3, 2019).

See also Bower, 206 W.Va. at 142 (explaining that medical monitoring is reasonably necessary when “a qualified physician would prescribe [it] based upon the demonstrated exposure to a particular toxic agent”). As the U.S. Department of Health and Human Services has explained, screening can be an appropriate response where exposure to a chemical is associated with specific adverse health effects. *See, e.g., Agency for Toxic Substances and Disease Registry (ATSDR), Final Criteria for Determining the Appropriateness of a Medical Monitoring Program Under CERCLA*, 60 Fed. Reg. 38,840, 38,841-42 (July 28, 1995). Waiting for “physical” signs of the disease undermines the point of preventive testing and early treatments. As a New York federal district court reasoned: “requiring plaintiffs to manifest physical symptoms before receiving medical monitoring would defeat the purpose of that remedy. The entire point of medical monitoring is to provide testing that would detect a patient’s disease *before* she manifests an obvious symptomatic illness, thus allowing for earlier treatment that carries a better chance of success.” *Baker*, 232 F.Supp.3d at 252 (emphasis in original).

The other benefits of medical monitoring are similarly significant. Recognizing the need for medical monitoring as a present injury should help save money, rather than divert funds away from exposure victims who become sick. *See Ayers*, 525 A.2d at 312, 314. And it will deter negligent actors from releasing toxic chemicals into the environment. *See In re Paoli R.R. Yard PCB Litig.*, 916 F.2d at 852 (“Allowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals by defendants and encourages plaintiffs to detect and treat their injuries as soon as possible.”). The end result is fewer people exposed to toxic substances and a lower overall incidence of disease. One federal court recently summarized the public policy benefits of toxic tort claims as “(1) public health

interest in encouraging and fostering access to early medical testing for those exposed to hazardous substances; (2) possible economic savings realized by the early detection and treatment of disease; (3) deterrence of polluters; and (4) elemental justice.” *Trujillo v. Ametek, Inc.*, 2015 WL 7313408, at *5 (S.D. Cal. Nov. 18, 2015).

CONCLUSION

For the foregoing reasons, the Appellate Court’s ruling should be upheld and the case remanded to the Circuit Court for further proceeding consistent with a finding that the need for medical monitoring due to toxic exposure is a present injury.

Respectfully submitted,

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/s/ Neil Levine
Neil Levine (ARDC No. 6333725)
Public Justice
4404 Alcott St.
Denver, Colorado 80212
(303) 455-0604
nlevine@publicjustice.net

Albert Ettinger (ARDC No. 3125045)
53 W. Jackson #1664
Chicago, Illinois 60604
(773)-818-4825
ettinger.albert@gmail.com

Attorney for Amicus Curiae
Public Justice

CERTIFICATE OF COMPLIANCE

In accordance with Rule 341(c), I certify that this Amicus Brief conforms to the requirements of Rules 341(a) and (b). The length of this brief is 17 pages, excluding the cover, points and authorities, certificate of compliance, and certificate of service.

/s/ Neil Levine

Neil Levine (ARDC No. 6333725)

CERTIFICATE OF SERVICE

I certify that on December 5, 2019, I electronically filed the foregoing via the Odyssey E-Filing System and served this Amicus Brief on all parties through the Odyssey E-Filing System as well as via emails to the attorneys listed below:

Richard C. Godfrey
J. Andrew Langan
Andrew R. Running
R. Chris Heck
Kirkland & Ellis LLP
300 North LaSalle
Chicago, Illinois 60654
Telephone: 312-862-2000
richard.godfrey@kirkland.com
andrew.langan@kirkland.com
andrew.running@kirkland.com
r.chris.heck@kirkland.com

Mark A. Flessner, Corporation Counsel
Benna Ruth Solomon, Deputy Corporation Counsel
Myriam Zreczny Kasper, Chief Assistant Corporation Counsel
Sara K. Hornstra, Assistant Corporation Counsel
30 North LaSalle Street
Suite 800
Chicago, Illinois 60602
Telephone: 312-744-7764
benna.solomon@cityofchicago.org
appeals@cityofchicago.org

Attorneys for Defendant-Appellant

Mark T. Vazquez
Hagens Berman Sobol Shapiro LLP
455 Cityfront Plaza Drive, Suite 2410
Chicago, IL 60611
Telephone: (708) 628-4949
Facsimile: (708) 628-4950
markv@hbsslaw.com

David Freydin
Freydin Law Firm LLP
8707 Skokie Blvd # 305
Skokie, IL 60077
Telephone: (847) 972-6157
david.freydin@freydinlaw.com

Elizabeth A. Fegan
 Fegan Scott LLC
 150 S. Wacker Dr., 24th Floor
 Chicago, IL 60606
 Telephone: (312) 741-1019
 Facsimile: (312) 264-0100
 beth@feganscott.com

Steve W. Berman
 Hagens Berman Sobol Shapiro LLP
 1918 Eighth Avenue, Suite 3300
 Seattle, WA 98101
 Telephone: (206) 623-7292
 Facsimile: (206) 623-0594
 steve@hbsslaw.com

Philip H. Corboy, Jr.
 Corboy & Demetrio
 33 N. Dearborn St., 21st Floor
 Chicago, IL 60602
 Telephone: (312) 346-3191
 fhc@corboydemetrio.com

Attorneys for Plaintiffs-Appellees

Upon penalties as provided by Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set for in this instrument are true and correct.

Dated: December 5, 2019

/s/ Neil Levine
 Neil Levine
 Public Justice
 4404 Alcott St.
 Denver, Colorado 80212
 (303) 455-0604
 nlevine@publicjustice.net

*Attorney for Amicus Curiae
 Public Justice*