THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2022-0132

KEVIN BROWN *et al*.,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION *et al*.,

On Certified Question from the United States District Court
for the District of New Hampshire

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS

Matthew J. Delude, #18305
PRIMMER PIPER EGGLESTON & CRAMER, PC
P.O. Box 3600
Manchester, NH 03105-3600
(603) 626-3324
mdelude@primmer.com

Attorney for Amicus New England Legal Foundation

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QUESTION PRESENTED

In response to Question A, certified to this Court by the U.S. District Court, should this Court answer no in deference to the Legislature's primary responsibility for declaring public policy?

INTEREST OF AMICUS CURIAE[1]

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting balanced economic growth, protecting free enterprise, and defending economic rights throughout New England. NELF's more than 130 members and supporters include a cross-section of large and small businesses and other organizations from all six New England states, as well as national public interest foundations. In fulfilling its mission, NELF has appeared as amicus curiae in federal and state courts throughout New England as well as in the U.S. Supreme Court.

This case is of interest to NELF because one important aspect of our mission is to advocate that the three branches of government play their assigned and appropriate roles in the constitutional order. The Court itself has noted that the New Hampshire Legislature bears primary responsibility

[1] No party or party's counsel nor any other individual or entity, aside from Amicus and its counsel, authored this brief in whole or part, or made any monetary contribution to its preparation or submission. On June 28, 2022, Amicus obtained the written email consent of plaintiffs' counsel to the filing of this brief, and on the same day, by separate written email, the consent of defendants' counsel.

for announcing this state's public policy. As NELF explains in this brief, it believes that the public policy issues raised by the certified questions now before the Court are therefore best addressed by the Legislature. The Legislature can best do needed fact finding, as well as the balancing and weighing of the various humanitarian, legal, environmental, and economic factors involved in a novel claim for medical monitoring.

NELF believes that its brief provides an additional perspective which may aid the Court in responding appropriately to the certified questions.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

NELF incorporates by reference the relevant portions of the district court's order certifying the questions.

SUMMARY OF THE ARGUMENT

The Legislature has primary responsibility for declaring this state's public policy. The Court declares public policy only when there is sufficient guidance from the Legislature or when the Court is assured that the public's mind is so clearly and firmly settled on an issue that there remains no substantial doubt about it.

The Court's deference to the Legislature is amply warranted here because neither of the two preceding conditions exists concerning medical monitoring. The Legislature is fully aware of the problems posed by PFAS; where it has been able to achieve a sufficient consensus, it has enacted laws enunciating public policy on PFAS issues. Notably, however, though the Legislature has considered medical monitoring, it has not

achieved a sufficiently large, stable consensus among the members of both chambers to enact legislation recognizing claims for monitoring.

Other state courts have deferred to their respective legislatures on this subject because representative bodies are better suited to the fact-finding and balancing of interests entailed by legal claims for such monitoring.

ARGUMENT

I. The Court Should Answer No to Threshold Question A Because This Court Should Defer to the Legislature Concerning the Major Changes to New Hampshire Law that Affirmative Answers to the Certified Questions Would Make.

The certified questions now before the Court raise numerous novel issues of public policy for which adequate guidance from the Legislature is lacking. The Court should therefore defer to the Legislature, as other courts have done, *see infra* pp. 13-16, and answer no to threshold Question A, rather than launch into unchartered waters. *See Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 830 (Ala. 2001) (medical monitoring cause of action like "traveling into unchartered waters, without a seasoned guide"; "We are unprepared to embark upon such a voyage.").

This Court has acknowledged the primacy of the Legislature in declaring New Hampshire's public policy in legal matters such as these. In *Couture v. Couture*, the Court wrote, "[i]t is the legislature that has the primary responsibility to declare public policy in this State." 124 N.H. 500, 502 (1984). More recently the Court has stated that "[d]eclaration of public policy with reference to a given subject is regarded as a matter primarily for legislative action." *Rizzo v. Allstate Insurance Company*, 170

N.H. 708, 713 (2018) (quoting *Welzenbach v. Powers*, 139 N.H. 688, 690 (1995)); *see also Dolbeare v. City of Laconia*, 168 N.H. 52, 57 (2015) (noting that "matters of public policy are reserved for the legislature").

The Court does have a share in "the business of declaring policy," of course. *Welzenbach*, 139 N.H. at 689. However, as this Court has acknowledged, when a '"public policy is unsupported by legislative announcement,'" any policy made by the Court itself must meet a high standard. *Id*. at 690 (quoting *Welch v. The Frisbie Memorial Hospital*, 90 N.H. 337, 340-41 (1939)). As the Court explained in *Welzenbach*, court-made public policy "'must be based on a thoroughly developed, definite, persistent and united state of the public mind. There must be no substantial doubt about it.'" *Id*. at 690 (quoting *Welch*, 90 N.H. at 341). Hence, when there exists only a public "diversity of thought and views" on a subject of public import, '"no established sentiment of general prevalence can be found to entitle it to declaration as a definite policy with fixed and set bounds."' *Id*. (quoting *Heath v. Heath*, 85 N.H. 419, 426 (1932)). "[W]here 'The state of the public mind' on a matter of policy is 'uncertain,' the Court would be presumptuous to declare it." *Patey v. Peaslee*, 101 N.H. 26, 32 (1957) (quoting *Heath*, 85 N.H. at 425–426).

Accordingly, in the past the Court has declined to act in a variety of situations in which it believed that deference was the better part of valor because necessary public policy guidance from the Legislature was lacking. As the Court wrote in a workers compensation case, "[a]lthough the concerns raised by the respondents may be legitimate, the respondents raise them in the wrong forum. These concerns implicate matters of public policy

that are better left to the legislature[.]" *Appeal of Northridge Environmental, LLC*, 168 N.H. 657, 662 (2016). Similarly, when abutters invoked public policy for their claim to standing to challenge a waiver of lot size for a school, the Court ruled that "[t]o the extent the petitioners argue that, as a matter of public policy, abutters should be afforded standing . . . , they make their argument in the wrong forum. Such matters of public policy are reserved for the legislature." *Avery v. New Hampshire Dept. of Educ*., 162 N.H. 604, 609 (2011) (citing *Petition of Kilton*, 156 N.H. 632, 645 (2007)).

That such deference is well-advised in these situations is cogently illustrated by *Johnsen v. Fernald*, 120 N.H. 440 (1980), a motor vehicle personal injury case. There the Court was asked to rule that intoxicated driving is *per se* wanton or malicious conduct and thereby justifies imposition of enhanced damages. *Id*. at 441. The Court declined to so rule, stating, "[t]he act of operating a motor vehicle while under the influence is indeed deplorable and should the legislature determine, as a matter of public policy, that those who cause injuries while driving under the influence should be liable for enhanced damages, it is free to do so." *Id*. The Court's caution proved to be provident. Two years later, in *Rahaim v. Psaros*, 122 N.H. 603, 614 (1982), adverting to its caution in the earlier case, the Court noted that "[s]ince *Johnsen*, the legislature has set forth the measure of damages in civil actions involving intoxicated drivers and the conditions for application of statutorily enhanced damages." The Court cited RSA 265:89-a, which doubles the damages imposed on intoxicated drivers, but which also adds the significant qualifiers that enhanced

damages may be imposed only on those drivers who have been convicted of a second or subsequent offense of driving while intoxicated within a seven-year period. *Id*. Thus the Court's earlier deference to the Legislature enabled that law-and public policy-making body to condition a significant change in the law on certain limiting provisos that the Legislature deemed to be important.

It is noteworthy that those provisos, so important to the Legislature, had not even been mentioned in *Johnsen*, where the Court had been asked by an injured plaintiff to act on its own despite insufficient legislative guidance concerning public policy in that area of law. *See also Hart v. Warden, New Hampshire State Prison*, 171 N.H. 709, 725 (2019) (declining to follow other state courts in use of heightened competency standard for mentally ill to self-represent; "To the extent the petitioner argues the policy concerns . . . , we observe that matters of public policy are best suited for the legislature").

The Court's deference is particularly warranted in this case, for the Legislature has already made some efforts towards enunciating New Hampshire's public policy on PFAS and medical monitoring and thus on issues bound up with the certified questions. Up to the present, however, that public policy remains inadequate as guidance for the judiciary's own affirmative policy making in these areas, especially given the scope of the certified questions. Over the past several years the members of the Legislature simply have not been able to agree among themselves sufficiently to provide public policy guidance on medical monitoring. The Legislature's repeated failure to achieve a sufficient consensus should tell

the Court a lot about the state of legislative public policy in New Hampshire, as well as about the absence of a "thoroughly developed, definite, persistent and united state of the public mind" on the subject. *Welzenbach*, 139 N.H. at 690 (quoting *Welch*, 690 N.H. at 341).

In 2018, for example, the Governor signed a law regulating PFAS contamination of the public waters of the state. Pursuant to that enabling legislation, in 2019 the Department of Environmental Services set maximum allowable concentrations of PFAS in drinking water. After a challenge to the regulations reached this Court in 2020, the Legislature again acted, mooting the appeal by passing into law the numerical values DES had promulgated in its regulations. *See* RSA § 485:16-e.

Also in 2020, the Legislature passed House Bill 1375, which would have established a statutory cause of action for medical monitoring for all toxic substances. The Governor vetoed the law, however.[2] Of particular significance here is that the Legislature failed to achieve sufficient public policy consensus on the bill so as to be able to muster the two thirds vote of each chamber needed to override the veto.

In 2021 a bill titled "An Act relative to treatment of PFAS contaminants in the drinking water of the Merrimack Village Water District" was introduce as House Bill 478 and more than a year later remains under study in the Senate.[3] Another proposed piece of legislation

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[2] Governor's Veto Message Regarding House Bill 1375, available at https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/hb1375-veto-message.pdf (last accessed June 26, 2022).

[3] https://legiscan.com/NH/bill/HB478/2022 (last accessed June 24, 2022).

from 2021, House Bill 368, once again proposed a statutory cause of action for medical monitoring,[4] as did Senate Bill 111.[5] However, the House bill "died on the table" when the 2021 session ended, and the Senate bill appears to have never emerged from committee. That neither of these two bills even went to a full vote of the House and Senate, let alone made it to the Governor's desk, has considerable bearing on the questions of public policy posed in this case by the certified questions. Plainly, on the subject of medical monitoring — the very subject of the certified questions — the Legislature continues to lack a substantial enough consensus among its members to endorse monitoring as a matter of public policy. Indeed, the Legislature's repeated failure to endorse medical monitoring signals pretty clearly that it lacks the Legislature's imprimatur and hence is *not* New Hampshire's public policy.

This overview strongly counsels judicial restraint. *See Hickingbotham v. Burke*, 140 N.H. 28, 33 (1995) ("We note that '[j]udicial power to create a tort "is to be exercised in light of relevant policy determinations made by the [legislative branch].""") (citations omitted). While the Legislature has taken steps toward formulating this state's public policy purely as far as regulating PFAS themselves is concerned, over the recent few years the outcome of its debates and various bills on medical monitoring can be understood to mean only that it is aware of the issues raised in the certified questions and has so far decided *not* to make medical

[4] https://trackbill.com/bill/new-hampshire-house-bill-368-relative-to-claims-for-medical-monitoring/1967744/last accessed June 24, 2022).

[5] https://trackbill.com/bill/new-hampshire-senate-bill-111-relative-to-claims-for-medical-monitoring/2009440/ (last accessed June 24, 2022)

monitoring public policy. Under the circumstances, the Court should defer to that state of affairs. *See Green Mountain Ins. Co. v. George*, 138 N.H. 10, 13 (1993) (refusing to "effectively" create law "where our legislature has refused to enact [it], despite the constitutional ability to do so").

Faced with the similar requests for this novel form of relief, the courts of other states have responded with deference to the greater role played by their respective legislatures in establishing public policy, especially when the issues involved depart from legal norms and require a careful balancing of interests, as would certainly be the case with medical monitoring.

In a Kentucky class action, a plaintiff sought a court-supervised medical monitoring program funded by the defendant drug manufacturer. *Wood v. Wyeth-Ayerst Labs*., 82 S.W. 3d 849, 851 (Ky. 2002). After evaluating the claims under existing Kentucky law, that state's Supreme Court rejected medical monitoring both as a cause of action and as a consequential remedy, writing:

> Courts in some states, however, are venturing into uncharted territory as they create medical monitoring causes of action and make available medical monitoring remedies that do not require a showing of present physical injury. In these states, the costs of diagnostic testing can be recovered before they are actually incurred on a mere showing of exposure coupled with increased risk of injury. In the name of sound policy, we decline to depart from well-settled principles of tort law.

Id. at 856.

Among other reasons for its decision, the Kentucky high court, drawing on a law review article, cited the superior ability of a legislative body to fashion an adequate, fair, and informed public policy on this issue.

> Of the many reasons proffered in the article as to why courts should refrain from stepping into lawmakers' shoes, the most convincing are as follows: first, legislatures are in a better position than courts to acquire all of the relevant information in making such a complex and sweeping change to traditional tort law; second, legislatures' prospective treatment of medical monitoring awards would provide fair notice to potential tortfeasors; and third, claims involving collateral compensation demand careful consideration from the legislature.

Id. at 858 (citing Victor Shwartz, et al., *Medical Monitoring: Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999)). 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*. 859.

The Supreme Court of Michigan enlarged on those concerns when rejecting medical monitoring claims in *Henry v. The Dow Chemical Company*, 701 N.W. 2d 684 (2005).

> Recognition of a medical monitoring claim would involve extensive fact-finding and the weighing of numerous and conflicting policy concerns. We lack sufficient information to assess intelligently and fully the potential consequences of recognizing a medical monitoring claim.
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> It is less than obvious . . . that the benefits of a medical monitoring cause of action would outweigh the burdens imposed on plaintiffs with manifest injuries, our judicial

> system, and those responsible for administering and financing medical care. Because such a balancing process would necessarily require extensive fact-finding and the weighing of important, and sometimes conflicting, policy concerns, and because here we lack sufficient information to assess intelligently and fully the potential consequences of our decision, we do not believe that the instant question is one suitable for resolution by the judicial branch.
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> Such a decision necessarily involves a drawing of lines reflecting considerations of public policy, and a judicial body is ill-advised to draw such lines given the limited range of interests represented by the parties and the resultant lack of the necessary range of information on which to base a resolution

Id. at 686, 694-5, 697; *see also* D. Scott Aberson, Note, *A Fifty State Survey of* Medical *Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 Wm. Mitchell L. Rev. 1098, 1123-1129 (2006) (advancing reasons why legislatures are more appropriate policy makers on this issue than courts would be).

"In effect," the Michigan court concluded, "we have been asked to craft public policy in the dark. This problem alone ought to make any reasonably prudent jurist extremely wary of granting the relief sought by the plaintiffs." *Henry*, 701 N.W. 2d at 698. *See also Alsteen v. Wauleco*, 802 N.W. 2d 212, 223 (Wis. Ct. App. 2001) (citing *Henry* and *Wood*; "we therefore refuse 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"); *Curl v. American Multimedia, Inc*., 654 S.E. 2d 76, 657 (N.C. 2007) ("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.").

CONCLUSION

For all of the foregoing reasons, the Court should defer to the Legislature and should answer no to Question A.

Respectfully submitted,

Dated: July 8, 2022

/s/ Matthew J. Delude, Esq.

Matthew J. Delude, #18305
Primmer Piper Eggleston & Cramer, PC
P.O. Box 3600
Manchester, NH 03105-3600
(603) 626-3324
mdelude@primmer.com

Attorney for Amicus New England Legal Foundation

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of *Amici Curiae* complies with the word limitation set out in Supreme Court Rule 16(11).

/s/ Matthew J. Delude, Esq.
Matthew J. Delude, #18305
Primmer Piper Eggleston & Cramer, PC
P.O. Box 3600
Manchester, NH 03105-3600
(603) 626-3324
mdelude@primmer.com

Attorney for Amicus New England Legal Foundation

CERTIFICATE OF SERVICE

I certify that the foregoing brief will be served on this date to all counsel via the Court's e-file system.

Dated: July 8, 2022

/s/ Matthew J. Delude, Esq.
Matthew J. Delude, #18305
Primmer Piper Eggleston & Cramer, PC
P.O. Box 3600
Manchester, NH 03105-3600
(603) 626-3324
mdelude@primmer.com

Attorney for Amicus New England Legal Foundation