

No. 19-1852

IN THE SUPREME COURT OF IOWA

LARRY C. BEVERAGE, Individually and as Personal Representative of the Estate of CHARLES E. BEVERAGE, deceased, LINDA K. ANDERSON, and BONNIE K. VALENTINE.

Plaintiffs-Appellants,

v.

Alcoa, INC., a Pennsylvania Corporation, and IOWA-ILLINOIS TAYLOR INSULATION, INC., successor-in-interest to IOWA ILLINOIS THERMAL INSULATION, INC. an Iowa Corporation,

Defendants-Appellees.

Appeal from the Scott County District Court,
District Court No. LACE129455,
The Honorable Judge Patrick A. McElyea, presiding

AMICI CURIAE BRIEF OF IOWA ASSOCIATION OF BUSINESS AND INDUSTRY, IOWA INSURANCE INSTITUTE, NFIB SMALL BUSINESS LEGAL CENTER, AND COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF DEFENDANTS-APPELLEES

Mark Behrens (*pro hac pending*) Matthew McKinney, AT0009345
SHOOK, HARDY & BACON L.L.P. Thomas Story, AT0013130
1800 K Street, NW, Suite 1000 BROWN, WINICK, GRAVES, GROSS &
Washington, DC 20006 BASKERVILLE, P.L.C.
Tel: (202) 783-8400 666 Grand Avenue, Suite 2000
Fax: (202) 783-4211 Des Moines, IA 50309
mbehrens@shb.com Tel: (865) 525-5300
Fax: (515) 283-0231
matt.mckinney@brownwinick.com
thomas.story@brownwinick.com
Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... 3

STATEMENT OF THE ISSUES 8

ROUTING STATEMENT: THIS APPEAL SHOULD BE
TRANSFERRED TO THE IOWA COURT OF APPEALS..... 13

IDENTITY AND INTEREST OF *AMICI CURIAE*15

DISCLOSURE STATEMENT.....15

INTRODUCTION AND SUMMARY OF THE ARGUMENT 16

ARGUMENT

 I. Plaintiffs Waived Any Constitutional Challenges
 to the Statute by Failing to Preserve Them in the
 District Court 16

 II. Plaintiffs Newly-Raised Equal Protection
 Challenge Also Fails Because All Asbestos
 Plaintiffs are Treated the Same Under the
 Statute and the Law Has a Rational Basis 19

 A. The Statute Treats Similarly Situated
 Plaintiffs the Same..... 20

 B. The Statute Has a Rational Basis 21

 III. Plaintiffs Newly-Raised As-Applied Due
 Process Challenge Also Fails Because the
 Statute May be Given Retroactive Effect 28

CONCLUSION 31

CERTIFICATE OF COMPLIANCE 32

CERTIFICATE OF FILING AND SERVICE End

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Appleby v. Farmers State Bank of Dows</i> , 56 N.W.2d 917 (Iowa 1953).....	31
<i>AFSCME Iowa Council 61 v. State</i> , 928 N.W.2d 21 (Iowa 2019)	20-21
<i>Baldwin v City of Waterloo</i> , 372 N.W.2d 486 (Iowa 1985)	31
<i>Beeler v. Van Cannon</i> , 376 N.W.2d 628 (Iowa 1985)	22
<i>Bowers v. Polk Cty. Bd. of Supervisors</i> , 638 N.W.2d 682 (Iowa 2002).....	<i>passim</i>
<i>Branson v. O.F. Mossberg & Sons, Inc.</i> , 221 F.3d 1064 (8th Cir. 2000)	23
<i>Carter v. Rowe</i> , 710 N.W.2d 545 (Table) (Iowa Ct. App. 2005)	20, 22
<i>Clark v. Insurance Co. of State of Pa.</i> , 927 N.W.2d 180 (Iowa 2019)	22
<i>Duntz v. Zeimet</i> , 478 N.W.2d 635 (Iowa 1991).....	23
<i>Grovijohn v. Virjon, Inc.</i> , 643 N.W.2d 200 (Iowa 2002).....	20, 22
<i>In re Garlock Sealing Techs., LLC</i> , 504 B.R. 71 (W.D.N.C. Bankr. 2014)	25, 28
<i>Koppes v. Pearson</i> , 384 N.W.2d 381 (Iowa 1986), <i>abrogated on other grounds by Christy v. Miulli</i> , 692 N.W.2d 694 (Iowa 2005)	22
<i>Krull v. Thermogas Co. of Northwood, Iowa, a Div. of Mapco Gas Prods. Inc.</i> , 522 N.W.2d 607 (Iowa 1994)	22
<i>Lambert v. Sisters of Mercy Health Corp.</i> , 369 N.W.2d 417 (Iowa 1985).....	22

<i>Martin v. Crook</i> , 776 N.W.2d 110 (Table) (Iowa Ct. App. 2009).....	30
<i>Meier v. Senecaut</i> , 641 N.W.2d 532 (Iowa 2002)	17
<i>Metz v. Amoco Oil Co.</i> , 581 N.W.2d 597 (Iowa 1998).....	17
<i>NextEra Energy Res. LLC v. Iowa Utils. Bd.</i> , 815 N.W.2d 30 (Iowa 2012)	21
<i>Patel v. Fleur de Lis Motor Inns, Inc.</i> , 771 F. Supp. 961 (S.D. Iowa 1991)	23
<i>Pfiffner v. Roth</i> , 379 N.W.2d 357 (Iowa 1985)	29
<i>Racing Ass’n of Central Iowa v. Fitzgerald</i> , 675 N.W.2d 1 (Iowa 2004), cert. denied, 541 U.S. 1086 (2004)	19
<i>Runyon v. Kubota Tractor Corp.</i> , 653 N.W.2d 582 (Iowa 2002).....	17-18
<i>Seivert v. Resnick</i> , 342 N.W.2d 484 (Iowa 1984)	23
<i>Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.</i> , 473 N.W.2d 612 (Iowa 1991).....	22
<i>Spencer v. Truro Tavern, Inc.</i> , 728 N.W.2d 853 (Table) (Iowa Ct. App. 2007)	20
<i>Strand v. Rasmussen</i> , 648 N.W.2d 95 (Iowa 2002)	17
<i>Suckow v. NEOWA FS, Inc.</i> , 445 N.W.2d 776 (Iowa 1989).....	22
<i>Taft v. Iowa Dist. Ct. for Linn Cty.</i> , 828 N.W.2d 309 (Iowa 2013)	17
<i>Thorp v. Casey’s Gen. Stores, Inc.</i> , 446 N.W.2d 457 (Iowa 1989)	29-31
<i>Varnum v. Brien</i> , 763 N.W.2d 862 (Iowa 2009)	21
<i>Veasley v. CRST Int’l, Inc.</i> , 553 N.W.2d 896 (Iowa 1996).....	30

<i>West Des Moines State Bank v. Mills</i> , 482 N.W.2d 432 (Iowa 1992)	30
--	----

Constitution & Statutes

Asbestos Bankruptcy Trust Claims Transparency Act, Iowa Code §§ 686A.1 to 686A.9.....	27
Iowa Code § 686B.7(5)	<i>passim</i>
Iowa Code § 603.4102(1-2).....	18-19
Iowa Const. Art. V § 4	18-19
11 U.S.C. § 524(g).....	26

Rules

Iowa R. App. P. 6.903(2)(g)(1)	18
Iowa R. App. P. 6.1101(3).....	14

Other Authorities

American Academy of Actuaries’ Mass Torts Subcommittee, <i>Overview of Asbestos Claims Issues and Trends</i> (Aug. 2007)	24
Best’s Market Segment Report, <i>No Slowdown in Asbestos and Environmental Claims</i> (Nov. 28, 2018)	25
Jenni Biggs, et al., <i>A Synthesis of Asbestos Disclosures from Form 10-Ks – Updated</i> (Towers Watson June 2013)	25
Lester Brickman, <i>Fraud and Abuse in Mesothelioma Litigation</i> , 88 Tul. L. Rev. 1071 (2014)	28
S. Todd Brown, <i>Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation</i> , 23 Widener L.J. 299 (2013)	25

Lloyd Dixon, et al., <i>Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts</i> (Rand Corp. 2010).....	26-27
Lloyd Dixon & Geoffrey McGovern, <i>Bankruptcy’s Effect on Product Identification in Asbestos Personal Injury Cases</i> (RAND Corp. 2015).....	26
Lloyd Dixon & Geoffrey McGovern, <i>Asbestos Bankruptcy Trusts and Tort Compensation</i> (RAND Corp. 2011)	27
John J. Hare & Daniel J. Ryan, <i>Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: Refuting the Myths About Transparency</i> , 15 Mealey’s Asbestos Bankr. Rep. 1 (2015).....	27
KCIC, <i>Asbestos Litigation: 2019 Year in Review</i> (2020)	24
Thomas A. Mayes & Anuradha Vaitheswaran, <i>Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice</i> , 55 Drake L. Rev. 39 (Fall 2006).....	18
‘ <i>Medical Monitoring and Asbestos Litigation</i> ’–A Discussion with Richard Scruggs and Victor Schwartz, 17 Mealey’s Litig. Rep.: Asbestos 19 (Mar. 1, 2002)	24
Marc C. Scarcella, et al., <i>The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010</i> , 27 Mealey’s Litig. Rep.: Asbestos 1 (Nov. 7, 2012).....	23
William P. Shelley, et al., <i>The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008</i> , 23 Widener L.J. 675 (2014).....	27
Joseph E. Stiglitz, et al., <i>The Impact of Asbestos Liabilities on Workers in Bankrupt Firms</i> , 12 J. Bankr. L. & Prac. 51 (2003)	25

U.S. Gov't Accountability Office, GAO-11-819, *Asbestos
Injury Compensation: The Role and Administration
of Asbestos Trusts* (Sept. 2011) 26

STATEMENT OF THE ISSUES

I. Whether Plaintiffs Waived Their Constitutional Challenges by Failing to Preserve Them in the District Court

Cases

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)

Metz v. Amoco Oil Co., 581 N.W.2d 597 (Iowa 1998)

Strand v. Rasmussen, 648 N.W.2d 95 (Iowa 2002)

Taft v. Iowa Dist. Ct. for Linn Cty., 828 N.W.2d 309 (Iowa 2013)

Constitution & Statutes

Iowa Code § 686B.7(5)

Iowa Code § 603.4102(1-2)

Iowa Const. Art. V § 4

Rules

Iowa R. App. P. 6.903(2)(g)(1)

Other Authorities

Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39 (Fall 2006)

II. Whether Plaintiffs Newly-Raised Equal Protection Challenge Also Fails Because All Asbestos Plaintiffs Are Treated the Same under the Statute and the Law Has a Rational Basis

Cases

AFSCME Iowa Council 61 v. State, 928 N.W.2d 21 (Iowa 2019)

Beeler v. Van Cannon, 376 N.W.2d 628 (Iowa 1985)

Bowers v. Polk Cty. Bd. of Supervisors, 638 N.W.2d 682
(Iowa 2002)

Branson v. O.F. Mossberg & Sons, Inc., 221 F.3d 1064
(8th Cir. 2000)

Carter v. Rowe, 710 N.W.2d 545 (Table) (Iowa Ct. App. 2005)

Clark v. Insurance Co. of State of Pa., 927 N.W.2d 180
(Iowa 2019)

Duntz v. Zeimet, 478 N.W.2d 635 (Iowa 1991)

Grovijohn v. Virjon, Inc., 643 N.W.2d 200 (Iowa 2002)

In re Garlock Sealing Techs., LLC, 504 B.R. 71
(W.D.N.C. Bankr. 2014)

Koppes v. Pearson, 384 N.W.2d 381 (Iowa 1986),
abrogated on other grounds by Christy v. Miulli,
692 N.W.2d 694 (Iowa 2005)

*Krull v. Thermogas Co. of Northwood, Iowa, a Div. of
Mapco Gas Prods. Inc.*, 522 N.W.2d 607 (Iowa 1994)

Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417
(Iowa 1985)

NextEra Energy Res. LLC v. Iowa Utils. Bd., 815 N.W.2d 30
(Iowa 2012)

Patel v. Fleur de Lis Motor Inns, Inc., 771 F. Supp. 961
(S.D. Iowa 1991)

Racing Ass'n of Central Iowa v. Fitzgerald, 675 N.W.2d 1
(Iowa 2004), *cert. denied*, 541 U.S. 1086 (2004)

Runyon v. Kubota Tractor Corp., 653 N.W.2d 582 (Iowa 2002)

Seivert v. Resnick, 342 N.W.2d 484 (Iowa 1984)

*Shepherd Components, Inc. v. Brice Petrides-Donohue &
Assocs., Inc.*, 473 N.W.2d 612 (Iowa 1991)

Spencer v. Truro Tavern, Inc., 728 N.W.2d 853 (Table)
(Iowa Ct. App. 2007)

Suckow v. NEOWA FS, Inc., 445 N.W.2d 776 (Iowa 1989)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

Statutes

Asbestos Bankruptcy Trust Claims Transparency Act,
Iowa Code §§ 686A.1 to 686A.9

Iowa Code § 686B.7(5)

11 U.S.C. § 524(g)

Other Authorities

American Academy of Actuaries' Mass Torts Subcommittee,
Overview of Asbestos Claims Issues and Trends (Aug. 2007)

Best's Market Segment Report, *No Slowdown in Asbestos and
Environmental Claims* (Nov. 28, 2018)

Jenni Biggs, et al., *A Synthesis of Asbestos Disclosures from
Form 10-Ks – Updated* (Towers Watson June 2013)

Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*,
88 Tul. L. Rev. 1071 (2014)

S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future
of Asbestos Compensation*, 23 Widener L.J. 299 (2013)

Lloyd Dixon, et al., *Asbestos Bankruptcy Trusts: An Overview of
Trust Structure and Activity with Detailed Reports on the
Largest Trusts* (Rand Corp. 2010)

Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on
Product Identification in Asbestos Personal Injury Cases*
(RAND Corp. 2015)

Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy
Trusts and Tort Compensation* (RAND Corp. 2011)

John J. Hare & Daniel J. Ryan, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: Refuting the Myths About Transparency*, 15 Mealey's Asbestos Bankr. Rep. 1 (2015)

KCIC, *Asbestos Litigation: 2019 Year in Review* (2020)

'*Medical Monitoring and Asbestos Litigation*'—A Discussion with Richard Scruggs and Victor Schwartz, 17 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002)

Marc C. Scarcella, et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27 Mealey's Litig. Rep.: Asbestos 1 (Nov. 7, 2012)

William P. Shelley, et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675 (2014)

Joseph E. Stiglitz, et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003)

U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* (Sept. 2011)

III. Whether Plaintiffs Newly-Raised As-Applied Due Process Challenge Also Fails Because the Statute May Be Given Retroactive Effect

Cases

Appleby v. Farmers State Bank of Dows, 56 N.W.2d 917 (Iowa 1953)

Baldwin v City of Waterloo, 372 N.W.2d 486 (Iowa 1985)

Martin v. Crook, 776 N.W.2d 110 (Table) (Iowa Ct. App. 2009)

Pfiffner v. Roth, 379 N.W.2d 357 (Iowa 1985)

Thorp v. Casey's Gen. Stores, Inc., 446 N.W.2d 457 (Iowa 1989)

Veasley v. CRST Int'l, Inc., 553 N.W.2d 896 (Iowa 1996)

West Des Moines State Bank v. Mills, 482 N.W.2d 432 (Iowa 1992)

Statutes

Iowa Code § 686B.7(5)

**ROUTING STATEMENT:
THIS APPEAL SHOULD BE TRANSFERRED
TO THE IOWA COURT OF APPEALS**

The Iowa Court of Appeals should decide this case because the only issue preserved for appeal involves a straightforward question of statutory interpretation: whether Iowa Code § 686B.7(5) places liability for asbestos-related injuries solely on manufacturers and sellers of asbestos-containing products, as the language plainly states and several District Courts (including the one below) have found, or is intended to codify a legal concept known as the “bare metal defense,” which limits the liability of product manufacturers to their own products in asbestos cases.

It is clear that Plaintiffs did not preserve, and therefore waived, the constitutional arguments they are presenting for the first time on appeal. Indeed, they readily admit this in their brief. *See* Appellants’ Amended Proof Brief, at 20 (“While the due process clause was not invoked below....”) and 42 (“While the equal protection clause was not invoked below....”). The only claim Plaintiff may have preserved relates to the statutory interpretation issue. *See* Appellants’ Amended Proof Brief, at 20 (“the Beverages argued in the trial court that they retained their premises liability claims against Alcoa” and “their

product liability claims against IITI.”); *see id.* at 42. Because the Plaintiffs did not raise their equal protection or due process arguments below, the District Court’s Summary Judgment Order did not address them, leaving no constitutional question for this Court to review.

Transfer to the Iowa Court of Appeals is proper in these circumstances. *See Iowa R. App. P. 6.1101(3)* (“The supreme court shall ordinarily transfer to the court of appeals...[c]ases presenting the application of existing legal principles” or “presenting issues that are appropriate for summary disposition.”). The Court of Appeals should be given the opportunity to resolve the issue of error preservation and, ultimately, the sole remaining question of statutory interpretation. Resolution of the statutory interpretation and error preservation issues by the Court of Appeals would be straightforward and dispositive, leaving no compelling question for this Court to review.

The Court is best served by focusing its finite resources on those cases where key issues have been properly preserved in the district courts and cannot be decided by the Court of Appeals based on existing legal principles. This is not one of those cases. For these reasons, *amici* urge the Court to route this appeal to the Iowa Court of Appeals.

IDENTITY AND INTEREST OF AMICI CURIAE

Amici Iowa Association of Business and Industry, Iowa Insurance Institute, NFIB Small Business Legal Center, and Coalition for Litigation Justice, Inc. are organizations whose members include Iowa asbestos litigation defendants and their insurers. The statute at issue, Iowa Code § 686B.7(5), shifts the focus of Iowa asbestos cases to manufacturers and sellers of asbestos-containing products, thereby protecting Iowa businesses that would otherwise face litigation and incur the substantial burdens associated with litigation costs and potential liability. Iowa employers, especially smaller businesses, would be negatively impacted if the statute is interpreted as Plaintiffs propose and would suffer dire consequences if the statute is struck down as unconstitutional on its face or as-applied. Asbestos personal injury litigation—approaching its fifth decade—has bankrupted over 120 companies, shows no sign of abating, and may last several more decades. *Amici* have a unique perspective that will aid this Court’s evaluation of the issues presented.

DISCLOSURE STATEMENT

No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their

counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs admit that they did not preserve the constitutional arguments they are presenting for the first time on appeal. Those arguments are waived and beyond the jurisdiction of this Court. The Court should refuse to entertain those issues.

Our brief focuses on the preservation of error issue because it is dispositive of most of the issues in the appeal. In the event the Court breaks with settled law and decides to hear the newly-raised constitutional issues, we address those here. The statute passes constitutional muster, both respect to the equal protection challenge and as to the as-applied due process challenge.

We support the position of Defendants-Appellees on the statutory interpretation issue. We are not briefing that issue now because the statute is clear and the District Court's ruling is persuasive.

ARGUMENT

I. PLAINTIFFS WAIVED ANY CONSTITUTIONAL CHALLENGES TO THE STATUTE BY FAILING TO PRESERVE THEM IN THE DISTRICT COURT

As explained in our Routing Statement, Plaintiffs did not preserve, and therefore waived, any constitutional challenges

regarding the statute at issue, Iowa Code § 686B.7(5). Plaintiffs readily admit this in their brief. *See* Appellants’ Amended Proof Brief, at 20 (“While the due process clause was not invoked below....”) and 42 (“While the equal protection clause was not invoked below....”). The District Court did not resolve a question never asked, and Plaintiffs cannot appeal from a decision never made.

Issues not presented to district courts cannot be raised for the first time on appeal, even if they involve constitutional issues. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”); *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) (“issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.”); *Taft v. Iowa Dist. Ct. for Linn Cty.*, 828 N.W.2d 309, 322 (Iowa 2013) (“Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal.”); *Strand v. Rasmussen*, 648 N.W.2d 95, 100-101 (Iowa 2002) (due process challenge raised for the first time on appeal and equal protection challenge not addressed by District Court were not preserved); *Runyon*

v. Kubota Tractor Corp., 653 N.W.2d 582, 584 (Iowa 2002) (constitutional issue was not preserved so the Court deemed it waived); *see also* Iowa R. App. P. 6.903(2)(g)(1) (appellant briefs must include “[a] statement addressing how the issue was preserved for appellate review, with references to the places in the record where the issue was raised and decided.”).

The requirement that issues must be raised and considered at the district court level to be considered by this Court flows directly from the Court’s grant of authority under the Iowa Constitution and Iowa Code. The Court has jurisdiction “for the correction of errors at law.” Iowa Const. Art. V § 4 (“The Supreme Court . . . shall constitute a Court for the correction of errors at law”); Iowa Code § 603.4102(1-2) (“The supreme court . . . constitutes a court for the correction of errors at law.”); *see also* Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 44 (Fall 2006) (“If alleged error is was not pointed out to the trial court, it is hard to see how the trial court's failure to rule on an objection that was never made can properly be called an error of law amenable to correction.”). Plaintiffs did not

complain of a legal error on the constitutional issues they raise here for the first time; thus, there is nothing there for the Court to correct.

Because Plaintiffs failed to make and preserve their constitutional challenges in the District Court, this Court lacks jurisdiction to decide those issues and should reject them. *See* Iowa Const. Art. V § 4; Iowa Code § 603.4102(1-2).

II. PLAINTIFFS NEWLY-RAISED EQUAL PROTECTION CHALLENGE ALSO FAILS BECAUSE ALL ASBESTOS PLAINTIFFS ARE TREATED THE SAME UNDER THE STATUTE AND THE LAW HAS A RATIONAL BASIS

Even if Plaintiffs’ newly raised equal protection challenge was preserved, it would fail because all asbestos plaintiffs are treated the same under the statute and because the statute has a rational basis.¹

¹ While this Court reserves “the ability to employ a different analytical framework under state constitutional provisions,” *Racing Ass’n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 5 (Iowa 2004), *cert. denied*, 541 U.S. 1086 (2004), it will generally apply the “same analysis in considering state equal protection claims as [it does] in considering federal equal protection claims under the Fourteenth Amendment to the Federal Constitution.” *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002). Regardless, Plaintiffs fail to advocate an independent state constitutional analysis in this case. *See* Appellants’ Amended Proof Brief at 44 (“This Court has interpreted both [state and federal] constitutional provisions similarly.”).

A. THE STATUTE TREATS SIMILARLY SITUATED PLAINTIFFS THE SAME

“The Equal Protection Clause requires that similarly-situated persons be treated alike.” *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002); *see also AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 32 (Iowa 2019) (“To prove an equal protection violation, the plaintiffs must first establish that the statute treats similarly situated individuals differently.”).

Here, “it is significant all [asbestos] plaintiffs, as a unique class, are treated alike among themselves,” satisfying the first step of the equal protection analysis. *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 204 (Iowa 2002) (upholding pre-suit notice requirement applicable to all dramshop plaintiffs); *Carter v. Rowe*, 710 N.W.2d 545, at *2 (Table) (Iowa Ct. App. 2005) (upholding heightened recklessness standard for injuries caused by domesticated animals that treats all individuals who are injured by domesticated animal activity in a like manner). Iowa Code § 686B.7(5) does not discriminate: “All [asbestos] plaintiffs are subject to the same requirements of the . . . statute.” *Grovijohn*, 643 N.W.2d at 204. Plaintiffs cannot show that “two classes of similarly situated plaintiffs were given differential treatment.” *Spencer v. Truro Tavern, Inc.*, 728 N.W.2d 853, at *2 (Table) (Iowa Ct. App. 2007).

B. THE STATUTE HAS A RATIONAL BASIS

The next step in the equal protection analysis for cases that do not involve a fundamental right or inherently suspect classification is to determine whether the statute has a rational relationship to a legitimate government interest. *See Bowers*, 638 N.W.2d at 689. Here, Plaintiffs “acknowledge that the distinction made in Section 686B.7(5) does not involve a fundamental right or an inherently suspect classification, and thus is reviewed under the least rigorous equal protection scrutiny.” Appellants’ Amended Proof Brief at 44. By Plaintiffs’ admission, this Court should apply a rational basis test.

The rational basis test is a “very deferential standard.” *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 46 (Iowa 2012). The test “defers to the legislature’s prerogative to make policy decisions by requiring only a plausible policy justification, mere rationality of the facts underlying the decision, and again, a merely rational relationship between the classification and the policy justification.” *AFSCME Iowa Council 61*, 928 N.W.2d at 32 (quoting *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009)). Moreover, under the rational basis standard, a “statute enjoys a presumption of constitutionality which can only be

overcome by proof that the law is patently arbitrary” *Bowers*, 638 N.W.2d at 689.

The Plaintiffs’ “burden is very heavy.” *Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776, 779 (Iowa 1989). This Court has said that its job is “not to sit as a superlegislature rethinking policy choices of the elected branches.” *AFSCME Iowa Council 61*, 928 N.W.2d at 26. In fact, the Court has repeatedly held that civil justice reforms satisfy equal protection guarantees, and the federal courts are in agreement.²

² See *Grovijohn*, 643 N.W.2d at 204 (six-month pre-suit notice requirement for dramshop plaintiffs); *Krull v. Thermogas Co. of Northwood, Iowa, a Div. of Mapco Gas Prods. Inc.*, 522 N.W.2d 607 (Iowa 1994) (15-year statute of repose for improvements to real property); *Koppes v. Pearson*, 384 N.W.2d 381 (Iowa 1986) (statute of limitations for medical malpractice suits), *abrogated on other grounds by Christy v. Miulli*, 692 N.W.2d 694 (Iowa 2005); *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417 (Iowa 1985) (statute abrogating collateral source rule for certain medical liability claims); *Beeler v. Van Cannon*, 376 N.W.2d 628 (Iowa 1985) (statute which specified effective date for application to trials of statute barring joint liability for defendants found to be less than 50% at fault); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612 (Iowa 1991) (statute directing 75% of punitive damages awards to civil reparation trust fund); see also *Carter*, 710 N.W.2d at *2 (Table) (heightened recklessness standard for injuries caused by domesticated animals); *Clark v. Insurance Co. of State of Pa.*, 927 N.W.2d 180 (Iowa 2019) (immunity for workers’ compensation insurance carriers conducting insurance inspection of workplace); *Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776 (Iowa 1989) (worker’s compensation law’s immunity for negligent acts by employers while giving co-

Iowa Code § 686B.7(5) easily meets the Court’s highly deferential standard. As the District Court found, the legislature may have intended to shift the focus of asbestos cases to “the actual producers of products containing asbestos rather than the entities who purchase it.” (10.1.19 Order, p. 8 App. ____). By doing so, the statute relieves Iowa businesses of the substantial burdens associated with litigation costs and potential liability from asbestos cases. Many such defendants are smaller businesses, and the Iowa legislature may have reasonably desired to protect these vulnerable businesses from costly litigation.

Over the past two decades, asbestos plaintiffs’ attorneys have shifted their focus away from manufacturers of asbestos-containing thermal insulation and “towards peripheral and new defendants...” Marc C. Scarcella, et al., *The Philadelphia Story: Asbestos Litigation*,

employees only limited immunity for the same acts); *Seivert v. Resnick*, 342 N.W.2d 484 (Iowa 1984) (workers’ compensation law’s limited immunity for negligent co-employee tortfeasors as opposed to tortfeasors who are not co-employees); *cf. Duntz v. Zeimet*, 478 N.W.2d 635 (Iowa 1991) (party’s failure to wear seat belt may be considered to reduce amount of party’s recovery by no more than 5%). *See generally Branson v. O.F. Mossberg & Sons, Inc.*, 221 F.3d 1064 (8th Cir. 2000) (upholding Iowa’s product liability statute of repose); *Patel v. Fleur de Lis Motor Inns, Inc.*, 771 F. Supp. 961 (S.D. Iowa 1991) (upholding Iowa’s statute of repose for improvements to real property).

Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010, 27 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 7, 2012). The litigation has become an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002) (quoting Mr. Scruggs).

The spread of the litigation to remote defendants is evident in the sheer number of companies that have been swept into the litigation. "In 2019, more than 10,000 individual entities were named as defendants in asbestos litigation." KCIC, *Asbestos Litigation: 2019 Year in Review* 11 (2020). Companies formerly viewed as peripheral defendants are "now bearing the majority of the costs of awards relating to decades of asbestos use." American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 3 (Aug. 2007). The legislature may have sought to address this trend and cabin the litigation.

The legislature also may be concerned that inaction could lead to Iowa companies being forced into bankruptcy, like scores of asbestos

defendants that faced extreme liability.³ Over 120 companies have declared bankruptcy due at least in part to asbestos-related liabilities, including at least three companies in the first quarter of 2020.⁴ Further bankruptcies could lead more to more Iowa defendants being pulled into the litigation. *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014) (describing how a gasket manufacturer became a target of asbestos cases until it was forced into bankruptcy).

Asbestos personal injury litigation costs defendant businesses and insurers billions of dollars annually, shows no sign of slowing, and will last several decades. *See Best's Market Segment Report, No Slowdown in Asbestos and Environmental Claims* 1 (Nov. 28, 2018) (“Asbestos losses have not slowed down....”); Jenni Biggs, et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* (Towers Watson June 2013) (“Typical projections based on

³ *See* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 *Widener L.J.* 299, 306 (2013) (“Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.”).

⁴ Bankruptcies have terrible consequences for claimants, affected companies, workers, retirees, and communities. *See* Joseph E. Stiglitz, et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 *J. Bankr. L. & Prac.* 51, 70-88 (2003).

epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years.”). The Iowa legislature may have recognized the activity in asbestos litigation and sought to protect Iowa businesses from the years to come.

Finally, the approach taken by the legislature provides an alternative remedy to asbestos plaintiffs, though this is not required in the constitutional analysis. Plaintiffs remain free to pursue tort claims against any solvent asbestos product manufacturers and sellers. Plaintiffs also can obtain recoveries through trusts set up by former asbestos producers in bankruptcy. *See* Lloyd Dixon & Geoffrey McGovern, *Bankruptcy’s Effect on Product Identification in Asbestos Personal Injury Cases* iii (RAND Corp. 2015) (“Plaintiffs now often receive compensation both from the trusts and through a tort case.”).

Billions of dollars are available in trusts to pay asbestos claimants for harms caused by companies that exited the tort system through bankruptcy.⁵ *See* U.S. Gov’t Accountability Office, GAO-11-

⁵ The Bankruptcy Code provides a mechanism for companies with asbestos-related liabilities to reorganize, channel their asbestos liabilities into trusts, and emerge from bankruptcy with immunity from asbestos-related tort claims. *See* 11 U.S.C. § 524(g); Lloyd Dixon, et al.,

819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011); Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* 2 (RAND Corp. 2011). To the extent Plaintiff's exposures to asbestos came from products made by bankrupt companies, the trusts provide a remedy. See William P. Shelley, et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 *Widener L.J.* 675, 675 (2014) (trusts established in asbestos-related bankruptcy reorganizations “answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades”). In fact, Iowa is one of many states that require plaintiffs to pursue their asbestos trust claim remedies in a timely manner. See *Asbestos Bankruptcy Trust Claims Transparency Act*, Iowa Code §§ 686A.1 to 686A.9.⁶

Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts (Rand Corp. 2010).

⁶ The asbestos trust system is non-adversarial; it is much easier and faster than bringing a lawsuit. See John J. Hare & Daniel J. Ryan, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: Refuting*

Trust payments in the aggregate can be substantial. *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1078-79 (2014) (claimants typically receive multiple trust payments since workers were often exposed to different asbestos products). A typical mesothelioma plaintiff's recovery has been estimated to be \$1–1.5 million, “including an average of \$560,000 in tort recoveries and about \$600,000 from 22 trusts.” *In re Garlock Sealing Techs., LLC*, 504 B.R. at 96.

In sum, Iowa Code § 686B.7(5) does not deprive Iowa plaintiffs of remedies but does, rationally, protect Iowa businesses by shifting the focus of liability to manufacturers and sellers of asbestos products.

III. PLAINTIFFS NEWLY-RAISED AS-APPLIED DUE PROCESS CHALLENGE ALSO FAILS BECAUSE THE STATUTE MAY BE GIVEN RETROACTIVE EFFECT

Even if Plaintiffs' newly raised as-applied substantive due process challenge was preserved, it would fail because the statute does

the Myths About Transparency, 15 Mealey's Asbestos Bankr. Rep. 1, 3 (2015) (“Plaintiffs’ lawyers routinely advertise their ability to file trust claims ‘quickly and easily,’ and tell potential clients that paralegals evaluate potential trust claims and undertake the filing process. The evidence also demonstrates that trust claims are paid more quickly than tort claims.”).

not unconstitutionally deprive Plaintiffs of all redress, it merely affects a remedy.

Plaintiffs argue that retrospective application of Iowa Code § 686B.7(5) to their accrued cause of action violates substantive due process. The cases they rely upon, however, involved statutes that did not merely affect a remedy, but eliminated any remedy at all. That is not the case here.

For instance, Plaintiffs cite *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457 (Iowa 1989), where the Court held that amendments to Iowa's dramshop law could not be applied retroactively to deprive "plaintiff of all redress" against dramshops. *Id.* at 462. The Court said, "It is well settled . . . that . . . it is not competent for the legislature to cut off all remedy" through retroactive application of a statute. *Id.* (citation omitted).

Plaintiffs also cite *Pfiffner v. Roth*, 379 N.W.2d 357 (Iowa 1985), where an amendment to the competition law meant that the "plaintiff had a right of recovery against the city under the old law but would have none under the new one." *Id.* at 360. The Court said, "Ordinarily, we will not give retrospective effect to an amendment when it has that effect." *Id.*

Likewise, in *Veasley v. CRST International, Inc.*, 553 N.W.2d 896 (Iowa 1996), the Court did not give retroactive effect to a law that eliminated vicarious liability for title holders of leased vehicles because the change would “completely eliminate that claim or any remedy pursuant thereto.” *Id.* at 901.

The statute at issue is unlike those in *Thorp*, *Pfiffner*, or *Veasley* because it does not cut off all redress for asbestos-related harms, it merely alters the remedy by shifting the focus of liability from Iowa businesses such as Defendants-Appellees to manufacturers and sellers of asbestos products. Plaintiffs remain able to pursue recoveries from solvent manufacturers or sellers of asbestos-containing products and to recover additional funds from multiple asbestos trusts, as Plaintiffs here apparently did.

“The retroactive amendment here was a legitimate and proper use of legislative authority.” *West Des Moines State Bank v. Mills*, 482 N.W.2d 432, 436 (Iowa 1992).⁷ Indeed, in *Thorp*, this Court said that a statutory change “which merely affects the remedy . . . can

⁷ The U.S. Constitution does not preclude elimination of “a tort cause of action by legislation, even if that cause of action has already accrued and even if . . . a lawsuit was already pending.” *Martin v. Crook*, 776 N.W.2d 110, at *9 (Iowa Ct. App. 2009).

constitutionally apply retroactively to causes of action which vested before their enactment.” *Thorp*, 446 N.W.2d at 461 (citing *Appleby v. Farmers State Bank of Dows*, 56 N.W.2d 917, 920 (Iowa 1953)); see also *Baldwin v City of Waterloo*, 372 N.W.2d 486, 492 (Iowa 1985) (“Plaintiff had no vested right in a particular result of this litigation . . .”). Furthermore, the statute clearly has a rational basis.

CONCLUSION

For these reasons, the Court should affirm summary judgment in favor of Defendants-Appellees.

Dated: June 17, 2020 Respectfully submitted,

/s/ Matthew H. McKinney
Matthew H. McKinney, AT0009345
Thomas D. Story, AT0013130
BROWN, WINICK, GRAVES, GROSS &
BASKERVILLE, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309
Tel: (865) 525-5300
Fax: (515) 283-0231
matt.mckinney@brownwinick.com
thomas.story@brownwinick.com

Mark A. Behrens (*pro hac vice pending*)
SHOOK, HARDY & BACON, L.L.P.
1800 K Street, NW, Suite 1000
Washington, DC 20006
Tel: (202) 783-8400
Fax: (202) 783-4211
mbehrens@shb.com

Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume limitation of Iowa R. App. P. 6.903 (1)(d), 6.903(1)(e)(1), and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Georgia, in font size 14 and contains 3,865 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Matthew H. McKinney

Dated: June 17, 2020

CERTIFICATE OF FILING AND SERVICE

I certify that on June 17, 2020, the foregoing was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

Clerk of Court for the Supreme
Court of Iowa
Judicial Branch Building
1111 East Court Avenue
Des Moines, Iowa 50319

Lisa W. Shirley
Kevin W. Paul
DEAN OMAR BRANHAM SHIRLEY
302 N. Market Street, Suite 300
Dallas, Texas 75202
Tel: (214) 722-5990
lshirley@dobslegal.com
kpaul@dobslegal.com

James H. Cook, AT0001622
DUTTON, DANIELS, HINES,
KALKHOFF, COOK & SWANSON
3151 Brockway Road
Waterloo, IA 50701
Tel: (319) 234.4471
jcook@duttonfirm.com
ATTORNEYS FOR
PLAINTIFFS-APPELLANTS

Kevin P. Horan
Douglas M. Sinars
Owen Blood, AT0013721
SINARS SLOWIKOWSKI TOMASKA
55 West Monroe St., Suite 4000
Chicago, IL 60603
Tel: (312) 767-9790
dsinars@sinarslaw.com
oblood@sinarslaw.com
khoran@sinarslaw.com
ATTORNEYS FOR DEFENDANT-
APPELLEE, IOWA-ILLINOIS TAYLOR
INSULATION, INC.

Robert M. Livingston, AT0004728
William R. Hughes, Jr., AT0003678
STUART TINLEY LAW FIRM LLP
310 West Kanessville Blvd., Second Floor
Council Bluffs, IA 51503
Tel: (712) 322-4033
rml@stuarttinley.com
wrh@stuarttinley.com

Donna R. Miller
MILLER ZIMMERMAN & EVANS, P.L.C.
535 SW 11th Street, Suite 100
Des Moines, IA 50309
Tel: (515) 809-9699
dmiller@mzelaw.com
ATTORNEYS FOR DEFENDANT-
APPELLEE, ARCONIC, INC., F/K/A
ALCOA, INC.

/s/ Matthew H. McKinney