STATE OF LOUISIANA

SUPREME COURT

DOCKET NO. 2014-C-2102

ALNEIDA ANTHONY, ET AL.

VERSUS

GEORGIA GULF LAKE CHARLES, LLC

C/W

MAURICE PAUL BILLIOT, ET AL.

VERSUS

GEORGIA GULF LAKE CHARLES, LLC

C/W

TANGELA BROWN, ET AL.

VERSUS

GEORGIA GULF LAKE CHARLES, LLC

APPLICATION FOR A WRIT OF CERTIORARI OR REVIEW TO THE LOUISIANA COURT OF APPEAL, THIRD CIRCUIT DOCKET NOS.: 13-236 (*ANTHONY*) C/W 13-638 (*BILLIOT*), AND 13-778, 13-779, 13-780, 13-781, 13-782, 13-783, 13-784, 13-785, 13-786, 13-787, 13-788 (*BROWN, ET AL.*)

APPEALED FROM THE FOURTEENTH JUDICIAL DISTRICT COURT, PARISH OF CALCASIEU, STATE OF LOUISIANA, DOCKET NOS. 2007-5073-E (*ANTHONY*); 2007-5082-A (*BILLIOT*); 2007-5068, 2007-5074, 2007-5078, 2007-5120, 2007-5142, 2007-5189, 2007-5201, 2007-5206, 2007-5123, 2007-5129 AND 2007-5264 (*BROWN, ET AL.*) THE HONORABLE DAVID A. RITCHIE (*ANTHONY*), HONORABLE D. KENT SAVOIE (*BILLIOT*) AND HONORABLE CLAYTON DAVIS (*BROWN, ET AL.*) PRESIDING

BRIEF OF *AMICI CURIAE,* AMERICAN CHEMISTRY COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS, VINYL INSTITUTE, PLASTIC PIPE AND FITTINGS ASSOCIATION, CROPLIFE AMERICA, AND LOUISIANA CHEMICAL ASSOCIATION IN SUPPORT OF DEFENDANT-APPLICANT, GEORGIA GULF LAKE CHARLES, LLC

A CIVIL PROCEEDING

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BRIEF OF *AMICI CURIAE*, AMERICAN CHEMISTRY COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS, VINYL INSTITUTE, PLASTIC PIPE AND FITTINGS ASSOCIATION, CROPLIFE AMERICA AND LOUISIANA CHEMICAL ASSOCIATION IN SUPPORT OF DEFENDANT-APPLICANT, GEORGIA GULF LAKE CHARLES, LLC

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."[1]

The principle of "cause-in-fact" is so entrenched in the tort liability system that the notion of holding a defendant liable for damages in the absence of proof of cause-in-fact has been considered anathema to the American legal system.[2] *Amici curiae*, American Chemistry Council ("ACC"), National Association of Manufacturers ("NAM"), Vinyl Institute ("VI"), Plastic Pipe and Fittings Association ("PPFA"), CropLife America ("CLA"), and Louisiana Chemical Association ("LCA"), respectfully submit this brief in support of Defendant-Applicant, Georgia Gulf Lake Charles, LLC ("Georgia Gulf"), urging this Court to exercise its supervisory jurisdiction to correct the lower courts' extreme misapplication of the fundamental requirement of causation in this toxic tort case.

It is axiomatic that a plaintiff in a toxic tort case must establish: (1) that he or she was actually exposed to the toxic substance at issue; (2) that the substance in question is capable of causing the complained of injury (*i.e.*, general causation); and (3) that the substance did, in fact, cause the plaintiff's alleged injury (*i.e.*, specific causation).[3] Yet in this case, both the district

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[1] LA. CIV. CODE art. 2315, entitled "Liability for acts causing damages".

[2] Jean Macchiaroli Eggen, *Symposium: Toxic Torts, Causation, and Scientific Evidence after Daubert*, 55 U. Pitt. L. Rev. 889, 895 (Spring, 1994) (citing Michael Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-In-Fact*, 7 Harv. Envtl. L. Rev. 429, 429-31 (1983)).

[3] *See* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 28, at 436 (2010) (recognizing the "trilogy of elements of proof of agent-disease causation—namely, exposure, general causation, and specific causation"); *Golden v. CH2M Hill Hanford Group, Inc.*, 528 F.3d 681, 683 (9th Cir. 2008) ("To survive summary judgment on a toxic tort claim for physical injuries, Golden had to show that he was exposed to chemicals that could have caused the physical injuries he complains about (general causation), and that his exposure did in fact result in those injuries (specific causation)."); *Mancuso v. Consolidated Edison Co. of New York, Inc.*, 56 F. Supp. 2d 391, 399 (S.D. N.Y. 1999), *affirmed in pertinent part*, No. 99-9233, 2000 U.S. App. LEXIS 12487 (2d Cir. June 5, 2000) ("The methodology for determining whether a person's illness was caused by a specific toxin, as prescribed by [the World Health Organization] and [the National Academy of Sciences], and recommended by the [Federal Judicial Center: Reference Manual on Scientific Evidence, "Reference Guide on Toxicology"], is a three-step procedure: First, the level of exposure of plaintiff to the toxin in question must be determined; second, from a review of the scientific literature, it must be established that the toxin is capable of producing plaintiff's illness--called 'general causation'--and the dose/response relationship between the toxin and the illness--that is, the level of exposure which will produce such an illness--must be ascertained; and third, 'specific causation' must be established by demonstrating the probability that the toxin caused this particular plaintiffs illness, which involves weighing the possibility of other causes of the illness--a so-called 'differential diagnosis.'"); *Suthlert v. Monsanto Co.*, No. 01-1611, 2002 U.S. Dist. LEXIS 28716, *7-8 n.2 (S.D. Fla. Apr. 29, 2002) (same); *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 446 n.2 (N.Y. 2006) (defining the three-step process for generating an opinion on causation in toxic tort cases as: "(1) determining the plaintiff's exposure to the particular toxin; (2) general causation, which is proof that the toxin in question can in fact cause the illness, and the amount of exposure required to cause the illness (the dose-response relationship); and (3) specific causation--meaning the likelihood that plaintiff's illness was caused by the toxin, including eliminating other potential causes of the disease"); *Hooper v.*

courts and the Louisiana Third Circuit allowed dozens of plaintiffs to recover damages despite their failure to adequately prove two of the three requisite elements of proof – actual exposure and specific causation. As there is no evidence in the record that any particular plaintiff was exposed to any particular chemical, at any particular concentration, for any particular period of time, the lower courts improperly equated the mere possibility of exposure with proof of actual exposure. And in simply reiterating the district courts' findings regarding causation and summarily adopting the conclusory opinions of the various experts presented by the plaintiffs (all of which at best demonstrate only general causation), the Third Circuit erroneously collapsed the distinction between general causation and specific causation, allowing plaintiffs to recover when at most, only one essential element of the causation prong was established.

The lower courts' misapplication of the causation requirement creates a new standard of causation for toxic tort claims in this state. The ramifications of these decisions are significant and far-reaching in both the legal and industry arenas. Accordingly, the following associations urge this Court to exercise its supervisory jurisdiction and restore the traditional causation standard that until now, has been uniformly applied in toxic tort cases.

ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The business of chemistry is a $770 billion enterprise and a key element of the nation's economy.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

VI is a U.S. trade association representing the leading manufacturers of vinyl, vinyl chloride monomer, vinyl additives and modifiers, and vinyl building materials. VI's mission is

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Travelers Ins. Co., 10-1685 (La. App. 4 Cir. 9/28/11), 74 So. 3d 1202, 1205 (quoting *Watters v. Dept. of Social Servs.*, 08-977 (La. App. 4 Cir. 6/17/09), 15 So. 3d 1128, 1142-43) (recognizing that proof of causation in a toxic mold case includes proof of actual exposure to the mold, proof that the exposure was a dose sufficient to cause health effects (general causation), and proof of a sufficient causative link between the alleged health problems and the specific type of mold (specific causation)).

to advocate the responsible manufacture of vinyl resins, lifecycle management of vinyl products, and promotion of the value of vinyl to society. The vinyl industry employs over 355,000 people in the United States, at 2,941 manufacturing facilities, and provides an economic value of $54.4 billion to the U.S. economy. VI's membership includes manufacturers with facilities located in the State of Louisiana.

PPFA is a North American trade association comprised of member companies that manufacture plastic piping, fittings and solvent cements for plumbing and related applications, or supply raw materials, ingredients or machinery for the manufacturing process. PPFA's mission is to promote and defend plastic piping systems governed by construction codes. PPFA advances its mission by promoting a regulatory environment in which the superior value of plastic piping products is recognized, providing users with relevant information needed to properly design, specify and install plastic piping systems, and by promoting an understanding of the environmental impact and benefits of thermoplastic piping products.

CLA represents the developers, manufacturers, formulators and distributors of plant science solutions for agriculture and pest management in the United States. CLA's member companies produce, sell and distribute virtually all the crop protection and biotechnology products used by American growers. CLA is dedicated to supporting responsible stewardship of its members' products to promote the health and well-being of people and the environment, and to promote increasingly responsible, science-driven legislation and regulation of pesticides.

LCA is a non-profit Louisiana corporation, composed of sixty-three member companies with over 100 chemical manufacturing plant sites in Louisiana and more than 24,000 Louisiana employees. LCA was formed in 1959 to promote a positive business climate for chemical manufacturing that ensures long-term economic growth for its member companies. LCA works collaboratively with related organizations in order to protect and expand Louisiana's petrochemical manufacturing base. It is critical for the industry to have a unified voice in state governmental activities because judicial, legislative and regulatory actions can affect capital investment and job retention and growth.

I. Plaintiffs Failed to Establish the Threshold Requirement of Proof of Causation – Actual Exposure.

"In a toxic tort case, a plaintiff must first show that he or she was actually exposed to a toxic substance because '[i]f there has been no exposure, there is no causation.'" *Avila v. Willits Envtl. Remediation Trust*, No. 99-3941, 2009 U.S. Dist. LEXIS 67981, *20-21 (N.D. Cal. June

18, 2009) (quoting *Ferris v. Gatke Corp.*, 107 Cal. App. 4th 1211, 1220 n.4 (Cal. Ct. App. 2003)); *see also* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 28, at 405 (2010) ("In any case, plaintiff's exposure to the toxic agent must be established."); EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW, SCIENCE AND THE FJC MANUAL, "Guide to Toxicology" 127, n.38 (B. Black and P. Lee, 1st ed. 1997) ("Proof of a toxic release alone is not sufficient to support a claim for damages in the absence of proof of actual exposure."); *Wright v. Willamette Indus.*, 91 F.3d 1105, 1106 (8th Cir. 1996) ("We agree with [the defendant] that a plaintiff in a toxic tort case must prove the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover."). The notion that proof of exposure to the substance is an essential element of a toxic tort plaintiff's claims, and that without evidence of such exposure the plaintiff's claims collapse, has been described as a "rather obvious proposition." *Mascarenas v. Miles Inc.*, 986 F. Supp. 582, 587-588 (W.D. Mo. 1997) (citing cases).

It further goes without saying that the plaintiff must establish that he or she was actually exposed to a harmful level of the toxic substance at issue. Indeed, courts have consistently dismissed toxic tort claims where the plaintiffs fail to provide sufficient evidence of actual exposure to the alleged toxins at a level capable of causing injury. For example, in *Abuan v. General Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993), the Ninth Circuit noted that although expert reports established that the release of chemicals exposed employees at a power plant to PCBs, the experts made no attempt to compare the varying degrees of exposure levels among the individual plaintiffs. The court held that the experts' conclusions that the plaintiffs had been exposed and, as a group, were at risk for future injury were insufficient to meet the individual exposure requirement of a toxic tort claim and affirmed the entry of summary judgment in favor of the defendants. *Id.*; *see also Gallaway v. Empire Fire & Marine Ins.*, No. 03-113, 2007 U.S. Dist. LEXIS 29714 (W.D. La. Apr. 19, 2007) (granting motions for summary judgment dismissing plaintiffs' claims "because Plaintiffs have failed to create a genuine issue of material fact for trial regarding whether or not they were exposed to harmful levels of HCL."); *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1533 (D. Kan. 1990) (stating that "[i]n cases claiming personal injury from exposure to toxic substances, it is essential that the plaintiff demonstrate that she was, in fact, exposed to harmful levels of such substances," and granting summary

judgment where there was no scientific or expert evidence indicating the level or duration of plaintiff's exposure to the specific toxins at issue).

Here, the plaintiffs offered no scientific proof that each individual plaintiff was actually exposed to the toxic substances at issue, much less that the exposure of each plaintiff was to a harmful level. In fact, the plaintiffs' experts admitted that they did not have or use dose information in formulating their opinions. While some of the plaintiffs did testify as to the "smell, taste, visual, and . . . immediate effects reactions" following the release,[4] such self-serving testimony by itself is insufficient to prove the threshold requirement of actual exposure to a harmful level of the alleged toxins. *See, e.g., Pratt v. Landings at Barksdale*, No. 09-1734, 2013 U.S. Dist. LEXIS 136841, *15-16 (W.D. La. Sept. 24, 2013) ("Plaintiffs further rely upon their own lay testimony regarding the visibility of mold in the property. Yet, '**scientific knowledge** of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs' burden in a toxic tort case.' *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996) (emphasis added). Standing alone, the lay witness testimony of Plaintiffs is insufficient to establish a harmful level of exposure to mold."). Accordingly, the record in this case is entirely devoid of any evidence establishing that any particular plaintiff was exposed to a particular chemical, for any particular dose level, for any period of time. On this basis alone, the plaintiffs' claims should have been dismissed. By allowing the plaintiffs here to nevertheless recover damages, the lower courts have adopted an unprecedented standard for the requisite level of proof in toxic tort cases, essentially writing out the "rather obvious proposition" that a plaintiff must establish actual exposure to a harmful level of the alleged toxin at issue in order to prevail on a toxic tort claim. The decisions have thus profoundly altered the landscape of toxic tort litigation, necessitating review and correction by this Court.

II. Plaintiffs Failed to Set Forth Sufficient Evidence to Establish Specific Causation.

Even assuming that the plaintiffs here demonstrated the threshold requirement of actual exposure (which they did not), their failure to provide adequate proof of specific causation should have precluded each of them from recovering damages in this toxic tort action. General and specific causation are separate and distinct elements of a toxic tort claim, both of which must

[4] *See* Third Circuit decision, p. 7 (quoting Judge Davis).

be established for a plaintiff to prevail.[5] However, the lower courts in this case improperly conflated the two concepts, finding causation satisfied based on evidence that established only general causation, at best.[6]

To be sure, the district courts' findings quoted by the Third Circuit focus primarily on the release of the chemicals, the monitoring data, and the pre-existing characteristics of some of the plaintiffs; they do not even purport to explain the causal link between the release of the chemicals and the actual injuries alleged by the individual plaintiffs.[7] Similarly, the Third Circuit's cursory review of the majority of the expert testimony offered by the plaintiffs demonstrates only that the levels of the chemicals released exceeded safe levels and thus had the "potential" to cause injury to the plaintiffs, and that the plaintiffs' symptoms were "consistent with exposure to the toxic chemicals released."[8] This evidence alone is plainly insufficient to

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[5] *See Faust v. BNSF Ry. Co.*, 337 S.W.3d 325, 333 (Tex. App. 2011) ("The cases—both state and federal—are legion that a plaintiff in a toxic tort case must prove general and specific causation.") (citing cases); *Howell v. Centric Group, LLC*, 508 Fed. Appx. 834, 837 (10th Cir. 2013) ("Even if we assume, as the district court did, that anise oil is capable of causing injuries similar to those Howell complained of, he has provided no evidence that the anise oil was the actual cause of those injuries. . . . Because Howell failed to provide any evidence of specific causation, summary judgment was appropriate."); *Johnson v. Arkema, Inc.*, 685 F.3d 452, 472 (5th Cir. 2012) (affirming the district court's grant of summary judgment because "[e]ven assuming that this evidence suffices to demonstrate that tin oxide is capable of causing restrictive lung disease, thus satisfying general causation, the evidence falls short of satisfying the requirement of specific causation."); *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 355 (5th Cir. 2007) (finding that the district court did not abuse its discretion in excluding the testimony of Dr. Barry Levy as to general causation under *Daubert*, but noting that even if it did, such error was harmless, because the studies relied upon by Dr. Levy were "neither reliable nor relevant for specific causation"); *Plunkett v. Connecticut Gen. Life Ins. Co.*, 285 S.W.3d 106, 121 (Tex. App. 2009) (finding that the expert affidavit submitted by the plaintiffs did not raise a fact issue to defeat summary judgment, as the "affidavit does no more than provide evidence that the type of mold found at the apartment complex is generally capable of causing health problems, but is no evidence of cause-in-fact of any specific resident's health complaints").

[6] Admittedly, there are particularized instances within the ambit of toxic tort cases where specific causation is met simply by the existence of the injury. These are known as "signature diseases," defined as those "so associated with a particular cause that the presence of the disease presumes that cause." *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1402 n.33 (D. Or. 1996). For example, mesothelioma and asbestosis are signature diseases for asbestos exposure, and vaginal clear cell adenocarcinoma is a signature disease of diethylstilbestrol (DES) exposure. *See* Gerald W. Boston, *A Mass-Exposure Model of Toxic Causation: the Content of Scientific Proof and the Regulatory Experience*, 18 Colum. J. Envtl. L. 181, 203 (1993). These signature diseases qualify for a lesser standard of proof of causation because it is accepted as certain that a given substance caused the signature disease. However, in most toxic tort cases, including this one, this rare exception does not apply, as more generic injuries with numerous potential causes are involved (*e.g.*, here, the signature disease exception was never raised, as the plaintiffs' injuries include such common ailments as headaches, sore throat, and aggravated allergies). Proof of specific causation is thus vital to an accurate finding of liability.

[7] *See, e.g.*, p. 8 of the Third Circuit decision (quoting Judge Davis) ("[C]learly, there were sufficient concentrations [of toxic chemicals] to cause effects on people in the community. And that's the finding of the Court."); p. 8 (quoting Judge Ritchie) ("there is other credible evidence to show that the hazardous chemicals released by Georgia Gulf were in the air outside of the plant, including the few air monitoring results obtained by Georgia Gulf."); p. 9 (quoting Judge Ritchie) ("The Plaintiffs in this group of cases each had some pre-existing health problems that would make them more susceptible to injury as a result of exposure to hazardous chemicals from the Georgia Gulf release/explosion/fire.").

[8] Third Circuit decision, pp. 9-11.

establish that the plaintiffs' garden variety ailments, which can result from countless causes, were in fact caused by the release.

Moreover, the testimony of Dr. Barry Levy, an expert in occupational medicine and epidemiology, and local physicians Dr. Robert Looney and Dr. Gerald Mouton wholly failed to satisfy particular requirements for expert opinions regarding specific causation. As the Third Circuit recognized, "Dr. Levy testified as to several epidemiology studies which examined the effects of exposure to hazardous chemicals. Dr. Levy specifically addressed one study that involved exposure to hydrogen chloride released into a community."[9] Critically, epidemiological studies are probative of specific causation ***only*** "if the study shows that the relative risk is greater than 2.0, that is, the product more than doubles the risk of getting the disease."[10] Yet, the studies relied upon by Dr. Levy do not address doubling of the risk. In addition, numerous courts have held that a differential diagnosis – *i.e.*, a patient-specific process of elimination that medical practitioners use to identify the "most likely" cause of a set of signs and symptoms from a list of possible causes[11] – must be performed for an expert's opinion to be admissible regarding causation in toxic tort cases.[12] The importance of a differential diagnosis was explained in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 761 n.31 (3d Cir. 1994):

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[9] *Id.* at p. 10.

[10] *Henricksen v. Conoco Phillips Co.*, 605 F. Supp. 2d 1142, 1158 (E.D. Wash. 2009) (citing *Daubert v. Merrell Dow Pharms. Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995)); *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 524 F. Supp. 2d 1166, 1172 (N.D. Cal. 2007) ("[Epidemiology] studies can also be probative of specific causation, but only if the relative risk is greater than 2.0, that is, the product more than doubles the risk of getting the disease."); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772 (Tex. 2007) (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 717-718 (Tex. 1997) ("While such studies are not necessary to prove causation, we have recognized that 'properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case,' and 'the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.'"); Bert Black and David E. Lilienfeld, *Article: Epidemiologic Proof in Toxic Tort Litigation*, 52 Fordham L. Rev. 732, 769 (April 1984) ("In no case, however, can evidence suffice to establish a causal link if it does not include at least reasonable estimates of exposure levels and durations, and data that reasonably indicate a relative risk greater than 2.").

[11] *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1413 (D. Or. 1996).

[12] *Baker v. Chevron U.S.A. Inc.*, 553 Fed. Appx. 509, 521 (6th Cir. 2013) (citing *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 678 (6th Cir. 2011); *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674-76 (6th Cir. 2010) ("We have held previously that the absence of a differential diagnoses is fatal to the admissibility of an expert's opinion regarding disease causation in cases involving hazardous substances."); *Mancuso, supra*, 56 F. Supp. at 407, 411 (excluding testimony of medical expert, finding her methodology flawed as it was "clear that Dr. Baturay did not even attempt to make a differential diagnosis by realistically assessing the possibility that plaintiffs' symptoms could have been caused by exposure to some substance other than PCBs. She merely announced that there was no such possibility and let it go at that."); *Hall, supra*, 947 F. Supp. at 1413 ("If other possible causes of an injury cannot be ruled out, or at least the possibility of their contribution to causation minimized, then the 'more likely than not' standard for proving causation may not be met."); *Diaz v. Johnson Matthey, Inc.*, 893 F. Supp. 358 (D. N.J. 1995), 375-377 (excluding medical expert's testimony, finding that the major flaw in his opinion was "his method of eliminating other possible causes of [plaintiff's] asthma," and noting that "[w]hile Dr. Auerbach did use standard diagnostic techniques to measure the extent to which [plaintiff] suffered lung impairment, he did little, if anything, to 'rule out alternative causes.'").

> Here, however, if plaintiffs' experts failed to rule out alternative causes, it means that these alternative causes may have been the sole causes of plaintiffs' injuries -- PCBs may not have played any role at all and certainly may not have been sufficient to bring about the plaintiffs' injuries. Testimony that PCBs increased the risk that plaintiffs would contract the injuries that they contracted does not show that PCBs were a substantial factor in those injuries. Moreover, testimony that plaintiffs' exposure to PCBs makes it likely that PCBs were a substantial factor in plaintiffs' injuries cannot reliably establish that PCBs were in fact a substantial factor unless the expert thought about the possibility that other potential causes of those injuries were in fact the sole cause of those injuries.

Yet again, there is no evidence in the record that Dr. Levy, Dr. Looney, or Dr. Mouton made a proper differential diagnosis as to any individual plaintiff.[13]

Notably, as the Third Circuit acknowledged in its decision in this case, Dr. Levy also testified in *Arabie v. CITGO Petroleum Corp.*, 10-244 (La. App. 3 Cir. 10/27/10), 49 So. 3d 529, *affirmed in pertinent part*, 10-2605 (La. 3/13/12), 89 So. 3d 307. In *Arabie*, the Third Circuit explained that Dr. Levy meticulously described his methodology for determining both general causation (*i.e.*, "that slop oil and its ingredients can cause various symptoms and health problems") and specific causation (*i.e.* "that slop oil exposure caused certain symptoms of each specific plaintiff"). 49 So. 3d at 539. And as to specific causation, the Third Circuit stated:

> Dr. Levy detailed his reliance upon information regarding not only the chemicals and chemical mixture at issue, but all relevant information, including the plaintiffs' medical records, interviews, deposition testimony, and other information specific to each individual. Next, he looked at the relevant medical literature, exposure factors, and other factors such as the individual's genetic factors, medications, pre-existing conditions and disorders, infections, allergies, and other exposures, including smoking, that may have caused certain symptoms and illnesses. ***Using this information, Dr. Levy performed what is referred to as a differential diagnosis or, in his field, a differential etiological analysis, to arrive at a reasonable diagnosis of the disease or adverse health outcome and conclusion, weighing and synthesizing all of the evidence in relation to that given individual.***

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[13] To the extent that Dr. Levy responded "yes" when asked by plaintiffs' counsel if he "ruled out" other causes for the plaintiffs' injuries, this generic, check-the-box statement is insufficient to establish causation. *See, e.g., Palmer v. Asarco Inc.*, No. 03-498, 2007 U.S. Dist. LEXIS 57291, *30-33 (N.D. Okla. Aug. 6, 2007) (finding doctor's testimony unreliable because despite testifying in his deposition that he did consider other causes, it was not clear how he ruled in or ruled out different factors because of the general nature of his testimony); *Wooley v. Smith & Nephew Richards, Inc.*, 67 F. Supp. 2d 703, 709 (S.D. Tex. 1999) (excluding doctor's opinion where his report lacked any analysis or explanation for how he ruled out other potential causes of the plaintiff's injury); *Cornell v. 360 W. 51st St. Realty, LLC*, 9 N.E. 3d 884, 900 (N.Y. 2014) (finding that plaintiff's expert failed to establish specific causation through a differential diagnosis because he "does not explain what other possible causes he ruled out or in, much less why he did so. He states that he performed a panoply of diagnostic tests, but does not give any results. . . . Instead, he broadly states his conclusion that [plaintiff's] medical problems are mold-induced, based on a differential diagnosis.").

Id. at 541. In allowing Dr. Levy's opinion to provide a basis for the plaintiffs' recovery in the instant matter, given that the studies he relied upon were insufficient evidence of specific causation and his failure to perform the requisite differential diagnosis, the Third Circuit's decision not only conflicts with the weight of the jurisprudence nationwide, but it is also inconsistent with its own prior decision, which was affirmed by this Court just over two years ago. This Court should grant Georgia Gulf's writ application in order to correct the lower courts' departure from established precedent, both from this State and across the country.

Finally, in failing to apply the proper standard of proof for causation in this toxic tort case, the lower courts necessarily utilized the *post hoc ergo propter hoc* fallacy, which courts have repeatedly cautioned against employing as a means of establishing causation:

> The issue of the chronological relationship leads to another important point - - proving a temporal relationship between taking Metabolife and the onset of symptoms does not establish a causal relationship. In other words, simply because a person takes drugs and then suffers an injury does not show causation. Drawing such a conclusion from temporal relationships leads to the blunder of the *post hoc ergo propter hoc* fallacy.
>
> The *post hoc ergo propter hoc* fallacy assumes causality from temporal sequence. It literally means "after this, because of this." BLACK'S LAW DICTIONARY 1186 (7th ed. 1999). It is called a fallacy because it makes an assumption based on the false inference that a temporal relationship proves a causal relationship.

McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1243 (11th Cir. 2005).[14] Indeed, courts nationwide have excluded expert testimony based solely on this circular reasoning, finding these opinions unable to withstand *Daubert* scrutiny.[15]

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[14] *See also Austin v. Children's Hosp. Med. Ctr.*, No. 95-3880, 1996 U.S. App. LEXIS 22329, *7 (6th Cir. July 26, 1996) (finding that *post hoc ergo propter hoc* reasoning alone is insufficient to create a material issue of causation); *Haller v. Astrazeneca Pharms. LP*, 598 F. Supp. 2d 1271, 1301 (M.D. Fla. 2009) ("merely demonstrating a temporal connection between a drug and a disease diagnosis is insufficient to prove a causal connection"); *Young v. Burton*, 567 F. Supp. 2d 121, 140 (D.D.C. 2008) ("Drawing conclusions about causation from temporality is a common logical fallacy known as *post hoc ergo propter hoc* (after the fact, therefore because of the fact), and is as unpersuasive in the courts as it is in the scientific community."); *Nguyen Thang Loi v. Dow Chem Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 32 (E.D.N.Y. 2005) ("*Post hoc ergo propter hoc* remains a logical fallacy unacceptable in toxic tort law.").

[15] *See, e.g., Rolen v. Hansen Bev. Co.*, 193 F. Appx. 468, 473 (6th Cir. 2006) ("Expert opinions based upon nothing more than the logical fallacy of *post hoc ergo propter hoc* typically do not pass muster under *Daubert*."); *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607 (7th Cir. 1993) (affirming district court's exclusion of expert testimony "based merely on the temporal relationship between the ingestion of ibuprofen and the injury"); *Leathers v. Pfizer, Inc.*, 233 F.R.D. 687, 696 (N.D. Ga. 2006) ("While the temporal relationship between a drug and symptoms may have some utility to a clinical practitioner . . ., heavy reliance on such a relationship does not withstand scrutiny under *Daubert*."); *Roche v. Lincoln Prop. Co.*, 278 F. Supp. 2d 744, 764 (E.D. Va. 2003) (excluding expert opinion in a mold case "based primarily, if not solely, on temporal proximity"); *Hannan v. Pest Control Servs.*, 734 N.E.2d 674, 682 (Ind. Ct. App. 2000) ("In sum, it is apparent from the proposed testimony of the experts that they were relying on a mere temporal coincidence of the pesticide application and the Hannans' alleged and self-reported illness. Such a relationship is insufficient to establish a prima facie case on the element of causation.").

Thus, allowing the Third Circuit's decision to stand not only significantly reduces the standard of proof for toxic tort claims brought in Louisiana, but also condones an illogical theory for establishing causation that has been rejected by courts across the country. Without doubt, the Third Circuit's decision results in the unprecedented and inconsistent treatment of toxic tort litigation, rendering Louisiana an outlier in its construction of a prevailing area of the law. Fundamental fairness dictates that members of the chemical and manufacturing industries are entitled to certainty regarding the basic standard of causation in toxic tort cases. The Third Circuit's decision is a game changer, upending previously relied upon settled law of causation applicable to toxic tort cases in Louisiana. This Court should grant writs to reverse this fundamental misapplication of well-established legal principles and prevent the significant repercussions necessarily flowing to industries vital to this State if the Third Circuit decision remains intact.

III. Any Change in the Standard of Causation for Toxic Tort Claims Must Come From the Legislature, Not the Courts.

The Third Circuit's decision plainly violates the constitutional principle of separation of powers. By affirming the district courts' application of a lesser standard of causation, the Third Circuit engaged in a profound deviation from the traditional meaning of causation in tort law, implicating policy concerns and societal issues better addressed by the state legislature. Numerous courts have recognized that significant changes to a state's substantive tort law, specifically regarding principles of causation, must be made through the legislative process and not unilaterally by the courts themselves.

For example, in *Smith v. Parrott*, 833 A.2d 843 (Vt. 2003), the Vermont Supreme Court rejected the "loss of chance" doctrine as a theory of tort recovery, thoroughly explaining:

> Although some of the arguments in favor of the loss of chance doctrine are appealing, we are mindful that it represents a significant departure from the traditional meaning of causation in tort law. Implicated in such a departure are fundamental questions about its potential impact on not only the cost, but the very practice of medicine in Vermont; about its effect on causation standards applicable to other professions and the principles – if any – which might justify its application to medicine but not other fields such as law, architecture, or accounting; and ultimately about the overall societal costs which may result from awarding damages to an entirely new class of plaintiffs who formerly had no claim under the common law in this state. In short, we are persuaded that the decision to expand the definition of causation and thus the potential liability of the medical profession in Vermont "involves significant and far-reaching policy concerns" more properly left to the Legislature . . .

833 A.2d at 848 (internal citations omitted). *See also In re Fibreboard Corp.*, 893 F.2d 706, 711-712 (5th Cir. 1990) (vacating consolidation of nearly 3000 class members' asbestos claims for trial, finding that such procedure could not address individual causation issues and would therefore alter substantive Texas law, and noting that the class members' arguments for such procedure "are compelling, but they are better addressed to the representative branches -- Congress and the State Legislature."); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1201 (6th Cir. 1988) (regarding causation in a chemical exposure case: "Although it is argued that a lesser standard of proof allocates loss on a socially acceptable basis, it is the province of the state legislatures to make such changes as they have done in some areas by establishing 'no-fault' or other alternate systems."); *Kemper v. Gordon*, 272 S.W.3d 146, 153-153 (Ky. 2008) (rejecting the doctrine of lost or diminished chance for tort recovery based on the reasoning of *Smith, supra*, and noting "[i]n short, this Court declines to expand tort liability by judicial legislation in a matter of such far reaching consequence to our citizens."); *Wilkins v. Lamoille County Mental Health Servs.*, 889 A.2d 245, 249-250 (Vt. 2005) (recognizing "the difficulties of proof that may inhere in meeting the traditional causation standard in malpractice cases, and the potentially harsh outcomes that may result[,]" but noting that "[s]uch complexity does not, however, militate in favor of lowering the causation threshold, but rather reinforces *Smith*'s conclusion that such a departure implicates an array of medical-practice, economic, and social issues better addressed through the legislative process."); *Ayers v. Jackson*, 525 A.2d 287, 308 (N.J. 1987) (rejecting plaintiffs' cause of action for enhanced risk of disease, recognizing "the substantial difficulties encountered by plaintiffs in attempting to prove causation in toxic tort litigation[,]" but stating that "this dilemma could be mitigated by a legislative remedy that eases the burden of proving causation in toxic-tort cases where there has been a statistically significant incidence of disease among the exposed population. . . . We invite the legislature's attention to this perplexing and serious problem.").

These cases make clear that the district courts and the Third Circuit usurped the role of the Louisiana Legislature in significantly altering substantive tort law by applying a reduced standard of causation to the toxic tort claims at issue. The implications of this expansion of tort liability are inescapable and far-reaching – if this lessened standard of causation is applied within the Third Circuit, but is not accepted in the other circuits within the State or in jurisdictions outside of Louisiana, both plaintiffs and defendants alike will be subject to differing burdens and

inconsistent obligations in litigation based on the same causes of action. Moreover, a relaxed standard of causation will incentivize frivolous claims and at the same time amplify both the scope and the uncertainty of a defendant's potential liability, thwarting the dual purposes of toxic tort litigation (*i.e.*, to compensate individuals actually harmed by toxic exposure and to deter the conduct of the wrongdoer to prevent future injuries). Thus, the decision to alter the traditional standard of causation in toxic tort cases should not be made lightly and certainly not by a single appellate court, as it raises critical policy considerations that must be carefully balanced by the proper branch of government. The lower courts' encroachment on matters within the province of the state legislature, in blatant violation of the fundamental notion of separation of powers, cannot be sanctioned by this Court.

IV. A Reduced Causation Standard Will Have a "Chilling Effect" on Industry Development.

Of significant concern to *amici curiae*, a lower standard of causation in toxic tort cases will have a severe impact on the growth of the business, chemical, and manufacturing industries, affecting all facets of the global economy. These industries are essential in both the extraordinary advancements that they make possible, as well as the ordinary, day to day functions for which they are responsible. The benefits that have been obtained through the constant development of these industries are immeasurable.

In deciding whether to expand the scope of liability in cases involving toxic torts, the importance of the advancement of these industries and the inevitable consequences from broader liability cannot be ignored. As Justice Breyer recognized nearly two decades ago:

> [M]odern life, including good health as well as economic well-being, depends upon the use of artificial or manufactured substances, such as chemicals. And it may, therefore, prove particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate production, points towards the right substances and does not destroy the wrong ones.

Gen. Elec. Co. v. Joiner, 522 U.S. 136, 148-149 (U.S. 1997) (Breyer, J., concurring). Justice Breyer has further acknowledged that "a decision wrongly granting compensation, although of immediate benefit to the plaintiff, can improperly force abandonment of the substance. Thus, if the decision is wrong, it will improperly deprive the public of what can be far more important benefits – those surrounding a drug that cures many while subjecting a few to less serious risk,

for example." Stephen Breyer, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, Introduction, at 3-4 (Federal Judicial Center ed., 2d ed. 2000).

Justice Breyer hits the nail on its head. A lessened standard of causation for toxic tort claims will inevitably lead to recovery of damages by individuals who were not actually harmed by the conduct at issue, which in turn will hinder the development of valuable substances that sustain the environment, support the economy, and enhance the quality of human life. The detrimental effect of the Third Circuit's decision on these vital industries throughout the nation and the world is unmistakable. Indeed, without the requisite proof of specific causation, every time a minor hiccup occurs at a chemical or manufacturing facility in Louisiana, the floodgates are now open for companies to be held liable for bogus injuries otherwise not recoverable had the specific causation requirement been enforced. And, the prospect of a slippery slope of a reduced standard of causation being applied beyond the chemical and manufacturing industries is daunting yet real for all businesses in Louisiana. In other words, the evisceration of specific causation will naturally increase the cost of doing business in Louisiana. Exercise of this Court's supervisory jurisdiction is warranted to correct the Third Circuit's decision.

V. Conclusion

The Third Circuit's decision unilaterally adopts a reduced standard of causation in toxic tort cases that (i) runs afoul of the traditional application of the causation requirement both in this State and across the country, (ii) unconstitutionally violates the separation of powers doctrine, and (iii) effectively halts the advancement of industries on which modern life depend. The ill effects of this decision go well beyond this particular case. This Court should grants writs in this matter and reverse the Third Circuit's decision.

Respectfully submitted,

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VERIFICATION UNDER RULE X, SECTION 2(D)

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, personally came and appeared Joe B. Norman and stated that he is attorney for American Chemistry Council, National Association of Manufacturers, Vinyl Institute, Plastic Pipe and Fittings Association, CropLife America, and Louisiana Chemical Association in the above and foregoing brief of *amici curaie*; that he has prepared and read the said application and that all the allegations contained therein are true and correct to the best of his knowledge, information, and belief; that notifications of this filing are being delivered on this date via United States mail to the Honorable David A. Ritchie, Judge, 14th JDC, Division "E", P.O. Box 3210, Lake Charles, LA 70602; Honorable D. Kent Savoie, Judge, 14th JDC, Division "A", P.O. Box 3210, Lake Charles, LA 70602; Honorable Clayton Davis, Judge, 14th JDC, Division "B", P.O. Box 3210, Lake Charles, LA 70602; and to the Honorable Kelly McNeely, Clerk of Court, Third Circuit Court of Appeal, 430 Fannin Street, Shreveport, LA 71101; and to all counsel of record via e-mail and/or U.S. Mail postage prepaid and properly addressed, at the business address listed below:

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New Orleans, Louisiana this 10th day of October, 2014.

Joe B. Norman

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 10TH DAY OF OCTOBER, 2014

KATHRYN ZAINEY
NOTARY PUBLIC
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State of Louisiana
My Commission Is Issued For Life