

Case No. 131710

In The
Supreme Court of Illinois

GRIFFITH FOODS INTERNATIONAL, INC., GRIFFITH
FOODS GROUP, INC., AND STERIGENICS, U.S., LLC,

Plaintiffs-Appellees,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, P.A.,

Defendant-Appellant.

**AMICI CURIAE BRIEF OF CHEMICAL INDUSTRY COUNCIL OF
ILLINOIS AND THE AMERICAN CHEMISTRY COUNCIL IN
SUPPORT OF THE PLAINTIFFS-APPELLEES**

On Certified Question from The United States Court of Appeals for the
Seventh Circuit (Case Nos. 24-1217 and 24-1223). There on appeal from the
United States District Court for the Northern District of Illinois, Case Nos.
1:21-cv-6403 & 1:21-cv-4581, Honorable Mary M. Rowland, Judge Presiding.

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INTERESTS OF THE AMICI

The Chemical Industry Council of Illinois and the American Chemistry Council submit this brief as *Amici Curiae* in support of the Plaintiffs-Appellees (“Plaintiffs”).

The Chemical Industry Council of Illinois (“CICI”) has represented the chemical industry in Illinois since 1951 and today continues to serve as the unified voice of a sector that directly employs 46,206 people (8.1% of Illinois’ manufacturing workforce) with average annual wages of \$127,435.00 and further supports 231,200 jobs in the state. CICI has 205 members representing over 683 facilities in Illinois. In all, the business of chemistry in Illinois generated \$41.5 billion in chemistry products and chemistry exports of \$9.5 billion, making it the state’s second largest industry in the state and its largest exporter. Additionally, CICI advances responsible policies that prioritize safety and protection of the environment (Core Toxics Release Inventory emissions are down 87% since 1988), while growing the industry and making Illinois a better place to create jobs. *See generally* <https://www.cicil.net>.

The American Chemistry Council (“ACC”) represents more than 190 of the leading companies engaged in the business of chemistry—a catalyst for economic growth and social development helping to resolve some of the most challenging problems facing the world today. Its members are companies of all sizes and are engaged in every aspect of the business of chemistry. In the United States, the business of chemistry generates \$633 billion annually, and employs 554,000 Americans with average wages of \$100,000 annually. The

business supports another 4.1 million jobs with annual exports of \$164 billion, making the United States the second largest chemical producer in the world. ACC's members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. *See generally* <https://www.americanchemistry.com>. From consumer products like lotions and deodorants to safety equipment like helmets and eyewear, chemistry plays an essential role in products and technologies used by people every day. *Id.*

CICI and ACC support common sense and scientifically based approaches to major public policy issues, including but not limited to, environmental, health, and safety performance. As part of their advocacy efforts, ACC and CICI occasionally participate in litigation arising from those proceedings that affect their members

Like Plaintiffs, many of *Amici's* members hold various types of emissions permits, are regulated by the Environmental Protection Agency and/or the Illinois Environmental Protection Agency and, given their operations, are purchasers of insurance policies. These members are subject to the same or similar reporting and permitting requirements under state and federal law as Plaintiffs-Appellees. Thus, members of the *Amici* have a strong interest in receiving the value of the commercial general liability insurance policies they purchased decades ago to insure them against liabilities arising from their ordinary business operations in compliance with environmental laws, regulations, and permits.

In short, the *Amici's* members are similarly situated policyholders that may be involved with future litigation under Illinois law for their lawful, permitted emissions, and thus have a direct interest in the controlling precedent the Court will establish here. The issues raised here are significant beyond just the instant case concerning ethylene oxide and the Clean Air Act and implicate liability under other environmental laws and in other lawful activities engaged in by *Amici's* members in the ordinary course of their business. These members have previously been abandoned by their insurers and have a strong interest in retaining coverage for these permitted activities under previously purchased insurance policies in an ever-changing regulatory and scientific landscape.

INTRODUCTION

The Seventh Circuit has requested this Court to weigh in on a critical issue of Illinois insurance law – whether the pollution exclusion in the standard commercial general liability (“CGL”) policy form excludes coverage for liabilities arising from permitted environmental emissions. It asks whether this Court will affirm the decision of the Illinois Appellate Court in *Erie Ins. Exch. v. Imperial Marble Corp.*, 2011 IL App (3d) 100380 (2011), which held that a CGL insurer owed a duty to defend its insured in a lawsuit alleging harm arising from emissions permitted under state and federal law. The *Amici* submit that *Imperial Marble* represents Illinois law and request that this Court endorse that decision.

However, the *Amici* here write for different purposes: (1) to demonstrate that the intent of the pollution exclusion, as represented by the insurance industry to its regulators, is to exclude coverage for knowing polluters and governmental clean-up costs under environmental statutes and not to exclude coverage for liabilities arising from ordinary business activities, such as permitted emissions expressly authorized by permit; (2) to detail the permitting process and ongoing compliance necessary for regulated entities in Illinois (like *Amici*’s members) to maintain an emissions permit and explain why emissions within permitted limits under the controlling environmental laws are not traditional environmental pollution, and (3) to counter certain misstatements made by the insurance industry relating to the availability of

pollution coverage and the effects of affirming the 2011 *Imperial Marble* decision.

As this Court set forth in *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473 (1997), the insurance industry indisputably represented to its regulators when seeking approval for the pollution exclusion that it was “intended solely to protect insurers from having to defend and indemnify insureds in connection with government clean-up costs” and did not exclude liabilities from ordinary business operations from coverage. The insurance industry further represented that the pollution exclusion would only apply to knowing polluters. Yet, despite these representations, once that exclusion gained approval, insurers immediately asserted that the exclusion’s application was much broader and excluded virtually all pollution-related liability from coverage. Accordingly, this Court in *Koloms* (as well as other courts across the country), rejected a literal reading of the exclusion and required the insurance industry to honor its word by limiting the scope of the exclusion to what was represented – *i.e.*, traditional environmental pollution.

Contrary to the insurers’ arguments, traditional environmental pollution cannot be defined by the oft-rejected and overbroad literal interpretation of the language of the pollution exclusion and instead is defined by Illinois precedent and the relevant regulatory statutes – here, the Clean Air Act (“CAA”) and Illinois Environmental Protection Act (“Illinois Act”). One purpose of the CAA is to ensure “air pollution prevention...and air pollution

control at its source...”, and, therefore, permitted or otherwise lawful emissions in the ordinary course of business under their auspices cannot, by definition, be unlawful pollution as contemplated by pollution exclusion. 42 U.S.C. § 7401(a)(3). Thus, based on the insurance industry’s representations, the statutory definition, permitting scheme, and permit shields contained in these laws, companies operating within permitted limits reasonably believe that any emissions in compliance with their permit are not the type of “traditional environmental pollution” that the insurance industry sought to prohibit when first adopting the exclusion. Rather, emissions within permitted limits are covered as part of the ordinary business operations of the permittee.

In an effort to deflect attention away from the insurance industry’s misleading conduct, one insurer *amici* seeks to shift blame to the insureds for not purchasing specialized pollution insurance in the 1980s to cover environmentally related claims. Yet, pollution insurance was largely unavailable at that time and the coverage that was available typically only covered environmental remediation costs – the liability that is actually commonly excluded from the CGL policy under the pollution exclusion – and not other risks, such as third-party tort claims arising from an insured’s permitted emissions like the Plaintiffs face here. In addition to not being a realistic option, based on the insurance industry’s representations of coverage under the CGL policy and the CAA’s declaration that permitted emissions are not pollution, a regulated entity in the 1980s would have had no reason to

purchase such coverage when it had already purchased the CGL insurance that was represented to cover claims from ordinary business operations, such as permitted emissions. Pollution insurance is a false equivalency.

The insurers finally argue that allowing coverage for permitted emissions is a moral hazard and will lead to more pollution, increased insurance costs, and a litany of other woes. These doomsday predictions are a familiar refrain from the insurance industry and vastly overblown. Allowing coverage for permitted emissions provides an incentive for regulated entities to comply with their permits and regulatory requirements and is not a moral hazard. Moreover, the insurance industry regularly screams that the sky is falling and claims that its very existence is at stake whenever asked to cover large losses. That claim is simply not true. *Koloms* has been the law in Illinois since 1997, and *Imperial Marble* has been the law in Illinois since 2011. The industry has clearly not abandoned the Illinois market nor sought to amend the pollution exclusion to exclude coverage for permitted emissions. In fact, the insurance industry (including several of the insurers submitting *amicus* briefs to this Court) are reporting record profits, amidst years of steady premium increases despite repeatedly crying wolf. Additionally, industries are not relocating to Illinois in order to pollute and gain insurance coverage for their permitted emissions. These arguments can be given no credence.

Accordingly, *Amici* request that this Court hold, as the district court did, that lawful, permitted emissions are ***not*** subject to the pollution exclusion in a commercial general liability policy.

ARGUMENT

I. The Pollution Exclusion Does Not and Was Not Intended to Exclude Legally Authorized Emissions from Coverage.

A. This Court Found in *Koloms* That the Historical Purpose of the Pollution Exclusion Was to Exclude Governmental Clean-up Costs and “Knowing” Pollution from the Scope of Coverage.

In *Koloms*, this Court restricted the application of the pollution exclusion “only to those injuries caused by traditional environmental pollution.” 177 Ill.2d at 494.¹ The Plaintiffs and supporting *amici* discuss the *Koloms* decision at length, so the *Amici* here focus on *why* the pollution exclusion was so limited in *Koloms*, *Imperial Marble*, and other decisions, since that very same reasoning dictates the conclusion that permitted air emissions do not constitute “traditional environmental pollution.”

In *Koloms*, the insureds recounted that the pollution exclusion was “intended solely to protect insurers from having to defend and indemnify insureds in connection with government clean-up costs” and expressly not

¹ In reaching this decision, the *Koloms* Court rejected a literal reading of the pollution exclusion based on its “overbreadth.” *Id.* at 487-88. To the extent that National Union or the insurer *amici* seek to re-litigate *Koloms* by again urging this Court to adopt a literal interpretation of the pollution exclusion, those claims should be summarily rejected.

intended to exclude liabilities from ordinary business operations from coverage. *Id.* at 483-84. This recitation was supported by the “well-documented and relatively uncontroverted” history of the “events leading to the insurance industry’s adoption of the pollution exclusion.” *Id.* at 489. This history was articulated in *Morton Int’l, Inc. v. Gen. Acc. Ins. Co.*, 629 A.2d 831, 850 (N.J. 1993), which determined that “the occurrence-based policies, drafted before large scale industrial pollution attracted wide public attention, seemed tailor-made to extend coverage to most pollution situations.” Around the same time, the CAA and other environmental statutes were amended or enacted to include strict liability provisions for cleaning up the environment. In the wake of this legislation, environmental disasters like Times Beach, Love Canal, and Torrey Canyon became highly publicized. *Koloms*, 177 Ill.2d at 490. This explosion of environmental exposure caused the insurance industry to draft “what was eventually to become the pollution exclusion.” *Id.* (citing *Morton*, 629 A.2d at 849-50).

The *Koloms* Court, based on this uncontroverted history, took the insurance industry at its word and found that the “purpose of the current exclusion, like its predecessor, is to **‘to exclude governmental clean up costs from [the scope of] coverage.’**”) *Id.* at 492 (emphasis added) (citation omitted); see also *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1216 (Cal. 2003) (“[T]here appears to be little dispute that the pollution exclusion was adopted to address the enormous potential liability resulting from anti-

pollution laws enacted between 1966 and 1980”). The Court sided with those courts which have restricted the exclusion’s otherwise potentially limitless application to those hazards “traditionally associated with environmental pollution” and based its decision largely on the drafting history of the exclusion, “which reveals an intent on the part of the insurance industry to so limit the clause.” *Koloms*, 177 Ill.2d at 489.

Additionally, the drafting and regulatory history of the pollution exclusion is replete with statements by the insurance industry showing the exclusion was intended only to exclude liability arising from knowing pollution. *Morton*, 629 A.2d at 850 (citing Francis X. Bruton, *Historical Liability and Insurance Aspects of Pollution Claims, Proceedings of Insurance, Negligence and Compensation Law Section*, ABA, 1971, at 311) (“the pollution-exclusion clause allowed the underwriters ‘to perform their traditional function as insurers of the unexpected event or happening and yet [did] not allow an insured to seek protection from his liability insurers if he knowingly pollute[d].’”) This point is not seriously in controversy. *See Id.* (citation omitted) (“By the use of the pollution-exclusion endorsement [c]overage for willful, intentional or expected *violations* was to be excluded”) (emphasis added)

Accordingly, *Koloms* stands for the proposition that the pollution exclusion must be limited to its historical purpose – *i.e.*, protecting insurers from governmental clean-up costs and other liability arising from traditional environmental contamination from knowing polluters. It is these liabilities and

not liabilities from ordinary business operations, such as permitted emissions, that are excluded by both versions of the pollution exclusion.

B. Permitted Emissions Are Not Knowing or Traditional Environmental Pollution

Defendant and the insurer *amici* argue that environmental laws have no bearing on whether lawful emissions pursuant to a state-approved permit constitute traditional environmental pollution. They are wrong. The literal application of the language of the pollution exclusion has already been rejected by this Court and has no role in defining traditional environmental pollution. *Koloms*, 177 Ill.2d at 487-88. Thus, the environmental statutes control the outcome.

1. Permitted Emissions Are Not Pollution Under the Clean Air Act and Illinois Environmental Protection Act.

The CAA was enacted with the goal of *preventing air pollution*. See 42 U.S.C. § 7401(c). To achieve this purpose, the CAA created a comprehensive framework where federal and approved states work together to manage emissions for “pollution prevention.” 42 U.S.C. § 7401(a)(3)-(4); (c). The CAA relies on a “cooperative federalism” approach under which responsibility for ensuring air quality controls is shared between the states and the Environmental Protection Agency (“EPA”). *GenOn REMA, LLC v. U.S. E.P.A.*, 722 F.3d 513, 516 (3d Cir. 2013) (“This ‘cooperative federal’ structure is a defining feature of the statute.”).

Under the CAA, the EPA is authorized to write air quality standards and states (like Illinois) are empowered to achieve those standards, in part, by issuing permits and overseeing compliance. *See e.g.* 42 U.S.C. § 7409; 42 U.S.C. § 7412; 415 ILCS 5/39.5(3) & (9). In drafting the CAA, Congress expressly delegated authority to federal and state governments (and their regulatory arms) for determining appropriate levels of emissions to prevent pollution. 42 U.S.C. § 7401(a)(3)-(4). In implementing those standards, the Illinois General Assembly vowed “to restore, maintain, and enhance the purity of the air of this State in order to protect health, welfare, property, and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary *to prevent pollution.*” 415 ILCS 5/8 (emphasis added).

By definition, a permitted emission under the CAA or Illinois Act is not traditional environmental pollution. Otherwise, no permit could have been issued for the subject emissions. 42 U.S.C.A. § 7661c(a) (“Each permit issued under this subchapter shall include enforceable emission limitations and standards... and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.”); 415 ILCS 5/9.1(d)(2) (“no person shall... construct, install, modify or operate any equipment, building, facility, source or installation... except in compliance with the requirements of such Sections and federal regulations...without a permit granted by the Agency whenever a

permit is required...”). In other words, permits are only issued *after* the regulating agencies determine a facility will not emit traditional environmental pollution.

During the relevant timeframe, the Illinois Environmental Protection Agency (“IEPA”), under authority delegated by the EPA, has expressly authorized Plaintiffs to lawfully emit ethylene oxide (“EtO”) within permitted limits as part of their routine operations. The emission of EtO within those authorized limits is, by statutory definition, neither pollution nor traditional environmental pollution.

2. *An Entity Operating Within the Limits of an Air Emissions Permit Is Not a Polluter.*

Contrary to the assertions of Defendant and the insurer *amici*, air emissions operating permits are not issued on a whim. In order to obtain an air emissions permit, an applicant must complete a rigorous review of the applicable federally enforceable state air quality requirements and federal regulations. *See, e.g.*, 415 ILCS 5/39.5. This review often involves retaining an expert air emissions consultant and an environmental lawyer to navigate the complex regulatory process.² Permittees must submit a compliance plan detailing how the emission units will comply with applicable requirements. 415

² Illinois EPA’s air permitting guidance explains that “[t]he CAAPP application process is detailed and complex and will typically require professional assistance” *See Does My Business Need an Air Pollution Control Permit?* at 7, *available at* <https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/small-business/publications/documents/airpermit2016.pdf>.

ILCS 5/39.5(5)(d); 35 Ill. Adm. Code § 201.241. The completed application is reviewed by the permitting authority, the EPA, and sometimes adjoining states. 42 U.S.C. § 7661(d); 415 ILCS 5/39.5(3) & (9). Applications also involve public notice and an opportunity for objections, comments, and a hearing on the proposed permit. 415 ILCS 5/39.5(8). Only after that multi-step review process is an operating permit issued; and once issued, the permit includes all applicable air quality requirements that must be met. *See Env't Integrity Project v. United States Env't Prot. Agency*, 969 F.3d 529, 536 (5th Cir. 2020) (“Title V’s purpose is to provide each source a single permit that contains and consolidates all the information it needs to comply with the Act” and thus, a Title V permit “is a source-specific bible for Clean Air Act compliance.”).³

Once a permit is received, the permittee becomes subject to a rigorous ongoing compliance process. Permittees must maintain and implement complex and robust operational requirements and control technology to maintain air emissions within permitted limits. 415 ILCS 5/39.5(7)(a). This includes regular monitoring and recordkeeping, analysis of data and sampling, identification and remedying of deviations, and constantly evolving to stay

³ Major sources of air emissions are governed by the CAA’s Title V Permit Program, known as the Clean Air Act Permit Program (CAAPP) in Illinois. Title V requires that all “major sources” of air emissions obtain a permit establishing source level emissions limitations. 42 U.S.C. §§ 7661-7661(f); 415 ILCS 5/39.5(7)(a). Illinois administers the CAAPP with support and approval from the EPA. 415 ILCS 5/39.5(3) & (9). All CAAPP permits issued by the IEPA must comply with the state implementation plan and be submitted and approved by EPA. 40 C.F.R. § 70; 42 U.S.C. § 7661(d); 415 ILCS 5/39.5(3) & (9).

compliant with current regulations. 415 ILCS 5/39.5(7)(f)-(p). Permittees are subject to ongoing inspection by regulatory authorities. 415 ILCS 5/39.5(7)(p)(2). As such, companies must periodically make significant investments to ensure that their air emissions meet applicable state and federal requirements.

Accordingly, a permittee may spend millions of dollars over the lifetime of the facility in fees and on technical consultants, environmental attorneys, control equipment (like scrubbers), building improvements, monitoring, reporting and investments in dedicated employees.⁴ This is no simple or easy process.

An issued permit incorporates limitations on what may be lawfully discharged to prevent pollution. Armed with the knowledge of these prescribed limits, permittees can operate knowing their operations comply with emissions standards. *See* 45 Fed. Reg. 33290, 33312 (May 19, 1980) (“[O]ne of the most useful purposes of issuing a permit is to prescribe with specificity the requirements that a facility will have to meet, both so that the facility can plan and operate with knowledge of what rules apply, and so the permitting authority can redirect its standard-setting efforts elsewhere.”). This is invaluable because the EPA and IEPA may seek civil penalties for violations for thousands of dollars per violation per day. 415 ILCS 5/42(a); 42 U.S.C. §

⁴ Once permitted, operation fees range from \$235- \$4,112 per year for smaller sources. *See, supra*, fn.2 at p. 9. Major sources have a range of annual fees from \$2,150 – up to \$294,000 per year. *Id.*

7413(d)(1). Therefore, a reasonable policyholder would expect that its lawful emissions would not constitute traditional environmental pollution or be excluded from coverage by a pollution exclusion.

Additionally, a permit protects permit holders who are in compliance with their limits through a “permit shield.” Permit programs under the CAA explicitly state that compliance with a permit bars subsequent enforcement under those laws.⁵ Under § 70.6(f) of the CAA:

... the permitting authority may expressly include in a part 70 permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of the permit issuance

(internal citations omitted); *see also* 42 U.S.C. § 7661c. The Illinois Act has a similar provision. 415 ILCS § 5/39.5(5)(p); 35 Ill. Adm. Code § 201.245.⁶ Thus, permit holders who comply with the terms of their permit are immunized from being deemed in violation of the CAA by the relevant enforcement agencies or under the citizen suit provisions.

⁵ Other major federal environmental statutes like the Clean Water Act contain analogous permit shield language. *See* 33 U.S.C § 1342(k).

⁶ Even before the concept of the permit shield was formally codified in the CAA and Illinois Act, the IEPA (in conjunction with the Illinois Pollution Control Board) had long had broad authority to limit liability for compliance with a valid air emissions permit. Indeed, in commentary to rulemaking for “Emission Standards” in 1972, the Illinois Pollution Control Board stated “the basic issue with respect to an operating permit will be whether or not the terms of the construction permit have been met, since compliance with them should assure compliance with the law and regulations. *In the Matter of Emission Standards*, 1972 WL 8146, at *4 (Ill. Pol. Control Bd. Apr. 13, 1972).

The purpose of the permit shield is two-fold. First, it relieves the permittee from having to litigate an enforcement action regarding whether its permits are sufficiently strict. *Atlantic States Legal Found. v. Eastman Kodak*, 12 F.3d 353, 357 (2d Cir. 1993). Second, it provides much-needed certainty to a permit holder knowing that it is immune from being in violation of the Act so long as it complies with the permit.⁷ See 45 Fed. Reg. 33290, 33311 (May 19, 1980) (stating the permit shield provision “gives the permittee the security of knowing that, if it complies with its permit, it will not be enforced against for violating some requirement of the appropriate Act”).

Therefore, a reasonable policyholder would expect that after meeting these stringent standards and obtaining a permit shield, its lawful emissions would not constitute “traditional environmental pollution”—especially since the relevant government agency has already concluded that such action is not unlawful pollution. Rather, its authorized emissions are simply part of its

⁷ The certainty provided by the permit shield is critical. For one, the whole purpose behind the “cooperative federalism” framework in Title V and, on a more micro level, the Illinois CAAPP, is so that Illinois permit holders have a well-established target for compliance with state-issued permits and other federal requirements. By establishing clear boundaries as to what constitutes lawful emissions, the permitting process instills confidence in Illinois businesses by knowing that they will be protected from liability arising from the very operations approved by the EPA and the IEPA. *U.S. v. Murphy Oil, USA, Inc.*, 143 F. Supp. 2d 1054, 1101 (W.D. Wis. 2001) (recognizing one purpose of the permitting process “is to provide regulated entities with a degree of finality and certainty once regulated determinations have been made for a facility”); see also *N. Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 301 (4th Cir. 2010) (“the fact that the process has been regulated in such detail has contributed to its inclusiveness and predictability”).

ordinary business operations. Most importantly here, a lawful permittee would not reasonably believe that any liability related to its lawful, permitted emissions would be excluded from coverage by a pollution exclusion.⁸

Defendant asserts that the fact that the Plaintiffs' permit did not preclude tort liability is significant. *See* Opening Br. of Appellant Nation Union, p. 14. But if anything, this *supports* Plaintiffs' argument that the average policyholder would reasonably expect its general liability insurer to protect against state tort claims alleging harm from exposure for routine, lawful emissions. Put another way, because the permit creates a safe harbor against enforcement actions under the applicable statutory programs, an insured would fully anticipate that lawful emissions generated as part of its ordinary business operations (and which do not constitute traditional environmental pollution) would be the type of exposure falling directly within the scope of its CGL coverage and outside of the pollution exclusion.

What's more, unknown liabilities from ordinary operations are *precisely* the type of risks covered by CGL policies. 9A Couch on Ins. § 129.1 (3d ed. June 2025) (stating a CGL policy is "designed to provide coverage for tort liability")

⁸ The nation's environmental cleanup law, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* or CERCLA, also prohibits cost recovery by the federal and state governments and private parties where the releases at issue are "federally permitted". 42 U.S.C. § 9601(1). This is plainly aligned with the Court's justification in *Koloms*, which explained that the intent of the pollution exclusion is to "exclude governmental cleanup costs from [the scope of] coverage." *Koloms*, 177 Ill. 2d at 492.

for “losses arising out of business operations”). By complying with a valid state authorized permit, a permit holder, like Plaintiffs, would be entirely reasonable in believing they would be protected by their insurance company from exactly the type of liability asserted in the underlying lawsuits.

II. The Insurers Are Seeking a Windfall – They Represented That the Pollution Exclusion Was Intended to Exclude Coverage for Knowing Polluters and Traditional Environmental Pollution, but Now Seek to Disclaim Virtually All Emissions Liability.

The New Jersey Supreme Court undertook a “review of the history of the pollution exclusion” in *Morton*, 629 A.2d 831, and found that the insurance industry had perpetrated a bait-and-switch in adding the pollution exclusion. The insurers represented that the exclusion was limited to denying coverage for governmental clean-up costs and knowing polluters when it sought regulatory approval of the clause – but once the exclusion was approved, they denied coverage to insureds on the basis that the pollution exclusion operated to exclude coverage for virtually all emissions. The *Morton* court righted this wrong by limiting the scope of the pollution exclusion to what the insurance industry had represented to its regulators. *Id.* at 873-74.

The *Morton* court included four important findings relevant to the issue in this case. The court first held that the pollution exclusion must be construed against the insurers because the industry’s “presentation and characterization of the standard pollution-exclusion clause to state regulators constituted virtually the only opportunity for arms-length bargaining by interests adverse

to the industry, insureds having virtually no choice at all but to purchase the industry-wide standard CGL policy.” *Id.* at 848.

Like this Court in *Koloms*, the *Morton* court also declined to enforce the standard pollution exclusion clause literally as written because “[a]s presented, the regulatory authorities would not readily have understood that the pollution-exclusion clause eliminated *all* coverage for pollution-related claims except in cases of abrupt and accidental discharges. Rather than ‘clarify’ the scope of coverage, the clause virtually eliminated pollution-caused property-damage coverage, without any suggestion by the industry that the change in coverage was so sweeping or that rates should be reduced...” *Id.*

The *Morton* court further held that “the industry’s public statements contemporaneous with the drafting and submission of the pollution-exclusion clause suggested that its overriding purpose was to deny coverage to intentional polluters” and thus “the typical commercial insured may have had little, if any, awareness that the terms of CGL coverage had been changed, much less any ‘objectively-reasonable expectation’ of the scope of the new coverage, except to the extent of an assumption that unchanged premiums ordinarily would be consistent with a continuing level of coverage.” *Id.* at 875.

Finally, the *Morton* court held that “[h]ad the insurance industry candidly revealed the extent of the contraction in coverage intended by the pollution-exclusion clause...commercial and governmental insureds would have taken action, either directly or through intervention by state regulatory

authorities, to encourage the industry to provide broader coverage for pollution damage, even at increased rates, perhaps avoiding the litigation explosion that the pollution-exclusion clause has precipitated.” *Id.* at 876, Accordingly, “[h]aving profited from that nondisclosure by maintaining pre-existing rates for substantially-reduced coverage, the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities.” *Id.*

Despite being exposed in *Morton*, the insurance industry once again turns out in full force to seek judicial endorsement of its misconduct by expanding the application of the pollution exclusion far beyond what it represented – here to deny coverage for liabilities arising from lawful, permitted emissions generated in the ordinary course of a permittee’s business operations. Permitted emissions are neither knowing pollution nor traditional environmental pollution. The insurers should not be allowed to gain a windfall from their bait-and-switch by receiving and investing premiums for decades based upon a representation of coverage and then abandoning their insureds when the coverage is owed. *Amici* urge the Court to hold the insurers to their word like the New Jersey Supreme Court did in *Morton* and like this Court did over two decades ago in *Koloms*.

III. The Insurers’ Claim That Pollution Liability Coverage Could Have Been Obtained to Cover Liabilities Related to Permitted Emissions in the 1980s Is a Red Herring.

The insurer *amici* spend a significant amount of time arguing that pollution liability insurance policies – not CGL policies – should have been

obtained by policyholders across the country, presumably in the early and mid-1980s, in prescient anticipation of potentially ruinous lawsuits arising out of their permitted, lawful emissions. *Amicus Curiae* Br. of Zurich American Insurance Company, pp. 4-7. The insurers provide little citation to authority supporting this argument and appear to invite the Court to trust their expertise. It should not.

First, as set forth herein, the insurance industry repeatedly represented that the pollution exclusion was only intended to exclude coverage for governmental clean-up costs and knowing pollution and that the CGL policy would continue to cover unknown liabilities arising from ordinary business activities. *Morton*, 629 A.2d at 875. Taking the industry at its word, a reasonable insured in the 1980s, as set forth above, would have believed that any claims arising from its lawful, permitted emissions would be covered under a CGL policy and would see no need for additional, duplicative insurance.

Second, as set forth herein, the plain language of the CAA and Illinois Act, which govern the emissions at issue in this case, indicate that permitted emissions are not “traditional environmental pollution” and shields entities operating within their permitted limits. Accordingly, a reasonable insured in the 1980s would have believed its permitted, lawful emissions were not traditional environmental pollution excluded from coverage under the pollution exclusion, especially given the statements of the insurance industry confirming the same.

Third, it is widely understood and acknowledged that pollution-specific insurance policies were largely unavailable in the 1980s and likely would not have been available to cover liabilities arising from permitted emissions. In fact, pollution insurance was created by the insurance market in response to the gaps created by the pollution exclusion in the 1980s. *See Typical policies—Pollution coverage*, 57 MASS. PRAC., MASS. CONSTRUCTION LAW § 8:12; 49 Am. Jur. Trials 1 at § 12 (Originally published in 1994) (noting that “other types of policies” were needed “to fill the void in CGL policies that was created by the addition of the absolute pollution exclusion clause.”) Thus, only a handful of insurance markets offered environmental coverage in the early 1980s and those that did provided limited coverage because pollution was an emerging exposure.⁹ *See* 49 Am. Jur. Trials 1 at §§ 12, 13; *Champion Dyeing & Finishing Co., Inc. v. Centennial Ins. Co.*, 355 N.J. Super. 262, 810 A.2d 68 (App. Div. 2002) (noting that environmental impairment liability (EIL) insurance was unavailable in 1997). It is rank speculation, at best, that coverage would have been available to the Illinois business with lawful permits in the 1980s.

Moreover, any available pollution liability insurance may not have covered the risk at issue. For example, the pollution liability insurance policy submitted to state regulators at the time the pollution exclusion was being

⁹ *See* John Hannah, *The US Environmental Liability Insurance Market – Reaching New Frontiers* (May 1, 2000) published online via the International Risk Management Institute, Inc. website, <https://www.irmi.com/articles/expert-commentary/the-us-environmental-liability-insurance-market-reaching-new-frontiers>

considered in the mid-1980s was touted as a “buyback” policy to restore the coverage carved out by the pollution exclusion, but that policy was limited solely to “environmental damage.” John N. Ellison, Richard P. Lewis, Paul E. Breen and Brian T. Valery, *Recent Developments In The Law Regarding The ‘Absolute’ And ‘Total’ Pollution Exclusion, The ‘Sudden And Accidental’ Pollution Exclusion And Treatment Of The ‘Occurrence’ Definition*, SFA3 American Law Institute – American Bar Association Continuing Legal Education 15 (June 14-15, 2001) at 33 (citing James H. Brown, La. Ins. Commissioner, Letter to the Editor, *National Underwriter Prop. & Casualty Ed.*, April 22, 1996 at 30)). But because the permitted emissions at issue are not “traditional environmental pollution,” it is unlikely that a pollution liability policy would have even applied. Regardless of whether concurrent coverage was possible, the insurer *amici*’s current position is inconsistent with the insurance industry’s previous representations about the scope of pollution policies and the pollution exclusion in general.

Given the above facts, any claim that a permitted emitter could have or should have purchased additional, specialized pollution coverage in the 1980s to cover the risks at issue here must be dismissed out of hand.

In addition, it appears that the insurer *amici* argue that permitted emitters should have identified this alleged gap in coverage – despite Illinois courts finding no such gap exists – and purchased “claims made” pollution liability coverage, providing retroactive coverage, at a later date to cover these

risks. But the pollution insurance market is highly specialized, not standardized, and often excludes claims for known risks or business activities, and only sometimes provides a duty to defend the insured. 49 Am. Jur. Trials 1 at §§ 12-16. Thus, the insurer's argument on this point is pure speculation.

Further, the fact that the Plaintiffs purchased and sought coverage under separate pollution insurance does not demonstrate that CGL policies should not provide coverage, as the insurer *amici* infer (with no citation). The policies cover different types of risks. Indeed, the purchase of additional insurance does not indicate a belief by the policyholder that its existing policies do not provide coverage. The opposite is true – purchasing additional coverage to supplement existing policy limits at a later date is a common practice, given the increase in exposure over time and the lower limits of liability found on policies issued decades earlier. This is prudence and sound risk management, not an admission of no coverage.

Nor is this double-dipping as implied by the insurers. As the insurer *amici* are well aware, environmental insurance cases often involve multiple insurance carriers, especially when allegations span many years during several policy periods. 38 Am. Jur. Proof of Facts 3d 477, § 2 (Originally published in 1996) (“Environmental insurance cases often involve multiple insurance carriers, especially when contamination has occurred over many years during several policy periods”).

In sum, these speculative arguments should be given no credence.

IV. The Insurers' Claims That Providing Coverage for Permitted Emissions Would Encourage Pollution, Increase Insurance Costs and/or Lead to Disruption in the Insurance Markets and Further Litigation is Yet Another Instance of the Insurance Industry Crying Wolf While It Reaps Record Profits.

The insurers also make a myriad of public policy arguments that allowing insureds coverage for permitted emissions under policies purchased some forty years ago will lead to a “moral hazard.” These claims have no basis.

Initially, *Imperial Marble* has been the controlling law in Illinois for over a decade. Certainly, these moral hazards would have shown their face since 2011. Yet, the insurers cite no evidence that they have *actually occurred*. Moreover, the insurers have known of the *Imperial Marble* decision for nearly 15 years, but the insurance industry has not changed their policies to expressly exclude permitted emissions from coverage. Certainly, if covering these emissions constituted the crisis the industry now claims, it would have acted as it did in the 1970s and 1980s when faced with newly-imposed liabilities for environmental clean-up costs. The hellscape alleged by the insurers simply does not exist.

For example, the insurers argue that affording CGL coverage for permitted emissions will “encourage pollution in Illinois.” The opposite is true. It will encourage operations within permitted limits, which are by definition not pollution. Under this scheme, an entity operating within permitted limits will be allowed coverage under their previously purchased policies. This is an invaluable incentive for good conduct and to increase compliance, not a moral

hazard. Illinois (and other states) will gladly welcome entities operating within permitted limits.

The insurers further argue that insurance armageddon will invariably follow if permitted emitters are allowed to recover their defense costs under previously purchased policies. This is a well-worn tactic of the insurance industry. Every time insurers are asked to cover significant losses, such as in response to natural disasters, the insurance industry cries wolf – insurance will be unavailable, costs will skyrocket, insurers will be forced to liquidate, markets will be thrown into turmoil, coverage litigation will explode ... – to avoid paying covered losses. *See* Michael Childress, Daniel Loucks, *The Hidden Conflict: The Secret Insurers Don't Tell Insureds*, 11 Rutgers J.L. & Pub. Pol'y 89. 90-91 (2013). And, every time this happens, the insurance industry avoids or passes any losses onto its insureds and reaps record profits. *See* The National Association of Insurance Commissioners, 2024 Market Share Report (available at <https://content.naic.org/sites/default/files/pc-and-title-2024mid-year-industry-report.pdf>). For instance, the parent company of one of the insurer *amici*, Zurich North American Insurance Company, just reported record profits to the market and insurers are imposing significant premium increases across policy lines. *See generally* <https://www.zurich.com/media/news-releases/2025/2025-0807-01> (noting “Zurich reports record operating profit and industry-leading return on equity”);

The insurance industry likewise cries wolf here, as it has when advocating in other jurisdictions for the same type of literal and overbroad interpretation of the pollution exclusion. *See, e.g.,* Amicus Brs. of Complex Insurance Claims Litig. Ass’n in *MacKinnon v. Truck Ins. Exch.*, 2002 CA S. Ct. Briefs LEXIS 135, at *34 and *Belt Painting Corp v. TIG*, 2003 NY App. Ct. Briefs LEXIS 38, at *7 (each arguing that failing to adopt the insurers’ overbroad, hyper-literal interpretation of the exclusion “would undermine the stability and predictability of the insurance market”). The Plaintiffs and policyholder *amici* simply seek to hold the insurers to their word and provide the coverage that was represented when the policies were purchased decades ago. The policyholders seek no windfall, just the benefit of their bargain.

Nor is the insurance market imploding. Their strenuous protestation to the contrary, coverage for permitted emissions is not a huge systemic risk for insurers, as evidenced by the relative lack of such claims, their inaction, and record profits over the past decade. Defendant just does not want to honor its obligations to pay the loss here.

In contrast, allowing the insurance industry to escape coverage for permitted emissions in Illinois – coverage it represented was provided to the detriment of their insureds – would deny permitted entities operating lawfully the benefit of their previously purchased insurance coverage, while granting insurers a windfall of premiums already paid for no resulting coverage (plus

forty years of interest). The only moral hazard here is rewarding the insurers for their historic misrepresentations.

CONCLUSION

For the reasons set forth above, the *Amici* here request that the Court answer the certified question by affirming that under Illinois law, claims related to permitted emissions are not subject to exclusion from coverage under the pollution exclusion.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that this Brief conforms to the requirements of Illinois Supreme Court Rules 341 and 345. The length of this Brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Rule 342(a) is 6,117 words.

Dated: August 27, 2025

/s/ Brent W. Vincent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served this 27th day of August, 2025 via the Court's e-filing system on all counsel of record.

/s/ Brent W. Vincent