

No. 131710

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**In the Supreme Court of Illinois**

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

*Plaintiffs-Appellees,*

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

*Defendant-Appellant.*

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On Certified Question from the United States Court of Appeals  
for the Seventh Circuit, Case Nos. 24-1223, 24-1217.

There Heard on Appeal from the United States District Court  
for Northern District of Illinois, Case Nos. 21-cv-4581, 21-cv-6403  
The Honorable Mary M. Rowland, Judge Presiding.

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**BRIEF OF PLAINTIFFS-APPELLEES GRIFFITH FOODS  
INTERNATIONAL INC., GRIFFITH FOODS GROUP INC.,  
AND STERIGENICS U.S., LLC**

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## NATURE OF THE ACTION

This is a duty-to-defend suit brought by Griffith Foods International Inc. and Griffith Foods Group Inc. (“Griffith”) and Sterigenics U.S., LLC (“Sterigenics U.S.”) (together, “Policyholders”) against their insurer, National Union Fire Insurance Company of Pittsburgh, PA (“National Union”). For years, National Union has failed to honor its duty to defend Policyholders against tort suits (the “Underlying Litigation”) brought in Cook County Circuit Court, which allege injuries from ethylene oxide emitted from their facility while sterilizing medical equipment under a permit issued by the Illinois Environmental Protection Agency (“IEPA”). National Union attempted to justify its refusal to defend by arguing, contrary to controlling law from the Appellate Court, that the pollution exclusion in its policies bars coverage.

The federal district court ruled for Policyholders. Applying Appellate Court precedent, the district court held that National Union failed to show that the pollution exclusion negated its duty to defend, reasoning that emissions authorized by permit do not unambiguously fall within the exclusion’s scope. Accordingly, because the IEPA had issued a construction and operating permit explicitly authorizing Policyholders’ emissions, based on an individualized assessment conducted by the IEPA under the Illinois Environmental Protection Act (the “Act”), the tort claims brought in the Underlying Litigation raised the potential for coverage and triggered a duty to defend.

National Union appealed, and the Seventh Circuit certified a question to this Court regarding the “relevance” of “a permit or regulation authorizing

emissions ... in assessing the application of a pollution exclusion within a standard-form commercial general liability policy.” A19. This Court accepted the certified question for review. No questions are raised on the pleadings.

## INTRODUCTION

In *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473 (1997), this Court held that standard pollution exclusions are ambiguous, rejecting a “purely literal interpretation” and instead holding that such exclusions apply only to “traditional environmental pollution.” *Id.* at 488, 494. Distorting this limited interpretation, and ignoring the crucial distinction between the duty to defend and the duty to indemnify, National Union contends that Illinois businesses unambiguously engage in “traditional environmental pollution” when they make *any* emissions into the environment, even those expressly authorized by a permit issued by the state agency charged with *preventing* pollution. In National Union’s view, those businesses, operating under their state-issued permits, cannot obtain a defense from their insurers under any policy with a standard-form pollution exclusion, even when the underlying tort claims squarely implicate the business’s permitted emissions—emissions that the IEPA itself authorized.

National Union claims support for this result in text, precedent, and “considerations of sound policy and common sense.” Opening Brief (“OB”) 3. National Union is wrong, falling far short of satisfying its heavy burden to show that the pollution exclusion clearly and unambiguously applies to

permitted emissions such that it negates National Union’s duty to defend the Underlying Litigation.

The pollution exclusion’s text does not expressly encompass emissions authorized by permit. And Illinois law makes clear that emissions authorized by state permit are not pollution in the first place, let alone “traditional environmental pollution” under *Koloms*. The Act, under which the permit here was issued, prohibits “the discharge or emission of any contaminant into the environment ... *so as to cause or tend to cause air pollution* in Illinois.” 415 ILCS 5/9(a) (emphasis added). And the Act provides that the IEPA may issue a permit only when it is “assured that “[t]he emission source or air pollution equipment will not cause a violation of the Act”—*i.e.*, will not cause pollution. *Wells Mfg. Co. v. IEPA*, 195 Ill. App. 3d 593, 596 (1st Dist. 1990) (alteration in original) (quoting 35 Ill. Admin. Code § 201.155 (1986)).

If emissions authorized by permit are not considered pollution under the Act, it is reasonable to conclude they are not pollution under the exclusion. To avoid its duty to defend, National Union must show that this commonsense position would be unreasonable to the average person—meaning that National Union’s construction of the pollution exclusion as encompassing permitted emissions is the *only* reasonable interpretation of the exclusion—and that Policyholders’ interpretation is unreasonable. *See Acuity v. M/I Homes of Chicago, LLC*, 2023 IL 129087, ¶ 31 (where “competing reasonable

interpretations of a policy exist,” courts must “construe the policy in favor of the insured”). National Union cannot and does not meet this high burden.

Precedent likewise cuts squarely in Policyholders’ favor. Applying *Koloms*, the Appellate Court has twice held that insurers have a duty to defend lawsuits arising from alleged emissions expressly authorized by the State through permits, because such emissions are not unambiguously “traditional environmental pollution” and therefore do not fall within the pollution exclusion. See *Erie Ins. Exch. v. Imperial Marble Corp.*, 2011 IL App (3d) 100380, ¶¶ 22-23 (O’Brien, J.); *Country Mut. Ins. Co. v. Bible Pork, Inc.*, 2015 IL App (5th) 140211, ¶ 41. National Union brushes aside those cases in favor of a grab-bag of decisions from other jurisdictions, but none controls here, and none holds or even suggests that the pollution exclusion clearly applies to permitted emissions.

The reasonable expectations of Illinois insureds, and broader public policy considerations, confirm that it is at least ambiguous whether standard pollution exclusions extend to permitted emissions. A reasonable insured would not consider emissions authorized by a state permit to be pollution—much less traditional environmental pollution—such that lawsuits arising from those emissions would be excluded from coverage. That is especially true given the statutory and regulatory backdrop allowing permits to be issued only when the IEPA finds they do *not* violate the Act’s prohibition on pollution. The General Assembly establishes the public policy of Illinois—yet National Union

asks this Court to override the IEPA’s legal and policy judgments to hold that emissions the State found not to be pollution must be treated as if they were. Doing so would upset the reasonable expectations of Illinois insureds—including Illinois businesses that engage in a host of important operations and employ thousands of Illinois residents.

At a minimum, given the duty-to-defend context of this case and the precedent holding that the pollution exclusion does not apply to permitted emissions, it was not “clear and free from doubt” that the exclusion applied at the time National Union refused to defend Policyholders in the Underlying Litigation. *See Ins. Co. of Ill. v. Markogiannakis*, 188 Ill. App. 3d 643, 662 (1st Dist. 1989). Thus, as the federal district court held, and consistent with the Appellate Court’s holdings in *Imperial Marble* and *Bible Pork*, National Union breached its duty to defend.

### **ISSUE PRESENTED FOR REVIEW**

This Court accepted the following question certified by the Seventh Circuit under Supreme Court Rule 20:

In light of the Illinois Supreme Court’s decision in *American States Insurance Co. v. Koloms*, 687 N.E.2d 72 (1997), and mindful of *Erie Insurance Exchange v. Imperial Marble Corp.*, 957 N.E.2d 1214 (2011), what relevance, if any, does a permit or regulation authorizing emissions (generally or at particular levels) play in assessing the application of a pollution exclusion within a standard-form commercial general liability policy?

A19. Noting that it did “not intend to limit the scope of [this Court’s] inquiry,” the Seventh Circuit “welcome[d] the Justices to reformulate the question as they see fit.” *Id.* Policyholders respectfully ask this Court to consider two

reformulations that would narrow the scope of the certified question to more precisely fit the circumstances of this case.

*First*, as the Seventh Circuit noted and National Union concedes, the only question presented is whether National Union had a duty to *defend* Policyholders in the Underlying Litigation, not whether National Union has a duty to *indemnify* Policyholders from any judgment or settlement. A5-6, A10; OB 18. “[T]he insurer’s duty to defend its insured is broader than its duty to indemnify.” *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 456 (2010). A “[r]efusal to defend is unjustifiable unless it is clear from the face of the underlying complaint that the facts alleged do not fall potentially within the policy’s coverage.” *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108 (1992). That assessment is made “at the time the insurer is requested to defend.” *Markogiannakis*, 188 Ill. App. 3d at 662. Therefore, this Court need address only whether the pollution exclusion here unambiguously, clearly, and without any doubt excluded coverage for the permitted emissions at issue “at the time” National Union refused to provide a defense. *Id.*

*Second*, Policyholders’ position, and that of the federal district court, is that the IEPA’s *individualized assessment and permitting* of the alleged emissions necessarily means that such emissions are not “traditional environmental pollution” under *Koloms*. The broader question of whether *generally applicable* regulations or general legal compliance is relevant to the scope of pollution exclusions is not presented here, and this Court need not

reach it. The only question the Court need resolve is whether emissions expressly authorized by permit are unambiguously within the pollution exclusion's scope.

Given these considerations, Policyholders propose the following reformulation:

In light of *American States Insurance Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997), and mindful of *Erie Insurance Exchange v. Imperial Marble Corp.*, 957 N.E.2d 1214 (Ill. App. 2011), are emissions authorized by a permit from the Illinois Environmental Protection Agency unambiguously “traditional environmental pollution,” such that an insurer can avoid its duty to defend lawsuits alleging injuries or damage from those emissions by invoking a pollution exclusion within a standard-form commercial general liability policy?

Whether in its original or modified formulation, the question certified by the Seventh Circuit has only one correct answer under Illinois law: the pollution exclusion in Policyholders' policies does not relieve National Union of its duty to defend Policyholders from tort suits alleging injuries and damage arising from permitted emissions.

## STATEMENT OF FACTS

### A. Illinois' Permitting Regime under the Act

The General Assembly was the first state legislature in the nation to adopt a comprehensive Environmental Protection Act, signed into law in 1970. *About Us*, Illinois Environmental Protection Agency, <https://epa.illinois.gov/about-us.html> (last visited Aug. 27, 2025). A core “purpose” of the Act is “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). The Act thus broadly “prohibit[s] ... the discharge or emission of any contaminant into the environment in any State *so as to cause or tend to cause air pollution* in Illinois.” 415 ILCS 5/9(a) (emphasis added). The Act also establishes a permitting process imposing on the IEPA the “duty ... to issue” construction and operating permits “upon proof by the applicant that the facility [or] equipment ... will not cause a violation of this Act”—*i.e.*, will not cause pollution. 415 ILCS 5/39(a); *see* 415 ILCS 5/4(g) (“The Agency shall have the duty to administer ... such permit and certification systems as may be established by this Act ....”).

Because the Act’s prohibition on pollution is broad, “[t]he heart of the statute ... is a series of grants of authority [to agencies] to make whatever regulations may be necessary to accomplish the explicit purposes set forth by the General Assembly.” David P. Currie, *Rulemaking Under the Illinois Pollution Law*, 42 U. Chi. L. Rev. 457, 458 (1975). Pursuant to the Act, the IEPA developed a detailed scheme to prevent pollution by regulating emissions from a wide range of entities through the permitting process. *Id.* at 458-59.

These regulations, which have remained materially unchanged since the 1980s, provide that entities must secure both a construction permit for facilities that produce emissions and an operating permit to undertake such emissions. *See* 35 Ill. Admin. Code § 201.152 (construction permit); *id.* § 201.157 (operating permit). The regulations further provide that “[n]o

construction permit shall be granted unless” the “emission unit or air pollution control equipment will be constructed or modified to operate so as not to cause a violation of the Act.” *Id.* § 201.160(a).

Given the Act’s prohibition on “air pollution,” a construction permit cannot be issued unless the IEPA determines that the unit or equipment will not “tend to cause air pollution in Illinois.” 415 ILCS 5/9(a). Similarly, “[n]o operating permit shall be granted unless” the “emission unit or air pollution control equipment has been constructed or modified to operate so as not to cause a violation of the Act,” 35 Ill. Admin. Code § 201.160(b)—*i.e.*, not to cause “air pollution in Illinois.” 415 ILCS 5/9(a). Accordingly, under the Act, when the IEPA grants a permit to operate a facility that will produce emissions, it has determined that those emissions are not pollution. *See* 415 ILCS 5/8 (the Act is intended “to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution”); *see also Wells Mfg. Co.*, 195 Ill. App. 3d at 596 (summarizing regulatory scheme).

### **B. Policyholders’ Medical Equipment Sterilization Facility**

This case turns on whether National Union had a duty to defend Policyholders against lawsuits alleging injuries and damage arising from alleged emissions of ethylene oxide (“EtO”), made in the course of sterilizing medical equipment, pursuant to an IEPA permit.

“Ethylene oxide sterilization is an important sterilization method that manufacturers widely use to keep medical devices safe.” *Sterilization for*

*Medical Devices*, Food and Drug Administration (May 14, 2025), <https://shorturl.at/qMklY>. “For many medical devices, sterilization with ethylene oxide may be the only method that effectively sterilizes and does not damage the device during the sterilization process.” *Id.* Approximately fifty percent of all sterile medical devices in the U.S. are sterilized with ethylene oxide. *Id.* (footnotes omitted).

In the Underlying Litigation, Plaintiffs allege that, in 1984, Policyholders “opened and operated an EtO sterilization facility in the Village of Willowbrook.” A250 (¶ 33). On July 30, 1984, before the facility was opened, the IEPA issued a “Joint Construction and Operating Permit to construct and operate” sterilization chambers that emitted EtO up to a specified level. A250 (¶ 33), A260 (¶ 57).

### **C. Policyholders’ National Union Policies**

Griffith purchased two commercial general liability policies from National Union with the same relevant policy provisions, together covering the period from September 30, 1983 to September 30, 1985. A109-59. The policies provide coverage for Griffith and “any subsidiary” of Griffith. A124; A148. Through a series of name changes and mergers, Sterigenics U.S. inherited rights under the policies. *See* A28-A31.

The policies broadly provide that National Union “will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of [A] bodily injury or [B] property damage to which this insurance applies, caused by an occurrence.” A114; A145. The policies further

provide that National Union will “defend any suit against the insured seeking damages on account of” bodily injury, property damage, or personal injury, “even if any of the allegations of the suit are groundless, false or fraudulent.” A114-115; A139; A145.

The policies include a standard-form pollution exclusion, which provides that they do not apply “to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water.” A145. The exclusion “does not apply if such discharge, dispersal, release or escape is sudden and accidental.” A145. Aside from the sudden-and-accidental carve-out, this exclusion is materially identical to the exclusion at issue in *Koloms*.

#### **D. The Underlying Litigation**

Beginning in 2018, certain individuals (the “Underlying Plaintiffs”) began suing Sterigenics U.S.—a successor of a Griffith subsidiary—for bodily injury, property damage, and nuisance allegedly arising out of exposure to EtO from the Willowbrook facility. A240 (¶ 5.h). Griffith was first named as a defendant in August 2020. A163-164 (¶¶ 15, 19). The Underlying Plaintiffs’ cases were consolidated for pretrial purposes under the caption *In re: Willowbrook Ethylene Oxide Litigation*, Case No. 2018-L-010475 (Cook Cnty.

Cir. Ct.), A161 (¶ 5), and ultimately became governed by a Fourth Amended Master Complaint (the “Master Complaint”). A237-354.

The Master Complaint alleges that the Underlying Plaintiffs’ injuries arose generally from emissions of EtO at the facility. A242-243 (¶¶ 9-10, 13-14). The Master Complaint also alleges that before beginning operations, the IEPA issued a permit to construct and operate the facility, and that the permit contemplated that sterilization operations at the facility would result in “emissions of EtO” “from the [Willowbrook] facility.” A260-261 (¶¶ 57-60) (alleging that a “Joint Construction and Operating Permit” was issued in 1984); A253 (¶ 41) (alleging that the IEPA permit indicated that the facility would produce EtO emissions); A261 (¶ 60.h) (alleging that the permit made the facility responsible for monitoring “excess emissions” of EtO). The Master Complaint further alleges that there is “no safe level of EtO,” A242 (¶ 9); A256 (¶ 46), underscoring that the Underlying Plaintiffs’ alleged injuries resulted at least in part from emissions allowed by the permit.

Policyholders provided notice of the Underlying Litigation to National Union and sought a defense under the policies. A229 (¶¶ 51-55); A165-166 (¶¶ 29-35). Although *Imperial Marble* and *Bible Pork* had held that insurers have a duty to defend lawsuits seeking damages for injuries allegedly caused by permitted emissions, National Union refused to defend, asserting that its policies’ standard pollution exclusions barred coverage. A229 (¶¶ 51-55); A166 (¶¶ 34-35).

### **E. Procedural Background**

In August 2021, following National Union's denial of coverage and while the Underlying Litigation was ongoing, Sterigenics U.S. filed suit in federal court seeking, as relevant here, a declaratory judgment that National Union owed it a duty to defend. A214-235. In November 2021, Griffith filed a similar suit, and the cases were consolidated. The parties filed cross-motions for judgment on the pleadings regarding National Union's duty to defend. Among other things, Policyholders argued that the Master Complaint includes allegations that certain injuries arose from EtO emissions made pursuant to the IEPA permit for the facility, and that such "permitted emissions" do not clearly and unambiguously fall within the pollution exclusion under Illinois law.

The district court agreed. Relying on *Imperial Marble* and *Bible Pork*, the court held that emissions authorized by a regulatory permit do not clearly fall within the scope of a pollution exclusion. A33-34. Accordingly, because the Master Complaint included allegations of "permitted emissions," A33, application of the pollution exclusion was not clear and free from doubt and could not "excuse National Union from its defense obligations." A35.

National Union appealed, arguing, among other things, that it had no duty to defend because emissions authorized by permit unambiguously fall within the pollution exclusion's scope. The Seventh Circuit acknowledged the Appellate Court's holdings that such emissions do not unambiguously fall within the scope of the pollution exclusion in standard-form commercial

general liability policies. But because the Seventh Circuit perceived a potential tension between Appellate Court precedent and its own case law, it certified the question to this Court. A17-19.

### STANDARD OF REVIEW

“[T]he construction of the provisions of an insurance policy is a question of law” reviewed *de novo*. *Wilson*, 237 Ill. 2d at 455. Whether an insurer has a duty to defend involves “the construction of an insurance policy,” and is therefore likewise “subject to *de novo* review.” *Koloms*, 177 Ill. 2d at 479-80.

### ARGUMENT

#### **I. National Union Can Avoid Its Duty to Defend Only by Proving the Pollution Exclusion Clearly and Unambiguously Applies**

In construing insurance policy provisions, this Court “ascertain[s] the intent of the parties to the contract” by “constru[ing] the policy as a whole,” with “due regard to the risk undertaken, the subject matter that is insured and the purpose of the entire contract.” *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108 (1992). If policy terms “are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy.” *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997). Indeed, “where competing reasonable interpretations of a policy exist, a court may not choose which interpretation it will follow,” but should instead “construe the policy in favor of the insured and against the insurer that drafted the policy.” *Acuity v. M/I Homes of Chicago, LLC*, 2023

IL 129087, ¶ 31. In other words, an insured's interpretation need only be *reasonable*—not necessarily the best or only possible interpretation.

The principle that ambiguities in insurance policies should be construed in the insured's favor, often referred to as *contra proferentem*, “is especially true with respect to exclusionary clauses.” *Outboard Marine*, 154 Ill. 2d at 119; *see also Koloms*, 177 Ill. 2d at 479. As the insurer, National Union “bears the burden of proving an exclusion applies.” *Acuity*, 2023 IL 129087, ¶ 33. And a policy exclusion “will be applied only where its terms are clear, definite, and specific.” *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 393 (2005). Exclusions to insurance coverage “are to be most strictly construed against the insurer.” *State Sec. Ins. Co. v. Burgos*, 145 Ill. 2d 423, 438 (1991).

These principles apply with particular force in the duty-to-defend context, where an insurer is obligated to defend an insured “unless it is *clear* from the face of the underlying complaint[] that the allegations fail to state facts which bring the case within, *or potentially within*, the policy's coverage.” *U.S. Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991) (second emphasis added). Contrary to National Union's suggestion (OB 7), insurers may have a duty to defend even if they ultimately have no duty to indemnify. “The threshold that an underlying complaint must meet to trigger a duty to defend is minimal.” *ITW Inc. v. Travelers Cas. & Sur. Co.*, 2015 IL App (1st) 132350, ¶ 20. If a single allegation or theory in an underlying complaint is potentially covered, then the insurer must defend the entire case.

*Int'l Ins. Co. v. Rollprint Packaging Prods., Inc.*, 312 Ill. App. 3d 998, 1011 (1st Dist. 2000) (duty to defend triggered even where “only one of the theories” in a complaint “is within the policy’s coverage and the others may not be”). In reviewing a duty-to-defend dispute, the Court construes all allegations in the underlying complaint in favor of coverage and resolves any doubts in the policyholder’s favor. See *Emps. Ins. of Wausau v. Ehlco Liquidating Tr.*, 186 Ill. 2d 127, 153 (1999).

To avoid a duty to defend by invoking an exclusion, an insurer must show that the exclusion’s application is “clear and free from doubt.” *Country Mut. Ins. Co. v. Dahms*, 2016 IL App (1st) 141392, ¶ 69; see also *Ins. Co. of Ill. v. Markogiannakis*, 188 Ill. App. 3d 643, 662 (1st Dist. 1989) (“[I]f an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt at the time the insurer is requested to defend ....”). “This is so because there is little or no bargaining involved in the insurance contracting process, the insurer has control in the drafting process, and the policy’s overall purpose is to provide coverage to the insured.” *Outboard Marine*, 154 Ill. 2d at 119 (citations omitted); see also *Econ. Fire & Cas. Co. v. Kubik ex rel. Kubik*, 142 Ill. App. 3d 906, 909 (1st Dist. 1986) (explaining that stringent rules of construction apply because insurer “could have drafted the ambiguous provision clearly and specifically”).

This high standard also reflects the settled principle that the duty to defend goes beyond a mere duty to pay money—it is a duty to perform a *service*

for the insured by taking on the burden of mounting a defense to litigation. *See ITW*, 2015 IL App (1st) 132350, ¶ 46 (“The duty to defend has been referred to as litigation insurance ....”). To avoid that duty and “justifiably refuse to defend,” an insurer must show “absolute clarity on the face of the complaint that a particular policy exclusion applies.” *RLI Ins. Co. v. Thomas Eng’g Grp., LLC*, 2021 IL App (1st) 191950-U, ¶ 27 (citation omitted).

National Union falls far short of bearing that heavy burden. Indeed, given the Appellate Court’s *Imperial Marble* and *Bible Pork* decisions, it is impossible for National Union to show that, at the time National Union refused to defend, the pollution exclusion’s application to permitted emissions was clear and free from doubt.

## **II. National Union Fails to Prove That the Pollution Exclusion Clearly and Unambiguously Applies to Emissions Authorized by Permit**

National Union approaches the certified question as though it concerned the duty to indemnify, not the duty to defend. In doing so, National Union fails to prove that the pollution exclusion here clearly and unambiguously applies to lawsuits, like the Underlying Litigation, alleging injuries and property damage arising from emissions authorized by an IEPA permit. This Court has recognized that standard pollution exclusions, like the one at issue, are ambiguous, and National Union cannot show that such exclusions unambiguously apply to emissions the IEPA has determined are not pollution within the meaning of Illinois law. That is precisely why the Appellate Court in *Imperial Marble* and *Bible Pork* held that pollution exclusions are

ambiguous as applied to emissions authorized by a government permit—and why National Union is unable to cite any case holding otherwise. National Union’s position would require this Court to disregard the reasonable expectations of Illinois insureds as to their liability policies, improperly second-guess the judgment of the state agency charged with preventing pollution, and upset the well-founded reliance interests of Illinois businesses on their state-issued permits.

**A. The pollution exclusion’s text and drafting history show that it does not unambiguously reach permitted emissions.**

This Court held nearly three decades ago that standard pollution exclusions are ambiguous, must be construed liberally in favor of coverage, and apply only to “traditional environmental pollution.” *Koloms*, 177 Ill. 2d at 488-89, 494; *see also* OB 7 (describing the pollution exclusion in *Koloms* as “materially identical” to the exclusion here). The permitted emissions alleged in the Underlying Litigation cannot *unambiguously* constitute “traditional environmental pollution” because the IEPA specifically authorized them after determining, pursuant to its authority under the Act, that the specified level of emissions was not “pollution” under Illinois law. National Union’s contrary arguments impermissibly depend on a broad reading of the exclusion, ignoring the rule that exclusions must be construed narrowly. National Union attempts to avoid its burden by arguing that the pollution exclusion’s text lacks an express “exception” for permitted emissions, OB 21, and advances an inapposite analysis of the terms “discharge” and “release,” OB 22-24. But

neither argument supports the proposition that the exclusion's application is clear and free from doubt.

**1. The pollution exclusion's text and drafting history show that it does not unambiguously apply to emissions authorized by permit.**

The pollution exclusion here excludes coverage for “bodily injury or property damage arising out of the discharge, dispersal, release or escape of” an expansive list of substances, including “liquids or gases” and “other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water.” A145. As this Court explained in *Koloms*, the “breadth of the language” in such pollution exclusions renders their application “uncertain.” 177 Ill. 2d at 487. Accordingly, this Court rejected a “purely literal interpretation” and construed such exclusions to apply only to the “traditional environmental pollution” to which the exclusions were directed when initially drafted. *Id.* at 488, 494.<sup>1</sup>

Under the *Koloms* analysis, the pollution exclusion can reasonably be read not to encompass emissions authorized by the State through a permit. While “traditional environmental pollution” evokes the impermissible

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<sup>1</sup> Consistent with *Koloms*, Illinois law routinely looks to indicia beyond a rigid, literal interpretation of insurance policies to discern the scope of policy provisions. *See Hogle v. State Farm Mut. Auto. Ins. Co.*, 148 Ill. 2d 272, 280 (1992) (rejecting “a literal interpretation” where policy provision was “subject to a second reasonable interpretation” and thus “ambiguous”); *Farmers Auto. Ins. Ass'n v. Coulson*, 402 Ill. App. 3d 779, 782-83 (5th Dist. 2010) (rejecting “literal interpretation” of policy provision where it “would frustrate the [State’s] public policy”); *Bohner v. Ace Am. Ins. Co.*, 359 Ill. App. 3d 621, 625 (2d Dist. 2005) (rejecting “literal interpretation” of exclusion).

dumping of hazardous waste into the environment, *see Country Mut. Ins. Co. v. Hilltop View, LLC*, 2013 IL App (4th) 130124, ¶ 39, emissions specifically authorized through a state permitting regime are markedly different in kind. The exclusion includes no language expressly encompassing such emissions. And Illinois law provides that permitted emissions are *not* pollution.

The Illinois Environmental Protection Act, enacted in 1970, seeks to “prevent pollution,” 415 ILCS 5/8, by broadly “prohibit[ing] ... the discharge or emission of any contaminant into the environment in any State *so as to cause or tend to cause air pollution* in Illinois,” 415 ILCS 5/9(a) (emphasis added). The Act further provides that the IEPA may issue construction and operating permits only “upon proof by the applicant that the facility [or] equipment ... will not cause a violation of th[e] Act”—*i.e.*, will not cause pollution. 415 ILCS 5/39(a); *see also* 35 Ill. Admin. Code § 201.160(a)-(b) (same). Accordingly, when the IEPA issues a permit, it necessarily determines that the emissions authorized by the permit will not “cause air pollution.” 415 ILCS 5/9(a); *see Wells Mfg. Co. v. IEPA*, 195 Ill. App. 3d 593, 596 (1st Dist. 1990) (summarizing regulatory scheme).<sup>2</sup>

This legal scheme makes clear that not all emissions into the environment constitute pollution and, pertinent here, that emissions

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<sup>2</sup> The Master Complaint’s allegations similarly reflect that the State’s regulatory scheme works in this fashion—in particular, that the Act (under which the IEPA issued the permit) “forbid[s] air pollution in the State of Illinois.” A261 (¶ 59.c).

authorized by permit are not pollution. *See Hilltop*, 2013 IL App (4th) 130124, ¶ 40 (emphasizing that the Act “does not classify all odors as ‘air pollution,’” but only those that rise to a particular level). Accordingly, it is at least reasonable to conclude that permitted emissions are not pollution at all, let alone “traditional environmental pollution,” within the meaning of the pollution exclusion. In fact, the Appellate Court has explained that even where a statute does treat particular conduct or emissions as pollution, the scope of the environmental laws “is far greater than what [*Koloms*] had in mind when it spoke of ‘traditional environmental pollution.’” *Id.* ¶ 41. Emissions the Act does not treat as pollution thus cannot be considered “traditional environmental pollution.” That alone demonstrates that National Union has a duty to defend.

The Act’s conception of “pollution” is especially significant given the drafting history of standard pollution exclusions. As this Court explained, “the predominate motivation in drafting an exclusion for pollution-related injuries was the avoidance of the ‘enormous expense and exposure resulting from the “explosion” of environmental litigation.’” *Koloms*, 177 Ill. 2d at 492 (citation omitted). The “purpose” of standard pollution exclusions was “to exclude government clean up costs from [the scope] of coverage.” *Id.* (alteration in original) (citation omitted). Insurers were concerned, in particular, with excluding claims arising from newly established environmental regulatory regimes carrying the prospect of steep liability, which were enacted in the wake

of environmental disasters that arose from the unregulated conduct at Love Canal, Times Beach, and other sites. *Id.* at 490-92. The Love Canal disaster, for example, resulted from the unregulated dumping of 63,000 tons of chemical waste into a converted canal. *United States v. Hooker Chem. & Plastics Corp.*, 776 F.2d 410, 410 (2d Cir. 1985). Likewise, at Times Beach, a subcontractor mixed carcinogenic toxins with motor oil, which it then sprayed on farms to control dust. *See Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1350 (D.D.C. 1986), *aff'd*, 944 F.2d 940 (D.C. Cir. 1991). Both incidents resulted in substantial alleged harms and extensive litigation.

In response to these and other environmental catastrophes, federal and state governments in the 1970s began enacting broad environmental regulatory regimes. As this Court explained, “Congress substantially amended the Clean Air Act,” including by adding provisions “for cleaning up the environment,” which “imposed greater economic burdens on insurance underwriters, particularly those drafting standard-form CGL policies.” *Koloms*, 177 Ill. 2d at 490. Illinois was on the vanguard of these regulatory reform efforts, enacting the Act in 1970 to create a “unified,” comprehensive, and robust legal regime for the prevention of pollution. Currie, *supra*, at 457-58. As described above, the Act sought to *prevent* pollution, while authorizing through its permitting regime emissions that do not rise to the level of pollution.

It was against this statutory and regulatory backdrop that insurers like National Union drafted and added pollution exclusions like the one here into Illinois commercial general liability policies. *See Koloms*, 177 Ill. 2d at 490. Had insurers wanted to exclude from the scope of coverage such permitted emissions—which the State had deemed not to be pollution—they could have done so expressly. *See Kubik*, 142 Ill. App. 3d at 909. But they did not. As a result, it is not clear and free from doubt that the exclusion applies to emissions authorized by state permit. National Union thus cannot invoke the exclusion to avoid its duty to defend.

**2. National Union’s textual arguments lack merit.**

Notwithstanding *Koloms*’ determination that the pollution exclusion is ambiguous and thus covers only “traditional environmental pollution,” National Union insists that the exclusion’s plain terms make “clear” that it applies to permitted emissions. OB 21-24. That is wrong.

*First*, National Union argues that the pollution exclusion’s text “unambiguously creates no *exception* for emissions pursuant to a permit or regulation” because it does not expressly mention permits or regulations. OB 3 (emphasis added); *see also* OB 21. That argument upends the relevant legal inquiry. The pertinent question is not whether the exclusion “unambiguously” creates an “exception”; rather, it is whether the exclusion unambiguously encompasses permitted emissions in the first place. And the absence of language expressly addressing permitted emissions must be construed *against* National Union—not in its favor. *See Koloms*, 177 Ill. 2d at 479 (“[P]rovisions

that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer”). In other words, it is National Union’s burden to prove the exclusion conclusively negates coverage—and that its reading is the *only* reasonable one. It cannot fault Policyholders for ambiguities in the policy it drafted. *E.g., Acuity*, 2023 IL 129087, ¶ 33 (noting that “the insurer bears the burden of proving an exclusion applies”).

This Court’s reasoning in *Koloms* undercuts the “textualist” approach that National Union espouses here. The pollution exclusion in *Koloms*—like the one here—did not expressly limit its applicability to “traditional environmental pollution.” Had *Koloms* adopted the purely textualist approach advanced here by National Union, it would have reached the opposite conclusion because, as *Koloms* noted, carbon monoxide is “regulated by the federal government as a ‘pollutant’” and would fall within the literal definition of a pollutant. 177 Ill. 2d at 480 (citation omitted). Instead, this Court examined whether the alleged injuries necessarily and unambiguously fell within the intended scope of the exclusion—and held they did not, even in the absence of any express “exception” for particular types of discharges. Accordingly, as *Koloms* teaches, the fact that the pollution exclusion does not “mention” permits or regulations is beside the point.

For the same reason, National Union is wrong to contend that it would be “inappropriate” to consider a policyholder’s permits simply because unrelated policy provisions, like the alcohol-sales exclusion, are specifically

made contingent on “legal authorization.” OB 24. While such language may be necessary where a provision would otherwise unambiguously cover both lawful and unlawful conduct, that is not the case here. Whether emissions constitute “pollution” within the meaning of the exclusion may reasonably turn on whether the State expressly authorized the emissions, thereby deeming them not to be pollution, as the IEPA did here. *Supra* at 20-21. And while the Master Complaint raises varying allegations about EtO emissions at the Willowbrook facility, it is undisputed that the Master Complaint can be read to allege that at least some of the Underlying Plaintiffs’ asserted injuries and damage arose from emissions within the permit’s scope. *Supra* at 12.

*Second*, National Union argues at length that the exclusion’s reference to “discharge” or “release” shows the emissions here fall within the exclusion. OB 22-24. That argument is effectively an attempt to relitigate *Koloms* itself. As *Koloms* makes clear, application of the pollution exclusion requires *more* than a mere “discharge” or “release”—it requires “traditional environmental pollution.” 177 Ill. 2d at 494 (citation omitted). In *Koloms*, after all, there was unquestionably a “release of carbon monoxide,” but the Court still found that the facts alleged fell outside the scope of the exclusion because they were not traditional environmental pollution. *Id.*

National Union’s argument that press coverage, regulations, and permits use the terms “discharge” or “release” is therefore irrelevant. The question is not whether there was a “release” of EtO, but instead whether

Policyholders' releases authorized by state permit can reasonably be understood as distinct from "traditional environmental pollution."

As to that question, National Union does not show that the answer is no. Nor could it, given that the General Assembly expressly enacted the Act's permitting regime to *prevent* pollution. *Supra* at 20-21. It is entirely reasonable to interpret the pollution exclusion to refer to the unregulated or illegal dumping or release of hazardous materials, rather than emissions specifically authorized by a state-issued permit. Given that reasonable interpretation and the broad duty-to-defend standard, this Court "may not choose which interpretation it will follow," but should instead "construe the policy in favor of" Policyholders and against National Union. *Acuity*, 2023 IL 129087, ¶ 31.

**B. Precedent supports Policyholders, not National Union.**

National Union's attempt to rely on precedent, OB 25-40, fares no better. The Appellate Court has twice held that pollution exclusions do not unambiguously apply to emissions authorized by a state permit, and National Union cites no case holding otherwise, in Illinois or elsewhere.

**1. The Appellate Court in *Imperial Marble and Bible Pork* correctly held under *Koloms* that it is, at the very least, ambiguous whether permitted emissions fall within the pollution exclusion.**

Applying *Koloms*, the Appellate Court has twice held that pollution exclusions materially identical to the one here are ambiguous as to whether they encompass permitted emissions. Because ambiguity must be resolved in

favor of coverage, the Appellate Court correctly held in both instances that permitted emissions are not excluded “traditional environmental pollution” and that insurers therefore have a duty to defend their insureds in actions involving alleged injuries or property damage arising from such emissions.

In *Erie Insurance Exchange v. Imperial Marble Corp.*, 2011 IL App (3d) 100380, the underlying tort plaintiffs alleged that the insured manufacturer operating under an IEPA permit emitted hazardous air pollutants. *Id.* ¶¶ 3-5, 9. While the plaintiffs alleged that certain emissions exceeded the amounts “allowed under [the manufacturer’s] permit,” the complaint also could “reasonably be read as alleging harm caused, at least in part, by permitted emissions.” *Id.* ¶¶ 9, 19. The insurer sought a declaratory judgment that it had no duty to defend because the pollution exclusion in the manufacturer’s policy barred coverage. *Id.* ¶ 10.

The Appellate Court held that the exclusion did not apply, explaining that the duty to defend was triggered by the mere finding that the exclusion was ambiguous as to this issue. *Id.* ¶¶ 22-23. According to the Appellate Court, given that *Koloms* had rejected “a literal interpretation” of the pollution exclusion, the inquiry was straightforward: “[I]t is unclear whether permitted emissions constitute traditional environmental pollution that is excluded under the policy ...” *Id.* ¶ 22. “Because [courts] must resolve ambiguities in the complaint and policy in favor of” the insured, the Appellate Court held that

the insurer owed the insured a duty to defend notwithstanding the pollution exclusion. *Id.* ¶ 23.

Similarly, in *Country Mutual Insurance Co. v. Bible Pork, Inc.*, 2015 IL App (5th) 140211, the Appellate Court relied on *Koloms* and *Imperial Marble* to reject an insurer's argument that its pollution exclusion barred coverage for alleged injuries and damage from emissions from the insured's permitted hog factory. *Id.* ¶¶ 1-9, 39-41. The underlying complaint alleged that "discharges of chemicals, wastes, manure dust or airborne particles" would lead to "contamination of surface waters," "water contamination and depletion," and "significant reduction in Plaintiffs' property values." *Id.* ¶ 32 (quoting underlying complaint). Because those alleged "injuries and damages came from [the insured's] hog facility, which was granted regulatory approval by the Department [of Agriculture]," the Appellate Court held that the alleged conduct did not unambiguously fall within the pollution exclusion and therefore that the insurer had a duty to defend the underlying claims. *Id.* ¶¶ 32 33; see also *Velsicol Chem., LLC v. Westchester Fire Ins. Co.*, No. 15-cv-2534, 2017 WL 3922901, at \*9 (N.D. Ill. Sept. 7, 2017) (applying *Imperial Marble* and *Bible Pork* to reject insurer's motion for summary judgement on pollution exclusion as applied to permitted emissions).

No Appellate Court decision has departed from *Imperial Marble* or *Bible Pork* or even questioned their rationale, and for good reason. In both cases,

the Appellate Court properly held that permitted emissions do not unambiguously fall within the scope of standard pollution exclusions.

**2. National Union’s reading of *Koloms* is wrong.**

National Union dismisses *Imperial Marble* as “incorrect,” OB 29, and relegates *Bible Pork* to a footnote, OB 30 n.2. But National Union identifies no case actually disagreeing with those decisions. Instead, it insists that *Koloms* itself resolves the certified question. In particular, National Union contends *Koloms* held that “where” the discharge occurs is the dispositive factor in determining whether the pollution exclusion applies, and that all discharges “into the environment” are “traditional environmental pollution.” OB 26 (citation omitted). In National Union’s view, whether the emissions or discharges are authorized by a permit is therefore irrelevant under *Koloms* so long as they occur in the environment.

*Koloms* says no such thing. This Court did not hold that *any* discharge into the environment is “traditional environmental pollution.” And the Appellate Court has not read *Koloms* in such a limited manner. In *Hilltop View*, for example, the Appellate Court held that a pollution exclusion was inapplicable to claims “based on the odors coming from the operation of the confinement hog farm and the application of hog manure to the surrounding fields,” even though that activity plainly involved putting substances into the environment. 2013 IL App (4th) 130124, ¶¶ 28, 37. Even National Union’s amicus does not read *Koloms* as suggesting National Union’s location-based rule. *See* Swiss Re Corporate Solutions Elite Insurance Corporation *Amicus*

Br. 10 (arguing instead that “the core of [*Koloms*] analysis focused on whether the nature of the pathway or manner of the emission of the pollution was intended to be considered traditional environmental pollution to which the pollution exclusion would apply”); *id.* (“Under *Koloms*, the *mechanism* of pollution is the determinative factor.” (capitalization normalized) (emphasis added)).

Such a location-based rule makes no sense. If *Koloms*’ sole focus and limitation were “where” the discharge occurs, then any discharge of any liquid or gas “into the environment” would be “pollution.” See A145 (pollution exclusion applies to “discharge” of any “liquids or gases”). Under National Union’s reading, then, the release of carbon monoxide from a charcoal grill at a park would constitute “pollution” because the only relevant fact is “*where*” the discharge occurs. OB 4. But no reasonable person would say such releases constitute pollution, let alone “traditional environmental pollution;” to the contrary, a reasonable person could say they do not, and *Koloms* does not foreclose that understanding.

Nor does the Seventh Circuit’s discussion of *Koloms* cast any light on the certified question. The Seventh Circuit observed that the facts alleged in the Underlying Litigation were, in its view, “more reminiscent of the ‘well-publicized, environmental disasters’ of Times Beach and Love Canal” than the “routine commercial hazards” the *Koloms* Court found to fall outside the pollution exclusion’s scope. A15-16. But that comparison does not resolve

whether alleged emissions authorized by a state permit—which the discharges at Times Beach and Love Canal were not—clearly and unambiguously qualify as traditional environmental pollution. That is why the Seventh Circuit certified the question to this Court rather than answer the question itself.

As to the certified question, *Koloms* requires a holistic analysis of whether the alleged conduct qualifies as the “type of environmental pollution contemplated” by the exclusion. 177 Ill. 2d at 489, 494. Nothing in *Koloms* forecloses considering an insured’s permits in making that assessment, and *Koloms* itself had no occasion to directly address whether emissions permitted by a state agency constitute traditional environmental pollution. Its “holding” thus does not resolve this case in National Union’s favor, much less unambiguously. OB 25.

To the contrary, because permitted emissions are not “pollution” as a matter of Illinois law, *supra* at 20-21, and the average person could reasonably understand permitted emissions to be different from “traditional environmental pollution,” they do not clearly and unambiguously fall within the pollution exclusion’s scope. At minimum, National Union cannot meet its very high burden of showing that the opposite is true—*i.e.*, that Policyholders’ reading of the policy as applied to permitted emissions is unreasonable and that the meaning of the exclusion is clear, unambiguous, and beyond doubt.

National Union’s attempt to rely on *Koloms*’ reasoning is no more persuasive. National Union points to the exclusions’ drafting history,

purported “absurd results,” and supposed “sharp disagreement among the courts of other States on similar facts.” OB 31. But none of those factors demonstrate, let alone unambiguously, that the pollution exclusion applies to alleged emissions permitted by the State.

*First*, as discussed, the drafting history and purposes of the exclusion strongly favor coverage. The exclusion was a reaction to the rise in more robust environmental regulation, and insurers drafted the pollution exclusions at a time when the key regulatory scheme at issue, the Act, made clear that permitted emissions were not pollution while imposing serious liability for violations of the Act or a permit. *Supra* at 20-23; 415 ILCS 5/42 (outlining civil penalties).

National Union insists, citing *Koloms*, that the pollution exclusion was instead intended to exclude “tort liability for emissions that were authorized by ... new federal statutes and the permits and regulations issued under them,” and that permitted emissions must fall within the exclusion’s scope so as not to “frustrate that core purpose of the exclusion.” OB 35. But *Koloms* does not discuss tort liability at all, much less tort liability specifically stemming from emissions authorized by state-issued permits. Instead, *Koloms* emphasizes that “the purpose” of the pollution exclusions was “to exclude governmental clean up costs from [the scope of] coverage.” 177 Ill. 2d at 492 (alteration in original) (citation omitted). National Union’s amici likewise understand the

pollution exclusion as targeting “cleanup costs.” American Property Casualty Insurance Association et al. *Amici Br.* (“APCIA *Amici Br.*”) 32.

There has been no suggestion in this case that EtO causes any harm to the environment that would require remediation of the type typically associated with “traditional environmental pollution.” Moreover, such government-mandated cleanup costs are not at issue in private tort suits like the Underlying Litigation, and insurers’ purported general intent to exclude such costs does not demonstrate that emissions expressly *permitted* by the State clearly and unambiguously constitute “traditional environmental pollution.” It is, at minimum, reasonable to interpret the exclusion to apply only to those claims and suits stemming from unauthorized emissions—emissions that may well result from “normal business operations,” OB 36 (citation omitted), but that the State has not sanctioned. After all, if National Union had wanted to ensure that its policies excluded, clearly and without any doubt, claims arising even from emissions the IEPA deemed *not* to be pollution through the state permitting process, it could have included such language. *See Outboard Marine*, 154 Ill. 2d at 119 (explaining that “the insurer has control in the drafting process”).

*Second*, the purported “absurd results” National Union alludes to do not support its argument. National Union suggests that endorsing *Imperial Marble* would give the exclusion a “vanishingly narrow scope” and would make it inapplicable to conduct that “everyone” would understand to be “heartland

‘pollution in the conventional, or ordinary sense of the word.’” OB 32-33 (quoting *Koloms*, 177 Ill. 2d at 488). But under the Illinois regulatory scheme, the IEPA does not understand emissions authorized by permit to be pollution, *supra* at 20-21, and it is far from absurd to honor the IEPA’s judgment. Nor is it a stretch to say that a reasonable person might understand conduct expressly permitted by environmental authorities to be something other than traditional environmental pollution. Further, contrary to National Union’s view that pollution exclusion should be construed *broadly*, it is blackletter law that policy exclusions must be “most strictly construed against the insurer”—particularly in the duty-to-defend context. *Burgos*, 145 Ill. 2d at 438. The Court should apply that canon here.

Nor is National Union correct in suggesting the pollution exclusion would be “an empty husk” because even tort claims based on emissions that *exceed* permit limits would “fall outside the exclusion.” OB 32-33. This case does not present circumstances where the underlying claims allege injuries based *solely* on conduct in violation or in excess of a permit. Here, where the Master Complaint alleges injuries arising from permitted emissions, it triggers the duty to defend all claims in a lawsuit. *See ITW*, 2015 IL App (1st) 132350, ¶ 5.<sup>3</sup>

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<sup>3</sup> This case also does not implicate National Union’s duty to indemnify Policyholders—which, unlike the duty to defend, could turn on a distinction between permitted emissions and emissions exceeding the limit set forth in the permit. *See Outboard Marine*, 154 Ill. 2d at 125 (explaining that an insurer’s

### 3. National Union’s other cases are inapposite.

National Union also contends that endorsing *Imperial Marble* would make Illinois an outlier. But none of the cases cited by National Union squarely considered the issue presented here. Instead, National Union cherry-picks discussions of general lawfulness or generally applicable regulations and relies on cases analyzing unrelated language that carves out sudden and accidental releases—none of which has any relevance where, as here, the question is whether permitted emissions fall within a pollution exclusion.

In *Aloha Petroleum, Ltd. v. National Union Fire Insurance Co. of Pittsburgh*, 557 P.3d 837, 855-56 (Haw. 2024) (cited at OB 37-38), for example, the Hawai’i Supreme Court considered whether “greenhouse gases” are “pollutants” within the meaning of a pollution exclusion. *Id.* at 843. In resolving that question, the court noted that the mere fact that a substance, like gasoline, is “legal” or “ordinary” does not prevent application of the pollution exclusion. *Id.* at 856. The case did not involve, and court did not answer, the distinct question whether permitted emissions fall within the pollution exclusion’s scope. That distinction matters. Because the “operative question is whether a substance causes pollution to the environment,” *id.*, a state agency’s determination not only that a substance is “legal” in the abstract, but that a particular business’s emissions will not cause pollution and

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“duty to defend its insured is much broader than its duty to indemnify” because the duty to defend applies whenever there is “*potentially*” coverage).

thus merit a permit, is directly relevant to assessing whether a pollution exclusion applies, particularly under *Koloms*.

National Union's other cases considering whether a particular substance is a pollutant are irrelevant for the same reason. *See, e.g., Travelers Prop. Cas. Co. of Am. v. Chubb Custom Ins. Co.*, 864 F. Supp. 2d 301, 313-16 (E.D. Pa. 2012) (cited at OB 39).<sup>4</sup> None of those cases considered whether *permitted* emissions were pollutants. Even if they had, they still would not be helpful. *Koloms* asks whether an activity is "traditional environmental pollution." 177 Ill. 2d at 494. That inquiry is distinct from whether a substance is a pollutant, because a substance can be a pollutant in theory without causing what state law considers to be pollution. *See Hilltop*, 2013 IL App (4th) 130124, ¶¶ 28-42. Even National Union embraces this distinction in its otherwise mistaken contention that *Koloms* depends on where the emission occurs, not what substance is emitted. OB 26.

National Union's reliance on *Technicon Electronics Corp. v. American Home Assurance Co.*, 542 N.E.2d 1048 (N.Y. 1989), is equally misplaced. There, the "dispositive issue" was whether certain emissions were "sudden and accidental" and thus encompassed by a then-common carve-out from a pollution exclusion. *Id.* at 1049. In dicta, the New York Court of Appeals opined that the lawfulness of emissions did not change its analysis of the

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<sup>4</sup> The same is true as to National Union's amici's reliance on cases considering the scope of the term "pollutant." *See, e.g., American Property Casualty Insurance Association, et al., Amici Br.* 19-23.

“sudden and accidental” policy language. *Id.* at 1051. But again, the court did not analyze (or even mention) whether “traditional environmental pollution” unambiguously encompasses emissions authorized by state permit—a threshold showing for application of the exclusion, on which National Union bears the burden. National Union’s reliance on other cases considering the scope of the sudden-and-accidental carve-out, OB 39-40, is misplaced for the same reason.

National Union also cites cases in which no permit was at issue and the court thus had no opportunity to consider the question presented here. In *Kim v. State Farm Fire & Casualty Co.*, 312 Ill. App. 3d 770 (1st Dist. 2000), for example, the Appellate Court held that the pollution exclusion barred coverage for harm flowing from the use of perc at a dry cleaning business. *Id.* at 776-77. But the discharge in *Kim* was the result of a malfunction and was not made pursuant to a permit, rendering the case inapposite. *Id.* at 772.

So too with the cases considering harms flowing from the mixture of contaminated groundwater and drinking water in the Village of Crestwood. See *Vill. of Crestwood v. Ironshore Specialty Ins. Co.*, 2013 IL App (1st) 120112, ¶ 5; *Scottsdale Indem. Co. v. Vill. of Crestwood*, 673 F.3d 715, 716-17 (7th Cir. 2012). In *Ironshore*, the Appellate Court rejected the Village’s contention that the pollution exclusion could not apply because the “contaminant levels were below the maximum amounts” allowed by generally applicable law. 2013 IL App (1st) 120112 ¶ 23. In doing so, however, the Appellate Court emphasized

that the Village “did not have a permit to distribute any water from the contaminated well.” *Id.* The Seventh Circuit’s decision in *Scottsdale* likewise considered only an argument that the contaminant was below the level generally allowed by “environmental regulations.” 673 F.3d at 721. Contrary to the Seventh Circuit’s suggestion (A17-18), there is no inconsistency between that conclusion and *Imperial Marble*’s holding that emissions authorized by an individually granted, state-issued permit do not unambiguously fall within the exclusion.<sup>5</sup>

Finally, National Union cites *Prime Tanning Co. v. Liberty Mutual Insurance Co.*, 750 F. Supp. 2d 198 (D. Me. 2010). But there, as required by Maine law, the court analyzed whether the insured was a “*business* traditionally associated with environmental pollution,” and looked to the existence of a regulatory regime only in concluding that “spreading fertilizer” was such a business. *Id.* at 212 (emphasis added). By contrast, *Koloms* asks whether the emissions *themselves* are traditional environmental pollution, not whether a *business* is traditionally associated with environmental pollution. *Prime Tanning* is therefore inapposite.

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<sup>5</sup> National Union’s amici likewise rely on cases where no permit was at issue. See, e.g., *APCIA Amici Br.* 28-29 (citing *Doe Run Res. Corp. v. Lexington Ins. Co.*, 719 F.3d 868 (8th Cir. 2013); *City of Chesapeake v. States Self-Insurers Risk Retention Grp., Inc.*, 628 S.E.2d 539 (Va. 2006); *Martin v. State Farm Fire & Cas. Co.*, 932 P.2d 1207 (Or. Ct. App. 1997); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995)). Those cases are inapposite for the same reasons.

In sum, neither National Union nor its amici point to any case where any court—in Illinois or elsewhere—has rejected as unreasonable the theory that permitted emissions are distinct from “traditional environmental pollution” for purposes of determining whether an insurer has a duty to defend lawsuits arising from such emissions. This only underscores that *Imperial Marble* and *Bible Pork* were rightly decided, and that the permitted emissions here do not unambiguously fall within the pollution exclusion.

**C. Public policy considerations and the reasonable expectations of Illinois insureds support Policyholders, not National Union.**

Finally, broader considerations of public policy and “policyholder[s] reasonable expectations” of coverage weigh strongly against treating emissions authorized by state permit as traditional environmental pollution. *Cummins v. Country Mut. Ins. Co.*, 178 Ill. 2d 474, 485 (1997). Policyholders’ interpretation aligns with the Act and the IEPA’s conception of “pollution,” upon which Illinois businesses have long relied in conducting their operations. National Union’s attempt to invoke competing public policy considerations falls flat, and those considerations cannot render the exclusion’s application “clear and free from doubt” in any event. *Dahms*, 2016 IL App (1st) 141392, ¶ 69.

**1. National Union’s rule would upset the reasonable expectations of Illinois policyholders, contradict the General Assembly’s public policy judgments, and harm Illinois businesses.**

Holding that permitted emissions fall clearly and unambiguously within the pollution exclusion, so as to defeat National Union’s duty to defend the Underlying Litigation, would upset the reasonable expectations of Illinois policyholders, contradict the General Assembly’s public policy determinations, and inflict considerable harm on Illinois businesses and the residents they employ.

Because a “policy’s overall purpose is to provide coverage to the insured,” *Outboard Marine*, 154 Ill. 2d at 119 (citations omitted), this Court can “consider a policyholder’s reasonable expectations” in determining whether “coverage is appropriate,” *Cummins*, 178 Ill. 2d at 485. In particular, “[i]n determining whether there is an ambiguity, the provision in question ... must be read in conjunction with the policyholder’s reasonable expectations and the coverage intended by the insurance policy.” *Am. Family Mut. Ins. Co. v. Hinde*, 302 Ill. App. 3d 227, 232 (2d Dist. 1999).

Here, Illinois policyholders would reasonably expect that emissions expressly authorized by an IEPA permit are not pollution at all, let alone “traditional environmental pollution.” Permitting regimes and individualized permit assessments reflect the State’s policy judgment that particular types of conduct are not unduly harmful and should be permitted. *Supra* at 20-21. Such balancing of interests is a determination of public policy at the core of

legislative and executive power. *See Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 55-56 (2011) (“[T]he General Assembly, which speaks through the passage of legislation, occupies a ‘superior position’ in determining public policy.” (citation omitted)). And a reasonable insured may understandably rely on such judgments, especially because an insurance policy “may not establish a public policy which is contrary to the public policy that the Illinois legislature has determined is appropriate for the State of Illinois.” *State Farm Mut. Auto. Ins. Co. v. Smith*, 197 Ill. 2d 369, 376 (2001).

The General Assembly undertook such an assessment when it crafted the State’s environmental regulatory scheme, determining that the public good that flows from allowing beneficial industries to operate within permitting requirements outweighs some potential externalities. That is why the General Assembly outlawed air pollution but gave the IEPA the power to grant permits for emissions that do not rise to the level of “pollution.” *See* 415 ILCS 5/8, 5/9(a); 35 Ill. Admin. Code § 201.160(b); *see also Wells Mfg. Co. v. Pollution Control Bd.*, 73 Ill. 2d 226, 233, 235-36 (1978) (in suit alleging violation of the Act, explaining that the agency must prove that a business has “cause[d] air pollution” by balancing several criteria, including the “social and economic value” of the business (citation omitted)). As the Master Complaint alleges, the IEPA implemented that legislative directive in the permits at issue here by authorizing the construction and operation of the Willowbrook facility. In doing so, it allowed the regulated emission of EtO to perform the critical public

purpose of sterilizing medical equipment for doctors and patients in need. *Supra* at 12.

This Court should reject National Union’s request that those emissions be declared “pollution”—let alone “traditional environmental pollution,” *Koloms*, 177 Ill. 2d at 494—despite the IEPA having declared otherwise. To hold that such emissions are *unambiguously* “traditional environmental pollution,” even though they are specifically authorized through an individualized assessment by an expert agency charged with preventing pollution, would upset the reasonable expectations of policyholders as to the coverage they purchased—coverage upon which businesses throughout Illinois rely in maintaining their core operations. *See Outboard Marine*, 154 Ill. 2d at 115 (“comprehensive general liability insurance” is “a very broad liability policy whereby the insurer assumes a wide scope of risks” (emphasis omitted)); *Acuity*, 2023 IL 129087, ¶ 32 (same); 9A Steven Plitt et al., *Couch on Insurance* § 129:2 (3d ed. 2025) (“Commercial general liability policies are designed to protect the insured against losses to third parties arising out of the operation of the insured’s business”). And such a holding would undermine decades of reliance on state permitting and improperly conflict with the “public policy that the Illinois legislature has determined is appropriate for the State of Illinois.” *Smith*, 197 Ill. 2d at 376 (deferring to statutory determination in construction of insurance policy); *see also Reed v. Farmers Ins. Grp.*, 188 Ill. 2d 168, 175 (1999) (explaining that, “[w]hen the legislature has declared, by law, the public

policy of the State,” that determination must control (quoting *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 44 (1907))).

As a result, adopting National Union’s rule would deprive a wide range of Illinois industries of the coverage they purchased, exposing them to serious uninsured losses and, in many cases, reducing the amount that tort claimants themselves are ultimately able to recover.

**2. National Union’s public policy arguments lack merit.**

National Union ignores these consequences, insisting that “common sense” and public policy considerations weigh in its favor. OB 41-43. But the concerns National Union invokes are meritless and do not suggest that the pollution exclusion clearly and unambiguously applies to permitted emissions.

*First*, National Union asserts that allowing coverage for injuries related to permitted emissions will encourage pollution. OB 41. But there is no reason to think that insurance coverage for *permitted* levels of emissions would encourage emissions in *excess* of those levels—and the Act itself imposes penalties for such violations. *See, e.g.*, 415 ILCS 5/42 (outlining penalties). Nor is there any basis to assume that Illinois wishes to categorically deter *permitted* emissions, which the IEPA itself has found not to be pollution and chosen to permit. In fact, there is every reason to conclude the opposite. After all, emissions are frequently an unavoidable byproduct of critically important services like the sterilization services at issue here, and the so-called “polluters” National Union denigrates are important Illinois businesses that

employ thousands of Illinois citizens. National Union's argument simply underscores that its proposed rule would require this Court to second-guess the General Assembly's and IEPA's respective policy judgments.

Moreover, publicly available data refutes National Union's speculative argument that adopting *Imperial Marble* would encourage pollution. *Imperial Marble* was issued in 2011, with no contrary opinions from the Appellate Court in the intervening fourteen years. Yet IEPA data shows that the annual emission of every tracked point source contaminant *decreased* between 2011 and 2022, the most recent year for which such data is available. *See Illinois Air Quality Report 2022*, Illinois Environmental Protection Agency, at 80-81 (Jan. 2024), <https://shorturl.at/faUiv>. This data backs up the fact that insurance coverage for permitted emissions no more encourages pollution than insuring product liability claims encourages companies to manufacture and sell dangerous products, or insuring drivers encourages them to drive recklessly. The tort system—and the court of public opinion—encourage companies and individuals to act appropriately, even where they can purchase liability insurance to help spread and manage their risk. *See State Farm Mut. Auto. Ins. Co. v. Fisher*, 315 Ill. App. 3d 1159, 1163 (1st Dist. 2000) (“Insurance is based upon the theory of spreading risk among many policy holders.”), *aff'd*, 197 Ill. 2d 369 (2001). This Court should reject National Union's suggestion that insurance coverage itself creates a moral hazard.

*Second*, National Union asserts that *Imperial Marble* would create line-drawing problems for courts, as permits and regulatory regimes differ in their provisions and requirements. OB 42-43. But this Court need only recognize what the regulatory scheme already provides: that emissions the State has expressly allowed by permit do not unambiguously qualify as pollution, let alone “traditional environmental pollution.”<sup>6</sup> That rule is straightforward and sensible, and as always, insurers retain the ability to revise their policies to obviate any ambiguity. If anything, it is National Union’s proposed rule that would create line-drawing problems by inviting courts to second-guess the General Assembly’s assessment as to what constitutes pollution. Doing so will create uncertainty for policyholders and increase costs for Illinois businesses, which will inevitably be passed on to residents.

*Third*, National Union contends that adopting *Imperial Marble* will increase premiums. OB 43. But *Imperial Marble* has been controlling in Illinois for over a decade, and National Union points to nothing showing any negative impact on the Illinois insurance market. Rather than increase

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<sup>6</sup> National Union points to the absence of permit shield language in Plaintiffs’ permit in an attempt to illustrate these differences. OB 42. But the presence or absence of a permit shield does not present any line-drawing problem, because the permits themselves are issued in the first instance only where the IEPA determines on an individualized inquiry that the facility will not cause pollution. *Supra* at 20-21. A permit need not also expressly preclude claims by third parties or the State to demonstrate that the authorized emissions are not unambiguously “traditional environmental pollution.”

premiums, insurers could simply add language to the pollution exclusion specifying that it applies whether or not emissions occur under a government permit.<sup>7</sup>

Nor is there merit to National Union’s argument that “would-be polluters”—*i.e.*, Illinois businesses operating pursuant to their state-issued permits—“should be forced to bear the costly risks of their pollution by purchasing separate pollution legal liability insurance.” OB 43. That argument assumes that emissions pursuant to a permit are pollution, an assumption at odds with Illinois law. *Supra* at 20-21. In any event, just because specific pollution policies are currently available does not mean that commercial general liability policies issued four decades ago do not cover harm flowing from permitted emissions. Insurers offer, and insureds often purchase, different policies with overlapping coverage. *See* 4 New Appleman Insurance Law Practice Guide § 39.04[4] (2025) (“Multiple policies may apply when a loss affects different types of policies, such as a general liability policy and a policy specifically written for the loss presented.”); *Acuity v. Chartis Specialty Ins. Co.*, 861 N.W.2d 533, 549 (Wis. 2015) (“[I]t is entirely possible for both a commercial general liability policy with a pollution exclusion clause and a contractors’ pollution liability policy to cover the insured’s liability.”).

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<sup>7</sup> The contentions of National Union’s amici that insurers and the insurance markets will be harmed ring hollow for the same reason. *See* Zurich American Insurance Co. Amicus Br. 8-10; APCA Amici Br. 30-33.

Modern policies that offer highly tailored coverage for certain risks do not displace general liability coverage. *See Outboard Marine*, 154 Ill. 2d at 115 (commercial general liability insurance “is a very broad liability policy whereby the insurer assumes a wide scope of risks”). Claims arising from a business’s core, permitted operations should be covered by the broad comprehensive general liability policies they purchased, unless and until insurers take steps to specifically and unambiguously exclude such claims.

**III. At Minimum, It Was Not Clear and Free from Doubt That the Exclusion Applied at the Time National Union Refused to Defend Policyholders in the Underlying Litigation**

Even if this Court were to determine that permitted emissions fall within the pollution exclusion, that determination should not displace the federal district court’s judgment that National Union had a duty to defend. Whether an insurer has a duty to defend is measured “at the time” the insured provides notice of the underlying lawsuit. *Title Indus. Assurance Co., R.R.G. v. First Am. Title Ins. Co.*, 853 F.3d 876, 888 (7th Cir. 2017). Accordingly, “if an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt *at the time the insurer is requested to defend*, because any doubts as to coverage will be resolved in the insured’s favor.” *Markogiannakis*, 188 Ill. App. 3d at 662 (emphasis added); *see also Dahms*, 2016 IL App (1st) 141392, ¶ 68 (holding that an insurer had a duty to defend “at the time the [underlying] complaint was filed” because policy’s criminal-acts exclusion did not clearly apply at that time).

That rule is consistent with the purposes and policies behind the duty to defend. Illinois law has long recognized that “an insurer’s duty to defend” under a liability policy is a “fundamental ... obligation” of the contract. *Ehlco Liquidating Tr.*, 186 Ill. 2d at 151. That duty is often described as “litigation insurance” designed to “protect[] the insured from the expense of defending suits brought against it.” *ITW*, 2015 IL App (1st) 132350, ¶ 46. And that duty also serves “the state’s interest in assuring that an insured is adequately represented in litigation.” *Hartford Accident & Indem. Co. v. Gulf Ins. Co.*, 776 F.2d 1380, 1382 (7th Cir. 1985) (citing *Country Mut. Ins. Co. v. Murray*, 97 Ill. App. 2d 61, 73 (2d Dist. 1968)). As discussed above, “[a]n insurer’s duty to defend its insured is much broader than its duty to indemnify” because it applies whenever there is “potentially” coverage. *Outboard Marine*, 154 Ill. 2d at 125. Accordingly, if there is any possibility of coverage when an insurer is given notice of the underlying complaint, an insurer must provide a defense.

When Policyholders notified National Union of the Underlying Litigation in February 2021, and when National Union refused to defend in April and June 2021, A229 (¶¶ 52-55), controlling Illinois authority—*Imperial Marble* and *Bible Pork*—squarely held that permitted emissions fell outside the pollution exclusion’s reach. *See State Farm Fire & Cas. Co. v. Yapejian*, 152 Ill. 2d 533, 539-40 (1992) (“A decision of the appellate court ... is binding on the circuit courts throughout the State ... absen[t] ... controlling authority from [a circuit court’s] home district ...”). In the decade and a half since

*Imperial Marble* was decided, no Appellate Court decision has departed from or rejected that holding. Accordingly, when National Union refused to defend, it was not “clear from the face of the underlying complaint that the facts alleged d[id] not fall potentially within the policy’s coverage.” *Outboard Marine*, 154 Ill. 2d at 108; *see also Markogiannakis*, 188 Ill. App. 3d at 662-63 (construing exclusion in favor of coverage in light of exclusion’s “well-recognized ambiguity” and “the necessity for a judicial construction of” the clause). To the contrary, existing law made clear that National Union *did* have a duty to defend, making its refusal to defend “unjustifiable.” *Outboard Marine*, 154 Ill. 2d at 108.

The record bears this out. The district court ordered National Union to provide a defense in light of existing Appellate Court authority. A33-35, A47. And National Union itself acknowledges that the Seventh Circuit’s decision to certify a question to this Court was grounded in “uncertainty” about the law. OB 3 (quoting A16-19). That uncertainty confirms that the pollution exclusion’s application here was not “clear and free from doubt,” *Markogiannakis*, 188 Ill. App. 3d at 662, imposing on National Union a duty to defend.

Even aside from that established rule of insurance law, this Court has “the inherent power to make its rulings prospective” based on equitable considerations, including settled reliance interests. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 529 (1993); *see also Tzakis v. Maine Township*, 2020 IL

125017, ¶ 36 (giving rule only prospective effect to “avoid substantial inequitable results for [litigants] who have relied upon” previously controlling law). Illinois businesses relied on the IEPA’s assessment that their operations were not pollution, including in determining what insurance they needed to acquire. Thus, if this Court were to disagree with *Imperial Marble* and hold that claims arising from Policyholders’ permitted emissions fall within the pollution exclusion, those reliance interests strongly favor applying this Court’s decision only prospectively, so that Illinois businesses may take appropriate steps to protect themselves from the threat of crippling, uninsured liability for their state-authorized business operations. *See Lane v. Sklodowski*, 97 Ill. 2d 311, 319 (1983) (giving decision only prospective effect given reliance on state agency’s prior interpretation of statute).

## CONCLUSION

The Court should answer the certified question by holding that insurers have a duty to defend lawsuits arising from alleged emissions authorized by a state permit because such emissions do not unambiguously qualify as pollution, let alone “traditional environmental pollution,” and thus fall outside the scope of pollution exclusions in standard-form commercial liability insurance policies like those here.

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). 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 to be appended to the brief under Rule 342(a), is 12,174 words.

/s/ Gary Feinerman  
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**PROOF OF FILING AND SERVICE**

I hereby certify that I electronically filed the foregoing Brief of Plaintiffs-Appellees with the Clerk of the Court, on August 27, 2025.

I further certify that on August 27, 2025, an electronic copy of the foregoing Brief of Plaintiffs-Appellees is being served through the Court's electronic filing manager on all counsel on the attached Service List.

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