

131710

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 INSUR-
ANCE COMPANY OF PITTSBURGH,
PA.,
Defendant-Appellant.

On Question of Law Certified by
the United States Court of Ap-
peals for the Seventh Circuit,
Nos. 24-1223, 24-1217

There Heard on Appeal from
the United States District Court
for the Northern District of Illi-
nois, Nos. 1:21-cv-4581,
1:21-cv-6403

**REPLY BRIEF OF APPELLANT NATIONAL UNION
FIRE INSURANCE COMPANY OF PITTSBURGH, PA.**

Michael T. Reagan (ARDC #2295172)
LAW OFFICES OF MICHAEL T. REAGAN
633 LaSalle Street, Suite 409
Ottawa, IL 61350
(815) 434-1400
mreagan@reagan-law.com

Thomas H. Dupree Jr.
(Rule 707, ARDC #6351446)
Nick Harper
Aaron Hauptman
Aly Cox
John N. Reed
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8500
tdupree@gibsondunn.com

E-FILED
9/24/2025 1:32 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

INTRODUCTION.....	1
ARGUMENT	3
I. The Pollution Exclusion Unambiguously Forecloses An Unwritten Permit Exception.....	3
A. The Pollution Exclusion’s Text, History, And Purpose Preclude A Permit Exception.....	3
<i>Am. States Ins. Co. v. Koloms,</i> 177 Ill. 2d 473 (1997)	4, 5, 6
<i>United States v. Turkette,</i> 452 U.S. 576 (1981).....	4
<i>Sims v. Allstate Ins. Co.,</i> 365 Ill. App. 3d 997 (5th Dist. 2006)	5
B. The Illinois Environmental Protection Act Precludes A Permit Exception	6
Pub. Act No. 76-2429, 1970 Ill. Laws 873 (June 29, 1970).....	6
<i>People ex rel. Madigan v. Sterigenics U.S., LLC,</i> No. 2018-CH-1329 (DuPage Cnty. Cir. Ct. Oct. 30, 2018)	7
Pub. Act No. 101-22, 2019 Ill. Laws 1979 (June 21, 2019).....	7
Press Release, Gov. Pritzker Signs ‘Matt Haller Act,’ Strictest Regulations on Ethylene Oxide in the Nation (June 21, 2019)	7
415 ILCS 5/39(a)	8, 9
<i>Village of Wilsonville v. SCA Servs., Inc.,</i> 86 Ill. 2d 1 (1981)	8
Ill. Admin. Code tit. 35, § 201.121.....	9
Illinois Environmental Protection Agency, <i>Air Pollution Control Regulations</i> (2d prtng. Jan. 1973)	9
<i>Landfill, Inc. v. Pollution Control Bd.,</i> 74 Ill. 2d 541 (1978)	10
<i>City of Yorkville v. Hamman Farms,</i> PCB No. 08-96, 2008 WL 4742379 (Oct. 16, 2008).....	10

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

<i>People v. Peabody Coal Co.</i> , PCB No. 99-134, 2003 WL 21405850 (June 5, 2003).....	10
 C. <i>Koloms And Other Precedent Foreclose A Permit Exception</i>.....	
<i>Am. States Ins. Co. v. Koloms</i> , 177 Ill. 2d 473 (1997)	10, 11, 14
<i>Village of Crestwood v. Ironshore Specialty Ins. Co.</i> , 2013 IL App (1st) 120112	12, 13
<i>Kim v. State Farm Fire & Casualty Co.</i> , 312 Ill. App. 3d 770 (1st Dist. 2000)	12
<i>Scottsdale Indem. Co. v. Village of Crestwood</i> , 673 F.3d 715 (7th Cir. 2012).....	12
<i>Aloha Petroleum, Ltd. v. Nat’l Union Fire Ins. Co.</i> , 155 Haw. 108 (2024)	12
<i>Technicon Elecs. Corp. v. Am. Home Assurance Co.</i> , 74 N.Y.2d 66 (1989)	12, 13
<i>Technicon Elecs. Corp. v. Am. Home Assurance Co.</i> , 141 A.D.2d 124 (N.Y. Sup. Ct. 1988).....	13
Ill. Admin. Code tit. 35, § 212.....	13
<i>Erie Ins. Exch. v. Imperial Marble Corp.</i> , 2011 IL App (3d) 100380	14
<i>Country Mut. Ins. Co. v. Bible Pork, Inc.</i> , 2015 IL App (5th) 140211.....	14
 D. A Permit Exception Would Effectively Nullify The Pollution Exclusion, Reward Polluters, And Lead To More Pollution In Illinois	
<i>Sterigenics U.S., LLC v. Nat’l Union Fire Ins. Co.</i> , No. 21-cv-04581 (N.D. Ill. Oct. 29, 2021)	15
<i>Griffith Foods Int’l Inc. v. Nat’l Union Fire Ins. Co.</i> , No. 21-cv-06403 (N.D. Ill. Nov. 30, 2021)	15
<i>Mortenson v. Nat’l Union Fire Ins. Co.</i> , 249 F.3d 667 (7th Cir. 2001).....	16

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

<i>Progressive Universal Ins. Co. of Ill. v. Liberty Mut. Fire Ins. Co.</i> , 215 Ill. 2d 121 (2005)	16
<i>Roberts v. Northland Ins. Co.</i> , 185 Ill. 2d 262 (1998)	16
415 ILCS 5/2(b)	16
II. There Can Be No Permit Exception When The Insured Allegedly Violated The Permit Or Obtained It Under False Pretenses.....	17
<i>Am. States Ins. Co. v. Koloms</i> , 177 Ill. 2d 473 (1997)	18
III. The Pollution Exclusion Was Unambiguous At The Time Defense Costs Were Sought	21
<i>Ford v. Dovenmuehle Mortg., Inc.</i> , 273 Ill. App. 3d 240 (1995)	22
<i>Gilbert v. Sycamore Mun. Hosp.</i> , 156 Ill. 2d 511 (1993)	23
Ill. Admin. Code tit. 35, § 201.121	23
CONCLUSION	23

INTRODUCTION

For decades, Griffith and Sterigenics allegedly emitted hundreds of thousands of pounds of a toxic gas into an Illinois neighborhood containing homes, small businesses, and schools—causing widespread injury and death. Now, Griffith and Sterigenics make the stunning argument that their toxic emissions are actually not “pollution” because the companies had a permit that purportedly authorized the emissions.

There is no unwritten “permit exception” to the pollution exclusion. The text of the exclusion is—and always has been—unambiguous in this respect. The pollution exclusion says nothing about a permit exception; the plain language and purpose of the Illinois Environmental Protection Act foreclose such an exception; and, as the Seventh Circuit observed, this Court held in *Koloms* that the relevant question is simply whether the emissions are “traditional environmental pollution,” *not* whether the insured has a permit. This Court should therefore answer the certified question by holding that a permit has *no* relevance to the application of the pollution exclusion.

In the alternative, and at a minimum, the Court should hold that a permit has no relevance to the application of the pollution exclusion when the insured did not comply with the terms of the permit or obtained the permit through false pretenses. Here, the underlying Master Complaint—which determines whether National Union’s duty to defend was triggered—specifically alleges that Griffith and Sterigenics did not comply with the terms of the

permit *and* that they obtained the permit through false representations to the Illinois Environmental Protection Agency (IEPA). This is not a case about *authorized* emissions. To the contrary, it is a case where the emissions allegedly *violated* the terms of a permit that IEPA was fraudulently induced into issuing. Even if there were a permit exception, it cannot possibly extend to cases where the permit was violated or obtained under false pretenses.

At the core of Griffith and Sterigenics’ position is the claim that so long as a government official has issued a permit, polluters cannot be held liable for their conduct, even in cases where they violate the permit and their toxic emissions poison a community. According to them, polluters can foist liability for their misconduct on their general-liability insurer, even when the insurance policy specifically excludes coverage for injuries caused by their pollution. Recognizing their proposed permit exception would lead to more pollution and set the stage for another Willowbrook.

Illinois has long been a leader in protecting its citizens from environmental harm. A decision that makes Illinois the only State in the nation where polluters can avoid liability by asserting a permit exception—under which permitted emissions are not “pollution”—would turn Illinois environmental law upside down and instantly render Illinois a national and notorious outlier. And it would mark a sad and ironic end to the Willowbrook tragedy by telling the thousands of victims that, in the opinion of this Court, they were never exposed to “pollution” after all.

ARGUMENT

I. The Pollution Exclusion Unambiguously Forecloses An Unwritten Permit Exception.

The Seventh Circuit asked: “[W]hat relevance, if any, does a permit or regulation authorizing emissions ... play in assessing the application of a pollution exclusion?” A19. The answer is “none.” All the factors *Koloms* considered in its duty-to-defend analysis—the text, history, and purpose of the pollution exclusion, as well as precedent, canons of construction, and policy considerations—establish that permits and other forms of government authorization are irrelevant to the pollution exclusion.

A. The Pollution Exclusion’s Text, History, And Purpose Preclude A Permit Exception.

Griffith and Sterigenics have no answers to National Union’s argument that the text of the pollution exclusion—which encompasses any “discharge, dispersal, release or escape of” certain substances “into or upon land, the atmosphere or any water course or body of water,” A114—forecloses an exception for emissions authorized by a permit. They do not dispute that federal and state regulators and environmental permits, as well as ordinary English speakers, commonly use the words “discharge” and “release” to refer to emissions pursuant to a permit. Opp. 25-26. And they admit both that the pollution exclusion lacks any express permit exception and that other provisions of the same insurance policy *are* “made contingent on ‘legal authorization.’” *Id.* at 24-25.

Because the text of the pollution exclusion does not help them, Griffith and Sterigenics ignore it. They announce that *Koloms* rejected a “textualist approach” to interpreting the pollution exclusion. Opp. 24. That is a strange claim because *Koloms* stated that “whether the pollution exclusion applies ... turns primarily upon the language of the exclusion itself.” *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 480 (1997) (emphasis added). Next, Griffith and Sterigenics say *Koloms* “held ... that standard pollution exclusions are ambiguous” across the board. Opp. 18. Not so. After analyzing “the facts alleged in the underlying complaints,” *Koloms* held that the pollution exclusion had an “ambiguity” with respect to cases that “have nothing to do with ‘pollution’ in the conventional, or ordinary, sense of the word.” *Id.* at 488. Here, there can be no dispute that the ethylene-oxide emissions alleged in the Master Complaint amount to “pollution” in the ordinary sense of the word. So the single “ambiguity” identified in *Koloms*—whether fumes from a building furnace amount to “pollution”—is not implicated by this case.

Griffith and Sterigenics claim that the exclusion is ambiguous as to permitted emissions because it does not expressly mention permits. Opp. 23. But when an item indisputably falls within a category, there is no need for the contract to expressly state that the item is included in the category. *Cf. United States v. Turkette*, 452 U.S. 576, 580-81 (1981) (RICO applies to the entire category of “enterprise” because the “face” of the statute’s definition “include[s] both legitimate and illegitimate enterprises within its scope” and “no more

excludes criminal enterprises than it does legitimate ones”). The pollution exclusion applies to “discharges” and “releases,” categories that on their face include discharges and releases made pursuant to a permit. Likewise, the pollution exclusion applies to “discharges” and “releases” that happen in Cook County, or happen on Thursday, even though the exclusion does not expressly say it applies to either type. Illinois courts reject “perversions of plain language to create an ambiguity where none in fact exists.” *Sims v. Allstate Ins. Co.*, 365 Ill. App. 3d 997, 1001 (5th Dist. 2006) (citation omitted).

A “review of the history of the pollution exclusion” confirms there is no unwritten permit exception hidden within its plain language. *Koloms*, 177 Ill. 2d at 483, 489-93. Griffith and Sterigenics admit that the pollution exclusion “was a reaction to the rise in more robust environmental regulation.” Opp. 32. And they do not dispute that those new regulations made clear that “the insurance industry could reasonably contemplate that numerous intentional air and water discharges of pollutants could occur lawfully under permit.” NU Br. 34-35. But they argue that the pollution exclusion was meant to foreclose liability only for “cleanup costs” stemming from these new regulations—not for the “tort liability” that would follow from companies emitting toxic chemicals pursuant to new federal, state, and local permits. Opp. 32-33. Here too, this argument was rejected in *Koloms*. This Court explained that the pollution exclusion was created to protect insurers from having to pay for “pollution-related injuries”; “damages resulting from long-term, gradual exposure to

environmental pollution”; and “all pollution-related damage”—tort damages included. 177 Ill. 2d at 489-90 (citation omitted).

B. The Illinois Environmental Protection Act Precludes A Permit Exception.

1. Griffith and Sterigenics base their entire case on an argument that is not just audacious but stunningly wrong: that ethylene oxide emitted for decades into a residential neighborhood, in quantities so vast that they led to one of the most notorious cancer clusters in Illinois history, is actually not “pollution” because Griffith obtained a construction and operating permit in 1984. In Griffith and Sterigenics’ view, if they have a permit, anything they emit cannot be “pollution,” no matter how deadly. *See* Opp. 3 (“[E]missions authorized by state permit are not pollution in the first place.”).

Griffith and Sterigenics’ alleged ethylene-oxide emissions were pollution under Illinois law. The Illinois Environmental Protection Act defines “Air pollution” as “the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration *as to be injurious to human, plant, or animal life, to health, or to property*, or to unreasonably interfere with the enjoyment of life or property.” Pub. Act No. 76-2429, § 3(b), 1970 Ill. Laws 873, 875 (June 29, 1970) (emphasis added) (codified at 415 ILCS 5/3.115). The alleged emissions in this case were obviously and indisputably “pollution” because they were injurious to human health. Ethylene-oxide exposure has long been known to “lead to birth defects and cancer.” A279-82. And the Master Complaint alleges that Griffith and Sterigenics’ emissions of

massive quantities of ethylene oxide into Willowbrook had just that effect: Because of the emissions, the “Willowbrook area has an extremely high cancer risk relative to other parts of the country.” A292-94.

Illinois public officials have recognized that Griffith and Sterigenics’ emissions were pollution under Illinois law. That is what the Illinois Attorney General determined when she sued Sterigenics in 2018. *See* Compl. ¶¶ 50-62, *People ex rel. Madigan v. Sterigenics U.S., LLC*, No. 2018-CH-1329 (DuPage Cnty. Cir. Ct. Oct. 30, 2018). That is what the Illinois General Assembly determined in 2019, when it enacted the Matt Haller Act—named after a Willowbrook resident—which restricted ethylene-oxide emissions from sterilization facilities to near-zero levels. A308; Pub. Act No. 101-22, 2019 Ill. Laws 1979 (June 21, 2019) (codified at 415 ILCS 5/9.16). As Governor JB Pritzker explained in signing the bill, the Matt Haller Act aims to “[p]rotec[t] the health and well-being of the people of Illinois” by “keep[ing] dangerous pollutants out of our communities.” Press Release, *Gov. Pritzker Signs ‘Matt Haller Act,’ Strictest Regulations on Ethylene Oxide in the Nation* (June 21, 2019), <https://tinyurl.com/5ak8mfe9>.

Sterigenics itself has acknowledged its emissions were “pollution.” As detailed in Zurich American Insurance Company’s amicus brief (at 6), Sterigenics tendered (to a different insurer) ethylene-oxide claims brought by injured people who lived near Willowbrook or other sterilization facilities, demanding coverage under a pollution liability policy covering “pollution events.”

So while Sterigenics argues to this Court that its emissions were *not* “pollution” under its National Union policy, it is seeking coverage under different policies on the basis that its emissions *were* “pollution.”

This Court should reject Griffith and Sterigenics’ attempt to lure the Court into making the bizarre pronouncement—contrary to the determinations of the Illinois General Assembly, Governor, and Attorney General—that the companies did not actually emit pollution when they allegedly pumped hundreds of thousands of pounds of toxic gas into a small Illinois town for decades.

2. Griffith and Sterigenics rely on the provisions of the Environmental Protection Act governing the issuance of permits. But these provisions undermine the companies’ arguments because they confirm that permitted emissions can be pollution.

The Act provides that IEPA may issue a permit only “upon proof by the applicant that the facility [or] equipment ... will not cause a violation of th[e] Act.” 415 ILCS 5/39(a). The Act thus requires the agency to make a *predictive* judgment—whether the proposed emissions “will” cause pollution. If the predictive judgment turns out to be wrong, that does not mean the emissions are not “pollution.” It just means the agency got it wrong or was misled. *See Village of Wilsonville v. SCA Servs., Inc.*, 86 Ill. 2d 1, 27 (1981) (finding nuisance despite permits issued by IEPA because tortfeasor provided inaccurate information to the agency during the permitting process). Griffith and Sterigenics try to portray the permitting process as a conclusive judgment by the agency

that any emissions under the permit can never amount to pollution. But the permitting statute does not require the agency to make *any* determination for a permit to issue. It provides that an “applicant may deem the permit issued” if IEPA does *not* act within a specified time. 415 ILCS 5/39(a).

The Environmental Protection Act’s implementing regulations confirm that a permitholder can still be a polluter. The regulations have provided since the early 1970s that, with exceptions not relevant here, the “existence” of a construction or operating permit “*shall not constitute a defense to a violation of the Act.*” Ill. Admin. Code tit. 35, § 201.121 (emphasis added); see Illinois Environmental Protection Agency, *Air Pollution Control Regulations* at 11 (2d prtg. Jan. 1973) (codified as Rule 103(h) at the time), <https://tinyurl.com/yy849hca>. In fact, Griffith’s permit contained language making this exact point. According to the Master Complaint, the permit specifically warned Griffith that its sterilization facility could not be operated in such a manner as to “cause a violation of the [Illinois] Environmental Protection Act or Regulations promulgated thereunder”—such as by polluting the air. The permit expressly stated that it does “*not* release the permittee from any liability for any loss due to damage to person or property caused by, resulting from, or arising out of, the design, installation, maintenance, or operation of” the facilities. A260-61 (emphasis added). If Griffith and Sterigenics were correct that a permit is a trump card that says your emissions are not pollution, this language would make no sense.

Griffith and Sterigenics’ argument that a permitholder cannot be a polluter was rejected in *Landfill, Inc. v. Pollution Control Board*, 74 Ill. 2d 541, 559-60 (1978), where this Court concluded that “[t]he grant of a permit does not insulate violators of the Act or give them a license to pollute.” And the Illinois Pollution Control Board has said the same thing. “By holding a permit ... , a person is thereby not in violation of the requirement to have a permit; the person is not, however, insulated from liability if its activities otherwise violate the Act, such as by causing air pollution.” *City of Yorkville v. Hamman Farms*, PCB No. 08-96, 2008 WL 4742379, at *18 (Oct. 16, 2008); *see People v. Peabody Coal Co.*, PCB No. 99-134, 2003 WL 21405850, at *9-10 (June 5, 2003) (rejecting compliance with NPDES permit as defense to alleged water-pollution violation). Griffith and Sterigenics advance an understanding of permits that is directly contrary to Illinois law.

C. *Koloms* And Other Precedent Foreclose A Permit Exception.

This Court’s decision in *Koloms*, as well as many other cases from Illinois and around the nation, confirm that the pollution exclusion unambiguously applies to government-authorized toxic emissions.

***Koloms*.** *Koloms* distinguished “traditional environmental pollution” (which falls within the pollution exclusion) from emissions resulting from “routine commercial hazards such as a faulty heating and ventilation system” (which do not). 177 Ill. 2d at 483, 488-89, 494. In doing so, *Koloms* described “traditional environmental pollution” as the “gradual or repeated discharge of

hazardous substances *into the environment.*” *Id.* at 493-94 (citation omitted). That description of traditional environmental pollution looks to the “what” (i.e., gradual or repeated discharges) and the “where” (i.e., traveling into the environment). Nothing in that description suggests that it matters whether the toxic emissions occurred pursuant to a permit. So it is no surprise that the Seventh Circuit explained in this case that “if *Koloms* stood in the Illinois Reports as the only pertinent authority on the question presented, we would hold that the pollution exclusion ... exclude[s] the possibility of coverage for the bodily injuries alleged in the Master Complaint.” A15.

Griffith and Sterigenics offer no persuasive response. They claim that *Koloms* “requires a holistic analysis” of whether conduct constitutes traditional environmental pollution, but *Koloms* did not say that. Opp. 31. They say that National Union wants to “relitigate” *Koloms*. *Id.* at 25. But National Union is not arguing, as Griffith and Sterigenics claim, that “*any* discharge into the environment is ‘traditional environmental pollution.’” *Id.* at 29. National Union’s position is simply that when conduct satisfies *Koloms*’s description of traditional environmental pollution—the “gradual or repeated discharge of hazardous substances into the environment,” 177 Ill. 2d at 493 (emphasis and citation omitted)—that is the end of the inquiry. *Koloms* requires no *additional* inquiry into whether the polluter had a permit.

Other Cases. Nearly every court to have addressed the certified question has held that permits and other forms of legal authorization are irrelevant to the application of the pollution exclusion.

Within Illinois, two appellate courts have “reject[ed] the ... contention that the pollution exclusions do not apply when alleged emissions are within permitted legal standards.” *Village of Crestwood v. Ironshore Specialty Ins. Co.*, 2013 IL App (1st) 120112, ¶ 23; accord *Kim v. State Farm Fire & Casualty Co.*, 312 Ill. App. 3d 770, 776 (1st Dist. 2000). So has the Seventh Circuit when applying Illinois law. *Scottsdale Indem. Co. v. Village of Crestwood*, 673 F.3d 715, 721 (7th Cir. 2012); see also A17 (Seventh Circuit explaining in this case that this is the “natural reading of *Koloms*”).

Outside Illinois, two state courts of last resort—New York and Hawaii—also have held that the “legality, ordinariness, and intent of a product’s use is irrelevant” to the exclusion’s application. *Aloha Petroleum, Ltd. v. Nat’l Union Fire Ins. Co.*, 155 Haw. 108, 126-27 (2024); *Technicon Elecs. Corp. v. Am. Home Assurance Co.*, 74 N.Y.2d 66, 76 (1989). And still other courts have found the existence of permits to *support* application of the exclusion. See NU Br. 38-40 & n.3 (collecting cases); see also APCIA Br. 28-29 (collecting “decades of case law applying pollution exclusions to releases from facilities, plants, manufacturers, waste sites and other businesses regulated under” federal and state environmental laws).

Griffith and Sterigenics note that some of the many cases cited by National Union and its amici involved emissions authorized by a regulation rather than a permit. Opp. 35-36, 37-38 & n.5. But others *did* involve permits, including the New York Court of Appeals' *Technicon* decision. *See Technicon*, 74 N.Y.2d at 75 (referencing the allegations set forth in *Technicon Electronics Corp. v. American Home Assurance Co.*, 141 A.D.2d 124, 127 (N.Y. Sup. Ct. 1988), that Technicon's discharges of toxic chemicals allegedly were made "in accordance" with "applicable permits and regulations"). Griffith and Sterigenics claim *Technicon* is "dicta" because it addressed the sudden-and-accidental exception, but *Technicon* also rejected the insured's alternative argument that "the pollution exclusion provision is displaced from its policy" because the discharges were "legal" under a permit. 74 N.Y.2d at 76.

Moreover, Griffith and Sterigenics do not explain why it matters whether emissions are authorized by an "individualized assessment" through a permit, Opp. 42, or instead by generally applicable laws like "the Safe Drinking Water Act" and "environmental regulations," *Village of Crestwood*, 2013 IL App (1st) 120112, ¶ 23. Both forms of authorization have the same legal effect, and Illinois regulates emissions through both mechanisms. *E.g.*, Ill. Admin. Code tit. 35, § 212 (Visible and Particulate Matter Emissions Regulations). Indeed, the Seventh Circuit appeared to view permits and regulations as indistinguishable for purposes of the certified question, asking about the "relevance, if any, [of] *a permit or regulation* authorizing emissions." A19 (emphasis added).

Griffith and Sterigenics rely on *Imperial Marble* and *Bible Pork*. But *Imperial Marble* interpreted *Koloms* as having found the pollution exclusion ambiguous in *all* applications, see *Erie Ins. Exch. v. Imperial Marble Corp.*, 2011 IL App (3d) 100380, ¶ 22, when in fact the *Koloms* Court found it ambiguous on the single question whether fumes emitted from a malfunctioning furnace fell within the pollution exclusion, see 177 Ill. 2d at 488 (finding “an ambiguity which results when the exclusion is applied to cases which have nothing to do with ‘pollution’ in the conventional, or ordinary, sense of the word”). *Koloms* would not have found the pollution exclusion ambiguous on the question presented here—whether emissions of tons of ethylene oxide fall outside the pollution exclusion just because the insured had a permit. And *Bible Pork* adds nothing. Only in a single sentence at the tail end of the opinion that made no difference to the disposition of the case did *Bible Pork* “agree” with *Imperial Marble*. *Country Mut. Ins. Co. v. Bible Pork, Inc.*, 2015 IL App (5th) 140211, ¶ 41. The court provided no further explanation or analysis.

D. A Permit Exception Would Effectively Nullify The Pollution Exclusion, Reward Polluters, And Lead To More Pollution In Illinois.

It is hard to envision a rule of law that would be more welcomed by polluters—and more destructive to the health of Illinois residents—than the recognition of a permit exception to the pollution exclusion. It would be ironic indeed if the result of the Willowbrook tragedy were to make Illinois the only

State in the nation to recognize a permit exception that would insulate polluters from having to pay for the harm they caused.

Griffith and Sterigenics do not dispute that businesses today rarely discharge chemicals into the environment without a permit. *See* NU Br. 32. So there can be no dispute that recognizing a permit exception would free most polluters—and virtually all large-scale industrial polluters like Griffith and Sterigenics—from liability for causing harm to the environment or human health. Griffith and Sterigenics say that such an exception would not render the pollution exclusion an “empty husk” because there could be cases where the plaintiff’s lawyer chose to “allege injuries based *solely* on conduct in violation or in excess of a permit.” Opp. 34. But they cite no examples of such cases, which do not seem to have happened in the real world (likely because plaintiffs have no reason to omit permitted emissions from their complaints).

Griffith and Sterigenics halfheartedly suggest that a permit exception might be confined to the duty-to-defend stage and not to the indemnity stage of an insurance dispute. Opp. 34 n.3. But they do not explain why that would be so—and they argued in the district court that their permits should relieve them of liability *altogether*. *E.g.*, Am. Compl. ¶¶ 2-3, 6, 38-42, 65-66, 75-77 (raising permit argument to establish duty to defend and duty to indemnify), *Sterigenics U.S., LLC v. Nat’l Union Fire Ins. Co.*, No. 21-cv-04581 (N.D. Ill. Oct. 29, 2021), ECF No. 15; Compl. ¶¶ 44, 48 (similar), *Griffith Foods Int’l Inc. v. Nat’l Union Fire Ins. Co.*, No. 21-cv-06403 (N.D. Ill. Nov. 30, 2021), ECF

No. 1. So while they propose a reformulated certified question noting that this is a duty-to-defend case, a permit exception (at least in their view) would apply equally at the indemnity stage, relieving polluters not just of the cost of defense but of all liability for the harm caused by their pollution.

A permit exception would subsidize pollution and harm Illinoisans. NU Br. 41-43. Eliminating tort law’s disincentive for companies to pollute would create an “acute moral hazard” by “tempt[ing] ... the insured to commit the very act insured against”—resulting in the emission of more harmful chemicals in Illinois. *Mortenson v. Nat’l Union Fire Ins. Co.*, 249 F.3d 667, 671-72 (7th Cir. 2001). Plus, a carveout for permitted emissions would ultimately require *all* commercial-general-liability policyholders to subsidize pollution as premiums rise to cover the risk of pollution claims. *See, e.g., Progressive Universal Ins. Co. of Ill. v. Liberty Mut. Fire Ins. Co.*, 215 Ill. 2d 121, 135 (2005) (recognizing that insurance premiums are based on risk); *Roberts v. Northland Ins. Co.*, 185 Ill. 2d 262, 271 (1998) (same).

All of this would be contrary to the Illinois Environmental Protection Act, which emphasizes that Illinois public policy should “assure that adverse effects upon the environment are fully considered and borne by those who cause them.” 415 ILCS 5/2(b). Griffith and Sterigenics get Illinois public policy backwards when they insist that a permit exception is consistent with the General Assembly’s purported goal of protecting “beneficial” emissions. Opp. 41-42. They downplay moral hazard (and the toll on human health) on the

ground that the “public good” of permitted emissions from “important Illinois businesses” “outweighs some potential externalities” to the residents of Willowbrook and other Illinois communities. *Id.* at 41, 43-44. But the moral hazard created by the companies’ approach would lead to a dirtier environment and more victims of pollution.

While Griffith and Sterigenics profess concern for the “amount” that victims “are ultimately able to recover,” Opp. 43, the Court’s disposition of this appeal will have no impact on the money the Willowbrook victims will recover. The overwhelming majority of the underlying lawsuits have now settled, and Griffith and Sterigenics do not dispute that they have already placed the funds to pay the victims in escrow. The only issue here is whether Griffith and Sterigenics can force someone else to pay their costs of defending against the claims of their victims.

II. There Can Be No Permit Exception When The Insured Allegedly Violated The Permit Or Obtained It Under False Pretenses.

In the alternative, and at a minimum, the Court should hold that a permit has no relevance to the application of the pollution exclusion when the insured did not comply with the terms of the permit or obtained the permit through false pretenses. Even if the Court were to recognize a permit exception, such an exception cannot possibly apply when the insured allegedly violated the terms of the permit or secured the permit by making false representations to the regulator. In either scenario, the regulator cannot be deemed to have “authorized” the emissions, so the basis for a permit exception does not

apply. Where, as here, the insurer's duty to defend is at issue, the Court looks to the allegations in the underlying complaint to determine whether the duty has been triggered. *Koloms*, 177 Ill. 2d at 479.

Griffith and Sterigenics claim entitlement to a permit exception based on a single permit: the construction and operating permit Griffith acquired in 1984 from IEPA. *See* Opp. 10-12. But the Master Complaint alleges that Griffith *violated* the terms of that permit. It also alleges that Griffith obtained the permit under false pretenses. The existence of a duty to defend turns on the allegations of the Master Complaint—and here, these two allegations foreclose any reliance on a permit exception. Illinois cannot be deemed to have “authorized” emissions that were made in violation of a permit that was obtained through fraud.

The terms of the permit allegedly were violated. The Master Complaint alleges that Griffith violated the mitigation and monitoring conditions imposed by the permit. According to the Master Complaint, IEPA had serious “concerns” about the “environmental impact” of Griffith’s planned ethylene-oxide emissions, which were known at the time to be carcinogenic. A262. So the agency included two “special conditions” in the permit to address those concerns: Griffith needed to “conduct ambient air monitoring for a one-year period and submit a final report,” and “investigate the availability of emission reduction measures for ethylene oxide.” *Id.*

But the Master Complaint alleges that Griffith violated both conditions. Griffith never monitored the ambient air quality or submitted a final report to IEPA, *see* A263; A274-75, even though it understood that air-quality monitoring was necessary for the agency to confirm that the facility was operating safely. A266. Moreover, according to the Master Complaint, Griffith misled IEPA about its investigation into potential emission-reduction measures. Griffith claimed that it needed more time to investigate even though it was already aware of cost-effective reduction measures because it was using them in its own facilities in other States. A264; A272-73.

Griffith and Sterigenics respond that because the underlying claims allege injuries based *in part* on emissions that were not “in violation or in excess of a permit,” National Union owes a duty to defend the entirety of the underlying lawsuits. Opp. 34. But that misreads the Master Complaint. *None* of the emissions can be deemed “permitted emissions” because Griffith violated two conditions that governed the operation of the entire facility. Any emissions allowed by the permit were permissible only if Griffith honored the two conditions the permit imposed—that Griffith monitor and report on the air quality; and that Griffith investigate mitigation measures. Griffith did neither, according to the Master Complaint. Thus, even if there were a permit exception in Illinois law, it would not apply in situations like this one, where the insured violated the terms and conditions of the permit.

The permit allegedly was obtained under false pretenses. The Master Complaint alleges that Griffith acquired the permit by making false representations to IEPA. For this reason too, the emissions cannot be deemed to have been “authorized” by the government and cannot qualify for a permit exception, even if one existed.

The Master Complaint alleges that, in order to obtain its permit, Griffith lied to IEPA about three things:

- the volume of ethylene oxide that its facility was already emitting;
- the maximum amount of ethylene oxide that it would be able to emit in the future; and
- the height of its planned emissions stacks, which directly affects the concentration of ethylene oxide at ground level.

See A257-58. The Master Complaint alleges that just two years after receiving the permit based on these false representations, Griffith was emitting *more than double* what it told IEPA was the maximum amount of ethylene oxide it would emit. *Id.*

A polluter who obtains its permit through fraud and deceit cannot possibly claim entitlement to a permit exception. Griffith and Sterigenics say their toxic emissions were not “pollution” because IEPA “necessarily determine[d] that the emissions authorized by the permit will not ‘cause air pollution.’” Opp. 20. But IEPA cannot have made such a determination if, as the Master Complaint alleges, Griffith made false representations about its

emissions in order to acquire the permit. It should not be controversial to hold that a permit obtained under false pretenses has no relevance to the application of the pollution exclusion.

* * *

In sum, this Court could answer the certified question by holding that a permit has no relevance to the application of the pollution exclusion when the insured violated the terms of the permit or obtained the permit through false pretenses. Because this is a duty-to-defend case, the Court looks solely to the allegations in the Master Complaint. Griffith and Sterigenics cannot credibly argue that the government has “authorized” emissions that—as alleged in the Master Complaint—violate the terms of a permit that was obtained through fraud.

III. The Pollution Exclusion Was Unambiguous At The Time Defense Costs Were Sought.

As a last resort, Griffith and Sterigenics insist that they should win even if they lose. They argue that if this Court holds that permits and regulations are not relevant to the application of the pollution exclusion, it should say that this principle was unclear at the time Griffith and Sterigenics requested defense from National Union in 2021.

This argument is just a repackaging of their meritless argument that the pollution exclusion is ambiguous as applied to “permitted emissions.” National Union’s position is that based on text, precedent, history, and policy considerations, the pollution exclusion has *always* unambiguously foreclosed an

exception for government-authorized toxic emissions—either in general or on the facts of this case. This is clear from decades-old contractual provisions, case law, and other authorities, and the Court would break no new ground in reaching that conclusion.

Griffith and Sterigenics suggest that the mere existence of *Imperial Marble* and *Bible Pork* gave rise to ambiguity, but that is inconsistent with Illinois law. “[T]he mere fact” that “other courts and other judges have reviewed similar contractual language and have reached differing conclusions,” does not “compel” a finding of ambiguity. *Ford v. Dovenmuehle Mortg., Inc.*, 273 Ill. App. 3d 240, 245 (1995). And here, for the reasons explained above, neither *Imperial Marble* nor *Bible Pork* creates ambiguity about the meaning of the pollution exclusion.

At the time Griffith and Sterigenics sought a defense in 2021, their emissions allegedly had caused injury, disease, and death to hundreds of Willowbrook residents; the Illinois Attorney General had sued them for polluting the environment in violation of the Environmental Protection Act; and the Matt Haller Act had restricted ethylene-oxide emissions to negligible levels in response to their wrongdoing. National Union was on unimpeachable footing when it denied coverage on the basis of the pollution exclusion.

Griffith and Sterigenics ask the Court to make any decision ruling against them prospective only, due to their “settled reliance interests.” Opp. 49-50. But only “justifiable” reliance can warrant a decision’s

prospective-only application. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 529 (1993). Griffith and Sterigenics could not have “relied” on *Imperial Marble* or *Bible Pork* (decisions from 2011 and 2015) at the time National Union’s policies were in force from 1983 to 1985. And any reliance on the IEPA permit was always unreasonable due to the agency’s longstanding caution that its construction and operating permits provide “[n]o [d]efense” to “a violation of the Act.” Ill. Admin. Code tit. 35, § 201.121.

CONCLUSION

This Court should hold that a permit has no relevance to the application of the pollution exclusion.

Dated: September 24, 2025

Respectfully submitted,

Michael T. Reagan (ARDC #2295172)
LAW OFFICES OF MICHAEL T. REAGAN
633 LaSalle Street, Suite 409
Ottawa, IL 61350
(815) 434-1400
mreagan@reagan-law.com

/s/ Thomas H. Dupree Jr.
Thomas H. Dupree Jr.
(Rule 707, ARDC #6351446)
Nick Harper
Aaron Hauptman
Aly Cox
John N. Reed
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8500
tdupree@gibsondunn.com

RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or 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 5,475 words.

/s/ Thomas H. Dupree Jr. _____
Thomas H. Dupree Jr.
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth herein are true and correct. On September 24, 2025, the foregoing Reply Brief of Defendant-Appellant National Union Fire Insurance Company of Pittsburgh, Pa. was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email addresses:

Scott L. Howie
Karen Kies DeGrand
DONOHUE BROWN SMYTH LLC
131 South Dearborn Street Suite 1600
Chicago, IL 60603
(312) 422-0900
howie@dbb-law.com
degrand@dbb-law.com

James M. Davis
PERKINS COIE LLP
1201 Third Avenue Suite 4900
Seattle, WA 98101
(206) 359-8000
jamesdavis@perkinscoie.com

Sopen B. Shah
PERKINS COIE LLP
33 E. Main Street Suite 201
Madison, WI 53703
(608) 663-7460
sshah@perkinscoie.com

Christopher B. Wilson
 Bradley Dlatt
 Kahin Gabriel Tong
 PERKINS COIE LLP
 110 N. Wacker Drive Suite 3400
 Chicago, IL 60606
 (312) 324-8400
 cwilson@perkinscoie.com
 bdlatt@perkinscoie.com
 ktong@perkinscoie.com

Jonathan G. Hardin
 PERKINS COIE LLP
 700 13th Street, NW Suite 800
 Washington, DC 22305
 (202) 654-6200
 jhardin@perkinscoie.com

*Counsel for Plaintiffs-Appellees
 Griffith Foods International Inc.
 f/k/a Griffith Laboratories U.S.A.,
 Inc., and Griffith Foods Group Inc.
 f/k/a Griffith Laboratories, Inc.*

Gary Feinerman
 LATHAM & WATKINS LLP
 330 North Wabash Avenue Suite 2800
 Chicago, IL 60611
 (312) 777-7110
 gary.feinerman@lw.com

Margaret A. Upshaw
 Peter A. Prindiville
 LATHAM & WATKINS LLP
 555 Eleventh Street, NW Suite 1000
 Washington, DC 20004-1304
 (202) 637-2200
 maggie.upshaw@lw.com
 peter.prindiville@lw.com

K. James Sullivan
 Matthew A. Chiricosta
 CALFEE, HALTER &
 GRISWOLD LLP
 The Calfee Building
 1405 East Sixth Street
 Cleveland, OH 44114
 (216) 622-8200
 kjsullivan@calfee.com
 mchiricosta@calfee.com

Andrew G. May
 Paul Walker-Bright
 Steven F. Pflaum
 NEAL GERBER & EISENBERG LLP
 225 W. Randolph Street Suite 2800
 Chicago, IL 60606
 (312) 269-8000
 amay@nge.com
 pwalkerbright@nge.com
 spflaum@nge.com

*Counsel for Plaintiff-Appellee
 Sterigenics U.S., LLC*

Michael Resis
 AMUNDSEN DAVIS
 150 N. Michigan Ave. Suite 3300
 Chicago, Illinois 60601
 (312) 894-3200
 mresis@amundsendavislaw.com

*Counsel for Complex Insurance Claims
 Litigation Association, American Property
 Casualty Insurance Association, National
 Association of Mutual Insurance Companies,
 and Illinois Insurance Association*

Adam H. Fleischer
 Mark A. Deptula
 Kristin M. Johnson Holevas
 BATESCAREY LLP
 191 North Wacker Drive, Suite 2400
 Chicago, IL 60606
 (312) 762-3100
 afleischer@batescarey.com
 mdeptula@batescarey.com
 kholevas@batescarey.com

*Counsel for Swiss Re Corporate Solutions
 Elite Insurance Corporation*

Michael M. Marick
 SKARZYNSKI MARICK & BLACK LLP
 500 West Madison Street, Suite 3600
 Chicago, Illinois 60661
 (312) 946-4235
 mmarick@skarzynski.com

Counsel for Zurich American Insurance Company

John S. Vishneski
 Stanley C. Nardoni
 Claire M. Whitehead
 Jake A. Ziering
 REED SMITH LLP
 10 S. Wacker Dr., 40th Floor
 Chicago, Illinois 60606
 Tel.: (312) 207-1000
 jvishneski@reedsmith.com
 snardoni@reedsmith.com
 cmwhitehead@reedsmith.com
 jziering@reedsmith.com

Counsel for United Policyholders

Patrick A. Salvi, II
 SALVI, SCHOSTOK & PRITCHARD P.C.
 161 N. Clark St., Ste. 4700
 Chicago, IL 60601
 (312) 372-1227
 psalvi2@salvilaw.com

Counsel for the Illinois Trial Lawyers Association

Brent W. Vincent
 Matthew Walker
 LATHROP GPM LLP
 155 North Wacker Drive Suite 3800
 Chicago, IL 60606
 Tele: 312.920.3300
 Fax: 312.920-3301
 brent.vincent@lathropgpm.com
 matt.walker@lathropgpm.com

Alana M. McMullin
 Noah H. Nash
 LATHROP GPM LLP
 2345 Grand Blvd. Suite 2200
 Kansas City, MO 64108
 Tele: 816.292.2000
 Fax: 816.292.2001
 alana.mcmullin@lathropgpm.com
 noah.nash@lathropgpm.com

*Counsel for Amicus Curiae
 The Chemical Industry Council of Illinois
 and The American Chemistry Council*

J. Timothy Eaton
 Jonathan B. Amarilio
 Adam W. Decker
 TAFT STETTINIUS & HOLLISTER LLP
 111 E. Wacker Dr., Ste. 2600
 Chicago, Illinois 60601
 Tel.: 312.527.4000
 teaton@taftlaw.com
 jamarilio@taftlaw.com
 adecker@taftlaw.com

*Counsel for the Illinois Manufacturers'
 Association, Medline Industries,
 LP, Vantage Specialty Chemicals, Inc.,
 Sterilization Services of Tennessee, Inc., iBio*

Ryan D. Andrews
 Alexander G. Tievsky
 EDELSON PC
 350 North LaSalle Street, 14th Floor
 Chicago, Illinois 60654
 randrews@edelson.com
 atievsky@edelson.com

*Counsel for Vantage Ethylene Oxide
 Settlement Participants*

Upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Thomas H. Dupree Jr.
 Thomas H. Dupree Jr.
 GIBSON, DUNN & CRUTCHER LLP
 1700 M Street, N.W.
 Washington, D.C. 20036