

No. 131710

IN THE
Supreme Court of Illinois

GRIFFITH FOODS INTERNATIONAL INC., ET AL.,

Plaintiffs-Appellees,

v.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA,

Defendant-Appellant.

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

**AMICI CURIAE BRIEF OF
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION,
COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION,
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
AND THE ILLINOIS INSURANCE ASSOCIATION
IN SUPPORT OF DEFENDANT-APPELLANT**

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INTEREST OF *AMICI CURIAE*

The Complex Insurance Claims Litigation Association (“CICLA”), American Property Casualty Insurance Association (“APCIA”), National Association of Mutual Insurance Companies (“NAMIC”), and Illinois Insurance Association (“IIA”) (collectively, “Amici”) are trade associations of property and casualty insurance companies. Together, Amici represent the vast majority of commercial and personal lines insurance companies in the United States, including many insurers headquartered in Illinois. Amici seek to assist courts in resolving important insurance cases, regularly appearing as amicus curiae in state and federal courts around the country, including important cases before this Court.¹

CICLA is a trade association of major property and casualty insurance companies. Through amicus curiae briefs, CICLA seeks to assist courts in understanding and resolving the core coverage issues of greatest importance to insurers today. CICLA has participated as amicus curiae in numerous insurance cases in state and federal appellate courts across the United States.

¹ See, e.g., *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 602 U.S. 268 (2024) (APCIA/CICLA) (where SCOTUS quoted and twice cited their amicus submission); *Sherwin-Williams Co. v. Certain Underwriters of Lloyd’s London*, No. 2024-Ohio-5773, 2024 WL 5049193 (Dec. 10, 2024) (APCIA, CICLA & NAMIC); *Aloha Petroleum, Ltd. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 557 P.3d 837 (Haw. 2024) (APCIA/CICLA); *Kajima Constr. Servs., Inc. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill. 2d 102, 879 N.E.2d 305 (2007) (CICLA); *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (1997) (CICLA’s predecessor IECLA).

American Property Casualty Insurance Association (“APCIA”) is a primary national trade association for home, auto, and business insurers. With a legacy dating back 150 years, APCIA promotes and protects the viability of private competition to benefit consumers and insurers. APCIA’s member companies represent 67% of the U.S. property-casualty insurance market and write more than \$23 billion in premiums in the State of Illinois, including nearly 82% of the general liability insurance market. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the United States and across the globe.

NAMIC consists of more than 1,500 member companies, including seven of the top 10 property/casualty insurers in the United States. The association supports local and regional mutual insurance companies on main streets across America as well as many of the country’s largest national insurers. NAMIC member companies write \$357 billion in annual premiums and represent 69 percent of homeowners, 56 percent of automobile, and 31 percent of the business insurance markets. Through its advocacy programs NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve and fosters greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

The IIA, founded in 1959, is an insurance trade association representing the largest property and casualty insurance companies in Illinois. The IIA’s

mission is to preserve and enhance a positive insurance climate in which member companies may conduct business, responsibly serve the needs of Illinois consumers, and grow and prosper in a highly competitive insurance market.

This case raises a question of great significance to insurers and their policyholders. The Court must decide whether the pollution exclusion in a commercial general liability (“CGL”) insurance policy, which excludes coverage for claims arising from the discharge of a pollutant into the atmosphere, bars claims for bodily injury arising from the policyholder’s regular discharge of ethylene oxide (“EtO”), a known carcinogen, as part of its ongoing business operations. The policyholder paradoxically contends that a regulatory permit allowing it to pollute the environment negates the pollution exclusion in its private insurance contracts.

Recognizing the “substantial ramifications” for the insurance marketplace given that “federal law requires any company that emits large amounts of pollutants to obtain a permit,”² the United States Court of Appeals for the Seventh Circuit certified the following question to this Court:

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

² See *Griffith Foods Int’l Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 134 F.4th 483, 492-93 (7th Cir. 2025).

levels) play in assessing the application of a pollution exclusion within a standard-form commercial general liability policy?³

Id. at 493.

Amici submit that the answer is: none. Nothing in this Court’s decision in *Koloms* supports carving out a “permit or regulatory exception” from the pollution exclusion – particularly with respect to claims arising from what is clearly “traditional environmental pollution.” To create such an exception, as the federal district court did, would effectively nullify the pollution exclusion given the extensive regulatory environment in which modern businesses operate. It would overturn decades of caselaw and make Illinois an outlier in failing to give effect to the exclusion.

Moreover, there is no requirement that an insurer take on a risk that is regulated, even if the insured has obtained a permit or is otherwise in compliance with regulatory standards. To the contrary, the parties to the insurance contract are entitled to decide which risks will transfer to the insurer and which will be borne by the insured. They did so here, agreeing to a contract – with no “permitted” or “regulatory approval” exception – which excludes bodily injury claims arising from the discharge of any irritant, contaminant or

³ Whether the pollution exclusion is the earlier “sudden and accidental” exclusion (as here), or an “absolute” pollution exclusion (as in *Koloms*), the same analysis applies to the question whether a “permitted” discharge of pollutants into the atmosphere falls within the broad scope of the pollution exclusion.

pollutant into the atmosphere. The policy does not except “permitted” pollution from the scope of the pollution exclusion.

The hazard created by the policyholder’s regular discharge of EtO into the atmosphere falls squarely within the scope of the pollution exclusion. Insurers are not the guarantors of regulatory policy decisions. They are engaged in the business of risk transfer – identifying and pricing risks and agreeing, or not agreeing, to undertake them. Holding that a policyholder’s compliance with state and federal environmental laws and regulations governing the discharge of pollutants negates the application of the pollution exclusion would upset the fundamental bargain between the insurance contract parties and the underwriting decisions on which their contract was based, setting Illinois apart from the rest of the country. Enforcing the pollution exclusion, on the other hand, supports important public policy goals, including long-term environmental objectives, and protects the vital functioning of the insurance market by supporting the availability and affordability of insurance for Illinois policyholders.

Amici demonstrate that the pollution exclusion bars coverage for bodily injury claims arising from a policyholder’s discharge of an irritant, contaminant or pollutant into the environment, irrespective of whether the policyholder acted under a permit from a regulatory agency.

BACKGROUND

This case arises out of over 800 bodily injury lawsuits against Griffith Foods International Inc. (“Griffith”) and Sterigenics U.S., LLC (“Sterigenics”)

(collectively, “Appellees”) arising from their operation of a medical supply sterilization plant in Willowbrook, Illinois. *Griffith Foods*, 134 F.4th at 485. As the Seventh Circuit explained, “[t]he gravamen of the Master Complaint is clear: for the 35 years the sterilization plant operated in Willowbrook, local residents unknowingly inhaled EtO on a regular and continuous basis, with many individuals coming to experience a range of illnesses, including cancer and other serious diseases. *See, e.g.*, MC ¶¶ 10, 13, 90–91, 300(a)).” *Id.* Further, “[t]he complaints commonly alleged that Griffith intentionally located and operated its facility in a residential area despite knowing that its dangerously high EtO emissions would migrate to areas near the facilities, including to homes and neighboring schools, and eventually cause bodily injuries.” *Id.* at 485-86.

In 1984, Griffith obtained a construction and operating permit from the Illinois Environment Protection Agency (“IEPA”) to open the plant. *Id.* at 485. In its application, Griffith informed the IEPA that its operations would discharge ethylene oxide (“EtO”) into the atmosphere. *Id.* Although IEPA expressed concerns about the projected EtO emissions, it granted the permit. *Id.* Griffith continued to operate the plant until 1999, when Sterigenics purchased it and assumed operations. *Id.* Sterigenics continued to operate the facility and continued to discharge EtO pursuant to the existing permit until it was forced to close in 2019. *Id.*

National Union Fire Insurance Company of Pittsburgh (“National Union”) issued two one-year CGL policies to Griffith from September 30, 1983 to September 30, 1985. *Id.* at 486. In 2021, Griffith tendered the lawsuits to National Union, which denied coverage based, in part, on the pollution exclusions in its policies. *Id.* Both Griffith and Sterigenics filed coverage actions against National Union. *Id.*

The National Union policies require the insurer to “defend any suit against the insured seeking damages on account of ... bodily injury” that “occur[ed] during the policy period.” The policies also contain a pollution exclusion that bars coverage for

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; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental[.]⁴

Id. at 489.

SUMMARY OF ARGUMENT

The pollution exclusions bar coverage for the underlying bodily injury claims arising out of the regular and deliberate discharges of EtO from the insured’s operations. They exclude coverage for “bodily injury” “arising out of the discharge... of ... contaminants or pollutants into... the atmosphere....”

⁴ This pollution exclusion was introduced as part of the CGL policy in 1973. See *Koloms*, 177 Ill. 2d at 491, 687 N.E.2d at 80. It is commonly referred to as the “sudden and accidental” or “qualified” pollution exclusion.

unless “such discharge ... is ‘sudden and accidental.’”⁵ There is no exception in the policy language for “permitted uses.”

The underlying lawsuits allege bodily injury arising from the discharge of EtO, a known carcinogen, into the atmosphere for 35 years. Those discharges were deliberate and integral to Griffith/Sterigenics’ normal business operations. To conduct those operations, Griffith/Sterigenics had to obtain a permit from the IEPA.⁶ But that doesn’t make EtO any less an irritant, contaminant or pollutant under the policies. As the underlying complaints allege, EtO is a toxic pollutant, whether its discharge is regulated or not.

Courts across the country have enforced the pollution exclusion where the underlying claims allege bodily injury arising out of the discharge of irritants, contaminants or pollutants into the environment. The exclusion applies when the discharges of an irritant, contaminant or pollutant into the atmosphere occur as part of the company’s normal business operations, and regardless of whether the insured complies with state or local environmental regulations at a particular point in time. That is because application of the pollution exclusion turns not on the regulation of a hazardous substance, but on the insurance policy terms. Under the insurance contract, the pollution exclusion doesn’t apply only to “unpermitted” releases. It applies to precisely

⁵ As the Seventh Circuit held, the “sudden and accidental” exception to the pollution exclusion is not implicated here. *See infra* n.9.

⁶ *See* <https://epa.illinois.gov/topics/forms/air-permits.html> (last visited June 20, 2025); <https://www.epa.gov/hazardous-air-pollutants-ethylene-oxide> (last visited June 20, 2025).

the circumstances at issue here – bodily injury claims allegedly arising from the discharge of an irritant, contaminant or pollutant into the atmosphere.

Regulatory approvals governing discharges of hazardous materials into or upon land, the atmosphere or any water course or body of water are a necessary part of doing business for many companies. If discharging hazardous substances pursuant to a permit somehow negated application of the pollution exclusion, enforcement of the pollution exclusion would turn not on the policy language and the nature of the hazard as a pollutant, but on the policyholder’s compliance with a permit, and the law in place on a particular date.⁷ Insurance companies undertake risks on the assumption that the policyholder will conduct its business legally and in accordance with pertinent regulations for the industry. To superimpose on the insurance contract a requirement that insurers must underwrite pollution risks simply because they are “legal” or “authorized” would undo the basis for excluding such risks in the first place.

⁷ Those standards change over time. For example, the EPA website states that a final rule on EtO emissions was announced on April 9, 2024, but that on March 12, 2025, the Trump Administration announced reconsideration of air rules regulating American Energy, Manufacturing, and Chemical Sectors.

<https://www.epa.gov/hazardous-air-pollutants-ethylene-oxide/final-rule-strengthen-standards-synthetic-organic-chemical> (last visited June 19, 2025).

This is not unique to EtO. A review of the EPA’s press releases regarding PFAS regulation over the past year tells a similar story. <https://www.epa.gov/pfas/press-releases-related-pfas> (last visited June 19, 2025).

By contrast, the policy terms are constant: the pollution exclusion bars coverage for bodily injury claims arising out of the release of an irritant, contaminant or pollutant – precisely what is alleged in the underlying claims here.

Moreover, evolving pollution standards (not reasonably predictable) would make rational underwriting unachievable. Coverage would then turn not on the nature of pollution risk, but on disputes over the policyholder's compliance with complex and variable environmental regulations.

A viable insurance system requires that an insurer know at the outset of the policy relationship what risks are assumed. Without such certainty, the insurer could not accurately price the cost of coverage, and rational underwriting would become impossible. Imposing on insurers that declined to accept such risks the costs of defending and possibly indemnifying pollution-related suits based on whether a policyholder complies with a regulatory permit would disrupt the delicate and vital mechanism of insurance. Moreover, over time, imposing pollution-related liability on insurers despite clear policy exclusions would invade and deplete insurer surplus, thereby distorting the entire insurance system. In the long run, the cost of these unforeseen liabilities would be shifted to all consumers of insurance in Illinois – businesses and individuals alike.

ARGUMENT

I. THE POLLUTION EXCLUSIONS PLAINLY BAR COVERAGE FOR THE UNDERLYING CLAIMS.

An Illinois court's primary objective in construing an insurance policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement. *E.g., Crum & Forster Managers Corp. v. Resol. Tr. Corp.*, 156 Ill. 2d 384, 391, 620 N.E.2d 1073, 1078 (1993). As this Court has repeatedly said,

“[i]f the words in the policy are unambiguous, a court must afford them their plain, ordinary, and popular meaning.” *E.g., Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108, 607 N.E.2d 1204, 1212 (1992).⁸

National Union’s policies bar coverage for bodily injury “arising out of the discharge... of ... irritants, contaminants or pollutants into... the atmosphere...” unless “such discharge ... is ‘sudden and accidental.’” *Griffith Foods*, 134 F.4th at 489. The underlying claims allege word for word what the policies exclude: bodily injuries allegedly arising from the routine discharge of EtO from the Willowbrook sterilization facility – here, emissions that were an intentional part of the plant operations, not sudden and accidental releases. *Id.* at 485.

The underlying claimants allege they suffered bodily injury arising out of Griffith/Sterigenics’ discharge of EtO into the atmosphere. As the Seventh Circuit explained, “[t]he complaints commonly alleged that Griffith intentionally located and operated its facility in a residential area despite

⁸ Illinois courts will not search for an ambiguity where there is none. *U.S. Fire Ins. Co. v. Schnackenberg*, 88 Ill. 2d 1, 5, 429 N.E.2d 1203, 1205 (1981). Where the terms of the policies are plain in their meaning, they will be enforced as written. *Cent. Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153, 157, 821 N.E.2d 206, 213, 215 (2004) (“*CILCO*”). If the policy language is unambiguous, a rule of construing ambiguous terms against the drafter does not apply. *Baxter Int’l, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 369 Ill. App. 3d 700, 705-06, 861 N.E.2d 263, 268-69 (2006) (“The anti-drafter rule is intended to aid the party with less bargaining power during the drafting process and is not appropriate where the parties are equally sophisticated.”). Rather, when both parties to the insurance contract are sophisticated businesses, they “can be assumed to have specialized knowledge of the contractual terms they employ.” *CILCO*, 213 Ill. 2d at 156, 821 N.E.2d at 215.

knowing that its dangerously high EtO emissions would migrate to areas near the facilities, including to homes and neighboring schools, and eventually cause bodily injuries.” *Griffith Foods*, 134 F.4th at 485-86. As applied to the facts of this case, there is no question that the pollution exclusions bar coverage. The underlying suits are claims of bodily injury from injurious exposure to an irritant, contaminant or pollutant routinely discharged into the environment. This is precisely what falls under the policies’ pollution exclusions, regardless of whether those discharges were within – or above – regulatory permitted levels. The plain terms of the National Union policies, and decades of case law from Illinois and elsewhere, make clear that the pollution exclusions bar coverage for these claims.

II. DECADES OF ILLINOIS AND NATIONWIDE CASELAW RECOGNIZES THAT THE POLLUTION EXCLUSION BARS COVERAGE FOR BODILY INJURY ARISING OUT OF THE DISCHARGE OF INDUSTRIAL POLLUTANTS INTO THE ATMOSPHERE.

A. Settled Illinois Law Holds That CGL Pollution Exclusions Encompass the Discharge of Irritants, Contaminants and Pollutants into the Atmosphere.

Illinois courts have long held that discharging hazardous materials into the environment falls squarely within the scope of the pollution exclusion. In *Outboard Marine*, this Court applied the same “sudden and accidental” pollution exclusion at issue here to claims arising from the release of

polychlorinated biphenyls (“PCBs”) into Waukegan Harbor and Lake Michigan. The Court explained that under the precise exclusion now at issue:

(1) the insurer excludes coverage for the release of environmentally toxic materials into any part of our natural environment and (2) the insurer makes an exception from this broad exclusion for toxic releases which are *sudden and accidental*.

154 Ill. 2d at 118, 607 N.E.2d at 1217. There, this Court found it self-evident that, where the underlying claims alleged harm from the discharge of hazardous materials into the environment, the first element of the pollution exclusion applied. As the Court stated,

[i]n the instant case, OMC has allegedly released PCBs into Waukegan Harbor and Lake Michigan. Therefore, it appears that the first part of the exclusion applies. The issue before this court is whether, under the facts of this case, OMC’s releases of PCBs were ‘sudden and accidental,’ thereby triggering the pollution exclusion exception and recreating coverage for OMC.

Id. at 119, 607 N.E.2d at 1217. The Court found “the term ‘sudden’ in the pollution exclusion exception of these CGL policies is ambiguous” and “construe[d] it in favor of the insured to mean unexpected or unintended.” *Id.* at 125, 607 N.E.2d at 1220. It then “turn[ed] to a comparison of the allegations of the underlying complaints with the language of the policies.” *Id.* at 126, 607 N.E.2d at 1221. Because the complaints nowhere alleged that the release of PCBs into Waukegan Harbor or Lake Michigan was intended or expected, they left open the potential for the sudden and accidental exception to restore coverage. Accordingly, the insurers had a duty to defend and because there

remained disputed issues of fact material as to the duty to indemnify, summary judgment on indemnity was inappropriate.

Here, as in *Outboard Marine*, the application of the first part of the exclusion is self-evident: the complaints allege that the policyholder discharged hazardous substances into the atmosphere. *Griffith Foods*, 134 F.4th at 485-86. Unlike *Outboard Marine*, in this case coverage is not restored by the sudden and accidental exception to the exclusion because the underlying complaints allege deliberate releases, as the Seventh Circuit held. *Id.* at 489-90.⁹ Thus, the first step in the analysis, that the underlying claims allege a release of environmentally toxic materials into any part of our natural environment, is conclusive here. *See id.*

This Court reaffirmed that the discharge of industrial pollutants into the atmosphere plainly falls within the scope of a pollution exclusion in *Koloms*, which construed a later version of the pollution exclusion.¹⁰ In *Koloms*, the Court stated that “the predominate motivation in drafting an exclusion for

⁹ The underlying lawsuits allege the EtO discharges into the atmosphere were intentional, “despite [the policyholder’s] knowledge that [the EtO] would contact people who lived or worked near the facilities.” 134 F.4th at 489. The Seventh Circuit recognized that because, under *Outboard Marine*, the “sudden-and-accidental exception” applies only to unexpected and unintended releases of pollutants, and the complaints allege that “Griffith and Sterigenics ‘intentionally,’ and therefore, expectedly” discharged EtO into the atmosphere, that exception “finds no application here.” *Id.*

¹⁰ *Koloms* interpreted what is called the “absolute” pollution exclusion because it does not contain the “sudden and accidental” exception to the exclusion found in the earlier, 1973 version of the clause. *See Koloms*, 177 Ill. 2d at 492, 687 N.E.2d at 81.

pollution-related injuries was the avoidance of the ‘enormous expense and exposure resulting from the “explosion” of *environmental* litigation.’” 177 Ill. 2d at 492, 687 N.E.2d at 81 (citation omitted). Reaffirming that pollution exclusions bar coverage for “injuries caused by traditional environmental pollution,” *Koloms* found the exclusion at issue did not unambiguously reach the release of carbon monoxide inside a building as a result of a defective furnace. 177 Ill. 2d at 494, 687 N.E.2d at 82. The facts of *Koloms* are plainly distinguishable from the routine discharge of industrial emissions into the atmosphere from Griffith/Sterigenics’s normal operations and the bodily injury claims arising out of exposure to EtO – the facts before the Court here.

Through the decades since *Outboard Marine* and *Koloms*, Illinois courts have continued to enforce the pollution exclusion, routinely applying it to claims alleging the discharge of an irritant, contaminant or pollutant into the environment – regardless of whether the discharge was “permissible” or “authorized” by regulatory authorities. For example, in *Connecticut Specialty Insurance Co. v. Loop Paper Recycling, Inc.*, 356 Ill. App. 3d 67, 824 N.E.2d 1125 (1st Dist. 2005), the First District held that the pollution exclusion barred coverage for bodily injury claims by neighboring residents when, as a result of a fire at the policyholder’s recycling facility, smoke containing toxic and hazardous substances was released into the air.

In *Kim v. State Farm Fire & Casualty Co.*, 312 Ill. App. 3d 770, 728 N.E.2d 530 (1st Dist. 2000), a pollution exclusion barred coverage of claims

arising from the discharge of a hazardous chemical used in policyholder's dry-cleaning business into the soil beneath a drycleaning and laundry store. *Kim* expressly rejected the policyholder's claim that because the hazardous material was "legally and intentionally placed in the dry cleaning machine as part of the cleaning company's normal business activity," the pollution exclusion should not apply. *Id.* at 776, 728 N.E.2d at 535. The court explained:

As discussed, *Koloms* held that the absolute pollution exclusion applied to bar coverage for injuries caused by "traditional environmental pollution," that is, hazardous material discharged into the land, atmosphere, or any watercourse or body of water. *Koloms*, 177 Ill.2d at 488-94, 227 Ill.Dec. 149, 687 N.E.2d 72. Here, the perc was hazardous material discharged into the land underneath the dry cleaning and laundry store. Therefore, the absolute pollution exclusion applies to bar coverage, regardless of whether the perc was a waste product or whether it was legally and intentionally placed in the dry cleaning machine as part of the cleaning company's normal business activity. The absolute pollution exclusion, as construed by the supreme court in *Koloms*, also applies regardless of whether the cleaning company thought the policy would protect it from the type of activity at issue here.

Id. at 776-77, 728 N.E.2d at 535.

Likewise in the *Village of Crestwood v. Ironshore Specialty Insurance Co.*, 2013 IL App (1st) 120112, 986 N.E.2d 678, the pollution exclusion barred coverage for claims the Village negligently provided contaminated drinking water from Lake Michigan to its residents. When the policyholder argued that the pollution exclusions did not apply because the contaminant levels were "below the maximum amounts permitted by the Safe Drinking Water Act (42 U.S.C. § 300f *et seq.* (1976)) or other environmental regulations," ¶ 23, 986

N.E.2d at 688, the Court disagreed. It rightly concluded that regulatory compliance had no bearing on the exclusion's application.

Similarly, in *Scottsdale Indemnity Co. v. Village of Crestwood*, 673 F.3d 715 (7th Cir. 2012), the Seventh Circuit, applying Illinois law, also rejected the policyholder's contention that regulatory compliance could somehow negate the application of the pollution exclusion. The Court reasoned that while the policyholder's regulatory compliance may pertain to its underlying liability, it had no relevance to the coverage issue, explaining:

[E]ither the perc caused injuries, maybe because the relevant regulations are too lax, or it did not and the tort suits will fail. All that counts is that the suits are premised on a claim that the perc caused injuries for which the plaintiffs are seeking damages, and that claim triggers the pollution exclusion.

Id. at 721.

This strong line of Illinois authority stands in contrast to the Third District's outlier decision in *Erie Insurance Exchange v. Imperial Marble Corp.*, 2011 IL App (3d) 100380, 957 N.E.2d 1214. There the policyholder argued that the emissions from its manufacturing plant were not "pollutants" under the policy language because they were made in compliance with an IEPA permit. The Third District concluded that the pollution exclusion is "arguably ambiguous as to whether the emission of hazardous materials in levels permitted by an IEPA permit constitute traditional environmental pollution excluded under the policy." *Id.* ¶ 22, 957 N.E.2d at 1221.

But the *Imperial Marble* court erred in its analysis. As this Court's precedent teaches, a court must compare the allegations of the underlying complaints with the policy terms. The facts of *Imperial Marble* lead to the straightforward conclusion that the pollution exclusion applies. There is no ambiguity in whether allegations of bodily injury arising out of exposure to industrial emissions fall within the exclusion: if those emissions were not hazardous or pollutants, then the underlying claims will fail, but the court cannot sidestep the clear allegations of the underlying complaint. Here, the underlying claims allege the EtO discharges were hazardous (that is, that they were irritants, contaminants or pollutants) and allegedly caused bodily injuries. And they are exactly the kind of traditional environmental litigation this Court found that pollution exclusions are intended to address. *See Koloms*, 177 Ill. 2d at 493-94, 687 N.E.2d at 81-82.

Bodily injury arising from industrial emissions – such as the discharges of EtO in this case – are precisely the “nature of the risk” that is within the scope of the pollution exclusion. Unlike *Koloms*, where the Court found ambiguity arose “when the exclusion [wa]s applied to cases which have nothing to do with ‘pollution’ in the conventional, or ordinary, sense of the word,” 177 Ill. 2d at 488-89, 687 N.E.2d at 79, there is no question that EtO discharged into the atmosphere from normal business operations, allegedly causing cancers and other bodily injuries, is “‘pollution’ in the conventional, or

ordinary, sense of the word.” Thus, decades of Illinois case law supports application of the pollution exclusion here.

B. Longstanding Authority from Courts Nationwide Also Supports Application of the Pollution Exclusion Here.

Courts around the country routinely hold that discharging pollutants into the environment as part of a policyholder’s normal business operations falls squarely within the scope of pollution exclusions. Given that companies are required to comply with state and federal environmental law and regulations as a prerequisite and cost of doing business, whether the discharge is “authorized” or “permitted” is beside the point. Instead, courts look to the terms of the insurance policy and the facts of the underlying claims.

For example, in *Headwaters Resources Inc. v. Illinois Union Insurance Co.*, 770 F.3d 885 (10th Cir. 2014), the U.S. Court of Appeals for the Tenth Circuit rejected arguments that pollutants released into the air as part of a construction contractor’s “regular business activities” were outside the scope of the policies’ pollution exclusions. The Court stated:

[W]e are not aware of any categorical rule that prohibits a normal business activity from also producing pollution, or a product from also being classified as a pollutant.... Stated otherwise, euphemistically designating an activity or a material in a certain way does not necessarily insulate it from the force of a broad pollution exclusion.

Id. at 896 (internal citation omitted).

Courts that apply a “traditional environmental pollution” approach to the pollution exclusion, as in Illinois, routinely enforce the exclusion where

discharges of pollutants are inherent in or incidental to the policyholder's normal business operations. In *Garamendi v. Golden Eagle Insurance Co.*, 127 Cal. App. 4th 480, 486 (2005), for example, the California Court of Appeal held that a total pollution exclusion barred bodily injury claims arising from "the widespread dissemination of silica dust as an incidental by-product of industrial sandblasting operations." In *MacKinnon v. Truck Insurance Exchange*, 31 Cal. 4th 635, 652, 73 P.3d 1205, 1216 (2003), the California Supreme Court followed a "traditional pollution approach," like this Court's ruling in *Koloms*. Although the court found a pollution exclusion did not unambiguously exclude injury to a tenant resulting from a landlord's normal, though negligent, residential application of pesticides, it recognized that the exclusion applies to conventional environmental pollution, including where the pollutant is emitted "in an industrial or environmental setting." *Id.* at 646, 652-55, 73 P.3d at 1212, 1216-18.

In fact, in settings akin to the industrial discharges here, California courts have long applied the exclusion to bar coverage. *E.g., Legarra v. Federated Mut. Ins. Co.*, 35 Cal. App. 4th 1472 (1995) (groundwater contamination from petroleum plant); *Titan Corp. v. Aetna Cas. & Sur. Co.*, 22 Cal. App. 4th 457 (1994) (groundwater contamination from manufacturing plant). The same is true for federal cases applying California law. *See E. Quincy Servs. Dist. v. Cont'l Ins. Co.*, 864 F. Supp. 976, 979-80 (E.D. Cal. 1994) (groundwater contamination); *Staefa Control-System Inc. v. St. Paul Fire &*

Marine Ins. Co., 847 F. Supp. 1460, *as amended*, 875 F. Supp. 656 (N.D. Cal. 1994) (groundwater contamination from former manufacturing plant); *Hydro Sys., Inc. v. Cont'l Ins. Co.*, 717 F. Supp. 700 (C.D. Cal. 1989), *aff'd*, 929 F.2d 472 (9th Cir. 1991) (hydrocarbon emissions from a manufacturing plant).

Likewise, in *Schilberg Integrated Metals Corp. v. Continental Casualty Co.*, 263 Conn. 245, 819 A.2d 773 (2003), the Connecticut Supreme Court held that the pollution exclusion barred claims arising from the discharge of pollutants from the policyholder's scrap copper processing operations. The processing of the insulation from the wires resulted in the release of hazardous substances at the site. Rejecting the policyholder's suggestion that the pollution exclusion should not apply to "the discharge of pollutants resulted from the plaintiff's central business activity," the Court emphasized that "there is no evidence that the [policyholder] did not get what it bargained for when it contracted with the [insurers]." *Id.* at 251, 270, 819 A.2d at 780, 790.

In Louisiana, the fact that pollution is inherent in the policyholder's industrial operations *supports* application of the pollution exclusion. *Doerr v. Mobil Oil Corp.*, 2000-0947 (La. 12/19/2000), 774 So. 2d 119, 135 (courts consider, among other things, "whether that type of business presents a risk of pollution"). Louisiana courts thus regularly enforce the exclusion to bar pollution claims arising from the policyholder's normal business operations. *E.g., Lodwick, L.L.C. v. Chevron U.S.A., Inc.*, 48,312 (La. App. 2d Cir. 10/2/2013), 126 So. 3d 544, 561 (pollution resulting from oil and gas company's

operations is the “exact type of case” within the scope of pollution exclusion under Louisiana law); *Grefer v. Travelers Ins. Co.*, 04-1428 (La. App. 5th Cir. 12/16/2005), 919 So. 2d 758, 770 (pollution exclusion barred coverage where the nature of the policyholder’s business was to clean oilfield pipes, which presented a clear and obvious risk of pollution).¹¹

In *Sharon Steel Corp. v. Aetna Casualty & Surety Co.*, 931 P.2d 127 (Utah 1997), the Utah Supreme Court observed:

[W]here incidents of pollution appear to be more like normal business activities, the costs of cleanup should be included in the normal cost of business by the insured. Furthermore, holding the industrial community liable for its pollution may be more likely to motivate industry to improve its practices and become safer and cleaner.

Id. at 136.

Claims arising from a policyholder’s polluting activities, even when part of its ordinary business operations, deliberate, or authorized, are not a risk assumed under a CGL policy that unambiguously excludes pollution coverage. *Accord Aloha Petroleum, Ltd.*, 557 P.3d 837 (no coverage for claims arising from release of “greenhouse gases”); *Doe Run Res. Corp. v. Am. Guar. & Liab. Ins.*, 531 S.W.3d 508 (Mo. 2017) (no coverage for lead particulates emanating from mining and milling operation); *Travelers Cas. & Sur. Co. v. Ribi Immunochem Rsch., Inc.*, 326 Mont. 174, 108 P.3d 469 (2005) (no coverage

¹¹ As the *Grefer* court noted, “[a] clear reading of the exclusion language in the applicable policies suggests that a reasonable person, upon reading the same, would be on notice that should they desire pollution coverage, they should obtain a separate policy.” *Id.*

where contamination caused by routine disposal of hazardous waste at a landfill); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059 (Del. 1997) (no coverage for long-term environmental contamination from policyholder's routine business practices); *Highlands Ins. Co. v. Aerovox Inc.*, 424 Mass. 226, 676 N.E.2d 801 (1997) (no coverage for costs incurred to remediate chemical reclamation facility); *Anderson v. Minn. Ins. Guar. Ass'n*, 534 N.W.2d 706 (Minn. 1995) (no coverage for gradual environmental contamination from waste disposal at a dump); *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.*, 636 So. 2d 700 (Fla. 1993) (no coverage for routine spills at oil recycling facility).

III. EXCUSING “PERMITTED” RELEASES FROM THE SCOPE OF THE POLLUTION EXCLUSION WOULD NEGATE THIS CRITICAL POLICY TERM.

The contention that by obtaining a regulatory permit, a policyholder can somehow “redefine” whether its discharges of pollutants into the environment are within or outside the scope of the pollution exclusion violates the plain policy terms. Moreover, recognizing a “permitted release” exception would swallow the pollution exclusion and override decades of case law applying pollution exclusions to cases where the discharges were regulated and made pursuant to permits.

The breadth and scope of federal, state and local requirements for environmental discharge permits shows that this purported “exception” would reach most situations where the pollution exclusion applies today. After all, discharge permits are required under key federal environmental statutes such

as the Clean Air Act, the Clean Water Act and the Resource Conservation and Recovery Act, as well as under many state and local environmental laws and regulations.

For instance, releases into the air are regulated under the Clean Air Act (“CAA”), 42 U.S.C. Chapter 85, which addresses air pollution. The CAA addresses substances such as Ozone, Particulate Matter, Carbon Monoxide, Lead, Sulfur Dioxide, and Nitrogen Dioxide, which are known as criteria air pollutants. The Clean Air Act requires the Environmental Protection Agency (“EPA”) to set National Ambient Air Quality Standards (“NAAQS”) for these six commonly found air pollutants (known as criteria air pollutants). For areas that do not meet the NAAQS, either state implementation plans or a federal implementation plan must outline the strategies – and emissions control measures – that show how the area will improve air quality and meet the NAAQS. The CAA also regulates hazardous air pollutants (“HAPs”) which are more than 180 listed substances including chemicals such as benzene, formaldehyde, and arsenic and mercury compounds. According to the EPA, “Leaks, flares, and excess emissions from refineries, chemical plants and other industries can contain HAPs that are known or suspected to cause cancer, birth defects, and seriously impact the environment. Leaking equipment is the

largest source of HAP emissions from petroleum refineries and chemical manufacturing facilities.”¹²

The CAA requires major sources of air pollution to obtain operating permits, typically through Title V of the Act. These permits outline specific emission limits, monitoring requirements, and other conditions for operating the source of the pollution. Stationary sources of air pollutants include facilities such as factories and chemical plants, which must install pollution control equipment and meet specific emission limits under the CAA. These factory air pollution control systems are required at facilities such as coal-fired power plants; plants that manufacture sulfuric and nitric acid, which are used in fertilizer, chemical and explosives production; glass manufacturing plants; cement manufacturing plants; and petroleum refineries. If all such permitted releases were outside the reach of the pollution exclusion, it would have little impact indeed.

Of course, regulation and permitting of pollutant discharges is not limited to emissions into the air, or the CAA. For example, discharges of pollutants from any plant or factory into surface waters requires a permit. The Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.* (1972), made it unlawful to discharge any pollutant from a point source, such as a factory discharge pipe, into navigable waters, unless a permit was obtained. As the EPA explains, the

¹² <https://www.epa.gov/enforcement/air-enforcement#stationary> (last visited June 20, 2025).

“EPA’s National Pollutant Discharge Elimination System (NPDES) permit program controls discharges.... Industrial, municipal, and other facilities must obtain permits if their discharges go directly to surface waters.”¹³

The CWA provides for NPDES permits to address the discharge of toxic pollutants such as heavy metals, PCBs, dioxins, as well as conventional pollutants such as oil and grease. EPA has a specific list of priority pollutants under the CWA that includes 126 substances that is used as a reference by the EPA and states in developing ambient water quality criteria pursuant to the CWA. Again, if all permitted releases under the CWA were exempted from the pollution exclusion, the exemption would swallow the clause.

The Resource Conservation and Recovery Act (“RCRA”), Title 40 of the Code of Federal Regulations (“CFR”), parts 239 through 282, also relies on a permitting scheme in accomplishing its mission, “to control hazardous waste from the ‘cradle-to-grave.’ This includes the generation, transportation, treatment, storage and disposal of hazardous waste.”¹⁴ As the EPA explains: “Non-hazardous solid waste is regulated under Subtitle D of RCRA.” *Id.*¹⁵

¹³ <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited June 20, 2025).

¹⁴ <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview> (last visited June 20, 2025).

¹⁵ The EPA website explains: “Regulations established under Subtitle D ban open dumping of waste and set minimum federal criteria for the operation of municipal waste and industrial waste landfills, including design criteria, location restrictions, financial assurance, corrective action (cleanup), and closure requirement. States play a lead role in implementing these regulations and may set more stringent requirements. In absence of an approved state program, the federal requirements must be met by waste facilities.” *Id.*

“States play the lead role in implementing non-hazardous waste programs under Subtitle D. EPA has developed regulations to set minimum national technical standards for how disposal facilities should be designed and operated. States issue permits to ensure compliance with EPA and state regulations.” *Id.* With respect to hazardous solid waste, this:

is regulated under Subtitle C of RCRA. EPA has developed a comprehensive program to ensure that hazardous waste is managed safely from the moment it is generated to its final disposal (cradle-to-grave). Under Subtitle C, EPA may authorize states to implement key provisions of hazardous waste requirements in lieu of the federal government. If a state program does not exist, EPA directly implements the hazardous waste requirements in that state. Subtitle C regulations set criteria for hazardous waste generators, transporters, and treatment, storage and disposal facilities. This includes permitting requirements, enforcement and corrective action or cleanup.

Id. Thus, both non-hazardous and hazardous solid waste regulated by RCRA is subject to permitting requirements, which – under the policyholder’s approach – could mean such activities were outside the application of pollution exclusions.

In addition to federal environmental laws and regulations, state and local governments also have laws and regulations that involve permitting of discharges into or on air, water and land. For instance, the IEPA, through its Bureau of Air, Bureau of Water and Bureau of Land, implements federal and Illinois state law, such as the Illinois Environmental Protection Act requiring

permits for discharges of regulated chemicals.¹⁶ Here, the policyholder relies on permits issued by the IEPA in an effort to exempt its discharge of EtO from the pollution exclusions at issue. Local ordinances also often have specific standards for discharges and may provide for permits, such as through local water authorities' regulation of sewer discharges.

As even the most cursory discussion of environmental law and regulations makes clear, carving “permitted releases” out of the pollution exclusion would nullify the clause. It would contradict decades of case law applying pollution exclusions to releases from facilities, plants, manufacturers, waste sites and other businesses regulated under the CAA, the CWA, RCRA, the IEPA, and other laws. *E.g., Doe Run Res. Corp. v. Lexington Ins. Co.*, 719 F.3d 868, 875 (8th Cir. 2013) (Missouri law) (pollution exclusions barred claims arising out of the insured’s lead smelting operations alleged to violate RCRA and CWA, where court noted: “[t]hat its toxic or hazardous materials are valuable products if [the policyholder] properly contains them does not make them any less ‘pollutants’ when they are abandoned and released into the environment”); *City of Chesapeake v. States Self-Insurers Risk Retention Grp., Inc.*, 271 Va. 574, 578, 628 S.E.2d 539, 541 (2006) (pollution exclusion precludes coverage for claims arising out of release into city’s water supply of trihalomethanes, “a poisonous byproduct of disinfection” resulting from the

¹⁶ See <https://epa.illinois.gov/topics/air-quality.html> (last visited June 19, 2025).

city's water treatment process); *Martin v. State Farm Fire & Cas. Co.*, 146 Or. App. 270, 932 P.2d 1207 (1997) (pollution exclusion bars coverage for remediation claims arising from release of petroleum into soil from underground petroleum tanks); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995) (pollution exclusion unambiguously bars coverage for claims by area residents arising from release of a hydrofluoric acid at oil refinery into the atmosphere).¹⁷

IV. INSURERS ARE NOT REQUIRED TO UNDERTAKE RISKS SIMPLY BECAUSE THE INSURED'S CONDUCT IS REGULATED BY LAW.

Unless it is stated in the insurance contract, coverage does not turn on whether a regulatory agency deems the policyholder's conduct permissible. While maintaining permissible emission levels may establish that an insured was not negligent or liable in the underlying case, that is a different question

¹⁷ See also *Hiland Partners GP Holdings, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 847 F.3d 594 (8th Cir. 2017) (applying North Dakota law) (exclusion barred coverage for claim arising from explosion of hydrocarbon condensate tank at natural gas processing facility); *Cincinnati Ins. Co. v. Roy's Plumbing, Inc.*, 692 F. App'x 37 (2d Cir. 2017) (applying New York law) (pollution exclusion bars coverage for claims arising from release of toxic chemicals onto neighboring residential properties by a plumbing company during sewer repairs); *United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880 (8th Cir. 2014) (applying Missouri law) (chemical concrete sealant used by insured, constitutes a pollutant within the pollution exclusion); *Sulphuric Acid Trading Co. v. Greenwich Ins. Co.*, 211 S.W.3d 243, 254 (Tenn. Ct. App. 2006) (pollution exclusion bars coverage for claim arising out of sulphuric acid spill because such a discharge is clearly "classic environmental pollution"); *Pa. Nat'l Mut. Cas. Ins. Co. v. Triangle Paving, Inc.*, 973 F. Supp. 560 (E.D.N.C. 1996), *aff'd*, 121 F.3d 699 (4th Cir. 1997) (applying South Carolina law) (exclusion bars coverage for damages associated with job-site runoff sedimentation from a construction site).

from what risks were transferred (and paid for with premium) under a private insurance contract. CGL insurers may choose to exclude a host of risks, regardless of the legality of the insured's conduct.

There are many situations where an exclusion bars coverage for regulated activities. The insurance policy terms are not ignored or overridden if the insured complies with the regulation. For instance, a common exclusion in general liability and personal lines policies bars coverage for injuries caused by watercraft. The operation of watercraft is heavily regulated, and an insured may have complied with all such regulations. But a watercraft exclusion is not overridden by the fact of the insureds' compliance. Skydiving is another example. Injuries resulting from skydiving are commonly excluded from coverage. But compliance with safety regulations governing the activity does not invalidate those exclusions, forcing insurers to cover the very risk they chose to avoid. The same holds true for pollution exclusions. A policyholder can do everything by the book, but that does not mean that the insurer is forced to cover losses caused by pollutants if it did not agree to underwrite those risks. To impose liability on insurers based on the policy decisions of regulators would violate the fundamental principle of freedom of contract.

V. INVENTING AN EXTRACONTRACTUAL REGULATORY APPROVAL EXCEPTION TO THE POLLUTION EXCLUSION WOULD UNDERMINE PUBLIC POLICY.

A viable insurance system requires that an insurer know from the start of the policy relationship what risks are assumed. Without such certainty, the insurer could not accurately price the cost of coverage, and rational

underwriting would become impossible. Creating a post hoc exception for any “permitted” release of hazardous substances into the environment would nullify the pollution exclusion and make the insurer’s estimation of exposure the onset of its relationship with its insured meaningless.

The “permitted release” argument is fundamentally different from “facts that have nothing to do with ‘pollution’ in the conventional, or ordinary, sense of the word,” where coverage was afforded in *Koloms*. This proposed exception goes to the heart of traditional pollution risks and would upend the agreed insurance contract terms. The pollution exclusion is included in CGL policies because of the expansive and unpredictable consequences of pollution liability. Failing to enforce the pollution exclusion would create excessive uncertainty as to the nature and scope of the risks assumed. That excessive uncertainty could, in turn, discourage the writing of all general liability coverage potentially subject to environmental claims.

Insurance involves an insurer’s agreement to protect the insured against a specified risk for a fee. Insurance can cover risks, even very large ones, that can be actuarially predicted over many insureds. But no insurer can (or would) agree to cover a carefully defined risk if courts were free to impose broader obligations that contradict the plain and definite language of the policy. Settled principles governing judicial enforcement of contracts underlie insurers’ actuarial projections of their expected loss experience and their resulting calculation of premiums, particularly for large commercial risks. The

original risk assessment becomes a nullity if courts do not enforce the limits of coverage planned for by the insurer in the contract of insurance. *See New Process Baking Co. v. Fed. Ins. Co.*, 923 F.2d 62, 63-64 (7th Cir. 1991) (recognizing that insurance premiums reflect the risks insurers have agreed to assume and that policies should not be changed to cover different risks).

Ignoring these actuarial considerations and distorting the terms of pollution exclusions would reward companies – including those that have polluted for years or decades – with free insurance against environmental cleanup costs. By contrast, enforcing the policy as written benefits the public by preserving disincentives to pollution. It places the burden of a clean environment on those insureds whose regular business operations cause the pollution. These corporations have “the most control over the circumstances most likely to cause the pollution,” *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*, 315 N.C. 688, 698, 340 S.E.2d 374, 381 (1986), – and the ability to insure against them.¹⁸

Over time, imposing pollution-related liability on insurers despite clear contractual limitations to the contrary would invade and deplete insurer surplus, significantly distorting the insurance process. Ultimately, the cost of

¹⁸ There is a market for pollution coverage. If a medical manufacturer needs it, it can buy it. As the National Association of Insurance Commissioners has noted, “Environmental insurance (also known as pollution insurance or pollution coverage) provides coverage for loss or damages resulting from unexpected releases of pollutants typically excluded in general liability and property insurance policies.” NAIC, Environmental Insurance (July 25, 2024), <https://content.naic.org/insurance-topics/environmental-insurance>.

these unforeseen liabilities would be shifted to all consumers of insurance – businesses and individuals alike. As the California Supreme Court noted, judicially created insurance coverage leaves “ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers’ potential liabilities.” *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 408, 770 P.2d 704, 711 (1989).

In the long run, enforcing the pollution exclusion’s terms is consistent with the public interest in the insurance system, as well as settled law. Fundamental public policy considerations reinforce what Illinois law requires: an insurance policy, like any other contract, must be applied according to its clear terms. Here, the pollution exclusions bar coverage for bodily injury claims arising out of the policyholder’s release of EtO into the environment.

CONCLUSION

This Court should answer the certified question in the negative. The plain language of the pollution exclusion should be enforced; its application does not turn on whether the policyholder has obtained a regulatory permit or is otherwise in compliance with state and federal environmental law and regulations.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this amici brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b) and Rule 345. 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 points and authorities, and the Rule 341(c) certificate of compliance, is 34 pages and 8,188 words.

/s/*Michael Resis*
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