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IN THE
INDIANA SUPREME COURT

Court of Appeals Case No. 21A-PL-00628

INDIANA REPERTORY THEATRE, Appellant, v. THE CINCINNATI CASUALTY COMPANY Appellees.	Appeal from the Marion County Superior Court D01 Trial Court Cause No. 49D01-2004-PL-013137 The Honorable Heather A. Welch, Judge

BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* SUPPORTING TRANSFER

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I. STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit organization whose mission is to serve as a voice and a source of information and guidance for insurance consumers around the country and an advocate for their interests. UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies.

UP works to provide an intellectual counterweight to the claims of the insurance industry, in order to help facilitate the evenhanded development of the law. During the pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating Covid-19 losses is more vital than ever. UP seeks to assist the Court on this issue of immense public importance by contextualizing the arguments and the current state of the law for this essential coverage, and for the existential risk threatening many business policyholders today as a result of the losses caused by the Covid-19 pandemic.

II. SUMMARY OF THE ARGUMENT

The Court of Appeals' decision to construe "physical loss" narrowly, in favor of the insurer, presents a question of immense public importance and warrants transfer. Those words form the basic coverage grant for the tens of thousands of property insurance policies sold in this state every year, protecting the assets of millions of Hoosier homes and businesses. The public policy of this state and this Court's precedent dictate that those words must be read broadly to favor coverage, rather than narrowly, as the Court of Appeals did here.

By requiring "physical *alteration*," rather than just "physical *loss*," the decision below dramatically narrows the coverage of property insurance policies purchased by virtually every Hoosier business and homeowner. That holding will have impacts far beyond Covid-19.

As the parties and *amici* explained in the Court of Appeals, courts frequently acknowledged coverage on facts like those present here—cases in which property is rendered unsafe or unusable for its intended purpose. Indeed, insurers were so afraid of the "specter of pandemic" in 2005 that they drafted exclusions for business income losses caused by viruses and pandemics. Despite the industry's recommendation that those exclusions be mandatory in all property-insurance policies, many insurers—Cincinnati included—omitted those exclusions, gambling that a pandemic would not occur. Unfortunately for everyone, it did. The Court needs to reaffirm that the consequences for an insurer's business judgment ought to be borne *by the insurer*, and not by policyholders and the taxpaying public.

III. ARGUMENT

The Court should grant transfer in this case. The Court of Appeals' decision involves a question of immense public importance, and it decided it incorrectly. UP submits this brief to outline (A) the significant impact to consumers of letting that decision stand, and (B) the importance of holding Cincinnati to its drafting choices.

A. The language construed by the Court of Appeals is a nonnegotiable, core feature of every property-insurance policy sold in the state.

The issue decided by the Court of Appeals affects virtually every Hoosier. The disputed term ("physical loss"), with some variations, defines the basic coverage promised by nearly every property insurance policy sold in the United States and touches billions of dollars in premiums. That language is nonnegotiable boilerplate, leaving millions of Hoosiers now subject to the narrow interpretation imposed by the Court of Appeals. This Court routinely grants transfer to settle similar foundational questions, and it should do so here.

Hoosiers pay over $3.1 billion every year to insure their homes and businesses. *2021 Insurance Factbook*, p. 67 (INS. INFO. INST. 2021). In exchange, property insurers generally promise to pay for any "physical loss" or "physical damage" to our property, including any resulting business or rental income. Richard P. Lewis, et al., Couch*'s "Physical Alteration" Fallacy: Its Origins and Consequences*, 56 TORT, TRIAL & INS. L.J. 621, 623-24, 630-31 nn.54, 56 (2021). Those terms define the basic scope of coverage for everything from basic homeowner's insurance to commercial coverage issued to small businesses and large manufacturers alike. *See id.*; *Schultz v. Erie Ins. Grp.*, 754 N.E.2d 971, 974 (Ind. Ct. App. 2001), *trans. denied*; *Associated Aviation Underwriters v. George Koch Sons, Inc.*, 712 N.E.2d 1071, 1073 (Ind. Ct. App. 1999), *trans. denied*.

These policies provide essential risk protection for homeowners and businesses. There are 2.9 million housing units in Indiana, with 2.5 million

occupied by owners or tenants.[1] Nearly 40,000 single-family homes changed hands in 2021.[2] Virtually all of these properties have property insurance, as most mortgage lenders demand it and most prudent homeowners purchase it. *2021 Insurance Factbook*, p.90. Hoosier homeowners pay over $2 billion in premiums every year for this protection. *Id.* p.67.

Businesses and farmers depend on similar commercial property policies for similar reasons. *Id.* p.124. Like residential lenders, commercial lenders demand that borrowers insure their collateral. But more importantly, businesses without adequate property insurance (and particularly small businesses) can easily "be wiped out by a disaster."[3] Hoosier farmers and businesses pay $1.1 billion for this protection every year. *2021 Insurance Factbook*, p.67.

This Court routinely grants transfer to settle disputes about the scope and meaning of such foundational insurance policy language. Those matters impact entire lines of coverage and have lasting impacts beyond the individual case. For example, last year the Court granted transfer to consider the scope of key terms in a business policy's "Computer Fraud" coverage. *G&G Oil Co. of Indiana v. Cont'l W. Ins. Co.*, 165 N.E.3d 82 (Ind. 2021). In doing so, it disagreed with the Court of

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[1] *Indiana's Population & Housing*, STATSAMERICA, https://www.statsamerica.org/sip/Default.aspx?ct=S18 (follow "Housing" hyperlink under "Population" section) (last visited Feb. 14, 2022).
[2] *Market Insights Report*, MIBOR REALTOR ASS'N, 2 (Dec. 2021), www.mibor.com/clientuploads/PDFs/Reports_Stats/2021/MIBOR_Market_Report_2021_12.pdf.
[3] *Facts + Satistics: Commercial Lines*, INS. INFO. INST., https://www.iii.org/fact-statistic/facts-statistics-commercial-lines (last visited Feb. 14, 2022).

Appeals' narrow construction and remanded the case for a trial on whether the facts triggered the broad language. *Id.*

Although it has never addressed the question now before it, the Court has granted transfer to consider the core language of other property-insurance products and issues related to them. It has granted transfer to consider the scope of a standard-form AIA "Waiver of Subrogation" terms that are crucial to the allocation of risk and insurance in construction projects. *Bd. of Comm'rs of Jefferson Cnty. v. Teton Corp.*, 30 N.E.3d 711, 714 (Ind. 2015). It granted transfer and affirmed the Court of Appeals' broad, modern reading of "collapse" coverage, construing it to apply whenever a building suffers a substantial impairment of its structural integrity, and not simply when it actually falls down. *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 973 (Ind. 2005). And it granted transfer to reverse the Court of Appeals' narrow construction of trigger terms in a "Builder's Risk" policy—property insurance for buildings that are under construction. *Bosecker v. Westfield Ins. Co.*, 724 N.E.2d 241, 242-43 (Ind. 2000). The issues here are at least as important to property-insurance law as those in *Teton*, *Magwerks*, and *Bosecker*.

The Court is equally active in other foundational areas of insurance. It granted transfer to reverse the Court of Appeals' narrow construction of the "professional services" definition in a professional-liability policy. *WellPoint, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 29 N.E.3d 716, 720-25 (Ind. 2015). It did the same when the Court of Appeals construed "property damage" and "occurrence" in a comprehensive general liability policy to exclude damage caused by a

subcontractor's faulty work—a risk inherent in virtually all construction projects. *Sheehan Constr. Co. v. Cont'l Cas. Co.*, 935 N.E.2d 160, 167-72 (Ind. 2010). So, too, in cases raising questions about the meaning of "property damage," "all sums," and "personal injury," and "occurrence," all of which are core concepts in liability insurance. *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001). The Court has given similar attention to fundamental issues that come up in auto policies.[4]

Property insurance is ubiquitous and is an essential tool to manage the risks of the modern world. The insurance industry has elected to write that coverage mostly on a broad "all-risk" basis, accepting the risk that what they do not specifically exclude is covered. *E.g.*, *Board of Com'rs of County of Jefferson*, 30 N.E.3d at 713-14, 716-17 (describing how owners and contractors in construction projects use "all risk" insurance similar to that in dispute here "to ensure that the parties resolve damages disputes through insurance claims, not lawsuits"). The Court of Appeals took an unduly narrow view of this core coverage language, and that holding will have ripple effects throughout the entire property-insurance marketplace. The Court has intervened to remedy those errors in the past. *WellPoint. Inc.*, 29 N.E.3d at 720-25; *Sheehan Const. Co.*, 935 N.E.2d at 167-72. It should do so again.

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[4] *Glover v. Allstate Prop. & Cas. Ins. Co.*, 153 N.E.3d 1114 (Ind. 2020) (considering scope of "insured person" and "operator" in auto policy); *State Farm Mut. Auto. Ins. Co. v. Jakupko*, 881 N.E.2d 654, 657 (Ind. 2008) (granting State Farm's petition for transfer but affirming COA's broad interpretation of "bodily injury" as including emotional distress).

The Court has historically recognized that Indiana courts, in order to protect their citizens, must engage in searching scrutiny of these standardized insurance policy terms. As this Court wrote more than a century ago, "[i]nsurance companies are not favorites of the law." *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96, 104 (1854). "The language of the policy . . . is carefully and deliberately prearranged by the insurer. In its preparation the insured has no part." *Louisville Underwriters v. Durland*, 24 N.E. 221, 222(Ind. 1890). For that reason, any time that language "has *any tendency* to defeat the main purpose of the contract," it "should be strictly construed against the insurer." *Id.* (emphasis added). Indeed, "[i]t is the *duty of the insurance company*, seeking to limit the operation of its contract of insurance . . . to make such limitations in clear terms, and not leave the insured in a condition to be misled." *Id.* (emphasis added). The policyholder, therefore, "may reasonably be held entitled to rely on a construction favorable to himself, where the terms will rationally permit it." *Id.*

These fundamental principles have not changed in the many years since the Court first applied them. The "strict construal against the insurer is driven by the fact that the insurer drafts the policy and foists its terms upon the customer. The insurance companies write the policies; we buy their forms or *we do not buy insurance*." *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 (Ind. 1996) (quotations omitted, emphasis added). The Court reiterated this rule as recently as last year. *G&G Oil Co. of Indiana v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 87 (Ind. 2021) ("[W]e . .

. apply some specialized rules of construction in recognition of the frequently unequal bargaining power between insurance companies and [policyholders].").

The Court of Appeals departed from these principles here in a case of first impression, taking an extremely narrow view of the word "physical" when a broader and equally reasonable interpretation should have been applied. That holding narrows coverage, not only for IRT, but also for millions of property owners across the state. That is an issue of statewide importance justifying this Court's review.

B. Some Insurers, like Cincinnati, made a conscious business decision not to add virus or pandemic exclusions—and the Court should not bail them out from that choice.

Unlike most of us, insurers had abundant warning about what SARS viruses were capable of. The "specter of pandemic" was at the forefront of insurers' minds nearly a decade-and-a-half *before* Covid. (Appellant's App., Vol. VII, p. 161.) Insurers paid out millions when SARS-CoV-1 disrupted commerce in Asia in 2002-03. (Corrected Appellant's Br., pp. 35-36.) In 2005-06, large insurance trade groups created virus and pandemic exclusions to address this risk, insisting that they should be "mandatory" in property policies. *See Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 1:20-cv-10850 (D. Mass.), ECF #36-2 (GNY[5] Explanatory Memorandum, Response to Objection 1 Dated 4-30-2012).

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[5] Strathmore is a GNY insurance company, which is why the memorandum appears in the *Strathmore* case. In a Covid-19 suit against Strathmore, the policyholder offered this memorandum as evidence that the policy covered Covid-19 related losses. That case is currently on appeal in the First Circuit. *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 1:20-cv-10850 (D. Mass.).

Some insurers chose not to take their own industry's advice. Many, Cincinnati included, did *not* use virus exclusions in their policies, fearing regulators would force them to charge less in premiums for providing less coverage. *Id.* After all, *what were the odds* of a global pandemic, on the scale of the 1918 flu, in light of modern medicine? So they did nothing, collecting premiums for pandemic-based losses, and hoping the world would never come face-to-face with a pandemic. *Id.* Then, disaster. Policyholders, believing that they had coverage and seeing no clear exclusions for viruses or pandemics, filed tens of thousands of claims. Insurers panicked and denied coverage, fearing a sharp decline in profits and shareholders who could not fathom why an insurer would knowingly omit an exclusion for such catastrophic losses.

Unable to rely on any exclusion, these insurers cried wolf—proclaiming (falsely) that if they had to pay these claims, they would go insolvent.[6] (IRT Ct. App. Reply Br., pp. 22-24.) They claimed (wrongly) that virus exclusions were not necessary because the policies never covered these losses to begin with. (ICI Ct. App. *Amicus* Br., pp. 10-26.) Many courts have gone along with this story, rewriting

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[6] *NAIC Statement on Congressional Action Relating to Covid-19*, NAT'L ASS'N OF INS. COMM'RS (Mar. 25, 2020), https://campbell-bissell.com/wp-content/uploads/2020/04/NAIC-Statement-on-Congressional-Action-Relating-to-Covid-19.pdf; *Best's Commentary: Two Months of Retroactive Business Interruption Coverage Could Wipe Out Half of Insurers' Capital*, BUSINESS WIRE, ¶2 (May 5, 2020, 11:07 AM), https://www.businesswire.com/news/home/20200505005723/en/Best%E2%80%99s-Commentary-Two-Months-of-Retroactive-Business-Interruption-Coverage-Could-Wipe-Out-Half-of-Insurers%E2%80%99-Capital; E. Gilligan, *APCIA Releases Update to Business Interruption Analysis*, APCIA (Apr. 28, 2020), https://www.apci.org/media/news-releases/release/60522/.

decades of insurance law. *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 470 (6th Cir. 2021); *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA, Inc.*, 2022 Cal. App. LEXIS 329, *11 n.2 (Ct. App. Apr. 21, 2022).

This Court should stand firm on its history of enforcing the choices of insurance companies and the reasonable expectations of the insurance-buying public. When courts excuse insurers from their own underwriting decisions, they foist those losses on businesses and taxpayers. Millions of dollars in PPP, HEROES, and HERFF relief would have stayed in the taxpayers' pockets had courts held insurers to their broad policy language and underwriting choices. In the meantime, insurers (including Cincinnati) have booked record profits, and increased rates on consumers by 20% or more during every quarter of 2020.[7]

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[7] Cincinnati has $10 billion in shareholders' equity (i.e., equity after all operating expenses). *2021 Annual Letter to Shareholders,* CINCINNATI FINANCIAL CORP. at 1, 9 (Mar. 24, 2021), https://cincinnatifinancialcorporation.gcs-web.com/static-files/1d82abf9-8aa1-43b8-8782-13e7e61be322. It comprises 1.22% of the total insurance market. Lucy Lazarony, *50 Largest Business Insurance Companies*, FORBES (Apr. 28, 2021, 9:16 AM), https://www.forbes.com/advisor/business-insurance/largest-business-insurance-companies/.

Cincinnati's share of the payments can be estimated at $463 million per month on the low end ($38 billion *x* 0.0122) and $890 million on the high end ($72 billion *x* 0.0122). On these numbers, it would take between 11 and 21 months of continuous payments to *all* policyholders to exhaust Cincinnati's *shareholders equity alone* and actually eat into its non-equity assets—and that assumes Cincinnati loses on every other issue: it cannot get an offset, it cannot get reinsurance, it refuses to settle claims, and it has no fixed limits of insurance. In short, Cincinnati is in no danger of going broke.

In addition, NAIC itself has estimated that 83% of policies include virus exclusions. If business interruption coverage is only applied to policies without such exclusions, there is even less market solvency risk. *See*, *NAIC COVID-19 Report for 2020: Year in Review*, p. 23, https://content.naic.org/sites/default/files/naic-covid-19-report-update3-eoy-2020.pdf

The Court should not be swayed by the insurers' claims that paying losses in excess of premiums will lead to insolvency. This is not the first time the insurance industry has made that claim. Insurers "warned" the Court of "potential" insolvency in petitions for rehearing after this Court held that generic pollution exclusions were unclear and ambiguous. *See* Brief of the Ins. Inst. of Ind., Inc., as *Amicus Curiae* in Support of Appellant in *Am. States Ins. Co. v. Kiger*, No. 32C01-9206-CP-184, pp. 15-16; Brief of Alliance of Am. Insurers as *Amicus Curiae* In Support of Rehearing in *Kiger*, pp. 1-2, 6-9. The Court denied those petitions, the insurers adjusted, and they are doing just fine—understanding they must now provide clear notice to their customers about what kind of substances the insurers will and will not cover. *American States Ins. Co.*, 662 N.E.2d at 948-50. That is how the insurance transaction should work.

If this Court does not act to enforce its historic structure for interpreting insurance policies, then policy interpretation in Indiana will be turned on its head. Insurers will feel free to use and sell policies with broad and undefined terms like "physical loss," knowing they can "decide at a later date what meaning to assert" once a catastrophe occurs. Richard P. Lewis, et al., Couch*'s "Physical Alteration" Fallacy: Its Origins and Consequences*, 56 TORT, TRIAL & INS. L.J. 621, 638 (2021) (quotations omitted). That is the opposite of how this Court has historically and repeatedly held that insurance policy interpretation works in Indiana.

That path hurts Hoosier policyholders and taxpayers and reverses over a century of insurance law in this State. Hoosier policyholders will trade the certainty

that their policies will be construed in their favor, for lengthy and expensive litigation with their insurance companies. Paying lawyers is part of an insurance company's business and that cost is a "rounding error" on their financial statements. But, for millions of Hoosier homeowners and businesses, such litigation is a distraction, and often one they cannot afford (particularly after they have experienced a major loss).

Hoosiers pay $3.3 billion in premiums a year for property insurers to do the hard work of predicting and spreading the risk of catastrophe—in this case, a pandemic—and deciding whether to exclude it. Some took that job seriously. Cincinnati did not. It is up to the Court to decide who will bear the cost of that failure: Cincinnati or the taxpaying public. Under the policy and Indiana law, Cincinnati should.

IV. CONCLUSION

The Court should grant IRT's petition for transfer, vacate the decision below, and reverse the trial court.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44, I verify that this Brief of Amicus Curiae contains 3075 words, excluding the items specified in Appellate Rule 44(C), as calculated by the word processing program used to create this brief, which is Microsoft Word 2016.

/s/ Charles P. Edwards

CERTIFICATE OF SERVICE

Pursuant to Indiana Appellate Rule 24(D), I certify that on May 5, 2022, the foregoing Brief of United Policyholders as *Amicus Curiae* Supporting Transfer was electronically filed through the Indiana E-filing System ("IEFS") and was served electronically to counsel of record as follows:

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