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IN THE
INDIANA SUPREME COURT
CAUSE NO. ___________

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|---|---|---|
| HARSCO CORPORATION, | ) | Court of Appeals No. 21A-PL-02483 |
| | ) | |
| Plaintiff/Appellee, | ) | Appeal from the Marion County, Indiana |
| | ) | Superior Court |
| v. | ) | |
| | ) | Trial Court No. |
| SCOTTSDALE INSURANCE | ) | 49D01-1001-PL-002227 |
| COMPANY, *et al.*, | ) | |
| | ) | The Honorable Heather Welch, Judge |
| Defendants/Appellants. | | |

**BRIEF OF AMICI CURIAE UNITED POLICYHOLDERS AND ASSOCIATED GENERAL CONTRACTORS OF INDIANA**

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## III. STATEMENT OF INTEREST

United Policyholders is a non-profit organization that advocates on behalf of a diverse range of policyholders regarding insurance law. This appeal raises an important insurance issue.

The Court of Appeals interpreted the language of the insurance policy from a "neutral stance" because an additional insured seeking coverage, Appellee Harsco Corporation, did not directly pay premiums to Appellant Scottsdale Insurance Company. This led it to incorrectly deprive Harsco of coverage.

Additional insured coverage is common in many kinds of policies. Numerous businesses rely on such provisions to support commercial relationships. 12 New Appleman on Insurance Law Library Edition §148.07 [5]. The coverage also protects tort victims. *See, e.g., Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 646 (Col. 2005) ("liability insurance is…for the protection of the innocent tort victim…."). *See also Wilson v. Cont'l Cas. Co.*, 778 N.E.2d 849, 851 (Ind. Ct. App. 2002) (injured tort victim has legally protectable interest in policy). The "neutral stance" issue is important to many policyholders other than Harsco.

Associated General Contractors of Indiana ("AGC of Indiana") is an association of Commercial and Industrial General Contractors, Specialty Contractors and Supply and Service firms. AGC of Indiana's mission is to be the voice of construction and provide education, training, resources and advocacy for its members in the construction industry and market. As part of that advocacy, AGC of Indiana files *amicus curiae* briefs in significant cases. Additional insured provisions

are especially common in construction. AGC of Indiana's members rely on such provisions to protect their businesses and commercial relationships.

## IV. SUMMARY OF ARGUMENT

Indiana for over 100 years has maintained rules for interpreting insurance policies to honor the basic purpose of insurance, which is to indemnify against loss. *See, e.g., Northwestern Mut. Life Ins. Co. v. Hazelett*, 4 N.E. 582, 584 (Ind. 1886) ("Courts will construe a contract of insurance liberally, so as to give it effect rather than to make it void."). One of the most important of these rules is that ambiguous policy language is interpreted against the insurer, who drafted it, and in favor of coverage. However, in *Indiana Lumbermens Mutual Insurance Company v. Statesman Insurance Company*, 260 Ind. 32; 291 N.E.2d 897 (Ind. 1973), this Court—for the only time in its history—deviated from this rule. There, because "[t]he party claiming to be an insured…never paid a penny's premium to the insurer…", *Lumbermens* reasoned that "[w]e are therefore not in a situation where we must construe the contract language any certain way and can seek out the general intent of the contract from a neutral stance." 260 Ind. at 34. No other state in the country has adopted *Lumbermens'* "neutral stance" rule.

The Court of Appeals below cited *Lumbermens* in holding Harsco was not entitled to indemnity coverage as an additional insured under the Scottsdale primary policy and was not an additional insured under the Scottsdale umbrella policy. Slip Op. at 19, ¶31.

*Lumbermens'* deviation from the bedrock ambiguity rule was error, for several reasons. First, our courts developed rules construing policy language

against the insurer not just to protect policyholders, but also to encourage insurers to draft clear language. *Lumbermens'* "neutral stance" rule does not encourage clear drafting. It instead supports selective ambiguity that the original rule, and the entire doctrine of *contra proferentem*, was developed to avoid.

Second, *Lumbermens*' rule is too broad. The Court of Appeals has promulgated inconsistent reasons not to apply it. *See, e.g.*, *Vann v. United Farm Bureau Mut. Ins. Co.*, 778 N.E.2d 868, 872 n. 5 (Ind. Ct. App. 2002) (named insured originally part of action, so "neutral stance" rule does not apply); *Argonaut Ins. Co. v. Jones*, 953 N.E.2d 608, 615-16 (Ind. Ct. App. 2011) ("neutral stance" rule not applied when party seeking benefits was not stranger to the contract). Such inconsistencies are evidence the rule does not work and should be abandoned.

Finally, the sole justification for the "neutral stance" rule—who pays the insurance premium—is often the result of happenstance or commercial convenience. Interpreting insurance policies differently based on who paid the premium forfeits indemnity unnecessarily and serves no socially useful purpose.

For all these reasons, this Court should overrule *Lumbermens* and hold that all insurance policy language is interpreted against the insurer and in favor of coverage, regardless of who paid the premium.

The Court need not overturn *Lumbermens* to rule in Harsco's favor. The Court of Appeals has narrowed *Lumbermens* in various ways, and this Court can follow that lead. However, overruling *Lumbermens* has many advantages, and no downside. It will encourage careful drafting of **all** policy language, not just that

related directly to premium-paying insureds. It will add clarity and simplify the work of our courts, who will no longer have to evaluate whether a "neutral stance" rule applies. It will cease to leave the rules by which policies are interpreted up to chance.

But outright reversal is not the only available remedy. The Court can follow *Jones* and hold that the "neutral stance" rule only applies if the party seeking coverage is a stranger to the policy. Here, Harsco was no stranger. Metro Elevator Company, Inc. ("Metro") added Harsco by name as an additional insured. While Metro directly paid the premium to Scottsdale, Scottsdale nonetheless **knew** it was insuring Harsco. Scottsdale issued a certificate expressly naming Harsco an additional insured, and analyzed Harsco's exposures in its underwriting file. This is not a situation where an "undeserving" tortfeasor seeks to benefit from unclear policy language sold to protect someone else. As the Court of Appeals has recognized several times, a party like Harsco, who is not a stranger to the policy, should get the benefit of the normal rules of policy interpretation. *See*, *e.g.*, *Jones*, 953 N.E.2d at 615-16. Scottsdale sold this coverage **for** Harsco. Harsco should get the benefit of interpretive rules developed to protect policyholders.

## V. ARGUMENT

The Court of Appeals reversed the trial court, holding that Harsco is not entitled to indemnity coverage under an "additional insured" endorsement in policies sold by Scottsdale to Metro, even though Harsco is **listed by name** as an additional insured under those policies. In making that decision, the Court of Appeals declined to apply long-standing rules of insurance policy interpretation—

rules that have guided Indiana's courts for more than a century—which hold that insurance policies are to be construed to support indemnity wherever reasonably possible. *See, e.g., Hazelett*, 4 N.E. at 584 ("Courts will construe a contract of insurance liberally, so as to give it effect rather than to make it void."); *Masonic Accident Ins. Co. v. Jackson*, 164 N.E. 628, 631 (Ind. 1929) ("An insurance policy should be so construed as to effectuate indemnification…rather than defeat it."); *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470, 471 (Ind. 1985) ("An ambiguous insurance policy should be construed to further the policy's basic purpose of indemnity"); *G&G Oil Co. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 87 (Ind. 2021) (quoting *Lilly*).

Instead of following these rules, the Court of Appeals relied on *Barga v. Ind. Farmers Mut. Ins. Group, Inc.*, 687 N.E.2d 575, 578 (Ind. Ct. App. 1997) and interpreted the language of the Scottsdale policies from a "neutral stance." *Barga* relied on *Lumbermens*, in which this Court departed from its longstanding rules and stated that "[t]he party claiming to be an insured in this case never paid a penny's premium to the insurer. We are therefore not in a situation where we must construe the contract language any certain way and can seek out the general intent of the contract from a neutral stance." *Lumbermens*, 260 Ind. at 34.

Since *Lumbermens*, this Court has **never again** applied this "neutral stance" rule. The Court of Appeals has developed creative reasons not to apply it. *See, e.g.*, *Vann*, 778 N.E.2d at 872 n. 5 (named insured was originally part of action, so "neutral stance" rule does not apply); *Jones*, 953 N.E.2d at 615-16 ("neutral stance"

rule not applied when party claiming benefits under the policy was not a stranger to the parties). Federal courts have criticized this rule. *Bledsoe v. State Farm Fire & Cas. Co.*, 2005 U.S. Dist. LEXIS 50239 at *24 (S.D. Ind. Oct. 7, 2005).

Perhaps most telling of all, **no other state has adopted *Lumbermens'* neutral stance rule**. There is no reason why Indiana policyholders should the only policyholders in the country whose coverage rights are so dependent on who tendered the check.

### A. This Court Should Overturn *Lumbermens*

#### *i. The "Neutral Stance" Rule Was Formulated in Response to Unique Circumstances, but those Circumstances did not Warrant Such a Drastic Deviation from Accepted Law and Practice*

*Lumbermens* was factually unique, a classic "hard case." An overbroad "rule" emerged.

There Jack Walker delivered a water softener to the Soots home. *Id.*, 291 N.E.2d at 898. While Walker was carrying the water softener, the basement steps collapsed, seriously injuring Walker. *Id.* Walker sued the Soots. The Soots' insurer, Lumbermens, settled with Walker. *Id.* Lumbermens then sought subrogation from Statesman Insurance, which insured Walker's truck. *Id.* Lumbermens claimed the Soots qualified as "insureds" under Statesman's policy.

The Statesman policy defined "insureds" as anyone who "used" Walker's truck. *Id.* "Use" was defined in part as "the loading and unloading" of the truck. *Id.* As *Lumbermens* states, "Lumbermens contends that the [Soots] were users of the truck by virtue of their cooperating with the driver in the loading and unloading process." *Id.*

Plainly disconcerted by the tortfeasors' insurer asserting its policyholders were "insureds" under the victim's policy, the *Lumbermens* court declined to apply the normal rules of policy interpretation. The Court of Appeals had applied those rules, concluding the Soots **were** insureds, 274 N.E.2d 419 (Ind. Ct. App. 1971). In so doing, the Court of Appeals followed the majority rule nationally, that "'loading and unloading' embrace, not only the immediate transference of the goods to or from the vehicle, but the 'complete operation' of transporting the goods between the vehicle and the place from or to which they are being delivered." 274 N.E.2d at 424 (quoting *Wagman v. Am. Fidelity & Cas. Co., Inc.*, 109 N.E.2d 592 (N.Y.1952)).

While *Lumbermens'* facts make deviation from the rules of policy interpretation understandable, they also show why it was the wrong decision. *Wagman*, relied upon as the majority rule, was nearly 20 years old when the Court of Appeals cited it. Statesman, the insurer who employed the language at issue, was thus on notice the language it chose would likely be construed broadly. If Statesman wanted its policy to apply more narrowly, it should have chosen different language. Statesman, after all, drafted the policy. What language to employ was entirely under Statesman's control. This Court is not in the business of saving insurers from the consequences of the language they deliberately choose, especially when the consequences were entirely foreseeable to those insurers.

This Court compounded its error by creating a new rule that parties who have not directly paid premiums do not benefit from the ordinary rules of policy

interpretation. As shown below, this "neutral stance" rule creates far more problems than it solves and should be abandoned.

*ii. Insurance Policies Are Interpreted Against the Drafter Not Just to Protect Policyholders, but also to Encourage Insurers to Draft Clear Language*

In formulating the neutral stance rule, *Lumbermens* seems to have reasoned that policies are interpreted against the drafter only to protect policyholders. But interpretation against the drafter is also intended to incentivize insurers to draft clear language free from ambiguity or doubt. The interpretation against the insurer who drafted the policy language exists for two reasons:

> (1) the insured's intent in purchasing an insurance policy is to obtain coverage and therefore any ambiguity jeopardizing such coverage should be construed consistent with the insured's intent, and (2) **the insurer is the drafter of the policy and could have drafted the ambiguous provision clearly and specifically.**

*Economy Fire & Casualty Co. v. Kubik*, 492 N.E.2d 504 (Ill. App. 1986) (internal citations omitted) (emphasis added); *see also Panfil v. Nautilus Ins. Co.*, 799 F.3d 716, 721 (7th Cir. 2015); *Hurst-Rosche Eng'rs v. Commercial Union Ins. Co.*, 51 F.3d 1336, 1342 (7th Cir. 1995); *Transamerica Ins. Co. v. South*, 975 F.2d 321, 327 (7th Cir. 1992).

This rule is not unique to insurance policy interpretation. It derives from the rule of contract interpretation known as *contra proferentem*. The Restatement (Second) of Contracts formulates this rule in § 206, entitled "Interpretation Against the Draftsman." Section 206 states: "In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing

otherwise proceeds." As rationale, the Restatement (Second) states "Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party." It continues:

> He is also more likely than the other party to have reason to know of uncertainties of meaning. **Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert**.

(Emphasis added).

The Restatement of the Law of Liability Insurance offers a similar rationale for interpretation against the drafter. See Restatement of the Law of Liability Insurance §4, comment h. ("[T]he *contra proferentem* rule provides an important incentive to draft terms clearly…".)

Thus the rule exists not just to protect the non-drafting party, but also to encourage the use of clear language. This rationale applies equally to questions involving additional insureds as it does to those involving premium-paying insureds.

By contrast, the "neutral stance" rule announced in *Lumbermens* utterly fails to incentivize insurers to draft clear language. Instead, it encourages the very underhandedness § 206 exists to combat. Insurers are **encouraged** to draft unclear language, so long as that language applies to a party, such as an additional insured, who does not pay the premium directly. Rather than encourage insurers to draft unclear policy language, this Court should overturn *Lumbermens* and thereby take a clear stand in favor of encouraging insurers to draft language whose meaning is free from all reasonable doubt.

*iii. The Neutral Stance Rule Is Too Broad, and Has Been Narrowed for Inconsistent Reasons*

The Court of Appeals has deviated from the letter of the "neutral stance" rule several times, but it has done so for inconsistent reasons. This creates uncertainty in what rules apply.

In *Vann* the Court of Appeals refused to apply the "neutral stance" rule because, while the party seeking to take advantage of insurance coverage (Vann) had not paid the premium, Upchurch, who had paid the premium, originally brought the case and Vann later intervened. 778 N.E.2d at 872 n. 5. There Upchurch insured his boat under a watercraft endorsement to his homeowners' policy. Upchurch was hauling the boat when the trailer detached from Upchurch's truck. The boat collided into Vann's car, injuring Vann. The insurer there sought application of the "neutral stance" rule as to Vann, but the Court of Appeals declined to apply it, stating:

> [T]he factor distinguishing these cases in which we apply a neutral stance from cases in which we construe the policy language strictly against the insurer, appears to be that the party that was seeking to benefit from a particular interpretation of the insurance contract was not a party to the contract. Here, the Third-Party Complaint was between Upchurch and Farm Bureau, who were the parties to this Policy. The fact that the Vanns intervened, and are appellants here, does not change the posture of the controversy.

*Id.* (internal citations and quotations omitted).

In *Jones*, the Court of Appeals likewise declined to apply the "neutral stance" rule even though there, again, the party seeking policy proceeds had not paid premiums. However, the Court of Appeals' rationale was quite different. There,

Sarah Jones was struck and killed by a vehicle while directing traffic on-duty in her capacity as a Monroe County Deputy Sheriff. Monroe County insured Jones' police car, which she was using to direct traffic, with Argonaut. However, Jones had not paid the premium herself.

Argonaut, citing the language quoted above from *Vann* that the "neutral stance" rule should apply when "the party that was seeking to benefit from a particular interpretation of the insurance contract was not a party to the contract," argued for application of that rule. The *Jones* court declined, but also deviated from the rule as stated in *Vann*, instead reasoning: "A more helpful distinction, we think, lies in the observation that in cases like *Lumbermens*, *American Family [Mut. Ins. Co. v. Nat'l Ins. Ass'n*, 577 N.E.2d 969 (Ind. Ct. App. 1991)], and *Burkett [v. Am. Family Ins. Grp.*, 737 N.E.2d 447 (Ind. Ct. App. 2000)], the claimants to the benefits of the insurance policy were strangers to the policyholders entirely." *Jones*, 953 NM.E.2d at 615-16. In *Jones*, though Sarah Jones had not paid premiums, she "was not a stranger to either party, but was instead an employee of the policyholder." *Id.* at 616. The *Jones* court concluded that because "Deputy Jones, though an unnamed insured, is squarely within the class of individuals whom the Argonaut policy was intended to benefit by providing liability and UIM insurance coverage," the "neutral stance" rule did not apply. *Id.*

The Court of Appeals has either declined to follow or questioned the neutral stance rule in other cases as well. *Liberty Mut. Ins. Co. v. Mich. Mut. Ins. Co.*, 891 N.E.2d 99, 102 (Ind. Ct. App. 2008) (rule likely inapplicable when additional

insured is specifically named in endorsement); *Bedwell v. Sagamore Ins. Co.*, 753 N.E.2d 775, 779 (Ind. Ct. App. 2001) (reciting "neutral stance" rule but nonetheless construing ambiguous policy language against the insurer even though person seeking coverage had not paid premiums). The Northern District has also declined to apply the rule. *Lightner v. Nat'l Union Fire Ins. Co.*, 2005 U.S. Dist. LEXIS 10622 at *17-*19 (N.D. Ind. March 31, 2005) (holding neutral stance inapplicable when coverage at issue was purchased specifically for benefit of person seeking coverage).

A consistent application of *Lumbermens* would of course result in taking a neutral stance in both *Vann* and *Jones*, while a consistent application of *Jones* would result in **not** taking a neutral stance here, or in any additional insured case. After all, Scottsdale issued a certificate expressly naming Harsco an additional insured and analyzed Harsco's exposure, so Harsco was "squarely within the class of individuals whom the [Scottsdale] policy was intended to benefit." And while the result in *Vann* is unobjectionable, conditioning rules of policy interpretation on whether the policyholder was ever part of the suit only encourages inconsistent results.

What these cases show is that the "neutral stance" rule as formulated in *Lumbermens* is unworkable and should be overturned. It has not been applied consistently, because to do so would lead to harsh results. But the exceptions to it have themselves been applied inconsistently, or are themselves likely to result in cases being determined not by consistent rules of policy interpretation, but the happenstance of sympathies for who is involved in the litigation.

*iv. Basing a Rule of Policy Interpretation on Who Pays the Premium Is not Socially Useful*

*Lumbermens'* rationale for deviating from the normal rules of policy interpretation undermines the purposes of insurance. While individuals and companies purchase insurance to protect themselves against liability or loss, insurance also serves broader social goals. It serves, for instance, to compensate tort victims. *See, e.g.*, *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005, 1008 (Fla. 1989) (liability imposed to compensate tort victims insurable, even for intentional torts). It also serves to spread losses broadly, so that individuals need not shoulder the entire burden of socially-important, but expensive, efforts. *See, e.g.*, George M. Plews and Donna C. Marron “Environmental Law Developments: Hope and Ambiguity in Achieving the Optimum Environment,” 37 Ind. L. Rev. 1055, 1069 (2004); Restatement of the Law of Liability Insurance § 4, comments d. and e. Finally, it supports commerce by protecting businesses from the inevitable injuries and losses that occur.

None of these goals is served by basing interpretive rules on who paid the premium. In fact, tort victims are **less** likely to be compensated by application of the neutral stance rule. *See, e.g.*, *Burkett*, 737 N.E.2d at 452-53 (tort victim not compensated in neutral stance case); *Moons v. Keith*, 758 N.E.2d 960, 963-64 (same); *Barga*, 687 N.E.2d at 578.

The neutral stance rule does not encourage insurers to draft clear policy language. It does not help spread losses broadly. It does not help compensate tort victims. It narrows rather than expands the scope of insurance protection, even as

to other named insureds, who are indisputably the intended beneficiaries of the coverage.

So what socially-important goals **does** the rule serve? There is none. As noted, several cases, including *Vann* and *Burkett*, have held or stated that whether to apply the neutral stance rule depends on whether the policyholder (*Vann*, 778 N.E.2d 868, 872 n. 5) or the tortfeasor (*Burkett*, 737 N.E.2d at 452-53 ) was or is a party to the coverage action. But as Judge Hamilton has noted: "it seems unlikely that the proper interpretation of a contract should depend on the presence, absence, or alignment of particular parties in the litigation." *Bledsoe*, 2005 U.S. Dist. LEXIS 50239 at *24.

For all these reasons, this Court should abandon the neutral stance rule, and overturn *Lumbermens*.

### B. If the Court Declines to Overturn *Lumbermens*, it Should Make Clear When the Neutral Stance Rule Applies, and Not Apply it in Cases where the Party Seeking Coverage Was Known to the Insurer Prior to the Lawsuit

The Court need not overturn *Lumbermens* for Harsco to prevail. But if it declines to overturn, it should clarify when the neutral stance rule applies. Here, there is no question Scottsdale knew it was insuring Harsco. Metro's broker—an agent of Scottsdale[1]—issued a certificate listing Harsco as an additional insured. (App. Vol. III at 145). Scottsdale's underwriters analyzed Harsco as a risk to which Scottsdale was exposed. (App. Vol. IV at 49, 69, 71). The Indiana Court of Appeals

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[1] *Benante v. United Pacific Life*, 659 N.E.2d 545, 547 (Ind. 1995) (broker is agent of insurer after issuance of policy)

has at least twice held that in such circumstances the neutral stance rule does not apply. If the Court declines to overturn *Lumbermens*, it should grant transfer and hold that the neutral stance rule does not apply here.

As noted above, *Jones*, 953 N.E.2d at 615-16, and *Liberty*, 891 N.E.2d at 102 both note that the neutral stance rule may not apply when the insurer knew it was insuring the person seeking coverage. In *Jones* the Monroe County Sheriff's Department's vehicles were expressly covered for UIM benefits. The only interpretive question was whether Deputy Jones "was using her police car as contemplated by the liability portion of the Argonaut policy" at the time of the crash that killed her. *Jones*, 953 N.E.2d at 613. *Liberty* is even more similar to the case at bar. There Michigan Mutual insured Trilithic (Duke Realty's tenant), and added Duke Realty by name as an additional insured via endorsement. 891 N.E.2d at 100. A Trilithic employee was injured in the parking lot of the premises. *Id.* Duke Realty's insurer (Liberty) defended Duke Realty and then sought contribution from Michigan Mutual. *Id.*

Michigan Mutual advocated for application of the neutral stance rule. Liberty resisted. The Court of Appeals noted that Liberty's position "has merit, as Duke was an additional named insured (under limited circumstances, of course) and the policy was procured for its benefit, as well as Trilithic's." *Id*. at 102. However, the *Liberty* court concluded the language at issue was unambiguous, and so did not decide whether the neutral stance rule applied. *Id*.

If the Court declines to overturn *Lumbermens*, it should still make clear that when the additional insured is not a stranger to the policy, the neutral stance rule should not apply.[2] There is simply no sound reason not to give Harsco the benefit of the standard insurance policy construction rules here. Unlike in *Lumbermens*, where the party claiming to be an insured was arguably never contemplated to be within the scope of the protection of the policy, here there is no question Scottsdale **knew** it was insuring Harsco. Scottsdale issued a certificate expressly naming Harsco as an additional insured and analyzed Harsco's risk exposure as part of its underwriting. Allowing Scottsdale to write latent ambiguities into its policy language, and then wait for an opportune time to take advantage of them, is contrary to one of the goals of *contra proferentem*—encouragement of clear language.

## VI. CONCLUSION

The Court should reverse the Court of Appeals and overrule *Lumbermens*. If it declines to overrule *Lumbermens*, it should still reverse the Court of Appeals and hold the neutral stance rule does not apply when the party seeking status as an insured was clearly contemplated to be an insured when the policy was sold.

[2] Tort victims asserting declaratory judgment actions should also get the benefit of this rule, since like the additional insured in *Jones*, they are also parties whom policies are intended to benefit.

Respectfully submitted,

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## WORD COUNT CERTIFICATE

I verify that this brief contains no more than 4,200 words.

/s/ *Gregory M. Gotwald*

## CERTIFICATE OF SERVICE

I certify that on January 5, 2023 the foregoing brief was filed through the Indiana E-filing System ("IEFS") and was served electronically to counsel of record. All e-filed documents are deemed served when they are electronically served through the IEFS in accordance with Rule 68(F)(1).

/s/ *Gregory M. Gotwald*