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Case No. SCCQ-23-0000515

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

ALOHA PETROLEUM, LTD., *Plaintiff*, -vs.- NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA AND AMERICAN HOME ASSURANCE COMPANY, *Defendants*.	CIVIL NO. 1:22-cv-00372 JAO-WRP ON SEPTEMBER 5, 2023 ORDER CERTIFYING QUESTIONS TO THE HAWAI`I SUPREME COURT  UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAI`I

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS FILED IN SUPPORT OF PLAINTIFF AND IN RESPONSE TO *AMICUS CURIAE* BRIEF FILED IN SUPPORT OF DEFENDANTS

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I. INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*

United Policyholders ("UP") submits this brief as amici curiae in support of Plaintiff Aloha Petroleum, Ltd., in response to the amicus curiae brief filed by Complex Insurance Claims Litigation Association ("CICLA") and American Property Casualty Insurance Association in support of Defendants (the "Insurance Industry Amicus Brief"). UP is a highly respected national non-profit 501(c)(3) organization that for over 30 years has operated as a dedicated advocate and information resource for individual and commercial insurance consumers throughout the United States. As discussed below, the Insurance Industry Amicus Brief presents erroneous and incomplete interpretations of the policy terms, "occurrence" and "pollutant."

II. CONCISE STATEMENT OF FACTS, CERTIFIED QUESTIONS, AND STANDARD OF REVIEW

United Policyholders adopts the Statement of Facts, Certified Questions, and Standard of Review in Aloha's Brief. This is an original proceeding concerning those two certified questions from the United States District Court for the District of Hawai`i.

III. ARGUMENT

A. Hawai`i and Courts Nationwide Recognize That Allegations of Recklessness Potentially Allege an "Accident Or an "Occurrence."

The Insurance Industry Amicus Brief argues that the "fundamental concept of fortuity answers the certified question" concerning whether an "occurrence" is alleged by referring "solely" to specific allegations "that damage to the environment was the natural and reasonably foreseeable consequence" of AP's alleged intentional conduct. Insurance Industry Amicus Brief ("IIAB"), pp. 8-9. This Court should reject this outlier argument, which would greatly restrict Hawai`i policyholders' rights to a defense provided by their liability insurer, while putting this

Court at odds with its own precedent in *Tri-S Corp. v. Western World Insurance Co.*, 110 Hawai`i 743, 135 P.3d 82 (2006). Indeed, the vast majority of jurisdictions nationwide agree that recklessness constitutes an occurrence.[1] The foreseeable result of the Industry's proposed rule would be to rob policyholders of their reasonably expected protection whenever a plaintiff merely ***alleges*** that their injury was foreseeable, expected, or intended.

Indeed, beyond this case, the impact of this unwarranted change would be immediately felt in **every** claim an insurance company initially reviews to consider whether it owes any defense to its policyholder. If the complaint alleges that the injury was the natural and reasonably foreseeable result of alleged intentional conduct, under the Insurance Industry's proposed rule, no defense would be provided, and further inquiry into the actual facts and the policyholder's actual intentions or expectations would not be needed. Such a rule would deprive Hawai`i policyholders of the

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[1] *See Queen City Farms v. Cent.Nat'l Ins. Co.*, 827 P.2d 1024 (Wash. App. Div. 1992); *Quaker State Minit-Lube v. Fireman's Fund Ins. Co.*, 868 F. Supp. 1278 (D. Utah 1994); *Cello-Foil Products, Inc. v. Michigan Mutual Liability Co*., No. 151615, 1995 WL 854728, 1995 Mich. App. LEXIS 529, at *16 (Mich. Ct. App. Aug. 15, 1995); *Arco Indus. Corp. v. American Motorists Ins. Co.*, 448 Mich. 395, 404-405 (Mich. 1995); *Spirtas Co. v. Autilus Ins. Co.*, 897 F. Supp. 2d 790 (E.D. Mo. 2012); *Amerisure Mut. Ins. Co. v. Paric Corp.*, 2005 U.S. Dist. LEXIS 30383 (E.D. Mo. Oct. 21, 2005); *Grindheim v. Safeco Ins. Co. of Am*., 908 F. Supp. 794 (D. Mont. 1995); *Koch Eng'g Co. v. Gilbralter Cas. Co*., 78 F.3d 1291 (8th Cir. 1996); *Williamsport Wire Rope Co. v. Bethlehem Steel Corp*., 78 F.2d 1023 (8th Cir. 1996); *Kipin Industries, Inc. v. American Universal Ins. Co.*, 535 N.E.2d 334, 337 (Ohio Ct. App. 1987); *Diocese of Winona v. Interstate Fire & Cas. Co*., 858 F. Supp. 1407 (D. Minn. 1994); *MAPCO Alaska Petroleum, Inc. v. Central Nat. Ins. Co. of Omaha*, 784 F. Supp. 1454 (D. Alaska 1991); *Citizens Ins. Co. v. Pro-Seal Service Grp., Inc*., 710 N.W.2d 547 (Mich. App. Ct. 2005); *Erie Ins. Exchange v. Moore*, 228 A.3d 258, 268 (Pa. 2020); *Liberty Mut. Ins. Co. v. Black & Decker Corp*., No. Civ. A. 04-10654, 10659, 10662, 2005 WL 102964, at *12 (D. Mass. Jan. 13, 2005); *Royal Indem. Co. v. Love*, 630 N.Y.S.2d 652 (N.Y. Sup. Ct. 1995); *Rhodes v. Liberty Mut. Ins. Co*., 67 A.D.3d (N.Y. App. Div. 2d Dep't 2009); *Allstate Indem. Co. v. Lewis*, 985 F. Supp. 1341 (M.D. Ala. 1997); *Universal Underwriters Ins. Co. v. Stokes Chevorlet, Inc*., 990 F.2d 598 (11th Cir. 1993); *Consol. Edison Co. of N.Y. v. Allstate Ins. Co*., 774 N.E.2d 687 (N.Y. 2002); *Greene v. Will*, 394 F. Supp. 3d 849 (N.D. Ind. 2019); *Steyer v. Westvaco Corp.*, 450 F. Supp. 384 (D. Md. 1978); *American Family Mut. Ins. Co. v. Pachhetti*, 808 S.W.2d 369 (Mo. 1991); *Gregory v. City of Rogers*, 921 F.2d 750 (8th Cir. 1990); *DecisionOne Corp. v. ITT Hartford Ins. Grp*., 942 F. Supp. 1038 (E.D. Pa. 1996).

"litigation insurance" any reasonable business expects to receive for claims arising out of its normal business operations.

There is no reason to deviate from *Tri-S*. Allegations of recklessness ***should*** trigger "occurrence"-based liability insurance policies—just like allegations of negligence or gross negligence.[2] Historically, courts have so ruled because liability insurance companies must bear the burden of demonstrating that injury from alleged negligent or reckless conduct was ***subjectively intended*** by the policyholder to establish that the conduct does not qualify as an "occurrence."[3]

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[2] In fact, in explaining the drafting history for the definition of an "occurrence," the New York Court of Appeals pointed out that, "[t]he insurance industry changed to occurrence-based coverage in 1966 to make clear that gradually occurring losses would be covered so long as they were not intentional[,]" and as a result, "the occurrence model more readily embraced a wider range of liabilities – such as liability arising from asbestos exposure or contamination." *Appalachian Ins. Co. v. Gen. Elec. Co.*, 863 N.E.2d 994, 1000 (N.Y. 2007) (quoting *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 509 (N.Y. 1993)) (followed by *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 991 N.E.2d 666, 674 (N.Y. 2013)).

[3] *See State Farm Fire and Cas. Co. v. GHW*, 56 F. Supp. 3d 1210 (N.D. Ala. 2014) (applying Alabama law) (applying a subjective standard and requiring specific intent to cause damage/bodily injury to another); *Allstate Indem. Co. v. Lewis*, 985 F. Supp. 1341 (M.D. Ala. 1997) (*citing Universal Underwriters Ins. Co. v. Stokes Chevorlet, Inc.*, 990 F.2d 598 (11th Cir. 1993)) (requiring subjective intent to cause the harm); *Brosnahan Builders, Inc. v. Harleysville Mut. Ins. Co.*, 137 F. Supp. 2d 517 (D. Del. 2001) (addressing civil recklessness); *Steyer v. Westvaco Corp.*, 450 F. Supp. 384 (D. Md. 1978) (holding that because the policyholder did not intend to cause the alleged air pollution, the insurer must honor its duty to defend the company); *Grindheim v. Safeco Ins. Co. of Am.*, 908 F. Supp. 794 (D. Mont. 1995) (holding that intent to cause harm did not arise until notice of contamination of water causing the alleged injuries); *Providence Mut. Fire. Ins. Co. v. Scanlon*, 638 A.2d 1246, 1247 (N.H. 1994) (applying a subjective standard to determine that the policyholder's shooting of a BB gun was not inherently injurious); *Hammer v. Thomas*, 1 A.3d 784 (N.J. App. Div. 2010) (ruling that "acts that appear foolhardy or reckless . . . require an inquiry into the actor's subjective intent to cause injury"); *New Jersey Mfrs. Ins. Co. v. Delta Plastics Corp.*, 883 A.2d 299 (App. Div. 2005) (holding the employer's conduct was an occurrence that did not fall within the 'intended or expected' harm exclusion because even though it was objectively certain that the employer's conduct would cause injury; the injury was not, subjectively, an injury intentionally caused); *Lansco, Inc. v. Dep't of Environmental Protection*, 350 A.2d 520 (N.J. 1975) (same); *Consolidated Edison Co. of N.Y., Inc. v. Allstate Ins. Co.,* 774 N.E.2d 687, 690-92 (N.Y. 2002) (applying a subjective test in determining whether the policyholder itself intended to cause the underlying damages); *Atlantic Cement Co. v. Fidelity & Casualty Co.*, 459 N.Y.S.2d. 425 (N.Y. App. Div. 1st Dep't 1983) (applying subjective standard

Further, recklessness claims generally require no evidence or proof of subjective intent to cause harm.[4] Because these claims require no proof of intent to harm, an allegation of recklessness necessarily qualifies as an "accident" or "occurrence." As such, the insurer's duty to defend must continue until such time as proof establishes that the policyholder in question subjectively intended to cause the harm at issue. Until that subjective intent is proven, the "fortuity" concerns raised in the Insurance Industry Amicus Brief never arise. Focusing on mere allegations of objective foreseeability—as allegations of recklessness do by definition—would eliminate the protection found in the definition of "occurrence" and unfairly restrict the scope of the litigation insurance of which the duty to defend is a valuable part.[5]

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to ultimately provide coverage for the policyholder's reckless conduct in creating the liability-causing pollution); *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989) (recognizing that "to exclude all losses or damages which might in some way have been expected by the [policyholder], could expand the field of exclusion until virtually no recovery could be had on insurance."); *United Services Auto. Ass'n. v. Elitzky*, 517 A.2d 982, 986 (Pa. Super. Ct. 1986) ("The vast majority of courts hold that the clause precludes coverage if the [policyholder] acted with the specific intent to cause some kind of bodily injury or damage."); *Quaker State Minit-Lube v. Fireman's Fund Ins. Co.*, 52 F.2d 1522 (10th Cir. 1995) (requiring proof that the policyholder specifically and subjectively intended the injury and/or damage giving rise to the environmental damage claim); *Overton v. Consolidated Ins. Co.*, 6 P.3d 1178 (Wash. App. Div. 2000) (finding a genuine issue of material fact as to whether insured "expected" or "intended" contamination).

[4] *See Tri-S*, 110 Hawai`i at 493 (recognizing that "wilful and wanton misconduct" and liability for "recklessness" did not require a specific intent to cause injury, resulting in the possibility that the underlying plaintiff could establish liability without any evidence of intent to harm). The decision in *Haw. Holiday Macadamia Nut Co. v. Indus. Indem. Co.*, 76 Hawai`i 166, 170, 872 P.2d 230, 234 (1994) is not to the contrary. In that case, the complaint focused on alleged fraud and intentional breaches of contract without any claims sounding in negligence or recklessness that might trigger the duty to defend.

[5] Under Hawai`i law, "[a]ll doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured." *Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai`i, Ltd.*, 76 Hawai`i 277, 287, 875 P.2d 894, 904 (1994). Courts frequently refer to this broad defense promise as "litigation insurance"—sold hand in glove with the promise to indemnify judgments or settlements, the two separate promises together forming a CGL insurance policy. *See Schulman Inv. Co. v. Olin Corp.*, 514 F. Supp. 572 (S.D.N.Y. 1981), (quoting *Spoor-Lasher Co. v. Aetna Cas. & Sur. Co.*, 352 N.E.2d 139 (N.Y. 1976)); *Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178,

B. The Pollution Exclusion Only Removes Coverage For Traditional Environmental Pollutants.

Insurers began using the pollution exclusion clause as part of the standard general comprehensive liability policy in 1970, and later updated the language of the exclusion in 1986.[6] That term has triggered numerous disputes between insurers and policyholders about the extent to which insurers must help policyholders respond to the problems of modern, industrial societies. Here, the certified question asks whether greenhouse gases are "pollutants." At bottom, the question asks whether insurance—a promise to spread the costs of catastrophic fires, storms or other disasters—should extend as it promised to those disasters allegedly exacerbated by the release of greenhouse gases from the policyholder's products.

The Underlying Suit in this coverage dispute refers to the greenhouse gases in question as "emissions of carbon dioxide, and other greenhouse gases."[7] UP follows this focus on carbon dioxide, though we discuss other greenhouse gases.[8]

1. The Historical Understanding of "Pollutant" and Associated Terms Controls Policy Interpretation.

1185 (7th Cir. 1980). Because of this, if the underlying claims asserting the policyholder's liability to an underlying plaintiff reveal the possibility of any covered claim under an insurance policy, the insurance company must defend the policyholder, with doubts resolved in favor of the policyholder.

[6] *See generally The Pollution Exclusion Through the Looking Glass,* 74 GEO. L. J. 1237, 1241–53 (1986). *See also The Pollution Exclusion Under Ohio Law: Staying the Course,* 59 U. CIN. L. REV. 1165, 1187–1203 (1991); *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion,* 75 CORNELL L. REV. 610, 622–27 (1990).

[7] *Aloha Petroleum, Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 1:22CV00372 (Reply Br. ¶ 42, Sept. 15, 2022).

[8] *Greenhouse Gas Emissions, Carbon Dioxide*, ENVIRONMENTAL PROTECTION AGENCY (last visited Dec. 29, 2023), https://www.epa.gov/ghgemissions/overview-greenhouse-gases#carbon-dioxide.

Insurance policies are contracts, and as such must be interpreted to effect the intentions of the parties at the time of contract formation.[9] Here, the policies date back as far as 1984[10], and that historical understanding of the term "pollutant" must control. The lack of historical or regulatory consensus on whether greenhouse gases were pollutants demonstrates the lack of a common understanding of the term as applied to those gases.

The Clean Air Act ("CAA") in 1963 authorized the EPA to regulate "air pollutants," but provided no clear guidance about the appropriate treatment of greenhouse gases.[11] The EPA did not for decades regulate carbon dioxide, nor is there any evidence the Agency considered carbon dioxide a pollutant.[12] Then in 1998, EPA issued a memorandum asserting that the CAA's "broad" definition of "air pollutant" included carbon dioxide.[13] In 2003, the EPA reversed itself, declaring that carbon dioxide did not fall under the Act's definition of an "air pollutant."[14] Shortly thereafter, the EPA denied a request to regulate emissions of carbon dioxide in automobiles, in part because

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[9] *University of Hawaii Professional Assembly v. University of Hawaii*, 66 Haw. 214, 219, 659 P.2d 720, 724 (1983) (citing *Hawaii State Teachers Association v. Hawaii Public Employment Relations Board*, 60 Haw. 361, 368, 590 P.2d 993, 998 (1979)).

[10] *Aloha Petroleum, Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 1:22CV00372 (Concise Opp. Statement. p. 2, July. 17, 2023).

[11] *Criteria Air Pollutants, NAAQS Table*, ENVIRONMENTAL PROTECTION AGENCY (last visited Dec. 29, 2023) https://www.epa.gov/criteria-air-pollutants/naaqs-table.

[12] The EPA's earliest attempt to regulate carbon dioxide appears to have occurred only after the following memo in 1998: Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator 3 (Apr. 10, 1998), available at https://biotech.law.lsu.edu/blog/EPA-Cannon-memo-1998.pdf.

[13] *Id.*

[14] Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator (Aug. 28, 2003), available at https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Filings%20By%20Appeal%20Number/BC82F18BAC5D89FF852574170066B7BD/%24File/UARG%20Attchmnt%20G...43.pdf.

it concluded that carbon dioxide was *not* an air pollutant.[15] That view was the government's position until 2007, when the Unites States Supreme Court decided in *Massachusetts v. EPA* that the EPA was allowed to regulate greenhouse gases, including carbon dioxide, as "air pollutants."[16] That decision was itself split, highlighting the differing reasonable interpretations of the word, "pollutant," at least as applied to carbon dioxide.[17]

Said otherwise, the EPA, the government agency charged with deciding what gases are pollutants, did not view carbon dioxide as one until 2007, decades after the insurance policies at issue here were formed. To attribute to policyholders an understanding more sophisticated and nuanced than the EPA's would contradict this Court's repeated holding that insurance policies must effectuate the parties' contractual intentions at formation,[18] based on the reasonable understanding of the lay person.[19] The significant dispute within the regulatory community (and Supreme Court) about whether carbon dioxide is a "pollutant" likewise demonstrates that as applied here "pollutant" does not unambiguously include carbon dioxide, as there is at the very least reasonable disagreement as to the nature of carbon dioxide. Courts, including this Court,[20] have repeatedly held that a split in court decisions as to the meaning of contract terms evidences

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[15] Environmental Protection Agency, Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52922 (Sept. 8, 2003), available at https://www.federalregister.gov/documents/2003/09/08/03-22764/control-of-emissions-from-new-highway-vehicles-and-engines.
[16] 549 U.S. 497 (2007).
[17] *Id.*
[18] *University of Hawaii Professional Assembly,* 66 Haw. at 219, 659 P.2d at 724 (citing *Hawaii State Teachers Association*, 60 Haw. at 368, 590 P.2d at 998).
[19] *Hawaiian Ass'n of Seventh-Day Adventists v. Wong,* 130 Hawai`i 36, 45, 305 P.3d 452, 462 (2013) (citing *Cho Mark Oriental Food v. K & K Intern.,* 73 Haw. 509, 520, 836 P.2d 1057, 1064 (1992)).
[20] *See Sentinel Ins. Co., LTD v. First Ins. Co. of Hawaii, Ltd.*, 76 Haw. 277, 290, 873 P.2d 894, 907 (1994) (finding a duty to defend where coverage depended on legal uncertainty in Hawai`i law and differing opinions in other jurisdictions)

ambiguity.[21] As one judge explained, "[t]he real fact of this diversity of opinion *between* courts and *within* courts overcomes the conclusion" that the terms is clear and precise, even if considered in isolation the policy language might so suggest.[22]

The classification of specific chemicals as greenhouse gases does not always align with our common understanding. According to the EPA, "water vapor is the most abundant greenhouse gas in the atmosphere."[23] Outstripping carbon dioxide,[24] the amount of water vapor in the

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[21] *See, e.g., Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 248 (Ind. 2005) (A disagreement among courts as to the meaning of a particular contractual provision is evidence that an ambiguity may exist); *Fireman's Fund Ins. Companies v. Ex-Cell-O Corp.*, 702 F. Supp. 1317 (E.D. Mich. 1988) ("Conflicting judicial interpretations may indeed be some evidence of ambiguity."); Connecticut Ins. Guar. Ass'n v. Fontaine, 278 Conn. 779, 900 A.2d 18 (2006) ("the reasonableness of both parties' positions is exemplified by the split of authority on this very point between two other New England appellate courts"); *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 667 A.2d 617 (1995) ("if other judges have held alternative interpretations of the same language to be reasonable, that certainly lends some credence to the proposition that the language is ambiguous and must be resolved against the drafter."); *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.*, 445 Mich. 558, 519 N.W.2d 864 (1994) (the division of judicial authority as to the meaning of a policy term lends credence to the notion that more than one reasonable interpretation of the term exists), *overruled on other grounds by*, *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 664 N.W.2d 776 (2003)); *Greenville County v. Insurance Reserve Fund, a Div. of South Carolina Budget and Control Bd.*, 313 S.C. 546, 443 S.E.2d 552 (1994) (reasoning, after noting a split in authority as to the interpretation of a policy term, that "[i]n view of the holding by numerous jurisdictions … we find the term is ambiguous and susceptible of more than one reasonable interpretation."). *See generally* 16 Williston on Contracts § 49:18 (4th ed.) ("Most courts maintain that a division of judicial opinion is at least evidence of ambiguity.").

[22] *Walker v. Fireman's Fund Ins.* Co., 268 F. Supp. 899, 901 (D. Mont. 1967) (emphasis added).

[23] *Climate Change Indicators: Atmospheric Concentrations of Greenhouse Gases,* ENVIRONMENTAL PROTECTION AGENCY (last visited Dec. 29, 2023) https://www.epa.gov/climate-indicators/climate-change-indicators-atmospheric-concentrations-greenhouse-gases.

[24] Carbon dioxide comprises 0.04% of the Earth's atmosphere. Water vapor comprises approximately 1%. *The Atmosphere: Getting a Handle on Carbon Dioxide,* NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (last visited Dec. 29, 2023) available at https://climate.nasa.gov/news/2915/the-atmosphere-getting-a-handle-on-carbon-dioxide/#:~:text=What's%20in%20the%20Air%3F&text=By%20volume%2C%20the%20dry%20air,methane%2C%20nitrous%20oxide%20and%20ozone.

atmosphere causes the most important positive feedback loop in our changing climate.[25] No lay person would say that steam from a kettle is a pollutant, and her understanding controls.

But framing the question as "are greenhouse gases pollutants" adopts a conceptual framework that loads the dice. Specific gases should instead be considered. Would an ordinary person consider water vapor from a kettle a "pollutant"? Would she consider the carbon dioxide she exhales "pollution"? Considered in the context of a neutral framing, the answers are obvious, and makes clear that the Insurance Industry Amicus Brief overreaches.

2. The Remaining Terms Do Not Apply.

The certified question before this Court defines "pollutant" as "gaseous" "irritant[s] or contaminant[s], including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Carbon dioxide at certain levels or under certain conditions can cause problems, but it does not cause irritation in humans; nor, at the levels in question, does it make the air we breathe impure. It is not a "smoke," "vapor," or "fume," nor is it an "acid" or "alkali." It is no more a "chemical" as that term is here used, than the H_2O we drink or the N_2 we breathe.

Pollutants are problematic because they are harmful to humans, animals, and plants.[26] Traditional pollutants interact biochemically, increasing rates of illness and disease.[27] But

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[25] *Basics of Climate Change,* ENVIRONMENTAL PROTECTION AGENCY (last visited Dec. 29, 2023) https://www.epa.gov/climatechange-science/basics-climate-change.

[26] *Health consequences of air pollution on populations,* WORLD HEALTH ORGANIZATION (last visited Jan. 1, 2024) https://www.who.int/news/item/15-11-2019-what-are-health-consequences-of-air-pollution-on-populations.

[27] *Id.*; *Air quality and health,* MINNESOTA POLLUTION CONTROL AGENCY (last visited Jan. 1, 2024) https://www.pca.state.mn.us/air-water-land-climate/air-quality-and-health#:~:text=When%20we%20breathe%20in%20air,cancer%2C%20or%20even%20premature%20death.

greenhouse gases such as carbon dioxide and water vapor are chemically inert.[28] They do not chemically interact with organic materials.[29] Rather, carbon dioxide, for example, is problematic because it does not reflect, but rather absorbs, sunlight.[30] Treating something as a "contaminant" or "pollutant" because it does not reflect sunlight would do violence to the common understanding of those words.

The problem of climate change is not simple, and attempting to cram the problem into a few insurance policy words that were intended by the contracting parties to deal with traditional environmental problems would undermine the purpose of insurance. We buy insurance as a society to help each other deal with catastrophic problems. The insurance industry serves as the mechanism for that support network. Allowing the insurance industry to escape its obligations would dramatically undermine our shared ability to deal with a complex, critically important problem.

IV. CONCLUSION

For the foregoing reasons, United Policyholders respectfully submits that the certified questions be answered in favor of Aloha Petroleum as follows: 1) allegations of "reckless" conduct can constitute an "occurrence" or "accident" within the meaning of a general lability insurance

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[28] *Carbon Dioxide 101,* U.S. DEP'T OF EDUCATION (last visited Jan. 1, 2024) https://netl.doe.gov/coal/carbon-storage/faqs/carbon-dioxide-101; *Water Vapour as an Inerting Agent,* U.S. NAT'L INST. OF STANDARDS & TECH. (last visited Jan. 1, 2024) https://www.nist.gov/system/files/documents/el/fire_research/R0301099.pdf#:~:text=For%20all%20practical%20purposes%2C%20water,considered%20as%20an%20inert%20agent.

[29] *Carbon Dioxide 101,* U.S. DEP'T OF EDUCATION (last visited Jan. 1, 2024) https://netl.doe.gov/coal/carbon-storage/faqs/carbon-dioxide-101; *Water Vapour as an Inerting Agent,* U.S. NAT'L INST. OF STANDARDS & TECH. (last visited Jan. 1, 2024) https://www.nist.gov/system/files/documents/el/fire_research/R0301099.pdf#:~:text=For%20all%20practical%20purposes%2C%20water,considered%20as%20an%20inert%20agent.

[30] *Why Carbon Dioxide Is a Greenhouse Gas,* SCIENTIFIC AMERICAN (last visited Jan. 1, 2024) https://www.scientificamerican.com/article/why-carbon-dioxide-is-greenhouse-gas/.

policy; and 2) carbon dioxide and greenhouse gases do not qualify as “pollutants” within the meaning of the pollution exclusions.

Respectfully submitted,

Dated: January 11, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served upon the parties listed below, by JEFS and/or via U.S. Mail at their last known address as reference below:

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DATED: Honolulu, Hawai’i, January 11, 2024.

/s/ Tred R. Eyerly

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Electronically Filed
Supreme Court
SCCQ-23-0000515
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Case ID: SCCQ-23-0000515
Title: Aloha Petroleum, Ltd, Plaintiff-Appellant, vs. National Union Fire Insurance Company of Pittsburgh, PA, and American Home Assurance Company, Defendants-Appellees.
Filing Date / Time: THURSDAY, JANUARY 11, 2024 11:56:13 AM
Filing Parties: Tred Eyerly
United Policyholders
Case Type: Certified Question
Lead Document(s): 132-Brief of Amicus Curiae
Supporting Document(s): 133-Certificate of Service

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This notification is being electronically mailed to:
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The following parties need to be conventionally served:
U.S. District Court - District of Hawaii